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ON THE ONE HAND…BUT ON THE OTHER…

California's lethal force laws devolve into a legal Neverland

For Police issues by Julius (Jay) Wachtel. A few days ago the City of Pomona, Calif. and its police department settled a long-running ACLU lawsuit (*Gente Organizada v. Pomona*, L.A. Superior Court case no. 20STCV28895). While no bucks will apparently change hands, the agreement seemingly imposes significant restraints on the city's cops.

Among (many) other things, Pomona P.D. must revamp its use-of-force rules to conform with the August 2019 revision of California Penal Code Sec. 835a. Officers will have to be informed that the decision-making process about using deadly force has become far more demanding, creating "a higher standard for the application of deadly force in California." They must also receive extensive training to assure that the "new normal" is incorporated into everyday practice.

We'll get into the specifics of Pomona's travails later. But first, let's examine the disturbing episode that propelled the change in California's police use-of-force laws. We posted a detailed essay ("A Reason? Or Just an Excuse?") about the fraught event two weeks after it took place. It didn't happen in Pomona but in the State's capital, Sacramento. To summarize, on March 18, 2018 city police officers encountered Stephon Clark, 22 as they responded to a late-evening 9-1-1 call about someone "going into back yards and breaking the windows of parked cars." Clark was quickly spotted by a helicopter. His behavior fit the suspect's, and as he ran from officers and entered yet another rear yard the threat level skyrocketed.

Clark took refuge under a patio. (Click here for helicopter video and here for officer bodycam video). Two officers peered around a wall. And as Clark (that third, lone figure) motioned with one of his hands, which held an indistinct object, they opened fire. After all, it simply *had* to be a gun. Alas, what they couldn't predict was our essay's subtitle: "Figuring out why officers kill persons 'armed' with a cell phone". Neither did they know that this was the residence of Clark's grandmother, with whom he was staying.

Clark, who was on probation for robbery, was clearly up to no good. His behavior had inarguably placed two cops in a tough spot. Apparently *so* tough that one year later, on March 2, 2019, the Sacramento D.A. announced that neither officer would be charged.

> Based on the circumstances of this incident, Officers Mercadal and Robinet had an honest and reasonable belief that they were in imminent danger of death or great bodily injury. Therefore, they acted lawfully in shooting Clark to defend themselves. Accordingly, we will take no further action in this matter.

Three days later that decision was seconded by the California Attorney General. And on September 26, 2019, the U.S. Department of Justice determined that there was insufficient evidence to pursue Federal civil rights charges.

When Mr. Clark was shot dead two long-standing California statutes governed police use of force. Penal Code section 835a, which didn't then specifically mention *lethal* force, bound cops who had probable cause to make an arrest to use "reasonable force to effect the arrest, prevent escape or overcome resistance." In contrast, P.C. section 196 was all about *lethal* force. It deemed it justifiable:

> 1. In obedience to any judgment of a competent Court; or,
>
> 2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,

> 3. 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. [emphases ours]

P.C. 196's emphasis on "necessity" didn't automatically endorse the shooting of Mr. Clark. But in 1989, the U.S. Supreme Court ruled in *Graham v. Connor* that the unforgiving nature of the police workplace must be taken into account:

> The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation.

And as Sacramento D.A. Anne Marie Schubert reached the end of her sixty-one page decision, that's where she turned. While *Graham* was a Federal Fourth-Amendment case, its grant of that "allowance" apparently inspired her to conclude that the cops couldn't be faulted as they had done their "reasonable" best.

Needless to say, the reaction wasn't all positive. Here, for example, is what the ACLU had to say:

> Police departments in California are some of the deadliest in the country. Police in Kern County, for example, have killed more people per capita than in any other county in the U.S. But many of these deaths could have been prevented if police were held to a higher standard that valued the preservation of life.

Mr. Clark was Black, so his killing carried racial implications. But it wasn't *all* about race. After all, one of the cops who shot him was also Black. Still, it was left to Shirley Weber, a Black assembly member from the opposite end of the state, to lead the charge. She was soon joined by Kevin McCarty, a White assembly member from Sacramento. On February 23, 2017 they introduced AB 931, the "Police Accountability and Community Protection Act." Its focus was Penal Code Section 835a. Here's how the existing section then read, in full:

> 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. 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.

Despite its weighty topic, Section 835a's word count was a stingy 99. Its suggested replacement, via AB 931 (click here), came in at an awe-inducing 858 words. Here's an extract from its introductory content:

> ...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, and that the totality of the circumstances must account for occasions when officers may be forced to make quick judgments about using force in circumstances that are tense, uncertain, and rapidly evolving.

Well, that seems cop-friendly. But what followed imposed strict limits on the use of deadly force, and particularly against fleeing suspects. At the time, Penal Code Sec. 196 authorized police to use lethal force "when necessary" against known or suspected felons who flee or resist (see above). These provisions were eliminated. Lethal force was also broadly defined, encompassing "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" (emphasis ours.)

AB 931's complexities and unforgiving language drew strong objections from the law enforcement community. For example, the Peace Officers Research Association of California (PORAC) complained that while officers take "necessity" into account as a matter of course, making it an explicit standard might lead them to inappropriately hesitate:

> Hesitation will place our communities at greater risk as officers delay the response to a rapidly evolving and dangerous situation in order to review and evaluate a checklist of options before acting to protect the public safety.

Despite strong support from civil rights groups, as 2018 rolled to an end the bill quietly died. But in February 2019 Assemblymembers Weber and McCarty introduced a replacement measure, AB 392. Here's the preamble to its new, supposedly improved version of P.C. section 835a:

> (2) ...it is the intent of the Legislature that peace officers use deadly force only when necessary in defense of human life. In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques if reasonably safe and feasible to an objectively reasonable officer.

At a full 833 words, the "California Act to Save Lives" is, like its abandoned predecessor, elaborately articulated. But constraints on police use of lethal force have somewhat relaxed from the bad, old AB 931. Here's a side-by-side comparo of key text from both (emphases ours):

AB 931 (OLD P.C. 835a)	AB 392 (NEW P.C. 835a)
(2) (d) (1) (A) 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. (3) A peace officer may use deadly force against fleeing persons only when both of the following are true: (A) The peace officer has probable cause to believe that the person has committed, or intends to commit, a felony involving death or serious bodily injury. (B) There is- a threat of imminent death or serious bodily injury to the peace officer or to another person if the subject is not immediately apprehended.	(5) (c) (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 an imminent threat of death or serious bodily injury to the officer or to another person. (B) To apprehend a fleeing person for any felony that threatened or resulted in death or serious bodily injury, if the officer reasonably believes that the person will cause death or serious bodily injury to another unless immediately apprehended. Where feasible, a peace officer shall, prior to the use of force, make reasonable efforts to identify themselves as a peace officer and to warn that deadly force may be used, unless the officer has objectively reasonable grounds to believe the person is aware of those facts.

In the new version, the requirement that lethal force must in fact be "necessary" seems tempered. Ditto, constraints on using lethal force against fleeing suspects. AB 931 required that officers who wished to do so have probable cause that a suspect committed or intended serious violence. For AB 392, a prior act that "threatened" a bad outcome is enough. In actual practice, that could be a significant distinction.

Still, considering the complexities that the "good, new" AB 392 introduces into P.C. 835a – again, we're talking 833 words vs. 99 – many peace officer groups remained opposed. One complained that the new version "does nothing to change use of force policing policies, training, or guidelines-no funding for training, critical to any plan to reduce police use of force, and no proactive plan to achieve such a reduction in force." But the highly influential (and politically attuned) California Police Chiefs Association shifted its stance from opposed to "neutral." And on August 19, 2019, California Governor Gavin Newsom signed AB 392 into law.

Back to Pomona P.D. Why did it draw the ACLU's ire? Go back to May 25, 2020. That's the day when a Minneapolis cop squeezed the life out of George Floyd. And, not incidentally, forever altered the trajectory of American policing. Two months later, on July 31st., the ACLU sued. Filed in California Superior Court, the action claimed that Pomona P.D. "unlawfully used public funds and employee time in adopting policies and trainings — designed by police lobbying groups — that conflict with the new state law". PORAC, the peace officer group that worried about hesitating cops, drew prominent mention:

> The Pomona Police Department, in the spirit of that opposition, deleted in multiple spots the word "necessary" — the new law's single most vital change — in its stated policy of state penal code. The department's training center also instructed supervisors to review with employees PORAC's content on AB 392 that denied any change to the legal standard for deadly force. A sergeant forwarded the directive with the note: "FYI from PORAC. Nothing has changed."

In its announcement, the ACLU bitterly remarked that Pomona officers had "shot and killed three people since the law went into effect" on January 1st, 2020. That naturally raised the question of whether cops would have fired had Pomona sincerely attempted to train them about the new provisions. We found the episodes in the *Washington Post's* "Fatal Force" database. According to the San Bernardino County D.A., two of the shootings, of Nick Costales on 6/29/20 and of Matthew Dixon on 7/5/20, were fully justified. Costales murdered his mother then fired at officers who intercepted his flight.

Dixon allegedly "pointed a gun at different people". While the D.A.'s website did not mention the third shooting, of Anthony Pacheco on 3/31/20, a local news source reported that Pacheco had stabbed his brother. A police bodycam video (we couldn't find it) reportedly depicts him advancing on a cop with a sword while "ignoring the officer's repeated commands to stop."

No matter. On November 8, 2022, Pomona P.D. Chief Michael Ellis affixed his signature to a settlement in which he agreed to incorporate the statutory changes in agency policy and to train officers on the new normal. A "new, improved" use of force policy is online. Its well-intentioned attempt to mesh the intricacies of the law with the real world of policing, though, doesn't fully succeed. Here's an extract (emphases ours):

> If an *objectively reasonable* officer would consider it *safe and feasible* to do so under the *totality of the circumstances*, officers shall evaluate and use other *reasonably available* resources and techniques when determining whether to use deadly force (emphases ours).

Aside from potentially confusing working cops, each italicized condition creates an obstacle to retrospectively evaluating whether a use of force was justified. Cops aren't only judged by persons who have done policing. Decisions about the correctness of the use of force are often made by persons such as the D.A. who cleared the cops in the killing of Stephon Clark. And given our society's litigiousness, by robed creatures such as the one depicted at the top of this post.

And that brings us back to Sacramento. Its D.A.'s reliance on good-ol' *Graham v. Connor* caused severe blowback from the civil rights community. That led to the expansion of the Penal Code section that regulates police use of force from a "mere" 99 words to a weighty 833.

Job done, right?

Well, not exactly. In "Who's in Charge?" we discussed the tragic killing of a 14-year old girl who was struck by one of the bullets an LAPD officer fired at a man who was rampaging through a clothing store. That incident happened on December 23, 2021, two years into P.C. 835a's "new, improved" version. When time came for the Police Commission to rule on the officer's actions, it disagreed with the Chief's conclusions that none of the shots were justified (the suspect's weapon was a bicycle chain.) Instead, the Commissioners ruled that the first shot (but not the second or third) was reasonable. Here's one of the closing paragraphs of their "abridged" 44-page decision:

> Based on the totality of the circumstances, for round one, by a 3-2 vote, the BOPC concurred with the UOFRB Majority and determined that an officer with similar training and experience as Officer F, in the same situation, would reasonably believe that the use of deadly force was proportional, objectively reasonable, and necessary.

According to the Commission, it analyzes the use of deadly force "by evaluating the totality of the circumstances of each case consistent with the California Penal Code Section 835(a), as well as the factors articulated in *Graham v. Connor*." That turned out to be Section 835's most prominent mention. *Graham* played a far more significant role in the assessment. It was mentioned as the source of the all-important "objectively reasonable" standard that's "used to determine the lawfulness of a use of force." And *Graham's* "reasonableness" language, which we set out above, appeared twice.

In all, the nuances and complexities of P.C. Section 835a seem to make it a poor vehicle for deconstructing (let alone *making*) police decisions. *Graham's* far more succinct and well-articulated approach continues to carry the day with both officers and superiors. Really, given the complexities of the police workplace, the personal characteristics of cops and citizens, and the reluctance of more than a few of the latter to comply, sometimes less is really, *really* more.