The Science of Training
with David Blake

Calif. battle over use of force legislation rages on

Assembly Bill 392 is a difficult web to untangle

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We are all familiar with the adage, “As California goes, so goes the nation,” so it is imperative LEOs are educated about proposed legislation that seeks to change the use of force legal standard in California. As attorney Mildred O'Lynn wrote in PoliceOne's roundup of the top police issues for 2019, use of force with a focus on de-escalation continues to be a high-profile issue. The ability of officers to recall, articulate and implement the training, procedures and policies that they have learned will be more significant in the defense of officers' choices and actions.

Last year, PoliceOne published an article discussing California Assembly Bill AB 931, which was intended to enhance law enforcement officers’ accountability for the use of deadly force.

The bill was introduced by California Assembly members Shirley N. Weber (D-San Diego) and Kevin McCarty (D-Sacramento) and was framed as a response to the Stephon Clark officer-involved shooting (OIS). The bill failed, due in no small part to the efforts of the Los Angeles Police Protective League, the California Police Chiefs Association and the Peace Officers Research Association of California.

The Clark OIS was independently investigated by Sacramento District Attorney and the California Attorney General. Both determined the officer’s use of deadly force in response to Clark’s actions was reasonable.

It goes without saying that law enforcement officers should be held accountable for unlawful force. However, the realities of force continue to be misunderstood and misrepresented, which has brought us to where we are today. (Photo/PoliceOne)

This year, Weber and McCarty introduced AB 392, which is another attempt at changing the use of force legal standard in the state of California. Like last year, the new bill amends California Penal Code (CPC) section 196 (Justifiable Homicide by a Peace Officer) and CPC 835a (Authority to Use Force). However, the new proposal is significantly different than last year. While reading AB 392, I found it complex and confusing. I am not an attorney or a legal scholar, but I have worked in or with law enforcement for over 20 years. As a current use of force expert witness and trainer, I believe it is important to attempt to disentangle the narrative of AB 392 to inform myself, law enforcement and the public.

If passed, AB 392 would increase officers' civil and criminal liability for not making the absolute best decisions leading up to and at the moment force was used. This is a type of standard federal courts have warned about (*Scott v. Henrich*, 39 F. 3d 912 9th Cir. 1994). It is also a standard inconsistent with continuously reaffirmed guidance from the United States Supreme Court (*Graham v. Connor*, 490 U.S. 386 (1989).

Now, if I have your attention, print out a copy of AB 392 and follow along.

AB 392 PROPOSED DEADLY FORCE STANDARD

AB 392 significantly alters CPC 196 (Justifiable Homicide by a Peace Officer).

CPC 196 Section (2): Changes include separating incidents of non-lethal force that result in an in-custody type death from those aligned with officer-involved-shootings. A homicide resulting from a non-lethal (intended) use of force appears to fall under evaluation standards found in CPC 835a section (b) and by proxy, section (c). These two sections relate specifically to non-lethal force and state an officer **shall** have complied with a comprehensive list of de-escalation tactics demonstrating an attempt to avoid the need to use force (if feasible).

CPC 196 Section (3): Officer-involved shootings resulting in death will apparently be evaluated equivalent to that of a civilian (CPC 197). Interesting that this standard is also a reasonableness inquiry. For example, the jury instructions for justifiable homicide (CalCrim 505) state, "The defendant

reasonably believed he or someone else was in imminent danger of being killed or suffering great bodily injury and believed the immediate use of deadly force was necessary."

WHAT IS THE BIG DEAL?

I can't say how this would change a prosecutor's charging decision, but it appears as if an officer-involved shooting would not be evaluated by CPC 197 standards alone. Rather, additional criteria in CPC 196 and CPC 835a may apply.

For instance, regarding self-defense and defense of others, the civilian standard does not use the word **necessary** in PC197; however, the jury instruction does, although without definition. PC 196 defines **necessary** as an officer having "no reasonable alternative" while including an evaluation of the tactical conduct and decisions of an officer leading up to the use of deadly force. It should be noted that the narrative in PC 196 indicates the operationalism of the word **necessary** only applies to fleeing felons. Yet, one must consider the possibility that this definition may fill the gap where one fails to exist?

Additional evaluative guidance may be found in the proposed changes to the authority for an officer to use deadly force. The proposed version of CPC 835a states that deadly force can be used when **necessary** to defend against an **imminent threat** of death or serious bodily injury. While **necessary** is defined similarly in both CPC 835a and CPC 196, the word **imminent** remains a little less clear.

835a Section (3)(e)(2): Defines an "**imminent threat**" of death or serious bodily injury as a reasonable belief that a person has the ability, opportunity and intent to **immediately** cause death or serious bodily injury. It goes on to state "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."

CalCrim Section 505: The civilian standard for justifiable homicide (PC 197) uses the word **imminent** as well. The associated jury instruction states: "**Imminent Peril** means that the peril must have existed or appeared to the defendant to have existed at the very time the fatal shot was fired. In other words, the peril must appear to the defendant as immediate and present and not prospective or even in the near future. An imminent peril is one that, from appearances, must be instantly dealt with."

The differences here may be insubstantial to some. Some could argue I am comparing apples to oranges. Others may argue that the proposed 835a section (3) clearly states the criteria cannot be used in criminal proceedings but can be used in civil and administrative hearings. I understand but feel the definitions should not be ignored.

PROPOSED CALIFORNIA FLEEING FELON RULE

CPC 196 Section (4): This section appears to mirror the "fleeing felon" standards as outlined in Tennessee v. Garner, 471 U.S. 1 (1985). However, it is interesting that the "probable cause" statements from the federal standard are replaced with "reasonable belief" in the state standard. This section also establishes a need to follow the "necessary deadly force" definition previously discussed.

Lastly, there is an added section allowing for an officer to be charged with manslaughter if a mistake is made.

CPC 196 Section (c): Indicates that the criteria outlined in CPC 196 will not prevent an officer from being charged with manslaughter (CPC 192). This includes "situations in which the victim is a person other than the person that the peace officer was seeking to arrest, retain in custody, or defend against, or if the necessity for the use of deadly force was created by the peace officer's criminal negligence."

AB 392 PROPOSED NON-LETHAL FORCE STANDARD

The current version of CPC 835a (in practice) provides officers the ability to use force to effect an arrest, overcome resistance, or prevent the escape of a suspect. Officers are not required to retreat or desist, nor will they be deemed the aggressor when using reasonable force.

Beyond separating standards for deadly and non-deadly force, the first notable change in the proposed version of CPC 835a is the removal of the word "**retreat**" from its original narrative. The proposed narrative reads that officers "need not **abandon or desist** from the arrest." The proposed version adds narrative stating officers **shall** use time, distance, shielding and communications…" to mitigate force (when feasible). The overall objective of the narrative demonstrates the expectations and evaluative criteria that officers may be held in the near future.

SUMMARY OF AB 392

It is difficult to summarize what I can only describe as a complex use of force standard(s) that provides separate evaluative criteria dependent on the type of force.

If AB 392 were to pass, it appears there are separate standards for non-lethal force, lethal force and non-lethal use of force resulting in an in-custody death. The non-lethal standard is fully based in a list of requirements circumscribing de-escalation, including distance, shielding and communication – when feasible. The deadly force standard is what I would call an enhanced civilian standard, meaning it must be a reasonable defense of self or others, BUT also necessary (as defined in CPC 196) and evaluated based upon pre-shooting tactics and decision making.

Lastly, there is what I opine to be a novel evaluative standard for in-custody deaths resulting from the non-lethal use of force. An event that would intuitively be judged under CPC 196/197 depending on what the future holds.

LE BACKING OF SENATE BILL 230

A second bill has been introduced that has the backing of law enforcement.

SB 230 addresses the issues with current law while also addressing peace officer training. The proposed changes to the law are straightforward and succinct while aligning with contemporary federal standards.

In addition to adjusting the law, SB 230 will fill a significant gap in regard to California peace officer training. SB 230 proposes regular training be provided to officers on a statewide standard of acceptable use of force guidelines including legal standards, de-escalation, duty to intervene, alternatives to force and rendering medical aid (not all inclusive).

CONCLUSION

This article is not intended to be a legal opinion, nor am I providing legal or any other guidance. The article is intended to inform based on my attempt to disentangle the narrative found in AB 392.

I believe there are a significant number of law enforcement officers, their families and friends who have no idea of this proposal or its content. I don't blame you, nor would I expect most to spend the time I have in attempting to interpret AB 392. Subsequently, I doubt the California voter will either. They will likely pull the lever based on anecdotal beliefs coupled with media messaging of much-needed change.

While I no longer have skin in the game, I do have beliefs on right and wrong. It goes without saying that law enforcement officers should be held accountable for unlawful force. However, the realities of force continue to be misunderstood and misrepresented, which has brought us to where we are today. It is up to the law enforcement agencies, unions and officers to educate themselves, make informed decisions and assist the public in doing the same.

Be safe, be vigilant.

About the author

David Blake is a retired California peace officer and certified Ca-POST instructor in DT, firearms, force options simulator and reality-based training. His experience includes SWAT, force option unit, field training, gangs/narcotics and patrol. He is a certified Force Science Analyst and teaches the Ca-POST certified courses entitled Force Encounters Analysis and Human Factors: Threat & Error Management for the California Training Institute. He also facilitates the Ca-POST Force Options Simulator training to tenured officers from multiple jurisdictions. Dave is an expert witness/consultant in human performance and use of force.

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