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## Police Shootings - Administrative Law as a Method of Control over Police: *Peterson v. City of Long Beach*

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## Police Shootings—Administrative Law As a Method of Control Over Police: *Peterson v. City of Long Beach*

*Professor Kenneth Davis has long advocated that police manuals should be viewed as interpretative administrative rules, which would guide police in their daily activities. He argued that police departments should not fear adopting interpretative rules because such rules would not be binding; therefore, the department would not be subject to tort liability if an officer violated such a rule.*

*In Peterson v. City of Long Beach, a police officer violated the police manual when he shot and killed a non-violent fleeing suspect. The California Supreme Court, in an opinion by Justice Frank Newman, cited Professor Davis and his call for police administrative rulemaking. Justice Newman, however, ignored Davis's view that the manual represented non-binding interpretative rules. Instead, Newman held that the police manual is a regulation of a public entity and the violation of its rules by a police officer carries a rebuttable presumption of negligence. The result of Peterson is that police departments in California are now subject to tort liability when an officer violates the provisions of the department's own manual. Justice Newman had an opportunity to incorporate Davis's view and introduce California police departments to administrative rulemaking. Instead Newman chose to view police manuals as regulations of a public entity and as an additional source of tort liability for police departments.*

### I. INTRODUCTION

Police department policy, outlining the use of deadly force, has often been reduced to written form within police manuals. One of the chief fears regarding written policy is that it might be used against the department to impose civil liability.<sup>1</sup>

In 1968, this fear began to materialize. The California Supreme Court held in *Dillenbeck v. City of Los Angeles*<sup>2</sup> that the failure of

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1. Uelmen, *Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County*, 6 *LOY. L.A.L. REV.* 1 (1973).

2. 69 Cal. 2d 472, 446 P.2d 129, 72 Cal. Rptr. 321 (1968); text accompanying note 53 *infra* has additional discussion of the case. In *Dillenbeck*, the Los Angeles Police Department had issued "Daily Training Bulletins" which advised how officers should operate a vehicle under emergency conditions. On January 22, 1962, an officer, responding to a broadcast ordering all units to the site of a bank robbery, entered a blind intersection at a speed between 30 to 60 miles per hour with his siren activated. The officer's vehicle struck a car resulting in fatal injuries to the driver of that car. The posted speed limit was 35 miles per hour. The training bulletins had advised officers to avoid operating a vehicle in an emergency in excess of posted speed limit, and to reduce speed in an emergency to 15 miles per hour when going against a traffic signal in a blind intersection. The court found that the

an officer to follow training bulletins concerning the safe use of police vehicles constituted evidence of negligence. This decision was followed in 1970 by *Grudt v. City of Los Angeles*,<sup>3</sup> a case applying the *Dillenbeck* rule to the use of firearms by the police. *Grudt* held that a police tactical manual on the use of firearms was admissible on the issues of negligence and intentional torts.

Now these fears have fully materialized. The California Supreme Court, per Justice Newman, ruled in *Peterson v. City of Long Beach*,<sup>4</sup> that the violation of a police manual constitutes a rebuttable presumption of negligence. The court found that police departments were "public agencies" with rulemaking power and that police manuals contained rules and regulations, having the same effect as a statute, ordinance, or regulation with the "force of law" and with accompanying civil liability for noncompliance.<sup>5</sup>

Professor Kenneth Davis has long advocated that the police should be treated as administrative agencies which should abide by administrative rulemaking procedures. Davis said the police manual contained interpretive rules which were to guide the police officer in his daily actions in the field so that arbitrary actions by officers can be avoided. He felt that officers should not be guided by their "momentary whims."<sup>6</sup>

In *Peterson*, Justice Newman cited Professor Davis and his call for police administrative rulemaking. Thus, Newman had a choice in how he would characterize the police manual. He could have

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bulletins were safety regulations of an employer and as such, constituted a standard of due care. See Morrison, *Negligent Operation of a Police Vehicle*, 16 CLEV.-MAR. L. REV. 442 (1967).

3. 2 Cal. 3d 575, 468 P.2d 825, 86 Cal. Rptr. 465 (1970); text accompanying note 54 *infra* has additional discussion of the case. In *Grudt*, the decedent was shot to death by Los Angeles police officers after a high-speed chase in a high-crime area. The decedent's car was stopped by a blockade, and officers in plain clothes ordered the decedent to exit his vehicle. The officers testified that the decedent then attempted to run down an officer; whereupon, the fatal shots were fired. Witnesses at the scene disputed the officers' testimony. The police tactical manual contained rules for the use of firearms. In this type of factual situation, the manual justified the use of deadly force by an officer only if it was necessary to save himself, a citizen, a fellow officer, or a prisoner from death or grave bodily injury. The court quoted *Dillenbeck* and found the manual represented safety rules of an employer; thus, it was a standard of due care.

4. 24 Cal. 3d 238, 594 P.2d 477, 155 Cal. Rptr. 360 (1979).

5. *Id.* at 244-45, 594 P.2d at 480-81, 155 Cal. Rptr. at 363-64; see text accompanying notes 39-41 *infra*.

6. K.C. DAVIS, *POLICE DISCRETION* 108-11 (1975). It is generally recognized that there are three types of rulemaking: procedural rulemaking are rules established to control an agency's internal operation; interpretive rules are an agency's interpretation of existing statutes; and, legislative rules issued by an agency are the equivalent of a statute or ordinance. Legislative rules must be issued pursuant to statutory authority. See text accompanying notes 97-100 *infra*.

followed Davis's position and treated police manuals as administrative regulations, or he could have compared them to local municipal regulations. He chose the latter. Justice Newman thereby declined the opportunity to introduce California police departments to administrative rulemaking as Professor Davis had advocated for so long.

When Justice Newman elected to treat the police manual as local regulations, he determined the outcome of the case. The violation of local municipal regulations by a municipal employee carries tort liability. In contrast, the violation of an interpretive administrative rule carries no such liability.<sup>7</sup> After *Peterson*, any rule within a police manual, no matter how it is classified, can now be a standard of care with accompanying civil tort liability.

In applying tort liability to the police manual, Justice Newman extended the California position far beyond that advocated by Professor Davis. Davis never advocated tort liability but intended that police rulemaking be a guide for police, and he felt that tort liability would discourage such rulemaking.<sup>8</sup>

This note will examine the *Peterson* court's reasoning, the case history leading to this decision, the present state of administrative law on this issue, and the potential impact of this case. The note will also include a comparison of *Peterson* with the position

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7. CAL. EVID. CODE § 669(a) (West Supp. 1980) provides: "The failure of a person to exercise due care is presumed if . . . [he] violated a . . . regulation of a public entity . . ." This provision is contrasted with administrative law which usually provides that the violation of an interpretive administrative rule will not impose tort liability on police officers. Such regulations merely interpret existing law, they do not create law. K.C. DAVIS, *supra* note 6, at 110; note 8 *infra*.

8. Professor Davis never advocated tort liability for police rulemaking:

For the purpose to be served by police rules governing or guiding enforcement policies, interpretative rules will be at least as satisfactory as legislative rules, and they might sometimes be better in that they will not necessarily be controlling in suits that seek to impose tort liability on police officers.

K.C. DAVIS, *supra* note 6, at 110. Davis also claimed that police have rulemaking power for interpretative regulations: "[T]he police have rulemaking power, and [the] rules they might make on enforcement policy could be legal and constitutional, but the rules would not necessarily have the force of law." *Id.* at 108. While Davis qualifies his statements by saying that such rules are not "necessarily" conclusive in determining tort liability, the overriding goal of police rulemaking is to guide police. Tort liability would discourage such guidance and thus, defeat Davis's goal. Professor Uelmen claims that the combined effect of *Dillenbeck* and *Grudt* is to discourage police administrators from making a clear enunciation of policy. Uelmen, *supra* note 1, at 25.

taken by the leading scholar on administrative law and police control, Professor Kenneth Davis.

## II. FACTS OF THE CASE

### A. *The Shooting Incident*

*Peterson*<sup>9</sup> involved a police shooting incident where the officer fatally shot a fleeing burglary suspect in violation of the department's manual but within the confines of California Penal Code section 196.<sup>10</sup>

On October 13, 1972, Thomas Rabuchin's apartment was burglarized and his stereo equipment was taken. Rabuchin saw a tall black man in the apartment's carport the night of the burglary. The suspect was wearing a letterman's jacket from Long Beach State College. Rabuchin and his roommate, both students at Long Beach State, made inquiries which led to their suspicion of Roland Peterson. On October 18, 1972, Rabuchin and his roommate, went to Peterson's apartment where Rabuchin viewed his stereo inside the apartment after the door was opened in response to his knock. Rabuchin left Peterson's apartment and called the police.

It was at this point the police were misled. Rabuchin's call resulted in a series of police radio transmissions reporting that a burglary was in progress in Peterson's apartment. Officer Dennis Vershaw of the Long Beach Police Department [hereinafter LBPD] arrived first; then Officer John Finn arrived. Vershaw was met by a group of excited persons who told him to hurry to Peterson's apartment because a suspect was on his way to warn the others. Vershaw went to Peterson's third floor apartment and apprehended a black man on the third floor balcony. Finn arrived and went to the door of Peterson's apartment, knocked and announced, "Police. Open the door!" There was a sound of "stamping" to the rear of the apartment. Vershaw went to a place on the balcony where he could see the rear of the apartment. He saw a tall black man swing from the third floor to the second floor balcony and then to the courtyard. Vershaw shouted several times, identifying himself as a policeman and telling the suspect

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9. *Peterson v. City of Long Beach*, 72 Cal. App. 3d 923, 140 Cal. Rptr. 401 (1977), *vacated*, 24 Cal. 3d 238, 594 P.2d 477, 155 Cal. Rptr. 465 (1979) (official reports have deleted the appellate opinion, citation will be to the unofficial reports). The dissent of Justice Hanson of the court of appeal contains the more complete set of facts, 140 Cal. Rptr. at 404.

10. CAL. PENAL CODE § 196(3) (West 1970): "[H]omicide is justifiable when committed by public officers . . . in arresting persons charged with [a] felony, and who are fleeing from justice or resisting such arrest." See text accompanying notes 30 and 81 *infra*.

to halt. The tall black man stopped and looked at Officer Vershaw who was in uniform.<sup>11</sup> The suspect then continued his flight. Vershaw, believing the person was a burglar fleeing to avoid apprehension, fired his pistol and Roland Peterson was struck in the head and killed. Rabuchin identified Peterson as the person he had seen near his apartment on the night of the burglary.

*B. The Trial and Appeal*

Peterson's parents sued Officer Vershaw and the LBPD for the wrongful death of their son. They claimed Vershaw was negligent and unreasonable in firing his gun to prevent Peterson's escape, because the officer himself was in no danger. During the trial, the plaintiffs introduced into evidence the LBPD's manual section 4242,<sup>12</sup> which forbids an officer from using deadly force against an

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11. Vershaw later testified that he made eye contact with the suspect at this point. The importance of this testimony was never explained; presumably officer Vershaw wished to emphasize the fact that he believed the suspect saw him in uniform and identified him as a police officer.

12. LBPD manual § 4242 reads:

The policy of the Department governing the display and discharge of firearms is that members shall exhaust every other reasonable means of apprehension before resorting to the use of a firearm.

An officer shall not discharge a firearm in the performance of his police duties except under the following circumstances and only after all other means fail:

- \* In the necessary defense of himself from death or serious injury when attacked.

- \* In the necessary defense from death or serious injury of another person attacked.

- \* To effect an arrest, to prevent an escape, or to recapture an escapee when other means have failed, of an adult felony suspect when the officer has reasonable cause to believe that (a) the crime for which the arrest is sought involved conduct including the use or threatened use of deadly force and (b) there is a substantial risk that the person whose arrest is sought will cause death or serious bodily harm if apprehension is delayed.

- \* To kill a dangerous animal or one that is so badly injured that humanity requires its removal from further suffering and other disposition is impractical.

- \* To give an alarm or to call assistance for an important purpose when no other means can be used.

- \* For target practice at an approved range.

An officer shall not fire at persons known to be, or suspected of being juveniles (persons under 18 years of age) except (a) in the necessary defense from death or serious injury when attacked or (b) in the necessary defense from death or serious injury of another person attacked.

Firearms shall not be discharged under the following circumstances:

- \* As a warning.

- \* At moving or fleeing vehicles unless (a) in the necessary defense of himself from death or serious injury when attacked or (b) in the necessary defense from death or serious injury of another person attacked.

escaping felony suspect when there is no substantial risk that the suspect will cause death or serious bodily harm or when the crime which the suspect committed did not involve death or serious bodily injury.

The trial court, found that (1) Vershaw reasonably believed a burglary was in progress; (2) Vershaw had reasonable cause to believe that Roland Peterson had committed the burglary and was fleeing from the scene; and (3) Vershaw had reasonable cause to believe that there were no other means to prevent escape other than by firing the shot.<sup>13</sup> The trial court concluded that Vershaw acted reasonably in the use of deadly force and that the use of such force was justifiable. The trial court cited<sup>14</sup> *Murphy v. Murray*,<sup>15</sup> a 1925 case, which allowed a police officer to use force reasonably necessary to prevent the escape of a suspect which the officer reasonably and in good faith believed to be an adult who had committed a felony.

The trial court was reversed on appeal. Justice Thompson of the California Court of Appeal for the Second District wrote the majority opinion with Justice Lillie concurring.<sup>16</sup> Justice Thompson relied solely on *Kortum v. Alkire*,<sup>17</sup> which held police officers to the same standard of care as a private citizen in the use of deadly force to arrest a felony suspect. This standard forbids the use of deadly force against a fleeing suspect "unless the felony is of the violent variety, *i.e.*, a forcible and atrocious one which threatens death or serious bodily harm, or where there are other circumstances which reasonably create a fear of death or serious bodily harm to the officer or to another."<sup>18</sup> As such, the court

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140 Cal. Rptr. at 408 n.3 (emphasis in original).

13. 140 Cal. Rptr. at 409 n.5.

14. *Id.* at 408 n.4.

15. 74 Cal. App. 726, 241 P. 938 (1925). *Murphy* was similar in facts to *Peterson*. The officer had been informed that a burglary had been committed at a home. After arriving at the home, he was told that two suspects were running away at the rear of the house. One of the suspects was 16-year-old Murphy. Murphy failed to obey the officer's order to stop and ran into a grove of trees. The officer fired into the grove, striking and killing Murphy. It was later determined that the Murphy boy had performed a Halloween prank by cutting a screen on the house in question, entering the back porch, and turning off the electric current. This was the activity which resulted in the report of the burglary.

16. 140 Cal. Rptr. at 404.

17. 69 Cal. App. 3d 325, 138 Cal. Rptr. 26 (1977), *see* note 28 *infra* for a discussion of the facts in *Kortum*.

18. *Id.* at 333, 138 Cal. Rptr. at 31. The court in *Kortum* recognized that the police manual in that case was valid because it followed CAL. PENAL CODE § 835(a) (West 1970), which allowed any police officer who has reasonable cause to believe that the suspect has committed a public offense to "use reasonable force to effect the arrest, to prevent escape or to overcome resistance." The court, however, went on to hold that its own interpretation prevailed over the code. It is this interpretation which was the source of the standard of care applicable to private citizens

found that a burglary, where there is no fear of great bodily harm, is not a situation where deadly force can be used to apprehend a fleeing suspect.

Nonetheless, the court of appeal was uneasy with *Kortum*. "Unquestionably, *Kortum* grants a license to burglars and other 'nonviolent' felons to flee apprehension."<sup>19</sup> If the felony is nonviolent and the officer can not use deadly force to apprehend the suspect, there is every reason for the suspect to risk the dangers of fleeing. Yet, the court dismissed this concern stating the problem belonged with the legislature or the state supreme court.<sup>20</sup>

More importantly, the court of appeal commented on the police manual. The first comment was that the LBPD manual was "evidence of a standard of reasonableness but not controlling."<sup>21</sup> This comment was in agreement with *Vallas v. City of Chula Vista*,<sup>22</sup> a case rejecting the idea that a police manual was a statute, ordinance, or regulation the violation of which would be negligence as a matter of law.

Second, the court compared the three cases of *Murphy*, *Kortum*, and *Vallas*. The court of appeal found that *Murphy*, which allowed the use of deadly force on fleeing suspects involved in nonviolent felonies, was disapproved by the holding in *Kortum* because *Kortum* imposed the standard of care of a private citizen upon police officers. Then the court found that any implication in *Vallas* rejecting the idea that the police manual was a regulation was overridden.<sup>23</sup> The court stated *stare decisis* required *Kortum* to prevail. Yet it should be noted that *Kortum*, *Murphy*, and *Vallas* had all emanated from courts of jurisdiction equal to that of

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and police officers, which forbade the use of deadly force in connection with non-violent crimes.

19. 140 Cal. Rptr. at 404.

20. *Id.* Other police departments have their own solutions to prevent this "license to flee." Some departments allow the use of deadly force on nonviolent fleeing felons. The question of whether or not a police department uses deadly force with nonviolent fleeing suspects is determined by the individual police department and not the legislature. Notes 77-92 *infra* and accompanying text.

21. 140 Cal. Rptr. at 403.

22. 56 Cal. App. 3d 382, 128 Cal. Rptr. 469 (1976). *Vallas* also involved a police shooting, where the officer was charged with negligence in the discharge of his weapon against a fleeing suspect. Both the trial court and the court of appeal upheld the defendant officer. The trial court allowed the city police manual relating to officer's use of firearms to be admitted into evidence and considered on the issue of negligence, but it was not considered conclusive. The manual was not found to be a statute, ordinance, or the regulation of a public entity.

23. 140 Cal. Rptr. at 404.



the court in *Peterson*.<sup>24</sup> As such, the court of appeal was in no position to officially overrule *Murphy* and *Vallas*. In fact, the court of appeal in *Peterson* frankly admitted that the trial court had correctly decided the case by relying on *Murphy*; however, the court then found that *Kortum* was to be given retroactive effect.<sup>25</sup> This retroactive treatment was effectuated despite the fact that *Kortum* was decided in April 1977, which was *four and one-half years* after Officer Vershaw had fired his fatal shot of October 18, 1972.<sup>26</sup> Indeed, the dissenting justice wondered how Officer Vershaw was supposed to conform to the judicial interpretation of *Kortum* nearly five years in advance of that decision.

In his dissent, Justice Hanson found that there were other reasons for the court of appeal to be uneasy with *Kortum*. He noted that *Kortum* had relied upon *Long Beach Police Officers Assn. v. City of Long Beach*<sup>27</sup> in arriving at its conclusion that police and citizens were held to the same standards of care when using deadly force in apprehension of fleeing suspects. He then noted that *Kortum* and *Long Beach* did not involve civil litigation seeking money damages for negligence in police activity as *Peterson* had.<sup>28</sup> Rather, *Long Beach* involved a challenge to the police

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24. *Id.* at 412. All four decisions were issued by the California Courts of Appeal. *Kortum* and *Murphy* were issued by the first district; *Vallas* was issued by the fourth district; and *Peterson* was issued by the second district. Although, the court of appeal did not officially overrule *Murphy*, it stated that “[e]ffectively, however, *Kortum* overrules *Murphy* and disapproves the result in *Vallas*.” *Id.* at 404.

25. *Id.* at 403-04.

26. *Id.* at 417.

27. 61 Cal. App. 3d 364, 132 Cal. Rptr. 348 (1976); *see* note 27 *infra* for discussion of the facts.

28. 140 Cal. Rptr. at 412. *Long Beach* was a challenge by the Long Beach Police Officer's Association against the very section of the LBPD manual at issue in *Peterson*, § 4242. The suit was brought against the City of Long Beach and the Chief of Police seeking injunctive relief to restrain enforcement of § 4242. The contention was that § 4242 was unconstitutional and preempted by state law. The city argued that preemption applied because § 4242 went beyond the penal code. The manual forbade the use of deadly force by an officer except for situations involving violent crimes, note 11 *supra*, while California Penal Code § 196(3) allowed the use of deadly force to apprehend fleeing felons even though there was no physical danger existing to anyone. Note 85 *infra* and accompanying text.

The trial court upheld the promulgation of the manual section and the court of appeal affirmed. The court found that the manual section was a reasonable regulation within the powers of the city manager to prescribe, that it was not in conflict with or preempted by state law. The court found that the manual was not unconstitutional and that it was acceptable as local policy guidance.

Then in *Kortum*, citizens challenged as invalid the Pleasant Hill Police Department's manual section which contained the exact language of California Penal Code § 835(a), which allows a police officer to use reasonable force to arrest, to prevent escape, or to overcome resistance. The court of appeal affirmed the trial court holding the regulation valid. The court of appeal, however, went on to hold that it would be the judicial interpretation of the statutes or codes relied upon by the manual which would be determinative. It was only this “judicial interpreta-

manual by police officers, themselves, and *Kortum* involved a challenge to police manual by citizens. Neither case involved the use of deadly force by a police officer. In addition, *Long Beach* relied upon cases involving the use of deadly force only by private citizens and did not discuss cases involving the use of deadly force by police officers. As such, Justice Hanson found the *Long Beach* inclusion of police officers under the same standard as private citizens to be "gratuitous," "philosophical," and not necessary in order to arrive at a conclusion.<sup>29</sup> Justice Hanson also called attention to the fact that the court in *Long Beach* had found that the police manual was only for guidance and training, and would not per se create a basis for liability.<sup>30</sup>

Finally, Justice Hanson noted Officer Vershaw was within the confines of California Penal Code section 196 which holds that "[h]omicide is justifiable when committed by public officers . . . in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest."<sup>31</sup> He accused the majority of rewriting this section "by inserting the words 'forcible and atrocious' before the word 'felony' without resorting to constitutional, statutory, or proper judicial authority."<sup>32</sup> This, according to Justice Hanson, was an unwarranted intrusion upon the powers of the legislative branch.

### III. THE CALIFORNIA SUPREME COURT DECISION

#### A. *The Majority Opinion*

Ignoring *Kortum v. Alkire*,<sup>33</sup> the California Supreme Court did not address the issue of whether or not an officer is to be held to the same standard as a private citizen in the use of deadly force.<sup>34</sup> The court vacated the decision of the court of appeal and focused

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tion" which interpreted the code as holding a police officer and citizen to the same standard and that deadly force could not be used against a fleeing felony suspect unless the felony was a violent one.

29. 140 Cal. Rptr. at 414.

30. *Id.* at 414. This position paralleled that of Professor Davis and also that of Justice Richardson's dissent in *Peterson v. Long Beach*, 24 Cal. 3d 238, 247, 594 P.2d 477, 482 Cal. Rptr. 360, 365 (1979).

31. CAL. PENAL CODE § 196(3) (West 1970).

32. 140 Cal. Rptr. at 415. "Here, the California Legislature enacted section 196 as written in black ink in the book and it and only it or the people under the initiative process have power to change it by inserting the words 'forcible and atrocious' before the word 'felony.'" *Id.*

33. 69 Cal. App. 3d 325, 138 Cal. Rptr. 26 (1977).

34. Perhaps the court chose to do this in part because of the separation of

on a completely different area of discussion. Evidently, Justice Newman saw *Peterson* as the opportunity for the court to introduce the police department to a new concept, which recognizes that police manuals were regulations of a public entity. Justice Newman cited Professor Kenneth Davis and his theory that police departments should use administrative rulemaking procedures. Davis had advocated this because the police officer makes innumerable decisions in the field; to avoid arbitrary decisions in the field, Davis believed that administrative rulemaking by the police department would guide the officer in more detail than would the general state codes.

Newman, however, used an entirely different analysis than his cited authority, Davis. Newman first asked whether or not the police manual contained the rules of a public entity. By the simple act of asking this question, Justice Newman predetermined the outcome of the case: Newman was automatically comparing the police manual to rules of a local public entity. In so doing, Newman opposed their characterization as administrative rules which Professor Davis had urged. This distinction in analysis was extremely significant: a violation of the rules of a local public entity carries tort liability, while the violation of Davis's interpretive administrative rules does not.<sup>35</sup>

The supreme court found that the police manual, which regulates the use of weapons, does contain regulations of a public entity. Justice Newman, however, did not stop here; he went on to rule that the police manual also had the force of law. He concluded that if the manual had the force of law, it sets a standard of care; thus, its violation constituted a rebuttable presumption of negligence.<sup>36</sup> In effect, this decision upheld the results of the court of appeal and Officer Vershaw was to be presumed negligent unless this presumption was rebutted.

In the opinion, Justice Newman first looked at the question of whether or not the LBPD manual contains the regulations of a public entity. Turning to California Evidence Code section 200,

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power problem Justice Hanson pointed out in *Kortum*, but this is speculation as there was no discussion at all about the appellate court decision.

35. Notes 97-100 *supra* and accompanying text.

36. 24 Cal. 3d at 241, 594 P.2d at 478, 155 Cal. Rptr. at 361. Essentially, this was the limit of the court's discussion of the issue of rebuttal. The court simply concluded the decision by noting that the officer's violation of the manual raised a presumption of negligence and that "the officer cannot be freed from liability without a judicial inquiry as to whether he could successfully rebut the presumption." *Id.* at 247, 594 P.2d at 482, 155 Cal. Rptr. at 365. There was no further discussion, and there was no remand of the case to find whether or not this presumption could be rebutted. The court noted that rebuttal was now to be afforded the defendant but then denied the opportunity to so rebut.

Justice Newman found that a public entity can be "a nation, state, county, city and county, city, public authority, *public agency* or any other political subdivision, whether foreign or domestic."<sup>37</sup> He also looked to the California Law Revision Commission's definition of a public entity which commented that "[t]he broad definitions of 'public entity' includes every form of public authority."<sup>38</sup> Thus, the city was a public entity and Justice Newman took this to include the office of city manager and the police department as well. Newman went on to comment that when the city manager and the police department promulgated the LBPD manual, they were acting as heads of a public agency; consequently, the manual contained regulations of a public agency. "When regulations, have been duly prescribed and contain words that clearly are obligatory," California will not recognize any distinction between varying degrees of regulations, *i.e.*, all have the force of law.<sup>39</sup> Section 4242 of the LBPD manual was deemed by the court to have this obligatory language, *e.g.*, "'An officer shall not discharge a firearm' and 'Firearms shall not be discharged.'"<sup>40</sup> Since the manual was issued by a public entity with words that are "clearly obligatory," the police manual contained regulations which establish a standard of care. In support of this conclusion, Justice Newman cited Davis and his call for police administrative rulemaking to eliminate any chance of arbitrary policy making by the officers in the field.<sup>41</sup> Professor Davis, however, never advocated that tort liability should be a result of police administrative rulemaking.<sup>42</sup>

The court then proceeded to apply California Evidence Code section 669(a): "The failure of a person to exercise due care is presumed if . . . he violated a . . . regulation of a public entity . . . ."<sup>43</sup> After finding that the violation of the LBPD manual

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37. *Id.* at 243-44, 594 P.2d at 479, 155 Cal. Rptr. at 362 (emphasis in original); CAL. EVID. CODE § 200 (West 1966).

38. 24 Cal. 3d at 244, 594 P.2d at 479-80, 155 Cal. Rptr. at 362-63.

39. *Id.* at 245-46, 594 P.2d at 480-81, 155 Cal. Rptr. at 363-64.

40. *Id.* at 244 n.4, 594 P.2d at 480 n.4, 155 Cal. Rptr. at 363 n.4; note 11 *supra*.

41. 24 Cal. 3d at 245, 246 n.7, 594 P.2d at 480, 481 n.7, 155 Cal. Rptr. at 363, 364 n.7.

42. K.C. DAVIS, *supra* note 6, at 110; note 8 *supra*. One of the main reasons for not advocating liability for violation of a police manual was brought out by the amici curiae. They claimed such liability would deter the police department from making rules at all. 24 Cal. 3d at 246 n.7, 594 P.2d at 481 n.7, 155 Cal. Rptr. 364 n.7; see text accompanying note 52.

43. 24 Cal. 3d at 241-42, 594 P.2d at 478, 155 Cal. Rptr. at 361; CAL. EVID. CODE § 669 (West Supp. 1980) states in part:

presumes lack of due care and thus negligence, the only question which remained was whether or not Officer Vershaw could rebut this presumption by evidence that he did “‘what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.’”<sup>44</sup> Since the trial court did not decide whether or not Officer Vershaw desired to comply with the law, *i.e.*, the police manual, the officer “cannot be freed from liability without a judicial inquiry as to whether he could successfully rebut the presumption.”<sup>45</sup> The fact that Vershaw’s action was within the confines of California Penal Code section 196, which permits the use of deadly force in apprehending nonviolent fleeing felons, did not deter the court. They found that section 196 did not compel the use of deadly force;<sup>46</sup> thus, a stricter rule could be imposed. The effect of the court’s ruling is that in California, local entities can promulgate more stringent regulations than those contained in the state codes.<sup>47</sup> In *Peterson*, that more stringent regulation was the LBPDP manual.

For a public agency to promulgate rules, however, as Justice Newman had claimed the police department had done, there must be a specific grant of authority “vested by constitution, statute,

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- (a) The failure of a person to exercise due care is presumed if:
    - (1) He violated a statute, ordinance, or regulation of a public entity;
    - (2) The violation proximately caused death or injury to person or property;
    - (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
    - (4) The person suffering the death or injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.
  - (b) This presumption may be rebutted by proof that:
    - (1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law. . . .

44. 24 Cal. 3d at 241, 247, 594 P.2d at 478, 482, 155 Cal. Rptr. at 361, 365; CAL. EVID. CODE § 669(b)(2) (West Supp. 1980); note 43 *supra*.

45. *Id.* at 247, 594 P.2d at 482, 155 Cal. Rptr. at 365.

46. 24 Cal. 3d at 247 n.8, 594 P.2d at 482 n.8, 155 Cal. Rptr. 365 n.8. This reasoning was not explained by the court. Presumably, since Penal Code § 196 did not compel the use of deadly force, Justice Newman took the liberty to conclude that a police manual could rewrite the penal code so long as the manual placed additional limits on the use of deadly force. This was the substance of Justice Hanson’s dissent when the case was in the appellate court. *Peterson v. City of Long Beach*, 140 Cal. Rptr. at 415.

47. In the instant case, as in *Long Beach Police Officer’s Ass’n v. City of Long Beach*, 61 Cal. App. 3d 364, 132 Cal. Rptr. 348 (1976), the police manual § 4242 was stricter than California Penal Code § 196. The manual forbade the use of deadly force by an officer except for situations involving violent crimes, note 11 *supra*. The penal code, however, allowed the use of deadly force to apprehend fleeing felons even though violent crime is not involved nor threatened, notes 81-82 *infra* and accompanying text.

charter or ordinance."<sup>48</sup> Justice Newman said the authority had been granted to the city manager and chief of police, but he did not identify that specific grant of authority other than to say such authority was vested "by charter or ordinance."<sup>49</sup>

Chief Justice Bird and Justices Tobriner and Mosk joined in the majority opinion.

### *B. The Dissent*

Justice Richardson disagreed; he found that the police manual could not establish a standard of care. He felt the manual was not designed to protect persons within the plaintiffs' class from the type of injury which in fact occurred. Justice Richardson noted that the regulation was not designed to protect this class of persons because the manual was intended only as guidance to the police officer. The LBPD manual had intended section 4242 to be a restraint over and above penal code section 196 so that it would prevent acts by police officers which would later lead to law suits. Justice Richardson thought it ironic "that guidelines which were intended to shield against civil suits may now furnish the sole basis for imposing such liability."<sup>50</sup> Indeed, even the plaintiffs had agreed: "there is *no dispute* as to the rule . . . that the violation of the Police Manual Procedure will not be deemed the equivalent of the violation of a statute or ordinance [under section 669]."<sup>51</sup>

Both the American Civil Liberties Union and the American Bar Association appearing as amici curiae supported the Long Beach Police Department. They feared the result would be to inhibit the preparation and publication of sorely needed guidelines for the

48. 24 Cal. 3d at 246, 594 P.2d at 481, 155 Cal. Rptr. at 364. The court was referring to California Government Code § 811.6, which defines a regulation as a "rule, regulation, order or standard, having the force of law, adopted by an employee or agency . . . of a public entity pursuant to authority vested by constitution, statute, charter or ordinance in such employee or agency to implement, interpret, or make specific the law enforced or administered by the employee or agency." CAL. GOV'T CODE § 811.6 (West 1980). Newman had a choice, he could define a police manual as a local regulation as defined by § 811.6 or he could define the manual as administrative rulemaking. He chose the former.

49. 24 Cal. 3d at 244, 246, 594 P.2d at 480, 481, 155 Cal. Rptr. at 363, 364.

50. *Id.* at 249, 594 P.2d at 483, 155 Cal. Rptr. at 366 (Richardson, J., dissenting).

51. *Id.* (emphasis in original). Of course, Justice Richardson's position was in contrast to that held by Newman as Newman had sought to emphasize that the manual established a standard of care. Richardson's counter point was that the manual could not be a standard of care because its very purpose was to go over and above the standard of care set by the penal code so that the actions of the police officers would be above attack by civil suits.

police which were over and above the statutory regulations.<sup>52</sup> The American Civil Liberties Union and the American Bar Association did not believe the manual had the force of law, but they both preferred a police manual which went over and above the minimum standard of care established by the penal code.

Justices Clark and Manuel joined the dissent.

#### IV. HISTORICAL REVIEW

##### A. *Prior Case History*

The results in *Peterson* were foreshadowed by *Dillenbeck v. City of Los Angeles*<sup>53</sup> and *Grudt v. City of Los Angeles*.<sup>54</sup> These cases respectively held that the violation of a training bulletin and the violation of a police tactical manual were admissible on the subject of the standard of care.<sup>55</sup> Justice Newman, in his majority opinion in *Peterson*, never mentioned these two cases; however, he applied their reasoning to arrive at his conclusion in *Peterson* that police manuals have the force of law.

In *Dillenbeck*, the defendant city argued that the police training bulletins were only "informative" or "instructive," and as such, they were not rules evidencing a standard of care. Justice Tobriner, echoing Justice Newman in his *Peterson* opinion, answered this claim by stating that the bulletins "laid down a guide to conduct" and thus, established a minimal standard of care.<sup>56</sup> Likewise, the dissent in *Dillenbeck* was similar to Justice Richardson's position in *Peterson*. The *Dillenbeck* dissent noted the training bulletins were only informative and instructive and were in the nature of written lectures. Justice Burke in the *Dillenbeck* dissent argued that the bulletins were taken out of context and given a meaning and a standard of care which the authors of the bulletin had never intended.

*Dillenbeck* had taken its standard of care from the earlier case of *Torres v. City of Los Angeles*, which held that "the degree of

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52. *Id.*

53. 69 Cal. 2d 472, 466 P.2d 129, 72 Cal. Rptr. 321 (1968). See note 2 *supra* for facts of the case.

54. 2 Cal. 3d 575, 468 P.2d 825, 86 Cal. Rptr. 465 (1970). See note 3 *supra* for facts of the case.

55. 69 Cal. 2d at 479, 446 P.2d at 133, 72 Cal. Rptr. at 325. "[T]he jury should have had the opportunity to consider [the bulletins] as evidence of the requirements for public safety necessary to meet the standard of due care in the operation of an emergency vehicle." *Id.*

56. *Id.* The court found that in determining whether or not an employer's directive is a safety rule which would be admitted on the issue of negligence, "the issue turns on whether the directive in question affords a specific indication of the employer's reconciliation of the conflict between maximum efficiency in operations and maximum safety to the public." *Id.*

care lawfully imposed upon the agents or the employees of a municipality is that care consistent with the exercise of ordinary prudence in all the prevailing circumstances."<sup>57</sup> Thus in 1962, *Torres* used the standard of care of a private citizen. Yet, *Torres* and *Dillenbeck* are both distinguishable from the fact situation in *Peterson*. *Torres* involved a manual on the safe operation of fire trucks, while *Dillenbeck* involved a manual on the safe operation of police vehicles, but neither involved the use of deadly force to stop fleeing felons as *Peterson* had. The negligent use of municipal vehicles is a vastly different factual setting than the affirmative use of deadly force to stop fleeing felons. Evidently, after *Peterson*, the court views the standard of care as the same in these widely divergent situations.<sup>58</sup>

It was the *Grudt* decision which applied the *Dillenbeck* standard of care to a fact situation involving the use of firearms by police. *Grudt* simply cited *Dillenbeck*, which stated that the rules for the use of firearms "represent an informed judgment" and the violation of such rules "serves as evidence of negligence."<sup>59</sup> So by a brief quote, *Grudt* applied the *Dillenbeck* and *Torres* standard of care to a police shooting incident. *Peterson* was the next case to use the *Grudt* reasoning, but *Peterson* went further, and declared that the police manual had the force of law.

Professor Uelmen, concerned about the effect of these rulings, stated: "The simple truth is that the *Dillenbeck* and *Grudt* rulings will deter and have deterred some police administrators from producing a clear enunciation of policy."<sup>60</sup> Uelmen argues this fear of civil liability by police administrators is nonetheless a misconception; since a clearly enunciated policy would actually serve to limit liability by requiring officers to more consistently meet a uniform standard of conduct. *Peterson*, however, would not seem to alleviate any of the fears of police administrators; obviously in *Peterson*, liability was not avoided. Professor Uelmen then noted

57. 58 Cal. 2d 35, 51, 372 P.2d 906, 916, 22 Cal. Rptr. 866, 876 (1962).

58. *Torres* used the standard of care of a private citizen just as *Kortum v. Alkire*, 69 Cal. App. 3d 325, 138 Cal. Rptr. 26 (1977), would later use in 1977, by requiring a police officer to use the standard of care of a private citizen when using deadly force. See note 28 *supra* for a discussion of the facts of *Kortum*.

59. 2 Cal. 3d at 588, 468 P.2d at 831, 86 Cal. Rptr. at 471.

60. Uelmen, *supra* note 1, at 25. Professor Uelmen also noted that a committee of the American Bar Association recommended that "a violation of administrative policy should not result in mandatory civil liability." *Id.* at 25 n.64; ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE URBAN POLICE FUNCTION (Tentative Draft, March 1972) § (b)(ii).



a *Catch-22* situation. If police departments do not produce clearly enunciated manuals, liability of a city may be premised on the lack of training given to police officers.<sup>61</sup>

Perhaps in response to the possibility of liability, the court of appeal, in 1976, decided *Vallas v. City of Chula Vista*,<sup>62</sup> which held that a police manual was *not* a statute, ordinance, or regulation which carried civil liability. However, the next year, this decision was countered by a different court of appeal in *Kortum* which held police officers to the same standards of care as private citizens in the use of deadly force. Finally in 1979, the *Peterson* decision was issued.

It would simply be speculative to attempt to predict future actions of police departments where they face liability for clearly enunciated manuals and also liability for vague manuals. It would, however, be doubtful that all written police policy would disappear. As long as there is any policy, it would be admissible under the *Dillenbeck-Grudt* holdings regardless of whether or not it is in writing.<sup>63</sup>

### B. *Liability and Methods of Controlling the Police*

The issue of liability of government officers has its roots in the doctrine of sovereign immunity, which prevented suits against a state by its citizens.<sup>64</sup> Treating the doctrine as an anachronism,<sup>65</sup> many states have concluded that it is mistaken and unjust for a government to refuse redress to its citizens. Yet the state should not accept liability for all harms. The public has a vital interest in the free and independent judgment of its officers.<sup>66</sup> That free judgment would not exist if the threat of a lawsuit constantly hung over the heads of the governmental agents. Chief Justice Traynor had developed a formula so that California may provide an acceptable amount of governmental immunity. "Governmental

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61. Uelmen, *supra* note 1, at 25-26.

62. 56 Cal. App. 382, 128 Cal. Rptr. 469 (1976); *see* notes 21 and 23 *supra* and accompanying text.

63. Uelmen, *supra* note 1, at 25.

If policy is perceived as a prophylactic device designed for maximum flexibility in "backing up" an officer in his decisions, it may well be that maximum flexibility can be maintained by having no policy, or by not putting policy in written form. If policy is perceived as a means of controlling the conduct of police officers, however, a clearly formulated policy may serve to limit liability by insuring that officers more consistently meet a uniform standard of conduct.

*Id.*

64. K.C. DAVIS, ADMINISTRATIVE LAW TEXT, 458-73 (3d ed. 1972).

65. *Id.* at 469 (citing *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961)).

66. *Id.* at 471 (citing *Lipman v. Brisbane Elementary School District*, 55 Cal. 2d 224, 359 P.2d 465, 11 Cal. Rptr. 97 (1961)).

officials are liable for the negligent performance of their ministerial duties . . . but are not liable for their discretionary acts within the scope of their authority . . . even if it is alleged that they acted maliciously . . . ."<sup>67</sup> The distinction between ministerial and discretionary duties is based upon the assumption that discretionary decisions are necessarily nontortious. "It is not a tort to govern."<sup>68</sup> Free judgment must exist in the discretionary area.

Of all governmental agents, police officers are treated differently as they are not entirely governed by the above rule. "They usually enjoy no immunity even for action involving a good deal of discretion."<sup>69</sup>

It is undoubtedly true that the immunity doctrine has been extended by the courts in recent years from the highest ranks to many of the lesser [sic] ranks, but we are not inclined to hold that its coverage extends to the police officers of Washington National Airport. To do so, in our opinion, would be carrying the doctrine too far.<sup>70</sup>

The U.S. Supreme Court held in *Barr v. Matteo*<sup>71</sup> that the principle of immunity extends to all governmental officers acting in the line of duty. This was applied to officers far down the administrative hierarchy but not to police officers sued for false arrest, false imprisonment, excessive force, and the like.<sup>72</sup>

One of the reasons offered for treating police differently is that police powers are substantially different. Subordinates, far removed in the line of authority, have wide discretionary authority in the field<sup>73</sup> as compared with the more limited authority of state employees in other state agencies. This wide authority in the of-

67. *Id.* at 470 (citing *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 220, 359 P.2d 457, 462, 11 Cal. Rptr. 89, 94 (1961)); B. SCHWARTZ, *ADMINISTRATIVE LAW* 557 (1976).

68. K.C. DAVIS, *supra* note 64, at 469.

69. *Id.* at 489.

70. *Craig v. Cox*, 171 A.2d 259, 262 (D.D.C. 1961), *aff'd*, 304 F.2d 954 (D.C. Cir. 1962).

71. 360 U.S. 564 (1959).

72. B. SCHWARTZ, *supra* note 67, at 559.

73. K.C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 88 (1969):

No other federal, state or local agency . . . delegates so much power to subordinates. No other agency . . . does so little supervising of vital policy determinations which directly involve justice or injustice to individuals. And no other agency . . . makes policy which in such a large degree is illegal or of doubtful legality.

Brent, *Redress of Alleged Police Misconduct: A New Approach to Citizen Complaints and Police Disciplinary Procedures*, XI U.S.F. L. REV. 587, 589-90 (1977).

ficers resulted in attempts to limit it by removing immunity.<sup>74</sup> In order to understand the extent of this lack of immunity and when liability attaches, the various methods of police control must be reviewed since liability varies with the method of control.

Professor Goldstein has pointed out several methods of civilian control of the police,<sup>75</sup> and the accompanying weaknesses. Civil action is always possible but the costs to the civilian plaintiffs can be prohibitive. Judicial review is limited to the exclusionary rule and it is questionable whether it has adequate influence on the future behavior of the officer.<sup>76</sup> Civilian review boards are not equipped to initiate actions against police officers as they are usually given no such powers. Simply airing public grievances against police officers has limited function. Goldstein advocated an ombudsman concept which has control over internal disciplinary procedures.

### C. *The Use of Deadly Force by Various California Police Departments Under the California Penal Code*

The California Penal Code advocates a method of police control and a source of liability especially in the area of the use of deadly force. Penal Code section 835(a) provides: "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

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74. Brent, *supra* note 73, at 590.

75. Goldstein, *Administrative Problems in Controlling the Exercise of Police Authority*, 58 J. CRIM. L.C. & P.S. 160, 168-70 (1967). See Cohen, *The Police Internal System of Justice in New York City*, 63 J. CRIM. L.C. & P.S. 54 (1972) for discussion of internal control. Cohen outlines a statistical study of complaints against officers which notes that of the sample studied, 41.7% of all officers received complaints either from the department or from citizens. Ninety-five percent had fewer than five complaints. *Id.* at 56. Of the complaints which were received, most were departmental: 64% were departmental; 9.5 were criminal complaints; the remaining 26% were civilian complaints. *Id.* at 57. Of the civilian complaints received, half involved the charge of the use of unnecessary force. Approximately 85% of the civilian complaints were dismissed or filed while 15% came to trial. *Id.* at 62. Of the departmental complaints, however, 59% were brought to trial. The reason why more civilian complaints were dismissed than departmental complaints is because departmental complaints, being brought by superior officers, were found to be more substantial, and thus, had a stronger basis than civilian complaints. *Id.* at 60.

76. See McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972). Judge McGowan would pursue court involvement beyond that of the exclusionary rule. Instead of merely consigning cases to the official reports, McGowan urged the embodiment of police practices into rules which would then be scrutinized by the courts promptly after issuance. This, according to McGowan, would greatly expand the court's authority over the police, because courts would now review more police practices directly instead of just those which are linked to evidence gathering and the exclusionary rule. *Id.* at 686-87.

...<sup>77</sup> The penal code also authorizes the use of deadly force. Section 197(1),<sup>78</sup> allows both a police officer *and* a private citizen to defend himself or another against death or great bodily harm inflicted by another. In addition, a police officer and a private citizen may use deadly force to prevent commission of a felony but only those felonies which threaten serious bodily harm.<sup>79</sup>

The requirements for the use of deadly force, however, change once the felony has been committed and the goal is the apprehension of the felon. When a felony has taken place, both a private citizen and a police officer may use deadly force to apprehend the felon.<sup>80</sup> In addition, Penal Code section 196(3) allows the officer to use deadly force to arrest "persons charged with a felony, and who are fleeing from justice or resisting such arrest."<sup>81</sup> The key word is "charge" and this provision has been liberally construed to allow the use of deadly force by a police officer upon reasonable belief that a person is fleeing after the commission of a felony even though no felony has actually been committed.<sup>82</sup>

When it comes to the issue of escape of a felon as opposed to prevention of a felony, the law does not concern itself with the type of felony. The police officer's right to use deadly force exists even though there is no threat of danger to the safety of any person.<sup>83</sup> *Murphy v. Murray*,<sup>84</sup> which was cited by the trial court in

77. CAL. PENAL CODE § 835(a) (West 1970).

78. CAL. PENAL CODE § 197 (West 1970) provides in part:

Homicide is also justifiable when committed by *any person* in any of the following cases:

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

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

(Emphasis added).

79. CAL. PENAL CODE § 197(1) (West 1970).

80. CAL. PENAL CODE § 197(4) (West 1970). Note 78 *supra*.

81. CAL. PENAL CODE § 196(3) (West 1970). Section 196 provides in part:

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

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.

82. Uelmen, *supra* note 1, at 6.

83. *Id.* at 6 n.21.

84. 74 Cal. App. 726, 241 P. 938 (1925); note 15 *supra* and accompanying text.

*Peterson*,<sup>85</sup> illustrated this point because its holding is identical with the current penal code in allowing the application of deadly force to apprehend nonviolent fleeing felons.

Now, *Peterson* limits this liberal construction of the penal code; the right of a police officer to use deadly force against an escaping nonviolent felon is restricted by the language found in police manuals which are given the status of "regulations of a public entity" by *Peterson*. Presumably, if the police manual itself had allowed such force or had repeated verbatim section 196<sup>86</sup> of the California Penal Code, the police officer could still use deadly force against a nonviolent felon. *Murphy* may have been challenged but section 196 is still valid.

In California, the penal code provisions on deadly force are very broad and allow much discretion by the individual police officer.<sup>87</sup> The code provisions are broad enough so that a fourteen-year-old boy fleeing the scene of an auto theft could be justifiably killed.<sup>88</sup> This illustrated Kenneth Davis's point that case by case discretion by police in the field can be denial of equal justice.<sup>89</sup>

Professor Uelmen, in an expansive and detailed statistical analysis of the use of deadly force by the fifty police departments in Los Angeles County, pointed out remarkable disparities in this broad police discretion.<sup>90</sup> He found that the police policies adopted with respect to fleeing felons were surprisingly diverse, especially in determining which felons were considered danger-

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85. 140 Cal. Rptr. at 408-09 n.4.

86. CAL. PENAL CODE § 196 (West 1970); note 81 *supra* and accompanying text.

87. Uelmen, *supra* note 1, at 6. Professor Uelmen went on to summarize the problem under the California Penal Code:

The bare skeleton of the Penal Code provisions offers no guidance as to which felonies should be regarded as sufficiently dangerous to justify resorting to deadly force to prevent their commission or to capture the perpetrator. Nor do the statutes suggest the use of non-deadly force if the felon is a juvenile or is known to be intoxicated or otherwise incapacitated. Such guidelines must come from police administrators.

*Id.* Under *Peterson*, it is these "guidelines" which have force of law and its attendant civil liability.

88. *Id.*

89. K.C. DAVIS, *supra* note 6, at 99. According to Professor Davis, the denial of equal justice occurs when there is a disparity in the handling of one situation by an officer in contrast to another situation in the field. "The police obviously need rules. That is why they have always had rules, such as the present general orders and special orders. . . . The Chicago Police are seriously deficient, in my opinion, in the extent to which disparity from case to case produces a denial of equal justice." *Id.* at 98-99.

90. Uelmen, *supra* note 1, at 7-15. All 50 police departments within Los Angeles County were surveyed. Professor Uelmen provided three tables outlining each department's policy on the use of deadly force. Of course, the study is subject to subsequent police department modification of their own policies following the date of the study in 1973.

ous enough to justify use of deadly force.<sup>91</sup> Uelmen found that there were five types of police department policies. First, some departments did not restrict the breadth of the penal code provisions, and thereby allow deadly force to be used in all situations allowed by the code, including situations involving nonviolent felony crime. Second, other departments would prohibit the use of deadly force against fleeing adults whether or not they were violent or showed potential for violence. Third, other departments significantly limit the type of felony from which a suspect must be fleeing before deadly force may be used, permitting it in an armed robbery situation while prohibiting it in the case of the fleeing burglary suspect. The Los Angeles Police Department was in this category. Fourth, some of the departments which limit the type of felony from which a suspect must be fleeing also prohibit use of deadly force against fleeing juveniles, *i.e.*, deadly force could only be used in the case of a fleeing adult armed robbery suspect. This was the category in which the Long Beach Police Department was classified. It is notable that the LBPD has one of the more stringent policies on the use of deadly force. Arguably, had the LBPD had a less stringent policy such as those departments, which follow the penal code, then the officers in *Peterson* would not have been in violation of their manual, hence the result of *Peterson* would obviously be different. Finally, there were those departments which follow a policy of self-defense or defense of others before use of deadly force is allowed.

Uelmen also found that this disparity in police policy was not due to geography, race, arrest rates, or the character of the community.<sup>92</sup> Rather, this disparity is attributable to the individual likes and dislikes of the particular police chief who alone usually chooses the policy.<sup>93</sup> Davis's solution was police rulemaking. "[E]very police chief executive should formalize procedures for

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91. *Id.*

92. *Id.* at 12-15.

93. *Id.* at 15. Uelmen summarized his conclusion as follows:

Nor do the variations appear to be the result of varying community sentiments as to the vigor with which law enforcement officers should pursue fleeing felons. An inquiry as to how police policy is formulated discloses that the major factor which accounts for this wide disparity in policy is the equally wide diversity in the personal philosophies of the fifty chiefs of police who administer the various police departments in Los Angeles County.

*Id.*

developing and implementing the . . . written agency policy.”<sup>94</sup> The formality of administrative rulemaking would replace the subjective choice of one man. Professor Uelmen would urge that a statewide police policy board be established to insure uniformity of policy.<sup>95</sup>

## V. RULEMAKING AND ADMINISTRATIVE LAW

### A. *The Present State of Administrative Law*

The California Administrative Procedure Act<sup>96</sup> [hereinafter California APA] promulgates the principles for adoption of administrative rules and regulations. If a state decides to use the administrative rulemaking procedures as a method of police control, it must consider the conditions under which rulemaking has the force of law and the conditions under which liability attaches. Professor Davis advocates introducing the use of such administrative procedures as an alternative method of police control.

Administrative law recognizes that agencies issue three types of rules.<sup>97</sup> First, *procedural* housekeeping rules establish the control of the agency's own operation, its rulemaking, and adjudicative hearings. Such rules would be binding. “In other words, an agency decision will usually be reversed if a regulated party can show that the agency did not comply with its own [procedural] rules.”<sup>98</sup> Second, *interpretive* rules would outline the agency's informal opinion on the meaning of a statute or its terms. It is a clarification or explanation of existing laws rather than a modification of them. The agency's interpretive rules are significant but

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94. K.C. DAVIS, *supra* note 6, at 101.

95. Uelmen, *supra* note 1, at 62-64. The idea of a board to review police policy takes varied forms. Prior to becoming Chief Justice of the United States Supreme Court, Warren Burger advocated the establishment of an independent review board composed of a majority of civilians, but with some police participation. Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1 (1964); see Brent, *supra* note 73, at 588. Such efforts at review of police activity will not, however, be aided by the federal courts. In *Rizzo v. Goode*, 423 U.S. 362 (1976), a federal district court in Philadelphia issued an injunction under the Civil Rights Act, 42 U.S.C. § 1983 (1970), requiring the police department to restructure its complaint procedures and disciplinary system. The injunction was supposed to eliminate unconstitutional conduct on the part of police officers. In addition to finding that the plaintiffs had a lack of standing, the court ruled that control of police departments is primarily a local matter. Thus, the role of federal courts in such matters is greatly diluted.

96. CAL. GOV'T CODE §§ 11340-11445 (West Supp. 1980) (originally codified at CAL. GOV'T CODE §§ 11370-11528 (West 1966) (repealed, effective July 1, 1980)); Hutchinson, *Rule Making Function of California Administrative Agencies*, 15 HASTINGS L.J. 272, 272-73 (1964).

97. K.C. DAVIS, *supra* note 6, at 108-10; E. GELLHORN, ADMINISTRATIVE LAW AND PROCESS, 122-27 (1972); B. SCHWARTZ, *supra* note 67, at 153.

98. E. GELLHORN, *supra* note 97, at 123; B. SCHWARTZ, *supra* note 67, at 153.

do not have the force of law.<sup>99</sup> Finally, *substantive* or *legislative* agency rules have the force of law. They are the equivalent of a statute or ordinance and must be issued pursuant to statutory authority. Such rules create law just as a statute does and compel compliance by their terms.<sup>100</sup>

The next question concerns which administrative law applies. If the agency is created by Congress, the federal Administrative Procedure Act [hereinafter federal APA] will govern its rulemaking procedures.<sup>101</sup> If the agency is created by the California Legislature, the California APA applies.<sup>102</sup> The type of rulemaking can have major ramifications. If a rule is merely *procedural* or *interpretive*, it is not covered by the federal APA.<sup>103</sup> The same was true in California; the California APA did not cover procedural or interpretive rules.<sup>104</sup> Recently, however, California changed its position in another decision by Justice Newman holding that *interpretive* rules by state agencies are now to be governed by the California APA.<sup>105</sup> Arguably, if Davis had prevailed in his view

99. E. GELLHORN, *supra* note 97, at 123-25; B. SCHWARTZ, *supra* note 67, at 154, 161.

100. B. SCHWARTZ, *supra* note 67, at 154-55, 160-61.

101. Administrative Procedure Act, 5 U.S.C. §§ 551 *et. seq.* Section 551 provides: "agency" means each authority of the Government of the United States."

102. CAL. GOV'T CODE § 11346 (West Supp. 1980): "the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute."

103. 5 U.S.C. § 553(b) (1976) provides:

General notice of proposed rulemaking shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.

. . . .  
Except when notice or hearing is required by statute, this subsection does not apply—

(A) to *interpretive* rules. . . .

(Emphasis added). 5 U.S.C. § 553(d) (1976): "The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except . . . (2) Interpretive rules. . . ."

104. CAL. GOV'T CODE § 11346 (West Supp. 1980). This statute specifically provided that the California APA applied only to the "exercise of quasi-legislative power conferred by any statute." There is no statute conferring power to make interpretive rules, so interpretive rules were not originally under the California APA. K.C. DAVIS, *supra* note 6, at 103-04. *But see* notes 105 and 134-41 *infra* and accompanying text.

105. *Armistead v. State Personnel Bd.*, 22 Cal. 3d 198, 204, 583 P.2d 744, 747, 149 Cal. Rptr. 1, 4 (1978) (Newman, J.): "Under . . . the APA, rules that interpret and implement other rules have no legal effect unless they have been promulgated in substantial compliance with the APA."



that police manuals contain interpretative rules, they too would be under the California APA.

In addition, legislative rules with the force of law must be issued according to either federal or state APA rules.<sup>106</sup> Also, there is one overriding rule; all rules which are issued and are governed by either the federal or California APA must be issued under a specific legislative grant of authority.<sup>107</sup>

One problem which arises, especially in relation to the federal APA, is distinguishing between interpretive and legislative rules. The analysis is as follows: if the main rule or standard is contained in a regular statute or a code, then any agency rule which is issued on the same subject as that statute or code, must be merely interpretive. The simple reason being that, if the agency rule is merely referring to a standard already contained in a code; then the agency rule can only be interpreting that code.

The question is then what type of rules do the police departments make? Arguably, police manuals in California contain *interpretive* rules, because the original standard of care in the use of firearms by police was contained in the penal code. Thus, the governing standard was in the code and not the manual; so the manual could be said to be merely interpreting that code. The manual in *Peterson*, however, had even stricter requirements than the code. As such, that particular police manual did more than interpret the code. This supports Justice Richardson's view that the manual did not contain rules at all, but rather constituted a guideline designed to prevent any action by an officer which might cause liability.<sup>108</sup>

Finally, if a rule is under either the federal or California APA, notice and opportunity to participate must be provided to interested parties<sup>109</sup> to allow them to make their contribution to the formulation of the rule. It helps to prevent arbitrary, capricious, or uninformed rulemaking.

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106. 5 U.S.C. § 553 (1976) excludes only interpretive rules from the federal APA; see note 103 *supra*. California includes "quasi-legislative power" under its provisions; CAL. GOV'T CODE § 11346 (West Supp. 1980); see note 102 *supra*.

107. CAL. GOV'T CODE § 11346 (West Supp. 1980); see note 102 *supra*.

108. Note 47 *supra*.

109. 5 U.S.C. § 553(b) (1976): "[N]otice of proposed rulemaking shall be published in the federal register." 5 U.S.C. § 553(c) (1976): "[T]he agency shall give interested persons an opportunity to participate through submission of written data, views, or arguments with or without opportunity for oral presentation." CAL. GOV'T CODE § 11346.8 (West Supp. 1980):

[T]he state agency shall afford any interested person or his duly authorized representative, or both, the opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present the same orally. The state agency shall consider all relevant matter presented to it before adopting, amending or repealing any regulation.

### *B. Statutory Authority for Police Rulemaking*

Professor Davis pointed out that "legislative rules' that have the force of law, like statutes, cannot be validly issued in the absence of a legislative grant of power to make rules having force of law."<sup>110</sup> California has not granted that rulemaking authority to police departments. There is no provision in any of the California codes granting police administrators any rulemaking powers.<sup>111</sup> Indeed this situation appears to be nationwide. Professor Davis noted that "[s]o far as I know, rulemaking procedure is unknown to American police."<sup>112</sup> Nonetheless, Justice Newman found that the LBPD manual had standards on the use of weapons and these "standards have the 'force of law' and were adopted . . . pursuant to authority vested by character or ordinance to implement, interpret, or make specific the law administered."<sup>113</sup> Justice Newman did not identify that source of authority other than to say that city managers and police chiefs, as heads of "a form of public authority," have power to promulgate rules and that such power is "conceded" to them.<sup>114</sup> No legislative grant of authority was found in *Peterson*; yet, Justice Newman found the LBPD manual to have the force of law.<sup>115</sup>

Davis was concerned about the problem presented when police departments are held to be rulemaking agencies yet have no grant of authority.<sup>116</sup> "[H]ow can the courts allow the police to

110. K.C. DAVIS, *supra* note 6, at 110. CAL. GOV'T CODE § 11342.1 (West Supp. 1980):

Except as provided in section 11344, nothing in this chapter confers authority upon or augments the authority of any state agency to adopt, administer, or enforce any regulation. Each regulation adopted to be effective, must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

CAL. GOV'T CODE § 11342.2 (West Supp. 1980):

Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.

HUTCHINSON, *supra* note 96, at 272-73; Uelmen, *supra* note 1, at 7; B. SCHWARTZ, *supra* note 67, at 154.

111. Uelmen, *supra* note 1, at 7.

112. K.C. DAVIS, *supra* note 6, at 103.

113. 24 Cal. 3d at 246, 594 P.2d at 481, 155 Cal. Rptr. at 364.

114. *Id.* at 244, 594 P.2d at 480, 155 Cal. Rptr. at 363.

115. *Id.* at 246, 594 P.2d at 481, 155 Cal. Rptr. at 364.

116. Davis's comments that there must be statutory authority before legislative rules can be adopted could be countered by the concept of "legislation by estop-

make rules without statutory standards? The answer is a legal anomaly, a serious flaw in judicial doctrine."<sup>117</sup> "Conceivably, an officer who was disciplined for a violation of department policy in the discharge of a firearm could justly complain if his action was sanctioned by the law of the state and the legislature had not delegated the power to, in any way, limit that sanction."<sup>118</sup> Such was the situation in *Peterson*; Officer Vershaw had acted in violation of department policy. Yet, his action was within the limits of the penal code. Davis's solution to this paradox was that since legislatures have not granted legislative rulemaking powers to the police, interpretive rules could be used by the police to circumvent the lack of special authority. Interpretive rules need not evolve from legislative authority and they would not necessarily impose civil liability on police officers.<sup>119</sup> Moreover, liability would not attach because interpretive rules merely explained existing law and did not establish new law. These rules would not have the force of law, and thus, reluctance by police to initiate administrative procedures would be diminished.<sup>120</sup> According to Davis's definition, a police manual would contain interpretive rules, for the very reason that they were not promulgated pursuant to a legislative grant of power.<sup>121</sup> The effect of *Peterson*, however, was to undermine the use of Davis's solution in California; such rulemaking by police can result in tort liability.

## VI. THE EFFECTS OF THE *PETERSON* DECISION

The effects of *Peterson* become more vivid when they are contrasted with the position of Kenneth Davis. *Peterson* differs in

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pel." This term was defined by Professor Schwartz when he recognized that in some circumstances rulemaking could have a legal effect without any statutory authority whatsoever; B. SCHWARTZ, *supra* note 67, at 160; E. GELLHORN, *supra* note 97, at 124-25. For example, an interpretive rule, which is usually non-binding, could be given binding effect if challenged in court and upheld, E. GELLHORN, *supra* note 97, at 124, or if it is already embodied in a formal regulation promulgated under the agency's aegis, B. SCHWARTZ, *supra* note 67, at 161. "Legislation by estoppel" is, however, simply a pragmatic consequence of the legal process. *Id.* at 155. It could not be interpreted as a general grant of legislative rulemaking authority from the legislature to police departments. The only reason such an interpretive rule would be binding is because it would be upheld by a court decision. In any event, Justice Newman did not base his decision on the concept of "legislation by estoppel." Note, however, that LBPD manual § 4242, which was in issue in *Peterson*, was indeed challenged in court and upheld in *Long Beach Police Officers Ass'n v. City of Long Beach*, 61 Cal. App. 3d 364, 132 Cal. Rptr. 348 (1976), note 27-28 *supra*; however, this point, as well, did not form the basis of Justice Newman's opinion in *Peterson*.

117. K.C. DAVIS, *supra* note 6, at 111.

118. Uelmen, *supra* note 1, at 7.

119. K.C. DAVIS, *supra* note 6, at 110.

120. *Id.* at 106-08.

121. *Id.* at 110.

three ways. First, *Peterson* labeled the police manual to be regulations with the force of law; the practical result is that the police manual has the same effect as *legislative* rules under administrative rulemaking. They both have the force of law and both have civil liability. This result differs from Davis's view which labels police manuals as interpretive rules. Second, the effect of viewing the manual as having force of law is to impose tort liability. By imposing tort liability *Peterson* discourages the use of police rulemaking to guide police activities, a function advocated by Davis. Finally, if Davis's view of the police manual as *interpretive* rulemaking were to prevail, the California Administrative Procedure Act would be applied, with the result that the manual, which was not promulgated by California APA procedures, would not serve as a source of tort liability.

#### *A. Regulations with the Force of Law*

Regarding the first difference, when Justice Newman labeled the police manual to be a regulation with the force of law, he cited Kenneth Davis and his call for police administrative rulemaking<sup>122</sup> and in fact made several references to Davis. There is, however, evidence that Newman was not really paying homage to Davis's thesis; Newman's result differed greatly.

Justice Newman had a choice in characterizing the police manual. He could fashion them as administrative regulations, as Professor Davis had advocated, or he could have compared them to local municipal regulations.<sup>123</sup> He chose the latter and by so doing, declined to introduce the California police departments to administrative rulemaking.

There is at least one reason why Newman bypassed Davis's plan. If Newman styled the manual as a city ordinance, then it would be "a regulation of a public entity." As a "regulation of a public entity," the manual would then be subject to California Evidence Code Section 669, which presumed negligence for the violation of a regulation of a public entity. The code specifically stated that "the failure of a person to exercise due care is pre-

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122. 24 Cal. 3d at 245, 246 n.7, 594 P.2d at 480, 481 n.7, 155 Cal. Rptr. at 363, 364 n.7.

123. Local public entities such as cities can issue regulations. The California Government Code defines this type of regulation as "a rule, regulation, order or standard, having the force of law, adopted by an employee or agency . . . of a public entity pursuant to authority vested by constitution, statute, charter or ordinance." CAL. GOV'T CODE § 811.6 (West Supp. 1980).

sumed if [he] violated a . . . regulation of a public entity." In contrast, the violation of an interpretive rule would not carry such liability.<sup>124</sup> Justice Newman chose to view the police manual as a local regulation; in so doing, he chose the end result; civil tort liability. The question remains whether or not Newman chose to consider the police manual as a local regulation solely for the purpose of applying tort liability to the manual.

Newman did not stop at classifying the police manual as "rules of a public entity," but forged on stating that "Section 4242 of the police manual is, of course, a quasi-legislative measure."<sup>125</sup> This term, "quasi-legislative," is significant as the California Administrative Procedure Act is applied to any quasi-legislative power conferred by any statute.<sup>126</sup> Thus, if a regulation is quasi-legislative, and there is proper authority to issue it, it must be issued under state APA standards. The issue then is whether or not the police manual is governed by the California APA because it is "quasi-legislative." *Peterson* does not address this issue. *Peterson* does, however, list several attributes of police manuals: they are quasi-legislative, they are adopted pursuant to charter or ordinance, and they carry civil liability. Whether or not the California APA applies remains at issue, but the practical effect of *Peterson* is to hold the police manual to be synonymous with *legislative* rules under administrative rulemaking. Both have the force of law and both carry civil liability.

### B. *The Effect of Civil Liability*

Davis's whole premise of police rulemaking was to guide police<sup>127</sup> rather than provide standards of care<sup>128</sup> which impose liability.<sup>129</sup> Thus California, in applying tort liability to violations of the police manual, actually seems to discourage the use of Davis's

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124. K.C. DAVIS, *supra* note 6, at 110.

125. 24 Cal. 3d at 247, 594 P.2d at 482, 155 Cal. Rptr. at 365.

126. CAL. GOV'T CODE § 11346 (West Supp. 1980): "[T]he provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted. . . ." This provision requires that quasi-legislative power be conferred by statute. Davis found that no such statute existed. K.C. DAVIS, *supra* note 6, at 103. Thus, California has conferred no authority to police departments to issue rules. Davis responded to this situation by claiming that no such authority was needed to issue *interpretive* rules which had no force of law. This was Davis's solution to this lack of statutory authority: the police departments could still issue these interpretive rules.

When *Peterson* claimed the police manual had force of law, the manual could no longer be considered interpretive; it was for all practical purposes legislative for the very reason that it now has the force of law.

127. 24 Cal. 3d at 245, 594 P.2d at 480-81, 155 Cal. Rptr. at 363-64.

128. K.C. DAVIS, *supra* note 6, at 108-11.

129. 24 Cal. 3d at 245, 594 P.2d at 483, 155 Cal. Rptr. at 366 (Richardson, J., dissenting): "It is highly ironic, I suggest, that guidelines which were intended to

ideas. The effective result of handcuffing police with the threat of tort liability established by their own rules was vividly illustrated by Professor Ulemen's discussion of the two cases which foreshadowed *Peterson: Dillenbeck v. City of Los Angeles*<sup>130</sup> and *Grudt v. City of Los Angeles*.<sup>131</sup> Those cases had also applied tort liability to a police training bulletin and a police tactical manual. These two decisions have actually deterred some police administrators from producing a clear enunciation of policy.<sup>132</sup>

*Peterson* goes beyond both *Dillenbeck* and *Grudt*, which were both based on the theory that the manuals involved were "safety rules of an employer,"<sup>133</sup> and thus, were also standards of care. *Peterson* went further and actually claimed that the manual contained regulations with the force of law. If *Peterson* expands the concept of the police manual from "safety rules of an employer" to regulations with the force of law, the reticence by police administrators is likely to expand. It would appear that *Peterson* would have the same effect as *Dillenbeck* and *Grudt*. If the rules in a police manual are used to apply civil liability, the incentive will be to design the wording of the manual to avoid such a purpose. This leaves the issue of whether or not such wording will lead to vagueness rendering the guidelines ineffective.

### C. *The California Administrative Procedure Act*

Justice Newman never stated that the police manual was governed by the California APA, which governs administrative regulations; yet inexplicably, he went ahead and discussed the point that the California APA differs from the federal APA.<sup>134</sup> The question arises then as to why Newman would discuss the Administrative Procedure Act [hereinafter APA] since he viewed the police manual to be local rules not governed by the APA. The answer becomes clear when the difference between the federal and California APA is explored.

California has evidently established a position beyond that of

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*shield* against civil suits may now furnish the sole basis for imposing such liability." (Emphasis in original).

130. 69 Cal. 2d 472, 466 P.2d 129, 72 Cal. Rptr. 321 (1968). See note 2 *supra* for a discussion of the facts in this case.

131. 2 Cal. 3d 575, 468 P.2d 825, 86 Cal. Rptr. 465 (1970).

132. Uelmen, *supra* note 1, at 25.

133. Notes 2-3 *supra*.

134. 24 Cal. 3d at 246 n.7, 594 P.2d at 481 n.7, 155 Cal. Rptr. at 364 n.7.

the federal APA in *Armistead v. State Personnel Board*.<sup>135</sup> This decision, also written by Justice Newman, found that California Government Code sections 11346 and 11342(b) “demonstrate a desire to achieve in the California APA a much greater coverage of rules than Congress sought in the federal APA.”<sup>136</sup> Section 11346<sup>137</sup> states that the purpose of the California APA is to “establish basic minimum procedural requirements for adoption, amendment or repeal of administrative regulations.” Section 11342(b)<sup>138</sup> found that these regulations under the California APA *include interpretive rules*. In other words, interpretive rules must be promulgated under the guidelines of the California APA.<sup>139</sup> In contrast, the federal APA specifically *excludes interpretive rules* from its purview.<sup>140</sup> Thus in California, interpretive rules, which usually would not have the force of law and usually would not require a specific grant of rulemaking authority, are now encompassed in the California APA.

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135. 22 Cal. 3d 198, 583 P.2d 744, 149 Cal. Rptr. 1 (1978). In *Armistead*, a state civil service employee wanted to withdraw his resignation. The State Personnel Board refused claiming they had accepted the resignation. The Personnel Transactions Manual allowed an employee to withdraw his resignation and continue employment only with the approval of the “appointing power.” The court, per Justice Newman, found the manual to contain *interpretive* administrative rules and, in addition, found that the California APA applied to these interpretive rules.

136. *Id.* at 201-02, 583 P.2d at 745, 149 Cal. Rptr. at 2. See *Peterson v. City of Long Beach*, 24 Cal. 3d at 246 n.7, 594 P.2d at 481 n.7, 155 Cal. Rptr. at 364 n.7. Newman actually made reference to California Government Code §§ 11420 and 11371(b). Both have since been repealed and replaced with §§ 11346 and 11342(b) respectively.

137. CAL. GOV'T CODE § 11346 (West Supp. 1980):

It is the purpose of this article to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in Section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superceded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly.

138. CAL. GOV'T CODE § 11342(b) (West Supp. 1980):

“Regulation” means every rule, regulation, order or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, *interpret*, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agencies. “Regulation” does not mean any instructions relating to the use of the form, but this provision is not a limitation upon any requirement that a regulation be adopted pursuant to this part when one is needed to implement the law under which the form is issued.

(Emphasis added).

139. *Armistead v. State Personnel Board*, 22 Cal. 3d 198, 204, 583 P.2d 744, 747, 149 Cal. Rptr. 1, 4 (1978): “Under sections 11371(b), 11420, and 11440 of the APA, rules that interpret and implement other rules have no legal effect unless they have been promulgated in substantial compliance with the APA.”

140. Note 103 *supra*.

The point which Justice Newman was making in *Armistead* was that the personnel transactions manual of the State Personnel Board was interpretive in nature; thus, it must be adopted according to state APA procedures. Since the manual was not duly promulgated and published according to state APA procedures, it was invalid. “[R]ules that *interpret* and implement other rules have no legal effect unless they have been promulgated in substantial compliance with the APA.”<sup>141</sup>

If *Armistead* were now applied to *Peterson*, the result would be dramatic in that the LBPD manual also would have been found invalid, because it was not “promulgated or published” according to APA rules. Of course, if the LBPD manual had been found invalid, it could not have the “force of law,” nor could it be a source of tort liability.

The reason Justice Newman failed to apply the California APA after labeling the LBPD manual as “quasi-legislative,” could be that Newman’s ultimate goal was to find the police officers civilly liable. To reach this goal, he had to avoid actually labelling the police manual as administrative regulations under the California APA because had the APA been applied, the LBPD manual would have been invalid as it was not published and promulgated by APA standards. Evidently, the goal of tort liability for police officers was far more important than the position that Davis has advocated for so long.

## VII. CONCLUSION

Justice Newman could have accomplished in California what Kenneth Davis had advocated for several years: that police manuals should be viewed as administrative rulemaking. Newman rejected Davis’s view in several critical respects.

First, both Professor Davis and Justice Richardson have argued that police manuals contain guidelines to guide behavior of the police. They did not view the manuals as standards of care having the force of law and accompanying civil liability. Rather, these guidelines were intended to encourage the police officer to perform above the minimum standards of care as established by the California Penal Code. Davis called police manuals interpretive rulemaking as there was no statutory authority to issue legislative rules.

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141. 22 Cal. 3d at 204, 583 P.2d at 747, 149 Cal. Rptr. at 4 (emphasis added).



Though, Justice Newman cited Kenneth Davis and his call for police administrative rulemaking, he chose to view the police manual as a local regulation, not as an administrative rule. In so doing, he predetermined the end result: civil tort liability. Newman fashioned the manual as a local ordinance, the violation of which presumes negligence.

Second, in applying tort liability to the police manual, California discourages, and indeed, precludes Professor Davis's plan to use administrative rulemaking as a method of control over police activities. Police, will be discouraged from promulgating rules that will later be used against them.

Finally, though many labels were used to describe the police manual the actual effect of *Peterson* is to equate the police manual with legislative rules of administrative rulemaking; both now have the force of law and both have civil tort liability attached.

Professor Davis did, however, propose to clarify the rulemaking authority of police departments by noting that California has not given police departments authority for this type of legislative rulemaking.<sup>142</sup> Davis also noted that it appears to be contradictory to hold the police liable for rulemaking on the one hand and deny them the required legislative authority on the other. "The answer is a legal anomaly, a serious flaw in the judicial doctrine."<sup>143</sup> Davis suggests that the legislature act to correct this flaw.

JAMES WRIGHT

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142. K.C. DAVIS, *supra* note 6, at 103.

143. *Id.* at 111.