

SB2:  
A Bold Initiative That Falls Short

Robert A. Rodriguez

University of the Pacific,  
McGeorge School of Law

## Introduction

Likely frustrated with a lack of accountability in criminal court, 66% of Americans believe that citizens need to have the power to sue police officers for using excessive force.<sup>i</sup> Contrary to this sentiment, instances of police brutality have not increased significantly<sup>ii</sup>. However, the availability of phones with recording capability *has* increased significantly, exposing the misconduct by law enforcement to a world audience with the tap of a screen. With confidence in law enforcement to act in the public's best interest on the decline among American citizens,<sup>iii</sup> civil suits are a citizen's last line of defense. Under federal law, a person has the power to bring a civil suit against the law enforcement officer that deprived that citizen's constitutional rights with a section 1983 civil action.<sup>iv</sup> In California, residents have the choice of a Tom Bane Act<sup>v</sup> civil action, as well as the § 1983 civil action. Both actions can be used to compensate a victim in the form of compensatory damages, punitive damages, and/or an injunction to attempt to ensure similar future incidents of constitutional deprivations do not occur.<sup>vi</sup>

Although there are obstacles to overcome for a civil action to be successful, such as qualified immunity, the passage of Senate Bill 2 (SB2) in California has removed this roadblock from the Tom Bane Act.<sup>vii</sup> However, even after SB2, indemnification laws allow the county that employs the officer to indemnify the officer.<sup>viii</sup> Thus, taxpayers still end up paying the price for the misconduct of a law enforcement officer.<sup>ix</sup> If one of the goals of a civil action is to deter future instances of that misconduct, how does placing the payment for damages on the taxpayers achieve that goal?<sup>x</sup> Is a civil action effective if indemnification laws are still intact? This Article will attempt to answer these questions by bringing attention to the faults in our current system of holding law enforcement accountable through civil actions and why they are ineffective for deterring future misconduct. Section I describes why civil actions against law enforcement are

needed. Section II introduces the state and federal civil actions available in California and their purposes. Section III gives background of a civil action before and after SB2. Section IV overviews the effect of a successful civil action, and Section V will outline a possible solution.

## Section I

When discussing misconduct by law enforcement, people commonly refer to a few “bad apples” that use excessive force. However, law enforcement investigates law enforcement, which leads legal scholars to believe that these investigations are rife with bias.<sup>xi</sup> From the beginning of the alleged misconduct, investigative officers afford preferential treatment to the law enforcement officer who is subject to investigation. According to the Los Angeles Police Department’s Board of Inquiry findings, the officer under investigation can leave the crime scene and convene with fellow officers without being questioned.<sup>xii</sup> In contrast, civilians are kept separate from other co-defendants to ensure that a scripted version of the events is not created.<sup>xiii</sup> To further complicate these investigations, the “Blue Wall” of silence is a well-known tactic used by law enforcement. Its existence is documented through court opinions, police investigatory reports, as well as testimony from law enforcement themselves:

“Cops don’t tell on cops. And if they did tell on them, [...] his career’s ruined.”<sup>xiv</sup>

Those wanting to speak up against the bad apples can expect retaliation in the form of verbal harassment and ostracization that follows them from unit to unit.<sup>xv</sup> This culture of lack of accountability and an “us before them” mindset has no better example than the current Los Angeles Sheriff Department’s (LASD) deputy gangs.

The first deputy gang, “The Little Devils,” was identified in 1973 by an internal memo that outlined 47 known deputy members, all distinguished by a red devil tattoo.<sup>xvi</sup> This was the start of a deputy gang culture that would expand to at least 18 different gangs and be tied to the

deaths of at least 19 people.<sup>xvii</sup> One of those victims was Arturo Cabrales in 2012. According to the medical examiner, Deputy Anthony Paez, a tattooed member of the “Jump Out Boys” deputy gang, shot Cabrales to death in the back.<sup>xviii</sup> However, according to the LASD homicide detectives, Paez shot Cabrales in self-defense. Thus, no criminal charges were filed.<sup>xix</sup>

Multiple investigations into complaints of excessive force and misconduct led to unsatisfactory conclusions over the years. In the rare occurrence that an officer was discharged due to their gang activity, on most occasions, they were granted appeals which came with backpay for their time discharged.<sup>xx</sup> Such was the case with Deputy Paez, who was relieved of duty the year after he shot Cabrales to death.<sup>xxi</sup> The Civil Service Commission granted Paez’s petition, allowed him back on the force, and reimbursed him for the seven years of lost wages, plus interest.<sup>xxii</sup> With the lack of criminal charges and accountability through internal investigations, citizens are often left to seek their remedy against “bad apples” in civil court.

## **Section II**

An individual who has had their constitutional rights infringed upon in the jurisdiction of California has three options: file a § 1983 claim in federal court, file a Tom Bane Act claim in California state court, or both.<sup>xxiii</sup> A § 1983 and Tom Bane actions are similar, and both allow for compensatory damages, punitive damages, and injunctive relief.<sup>xxiv</sup> The victim can seek an injunction under the Tom Bane act to eliminate a practice or pattern of misconduct, and to protect the peaceable enjoyment of rights, such as an injunction to ban chokeholds from law enforcement training.<sup>xxv</sup> Whereas compensatory damages would seek to make the victim whole again from any actual injuries incurred while the officer infringed on their constitutional rights,<sup>xxvi</sup> punitive damages, according to the Supreme Court, serve the purpose of punishing the tortfeasor and deterring them and others from similar conduct.<sup>xxvii</sup> Although it may seem that it

would be easy to win a § 1983 or Tom Bane lawsuit against a law enforcement officer who has used excessive force, there are roadblocks in the form of qualified immunity blocking the path to accountability.

Federally, the Supreme Court created qualified immunity with the caselaw of *Harlow v. Fitzgerald*.<sup>xxviii</sup> In that decision, the Supreme Court held that government officials were shielded from civil liability if their actions were within the scope of their job and did not violate clearly established constitutional rights that a reasonable person would know.<sup>xxix</sup> Thus, decreasing the amount of successful § 1983 claims. Apart from a couple of states, qualified immunity is the standard nationwide.<sup>xxx</sup> In California, one facet of qualified immunity is codified in Government Code § 821.6 (§ 821.6). It states, “A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.”<sup>xxxi</sup> Until very recently, § 821.6 left many citizens with no hope of a successful civil action. However, due to the changes enacted by SB2, the immunity provided by § 821.6 no longer applies to claims brought under California’s Tom Bane.<sup>xxxii</sup>

### **Section III**

California legislature sought a solution to recovery for victims found in the “specific intent” clause of the Tom Bane Act.<sup>xxxiii</sup> Before SB2, victims were required to show that a law enforcement officer deprived them of their rights and that the officer acted with the specific intent to do so.<sup>xxxiv</sup> In addition to this hurdle, the Tom Bane Act also afforded law enforcement qualified immunity under § 821.6, as explained previously.<sup>xxxv</sup> These clauses watered down the effects of the Tom Bane Act, enough so that the legislature made it clear that one of the goals of

SB2 was to “ensure that peace officers are treated fairly, but that they can be held accountable for violations of the law that harm others, especially the use of excessive force.”<sup>xxxvi</sup>

**Note:** Unfortunately, SB2 is state legislation and does not affect a federal § 1983 civil action. Thus, any changes outlined below will only influence a state civil action in California.

SB2 amended the Tom Bane Act by removing the requirement of specific intent to only require general intent.<sup>xxxvii</sup> It also stripped away the protections of § 821.6, the qualified immunity provision, thus opening the door for victims of excessive force and misconduct to successfully sue an officer who deprived them of their constitutional freedoms.<sup>xxxviii</sup> Although there was support for such a change in the general public, law enforcement groups fiercely opposed these amendments.<sup>xxxix</sup> These groups point to declining law enforcement numbers caused by police reform efforts and a negative change in attitude towards law enforcement.<sup>xl</sup> However, according to the National Law Enforcement Officers Memorial Fund, there are over 800,000 law enforcement officers in the U.S., the *highest* figure ever.<sup>xli</sup> Additionally, in one of the first and only states to repeal their qualified immunity clause, Colorado has seen an overall *decrease* in officers leaving their jobs.<sup>xlii</sup> Nonetheless, pushback from these law enforcement groups led to indemnification clauses being added to SB2.<sup>xliii</sup> Thus, even if a civil action against a law enforcement officer is successful, the individual may never pay a dime in damages.

#### **Section IV**

Indemnification clauses, like the one added to SB2, are commonplace among civil actions against employees of a public entity, such as law enforcement officers. Under federal law, there is no right to indemnification provided in a § 1983 civil action.<sup>xliv</sup> However, a claim for indemnification for a § 1983 violation may be made based upon state law.<sup>xlv</sup>

**Note:** Most indemnification clauses nationwide are similar. The Article will use California’s indemnification clause as an example.

Indemnification is codified in California under California Government Code § 825 (b). § 825 (b) authorizes the county to pay the judgment of punitive and exemplary damages incurred by the officer’s misconduct, if:

- (1) The judgment is based on an act or omission by an employee during the scope of employment.
- (2) The act was in the best interests of the county and was without malice, and
- (3) Payment of the claim would be in the county’s best interests.<sup>xlvi</sup>

Proponents of indemnification clauses, including jurists, believe the clauses are necessary for a multitude of reasons. Commonly, they point to the need to ensure the victim is compensated wholly.<sup>xlvii</sup> By ensuring the prospect of compensation, the county is ensuring that victims file civil lawsuits for misconduct by law enforcement in the first place.<sup>xlviii</sup> Without these lawsuits, there is no hope for deterrence. The Supreme Court in *City of Newport v. Fact Concert, Inc.*, held that while some counties authorize indemnification of punitive damages, they “specifically exclude indemnification for malicious or willful misconduct by the employees.”<sup>xlix</sup> This line of

thinking is rational at first glance. However, there is a significant disparity between conduct that is thought to be indemnified and what is actually indemnified.

Using the Supreme Court's language, states should never indemnify a law enforcement officer for an act of willful or malicious conduct.<sup>1</sup> California, and most other states, codified this same tenet. However, indemnification occurs virtually every time,<sup>li</sup> regardless of whether the conduct was malicious or not.<sup>lii</sup> According to an overarching study by Joanna C. Schwartz in 2014, local governments paid approximately 99.98% of damages awarded to victims alleging civil rights violations by law enforcement.<sup>liii</sup> To compound matters, law enforcement officers never satisfied a punitive damages award entered against them, even when they were disciplined, terminated, or prosecuted for their conduct.<sup>liv</sup> To be clear, the assumption by the Supreme Court and the scholarly world that counties are not using indemnification to protect officers who were found to be malicious is incorrect.<sup>lv</sup> This protection of "bad apples" comes at a cost, literally and figuratively. The overuse of indemnification clauses passes an exorbitant monetary burden onto the taxpayers and abolishes the deterrence factor of damages.

In the past two fiscal years, litigation costs related to just LASD lawsuits have cost Los Angeles County over \$120,000,000.<sup>lvi</sup> The Supreme Court prohibits awarding punitive damages against a public entity, such as a county, due to the belief that placing the burden on taxpayers is unjust.<sup>lvii</sup> However, public employees, such as law enforcement officers, were fair game due to the prospective deterrence that the threat of owing monetary damages would cause.<sup>lviii</sup> As shown above, this view is rooted in the fantasy that the county indemnifies only non-malicious conduct by law enforcement. This view would support the belief that punitive damages are awarded against a plaintiff to deter future harmful conduct, among other reasons.<sup>lix</sup> However, due to a 99.98% indemnification rate, deterrence is a non-factor for alleged law enforcement plaintiffs.

One possible solution to the conundrum of indemnification may be hidden in the text of the California indemnification clause itself.

### Section V

California Government Code § 825 (f) outlines the course of action the public entity should take if an elected official uses their powers to influence the outcome of a judicial action by contacting a court official connected to the proceeding.<sup>lx</sup> The public entity shall not pay for any judgment of wrongdoing against the plaintiff.<sup>lxi</sup> If the plaintiff cannot pay the entire judgment, the public entity may step in to pay the deficiency. After doing so, the public entity would be entitled to pursue all available creditor's remedies until the elected official has reimbursed the entity.<sup>lxii</sup> This entire course of action satisfies all the deficiencies weakening the effects of a Tom Bane civil action or a § 1983 civil action:

1. The victim is never left deficient.
2. The threat of monetary damages deters the official.
3. The taxpayer's burden is decreased.

California legislature could accomplish their original legislative intent of SB2 by amending § 825 (f) to include law enforcement officers whom the court found to have committed malicious civil rights violations. This amendment would satisfy the agreed-upon purpose of punitive damages and hopefully deter future misconduct by law enforcement. Absent a fix such as proposed here, SB2 is a bold initiative with good intentions that ultimately falls short.

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<sup>i</sup> *Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, Pew Research Center (July 9, 2020), [https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/pp\\_2020-07-09\\_qualified-immunity\\_0-01/](https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/pp_2020-07-09_qualified-immunity_0-01/) .

<sup>ii</sup> Kendal Harden, *Exposure to Police Brutality Allows for Transparency and Accountability of Law Enforcement*, 33 J. Marshall J. Info. Tech. & Privacy L. 75, 86 (2017).

<sup>iii</sup> *Public Confidence in Scientists and Medical Scientists has Declined Over the Last Year*, Pew Research Center (Feb. 4, 2022), [https://www.pewresearch.org/science/2022/02/15/americans-trust-in-scientists-other-groups-declines/ps\\_22-02-15\\_trust-declines\\_00-01/](https://www.pewresearch.org/science/2022/02/15/americans-trust-in-scientists-other-groups-declines/ps_22-02-15_trust-declines_00-01/) .

<sup>iv</sup> 42 United States Code § 1983 [hereinafter, § 1983].

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- <sup>v</sup> Cal. Civ. Code § 52.1(c) (West 2022).
- <sup>vi</sup> *Id.*
- <sup>vii</sup> Lars T. Reed, *Governor Signs SB 2, Creating Police Decertification Process and Expanding Civil Liability Exposure*, LCW Legal (Sept. 30, 2021), <https://www.lcwlegal.com/news/governor-signs-sb-2-creating-police-decertification-process-and-expanding-civil-liability-exposure/> .
- <sup>viii</sup> Cal. Civ. Code § 52.1(o).
- <sup>ix</sup> Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014).
- <sup>x</sup> *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266 (1981).
- <sup>xi</sup> Kendall Godley, *POLICE INVESTIGATING POLICE: SYSTEMIC INJUSTICE SHIELDS OFFICERS FROM ACCOUNTABILITY*, 98 Denv. L. Rev. Forum 1, 19 (2021).
- <sup>xii</sup> Bernard C. Parks, Los Angeles Police Department Board of Inquiry into the Rampart Area Corruption Incident Public Report, at 221-63 (Mar. 1, 2000), available at [http://www.lapdonline.org/pdf\\_files/pc/boi\\_pub.pdf](http://www.lapdonline.org/pdf_files/pc/boi_pub.pdf).
- <sup>xiii</sup> Godley, *supra* note 11, at 20.
- <sup>xiv</sup> *Id.*
- <sup>xv</sup> *Id.* at 22.
- <sup>xvi</sup> Cerise Castle, *The Protected Class*, Knock LA (Mar. 22, 2021), <https://knock-la.com/lasd-gangs-little-devils-wayside-whities-cavemen-vikings/> .
- <sup>xvii</sup> *Id.*
- <sup>xviii</sup> *Id.*
- <sup>xix</sup> Cerise Castle, *How to Get Paid for Being Fired*, Knock LA (Mar. 30, 2021), <https://knock-la.com/grim-reapers-jump-out-boys-lasd-gangs/> .
- <sup>xx</sup> *Id.*
- <sup>xxi</sup> *Id.*
- <sup>xxii</sup> *Id.*
- <sup>xxiii</sup> 42 U.S.C. § 1983; Cal. Civ. Code § 52.1.
- <sup>xxiv</sup> *Id.*
- <sup>xxv</sup> Cal. Civ. Code § 52.1(c).
- <sup>xxvi</sup> R. Eric Sanders & Jeffrey K. Lewis, *Recoverable Damages Under 42 U.S.C. Section 1983*, Rolfe S. Henry, <https://rolfshenry.com/wp-content/uploads/2018/04/RES-Article.pdf> (Last visited Sept. 18, 2022).
- <sup>xxvii</sup> *Id.*
- <sup>xxviii</sup> 457 U.S. 800, 818 (1982).
- <sup>xxix</sup> *Id.*
- <sup>xxx</sup> *On Qualified Immunity Reform, States are Leading on Policing Rogue Officers*, USA Today (Aug. 6, 2021, 8:00 AM EST), <https://www.usatoday.com/story/opinion/todaysdebate/2021/08/06/police-qualified-immunity-states-leading/5460787001/> .
- <sup>xxxi</sup> Cal. Gov. Code § 821.6 (West 2022).
- <sup>xxxii</sup> Reed, *supra*.
- <sup>xxxiii</sup> USA Today, *supra*.
- <sup>xxxiv</sup> S. Jud. Comm., 2021-2022 Reg. Sess. 4 (Ca. 2021) available at [https://sjud.senate.ca.gov/sites/sjud.senate.ca.gov/files/sb\\_2\\_bradford\\_sjud\\_analysis.pdf](https://sjud.senate.ca.gov/sites/sjud.senate.ca.gov/files/sb_2_bradford_sjud_analysis.pdf).
- <sup>xxxv</sup> 2021 Cal. Legis. Serv. Ch. 409 (S.B. 2) (WEST).
- <sup>xxxvi</sup> *Id.* at (f).
- <sup>xxxvii</sup> Cal. Civ. Code § 52.1(n).
- <sup>xxxviii</sup> *Id.*
- <sup>xxxix</sup> Brian Marvel, *Senate Bill 2 is Bad for Public Employees, Municipalities and Taxpayers*, Los Angeles Daily News (Apr. 6, 2021, 8:47 AM), <https://www.dailynews.com/2021/04/06/senate-bill-2-is-bad-for-public-employees-municipalities-and-taxpayers/> .
- <sup>xl</sup> *Id.*
- <sup>xli</sup> *Law Enforcement Facts*, National Law Enforcement Officers Memorial Fund, <https://nleomf.org/memorial/facts-figures/law-enforcement-facts/> (Last visited Sept. 18, 2022).
- <sup>xlii</sup> Elise Schmelzer, *Did Colorado Law Enforcement Flee the Profession in 2020? Depends on the Department.*, The Denver Post (Mar. 8, 2021, 6:00 am), <https://www.denverpost.com/2021/03/08/colorado-police-sheriffs-leaving-2020/> .
- <sup>xliii</sup> Cal. Civ. Code § 52.1(o).

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<sup>xliv</sup> Martin A. Shwartz, *SHOULD JURIES BE INFORMED THAT MUNICIPALITY WILL INDEMNIFY OFFICER'S § 1983 LIABILITY FOR CONSTITUTIONAL WRONGDOING?*, 86 Iowa L. Rev. 1209, 1216 (2001).

<sup>xlv</sup> *Id.*

<sup>xlvi</sup> Cal. Gov. Code § 825 (West 2022).

<sup>xlvii</sup> Richard Emery & Ilann Margalit Maazel, *WHY CIVIL RIGHTS LAWSUITS DO NOT DETER POLICE MISCONDUCT: THE CONUNDRUM OF INDEMNIFICATION AND A PROPOSED SOLUTION*, 28 Fordham Urb. L.J. 587, 596 (2000).

<sup>xlviii</sup> *Id.*

<sup>xlix</sup> 453 U.S. at 269.

<sup>l</sup> *Id.*

<sup>li</sup> Schwartz, *supra* note 9, at 890.

<sup>lii</sup> *Id.* at 919.

<sup>liii</sup> *Id.* at 885.

<sup>liv</sup> *Id.*

<sup>lv</sup> *Id.* at 901.

<sup>lvi</sup> Cnty. Counsel Ann. Litig. Cost Rep. (Ca. 2020-22) available at <https://counsel.lacounty.gov/Report>.

<sup>lvii</sup> Schwartz, *supra* note 9, at 890.

<sup>lviii</sup> *Id.*

<sup>lix</sup> *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008).

<sup>lx</sup> Cal. Gov. Code § 825 (f).

<sup>lxi</sup> *Id.*

<sup>lxii</sup> *Id.*