The California Act to Save [*Black*] Lives? Race, Policing, and the Interest-Convergence Dilemma in the State of California

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In January 2020, the California Act to Save Lives became law, raising the state's standard for justifiable police homicide to cover only those police homicides that were "necessary in defense of human life." Although the Act was introduced in the wake of protests against officer-involved shootings of Black and Latinx people, the Act itself does not mention race at all. In this Note, I analyze the California Act to Save Lives through the lens of Professor Derrick Bell's interest-convergence theory, arguing that the Act was politically viable only because it assuaged protesters' anger about police brutality while leaving intact the racialized status quo that links threat to Blackness. The critical assumption at the heart of Bell's interest-convergence theory—namely, that the subordination of Black rights to White interests is an enduring, "neutral principle" of American jurisprudence—helps explain why conversations about race and racism are silenced and avoided in both the political and legal arenas. This insight also demonstrates that when laws are written in race-neutral language, they only reify the existing racialized power structure that devalues Black life.

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This Note proposes that the California Act to Save Lives should have defined the meaning of "necessary" use of lethal force by using race-conscious language, actively interrogating assumptions about race and criminality. The California legislature should have followed the example of the Movement for Black Lives, which has demonstrated how necessary it is to insist that Black lives, specifically, matter in a world where a race-neutral claim that "all lives matter" only maintains the status quo that devalues the lives of Black people. Although this Note focuses on California legislation, its analysis and lessons apply with equal force to jurisdictions across the country. The summer of 2020 ushered in a new wave of protest as people flooded the streets in cities across the country to demonstrate their outrage and sorrow in response to the high-profile police killings of George Floyd and Breonna Taylor. In the wake of these protests, lawmakers at the municipal, state, and federal levels are rethinking their approaches to policing. Without an explicit acknowledgment of the racialized nature of police use of force, as well as a clear commitment to eliminating the resulting racial disparities, these laws will ultimately fail to save Black and Latinx civilians from police use of lethal force.

INTRODUCTION

> I write you in your fifteenth year. I am writing you because this was the year you saw Eric Garner choked to death for selling cigarettes; because you know that Renisha McBride was shot for seeking help, that John Crawford was shot down for browsing in a department store. And you have seen men in uniform drive by and murder Tamir Rice, a twelve-year-old child whom they were oath-bound to protect. And you have seen men in the same uniforms pummel Marlene Pinnock, someone's grandmother, on the side of a road. And you know now, if you did not before, that the police departments of your country have been endowed with the authority to destroy your body.[1]

On the evening of March 18, 2018, two Sacramento police officers shot Stephon Clark, a twenty-two-year-old Black man, killing him.[2] The officers were responding to a routine report of a car break-in when they located Stephon, who matched the caller's description of the suspect.[3] They chased Stephon into his grandmother's backyard and, believing that he was armed, fired twenty shots at him.[4] Stephon died at the scene.[5] When the officers finally approached Stephon's body, they discovered that he was, in fact, unarmed.[6] The only object found near his body was his cell phone.[7] The officers who shot and killed Stephon were never prosecuted.[8] Sacramento's district attorney, Anne Marie Schubert, announced that the homicide was justified because the officers feared for their lives and therefore "acted lawfully under the circumstances."[9] Xavier Becerra, California's attorney general, reached the same conclusion.[10]

The tragedy immediately sparked grief and outrage.[11] The Sacramento City Council held a special meeting the week after Stephon's death, and mourning community members demanded police accountability.[12] They recognized the

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1. TA-NEHISI COATES, BETWEEN THE WORLD AND ME 9 (2015).

2. Nashelly Chavez, Benjy Egel & Anita Chabria, *Police Fired 20 Times at a South Sacramento Man Fatally Shot While Holding a Cellphone*, SACRAMENTO BEE (Mar. 20, 2018), https://www.sacbee.com/news/local/crime/article206055609.html [https://perma.cc/S8ZN-ETHK].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Sam Stanton, Tony Bizjak, Dale Kasler, Molly Sullivan & Ryan Sabalow, *Sacramento Police Officers Won't Be Charged in Shooting of Stephon Clark, DA Says*, SACRAMENTO BEE (Mar. 2, 2019), https://www.sacbee.com/news/local/crime/article227026334.html [https://perma.cc/8MWU-V2KT].

9. *Id.*

10. Sam Stanton, Darrell Smith & Sophia Bollag, *Stephon Clark: No Charges to Be Filed Against Police Officers by California Attorney General*, SACRAMENTO BEE (Mar. 5, 2019), https://www.sacbee.com/article227127344.html [https://perma.cc/43KM-H2HF].

11. *See* Jose A. Del Real, *Hundreds at Sacramento City Hall Protest Police Killing of Stephon Clark*, N.Y. TIMES (Mar. 27, 2018), https://www.nytimes.com/2018/03/27/us/stephon-clark-sacramento-protest.html [https://perma.cc/U5UP-Q2R4].

12. *Id.*

murder of Stephon as a tragedy in its own right but also drew the connection between this instance of police brutality against an unarmed Black man and other similar cases around the country, such as the police killings of Eric Garner in Staten Island, New York, and Michael Brown in Ferguson, Missouri.[13] Tanya Faison, then-leader of Black Lives Matter Sacramento, made this connection quite clear. Addressing the Sacramento mayor and city councilmembers, she said, "You're killing us. You're killing us. It's genocide, it feels like genocide."[14] Another local activist added, "For far too long, Sacramento has been comfortable with antiblackness."[15]

In the midst of these protests, then-California Assemblymember Shirley Weber[16] introduced Assembly Bill No. 392 (AB 392), a bill to change the state's legal standard for justifiable police homicide. This standard, codified in section 196 of the California Penal Code, grants police officers an affirmative defense to criminal homicide charges when their actions were legally justifiable. At the time of Stephon's death, section 196 followed the common law tradition, allowing police to use deadly force when making an arrest or chasing a fleeing suspect without regard to the level of danger the individual suspect posed.[17] The law governing police use of force during an arrest, codified in section 835a of the California Penal Code, allowed police to use any amount of force—including lethal force—when committing an arrest, so long as that force was "reasonable."[18] AB 392 proposed restricting the scenarios in which police use of lethal force could be deemed justified under sections 196 and 835a. The new legal standard would enable police officers to use deadly force only "when

13. Eric Garner, a forty-three-year-old father of six, was killed by a New York Police Department officer who held him in a chokehold while he repeatedly called out: "I can't breathe." Josh Sanburn, *Behind the Video of Eric Garner's Deadly Confrontation with New York Police*, TIME (July 23, 2014), https://time.com/3016326/eric-garner-video-police-chokehold-death/ [https://perma.cc/Z6A4-3WKC]. Garner was unarmed and was suspected merely of selling untaxed cigarettes. *Id.* Michael Brown, an unarmed eighteen-year-old, was shot and killed by a Ferguson, Missouri police officer in August 2014. *Q&A: What Happened in Ferguson?*, N.Y. TIMES (Aug. 10, 2015), https://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html [https://perma.cc/K8XS-HHUZ].

14. Del Real, *supra* note 11.

15. *Id.*

16. Shirley Weber has since become California's first Black Secretary of State. *See Governor Newsom Swears in Dr. Shirley Weber as California Secretary of State*, OFF. OF GOVERNOR GAVIN NEWSOM (Jan. 29, 2021), https://www.gov.ca.gov/2021/01/29/governor-newsom-swears-in-dr-shirley-weber-as-california-secretary-of-state/ [https://perma.cc/4BYE-PNJ7]. Because Shirley Weber was a state Assemblymember at the time of AB 392's passage, I refer to her as "Assemblymember Weber" throughout this Note.

17. CAL. PENAL CODE § 196 (West 2019) ("Homicide is justifiable when committed by public officers . . . either— . . . [w]hen necessarily committed in overcoming actual resistance to the execution of some legal process, or . . . [w]hen 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.").

18. CAL. PENAL CODE § 835a (West 2019) ("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.").

necessary in defense of human life."[19] On August 19, 2019, California Governor Gavin Newsom signed the bill into law[20] as the California Act to Save Lives.[21] The Act took effect on January 1, 2020.[22]

The California Act to Save Lives marks a significant departure from the common law's "fleeing felon" standard for police use of deadly force, and for that reason, it is certainly important. For many who supported this legislation, its passage was a hard-won victory. Assemblymember Weber had attempted to pass a similar bill, AB 931, in the 2018 legislative session.[23] It was vehemently opposed by law enforcement and ultimately died in the State Senate.[24] When Weber introduced AB 392 in the 2019 legislative session, law enforcement rallied behind an oppositional bill. This bill, SB 230, called for a "reasonable" standard for lethal force[25] and additional funding for police training.[26] Given the substantial procedural obstacles AB 392 needed to overcome, leading to several compromises, the bill's proponents praised its accomplishments when it finally passed the State Assembly. Cephus Johnson, who cofounded Families United 4 Justice after his nephew Oscar Grant was killed by a BART officer in 2009, stated, "In the past 10 years, never have we even come close to what 392 does . . . I believe that as it falls into judges' hands for interpretation, into D.A.s' hands to decide to charge, we will see changes."[27]

Yet some of AB 392's original supporters publicly rescinded their sponsorship of the bill shortly before it passed the State Assembly, citing concerns with the amendments made to the bill as it passed through the legislative process. In its initial form, AB 392 included a definition of "necessary"[28] and a mandate for police officers to use de-escalation tactics

19. CAL. PENAL CODE § 835a(a)(2) (West 2020).

20. *Governor Gavin Newsom Signs Use-of-Force Bill*, OFF. OF GOVERNOR GAVIN NEWSOM (Aug. 19, 2019), https://www.gov.ca.gov/2019/08/19/governor-gavin-newsom-signs-use-of-force-bill/ [https://perma.cc/4CD3-M8AN].

21. Jane Coaston, *California's New Law to Stop Police Shootings, Explained*, VOX (Aug. 23, 2019), https://www.vox.com/2019/8/23/20826646/california-act-to-save-lives-ab-392-explained [https://perma.cc/AJ49-3NRL].

22. *See* CAL. PENAL CODE §§ 196, 835a (West 2020).

23. Julian Mark, *Why AB 931, a Police Use-of-Force Reform Bill, Died This Week*, MISSION LOC. (Aug. 31, 2018), https://missionlocal.org/2018/08/why-ab-931-a-police-use-of-force-reform-bill-died-this-week/ [https://perma.cc/VK9P-HAZT].

24. *Id.*

25. Editorial, *SB 230 Is Fake Deadly Force Reform. Senate Should Shelve It in Committee*, SACRAMENTO BEE (Apr. 23, 2019), https://www.sacbee.com/opinion/editorials/article229560219.html [https://perma.cc/6ZXF-LQZA].

26. *See SB 230 Gives Law Enforcement the Training They Deserve*, L.A. AIRPORT PEACE OFFICERS ASS'N (Oct. 2, 2019), https://laapoa.com/2019/10/sb-230-gives-law-enforcement-the-training-they-deserve/ [https://perma.cc/WL8E-Z7JM] ("SB 230 will ensure that the state allocates much-needed funding to law enforcement so that our officers will receive updated training").

27. Anita Chabria, *California Police Use-of-Force Bill Advances After Black Lives Matter, Families Drop Support*, L.A. TIMES (May 29, 2019), https://www.latimes.com/politics/la-pol-ca-police-use-of-force-bill-california-05292019-story.html [https://perma.cc/3F49-3MJ3].

28. AB 392, as introduced on February 6, 2019, proposed amendment to section 835a(a)(3) ("'Necessary' means that, given the totality of the circumstances, an objectively reasonable peace officer

before resorting to lethal force.[29] The original bill also proposed making the justifiable homicide defense unavailable to officers who created the necessity for the use of deadly force through their own criminal negligence.[30] AB 392 was amended in the assembly to omit these three elements to appease law enforcement and gain the votes needed to pass through the senate.[31] However, the Black Lives Matter Global Network (BLM), among other advocacy groups, publicly withdrew its support from the bill when the senate adopted these amendments, explaining that the compromises rendered the bill ineffective at saving Black lives. BLM claimed that the amended bill "provides the greatest guidance during litigation or after someone has been killed by police, instead of working to prevent police killings and the devaluation of human life within our communities."[32] The group added, "[T]he tethering together of AB 392 and SB 230, introduced by Senator Anna Caballero . . . and supported by police associations, calls for increased budget allocation for law enforcement. This is in direct contradiction with BLM's call for divestment from police and investment in local communities."[33]

In this Note, I argue that the definition of "necessary," the criminal negligence exception to the justifiable homicide defense, and the de-escalation requirements are not the only glaring omissions in the California Act to Save Lives. As a piece of legislation intended to address racial disparities in police use of lethal force, the California Act to Save Lives conspicuously lacks any mention of race at all. In this way, the Act leaves intact the assumptions about race and policing that inform the law governing police use of force: that Black[34] and

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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.") Assemb. 392, 2019–2020 Leg., Reg. Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201920200AB392&cversion=20190AB39299INT [https://perma.cc/B9SB-HDF7].

29. *Id.* at § 835a(c) ("A peace officer shall . . . 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.").

30. *Id.* § 196(c).

31. Though the law enforcement lobby had consistently opposed both AB 931 and AB 392, it rescinded its opposition to AB 392 in response to these amendments. Senator Anna Caballero, the author of SB 230, also amended her bill to remove the "reasonable" standard for police use of lethal force and include only a call for additional police funding. *See* Laurel Rosenhall, *California's Attempt to Reduce Police Shootings, Explained*, CALMATTERS (July 18, 2019), https://calmatters.org/explainers/california-police-shootings-deadly-force-new-law-explained/ [https://perma.cc/KKD5-CMF6].

32. *Black Lives Matter Global Network Withdraws Support from California's AB 392*, BLACK LIVES MATTER, (May 29, 2019), https://blacklivesmatter.com/black-lives-matter-global-network-withdraws-support-from-californias-ab-392/ [https://perma.cc/MAT4-AL8X].

33. *Id.*

34. The racialized nature of police violence is complex. Although I focus this Note on police violence against Black men, I do not mean to imply that Black men are the only targets of racialized state violence. In her pathbreaking article, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 139 U. CHI. LEGAL F. 139, 140 (1989), Kimberlé Crenshaw warned of the dangers of a single-axis analysis of

Latinx[35] people are dangerous and that officers justifiably fear for their lives when policing them. Without reckoning with these underlying assumptions, the Act is unlikely to limit police violence against people of color. As Professor Khiara Bridges has cautioned, "the inability or unwillingness to speak about race and racism risks making attempts to address the effects of racism ineffective."[36]

While California lawmakers focused their efforts on the appropriate standard for justifying police use of lethal force, they ignored the fundamental issue at the core of law enforcement's disproportionate use of force against Black people—namely, the systemic devaluation of Black lives and the law's reification of racial stereotypes that construct Black men as threats. It is the subordination of Black people and the superordination of police officers,[37] not the relative lenience of any particular legal standard for justifying police homicide, that endangers Black lives. Indeed, one must wonder what difference a standard allowing police to use lethal force only "when necessary in defense of human life"[38] would have made for Stephon Clark. If the officers were justified in presuming that Stephon, a young Black man in a poor suburb of Sacramento, was armed, then weren't their actions not only "reasonable" but

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subordination that views racial discrimination "in terms of sex- or class-privileged Blacks" and sex discrimination in terms of "race- and class-privileged women." This single-axis lens tends to leave Black women and gender-nonconforming people out of understandings of the ways both race- and sex-based oppression function. It can also imply that racism in the United States is only expressed as the subordination of Black people to White people. In reality, Black men are not the only people who experience oppression at the hands of the police. At the same time, Black people, and particularly Black men, are dramatically overrepresented in California data on police homicides. *See infra* notes 152–56 and accompanying text; *infra* notes 207–10 and accompanying text; *see also Death in Custody Data, 2005-2019*, STATE OF CAL., DEP'T OF JUST. (June 22, 2020), https://data-openjustice.doj.ca.gov/sites/default/files/dataset/2020-07/DeathInCustody_2005-2019_20200622.xlsx.

35. Latinx Californians are also killed disproportionately relative to their share of the state population, though less so than Black people. *See infra* notes 152–56 and accompanying text; *infra* notes 207–10 and accompanying text; *see also Death in Custody Data, 2005-2019*, *supra* note 34. I have chosen to focus specifically on the links between criminality and Black men that render them vulnerable to police violence, with the recognition that each population that experiences police violence is criminalized in different ways and it would be impossible to study them all in this Note. Although I do not discuss the criminalization of Latinx people in depth here, I nevertheless maintain throughout this Note that the California Act to Save Lives should have mentioned both Black and Latinx people, because both groups are disproportionately impacted by police use of lethal force in California.

36. Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229, 1296 (2020) (discussing the failure of the Preventing Maternal Deaths Act—congressional legislation intended to reduce racial disparities in maternal mortality—to mention race).

37. *See* Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1451 (2016) ("I call the authority the Court gives the police 'super powers,' but the powers are contained in the sense that it is understood they are intended for [B]lack men."); *Id.* at 1451–54 (identifying the three "super powers" the Court has vested in police by interpreting the Fourth Amendment to grant police broad discretion: "Super Power to Kill," "Super Power to Racially Profile," and "Super Power to Arrest").

38. CAL. PENAL CODE § 835a(a)(2) (West 2020).

"necessary"? Once we construct the "thug"[39] in the image of the young Black man, won't the destruction of his body[40] always be necessary?

I ground my analysis of the California Act to Save Lives in Professor Derrick Bell's interest-convergence theory, which posits that laws advancing rights for Black people are only politically viable when they serve the interests of White Americans.[41] Drawing from this theory, I argue that the California Act to Save Lives was passed only because it assuaged protesters' anger about the police killing of unarmed people of color while managing to leave the racial hierarchy completely unchallenged. In this sense, the Act serves to legitimize the police while maintaining the subordinate status of Black and Latinx people. I further argue that the assumption at the heart of Bell's interest-convergence theory—that the subordination of Black rights to White interests is an enduring feature of American jurisprudence—demonstrates that laws written in race-neutral language only reify the existing racialized power structure. Thus, the absence of race in the California Act to Save Lives will likely lead officers and courts to understand its "necessary" legal standard in facially race-neutral terms that are in fact deeply rooted in racial bias.

This Note proceeds in three parts. Part I.A introduces the Fourth Amendment doctrine that lays the constitutional foundation for police use of force in every state, including California. Part I.B discusses the California Act to Save Lives, detailing the changes it made to the California Penal Code and its intended impact. Part I.C contrasts the advocacy efforts surrounding the California Act to Save Lives, which focused on addressing racial disparities in police homicides, with the Act's conspicuous failure to mention race. In Part II, I analyze the Act through the lens of Derrick Bell's interest-convergence theory. After introducing the theory in Part II.A, I argue in Part II.B that the Act's race-neutral language and failure to define "necessary" leaves intact the law's "neutral" guiding assumption of racial subordination. In this way, the Act enables the police and courts to import their own racialized understandings of threat when determining whether a particular encounter made the use of deadly force "necessary in defense of human life." In part II.C, I discuss the findings from several social science studies to demonstrate the extent to which Black men are perceived as inherently dangerous. In this context, when police, judges, prosecutors, and juries are not required to interrogate their own racial biases, the killing of Black men will always be deemed "necessary."

I conclude with Part III, which proposes an alternative, race-conscious version of the California Act to Save Lives. The Movement for Black Lives has

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39. *See* PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN ch. 1 (2018) (ebook).

40. *See* TA-NEHISI COATES, *supra* note 1, at 9.

41. Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522–23 (1980) (explaining that the "neutral principle" of law governing the Supreme Court's decision in *Brown v. Board of Education* and other civil rights decisions is the "principle of 'interest convergence.'" This principle "provides: The interest of [B]lacks in achieving racial equality will be accommodated only when it converges with the interests of [W]hites.").

demonstrated how necessary it is to insist that Black lives, specifically, matter in a world where a race-neutral claim that "all lives matter"[42] only maintains the status quo that devalues the lives of Black people. Similarly, without an explicit recognition of both the value of Black lives and the racism that consistently undermines that value, the California Act to Save Lives is unlikely to save Black lives in particular. Race-conscious legislation could have offered a framework for actively interrogating racial assumptions about criminality and threat. Such a law would also create the opportunity to affirm the value of Black and Latinx lives within our written code, conferring a sense of equal dignity and worth that is long overdue.

I.
THE CALIFORNIA ACT TO SAVE *BLACK* LIVES?

A. Constitutional Backdrop: The U.S. Supreme Court's Fourth Amendment Jurisprudence

The federal standard for justifiable police homicide, derived from the Fourth Amendment of the U.S. Constitution, provides the baseline protections against police use of force with which all states must comply. While states are free to provide additional restraints on police through legislation, the Fourth Amendment requires states to at least ensure that police use of force is reasonable under the totality of the circumstances of the police-civilian encounter.[43] Notably, however, states do not need to *criminalize* all police behavior that is unconstitutional.[44] Thus, state penal codes defining police homicide may provide

42. *See Anti-racism: What Does the Phrase 'Black Lives Matter' Mean?*, BBC (July 3, 2020), https://www.bbc.co.uk/newsround/53149076 [https://perma.cc/84XE-8HCB] ("Some people have been using the phrase 'All Lives Matter' in response to the Black Lives Matter movement. On the surface, it seems to suggest that people should be united. However, it's still viewed by many campaigners as a problematic statement.").

43. *See* Tennessee v. Garner, 471 U.S. 1, 8–9 (1985).

44. *See* Chad Flanders & Joseph Welling, *Police Use of Deadly Force: State Statutes 30 Years After* Garner, 35 ST. LOUIS U. PUB. L. REV. 109, 126 (2015) ("States have to obey the Constitution, but they do not have to criminalize violations of the Constitution."). Many racial justice advocates have pushed for the prosecution of police officers who have killed Black civilians as an important way for governments to signal public condemnation of these officer-involved homicides and to affirm the civil rights of Black civilians. *See, e.g.*, *LDF Statement on the Department of Justice Declining to Prosecute NYPD Police Officer for Unlawful Choking Death of Eric Garner*, NAACP LEGAL DEF. FUND (July 16, 2019), https://www.naacpldf.org/press-release/ldf-statement-on-the-department-of-justice-declining-to-prosecute-nypd-police-officer-for-unlawful-choking-death-of-eric-garner/ [https://perma.cc/43W4-P9J9] ("This decision [not to prosecute Daniel Pantaleo] . . . confirms for so many in communities around this country that the lives of ordinary African Americans do not matter when they are confronted by the police . . . . This decision affirms that we cannot count on this Justice Department to rigorously enforce the civil rights of African Americans."); Bill Hutchinson, *Former Florida Officer Nouman Raja Sentenced to 25 Years for Killing Corey Jones*, ABC NEWS (Apr. 25, 2019), https://abcnews.go.com/US/florida-officer-nouman-raja-sentenced-25-years-killing/story?id=62626285 [https://perma.cc/H57J-YCWM] ("There is hope for America because a jury . . . looked at all the evidence and they said a [B]lack man killed by the police can get equal justice, can get fair administration of the law."). Advocates also argue that the failure to rigorously prosecute

individual police officers shelter from criminal liability, even when their actions give rise to actionable civil claims of excessive force or wrongful death under 42 U.S.C. § 1983.[45] Nevertheless, the legal standards and interpretive methods established by the Supreme Court through its Fourth Amendment jurisprudence deeply influence the application of state penal codes concerning police homicides.[46] Thus, to understand the intended impact of the California Act to Save Lives, it is useful to study it within the broader context of federal police use-of-force law. Accordingly, this Section details the federal standard for police use of force as determined by the Supreme Court's Fourth Amendment

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and sentence police officers who have killed Black civilians reveals the anti-Black bias of the criminal legal system. *See, e.g.*, Letter from the Roderick & Solange MacArthur Just. Ctr., Nw. Pritzker Sch. of L., to Hon. Kwame Raoul, Att'y Gen., State of Ill. (Jan. 29, 2019), https://www.macarthurjustice.org/wp-content/uploads/2019/01/Letter-to-Raoul-McMahon-.pdf [https://perma.cc/9VKZ-794L] ("Make no mistake. If the tables were turned and Laquan McDonald were to have been convicted of multiple counts of armed violence against a Chicago Police officer, the court would have found no difficulty in imposing consecutive sentences that would have sent him to the penitentiary for decades . . . . We object in the strongest terms to an unjustifiable, illegal departure from the requirements of law that enables leniency—merely because the defendant is a White police officer."). At the same time, there is a growing body of abolitionist legal scholarship critiquing these calls for police prosecution as inconsistent with the anti-carceral values many of these racial justice advocates otherwise hold. *See, e.g.*, Kate Levine, *Police Prosecutions and Punitive Instincts*, 98 WASH. U. L. REV. (forthcoming 2021) (manuscript at 6) ("[T]he reliance on the criminal legal system, by those who would otherwise see it radically reduced, is a troubling reminder of our societal addiction to criminal legal solutions and of how difficult it will be to dismantle this deeply unjust system."). Abolitionist scholars have also warned that the focus on prosecuting individual officers risks concealing the systemic character of police violence. *See* Allegra M. McLeod, *Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613, 1639 (2019) ("[C]riminal prosecutions of state violence—such as murders perpetrated by police—focus on individual culpability of particular officers, leaving unchanged the institutional and cultural dynamics responsible for the pervasive violence of policing and its concentration on particular bodies and in specific disenfranchised communities."). While my own abolitionist values render me skeptical of the utility of police prosecutions, I nevertheless view them—within the confines of our current political reality—as a powerful way to signal that police officers cannot kill Black and Latinx civilians with impunity.

45. *See* Flanders & Welling, *supra* note 44, at 126; *see also* Sam Stanton & Molly Sullivan, *Sacramento Agrees to Pay $2.4 Million to Stephon Clark's Sons, Court Filings Say*, SACRAMENTO BEE (Sept. 5, 2019), https://www.sacbee.com/news/local/article234768167.html [https://perma.cc/2VNY-FTU5] (describing the settlement between the city of Sacramento and the children of Stephon Clark stemming from the Clarks' federal civil rights suit and reporting on the Sacramento district attorney's decision not to file charges against the responsible officers). Assemblymember Kevin McCarty, the co-author of AB 392, testified about the problems this phenomenon raises during the Assembly Public Safety Committee hearing on April 9th, 2019: "Down in L.A., in 2015, an L.A. police officer shot and killed an unarmed homeless man, Brandon Glen. Glen was on his stomach, pushing himself up, when an officer stepped back and shot him twice in the back, killing him. After the shooting . . . the [L.A.] police chief, Mr. Beck, in a rare instance, said that the officer needs to be prosecuted . . . [but] [t]he L.A. district attorney . . . decided not to file charges. . . . Even though there weren't [charges filed] in the Glen case, the City of L.A. paid 4 million dollars to the family. . . . In the last 15 years, the City of L.A. had to borrow 100 million dollars, from Wall Street, to pay out wrongful death settlements." Kevin McCarty, Cal. Assemb., Remarks at the Assembly Public Safety Committee Meeting, at 38:54 (Apr. 9, 2019), https://www.assembly.ca.gov/media/assembly-public-safety-part-1-20190409/video [https://perma.cc/FK72-DY66].

46. *See generally* Flanders & Welling, *supra* note 44 (examining how state use-of-force laws changed after the Court decided *Tennessee v. Garner*).

jurisprudence, as well as scholarly critiques of this standard, before moving on to discuss the new standard for justifiable police homicide established by the California Act to Save Lives.

The reasonableness standard for police use of force stems from the language of the Fourth Amendment itself, and has been elaborated upon in various Supreme Court cases. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[47] Drawing directly from this language, the Supreme Court has maintained that the "touchstone of the Fourth Amendment is reasonableness."[48] According to the Court, the reasonableness of a search or seizure is determined by balancing the "nature and quality of the intrusion on the individual's . . . interests against the importance of the governmental interests alleged to justify the intrusion."[49]

In its landmark case on police use of lethal force, *Tennessee v. Garner*, the Supreme Court held that police "use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment."[50] In that case, the Court considered a facial challenge to a Tennessee statute that, following the common law tradition, allowed police officers to use deadly force to effect an arrest, regardless of the perceived threat posed by the fleeing suspect.[51] Acting under the authority of that statute, Memphis Police Officer Elton Hymon used deadly force to stop Edward Garner from fleeing the scene of a suspected burglary, even though Hymon was "reasonably sure" that Edward was unarmed.[52] Edward, a Black boy in the eighth grade, was in fact unarmed when Officer Hymon shot him in the back of the head.[53] The Court applied the Fourth Amendment's balancing test to this case, reasoning that the "intrusiveness of a seizure by means of deadly force is unmatched" and that the government interests in effectively making arrests could not justify the use of lethal force in all circumstances.[54] The Court emphatically held, "The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape."[55] In so holding, the Court determined that the Fourth Amendment codified greater protections for civilians than the common law tradition did. The Court stopped short of declaring the Tennessee statute facially unconstitutional.[56] Nevertheless, it maintained that the statute was "invalid insofar as it purported to give Hymon

47. U.S. CONST. amend. IV.
48. Florida v. Jimeno, 500 U.S. 248, 250 (1991).
49. Tennessee v. Garner, 471 U.S. 1, 8 (1985) (quoting United States v. Place, 462 U.S. 696, 703 (1983)).
50. *Garner*, 471 U.S. at 7.
51. *Id.* at 4–5.
52. *Id.* at 3.
53. *Id.* at 4.
54. *Id.* at 9–10.
55. *Id.* at 11.
56. *Id.* at 22.

the authority"[57] to kill a fleeing burglary suspect absent any probable cause that the suspect posed a physical danger.[58]

Although *Garner* appeared to establish a set of circumstances in which police use of lethal force is clearly unreasonable, the cases following *Garner* muddied its clarity. In *Graham v. Connor*, decided only four years after *Garner*, the Supreme Court confirmed that all claims of excessive force by the police should be brought under the Fourth Amendment and analyzed according to its "reasonableness" test.[59] This reasonableness inquiry, the Court instructed, defies bright-line rules.[60] Rather, courts must pay "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[61] In language that has since been referenced in many judicial opinions,[62] police department manuals,[63] and state statutes governing police homicide,[64] the Court continued:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight . . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.[65]

This flexible, case-by-case determination of reasonableness is notable not only for its vagueness but also for its immense deference to the "split-second judgments" of police officers in determining the meaning of "reasonable" use of force.[66] Rather than establishing an *ex ante* definition of "reasonable" use of

57. *Id.*
58. *Id.* at 21.
59. 490 U.S. 386, 388 (1989).
60. *Id.* at 396.
61. *Id.*
62. *See, e.g.*, Seth W. Stoughton, *Policing Facts*, 88 TUL. L. REV. 847, 865 (2014) ("Were some future anthropologists to turn to the federal reporters to form an opinion about the environment in which law enforcement officers use force, they would have little choice but to conclude that those 'circumstances [were] tense, uncertain, and rapidly evolving' . . . . Since the Supreme Court first introduced that description in 1989, federal district and circuit courts have repeated it on more than 2300 occasions. . . . It is, by any measure, the accepted depiction of the environment in which police officers use force.").
63. *See, e.g.*, Osagie K. Obasogie & Zachary Newman, *The Endogenous Fourth Amendment: An Empirical Assessment of How Police Understandings of Excessive Force Become Constitutional Law*, 104 CORNELL L. REV. 1281, 1287 (2019) ("[V]irtually every use-of-force policy contains the language of 'reasonableness' reiterated throughout court decisions since *Graham v. Connor* in 1989 without much discussion of what this construct means as an on-the-ground, tactical matter.").
64. *See* Flanders & Welling, *supra* note 44, at 121 n.128.
65. *Graham*, 490 U.S. at 396–97.
66. *Id.* at 397.

force, the Fourth Amendment, according to the *Graham* Court, relies on the decision-making of police officers to give the term meaning.[67]

The Supreme Court deepened its commitment to this opaque standard in 2007, in *Scott v. Harris*.[68] In that case, plaintiff Victor Harris argued that *Garner* "prescribes certain preconditions that must be met" before an officer can use deadly force.[69] But the Court in *Scott* insisted that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the Fourth Amendment's 'reasonableness' test" on its particular facts.[70] Those facts were not analogous to Harris's case, where a police officer used deadly force to end a high-speed car chase.[71] The Court added, "Although [Harris's] attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end, we must still slosh our way through the factbound morass of 'reasonableness.'"[72]

Thus, while *Garner* is still good law, establishing that police cannot use deadly force against fleeing suspects known to be unarmed and non-dangerous, the opaque standard of *Graham* and its deference to police officers in determining the perceived dangerousness of the suspect has defined the Fourth Amendment's excessive force jurisprudence for the past three decades. In fact, this was the very standard that the United States Department of Justice relied upon to determine that Darren Wilson, the Ferguson police officer who shot and killed Michael Brown, acted reasonably under the circumstances. Invoking the language from *Graham*, the Department of Justice concluded, "Even if, with hindsight, Wilson could have done something other than shoot Brown, the Fourth Amendment does not second-guess a law enforcement officer's decision on how to respond to an advancing threat. The law gives great deference to officers for their necessarily split-second judgments."[73]

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67. *See* Obasogie & Newman, *supra* note 63, at 1288 ("Instead of an independent judiciary determining the meaning of the Fourth Amendment and impressing it upon local police departments, local departments create meaning and symbolic adherence to ambiguous constitutional norms by developing use-of-force policies that reflect their own institutional and administrative preferences. In turn, federal courts defer to these policies as a reasonable iteration of police force.").

68. 550 U.S. 372, 382–83 (2007).

69. *Id.* at 382. The three preconditions Harris suggested were, "(1) The suspect must have posed an immediate threat of serious physical harm to the officer or others; (2) deadly force must have been necessary to prevent escape; and (3) where feasible, the officer must have given the suspect some warning." *Id.*

70. *Id.*

71. *Id.* at 383.

72. *Id.*

73. U.S. DEP'T OF JUST., DEPARTMENT OF JUSTICE REPORT REGARDING THE CRIMINAL INVESTIGATION INTO THE SHOOTING DEATH OF MICHAEL BROWN BY FERGUSON, MISSOURI POLICE OFFICER DARREN WILSON 85 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/doj_report_on_shooting_of_michael_brown_1.pdf [https://perma.cc/RHH8-2BUJ].

This case law has sparked an enormous amount of scholarship critiquing the Fourth Amendment's inability to hold police officers accountable for unnecessary use of force. As Professors Osagie Obasogie and Zachary Newman have explained, although "Fourth Amendment jurisprudence on police use of force can be thought of by the Court and many legal scholars as *restricting* police . . . , as an empirical matter, communities (especially those of color) are experiencing continued if not increasing instances of police violence."[74] They argue that the Supreme Court's reliance on police officers as the determiners of "reasonable" use of force is an abdication of the interpretive role of the federal courts, rendering the Fourth Amendment's "reasonableness" standard ineffective as an independent check on police.[75] They further explain that under *Graham*'s precedent, the constitutional standard is established through a process of "legal endogeneity,"[76] whereby police departments—the very entities the Fourth Amendment intends to regulate—define the meaning of "reasonableness" according to their internal policy preferences.[77] This endogenous approach to determining the meaning of "reasonableness" leads to mere "symbolic" regulation of police use of force.[78] The language of the Fourth Amendment appears to impose restraints on police behavior, but its "notoriously opaque"[79] standard does not provide any substantive, exogenous guidelines with which police officers must comply.[80] Professors Brandon Garrett and Seth Stoughton have argued that the problems with this vague standard go beyond its reliance on law enforcement to define "reasonableness" according to internal policies.[81] They explain that the Fourth Amendment's "reasonableness" standard actually sets a lower floor for justified use of force than the tactical training manuals of many police departments.[82]

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74. Obasogie & Newman, *supra* note 63, at 1285; *see also* Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 130 (2017) ("African Americans often experience the Fourth Amendment as a system of surveillance, social control, and violence, not as a constitutional boundary that protects them from unreasonable searches and seizures.").

75. Obasogie & Newman, *supra* note 63, at 1287–89.

76. *Id.* at 1315 ("The theory [as developed by Professor Lauren Edelman] (1) 'posits that organizations respond to ambiguous law by creating a variety of policies and programs designed to symbolize attention to law'; (2) organizations 'equate the mere presence of these structures with legal compliance'; and (3) legal and organizational actors fail to 'scrutinize their effectiveness' once the structures are in place.").

77. *Id.* at 1318–19.

78. *Id.* at 1320.

79. *Id.* at 1319.

80. *Id.* at 1320–21.

81. *See generally* Brandon Garrett & Seth Stoughton, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 222 (2017) (arguing for a Fourth Amendment standard "grounded in today's still-advancing [police] tactics research").

82. *See id.* at 234–36 (describing how the Court in *Scott v. Harris* failed to consider law enforcement policies dictating that the high-risk maneuver employed by the officer could only be used under certain conditions, which were not present in that case).

Critical race scholars offer yet another critique of the Fourth Amendment standard, focusing on the standard's complete silence on the role that race plays in police-civilian encounters. For example, in *(E)racing the Fourth Amendment*, Devon Carbado analyzed the Court's failure to address race in its test for determining whether or not police investigative activity amounts to a seizure under the Fourth Amendment.[83] Carbado explained that the Court's colorblind test for a Fourth Amendment seizure—whether "a reasonable person would have believed that he was not free to leave"[84]—obscures the fact that an individual's racial identity mediates both the ways the individual interprets police authority and the police officer's perception of the individual's suspiciousness.[85] Because "there is no reasonable person who is racially unsituated,"[86] the Court's decision to ignore race does not make its opinions "raceless or even . . . race neutral."[87] Rather, as Carbado explained, "[t]o avoid explicitly invoking race is to invoke it in a particular way. Race avoidance conveys the idea that race does not matter, and masks the ways in which it actually does."[88] People of color are more vulnerable to police stops than White people.[89] By failing to consider this, the

83. *See* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 974–1004 (2002).

84. United States v. Mendenhall, 446 U.S. 544, 554 (1980).

85. Carbado, *supra* note 83, at 960–62 (describing a personal experience with police officers, after the police held him and his brothers at gunpoint and searched the apartment for guns in response to a neighbor's mistaken 9-1-1 call); *id.* ("Our privacy had been invaded, we experienced a loss of dignity, and our [B]lackness had been established—once more—as a crime of identity. But that was our law-enforcement cross to bear. In other words, the police were simply doing their job: acting on racial intelligence. And we were simply shouldering our racial burden: disconfirming the assumption that we were criminals."); *see also id.* at 966 ("The burden [of the racialized nature of suspicion] includes, but is not limited to, internalized racial obedience toward, and fear of, the police. . . . [P]eople of color are socialized into engaging in particular kinds of performances *for* the police.").

86. *Id.* at 1002.

87. *Id.*

88. *Id.*

89. *Id.*; *see also* Devon W. Carbado & Patrick Rock, *What Exposes African Americans to Police Violence?*, 51 HARV. C.R.-C.L. L. REV. 159, 163–64 (2016) ("[The seven converging variables that render Black people particularly] vulnerable to repeated police interactions: (1) Proactive policing, including 'broken windows' policing . . . ; (2) Mass criminalization (this criminalizes relatively non-serious activities and facilitates the diffusion of criminal justice actors and practices into other dimensions of the welfare state, including schools and public benefits offices); (3) Racial segregation (this both concentrates African Americans in 'high crime areas' in which entire communities are criminally suspect and makes African Americans 'out of place' and thus suspicious when they are not in predominantly [B]lack areas); (4) Racial stereotypes of African Americans as criminally inclined (these render African Americans hyper-visible to the police as presumptively persons of interest); (5) Group vulnerability (this increases the likelihood that the police will target African Americans, particularly those who are marginalized both inside and outside of the [B]lack community (for example, LGBTQ people), because vulnerable groups are less likely to report instances of police abuse and less likely to be believed or to engender public sympathy when they do); (6) Revenue generation (this encourages the police to arrest or issue citations to members of vulnerable groups as a mechanism to raise revenue for the city or the police department or to effectuate promotions and pay increases); and (7) Fourth Amendment doctrine (this area of law is supposed to protect African Americans from unreasonable searches and seizures but instead enables ongoing contact between African Americans and the police)").

Court's seizure analysis simply privileges the experience of White people as the presumptively neutral standard against which to measure police activity.[90]

The colorblind standard for determining whether an investigative stop amounts to a seizure contributes to the immense racial disparities in police homicides. This standard elides the role that racism plays in police encounters and thereby ratifies racially biased police conduct. A colorblind seizure analysis enables courts to determine that a number of police encounters directed at people of color are not, in fact, "seizure[s]" that trigger the Fourth Amendment's protections.[91] In addition, although the Fourth Amendment requires officers to articulate a basis for reasonable suspicion before effectuating a seizure[92]—a standard meant to protect against baseless police intrusion—applying this standard without attention to the race of the "suspect" and the racial biases of the officer allows racialized perceptions of criminality to constitute the basis for suspicion. This legal analysis thus both constructs people of color as presumptively suspicious and reifies this racialized perception of suspicion through case law authorizing the consistent policing of Black and Latinx people without judicial oversight. Carbado has explained that this Fourth Amendment jurisprudence "permits police officers to force interactions with African Americans with little or no basis. This 'front-end' police contact—which Fourth Amendment law enables—is often the predicate to 'back-end' police violence—which Fourth Amendment law should help to prevent."[93] However, the highly deferential standard for analyzing police use of force, as determined by *Graham*, often renders the Fourth Amendment incapable of preventing—or providing retroactive accountability for—this "'back-end' police violence."[94]

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90. Carbado, *supra* note 83, at 1002.

91. *See* Florida v. Bostick, 501 U.S. 429, 434 (1991) ("[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to 'disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required.") (internal citation omitted). The *Bostick* Court declined to decide whether Bostick, a Black man, was "seized" when he was approached by police officers for questioning "in the cramped confines of a bus," remanding the case to the lower court to determine whether a de-raced "reasonable person" under these circumstances would have felt "free to decline the officers' requests [for questioning] or otherwise terminate the encounter." *Id.* at 435–37; *see also* Immigr. & Naturalization Serv. v. Delgado, 466 U.S. 210, 221 (finding no "seizure" when agents from the Immigration and Naturalization Service entered a factory and questioned Latinx workers about their citizenship). The *Delgado* Court so held despite the fact that "several agents positioned themselves near the buildings' exits, while other agents dispersed throughout the factory to question most . . . employees at their work stations. The agents displayed badges, carried walkie-talkies, and were armed." *Id.* at 212.

92. *See* Terry v. Ohio, 392 U.S. 1, 21 (1968) (establishing that police officers may stop civilians for investigative purposes if they can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion").

93. Carbado, *supra* note 74, at 127; *see also* Butler, *supra* note 37, at 1424 ("It is possible for police to selectively invoke their powers against African-American residents, and, at the same time, act consistently with the law."). Butler urges that Fourth Amendment jurisprudence, which has determined that so many police-civilian encounters do not actually trigger the Constitution's protections, makes it so that "[t]he most far-reaching racial subordination stems not from illegal police misconduct, but rather from legal police conduct." *Id.* at 1425.

94. Carbado, *supra* note 74, at 127.

Recognizing the inability of the Fourth Amendment to curb police violence against Black and Latinx civilians, California lawmakers sought to introduce a stricter law governing justifiable use of police force at the state level.[95] With this background in mind, I now turn to a discussion of the California Act to Save Lives. In the Sections that follow, I demonstrate that though the "necessary" standard of the California Act to Save Lives is indeed stricter than the Fourth Amendment's "reasonable" one, the California law nevertheless replicates the Fourth Amendment's colorblindness and deference to law enforcement—qualities that will likely render it no more effective than the Fourth Amendment at protecting people of color from police use of force.

B. The California Act to Save Lives

The California Act to Save Lives was introduced to provide greater police accountability than the Fourth Amendment floor set by *Graham*. The legislation modified section 196 of the California Penal Code, which establishes an affirmative defense for police officers charged with homicide, and section 835a of the California Penal Code, which governs the standards for police use of force during an arrest. Before this Act, section 196 enabled police officers to use lethal force when making arrests and capturing suspects without considering the severity of the felony committed or the level of danger the suspect posed.[96] Thus, section 196, which had not been altered since it was enacted in 1872,[97] codified the same common law language as the Tennessee statute at issue in *Garner*.[98] In this way, California's standard for justifiable police homicide granted wider latitude to police officers than that authorized by the federal standard under the Fourth Amendment, by affording police officers a defense to criminal charges for behavior that would be deemed "unreasonable" under *Garner* in a civil suit for damages.[99] Similarly, section 835a allowed police officers to use any quantum of force to "effect [an] arrest, to prevent escape or to overcome resistance" so long as that force was "reasonable."[100]

95. *See infra* notes 120–26 and accompanying text.

96. CAL. PENAL CODE § 196 (West 2019). *But see* Tennessee v. Garner, 471 U.S. 1, 16 n.15 (1985) (noting that California courts had narrowed this broad language to apply only to serious felonies).

97. DAVID BILLINGSLEY, CAL. ASSEMB. COMM. ON PUB. SAFETY, AB 392 BILL ANALYSIS 5 (2019), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB392 (click "04/08/19- Assembly Public Safety" hyperlink) [https://perma.cc/34RF-WS69].

98. *See Garner*, 471 U.S. at 12 ("[T]he common-law rule . . . allowed the use of whatever force was necessary to effect the arrest of a fleeing felon").

99. *Compare Garner*, 471 U.S. at 11 ("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."), *with* CAL. PENAL CODE § 196 (West 2019) ("Homicide is justifiable when committed by public officers . . . [w]hen 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.").

100. CAL. PENAL CODE § 835a (West 2019).

The new legal standard for justifiable police homicide established by the California Act to Save Lives is more demanding than the standard set by the Supreme Court's Fourth Amendment jurisprudence. While the Fourth Amendment standard requires police use of deadly force to be "reasonable," California's new statutory scheme only allows a police officer to use the section 196 affirmative defense if their deadly force was "necessary in defense of human life."[101] The new law, which took effect on January 1, 2020, explains that a police officer can use lethal force only when the officer

> reasonably believes . . . 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.[102]

Subsection (B) marks a significant departure from California's old "fleeing felon" rule. Under this new law, lethal force against a fleeing felon is only justifiable when the felony committed was seriously violent *and* the fleeing suspect appears to pose a deadly threat. It goes beyond the constitutional standard in the sense that it requires officers to reasonably believe that lethal force is "necessary"—rather than merely "reasonable"—under the totality of the circumstances. Moreover, the Act defines "imminent" narrowly, stating that an imminent threat "is not merely a fear of future harm."[103] Rather, a threat 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."[104]

These features earned the California Act to Save Lives a reputation as one of the nation's "toughest laws" on police use of force.[105] Its heightened standard may very well lead to a decrease in police use of deadly force. For example, the law's narrow definition of "imminent threat" to life is expected to reduce the use of deadly force against civilians wielding knives because, as one of the Act's proponents explained, "[k]nives, in general, do not kill police officers. They can still pose a threat, but they don't pose the kind of threat that a firearm poses."[106]

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101. CAL. PENAL CODE § 835a(a)(2) (West 2020).

102. CAL. PENAL CODE § 835a(c)(1) (West 2020). See Appendix B, *infra*, for the statute in its entirety.

103. CAL. PENAL CODE § 835a(e)(2) (West 2020).

104. *Id.*

105. Hannah Wiley, *California Police Shooting Law Propelled by Stephon Clark's Death Wins Newsom's Signature*, SACRAMENTO BEE (Aug. 19, 2019), https://www.sacbee.com/news/politics-government/capitol-alert/article233682147.html [https://perma.cc/7CJJ-QZNM].

106. Laurel Rosenhall, Force of Law, *Split*, CALMATTERS, at 29:23–29:35 (May 4, 2019), https://calmatters.org/multimedia/podcasts/2019/05/force-of-law-podcast-episode-two-split/ [https://perma.cc/8GD5-M3L9] (interviewing a representative from the ACLU).

Despite these important changes to the California standard for justifiable police homicide, there are several aspects of the Act that threaten to undermine its efficacy in curbing police use of lethal force. When AB 392 was first introduced, it contained a definition of "necessary," a mandate that police officers employ de-escalation tactics before resorting to lethal force, and an exception to the availability of the justifiable homicide defense for police officers whose criminal negligence contributed to the need for lethal force. The law enforcement lobby found these three elements of the original bill intolerable and maintained its staunch opposition to AB 392 until May 2019, when the bill was amended to remove those elements. The criminal negligence exception to the affirmative defense was deleted in its entirety,[107] as was the definition of "necessary," which would have allowed the use of deadly force only when "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."[108]

107. *Compare* Assemb. 392, 2019–2020 Leg., Reg. Sess. (as introduced in Cal. Assemb., February 6, 2019) ("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 . . . or if the necessity for the use of deadly force was created by the peace officer's criminal negligence."), *with* Assemb. 392, 2019–2020 Leg., Reg. Sess. (Cal. 2019), https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201920200AB392&cversion=20190AB39299INT [https://perma.cc/6DHC-XEY8].

108. Assemb. 392, 2019–2020 Leg., Reg. Sess. (as introduced in Cal. Assemb., February 6, 2019) (proposing amendments to section 196 of the California Penal Code to add subsection (b) and section 835a of the California Penal Code to add subsection (e)(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"). Much of the police lobby's opposition to AB 392's definition of "necessary" concerned the phrase "no reasonable alternative," which police claimed created an "impossible standard" requiring "superhuman decision making." Hannah Wiley, *'Impossible Standard?' Police Oppose It, but California Use-of-Force Bill Advances*, SACRAMENTO BEE (Apr. 9, 2019), https://www.sacbee.com/news/politics-government/capitol-alert/article229021124.html [https://perma.cc/KLH6-5N5L]; *see also PPOA Public Safety Legislative Update: AB392*, L.A. CNTY. PRO. PEACE OFFICERS ASS'N (June 3, 2019), https://ppoa.com/2019/06/ppoa-public-safety-legislative-update-ab392/ [https://perma.cc/TQ3A-5QCE] (indicating that AB 392's definition of "necessary" was one of the bill's "features which were objectionable to law enforcement"). Interestingly, the California legislature tried and failed once more to add this definition of "necessary" to section 835a of the Penal Code. In the 2019–2020 legislative session, Assemblymember Chris Holden introduced AB 1022, which proposed to "make a peace officer who is present and observes another peace officer using excessive force, and fails to intercede . . . an accessory in any crime committed by the other officer during the use of excessive force." Peace Officers: Use of Force, Assemb. 1022, 2019–2020 Leg., Reg. Sess. (Cal. 2020), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200AB1022 [https://perma.cc/BW3T-7LZU]. The bill also proposed to amend section 835a of the California Penal Code to include the very definition of "necessary" proposed and rejected in AB 392. *See* Melody Gutierrez, *Plan to Strengthen California's Police Use of Force Rules Blocked in Sacramento*, L.A. TIMES (Aug. 20, 2020), https://www.latimes.com/california/story/2020-08-20/california-police-use-of-force-rules-legislation-blocked-george-floyd [https://perma.cc/TQN7-T5KE]. The proposed definition of "necessary" was struck from the bill in July. *See* Peace Officers: Use of Force, Assemb. 1022, 2019–2020 Leg., Reg. Sess. (as reported by Cal. S., July 27, 2020),

AB 392's language requiring police to use de-escalation tactics was preserved, though diluted. As introduced, the bill stated that a police officer would "not be deemed an aggressor" or be required to retreat when employing reasonable force to overcome resistance but added:

> 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.[109]

As enacted, this section of the California Act to Save Lives does not retain the mandatory language. Rather, it simply states that a police officer need not desist or "retreat" in the face of resistance, adding, "For the purposes of this subdivision, 'retreat' does not mean tactical repositioning or other deescalation tactics."[110] In other words, though the law clarifies that the use of sound tactics should not be conflated with retreat, it does not explicitly *require* police officers to employ these tactics to receive the benefit of the section 196 affirmative defense.

Most notably, the Act left intact the Fourth Amendment's dependence on police officers to determine the substance of the relevant legal standard. In language that closely mirrors *Graham*'s deference to the "split-second judgments"[111] of officers, the California Act to Save Lives states:

> [T]he 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 . . . the totality of the circumstances shall account for occasions when officers may be forced to make quick judgments about using force.[112]

Just as the Fourth Amendment's deference to police officers renders its "reasonableness" standard an ineffective external constraint on police discretion,[113] AB 392's stricter "necessary" standard is unlikely to meaningfully curtail police use of lethal force if police officers themselves are the ones determining its meaning. Without an *ex ante* definition of situations that necessitate the use of the lethal force, law enforcement's definition will control in later litigation.

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https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201920200AB1022&cversion=20190AB102292AMD [https://perma.cc/78FE-GZLM]. The remainder of the bill died in the Senate Appropriations Committee in August. *See* Gutierrez, *supra*. This second failure demonstrates the enormity of the resistance to external constraints on law enforcement.

109. Assemb. 392, 2019–2020 Leg., Reg. Sess. (as introduced in Cal. Assemb., February 6, 2019) (amending section 835a of the California Penal Code to add subsection (c)).

110. CAL. PEN. CODE § 835a(d) (West 2020).

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

112. CAL. PENAL CODE § 835a(a)(4) (West 2020).

113. *See supra* notes 74–82 and accompanying text.

California police officers recognized this, and that is ultimately what led them to withdraw their opposition to AB 392. The elimination of the bill's definition of "necessary," coupled with the bill's deference to the judgment of the "reasonable officer," led officers to believe that the bill did not set a higher standard than the one set by the Supreme Court in *Graham v. Connor*.[114] In fact, Ed Obayashi, deputy sheriff and legal advisor for the Plumas County Sheriff's Office, claimed, "Stephon Clark was the catalyst for this bill. If we had a Stephon Clark incident, and AB 392 was law today, no prosecutor would bring charges against the officers."[115] A representative from the ACLU of Northern California, one of the primary sponsors of AB 392, confirmed this sentiment:

> If someone is pointing something that looks like a firearm at an officer, this bill is not [going to] change whether the officer can use deadly force. And similarly, it's not [going to] prevent every death of someone who's unarmed, because there are situations where they're acting in such a way that the officer really feels like there is a threat to their life, and maybe they think they're armed and they're not.[116]

Yet these are precisely the cases that require the greatest external constraint on an officer's decision to employ lethal force. Cases where the subjective determinations of police officers have the greatest weight in evaluating whether their use of force was justified—cases in which there is no objective evidence that a particular civilian posed a lethal threat, such as a loaded and aimed firearm[117]—are also the cases where officers are most likely to rely on biases,

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114. Laurel Rosenhall, Force of Law, *The Line*, CALMATTERS, at 07:56–08:35 (July 20, 2019), https://calmatters.org/multimedia/2019/07/force-of-law-episode-four-the-line/ [https://perma.cc/BMN8-BKKV].

115. *Id.* at 08:49–09:04.

116. Rosenhall, *supra* note 106, at 29:46– 30:07.

117. I choose my words carefully here. I do not mean to imply that a police officer is necessarily justified in concluding that an individual posed an imminent lethal threat simply because they possessed a firearm. The role of racial bias in officer-involved shootings of armed civilians is beyond the scope of this Note, as there is insufficient data to properly assess the role racial bias might play in that context. However, the data demonstrate racial disparities in officer-involved shootings of armed civilians in addition to unarmed civilians, and anecdotal evidence suggests that racial bias may play a role in creating those disparities. For example, in July 2016, Philando Castile, a Black man who was pulled over for a broken taillight, was shot and killed by a Minnesota police officer after he calmly alerted the officer that he had a gun in his possession, which he was licensed to carry. *See* Mark Berman, *What the Police Officer Who Shot Philando Castile Said About the Shooting*, WASH. POST (June 21, 2017) https://www.washingtonpost.com/news/post-nation/wp/2017/06/21/what-the-police-officer-who-shot-philando-castile-said-about-the-shooting/ [https://perma.cc/5A3L-AAMG]. By comparison, Dylann Roof, the White twenty-one-year-old who killed nine people at a Black church in South Carolina in June 2015, was arrested without incident despite being armed. The police officers even bought him lunch from Burger King on their way to the station. *See* Mike Pearl, *Why Are Some People Saying Dylann Roof Was Given Special Treatment When He Was Arrested?*, VICE (June 23, 2015), https://www.vice.com/en_us/article/4wbnzd/why-are-some-people-saying-dylann-roof-was-given-special-treatment-when-he-was-arrested-623 [https://perma.cc/G4VS-GYDX]. Similarly, in February 2018, nineteen-year-old Nikolas Cruz was apprehended without incident after killing seventeen students at his former high school with a semiautomatic rifle. *See* Nicholas Nehamas, *The Parkland School Shooter Started Throwing Up and Hyperventilating After Being Arrested*, MIA. HERALD (Apr. 19,

including conscious or unconscious racism, to determine the level of threat posed by a subject. As I discuss in greater detail in Part II.C, racial disparities are greater among unarmed victims of police homicide than victims of police homicide in general, suggesting that the more subjective the officer's determination of an individual's dangerousness, the greater the role that racism will play in that determination.[118] Without attention to the racial biases that inform a police officer's perception of threat, courts' deference to that perception in determining whether an officer receives the benefit of AB 392's affirmative defense ensures that people of color will remain unprotected from racist policing. To make the difference it intended for people like Stephon Clark, AB 392 should have addressed racial bias outright.

C. The Lost Promise of the California Act to Save Lives

From the very beginning, the proponents of AB 392—and its predecessor, AB 931—insisted on the need for increased police accountability as a matter of racial justice. In support of her proposed bill, Assemblymember Shirley Weber testified before the Assembly Committee on Public Safety, "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."[119] Crucially, Assemblymember Weber added, "These tragedies disproportionately impact communities of color as California police kill unarmed young [B]lack and Latino men at significantly higher rates than they do [W]hite men."[120]

Notably, Assemblymember Weber and other proponents of AB 392 did not simply cite statistics of racial disparities in police homicides to demonstrate the need for the new law but also linked these disparities to the broader system of racial subordination in the United States. While advocating for the bill in the State Assembly, Weber regularly referenced the nation's long legacy of anti-Black racism, comparing California's legal standard that justified so many police homicides against people of color to the regime of Jim Crow. In March 2019, Weber addressed a group of clergy leaders who traveled to Sacramento to lobby in favor of AB 392:

2018), https://www.miamiherald.com/news/local/community/broward/article209356519.html [https://perma.cc/U7K9-466Z]. The disparate treatment afforded to these White men and Mr. Castile, a Black man who was pulled over for a minor traffic violation, demonstrates the danger of a legal and social movement that focuses only on the injustice of police killings of *unarmed* Black men. *See* David A. Graham, *Do African Americans Have a Right to Bear Arms?*, ATLANTIC (June 21, 2017), https://www.theatlantic.com/politics/archive/2017/06/the-continued-erosion-of-the-african-american-right-to-bear-arms/531093/ [https://perma.cc/UQG9-538V] ("Regardless of one's views about the ideal state of gun laws, the open question at the moment is not about what the Second Amendment means but . . . whether African Americans can expect it to protect their rights.").

118. *See infra* notes 206–12 and accompanying text.

119. BILLINGSLEY, *supra* note 97, at 5.

120. *Id.*

> I stand here as the daughter of a sharecropper who has lived through horrors of racism and the injustices of the judicial system . . . . [M]y father endured injustices and indignities that my grandchildren should never have to face. And so I stand here because of the fact that it is important that we fight back finally. AB 392 is just the beginning of so many efforts that we have to begin to bring the kind of justice that is essential for this state . . . . My father came to this golden state because he knew it had opportunities that the South did not have, yet we cannot continue the practices that are representative of the Jim Crow South by ignoring the fact that there are individuals in this state who are being harassed but also who are being killed unnecessarily . . . . And all we ask for, all we have ever asked for in this country, is to be treated with dignity, to be treated with fairness, to respect our lives like you respect other people's lives and give our children and our grandchildren a chance to grow and to develop.[121]

Assemblymember Weber invoked these same issues when presenting her bill to the California State Assembly's Committee on Public Safety. I quote her at length to demonstrate the extent to which she focused on addressing racial disparities in police homicides, and systemic racial injustice more generally, while advocating for AB 392:

> [P]eople here are trying to help folks understand what it's like to live in a country, for over 300—over 400—years now, and still find yourself, once again, unfairly treated, oftentimes because of bias. . . . [T]he death of unarmed African American and Latino males is truly out of proportion to their position in the society in terms of the numbers. And there doesn't seem to be a path forward for change. This bill does not in any way, we hope, put any officer at harm. That is not the intent. It is to—once again—address the critical issues we have faced in this nation for 400 years, of how we treat others who don't look like us, and how they feel, sometimes, being unfairly treated. It is unfortunate that my community does not feel adequately represented by . . . law enforcement. It is unfortunate that when they call the police officers, they are afraid . . . [of] not only what is outside that they're fighting, but what they may experience once the [officer has] arrived.[122]

She closed out her remarks before the Assembly Committee on Public Safety by acknowledging that conversations about racially biased violence are difficult, yet necessary. She testified:

> I've studied the history of this country, and I know what it is about . . . . [P]resenting this bill . . . opens some wounds that most of us don't want to have opened anymore . . . . [But] we have to confront the issue that is there. And the issue is fairly clear in California. African American and

121. Laurel Rosenhall, Force of Law, *The Deciders*, CALMATTERS, at 46:53–48:25 (June 14, 2019), https://calmatters.org/projects/episode-three-the-deciders/ [https://perma.cc/59P2-GUS3].

122. Shirley Weber, Cal. Assemb., Remarks at the Assembly Public Safety Committee Meeting, *supra* note 45, at 3:09:51–3:10:56.

Latino males are being shot more than anyone else who are unarmed.[123]

State Senator Steve Bradford echoed Weber's insistence that the prevention of police homicide is an issue of racial justice. When AB 931, the predecessor to AB 392, reached the State Senate in June 2018, Senator Bradford addressed the Senate Public Safety Committee in support of the bill:

> It always blows me away when law enforcement fear for their life only when they're facing Black and Brown people. Just a week after Stephon Clark was murdered, in the South, law enforcement encountered a White man with a rifle, who not only had a rifle, but fired at [the officers] *several times*. That individual is home safe today. And it blows me away that Black and Brown men and women don't even get to the jail. They don't even get a chance to be arrested . . . . There's implicit bias in law enforcement in this country and we must admit to it before we can address the problem.[124]

The state senator added that section 196 of the California Penal Code, enabling officers to kill suspects without facing homicide convictions, was only adopted in the wake of slavery "as another way of suppressing Black people in this country."[125] He insisted that this legacy of employing government violence to control and intimidate people of color continues today. "I have friends and family who are in law enforcement, but they will tell you—there is no reverence for life when it comes to Black men in this country [among] the majority of law enforcement."[126]

Assemblymember Weber received heavy criticism for sponsoring this legislation.[127] Yet Weber persisted because she firmly believed in the need to

123. *Id.* at 3:12:46–3:13:20.

124. Steven Bradford, Cal. Sen., Remarks at the Senate Public Safety Committee Meeting, at 1:39:13–1:40:12 (June 19, 2018), https://www.senate.ca.gov/media/senate-public-safety-committee-20180619/video [https://perma.cc/RWK3-9K59].

125. *Id.* at 1:40:29–1:40:40. He repeated this sentiment in June 2019, when AB 392 reached the Senate Committee on Public Safety. Steven Bradford, Cal. Sen., Remarks at the Senate Public Safety Committee Meeting, at 2:04:11–2:04:44 (June 18, 2019), https://www.senate.ca.gov/media/senate-public-safety-committee-20190618/video [https://perma.cc/N5VT-EBRJ] ("[W]e really don't have a problem with law enforcement in this country. We have a problem with race. And that's at the core of why we're here today. Because if we understand the origin of use of deadly force in 1872, it was in direct response to free Africans in this country. [There] was no greater threat to law enforcement in 1872 than [there] was in 1776. The only difference was Blacks were free and this was a way of suppressing [freed Black] people.").

126. Bradford, *supra* note 124, at 1:40:42–1:40:54.

127. See, for example, Shirley Weber's closing statement at the State Assembly Public Safety Committee Meeting, *supra* note 45, at 3:08:57–3:09:30 ("It was not easy for me to accept this bill as a bill for me to sponsor . . . . [I]t is a difficult bill, and it has taken its toll, clearly, on my staff, and on me and on my family—when you're vilified and you're talked about in manner [that is] unacceptable and is not reflective of who you are as a person."). Weber also indicated in interviews that law enforcement entities have regularly objected to her racialized understanding of police shootings. *See, e.g.*, *Commentary: San Diego Assemblywoman Shirley Weber Talks About Deadly Force, Education Reform*, SAN DIEGO UNION-TRIB. (Mar. 1, 2019), https://www.sandiegouniontribune.com/opinion/commentary/sd-utbg-assembly-shirley-weber-interview-20190301-htmlstory.html [https://perma.cc/2Y7R-9BW7] (explaining that when she brings

address disproportionate police killings of people of color.[128] Weber attributed her commitment to passing AB 392 to her two grandsons, who are both Black. She explained, "They believe at this point that they have just as much right and respect as any other child in this nation, and that should never change."[129] In a YouTube video embedded on her official website, Weber stated, "I've had to say to my kids, . . . and everybody says the same thing: 'When you're confronted with the officers, be as polite as you can be . . . do not make any quick moves, because you could end up dead.' . . . I don't want to have to keep telling my grandsons that."[130] Fueled by the public outcry following the murder of Stephon Clark, Assemblymember Weber introduced this bill to address racialized police violence—violence that makes young Black children like her grandsons feel that their lives matter less than the lives of their White peers.

Despite this clear legislative intent, the text of the Act itself does not mention race. This omission is perhaps to be expected. After all, the equal protection doctrine since the late 1970s has instructed courts to apply strict scrutiny to laws that make explicit racial classifications, even when those laws only invoke race to dismantle race-based inequality.[131] Moreover, in the context of the Fourth Amendment, as discussed above, the Supreme Court routinely applies an "objectively reasonable" standard when examining officers' actions.[132] Under this standard, the Court does not inquire into the individual police officer's subjective motivations for stopping or seizing someone.[133] Similarly, the Court generally does not inquire into the characteristics of an individual suspect when evaluating questions such as whether the individual

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up discrepancies in police treatment of White and Black suspects, police officers tend to say, "but there's no racial profiling, there's no bias in policing, there's none of this").

128. *See, e.g.*, Weber, *supra* note 45, at 3:10:09–3:10:56.

129. Chabria, *supra* note 27.

130. California Assembly Democrats, *Assemblymember Shirley Weber Seeking to Save Lives with AB 392*, YOUTUBE, at 2:46–3:11 (Apr. 24, 2019), https://www.youtube.com/watch?time_continue=166&v=zlJ2LCBDjFU [https://perma.cc/26CM-7TPB]; *see also* Carbado, *supra* note 83, at 952 ("And what precisely will be my racial exit strategy this time? How will I make the officers comfortable? Should I? Will I have time—the racial opportunity—to demonstrate my respectability? Should I have to? Will they perceive me to be a good or a bad [B]lack?").

131. *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."); *see also* Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."). *See generally* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. Rev. 1779 (2012) (arguing that the Court's hostility to race-conscious policymaking stems from its unwillingness to recognize ongoing racial inequities).

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

133. *See* Whren v. United States, 517 U.S. 806, 813 (1996) ("We think [our precedent cases] foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.").

consented to a police search[134] or understood that they were being seized.[135] Assuming that an individual's identity is irrelevant to their interactions with the police, the Court simply asks how a de-raced, de-gendered "reasonable person" would have interpreted the situation.[136]

Yet the Act's silence concerning race is still remarkable here because the Act does not adopt a "reasonable person," stripped of individualizing characteristics, as the archetypal civilian interacting with the police. As modified by the California Act to Save Lives, section 835a of the California Penal Code has several new subsections, including subsection (a)(5), which reads:

> [The legislature finds and declares] [t]hat 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.[137]

This addition to section 835a is important. As the Act states, and as multiple studies confirm,[138] people with disabilities account for a large portion of those killed by police.[139] If this Act is truly meant to save lives, then it makes good sense for it to instruct officers to interrogate their assumptions about the capacities of the people they police before they decide to shoot for lack of compliance. However, if the sheer number of people with mental illness killed by the police is enough to warrant mention in this Act,[140] it is difficult to understand why the Act would not indicate race as well.

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134. *See* Florida v. Bostick, 501 U.S. 429, 431 (1991) ("We have held that the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate.").

135. *See* United States v. Mendenhall, 446 U.S. 544, 545 (1980) ("A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

136. *See id.*

137. CAL. PENAL CODE § 835a(a)(5) (West 2020).

138. *See* Susan Mizner, *Police 'Command and Control' Culture Is Often Lethal – Especially for People with Disabilities*, ACLU (May 10, 2018), https://www.aclu.org/blog/criminal-law-reform/reforming-police/police-command-and-control-culture-often-lethal-especially [https://perma.cc/5L4B-VSBL]; *see also* Marti Hause & Ari Melber, *Half of People Killed by Police Have a Disability: Report*, NBC NEWS (Mar. 14, 2016), https://www.nbcnews.com/news/us-news/half-people-killed-police-suffer-mental-disability-report-n538371 [https://perma.cc/6YWP-ET4D].

139. *See, e.g.*, Kate Mather & James Queally, *More than a Third of People Shot by L.A. Police Last Year Were Mentally Ill, LAPD Report Finds*, L.A. TIMES (Mar. 1, 2016), https://www.latimes.com/local/lanow/la-me-ln-lapd-use-of-force-report-20160301-story.html [https://perma.cc/274H-PZA6]; Alex Emslie & Rachael Bale, *More than Half of Those Killed by San Francisco Police Are Mentally Ill*, KQED (Sept. 30, 2014), https://www.kqed.org/news/147854/half-of-those-killed-by-san-francisco-police-are-mentally-ill [https://perma.cc/8BTF-38TD].

140. It is not clear why the California Act to Save Lives included this finding on mental illness and police use of lethal force. This finding was added on March 27, 2019. C*ompare* Peace Officers: Deadly Force, Assemb. 392, 2019–2020 Leg., Reg. Sess. (as introduced in Cal. Assemb., February 6,

Without any instruction to police officers and courts about racial bias, it is unlikely that the California Act to Save Lives will succeed in saving Black and Latinx lives in particular. This hypothesis has proven true in Seattle, Washington—a city that Assemblymember Weber viewed as a model for California legislation to follow.[141] After a 2011 Department of Justice investigation revealed that the Seattle Police Department (SPD) engaged in "a pattern or practice" of excessive force in violation of the Fourth Amendment, a federal judge issued a consent decree requiring the police department to change its use-of-force policies.[142] Under SPD's new use-of-force policy, officers are directed to use only the degree of force that is "reasonable, necessary, and proportionate to effectively bring an incident or person under control."[143] In language very similar to that adopted by the California Act to Save Lives, the SPD policy also declares that officers may only use deadly force "in circumstances where threat of death or serious physical injury to the officer or others is imminent."[144]

While the SPD policy has succeeded in reducing police use of force overall, the policy, which does not mention race or racism, has failed to address immense racial disparities in SPD's employment of force. In April 2017, the federal monitor released a report stating that SPD was in initial compliance with the court order because the policy changes led to an overall decrease in SPD's use

2019), *with* Assemb. 392, 2019–2020 Leg., Reg. Sess. (as reported by Cal. Assemb., Mar. 27, 2019), https://leginfo.legislature.ca.gov/faces/billVersionsCompareClient.xhtml?bill_id=201920200AB392&cversion=20190AB39298AMD [https://perma.cc/72G7-JJEW]. But the Assembly Journal notes from that date do not indicate why the bill was amended. *See* Assemb. 2019–2020, 48th Sess., at 876 (Cal. Mar. 27, 2019), https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/adj032719.pdf [https://perma.cc/FWM6-CEU8]. The wording of the finding suggests that it was included because the legislature found the immense overrepresentation of people with mental illness in officer-involved homicides troubling. However, there is also some indication that this finding was included because the law enforcement lobbyists wanted it there. When police officers lobbied for the passage of SB 230 in AB 392's stead, they regularly discussed the need for training on police interactions with people experiencing mental health crises. For example, Robert Harris, Director of the Los Angeles Police Protective League, said, "We're looking at trying to address the mental health issues, but on the flip side, making sure that our officers—our frontline officers—are receiving better training on how to deal with people suffering from a mental health crisis." Rosenhall, *supra* note 106, at 12:03–12:14. Other officers bemoaned the phenomenon of people experiencing mental illness "committing suicide by cop." *Id.* at 25:18–25:20. In other words, at the same time that police officers full-throatedly rejected Assemblymember Weber's observation of the racial disparities in police homicides, they openly discussed the disproportionate number of lethal encounters they had with people in mental crisis.

141. BILLINGSLEY, *supra* note 97, at 5 ("Seattle's federal monitor determined that the [change in standard for police use of deadly force] resulted in a marked reduction in serious uses of force without compromising the safety of officers.").

142. SEATTLE POLICE MONITOR, NINTH SYSTEMIC ASSESSMENT: USE OF FORCE 1 (2017), https://static1.squarespace.com/static/5498b74ce4b01fe317ef2575/t/58e6793bd2b857876413c2f3/1491499326403/Ninth+Systemic+Assessment--Use+of+Force--FINAL.pdf [https://perma.cc/U39M-YK83].

143. SEATTLE POLICE MANUAL: USE OF FORCE POLICY § 8.100.1 (2013), https://static1.squarespace.com/static/5425b9f0e4b0d66352331e0e/t/542ae0cce4b05059a4ab0b85/1412096204453/Use_of_Force_Policy.pdf [https://perma.cc/6Y53-SV74].

144. *Id.* at § 8.100.5.

of force.[145] However, at the same time, the monitor's report revealed persistent racial disparities in police use of force.[146] Black people account for a mere 8 percent of Seattle's population, but they accounted for 33 percent of SPD's use of force subjects from July 1, 2014 to October 31, 2016.[147] During the same time period, 41 percent of SPD's use of force subjects were White, but White people accounted for 70 percent of Seattle's total population.[148] Moreover, the report found that "SPD officers are more likely to point firearms at . . . Black, Hispanic/Latin[x], and Asian/Pacific Islander subjects" than White subjects.[149] The report took note of this disparity, but could not explain it:

> Neither this data nor the Monitoring Team's qualitative use of force assessment . . . reveal any systematic trends about the actions, activities, or behavior of Black, Latin[x], and Asian subjects that would explain this disparity. That is, nothing about the circumstances of the interactions suggested that pointing a firearm at Black, Latin[x], and Asian subjects was more reasonable or necessary than for White subjects.[150]

The California Act to Save Lives, which, like the SPD use-of-force policy, does not mention race, will likely also fail to eliminate racial disparities in police use of force. Though the California Act to Save Lives, like the SPD policy, may successfully lower the *total* amount of officer-involved homicides,[151] the racial disparities in these homicides will likely persist absent an honest reckoning with underlying racial biases.

The data on officer-involved homicides in California from the first year the California Act to Save Lives was in effect also support this presumption. According to data gathered by Mapping Police Violence, California police killed 164 people between January 1, 2020, the date the California Act to Save Lives became law, and December 31, 2020.[152] Roughly 19 percent of the people killed

145. SEATTLE POLICE MONITOR, *supra* note 142, at 2.

146. *See id.* at 42–44.

147. *Id.* at 43.

148. *Id.*

149. *Id.* at 44.

150. *Id.*

151. Without the benefit of additional years of data, it is difficult to fully gauge the impact the California Act to Save Lives will have on the total number of officer-involved homicides in California. However, Mapping Police Violence (MPV) recorded 164 officer-involved homicides in 2020 but only 145 in 2019 and 143 in 2018. *See Full Dataset*, MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/ [https://perma.cc/P2NE-KV2T]. The California Department of Justice also recorded 145 deaths during the process of an arrest in 2019. *See Death in Custody Data, 2005-2019*, *supra* note 34. This suggests that the new standard for justifiable police homicide in California has not immediately led to the reduction in officer-involved homicides that its proponents had hoped for.

152. *See Full Dataset*, *supra* note 151. MPV created this dataset by "meticulously sourc[ing] from official police use of force data collection programs in states like California, Texas and Virginia, combined with nationwide data from the Fatal Encounters database, an impartial crowdsourced database on police killings" and supplementing that data with its own "extensive original research." *About the Data*, MAPPING POLICE VIOLENCE, https://mappingpoliceviolence.org/aboutthedata

were White, 32 percent were Hispanic/Latinx,[153] 10 percent were Black, and 3 percent were Asian or Pacific Islander.[154] The race of 36 percent of these victims was "[u]nknown."[155] By comparison, the U.S. Census Bureau estimated that in July 2019, 36.5 percent of Californians were non-Hispanic White, 39.4 percent were Hispanic/Latinx, 6.5 percent were Black, 15.5 percent were Asian, and 0.5 percent were Pacific Islander.[156] Although it is difficult to fully examine the impact of the California Act to Save Lives with such a large percentage of victims of "unknown" races, these data do demonstrate that Black Californians were still killed disproportionately to their share of the state population in 2020.

It also remains unclear whether the California Act to Save Lives will lead to greater accountability for police officers who kill Black civilians. Of the 164 people killed by police officers in 2020, only 44.5 percent were allegedly armed with guns,[157] yet only two officers have been charged with crimes for unjustifiably killing civilians.[158] The first of these pending prosecutions stems

[https://perma.cc/LNR7-X93J]. I use data from MPV rather than data from the California Department of Justice because at the time of writing, the state has not yet released data on police deaths from 2020. All law enforcement agencies within the state of California are required to report in-custody deaths, including deaths that occur in the midst of an arrest. CAL. GOV'T CODE § 12525 (West 2021). However, to date, the data compiled by the California Department of Justice spans only 2005 to 2019. *See Death in Custody Data, 2005-2019*, *supra* note 34.

153. The MPV dataset uses the term "Hispanic" rather than "Latinx." The term "Hispanic" refers to all "persons of Spanish-speaking origin or ancestry." NATIONAL ASSOCIATION OF HISPANIC JOURNALISTS, CULTURAL COMPETENCE HANDBOOK 7 (2021), https://nahj.org/wp-content/uploads/2021/03/NAHJ-Cultural-Compliance-Handbook-Revised-12-20-2.pdf [https://perma.cc/QC2N-BHS3]. By contrast, the term "Latinx" refers specifically "to anyone of Latin American origin or ancestry." *Id.* Although I use the term "Latinx" throughout this Note because I address police violence against people of Latin American origin and descent specifically, rather than police violence against Spanish speakers writ large, I use the term "Hispanic/Latinx" here for accuracy in citing the MPV dataset. The term "Hispanic/Latinx" accurately encompasses data collected on both Latinx individuals as well as any Hispanic individuals included in the MPV dataset.

154. *Full Dataset*, *supra* note 151.

155. *Id.* The high percentage of victims of "unknown" races makes it impossible to determine the actual racial breakdowns of officer-involved deaths in 2020. Moreover, the share of victims of "unknown" races varies widely from year to year and depends upon the information available to MPV, rendering it difficult to compare the MPV data from 2020 with its data from previous years. For example, according to MPV, roughly 27 percent of the people killed by police in 2019 were White, while 17 percent were Black, and 37 percent were Hispanic/Latinx. *Id.* Yet the share of victims of "unknown" races in 2019 was only 13 percent—much lower than the 36 percent in 2020. Moreover, the 2019 data from the California Department of Justice, which records the race of every victim, show that 30 percent of the people killed by police in 2019 were White, while 19 percent were Black, and 44 percent were Hispanic/Latinx. This shows that the racial disproportionalities of officer-involved deaths were even greater in 2019 than the MPV indicated and suggests that the racial disparities in 2020 may also be even greater than the data currently available.

156. *Quick Facts: California*, U.S. CENSUS BUREAU (July 1, 2019), https://www.census.gov/quickfacts/CA [https://perma.cc/7N99-BCWU].

157. *See Full Dataset*, *supra* note 151.

158. *See id.* A third officer, Christopher Samayoa, is facing manslaughter charges for the 2017 shooting death of Kieta O'Neil, an unarmed Black man. Julian Mark, *DA Files Homicide Charges Against Rookie Cop Who Shot Kieta O'Neil*, MISSION LOC. (Nov. 23, 2020), https://missionlocal.org/2020/11/da-files-homicide-charges-against-rookie-cop-who-shot-unarmed-suspect/ [https://perma.cc/4KT5-QPQP]. San Francisco's new and famously progressive District

from the May 2020 shooting of Nicholas Bils, a thirty-six-year-old White man with a history of severe mental illness.[159] The San Diego County district attorney filed murder charges against the ex-deputy who shot and killed Nicholas Bils, marking the first murder charges ever brought against a law enforcement officer in San Diego County.[160] This is also the first criminal case brought against a police officer under the new legal standard established by the California Act to Save Lives.[161] The second pending prosecution stems from the shooting of Steven Taylor, a Black man who was shot while wielding a bat in a Walmart, who was apparently experiencing a mental health crisis.[162] The responsible police officer is facing voluntary manslaughter charges.[163] The dearth of charges—with a notably less serious charge for the officer who killed a Black civilian—raises doubts about the impact the California Act to Save Lives will have on the systemic racism it was designed to address.

The elision of race in the California Act to Save Lives renders the law unlikely to bring about the racial change its supporters envisioned. The following Section attempts to explain why these weaknesses, which undermine the law's ability to protect Black and Latinx people, were embedded within a law that had such an ambitious and explicit racial justice intent.

II.
THE INTEREST-CONVERGENCE THEORY AND THE CALIFORNIA ACT TO SAVE LIVES

In light of the emphasis AB 392's proponents placed on racial disparities in police homicides as the impetus for reform, it is somewhat puzzling that the new law did not mention race at all. In this Section, I endeavor to solve this puzzle by analyzing the California Act to Save Lives through the lens of Professor Derrick Bell's interest-convergence theory. After explaining the origins and core arguments of the interest-convergence theory in Part II.A, I apply the theory to the California Act to Save Lives in Part II.B. Using the

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Attorney, Chesa Boudin, announced his decision to press charges against Samayoa in November 2020. However, because AB 392 is not a retroactive law, the case will be tried under the old, "reasonable" standard. *Id.*

159. Tim Elfrink, *A Police Officer Fatally Shot an Unarmed, Mentally Ill Man. He's Now Charged with Murder.*, WASH. POST (July 14, 2020), https://www.washingtonpost.com/nation/2020/07/14/nicholas-bils-murder-aaron-russell/ [https://perma.cc/4DSF-VCSL].

160. Greg Moran, *Ex-deputy's Murder Charge Is First in California Under New Use-of-Force Law*, L.A. TIMES (Aug. 30, 2020), https://www.latimes.com/california/story/2020-08-30/murder-charge-san-diego-county-sheriffs-deputy-first-under-new-law [https://perma.cc/6Z9A-ABPN].

161. *Id.*

162. Sam Levin, *'Don't Shoot Him No More!' California Police Face Backlash over Killing of Man in Walmart*, GUARDIAN (Apr. 20, 2020), https://www.theguardian.com/us-news/2020/apr/20/san-leandro-shooting-walmart-police-steven-taylor [https://perma.cc/K265-FFNQ].

163. *San Leandro Police Officer Charged in Shooting Death of Steven Taylor*, NBC BAY AREA (Sept. 3, 2020) https://www.nbcbayarea.com/news/local/east-bay/san-leandro-police-say-officer-to-be-charged-in-shooting-death-of-steven-taylor/2356648/ [https://perma.cc/J3B3-QTTM].

analytical lens of Bell's theory—that laws advancing the rights of Black people are only politically viable when they do not disturb the superior status of the White elite—I argue that the California Act to Save Lives did not mention racial disparities in police homicides because that would have been too great a challenge to the racial status quo. I further argue that Bell's theory helps explain why discussions about race are so regularly silenced and why laws that deviate from the colorblind norm are deemed unacceptably biased and partisan. Finally, in Part II.C, I demonstrate the harm of the colorblind language of the California Act to Save Lives by discussing the pervasiveness of stereotypes linking Blackness to criminality that, absent any intervention, are accepted as commonsense.

A. The Interest-Convergence Theory

Professor Derrick Bell famously formulated the interest-convergence theory in the early 1980s as a way to explain the Supreme Court's jurisprudence during the civil rights era. In his piece Brown v. Board of Education *and the Interest-Convergence Dilemma*, Bell crafted a response to Professor Herbert Wechsler, who had criticized the Court's reasoning in *Brown*.[164] Wechsler claimed that although the outcome of the case was admirable, the Court inappropriately acted as "a third legislative chamber"[165] to reach the result it wanted, rather than applying neutral principles that can "transcend[] the immediate result . . . achieved."[166] With this, Wechsler called into question the legal theory underlying one of the most important cases of the civil rights era.

In response to Wechsler's critique, Bell searched for a neutral legal principle that would justify the Court's landmark school desegregation case.[167] As a normative matter, Bell accepted Professor Charles Black's argument that the relevant neutral principle was simply racial equality.[168] Yet Bell insisted that "on a positivistic level—how the world *is*—it is clear that racial equality is not deemed legitimate by large segments of the American people, at least to the extent it threatens to impair the societal status of [W]hites."[169] Bell reasoned that the "neutral statement of general applicability" forming the basis of the *Brown* decision, as a matter of legal realism, was the interest-convergence thesis.[170]

According to the interest-convergence thesis, laws and jurisprudence that advance the civil rights of Black people only become politically viable when they serve interests of White Americans. Under this principle, legal protections granted to Black people are not "determined by the character of harm suffered

164. *See* Bell, *supra* note 41, at 519.
165. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 16 (1959).
166. *Id.* at 15.
167. Bell, *supra* note 41, at 522.
168. *Id.* at 522–23.
169. *Id.* at 523.
170. *Id.*

by [B]lacks or the quantum of liability proved against [W]hites."[171] Rather, "[r]acial remedies [are] . . . the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class [W]hites."[172]

Using this theory, Bell explained that the *Brown* Court's holding did not stem from a moral commitment to racial equity, but an understanding that de-segregated schools would best serve the nation's interests.[173] When *Brown* came before the Supreme Court, the United States was in the midst of the Cold War, competing with Communist countries for global legitimacy. As both the federal government and the NAACP argued in *Brown* and as *Time* magazine reported, "U.S. prestige and leadership [had] been damaged by the fact of U.S. segregation."[174] The Court's decision to desegregate schools would "come as a timely re-assertion of the basic American principle that 'all men are created equal.'"[175] Moreover, Bell explained, there was growing resentment among Black Americans who had fought in WWII and returned home to anti-Black violence; an anti-discrimination decision from the Supreme Court could help quell this anger.[176] Lastly, Bell argued that segregation in the South impeded the region's industrialization, and there was a general understanding that desegregation would serve the nation's economic interests.[177] Thus, though the *Brown* Court mandated the desegregation Black people had sought, it was not exclusively motivated by a desire to achieve racial equality. As Bell argued, this diminished the *Brown* decision's ability to bring about lasting racial change.[178]

Bell's interest-convergence thesis exposes a dark truth about the American legal system. The thesis is useful as a descriptive matter, explaining how law is "subordinat[ed] . . . to interest-group politics with a racial configuration."[179] Yet, as Professor Andrew Mamo has observed, the interest-convergence thesis contains an additional, "critical argument":[180] it rests on an assumption that the prioritization of White interests over Black rights can be understood as a generally applicable, "neutral statement"[181] of law that guides American

171. *Id.*
172. *Id.*
173. *Id.* at 524.
174. *Id.*
175. *Id.*
176. *Id.* at 524–25.
177. *Id.* at 525.
178. The Court's desegregation decisions in the years following *Brown* "increasingly erected barriers to achieving the forms of racial balance relief [the Court] had earlier approved." *Id.* at 527. These more recent cases "indicate that the convergence of [B]lack and [W]hite interests that led to *Brown* in 1954 . . . . has begun to fade." *Id.* at 526.
179. *Id.* at 523.
180. Andrew B. Mamo, *Against Resolution: Dialogue, Demonstration, and Dispute Resolution*, 36 OHIO ST. J. ON DISP. RESOL. (forthcoming) (manuscript at 9), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3634908 [https://perma.cc/2NH6-KKXF].
181. Bell, *supra* note 41, at 523.

jurisprudence.[182] Stated another way, Bell's thesis "shows how racial hierarchies had become so naturalized as to operate normatively as neutral principles of law,"[183] while, at the same time, "an appeal to end invidious discrimination on the basis of race was seen . . . to fail the test of neutrality."[184] Within this framework, when laws are colorblind, they necessarily accept and reify the "neutral" principle of racial subordination. At the same time, any law that challenges the status quo of racial stratification is not "neutral," but politicized, and therefore suspect. Yet the status quo is anything but neutral.[185] The prioritization of White interests over Black rights necessarily rests on assumptions—whether conscious or unconscious—about the inferior worth of people of color. This is the legal world into which the California Act to Save Lives was born.

B. California's Converging Interests

The elision of race in the California Act to Save Lives is puzzling at first blush, considering the fact that Assemblymember Weber explicitly cited racial disparities in police homicides as the reason for introducing the legislation. However, using Bell's interest-convergence thesis as an analytical framework, the Act's racial silence begins to make sense.

Viewed through the interest-convergence lens, the California Act to Save Lives can be understood as the product of a momentary convergence between the interest of the political elite in restoring the legitimacy of law enforcement and Black demands for an end to racialized police violence. Once understood as the result of an interest convergence, rather than the result of an unequivocal consensus on the need to right a racial wrong, the California Act to Save Lives—and more specifically, its silence with respect to the impact of racial bias on police use of force—is unsurprising. In California, as in *Brown*, the remedy granted was not "determined by the character of harm suffered by [B]lacks."[186] Such a remedy would have required the Act to explicitly document racial disparities in police homicides and codify a standard for justifiable police homicide that could prevent disproportionate deaths moving forward. Rather, the remedy was tailored to the societal interest of legitimizing law enforcement and quieting the protests without addressing the underlying systemic racism.

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182. Mamo, *supra* note 180, at 15.

183. *Id.*

184. *Id.* at 14–15.

185. *See* Kimberlé Crenshaw, *Introduction* to CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, at xiii, xviii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas, eds., 1995) ("Yet politics was embedded in the very doctrinal categories with which law organized and represented social reality. Thus the deeply political character of law was obscured . . . through the reigning assumptions that legal decision-making was—or could be—determined by preexisting legal rules, standards, and policies, all of which were applied according to professional craft standards encapsulated in the idea of 'reasoned elaboration.'").

186. *See* Bell, *supra* note 41, at 523.

The California Act to Save Lives was enacted in the midst of growing nationwide unrest in response to law enforcement's apparent unbridled power to kill people of color with impunity. In October 2014, following the police killing of Michael Brown in Ferguson, Missouri, Black residents of Ferguson and their allies protested against police violence in what would come to be known as the Ferguson Uprising. The Uprising gained national attention and sparked a national conversation on racialized police violence.[187] In cities throughout the country, the Black Lives Matter Global Network organized thousands of actions in response to police killings of unarmed Black civilians.[188] In the vast majority of these killings, prosecutors declined to seek criminal charges against the officers, sparking demands for police accountability.[189] These protests made their way to Sacramento in the wake of Stephon Clark's death when both the city and state district attorneys announced that the involved officers could not be charged.[190]

The nationwide protests were at the front of California legislators' minds as they discussed AB 392 in the State Assembly and Senate chambers. Many state lawmakers expressed an urgent need to address the growing chasm between law enforcement and civilians, particularly within Black and Latinx communities.[191] Advocates and journalists also drew attention to this erosion of trust in the police, stemming from repeated instances of police violence against people of color.[192]

Lawmakers at the federal level had also raised these concerns in the years following the Ferguson Uprising. In May 2015, the House Judiciary Committee

187. *See* Bakari Kitwana, *Message from the Ferguson Grassroots, 5 Years After Michel Brown's Death*, COLORLINES (Aug. 9, 2019), https://www.colorlines.com/articles/message-ferguson-grassroots-5-years-after-michael-browns-death [https://perma.cc/L9CR-XS6G] (reporting activists and organizers' reflections on the effects of the Uprising).

188. *See* ELEPHRAME, *Charts & Articles*, https://elephrame.com/textbook/BLM [https://perma.cc/RMB5-5H75] (detailing more than six thousand Black Lives Matter protests held in a six-year span).

189. German Lopez, *Cops Are Almost Never Prosecuted and Convicted for Use of Force*, VOX (Nov. 14, 2018), https://www.vox.com/identities/2016/8/13/17938234/police-shootings-killings-prosecutions-court [https://perma.cc/J8YX-4TJA] (reporting that police officers are rarely charged, and charged officers are half as likely to be convicted and incarcerated as civilians).

190. Stanton et al., *supra* note 8.

191. *See, e.g.*, Buffy Wicks, Cal. Assemb., Remarks at the Assembly Public Safety Committee Meeting, *supra* note 45, at 1:09:16–1:09:25 ("[E]ffective law enforcement . . . is built on trust, and in far too many communities, particularly Black and Brown communities, that trust has been lost.").

192. *See, e.g.*, Letter from Seth Stoughton, Assoc. Professor of L., Univ. of S.C., to Shirley Weber, Cal. Assemb. 4 (May 31, 2019) (on file with author) (supporting AB 392 and stating "[c]ommunity trust and confidence in the police is seriously undermined by the perception that officers are using force unnecessarily, too frequently, or in problematically disparate ways"); *see also* Lulu Garcia-Navarro, *Police Chief on California Bill Restricting When Police Can Fire Weapons*, (Apr. 15, 2018), https://www.npr.org/2018/04/15/602605313/police-chief-on-california-bill-restricting-when-police-can-fire-weapons [https://perma.cc/C4WK-GPBN] ("The ultimate problem many see is that these shootings specifically of unarmed Black men have damaged important relationships with the communities police are meant to serve. How do you repair that relationship without at least signaling your openness to consider new methods?").

held a hearing on "Policing Strategies for the 21st Century."[193] In his opening remarks, Representative Bob Goodlatte lamented the "increasing unrest in our urban communities about policing."[194] He explained that he hoped the hearing could lead to improved police training, adding, "I am especially interested to hear what we can do to raise the level of trust among our police officers and citizens while still protecting both."[195]

Responding to these state- and nationwide concerns, AB 392 changed California's law on justifiable police homicide just enough to create the illusion of police accountability. The law's strict standard for justifiable police homicide—"necessary in defense of life"—was recognized as "one of the toughest standards in the nation."[196] In this way, AB 392 served the societal interest in quieting the protests and legitimizing the police.

Yet the bill did not address the fundamental issue underlying the police killings of Black people. AB 392 did not acknowledge, or attempt to address, the effect of racial bias on police officers' evaluations of threat. Left undefined, the "necessary" standard lacks teeth. Police officers will ultimately determine its meaning, employing their racial biases—whether conscious or unconscious—to decide whether the use of force is, in fact, necessary. Within the interest-convergence framework, "'successful' reform efforts substantially improve community perceptions about the police without substantially improving police practices. The improved perceptions remove the impetus for the kinds of change that would actually benefit the community."[197] AB 392 was ultimately "successful" in the California legislature because it appeased protestors without requiring meaningful change.

The theoretical assumption at the root of Bell's interest-convergence thesis—that the realities of racial hierarchy are a "neutral" fact of life—offers another explanation for the elision of race in the California Act to Save Lives. Though Assemblymember Weber regularly addressed racial bias in her public statements, she could not easily write this into the bill itself. Law enforcement consistently objected to Weber's invocations of racism, categorizing these statements as improperly political. Members of the law enforcement lobby questioned Weber's qualifications as AB 392's sponsor—not simply because of her insistence that police accountability was a racialized issue, but because of her Blackness *itself*. David P. Mastagni, a lawyer for the Peace Officers' Research Association of California (PORAC), said of Weber:

193. *Policing Strategies for the 21st Century: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. (2015).

194. *Id.* at 1.

195. *Id.* at 2.

196. Anita Chabria, *Newsom Signs 'Stephon Clark's Law,' Setting New Rules on Police Use of Force*, L.A. TIMES (Aug. 19, 2019), https://www.latimes.com/politics/la-pol-ca-california-police-use-of-force-law-signed-20190711-story.html [https://perma.cc/QH4A-D5MD]; *see also* Wiley, *supra* note 105.

197. Butler, *supra* note 37, at 1425.

> In my view, somebody who has a background that gives them a predilection or a known outcome that they're trying to achieve, as opposed to fact gathering and law application, should not be the person carrying the legislation forward . . . . I see her perspective as entirely flawed. When something happens or a law comes up, . . . I look at the law, I look at precedent, and I try to subtract my personal or emotional background from it, and I try to be objective. In many forums, her background could very well be disqualifying for not being able to be objective.[198]

In Mastagni's eyes, Weber's identity as a Black woman disqualified her as a lawmaker capable of reason and neutrality. His comments demonstrate the extent to which conversations about race and racism are politicized, delegitimized, and silenced.

Mastagni's comments also reveal an adherence to a colorblind ideology—an insistence that race does not, or should not, matter in the eyes of the law. However, his very insistence that Weber's experience as a Black woman[199] somehow compromised her ability to legislate faithfully reveals the fallacy of colorblindness. In contrasting his purported ability to remain neutral (as a White man) with Weber's alleged partiality (as a Black woman), Mastagni inadvertently cast a racial lens—of Whiteness—on the "neutral" standard of a reasonable person.

These comments reveal the truth of critical race theorist Devon Carbado's observation that "there is no exit from race."[200] Accordingly, when our courts and legislatures fail to articulate the racial dynamics at play in any given encounter between a police officer and a civilian, "race is not absent . . . ; it is [merely] obscured."[201] By choosing to frame the issue of police use of lethal force in colorblind terms at the urging of Mastagni and the rest of the law enforcement lobby, the California legislature was not acting neutrally on the question of race; rather, it actively obscured the particular vulnerabilities of Black and Latinx people during police-civilian encounters.[202] The California legislature's omission of race does not render race irrelevant. Quite to the contrary, the legislature's racial avoidance only reifies the racial stereotypes that

198. Rosenhall, *supra* note 121, at 41:24–42:28.

199. It is difficult to know, precisely, which elements of Weber's racial identity Mastagni intended to include in his general allusion to her "background." Was it simply the color of her skin? Was it her experience as the daughter of a sharecropper? Her explicit articulation of the fear she carries for the safety and well-being of her grandchildren? Her insistence on speaking—and legislating—about racial disparities in police homicides?

200. Carbado, *supra* note 83, at 996.

201. *Id.* at 978 (describing Justice O'Connor's representation of a Black man and police officers in *Florida v. Bostick*, 501 U.S. 429 (1991)).

202. *See supra* notes 85–94 and accompanying text.

make Black and Latinx people vulnerable to heightened police scrutiny in the first place.[203]

Ultimately, the law enforcement representatives in opposition to AB 392 were able to point to the bill's colorblind language to discredit claims regarding racial bias in police use of force. Ronald Lawrence, the former president of the California Police Chiefs Association, responded to claims that AB 392 was a matter of racial justice by insisting, "This law is colorblind. It's talking about reducing use of force and reducing use of officer deadly force, irrespective of somebody's race."[204] Lawrence also asserted, "[Y]ou have to look at where the crime [is] occurring . . . . You're going to have officer-involved shootings in communities that have high crime. And . . . when an officer goes into a scenario that [*sic*] they're threatened by somebody with a weapon or a gun, there's a high potential that could lead to deadly force."[205]

These comments reveal the deadly impact of AB 392's failure to account for racial bias in police homicides. Police officers, prosecutors, jurors, and members of the general public are invited to assume that racial bias plays no part in a police officer's decision to use force, and instead, that the suspect must have been threatening, engaging in criminal activity, or otherwise "deserving" of the force response. In the following Section, I examine this dynamic in greater depth.

C. A "Neutral" Principle: Black People Seen as Inherently Dangerous

Race-neutral standards for police use of force are dangerous because they enable the system's actors to import their own racial biases when evaluating whether the force employed was "reasonable" or even "necessary." Due to its race-neutral language, the California Act to Save Lives leaves racial biases of police officers unchallenged. The Act does not force prosecutors, judges, or juries to account for potential racial bias when evaluating the necessity of a police officer's actions. Accordingly, these actors may lawfully rely on racial biases or stereotypes to determine whether a particular individual posed an "imminent threat of death"[206] necessitating the use of deadly force. In this Section, I discuss the results from a variety of empirical studies conducted by social psychologists to demonstrate how deeply ingrained racialized understandings of criminality and threat are. This Section primarily concerns the ways Black men are perceived as threats, in keeping with the Note's focus on police violence against Black men. However, I end this Section with a brief discussion of the stereotypes Black women and gender-nonconforming people face that render them vulnerable to harsh policing as well. Absent any guidance

203. *See* Carbado, *supra* note 83, at 980 ("[W]e explicitly invoke race when we perceive that race is relevant; [] we *choose* not to explicitly invoke race when we perceive that race is not (or should not be) relevant; and [] determinations as to the relevance of race socially construct race.").

204. Rosenhall, *supra* note 121, at 41:09–41:18.

205. *Id.* at 39:06–39:27.

206. CAL. PENAL CODE § 835a(c)(1)(A) (West 2020).

from the California Act to Save Lives to the contrary, these are the understandings that the legal system's actors can draw from when determining whether the use of lethal force was necessary.

The data on police use of lethal force in California, organized by victim race, offers important context for this discussion. According to the California Department of Justice, 15.2 percent of police homicide victims between 2016 and 2018 were Black, even though Black people only accounted for 6.5 percent of the state's total population.[207] By comparison, White people accounted for 36.8 percent of California's total population, but only 32.4 percent of the people killed by police from 2016 to 2018.[208] This racial disparity is even more severe when the data is limited to *unarmed* victims of California police officers. During the 2016–2018 period, 19.6 percent of the unarmed Californians killed by police were Black.[209] Only 27.8 percent of the unarmed people killed by police during that time period were White.[210] Police officers are instructed only to employ lethal force when they reasonably perceive a serious threat.[211] Yet the data demonstrate that California police killed *unarmed* Black people at a higher rate than they killed Black people overall. This suggests that police officers tend to misperceive Black people as serious threats even when they are, in fact, unarmed.

This "threat perception failure,"[212] whereby police officers designate Blackness as a sign of inherent threat, is a pervasive, nationwide phenomenon[213]

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207. *See* Rosenhall, *supra* note 31. During the same time period, 46.1 percent of the state's police homicide victims were Hispanic/Latinx, even though Hispanic/Latinx people make up 39.3 percent of the California population. I use the term "Hispanic/Latinx" here, rather than "Latinx," because "Hispanic" is the term that CalMatters used, citing data from the California Department of Justice and U.S. Census. In recognition of the fact that "Hispanic" and "Latinx" are often used interchangeably but actually mean two different things, *see supra* note 153, I use the term "Hispanic/Latinx" here to accurately capture the data collected.

208. *See* Rosenhall, *supra* note 31.

209. *Id.* 46.4 percent of unarmed police homicide victims during this time period were Hispanic/Latinx.

210. *Id.*

211. *See, e.g.*, ANAHEIM POLICE DEP'T, POLICY MANUAL § 300.4(a) (2015), https://static1.squarespace.com/static/56996151cbced68b170389f4/t/571ff55201dbaeb824dfee6c/1461712210676/Anaheim+Use+of+Force+Policy.pdf [https://perma.cc/7RLS-NS7M] ("An officer may use deadly force to protect him/herself . . . from what he/she reasonably believes would be an imminent threat of death or serious bodily injury."); BAKERSFIELD POLICE DEP'T, BAKERSFIELD PD POLICY MANUAL § 300.4(a) (2017), https://cdn.muckrock.com/foia_files/2018/05/16/Bakersfield_PD_Use_of_Force_Policy.pdf [https://perma.cc/ZP9M-47JL] (same); *see also* Garrett & Stoughton, *supra* note 81, at 263–78 (surveying and discussing common modern tactical procedures and guidelines for police officers).

212. Cynthia Lee, *Race, Policing, and Lethal Force: Remedying Shooter Bias with Martial Arts Training*, 79 LAW & CONTEMP. PROBS. 145, 149 (2016).

213. In 2001, the U.S. Department of Justice (DoJ) released a report indicating that "per capita, police are roughly five times more likely to shoot a Black person than a White person. That is, knowing nothing but a person's race, the likelihood of being killed by police quintuples if the person is Black rather than White." Joshua Correll, Sean M. Hudson, Steffanie Guillermo & Debbie S. Ma, *The Police Officer's Dilemma: A Decade of Research on Racial Bias in the Decision to Shoot*, 8 SOC. & PERSONALITY PSYCH. COMPASS 201, 202 (2014).

that is not unique to police officers. For example, a study of 123 university students revealed that participants generally perceived Black children over the age of ten as less innocent than their peers of other races.[214] Another study using a sample size of fifty-nine university students demonstrated that study participants consistently overestimated the age of Black suspects and found Black suspects more culpable than their White and Latinx peers accused of the same crimes.[215] Yet another study found that when White participants were shown images of unfamiliar Black faces, they showed heightened amygdala activation, indicating that the images of Black people triggered fear responses in participants.[216]

While there is evidence that this threat perception failure is a common phenomenon, it has particularly tragic consequences in the law enforcement context when left unchecked. A series of empirical studies conducted by social psychologists sheds important light on the implications of threat perception failure on the "split-second judgments"[217] of police officers. Joshua Correll and his colleagues designed a study to measure the extent to which a suspect's race impacts an individual officer's decision to shoot, absent any other factors such as neighborhood characteristics or suspected criminal activity.[218] They presented both police officers and civilians with images of Black and White men, some armed and others unarmed, and asked each study participant to press a key labeled "shoot" when confronted with an armed suspect and a key labeled "don't shoot" when confronted with an unarmed suspect.[219] Police officers, like their civilian counterparts, "were faster to shoot armed targets when they were Black (rather than White), and they were faster to choose a *don't-shoot* response if an unarmed target was White (rather than Black)."[220] This difference in response time "suggests that, when confronted with a Black target, officers may activate

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In a 2015 investigation of the Ferguson, Missouri Police Department (FPD), the DoJ found that "[n]early 90% of the time that FPD officers used force, it was used against African-Americans. Every single time they deployed a police dog to bite a suspect, the suspect was African-American." Butler, *supra* note 37, at 1422. Similarly, Black people account for only 20 percent of the population in Minneapolis, "[b]ut when the police get physical—with kicks, neck holds, punches, shoves, takedowns, Mace, Tasers or other forms of muscle—nearly 60 percent of the time the person subject to that force is [B]lack." Richard A. Oppel Jr. & Lazaro Gamio, *Minneapolis Police Use Force Against Black People at 7 Times the Rate of Whites*, N.Y. TIMES (June 3, 2020), https://www.nytimes.com/interactive/2020/06/03/us/minneapolis-police-use-of-force.html [https://perma.cc/QQ59-UU32].

214. Phillip Atiba Goff, Matthew Christian Jackson, Brooke Allison Lewis Di Leone, Carmen Marie Culotta & Natalie Ann DiTomasso, *The Essence of Innocence: Consequences of Dehumanizing Black Children*, 106 J. OF PERSONALITY AND SOC. PSYCH. 526, 529 (2014).

215. *Id.* at 530–32.

216. *See* Elizabeth A. Phelps, Kevin J. O'Connor, William A. Cunningham, E. Sumie Funayama, J. Christopher Gatenby, John C. Gore & Mahzarin R. Banaji, *Performance on Indirect Measures of Race Evaluation Predicts Amygdala Activation*, 12 J. COGNITIVE NEUROSCIENCE 729, 732 (2000).

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

218. Correll et al, *supra* note 213, at 203.

219. *Id.* at 203, 206.

220. *Id.* at 206.

racial stereotypes related to threat."[221] Encouragingly, the study found that police officers were typically able to overcome this racial bias if given sufficient time and adequate circumstances: though officers were slower to recognize a Black target as unarmed and a White target as armed, they ultimately made correct decisions and thus "were no more likely to shoot an unarmed Black target than they were to shoot an unarmed White [target]."[222] Critically, however, when the officers were given a shorter response time, the number of errors "dramatically increased."[223] Additionally, when the officers were confronted with environmental distractions designed to simulate the type of stress and fatigue officers are likely to experience on the job, their ability to overcome their racial biases was significantly undermined.[224]

As these studies demonstrate, it is precisely when police officers are confronted with "tense, uncertain, and rapidly evolving" situations that they are most likely to rely on their racial biases when making "split-second"[225] decisions about the level of force they should use. Yet the Fourth Amendment codifies these judgments as objectively reasonable, which in turn reifies racialized perceptions of threat and criminality as common-sense, neutral principles.[226] By mirroring the Fourth Amendment's deference to the judgment of police officers, the California Act to Save Lives does the same.

Although most of the studies about race and threat perception failure focus on the ways Black men have been stereotyped as criminals and "thugs," Black men are not the only targets of racialized police violence. A growing body of literature,[227] along with the #SayHerName movement,[228] has shed light on the ways that Black women—the "forgotten victims"[229] of police violence—are

221. *Id.*

222. *Id.*

223. *Id.* at 207.

224. *Id.* at 209.

225. *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989) and accompanying discussion at notes 53–59 (articulating the reasonability test for Fourth Amendment challenges to police use of force).

226. For an in-depth discussion of the ways the Supreme Court constructs race through its Fourth Amendment jurisprudence, see Carbado, *supra* note 83, at 967–68 ("[I]n the Fourth Amendment context, the Court both constructs race (that is, produces a particular conception of what race is) and reifies race (that is, conceptualizes race as existing completely outside of or apart from the very legal frameworks within which the court produces it). [This] . . . legitimizes and reproduces racial inequality in the context of policing.").

227. *See, e.g.*, BETH E. RICHIE, ARRESTED JUSTICE: BLACK WOMEN, VIOLENCE, AND AMERICA'S PRISON NATION (2012); ANDREA J. RITCHIE, INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR (2017); Nnennaya Amuchie, *"The Forgotten Victims" How Racialized Gender Stereotypes Lead to Police Violence Against Black Women and Girls: Incorporating an Analysis of Police Violence into Feminist Jurisprudence and Community Activism*, 14 SEATTLE J. FOR SOC. JUST. 617 (2016).

228. *See* Kimberlé Williams Crenshaw & Andrea J. Ritchie, *Say Her Name: Resisting Police Brutality Against Black Women*, AFR. AM. POL'Y F., July 2015, http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf [https://perma.cc/Y643-HUYU].

229. Amuchie, *supra* note 227.

stereotyped in distinct ways that also render them particularly vulnerable to state violence. Black women are characterized in varying ways "that shape [their] identity and social positioning . . . . Black women can be strong (and therefore not at risk of violence), . . . hypersexual (therefore ill-suited for long-term relationships or parenting), or criminal (and therefore unworthy of protection or support)."[230] Additionally, studies have demonstrated that Black women are often misperceived to be Black men,[231] which renders them vulnerable to the same stereotypes of aggression and hyper-masculinity that lead to the over-policing of Black men. Transgender and gender-nonconforming Black people are also at risk of harassment and violence at the hands of the police.[232] As Andrea Ritchie has explained, "Police police gender every day, even just in the context of 'broken windows' policing, when they decide who feels 'disorderly,' who looks . . . 'suspicious.' They will often read gender nonconformity, particularly in combination with race and poverty, to embody disorder."[233]

The data disaggregating police use of lethal force by gender is incomplete because the data on officer-involved homicides in general is underreported.[234] Nevertheless, an intersectional approach documenting the various ways that Black people are perceived and policed is critical to understanding "the complex structural dimensions that are actually at play."[235] An intersectional approach to police violence makes "clear that the problem is not a matter of whether a young man's hands were held up over his head, whether he had a mentor, or whether the police officers in question were wearing cameras or had been exposed to implicit bias trainings. A comprehensive approach reveals that the epidemic of police violence across the country is about how police relations reinforce the structural marginality of all members of Black communities in myriad ways."[236]

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230. RICHIE, *supra* note 227, at 130; *see also* Crenshaw & Ritchie, *supra* note 228, at 7 ("[P]erceptions of Black women as menacing and their bodies as 'superhuman'—and, therefore, not susceptible to pain or shame—inform police interactions with them in much the same way as they do those with Black men.").

231. Phillip Atiba Goff, Margaret A. Thomas & Matthew Christian Jackson, *"Ain't I a Woman?": Towards an Intersectional Approach to Person Perception and Group-Based Harms*, 59 SEX ROLES 392, 401 (2008).

232. *See* INCITE! WOMEN OF COLOR AGAINST VIOLENCE, LAW ENFORCEMENT VIOLENCE AGAINST WOMEN OF COLOR & TRANS PEOPLE OF COLOR: AN ORGANIZER'S RESOURCE & TOOL KIT (2018), https://incite-national.org/wp-content/uploads/2018/08/TOOLKIT-FINAL.pdf [https://perma.cc/FH5V-4YJD].

233. Amanda Marcotte, *How Cops Target Transgender People: "They Will Often Read Gender Nonconformity . . . to Embody Disorder*," SALON (Aug. 15, 2017), https://www.salon.com/2017/08/15/how-cops-target-transgender-people-they-WILL-often-read-gender-nonconformity-to-embody-disorder/ [https://perma.cc/3MTR-59DB].

234. In 2014, the Washington Post reported that "the FBI undercounted fatal police shootings by more than half. This is because reporting by police departments is voluntary and many departments fail to do so." *Fatal Force*, WASH. POST, (updated Oct 20, 2020). Available at: https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/ULD2-UL6K].

235. Crenshaw & Ritchie, *supra* note 228, at 6.

236. *Id.*

III.
HEEDING THE CALL FROM THE MOVEMENT FOR BLACK LIVES: RACING THE CALIFORNIA ACT TO SAVE LIVES

Since its founding in 2013, the Movement for Black Lives has thrust a new refrain into our nation's vernacular: Black Lives Matter. This phrase, shouted at rallies and marches demanding an end to police violence against Black people, is "an ideological and political intervention in a world where Black lives are systematically and intentionally targeted for demise."[237] The refrain quickly sparked backlash from conservatives who claimed that the movement's focus on the value of Black lives was biased and sectarian.[238] They instead insisted on the reactionary refrain: "All Lives Matter."[239] Their response ignores the reality that "all lives" are not equally in peril.[240] As Professor Keeanga-Yamahtta Taylor explained, it "has always been an assumption [that all lives matter] . . . The entire point of Black Lives Matter is to illustrate the extent to which [B]lack lives have not mattered in this country."[241]

The California Act to Save Lives, which was introduced to address the racialized crisis of police violence, should have emulated the Movement for Black Lives and explicitly affirmed the value of Black and Latinx lives. Its name implies, as does the "All Lives Matter" refrain, that the threat of police violence is borne equally by all Californians. This elision of race in the California Act to Save Lives dismisses the true root of the current crisis: racist assumptions ascribing danger to Black and Latinx people. It also misses the opportunity to grant Black and Latinx people the power of the symbolic right to a life free from violence at the hands of the state.

The leaders of the Movement for Black Lives were correct to object to AB 392's amendments removing the definition of "necessary" force from its text.[242] Without an external definition imposing an independent constraint on officer discretion, this new standard is not likely to affect much change. The meaning of "necessary" will now be determined by judges and juries on a case-by-case basis, just like the Fourth Amendment's "reasonableness" analysis. This makes alerting judges and juries to the potential racial bias of police officers all the more important. The California Act to Save Lives was introduced into a world where police officers are deemed "reasonable" for mistaking a cell phone in the

237. *Herstory*, BLACK LIVES MATTER, https://blacklivesmatter.com/herstory/ [https://perma.cc/FAB6-UV7C].

238. *See, e.g.*, Jeffrey Kluger, *Enough Already with 'All Lives Matter'*, TIME (July 11, 2016). https://time.com/4400811/all-lives-matter/ [https://perma.cc/HF2A-PUJ9].

239. *Id.*

240. *See* Daniel Victor, *Why 'All Lives Matter' Is Such a Perilous Phrase*, N.Y. TIMES (July 15, 2016), https://www.nytimes.com/2016/07/16/us/all-lives-matter-black-lives-matter.html [https://perma.cc/F2P5-AKR7].

241. *Id.*

242. *See supra* notes 28–32 and accompanying text.

hands of a Black man for a gun. To save Black lives, therefore, lawmakers must clarify that reliance on racial bias, while common, is not reasonable.

I argue that the California Act to Save Lives should have added a subsection, section 835a(a)(6), stating the following:

> The Legislature finds and declares all of the following: . . . That Black and Latinx individuals are significantly more likely to experience greater levels of physical force during police interactions than White individuals. This disparity is particularly salient amongst unarmed civilians. In 2016–2018, Black people accounted for 15.2 percent of the state's total police homicides, but 19.6 percent of the state's unarmed victims of police homicide. In that same time period, Hispanic/Latinx people accounted for 46.1 percent of the state's total police homicides, but 46.4 percent of the state's unarmed victims of police homicide. By comparison, White people accounted for 32.4 percent of the state's total police homicides but only 27.8 percent of the state's unarmed victims of police homicide.
>
> It is the intent of the Legislature to prevent the disproportionate use of force against Black and Latinx civilians. In exercising their best judgment to determine whether the use of lethal force is necessary, officers shall consider the fact that Black and Latinx civilians are more likely than White civilians to be misperceived as posing a serious threat.

This proposed addendum would achieve several important aims. Its language mirrors the legislative findings in the other subsections of section 835a(a).[243] Like section 835a(a)(5), which states the disproportionate impact of police violence on people with disabilities, this additional subsection would have demonstrated the disproportionality of police violence against Black and Latinx people. It would alert officers—and prosecutors, judges, and jurors—to interpret "necessary" with an understanding that racial bias may inform police judgment of a suspect's perceived dangerousness. And it would create an opening for these legal actors to interrogate the reasonableness of an officer's fear of a Black or Latinx suspect who was in fact unarmed. By doing so, they can interrogate more broadly the reasonableness of stereotypes linking race and criminality.

Skeptics may argue that the efficacy of this proposed addendum depends upon the weight judges give to section 835a(a)—the section containing the legislative findings and declarations—when interpreting the California Act to Save Lives. As a principle of statutory interpretation, preambles of statutes, including legislative findings and statements of legislative intent, "do not confer power, determine rights, or enlarge the scope of a measure."[244] Nevertheless, these statements "are entitled to consideration"[245] in litigation concerning the

243. *See* CAL. PENAL CODE § 835a(a).

244. Carter v. Cal. Dep't of Veterans Affs., 135 P.3d 637, 644 (2006).

245. *Id.*; *see also* People v. Valencia, 397 P.3d 936, 948 (2017) ("In considering the purpose of legislation, statements of the intent of the enacting body contained in a preamble, while not conclusive, are entitled to consideration." (quoting People v. Canty, 90 P.3d 1168 (2004))).

scope and meaning of the statute, because California courts "construe provisions 'in a manner that effectuates the [enactors'] purpose in adopting the law.'"[246]

Moreover, the impact of this proposed addendum does not stem from the weight judges place on it when instructing jurors on the essential elements of section 835a's affirmative defense. Rather, the addendum's power rests in the awareness of racial bias that it triggers. There is a wealth of research indicating that one of the most effective ways to eliminate the effects of implicit racial bias is to make race salient.[247] For example, researchers have found that when race is made salient during criminal trials of Black defendants, White jurors are much less likely to find the defendants guilty.[248] When race is not made salient, White jurors are "more likely to rely on negative stereotypes about Blacks and . . . more likely to find a Black defendant guilty."[249] By making race salient in the California Act to Save Lives, the state legislature would similarly prompt judges, prosecutors, and jurors to question any biases they might be harboring when tasked with judging whether a police officer's use of lethal force was, in fact, necessary.

Beyond these effects on legal actors, there is a symbolic importance, a conferring of dignity where it has so long been denied, in proclaiming that Black lives matter. Critical race scholars have long pointed out that the recognition of formal rights for Black people has a significance that "transcend[s] the narrower question of whether reliance on rights could alone bring about any determinate results."[250] The grant of formal civil rights through the legislation and jurisprudence of the 1960s, though incapable of fully shifting racialized power differences in the United States, enabled Black Americans to "re-imagin[e] themselves as full, rights-bearing citizens within the American political imagination."[251] As Professor Patricia Williams has taught:

> For the historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity: rights imply a respect that places one in the referential range of self and others, that elevates one's status from human body to social being. For [B]lacks, then, the attainment of rights signifies the respectful behavior, the collective

246. Cal. Cannabis Coal. v. City of Upland, 401 P.3d 49, 55 (2017) (quoting Silicon Valley Taxpayers' Ass'n, Inc. v. Santa Clara Cnty. Open Space Auth., 187 P.3d 37 (2008))).

247. *See, e.g.*, Donald O. Bucolo & Ellen S. Cohn, *Playing the Race Card: Making Race Salient in* Defence *Opening and Closing Statements*, 15 LEGAL & CRIM. PSYCH. 293, 293 (2010) (finding that including "racially salient statements" in defense attorney opening and closing statements reduced White jurors' bias against a Black defendant); Ellen S. Cohn, Donald Bucolo, Misha Pride & Samuel R. Sommers, *Reducing White Juror Bias: The Role of Race Salience and Racial Attitudes*, 39 J. APPLIED SOC. PSYCH. 1953, 1953 (2009) ("Making race salient reduced White juror racial bias toward a Black defendant."); Elizabeth Ingriselli, *Mitigating Jurors' Racial Biases: The Effects of Content and Timing of Jury Instructions*, 124 YALE L.J. 1690 (2015).

248. Cohn et al., *supra* note 247, at 1957.

249. *Id.*

250. *See* Crenshaw, *supra* note 185, at xxiii.

251. *See id.* at xxiii–xxiv.

responsibility, properly owed by a society to one of its own.[252]

The same applies to the acknowledgment of equal dignity and worth. An acknowledgment from the California legislature that people of color are disproportionately vulnerable to police use of force—and an explicit commitment from the state's lawmakers to eradicate these racial disparities—would be a symbolic affirmation that Black and Latinx lives do, in fact, matter.

CONCLUSION

The California Act to Save Lives became state law at the brink of a critical racial reckoning in this country. Just four months after Governor Newsom signed the California Act to Save Lives into law, protests erupted across the country, sparked by the deaths of George Floyd[253] and Breonna Taylor[254] at the hands of police officers in Minnesota and Kentucky. These protests, like the ones that preceded them in years past, decried the immense racial disparities in officer-involved homicides.[255] Yet this wave of protests, more so than the ones before it, has "radicalized millions of [W]hite Americans who were previously inclined to dismiss systemic racism as a myth, the racial wealth gap as a product of Black cultural pathology, and discriminatory policing as a matter of a few bad apples."[256]

These protests have also inspired responses from several institutional actors recognizing outright the prevalence of racial bias within the justice system.

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252. PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 153 (Harvard University Press 1991).

253. George Floyd was a forty-six-year-old Black man who died after Minneapolis police officer Derek Chauvin knelt on his neck for over eight minutes as Mr. Floyd repeatedly pleaded, "I can't breathe." *How George Floyd Died, and What Happened Next*, N.Y. TIMES (May. 25, 2021), https://www.nytimes.com/article/george-floyd.html [https://perma.cc/QS2G-D7ZE]. Chauvin and the officers with him were responding to a call from a convenience store clerk "who claimed Mr. Floyd paid for cigarettes with a counterfeit $20 bill." *Id.*

254. Breonna Taylor, a twenty-six-year-old Black woman, was shot and killed by Louisville police officers executing a "knock and announce" warrant on her home in the middle of the night. Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. TIMES (Apr. 26, 2021), https://www.nytimes.com/article/breonna-taylor-police.html [https://perma.cc/6M9U-FKQK]. Ms. Taylor and her boyfriend, Kenneth Walker, called out to see who was at the door. *Id.* When they did not receive an answer and instead heard the door being removed from its hinges, Mr. Walker fired one shot, fearing for his life. *Id.* The shot struck an officer in the thigh, and the "police responded by firing several shots, striking Ms. Taylor five times." *Id.* Brett Hankison, one of the three officers, "shot 10 rounds blindly into the apartment." *Id.*

255. *See id.*; *see also* Adam Serwer, *The New Reconstruction*, ATLANTIC (Oct. 2020), https://www.theatlantic.com/magazine/archive/2020/10/the-next-reconstruction/615475/ [https://perma.cc/EFF5-EFTN] (arguing the Black Lives Matter movement is a continuation of the Reconstruction project); Kimberlé Williams Crenshaw, *Fear of a Black Uprising: Confronting the White Pathologies That Shape Racist Policing*, NEW REPUBLIC (Aug. 13, 2020), https://newrepublic.com/article/158725/fear-black-uprising-confronting-racist-policing [https://perma.cc/2Q9D-H7GR] ("[Protestors' demand to defund the police can] be framed more accurately . . . as the mandate to dismantle the hyper-militaristic, racist functions of the police as the coercive power of [W]hite nationalism.").

256. Serwer, *supra* note 255.

Notably, the supreme courts of several states issued public statements on the matter, including the California Supreme Court, which stated:

> We must acknowledge that, in addition to overt bigotry, inattention and complacency have allowed tacit toleration of the intolerable. These are burdens particularly borne by African Americans as well as Indigenous Peoples singled out for disparate treatment in the United States Constitution when it was ratified. We have an opportunity, in this moment, to overcome division, accept responsibility for our troubled past, and forge a unified future for all who share devotion to this country and its ideal.[257]

Unlike the California Supreme Court, the California legislature missed a critical opportunity to usher in this era of public reckoning by formally recognizing the role that racial bias plays in police determination of threat. Professor Bell's interest-convergence theory, which emphasizes the political considerations constraining racial justice legislation and jurisprudence, helps explain how the racial silence of the California Act to Save Lives came to be. The Act was only politically feasible so long as it did not substantially disrupt the racial status quo; explicitly challenging the criminalization of Black and Latinx people was politically unviable. The critical assumption underlying Bell's theory—that the subordination of Black rights to White interests is a pervasive, "neutral" principle of American jurisprudence—also explains the Act's colorblind language. The elision of race in the California Act to Save Lives demonstrates the ways that discussions of race and racism have been politicized and therefore silenced within our legislatures and courts.

Yet without an explicit acknowledgment of race's influence on police officer's decisions to employ lethal force, we are unlikely to reduce racial disparities in officer-involved homicides. By taking up race-neutral language, the California Act to Save Lives invites police officers, prosecutors, judges, and jurors to impose their own racialized understandings of threat onto the new legal standard. If this leads them to conclude that the use of lethal force against Black and Latinx Californians is in fact "necessary in defense of human life," then the Act will only serve to reify racist stereotypes as a common-sense legal standard for evaluating police violence. It will also further legitimize the actions of the police, as not only reasonable but necessary.

Tinkering with the legal standard for justified use of lethal force without addressing the underlying racial narratives that rationalize and naturalize the disproportionate use of force against people of color is unlikely to bring about the wholesale change that this moment of racial reckoning demands. The California Act to Save Lives not only failed to address the "neutral" assumption that Black people are dangerous and criminal, rendering them particularly

257. *State Court Statements on Racial Justice*, NAT'L CTR. FOR STATE CTS., https://www.ncsc.org/newsroom/state-court-statements-on-racial-justice [https://perma.cc/QS5S-PBVK].

vulnerable to continued police violence; by omitting the definition of "necessary" and merging with SB 230, the senate bill that earmarked additional funding for police departments, the Act also failed to limit the discretion and reach of the police in a concrete way.

The protests of the summer of 2020 ushered a new policy objective into the mainstream[258]—defund the police—based on an understanding that the most effective way to prevent police use of force is to limit, or even eliminate, law enforcement interactions with civilians. This call for divestment urges governments at the city, state, and federal levels to "redirect the billions that now go to police departments toward providing health care, housing, education and good jobs"[259] in addition to "non-police first responder programs, . . . public defense, reentry, harm reduction and [] other non-carceral programs."[260]

These protests forge the path ahead for our legislators, should they dare to take it: explicitly acknowledge and renounce the disproportionate use of force against Black people and divest from an increasingly militarized law enforcement, investing instead in Black community. Such legislation would make the statement that the California Act to Save Lives failed to make clear: Black lives, and Black *life*—Black health, safety, opportunity, and dreams—matter.

APPENDIX A: CALIFORNIA PENAL CODE §§ 196 AND 835A BEFORE THE CALIFORNIA ACT TO SAVE LIVES

§ 196. Justifiable homicide; public officers

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

258. Many civil rights leaders, organizations, and theorists have long called for the divestment from, or the complete abolition of, the police. *See, e.g.*, *Invest-Divest*, MOVEMENT FOR BLACK LIVES, https://m4bl.org/policy-platforms/invest-divest/ [https://perma.cc/F3X5-LY5M]; Stuart Jeffries, *Angela Davis: "There Is an Unbroken Line of Police Violence in the US That Takes Us All the Way Back to the Days of Slavery,"* GUARDIAN (Dec. 14, 2014), https://www.theguardian.com/global/2014/dec/14/angela-davis-there-is-an-unbroken-line-of-police-violence-in-the-us-that-takes-us-all-the-way-back-to-the-days-of-slavery [https://perma.cc/8YKL-WU43] (arguing the criminal justice and prison system is not the solution to police violence); ALEX S. VITALE, THE END OF POLICING (2018) (demonstrating how modern law enforcement exacerbates violence and calling for the implementation of policing alternatives). However, the summer of 2020 was the first time many individuals and organizations, including prominent, nonpartisan legal nonprofits such as the American Civil Liberties Union, formally adopted divestment from law enforcement as an official policy position. *See Coalition Statement on Federal Divestment from Policing*, ACLU (June 10, 2020), https://www.aclu.org/coalition-statement-federal-divestment-policing [https://perma.cc/E3YB-JD5U]; Garrett Felber, *The Struggle to Abolish the Police Is Not New*, BOS. REV. (June 9, 2020), http://bostonreview.net/race/garrett-felber-struggle-abolish-police-not-new [https://perma.cc/YGZ9-WKN8].

259. Mariame Kaba, Opinion, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html [https://perma.cc/QT72-UVEU].

260. *Coalition Statement on Federal Divestment from Policing*, *supra* note 258.

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.

§ 835a. Use of force to effect arrest, prevent escape, or overcome resistance

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.

APPENDIX B: CALIFORNIA PENAL CODE §§ 196 AND 835A AFTER THE ENACTION OF THE CALIFORNIA ACT TO SAVE LIVES

§ 196. Justifiable homicide; peace officers

Homicide is justifiable when committed by peace officers and those acting by their command in their aid and assistance, under either 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 that is in compliance with Section 835a.

§ 835a. Legislative findings and declarations; use of force to effect arrest, prevent escape, or overcome resistance; use of deadly force; definitions

(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) As set forth below, 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.

(3) 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.
>
> (4) 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.
>
> (5) 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 objectively reasonable force to effect the arrest, to prevent escape, or to overcome resistance.
>
> (c)(1) Notwithstanding subdivision (b), 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.
>
> (2) A peace officer shall not use deadly force against a person based on the danger that person poses to themselves, if an objectively reasonable officer would believe the person does not pose an imminent threat of death or serious bodily injury to the peace officer or to another person.
>
> (d) A peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts 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 objectively reasonable force in compliance with subdivisions (b) and (c) to effect the arrest or to prevent escape or

to overcome resistance. For the purposes of this subdivision, "retreat" does not mean tactical repositioning or other de-escalation tactics.

(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) "Totality of the circumstances" means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.

APPENDIX C: ORIGINAL LANGUAGE OF AB 392 AS INTRODUCED ON FEBRUARY 6, 2019

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), the homicide would be justifiable pursuant to Section 197, in self-defense or the defense of another person.

(4) When, subject to subdivision (b), 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.

Section 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.

(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 and 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 the 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.