File No. 190256 Committee Item No. 3
Board Item No. 25

COMMITTEE/BOARD OF SUPERVISORS

AGENDA PACKET CONTENTS LIST

Comm: Public Safety & Neighborhood Services **Date:** April 25, 2019
Board of Supervisors Meeting: **Date:** May 7, 2019

Cmte	Board	
☐	☐	Motion
☒	☒	Resolution
☐	☐	Ordinance
☐	☐	Legislative Digest
☐	☐	Budget and Legislative Analyst Report
☐	☐	Youth Commission Report
☒	☒	Introduction Form
☐	☐	Department/Agency Cover Letter and/or Report
☐	☐	MOU
☐	☐	Grant Information Form
☐	☐	Grant Budget
☐	☐	Subcontract Budget
☐	☐	Contract/Agreement
☐	☐	Form 126 – Ethics Commission
☐	☐	Award Letter
☐	☐	Application
☐	☐	Public Correspondence

OTHER

☒	☒	Assembly Bill No. 392 - March 27, 2019
☒	☒	Assembly Committee on Public Safety Analysis - April 9, 2019
☐	☐	
☐	☐	
☐	☐	

Prepared by: John Carroll **Date:** April 19, 2019
Prepared by: John Carroll **Date:** May 2, 2109

FILE NO. 190256 RESOLUTION NO.

[Supporting California State Assembly Bill No. 392 (Weber and McCarty) - California Act to Save Lives: Incorporating Police Best Practices]

Resolution supporting California State Assembly Bill No. 392, introduced by Assembly Members Shirley Weber and Kevin McCarty, co-authored by Assembly Members Chris Holden and Mark Stone, and California State Senators Steven Bradford and Holly Mitchell, California Act to Save Lives: incorporating policing best practices that authorizes police officers to use deadly force only when it is necessary to prevent imminent and serious bodily injury or death and to require de-escalation methods whenever possible.

WHEREAS, Under current California law, police officers are authorized to use deadly force regardless of whether or not it is necessary to prevent death or serious bodily injury; and

WHEREAS, Current California law authorizes police officers to use deadly force regardless of whether or not there are viable nonlethal alternatives; and

WHEREAS, The California law that determines when a homicide by an officer is "justified" was written in 1872, fails to include current best practices, and authorizes deadly force in a manner that violates the U.S. constitution; and

WHEREAS, California State Assembly Bill No. 392 (California Act to Save Lives) introduced by Assembly Members Shirley Weber and Kevin McCarty would bring California law up to date and in line with policing best practices to avoid unnecessary death and ensure community safety; and

WHEREAS, Law enforcement is tasked with keeping the public safe—protecting and preserving human life should be a central guiding principle of this role; and

WHEREAS, Current law results in officers killing civilians far more often than is necessary, leaving many families and communities devastated and causing them to distrust those who have taken an oath to protect them; and

WHEREAS, The California Act to Save Lives provides a clear definition for when deadly use of force can be used by police officers; and

WHEREAS, Incorporating policing best practices, The California Act to Save Lives authorizes police officers to use deadly force only when it is necessary to prevent imminent and serious bodily injury or death – that is, if, given the totality of the circumstances, there was no reasonable alternative to using deadly force, including warnings, verbal persuasion, or other nonlethal methods of resolution or de-escalation; and

WHEREAS, According to the California Department of Justice, in 2017 California police killed 172 people, half of whom were unarmed; and

WHEREAS, Of the unarmed people California police killed in 2017, three out of four were people of color; and

WHEREAS, In 2017, Black people in California were 3.2 times more likely to be killed by police than white people; and

WHEREAS, An analysis by the Washington Post and census data found that California police kill people at a rate 37% higher than the national average per capita; and

WHEREAS, Nationwide, almost half of people killed by police have a disability or mental illness; and

WHEREAS, In a report conducted after the shooting death of Stephon Clark, the California Department of Justice recommended that the Sacramento Police Department update its use of force guidelines to clearly define when force is and is not authorized; and

WHEREAS, The California Act to Save Lives would update police use of force protocols by establishing adequate and constitutional standards to ensure officers avoid the use of deadly force at every possible opportunity; and

WHEREAS, This bill takes into account officer safety and specifies that officers can always invoke the self-defense law that applies to the public; and

WHEREAS, The California Act to Save Lives reflects policies that policing experts recognize as effective at better preserving life while also allowing officers the latitude needed to ensure public safety; and

WHEREAS, Under President Obama, the U.S. Department of Justice helped many cities adopt similar policies, including San Francisco and Seattle; and

WHEREAS, Several police agencies and law enforcement organizations outside of California have recommended or already adopted stricter use-of-force standards similar to those proposed under this bill; and

WHEREAS, Seattle's federal monitor determined that the policy change resulted in a marked reduction in serious uses of force without compromising the safety of officers; and

WHEREAS, Reforming California law is common sense; officers at agencies with stricter use of force policies kill fewer people and law enforcement in those agencies are also less likely to be killed or seriously injured themselves; now, therefore, be it

RESOLVED, That the City and County of San Francisco Board of Supervisors urges the California Legislature and Governor Newsom to support and pass California State Assembly Bill No. 392; and, be it

FURTHER RESOLVED, That the City and County of San Francisco Board of Supervisors directs the Clerk of the Board to transmit this resolution to the California State Legislature and Governor Gavin Newsom.

AMENDED IN ASSEMBLY MARCH 27, 2019

CALIFORNIA LEGISLATURE—2019–20 REGULAR SESSION

ASSEMBLY BILL No. 392

Introduced by Assembly Members Weber and McCarty
(Principal coauthor: Assembly Member Holden)
(Principal coauthors: Senators Bradford and Mitchell)
(~~Coauthor:~~ *Coauthors:* Assembly ~~Member~~ *Members Medina and* Mark Stone)

February 6, 2019

An act to amend Sections 196 and 835a of the Penal Code, relating to peace officers.

LEGISLATIVE COUNSEL'S DIGEST

AB 392, as amended, Weber. Peace officers: deadly force.

Existing law authorizes a peace officer to make an arrest pursuant to a warrant or based upon probable cause, as specified. Under existing law, an arrest is made by the actual restraint of the person or by submission to the custody of the arresting officer.

Existing law authorizes a peace officer to use reasonable force to effect the arrest, to prevent escape, or to overcome resistance. Existing law does not require an officer to retreat or desist from an attempt to make an arrest because of resistance or threatened resistance of the person being arrested.

Under existing law, a homicide committed by a peace officer is justifiable when necessarily committed in arresting a person who has committed a felony and the person is fleeing or resisting such arrest.

Existing case law deems such a homicide to be a seizure under the Fourth Amendment of the Constitution of the United States, and as such, requires the actions to be reasonable.

This bill would redefine the circumstances under which a homicide by a peace officer is deemed justifiable to include when the killing is in self-defense or the defense of another, consistent with the existing legal standard for self-defense, or when the killing is necessary to prevent the escape of a fleeing felon whose immediate apprehension is necessary to prevent death or serious injury. The bill would additionally bar the use of this defense if the peace officer acted in a criminally negligent manner that caused the death, including if the officer's criminally negligent actions created the necessity for the use of deadly force.

The bill would also affirmatively prescribe the circumstances under which a peace officer is authorized to use deadly force to effect an arrest, to prevent escape or to overcome resistance.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

SECTION 1. Section 196 of the Penal Code is amended to read:

196. (a) Homicide is justifiable when committed by peace officers and those acting by their command in their aid and assistance, under any of the following circumstances:

(1) In obedience to any judgment of a competent court.

(2) When the homicide results from a peace officer's use of force, other than deadly force, that is in compliance with subdivision (b) of Section 835a.

(3) When, except as otherwise provided in subdivision ~~(b),~~ *(c),* the homicide would be justifiable pursuant to Section 197, in self-defense or the defense of another person.

(4) When, subject to subdivision ~~(b),~~ *(c),* the officer reasonably believes, based on the totality of the circumstances, that the use of force resulting in a homicide is necessary to prevent the escape of a person, and all of the following are true:

(A) The peace officer reasonably believes that the person has committed, or has attempted to commit, a felony involving the use or threatened use of deadly force.

(B) The peace officer reasonably believes that the person will cause death or inflict serious bodily injury to another unless immediately apprehended.

(C) If feasible, the peace officer has identified themselves as a peace officer and given a warning that deadly force may be used unless the person ceases flight, unless the officer has reasonable ground to believe the person is aware of these facts.

(b) As used in paragraph (4) of subdivision (a), "necessary" means that, given the totality of the circumstances, an objectively reasonable peace officer in the same situation would conclude that there was no reasonable alternative to the use of deadly force that would prevent death or serious bodily injury to the peace officer or to another person. The totality of the circumstances means all facts known to the peace officer at the time and includes the tactical conduct and decisions of the officer leading up to the use of deadly force.

(c) Neither this section nor Section 197 provide a peace officer with a defense to manslaughter in violation of Section 192, if that person was killed due to the criminally negligent conduct of the officer, including situations in which the victim is a person other than the person that the peace officer was seeking to arrest, retain in custody, or defend against, or if the necessity for the use of deadly force was created by the peace officer's criminal negligence.

SEC. 2. Section 835a of the Penal Code is amended to read:

835a. (a) The Legislature finds and declares all of the following:

(1) That the authority to use physical force, conferred on peace officers by this section, is a serious responsibility that shall be exercised judiciously and with respect for human rights and dignity and for the sanctity of every human life. The Legislature further finds and declares that every person has a right to be free from excessive use of force by officers acting under color of law.

(2) That the decision by a peace officer to use force shall be evaluated carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers, in order to ensure that officers use force consistent with law and agency policies.

(3) That the decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of the circumstances shall account

for occasions when officers may be forced to make quick judgments about using force.

(4) 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.

(b) Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force, other than deadly force, to effect the arrest, to prevent escape or to overcome resistance.

(c) A peace officer who makes or attempts to make an arrest need not abandon or desist from the arrest by reason of the resistance or threatened resistance of the person being arrested. A peace officer shall not be deemed an aggressor or lose the right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance. A peace officer shall, however, attempt to control an incident through sound tactics, including the use of time, distance, communications, tactical repositioning, and available resources, in an effort to reduce or avoid the need to use force whenever it is safe, feasible, and reasonable to do so. This subdivision does not conflict with the limitations on the use of deadly force set forth in this section or Section 196.

(d) (1) A peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons:

(A) To defend against a threat of imminent death or serious bodily injury to the officer or to another person.

(B) To prevent the escape of a fleeing suspect consistent with paragraph (4) of subdivision (a) of Section 196.

(2) A peace officer shall not use deadly force against a person based on the danger that person poses to themselves, if the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.

(3) This subdivision does not provide the legal standard and shall not be used in any criminal proceeding against a peace officer

relating to the use of force by that peace officer, or to any defenses to criminal charges under Sections 196 or 197 or any other defense asserted by that officer, but may be used in any civil or administrative proceeding.

(e) For purposes of this section, the following definitions shall apply:

(1) "Deadly force" means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm.

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

(3) "Necessary" means that, given the totality of the circumstances, an objectively reasonable peace officer in the same situation would conclude that there was no reasonable alternative to the use of deadly force that would prevent death or serious bodily injury to the peace officer or to another person.

(4) "Totality of the circumstances" means all facts known to the peace officer at the time and includes the tactical conduct and decisions of the officer leading up to the use of deadly force.

O

98

Date of Hearing: April 9, 2019
Counsel: David Billingsley

ASSEMBLY COMMITTEE ON PUBLIC SAFETY
Reginald Byron Jones-Sawyer, Sr., Chair

AB 392 (Weber) – As Amended March 27, 2019

SUMMARY: Limits the use of deadly force by a peace officer to those situations where it is necessary to defend against a threat of imminent serious bodily injury or death to the officer or to another person. Specifically, **this bill**:

1) States that homicide is justifiable when committed by peace officers and those acting by their command in their aid and assistance, under any of the following circumstances:

   a) In obedience to any judgment of a competent court;

   b) When the homicide results from a peace officer's use of force, other than deadly force, that is in compliance with other provisions of this bill;

   c) When, except in specified situations involving criminal negligence, the homicide would be justifiable pursuant defenses to homicide that are available to non-peace officers, in self-defense or the defense of another person;

   d) When, except in specified situations involving criminal negligence, the officer reasonably believes, based on the totality of the circumstances, that the use of force resulting in a homicide is necessary to prevent the escape of a person, and all of the following are true:

      i) The peace officer reasonably believes that the person has committed, or has attempted to commit, a felony involving the use or threatened use of deadly force;

      ii) The peace officer reasonably believes that the person will cause death or inflict serious bodily injury to another unless immediately apprehended; and

      iii) If feasible, the peace officer has identified themselves as a peace officer and given a warning that deadly force may be used unless the person ceases flight, unless the officer has reasonable ground to believe the person is aware of these facts.

2) Specifies that with respect to justifiable homicide for a fleeing felon, "necessary" means that, given the totality of the circumstances, an objectively reasonable peace officer in the same situation would conclude that there was no reasonable alternative to the use of deadly force that would prevent death or serious bodily injury to the peace officer or to another person. The totality of the circumstances means all facts known to the peace officer at the time and includes the tactical conduct and decisions of the officer leading up to the use of deadly force.

3) States that defenses to justifiable homicide do not provide a peace officer with a defense to manslaughter, as specified, if that person was killed due to the criminally negligent conduct of the officer, including situations in which the victim is a person other than the person that the peace officer was seeking to arrest, retain in custody, or defend against, or if the necessity for the use of deadly force was created by the peace officer's criminal negligence.

4) States that a peace officer who has reasonable cause to believe that the person to be arrested has committed a crime may use reasonable force, other than deadly force, to effect the arrest, to prevent escape or to overcome resistance.

5) Provides that a peace officer who makes or attempts to make an arrest need not abandon or desist from the arrest by reason of the resistance or threatened resistance of the person being arrested.

6) States that a peace officer shall not be deemed an aggressor or lose the right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.

7) Specifies that a peace officer shall, however, attempt to control an incident through sound tactics, including the use of time, distance, communications, tactical repositioning, and available resources, in an effort to reduce or avoid the need to use force whenever it is safe, feasible, and reasonable to do so. This language does not conflict with the limitations on the use of deadly force set forth in the defenses of justifiable homicide by a peace officer.

8) States that a peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary for either of the following reasons:

   a) To defend against a threat of imminent death or serious bodily injury to the officer or to another person;

   b) To prevent the escape of a fleeing felon, as specified;

   c) A peace officer shall not use deadly force against a person based on the danger that person poses to themselves, if the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.

9) States that the language of 9(a)-(c) does not provide the legal standard and shall not be used in any criminal proceeding against a peace officer relating to the use of force by that peace officer, or to any defenses to criminal charges under theories of justifiable homicide or any other defense asserted by that officer, but may be used in any civil or administrative proceeding.

10) Define the following terms:

   a) "Deadly force" means "any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm;"

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

c) "Necessary" means that, given the totality of the circumstances, an objectively reasonable peace officer in the same situation would conclude that there was no reasonable alternative to the use of deadly force that would prevent death or serious bodily injury to the peace officer or to another person.

d) "Totality of the circumstances" means all facts known to the peace officer at the time and includes the tactical conduct and decisions of the officer leading up to the use of deadly force.

11) Finds and declares all of the following:

a) 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;

b) That the decision by a peace officer to use force shall be evaluated carefully and thoroughly, in a manner that reflects the gravity of that authority and the serious consequences of the use of force by peace officers, in order to ensure that officers use force consistent with law and agency policies;

c) That the decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight, and that the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force; and,

d) 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.

EXISTING LAW:

1) Provides that any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. (Pen. Code, § 835a)

2) Specifies that a peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance. (Pen. Code, § 835a)

3) Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either—

   a) In obedience to any judgment of a competent court; or,

   b) When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,

   c) When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest. (Pen. Code, §196.)

4) States that homicide is justifiable when committed by any person in any of the following cases: (Pen. Code, § 197)

   a) When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person;

   b) When committed in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein;

   c) When committed in the lawful defense of such person, or of a spouse, parent, child, master, mistress, or servant of such person, when there is reasonable ground to apprehend a design to commit a felony or to do some great bodily injury, and imminent danger of such design being accomplished; but such person, or the person in whose behalf the defense was made, if he or she was the assailant or engaged in mutual combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed; or,

   d) When necessarily committed in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot, or in lawfully keeping and preserving the peace.

FISCAL EFFECT: Unknown

COMMENTS:

1) **Author's Statement**: According to the author, "American political ideals require careful consideration of how government exercises power over its people. Vigilance is especially necessary in policing where, on a daily basis, democratic notions of liberty, security and autonomy are poised against the demands of public safety and the force that may be required

to effect it. Because the power to use force is granted by the governed, every effort must be made to ensure that force is exercised with careful attention to preserving the life and dignity of the individual to remain legitimate.

"In 2017, officers killed 172 people in California, only half of whom had guns. Police kill more people in California than in any other state – and at a rate 37% higher than the national average per capita. Of the 15 police departments with the highest per capita rates of police killings in the nation, five are in California: Bakersfield, Stockton, Long Beach, Santa Ana and San Bernardino. A 2015 report found that police in Kern County killed more people per capita than in any other U.S. county. These tragedies disproportionately impact communities of color as California police kill unarmed young black and Latino men at significantly higher rates than they do white men.

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

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

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

2) **Fleeing Felon Rule:** California's current law regarding justifiable homicide was enacted in 1872 and has not been amended since that time. Meanwhile, the U.S. Supreme Court has placed limits on police use of deadly force which are not reflected in existing law. Under the current statute, the law regarding use of deadly force on fleeing felons is significantly outdated and does not comply with constitutional standards based on the U.S. Supreme Court's decision in *Tennessee v. Garner*, (1985) 471 U.S. 1.

Current California law provides that a homicide committed by a police officer is justified "When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest." (Pen. Code, § 196). Based on the statutory language, such a homicide is justified whether or not the person poses a danger to the officer or another person.

The standard as set forth in *Garner* is:

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.

". . ., if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. (Id. at 11-12.)

This bill would establish the following standard for justifiable use of deadly force on a fleeing felon: When the officer reasonably believes, based on the totality of the circumstances, that the use of force resulting in a homicide is necessary to prevent the escape of a person, and all of the following are true:

i) The peace officer reasonably believes that the person has committed, or has attempted to commit, a felony involving the use or threatened use of deadly force;

ii) The peace officer reasonably believes that the person will cause death or inflict serious bodily injury to another unless immediately apprehended; and,

iii) If feasible, the peace officer has identified themselves as a peace officer and given a warning that deadly force may be used unless the person ceases flight, unless the officer has reasonable ground to believe the person is aware of these facts.

As used in the context of justifiable homicide with a fleeing felon, this bill defines "necessary" as "given the totality of the circumstances, an objectively reasonable peace officer in the same situation would conclude that there was no reasonable alternative to the use of deadly force that would prevent death or serious bodily injury to the peace officer or to another person. The totality of the circumstances means all facts known to the peace officer at the time and includes the tactical conduct and decisions of the officer leading up to the use of deadly force." The requirement of necessity is one which current law employs when evaluating whether the use of force in self defense is appropriate.

The provisions in this bill regarding fleeing felons are generally consistent with the standards set forth in Garner.

It is interesting to note that the court in *Garner* made the following observation regarding the effect of their ruling: "Nor do we agree with petitioners and appellant that the rule we have adopted requires the police to make impossible, split-second evaluations of unknowable facts. We do not deny the practical difficulties of attempting to assess the suspect's dangerousness. However, similarly difficult judgments must be made by the police in equally uncertain circumstances." (Id. at 20.) In spite of the concerns at the time the law was changed, officers and police departments have adapted to the rule established by *Garner*.

3) **Justifiable Homicide by Police Officers Under Other Circumstances:** This bill would establish criteria which provide legal justification for a homicide committed by a police officer. The circumstances which justify the killing of a fleeing felon have been described above. This bill would also provide that a killing is justified under all the same circumstances which provide justification for a citizen, including self defense or defense of others.

Every person in the State of California has the right to self-defense and to defend others. The following California jury instruction explains the right to self-defense and defense of others:

a) "[A] defendant is not guilty of [homicide] if he or she was justified in killing or attempting to kill someone in self-defense or defense of another. The defendant acted in lawful self-defense defense of another if:

i) The defendant reasonably believed that he, she, or someone else was in imminent danger of being killed or suffering great bodily injury or was in imminent danger of being raped, maimed, or robbed;

ii) The defendant reasonably believed that the immediate use of deadly force was necessary to defend against that danger; and,

iii) The defendant used no more force than was reasonably necessary to defend against that danger. (CALCRIM 505 Justifiable Homicide: Self-Defense or Defense of Another.)

This bill does not change current statutory language which specifies that a peace officer shall not be deemed an aggressor or lose the right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance. Ordinarily, self defense is not available to an individual that is an "aggressor" unless, the other party escalates the amount of force. Police officers are required to respond to situations that can require a lawful and legitimate use of force. Those circumstances include situations in which an officer is making an arrest. Although this bill maintains the current statutory language, it limits the reasonable use of force when making an arrest to non-deadly force. That limitation might affect the analysis regarding a justification based on self defense in situations involving the use of deadly force.

5) **This Bill Redefines Police Use of Force During Arrests and Use of Deadly Force:** In *Graham v. Connor*, 490 U.S. 386 in 1989, the U.S. Supreme Court issued a ruling regarding standards regarding police use of force. In *Graham,* the court held that an objective reasonableness test should be used as the standard to determine whether a law enforcement official used excessive force in the course of making an arrest, or other action. The court stated:

"As in other Fourth Amendment contexts... the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation... [t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather

than with the 20/20 vision of hindsight."

This bill amends the penal code section describing the parameters for police use of force during an arrest. This bill would specify that reasonable, non-deadly force should be used to make an arrest, prevent escape, or overcome resistance. That would be a change from current statutory language which states that the force must be reasonable, but does not make any distinction between deadly and non-deadly force.

This bill would define "deadly force" as "any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm."

With respect to deadly force, this bill would allow its use only when the officer reasonably believes, based on the totality of the circumstances, that such force is necessary to defend against a threat of imminent death or serious bodily injury to the officer or to another person, or to prevent the escape of a fleeing suspect, as specified.

This bill would add additional language directing an officer making an arrest to, ". . . , attempt to control an incident through sound tactics, including the use of time, distance, communications, tactical repositioning, and available resources, in an effort to reduce or avoid the need to use force whenever it is safe, feasible, and reasonable to do so." This bill goes on to state that such language does not conflict with the limitations on the use of deadly force or justifiable homicide by a peace officer, as described in this bill. Some law enforcement agencies have adopted use of force policies consistent with the language above. The use of force provisions of this bill would apply to all California law enforcement agencies.

The language of this bill is likely to expose law enforcement agencies to civil liability for police actions that are inconsistent with the provisions of this bill regarding the use of force. For the same reasons, individual officers could be subject to discipline from their employing agency if they fail to comply with this bill's provisions.

12) **It is Not Clear How the Provisions of This Bill Limiting Certain Defenses For Peace Officers Apply to Voluntary and Involuntary Manslaughter:** This bill provides exceptions of the justifications for homicide based on self defense/defense of others and fleeing felons. This bill states that the provisions regarding justifiable homicide of a fleeing felon and existing law regarding self defense, do not provide a peace officer with a defense to voluntary and involuntary manslaughter, as specified, if a person is killed due to the criminally negligent conduct of the officer. This bill also states that this includes situations in which the victim is a person other than the person that the peace officer was seeking to arrest, retain in custody, or defend against, or if the necessity for the use of deadly force was created by the peace officer's criminal negligence.

According the proponents, this language is intended to address situations, where the police have acted in a fashion that creates a dangerous situation through poor police practices. As a result of those actions, the officer creates a confrontation with another individual, the individual then presents an imminent threat to the officer or other people, and the officer then kills the individual in self defense or defense of others.

It is not clear how this principle would interact with California's law regarding homicide. This language applies to the statutory section that covers (1) voluntary manslaughter and (2) involuntary manslaughter. Voluntary manslaughter occurs when a killing is intentional and accompanied by one of the following circumstances: (1) The intentional killing occurs in the heat of passion, or (2) imperfect self defense, where the defendant has an honest, but unreasonable belief that self defense was necessary.

Involuntary manslaughter is an unintentional killing. The killing results because a person committed a crime or lawful act in an unlawful manner; the person committed the crime or act with criminal negligence; and the crime or act caused the person's death.

A person acts with criminal negligence when:

a) He or she acts in a reckless way that creates a high risk of death or great bodily injury; and

b) A reasonable person would have known that acting in that way would create such a risk. (CalCrim 581.)

This bill would place limits on the use of self defense/defense of others if an officer faces criminal charges involving the offenses of voluntary or involuntary manslaughter, if the officer acts with criminal negligence. Self defense/defense of other is a justification when a person intends to kill the decedent. This bill seeks to limit the use of such a defense by a peace officer when the defendant faces involuntary manslaughter, a crime that results from an unintentional killing. Self defense is not a defense to a crime of involuntary manslaughter.

The limitation also includes voluntary manslaughter. Imperfect self defense is one form of voluntary manslaughter. In order to be convicted of voluntary manslaughter based on imperfect self defense, the jury must find a honest belief in self-defense, or the crime would be a murder. It is not clear how this language would be interpreted by a court in analyzing criminal liability for voluntary manslaughter.

4) **Argument in Support**: According to *PolicyLink*, "In 2017, 172 Californians were killed by the police, and our state's police departments have some of the highest rates of killings in the nation. Of the unarmed people California police killed, three out of four were people of color. Black and Latino families and communities are disproportionately vulnerable to police violence, creating generations of individual and community trauma. Given the significant racial disparity and the disproportionate number of men of color killed by police, passing AB 392 is imperative to achieving racial justice and securing human rights. Boys and men of color have a right to be free from fear and violence, and changing the outdated standard for law enforcement use of deadly force is necessary to ensuring their safety.

"California must update its outdated law on deadly use of force. Current law allows police to use deadly force whenever "reasonable", even if there is no threat to life or bodily security, and even if safe alternatives to deadly force are available. California law even authorizes deadly force that is below the standard of the Constitution. This disturbing level of discretion has had dire consequences: Police in California kill community members at a rate 37 percent

higher than the national average, per capita, and several of our state's police departments have among the highest rates of killings in the country.

"In line with recommendations from policing and legal experts, including the California Attorney General, AB 392 updates California law so that police can use deadly force only when necessary to prevent death or serious injury, and requires them to use tactics to de-escalate a situation or use alternatives to deadly force when reasonable. Changing this standard will mean that officers will be trained to use deadly force less often and will be held accountable when they shoot and kill unnecessarily.

"The harm from police killings extends beyond the lives lost and impacts all involved. Police shootings cause extraordinary trauma for the families and communities impacted – trauma that disproportionately impacts communities of color. Studies show that police departments with more restrictive use of force policies not only have fewer shootings by police, but also lower rates of assaults against officers and lower crime rates. One of the Legislature's primary goals is to protect public safety, and safeguarding Californians' right to be safe from unnecessary deaths by law enforcement is a critical step in that direction."

5) **Argument in Opposition**: According to *California State Sheriffs' Association,* "Longstanding state and federal case law argued, reviewed, shaped, and clarified over decades, as well as thoroughly vetted policies and strict, evolving training guide law enforcement officers and agencies when it comes to the use of deadly force. The decision to apply this level of force is the most solemn, serious, and scrutinized choice an officer could be asked to make. It must often occur without notice and with only milliseconds to contemplate his or her actions. As such, shifting the standard that guides the use of lethal force from one of objective reasonableness in light of the facts and circumstances (the existing standard as described in *Graham v. Connor*) to necessity given the totality of the circumstances (as proposed by this measure to require an objectively reasonable peace officer in the same situation to conclude that there was no reasonable alternative to the use of deadly force) will necessarily require second-guessing of an officer's decision, potentially with facts and information not available or known to the officer during the pendency of the encounter. In fact, this standard of necessity elicits not-so-exaggerated scenarios where an officer, so as to ensure he or she does not risk violating the new paradigm, might wait until a subject discharges a firearm at the officer before engaging. He or she might choose this course of action because the language of the bill opens the door for an after-the-fact analysis that could find a use of lethal force unnecessary when a subject points an unloaded firearm at an officer. While there is little chance an officer would be able to ascertain such a fact made crucial by the implementation of a necessity standard, he or she could nevertheless be in violation of the law given possible interpretations of this proposed statute.

"In addition to creating tremendous and routinely life-threatening risk to peace officers, AB 392 could discourage proactive policing. Fearing repercussions ranging from employee discipline to criminal prosecution based on this new standard, it is possible that officers who today would purposefully put themselves in harm's way to do their job might tomorrow decline to act. Knowing this reality, criminals will be given carte blanche, if not encouraged, to flee from officers, disobey commands, and victimize our communities.

"Peace officers and their agencies will be subjected to levels of personal and organizational liability that will hamstring them from fulfilling their duties to protect the public safety.

Instead, cops and law enforcement agencies will be forced to decide how to do their jobs with monetary risks and criminal prosecution guiding their thinking instead of the best way to defend communities from wrongdoers.

"Even if this sea change in standard were appropriate, agency policies would have to be changed and tens of thousands of peace officers would have to receive all new training. That said, the bill does not contemplate this reality. Perhaps the only thing worse than converting to this standard, which will jeopardize the lives of peace officers and those who they are sworn to protect, is the possibility that it will be done without time to adjust and train."

6) **Related Legislation:** SB 230 (Caballero), would require each law enforcement agency to maintain a policy that provides guidelines on the use of force, utilizing de-escalation techniques and other alternatives to force when feasible, specific guidelines for the application of deadly force, and factors for evaluating and reviewing all use of force incidents, among other things. SB 230 is awaiting hearing in the Senate Public Safety Committee.

7) **Prior Legislation**: AB 931 (Weber), would have limited the use of deadly force by a peace officer to those situations where it is necessary to defend against a threat of imminent serious bodily injury or death to the officer or to another person. AB 931 was held in the Senate Rules Committee.

REGISTERED SUPPORT / OPPOSITION:

Support

Alliance for Boys and Men of Color (Co-Sponsor)
American Civil Liberties Union of California (Co-Sponsor)
Anti Police-Terror Project (Co-Sponsor)
Black Lives Matter (Co-Sponsor)
California Faculty Association (Co-Sponsor)
California Families United 4 Justice (Co-Sponsor)
Communities United for Restorative Youth Justice (Co-Sponsor)
PICO California (Co-Sponsor)
PolicyLink (Co-Sponsor)
Stop Terrorism and Oppression by the Police Coalition (Co-Sponsor)
United Domestic Workers of America-AFSCME Local 3930/AFL-CIO (Co-Sponsor)
Youth Justice Coalition (Co-Sponsor)
All Saints Church, Pasadena
Alliance San Diego
American Friends Service Committee
Amnesty International USA
Annual Pan African Global Trade & Investment Conference
Anti-Defamation League
Asian Americans Advancing Justice - California
Asian Law Alliance
Asian Pacific Environmental Network
Asian Solidarity Collective
Associate Professor Stoughton at the University of South Carolina

AYPAL: Building API Community Power
Bay Area Student Activists
Black American Political Association of California
Brothers, Sons, Selves Coalition
California Black Health Network
California Calls
California Civil Liberties Advocacy
California Immigrant Policy Center
California Latinas for Reproductive Justice
California League of United Latin American Citizens
California Nurses Association
California Pan-Ethnic Health Network
California Public Defenders Association
California State Conference of the National Association for the Advancement of Colored People
California Urban Partnership
California Voices for Progress
Center for African Peace and Conflict Resolution
Center on Juvenile and Criminal Justice
Change Begins With ME
Children's Defense Fund - California
City and County of San Francisco District Attorney
Clergy and Laity United for Economic Justice
Cloverdale Indivisible
Coalition for Humane Immigrant Rights
Coalition for Justice and Accountability
Committee for Racial Justice
Community Coalition for Substance Abuse Prevention and Treatment
Council on American-Islamic Relations, California
Courage Campaign
Davis People Power
Disability Rights California
Drug Policy Alliance
Earl B. Gilliam Bar Association
Ella Baker Center for Human Rights
Empowering Pacific Islander Communities (EPIC)
Exonerated Nation
Fair Chance Project
Fannie Lou Hamer Institute
Fathers & Families of San Joaquin
Feminists in Action Los Angeles
Friends Committee on Legislation of California
Greater Sacramento Urban League
Green Party of Sacramento County
HAWK Institute
Hillcrest Indivisible
Human Impact Partners
If/When/How: Lawyering for Reproductive Justice
Indivisible CA 37
Indivisible CA-43

Indivisible CA: Statestrong
Indivisible Colusa County
Indivisible Marin
Indivisible Peninsula and CA-14
Indivisible Project
Indivisible Sausalito
Indivisible South Bay-LA
Indivisible Stanislaus
Indivisible Ventura
Indivisible Watu
Indivisible: San Diego Central
Indivisibles of Sherman Oaks
Initiate Justice
InnerCity Struggle
International Human Rights Clinic at Santa Clara Law
Japanese American Citizens League, San Jose Chapter
Jewish Voice for Peace, San Diego Chapter
Justice & Witness Ministry of Plymouth United Church of Christ
Justice Teams Network
Kehilla Community Synagogue
LA Voice
League of Women Voters of California
Legal Services for Prisoners with Children
Los Angeles Black Worker Center
Mid-City Community Advocacy Network
Motivating Individual Leadership for Public Advancement
National Center for Youth Law
National Juvenile Justice Network
National Lawyers Guild Los Angeles
National Nurses United
Oakland Police Commission
Oakland Privacy
Orange County Communities Organized For Responsible Development
Orchard City Indivisible
Our Revolution Long Beach
Pacifica Social Justice
Partnership for the Advancement of New Americans
Paving Great Futures
Peace and Freedom Party of California
People Power LA | West
Pillars of the Community
Professor Alpert at the University of South Carolina
Progressive Students of Miracosta College
Public Health Advocates
Public Health Justice Collective
Resistance Northridge-Indivisible
Reverend Al Sharpton-National Action Network
Revolutionary Scholars
Riverside Temple Beth El

Rooted In Resistance
Sacramento Area Black Caucus
Sacramento Jewish Community Relations Council
Sacramento LGBT Community Center
San Diegans for Criminal Justice Reform
San Diego City College's Urban Scholar's Union
San Diego High School's Cesar Chavez Service Club
San Diego La Raza Lawyers Association
San Diego LGBT Community Center
San Francisco No Injunctions Coalition
San Francisco Peninsula People Power
San Francisco Public Defender's Office
San Jose/Silicon Valley NAACP
Santa Barbara Women's Political Committee
Service Employees International Union, Local 1000
Showing Up for Racial Justice, Bay Area
Showing Up for Racial Justice, Boston
Showing Up for Racial Justice, Greater Dayton
Showing Up for Racial Justice, Marin
Showing Up for Racial Justice, Sacred Heart
Showing Up for Racial Justice, San Diego
Showing Up for Racial Justice, Santa Barbara
Sister Warrior Freedom Coalition
Social & Environmental Justice Committee of the Universalist Unitarian Church of Riverside
Southeast Asia Resource Action Center
The Pacific Palisades Democratic Club
The Partnership for the Advancement of New Americans
The Praxis Project
The Resistance Northridge-Indivisible
The W. Haywood Burns Institute
The Women's Foundation of California
Think Dignity
Together We Will/Indivisible - Los Gatos
United Food and Commercial Workers, Western States Council
We The People - San Diego
White People 4 Black Lives
Women For: Orange County
Youth Alive!
Youth Forward

20 Private individuals

Oppose

Anaheim Police Association
Association for Los Angeles Deputy Sheriffs
Brawley Public Safety Employee Association
Brisbane Police Officers Association
California Association of Code Enforcement Officers

California Association of Highway Patrolmen
California College and University Police Chiefs Association
California Correctional Supervisors Organization, Inc.
California Narcotic Officers' Association
California Peace Officers Association
California Police Chiefs Association
California Rifle and Pistol Association, Inc.
California State Sheriffs' Association
California Statewide Law Enforcement Association
Chula Vista Police Officers Association
El Cerrito Police Employees Association
Fresno Police Officers Association
Glendale Police Officers' Association
Hanford Police Officers' Association
Hawthorne Police Officers Association
Kern Law Enforcement Association
League of California Cities
Los Angeles County Professional Peace Officers Association
Los Angeles Police Protective League
Napa County Deputy Sheriff's Association
North Valley Chapter of PORAC
Peace Officers Association of Petaluma
Peace Officers Research Association of California
Riverside County Sheriff's Department
Riverside Sheriffs' Association
Sacramento County Alliance of Law Enforcement
San Diego County Probation Officer Association
San Diego District Attorney Investigator's Association
San Diego Harbor Police Officers Association
San Francisco Police Officers Association
San Joaquin County Deputy Sheriff's Association
San Jose Police Officers' Association
Santa Barbara County Deputy Sheriff's Association
Solano County Deputy Sheriffs Association
Stockton Police Officer's Association
Sunnyvale Public Safety Officers Association
Union City Police Officer's Association
Ventura County Deputy Sheriffs Association

11 Private individuals

Analysis Prepared by: David Billingsley / PUB. S. / (916) 319-3744

Print Form

Introduction Form

By a Member of the Board of Supervisors or Mayor

RECEIVED
BOARD OF SUPERVISORS
SAN FRANCISCO
2019 MAR -5 PM 3:45
BY

Time stamp or meeting date

hereby submit the following item for introduction (select only one):

- [ ] 1. For reference to Committee. (An Ordinance, Resolution, Motion or Charter Amendment).
- [x] 2. Request for next printed agenda Without Reference to Committee.
- [ ] 3. Request for hearing on a subject matter at Committee.
- [ ] 4. Request for letter beginning :"Supervisor _____ inquiries"
- [ ] 5. City Attorney Request.
- [ ] 6. Call File No. _____ from Committee.
- [ ] 7. Budget Analyst request (attached written motion).
- [ ] 8. Substitute Legislation File No. _____
- [ ] 9. Reactivate File No. _____
- [ ] 10. Topic submitted for Mayoral Appearance before the BOS on _____

ase check the appropriate boxes. The proposed legislation should be forwarded to the following:

- [ ] Small Business Commission
- [ ] Youth Commission
- [ ] Ethics Commission
- [ ] Planning Commission
- [ ] Building Inspection Commission

Note: For the Imperative Agenda (a resolution not on the printed agenda), use the Imperative Form.

Sponsor(s):

Supervisor Haney

Subject:

[Supporting California State Assembly Bill 392 (Weber and McCarty) – California Act to Save Lives: Incorporating Police Best Practices]

The text is listed:

Resolution supporting California State Assembly Bill 392, introduced by Assembly Member Shirley Weber and Assembly Member Kevin McCarty, California Act to Save Lives: Incorporating policing best practices that authorizes police officers to use deadly force only when it is necessary to prevent imminent and serious bodily injury or death and to require de-escalation methods whenever possible.

Signature of Sponsoring Supervisor:

Clerk's Use Only