RESOLUTION 09-01-2018

DIGEST
Traffic Citations: Burden of Proof, Presumptions, and Standards of Review
Amends Vehicle Code sections 41100 and 41101, adds section 41102, and renumbers section 41103, to state the burden of proof, presumptions and standard of review in traffic court proceedings.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Vehicle Code sections 41100 and 41101, adds section 41102, and renumbers section 41103, to state the burden of proof, presumptions and standard of review in traffic court proceedings. This resolution should be disapproved because existing law clearly and adequately designates the traffic offense, judicial proceedings contesting the citations are conducted and supervised by a learned bench officer, and an attempt to summarize legal principles applicable to traffic citations will likely create more confusion and may conflict with existing law.

The stated objective, to enable self-represented litigants to more easily navigate the traffic courts, is noble. However, despite the resolution's stated problem regarding the complexities of the law in this area, a bench officer schooled in applicable law and procedure presides over the proceedings. A judicial officer conducts the hearing and makes a decision based on the facts of the case and the law applicable to the alleged traffic violation.

The resolution's proposed descriptions of the presumption of innocence, burden of proof beyond a reasonable doubt, the People's and the defendant's respective burdens, rules of evidence, and presumptions regarding traffic signs, along with encouragement to consider the California Public Records Act, will not, practically-speaking, clarify the legal analysis or effectively assist the typical in propria persona defendant's attempt at self-representation. It may also have the unintended consequence of lulling the pro se defendant into believing there is no need for legal consultation or representation. Finally, in the resolution's attempt to restate the applicable principles of law and evidence, it may unintentionally create confusion and conflict with established case law.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Vehicle Code sections 41100, 41101, add section 41102, and renumber 41104 to 41103 to read as follows:

CHAPTER 4. Burdens of Proof and Presumptions [41100 - ~~41104~~41103]

§ 41100

~~In any action involving the question of unlawful speed of a vehicle upon a highway which has been signposted with speed restriction signs of a type complying with the requirements of this code, it shall be presumed that existing facts authorize the erection of the signs and that the prima facie speed limit on the highway is the limit stated on the signs. This presumption may be rebutted.~~

(a) A defendant in an action charging a violation of this code is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his or her guilt is satisfactorily shown, he or she is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him or her guilty beyond a reasonable doubt. Reasonable doubt is defined as follows: "It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the trier of fact in that condition that they cannot say they feel an abiding conviction of the truth of the charge."

(b) The state bears the burden of proof of each element of the charged offense beyond a reasonable doubt. Unless expressly set forth by statute, a defendant is not required to negate any element of the offense to prove his or her innocence.

(c) The state bears the burden of proof using only evidence admissible under the California Evidence Code. In any trial involving an infraction violation of this code, regardless of any objection by the defendant, all hearsay, speculation and unqualified legal or factual expert opinion by testifying officers, unless otherwise admissible, shall be noted for the record and excluded by the trier of fact.

§ 41101

(a) Whenever a facially compliant traffic sign or traffic control device is placed in a position approximately conforming to the requirements of this code on the date of the citation, it shall be presumed to have been placed by the official act or direction of lawful authority, unless the contrary is established by any competent evidence.

(b) Any sign or traffic control device placed pursuant to this code and purporting to conform to the lawful requirements pertaining to it at the time of the citation shall be presumed to comply with the requirements of this code unless the contrary is established by any competent evidence.

(c) This presumption operates only if the facts that give rise to the presumption have been found or otherwise established beyond a reasonable doubt under Evidence Code Section 607, and, in such case, the defendant need only raise a reasonable doubt as to the existence of the presumed fact.

(d) If any competent evidence is proffered suggesting that the traffic sign or traffic control device was not lawfully authorized or placed in conformity with California Vehicle Code Section 21100.1, and/or any of the standards in the California Manual on Uniform Traffic Control Devices, the presumption shall be disregarded, and the state has the burden to prove the legality of the traffic sign or traffic control device at the time of the citation beyond a reasonable doubt to support a conviction. No citation shall be upheld if there is any doubt as to the current legality of any traffic control device or signage at the time of the citation.

(e) Upon a timely public records act request under the California Public Records Act, the local authority responsible for maintaining the traffic control device or signage in question shall produce all records supporting the legality of the signage to the defendant accused of any violation of this code. It shall be the affirmative obligation of the local authority to maintain records sufficient to establish the legality of any traffic control devices or signage in compliance with Vehicle Code Section 21100.1 as of the date when the challenged citation is issued. The absence of public records demonstrating the legality of the cited traffic control device or sign by the official custodian of records of such authority shall give rise to a rebuttable presumption in favor of the defendant that the signage is not lawful.

(f) On and after one year from the date of enactment of this section, all traffic citations for violation of any traffic control device or sign must provide written notice of the defendant's right to request public records pursuant to this section to verify the legality of the traffic control device or signage and specify how to timely request such records prior to trial and introduce such records at trial if desired.

§ 41102

In any action involving the question of unlawful speed of a vehicle upon a highway which has been signposted with speed restriction signs of a type complying with the requirements of this code, it shall be presumed that existing facts authorize the erection of the signs and that the prima facie speed limit on the highway is the limit stated on the signs. This presumption may be rebutted.

§ ~~41104~~ 41103

In any case, involving an accident or otherwise, where any rear component of a train of vehicles fails to follow substantially in the path of the towing vehicle while moving upon a highway, the vehicle shall be presumed to have been operated in violation of Section 21711.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem: Although the applicable standards can be pieced together from various codes and sources by skilled attorneys, including the Penal Code, Evidence Code, Vehicle Code, Government Code, the U.S. and State Constitutions, and the voluminous Uniform Manuals on Traffic Control Devices, a *pro se* defendant is unlikely to be able to easily compile the various standards that apply to protect their rights in defending against traffic related citations.
Police officers who issue tickets are now the principal "prosecutors" for traffic infractions in this state. There is no right to counsel for defendants, and generally no unbiased prosecutor (as in other criminal proceedings) to represent the interests of the state in traffic court. There are no lawyers other than the judge to "advocate" with respect to any necessary legal arguments. While the law requires all traffic control devices and signage to conform to certain uniform standards, there is no means to enforce these requirements to ensure local jurisdictions are in compliance. Thus, traffic citations are being issued in certain localities for violations of traffic control devices and signage that are unlawful; the citations are upheld because testifying officers are currently

permitted to simply presume the signage is legal.

The Solution: This resolution amends the Vehicle Code to expressly set forth all of the applicable burdens, presumptions and standards applicable in traffic citation proceedings in one place. Reinforce the requirements for signage to be legally maintained by local jurisdictions prior to issuing citations by clarifying the limits of the applicable presumptions. The intent is to make it easier to reference and apply the proper standards, for both the parties and the court, and to ensure justice and protect the rights of drivers to fair trials in traffic court.

Clarifying the standards will not only assist defendants, but it will also ensure that traffic judges are properly applying the presumptions and burdens of proof. When there are genuine issues in dispute, particularly questions of law for which the testifying police officer is not qualified to testify concerning the legality of devices and signs, this can place the traffic commissioner/judge in an inappropriate position where they are compelled to do the job of the prosecutor in an attempt to uphold the law. The current system permits localities to unfairly cite drivers and collect penalties, while evading their obligations to update and maintain their traffic control devices and signage as required by law. With a complete lack of counsel for the prosecution or defense in most cases, the current process can easily violate the defendant's Constitutional rights to a fair trial.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Kelly A. Ernby

RESOLUTION 09-02-2018

DIGEST

Vandalism: Suspension of License Must be Tied to Vehicle Use

Amends Vehicle Code section 13202.6 to make suspension of a driver's license for vandalism discretionary and tied to the use of a vehicle.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

Similar to Resolution 10-03-2017, which was approved in principle.

Reasons:

This resolution amends Vehicle Code section 13202.6 to make suspension of a driver's license for vandalism discretionary and tied to the use of a vehicle. This resolution should be approved in principle because it would require a rational nexus between the crime and the punishment.

California is one of only four states to impose license suspensions or delays based on graffiti. American Association of Motor Vehicle Administrators, Best Practices Guide to Reducing Suspended Drivers (2013). Section 13202.6 author Quentin Kopp told the Seattle Times in 1991 that "a driver's license is 'more important to teen-agers than sports or sex,'" and that his new law would "make them think twice before writing graffiti." Kopp did not reveal how he came by this information, and there does not appear to be any basis for his broader claim of a deterrent effect. Bipartisan bills are already pending in several other states to eliminate non-driving offenses as a basis for license suspensions, for equitable reasons and to reduce the overhead costs to state licensing agencies of administering non-vehicle related suspensions. (See, e.g., Fla. Sen. Bill No. 1270; Ohio House Bill No. 260; Pa. House Bill No. 42; Utah House Bill No. 144.)

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Vehicle Code section 13202.6 to read as follows:

§ 13202.6

(a)(1) For every conviction of a person for a violation of Section 594, 594.3, or 594.4 of the Penal Code, committed while the person was 13 years of age or older, and involving the use of a vehicle, the court ~~shall~~ may suspend the person's driving privilege for not more than two years, except when the court finds that a personal or family hardship exists that requires the person to have a driver's license for his or her own, or a member of his or her family's, employment, school, or medically related purposes. If the person convicted does not yet have the privilege to drive, the court ~~shall~~ may order the department to delay issuing the privilege to drive for not less than one year nor more than three years subsequent to the time the person becomes legally eligible to drive. However, if there is no further conviction for violating Section 594, 594.3, or 594.4 of the Penal Code in a 12-month period after the conviction, the court, upon petition of the person affected, ~~may~~ shall modify the order imposing the delay of the privilege. For each successive offense, the court ~~shall~~ may suspend the person's driving privilege for those

possessing a license or delay the eligibility for those not in possession of a license at the time of their conviction for one additional year.

(2) A person whose driving privilege is suspended or delayed for an act involving vandalism in violation of Section 594, 594.3, or 594.4 of the Penal Code, may elect to reduce the period of suspension or delay imposed by the court by performing community service under the supervision of the probation department. The period of suspension or delay ordered under paragraph (1) shall be reduced at the rate of one day for each hour of community service performed. If the jurisdiction has adopted a graffiti abatement program as defined in subdivision (f) of Section 594 of the Penal Code, the period of suspension or delay ordered under paragraph (1) shall be reduced at the rate of one day for each day of community service performed in the graffiti abatement program when the defendant and his or her parents or legal guardians are responsible for keeping a specified property in the community free of graffiti for a specified period of time. The suspension shall be reduced only when the specified period of participation has been completed. Participation of a parent or legal guardian is not required under this paragraph if the court deems this participation to be detrimental to the defendant, or if the parent or legal guardian is a single parent who must care for young children. For purposes of this paragraph, "community service" means cleaning up graffiti from any public property, including public transit vehicles.

(3) As used in this section, the term "conviction" includes the findings in juvenile proceedings specified in Section 13105.

(b)(1) Whenever the court suspends driving privileges pursuant to subdivision (a), the court in which the conviction is had shall require all drivers' licenses held by the person to be surrendered to the court. The court shall, within 10 days following the conviction, transmit a certified abstract of the conviction, together with any drivers' licenses surrendered, to the department.

(2) Violations of restrictions imposed pursuant to this section are subject to Section 14603.

(c) The suspension, restriction, or delay of driving privileges pursuant to this section shall be in addition to any penalty imposed upon conviction of a violation of Section 594, 594.3, or 594.4 of the Penal Code.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: Under current law, any person convicted of vandalism must have his or her driver's license suspended for up to two years. This is true even where the offense does not involve a car, and even where the offense has nothing to do with "tagging" or other forms of graffiti. The requirement that the defendant's driver's license be suspended is utterly impractical because the suspension of the defendant's license impacts the defendant's ability to work (and thereby maintain employment, and pay restitution) and, particularly in larger metropolitan areas where driving is a necessity, makes it more likely that a desperate defendant will violate the law again (by driving on a suspended license).

The Solution: This resolution would make suspension of a defendant's driver's license following a vandalism conviction permissible only where the offense involved the use of a vehicle, increasing the likelihood that those convicted of vandalism will be able to maintain employment and pay restitution.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Nick Stewart-Oaten

RESOLUTION 09-03-2018

DIGEST
Driver's License: Notice Requirements for Re-Examination Procedures to Determine Capacity
Amends Vehicle Code section 21061 to require the Department of Motor Vehicles to provide notice to a driver of the procedures used for determining the capacity of the driver.

RESOLUTIONS COMMITTEE RECOMMENDATIONS
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Vehicle Code section 21601 to require the Department of Motor Vehicles to provide notice to a driver of the procedures used for determining the capacity of the driver. The resolution should be disapproved because it requires the Department of Motor Vehicles examiners to determine whether the driver lacks the capacity to drive based only on the examiner's observations during an interview rather than based on an evaluation by a health care provider, such as a physician.

Under current law, a traffic officer can issue a notice of reexamination to a person who appears to the officer to lack the capacity to drive. (Veh. Code, § 21061.) When a traffic officer issues such a notice of reexamination to the person, the Department of Motor Vehicles ("DMV") determines a person's capacity to drive through a written examination.

The resolution would require that the notice of such a reexamination contain information about which procedures the DMV will use to assess the person's capacity to drive. The notice by the DMV would provide that the individual be prepared to take a written exam, may bring someone with them, and that a driving examiner will make a capacity determination based, in part, on his/her observation of the person. However, the resolution does not provide an objective standard regarding how the DMV examiner should determine whether a driver lacks the capacity to drive. This will result in inconsistency in the assessments, as each examiner will be left to use his/her own subjective observations to determine the person's capacity to drive. Therefore, rather than rely on the anecdotal observations of DMV examiners and a written re-examination, a better solution would be for the DMV to require a medical evaluation by a medical professional familiar with the health history and current medical condition of the driver. An existing and widely used DMV form that may be used is the "Driver Medical Evaluation" (form DS 326) which allows a personal physician of the driver to evaluate whether there is a condition that could affect the safe operation of a motor vehicle.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Vehicle Code Section 21061 to read as follows:

§ 21061

(a) In addition to any action prescribed in Division 17 (commencing with Section 40000.1), a traffic officer may issue a notice of reexamination to any person who violates any provision of this division and who, at the time of the violation, exhibits evidence of incapacity to the traffic officer which leads the traffic officer to reasonably believe that the person is incapable of operating a motor vehicle in a manner so as not to present a clear or potential danger of risk of injury to that person or others if that person is permitted to resume operation of a motor vehicle.

(b) For purposes of this section, "evidence of incapacity" means evidence, other than violations of this division, of serious physical injury or illness or mental impairment or disorientation which is apparent to the traffic officer and which presents a clear or potential danger or risk of injury to the person or others if that person is permitted to resume operation of a motor vehicle.

(c) Such notice of re-examination issued by said officer shall inform the citee the following:

1. The individual should be prepared to take the written driving exam at the first meeting with the DMV.

2. The individual may have someone accompany them to the DMV re-examination but will not be allowed to be represented by counsel.

3. During the re-examination interview process reaction time, mistakes and self-corrections made, and overall demeanor will be used in determining whether the citee lacks the capacity to drive.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problem: Existing law establishes a procedure where if a traffic officer believes a driver lacks the capacity to drive safely, the officer can have the Department of Motor Vehicles evaluate the driver's capacity. There is no due process for the cited individual until the end by way of a writ of mandamus. The present system mandates that the citee contact the DMV in as little as 5 days. At that first meeting without notice before hand the citee is given a written test. After the test the cited individual is asked to explain the circumstances of the citation. The information on the citation is given full credibility including hearsay. Denial of the violation is documented as "no recollection" and inferred as a lack of capacity. The examiner, who lacks professional training, evaluates the answers to determine whether the examinee exhibited cognitive issues or inability to remember specific details of the incident. Based on the original officer's ticket, the test results, and the interview, the hearing officer makes their determination to suspend the license. If an internal appeal is requested, the file is merely given to another hearing officer. The only review avenue available is a Writ of Administrative Mandate.

The Solution: This resolution attempts to inject some fairness in the process by requiring that the driver be alerted to the reexamination procedures. It allows the citee to study for the exam. (I still bone up for the driver's test if I don't get a pass on my license renewal.) It is lunacy for the DMV to infer passing knowledge of the written driver's test has anything to do with capacity

especially when the driver has not had an opportunity to review the rules of the road when the re-examination date is scheduled before one can run to the DMV, wait in line, and get a handbook. The idea of a non-professional evaluating the mental capacity of a driver without using one objective standard test is mind boggling. This also leads to age bias. A case I witnessed the hearing officer noted every misstatement as a mental defect in a ninety minute interview but neglected to mention that the examinee was wearing hearing aids and possibly was not hearing the question. This resolution will give us the opportunity to bring up these shortcomings to the legislature and force the DMV to admit and hopefully modify their practices.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 09-04-2018

DIGEST
Traffic: Eliminates Fine, Plea and Misdemeanor Punishment for Not Completing Traffic School
Amends Vehicle Code section 42005 to eliminate fine, bail and guilty plea for traffic citations and decriminalizes the willful failure not to complete traffic school when ordered by the court.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Vehicle Code section 42005 to eliminate fine, bail and guilty plea for traffic citations and decriminalizes willful failure to complete traffic school when ordered by the court. This resolution should be disapproved because eliminating the plea requirement removes the ability of the court to enforce the traffic violation if the driver fails to complete the court ordered Traffic Violator School.

Traffic Violator School is an opportunity to avoid the often far-reaching effect a traffic conviction has on insurance costs and insurability, driving points and even employment. In order for there to be legitimate judicial authority to order the defendant the option of Traffic Violator School, instead of a guilty plea or proceeding to trial with the risk of conviction, there must be a guilty-equivalent plea. Much like probation, an entry of a plea is required to the underlying charge in order for the court to enforce the stipulated order for Traffic Violator School. To assure the defendant does not trifle with the court in requesting traffic school and then not comply with the stipulated order, the court enforces the contempt with a misdemeanor conviction. As in Drug Court, the entry of the plea for a traffic violation is an opportunity and incentive for the defendant to avail him or herself of this diversionary program. It is not fair or in consonance with judicial economy to allow a defendant who enters a plea and request for Traffic Violator School, to then change his or her mind, contemptuously disobey the order, or further delay the matter. A defendant, who has requested and received the opportunity for this voluntary program as an alternative to contesting the traffic citation, who then does not complete it as ordered, is guilty of contempt and should face the entailed consequence of that conduct. Further, having a point added to your driving record and the possible increase in one's insurance for not completing Traffic Violator School as ordered by the court, is not incentive enough for a driver to complete when ordered by the court.

A defendant has the right to go to trial and fight the citation or simply plead guilty or no contest, and suffer the penalty of conviction. If a defendant seeks the diversionary program of Traffic Violator School, the costs associated with the citation and traffic school are properly borne by the defendant. For those defendants who are unable to pay bail or the fine entailed, mechanism exists to allow imposition of a lesser fee or payment over time. (Gov. Code, § 42007, subd. (a).)

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Vehicle Code section 42005 to read as follows:

§ 42005

(a) Except as otherwise provided in this section, ~~after a deposit of the fee under Section 42007 or bail, a plea of guilty or no contest, or a conviction,~~ a court may order or permit a person who holds a noncommercial class C, class M1, or class M2 driver's license who ~~pleads guilty or who pleads no contest or who is convicted of~~ has been charged with a traffic offense to attend a traffic violator school licensed pursuant to Chapter 1.5 (commencing with Section 11200) of Division 5. Notwithstanding Sections 42007 or 42007.1, no court may require a person to post bail, pay a fine, or plead guilty or no contest, to a traffic offense as a precondition of attending traffic school. A person who fails to complete traffic school within the time allowed by the court shall have a conviction for the charged offense(s) entered upon the person's driving record. A person who fails to complete traffic school pretrial shall not have a trial once traffic school is terminated without having been completed. A person who has been found guilty after a traffic trial may be ordered to pay a fine for the underlying conviction as a condition of being allowed to attend post-trial traffic school pursuant to Sections 42007. A person attending traffic school may be assessed a fee determined by the department to be sufficient to defray the cost of routine monitoring of traffic violator school instruction.

(b) To the extent the court is in conformance with Title 49 of the Code of Federal Regulations, and except as otherwise provided in this section, the court may, after deposit of the fee under Section 42007 or bail, order or permit a person who holds a class A, class B, or commercial class C driver's license, who pleads guilty or no contest or is convicted of a traffic offense, to complete a course of instruction at a licensed traffic violator school if the person was operating a vehicle requiring only a class C license, or a class M license. The court may not order that the record of conviction be kept confidential. However, the conviction shall not be added to a violation point count for purposes of determining whether a driver is presumed to be a negligent operator under Section 12810.5.

(c) The court shall not order that a conviction of an offense be kept confidential according to Section 1808.7, order or permit avoidance of consideration of violation point counts under subdivision (b), or permit a person, regardless of the driver's license class, to complete a program at a licensed traffic violator school in lieu of adjudicating an offense if any of the following applies to the offense:

(1) It occurred in a commercial motor vehicle, as defined in subdivision (b) of Section 15210.

(2) Is a violation of Section 20001, 20002, 23103, 23104, 23105, 23140, 23152, or 23153, or of Section 23103, as specified in Section 23103.5.

(3) It is a violation described in subdivision (d) or (e) of Section 12810.

(d) A person ordered to attend a traffic violator school pursuant to subdivision (a) or (b) may choose the traffic violator school the person will attend. The court shall provide to each person subject to that order or referral the department's current list of licensed traffic violator schools.

~~(e) A person who willfully fails to comply with a court order to attend traffic violator school is guilty of a misdemeanor.~~

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Los Angeles County Bar Association

STATEMENT OF REASONS

The Problem: The benefit of traffic school is that the traffic violation does not appear on a person's driving record, thus not causing insurance to increase. But the Legislature turned this into a profit-making endeavor, requiring a guilty or no-contest plea plus the payment of a fine (including all penalties and assessments). This means a $100 base fine actually amounts to around $500. This is simply gouging the motorist to enrich the court, county, and city. It is startling that when a person fails to complete traffic school the person can be charged with a misdemeanor! Really, putting a person with a speeding ticket in jail for up to six months for not completing school? Unconscionable.

The Solution: Traffic school should be pre-plea, without the requirement of an involuntary guilty or no-contest plea and payment of a fine. That's what this resolution does. The resolution does not allow the motorist to skate out of a conviction if they flunk traffic school. A conviction is entered and insurance will be negatively impacted. The resolution also eliminates the possibility of a prosecution for failing to complete traffic school, which is a ridiculous punishment. The punishment is the impact upon the license (negligent driving points) plus increased insurance costs.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Mark Harvis

RESOLUTION 09-05-2018

DIGEST
Law Enforcement: Reporting on Electronic Control Weapons
Amends Government Code section 12525.2 to require a report to the California Department of Justice when an Electronic Control Weapon results in serious injury or death.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution amends Government Code section 12525.2 to require a report to the California Department of Justice when an Electronic Control Weapon results in serious injury or death. This resolution should be disapproved because it is already covered by the statute.

Specifically, subdivision (a)(3) of Government Code section 12525.2 requires "a report of all instances when a peace officer employed by that agency is involved in … [a]n incident in which the use of force by a peace officer against a civilian result in serious bodily injury or death." As deploying an Electronic Control Weapon (e.g., Taser) is a use of force, the resolution does not make any change in the law.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Government Code section 12525.2 to read as follows:

§ 12525.2.

(a) Beginning January 1, 2017, each law enforcement agency shall annually furnish to the Department of Justice, in a manner defined and prescribed by the Attorney General, a report of all instances when a peace officer employed by that agency is involved in any of the following:

(1) An incident involving the shooting of a civilian by a peace officer.

(2) An incident involving the shooting of a peace officer by a civilian.

(3) An incident in which the use of force by a peace officer against a civilian result in serious bodily injury or death.

(4) An incident in which use of force by a civilian against a peace officer results in serious bodily injury or death.

(5) An incident in which a civilian was seriously injured or killed after an Electronic Control Weapon (ECW) was used either as a result of the ECW charge, suspected medical condition, or subsequent use of another weapon.

(b) For each incident reported under subdivision (a), the information reported to the Department of Justice shall include, but not be limited to, all of the following:

(1) The gender, race, and age of each individual who was shot, injured, or killed.

(2) The date, time, and location of the incident.

(3) Whether the civilian was armed, and, if so, the type of weapon.

(4) The type of force used against the officer, the civilian, or both, including the types of weapons used.

(5) The number of officers involved in the incident.

(6) The number of civilians involved in the incident.

(7) A brief description regarding the circumstances surrounding the incident, which may include the nature of injuries to officers and civilians and perceptions on behavior or mental disorders.

(c) Each year, the Department of Justice shall include a summary of information contained in the reports received pursuant to subdivision (a) in its annual crime report issued by the department pursuant to Section 13010 of the Penal Code. This information shall be classified according to the reporting law enforcement jurisdiction. In cases involving a peace officer who is injured or killed, the report shall list the officer's employing jurisdiction and the jurisdiction where the injury or death occurred, if they are not the same. This subdivision does not authorize the release to the public of the badge number or other unique identifying information of the peace officer involved.

(d) For purposes of this section, "serious bodily injury" means a bodily injury that involves a substantial risk of death, unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member or organ.

SEC. 2.

If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: National Lawyers Guild, San Francisco Bay Area Chapter

STATEMENT OF REASONS

The Problem: ECWs are hand-held weapons that fire two projectiles from a range of seven to 15 feet and use 50,000 volt shocks to induce temporary paralysis. ECWs are purportedly used by police throughout California as an alternative to the use of lethal force.

Despite the assertion that ECWs and TASERS are needed as a safe alternative to lethal force, many incidents of use around the nation, and in California, have resulted in serious injury or death of people shocked by ECWs. A recent article published by *Reuters* discusses the 1,028 deaths since 2000 involving ECWs and warns, "Nearly 80 percent of the population could fit into one of the higher risk groups identified by Taser's maker. …For example, any woman of childbearing age – about 20 percent of the population – could be pregnant. Any adult male could have impaired heart function, another third of the populace."
(https://www.reuters.com/investigates/special-report/usa-taser-vulnerable/)

Many incidents of ECW use show police deploying the weapons to control verbally resisting or otherwise non-compliant individuals in situations justifying only minimal force, many times causing serious injury or death.

The Solution: The National Lawyers Guild urges the Conference to ask the California Legislature to enact legislation that establishes mandatory reporting under §12525.2 of the California Government of incidents of serious injury or death to a civilian after ECW use, either as a result of the ECW charge, a suspected medical condition, or subsequent use of another weapon.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESPONSIBLE FLOOR DELEGATE: Richard P. Koch

RESOLUTION 09-06-2018

DIGEST
Law Enforcement: Compensation to Families of Victims of Deadly Force
Adds Government Code section 815.2.5 to provide compensation to a decedent's family where an unarmed decedent was a victim of deadly police force and did not present a threat.

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
No similar resolutions found.

Reasons:
This resolution adds Government Code section 815.2.5 to provide compensation to decedent's family where an unarmed decedent was a victim of deadly police force and did not present a threat. This resolution should be disapproved because current state and federal law allows a decedent's family to recover damages in cases where law enforcement uses excessive or deadly force against an individual and the individual does not present a threat.

Current state law allows a decedent's family to sue a law enforcement agency for excessive force as a cause of action for unlawful battery or wrongful death as a survivorship action. (Pen. Code, §§ 835a, 820, subd. (a); Civ. Code, § 52.1.) In addition, current state law limits the force a police officer may use to effect an arrest to *reasonable* force necessary to overcome resistance or prevent the escape of a suspect. (Pen. Code, § 835a.) Similarly, federal law allows a decedent's family to sue a police officer for violation of his or her Fourth Amendment rights to be free from an unlawful seizure, which includes an excessive force claim. (42 U.S.C. § 1983.)

The jury instructions for the state and federal claims provide that the officer may use only "reasonable force" from the perspective of a reasonable police officer to effect an arrest in light of the seriousness of the crime at issue and whether the decedent "reasonably appeared to pose an immediate threat to the safety" of the officers or the public. (CACI nos. 1305, 3020.) In addition, both state and federal law allow the decedent's family to recover monetary damages and attorney fees. (Civ. Code, § 52.1, subd. (h); 42 U.S.C. § 1988.)

The resolution is also vague because it does not address the standards by which to judge whether the force was reasonable. Additionally, this resolution mandates that the damages a family may recover may not be less than $1 million, without regard to a consideration of the amount necessary to actually compensate the family for their loss. Finally, there is no showing that this resolution will streamline excessive force cases because they are still subject to the reasonableness analysis and it does not foreclose a family's right to file a lawsuit. Thus, there is a potential for double recovery. Because the resolution fails to show that the current law inadequately compensates families where there is a determination that the force used by law enforcement was excessive, it should be disapproved.

Similar to Assem. Bill No. 931 (Weber), which passed the Assembly and was referred to the Senate Committee of Appropriations.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Government Code section 815.2.5 to read as follows:

§ 815.2.5

(a) This section shall be known and may be cited as the "Unarmed Decedent Family Compensation Act of 2019."

(b) Whenever a firearm deployment by an officer of a state, municipal, county, city and county**,** or transit agency law enforcement department or agency, or by an officer of a University of California police department, California State University police department, California Community College police department, or any law enforcement agency serving a school district results in the death of an unarmed individual who did not present a threat that necessitated deadly force, the eligible surviving family members of the decedent shall receive compensation for their loss.

(c) For purposes of this section, "eligible surviving family members" shall include a spouse or domestic partner, children, and dependent relatives listed in Code of Civil Procedure Sec. 377.60.

(d) Each surviving child, spouse or domestic partner who is compensated pursuant to this section for a State law enforcement agency shall be compensated no less than $1 million. Each dependent relative who is compensated for a state law enforcement agency fatality shall be compensated no less than $500,000.

(e) An eligible surviving family member may within six months of receiving notice from a California law enforcement agency of the family member's death as a result of a law enforcement firearm deployment, file a compensation claim under this section with the Department of General Services. At the claim hearing or at a subsequent trial, proof by a preponderance of evidence that the decedent was not armed with a weapon and not presenting a threat necessitating use of deadly force establishes compensability.

(f) The Department of Justice shall, subject to subdivision (d), negotiate a compensation amount for an approved claim against a state law enforcement agency, and the Controller shall certify the negotiated amount for compensation for the claimant or representative of a minor or dependent adult claimant. If a negotiated amount cannot be reached, the claim may proceed to state court. Compensation, whether negotiated or as provided by judgment, may be paid in full or on a multi-year schedule as the claimant or representative may elect.

(g) Eligible surviving family members shall be entitled to reasonable attorney fees for assistance with preparing, pursuing, and securing payment of claims.

(h) Compensation, whether by negotiated amount or by judgment, with respect to a death resulting from a state law enforcement firearm deployment shall be paid upon an appropriation for that purpose by the Legislature.

(i) Filing a claim with the Department of General Services does not foreclose or excuse compliance with municipal or other local government claim procedures requiring service of claims on a municipal clerk, governing board or other local official

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: National Lawyers Guild, San Francisco Bay Area Chapter

STATEMENT OF REASONS

The Problem: Law enforcement firearm deployments resulting in the deaths of unarmed individuals not presenting threats necessitating use of deadly force undermine public confidence in our justice system and leave family survivors devastated. The unnecessary deaths of Oscar Grant in Oakland, and Ezell Ford and Alfredo Montalvo in Los Angeles county traumatized those communities. The unnecessary deaths of Laquan McDonald in Chicago and Walter Scott in South Carolina were publicized internationally as human rights violations. A *Washington Post* November 29, 2017 report lists 903 fatalities nationwide including more than 300 persons fatally shot while fleeing. *The Guardian* report, "The Counted," lists 130 California law enforcement gunshot fatalities during 2016 including 12 fatal shootings of unarmed persons. Gross statistics for 2017 fatalities are similar to 2016 data.

Various causes – mistaken judgments, or an unintentional weapon discharge – can result in what hindsight shows are unnecessary gunshot fatalities but do not necessarily establish a viable claim based on negligence, tortious intent, or wrongful death. See "Wrongful death suits rarely filed; families seldom win," *Las Vegas Review-Journal*, November 27, 2011. There is no compelling policy reason to not treat such deaths as compensable without requiring proof of negligence, tortious intent, or other wrongful conduct.

The Solution: The solution is to simplify the litigation of these claims. The proposed statute provides a far more efficient and more reliable state statutory option for eligible family survivors to seek compensation. It is more efficient because it greatly simplifies the requirements to establish a right to compensation. Proof by a preponderance of evidence that the decedent was unarmed and not presenting a threat necessitating use of deadly force establishes compensability. The statute will provide a more reliable claim procedure because proof of wrongful conduct by law enforcement is not required in order to award compensation to family survivors.

Clearly, jurors have great difficulty finding wrongdoing by law enforcement officers. In a South Carolina criminal trial following the 2015 fatal shooting of unarmed motorist Walter Scott, the jury viewed video evidence showing no threat to anyone when the officer on trial repeatedly and fatally shot the fleeing, unarmed Mr. Scott in the back. Video evidence and bystander testimony also showed after the shooting the officer retrieved then placed his taser weapon next to Mr. Scott's prone body. The officer testified that Mr. Scott had taken possession of the taser before the fatal shooting. The eye witness testified Scott never touched the taser. The jury could not reach a verdict.

IMPACT STATEMENT
The proposed statute adds to the grounds for recovery presently contained in the California Government Claims Act.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

ORANGE COUNTY BAR ASSOCIATION

Public policy and public safety often go hand-in-hand. The proposed resolution threatens to undermine both public policy, and in effect, the safety of peace officers and the public at large. Law enforcement officers are trained to protect the public from threats of deadly violence. Policies are in existence to equip officers with the legal training, emotional reasoning and tactical skill to make critical split-second decisions with regard to the deployment of their firearms.

Lawsuits usually follow the death of an unarmed person at the hands of police. Typically, these suits are brought under a federal statute, 42 U.S.C. § 1983, which creates civil liability when a person acting under color of law violates federally protected rights of another. There is no liability unless the officer violated rights. A series of U.S. Supreme Court decisions makes clear that municipalities may be held liable under § 1983 when officers have not been adequately trained. Proof of negligence, tortious intent or other wrongful conduct entitles surviving victims to compensation. There is no need for a new remedy.

The resolution would be a drastic and devastating change to existing public policy. (1) The resolution jeopardizes public safety; (2) The resolution diminishes the existing due process requirements to impose liability; and (3) The resolution affords arbitrary compensation and is bad public policy.

Officers are trained to primarily consider the safety of the officer and the public when determining whether to utilize their firearm. Officers should not be asked to weigh the financial cost of firing during the incident, if they have a reasonable belief that a suspect is armed, presenting a threat. Any policy that would deter an officer from protecting the public against such a threat due to million-dollar payouts is ill-advised.

The legal question properly asked after an officer-involved shooting is whether the officer reasonably believed the suspect was armed and dangerous *during the incident.* Dispensing with that inquiry, instead asking only if the subsequent investigation revealed the presence of a weapon effectively supplants the officer's real-time assessment of the threat with that of an administrative board. Juries exist to weigh in on the reasonableness of such actions. Officers cannot be expected to identify the difference between a toy gun and a real gun in real time when the life of officers and bystanders are in jeopardy.

Where there is no viable claim based on negligence, tortious intent or wrongful death, there should be no compensation. Allotting an automatic payout to family members where an officer was acting in good faith based on reasonable suspicion flies in the face of due process and good public policy.

Wrongful death suits are calculated based on a number of determining factors. An arbitrary grant of at least $500,000 to $1 million under this resolution may lead to a flood of new claims against municipalities and departments where actual and compensatory damages may be far lower than the minimums stated herein

RESOLUTION 09-07-2018

DIGEST
Law Enforcement: Limitations on Immigration and Customs Enforcement
Adds Government Code section 7595.5 to prohibit Immigration, Customs and Enforcement agents from entering state-owned buildings, schools or community colleges without a warrant.

RESOLUTIONS COMMITTEE RECOMMENDATION
REFER TO CONFERENCE FOR DEBATE WITHOUT RECOMMENDATION

History:
No similar resolutions found.

Reasons:
This resolution adds Government Code section 7595.5 to prohibit Immigration, Customs and Enforcement agents from entering state-owned buildings, schools or community colleges without a warrant. This resolution is referred to the conference for debate without recommendation due to the meritorious arguments both for and against its approval.

California has already declared it public policy not to cooperate with Immigration, Customs and Enforcement (ICE) agents without their having obtained a valid federal warrant. Previously passed legislation prohibits businesses from permitting ICE agents to enter non-public premises without a warrant. (Gov. Code, § 7285.1, subd. (a).) The resolution applies to government owned property, prohibiting ICE agents from entering a state-owned or –operated building, school, or community college to perform surveillance, or question or arrest an individual thereon without a valid federal warrant. It further provides that when in possession of a valid federal warrant, ICE agents' activities on public property shall be limited to the individual named in the warrant.

The resolution continues California's efforts to provide a safe environment for immigrants to participate in the activities of living in society. A relationship of trust between California's immigrant community and state and local agencies is central to enforcing civil and criminal laws. This trust is threatened when employees of ICE conduct raids and make arrests at courthouses, or at schools where children are being picked up by their parents. Such actions make immigrants fear seeking earned benefits or reporting violations of state law such as wage and hour claims, workers' compensation benefits, or health and safety violations; hesitate appearing in California courts pursuant to a subpoena or warrant, or to pay a fine; and avoid participating in school activities with their children, even just dropping them off or picking them up. The resolution would assure people they can take part in state sanctioned activities such as paying a fine, attending school, or getting a permit, without the concern of being harassed or arrested by ICE agents.

However, under the Supremacy Clause, this resolution may be preempted by federal law because it creates an obstacle to the accomplishment of congressional objectives by prohibiting ICE agents from accessing property otherwise open to the public, and by requiring a warrant even if they seek only to speak with their target. The Supremacy Clause provides a clear rule that federal law shall be the supreme law of the land, and that Congress has the power to preempt state

law. However, the federal power to determine immigration policy is well settled. States are precluded from regulating conduct in a field that Congress has determined must be under its exclusive governance. Such intent may be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." (*Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230.)

It is this preemption argument that is the basis for Attorney General Sessions suit against California's recently passed sanctuary laws. The resolution makes ICE enforcement more difficult on and within public property, even where that property is otherwise open to the public, potentially inhibiting enforcement of federal immigration law. For example, an ICE agent would never be able to obtain a warrant for the sole purpose of questioning the target of an investigation because warrants are not available for that purpose.

Yet, while the federal power to determine immigration policy is well settled, states have their own important interests to protect. In general, state law governs the use of state buildings, while both the federal and state constitutions provide the right of people to be secure in their persons and property against unreasonable searches.

The resolution is identical to language proposed in Sen. Bill 183 (Chiu, Fletcher), which passed the Senate and is currently being reviewed in the Judiciary Committee of the Assembly.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Government Code section 7595.5 to read as follows:

§ 7595.5

(a) Federal immigration enforcement agents, officers, or personnel shall not enter a building owned and occupied, or leased and occupied, by the state, a public school, or a campus of the California Community Colleges, Colleges, to perform surveillance, effectuate an arrest, or question an individual therein, without a valid federal warrant.

(b) When in possession of a valid federal warrant, the activities of federal immigration enforcement agents, officers, or personnel in a building owned and occupied, or leased and occupied, by the state, a public school, or a campus of the California Community Colleges, shall be limited to the individual who is the subject of the warrant.

(c) For purposes of this section:

(1) "Public school" means a public elementary or secondary school offering kindergarten or any of grades 1 to 12, inclusive.

(2) "State" means a state agency, as defined pursuant to Section 11000, the Legislature, superior court, court of appeal, the Supreme Court, the Judicial Council, or the Administrative Office of the Courts, and each campus of the California State University and the University of California.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: National Lawyers Guild, San Francisco Bay Area Chapter

STATEMENT OF REASONS

The Problem: The California state Legislature has passed, and Gov. Jerry Brown has signed SB 54 which declares California to be a sanctuary state. The governor and legislature believe immigrants are crucial in contributing to the state's economy and culture and that state and local resources should not be used to detain and deport undocumented immigrants.

US Immigration & Customs Enforcement (ICE), an agency of the Department of Homeland Security, is responsible for enforcing immigration laws with the United States. In the past year, ICE has increased enforcement within California. That enforcement has included indiscriminate sweeps in which certain groups, based on race and ethnicity, are required to provide evidence of citizenship, contrary to the sanctuary state legislation. Some of those sweeps have occurred within public buildings.

The Solution: This proposed legislation would limit ICE enforcement within buildings owned and operated by the state of California to individuals for whom ICE has a specific warrant. ICE would be prohibited from initiating any enforcemnt action against other persons within those buildings for whom ICE did not have a warrant.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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RESOLUTION 09-08-2018

DIGEST
Police Use of Force: Requirement to Shoot at "Nonlethal Bodily Targets"
Adds Penal Code section 835b to require police officers who lawfully discharge a firearm to shoot at "nonlethal bodily targets."

RESOLUTIONS COMMITTEE RECOMMENDATION
DISAPPROVE

History:
Identical to Resolution 15-06-2017, which was disapproved.

Reasons:
This resolution adds Penal Code section 835b to require police officers who lawfully discharge a firearm to shoot at "nonlethal bodily targets." This resolution should be disapproved because it fails to define what is a 'nonlethal bodily target' and presumes that discharging a firearm is not an inherently dangerous act.

The belief that a police officer can shoot someone in a non-lethal manner or do so without posing a danger to others defies common sense. "[I]t would seem obvious the intentional firing of a gun at the victim at close range is an act dangerous to human life and presents a high probability of death." (*People v. Woods* (1991) 226 Cal.App.3d 1037, 1048.) This belief also has the unintended consequence of mitigating the actions of an errant officer who shoots and kills a suspect while purportedly trying to hit a "nonlethal bodily target."

The resolution suggests that there are parts of human anatomy that are "nonlethal bodily targets" even when shot, but provides no guidance as to what they are, leaving it up to the officer's imagination. Currently, officers are trained to fire at center mass to neutralize an imminent threat posed by a suspect. While a gunshot to the torso is more likely to be fatal, a bullet that strikes an arm or leg can easily result in death if it severs an artery or ricochets back into the body. Assuming that an arm, leg, or other appendage is a "nonlethal bodily target," the resolution requires the officer to endanger the lives of innocent bystanders in order to improve a suspect's survival, under circumstances where lethal force is justified. Officers who take aim at a moving target's extremities are much more likely to miss, which results in additional shots being fired. Meanwhile, every miss allows for a stray bullet to penetrate a random bodily target over 1,000 feet away with foreseeably fatal consequences.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to add Penal Code Section 835b to read as follows:

§ 835a

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.

§ 835b

Consistent with using reasonable force as set forth in Section 835a, a peace officer, when lawfully utilizing a firearm, shall be required to direct force toward nonlethal bodily targets on the person being arrested, if the officer can do so without posing a danger to themself or others. This Section is inapplicable if the officer has reasonable cause to believe that the person to be arrested possesses a firearm or if the officer's acts otherwise fall within the scope of Section 196 and/or Section 197.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: The Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: During each of 2016 and 2017, between 963-1000 people were shot and killed by police nationwide. (https://www.washingtonpost.com/graphics/national/police-shootings-2016/ (as of Jan. 30, 2017).Of the 963 individuals killed in 2016, 48 were unarmed, 172 were armed with only a knife, and 631 were not fleeing. California was the only state with triple-digit fatalities: 138, or about 14% of the total, though California has only 12% of the population.

Currently, widespread policing practice provides use of force guidance as a continuum. For example, the San Francisco Police Department has published a General Order governing the use of force, which includes a chart matching a subject's actions to corresponding force options available to a police officer. (San Francisco Police Department General Order 5.01.VI.G.4. (Dec. 21, 2016) <http://sanfranciscopolice.org/sites/default/files/Documents/PoliceDocuments/DepartmentGeneralOrders/DGO%205.01%20Use%20of%20Force%20%28Rev.%2012-21-16%29.pdf > (as of Jan. 30, 2017). The SFPD's listed force options to address an individual's life-threatening actions is "[u]tilizing firearms or any other available weapon or action in defense of self and others to stop the threat." The SFPD offers no distinction within this "deadly force" subdivision. SFPD does not describe when it is appropriate for an officer to shoot merely to incapacitate a suspect to arrest versus when shooting to kill is legally permissible.

To illustrate, on December 2, 2015, 26-year-old Mario Woods was shot and killed by San Francisco police. Woods, armed with only a knife, was surrounded by officers who simultaneously opened fire "firing squad style" on Woods from a distance of no less than 15 feet. (Ho et al., *Killing by S.F. police sets off public debate* (Dec. 4, 2015) <http://www.sfgate.com/crime/article/Man-shot-dead-by-S-F-cops-IDd-as-26-year-old-6673167.php#photo-9054615> (as of Jan. 30, 2017)). If the proposed Penal Code Section 835b had been in effect, the officers could have concluded that the appropriate force would have been to fire toward the suspect's arms or legs in an attempt to temporarily cripple, but not kill, the young man.

Certain segments of the military are already trained in how to shoot at non-lethal targets. If the United States military can attempt to address this situation in dangerous combat environments, it can be addressed on the streets of California.

The Solution: The proposed legislation would require an officer, when using a firearm and when he could safely do so, to use his weapon in a non-deadly manner. This Penal Code addendum would insert a midpoint alternative into the binary "shoot to kill or don't shoot at all" policing methodology. It would also clarify the term "reasonable force" under Section 835a. This statutory mechanism's implementation will undoubtedly produce a decline in unnecessary deaths resulting from police firearm use.

The primary criticisms of this proposals are 1) that it is difficult enough to shoot at a lethal target on a charging and/or running perpetrator and 2) aiming at non-lethal targets increases the danger of inadvertently striking bystanders. *This proposal does not apply in those circumstances*. This proposal addresses a limited situation where firing at non-lethal targets occur without danger to officers or other citizens, such as in the Mario Woods case. If the assailant is charging toward the officer, if the assailant is running away, or if changing the target would increase the danger to others, police officers would still be fully empowered to shoot at lethal targets as they have always done.

IMPACT STATEMENT
This resolution does not affect any other law, statute or rule other than those expressly identified.

CURRENT OR PRIOR RELATED LEGISLATION

No legislation known, but relevant court cases include:
1. *Graham v. Connor* (1989) 490 U.S. 386, 397 ("[T]he '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.").

2. *Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 639 ("Our response to the Ninth Circuit's question on an issue of state law, as restated by this court, is this: Law enforcement personnel's tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability.").

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