
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair
2019 - 2020 Regular

Bill No: AB 392 **Hearing Date:** June 18, 2019
Author: Weber
Version: May 23, 2019
Urgency: No **Fiscal:** No
Consultant: GC

Subject: *Peace Officers: Deadly Force*

HISTORY

Source: ACLU of California; Alliance for Boys and Men of Color; Anti Police-Terror Project; California Faculty Association; California Families United 4 Justice; Communities United for Restorative Youth Justice; Justice Teams Network; PICO California; PolicyLink; STOP Coalition; UDW America – AFSCME Local 3930

Prior Legislation: AB 931 (Weber), 2018, held in Senate Rules

Support: AFSCME 3299, Alameda Labor Council; Anti-Defamation League; Alliance San Diego; American Friends Service Committee; Amnesty International; Asian Americans Advancing Justice; Asian Law Caucus; Asian Pacific Environmental Network; Asian Solidarity Collective; AYPAL: Building API Community Power; Bay Area Student Activists; Bend the Arc Jewish Action; Bet Tzedek Legal Services; Black American Political Association of California; Brothers Sons Selves Coalition; California Black Health Network; California Calls; California Civil Liberties Advocacy; California Families United 4 Justice; California Immigrant Policy Center; California Labor Federation; California Latinas for Reproductive Justice; California League of United Latin American Citizens; California National Party; California Nurses Association; California Pan-Ethnic Health Network; California Public Defenders Association; California Conference of the NAACP; California Voices for Progress; Clergy & Laity United for Economic Justice; Cloverdale Indivisible; Center for African Peace and Conflict Resolution; Center for Juvenile and Criminal Justice; Change Begins with ME; Children’s Defense Fund California; Coalition for Humane Immigrant Rights (CHIRLA); Coalition for Justice and Accountability; Committee for Racial Justice; Community Coalition for Substance Abuse Prevention and Treatment; Community United for Restorative Youth Justice; Council on American-Islamic Relations-California; Courage Campaign; CWA-Communications Workers of America AFL-CIO; Davis People Power; Democrats of Greater Riverside; Disability Rights California; Drug Policy Alliance; Earl B. Gillam Bar Association; EduResearcher; Ella Baker Center for Human Rights; Empowering Pacific Islander Communities; Exonerated Nation; Fair Chance Project; Fannie Lou Hamer Institute; Fathers and Families of San Joaquin; Frederick Douglass Family Initiatives; Friends Committee on Legislation of California; Greater Sacramento Urban League; Green Party of Sacramento County; Hawk Institute; Hillcrest Indivisible; Human Impact Partners; Homie UP; If/When/Now;

Lawyering for Reproductive Justice; Imani community Church; Indivisible California Statestrong (60 Indivisible Groups); Indivisible CA37; Indivisible Colusa County; Indivisible Los Angeles; Indivisible Marin; Individual Peninsula; Indivisible Project; Indivisible San Diego Central; Indivisible Sausalito; Indivisible South Bay-LA; Indivisible Stanislaus; Indivisible Ventura; Indivisible Watu; Indivisibles of Sherman Oaks; Initiate Justice; InnerCity Struggle; International Human Rights Clinic at Santa Clara Law; Japanese American Citizens League, San Jose Chapter; Jewish Voice for Peace-San Diego Chapter; Justice for Josiah Campaign; Justice & Witness Ministry of Plymouth United Church of Christ; Kehilla Community Synagogue; LA Voice; League of Women Voters of California; Los Angeles Black Worker Center; Los Angeles County Democratic Party; March for Our Lives California; MARCH ON; Mayor of Oakland; Mid-City CAN; Motivating Individual Leadership for Public Advancement (MILPA); NARAL Pro-Choice California; National Action Network; National Association of Social Workers-California Chapter; National Center for Youth Law; National Compadres Network; National Juvenile Justice Network; National Lawyers Guild; National Nurses United; National Union of Healthcare Workers; Nihonmachi Outreach Committee; Oakland Privacy; Orange County Communities Organized for Responsible Development; Orchard City Indivisible; Our Revolution Long Beach; Pacifica Progressive Alliance; Pacifica Social Justice; Pan African Global Trade and Development Conference; Partnership for the Advancement of New Americans; Paving Great Futures; Peace and Freedom Party of California; People's Alliance for Justice; People Power LA/West; Pillars of the Community; The Praxis Project; Prevention Institute; Progressive Students of MiraCosta College; Public Health Advocates; Public Health Justice Collective; The Resistance Northridge-Indivisible; Revolutionary Scholars; Riverside Temple Beth El; Root & Rebound; Rooted in Resistance-San Gabriel Valley; Sacramento Area Black Caucus; Sacramento Jewish Community Relations Council; Sacramento LGBT Community Center; Sacramento State Black Student Union; Saint Mark United Methodist Church; San Diegans for Criminal Justice Reform; San Diego Coalition for Reproductive Justice; San Diego High School's Cesar Chavez Service Club; San Diego La Raza Lawyers Association; The San Diego LGBT Community Center; San Diego LGBT Pride; San Francisco District Attorney's Office; San Francisco No Injunctions Coalition; San Francisco Peninsula People Power; San Francisco Public Defender's Office; San Jose/Silicon Valley NAACP; San Mateo Adult School Federation of Teachers-CFT Local 4681; Santa Barbara Women's Political Committee; Self-Awareness and Recovery; Service Employees International Union (SEIU) Local 1000; Showing Up for Racial Justice (SURJ) Bay Area; Showing Up for Racial Justice (SURJ-B); Showing Up for Racial Justice San Diego; Showing Up for Racial Justice (SURJ) Santa Barbara; SEIU-California; Sister Warriors Freedom Coalition; Smart Justice California; Southeast Asia Resource Action Center; SURJ Greater Dayton; SURJ at Sacred Heart-San Jose; Starting Over, Inc; Think Dignity; Together We Stand; Together We Will/Indivisible-Los Gatos; United Food and Commercial Workers (DFCW) Western States Council; The Social & Environmental Justice Committee for the Universalist Unitarian Church of Riverside; University Professional and Technical Employees-Communication Workers of America; Urban Scholars Union-San Diego City College; Voices for Progress-California; The W. Haywood Burns Institute; Western Center on Law and Poverty; We The People-San Diego; White People 4 Black Lives; Women

For: Orange County; The Women's Foundation of California; Women's Health Specialists; Youth ALIVE!; Youth Forward; Youth Justice Coalition; approximately 100 individuals

Opposition: Anaheim Police Association; Brawley Public Safety Employee Association; Burbank Police Officers' Association; California Association of Code Enforcement Officers; California College and University Police Chiefs Association; California Correctional Supervisors Organization; California Narcotic Officers Association; California Rifle and Pistol Association; Chula Vista Police Officers Association; City of Brisbane Police Department; City of Camarillo; City of Clovis; City of Cypress; City of El Centro; City of Escalon; City of Fountain Valley; City of Hemet; City of La Palma; City of Los Alamitos; City of Mission Viejo; City of Ontario; El Cerrito Police Employees Association; Fresno Police Officers Association; Glendale Police Officers' Association; Hanford Police Officers' Association; Hawthorne Police Officers Association; Kern Law Enforcement Association; Kings County Deputy Sheriff's Association; League of California Cities; Los Angeles County Professional Peace Officers Association; Manhattan Beach Police Officers' Association; Napa County Deputy Sheriffs' Association; National Association of Police Organizations; Oakland Police Officers Association; Ontario Police Officers' Association; Ontario Police Officers' Association; Peace Officers Association of Petaluma; Redondo Beach Officers' Association; Sacramento County Alliance of Law Enforcement; San Diego Community College Police Officers Association; San Diego County Board of Supervisors; San Diego County Probation Officers Association; San Diego District Attorney Investigator's Association; San Diego Harbor Police Officers Association; San Francisco Police Officers Association; San Joaquin County Deputy Sheriffs Association; Santa Barbara County Deputy Sheriffs' Association; Shasta County Board of Supervisors; Solano County Deputy Sheriff Association; Southwest California Legislative Council; Stockton Police Officers Association; Sunnyvale Public Safety Officers' Association; Tehama County Deputy Sheriff's Association; Union City Police Officer's Association; Upland Police Management Association; Ventura County Deputy Sheriffs' Association; Ventura County Sheriff's Office, Yreka Police Officers Association

Assembly Floor Vote:

68 - 0

PURPOSE

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

Existing law provides that 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.

Existing law states that homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either:

- 1) In obedience to any judgment of a competent Court; or,
- 2) When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,
- 3) 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. (Pen. Code § 196.)

This bill specifies that homicide is justifiable when committed by a peace officer and those acting by their command in their aid and assistance, under either of the following circumstances:

- 1) In obedience to any judgment of a competent court; or
- 2) When the homicide results from a peace officer's use of force that is in compliance with the standards of Penal Code Section 835a (as set forth below).

Existing law states 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. 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).

This bill provides that any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use objectively reasonable force to effect the arrest, to prevent escape, or to overcome resistance.

This bill specifies that, despite the ability to use objectively reasonable force, a peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons:

- 1) To defend against an imminent threat of death or serious bodily injury to the officer or to another person.
- 2) To apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. Where feasible, a peace

officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.

This bill provides that a peace officer shall not use deadly force against a person based on the danger that person poses to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.

This bill specifies that a peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts by reason of the resistance or threatened resistance of the person being arrested. A peace officer shall not be deemed an aggressor or lose the right to self-defense by the use of objectively reasonable force, otherwise in compliance with the provisions of this bill to effect the arrest or to prevent escape or to overcome resistance.

This bill clarifies that for the purposes of this subdivision, “retreat” does not mean tactical repositioning or other de-escalation tactics.

This bill defines “deadly force” means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm.

This bill specifies that a threat of death or serious bodily injury is “imminent” when, based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.

This bill specifies that the “totality of the circumstances” means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.

This bill finds and declares the following:

- 1) That the authority to use physical force, conferred on peace officers by this section, is a serious responsibility that shall 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 use of force by officers acting under color of law.
- 2) As set forth below, it is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life. In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer.
- 3) That the decision by a peace officer to use force shall be evaluated carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers, in order to ensure that officers use

force consistent with law and agency policies.

- 4) That the decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force.
- 5) That individuals with physical, mental health, developmental, or intellectual disabilities are significantly more likely to experience greater levels of physical force during police interactions, as their disability may affect their ability to understand or comply with commands from peace officers. It is estimated that individuals with disabilities are involved in between one-third and one-half of all fatal encounters with law enforcement.

COMMENTS

1. Need for This Bill

According to the author:

American political ideals require careful consideration of how government exercises power over its people. Vigilance is especially necessary in policing where, on a daily basis, democratic notions of liberty, security and autonomy are poised against the demands of public safety and the force that may be required to effect it. Because the power to use force is granted by the governed, every effort must be made to ensure that force is exercised with careful attention to preserving the life and dignity of the individual to remain legitimate.

In 2017, officers killed 172 people in California, only half of whom had guns. Police kill more people in California than in any other state – and at a rate 37% higher than the national average per capita. Of the 15 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. A 2015 report found that police in Kern County killed more people per capita than in any other U.S. county. These tragedies disproportionately impact communities of color as California police kill unarmed young black and Latino men at significantly higher rates than they do white men.

Community trust in law enforcement is undermined when force is used unnecessarily and disproportionately. Police are less able to do their job when community distrust leads to decreased respect and cooperation, a situation that increases the risks to officers and civilians.

AB 392 reflects policies that policing experts recognize as effective at better preserving life while also allowing officers the latitude needed to ensure public safety. Under President Obama, the U.S. Department of Justice helped many cities adopt similar policies, including San Francisco and Seattle. Seattle's federal monitor determined that the policy change resulted in a marked reduction in serious uses of force without compromising the safety of officers.

AB 392 is the necessary step to affirming the sanctity of human life. For nearly a century and a half Californians have witnessed the justification of police homicides due to a standard that says it can be reasonable to use deadly force even if there were other alternatives. Far too many days and far too many deaths have gone by with inaction by those who have the power to enact change. As recent events have made clear, Californians will no longer tolerate these deaths as acceptable collateral damage for preserving the status quo, especially when there are effective best practices that will save both officer and civilian lives.”

2. Self-Defense, Defense of Others, and Justifiable Homicide Generally

Californians generally have 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:

- 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;*
- 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 homicide is generally justifiable in California under the standards set forth under Penal Code § 197. Penal Code § 197 specifically 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.*

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

California sets forth specific rules for justifiable homicide by peace officers. Under current California code 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 Penal 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).

AB 392 would update that language and specify that, in California:

Peace officers are justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons:

- *To defend against an imminent threat of death or serious bodily injury to the officer or to another person; or*
- *To apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. Where feasible, a peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.*

Unlike existing California statutory law, the provisions of this bill would exceed the standards articulated and set forth by the U.S. Supreme Court in *Graham* and *Garner*.

AB 392 also balances the nature of officers' roles in engaging the public in potentially dangerous situations. The bill specifies that a peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts by reason of the resistance or threatened resistance of the person being arrested. A peace officer shall not be deemed an aggressor or lose the right to self-defense by the use of objectively reasonable force, otherwise in compliance with the provisions of this bill to effect the arrest or to prevent escape or to overcome resistance.

However, the bill clarifies that de-escalation techniques should be used by law enforcement agencies in California. The bill finds and declares “[a]s set forth below, it is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life. In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer.”

The bill additionally requires that an officer's conduct prior to, and during, the use of deadly force must be considered in evaluating whether or not the use of deadly force is justified. Specifically the bill states that the “totality of the circumstances” means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.

4. 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:

Peace officers are justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary to apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. Where feasible, a peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.

The provisions in this bill exceed the standards set forth in *Garner*.

5. 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. Specifically, the bill provides that a peace officer shall not use deadly force against a person based on the danger that person poses to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.

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.

Under the current 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.

6. Lack of Training and Minimum Policies in AB 392 are Addressed in SB 230

One of the criticisms levied by the opposition to AB 392 is that the bill fails to adequately train officers in the use of deadly force provisions outlined in the legislation, fails to amend the training officers already receive, and fails to update use of force policies to reflect the provisions of the bill. Not only would law enforcement naturally have to do all of these things if this bill were to become law, but SB 230 (Caballero) specifically addresses all of those issues.

SB 230 requires that each law enforcement agency shall maintain a policy that provides a minimum standard on the use of force. Each agency's policy shall, without limitation, include all of the following:

- 1) A requirement that officers utilize de-escalation techniques, crisis intervention tactics, and other alternatives to force when feasible.
- 2) 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.
- 3) 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 objectively reasonable under the circumstances based upon the totality of information actually known to the officer.
- 4) Clear and specific guidelines regarding situations in which officers may or may not draw a firearm or point a firearm at a person.
- 5) A requirement that officers consider their surroundings and potential risks to bystanders, to the extent reasonable under the circumstances, before discharging a firearm.
- 6) Procedures for disclosing public records of police misconduct in accordance with California law.
- 7) Procedures for the filing, investigation, and reporting of citizen complaints regarding use of force incidents.
- 8) A requirement that an officer intercede when present and observing another officer using force that is clearly beyond that which is objectively reasonable under the circumstances, taking into account the possibility that other officers may have additional information regarding the threat posed by a subject.
- 9) Comprehensive and specific guidelines regarding approved methods and devices available for the application of force.
- 10) An explicitly stated requirement that officers carry out duties, including use of force, in a manner that is fair and unbiased.
- 11) Comprehensive and specific guidelines for the application of deadly force.
- 12) 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 as specified.
- 13) The role of supervisors in the review of use of force applications.
- 14) A requirement that officers promptly procure medical assistance for persons injured in a use of force incident, when reasonable and safe to do so.
- 15) 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.
- 16) Training and guidelines regarding vulnerable populations, including, but not limited to, children, elderly persons, people who are pregnant, and people with physical and developmental disabilities.

- 17) Comprehensive and specific guidelines under which the discharge of a firearm at or from a moving vehicle may or may not be permitted.
- 18) Factors for evaluating and reviewing all use of force incidents.
- 19) Minimum entry level and annual hourly training and course titles required to meet the objectives in the use of force policy.
- 20) A requirement for the regular review and updating of the policy to reflect developing practices and procedures.
- 21) Requires that each law enforcement agency shall make their use of force policy accessible to the public.

Additionally SB 230 requires the California Commission on Peace Officers Standards and Training (POST) to develop and 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. SB 230 provides that the POST 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 a use of force policy that the agency is encouraged to adopt and promulgate, and that reflects the needs of the agency, the jurisdiction it serves, and the law.

SB 230 specifies that the POST course or courses of basic training for law enforcement officers and the guidelines shall include all of the following:

- 1) Legal standards for use of force.
- 2) Duty to intercede.
- 3) The reasonable force doctrine.
- 4) Supervisory responsibilities.
- 5) Use of force review and analysis.
- 6) Guidelines for the use of deadly force.
- 7) State required reporting.
- 8) De-escalation and interpersonal communication training, including tactical methods that use time, distance, cover, and concealment, to avoid escalating situations that lead to violence.
- 9) Implicit and explicit bias and cultural competency.
- 10) Skills including de-escalation techniques to effectively, safely, and respectfully interact with people with disabilities or behavioral health issues.
- 11) 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.
- 12) Alternatives to the use of deadly force and physical force, so that de-escalation tactics and less lethal alternatives are, where reasonably practical, part of the decision making process leading up to the consideration of deadly force.
- 13) Mental health and policing, including bias and stigma.
- 14) 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.

Though AB 392 does not contain provisions related to training of officers to comply with the mandates of the bill, or the adoption of minimum guidelines by law enforcement agencies, those

provisions are contained in SB 230. SB 230 was unanimously passed by this committee on April 11, 2019 and off of the Senate floor on May 28, 2019 by a vote of 38-0.

7. Argument in Support

According to the American Civil Liberties Union of California:

The American Civil Liberties Union of California is proud to cosponsor your AB 392, which will replace the lax standard currently set by California law and the U.S. Constitution that police officers can use deadly force whenever “reasonable,” and replace it with a more stringent standard that appropriately authorizes police officers to use deadly force only when necessary to defend against an imminent threat of death or serious bodily injury.

After the May 23 amendments, the “necessary” standard established by AB 392 requires that officers use “other techniques and resources,” other than deadly force, when reasonably safe and feasible to do so. The bill also requires that when determining the propriety of deadly force, decisionmakers must consider the conduct leading up to the use of force.

Importantly, the requirement that force be “necessary” means that if de-escalation is possible, deadly force is not necessary. This is further borne out by the definition of “totality of the circumstances,” which includes officer conduct leading up to use of force, requiring decisionmakers to examine whether officers unnecessarily escalated situations leading up to a use of force, or failed to deescalate when it would have been reasonable to do so. In addition, the statutory language clarifying that “[i]n determining whether deadly force is necessary, officers ... shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer” focuses the evaluation of a use of deadly force on the officer’s use of other options, including de-escalation.

With AB 392, California will have one of the strongest deadly force laws in the nation – if not the strongest. It will make California the only state to require in statute that in evaluating the lawfulness of a use of force decisionmakers consider the conduct of the officer leading up to the use of force. It will also make California the only state to set forth in statute a strong and clear definition of “imminent threat,” that “a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person. An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.” In other words, AB 392 authorizes the use of deadly force when a reasonable officer on the scene would believe, based on the facts and circumstances known to the officer, that the subject appears to have the ability, opportunity, and intention to kill or cause serious bodily injury to an officer or another person, and the use of deadly force is necessary to address that threat. This definition draws upon best practices within policing, but has been incorporated by no other state in the country into statutory law.

8. Argument in Opposition

According to the Burbank Police Officers' Association:

Our organization recognizes that our profession exists at the will and for the benefit of the community we serve. In addition, we embrace the concept of equal protection under the law. We would not support any legislation that places an otherwise law abiding citizen in an impossible situation where they must make a life and death decision in an instant that will later be judged for its potential criminality from a vantage removed from this reality and with the luxury of time and safety. Why would we do this to the law enforcement professionals who are also citizens and members of our communities?

While there is always room for critical examination of tactics, policies, and training, this bill is dangerous because it criminalizes the practice of public safety in our communities. AB 392 contains no mandates for use of force policies and training in California.

California's police officers take an oath that they will run towards danger when everyone else is running away—they do so to protect the families and communities they serve. AB 392 seeks to implement standards that will have a chilling effect on the men and women in uniform—such an effect will result in policy implications that further endanger the public.

A simple review of the proposed legislation reveals that AB 392 does nothing to change use of force policing policies, training, or guidelines-no funding for training, critical to any plan to reduce police use of force, and no proactive plan to achieve such a reduction in force. We can and must do better.

Life is sacred. Law enforcement embraces this fact and demonstrates this daily in the risks taken to protect the public in addition to the data documenting the scarcity of police use of force in comparison to the number of police contacts. This is a sensitive and important issue that we must proactively address, but AB 392 is not the answer. We urge the bill's authors, sponsors, and supporters to develop a truly effective and achievable improvements to help California law enforcement minimize the use of force.

-- END --