CONSTITUTIONAL WHODUNNITS: MAINTAINING SECTION 1983 AND BIVENS SUITS AGAINST UNIDENTIFIED STATE ACTORS

Samuel Rossum*

INTRODUCTION

Democracies die in darkness. And so do the prospects of constitutional tort plaintiffs. Whether on account of chaos, prison bars, uniform dress, or unconsciousness, people who have suffered a constitutional tort (say, police brutality) may have no idea who harmed them.¹ These identification issues can hamper or even foreclose section 1983 and Bivens suits that might otherwise lead to the recovery of damages for constitutional violations.²

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¹ See Singletary v. Pa. Dep’t. of Corrs., 266 F.3d 186, 201 n.5 (3d Cir. 2001) (“It is certainly not uncommon for victims of civil rights violations (e.g., an assault by police officers or prison guards) to be unaware of the identity of the person or persons who violated those rights.”); Howard M. Wasserman, Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure, 25 CARDOZO L. REV. 793, 823 (2003) (describing how conduct giving rise to constitutional violations often occurs under circumstances where the identity of the offending officials is “uniquely in the hands of the potential defendants, their law enforcement compatriots, and the governmental entity, none of which may be willing to come forward”).

² Section 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .


Despite the evolution in technique, this is not a novel dilemma. To the contrary, the problem was vivid in 1871 when Congress enacted section 1983, with the legislation’s proponents warning that “[c]ombinations, darker than the night that hides them . . . ha[d] gone unwhipped of justice.”\footnote{Monroe v. Pape, 365 U.S. 167, 175 (1961) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871)).} And in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics—the landmark decision granting a path to recovering damages against federal officers for constitutional violations—the identification issue was front and center: The case name speaks for itself.\footnote{403 U.S. 388 (1971).} In short, the recurrence of these “whodunnits” is a problem that section 1983 and Bivens actions should be capable of handling.

Unfortunately, the constraints on these suits are baked into the jurisprudence. To be sure, some have clung to the Court’s decision in Bivens as edifying “the right of a plaintiff to sue unknown injurers.”\footnote{Billman v. Ind. Dep’t of Corr., 56 F.3d 785, 789 (7th Cir. 1995); see also Munz v. Parr, 758 F.2d 1254, 1257 (8th Cir. 1985) (citing Bivens as support for plaintiff’s ability to sue John Doe defendants).} But merely having the right to sue only keeps the courthouse doors open for so long. That is, a plaintiff who pursues a section 1983 or Bivens action to recover damages in these cases may be able to serve a complaint on a batch of officials who were in the vicinity of an offense, but even the shrewdest discovery tactics may not pierce the law enforcement “code of silence.” So plaintiffs run into a wall. In the world of section 1983 and Bivens suits, individual responsibility—not group association—is paramount. Courts

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\footnote{Monroe v. Pape, 365 U.S. 167, 175 (1961) (quoting CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871)).}

\footnote{403 U.S. 388 (1971).}

\footnote{Billman v. Ind. Dep’t of Corr., 56 F.3d 785, 789 (7th Cir. 1995); see also Munz v. Parr, 758 F.2d 1254, 1257 (8th Cir. 1985) (citing Bivens as support for plaintiff’s ability to sue John Doe defendants).}
who are unable (or unwilling) to stretch these boundaries will thus dismiss cases where the plaintiff cannot pin a real name on John Doe, leaving the victims uncompensated and the masked assailants undeterred.

This Comment explores how current section 1983 and *Bivens* doctrine thwarts plaintiffs and constrains courts when they must deal with unidentified tortfeasors. Part I lays out the approaches that plaintiffs in ordinary tort actions may take and considers their viability under the special liability regime for constitutional litigation. Part II focuses on the practical barriers that arise when plaintiffs resign themselves to suing John Doe defendants instead of known governmental entities or superiors. Part III takes stock of potential solutions including pleading conspiracies of silence, shifting the burden at trial, and bringing parallel actions via the Federal Tort Claims Act. I then evaluate whether these approaches get at the heart of the problem. All told, though there is likely no silver bullet, understanding how the various obstacles interlock and when the alleged cures will be effective may help provide constitutional tort plaintiffs with a fighting chance in court.

I. IDENTIFICATION ISSUES IN TORTS

A. Some Background on Constitutional Torts

If someone intentionally punches you, there’s a good chance they have committed the universal tort of battery.7 To obtain redress, you may seek money damages through a lawsuit, which will ideally compensate you for your injuries and deter your assailant from doling out more beatings. But if a police officer or other governmental official strikes you, that is a different story. As a state actor, the officer must abide by the Constitution.8 Tweak the parameters and this battery may morph into the use of “excessive force” in violation of either the Fourth, Fifth, Eighth, or Fourteenth Amendments.9 In spite of this overlap, the claims are not identical.

7 See, e.g., *Restatement (Second) of Torts* § 13 (1965) (providing generic definition of battery as an intentional harmful contact).
9 “The Fourth Amendment prohibits [excessive force] when it makes a search or seizure ‘unreasonable.’ The Eighth Amendment prohibits it when it constitutes ‘cruel and unusual’ punishment. The Fifth and Fourteenth Amendments prohibit it (or, for that matter, any use of force) when it is used to ‘deprive’ someone of ‘life, liberty, or property, without due process of law.’” *Kingsley v. Hendrickson*, 576 U.S. 389, 404 (2015) (Scalia, J., dissenting).
Rather, one can argue that “a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy.”

Enter section 1983 and *Bivens*, which contribute to the so-called “constitutional tort” system. Section 1983 provides a cause of action against state officials for “the deprivation of any rights, privileges, or immunities secured by the Constitution and laws” of the United States. *Bivens* actions fulfill a similar role for select constitutional violations by federal officials, albeit the basis for the suit comes from the Constitution itself. In both instances, a successful suit can saddle government officers with personal monetary liability for violating the plaintiff’s constitutional rights. But personal liability unremarkably requires knowing who the person is. This Comment will explore how that simple requirement confounds constitutional tort plaintiffs.

**B. Comparing Constitutional and Civilian Tort Mechanisms**

The crux of the problem is that tort actions—constitutional or not—tend to revolve around a frenetic or convoluted chain of events that can easily obscure the identities of the involved parties. And constitutional torts may particularly exacerbate these information asymmetries:

> [Often, a] claim arises from a brief, one-time-only encounter between an individual government officer and a citizen, actors who come to the encounter from unequal positions of power. It may involve a violent or extremely antagonistic, quickly occurring event. . . . The identities of the offending officers are uniquely in the hands of the potential defendants, their law enforcement compatriots, and the governmental entity, none of which may be willing to come forward.

At first blush, it is comforting to know that in civilian tort suits, plaintiffs have a well-established toolkit at their disposal to either avoid the

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15 *Wasserman, supra* note 1, at 822–23.
identification issue altogether or smoke out the responsible tortfeasor. It follows that if section 1983 and Bivens doctrines were a faithful “species of tort liability,” the solution would be straightforward: Plaintiffs could just transpose these tried-and-true methods into the constitutional realm. Yet as history has shown, “the field of constitutional torts largely disregards the field of torts writ large, relying instead on a discordant collection of policy solutions borrowed from the nineteenth century or crafted from whole cloth.” I argue that this divergence creates a system that rewards furtive behavior over transparency in government officials.

1. The Allure of Respondeat Superior

In the general run of torts, the cleanest solution to any identification problem involving an employee is to just sue someone or something else entirely. Hence the appeal of respondeat superior, or vicarious liability, which imputes liability based simply on the working relationship between an employee and an employer. So long as an employee was acting within the scope of their employment while committing a tort, an employer could be on the hook for damages. Though the results may at times raise an eyebrow, the doctrine is propelled by a need to compensate victims, deter employers, and spread the costs of harmful conduct.

In practice, respondeat superior is indeed a powerful tool for combatting unknown, civilian tortfeasors. When, say, a person gets grazed by a commercial vehicle but can make out the corporate logo on the car, they

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16 See Schwartz & Mahshigian, supra note 14, at 942 (“Courts have fashioned several theories to hurdle the plaintiff over the barrier posed by the identification requirement.”).
18 Smith-Drelich, supra note 11, at 573.
19 Alan O. Sykes, The Economics of Vicarious Liability, 93 YALE L. J. 1231, 1260 (1984) (“Under the doctrine of respondeat superior, masters are vicariously liable for torts that their servants commit within the course of employment.”); see also Catherine Fisk & Erwin Chemerinsky, Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX, 7 WM. & MARY BILL RTS. J. 755, 759–60 (1999) (“The employer is liable for the wrongful conduct simply because the tortfeasor was its employee acting within the scope of employment.”).
20 RESTATEMENT (SECOND) OF AGENCY § 219(1) (Am. L. Inst. 1957); see also Ira S. Bushey & Sons, Inc., v. United States, 276 F. Supp. 518, 527 (E.D.N.Y. 1967) (noting the trend to expand respondeat superior theory to hold employers accountable whenever an employee was “motivated by a desire—no matter how misguided—to further his employer’s interests”).
21 See, e.g., Nelson v. American-West Afr. Line, Inc., 86 F.2d 730, 731 (2d Cir. 1936) (“[M]en may vent their spleen upon others and yet mean to further their master’s business; that meaning, that intention is the test.”).
22 Fisk & Chemerinsky, supra note 19, at 761.
may have a good shot of recovering against the company.\textsuperscript{23} This obviates the need to engage in burdensome discovery practice to determine who was behind the injury, and the ultimate result is largely the same for the plaintiff, regardless of who is writing the check.

Or to move things into the world of civil rights, consider the role of \textit{respondeat superior} in Title VII, which creates civil liability for discrimination in employment.\textsuperscript{24} To be sure, in cases of coworker harassment—the category under which many anonymous acts are bound to fall—\textit{respondeat superior} has undergone a mutation, and is no longer tethered to the simple “scope of employment” test.\textsuperscript{25} Now, liability for coworker harassment only attaches to an employer when they are negligent in the face of a hostile work environment, an employer-friendly standard.\textsuperscript{26} But this blunted version of \textit{respondeat superior} may still allow for recovery where it would otherwise be impossible due to identification issues. Notably, the Fourth Circuit found the doctrine applicable to a case involving racist, anonymous death threats left in an office mailbox.\textsuperscript{27} Acknowledging that covert harassment poses “unique challenges,” the court nonetheless remained firm about the company’s obligations: “The anonymous nature of severe threats or acts of harassment may, in fact, heighten what is required of an employer, particularly in circumstances where the harassment occurs inside a secure space accessible to only company-authorized individuals.”\textsuperscript{28} The point is that even an impotent form of \textit{respondeat superior} still has some force against unknown tortfeasors.

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\textsuperscript{25} E.g., Faragher v. Boca Raton, 524 U.S. 775, 799 (1998) (observing that courts have “implicitly treated [coworker] harassment as outside the scope of common employees’ duties”).

\textsuperscript{26} See Vance v. Ball State Univ., 570 U.S. 421, 424 (2013) (“If the harassing employee is the victim’s coworker, the employer is liable only if it was negligent in controlling working conditions.”). This standard seriously hampers the enforcement of antidiscrimination law. See Jennifer A.L. Sheldon-Sherman, \textit{The Effect of Vance v. Ball State in Title VII Litigation}, 2021 U. Ill. L. REV. 983, 1038–39 (2021) (describing how the negligence standard is “difficult to meet” and provides “little incentive for employers to proactively monitor the workplace for harassment”).

\textsuperscript{27} Pryor v. United Air Lines, Inc., 791 F.3d 488, 490, 497 (4th Cir. 2015).

\textsuperscript{28} Id. at 497; see also Cerros v. Steel Tech., Inc., 398 F.3d 944, 951 (7th Cir. 2005) (“Cerros’s inability to verify the authorship of the racist graffiti poses no obstacle to his establishing that this graffiti produced or contributed to a hostile work environment.”).
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2. The Reality of Municipal and Supervisory Liability

In section 1983 and *Bivens* suits, the Supreme Court has foreclosed even an impotent form of the doctrine. Just as the landmark decision in *Monell v. Department of Social Services* granted section 1983 plaintiffs a means by which to hold a municipality to account for the constitutional violations of its employees, it also renounced *respondeat superior* for the same context. In stark contrast to a scope of employment test, *Monell* liability requires that a municipality—through its policies or customs—be the moving force behind a constitutional violation. This is no small feat.

In the types of cases germane to this Comment, there is unlikely to be a written formal rule or a directive from a high-ranking official urging employees to obscure their identities. Without anything tangible, plaintiffs will turn their sights to practices, looking for some sort of city-wide “failure to train, supervise, discipline, or otherwise control individual officers.” However, a municipality’s failure to manage its employees in a relevant respect must amount to “deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.” Only then does a shortcoming become actionable under section 1983. As a result, direct governmental liability in these instances has become exceptional.

To boot, municipal liability is, unsurprisingly, constrained to suits against municipalities. Damage actions against state officers—as opposed to city or county officials—must be personal capacity suits due to the

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29 436 U.S. 658, 691 (1978) (“[A] municipality cannot be held liable *solely* because it employs a tortfeasor . . .”); *but see* City of Oklahoma City v. Tuttle, 471 U.S. 808, 835 (1985) (Stevens, J., dissenting) (“[I]f Congress intended to impose liability on municipal corporations, it must have intended to make them responsible for at least some of the conduct of their agents.”).

30 Polk Cnty. v. Dodson, 454 U.S. 312, 326 (1981) (rejecting a section 1983 claim because the respondent’s alleged constitutional deprivation was not “caused by any constitutionally forbidden rule or procedure”).


32 *Id.* at 44 (“[S]ection 1983 plaintiffs now almost automatically assert that the constitutional deprivation they suffered at the hands of a law enforcement officer resulted from the municipality’s failure to train, transfer, or otherwise supervise that officer.”).


34 *Id.* at 389.

35 *See* John C. Jeffries Jr. & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1403 (2007) (“In the vast majority of cases, plaintiffs are relegated to suing officers . . .”).
Eleventh Amendment’s emanations. And for claims against federal officials, there is not even a parallel to Monell liability. Rather, plaintiffs must proceed against individual agents or under the ambit of the Federal Tort Claims Act (“FTCA”). Thus, system-wide challenges, while available in some suits against unidentified tortfeasors, face an uphill battle.

Granted, those resigned to sue individual officers need not always sue the person immediately responsible for a constitutional violation, providing a slight workaround to identification problems. A bundle of theories sometimes referred to as “supervisory liability” provides an approach that is endemic to the section 1983 and Bivens contexts. The unifying thread in supervisory liability is that a supervisor can only be held liable for their own conduct, and that this conduct has to be a cause of a constitutional violation. The traditional understanding was that a supervisor would meet this threshold by (1) directly participating in a constitutional violation, (2) penning a policy that violates constitutional rights, or (3) exhibiting of deliberate indifference to the prospect of constitutional violations by subordinates. Direct participation includes not only straightforward instances of supervisors contributing to some malfeasance but also failures to intervene when subordinates are violating someone’s civil rights. The latter two options, in turn, are extensions of municipal liability doctrine onto the person responsible for a policy or practice.
This was good in theory, until the Supreme Court’s decision in Ashcroft v. Iqbal muddied the waters. There, the Court went out of its way to cast aside a Bivens discrimination claim on the grounds that the plaintiffs were pushing supervisory liability too far:

In a § 1983 suit or a Bivens action—where masters do not answer for the torts of their servants—the term “supervisory liability” is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. . . . [P]urpose rather than knowledge is required to impose Bivens liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.43

In short, because the plaintiff alleged discriminatory treatment by subordinates, which must be purposeful, he was required to prove that the supervisors acted with the same intent to discriminate to hold them liable for those same violations. Iqbal’s open question, which has sown disagreement amongst courts and scholars, is whether the notion that subordinates and supervisors must have matching mental states extends beyond those constitutional violations like discrimination that require a showing of animus.44

Relevant here is Iqbal’s application to Fourth and Eighth Amendment claims, which are the prime candidates for identification problems. Fortunately, there has not yet been a sea change:

[W]here the subordinates’ underlying constitutional violation requires only “objective reasonableness” (as in Fourth Amendment claims) or deliberate indifference (as in Eighth Amendment or substantive due process cases involving arrestees and detainees), many courts have held that plaintiffs need only plead and prove the

44 For example, Professor Reinert, counsel for the plaintiffs in Iqbal, posits that the case has had “little impact on how courts . . . have constructed supervisory liability standards.” Alexander A. Reinert, Supervisory Liability and Ashcroft v. Iqbal, 41 CARDOZO L. REV. 945, 947 (2020); see also Patrick Boynton, Comment, Supervisory Liability in the Circuit Courts After Iqbal, 21 U. PA. J. CONST. L. 639, 657 (2018) (“Standing here today, eight years after Iqbal was handed down, the promised earthquake seems to have dissipated.”). Others argue that Iqbal “left the question of supervisory liability in a state of disarray, and it led many lower courts to ratchet up the standard for holding supervisors liable under § 1983, and to question supervisory liability in ‘failure to’ cases.” Rosalie Berger Levinson, Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post-Iqbal/Connick World, 47 HARV. C.R.-C.L. L. REV. 273, 292 (2012).
less culpable state of mind that triggers violation of those constitutional provisions.  

And so, it remains a possibility that Iqbal’s holding will be cabined to discrimination cases, leaving less stringent standards in place for the types of violation germane to this Comment. But for many, this doctrinal stabilization could be an empty victory—even if the names of supervisors are “obvious or easily learned, [] their liability is premised on a degree of responsibility that is generally absent.” In other words, unlike respondeat superior, plaintiffs alleging supervisory liability must make a two-tiered showing of culpability that the individual facts of most cases are unable to support. Yet again, what is legally possible is not necessarily what will be practically successful.

All in all, due to the byzantine requirements of section 1983 and Bivens jurisprudence, the primary targets for liability remain the rank-and-file officers on the ground who may be “least likely to be known by the plaintiff and most difficult for the plaintiff or her counsel to identify.” I will now consider whether there are effective mechanisms for constitutional tort plaintiffs to hold such individuals accountable when the primary actor remains unknown.

3. Alternative Liability

If the identification problem cannot be avoided, plaintiffs might instead seek to “smoke out” the responsible tortfeasor in a group by raising the specter of collective liability. Starting in the world of generic torts, alternative liability is one of the few doctrines that allows for recovery against multiple negligent defendants even where the victim cannot make out who was directly responsible for a harm. In the classic case Summers v. Tice, a three-man quail hunt went awry when the plaintiff was shot in the face by one of his two companions. Both had negligently fired at the same quail, so the plaintiff could not determine whose bullet had struck him. No matter, said the California Supreme Court, because “[o]rdinarily defendants are in a far better position to offer evidence to determine which one caused the injury.” The court then shifted the burden of proof to the

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45 Levinson, supra note 42, at 290.
46 Wasserman, supra note 1, at 828.
47 Id.
48 Summers v. Tice, 199 P.2d 1, 1–2 (Cal. 1948).
49 Id. at 4.
defendants: Unless one of the defendants offered evidence to absolve himself of the shooting, both would be held jointly liable for the plaintiff’s injuries. This modification allowed a deserving tort plaintiff to secure a remedy.

It certainly makes sense as a matter of principle to extend this doctrine into the section 1983 and Bivens realm, where compensation is a driving force. But there are some roadblocks. To start, even if these are constitutional tort doctrines, is it appropriate to import principles from a 1948 California Supreme Court case into federal causes of action? Indeed, the Supreme Court has opined that the common law of 1871—when section 1983 was enacted—is the paramount source of tort principles. Yet the Court selectively opts for a more flexible approach to sourcing, especially for those principles of law with widespread acceptance, regardless of their temporal origin. Given the canonical status of the Summers case,

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50 Id.; see also Restatement (Second) of Torts § 433B (1965) (“Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.”).

51 See Rutherford v. Owens-Illinois, 941 P.2d 1203, 1220 (Cal. 1997) (“The fundamental justification for a Summers-type shift of the burden is that without it all defendants might escape liability and the plaintiff be left ‘remediless.’”).

52 See Carey v. Piphus, 435 U.S. 247, 254 (1978) (“Insofar as petitioners contend that the basic purpose of a § 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights, they have the better of the argument.”).

53 E.g., Thompson v. Clark, 142 S. Ct. 1332, 1340 (2022) (“The status of American law as of 1871 is the relevant inquiry for our purposes.”); Kalina v. Fletcher, 522 U.S. 118, 123. (1997) (drawing on “common-law principles that were well settled at the time of [section 1983’s] enactment.”).

54 See Seth Kreimer, The Source of Law in Civil Rights Cases; Some Old Light on Section 1988, 133 U. P.A. L. REV. 601, 609 (1985) (“In contrast to the Court’s claims of fidelity to the common law as it stood in 1871, from early in its development constitutional tort doctrine in fact looked to modern policy as decisive.”). For example, the Court is no stranger to the 1965 Second Restatement of Torts, as the treatise was cited to help define the contours of official immunity doctrine, notwithstanding its potential deviation from the common law in 1871. See Pierson v. Ray, 386 U.S. 547, 555 (1967); Kreimer, supra, at 609. Moreover, in concocting its own species of proximate cause for section 1983, the Court looked to a prior decision interpreting the Violence Against Women Act, which in turn drew on the Third Restatement of Torts. See Caty. of Los Angeles v. Mendez, 137 S. Ct. 1539, 1548–49 (citing Paroline v. United States, 572 U.S. 434, 445 (2014) (citing Restatement (Third) of Torts § 29 (2005))]. The point of this citation soup is this: Section 1983 does not necessarily hinge on a regimented application of 1871 tort law, but rather has cultivated an unstated federal common law that can adapt to modern concerns. Kreimer, supra, at 611; Richard H. Fallon Jr., Bidding Farewell to Constitutional Torts, 107 CALIF. L. REV. 933, 991 (2019) (referring to the Court’s approach to official immunity doctrine as an “exercise in federal common lawmaking”).

the courts that have adopted alternative liability principles in constitutional tort cases have thus not done anything out of the ordinary.\textsuperscript{56}

The bigger problem is that alternative liability often lacks real oomph. Seemingly if several police officers empty their clips onto an innocent person, alternative liability can prevent the officers from evading accountability by alleging that it was not their bullet that delivered a fatal blow.\textsuperscript{57} But that is about it. Alternative liability requires equal negligence on part of all the defendants, and that is a weighty showing for less extreme circumstances. For instance, in \textit{Pineda v. Hamilton County}, the Sixth Circuit distinguished \textit{Summers} when a man was kicked in the head by one of three sheriff’s deputies during a frenzy at a nightclub: “Unlike the tortfeasors in \textit{Summers} who had \textit{both} been negligent, only \textit{one} deputy in this case allegedly committed a constitutional violation.”\textsuperscript{58} Though this understanding is not a departure from classic tort law, it suggests that a more potent doctrine is necessary.

\textbf{4. Res Ipsa Loquitur}

\textit{Res ipsa loquitur} is undoubtedly stronger than alternative liability, but it is far more controversial.\textsuperscript{59} Latin for “the thing speaks for itself,” the gist of \textit{res ipsa} is that some injuries are unlikely to occur unless negligence is in the air,
and therefore a jury considering such claims should be able to infer a defendant’s culpability from the totality of the circumstances.  However, as prerequisites a plaintiff must usually demonstrate that (1) the injury was not likely to occur without negligence, (2) the injury was caused by something within the exclusive control of the defendants, and (3) they were not contributorily negligent.

Ybarra v. Spangard provides a famous example of the principle as applied to a group of civilian defendants. There, the plaintiff went under the knife for an appendectomy. He lost his appendix but gained an unknown pain in his shoulder. Because the anesthesiologist did their job, the plaintiff had no way of knowing which of the doctors or hospital employees was responsible for his injury. Reviewing the plaintiff’s malpractice claim, the California Supreme Court was persuaded that it would be “manifestly unreasonable for [the defendants] to insist he identify any one of them as the person who did the alleged negligent act.”

To avoid that untoward result, the res ipsa doctrine would step in and allow the plaintiff to establish that some permutation of hospital employees had been negligent. Effectively, if the plaintiff established that there was negligence during his lapse of consciousness, the “burden of initial explanation” would fall on the defendants as a unit, and those who passed that bar could be absolved. Yet at the subsequent trial, each of the defendants denied seeing anything out of the ordinary. The trial court held that this evidence did not overcome the plaintiff’s prima facie case and entered judgment against all the defendants, which the California appellate court affirmed.

At its core, the decision “hint[s] that a plaintiff should not go uncompensated simply because doctors and nurses may be unlikely to testify against one another and identify the wrongdoer.” It follows that this principle could have much bite if injected into section 1983 and Bivens jurisprudence, because the “code of silence” amongst officials is a rampant

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61 Id. at 242.
63 Id.
64 Id. at 689.
65 Id. at 690.
66 Id. at 690.
68 Id.
69 Levmore, supra note 59, at 1562.
issue in constitutional litigation.\textsuperscript{70} Moreover, whether the venue be the back of a police cruiser, an interrogation room, or a prison cell, state actors regularly possess exclusive control over plaintiffs.\textsuperscript{71} Courts, however, have been reticent to apply \textit{Ybarra} and its progeny to nearly identical torts within hospitals, \textsuperscript{72} let alone to constitutional cases.\textsuperscript{73} Even the courts that do not flat out reject the idea in the constitutional realm have formulated at least three constraints, with varying degrees of persuasiveness.

First, constitutional plaintiffs seeking to get mileage out of \textit{res ipsa} will realize the doctrine is generally reserved for showing negligence—not any higher degree of culpability.\textsuperscript{74} For instance, in a case where a prisoner died of dehydration in a complex web of events involving fifteen defendants, the Sixth Circuit opted to resist its strong “tempt[ation] to invoke the doctrine of \textit{res ipsa loquitur} and let the trial begin.”\textsuperscript{75} That is because only instances of “deliberate indifference” to the medical needs of a prisoner violate the Eighth Amendment, not negligence.\textsuperscript{76} The mental state mismatch forced the court to try and piece together the convoluted narrative instead of adopting a burden shifting framework that would force information out of the guards under the threat of joint liability.\textsuperscript{77}

But letting that limitation stand in the way of relief relies on a myopic view of the doctrine. Indeed, some plaintiffs may be relying on the theory to prove \textit{causation}, not breach. As Judge Silverman of the Ninth Circuit argued: “If government actors/defendants, due to circumstances of their own creation, prevent the plaintiff from identifying precisely which of them

\textsuperscript{70} See infra notes 99–101 and accompanying text.

\textsuperscript{71} The Seventh Circuit recognized this much in the context of widespread claims of inadequate medical care at a prison: “\textit{Ybarra} is analogous to the case before us insofar as prison authorities have a special responsibility to inmates who are totally dependent upon them to receive medical treatment.” Wellman v. Faulkner, 715 F.2d 269, 276 (7th Cir. 1983), cert. denied, 486 U.S. 1217 (1984).


\textsuperscript{73} See Cyrus v. Town of Mukwonago, 624 F.3d 856, 864 (7th Cir. 2010) (declaring that \textit{res ipsa loquitur} is improper for section 1983 suits); Hanson v. Madison Cnty. Det. Ctr., 736 F. App’x 521, 539 (6th Cir. 2018) (“There is no \textit{res ipsa loquitur} principle for constitutional torts . . . .”).

\textsuperscript{74} See \textit{Ybarra}, 154 P.2d at 690; \textit{RESTATEMENT (SECOND) OF TORTS} § 328D (AM. L. INST. 1965). However, there is a persuasive argument that the principle of proof should be the same, given that it is still the defendants’ conduct that prevented a plaintiff from identifying the tortfeasor. See Jones v. Williams, 297 F.3d 930, 939 (9th Cir. 2002) (Silverman, J., concurring) [suggesting how “\textit{res ipsa-type} [jury instruction[s] should be given in a [constitutional tort] cases”].

\textsuperscript{75} Clark-Murphy v. Foreback, 439 F.3d 280, 282–86 (6th Cir. 2006).

\textsuperscript{76} \textit{Id}. at 286.

\textsuperscript{77} \textit{Id}. 
caused the plaintiff’s injury, the jury can infer causation against those in exclusive control of the event.”

For example, if one police officer in a team kicks a docile arrestee who is lying on the ground, the objective circumstances display intent, leaving the kicker’s identity as the only real issue for a jury. That question of causation is one to which a variant of res ipsa is well-suited.

Second, courts fear the threat of “collective punishment” may ultimately run afoul of the personal responsibility requirement at the heart of section 1983 and Bivens doctrine. By labelling someone as liable absent their ability to exculpate themselves, res ipsa could sever the strict chains of causality that are necessary to support these actions. Now, this is true insofar as the approach could ensnare officials who may not have been directly partaking in a constitutional violation, but that may rest on a narrow view of what actions those bystanders likely see and fail to curb or report. Not to mention the degree of artifice involved where the individual officers are almost guaranteed to be indemnified by the city. If one officer indisputably inflicted harm, there were multiple suspects at the

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78 Jones, 297 F.3d at 939 (Silverman, J., concurring). In a recent article, Professor Ravenell explores this concept in more depth, offering a novel theory of “causa per se.” See Teresa Ravenell, Unidentified Police Officials, 100 Tex. L. Rev. 891, 938–39 (2022). Under this framework, “[w]hen a plaintiff offers evidence of a constitutional violation and that the defendant was present around the time of the violation, a fact finder could infer causation. This shifts the burden of production to the defendants.” Id


80 Hessel v. O’Hearn, 977 F.2d 299, 305 (7th Cir. 1992).

81 Id. In Hessel, plaintiffs’ items went missing during a police search of their property, and there were fourteen candidates for the theft. Id. at 301, 305. Yet the plaintiffs couldn’t sort out the wrongdoer and thus the Seventh Circuit affirmed summary judgment. Id. In so holding, the court noted that “[p]roximity to a wrongdoer does not authorize punishment” and that there was “no more reason to fix liability on these 14 police officers than on the entire population of Horicon, Wisconsin.” Id.; but see Colbert v. City of Chicago, 851 F.3d 649, 664 (7th Cir. 2017) (Hamilton, J., concurring) (arguing that a burden shifting approach “would retain the regime of individual responsibility under § 1983” as it is merely a “procedural adjustment, shifting the burden of production based on the defendants’ own actions when they act together”).


83 Joanna C. Schwartz, Police Indemnification, 89 N.Y.U. L. Rev. 885, 890 (2014) (“Between 2006 and 2011, in forty-four of the country’s largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs’ favor . . . .”).
scene who could have intervened, and none of these actors will have to pay
the victim out of pocket, what’s really at stake?

Finally, and least convincingly, some courts have noted that *Ybarra*’s
burden shifting does not enter the fray until a plaintiff is unconscious.\(^8^4\)
True, *Ybarra* couched its holding in reference to unconscious plaintiffs, but
this approach prizes textual fidelity over common sense.\(^8^5\) Indeed, to say,
as did the First Circuit, that someone who was “held with his face to the
floor and struck repeatedly with nightsticks and fists”\(^8^6\) is not “so limited in
their access to information that the burden of explanation should be shifted
to defendants” is rather disingenuous.\(^8^7\) However attractive
unconsciousness is as a bright-line rule, it is untethered from the realistic
capabilities of someone to identify their assailants. Nevertheless, those cases
are out there.

At bottom, there is no settled and effective way to approach these
constitutional whodunnits in actions against individual officials on the
ground. Alternative liability is too inflexible to attract plaintiffs to its use,
and a faithful form of *res ipsa* is too indiscriminate to convince courts of its
propriety. This creates a double shield for the government: Stringent
causation requirements make suing governmental entities and supervisors a
difficult task and dragging a flock of low-level officers into court will be
fruitless without a very specific set of prerequisites. Even those that remain
committed to their actions against a group of officials face another set of
challenges, to which I now turn.

II. KEEPING SUITS ALIVE

A. The Early Stages

To craft a new hypothetical, say a person attends a peaceful protest but
is met with a barrage of “rubber bullets, pepper-spray[,] beanbags,

\(^8^4\) See Wellman v. Faulkner, 715 F.2d 269, 276 (7th Cir. 1983), cert. denied, 486 U.S. 1217 (1984)
declining to extend *Ybarra* because the plaintiffs in this case were still conscious; Unwin v.
Campbell, 863 F.2d 124, 134 (1st Cir. 1988) (positing that *Ybarra* was based on the premise that
defendants have a special responsibility for unconscious plaintiffs), abrogated by Johnson v. Jones,

\(^8^5\) Notably, *Ybarra* drew on the “background of common sense and human experience” in explaining
holding to only anesthesia induced unconsciousness betrays the spirit of the doctrine.

\(^8^6\) *Unwin*, 863 F.2d at 127.

\(^8^7\) Id. at 134 (quoting *Wellman*, 715 F.2d at 276).
shotgun-based projectiles . . . tear gas, and other weapons.” Due to the inherent chaos, they were not able to discern who was dispensing these projectiles because the police wore full riot gear lacking any personal identification, and cellphone footage does not lift the fog. Despite this impediment, the victim is sure that these incognito officers violated their First and Fourth Amendment rights. Assuming they are determined—or forced—to sue the individual officers, how will they maintain a suit against the unknown?

Before even wading into the doctrine, it is crucial to consider that the daunting prospect of recovering against John Doe defendants is bound to chill suits, especially in the prison litigation context. It may be too large of a financial risk to file suit, given that plaintiffs must be the “prevailing party” in section 1983 suits to recover attorneys’ fees, and get nothing in pure Bivens actions. Worse, people of color are disproportionate victims of police misconduct, and the undeniable racial wealth gap means that the people most affected are less likely to be able to afford an attorney. If a

88 These facts are drawn from allegations lodged against riot control officers in Rauen v. City of Miami, No. 06-21182, 2007 WL 6866609, at *1–2 (S.D. Fla. Mar. 2, 2007).
89 This is not to say that recording the police is not an extremely important avenue towards identifying state actors. Cf. Seth F. Kreimer, Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record, 159 U. PA. L. REV. 335, 345–47 (2011) (recounting how various actors use electronic records to defy government misconduct). From the constitutional angle, many circuit courts have recognized a First Amendment right to record police activity in public locations. See Fields v. City of Philadelphia, 862 F.3d 353, 355–56 (3d Cir. 2017) (listing five other courts of appeals that recognize the right and joining in the consensus). Likewise, equipping officers with bodycams can increase accountability, albeit at the expense of privacy and other interests. Cf. Michael D. White & Henry F. Fradella, The Intersection of Law, Policy, and Police-Worn Body Cameras: An Exploration of Critical Issues, 96 N.C. L. REV. 1579, 1592 (2018) (discussing that body cameras may create more problems than they solve because of factors such as the complexities involved with implementing the programs, privacy concerns, and resistance from officers).
90 Rauen, 2007 WL 6866609 at *4.
92 E.g., Kreines v. United States, 33 F.3d 1105, 1109 (9th Cir. 1994) (refusing to authorize award of attorneys’ fees in Bivens actions notwithstanding plaintiff’s argument that this setup “inequitably favors federal officers over state officers”).
93 See Utah v. Strieff, 136 S. Ct. 2056, 2070 (2016) (Sotomayer, J., dissenting) (“For generations, black and brown parents have given their children ‘the talk’—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.”).
94 Liz Mineo, Racial wealth gap may be a key to other inequalities, THE HARV. GAZETTE [June 3, 2021], https://news.harvard.edu/gazette/story/2021/06/racial-wealth-gap-may-be-a-key-to-other-inequities/ [https://perma.cc/GKM5-KKF3] (reporting that “the net wealth of a typical Black family in America is around one-tenth that of a white family”).
plaintiff’s attorney is unwilling to pick up these types of claims on a contingency fee, the most affected may be shut out of the courthouse altogether.

Those who secure an attorney or opt to march forward pro se may wish to file a complaint in federal court against the anonymous aggressors, but without access to court-supervised discovery, some placeholders are needed. Pleading against a host of John Doe defendants along with a party on which to serve the complaint (probably the city) is a natural starting point, unless that would require naming a State or the United States as a defendant, as they are not susceptible to municipal liability. In such scenarios any known commanding officers would have to serve as the placeholder defendants.

With the bookmark in place, discovery may create more headaches due to the “legendary code of silence among law enforcement officers.” The code is indeed the stuff of legend, having existed for as long as America has had organized police forces, and having spawned a parade of task forces and commissions to try and remedy the issue. “Code of silence” may also be a misnomer, as it reaches far more obstructionist conduct than mere unresponsiveness. In any event, the code lurks behind nearly every case with an identification problem. Though courts can compel discovery

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95 See Wasserman, supra note 1, at 815–16 (explaining the typical procedures). There may also be an opportunity for pre-complaint depositions in some cases. See Fed. R. Civ. P. 27.

96 See supra notes 36–37 and accompanying text.


98 Fillmore v. Page, 358 F.3d 496, 507 (7th Cir. 2004).


100 David Rudovsky, Police Abuse: Can the Violence Be Contained?, 27 HARV. C.R.-C.L. L. REV. 465, 487 (1992) (“The code of silence does more than prevent testimony. It mandates that no officer report another for misconduct, that supervisors not discipline officers for abuse, that wrongdoings be covered up, and that any investigation or legal action into police misconduct be deflected and discouraged.”).
disclosures by threat of sanction, enforcement will naturally come down to individual judicial discretion.\footnote{101}

Still, if discovery regarding the names of the responsible officials is fruitful, the plaintiff could have a chance to file an amended complaint against the specific officers.\footnote{102} Should the amended complaint exceed the relevant statute of limitations, however, disunity amongst the circuit courts will affect how the suit proceeds. Under Federal Rule of Civil Procedure 15(c)(1), if a plaintiff changes the name of a party, their amended complaint can “relate[] back” to the original complaint for statute of limitations purposes.\footnote{103} But this is all subject to the requirement that the newly added defendant both had notice of the action and, critically, “knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party’s identity.”\footnote{104} Per the majority view, a “mistake” concerning a party’s identity does not include a lack of knowledge.\footnote{105} This interpretation relies on the idea that suing a fictitious John Doe is not an error but rather a deliberate litigation strategy.\footnote{106} As long as this understanding persists,\footnote{107} statutes of limitations issues can force plaintiffs into a corner, wherein they may have to rely on unreliable theories of municipal or supervisory liability or cede their claim altogether.\footnote{108}

\footnote{101} FED. R. CIV. P. 37; see Fillmore, 358 F.3d at 507–08 (remanding case for trial court to follow through with discovery sanctions).

\footnote{102} FED. R. CIV. P. 15.

\footnote{103} FED. R. CIV. P. 15(c)(1)(C).

\footnote{104} FED. R. CIV. P. 15(c)(1)(C)(ii) (emphasis added).

\footnote{105} See Wayne v. Jarvis, 197 F.3d 1098, 1103 (11th Cir. 1999) (deciding that the plaintiff’s lack of knowledge of the sheriff’s identities was not a mistake), rev’d on other grounds by Manders v. Lee, 338 F.3d 1304, 1328 n.52 (11th Cir. 2003).

\footnote{106} Id. at 1104. The detractors from this view posit that fairness and the preference towards liberal constructions of the Federal Rules of Civil Procedure counsel towards the relation back of John Doe complaints. See Singletary v. Pa. Dep’t of Corr., 266 F.3d 186, 202 n.5 (3d Cir. 2001).

\footnote{107} There is some debate over whether the Supreme Court’s decision in Krupski v. Costa Crociere S.p.A., 560 U.S. 538, 555–57 (2010), modified the legal test. There, the Court held that suing a corporate subsidiary instead of its parent company could constitute a mistake under the logic that “a plaintiff might know that the prospective defendant exists but nonetheless harbor a misunderstanding about his status or role.” Id. at 549. Yet under a recent post-Krupski survey, at least the Second, Fifth, Seventh, and Eighth Circuits maintain that naming a John Doe defendant is no mistake. See Herrera v. Cleveland, 8 F.4th 493, 499 (7th Cir. 2021), cert. denied, 142 S. Ct. 1414 (2022).

\footnote{108} Indeed, a statute of limitations issue can direct a plaintiff towards novel liability theories. In a high-profile example, a pro se plaintiff brought a Bivens claim for apparent Eighth Amendment violations, naming John Doe private prison guards and the prison itself. See Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 64–65 (2001). After identifying the responsible guard and obtaining
And timeliness is not the only blockade at the complaint stage. For one, the Rule 8 pleading standard “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” At a point in litigation where information asymmetries are at their highest, even though courts are free to exercise their discretion in favor of plaintiffs, complaints against specific actors may still fail if a plaintiff cannot discern or remember enough specific information about each person’s involvement. Moreover, plaintiffs are “well-advised” to be over-inclusive in whom they sue to ensure that the primary tortfeasors are before the court, but this increases waste and complexity by “needlessly drag[ging] law enforcement officers into litigation where they had little or no involvement in the underlying conduct.”

B. Summary Judgment and Qualified Immunity

At the summary judgment stage, plaintiffs may have narrowed the universe of potential actors down to a handful of named defendants. But

counsel, he attempted to file an amended complaint but was barred by the statute of limitations. Id. The plaintiff therefore had to rely on the initial pleading that was lodged against the private prison itself, but the Court had never before recognized a Bivens action against non-persons. Id. at 65–66. On appeal, the Court remained steadfast in that standard and the plaintiff lost his case. Id.

110 Great discretion exists because the “height of the pleading requirement is relative to circumstances.” Cooney v. Rossier, 583 F.3d 967, 971 (7th Cir. 2009). So, to gauge the level of detail required for any given case is an exercise in judicial “experience and common sense.” Iqbal, 556 U.S. at 663–64 (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2006)). Though a malleable standard, it would stand to reason that when the lack of information is the defendant's doing, a lower pleading standard should suffice. See, e.g., Billman v. Ind. Dep't of Corr., 56 F.3d 785, 790 (7th Cir. 1995) (finding it improper to dismiss prisoner’s suit because confinement had prevented him from preparing his complaint); See, e.g., Rauen v. City of Miami, No. 06-21182, 2007 WL 686609, at *4 (S.D. Fla. Mar. 2, 2007) (“Plaintiffs’ inability to identify the specific officers involved in their alleged deprivation of rights does not mandate dismissal under Federal Rule 12(b)(6) . . . .”)

111 E.g., Wilson v. City of New York, No. 15-cv-3192 (KBF), 2016 WL 2838895, at *3 (S.D.N.Y. May 16, 2016) (dismissing proposed amended complaint that did “not identify what individual defendant took what action or otherwise provide any means of distinguishing one defendant’s personal involvement from another’s”).


113 E.g., Jutrowski v. Township of Riverdale, 904 F.3d 280, 291–92 (3d Cir. 2018) (explaining that even though the defendant had limited the universe of potential actors, he still could not make a definitive allegation against any of the possible perpetrators).
even if the John Does now have a name, they still retain two interrelated arguments in their pocket.

First, they may argue, on qualified immunity grounds, that any alleged offense did not violate a plaintiff’s clearly established rights. Qualified immunity is the wholly judge-made doctrine that protects most state officials from damages actions following conduct that, though unconstitutional, “could have been based off a reasonable mistake of law—even if it in fact, wasn’t.” But for a court to extend this aegis, it must engage in a fairly fact-intensive inquiry to ensure that a right was or was not clearly established in light of the “specific context of the case.” That is why the qualified immunity argument should be self-defeating in these types of cases, at least at the summary judgment stage. If the record is murky enough that it is not clear who did what, it is perverse to argue that specific actions were in line with clearly established law. Rather, these inherent conflicts must be resolved in favor of the plaintiff, unless her version of the events nonetheless supports a conferral of immunity.

The second argument, that there is not a factual basis to survive summary judgment, typically holds more water. Lawyers and judges can easily recite the relevant standard—i.e., whether there is a “genuine dispute as to any material fact”—but in situations like these, where does the dispute have to lie? There is obviously a dispute issue about who violated the constitution, but that may not be enough for a plaintiff to make it to trial.

Some cases are easier. In Fazica v. Jordan, for example, the Sixth Circuit confronted a prime example of a factual dispute that reached every officer involved:

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118 In *Tolan*, the Court stressed the importance of caution in granting summary judgment on qualified immunity grounds when the facts on the ground are hotly contested. 572 U.S. at 660. (“The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system.”).

119 FED. R. CIV. P. 56(a).
[A team of officers] roughly removed [Fazica] from the vehicle and immediately applied a spit hood over her head that nearly entirely obscured her vision . . . . They handled her forcefully and threatened her with a taser. The entirely male team took Fazica to a room in the jail where she was made to lie on her stomach and was strip searched. Her pants were physically torn off her; one officer placed his hands on her genitals and another groped her breasts. Fazica was then made to walk to a cell wearing only her bra and the spit hood. The spit hood had obscured her vision for much of the incident, largely preventing her from attributing specific acts to specific officers.120

The defendants moved for summary judgment, alleging that a juror could not find that each officer violated clearly established constitutional rights.121 The court was unpersuaded, and its decision in favor of the plaintiff promised a crisp rule: “[W]here a plaintiff who was unable to identify clearly which officers committed specific acts during the incident produces evidence that places an individual defendant in a small group of officers that committed allegedly unconstitutional acts within each other’s presence, the plaintiff’s claim against that defendant may survive summary judgment.”122

But a little over a year later, the same court clarified two constraints on Fazica.123 First, plaintiffs must raise a triable issue of fact over whether every defendant violated the constitution.124 So, if a plaintiff was hit by one police officer but three were on duty, the plaintiff still must allege that the other two officers either failed to intervene or were otherwise culpable.125 Second, there must be circumstances beyond the plaintiff’s control preventing the identification of the perpetrator.126 That makes sense in theory, but identification may be harder than it sounds. In that case, despite the fact a blow to the back of plaintiff’s head had knocked him unconscious, because he had a chance to briefly see his attacker before the strike summary judgment in favor of all three officers on the scene was appropriate.127 With the Third and Seventh Circuits adopting similar

120 Fazica v. Jordan, 926 F.3d 283, 284 (6th Cir. 2019).
121 Id. at 288.
122 Id. at 292; see also Smith v. Mensinger, 293 F.3d 641, 650 (3d Cir. 2002) (refusing summary judgment because defendant alleged that a mass of prison guards was beating him, which was a “classic factual dispute to be resolved by the fact finder”).
124 Id. at 483.
125 Id.
126 Id.
127 Id. at 494.
schema, it is unsurprising that both courts concede that plaintiffs in such situations should pursue other “avenue[s] for relief.” So it goes.

C. The Rare Trial

If a case does make it to trial, a plaintiff cannot rely on evidence that is in “equipoise” as to the identity of the tortfeasor. So if a jury can only flip a coin to determine liability, defendants can secure judgment as a matter of law by echoing the same arguments raised at the summary judgment stage. However, a court cannot usurp the jury’s ability to assess witness credibility and when a plaintiff has a piece of evidence that could implicate one John Doe over the other, the rare case may be able to reach the jury.

Naturally, this has not been an exhaustive list of every problem that will arise when a civil rights plaintiff faces a John Doe defendant. Still, this host of concerns signals that some doctrinal shift is necessary to prevent bad faith concealment efforts from providing an end run around section 1983 and Bivens.

III. OLD SOLUTIONS TO OLD PROBLEMS

Perhaps the biggest through line in constitutional tort cases with identification problems is the chorus of judges recognizing that the current patchwork is unjust, with one court colorfully noting: “We do not think that the children’s game of pin the tail on the donkey is a proper model for constitutional tort law.” Courts admit there is a problem—I will now appraise some of the proposed solutions.

128 Jutrowski v. Township of Riverdale, 904 F.3d 280, 293 (3d Cir. 2018); Colbert v. City of Chicago, 851 F.3d 649, 658 (7th Cir. 2017).
129 Pineda, 977 F.3d at 492.
130 See, e.g., Howell v. Cataldi, 464 F.2d 272, 283 (3d Cir. 1972) (rejecting alternative liability approach and granting directed verdict because “[a]t best, there was proof of wrongful conduct of one, identified only as one of two possible actors, without an explicit identification as to which of the two.”).
131 Burley v. Gagacki (Burley I), 729 F.3d 610, 621–22 (6th Cir. 2013) (reversing judgment as a matter of law because voice recognition testimony, even if novel, could allow jury to pinpoint the officer responsible for alleged excessive force); Abu-Joudeh v. Schneider, 954 F.3d 842, 851–52 (6th Cir. 2020) (reasoning that plaintiff’s description of involved officers’ hair colors could allow the jury to identify perpetrator).
132 Billman v. Ind. Dep’t of Corr., 56 F.3d 785, 789 (7th Cir. 1995); see also Hessel v. O’Hearn, 977 F.2d 299, 305 (7th Cir. 1992) (“The plaintiffs are in a bind. Each of the defendants can plausibly deny guilt.”); Pineda, 977 F.3d at 492 (“A plaintiff often may not know the culprit for reasons
A. The Conspiracy of Silence Approach

1. The Fundamentals of the Claim

One option is to allege a new constitutional violation altogether—an unlawful concealment of misconduct. At its heart, a section 1983 “conspiracy of silence” claim allows a plaintiff to show that a group of officials plotted to thwart a cause of action, effectively barring their ability to access the courts to seek vindication.\(^\text{133}\) Two circuit court decisions highlight both the appeal and limitations of this theory of liability.

In \textit{Colbert v. City of Chicago}, during a parole check a team of ten police officers handcuffed and sequestered the plaintiff while they “pulled out insulation, put holes in the walls, ripped [a] couch open to search its contents, and tracked dog feces throughout the house.”\(^\text{134}\) Due to the plaintiff’s restraints, he could not identify who broke what, and the named defendants all denied culpability.\(^\text{135}\) The Seventh Circuit was candid about these issues and offered a way out:

\begin{quote}
We recognize the potential tension between § 1983’s individual-responsibility requirement and factual scenarios of the kind present here: It may be problematic to require plaintiffs to specifically identify which officers caused property damage when officers commonly remove these individuals from the search area. . . . We have indicated, however, that plaintiffs in this context can still satisfy § 1983’s personal-responsibility requirement by including in their complaint allegations of misconduct that are unaffected at summary judgment by the inability to observe the search. For example, plaintiffs may allege that the named officers participated in something akin to a “conspiracy of silence among the officers” in which defendants refuse to disclose which of their number has injured the plaintiff.\(^\text{136}\)
\end{quote}

But there was no explanation as to how that claim would function in practice, and the court’s precedents do not crystallize matters. On the one hand, the Seventh Circuit has announced as a general principle that “efforts by state actors to impede an individual’s access to courts or administrative agencies may provide the basis for a constitutional claim outside the plaintiff’s control . . . .”\(^\text{133}\); \textit{Jutrowski v. Township of Riverdale}, 904 F.3d 280, 284–85 (3d Cir. 2018) (agreeing that the “proverbial ‘blue wall of silence’” can place plaintiffs in an “unfortunate situation” beyond their control).

\(^{133}\) \textit{Jutrowski}, 904 F.3d at 294.
\(^{135}\) \textit{Id. at} 657–58.
\(^{136}\) \textit{Id.}
under 42 U.S.C. § 1983. On the other hand, when that court first discussed the “conspiracy of silence” approach, it doubted that a claim would be viable. Moreover, the Seventh Circuit has applied a heightened pleading standard for conspiracy cases. In any event, none of this mattered for Colbert because the conspiracy was not a part of his complaint and so the court affirmed summary judgment.

In *Jutrowski v. Township of Riverdale*, however, the plaintiff did allege a conspiracy of silence in his complaint, giving the Third Circuit a chance to put some more meat on the bones of this theory. There, during an arrest one of four officers kicked the plaintiff while he was on the ground, caving in his eye socket and fracturing his nose. The plaintiff attempted to use discovery to identify the officer responsible for this clear excessive force, but something fishy was afoot. All dashboard camera footage was either missing or out of focus. The various police reports were contradictory. None of the officers admitted to seeing anything. And under the Third Circuit’s summary judgment standard, one kick could not bring three officers to trial. As a result, the action for the “undisputed constitutional violation” was dead in its tracks. But the conspiracy claim survived.

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137 Vasquez v. Hernandez, 60 F.3d 325, 328 (7th Cir. 1995).
138 Hessel v. O’Hearn, 977 F.2d 299, 305 (7th Cir. 1992) ("The controversial decision of *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944), held that the doctrine of res ipsa loquitur could be used to thwart a ‘conspiracy of silence’ of medical personnel . . . . Whether any such approach (so redolent of collective punishment) might have been used by the plaintiffs in this case we need not decide; they have not urged it."). See also Recent Case, Colbert v. City of Chicago, 851 F.3d 649 (7th Cir. 2017), rehe’g denied, No. 16-1362 (7th Cir. July 20, 2017), 117 HARV. L. REV. 1171, 1177–78 (2018) ("Hessel gives rise to the question of whether a court faced squarely with a conspiracy-of-silence claim based in facts similar to Colbert’s would have the same collective punishment concerns.").
139 In the context of a section 1983 conspiracy charge, the court of appeals noted that it had historically viewed those claims with greater suspicion: “Even before the Supreme Court’s new pleading rule . . . conspiracy allegations were often held to a higher standard than other allegations; mere suspicion that persons adverse to the plaintiff had joined a conspiracy against him or her was not enough.” Cooney v. Rossiter, 583 F.3d 967, 971 (7th Cir. 2009) (emphasis added).
140 Colbert, 851 F.3d at 657–58. The concurrence disagreed with dismissal, stressing that the plaintiff had noted in his second amended complaint that he expected the officers to deny responsibility, which should have been enough to plead a conspiracy. Id. at 662 (Hamilton, J., concurring).
141 904 F.3d 280, 293–94 (3d Cir. 2018).
142 Id. at 284.
143 Id. at 287.
144 Id. at 296–97.
145 Id. at 287. Despite claiming ignorance, the officers did not contest that the plaintiff was indeed kicked in the head. Id. at 286 n.5.
146 Id. at 292.
147 Id. at 284, 292–93.
As the court put it, “[a] conspiracy of silence among officers is actionable as a § 1983 conspiracy because the coordinated officer conduct impede[s] an individual’s access to courts and renders hollow a victim’s right to redress in a court of law.”\footnote{Id. at 295 (quoting Vasquez v. Hernandez, 60 F.3d 325, 328–29 (7th Cir. 1995) (internal quotation marks omitted). Though this Comment focuses on section 1983 conspiracies, a conspiracy to bar access to the courts may also be available under 42 U.S.C. § 1985, though that would require some “racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action.”
}

The claim preserves the traditional requirements of an agreement and an overt act in furtherance of the conspiracy, both of which can be inferred by circumstantial evidence.\footnote{Jutrowski, 904 F.3d at 295.}

In Jutrowski’s case, the irregularities in the stories, evidentiary holes, and evidence of deliberations between the officers following the beating provided sufficient evidence of an after-the-fact conspiracy to survive summary judgment.\footnote{Id. at 296–98.}

In the main, Colbert and Jutrowski direct plaintiffs facing a wall of silence to allege that the officials conspired to deprive them of their access to the courts. Yet instead of opening the courtroom doors, these types of claims may open a veritable Pandora’s Box. For starters, there are at least four candidates for the constitutional source of this right: The First Amendment,\footnote{See California Motor Transp. v. Trucking Unlimited, 404 U.S. 508, 513 (1972) (referring to the right of access to the courts as “part of the right of petition protected by the First Amendment”).
}

the Due Process Clause,\footnote{See Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1979) (“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.”).}

}

and the Privileges and Immunities Clause.\footnote{Though less frequently called upon, this argument carried the day in Chambers v. Baltimore & Ohio R.R.:
The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.
207 U.S. 142, 148 (1907).
}

Further, this penumbral right can be bifurcated into forward-looking claims and backward-looking claims.\footnote{Christopher v. Harbury, 536 U.S. 403, 412–415 (2002).}

Forward-looking actions usually seek some sort of injunctive
relief that will enable future litigation on the merits.\textsuperscript{156} Backward-looking actions, on the other hand, allege that on account of state interference a worthy case is either lost or settled for a mere pittance relative to its full value.\textsuperscript{157} This second variation—which parallels the \textit{Colbert/Jutrowski} model\textsuperscript{158}—was described as “unsettled” during the Supreme Court’s most recent foray into the doctrine.\textsuperscript{159} In the face of all this fuzziness, some courts are unconvinced that the right of access to courts is clearly established and have dismissed these cases on qualified immunity grounds.\textsuperscript{160}

2. Damages and Potential for Widespread Use

There is also the critical question, unanswered by \textit{Colbert} or \textit{Jutrowski}, of whether this amorphous right would even support meaningful damages. When police officers conspire to cover up a beating, does one get compensated for both their broken bones \textit{and} the damage caused by their inability to air grievances in federal court?\textsuperscript{161} I argue that precedent and justice counsel towards a two-pronged recovery.

As to compensation for the original constitutional violation, plaintiffs have a property interest in the expected judgment from the original suit,

\textsuperscript{156} These actions often arise in the prison litigation context, see \textit{id}. at 413, where a plaintiff argues that some official action such as barring access to a law library prevents a lawsuit from ever materializing. \textit{See also}, e.g., \textit{Bounds v. Smith}, 430 U.S. 817, 828 (1977) (holding that the constitutional right of access to the courts requires prisoners be provided with adequate law libraries).

\textsuperscript{157} \textit{Harbury}, 536 U.S. at 413–14.

\textsuperscript{158} In both cases, the courts agreed that summary judgment in favor of the officers on the underlying Fourth Amendment claims was appropriate. \textit{Colbert v. City of Chicago}, 851 F.3d 649, 657 (7th Cir. 2017); \textit{Jutrowski v. Township of Riverdale}, 904 F.3d 280, 293 (3d Cir. 2018). Thus, a conspiracy of silence claim would seemingly fill the void rather than resurrect the dismissed action.

\textsuperscript{159} \textit{Harbury}, 536 U.S. at 415.

\textsuperscript{160} \textit{See}, e.g., \textit{Lynch v. Barrett}, 703 F.3d 1153, 1162 (10th Cir. 2013) (“At least in the Tenth Circuit, the question of whether an evidentiary cover-up by police officials may violate an individual’s constitutional right to court access was not clearly established at the time of the alleged violation.”); \textit{Harrell v. Cook}, 169 F.3d 428, 432–33 (7th Cir. 1999) (holding that hampering access to courts through destruction of evidence was not a violation of a clearly established right).

\textsuperscript{161} \textit{See} Una A. Kim, \textit{Note}, \textit{Government Corruption and the Right of Access to Courts}, 103 MICH. L. REV. 554, 571 (2004) (“In the case of backward-looking access claims, in fact, the injuries suffered by victims are twofold: the injury inflicted by the underlying cause of harm and the injury caused by the ensuing cover-up.”).
which the conspirators have deprived them of without due process. The Second Circuit took that approach in finding that a government cover-up of secret mescaline injections amounted to an “[u]nconstitutional deprivation of a cause of action” that merited a damage award to make up for a meager prior settlement in the case. The Ninth Circuit adopted a similar view in Phillips v. Hust, where a plaintiff prisoner’s attempt to file a pro se petition for certiorari was stymied by a prison librarian who barred his access to office supplies, resulting in his petition getting rejected as untimely. In considering the damages that would be available for the quashed suit, the court opined that “one possible measure of the remedy for the loss of access is the remedy which would have been available on the lost claim.” Of course, the guessing game creates its own issues, as a court must wade into the merits for a claim that, by its very nature, is underdeveloped. But courts engage with such hypotheticals all the time—the loss of information due to a defendant’s foul play is no reason to deny meaningful compensation.

As to damages for the separate “access to courts” violation, the Supreme Court’s decision in Carey v. Piphus set off a line of cases suggesting that a freestanding remedy for due process violations is permissible, but likely to be slim: “[T]he denial of procedural due process should be

162 Bd. Regents v. Roth, 408 U.S. 564, 577 (1972) (noting that a due process property interest is triggered when a person has a “legitimate claim of entitlement” to a benefit); Barrett v. United States, 798 F.2d 565, 575 (2d Cir. 1986) ("Unconstitutional deprivation of a cause of action occurs when government officials thwart vindication of a claim by violating principles that enable civil claimants to assert their rights effectively.").

163 Id.

164 Phillips v. Hust, 477 F.3d 1070, 1073–74 (9th Cir. 2007), vacated sub nom. Hust v. Phillips, 555 U.S. 1150 (2009); cf. Vasquez v. Hernandez, 60 F.3d 325, 329 (7th Cir. 1995) (justifying lack of damage reward by noting that there are “no allegations” that “the value of [the] action has been reduced by the cover-up”).

165 Phillips, 477 F.3d at 1081. However, the plaintiff in the suit did not pursue compensatory damages for the underlying claim but rather sought his litigation costs, which the court deemed a proper measure of damages in such a case. Id. at 1081–82.

166 Christopher v. Harbury, 536 U.S. 403, 416 (2002) (describing the inherent risk in backwards-looking access claims, as there will be a “natural temptation on the part of plaintiffs to claim too much, by alleging more than might be shown in a full trial focused solely on the details of the predicate action.").

167 Barrett, 798 F.2d at 578 (estimating difference between value of underlying cause of action and unjust settlement figure). Making these guesses is justified because the “concealment at least in part precludes knowledge of the relief plaintiffs otherwise would have obtained.” Bell v. City of Milwaukee, 746 F.2d 1205, 1263 n.72 (1984). Thus, all that should be required is that “plaintiffs establish that the concealment was a substantial cause of their failure to obtain judicial relief.” Id.
actionable for nominal damages [only] without proof of actual injury."¹⁶⁸ Carey viewed the actual injury from a due process deprivation as the "mental suffering or emotional anguish" associated with the deprivation,¹⁶⁹ and these would certainly be in play with a conspiracy of silence. Despite this firm precedent, however, obtaining separate damages is not a given.¹⁷⁰

And the proper measure of damages aside, transplanting the "conspiracy to deprive of access to courts" theory into the Bivens realm may be an exercise in futility. Unlike section 1983, which reaches all constitutional rights, courts must build Bivens claims from the ground up, and the modern Court has adopted a "cautious course" in expanding the doctrine.¹⁷¹ In fact, after a trilogy of cases finding implied causes of action,¹⁷² the Court has declined to construct any new claims.¹⁷³ In Christopher v. Harbury, the Court even had the opportunity to rule on the propriety of a Bivens access-to-courts claim but dismissed the case on other grounds.¹⁷⁴ ¹⁷⁵

¹⁶⁸ Carey v. Piphus, 435 U.S. 247, 266 (1978); see also Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986) (recounting that the basic purpose of section 1983 is compensation for injuries caused by constitutional violations). In Carey, the potential recovery was capped at one dollar. Id. at 267.

¹⁶⁹ Id. at 264 n.20.

¹⁷⁰ Justice Souter noted in Harbury that the "the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial relief for some wrong." 536 U.S. at 414–15 (emphasis added). But even for egregious conspiracies by state officials, courts are not certain that compensation beyond the value of the original lawsuit is appropriate. Compare Bell v. City of Milwaukee, 746 F.2d 1205, 1265–66 (7th Cir. 1984) [applying Carey v. Piphus to grant plaintiffs damages for emotional distress stemming from cover-up of killing], with Vasquez v. Hernandez, 60 F.3d 325, 332–33 (7th Cir. 1995) (Crabb, C.J., dissenting) [criticizing lack of separate damage award for harm from delayed access to courts].


¹⁷³ Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009). See also Stephen I. Vladeck, The Disingenuous Demise and Death of Bivens, 2020 CATO S. CT. REV. 263, 283 (2021) (observing that the recent "evisceration of Bivens" confirms that there is no longer a remedy for every constitutional right).

¹⁷⁴ Christopher v. Harbury, 536 U.S. 403, 412 n.6 (2002).

¹⁷⁵ The Freedom of Information Act, 5 U.S.C. § 552, which would be a logical vehicle for challenging the suppression of information, does not provide much refuge either. For one, the statute only provides injunctive relief. See Cornucopia Inst. v. U.S. Dep’t of Agric., 560 F.3d 673, 675 n.1 (7th Cir. 2009). Further, the comprehensiveness of the statute "precludes the creation of a Bivens remedy." See Johnson v. Exec. Off. for U.S. Att’y.s, 310 F.3d 771, 777 (D.C. Cir. 2002). Perhaps the closet analog in these instances would be to pursue a state law spoliation claim via the FTCA. See infra notes 194–205 and accompanying text.
All of this is to say that the conspiracy of silence approach could create more problems than it solves for plaintiffs stuck in this morass. Perhaps by drawing out litigation, plaintiffs can boost their chance of obtaining a favorable settlement, but that is speculation. What is clear is that litigants should nonetheless assert this theory as soon as they suspect any concealment, and that aggressive discovery practice is necessary to excavate inconsistencies among internal reports, official testimony, and physical evidence. If it appears the defendants are burying the truth, then the conspiracy of silence approach may prove useful.

B. Burden Shifting

An alternative to the conspiracy of silence approach—one advocated for by Judge Hamilton in his concurrence in Colbert—is to shift the burden to defendants on the issue of personal responsibility for the alleged harm.\footnote{Colbert, 851 F.3d at 663 (Hamilton, J., concurring) ("There is at least one better approach in cases like this . . . . It would be to shift the burden of production to the defendants on the issue of individual responsibility.").} A burden shift in constitutional tort cases lessens a plaintiff’s onus by requiring the potentially responsible officials to come forward with some proof of their non-involvement to avoid liability.\footnote{Id. at 664.} This mechanism resembles the \textit{res ipso loquitur} approach discussed in Section I.B.4,\footnote{Colbert, 851 F.3d at 659 ("[S]ection 1983 claims and accompanying 'burden-shift' arguments like those we now confront all sound in \textit{res ipso loquitur} tort liability.").} although courts have opted for a burden of production instead of persuasion for constitutional cases.\footnote{Id. at 663 (Hamilton, J., concurring).} Burden shifting’s proponents argue that it may “prevent [the] scenario where police officers can hide behind a shield of anonymity and force plaintiffs to produce evidence that they cannot possibly acquire.”\footnote{Dubner v. City & Cty. of San Francisco, 266 F.3d 959, 966 (9th Cir. 2001).} And as a matter of principle, it is certainly attractive to litigate the principal tort in dispute instead of grafting it onto a conspiracy claim. Unfortunately, the approach is unpopular in the federal courts.

The Ninth Circuit—the only circuit where burden shifting is potentially alive—has used the approach for wrongful arrest claims by requiring arresting officers to provide evidence that they had probable cause for any
detainment. If the officer cannot meet this burden of production, a court presumes an arrest was unlawful. Unfortunately, the Ninth Circuit later confined this principle to the world of wrongful arrests.

The Sixth Circuit almost entertained the theory but quickly stomped out the embers. Burley v. Gagacki served as the focal point, and the facts of the case are animating:

According to plaintiffs, they were inside their home . . . when they heard a loud boom. When Geraldine Burley came upstairs from the basement, an officer put a gun to her face and said “[g]et on the floor.” She explained that she needed to ease herself to the floor because she had undergone two knee replacements. At that point, another officer appeared, ordered Geraldine to the floor, and shoved her into the table. She hit her head, shoulder, neck, and back against the table as she fell to the ground. Another officer walked on top of her body . . . . According to plaintiffs, the officers were dressed in black clothing with their faces covered except for their eyes, concealing their identities. When Geraldine asked for the officers’ names, one of the officers was about to write them down when another officer stopped him and said, “No, just put Team 11.”

Though a Freedom of Information Act request revealed the names of the officers who had executed the search warrant, that hardly simplified matters given that the masks still obscured who had assailed Geraldine. To boot, there had apparently been a contemporaneous raid at a nearby address, and multiple agents’ names were listed on both warrants. Naturally, when presented with these inconsistencies, the agents claimed they were at the raid that had not sprouted any litigation. Even if the disquieting allegations were true, this would be a hard case to win.

The Burley’s odyssey of litigation brought them twice before the Sixth Circuit, and both times they sought a way to present their claim without requiring the jury to engage in guesswork as to which of the cloaked officers did what. Though the Sixth Circuit had asked the district court to consider whether burden shifting would be appropriate the first time

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181 To illustrate, in Dubner a legal observer at a protest was arrested by an unknown officer. Id. at 961–64. The arrest report listed two officers’ names, but neither remembered arresting the plaintiff. Id.
182 Id. at 965.
183 Johnson v. Bay Area Rapid Transit Dist., 724 F.3d 1159, 1172–73 (9th Cir. 2013).
184 Burley I, 729 F.3d at 614 (alteration in original).
185 Id. at 614. Geraldine did, however, recognize one officer’s voice, which allowed the case to survive defendant’s motion for judgment as a matter of law. Id. at 621–22.
186 Id. at 615.
187 Id.
188 Id. at 622–23; Burley v. Gagacki (Burley II), 834 F.3d 606, 612 (6th Cir. 2016).
around, it later refused to adopt the framework, believing that shifting the burden as the Burleys had requested was too onerous. The court condemned the officers on paper, but felt that its hands were tied—to go any further “would stand § 1983/Bivens jurisprudence on its head.” Thus, the family walked away with nothing.

Without much guidance from the courts, then, it is hard to see this approach as better than the conspiracy of silence route. It is illustrative to reconsider the reasons that courts have rejected res ipsa loquitur, as discussed in Section I.B.4 above, because those would presumably restrain courts from beefing up their burden shifting frameworks (though I am hopeful that a novel causation-focused approach may avoid some of these pitfalls).

I will also add some criticism to the pile (albeit from the opposite side) and argue that shifting the burden of production is too lenient of an approach—defendants must bear a burden of persuasion to produce meaningful change. Just look to Batson v. Kentucky’s framework for challenging discriminatory peremptory strikes in jury selection, which requires the proponent of a strike to meet a burden of production by offering a facially neutral justification for removing the juror. This has been proven to be a low bar, to say the least. So low, in fact, that district attorneys’ offices put on trainings so that prosecutors can have canned non-discriminatory responses at the ready should a defendant allege discrimination. Without laying out what defendants should say to meet

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189 Burley I, 729 F.3d at 622–23.
189 Burley II, 834 F.3d at 615.
191 Id. at 615.
192 Id.
193 For instance, the Sixth Circuit in Burley II left open the option of a “lesser burden shift in different circumstances” including where “a defendant comes forward with no evidence at all of his nonparticipation.” 834 F.3d at 615 n.5; see also Ravenell, supra note 78, at 936–39 (proposing new rule of “causa per se” where possible tortfeasors must “com[e] forward with evidence that shows they did not inflict the injury and could not have prevented the injury from being inflicted.”).
195 Purkett v. Elem, 514 U.S. 765, 767–68 (1995) (per curiam) (confirming that Batson “does not demand an explanation that is persuasive, or even plausible”). Cf. Guidry v. Lumpkin, 2 F.4th 472, 485 (5th Cir. 2021) (finding that district court’s determination that NAACP membership is a race-neutral justification for a strike was not objectively unreasonable).
such a burden in section 1983 and Bivens cases, I have no doubts that officials could conform their practices to clear this hurdle. Therefore, it is not obvious that shifting the burden of production would level the playing field instead of just imbuing these cases with an air of legitimacy that makes it seem as if the problem has been solved.

C. Federal Tort Claims Act

I recognize that this Comment has gravitated towards section 1983 claims, but that is mostly because Bivens actions are a dying breed. Thus, even though I maintain that redress under state tort law does not cure a constitutional violation, that sentiment may need to be dialed back to account for the realities of the modern legal landscape. With that resignation, the Federal Tort Claims Act (“FTCA”)—which allows plaintiffs to sue the United States directly for its employee’s torts—becomes a more appealing “solution” to these identification issues.

The FTCA, by incorporating the substantive tort law of the state in which any malfeasance occurred, is less rigid than Bivens doctrine. For instance, res ipsa loquitur and respondeat superior stand on solid ground in FTCA suits, though their mileage may vary by jurisdiction. Indeed, “[a]ll FTCA liability is respondeat superior liability” because the defendant is technically the United States. Barring the applicability of some of the FTCA’s more prickly carve-outs like the discretionary function exception, the statute remains viable for obtaining relief against unidentified federal officers.

199 See Aseem Chipalkatti, A Backdoor Bivens Remedy: State Civil Rights Torts and the Federal Tort Claims Act, 23 U. PA. J. CONST. L. 1118, 1119 (arguing that plaintiffs can circumvent the “corpse of the Bivens doctrine” by relying on the Federal Tort Claims Act to bring suit against the United States “based on state law theories of tort that would otherwise be phrased in a Bivens action.”).
200 E.g., Smith v. United States, 860 F.3d 995, 996–97 (7th Cir. 2017) (finding that Illinois’ version of res ipsa granted a path towards recovery for plaintiff who fell off a broken stool in a federal courthouse).
201 See, e.g., L.B. v. United States, 8 F.4th 868, 870–71 (9th Cir. 2021) (analyzing Montana’s respondeat superior case law for a FTCA claim).
202 Johnson v. Sawyer, 47 F.3d 716, 730 (5th Cir. 1995).
203 The discretionary function exception, 28 U.S.C. § 2680(a), insulates the government from liability for actions that involve an element of “judgment or choice” and which are “based on considerations of public policy.” Berkovitz v. United States, 486 U.S. 531 536–37. Despite express grants of authority in the FTCA to target federal law enforcement, this exception has
The FTCA would not, however, allow a plaintiff to use one of these mechanisms to determine an officer’s identity, reach a final judgment in their FTCA suit, and then bring a subsequent Bivens claim against the uncloaked defendant. This is on account of the statute’s judgment bar, which precludes “any action by the [plaintiff], by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim” if a court entered judgment on the first suit. Therefore, there are likely no spillover benefits from bringing the FTCA claim.

And, to reiterate, the prospect of FTCA liability is perhaps less of a fix, and more of a consolation prize for the lack of a Bivens action. In Carlson v. Green, the Court was unequivocal on this point: “Plainly [the] FTCA is not a sufficient protector of [] citizens’ constitutional rights . . . .” In support, Justice Brennan gave four reasons: (1) plaintiffs lose the deterrent effects of recovery from individual officers; (2) plaintiffs cannot recover punitive damages; (3) the Seventh Amendment right to a jury trial does not attach to FTCA suits; and (4) plaintiffs are dependent on state law causes of action despite the FTCA being a wholly federal creature. On the bright side, indemnification makes the first justification illusory at this point, and in this context the primacy of state tort law is a boon, not a setback. Of course, litigants must be creative in fashioning a state tort law theory that tracks the underlying constitutional violation, but creative claims are better than no claims.


28 U.S.C. § 2676; see also Brownback v. King, 141 S. Ct. 740, 748 (2021) (analyzing judgment bar as a form of claim preclusion that applies to any judgment on the merits).

Carlson v. Green, 446 U.S. 14, 23 (1980).

Id. at 21–23.


For example, “[a] claim for unlawful search and seizure might instead transform into a claim of discrimination in a place of public accommodation, especially given increased reports of racial discrimination by federal law enforcement, those responsible for enforcing immigration laws.” Chipalkatti, supra note 199, at 1131.
D. A Grab Bag of Reforms

In the absence of some doctrinal panacea, it is worth recounting some general shifts that can make these cases either less common, or less severe. For one, as a prophylaxis citizens should be keen on exercising—and courts committed to honoring—the First Amendment right to record government activity.\footnote{See, e.g., Fields v. City of Philadelphia, 862 F.3d 353, 360 (3d Cir. 2017) (“In sum, under the First Amendment’s right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas.”).} As the Third Circuit has noted, bystander videos of police misconduct can be a boon for civil rights enforcement, by filling in the “gaps created when police choose not to record video or withhold their footage from the public.”\footnote{Id. at 359.} Because most civilians now walk around with quality cameras in their pocket, spontaneous recordings have the potential to lessen plaintiffs’ burdens when the misconduct occurs before the public eye.

When the identification problems do persist, courts can again follow the Third Circuit’s lead and allow complaints to “relate back” for statute of limitations purposes after a plaintiff amends their pleadings to include a John Doe’s true name.\footnote{See Singletary v. Pa. Dep’t of Corr., 266 F.3d 186, 202 n.5 (3d Cir. 2001); supra notes 100–06 and accompanying text.} This interpretation is well within the bounds of Rule 15, and most importantly, “[t]here seems to be no good reason to disadvantage plaintiffs . . . simply because, for example, they were not able to see the name tag of the offending state actor.”\footnote{Singletary, 266 F.3d at 202 n.5.} Alternatively, the Rules Advisory Committee can adopt a modest amendment to the rule that recognizes that a lack of information is a form of “mistake” for pleading purposes.\footnote{See id. (“[W]e encourage the Rules Advisory Committee to amend Rule 15(c)(3) so that it clearly embraces the . . . relation back of ‘John Doe’ complaints.”).}

Finally, a court presiding over a case involving John Doe defendants should feel inclined to take an active role in case management and be willing to get its hands dirty in discovery disputes. With the threat of sanctions looming over their heads, individual officers may be more inclined to ditch the “code of silence” in favor of, say, an ethic of transparency.
CONCLUSION

The notion that a group of officials can don hoods, break down someone’s door, and then escape liability due to their concealment efforts is unsettling. Yet, the crazy quilt that is section 1983 and *Bivens* jurisprudence may not just permit, but actually incentivize this type of covert state action.\(^\text{214}\)

The source of this scourge is the lack of a *respondeat superior* theory, but the current Court is not eager to overrule *Monell*. And as long as *respondeat superior* is foreclosed, it is worth considering the ways to turn the game of “pin the tail on the donkey” into a framework that will demolish the government’s ability to hide itself with apparent impunity.\(^\text{215}\) I admit that the breadth of the issue will necessitate a multi-pronged attack. Indeed, proposed solutions like allowing conspiracy of silence pleadings and burden shifting are hardly panaceas because even the plaintiffs that do unmask John Doe may still have to reckon with the usual blockades: Qualified immunity, statutes of limitations, the potential lack of a *Bivens* action, the unpredictability of trial, and so on. Still, losing battles have been won before,\(^\text{216}\) and one can only hope that there are some wins on the horizon.

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\(^{214}\) *See* Jutrowski v. Twp. of Riverdale, 904 F.3d 280, 293 (quoting Colbert v. City of Chicago, 851 F.3d 649, 657–58 (7th Cir. 2017)) (warning that officials could “effectively immunize” themselves from liability by preventing plaintiffs from observing their identities).

\(^{215}\) *Billman v. Ind. Dep’t of Corr.*, 56 F.3d 785, 789 (7th Cir. 1995).