Michael J. Haddad
HADDAD & SHERWIN

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It's time to bring back the Bane Act

THIS IMPORTANT CALIFORNIA CIVIL-RIGHTS LAW FOR CONTESTING UNLAWFUL ARREST OR EXCESSIVE FORCE HAS BEEN EVISCERATED BY THE COURTS

The Tom Bane Civil Rights Act, Civil Code section 52.1, is California's most broadly applicable civil rights law – the state counterpart to the Federal Civil Rights Act, 42 U.S.C. § 1983. Unfortunately, as the effectiveness of the Federal Civil Rights Act has been undermined by rights-restrictive decisions and judge-created defenses such as qualified immunity, so too has the Bane Act, from courts attempting to graft new non-textual requirements onto it and other longstanding gaps in its coverage. Many leading civil rights attorneys from across the state are working with the National Police Accountability Project (NPAP) and Consumer Attorneys of California (CAOC) to propose legislation that would fix and strengthen the Bane Act. These Bane Act amendments, if passed, will likely be among the most powerful law enforcement reforms of 2021.

The promise of the Bane Act

The Bane Act provides a private right of action for damages against any person who "interferes," or "attempts to interfere by threat, intimidation, or coercion," with the exercise or enjoyment of a constitutional or other right under California or federal law. (Civ. Code, § 52.1, subds. (b)-(c).) The California Supreme Court long ago explained that the Bane Act simply requires "an attempted or completed act of interference with a legal right, accompanied by a form of coercion." (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 334.) Many, if not all violations of fundamental rights could be so framed.

We most commonly bring Bane Act claims against police for unlawful arrest or excessive force, or against jailors and jail medical providers for deliberate indifference to inmates' medical needs and safety.

Unlike section 1983, since the Bane Act does not require a defendant to have acted "under color of law" (see *Jones, supra*), private persons can sometimes be liable, for example where a person or private security company provides false information to get police to arrest someone or prolong a citizen's arrest. (See *Dixon v. City of Oakland* (N.D. Cal. Dec. 8, 2014) 2014 U.S. Dist. LEXIS 169688, 2014 WL 6951260.) Or, where a private, for-profit jail medical provider, its medical director and employees are deliberately indifferent to an inmate's serious medical needs. (See *M.H. v. County of Alameda* (N.D. Cal. 2013) 90 F.Supp. 3d 889, 898-99.)

Both public entities and private companies are vicariously liable for Bane Act violations. (Gov. Code, § 815.2; *Dixon, supra*.) In addition to damages, successful plaintiffs may recover injunctive relief, including "to protect the peaceable

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exercise or enjoyment of the right or rights secured," and "to eliminate a pattern or practice of conduct." (Civil Code, § 52.1, subd. (c).) And, since a Bane Act violation is an intentional tort (based on either general or specific intent), there is no comparative fault. (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1.)

One of the Bane Act's greatest benefits is that the federal defense of qualified immunity does not apply. (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1246.) On occasion, a Bane Act claim has saved our case when a judge, exercising broad discretion, has granted the defendants qualified immunity from federal claims. Qualified immunity is an increasing federal impediment to law enforcement accountability. (See *Kisela v. Hughes* (2018) 138 S.Ct. 1148, 1152 [qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law"]; *City and County of San Francisco v. Sheehan* (2015) 135 S.Ct. 1765, 1774, n. 3 [Existing precedent closely tied to the facts of the particular case "must have placed the statutory or constitutional question beyond debate." … "[T]he court often corrects lower courts when they wrongfully subject individual officers to liability."]; and *Jessop v. City of Fresno* (9th Cir. 2019) 936 F.3d 937 [police officers have qualified immunity for stealing over $225,000 that was seized by warrant, because law was not clearly established "beyond debate."])

Prevailing Bane Act plaintiffs are entitled to attorneys' fees under section 52.1, subdivision (i), but not reasonable costs – those must be sought under Code of Civil Procedure section 1032 et seq. California attorneys' fees can be significant when section 1983 and Bane Act claims are brought together, because unlike federal law, California law encourages fee multipliers. (See *Horsford v. Bd. of Trustees* (2005) 132 Cal.App.4th 359, 394-95; *Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 988 [awarding 1.2 multiplier].)

Not limited to hate crimes

Although defense counsel often argue that the Bane Act was enacted in response to the increasing incidence of hate crimes in California, "the Bane Act is not limited to hate crimes." (*Bender, supra*, at 977.) Discriminatory intent or animus is not required. (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 841-43.) Neither is "violence or threat of violence." (*Moreno v. Town of Los Gatos* (9th Cir. 2008) 267 Fed. Appx. 665, 666 ["Reading section 52.1 on its own terms, as *Venegas* directs, the statutory language clearly requires only 'threats, intimidation, or coercion.'"].)

The *Venegas* Supreme Court's straightforward analysis showed that the requirement to show "threats, intimidation, or coercion" should not be onerous where police directly violate a person's rights. (See 32 Cal.4th at 850-851 (Baxter, J., concurring) ["[I]t should not prove difficult to frame many, if not most, asserted violations of any state or federal statutory or constitutional right, including mere technical statutory violations, as incorporating a threatening, coercive, or intimidating verbal or written component."].)

What could go wrong?

As the Bane Act has become an important tool for civil rights trial lawyers, defendants and some courts have sought to blunt it. Despite its clear language without any scienter required other than that the violation of rights be "by threat, intimidation or coercion," and despite *Venegas* suggesting that lower courts should not graft state-of-mind requirements onto the Act, courts have anyway.

The Judicial Council's Bane Act jury instruction, CACI 3066, remains seriously flawed, requiring violence or threats of violence, without regard to *Moreno* and district court cases holding otherwise. (See also *Bates v. Arata* (N.D. Cal. March 26, 2008) 2008 U.S. Dist. LEXIS 23910, at *79 (questioning CACI 3066).) BAJI 7.90 is more accurate.

While federal qualified immunity does not apply to the Bane Act, statutory state law immunities do. Even though most Bane Act claims are based on constitutional violations, and the California Supreme Court long ago held that "the legislature by statutory enactment may not abrogate or deny a right granted by the Constitution" (*Rose v. State of California* (1942) 19 Cal.2d 713, 725), several Courts of Appeal have held that "the Bane Act does not override statutory immunities," noting, for example, police officer immunity for malicious prosecution under Government Code section 821.6. (See *Towery v. State of California* (2017) 14 Cal.App.5th 226, 233-235 (and cases cited therein).) Other courts have granted counties and/or custodial officers immunity under Government Code sections 844.6 and 845.6 from claims that jail staff were deliberately indifferent to an inmate's serious medical needs (see *Brown v. County of Mariposa* (E.D. Cal. May 3, 2019) 2019 U.S. Dist. LEXIS 76405 at *41-44) or from claims that jailers beat and asphyxiated an inmate to death (see *Neuroth v. Mendocino County.* (N.D. Cal. Jan. 29, 2016) 2016 U.S. Dist. LEXIS 11109, 2016 WL 379806, at *5).

In *Bay Area Rapid Transit Dist.* (*BART*) *v. Superior Court* (1995) 38 Cal.App.4th 141, the Court of Appeal misconstrued the Bane Act by denying standing to anyone to bring a cause of action for wrongful death caused by a Bane Act violation. The *BART* Court relied on another incorrect decision (*Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797) that the Legislature later found in its 2000 Bane Act amendments had misconstrued the Bane Act. In death cases, the Bane Act currently is relegated to a survival claim, with limited damages. (*Dela Torre v. City of Salinas* (N.D. Cal. Sept. 17, 2010) 2010 U.S. Dist. LEXIS 97725, at *19.)

The *Shoyoye* requirements

One of the most obstructive cases to civil rights enforcement under the Bane

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Act came from *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, a case stemming from a sixteen-day jail over-detention caused by a clerical error. *Shoyoye* added new requirements beyond the plain language of the Bane Act that the threat, intimidation, or coercion must be independent from the violation of rights, despite the Bane Act stating the violation must be "*by* threat, intimidation, or coercion." Defense counsel and some courts also picked up on dicta in *Shoyoye* that only "spiteful" violations triggered Bane Act protections, again without textual support. *Shoyoye* was rejected by many courts (see *M.H. v. County of Alameda, supra*), and extended by other courts. (See *Allen v. City of Sacramento* (2015) 234 Cal.App.4th 41, 67, 69; *Lyall v. City of Los Angeles* (9th Cir. 2015) 807 F.3d 1178, 1196.) As a result, many violations of rights, including most unlawful arrests – even when done using significant coercion – were placed outside the reach of the Bane Act.

Cornell v. City and County of San Francisco

Shoyoye threw a major wrench into a case we were already doing for a rookie San Francisco police officer named Bret Cornell, who was wrongfully arrested and held at gunpoint by fellow officers who chased him down "Hippie Hill" during his morning jog in Golden Gate Park. The officers never told him to stop, and Bret never knew he was being chased. The officers claimed he looked suspicious running in khaki pants. (As my partner went on to say to the jury, in San Francisco it wouldn't be that surprising to see a man running in the park wearing a wedding dress.) Of course, Bret was not involved in any criminal activity, but once the police learned he was a rookie officer, they cited him for delaying their investigation (into what, we never learned), causing him to be summarily fired from his dream job.

The City moved for summary adjudication based on *Shoyoye*, arguing that we could not prove that the plaintiff's false arrest and subjection to excessive force were accompanied by any threat, intimidation, or coercion that was not inherent to those claims. The Superior Court agreed, dismissing our Bane Act claim – our only fee-generating claim.

Relief came several months later after another appellate division decided *Bender, supra*, which held that at least where a plaintiff can allege claims for both false arrest and use of excessive force, then the requisite threat, intimidation or coercion can be shown independently from any single violation. So, we moved to amend our complaint to restate the previously dismissed Bane Act claim, over the City's strenuous objection. The court granted our motion. After a bifurcated, six-week jury trial, Bret Cornell won a $575,000 Bane Act verdict. The City appealed. While the long appeal was pending, Bret got married, moved out of state, and became a fish and game warden. The Court of Appeal affirmed the verdict in *Cornell* and effectively wiped out *Shoyoye* as we had argued they should. But to our dismay, the Court sua sponte also created a new regime of required proof outside of the Bane Act's history and text.

In *Cornell v. City and County of San Francisco* (2017) 17 Cal.App.5th 766 (review denied), the Court noted that the Bane Act has been "the source of much debate and confusion" in state and federal courts, and "endeavored to provide some clarity." (*Id. at* 801.) *Cornell* explained that the California Supreme Court in *Venegas* "declined to place added restrictions on the scope of section 52.1" beyond its plain language, and therefore, "[n]othing in the text of the statute requires that the offending 'threat, intimidation or coercion' be 'independent' from the constitutional violation alleged," as *Shoyoye* and several other court decisions had required. (*Id.* at 800.)

Going further, even though neither side briefed or requested this holding, the *Cornell* Court went on to place a new restriction on the scope of the Bane Act, explaining that coercion is proven when the defendant acted with *specific intent* to violate rights. (*Id*. at 801-04.) Specific intent requires proof that a person acted with the "particular purpose" to deprive another of rights. The Court at least pointed out that whether defendants "understood they were acting unlawfully [is] not a requirement. Reckless disregard of the 'right at issue' is all that [is] necessary." (*Id*., at 804.) Significantly, "reckless disregard" of rights is also the federal standard for punitive damages. (*Dang v. Cross* (9th Cir. 2005) 422 F.3d 800, 807.)

***Cornell* and specific intent**

Since *Cornell*, courts generally have required proof of specific intent to violate rights. Specific intent is a much higher, more difficult-to-prove, level of culpability than general intent, which simply requires proof of volitional conduct or a conscious objective to engage in particular conduct. The Federal Civil Rights Act, section 1983, in contrast, applies the more appropriate general intent standard, as reflected in the Ninth Circuit Model Civil Jury Instructions. (See e.g., Instr. 9.20.)

In practice, the specific intent standard nullifies the Bane Act in a police shooting case where the jury finds that the shooting was "objectively unreasonable" in violation of the Fourth Amendment, but not done with the particular purpose to violate the decedent's rights. (See *Reese v. County of Sacramento* (9th Cir. 2018) 888 F.3d 1030, 1043-44 [overturning a Bane Act verdict won by a mentally ill man who police shot on his own doorstep, because he had not proven that the officer had specific intent to violate his rights].)

In another case we handled, the court granted summary judgment of the Bane Act claim brought by the father of Luke Smith, a 15-year-old boy who deputies encountered holding a knife after he had been experimenting with LSD. Luke was laying down peacefully by the side of a country road. When Luke did not drop the knife, deputies and officers converged on him. A deputy fatally shot Luke with an assault rifle while Luke was simultaneously being attacked by a police dog, tased, and shot with plastic

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projectiles. The court concluded that Luke's father could not prove the deputies' specific intent to violate his son's rights. (See *Smith v. County of Santa Cruz* (N.D. Cal. June 17, 2019) 2019 U.S. Dist. LEXIS 101958 at *46-47, *67-68, 2019 WL 2515841.)

A light of justice at the end of the tunnel

Now, in the wake of too many names we all have come to know – George Floyd, Breonna Taylor, Eric Garner, Tamir Rice, Oscar Grant, Elijah McClain, Luke Smith and countless others killed by police violence – California deserves a strong and effective civil rights remedy. In our system of private enforcement of constitutional rights, we need a law that allows us to fulfill that sacred mandate.

Senate Bill 2 was introduced for the 2021 legislative session by State Senator Steven Bradford ((D) – Los Angeles). SB 2 (although as of January, 2021, only containing legislative intent language) will address these issues and hopefully bring the Bane Act back up to its original intent and power to address our pressing civil rights struggles. It also will include a new police decertification process to track and decertify California law enforcement officers who are fired or determined to have engaged in serious misconduct. SB 2 will be similar to last year's SB 731, which narrowly failed to pass the Assembly in the eleventh hour of 2020's COVID-shortened legislative session. This year we have stronger support for it.

Bane Act amendments necessary to fix the current major problems with the Act include provisions that will:

- Eliminate state law immunities for peace officers who lie or plant evidence to maliciously prosecute innocent people (Gov. Code, § 821.6) and for public entities and officers who use excessive force on inmates and prisoners or deny them necessary medical care (Gov. Code, §§ 844.6 and 845.6);
- Create a wrongful death cause of action for a Bane Act violation;
- Codify positive case law that the required "threat, intimidation, or coercion" may be inherent in a single violation of rights, and that an intentional violation of a constitutional or other right is sufficient to prove a violation by threat, intimidation, or coercion; and
- Clarify that proof of specific intent is not required to prove a violation of the Bane Act; only general intent is required, the same as for federal civil rights claims and as the Bane Act was understood before *Cornell*.

Law enforcement reform begins and ends with accountability. This once-in-a-generation civil rights legislation is critical to our ability to hold law enforcement accountable and enforce constitutional rights in California. We should get behind the efforts of CAOC, NPAP, the ACLU, and other civil rights groups to get this done in 2021.

Michael Haddad is a partner in Haddad & Sherwin, *in Oakland, California. He primarily represents plaintiffs in police misconduct and other civil rights litigation, including wrongful death, police shootings, excessive force, jail deaths, and municipal liability. Where possible, Mr. Haddad and his firm also obtain voluntary or court-ordered injunctive relief to improve police department policies and procedures. He is past-President (2010-2015) of the National Police Accountability Project.*