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# Lawless Law Enforcement: The Judicial Invention of Absolute Immunity for Police and Prosecutors in California

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## INTRODUCTION

According to a 1974 opinion of the California Supreme Court, section 821.6 of the California Government Code,[1] a provision of the California Tort Claims Act, protects "public employees from liability only for *malicious prosecution*."[2] According to a 2002 opinion of the California Court of Appeal, however, section 821.6 " 'is not limited to only malicious prosecution actions.' "[3] No intervening statutory amendment or Supreme Court case accounts for the discrepancy.

How did this happen? As a matter of law, the Court of Appeal cannot overrule a decision of the Supreme Court.[4] But as a matter of fact, that is precisely what the Court of Appeal did. By first ignoring and later purporting to distinguish Supreme Court authority that was squarely on point, California's intermediate appellate court effectively erased the limits that the state's highest court had placed on the application of section 821.6.

Moreover, having removed those limits, the Court of Appeal went on to apply section 821.6—an immunity against suits for malicious prosecution that was intended to protect

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1. CAL. GOV'T CODE § 821.6 (Deering 1982 & Supp. 2008).

2. Sullivan v. County of Los Angeles, 527 P.2d 865, 870 (Cal. 1974).

3. Javor v. Taggart, 120 Cal. Rptr. 2d 174, 183 (Ct. App. 2002) (quoting Jenkins v. County of Orange, 260 Cal. Rptr. 645, 647 (Ct. App. 1989)).

4. *See, e.g.*, Auto Equity Sales, Inc. v. Superior Court, 369 P.2d 937, 940 (Cal. 1962).

exercises of prosecutorial discretion—in such a sweeping fashion as to place California's police and prosecutors absolutely above the law. The Court of Appeal's interpretation of the statute gives California's public employees a license to kill, destroy, and defame, maliciously and without probable cause, as long as their conduct relates to the investigation or prosecution of crime. However absurd that may sound, it presently is the law of the land in California.

This article traces the development of the Court of Appeal's interpretation of section 821.6 and argues that it is both misguided and unnecessary. Part I discusses the language and common law origins of section 821.6, the Supreme Court's authoritative interpretation of the statute, and various related immunities, concluding that section 821.6 must be interpreted narrowly as applying only to malicious prosecution. Part II reviews the development of the Court of Appeal's contrary interpretation, from the early cases that omitted relevant Supreme Court decisions altogether through the more recent decisions that have attempted to distinguish Supreme Court precedent and have expanded the immunity beyond recognition. Part III proposes a different analytical framework for understanding section 821.6 and argues that, had the Court of Appeal employed the proposed framework, it could have remained faithful to the Supreme Court's restrictive interpretation of the statute while still reaching fair and sensible results in the very cases that applied section 821.6 so expansively.

## I. THE NARROW SCOPE OF SECTION 821.6

Section 821.6 provides as follows: "A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." The statute was enacted in 1963 as part of the California Tort Claims Act, a comprehensive codification of the scope and limits of state and local government tort liability in California.[5] Analysis of the plain language of the statute, the common law immunity on which it was based, the

5. *See generally* TIMOTHY T. COATES ET AL., CALIFORNIA GOVERNMENT TORT LIABILITY PRACTICE § 1.2 (4th ed. 2007).

California Supreme Court's interpretation of the statute, and the statute's relationship to other statutory immunities leaves little doubt that section 821.6 applies to malicious prosecution alone.

### *A. Plain Language, Common Law Origins, and Authoritative Interpretation*

Section 821.6 by its terms applies only to the "instituting or prosecuting" of a "judicial or administrative proceeding."[6] Because malicious prosecution is the only tort action that can be based on the institution or prosecution of a judicial or administrative proceeding,[7] section 821.6 on its face bars only suits for malicious prosecution. The California senate committee comment confirms that interpretation, stating that "California courts have repeatedly held public entities and employees immune for this sort of conduct[,]"[8] and citing *White v. Towers*,[9] *Coverstone v. Davies*,[10] *Hardy v. Vial*,[11] and *Dawson v. Martin*.[12] All of those cases immunized public employees and public entities against suits for malicious prosecution alone.[13] The senate committee comment

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6. CAL. GOV'T CODE § 821.6 (Deering 1982 & Supp. 2008).

7. Pac. Gas & Elec. Co. v. Bear Stearns & Co., 791 P.2d 587, 593 (Cal. 1990) ("[T]he only common law tort claim that treats the instigation or bringing of a lawsuit as an actionable injury is the action for malicious prosecution."). As formulated in the text and in *Pacific Gas & Electric*, the rule is slightly oversimplified, because the instigation or prosecution of a proceeding can also form the basis for an abuse of process claim. For purposes of this article, the oversimplified statement of the rule suffices, because the availability of abuse of process claims is not relevant to the issues under discussion.

The rule that malicious prosecution is the only tort action that can be based on the institution or prosecution of a judicial or administrative proceeding is neither new nor unique to California law. *See* 2 DAN B. DOBBS, THE LAW OF TORTS 1229–30 (2001). Rather, it is a standard feature of the common law of torts. *See id.* The rationale for the rule is that unless disgruntled litigants are required to prove the demanding elements of malicious prosecution, including favorable termination of the underlying litigation, the risk of derivative tort liability will unduly discourage participation in judicial and other proceedings, even meritorious ones. *See id.* at 1213–15, 1229–30.

8. CAL. GOV'T CODE § 821.6 senate committee cmt. (Deering 1982 & Supp. 2008).

9. White v. Towers, 235 P.2d 209 (Cal. 1951).

10. Coverstone v. Davies, 239 P.2d 876 (Cal. 1952).

11. Hardy v. Vial, 311 P.2d 494 (Cal. 1957).

12. Dawson v. Martin, 309 P.2d 915 (Cal. Ct. App. 1957).

13. *Dawson*, 309 P.2d at 916–17 (holding that the *White v. Towers* immunity applies to malicious prosecution suits against not only public employees but also public entities); *Hardy*, 311 P.2d at 496–98 (holding that the *White v. Towers*

concludes that section 821.6 "continues the existing immunity for public employees; and, because no statute imposes liability on public entities for malicious prosecution, public entities likewise are immune from liability."[14]

Eleven years after section 821.6 was enacted, the California Supreme Court authoritatively construed the statute in *Sullivan v. County of Los Angeles*.[15] In that case, the plaintiff had sued the county for false imprisonment.[16] The county argued that it was immune under section 821.6, but the Supreme Court disagreed.[17]

The court observed that, in view of the senate committee comment and the case law on which it relies, "the history of section 821.6 demonstrates that the Legislature intended the section to protect public employees from liability only for *malicious prosecution* and not for *false imprisonment*."[18] The court also reasoned that such a "narrow interpretation of section 821.6's immunity, confining its reach to malicious prosecution actions," harmonized well with other statutory immunities.[19] Section 821.6 "recognizes the previously existing immunity of public employees from liability for malicious prosecution" but leaves untouched "the existing liability for false imprisonment," which is expressly preserved by a separate statutory provision.[20]

*Sullivan* went on to disapprove a previous decision of the

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immunity applies to malicious prosecution suits based on the improper institution or prosecution of administrative proceedings); *Coverstone*, 239 P.2d at 880 (holding that the defendant law enforcement officials were immune under *White v. Towers* to suit "for maliciously instituting the criminal proceeding" against the plaintiffs); *White*, 235 P.2d at 211 ("[S]ound reasons of public policy require that a peace officer, or other comparable official, be shielded by the cloak of immunity from civil liability for alleged malicious prosecution.").

14. CAL. GOV'T CODE § 821.6 senate committee cmt. (Deering 1982 & Supp. 2008).

15. Sullivan v. County of Los Angeles, 527 P.2d 865, 870–72 (Cal. 1974).

16. *Id.* at 866.

17. *Id.* at 870–72.

18. *Id.* at 870. The tort of false imprisonment "is premised upon a violation of the personal liberty of another accomplished without lawful authority." Asgari v. City of Los Angeles, 937 P.2d 273, 278 (Cal. 1997). Malicious prosecution, in contrast, consists of "procuring the arrest or prosecution of another under lawful process, but from a malicious motive and without probable cause." *Id.*

19. *Sullivan*, 527 P.2d at 871.

20. *Id.* (discussing the relationship between section 821.6 and CAL. GOV'T CODE § 820.4 (Deering 1982 & Supp. 2008)).

Court of Appeal, *Watson v. County of Los Angeles*,[21] and in the process the Supreme Court explained the rationale for the immunity codified in section 821.6.[22] In *Watson*, the Court of Appeal had held that section 821.6 rendered two court clerks immune from liability for recordkeeping errors that resulted in the wrongful imprisonment of the plaintiff.[23] In disapproving *Watson*, *Sullivan* quoted a treatise by "the principal architect of the California Tort Claims Act,"[24] explaining that the purpose of the section 821.6 immunity was " 'to prevent interference with [prosecutors' and other law enforcement officers'] discretionary and quasi-judicial responsibility for institution and prosecution of enforcement proceedings.' "[25] *Watson* erred by extending the immunity to " 'ministerial recordkeeping' " instead of limiting the immunity to " 'the kind of discretionary determination—to initiate proceedings against the plaintiff—which the immunity was designed to safeguard.' "[26]

In 1997, the Supreme Court reaffirmed *Sullivan* and further clarified the scope of the immunity that section 821.6 provides.[27] In *Asgari v. City of Los Angeles*,[28] the issue under review was whether a police officer's liability for false imprisonment "may include damages sustained by the arrestee *after* the filing of formal charges where, for example, the officer knowingly presented false evidence to the prosecutor."[29] The court concluded that damages for false imprisonment end with the filing of formal charges.[30] The court reasoned that because of section 821.6, a contrary conclusion "would produce absurd results" in the following way:

> If a police officer falsely arrested a suspect and then

21. Watson v. County of Los Angeles, 62 Cal. Rptr. 191 (Ct. App. 1967).

22. *See Sullivan*, 527 P.2d at 871–72.

23. *Watson*, 62 Cal. Rptr. at 191.

24. *Sullivan*, 527 P.2d at 871.

25. *Id.* at 872 (quoting 24 ARVO VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 5.63 (1st ed. Supp. 1969)).

26. *Id.* (quoting VAN ALSTYNE, *supra* note 25, § 5.63).

27. *See* Asgari v. City of Los Angeles, 937 P.2d 273 (Cal. 1997).

28. *Id.*

29. *Id.* at 275. In stating the issue under review, the court referred to "false arrest," *id.*, but false arrest is just a form of false imprisonment; they are not distinct torts. *Id.* at 278 n.3; *see also* Collins v. City of San Francisco, 123 Cal. Rptr. 525, 526 (Ct. App. 1975).

30. *Asgari*, 937 P.2d at 275.

> knowingly provided false information to the prosecutor, the officer could be found liable for damages arising from the entire period of the suspect's incarceration. But the officer would enjoy absolute immunity if, instead of arresting the suspect, the officer proceeded directly to the prosecutor and maliciously and knowingly provided false information that led to the filing of criminal charges. Such conduct would constitute malicious prosecution, and the officer would enjoy absolute immunity from liability under section 821.6. . . . A police officer's liability for damages arising from the filing of criminal charges, in conjunction with his or her malicious provision of false information to the prosecutor, should not depend upon whether the filing of criminal charges was preceded by an unlawful arrest.[31]

Thus, because the malicious provision of false information to prosecutors constitutes malicious prosecution, and because public employees are absolutely immune to suits for malicious prosecution under section 821.6, public employees cannot be liable for damages resulting from the malicious provision of false information to prosecutors. Moreover, once formal charges are filed against a criminal defendant, the defendant's subsequent incarceration is attributable to the filing of the charges, not to any unlawful arrest that may have preceded that filing. Recoverable damages for false arrest must therefore come to an end once formal charges are filed.

*Asgari* is significant not only because it shows the continuing validity of *Sullivan*'s holding—that the section 821.6 immunity applies only to malicious prosecution—but also because it clarifies the scope of that immunity. As *Asgari* explains, prosecutors are not the only potential defendants in malicious prosecution actions.[32] Rather, anyone who furnishes false information to a prosecutor and thereby instigates a baseless prosecution can, as a general matter, be

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31. *Id.* at 281–82; *see also* Jackson v. City of San Diego, 175 Cal. Rptr. 395, 398–401 (Ct. App. 1981) (reaching an identical conclusion about the point at which false imprisonment damages end and malicious prosecution damages—which cannot be recovered from public officials under section 821.6—begin).

32. *Asgari*, 937 P.2d at 282 (stating that if a police officer maliciously and knowingly provides a prosecutor with false information that leads to the filing of criminal charges, the officer's conduct "would constitute malicious prosecution").

sued for malicious prosecution.[33] Public employees such as police officers, however, are immune to such suits because of section 821.6, even when they act maliciously and without probable cause.[34]

*B. Related Immunities*

There are two other statutory immunities that complement the section 821.6 immunity and, by implication, support *Sullivan* and *Asgari*'s interpretation of section 821.6's scope. One relates to public employees' tort liability for law enforcement conduct in general, and the other relates to the liability of both public employees and private citizens for statements made in connection with any official proceedings authorized by law.

The first statute is California Government Code section 820.4. It provides that "[a] public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment."[35]

Two features of the statute bear emphasis. First, the statute applies to law enforcement conduct in general—any "act or omission . . . in the execution or enforcement of any law"[36]—unlike section 821.6, which applies only to the institution or prosecution of a judicial or administrative proceeding.[37] Second, the statute provides for only *qualified*, not *absolute*, immunity—only those "exercising due care"[38] are immune—unlike section 821.6, which provides immunity even for acts undertaken "maliciously and without probable

33. *See, e.g.*, Jacques Interiors v. Petrak, 234 Cal. Rptr. 44, 49 (Ct. App. 1987); Martin Centers v. Dollar Markets, 222 P.2d 136, 143–44 (Cal. Ct. App. 1950); Blancett v. Burr, 279 P. 668, 668–69 (Cal. Ct. App. 1929).

34. The common law immunity on which section 821.6 was based likewise applied not only to prosecutors but also to other public officials who provide information to prosecutors to procure meritless prosecutions, even if they act maliciously and without probable cause. *See* White v. Towers, 235 P.2d 209, 210–11 (Cal. 1951) (applying the malicious prosecution immunity to a publicly employed investigator who gave prosecutors information that led to two unsuccessful prosecutions).

35. CAL. GOV'T CODE § 820.4 (Deering 1982 & Supp. 2008).

36. *Id.*

37. *Id.* § 821.6.

38. *Id.* § 820.4.

cause."[39]

Given the existence of section 820.4, it cannot plausibly be argued that the absolute immunity codified in section 821.6 applies to law enforcement conduct in general. If it did, then section 820.4's qualified immunity for that same conduct would be superfluous. Consequently, the only reasonable interpretation that harmonizes the two statutes is the interpretation adopted in *Sullivan* and reaffirmed in *Asgari*: while section 820.4 provides a broad but qualified immunity for law enforcement conduct in general (except for acts constituting false imprisonment), section 821.6 provides an absolute immunity for a specific type of that conduct, namely, conduct of the sort that can give rise to a malicious prosecution action.

The second statute is California Civil Code section 47(b). It creates a "privilege" that bars tort liability for statements made in connection with various types of proceedings.[40] As relevant here, the statute provides that, subject to certain exceptions, any "publication or broadcast" made "in any . . . judicial proceeding," "in any other official proceeding authorized by law," or "in the initiation or course of any other proceeding authorized by law" is "privileged."[41] This so-called litigation privilege is absolute, not qualified, and it bars all tort claims except for malicious prosecution.[42] Thus, if a trial witness commits perjury and thereby harms one of the parties to the litigation, the privilege prohibits all tort claims (e.g., defamation, intentional infliction of emotional distress, or tortious interference with contractual relations) that the injured party might bring against the witness, other than malicious prosecution.

Taken together, the litigation privilege and section 821.6 provide comprehensive immunity from civil liability to public employees for statements made either during or in the initiation of any judicial or administrative proceedings. The litigation privilege bars all claims other than malicious prosecution, section 821.6 bars malicious prosecution, and both privileges are absolute. In addition, the litigation

39. *Id.* § 821.6.

40. *See* Hagberg v. Cal. Fed. Bank FSB, 81 P.3d 244, 248–49 (Cal. 2004).

41. CAL. CIV. CODE § 47(b) (Deering 2005).

42. *See* Kimmel v. Goland, 793 P.2d 524, 527 (Cal. 1990); Silberg v. Anderson, 786 P.2d 365, 370–71 (Cal. 1990).

privilege provides private citizens with absolute immunity from civil liability for the same conduct (e.g., reporting crime or testifying at trial), with the exception of suits for malicious prosecution.[43]

Finally, it should be noted that *criminal* liability can be imposed for some of the conduct covered by these immunity statutes. Perjury is, of course, a crime,[44] as is the deliberate submission of false reports of crime to law enforcement officials.[45] The immunities at issue, whether absolute or qualified, relate only to civil liability.

## II. THE COURT OF APPEAL'S BROAD APPLICATION OF SECTION 821.6

Given the Supreme Court's unequivocal limitation of section 821.6 to malicious prosecution, the application of the immunity by the lower courts should have been relatively straightforward. It has, however, been quite the opposite. In the years since *Sullivan*, and even after *Asgari*, the Court of Appeal has expressly rejected the narrow reading of section 821.6 and has expanded the application of the statute beyond anything its drafters could possibly have intended.

### *A. Initial Missteps*

The Court of Appeal's first explicit deviation from *Sullivan*'s interpretation of section 821.6 occurred in 1982.[46] In *Citizens Capital Corp. v. Spohn*,[47] the plaintiff private collection agencies alleged that certain public officials had conspired to put them out of business by "institut[ing] widespread newspaper publicity charging them with improper conduct" and initiating official proceedings to revoke the collection agencies' licenses.[48] The trial court sustained the defendants' demurrer on the basis of section

43. *Hagberg*, 81 P.3d at 245, 251. There are also certain narrow exceptions to the litigation privilege. For example, a police officer may bring a defamation action against an individual who maliciously files a false complaint of misconduct against the officer. *See* CAL. CIV. CODE § 47.5 (Deering 2005); *see also Hagberg*, 81 P.3d at 255.

44. CAL. PENAL CODE §§ 118, 126 (Deering 2008).

45. *Id.* § 148.5.

46. *See* Citizens Capital Corp. v. Spohn, 184 Cal. Rptr. 269 (Ct. App. 1982).

47. *Id.*

48. *Id.* at 270.

821.6, and the collection agencies appealed.[49]

The Court of Appeal explained that the collection agencies' argument on appeal depended upon "their contention that [section 821.6] is limited to immunity from malicious prosecution," but the court stated categorically that the "contention is fallacious."[50] The court did not mention *Sullivan*.[51] Instead, as its sole support for the assertion that section 821.6 is not limited to malicious prosecution, the court cited a then-recent decision of the California Supreme Court, *Kilgore v. Younger*.[52]

*Kilgore* likewise did not mention *Sullivan*.[53] But that is unsurprising, because *Kilgore* did not involve, and did not even cite, section 821.6. In *Kilgore*, the plaintiff sued the state attorney general and various media outlets for defamation, intentional infliction of emotional distress, and invasion of privacy.[54] The claims were based on the attorney general's distribution, at a press conference, of a report by a commission on organized crime, in which the plaintiff was implicated in illegal bookmaking.[55] The Supreme Court held that the claims against all of the defendants were barred.[56] In particular, the claims against the attorney general failed as a matter of law because the attorney general's conduct was privileged under a statutory provision protecting any publication made "[i]n the proper discharge of an official duty."[57]

*Kilgore* says nothing, even in dictum, about malicious prosecution or section 821.6. But it was the sole authority on which *Spohn* relied for its statement that section 821.6 is not limited to malicious prosecution.

Two years after *Spohn*, the Court of Appeal reinforced its expansion of section 821.6 in *Kayfetz v. State*.[58] In that case, a physician sued the state of California, two state agencies,

49. *Id.*
50. *Id.*
51. *See Spohn*, 184 Cal. Rptr. 269.
52. Kilgore v. Younger, 640 P.2d 793 (Cal. 1982); *see Spohn*, 184 Cal. Rptr. 269.
53. *See Kilgore*, 640 P.2d 793.
54. *Id.* at 795.
55. *Id.* at 795–96.
56. *Id.* at 796, 797–800.
57. *Id.* at 797 (citing CAL. CIV. CODE § 47(1), currently codified at CAL. CIV. CODE § 47(a) (Deering 2005)).
58. Kayfetz v. State, 203 Cal. Rptr. 33 (Ct. App. 1984).

and an agency administrator for damages allegedly caused by the publication of information concerning disciplinary action against him.[59] The publication, which occurred in an official "Action Report" that was distributed to hospitals and doctors, was allegedly misleading in that it implied the physician was on five years of probation when, in fact, the probation had been suspended because of the physician's admission to an "impaired physicians" rehabilitation program.[60] The physician alleged claims for libel, violation of certain statutory limits on the release of confidential information, and "breach of an agreement to keep confidential [his] application to and participation in" the impaired physicians program.[61] The trial court dismissed all of the causes of action, and the physician appealed.[62]

The Court of Appeal affirmed on the ground that all of the physician's claims were barred by section 821.6.[63] The court reasoned that publication of the information in the "Action Report" was "an integral part of the prosecution process," and section 821.6 immunizes both the institution and the prosecution of an administrative proceeding.[64] The court did not mention *Sullivan*.[65] Instead, the court stated that *Spohn* "demonstrates" that "section 821.6 is not limited to suits for damages for malicious prosecution."[66] As further support for that proposition, the court cited several other Court of Appeal cases, all but one of which predated *Sullivan*.[67]

The one post-*Sullivan* decision that *Kayfetz* relied on (other than *Spohn*) was *Engel v. McCloskey*.[68] In that case, an attorney sued the California state bar, its committee of bar examiners, and two of the committee's employees for damages

59. *Id.* at 34.
60. *Id.*
61. *Id.* at 35.
62. *Id.* at 34–35.
63. *Id.* at 35, 37.
64. Kayfetz v. State, 203 Cal. Rptr. 33, 35, 37 (Ct. App. 1984).
65. *See id.*
66. *Id.* at 36.
67. *Id.* (citing Engel v. McCloskey, 155 Cal. Rptr. 284 (Ct. App. 1979); Stearns v. County of Los Angeles, 79 Cal. Rptr. 757 (Ct. App. 1969); Brown v. City of Los Angeles, 73 Cal. Rptr. 364 (Ct. App. 1968)). The Supreme Court decided *Sullivan* in 1974. *See* Sullivan v. County of Los Angeles, 527 P.2d 865 (Cal. 1974).
68. *Engel*, 155 Cal. Rptr. 284; *see Kayfetz*, 203 Cal. Rptr. at 36.

caused by "an allegedly unlawful delay in his admission to the California bar while his moral character was being investigated."[69] The trial court dismissed the entire complaint, and the Court of Appeal affirmed.[70] With respect to the attorney's fifth cause of action—for "Blackmail, Coercion and Intentional Infliction of Emotional Harm"[71]—the court concluded that the complaint failed to allege facts showing the necessary intent.[72] But the court also stated that, even if intent had been adequately alleged, the claim would have been barred by section 821.6 because it sought damages for the institution of an administrative proceeding, namely, the investigation of the attorney's moral character.[73] The court did not mention that malicious prosecution is the only tort claim that can be predicated on the institution of an administrative proceeding.[74] In fact, the court said nothing about either malicious prosecution or *Sullivan*.[75]

Again, *Spohn* and *Engel* were the only post-*Sullivan* authority cited by *Kayfetz* in support of the proposition that "section 821.6 is not limited to suits for damages for malicious prosecution."[76] In addition, the court in *Kayfetz* expressly declined to consider whether section 47 of the California Civil Code—which creates both the litigation privilege, the "proper discharge of an official duty" privilege relied on in *Kilgore*, and other privileges—protected the publication of the information in the "Action Report."[77] But given the court's holding that the publication of the "Action Report" was "an integral part of the prosecution process,"[78] it is not easy to see how the publication could fail to be privileged under section 47(b), which protects any publication made in an "official proceeding authorized by law."[79]

After *Spohn* and *Kayfetz* unequivocally stated that section 821.6 is not limited to malicious prosecution,

69. *Engel*, 155 Cal. Rptr. at 285.
70. *Id.* at 288.
71. *Id.* at 287 (emphasis omitted).
72. *Id.* at 291–93.
73. *Id.* at 293.
74. *See id.*; *see also supra* note 7.
75. *See* Engel v. McCloskey, 155 Cal. Rptr. 284 (Ct. App. 1979).
76. Kayfetz v. State, 203 Cal. Rptr. 33, 36 (Ct. App. 1984).
77. *Id.* at 37.
78. *Id.*
79. CAL. CIV. CODE § 47(b) (Deering 2005).

*Sullivan*'s central holding—that section 821.6 is precisely so limited—became a dead letter. In case after case, the Court of Appeal has distinguished *Sullivan* or ignored it altogether, and the court has relied upon and expanded the broad interpretation of section 821.6 that originated in *Spohn* and *Kayfetz*.[80]

### *B. Limiting Sullivan*

Neither *Spohn* nor *Kayfetz* (nor *Engel*) discussed or even cited *Sullivan*.[81] But two years after *Kayfetz*, the Court of Appeal decided another case, *Randle v. City of San Francisco*, in which it expressly rejected *Sullivan*'s narrow reading of section 821.6 and adopted *Spohn* and *Kayfetz*'s expansive reading instead.[82] In *Randle*, the plaintiff had sued a district attorney, a police officer, and the city and county governments for damages caused by the alleged withholding of exculpatory evidence when the plaintiff was prosecuted for, and convicted of, rape.[83] The trial court dismissed the plaintiff's state law claims, and the plaintiff appealed.[84]

The Court of Appeal concluded that all of the state law claims were barred by section 821.6.[85] In so doing, the court relied on *Kayfetz* and one pre-*Sullivan* case as its sole authority for rejecting the plaintiff's argument that section 821.6 "immunizes only conduct analogous to the tort of malicious prosecution."[86] The court did not, however, ignore *Sullivan*.[87] Rather, it said that *Sullivan* and other cases that the plaintiff cited "as limiting the immunity under section 821.6 do so in the specific context of distinguishing actions for malicious prosecution from ones for false arrest or false imprisonment."[88] The court concluded that although the cases cited by the plaintiff, including *Sullivan*, "preclude application of section 821.6 to suits for false arrest or

80. *See infra* Part II.B–C.

81. *See Kayfetz*, 203 Cal. Rptr 33; Citizens Capital Corp. v. Spohn, 184 Cal. Rptr. 269 (Ct. App. 1982); *Engel*, 155 Cal. Rptr 284.

82. *See* Randle v. City of San Francisco, 230 Cal. Rptr. 901 (Ct. App. 1986).

83. *Id.* at 902. The conviction was eventually overturned, prompting the plaintiff to file his civil action. *Id.* at 902–03.

84. *Id.* at 903.

85. *Id.* at 905.

86. *Id.*

87. *Id.*

88. Randle v. City of San Francisco, 230 Cal. Rptr. 901, 905 (Ct. App. 1986).

imprisonment, they do not preclude its application to suits alleging conduct other than malicious prosecution which comes within the terms of the immunity provision."[89]

The *Randle* court thus read *Sullivan* as holding only that section 821.6 does not apply to false imprisonment.[90] But the court did not mention *Sullivan*'s basis for refusing to apply section 821.6 to false imprisonment, namely, that the statute applies *only* to malicious prosecution.[91] The *Randle* court appears to have believed—incorrectly—that it could treat those statements in *Sullivan* as mere dicta, because *Sullivan* was really just a false imprisonment case.

Later cases followed *Randle*'s approach of limiting *Sullivan* to the proposition that section 821.6 does not bar claims for false imprisonment.[92] In *Jenkins v. County of Orange*,[93] the mother and maternal grandparents of a young boy sued an emergency response social worker and the county that employed her, alleging claims for negligence, intentional or negligent infliction of emotional distress, false imprisonment, and federal constitutional violations.[94] On appeal after the trial court dismissed the complaint, the appellate court rejected the plaintiffs' argument that, under *Sullivan*, section 821.6 "provides a public employee with immunity from liability *only* for malicious prosecution and does not immunize the public employee from other claims of misconduct [such as negligence and misrepresentation of evidence]."[95] The court reasoned that the plaintiffs presented "too broad an interpretation of *Sullivan*[,] which limited its holding and discussion to the lack of immunity for false imprisonment."[96] The court then proceeded to apply *Spohn* and *Kayfetz*'s interpretation of the statutory immunity, citing both cases as establishing that "section 821.6 is not limited to only malicious prosecution actions."[97]

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89. *Id.*
90. *Id.*
91. *Id.*
92. *See, e.g.*, Gillan v. City of San Marino, 55 Cal. Rptr. 3d 158 (Ct. App. 2007); Amylou R. v. County of Riverside, 34 Cal. Rptr. 2d 319 (Ct. App. 1994); Cappuccio, Inc. v. Harmon, 257 Cal. Rptr. 4 (Ct. App. 1989); Jenkins v. County of Orange, 260 Cal. Rptr. 645 (Ct. App. 1989).
93. *Jenkins*, 260 Cal. Rptr. 645.
94. *Id.* at 646–47.
95. *Id.* at 647 (alteration in original) (citation omitted).
96. *Id.*
97. *Id.*

The court in *Cappuccio, Inc. v. Harmon*, which was decided the same year as *Jenkins*, took the same approach.[98] There the court dismissed *Sullivan* as holding only that section 821.6 "does not apply to a prosecution for false imprisonment."[99] The court never mentioned malicious prosecution.[100]

*Amylou R. v. County of Riverside*,[101] decided five years later, is similar. The court cited *Sullivan* only to show that "it is settled that section 821.6 does not provide immunity for claims for false imprisonment," and the court again failed to mention malicious prosecution at all.[102] Similarly, in *Gillan v. City of San Marino*,[103] the court cited *Sullivan* for the proposition that section 821.6 "provides no immunity from liability for false arrest or false imprisonment" but failed to note that *Sullivan*'s basis for that holding was that section 821.6 applies to malicious prosecution alone.[104]

By reading *Sullivan* as holding only that the section 821.6 immunity does not apply to false imprisonment, the Court of Appeal freed itself to apply the immunity to every *other* claim a plaintiff might bring against a public official. Thus liberated, the court proceeded to apply the immunity well beyond the limits that *Sullivan*—and the text and history of section 821.6—had actually imposed.

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98. Cappuccio, Inc. v. Harmon, 257 Cal. Rptr. 4 (Ct. App. 1989).

99. *Id.* at 7.

100. *Cappuccio* involved a successful prosecution of a seafood merchant for underweighing squid purchased from fishermen. *Id.* at 5. After the merchant was convicted, one of the investigating officers for California's Department of Fish and Game made a public announcement in which he grossly overstated the amount of the underweighing (1,391,690 pounds instead of 295,300 pounds in 1979, and 1,925,627 pounds instead of 171,175 pounds in 1980). *Id.* The merchant sued for defamation, but the Court of Appeal concluded that the claim was barred by section 821.6. *Id.* Given that the prosecution was successful, the merchant could not and did not try to sue for malicious prosecution. *See, e.g.*, Pac. Gas & Elec. Co. v. Bear Stearns & Co., 791 P.2d 587, 594 (Cal. 1990) (stating that a malicious prosecution plaintiff must prove favorable termination of the underlying action). Thus, if the court had followed *Sullivan*'s holding that section 821.6 applies only to malicious prosecution, the statute would have had nothing to do with the merchant's suit.

101. Amylou R. v. County of Riverside, 34 Cal. Rptr. 2d 319 (Ct. App. 1994).

102. *Id.* at 322 n.2.

103. Gillan v. City of San Marino, 55 Cal. Rptr. 3d 158 (Ct. App. 2007).

104. *Id.* at 171.

### C. *Expanding Spohn and Kayfetz*

The Court of Appeal continued to develop its expansive interpretation of section 821.6 in two largely separate lines of cases. First, in an early series of decisions, the court adopted the doctrine that because investigation is a necessary precursor to prosecution, it is a part of the prosecution process and hence is covered by the section 821.6 immunity.[105] Although the results reached in those early cases were probably correct,[106] the doctrine on which they were based was fundamentally misguided and pernicious, as subsequent cases showed. Second, the court decided to apply the immunity to virtually any prosecution-related public statement made by a public employee, including both provably false postconviction statements and announcements that the authorities had decided not to prosecute at all.[107] In both of these ways, the court stretched section 821.6 beyond anything that the statutory language, legislative history, Supreme Court precedent, or common sense permitted.

#### 1. *Immunity for Investigative Conduct*

The first line of cases began in 1988 with *Kemmerer v. County of Fresno*.[108] In that case, a county social services agency terminated one of its employees after investigating charges of misconduct against him.[109] The employee prevailed in an administrative appeal of the termination and was reinstated, with all back pay and benefits restored.[110] He then sued the county and two of his superiors for breach of contract, breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress, and

105. *See* Gillan v. City of San Marino, 55 Cal. Rptr. 3d 158 (Ct. App. 2007); Javor v. Taggart, 120 Cal. Rptr. 2d 174 (Ct. App. 2002); Baughman v. California, 45 Cal. Rptr. 2d 82 (Ct. App. 1995); Amylou R. v. County of Riverside, 34 Cal. Rptr. 2d 319 (Ct. App. 1994); Gensburg v. Miller, 37 Cal. Rptr. 2d 97 (Ct. App. 1994); Ronald S. v. County of San Diego, 20 Cal. Rptr. 2d 418 (Ct. App. 1993); Alicia T. v. County of Los Angeles, 271 Cal. Rptr. 513 (Ct. App. 1990); Jenkins v. County of Orange, 260 Cal. Rptr. 645, 647 (Ct. App. 1989); Kemmerer v. County of Fresno, 246 Cal. Rptr. 609 (Ct. App. 1988).

106. *See infra* Part III.B.

107. *See* Ingram v. Flippo, 89 Cal. Rptr. 2d 60 (Ct. App. 1999); Cappuccio, Inc. v. Harmon, 257 Cal. Rptr. 4 (Ct. App. 1989).

108. *Kemmerer*, 246 Cal. Rptr. 609.

109. *Id.* at 611–12.

110. *Id.* at 612.

intentional interference with contractual relations.[111] The trial court dismissed the complaint, and the employee appealed.[112]

The Court of Appeal concluded that the emotional distress claim was barred by section 821.6.[113] Without mentioning *Sullivan*, the court cited *Spohn* and *Kayfetz* for the proposition that section 821.6 is not "limited to suits for damages for malicious prosecution, although that is a principal use of the statute."[114] The court then noted that the plaintiff's superiors had "initiated formal disciplinary proceedings," "conducted an investigation," and "filed an interoffice memorandum detailing the investigation and recommending dismissal of" the plaintiff.[115] The court concluded that all of that conduct was immunized under section 821.6 because the disciplinary process was a covered administrative proceeding, and even "[t]he investigation . . . was an essential step to the institution of the disciplinary process and [was] also cloaked with immunity."[116]

Just one year later, *Jenkins* echoed *Kemmerer*'s reasoning that an "investigation" by a public official is "cloaked with immunity" because it is an "essential step" toward institution of a formal proceeding.[117] In *Jenkins*, the court held that a county social worker's investigation of a child abuse complaint was absolutely immune under section 821.6.[118] The court did not, however, cite *Kemmerer*, but instead relied upon a single pre-*Sullivan* case.[119] The following year, in *Alicia T. v. County of Los Angeles*,[120] the court relied upon *Jenkins* in again holding that publicly employed social workers "enjoy absolute immunity from liability arising out of investigation of child abuse and

111. *Id.* at 612–13.

112. *Id.* at 610.

113. *Id.* at 614–15. The court affirmed the dismissal of the contract-based claims on the ground that civil service employment is governed not by contract but by statute. *Id.* at 612–13.

114. Kemmerer v. County of Fresno, 246 Cal. Rptr. 609, 615 (Ct. App. 1988) (citation omitted).

115. *Id.*

116. *Id.* at 615–16.

117. Jenkins v. County of Orange, 260 Cal. Rptr. 645, 647 (Ct. App. 1989).

118. *Id.* at 646, 648.

119. *See id.* at 647–48 (citing Blackburn v. County of Los Angeles, 116 Cal. Rptr. 622 (Ct. App. 1974)).

120. Alicia T. v. County of Los Angeles, 271 Cal. Rptr. 513 (Ct. App. 1990).

instigation of dependency proceedings."[121] A few years later, *Ronald S. v. County of San Diego*[122] relied on both *Jenkins* and *Alicia T.* in holding that section 821.6 barred "claims of negligence" concerning "the activities of social workers" and a county government "in the process of administering an adoption."[123] And one year after that, in *Gensburg v. Miller*,[124] the court again cited *Jenkins* as authority for the proposition that section 821.6 precludes all state law liability for "actions taken in the investigation and prosecution of license suspension and revocation proceedings against foster parents."[125]

Having thus created an absolute immunity for investigations that are conducted by public officials, the court broadened the immunity still further in *Amylou R. v. County of Riverside*.[126] In that case, two teenage girls had been abducted and raped, and one of them murdered, apparently by a stranger.[127] In the course of the police investigation of

121. *Id.* at 516, 519.

122. Ronald S. v. County of San Diego, 20 Cal. Rptr. 2d 418 (Ct. App. 1993).

123. *Id.* at 425–26.

In the years between *Alicia T.* and *Ronald S.*, the Court of Appeal also decided Shoemaker v. Myers, 4 Cal. Rptr. 2d 203 (Ct. App. 1992), and Jager v. County of Alameda, 10 Cal. Rptr. 2d 293 (Ct. App. 1992), both of which broadly applied section 821.6 in other ways. In *Shoemaker*, the court relied on both *Kemmerer* and a case that predated section 821.6 in holding that section 821.6 barred a claim by a health department investigator for wrongful termination in violation of public policy. *See Shoemaker*, 4 Cal. Rptr. 2d at 205, 214. Quite apart from *Sullivan*'s limitation of section 821.6 to claims for malicious prosecution, *Shoemaker* is difficult to understand, because it is not clear that the case involved the institution or prosecution of an administrative or judicial proceeding at all.

In *Jager*, the court held that section 821.6 barred claims for negligent and intentional "interference with economic relationship" that were based on a district attorney's erroneous release of a child support judgment lien before the child support arrearage had been paid in full. *See Jager*, 10 Cal. Rptr. 2d at 294–95. The district attorney's alleged misconduct seemed to be the result of a record-keeping error, because the plaintiff had allegedly informed the district attorney's office of the correct amount of the arrearage. *Id.* at 294. Thus, independently of *Sullivan*'s limitation of section 821.6 to claims for malicious prosecution, the section 821.6 immunity probably should not have applied, because *Sullivan* specifically disapproved an earlier case that had applied section 821.6 to immunize a record-keeping error by a court clerk. *See* Sullivan v. County of Los Angeles, 527 P.2d 865, 871–72 (Cal. 1974) (disapproving Watson v. County of Los Angeles, 62 Cal. Rptr. 191 (Ct. App. 1967)).

124. Gensburg v. Miller, 37 Cal. Rptr. 2d 97 (Ct. App. 1994).

125. *Id.* at 99.

126. Amylou R. v. County of Riverside, 34 Cal. Rptr. 2d 319 (Ct. App. 1994).

127. *Id.* at 320–21.

the crime, "an antagonistic relationship developed" between the survivor, Amylou, and the investigating officers.[128] The officers came to suspect that Amylou "knew more than she was telling them," and they said so, "first to Amylou and then to her friends and neighbors."[129] For example, certain detectives "told neighbors that Amylou was lying, that she was not cooperating with the investigation, and that 'there was more to [her] involvement than meets the eye.' "[130] One detective "told the mother of another girl at Amylou's school that Amylou knew the man who committed the crimes, that she was not the victim she presented herself to be, and that she was involved in the crimes."[131] Amylou ultimately sued the county for negligence, assault, false imprisonment, slander, and intentional and negligent infliction of emotional distress.[132] The false imprisonment and emotional distress claims were tried to a jury, which awarded Amylou $325,000 in damages.[133]

The Court of Appeal concluded that the claim for emotional distress was barred by section 821.6.[134] The court explained that section 821.6 "is not limited to the act of filing a criminal complaint" but rather "extends to actions taken in preparation for formal proceedings."[135] Thus, relying on *Kemmerer*, *Jenkins*, and a pair of pre-*Sullivan* cases, the court concluded that "[b]ecause investigation is an 'essential step' toward the institution of formal proceedings, it 'is also cloaked with immunity.' "[136] On that basis, the court reasoned that because "the acts of which Amylou complains are incidental to the investigation of the crimes, and since investigation is part of the prosecution of a judicial proceeding, those acts were committed in the course of the prosecution of that proceeding."[137] The court further concluded that section 821.6 bars not only claims by the

128. *Id.* at 320.
129. *Id.*
130. *Id.* at 322.
131. *Id.*
132. Amylou R. v. County of Riverside, 34 Cal. Rptr. 2d 319, 320 (Ct. App. 1994).
133. *Id.*
134. *See generally id.* at 320–24.
135. *Id.* at 321.
136. *Id.*
137. *Id.* at 322.

"target of the judicial or administrative proceeding" (i.e., the man who had abducted Amylou and her friend) but also precludes "liability for injuries suffered by others, such as witnesses or victims."[138] Amylou's claim for emotional distress based on the detectives' investigative conduct was therefore barred.[139]

Before proceeding to the court's application of this reasoning in subsequent cases, it is worth pausing to consider the breadth of *Amylou R.*'s construction of the section 821.6 immunity. Under *Amylou R.*, police officers are immune to liability for any injuries caused by their conduct in the course of investigating crime, even if they act maliciously and without probable cause, and even if the injuries are suffered by innocent bystanders.[140] Thus, for example, police searching the home of a criminal suspect would be immune to liability if they were to shoot an innocent witness who happened to be present in the home, even if the shooting were malicious and without probable cause.

Although the Court of Appeal has not yet had the opportunity to apply the immunity in precisely that context, it has applied it elsewhere to reach similarly absurd results. In *Baughman v. California*,[141] police obtained a warrant to search certain premises for stolen computer equipment.[142] The plaintiff, a designer of computer hardware and software, rented space at the subject premises, but he was not named in the warrant and thus was not a target of the search.[143] In

138. Amylou R. v. County of Riverside, 34 Cal. Rptr. 2d 319, 322 (Ct. App. 1994).

139. *Id.* The court's extension of the immunity to bar claims by witnesses or victims who were not targets of the judicial or administrative proceeding appears difficult to defend, given (1) the detectives' claim that Amylou "was not the victim she presented herself to be" and "was involved in the crimes," and (2) the court's conclusion that investigation is part of the prosecution process. *Id.* at 322. That is, because Amylou was a target of the investigation, which the court said was part of the prosecution process, the court's own reasoning suggests that she was a target of the judicial proceeding even though she was never prosecuted. In any event, even if Amylou was not a target of the judicial proceeding, she certainly was a target of the investigation. The case thus did not present the need or even the opportunity to extend the immunity to bar claims by *mere* witnesses or victims who were never even targets of the investigation. But that is precisely what the court did.

140. *See Amylou R.*, 34 Cal. Rptr. 2d 319.

141. Baughman v. California, 45 Cal. Rptr. 2d 82 (Ct. App. 1995).

142. *Id.* at 85.

143. *Id.* at 85, 89.

the course of their three-day search, the police "destroyed floppy computer disks containing the sole source of [the plaintiff's] research over many years. These disks were not described in the search warrant."[144] The plaintiff filed suit against the state and certain police officers and other government employees, alleging claims for invasion of privacy, conversion, and intentional and negligent infliction of emotional distress.[145] The defendants prevailed on all claims, and the plaintiff appealed.[146]

On appeal, the court held that the conversion claim was barred by section 821.6.[147] After quoting and discussing *Amylou R.*'s interpretation of the statute at length, the court concluded that the plaintiff's claim failed as a matter of law because "section 821.6 shields investigative officers from liability for injuries suffered by witnesses or victims during an investigation."[148] The court also emphasized the absolute nature of the immunity, observing that "the officers' actions during the investigation were cloaked with immunity, even if they had acted negligently, maliciously or without probable cause in carrying out their duties."[149] As a result, the defendant police officers had absolute "immunity for the loss [the plaintiff] suffered as a result of their investigation."[150]

Two more recent cases have confirmed the continuing vitality of the Court of Appeal's interpretation of section 821.6 as immunizing investigative conduct.[151] In *Javor v. Taggart*,[152] the plaintiff was a licensed general contractor.[153] A state agency had mistakenly concluded that the plaintiff was the employer of a construction worker who had suffered a workplace injury, and that the plaintiff did not have workers' compensation insurance at the time of the injury.[154] The agency "paid benefits to the injured worker and recorded a

144. *Id.* at 85.
145. *Id.* at 84, 85 n.1.
146. *Id.* at 85.
147. Baughman v. California, 45 Cal. Rptr. 2d 82, 87–88 (Ct. App. 1995).
148. *Id.* at 89.
149. *Id.*
150. *Id.*
151. *See* Gillan v. City of San Marino, 55 Cal. Rptr. 3d 158 (Ct. App. 2007); Javor v. Taggart, 120 Cal. Rptr. 2d 174 (Ct. App. 2002).
152. *Javor*, 120 Cal. Rptr. 2d 174.
153. *Id.* at 177.
154. *Id.*

lien against the plaintiff's residence."[155] The plaintiff pursued his administrative remedies and ultimately succeeded in getting the lien canceled.[156] He then filed suit against three employees of the agency, alleging federal civil rights violations as well as "slander and clouding of title, intentional infliction of emotional distress, negligence, and violation of the state Constitution."[157] The trial court dismissed all of the claims, and the plaintiff appealed.[158]

The Court of Appeal quoted extensively from the cases that have interpreted section 821.6 broadly, stating that "section 821.6 is not limited to only malicious prosecution actions"[159] and that "[b]ecause investigation is an essential step toward the institution of formal proceedings, it is also cloaked with immunity."[160] The court went on to observe that when the defendant public officials perform their official duties, "[t]heir decisions are made in the course of investigations and also through formal administrative proceedings."[161] Thus, because the immunity applies to both investigations and formal proceedings, the court concluded that section 821.6 barred all of the plaintiff's tort claims.[162]

In *Gillan v. City of San Marino*[163]—the most recent case applying the immunity for investigative conduct—the plaintiff was a high school basketball coach who was accused of sexually molesting a student.[164] The police arrested the plaintiff without a warrant, booked but released him because they lacked sufficient grounds for filing a criminal complaint, and then issued a press release and held a press briefing concerning the case.[165] At the press briefing, an officer

155. *Id.*

156. *Id.*

157. *Id.* at 178.

158. Javor v. Taggart, 120 Cal. Rptr. 2d 174, 178 (Ct. App. 2002).

159. *Id.* at 183 (quoting Jenkins v. County of Orange, 260 Cal. Rptr. 645, 647 (Ct. App. 1989)) (citation omitted).

160. *Id.* at 183 (quoting Amylou R. v. County of Riverside, 34 Cal. Rptr. 2d 319, 321–22 (Ct. App. 1994)) (citation omitted).

161. *Id.* at 184.

162. *Id.* at 183–85. It is not clear from the opinion whether the court thought that the defendants had ever initiated or prosecuted any kind of formal proceeding against the plaintiff. In particular, it is not clear whether the court thought that the recording of a lien constituted the initiation or prosecution of a formal proceeding within the meaning of section 821.6.

163. Gillan v. City of San Marino, 55 Cal. Rptr. 3d 158 (Ct. App. 2007).

164. *Id.* at 163–64.

165. *Id.* at 164–65 & n.2.

identified the plaintiff by name, said it was alleged that the plaintiff had "sexually molested a member of last year's girl's basketball team" who "was 17 years old at the time," claimed that there was "supporting evidence" for that charge, and added that the authorities were trying to determine whether there were any additional victims.[166] The press release likewise stated that "[t]he assistance of the media is greatly appreciated in the event there are additional victims yet to be identified."[167] No additional witnesses or accusers ever materialized, however, and the district attorney ultimately declined to prosecute even the original charge, citing a "lack of sufficient corroboration."[168] The plaintiff filed suit against the city and three of its police officers, alleging claims for defamation, invasion of privacy, and intentional infliction of emotional distress, as well as one statutory cause of action.[169] The plaintiff eventually dismissed the invasion of privacy claim, but the remaining claims were tried to a jury, which found in favor of the plaintiff on each cause of action and awarded $4,453,000 in compensatory damages, plus punitive damages and attorneys' fees.[170]

On appeal, the court concluded that section 821.6 barred the claims for defamation and intentional infliction of emotional distress.[171] The court began its analysis with the observation that "California courts construe section 821.6 broadly in furtherance of its purpose to protect public employees in the performance of their prosecutorial duties from the threat of harassment through civil suits."[172] The court went on to apply *Amylou R.*'s holding that an investigation "is part of the prosecution of a judicial proceeding for purposes of the statute," so "[a]cts undertaken in the course of an investigation, including press releases

166. *Id.* at 164.

167. *Id.*

168. *Id.* (citation omitted).

169. Gillan v. City of San Marino, 55 Cal. Rptr. 3d 158, 164 (Ct. App. 2007).

170. *Id.* at 165–67.

171. *Id.* at 170. The court concluded that section 821.6 did not bar the plaintiff's statutory cause of action because it was, in effect, a claim for false arrest. *Id.* at 172–73.

172. *Id.* at 170. Read as a descriptive claim, the court's observation is certainly correct: the California courts have construed section 821.6 very broadly. But read as a normative claim—that the courts *should* construe the statute broadly—the court's observation appears to be in direct defiance of the Supreme Court's limitation of the immunity to claims for malicious prosecution.

reporting the progress or results of the investigation, cannot give rise to liability."[173] Because the "press releases and other public statements" made by the defendant officials "were made in the course of their investigation of a purported crime and in furtherance of the investigation," they were protected by section 821.6 against claims for defamation and emotional distress.[174]

*2. Immunity for Prosecution-Related Public Statements*

The second line of cases developing the Court of Appeal's expansive interpretation of section 821.6 consists of just two cases, *Cappuccio, Inc. v. Harmon*[175] and *Ingram v. Flippo*,[176] both of which were cited in *Gillan*.[177] In *Cappuccio*, the plaintiff seafood merchant was convicted of underweighing squid purchased from fishermen.[178] One of the prosecuting agency's investigating officers later made a public statement that grossly overstated the amount of underweighing, and the merchant sued for defamation.[179] The court concluded that the merchant's claim was barred by section 821.6.[180] The court reasoned that even if the injury-producing conduct occurred "after the prosecution had been terminated," the conduct was still immune under section 821.6 as long as the injury was "caused by the initiation or prosecution of the proceeding"; "the test of immunity is causal connection, not time of occurrence."[181] At the same time, the court concluded that the defendant's statements, which were merely a "report on the outcome" of the prosecution, constituted "part of the prosecution process" and therefore were covered by section 821.6.[182]

In *Ingram*, some individuals had complained to the local district attorney about alleged violations of the Brown Act

173. *Id.* at 171.
174. Gillan v. City of San Marino, 55 Cal. Rptr. 3d 158, 172 (Ct. App. 2007).
175. Cappuccio, Inc. v. Harmon, 257 Cal. Rptr. 4 (Ct. App. 1989).
176. Ingram v. Flippo, 89 Cal. Rptr. 2d 60 (Ct. App. 1999).
177. *Gillan*, 55 Cal. Rptr. 3d at 171.
178. *Cappuccio*, 257 Cal. Rptr. at 5.
179. *Id.* The officer said that the amount of underweighing was 1,391,690 pounds in 1979 and 1,925,627 pounds in 1980, but the actual figures were 295,300 pounds and 171,175 pounds. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 7.

(California's open meeting law) by the local school board.[183] The district attorney investigated the complaint but ultimately declined to file either a criminal or a civil enforcement action.[184] The district attorney did, however, say in a public statement that one or more unidentified board members had violated the Brown Act.[185] One of the board members then filed suit against the district attorney, but the trial court dismissed her complaint.[186] The Court of Appeal held that insofar as the complaint could be construed either as alleging a claim for defamation or as attempting to enjoin the district attorney from interfering with the plaintiff's free speech rights, the claims were barred by section 821.6.[187] Citing *Spohn*, *Kayfetz*, and *Cappuccio*, the court reasoned that the immunity applied even though the district attorney never instituted a prosecution of the plaintiff, because the district attorney's public statements were all "part of the prosecution process as that term is understood in the context of section 821.6."[188]

Between them, these two lines of cases give California public employees an immunity that is both sweeping and absolute. They can literally do whatever they want in the course of an investigation and never have to answer to their victims under state law. They can also make any public statements they want, either preprosecution or postconviction, and they can even seek the media's assistance in disseminating their slanders, all without incurring any state law liability.

## III. A BETTER ANALYTICAL FRAMEWORK

What happened here? California's legislature enacted a statutory immunity concerning claims for malicious prosecution in order to protect public officials' exercise of prosecutorial discretion. The California Supreme Court held that the statute is limited to malicious prosecution.[189] But in the hands of the Court of Appeal, the statute grew to provide

183. Ingram v. Flippo, 89 Cal. Rptr. 2d 60, 62–63 (Ct. App. 1999).
184. *Id.*
185. *Id.*
186. *Id.* at 63.
187. *Id.* at 68.
188. *Id.*
189. Sullivan v. County of Los Angeles, 527 P.2d 865, 870 (Cal. 1974).

absolute tort immunity for all police investigative conduct and for false statements made by government officials concerning investigations or successful prosecutions.[190]

The Court of Appeal's radical expansion of the immunity is unjustified both as a matter of law and as a matter of policy. The court could and should have charted a very different course if it had properly understood a few basic legal principles concerning both *Sullivan* and the malicious prosecution immunity. Sound application of those principles would have enabled the court to restrict section 821.6 to malicious prosecution while still reaching intuitively just results in the very cases that drove the expansion of the immunity.

### *A. Rediscovering the Key Legal Principles*

The first important point is that the Court of Appeal's attempts to limit *Sullivan* are legally indefensible. *Sullivan* held that the section 821.6 immunity does not apply to false imprisonment *because section 821.6 applies to malicious prosecution alone.*[191] Thus, the limitation to malicious prosecution was part of the court's holding, so the Court of Appeal was not at liberty to jettison it.[192] Moreover, if the Court of Appeal were right that *Sullivan* had held only that section 821.6 does not apply to false imprisonment, and that *Sullivan*'s limitation of section 821.6 to malicious prosecution was mere dictum,[193] then it would be impossible for the Supreme Court *ever* to hold that the statute applies only to malicious prosecution. Rather, no matter how often the Supreme Court rejected the application of section 821.6 to particular causes of action on the ground that the immunity applies to malicious prosecution alone, the Court of Appeal would remain free to discount the restriction to malicious prosecution as dictum and to limit the Supreme Court's

190. *See supra* Part II.

191. *See generally supra* Part I.A.

192. *See, e.g.*, Auto Equity Sales, Inc. v. Superior Court, 369 P.2d 937, 940 (Cal. 1962) ("Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court."); Bunch v. Coachella Valley Water Dist., 262 Cal. Rptr. 513, 518 (Ct. App. 1989) (explaining that "the *ratio decidendi* of a Supreme Court opinion . . . is fully binding as precedent on the lower courts of this state").

193. *See generally supra* Part II.B.

decisions to the specific causes of action that the Supreme Court addressed. Such a result would be absurd. If the Supreme Court says that section 821.6 does not apply to false imprisonment *because* it applies to malicious prosecution alone, then the statute applies to malicious prosecution alone.

The second important point is that limiting the immunity to malicious prosecution does not mean allowing plaintiffs to plead around the immunity by basing their claims on legal theories other than malicious prosecution. If it did, then the immunity would indeed provide little meaningful protection, because plaintiffs would always be able to recast their complaints in terms of defamation, intentional infliction of emotional distress, interference with business relations, or the like. That is, if pleading a different legal theory were all that it took to get around the immunity, then any plaintiff who sought to recover damages from a public official for the institution or prosecution of a judicial or administrative proceeding could get around the immunity by alleging, for example, that the institution or prosecution of the proceeding constituted intentional infliction of emotional distress.

No such evasion of the immunity is possible, however, for two reasons. First, malicious prosecution is the only tort action that can be based on the institution or prosecution of a judicial or administrative proceeding.[194] Second, any statements made in any "judicial proceeding" or "in any other official proceeding authorized by law" are absolutely privileged against all claims other than malicious prosecution.[195] Thus, were an acquitted criminal defendant to sue the prosecutor on the ground that the unsuccessful criminal prosecution itself constituted intentional infliction of emotional distress, the claim would fail as a matter of law. But the reason the claim would fail has nothing to do with governmental tort immunity in general or with section 821.6 in particular. Rather, it is purely a matter of the common law of torts and the litigation privilege—the only tort claim available to the plaintiff arising from the conduct in question would be malicious prosecution. And *that* claim would be barred by section 821.6, because a criminal prosecutor is a

194. Pac. Gas & Elec. Co. v. Bear Stearns & Co., 791 P.2d 587, 593–94 (Cal. 1990); *see also supra* note 7.

195. CAL. CIV. CODE § 47(b) (Deering 2005).

public official.[196]

The third important point is that all of this reasoning applies to *all* claims for damages caused by the institution or prosecution of judicial or administrative proceedings, including claims against officials who, though not prosecutors themselves, provide information to prosecutors or otherwise instigate prosecutions. Suppose, for example, that some parents believe they have been harmed by the prosecution of a meritless juvenile dependency petition, and they believe that the prosecution was the result of an improper and malicious investigation performed by a state-employed social worker. Because the parents' alleged damages arise from the institution and prosecution of a judicial proceeding, their only available tort claim, *even against the social worker*, would be for malicious prosecution. And, in the absence of section 821.6, the parents *would* be able to sue the social worker for malicious prosecution, because anyone who furnishes false information to a prosecutor in order to procure a baseless prosecution can, as a general matter, be sued for malicious prosecution. But because of section 821.6, the state-employed social worker would be immune.[197]

Indeed, in one of the original cases creating the common law immunity on which section 821.6 was based, the Supreme Court applied the immunity to a state-employed investigator who had signed affidavits on which two unsuccessful criminal prosecutions were based.[198] Thus, the immunity has always barred malicious prosecution actions not only against prosecuting authorities but also against investigators and

196. *See, e.g.*, Scannell v. County of Riverside, 199 Cal. Rptr. 644, 650–51 (Ct. App. 1984) (affirming the dismissal of a claim for intentional infliction of emotional distress based on the institution of a meritless criminal prosecution, because the only possible claim based on such conduct would be malicious prosecution, which was barred by section 821.6).

197. *See* Collins v. City of San Francisco, 123 Cal. Rptr. 525, 526–28 (Ct. App. 1975) (affirming summary judgment for the defense because, although the plaintiff alleged a claim for false imprisonment, the defendant police officer's improper signing of an affidavit in order to procure an improper arrest and prosecution of the plaintiff gave rise only to a claim for malicious prosecution, which was barred by section 821.6); *see also* Tur v. City of Los Angeles, 59 Cal. Rptr. 2d 470, 471 (Ct. App. 1996) (holding that section 821.6 barred a malicious prosecution claim against two firefighters who instigated a meritless criminal prosecution of the plaintiff by deliberately providing misleading information to the city attorney).

198. *See* White v. Towers, 235 P.2d 209, 210–11 (Cal. 1951).

other public employees who procure or instigate prosecutions.

None of the foregoing principles—(1) that *Sullivan* held that section 821.6 is limited to malicious prosecution, (2) that the immunity nonetheless bars all liability for damages arising from the institution or prosecution of a judicial or administrative proceeding because malicious prosecution is the only tort action that could be based on such damages, and (3) that the immunity covers not only prosecutors but also those who instigate prosecutions—should be controversial. But despite their soundness and importance, they have generally been absent from the Court of Appeal case law concerning section 821.6.

### *B. Rethinking the Case Law*

Had the Court of Appeal commanded a clear view of those legal principles, it would have been able to reach correct and satisfying results in the cases reviewed in Part II.C without relying on a blanket immunity for investigative conduct. In *Kemmerer*, for example, the plaintiff was a county employee who had been the target of an investigation by his employer, which led to a formal disciplinary proceeding and ultimately his termination.[199] The case does not indicate, however, that the plaintiff alleged he was harmed by the investigation itself—he claimed only that he was harmed by the disciplinary proceeding and consequent termination. For that reason, the court should have concluded that the plaintiff's only available claim, *even against the investigators*, was for malicious prosecution. And because the investigators were public employees, a malicious prosecution claim would have been barred by section 821.6. Thus, the court could have reached exactly the same result—affirmance of the dismissal of the complaint—without holding that "investigation" is an "essential step" in the prosecution process and therefore is "cloaked with immunity."[200]

Similar observations apply to *Jenkins*, *Alicia T.*, and *Ronald S.* Insofar as the plaintiffs in those cases sought to recover damages caused by the institution or prosecution of formal proceedings, rather than damages caused

199. Kemmerer v. County of Fresno, 246 Cal. Rptr. 609, 611–12, 615 (Ct. App. 1988).

200. *Id.* at 615–16.

independently by the investigations that preceded those proceedings, their only available claim was malicious prosecution, which would have been barred by section 821.6.[201] Thus, all of those complaints should have been dismissed, and the dismissals affirmed, without resort to a general immunity for investigative conduct.

If the Court of Appeal had taken that approach, it would have been analytically equipped to avoid the intuitively unjust results that it reached in later cases. In *Amylou R.*, for example, the plaintiff's alleged damages did not arise from the institution or prosecution of any judicial or other proceedings against her (there were none)[202] but rather from the patently defamatory statements that police officers had publicized in the course of their investigation—the police had told Amylou's friends and neighbors that she was an accomplice in the abduction, rape, and murder of a friend of hers.[203] Amylou was never prosecuted, she never sued anyone for malicious prosecution, and, indeed, she could not have done so, because no proceeding against her was ever initiated. Accordingly, section 821.6 should have had nothing to do with the case. Instead, the applicable immunity should have been the general *qualified* immunity for law enforcement activity, which protects public employees from liability for any "act or omission, exercising due care, in the execution or enforcement of any law."[204] It is impossible to determine from the court's

201. *See* Ronald S. v. County of San Diego, 20 Cal. Rptr. 2d 418, 419–20, 425–26 (Ct. App. 1993); Alicia T. v. County of Los Angeles, 271 Cal. Rptr. 513, 514–15 (Ct. App. 1990); Jenkins v. County of Orange, 260 Cal. Rptr. 645, 646–47 (Ct. App. 1989). Because those cases applied a blanket immunity for investigative conduct rather than using the analytical framework proposed in this article, the cases' discussion does not always make clear whether the plaintiffs' alleged damages flowed solely from the institution or prosecution of formal proceedings.

202. Amylou R. v. County of Riverside, 34 Cal. Rptr. 2d 319, 320–21, 322 (Ct. App. 1994). The court's statement of facts did not positively state that Amylou was not prosecuted, but it did not mention any prosecution brought against her. *See id.* Moreover, the court expended considerable effort in reaching the conclusion that immunity under section 821.6 is not "limited to claims for injuries suffered by the target of the judicial or administrative proceeding," but rather extends to "injuries suffered by others, such as witnesses or victims." *Id.* at 322. If Amylou had been prosecuted, she would have been a target of a judicial proceeding, so that entire portion of the court's analysis would have been superfluous. (In any event, it was arguably superfluous for other reasons. *See supra* note 139.)

203. *Amylou R.*, 34 Cal. Rptr. 2d at 322.

204. CAL. GOV'T CODE § 820.4 (Deering 1982 & Supp. 2008).

discussion whether the police acted reasonably when they made their damaging statements about Amylou. If they did not, she should have been allowed to hold them liable.

*Gillan* is substantively identical—there the authorities actually sought the aid of the news media in spreading defamatory claims about the plaintiff, who was never prosecuted.[205] And similar analysis applies to *Baughman*, in which police executing a search warrant destroyed computer disks that were the only copies of the plaintiff software designer's work, which was the product of years of research.[206] In all of these cases, if the police were not exercising due care, they should have been held liable.[207]

It is probably significant that several of the early cases developing the immunity for investigative conduct dealt with child abuse, juvenile dependency, and state-administered adoption proceedings.[208] In those cases, the court may well have been motivated by a concern to ensure that state employees charged with protecting the interests of children would be free to investigate and prosecute such matters zealously, uninhibited by the fear that their decisions would later be second-guessed by a jury in a tort suit.

To the extent that such considerations lay behind the court's decisions to immunize the defendants in those cases, one can certainly sympathize. But the misguided means that the court adopted—application of an *absolute* immunity to *all* investigative conduct—has the perverse consequence of barring liability even for conduct that would constitute child abuse, as long as it is done by a public employee. If a state-employed social worker investigating a child abuse complaint were to molest the victim after first asking, "Is this what

205. Gillan v. City of San Marino, 55 Cal. Rptr. 3d 158, 164–65 (Ct. App. 2007).

206. Baughman v. California, 45 Cal. Rptr. 2d 82, 85 (Ct. App. 1995).

207. *See, e.g.*, Ogborn v. City of Lancaster, 124 Cal. Rptr. 2d 238, 241–43, 248–49 (Ct. App. 2002) (holding that section 821.6 did not bar a claim for conversion when public officials destroyed certain property in the course of executing a nuisance abatement order, because the property was not the subject of the order and the destruction occurred after the official proceedings had concluded); Tallmadge v. County of Los Angeles, 236 Cal. Rptr. 338, 339–41 (Ct. App. 1987) (reaching a similar conclusion).

208. *See* Ronald S. v. County of San Diego, 20 Cal. Rptr. 2d 418 (Ct. App. 1993) (state-administered adoption); Alicia T. v. County of Los Angeles, 271 Cal. Rptr. 513 (Ct. App. 1990) (child abuse and dependency proceedings); Jenkins v. County of Orange, 260 Cal. Rptr. 645 (Ct. App. 1989) (child abuse).

daddy did to you?", all claims by the victim against the social worker would be barred under the Court of Appeal's interpretation of section 821.6. Thus, here again the judgment of the California legislature seems to have been more sensible than that of the Court of Appeal: of course child abuse investigators, like law enforcement personnel generally, should vigorously pursue their occupations, but they must exercise reasonable care when they do so or else face liability for any harm they cause.

*Cappuccio* and *Ingram* likewise are based on expansive interpretations of section 821.6 that are insupportable in view of *Sullivan*. In *Cappuccio*, a law enforcement officer grossly misrepresented the magnitude of the crime of which the plaintiff was convicted.[209] Because the prosecution was successful, however, the plaintiff did not and could not sue for malicious prosecution. Rather, the plaintiff sought to hold the officer liable for the officer's concededly false postprosecution statements, not for the prosecution itself. If there is an immunity that protects prosecuting authorities from liability for defamatory misrepresentations—even *deliberate* misrepresentations—concerning the prosecutions they win, the immunity must have some basis other than section 821.6. And in *Ingram*, the plaintiff school board member was never prosecuted, so her claims had nothing to do with malicious prosecution or section 821.6, just like the claims in *Amylou R.*[210] Also, as in *Amylou R.*, the plaintiff's claims in *Ingram* were based on harm that was caused by law enforcement authorities' public statements, not by the initiation or prosecution of a judicial or other proceeding, because no such proceeding existed.[211] Again, if the authorities failed to exercise due care when they made the statements at issue, then they should have been liable.[212]

209. Cappuccio, Inc. v. Harmon, 257 Cal. Rptr. 4, 5 (Ct. App. 1989).

210. Ingram v. Flippo, 89 Cal. Rptr. 2d 60, 62–64 (Ct. App. 1999).

211. *Id.*

212. One other possibility in the cases involving public statements (e.g., *Cappuccio*, *Ingram*, and *Gillan*) is that some of the statements might have been protected by the litigation privilege. *See supra* Part I.B; *see also supra* note 57 and accompanying text. A complete analysis of this issue would be beyond the scope of this article. It should be noted, however, that extension of the litigation privilege to cover some of the statements at issue in those cases would probably be much more benign than the Court of Appeal's extension of section 821.6 to cover all investigative conduct. The litigation privilege applies only to *statements*, but an absolute privilege for investigative conduct applies even to

One of the most striking features of the Court of Appeal's analysis in these cases is the court's seemingly total lack of awareness of the breadth and severity of the doctrine it was creating. For example, if the police had shot Baughman dead, maliciously and without probable cause (perhaps because one of the officers was a friend of a competing software designer), and even though Baughman was neither named in the warrant nor in any sense a target of the search, it would not have made any difference. According to the court, investigation is absolutely "cloaked with immunity,"[213] so Baughman's survivors could not have sued for wrongful death or any other tort. To take another example, if an accused child molester pled guilty to simple assault in exchange for dismissal of all other charges, but the prosecutor later announced to the press, maliciously and without probable cause, that the accused had pled guilty to child molestation, section 821.6 would again provide an absolute bar to liability. Under *Cappuccio*, such malicious misreporting of successful prosecutions is "part of the prosecution process" and hence absolutely immune.[214]

As these hypotheticals suggest, the Court of Appeal's construction and application of section 821.6 not only are irreconcilable with the statutory text, legislative history, and binding Supreme Court precedent[215] but also are unjustifiable as a matter of policy. The purpose of section 821.6, as articulated by both the Supreme Court and the principal architect of the California Tort Claims Act, is to protect exercises of prosecutorial discretion.[216] By absolutely prohibiting actions for malicious prosecution, the statute shields *the decision to prosecute* from after-the-fact scrutiny for evidence of malice or lack of probable cause. As a matter of policy, then, the statute should have nothing to do with cases involving harm that is caused independently of any decision to prosecute, or cases in which the authorities decline to prosecute at all. Indeed, section 820.4, which generally immunizes law enforcement conduct only if it is undertaken with due care, reflects the California legislature's policy

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the infliction of bodily injuries or destruction of property.

213. Baughman v. California, 45 Cal. Rptr. 2d 82, 89 (Ct. App. 1995).

214. *Cappuccio*, 257 Cal. Rptr. at 6.

215. *See generally supra* Part I.A.

216. *See supra* Part I.A.

judgment that law enforcement authorities do not need the protection of absolute immunity in order to do their jobs effectively.

To summarize: The Court of Appeal opinions that developed the broad interpretation of section 821.6 did not reach uniformly wrong results, as the foregoing discussion shows. In some cases (such as *Kemmerer*) the court came to the right conclusion but for the wrong reasons. Those wrong reasons, however, later led the court to reach patently unjust conclusions in other cases (such as *Amylou R.* and *Baughman*). Regrettably, the court never noticed that something had gone dreadfully wrong, and that there was a relatively straightforward way out of the thicket it had created.[217]

## CONCLUSION

The Court of Appeal's construction and application of section 821.6 have created a regime of lawless law enforcement in California. The court has handed the state's law enforcement authorities a license to kill or to do any other damage that strikes their fancy, even maliciously and without probable cause, as long as they do it in the course of investigating crime.

California officials can, of course, still be sued under federal law.[218] The existence of possible federal remedies, however, should not divest the California government of its interest in protecting its citizens against the wanton infliction of harm by state government employees. But the Court of Appeal has effectively held that the California government has no such interest—according to the court, California's law enforcement authorities are absolutely above the law.

The Court of Appeal's doctrine is lawless in another sense as well, because the court's own decisions have been in direct

217. It is worth noting that some of the Court of Appeal's published opinions involving section 821.6 do not merely reach the right results for the wrong reasons, *see supra* notes 199–201 and accompanying text, but actually reach the right results for largely the right reasons, mirroring in some respects the analysis proposed in this article, *see supra* notes 196–97, 207. Unfortunately, the relative handful of cases that employ a sound analytical framework never criticize, or even take note of, the unsound reasoning that prevails in the bulk of the case law. The well-reasoned cases have consequently done nothing to retard the development of the expansive interpretation of section 821.6.

218. *See* 42 U.S.C.S. § 1983 (LexisNexis 2002 & Supp. 2008).

defiance of California Supreme Court precedent, which all lower California courts are legally required to follow.[219] The Court of Appeal's expansive construction of section 821.6 turns out, when traced back to its origins, to be based on nothing. *Spohn*, which was the first post-*Sullivan* case to hold that section 821.6 is not limited to malicious prosecution, did not even cite *Sullivan* and instead relied on a single case that had nothing to do with section 821.6. *Kayfetz* followed up by stating that *Spohn* "demonstrates" that "section 821.6 is not limited to suits for damages for malicious prosecution,"[220] and that was that. By 1984, the Court of Appeal had, in effect, overruled *Sullivan* by ignoring it.

The lawlessness of the Court of Appeal's decisions has put California's trial courts in an unenviable position. On the one hand, there is abundant Court of Appeal case law telling the trial courts that section 821.6 is not limited to malicious prosecution. On the other hand, the Supreme Court's decision in *Sullivan* tells them that section 821.6 is indeed so limited. But there is also a wealth of Court of Appeal case law telling them that *Sullivan* does not mean what it says. Under these circumstances, even trial courts that realize the Court of Appeal's construction of section 821.6 is baseless cannot do anything about it—they are bound by the Court of Appeal's decisions, which hold that *Sullivan* did not limit section 821.6 to malicious prosecution after all.

In *White v. Towers*,[221] one of the first cases to recognize the common law immunity on which section 821.6 was based, the majority and the dissent vigorously disagreed about the consequences of immunizing police against suits for malicious prosecution. The majority rejected the plaintiff's argument that the immunity "constitute[d] a step toward the creation of a 'police state.' "[222] The dissent saw things differently, agreeing with the plaintiff that the immunity was "a major step toward statism."[223]

That case was decided over fifty years ago. Today, after decades of relentless prodding by the Court of Appeal, Californians find themselves at the bottom of the slippery

219. Auto Equity Sales, Inc. v. Superior Court, 369 P.2d 937, 940 (Cal. 1962).
220. Kayfetz v. State of California, 203 Cal. Rptr. 33, 36 (Ct. App. 1984).
221. White v. Towers, 235 P.2d 209 (Cal. 1951).
222. *Id.* at 213.
223. *Id.* at 216.

slope that the *White* dissent astutely perceived. As soon as an appropriate case presents itself, the California Supreme Court should take the opportunity to pull the people of California back up that slope and subject California law enforcement officials to California law once again.