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Chapter 977: “I think that’s him, but I’m not sure” Should Not Be Enough to Put Someone in Jail for Life

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**Setting the Standard: Changing the Use of Force Standard
Used by California Police**

*Molly Alcorn**

Code Section Affected

Penal Code § 835(a) (amended).
AB 931 (Weber).

“It always blows me away that law enforcement only fear for their life when they are facing black and brown people”¹

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* J.D. Candidate, University of the Pacific, McGeorge School of Law, to be conferred May 2020; B.A., Political Science, Sonoma State University, 2014. Firstly, I would like to thank Professor Michael Adams for his advice, guidance, and expertise during this writing process. I would also like to thank my family, friends, and classmates for supporting me during this time of growth and new experiences. I would like to dedicate this article to my little sister, Mary Carroll—her outstanding wit, courage, and passion motivated me to reach new heights.

1. Alexei Koseff, *Police Say No Deal on California Bill to Restrict Their Use of Force*, SAC. BEE (June 19, 2018), http://www.sacbee.com/news/politics-government/capitolalert/article213452784.html#emlnl=Alerts_Newsletter (on file with *The University of the Pacific Law Review*).

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I. INTRODUCTION

Stephon Clark, a 22-year-old African American man, was in his grandparent’s backyard late one night when Sacramento police officers shot and killed him.² Police were responding to a 911 call regarding a man in a dark hoodie breaking car windows.³ Helicopters chased Clark and directed police to him on foot, eventually leading to the backyard of his grandparents’ home.⁴ Seeing Clark, the police yelled for him to show his hands.⁵ As Clark turned with his arms raised, an officer, believing he had spotted a weapon, yelled “gun, gun, gun!” and began shooting at Clark.⁶ The two officers immediately fired approximately twenty shots.⁷ Clark was shot eight times, three times in the back, and fell to the ground.⁸

The police waited for backup before approaching and cuffing Clark, fearing that he possessed a weapon.⁹ As they waited for over five minutes, Clark bled out and died on the ground outside his family’s home with his grandmother watching in horror through the window.¹⁰ Emergency personnel pronounced him dead on the scene.¹¹ Ultimately, Stephon Clark was unarmed.¹² The only item

2. *Video Shows Sacramento Police Shooting Unarmed Black Man in Grandparents’ Backyard*, NPR (Mar. 22, 2018), <https://www.npr.org/sections/thetwo-way/2018/03/22/596051907/video-shows-sacramento-police-shoot-unarmed-black-man-in-grandparents-backyard?t=1531650733810> [hereinafter *Video Shows Sacramento Police Shooting*] (on file with *The University of the Pacific Law Review*).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Frances Robles & Jose A. Del Real, *Stephon Clark Was Shot 8 Times Primarily in His Back, Family-Ordered Autopsy Finds*, N.Y. TIMES (Mar. 30, 2018), <https://www.nytimes.com/2018/03/30/us/stephon-clark-independent-autopsy.html> (on file with *The University of the Pacific Law Review*).

9. *Video Shows Sacramento Police Shooting*, *supra* note 2.

10. *Id.*

11. *Id.*

investigators found near him was a cellphone.¹³

Following Clark's death, headlines about police brutality dominated American media.¹⁴ Riots and protests led by citizens, angered by what they saw as unnecessary police brutality, drew the eyes of the world and became international news.¹⁵ Legislators scrambled to appease the population, while also balancing the protection of police officers and the law within communities.¹⁶ California Assemblymember Shirley Weber authored AB 931 to address the concerns about the increase in police shootings sparked by the outrage of the shooting of Stephon Clark.¹⁷

Generally, police may use force if reasonable, which requires consideration of whether force would be reasonable to a police officer who might be afraid.¹⁸ According to Assemblymember Shirley Weber, this standard is ineffective because "anything [the police] do is reasonable."¹⁹ Studies show that under this standard, police killings often occur when an officer detains a suspect for a relatively harmless crime.²⁰ AB 931 attempted to set a stricter standard than the traditional "objectively reasonable standard" used by the rest of the country,

12. *Id.*

13. *Id.*

14. Matt Stevens et al., *Police Killing of Antwon Rose, 17*, in *East Pittsburgh Prompts Protests*, N.Y. TIMES (June 21, 2018), <https://www.nytimes.com/2018/06/21/us/antwon-rose-police-killing-protests.html> [hereinafter *Police Killing of Antwon Rose*] (on file with *The University of the Pacific Law Review*); Mihir Zaveri, *Video Shows Police Officer Firing Stun Gun at Unarmed Man Sitting on Curb*, N.Y. TIMES (June 29, 2018), <https://www.nytimes.com/2018/06/29/us/police-taser-black-man.html> (on file with *The University of the Pacific Law Review*); *After Stephon Clark Shooting, Questions Remain About Police Use Of Force*, NPR (Apr. 4, 2018), <https://www.npr.org/2018/04/04/599525838/after-stephon-clark-shooting-questions-remain-about-police-use-of-force?t=1531651876802> [hereinafter *Questions Remain About Police Use of Force*] (on file with *The University of the Pacific Law Review*); *Sacramento Protests Call For Charges Following Police Shooting Of Stephon Clark*, WBUR (Mar. 27, 2018), <http://www.wbur.org/hereandnow/2018/03/27/sacramento-protests-police-shooting-stephon-clark> (on file with *The University of the Pacific Law Review*); Alan Feuer, *Advocates From Left and Right Ask Supreme Court to Revisit Immunity Defense*, N.Y. TIMES (July 11, 2018), <https://www.nytimes.com/2018/07/11/nyregion/qualified-immunity-supreme-court.html> (on file with *The University of the Pacific Law Review*).

15. 'Stand with Us': *Tens of Thousands Protest Police Killings in the United States*, JAPAN TIMES (Dec. 14, 2014), <https://www.japantimes.co.jp/news/2014/12/14/world/crime-legal-world/stand-us-tens-thousands-protest-police-killings-united-states/#.WzKK8KdKh9A> [hereinafter 'Stand with Us'] (on file with *The University of the Pacific Law Review*); Shi Yinglun, *African American Teen Laid to Rest After Killing by Police Sparks Protests*, XINHUANET (June 26, 2018), http://www.xinhuanet.com/english/2018-06/26/c_137281790.htm (on file with *The University of the Pacific Law Review*); *US Police Shootings: Protests Spread with Dozens of Arrests*, BBC WORLD (July 10, 2018), <https://www.bbc.com/news/world-us-canada-36757456> [hereinafter *US Police Shootings*] (on file with *The University of the Pacific Law Review*).

16. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 931, at 3 (June 19, 2018).

17. Interview by Jon Wainwright with Shirley Weber, Assemb., Cal. State Assembly, in Sacramento, Cal. (May 17, 2018) (interview available on Cap-impact Podcast Website, episode 7).

18. *Id.*

19. *Id.*

20. See Lawrence W. Sherman, *Execution Without Trial: Police Homicide and the Constitution*, 33 VAND. L. REV. 71, 72-73 (1980) (citing four legal studies on the use of deadly force by officers, finding officers used force in situations where the victim was not carrying a weapon or was fleeing a scene to be a substantial portion of the total deaths).

which would have given California a unique standard.²¹

II. LEGAL BACKGROUND

California Penal Code § 835(a) governs the use of police force during an arrest.²² It does not have extensive legislative history because it was enacted over seven decades ago and efforts to amend it did not emerge until 2017.²³ Section 196, which governs justifiable homicide for police officers, was enacted in 1872 and has never been amended.²⁴ AB 931 was intended to amend Penal Code § 196; however, due to AB 931's failures, the statute remains in its original form.²⁵ Section 835(a), enacted in 1957, has also never been amended.²⁶ Therefore, the controlling statutory law is 146 years old.²⁷ However, the courts have modified the interpretation of these statutes over the years.²⁸ AB 931 would have been the only legislation to change the original statutory law, which defines acceptable use of force.²⁹ Section A presents information on existing statutory and case law.³⁰ Section B explains prior law no longer in force.³¹ Section C explores the constitutional issues raised by existing law that AB 931 addressed.³²

A. Existing Statutory and Case Law

Existing statutory law allows officers to use reasonable force when apprehending a person, preventing escape, or overcoming resistance.³³ Officers also can use self-defense through reasonable force, and retain this right so long as the self-defense is reasonable under the circumstances.³⁴ Under the original § 835(a), as well as under AB 931, an officer would not 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.”³⁵ Of course, the California Rules

21. See Interview by Jon Wainwright with Shirley Weber, *supra* note 17 (stating the statute's “necessary” standard for deadly force differs from other state statutes, which use a “reasonable” standard).

22. CAL. PENAL CODE § 835a (enacted by 1957 Stat. Ch. 2147).

23. CAL. PENAL CODE § 196 (enacted by 1872 Stat. Ch. 1); Letter from Seth Stoughton, Assistant Professor of Law, University of South Carolina, to Shirley Weber, Assembly Member, Cal. State Assembly (June 11, 2018) [hereinafter Stoughton Letter] (on file with *The University of the Pacific Law Review*).

24. Stoughton Letter, *supra* note 23, at 1.

25. PENAL § 196.

26. PENAL § 835a.

27. Stoughton Letter, *supra* note 23, at 1.

28. *Infra* Part II.A–B (discussing existing statutory and case law).

29. AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Aug. 24, 2018, but not enacted).

30. *Infra* Part II.A.

31. *Infra* Part II.B.

32. *Infra* Part II.C.

33. AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Aug. 24, 2018, but not enacted).

34. *Id.*

35. CAL. PENAL CODE § 835a (enacted by 1957 Stat. Ch. 2147); AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Aug. 24, 2018, but not enacted).

of Professional Conduct state that a prosecutor cannot charge a person if that prosecutor knows he or she lacks probable cause.³⁶ Therefore, a prosecutor must have probable cause that an officer's behavior did not meet the existing standards to charge them with the use of excessive force.³⁷

Subsection 1 explains the *Garner* Standard and federal case law.³⁸ Subsection 2 explores the *Graham* Reasonable Standard as supplementary to the *Garner* Standard.³⁹ Finally, Subsection 3 discusses the California statutory and case law impacting each of the previous standards.⁴⁰

1. The Garner Standard and Federal Case Law

In 1985, the Supreme Court of the United States decided *Tennessee v. Garner*, which narrowed the acceptable use of deadly force.⁴¹ *Garner* involved the wrongful death of an unarmed man fleeing from a burglary where a police officer shot and killed him.⁴²

The *Garner* Court held that an officer is permitted to use deadly force under the Fourth Amendment only when the officer "has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others," and is not just a "fleeing felon."⁴³ The Court reasoned that a trial is more favorable than a deadly shooting of a fleeing felon because deadly force does not determine guilt and appropriate punishments.⁴⁴ Notably, the Court firmly 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.⁴⁵

The Court adjusted the reasonableness standard with this holding and revoked the right to use deadly force for fleeing felons when they do not show an immediate threat of serious bodily injury or death to the officer or other

36. Cal. Rules of Professional Conduct, rule 5-110(A).

37. Stoughton Letter, *supra* note 23, at 8.

38. *Infra* Part II.A.1.

39. *Infra* Part II.A.2.

40. *Infra* Part II.A.3.

41. 471 U.S. 1, 3 (1985).

42. *Id.* at 1.

43. *Id.* at 3.

44. *Id.* at 9 ("The use of deadly force also frustrates the interest of the individual, and of society, in judicial determination of guilt and punishment.").

45. *Id.* at 11.

persons.⁴⁶ The *Garner* decision raised the question “whether deadly force is *only* justified when the felon presents an immediate threat or whether it can be used *also* when the felony is a dangerous one.”⁴⁷ The latter option would allow for the use of deadly force against felons when they are not considered an immediate threat, but would more likely be a continuing threat as suggested by Justice Scalia’s opinion in *Scott v. Harris*.⁴⁸

2. *Graham Reasonable Standard*

The federal standard for the use of deadly force remains the standard set in *Tennessee v. Garner*, with refinements from *Graham v. Connor*.⁴⁹ In *Graham*, the victim was a diabetic attempting to purchase orange juice to counteract an insulin reaction when he was detained by an officer for suspicious conduct.⁵⁰ Graham sustained multiple injuries during his detention, such as a “broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder.”⁵¹

The Supreme Court stated that because the excessive force claim fell under the Fourth Amendment, the reasonable standard was “whether the officers’ actions [were] ‘objectively reasonable’ . . . without regard to their underlying intent or motivation.”⁵² The “objectively reasonable” standard requires an inquiry into the surrounding circumstances that are “tense, uncertain, and rapidly evolving”⁵³ rather than “hindsight.”⁵⁴ Since these cases, courts have referenced these “*Graham* Factors” when analyzing whether an officer’s actions are objectively reasonable.⁵⁵ These factors include: severity of the crime, immediacy of the threat, active resistance or flight, proportionality of force used, and the totality of the circumstances.⁵⁶ These factors remain the constitutional standard today.⁵⁷

46. *Id.*

47. Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After Garner*, 35 ST. LOUIS U. PUB. L. REV. 109, 117 (2015).

48. *Scott v. Harris*, 550 U.S. 372, 382 n.9 (2007) (In deciding an excessive force claim, the majority found the officer did not violate the Fourth Amendment when he intentionally hit the fleeing car during a high-speed car chase to prevent the criminal from causing harm to others on the road. Justice Scalia in his opinion stated that *Garner*’s decision allows for “mere being at large” to be classified as a threat to society.).

49. *Graham v. Connor*, 490 U.S. 386, 397 (1989).

50. *Id.* at 386.

51. *Id.* at 390.

52. *Id.* at 397.

53. *Id.*

54. *Id.* at 396.

55. Stoughton Letter, *supra* note 23, at 7.

56. *Id.* at 7 n.16 (“First, the severity of the crime at issue must be considered. Second, the immediate threat to officers and others posed by the subject must be evaluated. Third, whether the subject is actively resisting or attempting to evade arrest by fleeing. The Court added additional factors by recognizing the importance of the proportionality of the force used, and the totality of circumstances.”).

57. *Id.* at 7.

3. California Statutory and Case Law

California case law also narrows the acceptable situations where an officer may use deadly force.⁵⁸ Section 196 of the California Penal Code states that homicide by police officers is justified when it is “necessarily committed in overcoming actual resistance to the execution of some legal process,”⁵⁹ or when it is “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.”⁶⁰ The statutory language does not mention immediate danger of causing serious bodily harm or death in its requirements for the use of deadly force.⁶¹

Case law requires police officers to use deadly force only if there is *reasonable* threat of death or serious injury.⁶² In 1997, the Ninth Circuit held that officers “may not kill suspects who do not pose an immediate threat . . . simply because they are armed.”⁶³ However, the court also acknowledged that officers do not need to use the “least intrusive means” when responding to a threat; “they need only act within that range of conduct we identify as reasonable.”⁶⁴ This standard is ambiguous, as the Ninth Circuit has also questioned whether “a reasonable non-deadly alternative exist[ed] for apprehending the suspect.”⁶⁵ The courts also narrowed justified homicide by police officers to exclude situations where the officer did not warn the suspect before using deadly force.⁶⁶

B. Enacted Law Not Affected by AB 931

The California Penal Code does not require officers to de-escalate or retreat to avoid the use of deadly force against the offending person.⁶⁷ An officer “need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested.”⁶⁸

In 2002, the Ninth Circuit placed liability on police officers involved in deadly shootings if they were reckless or provoked the need to use deadly force,

58. *Harris v. Roderick*, 126 F.3d 1189, 1204 (9th Cir. 1997); *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994); *Daniels v. Cty. of Ventura*, 228 F. App’x 669, 670 (9th Cir. 2007).

59. CAL. PENAL CODE § 196(2) (enacted by 1872 Stat. Ch. 1).

60. *Id.* § 196(3).

61. *Id.* § 196.

62. *Lopez v. City of L.A.*, 196 Cal. App. 4th 675, 689 (2d Dist. 2011).

63. *Harris*, 126 F.3d at 1204.

64. *Scott*, 39 F.3d at 915.

65. *Brower v. Cty. of Inyo*, 884 F.2d 1316, 1318 (9th Cir. 1989).

66. *Daniels v. Cty. of Ventura*, 228 F. App’x 669, 670 (9th Cir. 2007) (stating that the officer did not act within the realm of protected deadly force since the victim was not a criminal suspect nor was he warned about the officer’s inclination to shoot if he continued his actions).

67. CAL. PENAL CODE § 196 (enacted by 1872 Stat. Ch. 1); CAL. PENAL CODE § 835a (enacted by 1957 Stat. Ch. 2147).

68. PENAL § 835a.

later called the “Provocation Rule.”⁶⁹ In *Billington v. Smith*, the Ninth Circuit held that “even though the officers reasonably fired back in self-defense, they could still be held liable for using excessive force because their reckless and unconstitutional provocation created the need to use force.”⁷⁰ In the later case, *County of Los Angeles v. Mendez*, the Supreme Court sharply criticized and overturned the Provocation Rule by stating that it is “incompatible with [its] excessive force jurisprudence.”⁷¹ The Court concluded that the rule was “an unwarranted and illogical expansion of *Graham*.”⁷² Therefore, the Supreme Court found that an officer’s reckless conduct furthering the need to use deadly force is not punishable as stated by the Ninth Circuit’s “Provocation Rule.”⁷³

C. Constitutional Issues Raised by AB 931

AB 931 attempted to address the issue of deadly force used by police officers during a conflict.⁷⁴ Courts adjudicate the use of deadly force pursuant to the Third Enforcement Act⁷⁵ and the Fourth Amendment of the United States Constitution as a form of excessive force.⁷⁶ Commonly, plaintiffs assert that the use of force in question is in violation of their Fourth Amendment right.⁷⁷ Courts found that use of deadly force is a form of seizure under the Fourth Amendment.⁷⁸ Thus, the Supreme Court interprets a possible violation of the Fourth Amendment, including the use of excessive force, under an “objectively reasonable” standard.⁷⁹

III. AB 931

AB 931 attempted to amend § 835(a) of the California Penal Code starting January 1, 2020, regarding the acceptable forms of deadly force used by a police

69. *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002).

70. *Id.*

71. *Cty. of L.A., Cal. v. Mendez*, 137 S. Ct. 1539, 1546 (2017).

72. *Id.* at 1548.

73. *Id.*

74. Interview by Jon Wainwright with Shirley Weber, *supra* note 17.

75. 42 U.S.C. § 1983 (1996) (“Every person who, under color of [law in the United States], subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .”).

76. Rachel Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1126 (2008).

77. *See United States v. Dise*, 763 F.2d 586 (3d Cir. 1985) (Dise was charged with excessive force against mental hospital patients under the Fourth Amendment and Due Process Clause of the Fourteenth Amendment).

78. *Tenn. v. Garner*, 471 U.S. 1, 25 (1985) (O’Connor, J., dissenting) (finding that officers seized Garner when they shot and killed him).

79. *Graham v. Connor*, 490 U.S. 386, 397 (1989) (“[T]he 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.”); *see also Scott v. Harris*, 550 U.S. 372, 381 (2007) (“The question we need to answer is whether [the officer’s] actions were objectively reasonable.”).

officer and when such force is justified.⁸⁰ To begin, Assemblymember Weber’s original bill was drastically altered.⁸¹ Section A explains the importance of those changes.⁸² Section B then discusses the final version of AB 931 and addresses its proposed changes to § 835(a) of the Penal Code.⁸³

A. Previous Versions of AB 931

AB 931 underwent several amendments while in the Legislature, each time with more of the key provisions excluded.⁸⁴ Subsection 1 covers the introduced version of AB 931.⁸⁵ Subsection 2 discusses the first round of amendments to AB 931.⁸⁶ Finally, Subsection 3 introduces the second round of amendments to AB 931, which was the final version before the bill failed.⁸⁷

1. The Original Version of AB 931: April 16, 2018

In April 2018, Assemblymember Weber introduced the first draft of AB 931 involving the use of police force.⁸⁸ Notably, one of the most controversial sections of AB 931 stated that homicide was not justified when “committed by a public officer whose gross negligence substantially contributed to making it necessary.”⁸⁹ According to the United States Supreme Court in *County of Los Angeles v. Mendez*, the California Provocation Rule was inconsistent with the Fourth Amendment’s excessive force law.⁹⁰ The Provocation Rule stated that an officer could be held liable for excessive force if they were found to be reckless—causing the need to use deadly force.⁹¹ The overruled Provocation Rule is substantively similar to the “gross negligence” stated in the original AB 931.⁹²

80. AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Aug. 24, 2018, but not enacted).

81. Compare AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Apr. 16, 2018, but not enacted) (incorporating terms such as “gross negligence” and “applicable training and policy” along with a complete restructuring of the definition of terms), with CAL. PENAL CODE § 196 (enacted by 1872 Stat. Ch. 1) (omitting the terms “gross negligence” and “applicable training and policy”).

82. *Infra* Part III.A.

83. *Infra* Part III.B.

84. *Infra* Part III.A.1–3.

85. *Infra* Part III.A.1.

86. *Infra* Part III.A.2.

87. *Infra* Part III.A.3.

88. AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Apr. 16, 2018, but not enacted).

89. *Id.*; see also Bruce Praet, *Police Use of Force Legislation: The (Un)Intended Consequences of CA AB931*, LEXIPOL (Apr. 23, 2018), <https://www.lexipol.com/resources/blog/police-use-force-legislation-unintended-consequences-ab931/> [hereinafter *Police Use of Force Legislation*] (on file with *The University of the Pacific Law Review*) (arguing that the gross negligence section of AB 931 would hinder police recruitment and encourage prosecutors to charge all officer-involved shootings).

90. *Cty. of L.A., Cal. v. Mendez*, 137 S. Ct. 1539, 1546 (2017).

91. *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002), *abrogated by* *Cty. of L.A., Cal. v. Mendez*, 137 S. Ct. 1539 (2017).

92. *Id.*; see also AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Apr. 16, 2018, but not

2. *First Amended Version of AB 931: June 12, 2018*

The provision stating that the totality of the circumstances used to evaluate the officer's conduct included "applicable training and polic[ies]"⁹³ from the police force was also controversial.⁹⁴

Concerns about the term "applicable training and policies" quickly arose from proponents of AB 931.⁹⁵ Under the original version of AB 931, an officer's conduct in a situation where police used deadly force would be examined by the court in the context of his or her training and policies.⁹⁶ Critics of that standard stated that this link could cause agencies to "adopt less-stringent policies and lower training standards,"⁹⁷ which could lead to more fatalities.⁹⁸ This first round of amendments, published on June 12, 2018, removed this standard.⁹⁹

3. *Second Amended Version of AB 931: June 26, 2018*

AB 931 originally amended the section of the California Penal Code governing use of force.¹⁰⁰ It justified police officers committing homicide when it "result[s] from physical force used," so long as it was consistent with the guidelines in § 835(a) of the California Penal Code.¹⁰¹ The law did not justify a police officer's fatal conduct if a prudent officer under the same circumstances would have foreseen that the conduct would lead to the use of deadly force, and the actions taken were "incompatible with a proper regard for human life," also known as recklessness.¹⁰² However, the proposed legislation in the June 26 amendments removed the gross negligence and reckless standard, thus removing the constitutional conflict.¹⁰³

B. *AB 931 and the California Penal Code*

AB 931 would have amended § 835(a) of the California Penal Code regarding the use of force acceptable by police officers in an emergency.¹⁰⁴ AB

enacted) ("Homicide is justifiable when committed by public officers . . . unless committed by a public officer whose gross negligence substantially contributed to making it necessary.").

93. AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Apr. 16, 2018, but not enacted).

94. Arif Alikhan & Seth Stoughton, *Deadly Force Proposal Needs Work*, CAPITOL WEEKLY (May 29, 2018), <http://capitolweekly.net/use-deadly-force/> (on file with *The University of the Pacific Law Review*).

95. *Id.*

96. AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Apr. 16, 2018, but not enacted).

97. *Deadly Force Proposal Needs Work*, *supra* note 94.

98. *Id.*

99. AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on June 12, 2018, but not enacted).

100. AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on June 26, 2018, but not enacted).

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

931 stated, “the authority to use physical force, conferred on peace officers . . . must be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life.”¹⁰⁵ An officer who attempted to arrest a suspect was not required to retreat due to resistance and would not lose the right to self-defense under AB 931.¹⁰⁶ However, AB 931 highlighted the importance of de-escalation “whenever it is safe and reasonable to do so” by using available resources to control an incident.¹⁰⁷

AB 931 specified situations where the police would be able to use deadly force, such as “when such force is necessary to defend against a threat of imminent death or serious bodily injury to the officer or to another person.”¹⁰⁸ Another appropriate situation is when “the officer has probable cause to believe that [a person fleeing arrest] has committed, or intends to commit, a felony involving death or serious bodily injury.”¹⁰⁹ AB 931 would prohibit police officers from using force in situations where individuals do not pose “a threat of imminent death or serious bodily injury to the peace officer or to another person.”¹¹⁰ AB 931 stated that all people have a right to be free from excessive use of police force, thereby attempting to criminalize deadly force unless there was an immediate threat of death or serious bodily injury present.¹¹¹

Under AB 931, “deadly force” meant “force that creates a substantial risk of causing death or serious bodily injury, including, the discharge of a firearm.”¹¹² AB 931 stated that the term “necessary” meant “given the totality of the circumstances known to the officer at the time, an objectively reasonable peace officer in the same situation would conclude that there was no reasonable alternative to the use of deadly force.”¹¹³

AB 931 further defined “reasonable alternatives” as tactics “of apprehending a subject or addressing a situation that do not unreasonably increase the threat posed to the peace officer or another person.”¹¹⁴ Tactics included in AB 931 were “verbal communications, warnings, and de-escalation.”¹¹⁵

The “totality of the circumstances” was defined as “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.”¹¹⁶ The law would have required courts to examine the conduct of the officer to determine if the officer acted improperly in creating the

105. *Id.*

106. AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on June 26, 2018, but not enacted).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on June 26, 2018, but not enacted).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

necessity for deadly force.¹¹⁷

AB 931 attempted to establish a new minimum standard for the use of deadly force by peace officers in California—the “Necessary Standard.”¹¹⁸ However, the only time the word “necessary” was used in AB 931 was when the bill stated, “A peace officer may use deadly force only when such force is necessary to defend against a threat of imminent death or serious bodily injury to the officer or to another person,”¹¹⁹ and later when it defined “necessary.”¹²⁰

The “Necessary Standard” used the term “reasonable” when defining acceptable use of deadly force.¹²¹ The standard stated that “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.”¹²² Therefore, the standard would have still relied on the reasonableness of an officer’s conduct.¹²³

IV. ANALYSIS

AB 931 raised discussions on many issues involving the use of excessive police force: the perception of police, standards of police conduct and how they relate to federal standards, police training, and prosecution of police after a deadly shooting.¹²⁴ The following analysis reviews each of the issues surrounding AB 931.¹²⁵ Section A discusses issues with perception of police.¹²⁶ Section B raises issues with the Necessary Standard under AB 931.¹²⁷ Section C talks about the impact on police training.¹²⁸ Finally, Section D addresses AB 931’s impact on the prosecution of officers.¹²⁹

A. Issues with Perception of Police

The community’s perception of the police altered over many years because of police officers using deadly force across the country.¹³⁰ As a result,

117. Interview by Jon Wainwright with Shirley Weber, *supra* note 17.

118. AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Aug. 24, 2018, but not enacted).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* (emphasis added).

123. *Id.*; Stoughton Letter, *supra* note 23, at 5.

124. *Infra* Part IV.A–D.

125. *Infra* Part IV.A–D.

126. *Infra* Part IV.A.

127. *Infra* Part IV.B.

128. *Infra* Part IV.C.

129. *Infra* Part IV.D.

130. *Police Killing of Antwon Rose*, *supra* note 14; *Video Shows Police Officer Firing Stun Gun at Unarmed Man Sitting on Curb*, *supra* note 14; *Questions Remain About Police Use of Force*, *supra* note 14; *Sacramento Protests Call for Charges Following Police Shooting of Stephon Clark*, *supra* note 14; *Advocates*

Assemblymember Weber introduced AB 931 to help hold police officers accountable for the use of deadly force.¹³¹

Seth Stoughton, an Assistant Professor at the University of South Carolina, is a former police officer who specializes in the regulation of police.¹³² In his letter to the California Senate's Public Safety Committee in June 2018, Professor Stoughton stated that unlike every other state in the Union, California has never amended its excessive force law.¹³³ Stoughton argued that § 196 of the California Penal Code, which was originally enacted in 1872, was "painfully outdated" since it was "the single oldest unamended use-of-force statute in the country."¹³⁴ This outdated statute directly affects community trust in police because the community holds the officers to a standard of care that is undermined by the "longstanding frictions with, and disparate treatment of, communities of color"¹³⁵ that results in publicized police shootings.¹³⁶ Furthermore, the lack of trust resulted in half of "the ten most violent and destructive riots in United States history, . . . prompted by what were perceived as incidents of excessive force or police abuse."¹³⁷

B. Issues with the Necessary Standard

The "Necessary Standard" AB 931 would have created is not much different than the unamended California Penal Code § 196.¹³⁸ It would not have required that a police officer wait to use deadly force until they are faced with a high probability of being shot or killed.¹³⁹

The California Senate's Committee on Public Safety held a hearing on AB 931 where they noted the bill provides a standard "beyond the existing standard by creating a set of terms and definitions that one must use to evaluate whether an officer's use of deadly force is lawful."¹⁴⁰ Some believe AB 931's standard was consistent with existing Supreme Court precedent, while others believe it

From Left and Right Ask Supreme Court to Revisit Immunity Defense, supra note 14.

131. Interview by Jon Wainwright with Shirley Weber, *supra* note 17.

132. Seth W. Stoughton, UNIV. OF S.C., http://sc.edu/study/colleges_schools/law/faculty_and_staff/directory/stoughton_seth.php (last visited June 25, 2018) (on file with *The University of the Pacific Law Review*).

133. Stoughton Letter, *supra* note 23, at 1.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Compare CAL. PENAL CODE § 196 (enacted by 1872 Stat. Ch. 1) ("necessarily committed in overcoming actual resistance"), with AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on June 26, 2018, but not enacted) ("when such force is necessary to prevent imminent death or serious bodily injury").

139. Stoughton Letter *supra* note 23, at 3; Elliott v. Leavitt, 99 F.3d 640, 643 (4th Cir. 1996).

140. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 931, at 9 (June 19, 2018); see *infra* Part IV.C (defining terms and definitions used in AB 931 to determine whether the use of force was within the law's parameters).

would have conflicted with the previous legal standard of “allowance for split second judgements in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force.”¹⁴¹

However, the change from reasonable to necessary would still face issues regarding the federal standard and the perception of police liability.¹⁴² Subsection 1 discusses the federal standard and the Fourth Amendment in relation to AB 931.¹⁴³ Subsection 2 describes the Necessary Standard in relation to fears by police officers over their liability.¹⁴⁴

1. The Federal Standard and the Fourth Amendment

The use of force standard is closely tied to the Fourth Amendment’s right to be free from unreasonable searches and seizures.¹⁴⁵ In *Garner*, Justice O’Connor wrote that deadly excessive force is a form of seizure under the Fourth Amendment.¹⁴⁶ The *Garner* decision also states that it is constitutionally reasonable to prevent a fleeing felon’s escape with the use of deadly force if the officer believes the felon poses a probable threat of serious bodily harm.¹⁴⁷

AB 931 addressed concerns raised over the fleeing felon terms left ambiguous by the *Garner* decision and following cases such as *Scott v. Harris*.¹⁴⁸ AB 931 specified that an officer would only be allowed to use deadly force against fleeing persons who have “committed, or intend[] to commit, a felony involving death or serious bodily injury.”¹⁴⁹ However, it provided no guidelines on how to determine whether a person “intends to commit” a felony.¹⁵⁰ The California Penal Code does define intent as “a purpose or willingness to commit [an] act,”¹⁵¹ but does not include methods of determining intent.¹⁵²

Notably, AB 931 specified that deadly force is justified only when there is an imminent “risk of death or serious bodily injury to the peace officer or to another person if the subject is not immediately apprehended.”¹⁵³ However, AB 931 did not define what situations would classify as “imminent.”¹⁵⁴ In his support letter for AB 931, Professor Stoughton stated his assumption that it allowed for officers

141. *Graham v. Connor*, 490 U.S. 386, 397 (1989); SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 931, at 5–6 (June 19, 2018).

142. *Infra* Part IV.B.1–2.

143. *Infra* Part IV.B.1.

144. *Infra* Part IV.B.2.

145. *Tenn. v. Garner*, 471 U.S. 1 (1985).

146. *Id.* at 25 (O’Connor, J., dissenting) (finding that officers seized Garner by shooting and killing him).

147. *Id.* at 11.

148. Flanders & Welling, *supra* note 47.

149. AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Aug. 24, 2018, but not enacted).

150. *Id.*

151. CAL. PENAL CODE § 7(1) (West 2017).

152. *See id.* § 7 (finding no methods of determining willfulness or intent).

153. AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Aug. 24, 2018, but not enacted).

154. *Id.*

to use deadly force “so long as the officer can articulate, and a reasonable officer on the scene would agree, that the situation presented a threat.”¹⁵⁵ This would involve officers observing three key elements to determine if the threat was “imminent.”¹⁵⁶ The three elements include: capability, meaning the suspect has the “physical ability to cause death or great bodily harm through [an] explicitly identified means;”¹⁵⁷ opportunity, meaning the subject is in the appropriate proximity to do the kind of harm they are observed to be capable of;¹⁵⁸ and finally intent, meaning observations of physical manifestations of desire to cause harm.¹⁵⁹ However, none of these guidelines appeared in AB 931 or its previous versions, which might have provoked later judicial issues when attempting to determine the liability of an officer.¹⁶⁰

2. Fears by Police Over Liability

AB 931 would not have made police officers liable for every “tactical misstep”; instead, it would have only exposed officers to liability when they were “grossly negligent.”¹⁶¹ Scholars suggested that the change from the reasonable standard to the necessary standard would not have been “a meaningful change from current law.”¹⁶² However, police officers feared that the hindsight analysis would negatively impact the actions of police officers during “rapidly advancing and extraordinarily dangerous situations,”¹⁶³ making every encounter more dangerous.¹⁶⁴

Some case law reaffirms the fears of police officers.¹⁶⁵ Courts have stated that “it is unreasonable for an officer to believe ‘that a suspect poses a threat of serious physical harm, either to [himself] or to others,’ merely because that suspect possesses a firearm.”¹⁶⁶ However, the cases where courts have found the officer possibly liable and outside the protection of the law have had a common key fact: the officers did not warn the suspect or alert the suspects to the threat of

155. Stoughton Letter, *supra* note 23, at 5.

156. *Id.*

157. *Id.* at 4.

158. *Id.*

159. *Id.* at 5.

160. *Id.* at 4; *see generally* AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Aug. 24, 2018, but not enacted) (finding no mention of how to determine if a threat is imminent).

161. Stoughton Letter, *supra* note 23, at 6.

162. *Id.* at 5 (“The proposed verbiage is not, in and of itself, a meaningful change from current law. The current version of California Penal Code 196 states that homicide by a public official is justified only when it is ‘necessarily committed’ for the various reasons listed.”).

163. Letter from the California Police Chiefs Association, to Cal. Senate Committee on Public Safety (June 12, 2018) [hereinafter CPCA Letter] (on file with *The University of the Pacific Law Review*).

164. *Id.* at 14.

165. *Hensley v. Price*, 876 F.3d 573, 583 (4th Cir. 2017); *Cooper v. Sheehan*, 735 F.3d 153, 159 (4th Cir. 2013); *Pena v. Porter*, 316 F. App’x 303, 311 (4th Cir. 2009).

166. *Id.*

deadly force.¹⁶⁷ The Fourth Circuit Court of Appeals even suggested that issuing a warning would justify the force since the suspect would not have approached officers with a weapon had he not intended to use it.¹⁶⁸ AB 931 also addressed the hindsight fear after later amendments.¹⁶⁹ Under AB 931, a police officer's use of force "must [have been] evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known . . . at the time, rather than with the benefit of hindsight."¹⁷⁰

C. Impact on Police Training

Imposing a new standard for use of deadly force would require re-training every officer in the State.¹⁷¹ However, neither AB 931 nor its previous versions provided guidelines or requirements on how the re-training process or cost would affect officer policing during and after AB 931 was enacted in full force.¹⁷² AB 931 also failed to mention any funding sources or programs for training existing officers.¹⁷³

Opponents feared that this adjustment in policy and training would discourage enrollment of future officers, reduce morale for current officers and increase officer deaths due to hesitation and fear of prosecution.¹⁷⁴ Proponents of AB 931 believed new training would be valuable and necessary.¹⁷⁵ According to New York University Professor Barry Friedman, "in order to really reform the police, California must overhaul the system from the ground up—meaning that police-department policies, officer training, civil and criminal law liability would all need to change."¹⁷⁶

167. *Id.*; *Daniels v. Cty. of Ventura*, 228 F. App'x 669, 670 (9th Cir. 2007).

168. *Cooper v. Sheehan*, 735 F.3d 153, 159 (4th Cir. 2013) ("If the Officers had [issued a warning], they might have been safe in the assumption that a man who greets law enforcement with a firearm is likely to pose a deadly threat.").

169. *See* AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Aug. 24, 2018, but not enacted) ("That a peace officer's decision to use force must 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 . . .").

170. *Id.*

171. Letter from the Peace Officers Research Association of California, to Cal. Senate Committee on Public Safety (June 12, 2018) [hereinafter PORAC Letter] (on file with *The University of the Pacific Law Review*).

172. *See generally* AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Aug. 24, 2018, but not enacted) (noting that guidelines on retraining and its funding are not included in AB 931).

173. *Police Use of Force Legislation*, *supra* note 89.

174. *Id.*

175. Safiya Charles, 'Please Give Us Justice': New California Law Aims to Hold Police Accountable, *THE NATION* (May 2, 2018), <https://www.thenation.com/article/please-give-us-justice-new-california-law-aims-to-hold-police-accountable/> (on file with *The University of the Pacific Law Review*).

176. *Id.*

D. Impact on Prosecution of Officers

As originally introduced, AB 931 would have required courts to examine officers after using deadly force under the “Necessary Standard”;¹⁷⁷ however, the final version of AB 931 did not include this provision.¹⁷⁸ This did not mean prosecutors would have unlimited ability to charge officers with homicide over each deadly shooting.¹⁷⁹ As stated earlier, the California Rules of Professional Conduct state that a prosecutor cannot charge a person if they know there is no probable cause.¹⁸⁰ Therefore, a prosecutor would have only been able to charge an officer with homicide if there was at least probable cause that the officer did not meet the standard set by AB 931.¹⁸¹ Because AB 931 explicitly incorporated the perspective of a reasonable officer,¹⁸² it would have been near impossible to charge an officer within the necessary standard of care.¹⁸³

V. CONCLUSION

The United States continues to suffer from a tidal wave of controversy over the use of deadly force by police officers.¹⁸⁴ Outside our borders, other nations view the events in our country as barbaric.¹⁸⁵ Our nation has struggled for years to find a workable balance between the necessity for police to protect themselves as they perform their vital duties and the right of members of their communities to feel safe from the danger of summary executions for minor offenses and contact with police.¹⁸⁶

Without the passage of AB 931, California still has not made any changes to

177. AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Apr. 16, 2018, but not enacted) (stating in Section I that police officer homicide would be examined by courts to determine if it was necessary given the totality of the circumstances).

178. See generally AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Aug. 24, 2018, but not enacted) (noting that the necessary standard was not included in the final version of the bill).

179. Stoughton Letter, *supra* note 23, at 8.

180. Cal. Rules of Professional Conduct, rule 5-110(A).

181. Stoughton Letter, *supra* note 23, at 8.

182. AB 931, 2018 Leg., 2017–2018 Sess. (Cal. 2017) (as amended on Aug. 24, 2018, but not enacted).

183. Stoughton Letter, *supra* note 23, at 5.

184. Interview by Jon Wainwright with Shirley Weber, *supra* note 17; see generally *Police Killing of Antwon Rose*, *supra* note 14 (noting the controversy surrounding officer shootings has sparked protests across the country); *Video Shows Police Officer Firing Stun Gun at Unarmed Man Sitting on Curb*, *supra* note 14 (noting the issue of officer shootings has sparked controversy across the country); *Questions Remain About Police Use Of Force*, *supra* note 14 (noting the issue of officer shootings has sparked controversy across the country); *Sacramento Protests Call For Charges Following Police Shooting Of Stephon Clark*, *supra* note 14 (noting the controversy surrounding officer shootings has sparked protests across the country); *Advocates From Left and Right Ask Supreme Court to Revisit Immunity Defense*, *supra* note 14 (noting the controversy surrounding officer shootings has sparked protests across the country).

185. ‘Stand with Us’, *supra* note 15; *African American Teen Laid to Rest After Killing by Police Sparks Protests*, *supra* note 15; *US Police Shootings*, *supra* note 15; Lawrence W. Sherman, *Execution Without Trial: Police Homicide and the Constitution*, 33 VAND. L. REV. 71, 71 (1980).

186. *Id.*

that balance.¹⁸⁷ California's archaic laws have contributed to riots and protests led by citizens angered by the use of police force that they see as unnecessarily brutal.¹⁸⁸ AB 931 was the first attempt to update the oldest unamended use of force statute in the United States.¹⁸⁹ AB 931 attempted to move California in the direction of the national and international norms for how to regulate the use of force by police.¹⁹⁰ Sections 835(a) and 196 of the California Penal Code are now considered statutes out of sync with the constitutional standard.¹⁹¹ With the failure of AB 931, these statutes have yet to be updated to comply with the Supreme Court's interpretation of an acceptable use of deadly force under the *Garner* and *Graham* decisions.¹⁹²

Critics of AB 931 say it would have increased the risk to police by making them hesitant to use force when it is called for and that it would have encouraged impunity among the criminal elements.¹⁹³ Proponents of AB 931 say it is a sorely overdue change required by the Supreme Court, and necessary to address the tragically recurring killings of unarmed and nonthreatening members of our California community.¹⁹⁴

While AB 931 has received criticism from both police and legal experts, it sparked a conversation about the acceptable use of police force in California.¹⁹⁵ Whether the new "Necessary Standard" under AB 931 would have proved to be effective is controversial and unknown.¹⁹⁶ However, critics and proponents alike agree that AB 931 has changed how police and its community members will view the use of deadly force.¹⁹⁷

187. Stoughton Letter, *supra* note 23, at 1.

188. *Questions Remain About Police Use of Force*, *supra* note 14; *Sacramento Protests Call For Charges Following Police Shooting Of Stephon Clark*, *supra* note 14.

189. Stoughton Letter, *supra* note 23, at 1.

190. SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 931, at 5–6 (June 19, 2018).

191. *Id.* at 5.

192. *Id.* at 5–6; *see also* *Tenn. v. Garner*, 471 U.S. 1 (1985) (finding a seizure under the Fourth Amendment when an officer uses deadly force on a fleeing felon); *Graham v. Connor*, 490 U.S. 386, 397 (1989) (finding that an officer must be objectively reasonable when using deadly force).

193. *Police Use of Force Legislation*, *supra* note 89; CPCA Letter, *supra* note 163; PORAC Letter, *supra* note 171.

194. Stoughton Letter *supra* note 23, at 1; *Deadly Force Proposal Needs Work*, *supra* note 94; SENATE COMMITTEE ON PUBLIC SAFETY, COMMITTEE ANALYSIS OF AB 931, at 5–6 (June 19, 2018).

195. *Police Use of Force Legislation*, *supra* note 89; CPCA Letter, *supra* note 163; Stoughton Letter, *supra* note 23, at 1; PORAC Letter, *supra* note 171; *Deadly Force Proposal Needs Work*, *supra* note 94.

196. *Id.*

197. *Id.*