

Statement of Rafael A. Mangual (June 9, 2022)

**Statement to the U.S. House Committee on the Judiciary Subcommittee on the Constitution,  
Civil Rights, and Civil Liberties**

Hearing on Examining Civil Rights Litigation Reform, Part 2: State and Local Government  
Employer Liability

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***Reiterating a More Limited View of the Role of Litigation in Police Behavior, and Proposing a  
More Modest Approach to Reform***

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### **About the Author**

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*\*\*The Manhattan Institute for Policy Research does not take institutional positions on federal, state, or local legislation, rules, or regulations. Although my comments draw upon my research and writing about criminal justice issues as an Institute fellow, my statement to the Subcommittee is solely my own, and should not be construed as my employer's.*

## Statement

I'd like to once again express my gratitude to the Subcommittee for extending to me the honor and privilege of delivering testimony as part of its continuing examination of civil rights litigation reform. I was also honored to have addressed this body during the first part of its examination back in March of this year;<sup>1</sup> and today, as I did then, I will focus my remarks specifically on police litigation.

During last March's hearing, I offered reasons to be skeptical of the idea that "qualified immunity essentially functions as an unpierceable shield against liability for police officers, such that officers internalize a sense of impunity that in turn leads them to misbehave in ways they otherwise wouldn't if they had more financial skin in the game."<sup>2</sup> To the extent that a proposal to move to a vicarious liability (or, *respondeat superior*) model reflects similar concerns about the incentive structure undergirding police behavior, I think it's worth briefly reiterating the three primary reasons why such skepticism is warranted:

- First, there exists in use-of-force situations a documented tendency on the part of officers to default to what researchers call an "intuitive" (as opposed to an analytical) approach to decision-making largely because the situations in which such decisions are generally made do not lend themselves to the type of analysis required for an officer to accurately assess his or her risk of personal liability in constitutional tort.<sup>3</sup>
- Second, empirical research and other available data show that qualified immunity functions as a bar to recovery in a very small share of cases (likely less than 4%) filed against police officers.<sup>4</sup>
- Third, as things stand now, nearly 100% of the dollars recovered against police defendants in civil rights lawsuits ("approximately 99.98%," according to one study<sup>5</sup>) are **already** paid by the taxpayers in their respective jurisdictions pursuant to indemnification practices rooted in statutory requirements or contractual obligations; and, despite this reality, a recent study found (with respect to use of force issues) "unequivocal proof that officers are not notified of the facts and holdings of cases that clearly establish the law for

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<sup>1</sup> See, Rafael A. Mangual, *Statement to the U.S. House Committee on the Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties: [Understanding the Limited Role of Qualified Immunity in Police Litigation and a More Modest Approach to Reform](#)* (March 31, 2022). I would like to incorporate this statement by reference into the record for this hearing.

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., Hine, et al., *Exploring Police Use of Force Decision-Making Processes and Impairments Using a Naturalistic Decision-Making Approach*, CRIMINAL JUSTICE AND BEHAVIOR (Aug. 2018); and Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, UNIV. OF CHICAGO L. REV. (2021) (stating that "there is no reason to believe that officers would analogize or distinguish situations rapidly unfolding before them to the court decisions they once studied.").

<sup>4</sup> See, Joanna C. Schwartz, *How Qualified Immunity Fails*, YALE LAW JOURNAL 127, no.1 (October 2017) (finding that "Qualified immunity was the reason for dismissal in just 3.9% of the cases in my data set in which the defense could be raised, and just 3.2% of all cases in my dataset."); see also, CAPstat, *NYC Federal Civil Rights Lawsuit Data, 2015 to June 2018*, Legal Aid Society (available at: <https://www.capstat.nyc>) (showing that just 74 of the database's nearly 2,400 civil rights cases filed against the NYPD in federal court were disposed of in favor of the police defendants).

<sup>5</sup> Joanna C. Schwartz, *Police Indemnification*, NEW YORK UNIVERSITY LAW REVIEW, Vol.89, No.3 (Jun.2014).

qualified immunity purposes,” and are instead “taught the general principles... and then are trained to apply those principles in the widely varying circumstances that come their way.”<sup>6</sup>

The question then is whether, and, if so, to what degree and by what mechanisms, would shifting to a *respondeat superior* model in civil rights cases involving police result in changes to police behavior that would significantly change police behavior in the aggregate. It seems to me that the answer is far from clear.

While this testimony assumes a sophisticated understanding of the underlying legal issues, a brief overview may provide some helpful context. As things stand now, municipalities are liable for civil rights violations committed by their employees in very limited circumstances. Under the doctrine articulated by the Supreme Court in *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), municipalities can be held liable as “persons” for civil rights deprivation claims brought under 42 U.S.C. § 1983 when the violation results from the implementation of an officially adopted policy, statement, ordinance, regulation, custom (including customs that have not received formal approval from the municipality), or other official decisions, including certain failures to train police officers for situations that will inevitably arise during the performance of their official duties. But such liability is limited, and, under current law, may not attach simply because the municipality employs a tortfeasor.

If, however, the primary concern animating proposals to shift liability for civil rights violations from state and local government employees to the governments themselves is to minimize the risk that plaintiffs whose rights have been violated will go without redress, then this sort of end-run around qualified immunity makes a bit more sense. That said, there are issues worthy of consideration. Among them is the risk of destabilizing the insurance market in ways that leave smaller municipalities unable to afford to insure themselves against the risk of excess liability. This is more than just a theoretical concern. In the 1980s, the municipal liability insurance market experienced destabilization, leading some municipalities to completely disband their police departments.<sup>7</sup> And there is already evidence<sup>8</sup> of more recent insurance market destabilization related to police litigation that really ought to place this risk among the primary considerations of this body as it considers related proposals.

A more moderate approach might be to, as I proposed during my testimony in March, legislatively reestablish the analytical sequence set out in *Saucier v. Katz*, 533 U.S. 194 (2001), and restrict municipal liability to only those cases in which a not-yet-established constitutional

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<sup>6</sup> See, Schwartz *supra* note 3.

<sup>7</sup> See, e.g., John Rappaport, [How Private Insurers Regulate Public Police](#), HARVARD L. REV., Vol. 130 No. 6 at 1555 (April 2017) (“[I]n early 1983...[r]einsurers began to fold... Police liability insurance, for practical purposes, had vanished. Governments panicked. A number of municipalities shut down their police forces entirely rather than operate without insurance.”).

<sup>8</sup> See, Kenneth S. Abraham, [Police Liability Insurance after Repeal of Qualified Immunity, and Before](#), SSRN (January, 28 2021) (predicting “that repeal of qualified immunity under Section 1983 would likely aggravate a market that is already in turmoil,” by making “coverage even less available,” and leaving municipalities with “less insurance for higher premiums.”).

right (or other federal civil right) is found to have been violated. This would provide several benefits, such as:

- Promoting the development of the law by restricting judicial avoidance;
- More quickly shrinking the scope of unestablished rights;
- Maintaining important, if limited, protections enjoyed by individual police officers engaged in incredibly difficult work;
- Minimizing the budgetary risks a broader vicarious liability approach might pose to small municipalities; and
- Ensuring that plaintiffs whose rights have indeed been violated are able to recover.

To minimize the risk of destabilizing insurance markets and leaving smaller municipalities unable to afford their own insurance policies in the lurch, an expansion of municipal liability should be coupled with an effort to optimize the regulatory environment with an eye toward allowing private insurers to operate across state lines in order to build larger risk pools, as well as facilitating the creation and expansion of intergovernmental risk pools. Any legislation on this front should also build in a significant grace period between passage and the effective date of the legislation to allow for the development of the infrastructure municipalities will need to have in place in order to effectively manage their risk.

I'd like to also take this opportunity to suggest that perhaps another thing this Subcommittee should consider is whether the oppositional tone of our public debate (and Congress's role in contributing to that tone) has contributed to the current police recruitment and retention crisis<sup>9</sup> that risks leading to a situation in which individuals are dissuaded from careers in policing, leaving departments to choose among lower-quality candidates who may actually be *more* likely<sup>10</sup> to engage in official misconduct due to either malice or ignorance. An example of this may be the well-documented phenomenon of "wandering cops"—officers who leave one department under a disciplinary cloud and are then hired by another. A recent report by my Manhattan Institute colleague Dorothy Moses Schulz suggests that the recruitment of high-quality officers will play a key role in addressing this phenomenon and recommends a federal effort to subsidize the improvement of the quality of our nation's police forces through hiring.<sup>11</sup> This would likely have the added benefit of helping to address the elevated crime rates plaguing far too many American cities (and their most vulnerable residents) over the last few years. All of this is to say that, to the extent the goal here is to reduce the risk of civil rights violations

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<sup>9</sup> See, [The Workforce Crisis, and What Police Agencies Are Doing About It](#), POLICE EXECUTIVE RESEARCH FORUM (September 2019); and [Survey on Police Workforce Trends](#), POLICE EXECUTIVE RESEARCH FORUM (June 11, 2021).

<sup>10</sup> A growing body of research suggests that higher educational attainment is associated with fewer infractions and lower rates of force. See, e.g., Eugene A. Paoline, William Terrill, and Michael T. Rossler, "Higher Education, College Degree Major, and Police Occupational Attitudes," *Journal of Criminal Justice Education* 26, no. 1 (2015): 49–73; Jason Rydberg and William Terrill, "The Effect of Higher Education on Police Behavior," *Police Quarterly* 13, no. 1 (March 2010): 91–120; Christopher Chapman, "Use of Force in Minority Communities Is Related to Police Education, Age, Experience, and Ethnicity," *Police Practice and Research* 13, no. 5 (2012): 421–36.

<sup>11</sup> Dorothy Moses Schulz, [Wandering Cops: How States can Keep Rogue Officers from Slipping Through the Cracks](#), MANHATTAN INSTITUTE FOR POLICY RESEARCH (March 2022).

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perpetrated by police officers, a more robust examination of police recruitment and retention trends may very well be in order.

With that, I would like to once again thank the Subcommittee for the opportunity to speak to these important issues, of which I hope this statement will contribute to a better understanding. I look forward to answering any questions raised by these points as best I can.

Thank you.

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