The Science of Training
with David Blake

Got Graham? How AB931 could impact Calif. use-of-force law

Is it "objectively reasonable" or "necessary" for California to change the law on the use of deadly force?

Jul 2, 2018

I predicted 2018 might bring more restrictive use-of-force policy changes based upon a few incidents that went viral. Unfortunately, that prediction appears to be manifesting itself.

Recently, California's Police Accountability and Protection act (AB931) was introduced by California Assembly members Shirley N. Weber (D-San Diego) and Kevin McCarty (D-Sacramento). The bill was initially framed by Weber as a response to the officer-involved shooting of Stephon Clark in Sacramento.

AB931 significantly impacts current California criminal law on the use of deadly force and has been criticized by the California Police Chiefs Association, the Peace Officers Research Association of California (PORAC), the California Peace Officers Association (CPOA), Lexipol and many prominent law enforcement defense attorneys.

Rosa Cabrera, foreground, joined others in support of a measure to limit police use of deadly force, during a hearing of the Senate Public Safety Committee, Tuesday, June 19, 2018, in Sacramento, Calif. (AP Photo/Rich Pedroncelli)

AB931 is supported by the ACLU, the San Diego County Democratic Party, the California Council on American-Islamic Relations (CAIR), and the Council of the City of Berkeley, as well as many other civil rights groups.

The partisan lines are drawn, but are the decision-makers informed with facts or fiction?

AB931 CHANGES

The proposed changes under AB931 remove and/or add language to California Penal Code sections 196 (Justifiable Homicide by a Peace Officer) and 835a (Use of Force), to "require peace officers to attempt to control an incident by using time, distance, communications, and available resources in an effort to deescalate a situation whenever it is safe and reasonable to do so." The language changes appear to defer most of the evaluative criteria of section 196 (Justifiable Homicide) to an enhanced version of section 835a.

Most of the controversy from the law enforcement side stems from the use of the word "necessary" (in AB931) as it applies to the use of deadly force. It should be noted that the word "necessarily" is in the current version of section 196. So, what's the big deal? Well, that all depends on how the proposed narrative in section 835a is perceived by prosecutors and the trier of fact.

The proposed version of section 835a defines necessary as:

> …given the totality of the circumstances, an objectively reasonable peace officer would conclude that there was no reasonable alternative to the use of deadly force that would prevent imminent death or serious bodily injury to the peace officer or to another person.

Totality of the circumstances is defined as:

> all facts 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.

Reasonable alternative is then defined 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 may 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.

Yet, AB931 does not remove the section 835a language concerning officers not being required to retreat or desist, or being deemed an aggressor when using reasonable force to effect an arrest. How can one be told in the same paragraph that they must de-escalate and create distance, but that you do not need to retreat/desist and won't be deemed the aggressor?

WHAT DIFFERENCE DOES IT MAKE?

Many groups have made predictions regarding the effects of AB931. The ACLU states California police officers have a "problem with deadly force" and that data show restricting such force "works" toward reducing the number of citizen's killed by police. The CPOA states the new law will endanger both officer and public safety. Lexipol published an article that states the passing of AB931 would not only increase agency civil liability and unjust criminal prosecutions, but will also destroy officer morale and likely increase line-of-duty deaths.

A long list of legal experts have opined on what these changes in California law might mean. Between them, there is agreement that the proposed legal changes will lead to officer hesitation and increased officer injuries and deaths. Further, many believe the evaluative standard will be overly subjective while expecting officers to have superhuman abilities to predict the future. Seth Stoughton, a well-known police reformer and law professor, coauthored an article that surprisingly intimated AB931 would cause agencies to lower training standards and provide less restrictive policy. San Francisco District Attorney George Gascon states the new law will, "enhance community trust, improve officer training, and make the job of policing and those they police safer."

While this long list of organizations and individuals from both sides have made subjective arguments, it's very difficult to factually know what the change in the law might mean today, tomorrow, or far into the future. Personally, I want to hear from the California prosecutors about how they interpret the narrative in the proposed law. As of this writing, Gascon is the only prosecutor who I've seen opine upon this change. In general, it would be prudent to understand how prosecutors would change their charging decisions.

When considering long-term consequences, we might ask whether individual officers and their agencies will be so struck with fear of criminal and civil liability that they more frequently elect to not engage in or to walk away from certain situations, given the protections of public duty doctrine (Duty as a threshold issue). Another outcome could be a reduction in officer-involved shootings via the use of new tactics and technology to expeditiously solve these issues in a non-lethal manner. We could also see a combination of the two.

IS IT NECESSARY?

The ACLU claims California officers have a problem with deadly force. If this were proven true, then changing the law would arguably be the right thing to do. The ACLU falls short of proving its claim, but that does not mean the data is unavailable. Let me present some contextual information that might be of interest to legislators and the voting public.

The U.S. Department of Justice (2008) reports there are 79,431 sworn law enforcement officers serving 39 million residents in California (U.S. Census 2017). According to the Washington Post Shooting Database, 162 Californians were shot and killed by police in 2017, 138 in 2016, and 190 in 2015. Per capita, police killed .00041 percent, .00035 percent, and .00048 percent of the population of California in 2017, 2016 and 2015, respectively. However, those statistics have no context and are mostly meaningless without it.

To add some broad context, I turned to data collected by the largest law enforcement organization in the state for 2017: The Los Angeles Police Department (LAPD) responded to 1.2 million calls for service; 2,736 of those calls were listed as a "man w/gun." The LAPD reported 282 homicides, 10,784 robberies and 16,794 aggravated assaults. The department arrested 344 homicide suspects, 311 rape suspects and 9,594 aggravated assault suspects. Yet, working among this level of violence, the LAPD had 43 officer-involved shootings in 2017. What would these numbers look like when we add LA County, San Diego, Oakland and Sacramento?

Arguably, these are just surface numbers. A lot of additional information needs to be gathered and evaluated to determine if a problem exists. Individual agencies like the LAPD already have the data publicly available. Shouldn't such data be central to this conversation?

When considering the 162 Californians shot and killed by police last year, here are key questions to ask:

- How many of these cases was the suspect trying to kill or seriously injure an officer or another?
- How many of these cases was de-escalation or alternative tactics used before the OIS?
- Which cases would prosecutors have charged under the new standard?

My point here is that before we make a change in state law due to "a problem," the problem should be rationally evaluated and factually supported.

INFORMED DECISIONS

According to several of the sources, the authors of AB931 did not consult with law enforcement on the proposed changes. We need to know who they consulted with and what data was reviewed to create and support AB931. What specific situations have occurred in the past are they hoping to address with the new law? More importantly, where is the line to be drawn between "reasonable alternatives" and using "necessary" deadly force?

As a human performance expert, I have some concerns about the potentially superhuman performance we may be requiring from law enforcement officers in high-stress incidents. AB931's necessary standard, in association with the proposed changes to section 835a, appear to create a single, acceptable right answer after a long list of "reasonable alternatives" (what ifs) are reviewed in hindsight.

AB931 encompasses a concept the Ninth Circuit Court of Appeals warned about when they said:

> Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle, with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to assess the least intrusive alternative (an inherently subjective determination) and choose that option and that option only" (*Scott v. Henrich*, 39 F. 3d 912 (9th Cir. 1994).

Lastly, I believe it is significant that the most prominent and respected legal scholars in this nation created an objectively reasonable officer standard 30 years ago (*Graham v. Connor*, 490 U.S. 386 (1989). The real question is: Do California officers excessively use deadly force in such a way that the state should ignore such powerful legal guidance?

My thanks to Jeff Martin Esq. of DSI Consulting for his peer review of this article.

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.

Contact David Blake.

Tags › Officer-Involved Shootings • Use of Force