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# Police Terror and Officer Indemnification

ALLYSSA VILLANUEVA\*

## Introduction

On May 6, 2012, Oakland Police Officers Miguel Masso and Joseph Fesmire initiated a stop of Alan Bluford and two friends in Oakland, CA.<sup>1</sup> The facts are disputed but the altercation escalated resulting in Bluford sustaining three fatal gunshot wounds from Officer Masso.<sup>2</sup> Bluford was an 18-year-old high school senior.<sup>3</sup> No weapons were found on Bluford and witnesses stated he was not a threat to anyone around.<sup>4</sup> In July of 2012, Bluford's mother filed suit in federal district court under 42 U.S.C. § 1983 for violation of her son's civil rights against the Oakland Police Department and the individual officers involved.<sup>5</sup> In June of 2014, the case settled with an award agreement in the amount of \$110,000 to Bluford's family and was approved by the Oakland City Council.<sup>6</sup>

These homicides are portrayed as aberrations from routine

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\* J.D. Candidate at the University of California, Hastings College of the Law, 2016. Thank you to U.C. Hastings Professor Osagie Obasogie and to the *Hastings Race and Poverty Law Journal*.

1. Bluford v. City of Oakland, No. 12-CV-0379-WHO, 2014 WL939939, at \*1 (N.D. Cal. Mar. 6, 2015).

2. *Id.*

3. *Alan Bluford FAQ*, JUSTICE4ALANBLUEFORD.ORG (Nov. 12, 2012), <http://justice4alanblueford.org/2012/11/12/alan-blueford-faq/>.

4. *Id.*

5. Complaint for Damages for Violations of Civil Rights and Wrongful Death, Bluford v. City of Oakland, No. C12-03791 (N.D. Cal. July 19, 2012).

6. *Family of Teen Killed by Oakland Police Receives \$110k Settlement*, ABC 7 NEWS (June 4, 2014), [http://abc7news.com/news/family-of-teen-killed-by-oakland-police-receives-\\$110k-settlement/94178/](http://abc7news.com/news/family-of-teen-killed-by-oakland-police-receives-$110k-settlement/94178/).

policing and as rare “accidents.”<sup>7</sup> However, this atomized focus on each single event transforms them into a spectacle and it is the job of the spectacular to draw attention away from the banality of police murder as standard operating procedure.<sup>8</sup> The spectacularized event of murder by police is actually routine.<sup>9</sup> Police power is unique because it is the government’s central grant of authority to use physical repression and violence against citizens.<sup>10</sup> This includes implied power over life and death.<sup>11</sup> Police actions must be reviewed because a unique aspect of their power is the ability to use lethal force against unarmed citizens.<sup>12</sup> Even if there were no demonstrable pattern of police malpractice, the experience of American history suggests that safeguards must be constructed against any grant of state power as large as that given to the police.<sup>13</sup>

Critical Race Theory (“CRT”) was founded as a critique of the law as an institution complicit in the creation and sustenance of racism, discrimination, and other forms of societal inequality.<sup>14</sup> This Note offers a critique of indemnification law specifically, and § 1983 generally, as the main civil cause of action for homicides committed by police in the line of duty. Furthermore, CRT provides an analytical framework to assess the current economy of

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7. Steve Martinot & Jared Sexton, *The Avant-Garde of White Supremacy*, 9 SOCIAL IDENTITIES: J. FOR THE STUDY OF RACE, NATION, & CULTURE 2, 6 (2003).

8. *Id.*

9. Reported data shows that officers have killed 600-800 people every year in the past decade, which suggests a routine, if not daily, occurrence. ANDREA M. BURCH, *2003-2009 Statistical Tables*, BUREAU OF JUSTICE STATISTICS, ARREST-RELATED DEATHS 4 at T1 (2011).

10. Government police power is the general power to infringe on individual liberty to serve the public welfare. See *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).

11. ZENITH GROSS, POLICE POWER AND CITIZENS’ RIGHTS: THE CASE FOR AN INDEPENDENT REVIEW BOARD 4 (ACLU ed., 1966); Achille Mbembe, *Necropolitics*, 15 PUBLIC CULTURE 11, 11 (*Translated by Libby Mientjes*, 2003).

12. *Id.* at 4.

13. *Id.* at 14.

14. CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT xiii-xiv (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 1995).

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police violence, its historical trajectory, and legal structuring through a racial lens.

Before attending law school, I completed an undergraduate honors thesis entitled “Police Terror and Anti-Black Genocide in the United States.”<sup>15</sup> That thesis examined the issue of officer-involved homicides through a Black Studies and Ethnic Studies framework. The scope of this Note is limited to lethal police violence as it becomes subject to § 1983 litigation through a Critical Race Theory lens. The Note focuses specifically on § 1983 civil suits and the doctrine of indemnification; it will not include any discussion of potential criminal liability or nonlethal forms of police use of force.

Often, the only direct consequences for officers comes internally from their department or the locality they serve.<sup>16</sup> These commonly include: paid administrative leave, work suspension, negative reports in their file, job transfer, and other disciplinary measures. Many civil rights laws rely heavily on the assumption that police officers pay judgments and settlements out of their own pockets.<sup>17</sup> However, most officers do not.<sup>18</sup> The court’s jurisprudence prohibiting municipal liability for punitive damages was designed to protect taxpayers from bearing the costs of officer misconduct.<sup>19</sup> However, recent studies reveal that taxpayers almost always satisfy both compensatory and punitive damage awards assessed against their sworn servants.<sup>20</sup> This cost shifting effectively undercuts any liability potentially imposed on

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15. Allyssa Villanueva, *Police Terror and Anti-Black Genocide in the United States* (June 13, 2012) (unpublished B.A. honors thesis, U.C. San Diego) (on file with the Ethnic Studies Department, U.C. San Diego).

16. There is no comprehensive tracking of discipline and punishment rates of officers who use excessive force. This is due in part to the lack of mandated reporting and to the fact that many aspects of personnel decisions are not available for public disclosure. For officers’ thoughts and experiences with discipline, see DAVID WEISBURD ET AL., THE POLICE FOUNDATION, “THE ABUSE OF POLICE AUTHORITY: NATIONAL STUDY OF POLICE OFFICERS’ ATTITUDES” loc. 31 (2001) (online report) <http://www.policefoundation.org/wp-content/uploads/2015/06/Weisburd-et-al.-2001-The-Abuse-of-Police-Authority.pdf>.

17. Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 887 (2014).

18. *Id.*

19. *Id.* at 888.

20. *Id.* at 890.

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an individual officer through court judgment.

To address this practice, which fails to serve the goal of deterrence of lethal police misconduct, I propose excluding public monetary awards resulting from officer-involved homicides from indemnification coverage so that officers will bear sole responsibility. Individual liability is a necessary component in the regime of police reform to increase officer accountability and to decrease the number of officer-involved homicides of unarmed civilians each year.

I will first discuss the current problems of lethal police violence. I then discuss the doctrine of indemnification. I will then center my discussion on civil suits brought under 42 U.S.C. § 1983 and how the doctrine of indemnification, as applied, undermines the goals of the statute as well as the goal of deterring lethal police violence, which is my primary concern. I conclude by proposing my own solutions directed at local governments.

## **I. Overview of the Problem of Officer-Involved Homicides in the United States**

A central hurdle to defining the problem of officer-involved homicides is the lack of national and uniform reporting requirements. Departments currently participate in federal reporting programs on a voluntary basis.<sup>21</sup> Therefore, no one knows exactly how many people die each year at the hands of law enforcement. Reporting mandates are a key component to federal police reform.<sup>22</sup>

The United States (U.S.) Department of Justice publishes reports on arrest-related deaths nation-wide.<sup>23</sup> In the Department's most recent report of data from 2003 to 2009, homicide by law enforcement was the leading cause of arrest-related death and increased by eight

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21. Reporting mandates may accompany consent decrees resulting from Department of Justice investigations of unconstitutional "pattern and practices." 42 U.S.C. § 14141 (1994).

22. PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, INTERIM REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 8 (2015).

23. BURCH, *supra* note 9, at Fig. 1.

percent over the course of the reporting period.<sup>24</sup> Regardless of the manner of death, 4,813 people died in the course of arrest during this period.<sup>25</sup> Local governments are uniquely positioned to address this problem as 73.3 percent of arrest-related deaths reported to the federal government from 2003-2009 involved local police departments.<sup>26</sup>

### A. Officer-Involved Homicides Are a Manifestation of Racism.

Nationally, communities have organized protests, educational events, media blackouts, and occupations to demonstrate their dissatisfaction with officer-involved homicides and the lack of remedies, consequences, or meaningful reform.<sup>27</sup> The existing data also support the public's charges of racial inequality in arrest and arrest-related deaths.<sup>28</sup> The existence of racial category in the federal government's reports presupposes a racial dynamic in the tactic of police lethal violence.<sup>29</sup> Racism is the ordinary means through which dehumanization achieves ideological normality and it is through the practice of dehumanizing people that produces a racial category.<sup>30</sup> Regardless of intent, our national policing structure results in the disproportionate victimization and risk of death to civilians based on race.

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24. *Id.*

25. BURCH, *supra* note 9, at T1.

26. *Id.* at T17.

27. See, e.g., Kenrya Rankin Naasel, *RECAP: From #BlackLivesMatter to #RiseUpOctober, a Day of Protest*, COLORLINES (Oct. 26, 2015, 1:51 PM) <http://www.colorlines.com/articles/recap-blacklivesmatter-riseupoctober-day-protest>; David Nakamura & Hamil Harris, *20 Years After the Million Man March, a Fresh Call for Justice on the Mall*, WASH. POST (Oct. 10, 2015), [https://www.washingtonpost.com/politics/20-years-after-the-million-man-march-a-fresh-call-for-justice-on-the-mall/2015/10/10/b3d8ffca-6f66-11e5-b31c-d80d62b53e28\\_story.html](https://www.washingtonpost.com/politics/20-years-after-the-million-man-march-a-fresh-call-for-justice-on-the-mall/2015/10/10/b3d8ffca-6f66-11e5-b31c-d80d62b53e28_story.html).

28. BURCH, *supra* note 9, at T3 (disaggregating statistics by racial categories, including "White, non-Hispanic," "Black non-Hispanic," "Hispanic," "Other," "Unknown").

29. *Id.*

30. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 243 (2007).

Overall, 27.8 percent of all arrests were Black people yet thirty-one percent of the reported deaths related to arrest were Black victims.<sup>31</sup> Between 2003 and 2009, 1,529 Black victims were killed during arrests, which amounts to about one Black person per day, giving rise to the popularized slogan that a Black person is killed every twenty-eight hours by state or local law enforcement personnel in the U.S.<sup>32</sup> During the time period of this study, the national Black population was reportedly under thirteen percent.<sup>33</sup> Every historical study of police use of fatal force has found that persons of color (principally Black males) are a disproportionately high percentage of the persons shot by police compared to their representation in the general population.<sup>34</sup> If the number of Black people killed annually by law enforcement personnel is not alarming enough, consider the total number of victims, irrespective of race and/or gender.<sup>35</sup> Black people are more likely to be killed by police now than they were fifty years ago.<sup>36</sup>

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31. BURCH, *supra* note 9, at T3.

32. BURCH, *supra* note 9.

33. JESSE MCKINNON, *THE BLACK POPULATION: 2000*, 1 (2001). It is also important to note that California is the leading state in arrest-related deaths, with 775 total reported deaths over the six-year period. See BURCH, *supra* note 9.

34. Hubert G. Locke, *The Color of Law and the Issue of Color: Race and the Abuse of Police Power*, in *POLICE VIOLENCE: UNDERSTANDING AND CONTROLLING POLICE ABUSE OF FORCE* 129, 135 (William A. Geller & Hans Toch eds., 1996).

35. Citizen-generated databases estimated that 1,029 people were killed by law enforcement in 2014. See Jay Symopoulus, *Citizen Run Database Show over 1,000 People Killed by Cops in 2014*, FREE THOUGHT PROJECT (Dec. 10, 2014), <http://thefreethoughtproject.com/data-shows-1000-people-killed-cops-2014/>. The last report released by the Bureau of Justice Statistics totaled 4,813 deaths in custody or during attempted arrests from 2003-2009. See *More than 4,800 Arrest-Related Deaths Reported from 2003 to 2009*, BUREAU OF JUSTICE STATISTICS (Nov. 17, 2011, 10:00 AM), <http://www.bjs.gov/content/pub/press/ard0309stpr.cfm>.

36. Recent data estimates that police killed 238 Black people in 2014. See Tony Ortega, *Black Americans Killed by Police in 2014 Outnumbered Those Who Died on 9/11*, RAW STORY (Apr. 8, 2015, 12:47 PM), <http://www.rawstory.com/2015/04/black-americans-killed-by-police-in-2014-outnumbered-those-who-died-on-911/>.

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### **B. Racism Manifested in Officer-Involved Homicides is Historical.**

Although heightened attention to systemic police violence is recent, the practice is historical. Gerald Robin's study remarked that throughout several past sociological studies, "Regardless of the index used, then, the Negro's tendency to be a subject of police slayings is excessive [noting that] for a nation as a whole the ratio of Negro to white rates of the victim-offender was 7 to 1, respectively."<sup>37</sup> A study conducted in Philadelphia from 1950 to 1960 found that 87.5 percent of the victims of homicides by police were Black while the current population of the city was only twenty-two percent Black.<sup>38</sup>

In a subsequent study produced in 1974, research determined that the death rate for Blacks was found to be consistently nine times higher than for whites for the entire period of 1950-1968 in his study of police killings of "unarmed" civilians.<sup>39</sup> This study suggested that the rise in Black victims of homicide by police is attributable to the rise in Black militancy and political struggle during the time period.<sup>40</sup> One year later, an article on police killings in the U.S. from 1965 to 1969 based on the National Vital Statistics systems report combined this previous data and determined that Black people were killed by the police at a rate thirteen times higher than for whites and not the nine to ten times previously reported.<sup>41</sup> The report also offered details that thirty percent of the civilians killed from 1965 to 1969 were not involved in criminal activity. This is confirmed by a report released by the Police Foundation, which reveals that as many as forty percent of civilians killed by the police were not involved in serious criminal conduct.<sup>42</sup> These studies provide evidence of a history of racist and anti-Black

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37. Gerald Robin, *Justifiable Homicide by Police Officers*, 54 J. CRIM. L. & CRIMINOLOGY 223, 226 (Summer 1963).

38. *Id.* at 2.

39. Sid Harring, Tony Platt, Richard Speigman & Paul Takagi, *The Management of Police Killings*, 8 CRIME & SOC. JUSTICE 34, 34 (1977).

40. *Id.*

41. *Id.* at 36.

42. *Id.* at 39. The Police Foundation's mission is to advance policing through innovation and science. *Id.*



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policing practices in the U.S. The ratio has increased between Black and white victims even while the Black American population has declined.<sup>43</sup>

### C. Officers Enjoy a Unique Level of Impunity.

The police continue to kill civilians. Officer impunity adds insult to injury. Though officer-involved homicides are a daily occurrence, criminal prosecutions of police officers for misconduct in the line of duty are exceedingly rare.<sup>44</sup> Police officers have been indicted in every region of the U.S. for acting under the color of law, unlawfully shooting the victim, and taking away his or her constitutional right not to be deprived of life and liberty without due process of law. However, federal indictments do not mean that justice has been obtained because all too often the police officers involved are found not guilty. From 2009 to 2011, 2,716 officers throughout the U.S. faced allegations of excessive force.<sup>45</sup> Of those 2,716 officers, only twenty-eight were charged with a crime and fourteen were convicted which is only a 0.5 percent conviction rate.<sup>46</sup> As evidence of historical trend, 180 out of 228 officers indicted by the federal government between 1971 and 1975 were acquitted.<sup>47</sup>

These data reveal a continued pattern of protection and justification for officers who kill. Impunity itself is troubling but becomes intolerable when data and other evidence indicate that

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43. The Black U.S. population was 13.2 percent in 2012. U.S. CENSUS BUREAU, THE BLACK ALONE POPULATION IN THE UNITED STATES: 2012 (May 2, 2015), <http://www.census.gov/population/race/data/ppl-ba12.html>. The same year, there were 313 reported extrajudicial killings of Black people, amounting to one Black person killed every twenty-eight hours. ARLENE EISEN, OPERATION GHETTO STORM: 2012 ANNUAL REPORT ON EXTRAJUDICIAL KILLINGS OF 313 BLACK PEOPLE BY POLICE, SECURITY GUARDS AND VIGILANTES 12 (2014), [http://www.operationghettostorm.org/uploads/1/9/1/1/19110795/new\\_all\\_14\\_11\\_04.pdf](http://www.operationghettostorm.org/uploads/1/9/1/1/19110795/new_all_14_11_04.pdf).

44. Marshall Miller, Note, *Police Brutality*, 17 YALE L. & POL'Y REV. 149, 152 (1998).

45. David Packman, *The Problem with Prosecuting Police in Washington State*, NAT'L POLICE MISCONDUCT REPORTING PROJECT (Feb. 21, 2011, 12:55 AM), <http://www.policemisconduct.net/the-problem-with-prosecuting-police-in-washington-state/>.

46. *Id.*

47. Harring et al., *supra* note 39, at 40.

officer-involved homicides are also informed by systemic racism.<sup>48</sup> Though they occur at different times and places, these homicides are similar to the extent that they are premised on the logic of anti-Black racism.<sup>49</sup>

Furthermore, victims cannot defer to the existing structure of criminal justice when the alleged perpetrator of illegal behavior is an officer of the law. Even though police officers are employees of the local or state government, victims' families must turn to these same structures to seek justice. This triggers distrust in the legal system, which is exacerbated when there are seemingly no consequences for officers who are responsible for the death of an unarmed civilian. These notions of the state as the arbiter of justice and the police as the unaccountable arbiters of lethal violence are two sides of the same coin.<sup>50</sup>

## II. 42 U.S.C. § 1983 and its Application to Local and State Governments and Individual Police Officers

42 U.S.C. § 1983 is the most commonly used civil cause of action to remedy homicides caused by police officers, therefore, it follows that indemnification also occurs in cases alleging unconstitutional conduct under § 1983 against law enforcement personnel.<sup>51</sup> Indemnification protects police officers from individual liability for monetary judgments entered against them and ensures that a prevailing plaintiff can collect their court-ordered judgment.<sup>52</sup>

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48. Locke, *supra* note 34, at 137. Hubert Locke's research on race and police violence concludes that officers are more likely to use reasonable force against Blacks which increases the likelihood that such officers will adopt an aggressive or hostile approach to Black suspects but not white suspects.

49. Villanueva, *supra* note 15, at 40.

50. Martinot & Sexton, *supra* note 7, at 2.

51. Martin Schwartz, *Should Juries be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1211 (2001).

52. *Id.*

The Court's jurisprudence of § 1983 has developed as tort law.<sup>53</sup> Therefore, tort principles determine available remedies, which include compensatory, punitive, and exemplary damages. Compensatory damages are strictly provided to compensate the prevailing party for the injury suffered, thus these awards must correlate with the actual harm to the aggrieved party.<sup>54</sup> On the contrary, punitive damages are awarded as retribution and deterrence of the offending party's unlawful actions.<sup>55</sup> *Smith v. Wade* held that the threshold showing for awarding punitive damages in § 1983 cases requires that defendants be motivated by "evil motive or intent" or show "reckless or callous indifference to the federally protected rights of others."<sup>56</sup> The amounts awarded for punitive damages are left to the discretion of the jury or fact finder.<sup>57</sup> Exemplary damages are awarded when a defendant's behavior results from an "evil state of mind" including recklessness or spite.<sup>58</sup> Exemplary damages differ from punitive awards in that they may also serve compensatory functions.<sup>59</sup>

States and municipalities throughout the country frequently indemnify police officers to protect them from personal liability for monetary awards. States such as California mandate that public entities defend their employees in suit and pay any "judgments, compromises, or settlements agreed to in the process."<sup>60</sup> A 2014 study found that approximately 9,225 civil rights cases were resolved with payments to plaintiffs between 2006 and 2011 in the forty-four largest police jurisdictions in the country.<sup>61</sup> Of those cases, officers financially contributed to settlements or judgments in approximately 0.41

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53. *Smith v. Wade*, 461 U.S. 30, 34 (1983).

54. James R. Mckown, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419, 422-23 (1995).

55. *Id.*

56. *Smith*, 461 U.S. at 56.

57. *Id.* at 54.

58. Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 517 (1957).

59. *Id.* at 520-21.

60. See, e.g., CAL. GOV'T CODE § 825(a) (1995).

61. Schwartz, *supra* note 17, at 912-13.

percent of the cases and only 0.02 percent of the total dollars paid.<sup>62</sup> Furthermore, no officer paid any portion of a punitive damage award assessed against him or her.<sup>63</sup> A subsequent study of police misconduct suits confirmed that no City of Oakland police officer has paid settlement costs in civil rights-related cases since 1990.<sup>64</sup> The information collected further evinces that the largest police departments in the country *each* paid, on average, upwards of \$20 million in settlements from 2006 to 2010.<sup>65</sup> Indemnification shifts these costs from the individual officers and their respective police departments to cities and their resident taxpayers. Indemnification thus operates to make citizens, including the victims, pay the costs of lethal police misconduct.

Municipalities are specifically subject to § 1983 suits whereas the Eleventh Amendment gives states immunity against such suits and any resulting damages.<sup>66</sup> Municipalities often indemnify officers for compensatory damages under § 1983. State indemnification statutes regarding punitive and exemplary damages commonly require that the employee must (1) have acted within the scope of employment, (2) not have engaged in intentional, reckless, or malicious wrongdoing, and (3) be in the best interest of the public entity.<sup>67</sup> All three factors are weighed under the “sole discretion” of the government or public entity.<sup>68</sup>

Municipalities, specifically, are immune from being assessed punitive damages in § 1983 suits.<sup>69</sup> However, *Smith* held that officers may be sued in their individual capacity and assessed punitive

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62. *Id.*

63. *Id.* at 916.

64. Abraham Hyatt, *Oakland Spent \$74 Million Settling 417 Police Brutality Lawsuits*, OAKLAND POLICE BEAT (Apr. 9, 2014), <http://oaklandpolicebeat.com/2014/04/oakland-spent-74-million-settling-417-police-brutality-lawsuits/>; JOHN L. BURRIS, BLUE VS. BLACK: LET'S END THE CONFLICT BETWEEN COPS AND MINORITIES 22–23 (1999).

65. Schwartz, *supra* note 17, at 912–13.

66. *Id.* at 1214; U.S. CONST. amend. XI.

67. Schwartz, *supra* note 51, at 1217; *see, e.g.*, CAL. GOV'T CODE § 825(b).

68. CAL. GOV'T CODE § 825(b).

69. *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981).

damages.<sup>70</sup> In practice, municipalities pay the cost of punitive damages. However, the threshold findings required to award punitive damages should make an officer ineligible for indemnification. A municipality's obligation to indemnify an officer for punitive damages does not make the municipality the real party in interest, and thus does not violate the holding in *Newport*<sup>71</sup> that municipalities are immune from punitive damages under § 1983.<sup>72</sup> This precedent leaves municipalities responsible for damage awards that may rest primarily on punishment of the officer and not on compensation for the plaintiff. Furthermore, evidence that the municipality may indemnify the defendant is not admissible at trial.<sup>73</sup> In general, federal courts exclude this information from the jury just as liability insurance is excluded in tort cases.<sup>74</sup> State courts have not resolved whether a jury should be informed of this fact.<sup>75</sup>

The two prominent justifications in favor of officer indemnification are (1) that officers will be deterred from performing their jobs and (2) indemnification ensures that the plaintiff will be made whole. To the first claim, there is no factual basis to assert that law enforcement will be chilled if officers are not indemnified since no municipality has implemented a reform to deny indemnification of their officers in lawsuits for lethal use of force against unarmed civilians. Though this may be a legitimate concern, studies show that officers rarely pay any out-of-pocket costs for their defense or to satisfy awards assessed against them.<sup>76</sup> Many states require governments to provide officers with legal representation to defend claims arising from conduct or omission within the scope of officers' employment, regardless of whether the department ultimately

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70. *Smith*, 461 U.S. at 35.

71. *Newport*, 453 U.S. at 271.

72. Schwartz, *supra* note 51, at 1220; *see also* *Cornwell v. Riverside*, 896 F.2d 398 (1990); *Bell v. Milwaukee*, 536 F. Supp. 462 (1982).

73. Schwartz, *supra* note 51, at 1220.

74. *Id.* at 1229–30.

75. *Id.* at 1212.

76. Schwartz, *supra* note 17, at 890.

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indemnifies the officer.<sup>77</sup> Available evidence indicates that law enforcement officers are almost always provided with defense counsel paid by municipalities when they are sued.<sup>78</sup> Finally, refusing to perform one's job without indemnification presupposes conduct that warrants litigation. This is a reasonable expectation for law enforcement occupations. However, it becomes unreasonable to expect indemnification in the context of litigation regarding conduct that rises to the level of evil that warrants punitive damages.

The second justification that plaintiffs will not be made whole is the most compelling. Yet even this justification is not wholly merited, for at least two reasons. First, a plaintiff who has lost a relative due to an officer-involved homicide can never be made truly "whole" in the tortious sense, or be put back into the same position they were in before the incident, because the victim is deceased. On this ground, the tort of wrongful death is more egregious than lesser degrees of injury cognizable under tort law yet offers the same remedies. Second, police are government agents, funded through public dollars, and controlled by local and state governments. The public should all be uncomfortable allowing state agents whose primary mission is to "protect and serve" and enforce the law to commit arguably the most heinous crime—homicide—with no direct personal or financial liability.

The California Supreme Court addressed both arguments in its 1976 holding, in *Williams v. Horvath*, that state indemnification applies to officer defendants in § 1983 federal suits.<sup>79</sup> The court expressly rejected the argument that indemnification deprives plaintiffs of their rights to full relief, because this would mean that governments are never liable for their employees' conduct, and would actually limit plaintiffs' recovery.<sup>80</sup> The Court comments, "[I]t may be argued that to permit indemnification would remove an effective deterrent to illegal police conduct—the potential of personal liability. But in truly egregious cases the

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77. *Id.*; see, e.g., Cal. Gov't Code § 825(a) (1995).

78. *Id.* at 915. Officer defendants are usually represented by a city attorney or county counsel.

79. 16 Cal.3d. 834, 836 (1976).

80. *Id.* at 845.

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indemnification statutes expressly forbid reimbursement by the entity.”<sup>81</sup> Government indemnification or constructive indemnification by police unions and foundations show the opposite of this theory: near complete indemnification no matter the alleged conduct or judgment. Local governments assume entire liability for defense and fulfillment of awards with no responsibility resting on the individual officer whose conduct is the impetus of the suit.

### III. The Legislative and Judicial History of 42 U.S.C. § 1983 and its Application

42 U.S.C. § 1983 makes it unlawful for any person, under color of law, to deprive any citizen of any rights, privileges, or immunities secured by the U.S. Constitution and federal and state law.<sup>82</sup> Section 1983 does not confer substantive rights to potential plaintiffs, but creates a cause of action to vindicate rights found either in the U.S. Constitution or federal statute.<sup>83</sup> Section 1983 was originally enacted as the “Ku Klux Klan Act” to provide a remedy for civil rights violations inflicted by anyone acting “under the color of law.”<sup>84</sup> Section 1983 was passed in response to voluminous reports of Ku Klux Klan (“KKK”) violence and the inability of local governments to address it.<sup>85</sup> Nonenforcement of the law on the state and local level was the main problem identified by Congress at the time of the Act’s passage.<sup>86</sup> The Act was passed with the larger purpose of ensuring that lower governments would enforce the Civil Rights Act of 1866 and the Fourteenth Amendment. Congressman Lowe of Kansas expressed at the time that:

While murder is stalking abroad in disguise, while

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81. *Id.* at 848.

82. 42 U.S.C. § 1983.

83. *Id.*

84. Civil Rights Act of 1871 (Act Apr. 20, 1871, c. 22, § 1, 17 Stat. 13) (also referred to as “Enforcement Act of 1871,” “Third enforcement Act,” or “Third Klu Klux Klan Act”).

85. *Monroe v. Pape*, 365 U.S. 167, 174 (1961).

86. *Id.*

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whippings, lynching and banishing have been visited upon unoffending American citizens, the local administrators have been found inadequate or unwilling to apply the proper corrective measures. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime and the records of public tribunals are searched in vain for any evidence of effective redress.<sup>87</sup>

The Supreme Court of the United States addressed the specific question of whether police officers are equally subject to § 1983 suits in *Monroe v. Pape*.<sup>88</sup> In that case, the plaintiffs alleged that thirteen Chicago police officers broke into their home without a search or arrest warrant, made all the residents stand naked in their living room, ransacked their belongings, detained Plaintiff Monroe for questioning for ten hours without access to an attorney, then released Monroe with no charges.<sup>89</sup> The Court held that acting “under color of” the law is interpreted as a misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.<sup>90</sup> Since the *Monroe* decision held that police are certainly subject to suits under this provision, § 1983 suits have increased.<sup>91</sup>

Subsequently, *Monell v. Department of Social Services of the City of New York*, addressed whether a municipality can be the subject of suit under § 1983.<sup>92</sup> The *Monell* Court overruled the portion of *Monroe* that held that local governments are completely immune from suit under § 1983.<sup>93</sup> The Court held that local governments and officials can be

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87. Cong. Globe, 42d Cong. 1st Sess., 374 (1871) (remarks of Rep. Lowe) (quoted in *Wilson v. Garcia*, 471 U.S. 261, 276 (1985)).

88. *Monroe*, 365 U.S. at 174.

89. *Monroe*, 365 U.S. at 169.

90. *Id.* at 184.

91. Sheldon H. Nahmad, *Personal Viewpoint: The Mounting Attack on Section 1983 and the 14th Amendment*, 67 A.B.A. J. 1575, 1586 (1981).

92. 436 U.S. 658, 658 (1978).

93. *Id.* at 658.



sued directly under § 1983 for alleged constitutional violations as a result of an official policy or custom which results in a “pattern or practice” of misconduct.<sup>94</sup> Indemnification creates a liability relationship that mirrors the tort concept of *respondeat superior* between municipalities and its officers.<sup>95</sup> *Respondeat superior* imposes vicarious liability on an employer because of the conduct or omission of its employee.<sup>96</sup> However, the Supreme Court held in *Monell* that vicarious liability through *respondeat superior* is inapplicable to § 1983 suits.<sup>97</sup>

The original 1871 Act also included provisions for harsher punishment when the underlying charge is a criminal offense including larger fines and extended prison sentences.<sup>98</sup> In *United States v. Harris*, the Court interpreted these provisions when the State brought criminal conspiracy charges against Tennessee Sheriff, R. G. Harris, and nineteen others who removed four men from a county jail and subsequently beat one man to death.<sup>99</sup> The Court held that the criminal provisions were unconstitutional because Congress did not have constitutional authority to regulate private individuals.<sup>100</sup> *Harris* was only recently overturned in *United States v. Beebe*.<sup>101</sup> In *Beebe*, the defendants were indicted under the Hate Crimes Prevention Act of 2009 for conspiracy to commit a federal hate crime and the racially motivated harassment and assault of a developmentally disabled Navajo minor.<sup>102</sup> The Court held that Congress did have authority to enact the criminal provisions under the power granted by the Thirteenth Amendment and that racially motivated violence is a badge and incident of slavery.<sup>103</sup> Section 1983 was enacted to

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94. *Id.* at 659.

95. Schwartz, *supra* note 17, at 889.

96. 51 A.L.R. Fed. 285 § 2(a) (1981).

97. *Monell*, 436 U.S. at 707.

98. Civil Rights Act of 1871 (Act Apr. 20, 1871, c. 22, § 1, 17 Stat. 13).

99. *U.S. v. Harris*, 106 U.S. 629, 629–31 (1883).

100. *Id.* at 640–42.

101. 807 F. Supp. 2d 1045 (2011).

102. *Id.* at 1047; *see also* 18 U.S.C. § 249 (Hate Crimes Prevention Act of 2009).

103. *Beebe*, 807 F. Supp 2d at 1051 & 1056.

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counteract domestic terrorism and nonenforcement of the law, often perpetrated by the same person: law enforcement officers. Indemnification, especially in the blanket application we see today, undercuts the purpose of § 1983 by circumventing direct liability and denying citizens full protection from violence by those “acting under color of law.”<sup>104</sup>

#### **IV. Circumvention of the Original Purpose of § 1983 Through Officer Indemnification**

Our nation has declared racism a problem of the police force itself, embedded in police policies and in individual officer discretion.<sup>105</sup> If police are racist, and racism manifests itself in lethal police misconduct, officer indemnification is, in effect, the symbolic sanctioning of these attitudes and practices. Officer-involved homicides are an auxiliary constituent of the carceral state, a revised practice of lynching with many of the same tenets linking racism, criminalization, and domestic terrorism.<sup>106</sup>

##### **A. Officers Involved in Lethal Misconduct Do Not Face Legal Consequences.**

As this Note has described, officer-involved homicides contribute to our society’s long legacy of state terror and oppression. Furthermore, the legal recourse for this violence is inadequate. Criminal prosecution of officers is exceedingly rare, and the few that are charged rarely result in conviction.<sup>107</sup> Civil suits are often the only way to impose legal liability on officers following a homicide. The

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104. *Monroe*, 365 U.S. at 174 (discussing the purpose and history of Section 1983 to redress civil rights violations by law enforcement or failure to enforce the law by local law enforcement).

105. PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 22.

106. Terrorism defined as the use of violence and intimidation in pursuit of political aims.

107. Allyssa Villanueva, *Police Terror and Prosecutorial Discretion*, (UC Hastings College of the Law, working paper, 2015) (on file with author) (providing an overview of problems in criminal prosecution of officers and suggested solutions for local governments).

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main justification for indemnification is its supposed benefit to plaintiffs by ensuring that the liability of insolvent officers will shift to municipalities whom are able to pay monetary awards.<sup>108</sup> However, this reduces the legitimate substantive claims of constitutional violations resulting in death to a mere discussion of money. Indemnification contributes to the banality of police terror when it has the power to curtail this practice. Indemnification, as applied, shields officer defendants and does nothing to shield citizens from the violence that gives rise to § 1983 suits. This injustice is exacerbated by the low rates of criminal prosecution of officers who are found to have unlawfully used lethal or excessive force against unarmed civilians who posed no threat to them while in the line of duty. Local government involvement to assist with monetary remedies diminishes the significance of the violation and the injury to the plaintiffs that often includes racism and unjust lethal violence by government agents.

**B. The Current Application of Indemnification to § 1983 Suits Does Not Serve the Goal of Deterrence.**

The prospect and accumulation of civil suits, unfortunately, may not be enough to actually deter officers or encourage governments to implement policies that will have such a deterrent effect. A recent study found that the six police departments, constituting thirty-two percent of officers in the largest police departments across the country, do not gather or analyze information from lawsuits against them or their officers in any comprehensive or systematic way.<sup>109</sup> This information could be used for preventative and remedial measures including: early identification of problematic officers with a history of

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108. *See, e.g., Williams v. Horvath*, 16 Cal. 3d 834, 847 (1976) (holding that indemnification does not frustrate purpose of § 1983 but rather furthers the purpose by ensuring that Plaintiffs can recover from Defendants and that municipalities can be liable).

109. Joanna Schwartz, *Myth & Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decision-making*, 57 UCLA L. REV. 1023, 1045 (2010).

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misconduct or complaints, identification of patterns & trends, and investigation of claims made in lawsuits.

Furthermore, individuals charged under § 1983, who are not officers of the law, do not have the benefit of an agency to indemnify their awards. Such defendants must bear the total brunt of the liability. Indemnification creates a more favorable outcome for officer defendants compared to civilian defendants for the same violation. This “privilege” available to officer defendants is unsettling because officers are currently subject to § 1983 more frequently than civilians.<sup>110</sup> Blanket indemnification results in no legal accountability, criminal or civil, to individual officers engaged in misconduct. There are countless examples of officers, chiefs, and other officials who have revealed deep-seated racist beliefs and attitudes.<sup>111</sup>

### **C. The Current Law Enforcement Regime is Directly Connected to a Legacy of Domestic Terrorism in the U.S.**

The KKK is arguably the most well-known domestic terrorist organization in the U.S.<sup>112</sup> The KKK was directly responsible for the systematic perpetration of centuries of racialized domestic terror, inflicted upon African Americans, in particular.<sup>113</sup> Reports estimate that countless police departments across the country actively participated in at least fifty percent of documented lynchings in the U.S. between 1880 and 1950, and passively condoned a majority of the rest.<sup>114</sup> An important and ironic dynamic of this history of state-sponsored violence is the commonly known fact that many KKK

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110. Nahmad, *supra* note 91.

111. See, e.g., Associated Press, *7 San Francisco Officers Suspended over Racist Texts*, HUFFINGTON POST, [http://www.huffingtonpost.com/2015/04/03/cops-racist-text-suspend\\_n\\_7001580.html](http://www.huffingtonpost.com/2015/04/03/cops-racist-text-suspend_n_7001580.html) (Apr. 4, 2015, 8:59 AM).

112. *Extremist Files: Ku Klux Klan*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/ideology/ku-klux-klan> (last visited Oct. 17, 2015).

113. *Id.*

114. Robert A. Gibson, *The Negro Holocaust: Lynching and Race Riots in the United States, 1800-1950*, YALE NEW HAVEN TEACHERS INST. (2015), <http://www.yale.edu/ynhti/curriculum/units/1979/2/79.02.04.x.html>.

members and participants in these high-profile, coordinated, and widely celebrated acts of terrorism were in fact, distinguished members of the law enforcement community. Officers were routinely complicit in refusing to charge known KKK terrorists, to vindicate its victims, and allowing mobs and terror groups to forcefully take victims from police custody. Concerned citizens and hate-tracking organizations, like the Southern Poverty Law Center, have discovered officers belonging to the KKK or other hate groups that conflict with the mission of police departments.<sup>115</sup> Most police departments do not currently screen officers for hate group affiliation.<sup>116</sup> These facts intensify the demand for equal policing that is free of racism and discrimination.

For a nation-state like the U.S., sovereignty means the capacity to define who matters and who dies.<sup>117</sup> In a local context, police are given that power of discretion. Licensed by law, the mere capacity of the police for vicious and “irrational” violence is an important part of the state’s repressive apparatus, regardless of statistical frequency.<sup>118</sup> The willingness of the police to kill people exerts a control power far beyond any statistical measure of the actual incidence of police killings.<sup>119</sup> Even with statistical measure, victims are unequal along racial lines.

## V. Proposed Reform at the Local Government Level to Deter Lethal Use of Force

The objectives of this proposed reform are deterrence and

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115. Allie Jones, *This Florida Police Department Can’t Stop Hiring KKK Members*, GAWKER (July 14, 2014, 2:51 PM), <http://gawker.com/two-alleged-kkk-members-fired-from-florida-police-depar-1604795204>.

116. Renee Lewis, *No Police Screening for KKK, Hate Group Membership, Florida Case Shows*, AL JAZEERA (July 15, 2014, 2:30 PM), <http://america.aljazeera.com/articles/2014/7/14/kkk-florida-police.html>.

117. Achille Mbembe, *Necropolitics*, 15 PUB. CULTURE 11, 11 (Translated by Libby Mientjes, 2003).

118. Haring, et al., *supra* note 39, at 42.

119. *Id.*

punishment. At the least, municipal governments should not indemnify punitive awards based on officer misconduct, because the awards are based solely on findings of egregious misconduct and imposed for the purpose of punishment, not compensation. Complete non-indemnification of officers in any suit resulting from lethal misconduct (as opposed to nonlethal) is needed from employing agencies to deter lethal use of force policies and practice. A strict policy will force officers to not just think about the potential of civil suit but also the possibility of personal liability for monetary awards.

Prosecutorial discretion and internal investigations following officer-involved homicides demonstrate an unwillingness to criminally charge officers causing current national controversy. As discussed in Part IV, arguments that without indemnification people will not become officers or that officers cannot perform their jobs are unpersuasive. Furthermore, direct personal liability for civil awards puts an extreme financial burden on the officer(s) based on the fact that awards can reach millions of dollars. It is unlikely that officers will bear the burden alone. Police culture has created an ironclad system of moral, political, and financial support from police unions, foundations, and the larger American public.<sup>120</sup> Many of these organizations use their power to fund attorneys and support campaigns for officers. The National Police Misconduct Statistics and Reporting Project estimates that civil litigation related to police misconduct cost \$72 billion in 2009 alone.<sup>121</sup> Simple exposure to civil liability requires minimal reform effort with a potential for high societal impact. Local governments should not be in the business of indemnifying punitive awards by definition of the degree of conduct required to warrant punitive damages. Furthermore, local governments can use their statutory discretion to refuse to indemnify

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120. See, e.g., online fundraising campaigns for Officer Darren Wilson who was acquitted by a jury at trial for death of 18-year-old Michael Brown in Ferguson, Missouri; Carolyn M. Brown, *Over \$500,000 in Crowd Funding Raised for Ferguson Officer Darren Wilson*, BLACK ENTER. (Sept. 5, 2014), <http://www.blackenterprise.com/news/over-500000-raised-for-ferguson-officer-darren-wilson-before-sites-shut-down/>.

121. *National Police Misconduct Statistics and Reporting Project, 2009 Quarterly Q2 Report*, CATO INST., <http://www.policemisconduct.net/statistics/quarterly-q2-2009/> (last visited Apr. 21, 2015).

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officers in the specific class of cases involving the use of lethal force.

In the narrow case of officer-involved homicides, civil law reduces the violation to a mere tort that seeks to compensate victims and their families, rather than punish or deter the defendant. This effectively devalues citizens' lives; a value that is not even paid by the officer(s) responsible. Personal liability will strengthen deterrence. Deterrence is furthered by the threat of contempt of court proceedings if an officer refuses to pay a civil award. While state laws differ, contempt of court generally refers to the disobedience of any lawful judgment or order of the court.<sup>122</sup> The penalties for contempt of court vary and may include: jail time, community service, fines, and attorney fees.<sup>123</sup> Direct liability for civil damages may lead to other punitive measures if officers fail to take responsibility under court order.

When police and their supporters feel the true weight of the millions of dollars that are assessed in damages and settlements each year against municipalities for lethal officer misconduct, they might re-consider their position on the issue. Officers will certainly consider whether their discretion to use lethal force in the field is worth the risk to their personal finances with knowledge that their City will not indemnify them in suit. This shift of thinking from "Can I use lethal force?" to "Should I use lethal force?" will save countless lives. Cities will also have more money available to fund any number of other critical expenditures. It is true that non-indemnification will leave some successful plaintiffs without payment or delayed payment. Arguments for liability that turn on compensation shift the focus away from the structural issue of officer-involved homicides to monetary awards and a party's ability to pay. Individual victim compensation does not address the structural problems of policing that this Note intends to address.

Indemnification effectively circumvents individual liability that 42 U.S.C. § 1983 was designed to impose. Victims are left without the

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122. See, e.g., Cal. Civ. Proc. Code § 1209(a); La. Code of Civ. Proc. § 221 *et seq.*; N.Y. Code § 2308; Haw. Rev. Stat. § 571–81.

123. 17 C.J.S. Contempt § 5 (2015).

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legal right to life and liberty, and their families are left without an institution to provide them with justice. The law, clothed in the ethic of impunity, is simply contingent on the repetition of its own violence.<sup>124</sup> The least that local governments can do to remedy the historical trajectory of racist and anti-Black state violence is not indemnify its officers in cases involving homicide, especially when a court finds the officer's misconduct is as egregious or evil as to meet the higher standard required for punitive damages.

Each officer should be held individually liable for such civil awards. States such as California grant sole discretion to the public agency of whether to fulfill punitive or exemplary damages.<sup>125</sup> Furthermore, all states have an exemption for memorandum of understandings ("MOUs").<sup>126</sup> The terms of an MOU are bargained for between the police union and the municipality. These are a few of the opportunities for municipalities to limit their liability to satisfy awards based on officer misconduct.

## Conclusion

American society does not yet function as an idyllic state in which all vestiges of racism, oppression, and malicious deprivation of constitutional rights have been eliminated.<sup>127</sup> When police kill, the shock of the violence and the weight of the resulting awards are absorbed by local governments and their taxpayers. However, it is the local governments who are generally empowered to impose direct consequences on their officers and best situated to address the problems raised in this Note.

The individual officers who are the perpetrators of lethal violence and defendants in subsequent suits face no personal stake in the current regime of civil legal remedies. Criminal liability is even more of a rarity imposed on individual officers. Racism exists at the individual, interpersonal, and structural levels of society. No form

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124. Martinot & Sexton, *supra* note 7, at 8.

125. See, e.g., Cal. Gov't Code § 825(b) (1995).

126. See *supra* Part I.C. for an in-depth discussion of officer impunity.

127. *Williams*, 16 Cal. 3d at 841.



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of jurisprudence, civil or criminal, has been successful in imposing individual accountability for the citizen's life prematurely ended by police violence. Current remedies and suggested policy reforms are consistently structural. Reform must be instated at every level and indemnification limitations must be aimed at the individual and interpersonal level of this systemic violence.