Revising California law to allow recovery when police violate constitutional rights

Overview

The California Supreme Court should overrule its decision in *Michel v. Smith*, which granted police supervisors immunity for their officers' misconduct.[1] *Michel* was wrong in 1922 and has become more wrong since. Worse, courts have interpreted *Michel* so that its exceptions — which were necessary to its holding — no longer exist. Overruling *Michel* would give plaintiffs remedies when police violate their constitutional rights and increase pressure on police supervisors to end inhumane and unconstitutional practices.

Analysis

It is nearly impossible to pursue police misconduct claims under federal law

Congress adopted 42 U.S.C. section 1983 to authorize suits alleging constitutional rights violations by government officials.[2] It was in large part an "attempt to remedy state courts' failures to secure federal rights."[3] But during the 1950s, federal courts created a qualified immunity defense, holding that an officer cannot be held liable — or even be sued — unless their actions violated a clearly established law.[4] As it is interpreted today, qualified immunity protects officers from liability for even extreme misconduct.[5] Because supervisors are also immune from section 1983 suits, and because the U.S. Supreme Court has imposed strict conditions on municipal liability, there is no realistic federal remedy for police misconduct.[6]

Scholars and advocates have written extensively about section 1983, qualified immunity, and its unconscionable results.[7] Yet it seems unlikely that the high court will revise the doctrine or limit its application. Just last year, the Court granted

qualified immunity to an officer who shot a man, straddled him, and shoved his knee into the man's back while responding to a domestic violence complaint — because the otherwise identical precedent involved a noise complaint, not domestic violence.[8] Rather than stoking a vain hope for federal remedy reform here, we must turn to state law.

Since 1922 California immunized police chiefs from supervisory liability based on faulty reasoning

California's analogue of the section 1983 tort law immunity doctrine protecting peace officers originates from the 1922 California Supreme Court decision in *Michel v. Smith*. That decision erred by making a false distinction among peace officers between sheriffs and police chiefs, and subsequent development atop that shaky foundation has only made matters worse.

Just before World War I ended, Gerhardt Michel walked into a Los Angeles employment office and asked for work — temporary work, he said, because he expected to be drafted into service at any time.[9] The office employee questioned Michel about his draft registration status, so Michel presented registration cards from Oakland.[10] The office employee called in Officer Gross, a member of the Los Angeles police department's "war squad," who placed Michel under arrest.[11] At the police station, officers Gross and Smith demanded written proof that Oakland Selective Services knew Michel was in Los Angeles.[12] Michel insisted the officers would find proof if they checked the police blotter, but the officers refused to do so and detained Michel.[13] The following day, Oakland confirmed that Michel had notified them he was in Los Angeles.[14] Michel filed a lawsuit against Smith and Gross, and their supervisors, alleging he had been falsely arrested and detained.[15]

A jury found for Michel and awarded damages, but the California Supreme Court overturned the verdict. Although the court had applied *respondeat superior* liability to sheriffs since at least 1870, and just ten years before *Michel* had reiterated that the rule applied "indiscriminately against all principals, whether private or

official,"[16] the court held that the doctrine did not apply in Michel's case.[17] The court reasoned that sheriffs (like private employers) had complete control to hire and fire their employees, but municipal police chiefs did not.[18] Because the police chief could not fully control who worked for him, police chiefs could not be liable when their subordinates made errors.[19]

Factually, the court was wrong. Under common law, sheriffs could hire and fire deputies at will.[20] But when Los Angeles County adopted its charter in 1912, it limited the sheriff's hiring and firing authority.[21] Under the county charter, the sheriff could not hire any deputy he wanted — he chose from a County Commission-supplied three-candidate list.[22] Nor could the sheriff fire deputies whenever he wanted. Probationary period firings required explicit Commission approval,[23] and other firings required the sheriff to present the deputy reasons for discharge, allow the deputy reasonable reply time, and file the reason and reply with the Commission.[24] If the sheriff wanted to remove someone for being inefficient, he needed to hold a hearing before the Commission.[25] The Los Angeles City Charter, which governed the *Michel* police supervisors, granted similar powers. The police chief hired from a Commission-supplied three-candidate list, and his firing decisions were subject to Commission review.[26] Thus, there was no substantive difference between the hiring-and-firing powers of the Los Angeles sheriff and police chief in 1922 that would have affected the *respondeat superior* analysis.

Nor was a sheriff's actual power much different than a police chief's in 1922. General-law county sheriffs had absolute authority to hire deputies — but not to pay them, decide how many to have, or fire them. Paying deputies required a budget,[27] but budgeting is a core legislative power, not a sheriff power.[28] State law mandated that the legislature, not the sheriff, decide how many deputies would work in that department.[29] And firing deputies at will risked running afoul of due process requirements.[30] Meanwhile, each city split its police powers differently between the city commission and police chief, but each city involved the police chief in some

way.[31]

The court also held in *Michel* that, while sheriff's deputies were the sheriff's "representative[s]," police officers were themselves "servants of the government."[32] This is an absurd distinction — sheriffs and police chiefs are both government officials, with subordinates who serve and represent them. But for the court, this made the police chief's "charge[] [for] the supervision and control of the police force of the city" a matter of "position," not authority.[33] The court did not justify that difference, and there was no obvious support for it.

One possible explanation was that the California constitution (which governed general law cities and counties) did not explicitly create sheriff's deputies, but city charters, which governed anywhere there was a police chief, created police officers.[34] This meant sheriff's deputies' executive powers depended on the sheriff's executive powers, but police officers received executive power directly. Yet even that justification would not have applied in Los Angeles. In the 1920s, the California constitution required charter counties to provide "[f]or the fixing and regulation . . . of the appointment and number of . . . deputies . . . to be employed . . . and for prescribing and regulating . . . duties, qualifications and compensation of such persons, the times . . . and the terms . . . they shall be appointed, and the manner of their appointment and removal."[35] The California constitution required — or at least permitted — charter cities to do the same, and the Los Angeles city charter included those provisions.[36] Worse, the more obvious reading of the Los Angeles city charter would have imposed supervisory liability on the police chief, not erased it. Under the charter, the police chief adopted policies, set procedures, and created trainings.[37] By declaring that he was not liable when those policies, procedures, trainings, and operations led his officers to harm people, the court read out much of the charter's force.

Perhaps more glaring than either difference the court observed was one it ignored: sheriffs were elected, and thus eligible for recall, but police chiefs were not.[38] The recall power checks elected officials' power and permits voters to remove those who

govern ineffectively.[39] A sheriff whose deputies harm the public thus faces the risk that the public will remove him from office.[40] Even when small, that risk incentivizes public officials to respect citizen rights.[41] But because police chiefs were removable only by the appointing board or commission, they were accountable to the commissioners rather than the electorate.[42] Rather than supporting immunity, *Michel*'s justifications counseled *against* immunity and so the case was wrongly decided.

Since 1922, *Michel* immunity has expanded far beyond California police chiefs

As wrong as *Michel* was, it at least was limited to police chief immunity, not peace officers generally.[43] It did not apply to sheriffs, who oversaw the bulk of California's police and all of its prisons.[44] And, most importantly, it did not apply to direct liability claims.[45] With those limitations, *Michel* would have had little effect on the law or liability for police torts, because its immunity covered only one person per city or county: the police chief.

Those limitations do not exist today. In 1928, the California Supreme Court removed the first when it expanded *Michel* to cover any public officer who supervised other public officers.[46] The Court of Appeal expanded it from there, applying *Michel* to park and playground officers,[47] fish and game commissioners,[48] and Board of Medical Examiners members.[49] As recently as 2010, the Northern District of California granted *Michel* immunity to a park security officer.[50]

In 1936 a California appellate court removed the second limitation in *Lorah v. Biscailuz*, holding that it could find few "points of vital dissimilarity" between the *Michel* police chief and the Los Angeles County Sheriff and granting the sheriff *Michel* immunity.[51] The next year, another appellate decision used *Lorah* to hold that a municipal court marshal was not liable for his deputies' actions, calling vicarious liability for police supervisors "a legal fiction."[52] By the 1960s California's

legislature adopted a statute codifying the *Lorah* rule.[53] *Michel* immunity for sheriffs and police chiefs alike has been the rule ever since: as recently as 2008, the Central District of California granted it to the Orange County sheriff.[54]

In the 1940s, the California Supreme Court tried to preserve the final *Michel* limitation, clarifying that *Michel* permitted claims based on a supervisory defendant's own culpability.[55] That never caught on. Instead, California courts since *Michel* have denied plaintiffs' direct liability claims for reasons unrelated to direct liability.[56] Those courts have also announced bright-line rules requiring plaintiffs to demonstrate that police chiefs owed them special duties and had "immediate control over the officers who caused [the] injuries."[57] Courts also hold that supervisors are not personally involved in misconduct unless they knew about it when it occurred,[58] which has barred suits against police chiefs and supervisors who "set in motion" a plaintiff's constitutional injuries,[59] supply officers with guns used "willfully, wantonly, negligently and carelessly" to kill fourteen-year-old boys,[60] or personally authorize blood tests used to arrest and imprison plaintiffs.[61]

Indeed, *Michel* has expanded so far that in at least the past twenty years, only one case seems to have fit within its exceptions.[62] This doctrine, which started with an (at best) arbitrary distinction between police chiefs and sheriffs, was wrong on the law at the time. It now resembles federal Section 1983 law, granting near-total tort immunity to peace officers and all but eliminating *respondeat superior* liability. The upshot is that a citizen wronged by a peace officer in California has no remedy under either federal or state law for constitutional rights violations. Because a right without a remedy is no right at all, this should not be so. Having no influence over federal law, we can instead argue that *Michel* should be overruled.

The California Supreme Court should overrule *Michel* and eliminate state law immunity for police chiefs and sheriffs

Michel was incorrect and harmful when the California Supreme Court decided it, but it is even more incorrect and harmful today given the absence of any federal remedy

under Section 1983. The California Supreme Court should overrule *Michel* and allow plaintiffs to bring vicarious liability suits against police chiefs and sheriffs whenever their employees violate someone's rights.

The California Supreme Court can overrule *Michel*, its own precedent. Of course, *stare decisis* is relevant here. For certainty, predictability, and stability reasons, California views *stare decisis* as a "fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case . . . might be decided differently by the current justices."[63] This principle is most important when "overruling the decision would dislodge settled rights and expectations or require an extensive legislative response."[64] It is weakest when the decision is old, is inconsistent with other rules of law, or deals with constitutional questions.[65]

Overruling *Michel* may dislodge police supervisors' immunity expectations, but it would not "require an extensive legislative response" or affect a complicated statutory scheme — in fact, it would aid an important recent statutory action.[66] In September 2021 Governor Gavin Newsom signed into law Senate Bill 2; among other things, the bill eliminated state statutory immunities for individual peace officers and their employers.[67] Governor Newsom's signing statement noted that "broad interpretations of California law immunities" have "too often le[d] to officers escaping accountability in civil courts, even when they have broken the law or violated the rights of members of the public."[68] A good start — but studies have shown that "the possibility of being sued does not play a role in the day to day thinking of the average police officer.[69] Consequently, SB 2 is unlikely to influence their actions. Supervisory liability is the better solution to the legislature's problem, but it is impossible unless *Michel* is overturned.[70]

Michel is old, in the "outdated" sense. Even if meaningful differences existed in the *respondeat superior* context between sheriffs, police chiefs, and private employers in 1922, none exist today. Police chiefs no longer select their officers from city-chosen candidate lists, and hiring — statewide, and whether for sheriff or police departments — is similar to that of any other professional setting: officers apply to a

city's department, takes various relevant exams, and interviews with department members.[71] Based those the materials, the police department determines whether or not to hire the candidate, apparently without city commission input.

The only remaining doctrinal justification for police chief immunity, then, is the difference between public and private employees. Support for that distinction comes from U.S. Supreme Court cases applying immunity to port officials whose employees lost a passenger's luggage and a postmaster general whose employees lost a letter.[72] There are stark differences between holding a postmaster general liable for a lost letter, a port official liable for burned luggage, and a police chief liable for an unlawful arrest. In the former cases, vicarious liability serves no purpose but to hold the supervisor responsible for small, preventable mistakes concerning chattel.

Far more significant are the injury to life and limb and constitutional rights invasions caused by peace officers, and supervisors can often prevent them. If police chiefs impose rigid investigation standards, their officers will be more likely to confirm a crime was actually committed, and that their suspect committed it, before conducting an arrest.[73] More care in selecting which officers carry guns could prevent children from being shot in shopping malls.[74] Inviting and investigating anonymous officer misconduct reports, or improving other oversight processes, might do the same. Holding police chiefs vicariously liable would encourage them to take any or all of these actions — but *Michel* makes that impossible.

When overruling *Michel*, the California Supreme Court should establish a constitutional tort

Overruling *Michel* would provide many plaintiffs valuable remedies for constitutional violations. But tort and civil rights standards would still prohibit many plaintiffs from obtaining them. To ensure all plaintiffs have remedies after peace officers violate their rights, the court should find that the various relevant sections of the California constitution, including article I, sections 13 and 17 establish a constitutional tort.

A California constitutional provision can provide for a money damages action in two ways: when it indicates an "affirmative intent" to create "a damages action to

remedy a violation," or when the absence of an "adequate remedy," limited impact on "established tort law," and the "nature and significance" of the constitutional right support inferring the cause of action.[75] Few constitutional provisions indicate affirmative intent to authorize damages.[76] Here, the absence of alternative remedies, limited impact on tort law, and the constitutional rights' significance support inferring a damages action.

First, although overruling *Michel* would allow plaintiffs to sue police chiefs for police officers' traditional common-law torts, such as false imprisonment or battery, some constitutional violations do not have traditional tort analogues.[77] If there are tort analogues, courts nevertheless require plaintiffs to show the police owed a "special duty" of care[78] or had a "special relationship" to the plaintiff.[79] Once a duty exists, bright-line rules ensure that almost no conduct violates it. A police officer does not, for example, violate his duty when he refuses to investigate whether the plaintiff should be detained before detaining the plaintiff.[80] Even assuming the plaintiff can meet these requirements, they must comply with the Government Claims Act, which imposes procedural rules and deadlines that frustrate many a plaintiff.[81]

One alternative to tort liability is the Bane Act, which permits plaintiffs in extreme cases to sue individual officers who violated their article I, section 13 and 17 (or Fourth and Eighth Amendment) rights.[82] But like common-law torts, the Bane Act has limited value. It applies only to rights violations involving "threat[s], intimidation, or coercion"[83] independent from that inherent in policing.[84] Independent coercion is a high bar.[85] Bane Act plaintiffs must also meet a difficult specific intent standard.[86] And merely proving that the force was unreasonable is inadequate — a Bane Act claim requires the plaintiff to also prove that the officer *intended* it to be unreasonable.[87] This is a poor substitute for the constitutional tort option.

Next, inferring damages actions is also consistent with tort law principles. Vicarious liability has long been the norm in the United States for private employers, and in

California it is a statutory right for plaintiffs harmed by private employees.[88] Indeed, when *Michel* was decided vicarious liability was so common that police chiefs carried insurance to guard them against supervisory lawsuits.[89] After *Michel* was decided, courts throughout the country and in California increasingly denied government employers sovereign immunity to tort liability, prompting legislatures to adopt statutes that waived sovereign immunity and imposed default *respondeat superior* liability on public employers.[90] *Michel* is an odd exception to that default rule, barring recovery only because a peace officer, rather than some other public or private employee, harmed them.[91] Inferring a constitutional damages action would eliminate this exception, which shields the one class of public employees most likely to harm citizens.

Finally, few rights are more significant than those implicated in cases against police. Police are "invested . . . with coercive power to resolve problems . . . with finality," and their "understanding of what is required is usually dispositive."[92] They carry weapons, and ignoring them when they ask a question, running from them when they approach, or resisting them in any way can lead to arrest,[93] felony charges,[94] or death.[95] The California constitution is meant to protect Californians from abuses of these powers, but broad immunities have erased its force. Much of that erasure has come at the hands of the California Supreme Court itself. Far from counseling against inferring damages actions for violations, these special factors impel the court to do so.

Conclusion

When peace officers violate Californians' constitutional rights, the damages can be severe and the remedies are almost nonexistent. Scholars and advocates have focused on federal law as needing reform, but state law — especially in California — provides a more realistic avenue. By overruling its incorrect 1922 decision granting police chiefs immunity from vicarious liability suits, the California Supreme Court could revive a remedy for those who suffer at the law's hands.

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1. *Michel v. Smith* (1922) 188 Cal. 19. ↑
2. H.R. 320, 42d Cong. (1871); Achtenberg, *A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of Law*," (1999) 1999 Utah L.Rev. 1, 46–47. ↑
3. *Mitchum v. Foster* (1972) 407 U.S. 225, 241. ↑
4. *Kisela v. Hughes* (2018) 138 S.Ct. 1148, 1152. ↑
5. *Jamison v. McClendon* (S.D.Miss. 2020) 476 F. Supp. 3d 386, 390–95. ↑
6. *Ashcroft v. Iqbal* (2009) 556 U.S. 662, 676; *Monell v. Dept. of Civil Services of the City of N.Y.* (1978) 436 U.S. 658, 694–95 (*Monell*); Patel, *Jumping Hurdles to Sue the Police*, (2020) 104 Minn.L.Rev. 2260, 2261. ↑
7. *See, e.g.,* Reinert, *Qualified Immunity's Flawed Foundations* (forthcoming April 2023) 111 Cal.L.Rev. 101, 114; Baude, *Is Qualified Immunity Unlawful?* (2018) 106 Cal.L.Rev. 45. ↑
8. *Rivas-Villegas v. Cortesluna* (2021) 142 S.Ct. 4, 7. ↑
9. *Michel*, 188 Cal. at 204. ↑
10. *Ibid.* ↑
11. *Id.* at 205. ↑
12. *Id.* at 205. ↑
13. *Id.* at 206. ↑
14. *Ibid*. ↑
15. *Id.* at 201, 204, 206. ↑
16. *Hirsch v. Rand* (1870) 39 Cal. 315, 317–18; *Foley v. Martin* (1904) 142 Cal.

256, 262. ↑

17. *Michel*, 188 Cal. at 201. ↑

18. *Id.* at 202–03. ↑

19. *Ibid.* ↑

20. *Jobson v. Fennell* (1868) 35 Cal. 711, 713; *Taylor v. Brown* (1854) 4 Cal. 188, 188; *Litzius v. Whitmore* (1970) 4 Cal.App.3d 244, 249. ↑

21. *Cronin v. Civil Service Com. of L.A. County* (1925) 71 Cal.App. 633, 639 (*Cronin*); Moroney, *Historical Background of Los Angeles County* (1944) 26 The Quarterly: Historical Society of Southern Cal. 118, 120. ↑

22. *Cronin*, 71 Cal.App. at 639. ↑

23. *Id.* at 640. ↑

24. *Id.* at 638. ↑

25. *Id.* at 641. ↑

26. *Michel*, 188 Cal. at 203. ↑

27. *County of Butte v. Super. Ct.* (1985) 176 Cal.App.3d 693, 689. ↑

28. Cal. Const., art. III, § 3; *McCabe v. Carpenter* (1894) 102 Cal. 496, 473–74; *Hicks v. Bd. of Supervisors* (1977) 69 Cal.App.3d 228, 235. ↑

29. Works, *Home Rule in California: The Los Angeles County Charter* (1913) 47 The Annuls of the Am. Academy of Political and Social Science 229, 234. ↑

30. *See, e.g., Hanley v. Murphy* (1953) 40 Cal.2d 572, 581; *Skelly v. State Personnel Bd.* (1975) 14 Cal.3d 194, 201–07. ↑

31. *See Michel*, 188 Cal. at 203; *Coffee v. Way* (1932) 126 Cal.App. 43, 45; *Chambers v. City of Sunnyvale* (1942) 56 Cal.App.2d 430; *Fernelius v. Pierce* (1943) 22 Cal.2d 226, 239, 241; *Klevashi v. Byington* (1934) 3 Cal.App.2d

671, 674, 676 (appointment); *Maggi v. Pompa* (1930) 105 Cal.App. 496, 500 (removal). ↑

32. *Michel*, 188 Cal. at 202. ↑

33. *Ibid.* ↑

34. *Michel*, 188 Cal. at 203; Cal. Const., art. XI, §§ 1b, 5b. ↑

35. Works, *Home Rule in California*, *supra*, 47 The Annuls of the American Academy of Political and Social Science at 230. ↑

36. *Nicholl v. Koster* (1910) 157 Cal. 416, 419–20; *Rand v. Collins* (1931) 214 Cal. 168, 170; *see also Boyd v. Pendegast*, 57 Cal.App. 504, 505–06 (quoting the 1911 Los Angeles city charter provision governing police officer removal). ↑

37. *Michel*, 188 Cal. at 203; L.A. City Charter (1911), § 91. ↑

38. Cal. Const., art. XI, §§ 1b, 5b; Carillo & Chou, California Constitutional Law, *Popular Sovereignty: Introduction* (2021); Carrillo et al., *California's Recall is Not Overpowered* (2022) 62 Santa Clara L.Rev. 481, 487. ↑

39. Carrillo et al., *California's Recall is Not Overpowered*, *supra* at 507, 535. ↑

40. *See id.* at 514. ↑

41. *See ibid.* ↑

42. Carrillo et al., *California's Recall is Not Overpowered*, *supra* at 487; California Constitution Center, *Sheriff Removal Procedures*, SCOCAblog (March 29, 2021); L.A. City Charter § 203. ↑

43. *Michel*, 188 Cal. at 202–03. ↑

44. *Id.* at 203. ↑

45. *Id.* at 201, 203. ↑

46. *Hilton v. Oliver* (1928) 204 Cal. 535, 539–40. ↑

47. *Shannon v. Fleishhacker* (1931) 116 Cal.App. 258, 264–65. ↑

48. *Noack v. Zellerbach* (1936) 11 Cal.App.2d 186, 188. ↑

49. *Reed v. Molony* (1940) 38 Cal.App.2d 405, 407, 410. ↑

50. *Mitchell v. City of Rohnert Park* (N.D. Cal. 2010) 2010 WL 583948 at *3. ↑

51. *Lorah v. Biscailuz* (1936) 12 Cal.App.2d 100, 102, *disapproved of on statutory grounds by Union Bank & Trust Co. of L.A. v. L.A. County* (1938) 11 Cal.2d 675. ↑

52. *Van Vorce v. Thomas* (1937) 18 Cal.App.2d 723, 725. ↑

53. *Payne v. Bennion* (1960) 178 Cal.Rptr.2d 595, 600. ↑

54. *Nunn v. County of Orange* (C.D. Cal., March 22, 2007, No. CV 06–2275 AG) 2007 WL 9662332, at *1–*2. ↑

55. *Fernelius*, 22 Cal.2d at 236. ↑

56. In 2010, for example, a court applied immunity to a negligent supervision claim against Los Angeles County Sheriff Lee Baca, even though Baca "fostered, condoned . . . failed to correct an official policy, practice, or custom . . . permitting the . . . wrongs" the plaintiff suffered. *Arellano v. County of L.A.* (Cal.App., July 27, 2010, No. B213224) 2010 WL 2905954, at *11 [nonpub. opn.]. In 2018, another court held that a state law plaintiff could not sue for negligent supervision — a state law claim based on direct, not vicarious, liability — because federal Section 1983 law does not permit vicarious liability. *Prado v. Police Dept. of East Palo Alto* (Cal.App., Aug. 29, 2018, No. A151297) 2018 WL 4103175 [nonpub. opn.]. ↑

57. *Jones v. City of L.A.* (C.D. Cal., Sept. 15, 2006, No. CV 05-7270 DSF) 2006 WL 8434730. ↑

58. *Abrahamson v. City of Ceres* (1949) 90 Cal.App.2d 523, 526; *Kangieser v.*

Zink (1955) 134 Cal.App.2d 559, 561. ↑

59. *Arellano v. County of L.A.*, 2010 WL 2905954 at *11. ↑

60. *Abrahamson*, 90 Cal.App.2d at 526. ↑

61. *Kangieser*, 134 Cal.App.2d at 560. ↑

62. In *Eklund v. County of Orange*, police arrested a woman for driving under the influence. Before they put her in the back of their police car, they put her handcuffs on too tightly. She complained, so they told her they would "make her shut up and be quiet." She continued to complain, so one officer walked to the back of the police car, pointed his Taser into her chest, and shot a dart into her "breast area." The officer then sent five seconds of electrical current through her chest, which caused her to begin flailing around the car's backseat. The officer tased her again. Shortly afterward, Sergeant Pepe and Community Service Officer (CSO) Fouste — the supervisors — arrived and "attempted to remove the darts" from the plaintiff's chest "to cover up the [deputies'] brutal attack." When the deputies, the Sergeant, and the CSO failed to remove the darts, they took her to a hospital, where a surgeon removed them. The officers then took the plaintiff to a cell and "taunted," "verbally assaulted," and "abused" her until she attempted to cut her wrists open using her handcuffs. The deputies replaced the handcuffs. When she was eventually released, she filed suit against the deputies, Sergent Pepe, and CSO Fouste. The court permitted the claims against Pepe and Fouste to proceed past a motion to dismiss, but it noted that the allegations supporting their personal involvement — removing the darts from the plaintiff's chest with their bare hands to cover up their deputies' abuse, then leaving the plaintiff in those same deputies' care — were "meagre." *Eklund v. County of Orange* (C.D. Cal. May 19, 2008, No. SACV 08–0099 DOC) 2008 WL 11338615, at *1. ↑

63. *Trope v. Katz*, 11 Cal.4th 274, 288. ↑

64. *Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 504. ↑

65. *Trope*, 11 Cal.4th at 288; *Bd. of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 921. ↑

66. *Bd. of Supervisors v. Local Agency Formation Commission*, 3 Cal.4th at 921. ↑

67. Sen. Bill No. 2 (2021–2022 Reg. Session) § 3; Civil Code section 52.1(n) (as amended). ↑

68. Sen. Bill No. 2 (2021–2022 Reg. Session) § 2. ↑

69. Schwartz, *After Qualified Immunity* (2020) 120 Colum. L.Rev. 309, 352. ↑

70. *See, e.g.,* Moore & Fitzsimmons, *Justice Imperiled: False Confessions and the Reid Technique* (2011) 57 Criminal L. Quarterly 509, 510–11. ↑

71. Peace officer hiring in California is broadly governed by Cal. Code Regs., tit. 11, div. 2, art. 5, §§ 1950 et seq.; see, e.g., *id.* at § 1950(a) ("Peace Officer Selection Requirements The purpose of these regulations is to implement the minimum peace officer selection standards set forth in California Government Code sections 1029, 1031 and 1031.4, and as authorized by California Penal Code section 13510. Peace officer training requirements are addressed separately in Commission Regulations 1005 and 1007. . . . . (1) Every POST-participating department and/or agency . . . shall ensure that every 'peace officer candidate', . . . satisfies all minimum selection requirements specified in the following regulations unless waived by the Commission on a case by case basis. Statutory requirements in these regulations cannot be waived by the Commission."); *see, e.g.,* City of Los Angeles, *LAPD Hiring Process* (Feb. 26, 2022). ↑

72. *Robertson v. Sichel* (1888) 127 U.S. 507, 507–15. ↑

73. *See Hamilton v. City of San Diego* (1990) 217 Cal.App.3d 838, 841–42. ↑

74. *Eklund*, 2008 WL 11338615, at *1 ↑

75. *Katzberg v. Regents of U. of Cal.* (2002) 29 Cal.4th 300, 318. ↑

76. *Ibid.* ↑

77. See Wachtell, *No Harm, No Foul: Reconceptualizing Free Speech Via Tort Law* (2008) 83 N.Y.U. L.Rev. 949, 974. ↑

78. *Jones v. City of L.A.*, 2006 WL 8434730, at *6. ↑

79. *Davidson v. City of Westminster*, 32 Cal.3d 197, 205; McCabe, *Police Officers' Duty to Rescue or Aid: Are They Only Good Samaritans?* (1984) 72 Cal.L.Rev. 661, 668. ↑

80. *Michel*, 188 Cal. at 206; *Hamilton*, 217 Cal.App.3d at 838, 844. ↑

81. Parrish, *Avoiding the Mistakes of Terrell R.: The Undoing of the California Tort Claims Act* (2004) 15 Stan. L. and Policy Rev. 267, 281, 286–87. Note that the article's title uses an old, colloquial term for the Government Claims Act, which covers any money damages claims (tort or otherwise). See Gov. Code § 810 ("This division may be referred to as the Government Claims Act.") and *Lozada v. City and County of San Francisco* (2006) 145 Cal.App.4th 1139. ↑

82. *Bender v. County of L.A.* (2013) 217 Cal.App.4th 968, 977–78, 981. ↑

83. Civ. Code § 52.1. ↑

84. *Shoyoye v. County of L.A.* (2012) 203 Cal.App.4th 947, 959, 961; *Lyall v. City of L.A.* (9th Cir. 2015) 807 F.3d 1178, 1196. ↑

85. In *Bender*, for example, police officers arrived at a plaintiff's apartment complex and began harassing him. Then, unprovoked, the officers called him the N word, handcuffed him, placed him under arrest, and carried him to their police car, where they held him against their car, pepper sprayed him, threw him onto the ground, kicked him on the arms and ribs at least ten times, shouted the N word, and crushed his glasses until, finally, paramedics advised they take him to the hospital. The officers refused. The court found that altogether satisfied the standard — but only barely. *Bender*, 217 Cal.App.4th at 972–74, 979. ↑

86. It is not enough, for example, that a plaintiff prove an officer arrived at his apartment with several other officers in response to an unsubstantiated 911 call about possible drug use, followed the plaintiff into his apartment and — though the plaintiff did not threaten the officer in any way — fired his handgun into the plaintiff's chest from three feet away. *Allen v. City of Sac.* (2015) 234 Cal.App.4th 41, 67. ↑

87. *Id.* at 1045. ↑

88. Civ. Code § 2338. ↑

89. *See, e.g., Kenyon v. Hartford Acc. & Indem. Co.* (1927) 86 Cal.App. 269, 272–73. ↑

90. *See* Arvo Van Alstyne, *Governmental Tort Liability: A Decade of Change*, 1996 U. Ill. L.F. 919, 935–40 (Winter 1966). ↑

91. *See, e.g., Eklund*, 2008 WL 11338615, at *1; *Barden v. City of Pomona* (C.D. Cal. June 6, 2017, No. CV 16-8468-MWF (JCx)) 2017 WL 11633493, at *10; *Mitchell*, 2010 WL 583948, at *3. ↑

92. Sekhon, *Police and the Limit of Law* (2019) 119 Colum. L.Rev. 1711, 1719. ↑

93. *People v. Scrivens* (1969) 276 Cal.App.2d 429, 431. ↑

94. *People v. Delgado* (Cal.App., Nov. 17, 2015, No. H040648) 2015 WL 7252444, at *1 (unpublished opinion); Pen. Code § 69(b). ↑

95. *Forrett v. Richardson* (9th Cir. 1997) 112 F.3d 416, 419–20; Pen. Code § 196. ↑