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Law Enforcement Practices & Liability Conference

Navigating Use of Force Standards and other "Hot Button" Police Issues

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Speakers:

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Conference Reference Materials

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Seven Myths About Use of Force That Prosecutors Need to Know

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By Ed Obayashi

The first day at the police academy teaches cadets an article of faith—the one and only unbreakable and unquestioned "rule" that dominates how cops interact with the public: "*There is only one rule in my life from now on: I am going home after my shift*."

This "rule" is recited by the instructor, repeated by cadets, and remembered by cops throughout their careers. It is, however, also criticized by police reform advocates and even some law enforcement groups who claim that such a single-minded focus on officer safety instills a paranoiac effect on officers to defend themselves at all costs.[1]

Even with my patrol days long behind me (except when I make the occasional traffic stop), I still feel the protective call of the "rule" as strongly as I did then. So much so that in official training, I continuously remind officers to never let court cases compromise their safety. A trainee can fall short on report writing standards or even knowledge of legal issues and still graduate and pass the probationary period. But even a hint of concern about an officer's safety skills will ensure the end of his or her career as a cop.[2]

With the rise in violence against police officers, this "rule" is even more justified and is reinforced at the police academy. It is offered here to help explain why the demand for less lethal responses to subjects armed with weapons other than a firearm—from the public, politicians, and some law enforcement authorities—is unrealistic both from a policy and a legal perspective.

Use of force (UOF) by law enforcement officers is an emotionally volatile issue and prone to extreme differences in opinion by many experts. The opinions are dominated by "objective-subjective" analysis by the media, legal and UOF experts, and law enforcement managers. The hard truth is that there are only limited

statistics and unreliable studies to support any type of responsible conclusions regarding UOF.

This article examines seven myths and realities related to UOF based on this author's anecdotal experiences and opinions as an active sworn peace officer, law enforcement legal advisor, and deputy district attorney, as well as some analysis of the referenced statistics.

MYTH #1: **Peace officers (police and sheriffs' deputies) are killing more people than ever—especially the mentally challenged.**

REALITY: This is false. In fact, such killings (shootings or other means) have likely decreased over the past few decades.

Considering the history of police UOF, one would expect that statistics on these incidences—especially shootings—would be automatic, if not required, by state and federal authorities. In fact, very few agencies in California or nationally compile use of force by police statistics—even for internal use. Whatever statistics do exist are highly inaccurate and exacerbate the perception that police are "hiding something." There simply is no consistent increase or decrease in the numbers of police shootings. They are completely random.[3]

What also exaggerates the perception that police shootings have risen dramatically, especially against those with mental health issues, is that statistics typically focus on raw data (e.g., total number of people killed) with little emphasis on per capita analysis or other relevant statistical categories (e.g., armed or unarmed, type of weapon, mental health of victim, nature of crime, race, height, weight).

These "statistics" are cited by the media and advocacy groups as "evidence" that such deaths are rapidly rising, and therefore, are automatically questionable. Often overlooked by "experts" and the media is the expanding population of the United States since the Los Angeles riots and Rodney King beating in 1992, which is generally regarded as the baseline date of when the media began intensively scrutinizing police UOF. On July 1, 1992, the U.S. population was approximately 256.51 million. As of March 1, 2017, the U.S. population was approximately 323.42 million; a roughly 26 percent increase.[4]

Yet, addressing only California, there was an actual decrease in police UOF killings in larger jurisdictions perceived to be the "leaders" in officer-involved shootings. For example, the Los Angeles Police Department (LAPD) shot and killed 21 subjects in 2015, compared to 19 in 2016;[5] while the San Francisco Police

Department (SFPD) shot and killed six subjects in 2015, compared to two by mid-year 2016.[6] Still, these agency-specific statistics provide only raw data and do not address the "why" of the killings. In fact, no statistics reveal any such informative details, often due to personnel confidentiality issues.

With the unprecedented public scrutiny of police shootings since the death of Michael Brown on August 9, 2014, in Ferguson, Missouri, the U.S. Department of Justice and the California Department of Justice have attempted to account for shooting statistics by police. Since Ferguson, the number of police shootings has remained consistent with virtually no change between 2015–2016.[7] Unfortunately, the media, lacking any reliable official database, has resorted to their own statistical research.[8]

The widespread perception that police are killing more individuals under legally or morally questionable circumstances is attributable to one reason in this author's opinion: social media. The effects of real-time audio and visual media have led to this perception. Regardless of how legally justified the shooting of, or UOF (e.g., repeated use of batons) against an individual, such a video will always be "ugly" and have an immediate and contagious emotional impact on many people.

UOF videos do not tell the whole story, however, and often convey a distorted perspective that is subject to endless "second guessing" of the officer's actions. Prosecutors should note that analyzing video is both an art and a science requiring specialized training. The lack of a reliable database for officer-involved incidents resulting in death, much less serious injuries, only worsens the public's perception that police officers resorting to deadly force is the norm rather than the exception.

What is not perception is the unprecedented number of police officers who have been killed this past year and the shocking way they have been killed—premeditated ambush as opposed to the spontaneous and typical types of confrontations that cops are trained to be prepared for (e.g., domestic violence and traffic stops). The numbers show an increase in total officers shot and killed (a 56 percent spike since last year) and a 250 percent rise in ambush fatalities.[9]

MYTH #2: Police must use the least intrusive (physical) means to control a subject who is armed with a knife or a bat.

REALITY: In fact, the opposite is true. Officers are not legally required to use lesser physical means to subdue a subject.

> [T]he inquiry is whether the force that was used to effect [sic] a particular seizure was reasonable, viewing the facts from the perspective of a reasonable officer on the scene. Whether officers hypothetically could have used less painful, less injurious, or more effective force in executing an arrest is simply not the issue.[10]

The subtle nuances between reasonable and unreasonable UOF are very complex due to the varied nature of UOF incidents, and often baffle the courts. However, judges must make "allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[11]

MYTH #3: Even if it is legally justifiable, officers should resort to less than deadly force when confronting individuals armed with knives, etc., as a matter of public policy.

REALITY: Officers should and do employ less than lethal force options and tactics **if** it is feasible (i.e., it is safe to do so for the officer and others). However, the shooting option is employed only when less lethal options are not practical, have no effect (more on this later), or the situation has escalated so rapidly that lethal force is the only reasonable option, which is almost always the case.

A knife or other such object is by legal—not to mention practical—definition[12] a *deadly weapon.*[13] Officers cannot, nor should they be expected to, use any force less than deadly force in favor of "kinder and gentler" tactics when confronted with the immediate possibility that they will be seriously injured or killed. Such alternative measures are plagued with the sort of hindsight bias the U.S. Supreme Court has forbidden.[14]

An expectation of using less than lethal force is based on the uninformed realities on the part of the public (and others) of confronting individuals who possess "deadly weapons." To force officers to adopt a default rule against the use of deadly force in situations when it is legally justifiable is both unworkable and dangerous.

The notion that cops are martial arts experts on par with Bruce Lee, or can shoot a moving target from extreme distances is a Hollywood-created myth. It is safe to say that 99 percent of cops could not shoot a knife or any weapon out of a subject's hand, even within the so-called "21-foot rule."[15] This explains why officers are trained to never shoot to wound. Of the aforementioned police

shooting statistics, LAPD killed 21 in 38 shooting incidents[16] while SFPD killed six in nine.[17] So, if cops were the marksmen that Hollywood portrays them to be, the number of people killed by police could easily be twice what it is. Regarding martial arts, most cops rarely practice hand-to-hand combat—the standard requirement is one day annually—much less use it on the streets.

Of note to prosecutors, this myth has found its way into many federal circuit court decisions. The courts—particularly, the Ninth Circuit—have found a legal basis to impose such a "requirement" upon police[18] only to be overruled and pointedly admonished by the U.S. Supreme Court over the years, most recently in *White v. Pauly.*[19]

Disturbingly, some law enforcement authorities and agencies (both large and small), along with politicians, have jumped on the bandwagon endorsing this myth's reforms to mollify certain constituencies, often at the expense of sacrificing officer safety for the sake of public relations.[20]

Related to this myth is *Guiding Principles on Use of Force*, a report issued by the Police Executive Research Forum (PERF).[21] This "think tank" specifically addressed the issue of confronting mentally ill subjects armed with non-firearms in the report. It recommended that all U.S. law enforcement agencies formally adopt a policy, among others, that officers should respect the "sanctity of life."[22]

Frankly, every sheriff, police chief, and officer I know understandably considers this highly offensive.[23] To suggest that cops need to be taught or reminded that life is sacred serves no purpose other than heightening the public's mistrust in law enforcement.

The PERF "principles" and other related recommendations are mostly "public relations-oriented" reforms intended to prevent deadly confrontations between police and the mentally ill.[24] While well intended, they are highly impractical and dangerous to both officers and the public for the reasons stated here.[25]

MYTH #4: Officers should be trained in de-escalation techniques and mentally challenged subject recognition.

REALITY: This popularized "solution" has been highlighted by various police reform advocacy groups. Unfortunately, such techniques would not have worked in the high-profile shootings over the past few years because they are intended for a non-violent or very low-risk, manageable subject.

Contrary to what is viewed as a new and innovative improvement, officers have been mandatorily trained for decades in de-escalation techniques and sensitivity training toward mental health subjects. Advocacy groups recommend specially trained crisis response units that they claim would dramatically reduce such deaths. There is no evidence this would be the case, however, because such an approach is not a use-of-force tactic, but rather a long-term preventative process not intended to deal with the type of individual whom is the subject of this article.

In fact, recent events have called into doubt the effectiveness of such de-escalation and the dangers to officer safety.[26] Further, contrary to the overly optimistic expectation of preventing such confrontations, such a response team cannot be employed in these situations.[27] Crisis response units are typically composed of a civilian behavioral health specialist and a specially trained officer whose goal is to intervene as early as possible for those in need of mental health resources and develop a progress plan. So, assuming agencies even have such a resource (a luxury for the very few), a civilian is not going to be allowed anywhere near an armed subject for obvious safety reasons.

The individuals who have been killed by police are not the passive or semi-passive individuals they often are portrayed to be, for which such a process would have been helpful. In almost every one of these incidents that I have personally reviewed, and in almost every such publicized incident since Ferguson, these individuals were armed, or reasonably believed to be armed, with a knife or similar weapon. Most appeared to be unresponsive to any type of command or de-escalation efforts and posed an immediate threat to the officer or others (a legal analysis beyond the scope of this article).

Prosecutors should be aware that police have often been criticized for provoking mentally challenged subjects into otherwise avoidable confrontations. The Ninth Circuit has even created the so-called “Provocation Rule,” which holds that an officer can be civilly liable in excessive force cases when the officer “recklessly provoked” the confrontation that led to the use of force even though the use of force was reasonable.[28] In fact, this rule was relied upon by one California prosecutor in charging officers with murder.[29]

The Provocation Rule has been widely criticized by law enforcement as contrary to the “rapidly evolving” circumstances threatening officer safety, which the U.S. Supreme Court has consistently admonished the courts to consider in UOF cases. In a very significant development, the Supreme Court has granted certiorari to review this rule.[30]

MYTH #5: The officer should use a Taser, pepper spray, or bean bags instead of deadly force.

REALITY: Officers **do** employ Tasers and/or pepper spray in UOF situations **if** the opportunities are present. The problem is that typically, the mentally challenged individual, as a matter of well-documented experiences, is highly pain-tolerant and possesses almost "superhuman" strength because of an obsessive drive—a fact acknowledged by the courts.[31]

Law enforcement constantly struggles with developing less-lethal methods for controlling these armed subjects. There have been well-intentioned, but highly impractical, attempts at improvisation. One such tactic—dismissed immediately after its first demonstration when the officers had to chase the subject and repeatedly slipped and fell in the best tradition of Keystone Cops—called for officers to surround and wrap the subject with a volleyball net after another officer sprayed a fire extinguisher at the subject to distract him.

In addition, although certain to add to the controversy, not to mention the ethical considerations, advances in robotics may provide law enforcement with more less-lethal options.[32]

MYTH #6: Officers should "overwhelm" the subject with sheer physical force (e.g., body weight).

REALITY: Contrary to popular belief, officers will not and are trained **not** to go "hands-on" (weaponless) with a subject who is armed with a non-firearm weapon, especially one who is obviously mentally challenged. This is true even when multiple officers are present.

An officer must go hands-on, then all else has failed and the result is a chaotic, unrehearsable physical struggle commonly described as a "dog pile" that often leads to officer and subject injuries. More subjects have been killed and injured in "dog piles"—typically from compression asphyxia resulting from the sheer body weight of officers—than from the combined use of Tasers, batons, and/or pepper spray. In fact, it is the next highest cause of death in UOF cases after shootings.[33]

Think about another public policy consideration. If an officer gets hurt in a "hands-on" situation and injures his or her back (a common injury), a statutory presumptive basis for a disability claim exists that could, and often does, lead to a disability retirement—often a far costlier expense exceeding the average payout for an excessive force lawsuit considering the officer's lifelong, tax-free salary. Risk

management departments have had a huge stake and role in advocating for officers not to take unnecessary physical risks.

Although many advocacy groups would consider such a safety policy as evidence of police indifference toward saving lives, the reality is that these tragedies are the "cost of doing business" as long as necessary mental health resources are not devoted to effectively addressing the underlying problem. Generally speaking, cops are tasked to be the provider of de facto social services in many situations for which there are no viable solutions.

MYTH #7: UOF standards are or should be uniform throughout the state.

REALITY: This may come as a surprise to many readers, but UOF standards of agencies are influenced more by community standards than legal standards. This is because agencies are freely permitted to adopt less intrusive means for UOF, although they are not legally required to do so.[34]

For example, shooting at moving vehicles from helicopters is an acceptable UOF for Southern California agencies. However, any kind of shooting at a moving vehicle is prohibited by many Northern California agencies.[35]

What may be even more surprising is that there is no legal mandate in California that officers be trained or even be informed of the latest legal decisions related to the use of force. In my UOF training classes throughout the state, I have found it the rule rather than the exception, that officers, managers, and supervisors of both large and small agencies are uninformed on many important legal decisions, sometimes by years.

The norm is that county counsels, city attorneys, Attorneys General, or district attorneys do not, or cannot, provide this type of training. Thus, most law enforcement UOF policies typically are not current with "must know" UOF legal issues and cases.[36]

Most law enforcement agencies have no access to private resources, and even if they did, the services are often inadequate. Training is typically available from police training resource websites, which are not much better. There is no statutory or regulatory mandate for agencies or officers to be current on UOF law. Even if there was, both street officers and attorneys may find it difficult to understand.

It is very understandable that prosecutors are motivated to publicize cases about *Miranda* or other prosecutor-specific issues. But this author suggests that prosecutors are in the best position to provide training to law enforcement on

UOF law. No cop ever got fired for failing to Mirandize a suspect, even deliberately. But a UOF incident could end a career.

Conclusion

Such mandated or cooperative training may have prevented an otherwise preventable situation for many an officer who was disciplined or terminated because he or she was not provided this critical knowledge. How many readers realize—most cops in California do not—that merely pointing a firearm at the driver and occupants of a stolen car during the everyday "felony hot stop," by itself without more, is an unreasonable use of force denying officers qualified immunity?[37] Or, that when "dog piling" the mentally challenged (or not) individual requires that officers ensure that the subject is able to breathe?[38]

I meet annually with district attorney representatives assigned by the state to select worthwhile new cases that may be of interest to law enforcement. It is often difficult to convince my prosecutor colleagues of the importance of UOF cases to law enforcement as compared to the dwindling relevance of interrogation law. In this author's opinion, that needs to change.

It is highly unlikely that shootings such as those discussed here will decrease regardless of adopting any of the discussed "reforms." If the numbers do drop, it will likely be due to the random nature of these incidents. However, societal policies and economics have led to this problem and police are often left to deal with the consequences. With the help of UOF training by district attorneys, perhaps some of that growing burden can be lifted from the shoulders of law enforcement officers.

ENDNOTES

1. Renee Stepler, "Some 42% [of officers] say they nearly always or often have serious concerns about their safety," (Jan. 11, 2017) Pew Research Center. <*http://www.pewresearch.org/fact-tank/2017/01/11/police-key-findings/*> (accessed Sep. 11, 2017).

2. Kristine Phillips, "'Just shoot me," an armed man told a cop. The officer didn't—and was fired, lawsuit says," (May 15, 2017) *Washington Post*. <*https://www.washingtonpost.com/news/post-nation/wp/2017/05/15/just-shoot-me-an-armed-man-told-a-cop-the-officer-didnt-and-was-fired-lawsuit-says*> (accessed Sep. 11, 2017).

3. Wesley Lowery, “How many police shootings a year? No one knows,” (Sep. 8, 2014) *Washington Post.* <*https://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/*> (accessed Sep. 11, 2017).

4. <*http://www.multpl.com/united-states-population/table*> (accessed Sep. 11, 2017).

5. LAPD Use of Force Year-End Review Executive Summary 2015. <*http://assets.lapdonline.org/assets/pdf/UOF Executive Summary.pdf*> (accessed Sep. 11, 2017).

6. Joaquin Palomino, “SF’s police-involved shootings: practices and patterns,”

   (May 22, 2016) *San Francisco Chronicle*. <*http://www.sfchronicle.com/crime/article/SF-s-police-involved-shootings-practices-and-7921829.php*> (accessed Sep. 11, 2017).

7. Kimbriell Kelly, et al., “Fatal shootings by police remain relatively unchanged after two years,” (Dec. 30, 2016) *Washington Post*. <*https://www.washingtonpost.com/investigations/fatal-shootings-by-police-remain-relatively-unchanged-after-two-years/2016/12/30/fc807596-c3ca-11e6-9578-0054287507db_story.html?utm_term=.486654077e70*> (accessed Sep. 11, 2017).

8. Anita Chabria, et al., “Citrus Heights police: Too quick to shoot?” (Mar. 12, 2017) *Sacramento Bee*. <*http://www.sacbee.com/news/local/crime/article137804533.html*> (accessed Sep. 11, 2017).

9. Susan Miller, “Officer down: Police deaths hit a 5-year high,” (Dec. 29, 2016) *USA Today*. <*https://www.usatoday.com/story/news/nation/2016/12/29/officer-down-police-deaths-hit-5-year-high/95984998/*> (accessed Sep. 11, 2017).

10. *Forrester v. City of San Diego* (9th Cir. 1994) 25 F.3d 804, 807–808; citing *Graham v. Connor* (1989) 490 U.S. 386, 396–397 and *Hammer v. Gross* (9th Cir. 1991) 932 F.2d 842.

11. *Connor, supra*, at 397.

12. Anita Chabria and Phillip Reese, “Lethal force against knife-wielding suspects draws increasing scrutiny,” (Oct. 2, 2016) *Sacramento Bee*. <*http://www.sacbee.com/news/local/article105437571.html*> (accessed Sep. 11, 2017).

13. Pen. Code § 245.

14. *George v. Morris* (9th Cir. 2013) 736 F.3d 829, 846, citing *Connor, supra*.

15. *Norton v. City of S. Portland* (2011) 831 F.Supp.2d 340, 347 [“This standard training included videos and studies showing how quickly an average man with an edged weapon can close a distance of approximately 21 feet in an unanticipated attack and how quickly a police officer, would need to react, draw his weapon, aim and fire. Through this training, officers learn that the ‘21-foot rule’ serves as a guideline as to the distance at which an officer might consider deploying deadly force against a person with an edged weapon.”].

16. *LAPD UOF Year-End Review, supra*.

17. Palomino, “SF’s police-involved shootings,” *supra*.

18. *City and County of San Francisco v. Sheehan* (2015) 135 S.Ct. 1765; *Mullenix v. Luna* (2015) 136 S.Ct. 305.

19. *White v. Pauly* (2017) 137 S.Ct. 548, 551–553.

20. Anita Chabria, “San Francisco cop wrestles pantless man in scene that has some wondering if de-escalation has gone too far,” (Feb. 27, 2017) *Sacramento Bee*. <*http://www.sacbee.com/news/local/crime/article135325579.html*> (accessed Sep. 11, 2017).

21. PERF is a police research and policy organization and a provider of management services, technical assistance, and executive-level education to support law enforcement agencies. <*http://www.policeforum.org/*> (accessed Sep. 11, 2017).

22. Police Executive Research Forum, *Guiding Principles on Use of Force* (Mar. 2016) p. 34. <*http://www.policeforum.org/assets/guidingprinciples1.pdf*> (accessed Sep. 11, 2017).

23. Anita Chabria, “Lethal force against knife-wielding suspects,” *supra*.

24. PERF recommends that officers should never fire at a moving vehicle unless certain circumstances exist—a position the U.S. Supreme Court expressly rejected in *Luna, supra*, at 306.

25. In openly disagreeing with PERF, this threat to officer safety has drawn very strong official opposition from both myself in an official capacity and many California law enforcement groups, including the California Police Chiefs Association, the California State Sheriffs’ Association, and the California Peace Officers Association.

26. Chabria, “San Francisco cop wrestles pantless man,” *supra*.

27. Anita Chabria, “Sacramento mayor wants officers to spend a week learning how to approach mentally ill,” (Jan. 18, 2017) *Sacramento Bee*. <*http://www.sacbee.com/news/local/crime/article127351199.html*> (accessed Sep. 11, 2017).

28. 42 U.S.C. § 1983; *Alexander v. City & County of San Francisco* (9th Cir. 1994) 29 F.3d 1355; *Billington v. Smith* (9th Cir. 2002) 292 F.3d 1177. At the time of this publication, the Supreme Court, in a unanimous decision, overturned the “Provocation Rule” created by the Ninth Circuit Court of Appeals, stating that the rule was “an unwarranted and illogical expansion of *Graham*.” (*County of*

    Los Angeles v. Mendez, 2017 U.S. LEXIS 3396).

29. Orange County District Attorney Press Conference, “Kelly Thomas Investigation Results” (Sep. 21, 2011). <*https://www.youtube.com/watch?v=hN-gIRJoWNU*> (accessed Sep. 11, 2017).

30. *Mendez v. County of Los Angeles* (9th Cir. 2016) 815 F.3d 1178.

31. *Luchtel v. Hagemann* (9th Cir. 2009) 623 F.3d 975.

32. *Legal Talk Network* podcast, “Law Enforcement and the Use of Robots” (Sep. 12, 2016). <*https://legaltalknetwork.com/podcasts/lawyer-2-lawyer/2016/09/law-enforcement-use-robots/*> (accessed Sep. 11, 2017).

33. *Drummond v. City of Anaheim* (9th Cir. 2003) 343 F.3d 1052; *Arce v. Blackwell* (9th Cir. 2008) 294 Fed.Appx. 259.

34. *Forrester, supra*.

35. Nanette Asimov, “UC Berkeley police shift to safety over force at protests,” (Feb. 11, 2017) *San Francisco Chronicle*. <*http://www.sfchronicle.com/bayarea/article/UC-Berkeley-police-shift-to-safety-over-force-at-10925226.php*> (accessed Sep. 11, 2017).

36. Chabria, “Citrus Heights police,” *supra*.

37. *Green v. City and County of San Francisco* (9th Cir. 2014) 751 F.3d 1039.

38. *Mendoza v. City of West Covina* (2012) 206 Cal.App.4th 702.

OIS

Legal Issues

1. Criminal Investigation
2. Administrative Investigation
3. Civil Suit

Public Relations, Media and Political Issues

Tell public what happened ASAP

No preferential treatment of officers

Perception/Articulation Issues

Scene walk through?

Does video evidence exist?

Consideration of forensic evidence

Officer fatigue/emotional condition

Allow for REM sleep

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CRITICAL INCIDENT FACT SHEET

- Purpose?
- Means?
- What did officer know prior to use of force?
- What crimes have been or are about to be committed?
- How many officers present?
- Specialized knowledge, ability, skills on part of officer(s)?
- Officer exhaustion?
- Environmental facts (rain, uneven surface, crowd etc.)?
- Specialized knowledge, ability, skills on part of subject?
- Proximity to weapons?
- Imminence of danger/need for action?
- Emotionally disturbed person?
- Ability to comply/Apparent intent?
- De-Escalation?
- Use of force Policy/Procedure?

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WAS THE USE OF FORCE OBJECTIVELY REASONABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES?

For comments or suggestions please contact Vern Pierson @ vern.pierson@edcgov.us or 530-621-6472

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AB392 – Important Legislation for Police Liability in Civil and Criminal Cases

In 2019 the Legislature passed AB392 (sponsored by then Assemblywoman and now California Secretary of State Shirley Weber). The statute amended §§835a and 196 of the Penal Code. AB392 has significant implications for both criminal and civil litigation. Penal Code §196, which defines justifiable homicide by a police officer, now requires that the death result from the use of force in compliance with Penal Code section §835a.

Penal Code 835a(a)(1) explicitly declares a person's right to be free from the use of excessive force. It provides "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". Section 835a(a)(2) declares that peace officers may 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". Section 835a(a)(3) requires that a peace officer's decision 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".

Section §835a(a)(4) incorporates familiar language from *Graham v. Connor* 490 U.S. 386 (1989), "that the decision by a peace officer to use force shall be evaluated from 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”.

Section 835a(a)(5) notably declares 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”.

The statute establishes the standard of “objectively reasonable force to effect arrest, prevent escape or overcome resistance”. It requires, where feasible, that the officer make reasonable efforts to identify themself as a peace officer and to announce that deadly force may be used, unless the officer has objectively reasonable grounds to believe that the person is aware of those facts. A peace officer is justified in using deadly force only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons: (A) to defend against an imminent threat of death or serious bodily injury to the officer or to another person; or, (B) 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.

The statute forbids the use of deadly force to prevent self-harm or suicide: “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". P.C.§835a(c)(1)(B)(2)

The law does not require "retreat" but clarifies that retreat does not mean "tactical repositioning or other de-escalation tactics". The statute now includes definitions of "deadly force", "imminent threat of death or serious bodily injury", and "totality of the circumstances". "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". §835(e)(3) "Imminent" harm is "not merely 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" §835a(e)(2). AB392 also amended Penal Code §196 to clarify that justifiable homicide by a peace officer requires that the death result from the officer's use of force in compliance with Penal Code §835a.These changes in the law of police use of deadly force in California will impact both criminal and civil liability. There are four areas where AB392 has an immediate impact on litigation: actions under the Bane Act, the Ralph Civil Rights Act, negligence causes of action related to pre-shooting tactics and conduct, and defense of criminal charges for police homicide.

The Bane Act

The Bane Act (Civil Code §52.1) establishes civil liability for the interference with rights secured by the Constitution and laws of the United States or those of California. It forbids anyone, whether or not under color of law, from interference or attempted interference with the exercise of enjoyment of protected rights by "threat, intimidation or coercion". The Bane Act

makes the state immunity provisions of §§821.6, 844.6 and 845.6 of Government Code inapplicable to §52.1 to actions against any police officers or the entity that employs them.

The Bane Act protects both Constitutional and statutory rights. A Bane Act claim is essentially identical to a federal 42 U.S.C. §1983 action, with two distinctions. The Bane Act requires that the officer act with "specific intent". In a Bane Act case, unlike a §1983 action, there is no defense or qualified immunity.

The Bane Act authorizes the court to award the plaintiff reasonable attorney's fees. The Government Code provisions providing for indemnification of an employee of a public entity apply to the Bane Act.

The Ralph Act

The Ralph Civil Rights Act of 1976, as amended, provides that any person within the state of California has the right to be free from violence or intimidation by threat of violence committed because of political affiliation, sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status. Intimidation by threat of violence includes making or threatening to make a report to peace officer or law-enforcement agency falsely alleging that the person has engaged in unlawful activity, knowing the claim to be false or with reckless disregard for the truth.

Negligence for Pre-Shooting Tactics and Conduct

In *Hayes v. County of San Diego* (2013) 57 Cal 4th 622, California Supreme Court held that a pre-shooting circumstances might show that an otherwise reasonable use of deadly force by a police officer was in fact unreasonable. Pre-shooting conduct is included in the totality of

circumstances, surrounding the use of deadly force. The officers' duty to act reasonably when using deadly force extends to pre-shooting conduct by that officer. Such pre-shooting conduct should be considered in relation to the question whether the ultimate use of deadly force was reasonable. Thus the tactical planning and conduct of the defendant officers are relevant to determine whether there is liability on a negligence theory for the wrongful death of the person killed. *Hayes* made clear that state negligence law, which considers the totality of the circumstances surrounding use of deadly force, is broader than Fourth Amendment law, which focuses much more narrowly on the moment when deadly force is used.

Cal Crim §507

Cal Crim §507 is the standard jury instruction on the defense of justifiable homicide by a peace officer. It reads, in relevant part:

> The defendant is not guilty of (murder/ [or] manslaughter/attempted murder/ [or] attempted voluntary manslaughter if (he/she)(killed/attempted to kill) someone while acting as a peace officer. An [attempted] killing is justified and therefore not unlawful if:
>
> 1) The defendant was a peace officer…
>
> AND
>
> 2) The [attempted] killing was committed while the defendant either:
>
> A. Reasonably believed, based on the totality of the circumstances that the force was necessary to defend against an imminent threat of death or serious bodily injury to the defendant or another person…
>
> [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 to 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.]

[Totality of the circumstances means all facts known to the defendant at the time, including the conduct of the defendant and the decedent leading up to the use of deadly force]

In considering the totality of the circumstances, you may consider whether:

- Prior to the use of force, the defendant identified or attempted to identify him or herself as a peace officer and warned or attempted to warn that deadly force may be used;
- Prior to the use of force, the defendant had objectively reasonable grounds to believe the person was aware that the defendant was a peace officer and that deadly force may be used;
- The defendant was able, under the circumstances to identify or attempt to identify him or herself as a peace officer and to warn or attempt to warn that deadly force may be used.

A peace officer who makes or attempts to make an arrest need not retreat or stop because the person being arrested is resisting or threatening to resist. A peace officer does not lose his/her right to self defense by using objectively reasonable force to arrest or to prevent escape or to overcome resistance.

Conclusion

Although there will be debate concerning the effect of the legal changes effected by AB 392, it is clear that it has changed the law regarding both civil and criminal liability for death resulting from the use of deadly force by police. These changes are substantial and have not yet been fully delineated by appellate decisions. Suffice it to say that the effect of the changes in Penal Code §§196 and 835a have a substantial impact on the analysis that attorneys prosecuting civil and criminal cases involving the use of force by peace officers must undertake.

RLS RAINS LUCIA STERN ST. PHALLE & SILVER, PC

MASTAGNI HOLSTEDT
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Timothy K. Talbot
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November 29, 2022

Via Electronic & U.S. Mail

Brian Marvel, PORAC President
Peace Officers Research Association of California (PORAC)
2940 Advantage Way
Sacramento, CA 95834

Re: Reaffirming PORAC's position on California's heightened use-of-force standard

Dear Brian,

We write in response to your request for a reaffirmation of PORAC's reading of the law as it relates to recent use of force legislation. On Tuesday, November 22, the ACLU issued a press release misconstruing PORAC's position on recent use of force legislation and the impact of an out-of-court non-monetary settlement with the City of Pomona.

First, it is important to understand what the settlement in Pomona does and does not effect. Tellingly, this settlement involves no monetary compensation and primarily requires the City to implement policies that comport with AB 392 and SB 230. While this settlement is being touted by the ACLU as a legal determination over the scope and requirements of AB 392, the settlement does no such thing. Private parties cannot enter into settlement binding anyone other than the parties to the agreement. The settlement does not involve any legal interpretation from any court and has no precedential effect on anyone other than the City of Pomona.

While the ACLU is marketing this settlement as a determination of the justification standards under the penal code, agencies actually have an obligation to implement policies under SB 230 that exceed the justification standards for deadly force in Penal Code Section 832a. In fact, SB 230 – rather than AB 392 – requires implementation of polices and training on alternative tactics to deadly force, including de-escalation. Importantly, SB 230 sets minimum requirements for use of force polices and agencies have discretion to adopt policies that exceed the SB 230 standards so long as they do not impinge Constitutional self-defense rights. (See, *New York State Rifle & Pistol Association, Inc. v. Bruen* (2022)142 S.Ct. 2111, 2131, *holding*, the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms for self-defense" and only regulations consistent with this nation's historical tradition are Constitutional.)
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Thus, the settlement agreement in Pomona encompasses the agency's obligations to comply with both laws and its discretion to adopt policies that exceed the requirements of those laws. Lastly, the settlement agreement appears to focus on political statements and criticism of PORAC while merely restating the longstanding Constitutional requirements to only use deadly force when necessary to prevent an imminent threat of death or serious bodily injury, and to consider the totality of circumstances.

Penal Code Justification for Deadly Force

PORAC President Marvel's comments regarding deadly force and AB 392 have been misconstrued to malign PORAC's contributions to police reform in California, including the enactment of SB 230 over the vociferous objections of the ACLU. SB 230 requires training on de-escalation tactics and alternatives to deadly force, which the ACLU challenged in part based on their opposition to police funding, even for training. Now, according to news reports the ACLU is criticizing POST over its implementation of SB 230's requirements.

PORAC has long supported modernizing California's 200-year-old justification standards (Penal Code Sections 197 and 835a) to comport with the Constitutional standards set forth in *Graham* and *Garner* that deadly force is only to be used when necessary to protect human life or to prevent the escape of a violent felon who poses a significant risk to the public if not immediately apprehended. In fact, the early version of SB 230 included language that mirrored AB 392's Penal Code § 835a(c)(1). **PORAC stands behind our legal analysis that AB 392's changes to the Penal Code largely codified the Constitutional standards established by the courts and modernized the antiquated statutes in California.**

In fact, published appellate case law supports PORAC's conclusion. *Koussaya v. City of Stockton* (2020) 54 Cal.App.5th 909, 936, interpreted AB 392 and concluded, "as long as an officer's conduct falls within the range of conduct that is reasonable under the circumstances, there is no requirement that he or she choose the 'most reasonable' action or the conduct that is the least likely to cause harm and at the same time the most likely to result in the successful apprehension of a violent suspect, in order to avoid liability law enforcement personnel have a degree of discretion as to how they choose to address a particular situation." (citations omitted.) The court recognized that "although an officer's pre-shooting conduct must be considered as part of the totality of circumstances surrounding the use of force, the 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." (*Id*.)

AB 392 also codifies definitions of other important use of force terms, such as imminent, deadly force, and totality of the circumstances. PORAC has consistently supported codifying these important standards and included additional definitions such as "feasible" in the bill it sponsored, SB 230. AB 392 also includes PORAC supported restrictions on the use of force against individuals who are only a threat to themselves. In short, PORAC is proud to have worked with the Governor and the Legislative leadership to enact balanced and workable legal standards for deadly force, and more importantly for training and uniform statewide use of force standards that exceed the Penal Code.

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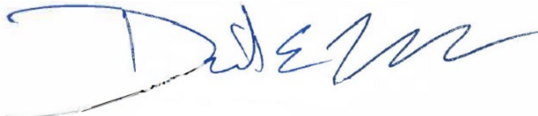
As you are aware, the enactment of SB 230 delivered the most significant policy improvements, resulting in better outcomes for everyone. Ironically, the ACLU testified against SB 230 in the public safety committee and was admonished by the Chair for throwing "last-minute firebombs" on this important legislation.

We trust this letter addresses the concerns that have been raised. Please do not hesitate to contact the undersigned if we can be of further assistance.

Sincerely,

MASTAGNI HOLSTEDT, A.P.C.



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Eugene Iredale

Gene Iredale has tried over 200 cases to verdict in federal and state courts, in criminal and civil cases. He has been in private practice for over thirty-five years. Gene has practiced in the Courts of Appeals as well, having argued more than 50 times before the Ninth Circuit, more than 20 times before state appellate courts, and twice before the U.S. Supreme Court.

> **"Mr Iredale had proved to be a formidable adversary ... Were I in petitioners position I'm sure I would want Mr. Iredale representing me too. He did a fantastic job in that trial."**
> *Justice Marshall, dissenting in the United States Supreme Court decision in United States v. Wheat, 486 U.S. 153 at 171 (1987)(quoting the district court)*

Personal

Gene has lectured all over the United States on trial practice. He has taught at the National Criminal Defense College. He has lectured to The National Association of Criminal Defense Lawyers, California Attorneys for Criminal Justice, and California Public Defenders Association, among others. He edited "Defending a Federal Criminal Case".

An honors graduate of Columbia University and Harvard Law School, Gene began his career as a federal public defender, ultimately becoming the Chief Trial Attorney at Federal Defenders of San Diego.

Gene has been listed for over thirty years in Best Lawyers in America (white-collar criminal defense, non-white collar criminal defense and civil rights law). He has a rating of AV from Martindale Hubbell.

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- Criminal Defense in State and Federal Courts
- White-collar Criminal Defense (against accusations of mail fraud, wire fraud, securities fraud, tax fraud and RICO)
- Defense of Homicide Cases
- Defense of Child Abuse and Child Pornography accusations
- Civil Rights Cases (police misconduct)
- Civil Litigation

Bar Admissions

- California
- Massachusetts
- U.S. District Court, Southern District of California
- Ninth Circuit Court of Appeals
- U.S. Supreme Court
- U.S. District courts throughout the country, including the districts of Arizona; Montana; Massachusetts; Nevada, the Western District of Washington; Northern, Central and Eastern districts of California; and the Eastern District of New York

VERN PIERSON

EL DORADO COUNTY DISTRICT ATTORNEY

In 2006, Vern Pierson was elected as District Attorney of El Dorado County and is currently serving his fourth term. Vern has been a prosecutor for 29 years, serving in various capacities as Deputy District Attorney, Deputy Attorney General, and Chief Assistant District Attorney. In addition, he currently serves as the Immediate Past President of the California District Attorneys Association and is the author of the California Evidence Pocketbook. Vern received a Master Degree from the Naval Postgraduate School, Center for Homeland Defense and Security (CHDS). His thesis argued for re-examination of the role of psychology within extremism and serves as a subject matter expert for CHDS. Vern has three children who each graduated from Oak Ridge High School. His two sons have served in active duty in the 82nd Airborne and his daughter is completing her teaching credential with hopes of being a high school teacher.