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Incrementalism and Police Reform

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Introduction

Professor Teressa Ravenell's provocative new article, *Unidentified Police Officials*,[1] offers a carefully conceived analysis of the challenges facing civil litigants in some police-misconduct cases, particularly those involving so-called John Doe officers. In these John Doe cases, the identity of an officer who caused a constitutional violation is unknown.[2] As she illustrates, these John Doe cases represent a surprisingly large number of cases in the context of civil rights violations—18.73% of cases filed in Georgia, 5.61% of cases filed in Illinois, and 19.28% of cases filed in Washington, according to her calculations.[3] As Professor Ravenell illustrates through various real-world examples, litigants' inability to identify the officer responsible for a constitutional violation may impede their ability to collect damages.[4] Take as an example *Colbert v. City of Chicago*,[5] one of the cases discussed in her article.[6] There, the plaintiff claimed that the Chicago police officers violated his Fourth Amendment right to be free from unreasonable search and seizure when they handcuffed him and ransacked

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1. Teressa Ravenell, *Unidentified Police Officials*, 100 TEXAS L. REV. 891 (2022).

2. *Id.* at 897–99 (describing this phenomenon, stating that "'John Doe' is perhaps the best-known pseudonym for a person whose identity is unknown" and describing the use of this term in litigation).

3. *Id.* at 898 (showing these figures among data on the frequency of "John Doe" cases in a variety of litigation contexts).

4. *Id.* at 899–904 (providing a detailed explanation of this phenomenon and further describing how litigants have to sue the municipality in these cases because they cannot identify the official involved).

5. 851 F.3d 649 (7th Cir. 2017).

6. Ravenell, *supra* note 1, at 921–23 (explaining the case in the context of the Article's argument).

his home without allowing him to observe the search.[7] But because the plaintiff was confined during the search, he was unable to identify which officers specifically caused his constitutional violation.[8] The district court granted the City of Chicago's motion for summary judgment, claiming that the plaintiff failed to provide "any evidence linking any individual Defendant to any of the damage in question."[9] And on appeal, the Seventh Circuit affirmed, holding that Colbert did not adequately link individual officers to the violation.[10]

Cases like *Colbert* present a puzzle for civil litigants. How can they meet the evidentiary requirements in these cases when they cannot identify the officer that caused the harm? And without the ability to identify this officer sufficiently early in the litigation process, how can they use tools such as open records requests and discovery to get to the truth? To help remedy these types of circumstances, Professor Ravenell offers a relatively technical but potentially important doctrinal solution: "a theory of *causa per se*, a Latin phrase that roughly translates to 'causation in itself.'"[11] In such cases, she argues that courts "should infer causation from the plaintiff's circumstantial evidence and shift the burden to defendants to explain what happened."[12] So in cases like *Colbert*, where the litigant can prove the presence of a Chicago Police officer at the scene of the alleged constitutional violation, the court would shift the burden of proof from the litigant onto the City of Chicago. This reform could alleviate some of the challenges faced by litigants in these types of John Doe cases as well as the evidentiary hurdles facing many litigants in other similar cases.

In addition, Professor Ravenell argues that this approach would provide additional benefits to plaintiffs throughout the litigation process. To build this argument, she lays out a detailed breakdown of the procedural steps involved in 42 U.S.C. § 1983 claims against police officers and municipal entities. She thoroughly describes the discovery challenges facing litigants,[13] the barrier presented by the Blue Wall of Silence,[14] the impact of widely varying state laws on open records,[15] and the emerging importance of video evidence

7. *Colbert*, 851 F.3d at 652.

8. *Id.* at 657.

9. Ravenell, *supra* note 1, at 922 & n.181 (quoting Colbert v. Willingham, No. 13-CV-2397, 2015 WL 3397035, at *13 (N.D. Ill. May 26, 2015), *aff'd sub nom.* Colbert v. City of Chicago, 851 F.3d 649 (7th Cir. 2017)).

10. *Colbert,* 851 F.3d at 657–58.

11. Ravenell, *supra* note 1, at 893.

12. *Id.*

13. *Id.* at 902–06 (describing how litigants attempt to identify officers through discovery).

14. *Id.* at 906–10 (explaining how "[t]he blue wall of silence has the potential to block plaintiffs from the information they need to litigate their case.").

15. *Id.* at 895–97 (providing a summary of some open record laws and their variation by state).

collected via body and dash cameras.[16] In doing so, Professor Ravenell demonstrates a meticulous understanding of how the Federal Rules of Civil Procedure influence policing litigation.[17]

Overall, Professor Ravenell's piece presents a compelling and persuasive adjustment to § 1983 doctrine that could potentially influence litigation success in a manner that spurs broader reform of American police departments. This review essay builds on Professor Ravenell's work. It helps connect her claim to several ongoing areas of research. It also situates her proposal within the rapidly growing literature on policing and civil rights.

In recent years, numerous academics have offered ideas for radically transforming the institution of policing.[18] By contrast, Professor Ravenell advances a narrower but impactful vision for solving a real problem facing modern litigants. While incremental in nature, her proposal represents the kind of concrete alteration in doctrine that could be feasibly implemented in the near future.

I. The Impact of Ravenell's Proposal

It might be worthwhile to start this review essay by considering the likely impact of Professor Ravenell's proposal. After reading her article, some may be left wondering how many cases her proposal would impact and the effect of her proposal more broadly on shifting police department policies. To be clear, this does not amount to a criticism in any way of her recommendation. She goes to great lengths to illustrate the myriad barriers litigants face in § 1983 cases against police officers.[19] And her proposal logically seeks to shift the burden onto defendants in some of these cases in a manner that may improve litigant success.

Nevertheless, the likely impact of her proposal is somewhat unclear in two ways. First, it is to some degree unclear how many cases Ravenell's proposal would influence among the overall universe of cases. Put another way, it is hard to tell how often this shift in doctrine would influence the direction of § 1983 suits. The data that Professor Ravenell provides on the

16. *Id.* at 905 ("Video evidence can be crucial in prosecuting and litigating police misconduct cases.").

17. *See, e.g.*, *id.* at 904 ("Plaintiffs may also use Rule 34 to obtain documents and other 'tangible things.'").

18. *See, e.g.*, Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform*, 105 CALIF. L. REV. 263, 268 (2017) (proposing that Congress pass transformative legislation to increase federal oversight of policing similar to how the Voting Rights Act transformed oversight of state voting procedures); *see generally* Jamelia Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637 (2021) (arguing for the abolishing of disorderly conduct laws presently enforced by police).

19. *See* Ravenell, *supra* note 1, at 899–910 (chronicling some of these barriers, such as the difficulties of meeting pleading requirements when the defendant is unknown and penetrating the "blue wall of silence").

frequency of John Doe cases is quite helpful.[20] No doubt, her proposal could be transformative for some of these cases. While these kinds of cases likely represent the minority of all § 1983 suits involving alleged police misconduct, it is also possible that the mere knowledge of this burden-shifting doctrine may motivate more litigants to bring civil suits under § 1983. Faced with a higher probability of obtaining a favorable judgment, more lawyers may pursue cases against police officers and police departments. Pinpointing the precise impact that this doctrinal shift may have on the total number of cases or the success of these claims is near impossible. But it seems highly likely that her proposal would both increase litigant success and the number of overall cases brought by litigants.

At the same time, her proposal may have considerably less impact on many other civil rights claims. For example, this proposal may do less to influence the outcomes of cases where the officer in question is clearly identified, but novel circumstances raise questions as to the constitutionality of the officer's behavior. And this proposal may not do much to assist in circumstances where a court determines that, despite the presence of a constitutional violation, the law was not clearly established, thereby triggering qualified immunity protection for the officer.[21] Of course, no proposal can solve all problems. Part of the appeal of Ravenell's proposal is its ingenuity and doctrinal underpinning that may increase its probability of becoming law.

Second, it is also somewhat unclear how much Ravenell's proposal would move the needle in terms of reforming police departmental policy or officer practices. As has been well-documented by others, even cities that experience high costs from § 1983 judgments and settlements may not rationally respond by reforming their police departments' policies or trainings.[22] As Joanna Schwartz found, officers themselves are almost always indemnified in the event of civil judgments or settlements.[23] So even if we shift the burden of production for some cases in a manner that leads to more

20. *Id.* at 898 (breaking down this data into different subject matters, including "Civil Rights (non-specific)").

21. For more details on the qualified immunity barrier in policing litigation, see Alan K. Chen, *The Facts About Qualified Immunity*, 55 EMORY L.J. 229, 234–41 (2006) (providing a summary of the qualified immunity doctrine, its historical origins, and some modern cases).

22. *See, e.g.*, Paul Stern, *Qualified Immunity and the Plea for Accountability*, LAWFARE (Dec. 21, 2020, 8:01 AM), https://www.lawfareblog.com/qualified-immunity-and-plea-accountability [https://perma.cc/7246-JJKH] (noting that the empirical evidence supporting the deterrent effect of imposing liability at the government level is "both scant and pessimistic"); Kimberly Kindy, *Insurers Force Change on Police Departments Long Resistant to It,* WASH. POST (Sept. 14, 2022), https://www.washingtonpost.com/investigations/interactive/2022/police-misconduct-insurance-settlements-reform/ [https://perma.cc/W5KK-V5TW] (noting that insurance companies are forcing long-resisted police reform).

23. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (conducting the most comprehensive study to date on indemnification policies in municipalities).

claims and judgments against officers, that does not necessarily mean that these officers will be incentivized to act differently. The municipality may still ultimately foot the bill.[24] Further, the complexities of municipal budgeting[25] and insurance coverage[26] mean that municipal entities may not respond to increases in costs associated with policing litigation by adjusting policies in a manner that prevents misconduct. Additionally, reforming police department practices can be challenging because of the political strength of police unions.[27] All of this is to say, even effective doctrinal changes that expose more officers to liability for their wrongdoing may, somewhat surprisingly, fail to generate reform at the departmental level.

Of course, some departments would likely respond to expanded civil liability by introducing additional precautionary measures. And regardless, there is little doubt that Professor Ravenell's proposal would make more victims of police misconduct whole for the harms they experienced. That, by itself, is an important goal on its own terms. Whether this proposal would solve all police-misconduct matters is somewhat beyond the point. Her proposal would likely improve the state of affairs in policing, and that by itself makes it a worthwhile enterprise.

II. Other Possible Paths Forward

While Ravenell's proposal is careful and plausible in scope, critics may argue that the proposal is insufficiently ambitious to meet the moment. As others have argued, we could abolish or severely curtail the qualified immunity doctrine.[28] While there may be some justifications for this doctrine,[29] there are several scholars who have argued that qualified

24. *Id.* at 890, 913 (finding that governments paid out 99.98% of all judgments and settlements against police officers in her study).

25. *See generally* Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144 (2016) (conducting an expansive study on how municipalities pay for lawsuits and discussing the implications of these findings for the deterrent effect of civil judgments and settlements).

26. For a comprehensive review of the relationship between policing and insurance, see generally John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539 (2017).

27. Zoe Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 MINN. L. REV. (forthcoming 2023) (describing the strength of police unions, among other law enforcement unions, and how they impede reform efforts).

28. For examples of critical evaluations of qualified immunity and calls for its curtailment or abolishment, see *generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).

29. For examples of defenses of qualified immunity, see Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1853–54 (2018) and Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 GEO. L.J. 229, 238 (2020).

immunity is unsupported by history,[30] data, or policy considerations.[31] Abolishing, or greatly curtailing, qualified immunity would take action by Congress or a fairly dramatic shift in doctrine by the U.S. Supreme Court.[32] At this point, such a change seems unlikely.

Or Congress could legislatively overrule the *Monell* requirement entirely.[33] To do this, presumably, Congress could simply pass a revision to § 1983 stating that local and state police agencies are vicariously liable for unconstitutional acts carried out under color of law by their officers, as Ravenell herself has proposed in her prior work.[34] This could arguably produce many of the same, or even more, benefits than the current Ravenell proposal. It would allow those harmed by unidentified officers to obtain relief—provided they can prove that the harm they suffered was caused by some officer employed by a particular police agency. It may also provide some of the other benefits Ravenell describes related to discovery. And more generally, this alternative proposal may also create greater reform pressure on municipalities to better train, oversee, and regulate their police forces because it would expose municipalities to a greater probability of judgments or settlements.

Nevertheless, one of the strengths of Ravenell's article is its practicality. For one thing, courts could seemingly adopt Ravenell's proposed alteration to existing doctrine without the need for congressional action.[35] It seems quite unlikely that there would be sufficiently broad support for far-reaching changes to the language of § 1983. In recent years, Congress considered various legislative changes to address police misconduct, such as the proposed George Floyd Justice in Policing Act of 2020.[36] But thus far, none

30. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 47 (2018) (criticizing the historical justifications for the qualified immunity doctrine).

31. *See, e.g.*, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 9 (2017) (providing a data- and policy-driven critique of the qualified immunity doctrine).

32. *See* Madeleine Carlisle, *The Debate Over Qualified Immunity Is at the Heart of Police Reform. Here's What to Know*, TIME (June 3, 2021, 6:35 PM), https://time.com/6061624/what-is-qualified-immunity/ [https://perma.cc/WX2A-MU52].

33. *See, e.g.*, Jordyn Manly, Note, *Policing the Police Under 42 U.S.C. § 1983: Rethinking* Monell *to Impose Municipal Liability on the Basis of Respondeat Superior*, 107 CORNELL L. REV. 567, 568 (2021) (making a similar argument for reforming the municipal liability standard).

34. *See, e.g.*, Teressa E. Ravenell, *Police Liability Reimagined: Vicarious Municipal Liability for Constitutional Deprivations*, *in* WHAT'S THE BIG IDEA?: RECOMMENDATIONS FOR IMPROVING LAW & POLICY IN THE NEXT ADMINISTRATION AND IN THE STATES 10.1, 10.2 (Am. Const. Soc'y 2020), https://www.acslaw.org/wp-content/uploads/2021/01/Whats-the-Big-Idea-Book-2020.pdf [https://perma.cc/6MU7-ZNTM].

35. *See* Ravenell, *supra* note 1, at 939 (stating that because the phrase "subjects or causes to be subjected" in § 1983 is ambiguous, courts have the "leeway to incorporate their own normative concepts of causation and liability").

36. George Floyd Justice in Policing Act of 2020, H.R. 7120, 116th Cong. (2020).

of these proposed bills have garnered a widespread consensus.[37] This arguably makes Professor Ravenell's proposal more plausible than many of the more ambitious proposals offered by scholars in recent years. As an added benefit, her proposal is grounded in well-founded principles already used by courts in other contexts like tort claims. This seemingly gives it a sound (and arguably somewhat apolitical) doctrinal foundation.

Conclusion

Teresa Ravenell's novel proposal for reforming civil rights litigation against police officers is a welcome and valuable addition to the literature on policing. In a time when some parts of the policing literature have focused on sweeping and transformative proposals—through defunding,[38] abolition,[39] and a wholesale reimagination of the role of law enforcement[40]—Professor Ravenell enters the debate, in this article, as a thoughtful reformer. In the end, this may represent one of the greatest strengths of an impressive paper. Public support for transformative changes in policing appears relatively low.[41] But demands for accountability and reform in policing remain.[42] Within this political reality, the most impactful policing scholarship may be articles like Professor Ravenell's. By presenting a careful defense of a practical reform, her article lays the groundwork for a substantive change in doctrine that could gradually improve the institution of policing. Of course, no reform by itself will change policing overnight. Even so, a series of changes like Ravenell's may, over time, motivate local communities to prioritize the protection of constitutional rights in the pursuit of public safety.

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37. Juana Summers, *Congressional Negotiators Have Failed to Reach a Deal on Police Reform*, NPR (Sept. 22, 2021, 5:55 PM), https://www.npr.org/2021/09/22/1039718450/congressional-negotiators-have-failed-to-reach-a-deal-on-police-reform [https://perma.cc/PQ62-7RRZ].

38. Jessica M. Eaglin, *To "Defund" the Police*, 73 STAN. L. REV. ONLINE 120, 123 (2021) (considering various interpretations of calls to defund the police).

39. Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html [https://perma.cc/A233-VYM2].

40. Jordan Blair Woods, *Traffic Without the Police*, 73 STAN. L. REV. 1471, 1477 (2021) (proposing the removal of police from the enforcement of traffic laws).

41. Sarah Elbeshbishi & Mabinty Quarshie, *Fewer than 1 in 5 Support 'Defund the Police' Movement, USA Today/Ipsos Poll Finds*, USA TODAY (Mar. 7, 2021, 6:31 PM), https://www.usatoday.com/story/news/politics/2021/03/07/usa-today-ipsos-poll-just-18-support-defund-police-movement/4599232001 [https://perma.cc/TAY3-FSXM].

42. Justin McCarthy, *Americans Remain Steadfast on Policing Reform Needs in 2022*, GALLUP (May 27, 2022), https://news.gallup.com/poll/393119/americans-remain-steadfast-policing-reform-needs-2022.aspx [https://perma.cc/9FKW-FKS8].