University of Chicago Law School
Chicago Unbound

Coase-Sandor Working Paper Series in Law and Economics

Coase-Sandor Institute for Law and Economics

2016

How Private Insurers Regulate Public Police

John Rappaport

Follow this and additional works at: http://chicagounbound.uchicago.edu/law_and_economics

Part of the Law Commons

Recommended Citation
"How Private Insurers Regulate Public Police" (Coase-Sandor Working Paper Series in Law and Economics No. 746, 2016).

This Working Paper is brought to you for free and open access by the Coase-Sandor Institute for Law and Economics at Chicago Unbound. It has been accepted for inclusion in Coase-Sandor Working Paper Series in Law and Economics by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

DRAFT

HOW PRIVATE INSURERS REGULATE PUBLIC POLICE

John Rappaport[*]

A string of deadly police-citizen encounters, made public on an unprecedented scale, has thrust American policing into the crucible of political conflict. New social movements have taken to the streets, while legislators have introduced a wide array of reform proposals. Optimism is elusive, though, as the police are notoriously difficult to change. One powerful policy lever, however, has been overlooked: police liability insurance. Based on primary sources new to legal literature and interviews with nearly thirty insurance industry representatives, civil rights litigators, municipal attorneys, and consultants, this Article shows how liability insurers are capable of effecting meaningful change within the agencies they insure—a majority of police agencies nationwide.

The Article is the first to describe and assess the contemporary market for liability insurance in the policing context; in particular, the effects of insurance on police behavior. While not ignoring the familiar (and potentially serious) problem of moral hazard, the Article focuses on the ways in which insurers perform a traditionally governmental "regulatory" role as they work to manage risk. Insurers get police agencies to adopt or amend written departmental policies on subjects like the use of force and strip searches, to change the way they train their officers, and even to fire problem officers, from the beat up to the chief. One implication of these findings is that the state might regulate the police by regulating insurers. In this spirit, the Article considers several unconventional legal reforms that could reduce police misconduct, including a mandate that all municipalities purchase insurance coverage, a ban on "first-dollar" (no-deductible) policies that may reduce municipal care, and a requirement that small municipalities pool their risks and resources before buying insurance on the commercial market. At bottom, the Article establishes that liability insurance has profound significance to any comprehensive program of police reform.

The Article also makes three important theoretical contributions to legal scholarship. First, it inverts the ordinary model of governance as public *regulation of* private *action, observing that here,* private *insurers regulate* public *police. Second, it illustrates how insurers not*

---

[*] Assistant Professor of Law, The University of Chicago Law School. For feedback on prior drafts, I am grateful to Ken Abraham, Will Baude, Omri Ben-Shahar, Justin Driver, Chuck Epp, Mark Iris, Adi Leibovitch, Jonathan Masur, Richard McAdams, Dan Richman, Joanna Schwartz, Chris Slobogin, and Lior Strahilevitz. For early-stage conversations, thanks to Daniel Abebe, Craig Futterman, Mike Klarman, Saul Levmore, Daryl Levinson, Shauhin Talesh, and Crystal Yang. Thanks as well to the participants in the Section on Insurance Law session at the 2016 AALS Annual Meeting. Scott Henney, Taylor Lopez, and Soo Park provided helpful research assistance.

Electronic copy available at: http://ssrn.com/abstract=2733783

only enforce the Constitution, but also construct its meaning. *Among other things, in the hands of insurers, liability for constitutional violations and other police misconduct becomes "loss" to the police agency, which must be "controlled." Perhaps surprisingly, by denaturing the law in this way and stripping it of its moral valence, insurers may actually advance the law's aims. Finally, the Article helps to pry open the black box of deterrence. In fact, given widespread indemnification of both individual* and *entity liability for constitutional torts committed by police, an understanding of how insurers manage police risk is essential to any persuasive theory of civil deterrence of police misconduct.*

INTRODUCTION

Ours is an era of populist police oversight. Footage from cell phones and police officers' body-worn cameras, amplified by both traditional and social media, has offered the American people an unprecedented, up-close look at the violence endemic to policing.[1] With each story that breaks of another unarmed citizen, usually black, dying at the hands of the law, the public is losing faith in law enforcement.[2] Thousands have taken to the streets in protest.[3] Activists have called upon every branch and level of government to intercede, and political leaders have begun to heed these calls.[4] Municipalities have paid millions in settlements.[5]

---

[1] *See, e.g.*, Eliott C. McLaughlin, *We're Not Seeing More Police Shootings, Just More News Coverage*, CNN (Apr. 21, 2015, 7:26 AM), http://www.cnn.com/2015/04/20/us/police-brutality-video-social-media-attitudes/; Nick Wing, *16 Numbers That Explain Why Police Reform Became an Even Bigger Story in 2015*, HUFFPOST POLITICS (Dec. 29, 2015), 8:00 AM), http://www.huffingtonpost.com/entry/police-reform-numbers-2015_us_5672e150e4b0688701dc7a54; *see also* Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. __ (forthcoming 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2571470.

[2] *See, e.g.*, Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP (June 19, 2015), http://www.gallup.com/poll/183704/confidence-police-lowest-years.aspx.

[3] *See, e.g.,* Lauren Gambino et al., *Thousands March To Protest Against Police Brutality in Major US Cities*, THE GUARDIAN (Dec. 14, 2014, 10:58 PM);

[4] *See, e.g.*, Nat'l Conference of State Legislatures, Law Enforcement Overview (May 29, 2015), http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx (reporting that state legislatures evaluated "hundreds of pieces of legislation that address policing issue during 2015 sessions").

[5] *See, e.g.*, Monica Davey, *Chicago Pays $5 Million Over Killing of Teenager*, N.Y. TIMES, Apr. 16, 2015, at A15 (reporting a $5 million settlement in the case of Laquan McDonald); Richard Fausset, *Settlement Reached in Shooting by Officer*, N.Y. TIMES, Oct. 9, 2015, at A24 (reporting $6.5 million settlement in death of Walter Scott); Sheryl Gay Stolberg, *Baltimore Announces $6.4 Million Settlement in the Death of Freddie Gray*, N.Y. TIMES, Sept. 9, 2015, at A20 (reporting $6.4

Electronic copy available at: http://ssrn.com/abstract=2733783

Prosecutors have finally begun to put police officers at the defendant's table.[6] Progress will be slow, we know, because the police are notoriously difficult to change.[7] All the more reason, one might think, to continue the frontal attack.

This Article is about something drier, more technical and obscure, and less democratic than all that, or so it may initially appear. But it's something that may be just as important to the mission of police reform: police liability insurance. Municipalities nationwide purchase insurance to indemnify themselves against liability for the acts of their law enforcement officers.[8] These insurance policies shield the government from financial responsibility, often including punitive damages, for common law and constitutional torts including assault and battery, excessive force, discrimination, false arrest, and false

---

million settlement for the death of Freddie Gray, which "[l]egal specialists said … was in line with settlements for recent racially charged police misconduct cases," including Eric Garner, whose estate settled for $5.9 million).

[6] *See, e.g.*, Ian Simpson, *Prosecution of U.S. Police for Killings Surges to Highest in Decade*, HUFFPOST POLITICS (Oct. 26, 2015, 9:21 AM), http://www.huffingtonpost.com/entry/prosecution-police-killings_us_562e26aee4b0ec0a3894eb23.

[7] *See, e.g.*, CMTY. RELATIONS SERV., U.S. DEP'T OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS (rev. 2003) ("The culture of a police department, once established, is difficult to change."); JEROME H. SKOLNICK & DAVID H. BAYLEY, THE NEW BLUE LINE 211 (1986) ("All organizations resist change, but one is hard put to think of any more resistant than the police."); SAMUEL WALKER & CAROL A. ARCHBOLD, THE NEW WORLD OF POLICE ACCOUNTABILITY 28 (2d ed. 2014) ("The challenge of sustaining [police] reforms is enormous."); Wesley G. Skogan, *Why Reforms Fail*, 18 POLICING & SOC'Y 27 (2008) ("Police reform is risky and hard, and efforts to innovate in policing often fall short of expectations."); Andrew E. Taslitz, *Trying Not To Be Like Sisyphus: Can Defense Counsel Overcome Pervasive Status Quo Bias in the Criminal Justice System?*, 45 TEX. TECH L. REV. 315, 360-61 (2012) ("There is an extensive literature on police officers' inability to change their enforcement methods despite evidence that their conduct leads to mistaken convictions."); Donovan X. Ramsey, *Police Reform Is Impossible in America*, JUSTICE (Feb. 3, 2015, 11:50 AM), http://justice.gawker.com/police-reform-is-impossible-in-america-1683262551 ("[A]s long as the public insists on its myth of black criminality—almost as an article of faith—police practices will be impossible to reform.").

[8] It appears, moreover, that municipalities are opting to insure an increasing proportion of their total liability risk, which presumably includes their law enforcement risk. *See* PUB. RISK MGMT. ASS'N & PUB. ENTITY RISK INST., 2005 COST OF RISK SURVEY 5-6 (2005) [hereinafter 2005 COST OF RISK SURVEY] (reporting that municipalities paid 57% of their total cost of risk toward insurance premiums in 2004, compared to only 33% in 1998); *see also id.* at 13 (reporting that liability premiums increased from 0.41% of the operating budget of state and local public entities in 1998 to 2.98% in 2004).

Electronic copy available at: http://ssrn.com/abstract=2733783

imprisonment.[9] Yet legal scholars know next to nothing about the effect of this insurance on police behavior—either its potential or its pitfalls. Indeed, legal scholarship has omitted insurers from even its richest models of policing.[10] This is a dangerous blind spot: "[I]t is unsound to discuss any objective that might be imputed to th[e tort] system"—such as reducing police misconduct—"without considering both the incidence of liability insurance and the relationship of that objective to liability insurance in its various forms."[11]

---

[9] *See, e.g.*, *Professional Liability*, APEX INS. SERVS., http://apexinsurance.com/professional-liability/ (last visited Aug. 31, 2015) (advertising coverage for "Intentional Acts," "Violation of Civil Rights," and "Assault and Battery"); Public Entity Solutions, Breckenridge Ins. Servs. (Apr. 28, 2015), http://www.breckgrp.com/wp-content/uploads/2015/04/Brokerage_PUBLIC-ENTITY_042814.pdf (listing "Civil Rights Violations/Discrimination" among available "enhancements"); "But, It Will Never Happen to Us, Right?", Travelers Ins. (2009), https://www.travelers.com/business-insurance/specialized-industries/public-sector/docs/59471.pdf (advertising coverage for "allegations of civil rights violations such as excessive force" and for punitive damages); *Police Professional*, GOV'TAL UNDERWRITERS, INC., http://www.pgui.com/View.aspx?page=coverage/police (last visited Aug. 31, 2015) (including punitive damages and "civil rights violations" among "Selected Policy Features"); Public Entity Insurance Program, Trident Ins. Servs. (Feb. 2015), https://www.argolimited.com/media/03C10U7X865H/docs/en_US/5d712b15651c2aa74d9f1c321efd22744d446ebd/YCX321Z60978/Trident_PE_Brochure_-_Web_2.4.15.pdf (advertising coverage for "Civil Rights Violations," "False Arrest," and "Canine/Equine Exposures").

[10] In a recent working paper, Joanna Schwartz observes that some municipalities carry liability insurance—and that the insurers that write these policies may create "an important and underappreciated litigation effect for law enforcement"—and concludes that "[f]urther research could better understand the ways in which these insurers function and the pressures they impose on law enforcement." Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform* 4, 37 (UCLA Sch. of Law Research Paper No. 15-23), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2635673 [hereinafter Schwartz, *How Governments Pay*]; *see also* Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. __ (listing insurers among potential "police reformers"); CHARLES R. EPP, MAKING RIGHTS REAL 115-37 (2009) (including insurance among a list of variables in a regression analysis to explain the degree of "legalized accountability" among police agencies).

[11] Gary T. Schwartz, *Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313, 364 (1990); *see also* Tom Baker & Peter Siegelman, *The Law and Economics of Liability Insurance: A Theoretical and Empirical Review*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 169, 169 (Jennifer Arlen ed., 2013) ("[L]ittle or nothing in tort law makes sense except in the light of liability insurance."); Randall R. Bovbjerg, *Liability and Liability Insurance: Chicken and Egg, Destructive Spiral, or Risk and Reaction?*, 72 TEX. L. REV. 1655, 1678 (1994) ("The presence of liability coverage alters the legal landscape more than most observers recognize.").

Insurance theory warns us first of moral hazard—the propensity of insurance to reduce the insured's incentive to prevent harm. So, for example, upon learning that the Republican Party had purchased a $10 million police liability policy for St. Paul before holding the Republican National Convention there in 2008, one activist fretted, "[n]ow the police have nothing to hold them back from egregious behavior."[12] Implicit in this thinking is an assumption—surprisingly complex but probably sustainable—that the threat of constitutional tort liability would, absent indemnification through insurance, deter police misconduct by making the police internalize the cost of any harms they cause.[13] Liability insurance dilutes, or even neutralizes, deterrence by transferring the risk of liability from the municipality to the insurer. Given the kinds of grave damage police misconduct can inflict, the possibility of underdeterrence is troubling.

But moral hazard is just the beginning. When the insurer assumes the risk of liability, it also develops a financial incentive to reduce that risk through loss prevention. By reducing risk, the insurer lowers its payouts under the liability policy and thus increases profits. An effective loss-prevention program can also help the insurer compete for business by offering lower premiums. In other words, an insurer writing police liability insurance may profit by reducing police misconduct. Its contractual relationship with the municipality gives it the means and influence necessary to do so—to "regulate" the municipality it insures. In fact, it may be better positioned than the government to reform police behavior.[14] Relative to government regulators, the insurer may possess superior information, such as data that cut across myriad police agencies; deeper and more nimble resources, including "boots on the ground" and the capacity to develop harm-prevention technologies; market incentives that favor good, but

---

[12] *Minn. GOP Convention Officials Bought Liability Coverage in First Time Deal*, INS. J., Sept. 5, 2008.

[13] *See, e.g.*, City of Riverside v. Rivera, 477 U.S. 561, 575 (1986) ("[T]he damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future"); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 240 (2013) (arguing that making "damages for constitutional violations routine" would "heighten the disincentives for government to engage in conduct that might result in constitutional violations").

[14] That insurers can outperform governmental regulators is the thesis of Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197 (2012); *see also* EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK 100 (1982) (contrasting government regulators' "rule oriented" factory inspections, which focus narrowly on mechanical and physical issues, with insurers' broader emphasis on the "attitude of management").

not overzealous, risk-management policies; and the flexibility to develop and prescribe individualized risk-reduction plans. If it uses the loss-prevention tools at its disposal, the insurer can therefore reintroduce, or possibly even enhance, constitutional tort law's deterrent effects.[15] In other words, far from creating moral hazard, police liability insurance may be a neglected backdoor route to police reform.

Through the lens of this theoretical framework, and based on trade literature and interviews with nearly thirty insurance industry representatives, civil rights litigators, municipal attorneys, consultants, and more, this Article describes and begins to assess the contemporary market for municipal liability insurance in the law enforcement context. While not ignoring moral hazard, I focus on the less familiar ways in which insurers can perform a traditionally governmental regulatory role, both by operationalizing behavioral norms the government espouses and imposing rules of their own devise. I also consider how the government can, in turn, regulate the insurers as a means to regulate the police.

In addition to its evident relevance to ongoing conversations about police reform, the Article makes three significant theoretical contributions that are woven throughout the Parts that follow. First, the Article inverts the ordinary model of governance as *public* regulation of *private* action. That insurance may be understood as "regulation" is a notion increasingly familiar to legal audiences.[16]

---

[15] *See* KENNETH S. ABRAHAM, THE LIABILITY CENTURY 228 (2008) (describing how "a version of tort law's deterrence function has slowly been incorporated into insurance"); Steven Shavell, *On Liability and Insurance*, 13 BELL J. ECON. 120 (1982) (providing theoretical proof that, under certain conditions, liability insurance is socially desirable). For a trenchant introduction of the competing risk-enhancing and risk-reducing effects of insurance, and the stakes of the inquiry, see TOM BAKER & SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT: HOW LIABILITY INSURANCE UNDERMINES SHAREHOLDER LITIGATION 1-3 (2010).

[16] There are countless scholarly assertions of this principle. For several examples drawn from a single volume of essays, see Tom Baker & Jonathan Simon, *Embracing Risk*, *in* EMBRACING RISK 1, 13 (Tom Baker & Jonathan Simon eds., 2002) ("[I]nsurance is one of the greatest sources of regulatory authority over private life."); Carol A. Heimer, *Insuring More, Ensuring Less: The Costs and Benefits of Private Regulation Through Insurance*, *in* EMBRACING RISK, *supra*, at 116, 119 (describing "insurance's role as one of the main regulatory institutions of contemporary societies"); Deborah Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity*, *in* EMBRACING RISK, *supra*, at 52, 62 ("Insurance is a form of what Foucauldian scholars call 'discipline,' that is, a system of inculcating norms, supervising behavior, and enforcing compliance with norms."). On the related concept of insurance as "governance," see RICHARD V. ERICSON ET AL., INSURANCE AS GOVERNANCE (2003); SUSAN STRANGE, THE RETREAT OF THE STATE 133-34 (1996) (describing insurers' increasing "authority" over the world's market and political

Insurers, we now know, enforce (or undermine) common law, statutory, and regulatory principles through their contractual relationships with the private actors they insure. A rich and growing literature investigates the tradeoff between moral hazard and loss prevention in such diverse fields as legal malpractice,[17] medical malpractice,[18] corporate governance,[19] employment practices,[20] motion pictures,[21] environmental hazards,[22] firearms,[23] and personal injury.[24] This Article is, however, the first to show how the phenomenon of regulation by insurance extends as well to *public* actors, whose behavior private insurers regulate according to *constitutional* and not just positive law.

Second, and closely related, the Article illustrates how, in the course of regulating, insurers not only *enforce* the Constitution, but also *construct its meaning*. This happens because the most salient standard of liability in this context asks whether the police have violated the

---

economies, defined as "the power to alter or modify the behaviour of others by using incentives and disincentives to affect the choice and range of options").

[17] George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 CONN. INS. L.J. 305 (1997); Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209 (1997).

[18] *E.g.*, Katherine Baicker & Amitabh Chandra, *The Effect of Malpractice Liability on the Delivery of Health Care*, 8 F. HEALTH ECON. & POL'Y, Art. 4 (2005); Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV. 393 (2005); Bernard Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988-2002*, 2 J. EMPIRICAL LEGAL STUD. 207 (2005); *see also* Richard L. Abbott et al., *Medical Professional Liability Insurance and Its Relation to Medical Error and Healthcare Risk Management for the Practicing Physician*, 140 AM. J. OPHTHALMOLOGY 1106 (2005).

[19] BAKER & GRIFFITH, *supra* note 15.

[20] *E.g.*, Francis J. Mootz III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1 (1997); Shauhin H. Talesh, *Legal Intermediaries: How Insurance Companies Construct the Meaning of Compliance with Anti-Discrimination Laws*, 37 LAW & POL'Y 209 (2015); Nancy H. Van der Veer, Note, *Employment Practices Liability Insurance: Are EPLI Policies a License To Discriminate? Or Are They a Necessary Reality Check for Employers?*, 12 CONN. INS. L.J. 173 (2005).

[21] Elizabeth O. Hubbart, *When Worlds Collide: The Intersection of Insurance and Motion Pictures*, 3 CONN. INS. L.J. 267 (1997); *see also* Edward Jay Epstein, *Nicole Kidman's Knee: Or, How the Insurance Business Runs Hollywood*, SLATE, May 23, 2005, http://www.slate.com/id/2119328.

[22] *E.g.*, Haitao Yin et al., *Risk-Based Pricing and Risk-Reducing Effort: Does the Private Insurance Market Reduce Environmental Accidents?*, 54 J.L. & ECON. 325 (2011).

[23] Tom Baker & Thomas O. Farrish, *Liability Insurance and the Regulation of Firearms*, *in* SUING THE GUN INDUSTRY 292 (Timothy D. Lytton ed., 2005).

[24] STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW 12-18 (1989).

Constitution.[25] This observation situates the Article within, and contributes to, two distinct literatures: First, the Article speaks to constitutional theory about "the Constitution outside the courts." The notion that elected officials and administrative agencies engage in constitutional construction is by now familiar.[26] These insightful accounts overlook, however, that private actors like insurance companies do so too. And they do so in ways that state actors typically do not—for example, insurers explicitly rank-order constitutional rights on consequentialist grounds. What is more, the discretion baked into substantive constitutional doctrine, coupled with qualified immunity, ensures that courts rarely overturn insurers' constitutional pronouncements.

The recognition that insurers construe the Constitution contributes, second, to legal and socio-legal work on how institutions and intermediaries mediate legal norms while translating them into workaday policies and protocols—how, in other words, "all this law filters into the nooks and crannies of social life."[27] Among other things,

---

[25] Federal civil rights claims predicated on constitutional violations are not subject to state-law immunities or damages caps that limit municipal exposure to state-law claims.

[26] On the role of legislatures, see, for example, THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE (Richard Bauman & Tsvi Kahana eds., 2006); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Keith E. Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119 (2010). On administrative agencies, see Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799 (2010); Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013); Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 B.U. L. REV. 519 (2015); *see also* BRUCE ACKERMAN, 1 WE THE PEOPLE: FOUNDATIONS (1991) (arguing that, in extraordinary moments, "the People" make constitutional law as well); Douglas G. Baird, *Blue Collar Constitutional Law*, 86 AM. BANKR. L.J. 3 (2012) (discussing how bankruptcy judges interpret the Constitution differently from Supreme Court Justices); Justin Driver, *Supremacies and the Southern Manifesto*, 92 TEXAS L. REV. 1053 (2014) (challenging the portrayal of judicial supremacy as a "power grab"); Ernest A. Young, *Constitutionalism Outside the Courts*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 843 (Mark Tushnet et al. eds., 2015) (reviewing theories on constitutionalism outside the courts).

[27] Jeb Barnes & Thomas F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 LAW & SOC'Y 493, 494 (2006); *see, e.g.*, EPP, *supra* note 10; Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992); Sharon Gilad, *Beyond Endogeneity: How Firms and Regulators Co-Construct the Meaning of Regulation*, 36 LAW & POL'Y 134 (2014); Ryken Grattet & Valerie Jenness, *The*

in the hands of insurers, liability for constitutional violations and other police misconduct becomes "loss" to the police agency, which must be "controlled."[28] Perhaps surprisingly, by denaturing the law in this way and stripping it of its moral valence, insurers may actually advance the law's aims. Insurers remove legal principles from the realm of moral and legal contestation and render them more palatable to police officers, who are not made to feel like they're doing something immoral by endeavoring to enforce the criminal law aggressively. The fight over police accountability is no longer a battle between good and evil, right and wrong, but simply reflects a desire to avoid the "loss" that occurs when (exogenously determined) legal rules are broken.

Finally, the Article helps pry open the "black box of deterrence."[29] In fact, given widespread indemnification of both individual *and* municipal liability for constitutional torts committed by police,[30] an understanding of how insurers manage police risk is essential to any persuasive theory of civil deterrence of police misconduct. What we see is that insurers transform vague, uncertain liability exposure into finely grained policies backed by differentiated premiums and the threat of coverage denial. *That* is a substantial part of how civil liability deters misconduct in insured jurisdictions.

The Article unfurls as follows. Part I begins by introducing some basic concepts from insurance theory—how insurance works, why municipalities buy it, and its potential effects on behavior through the polar forces of moral hazard and loss prevention. It previews, at a conceptual level, the kinds of tools insurers can use to manage liability

---

Reconstitution of Law in Local Settings: Agency Discretion, Ambiguity, and a Surplus of Law in the Policing of Hate Crime, 39 LAW & SOC'Y REV. 893 (2005); Talesh, *Rule-Intermediaries in Action: How State and Business Stakeholders Influence the Meaning of Consumer Rights in Regulatory Governance Arrangements*, 37 LAW & POL'Y 1 (2015).

[28] *Cf.* Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 10-12 (2005) (discussing how insurers transform law into rules of thumb that deemphasize individual fault and facilitate efficient resolution); Lauren B. Edelman et al., *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 LAW & SOC'Y REV. 497, 511 (1993) (finding that, in employers' internal systems for resolving discrimination complaints, "allegations of rights violations are often recast as typical managerial problems"); Talesh, *supra* note 20, at 211, 226-28 (arguing that "insurance field actors … recontextualize antidiscrimination laws around a nonlegal risk logic that dominates discourse concerning what constitutes discrimination").

[29] *See* Margo Schlanger, *Operationalizing Deterrence: Claims Management (in Hospitals, a Large Retailer, and Jails and Prisons)*, 2 J. TORT L. 1, 1 (2008).

[30] *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (finding that municipalities indemnify police officers over 99% of the time).

risk, focusing on loss prevention and underwriting. Part I then describes the tripartite market for police liability insurance, beginning with a brief history that tracks the market's trends and dislocations. An insurance crisis in the 1980s fostered the development of intergovernmental risk pools—quasi-governmental associations through which municipalities pool their risk—as an alternative to commercial coverage. These pools still thrive today. Municipalities that neither purchase commercial coverage nor join a pool—a group that includes the country's largest cities—opt instead to self-insure. This can mean anything from simply "going bare" to running a sophisticated in-house risk management program. Along the way, this Part introduces a cast that includes not only private insurance companies and risk pools, but also consultants, reinsurers, accreditors, and even credit rating agencies. Part I concludes by reviewing some key features of the most common forms on which police liability policies are written.

Part II is the Article's heart. Based on 29 interviews with individuals involved in, or who interact with, the police liability insurance industry, as well as trade literature, insurance applications, advertisements, and other primary sources, Part II describes in detail the measures that insurers take to prevent loss under the liability policies they write—that is, how insurers work to reduce police misconduct. Insurers' methods include education and policy guidance on topics ranging from the quotidian (*e.g.*, effecting an arrest) to the high-profile (*e.g.*, strip searches and "high-excitement risk like PIT maneuvers," vehicle pursuits in which the police force a fleeing car to lose control and stop).[31] Insurers also help municipalities train their officers. For example, leveraging economies of scale, insurers can provide expensive "virtual reality" training on driving and use-of-force simulators. And, as in the private-industry setting, insurance companies audit police practices, either themselves or by outsourcing to accreditation agencies. One insurer I interviewed even told of sending representatives incognito to visit bars frequented by police officers to listen and observe the local police culture.

The carrots and sticks that drive municipalities to cooperate in these loss-prevention initiatives are the availability and pricing of coverage, which both affect the public fisc directly and educate covered agencies about the likelihood they'll be hit with embarrassing and

---

[31] Travelers Ins., *The Search for the Best Strip Search Policy*, THE PUBLIC FORUM (June 2010), https://www.travelers.com/iwcm/Distribution/2010/06_June/7627/article-1.html; *Municipalities*, BERKSHIRE INS. GRP., https://www.berkshireinsurancegroup.com/municipalities (last visited Aug. 31, 2015).

politically problematic lawsuits. My evidence suggests, moreover, that insurers' incentives can affect the care with which police agencies function. In response to incentives insurers provide, police agencies adopt or amend departmental policies on important subjects like the use of force and firearms. They change the way they train their officers. And they even fire problem officers, from the beat all the way up to the chief. As in other, more familiar contexts, insurance can have activity-level effects as well, impacting not only the quality but also the quantity of policing. In extreme cases, municipalities have shut down their police forces after their insurers pulled coverage.

My principal objective is to show that insurance companies can and do shape police behavior or, at the least, influence policies, practices, and personnel decisions that are themselves proven or presumed to affect behavior. For this reason, it matters little that my sources—while diverse along several dimensions—are not necessarily a nationally representative sample. It may be, for example, that the insurers I interviewed are, by happenstance, unusually aggressive about managing police risk, and that most insurers take a more laissez faire approach. In that case, my findings suggest that we can improve police behavior by using the law to encourage the average insurer to regulate more closely. Similarly, I cannot, with available data, prove that insurers today are actually reducing police misconduct relative to self-insurance. My aim is more modest—to prove that their leverage over municipalities makes them capable of doing so. Given how difficult police reform is known to be, this alone changes the landscape.

Part III poses and provisionally answers some normative questions stemming from the system Part II describes. First, what exactly *can* we say about the present effect of insurance on the rate of police misconduct? Second, should we be worried that insurers may regulate the police too aggressively? Third, how does the presence of liability insurance interact with mechanisms of democratic accountability that are thought to constrain (or legitimize) police behavior? Writing in the early 1980s, Peter Schuck of Yale Law School questioned the desirability of widespread insurance for public malfeasance. "[I]nsurers that underwrite risks of liability for official misconduct," Schuck reasoned, "would presumably insist upon some influence over the agency policy and personnel decisions that affect the magnitude of those risks."[32] This would be, thought Schuck, "a private interference with public administration that would surely be politically and morally, even if not legally, objectionable."[33] I will demonstrate that insurers do in

[32] PETER H. SCHUCK, SUING GOVERNMENT 110 (1983).
[33] *Id.*

fact wield the sort of influence Schuck presumed they would demand. If his normative claim is sound, therefore, there is much to reconsider about our system. But is it sound? Fourth, how might the involvement of the insurance industry, a quintessential repeat player in litigation, affect the *content* of the law that regulates police? Finally, what role might there be for law to regulate police liability insurance in an effort to drive down police misconduct? In this last section, I consider several potential legal reforms, including a mandate that all municipalities obtain coverage, a ban on "first-dollar" (no-deductible) policies that may reduce municipal care, and a requirement that small municipalities pool their risks and resources before buying insurance on the commercial market.

Part IV concludes.

Now is an urgent time to consider these issues. Not only is the public more focused on policing than at any time in recent memory, but so too are insurers. The Rodney King assault in 1992, one expert told me, had "ripple effects" throughout the insurance industry.[34] Insurers reacted by making sure that police agencies had adequate policies and procedures on the use of force and closely related risks. After some time, however, attention waned as other sources of municipal liability captured insurers' focus. Today, in light of recent events, insurers find themselves "back in the soup."[35] Many now understand that the problems with police go "beyond policies and procedures"; in order to reduce police misconduct, insurers "need to find the root cause."[36] Their success could pay dividends to us all.

I. THE PROVISION OF POLICE LIABILITY INSURANCE

I begin, in Section A, with some basic insurance concepts and terminology, intended for the uninitiated. Sections B and C give a brisk

---

[34] Telephone Interview with Commercial Insurer F (July 24, 2015); *see also* Robert W. Esenberg, *Risk Management in the Public Sector*, RISK MGMT., Mar. 1992, at 72, 74 (stating that Rodney King "caused concerns in every jurisdiction over liability exposures").

[35] Telephone Interview with Commercial Insurer F, *supra* note 34.

[36] *Id.*; *accord* Telephone Interview with Commercial Broker B (July 22, 2015) (agreeing that underwriters have become deeply concerned with police liability since Ferguson); Zusha Elinson & Dan Frosch, *Cost of Police-Misconduct Cases Soars in Big U.S. Cities; Data Show Rising Payouts for Police-Misconduct Settlements and Court Judgments*, WALL ST. J., July 15, 2015 ("[I]nsurers and lawyers who defend police say current scrutiny of law enforcement is broadly affecting the resolution of lawsuits."); *see also* Roberto Ceniceros, *Scandals Can Influence Police Liability Coverage*, BUS. INS., June 5, 2000, at 4 (discussing the effect of police scandals on rates and coverage nationwide).

history and current overview, respectively, of the market for police liability insurance. Section C introduces the industry's cast of characters and highlights the pervasive influence of private actors, even in arrangements that, on the surface, appear to be purely public. Section C also discusses the considerations that inform a municipality's decision of how to insure, and with whom. Section D walks through the terms of a typical police liability policy.

My subject, to be clear, is county and local law enforcement, whose officers make up the vast majority of officers nationwide;[37] I use the terms "municipal" and "police" to embrace both the county and city level. Insurance for state and federal law enforcement is not within the Article's scope, but may be a fruitful subject of future research.[38]

My description draws largely from primary sources including insurance policies and applications, promotional and educational materials put out by insurers, trade literature, and twenty-nine interviews with members of the industry, typically high-ranking officials within their respective firms. My interview subjects were geographically diverse, including representatives of firms in every time zone and consultants who travel the country. And while each risk pool services members only within a single state, the commercial insurers—and especially the larger reinsurers—have policyholders all over. Some of my subjects requested anonymity, and I have decided for consistency's sake to refer to all of the interviews using only generic,

---

[37] *See* BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FEDERAL LAW ENFORCEMENT OFFICERS, 2008, at 1 (2012) (reporting 120,000 sworn federal officers in 2008); BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 tbl.1 (2011) (reporting roughly 644,000 county and local sworn officers in 2008).

[38] As in the local systems, it appears that the federal government is the real party in interest when federal officers are sued. It pays for officers' representation and reimburses them when they settle or pay judgments. *See* Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials' Individual Liability Under* Bivens, 88 GEO. L.J. 65, 65, 74-79 (1999). The federal government also pays half of any insurance premiums for individual professional liability policies that officers purchase. *See* Appropriations, 2000—Treasury, Postal Service, Executive Office of the President, and General Government, Pub. L. No. 106-58, § 642, 113 Stat. 430, 477 (1999); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 636, 110 Stat. 3009, 3009-363 to -364 (1996). That insurance provides for counsel if the government declines a representation request and indemnifies officers up to $2 million. Pillard, *supra*, at 78 n.62; *Federal Employee Professional Liability—Benefit Highlights*, WRIGHT USA, http://www.wrightusa.com/products/federal-employee-professional-liability/-/benefit-highlights/ (last visited Aug. 31, 2015).

non-identifying descriptors except where a subject did not request anonymity and his identity is clear (or knowable) from context.[39]

A. A Conceptual Overview of Liability Insurance

Insurance, for my purposes, is an arrangement in which one party, the *insurer*, agrees to reimburse the other party, the *insured*, for losses suffered upon the *occurrence* of certain events specified in an *insurance policy*.[40] In exchange, the insured pays a *premium* to the insurer that tends to approximate the insured's expected losses plus some margin for administrative costs and, typically, profits. *Liability insurance*, specifically, protects the insured in the event he is sued on a legal claim covered by the policy. This is a type of *third-party insurance*—the insured (the first party) purchases the policy from the insurer (the second party) for protection against the actions of the plaintiff (the third party), who alleges an injury caused by the insured. When the plaintiff

---

[39] The interviews were conducted by telephone and ranged from twenty minutes to over an hour in duration. They were semistructured, revolving around a basic set of common questions but also seizing on additional topics that interview subjects raised. In some instances I followed up with subjects by email or telephone to clarify or expand upon a point we had discussed; I did not count these contacts toward the total number of interviews reported in the text. I located the subjects of my interviews using a "snowball sampling" technique. *See, e.g.*, JOHN LOFLAND ET AL., ANALYZING SOCIAL SETTINGS: A GUIDE TO QUALITATIVE OBSERVATION AND ANALYSIS 41-43 (4th ed. 2006) (discussing "snowball" or "chain-referral" sampling: "a method for generating a field sample of individuals possessing the characteristics of interest by asking initial contacts if they could name a few individuals with similar characteristics who might agree to be interviewed"); *see also* Patrick Biernacki & Dan Waldorf, *Snowball Sampling: Problems and Techniques of Chain Referral Sampling*, 10 SOC. METHODS & RES. 141, 141 (1981) (describing the method as "widely used" and exploring some of its difficulties). I ceased interviewing new subjects when responses became repetitious.

[40] This overview is drawn from numerous sources, including KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION 463-681(5th ed. 2010); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 82 (5th ed. 1984); Ronen Avraham, *The Economics of Insurance Law—A Primer*, 19 CONN. INS. L.J. 29, 35-42 (2012); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1539-50 (1987); Gary T. Schwartz, *Insurance, Deterrence and Liability*, *in* PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 335 (Peter Newman ed., 1998). For a quick technical background, see ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 43-49 (6th ed. 2012). For more capacious and theoretical conceptions of "insurance," see Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653 (2013); Baker & Simon, *supra* note 16, at 7-10; Cohen, *supra* note 17, at 310-14.

sues the insured, the insurer has both a right and duty to defend the suit.

It is worth considering why the parties enter into these arrangements. In many situations, especially involving individual insureds, the insured is *risk averse*. This means that he dislikes uncertainty and is willing to pay to reduce it. Insurance allows him to do just this—he gets to pay, for example, a certain $1,000 insurance premium rather than face a 1% chance of suffering a $100,000 loss. Actually, he is willing to—and does—pay somewhat more than $1,000 because he benefits (given that he is risk averse) from transferring the risk to the insurer. The insurer is willing to take on the risk largely because it can pool the risk with many others (from other insureds), a form of *risk aggregation*. Risk aggregation exploits a mathematical theorem called the Law of Large Numbers, which states that increasing the size of a pool of uncorrelated risks will reduce variance—a measure of risk—and therefore reduce the risk for each member of the pool.[41] In addition to reducing risks by aggregating them, insurers can *diversify* their risks across multiple lines of business and profit by investing the premiums they collect. They can also access reinsurance markets that allow them to cede part or all of the risks they insure to reinsurers, whose risk portfolios are even larger and more diverse.

Some insureds, however, are thought to be *risk neutral* rather than risk averse. These include corporations and, importantly for present purposes, the government. The government is risk neutral, we assume, because it can spread its risks across a broad base of taxpayers and diversify them by owning a wide variety of investments.[42] Given the justification of insurance stated above, then—which was grounded in risk aversion—why would the government ever purchase insurance?

There are several reasons. First, the assumption of risk neutrality, even if generally valid for public entities, may prove false in some circumstances. For example, a municipality contemplating a loss large in size relative to its tax base—such as a small town facing a multi-million-dollar judgment or even a big city facing a truly catastrophic loss—may exhibit risk aversion.[43] Similarly, a city that would encounter substantial political barriers to reallocating the costs of harm

---

[41] Risks are uncorrelated, or statistically independent, "when the occurrence of one event does not alter the probability of the other." Priest, *supra* note 40, at 1540 n.98.

[42] *See* Paul K. Freeman, *Natural Hazard Risk and Privatization*, *in* BUILDING SAFER CITIES: THE FUTURE OF DISASTER RISK 33, 37 (Alcira Kreimer et al. eds., 2003).

[43] *Id.* at 38.

to the taxpayers may be a poor risk-bearer.[44] Second, agency costs may cause the government to behave as though it were risk averse. If the individuals who make the insurance-purchasing decisions are risk averse—perhaps because they've made substantial entity-specific investments in human capital—then the entity itself may appear risk averse as well.[45] Third, by translating large and uncertain liabilities into steady, relatively predictable premium payments, insurance helps stabilize the budget and avoid fluctuations in local taxes that might otherwise be necessary to satisfy substantial judgments.[46] And fourth, the government may value services the insurer bundles with the promise of indemnification, such as loss prevention.[47] Because the insurer is responsible for paying any losses its loss-prevention program fails to prevent, its advice is especially credible.[48] It is also economical, because the insurer acquires the information on which its loss-prevention initiatives are based as a natural incident to underwriting and claims evaluation.[49]

This last point raises another conceptual question, however: If insurers are in the business of insuring risk, why would they want to *reduce* risk in the first place? Again there are several explanations.[50] One relates to the point just made—because the insurer bears the risk of loss, once the insured has paid the premium, any loss prevented

---

[44] *Id.*

[45] *See* BAKER & GRIFFITH, *supra* note 15, at 72-76; Schwartz, *supra* note 11, at 322 n.40; *cf.* Jennifer H. Arlen, *Should Defendants' Wealth Matter?*, 21 J. LEGAL STUD. 413, 419-20 (1992); Li-Ming Han, *Managerial Compensation and Corporate Demand for Insurance*, 63 J. RISK & INS. 381 (1996).

[46] *See* THOMAS W. RYNARD, INSURANCE AND RISK MANAGEMENT FOR STATE AND LOCAL GOVERNMENTS § 1.01 (2009). Smoothing taxation may reduce the political costs of adverse judgments by reducing the salience of the judgments.

[47] *See* Ben-Shahar & Logue, *supra* note 14, at 205; Victor P. Goldberg, *The Devil Made Me Do It: The Corporate Purchase of Insurance*, 5 REV. L. & ECON. 541, 543-44 (2009); David Mayers & Clifford Smith, *On the Corporate Demand for Insurance*, 55 J. BUS. 281, 285-86, 288-89 (1982). For additional theories from the corporate literature that may apply to public entities, see Mayers & Smith, *supra*, at 286 (conflicts of interest between managers and owners due to divergent time horizons); Göran Skogh, *The Transaction Cost Theory of Insurance: Contracting Impediments and Costs*, 56 J. RISK & INS. 726 (1989) (transaction costs).

[48] *See* Cohen, *supra* note 17, at 343; Mayers & Smith, *supra* note 47, at 288.

[49] Schwartz, *supra* note 11, at 356.

[50] *See* Ben-Shahar & Logue, *supra* note 47, at 203-04 (listing several of the rationales that follow). For a theoretical proof that "investment in loss prevention can increase an insurer's potential to earn underwriting profits," see Harris Schlesinger & Emilio Venezian, *Insurance Markets with Loss-Prevention Activity: Profits, Market Structure, and Consumer Welfare*, 17 RAND J. ECON. 227, 237 (1986).

benefits the insurer. An insurer that can reduce risk efficiently, furthermore, can offer lower premiums and attract more business from competitors or from among the uninsured. It can also use risk-reduction programs to help find "good risk"—customers that are willing to adopt loss-control measures are more likely to be profitable customers whose behavior results in fewer losses. Good risk management may also improve an insurer's credit rating and its position in the reinsurance market.

Although liability insurance is commonplace today, it was not always so. At common law, in fact, liability insurance was thought to violate public policy.[51] The reason relates to what we today call *moral hazard*. Moral hazard is the propensity of insurance to reduce the insured's incentives to prevent harm.[52] In other words, moral hazard captures the concern that people will act less carefully when they (or the entities on behalf of which they act) are covered by insurance. Although the concept of moral hazard, as its name suggests, traces back to notions of morality[53]—in extreme cases, the insured may even purposefully cause a covered harm in order to collect under the policy—it need not entail any perniciousness on the part of the insured. It is a natural consequence of the incentives that the indemnification arrangement creates.

The insurer, in turn, has numerous devices for controlling moral hazard, which manifest in many of the most familiar features of the insurance relationship.[54] In this Article, I focus on two of these devices—loss prevention and underwriting—which themselves are capacious categories (the content of which I fill in below). These are two of the features of liability insurance that most plainly resemble "regulation."[55] Both are forms of ex ante intervention insurers deploy before a covered harm occurs and an insurance claim is filed. Insurers also make ex post interventions to manage loss—during claims

---

[51] *See* ABRAHAM, *supra* note 15, at 17.

[52] *See generally* KENNETH ARROW, ESSAYS IN THE THEORY OF RISK-BEARING (1971); Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996); Steven Shavell, *On Moral Hazard and Insurance*, 93 Q.J. ECON. 541 (1979). Technically, I refer here only to ex ante, not ex post, moral hazard. *See* Baker, *supra*, at 270.

[53] *See, e.g.*, Baker, *supra* note 52, at 250-52.

[54] *See, e.g.*, Baker & Farrish, *supra* note 23, at 293-98; Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1416-23 (2013); Ben-Shahar & Logue, *supra* note 14, at 205-16; Heimer, *supra* note 16, at 121-22. For a helpful table summarizing these devices, with citations to canonical literature, see Baker & Siegelman, *supra* note 11, at 178 tbl. 7.2.

[55] *See* Baker & Swedloff, *supra* note 54, at 1421-22.

management, for example—which can take on a regulatory cast as well.[56]

An insurer engages in *loss prevention* when it helps an insured identify and implement techniques for reducing the risk of loss. Insurers have access to large datasets that allow them to assess and price the effect of particular precautions on risk—questions like whether an antitheft device is a cost-effective way of reducing the risk of auto theft. Insurers convey this knowledge to their policyholders in various ways. They publish newsletters and other guidance; hold or subsidize training sessions; write and review model policies and protocols; perform on-site visits and risk audits; and implement what Omri Ben-Shahar and Kyle Logue have called "private safety codes"—codes of conduct with standards stricter than governmental regulation, managed and audited by third parties such as accreditation agencies.[57]

Underwriting is a process in which the insurer collects information about the applicant for insurance and decides whether to offer coverage, for what risks, under what terms, and at what cost. There are several ways underwriting can encourage less risky behavior by the insured. The insurer can deny coverage or cancel or refuse to renew an existing policy unless certain loss-prevention measures are adopted. It can charge higher premiums to riskier customers, as identified through either *experience rating*—based on loss history—or *feature rating*—based on the presence of traits correlated with riskiness.[58] These so-called *differentiated premiums* operate similarly to a Pigouvian tax.[59] And the insurer can require the insured to keep "skin in the game" by imposing a deductible, coinsurance obligation, or coverage cap that provides an incentive for careful behavior.[60]

B. The 1980s Insurance Crisis and the Rise of Intergovernmental Risk Pools

Commercial insurers have offered coverage for false arrest by the police since at least the 1960s.[61] The demand for coverage seems to

---

[56] *See generally* Schlanger, *supra* note 29.

[57] *See* Ben-Shahar & Logue, *supra* note 14, at 211-12; *see also* Davis, *supra* note 17, at 216-20 (describing how legal malpractice liability insurers create "new forms of restricted conduct").

[58] *See* KENNETH S. ABRAHAM, DISTRIBUTING RISK 46, 71-74 (1986).

[59] *See* HARVEY S. ROSEN & TED GAYER, PUBLIC FINANCE 82 (8th ed. 2008).

[60] For empirical evidence that deductibles help control moral hazard, see Jennifer L. Wang et al., *An Empirical Analysis of the Effects of Increasing Deductibles on Moral Hazard*, 75 J. RISK & INS. 551 (2008).

[61] Telephone Interview with Commercial Insurer A (July 20, 2015) (stating that the National Sheriffs' Association has run an insurance program since the 1960s);

have risen, as one would expect, with the amount of constitutional tort litigation, which ticked upward after *Monroe v. Pape*[62] in 1961 and continued to rise through the 1960s and '70s.[63] By 1976, one national study found, 65% of surveyed municipalities carried insurance to protect their employees; many of the insurance programs had not been operating long.[64]

In the mid-1970s, the supply of municipal liability insurance contracted. By one account, premiums doubled between 1974 and 1976.[65] Municipal managers began to worry about coverage stability; one police department reportedly shut down in 1976 after its insurer cut ties.[66] Relief was not forthcoming. Premiums continued to rise and, by late 1977, alarms sounded as many police agencies found themselves uninsured.[67] Then—and only then—did the law enforcement community begin to express "dismay about legal liability."[68] Yet around the same time, market conditions actually began to improve. Coverage expanded and prices dropped at record levels. This continued for about half a decade.[69] Then, in early 1983, new signs of trouble appeared. Reinsurers began to fold at a rate of one per month.[70] Before long, the

---

see Colson v. Lloyd's of London, 435 S.W.2d 42, 43, 45 (Mo. Ct. App. 1968) (discussing "False Arrest Insurance" in effect since at least 1964 and mentioning a "master policy issued to the National Sheriffs' Association").

[62] 365 U.S. 167 (1961) (holding state officials, including police officers, amenable to suit under 42 U.S.C. § 1983 even when they violate state law).

[63] EPP, *supra* note 10, at 71-72 (describing the rising number of police misconduct cases in the 1970s and early 1980s); Kevin Krajick, *The Liability Crisis: Who Will Insure the Police?*, POLICE, Mar. 1978, at 33, 33 (same for 1967 to 1971); Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 NW. U.L. REV. 277, 326 n.249 (1965) (reporting that, only two years after *Monroe*, Section 1983 litigation had grown by over sixty percent).

[64] CHARLES S. RHYNE ET AL., TORT LIABILITY AND IMMUNITY OF MUNICIPAL OFFICIALS 340-43 (1976).

[65] NAT'L LEAGUE OF CITIES, THE NEW WORLD OF MUNICIPAL LIABILITY 3 (1978).

[66] *See* EPP, *supra* note 10, at 95; Krajick, *supra* note 63, at 33.

[67] *See* EPP, *supra* note 10, at 95; Krajick, *supra* note 63, at 34; Robert F. Thomas, *Insurance for Police Agencies*, POLICE CHIEF, Jan. 1979, at 16, 16 ("November 1, 1977, was a day of reckoning for a substantial number of law enforcement agencies around the country which suddenly found themselves without police professional liability insurance coverage."); *see also* NAT'L LEAGUE OF CITIES, *supra* note 65, at 3 (reporting in April 1978 that municipal liability insurance was extremely expensive or even unavailable).

[68] EPP, *supra* note 10, at 95-96.

[69] Mark Ferraro, *Municipal Liability Insurance Crisis*, *in* NAT'L LEAGUE OF CITIES, MUNICIPAL LIABILITY AND RISK MANAGEMENT 1, 1 (1987); *see also* Gene C. Lai & Robert C. Witt, *Changed Insurer Expectations: An Insurance-Economics View of the Commercial Liability Crisis*, 10 J. INS. REG. 342, 343 (1992).

[70] Ferraro, *supra* note 69, at 2.

market spiraled downward. The resulting crisis affected many lines of liability insurance, but municipalities were some of the hardest hit.[71] 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.[72]

The causes of the crisis remain unclear.[73] It was popular at the time to blame the "epidemic" of constitutional tort litigation fueled by proliferating plaintiffs' attorneys and civil liberties groups.[74] Today, "[t]he academic literature has settled on the view that the mid 1980s liability insurance crisis was an extreme dip in the longstanding underwriting cycle in property casualty insurance, perhaps exacerbated by a mid 1980s change in taxation rules governing the reserves held by property casualty insurance companies."[75] The *underwriting cycle* "refers to the tendency of premiums and restrictions on coverage to rise and fall as insurers tighten their standards in response to the loss of

---

[71] *See* RYNARD, *supra* note 46, § 1.03 ("From 1983 to 1986, governments underwent a crisis in insurance availability."). For contemporaneous coverage of the crisis, see George J. Church, *Sorry, Your Policy Is Canceled*, TIME, Mar. 24, 1986, at 16; R. Bruce Dold, *Insurance Crisis Hits Cities*, CHI. TRIBUNE, Aug. 15, 1985; Meg Fletcher, *Public Entity Dilemma: Go Bare or Bust*, BUS. INS., July 8, 1985, at 1; Scott J. Higham, *Municipalities Have No Assurance of Getting Insurance*, MORNING CALL, Sept. 19, 1985; Special, *Liability Insurance: A Growing Crisis*, N.Y. TIMES, Feb. 20, 1986.

[72] *See, e.g.*, Church, *supra* note 71, at 17, 18.

[73] *See, e.g.*, Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399 (1987); Lai & Witt, *supra* note 69; Kyle D. Logue, *Toward a Tax-Based Explanation of the Liability Insurance Crisis*, 82 VA. L. REV. 895 (1996); Priest, *supra* note 40; Ralph A. Winter, *The Liability Crisis and the Dynamics of Competitive Insurance Markets*, 5 YALE J. REG. 455 (1988).

[74] *See* EPP, *supra* note 10, at 95-97. There were a remarkable number of changes during this period to the law of civil rights liability. Liability was expanded, *see, e.g.*, Smith v. Wade, 461 U.S. 30 (1983) (punitive damages available from individual defendants); Patsy v. Fla. Bd. of Regents, 457 U.S. 496 (1982) (exhaustion of state remedies not required); Maine v. Thiboutot, 448 U.S. 1 (1980) (liability available for violation of federal statutory law); Owen v. City of Independence, 445 U.S. 622 (1980) (no qualified immunity for municipalities); Monell v. Dep't of Soc. Servs. of the City of N.Y., 436 U.S. 658 (1978) (municipalities amenable to suit under Section 1983); Wood v. Strickland, 420 U.S. 308 (1975) (no qualified immunity if officer *should have known* state of the law); attorney fees became more readily available, *see* Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, § 2, 90 Stat. 2641, 2641 (codified at 42 U.S.C. § 1988); and avenues to non-pecuniary relief were closed, which may have funneled some additional plaintiffs into damages actions, *see, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976) (very narrow standing to seek injunctive relief against police practices); O'Shea v. Littleton, 414 U.S. 488 (1974) (same). For an overview covering these developments and more, see SCHUCK, *supra* note 32, at 47-51.

[75] Baker & Siegelman, *supra* note 11, at 187-88 (citations omitted).

capital"—called a "hard market"—"or, alternately, loosen their standards in order to maintain or grow market share when new capital enters the market"—a "soft market."[76]

The crisis proved temporary but caused lasting changes to the market for municipal liability insurance of all types. In the vacuum created by private industry's withdrawal, state legislatures authorized local governments to form *intergovernmental risk pools* ("pools"). The nature, structure, and regulation of these pools varies from state to state, but the basic idea is consistent: A pool is a nonprofit, mission-driven organization formed by a group of local government entities within one state to finance a risk, typically by pooling or sharing that risk.[77] The entities themselves own and govern the pool.[78] Technically, in most states, a pool is not an insurer, does not issue insurance policies, and is not regulated by the state insurance commissioner—at least not to the degree a commercial insurer is.[79] But the services a pool provides are virtually indistinguishable from insurance. Where an insurer issues an insurance policy to a policyholder in exchange for a premium, a pool writes a "coverage memorandum" to a "member" in

---

[76] BAKER & GRIFFITH, *supra* note 15, at 55.

[77] On the variation in legal structure of pools, see Jason E. Doucette, Note, *Wading in the Pool: Interlocal Cooperation in Municipal Insurance and the State Regulation of Public Entity Risk Sharing Pools—A Survey*, 8 CONN. INS. L.J. 533, 542 (2002). *Compare* R.I. Gen. Laws § 45-5-20.1(c) (corporation), *with* Mo. Rev. Stat. § 537.625 (association), *and* Alaska Stat. § 21.76.030 ("cooperative agreement"). On the regulatory requirements to which pools are subject, see RYNARD, *supra* note 46, § 31.03[2]-[4]; Michelle Baurkot, *Into the Pool*, BEST'S REV., Mar. 1998, at 43, 44-45; Ken Bush, *Captive Risk Pools for Public Entities*, RISK FINANCING (2003); Doucette, *supra*, at 543-62. It appears that, in some pools, members do not actually share risk but instead purchase insurance as a group. *See, e.g.*, Conn. Gen. Stat. § 7-479b(a); KAREN NIXON, PUB. AGENCY RISK SHARING AUTH. OF CAL., PUBLIC ENTITY POOLING—BUILT TO LAST 1 (2011), http://www.cajpa.org/documents/Public-Entity-Pooling-Built-to-Last.pdf. For a helpful general overview on pools, see Marcos Antonio Mendoza, *Reinsurance as Governance: Governmental Risk Management Pools as a Case Study in the Governance Role Played by Reinsurance Institutions*, 21 CONN. INS. L.J. 53, 55-63 (2014), or Peter C. Young, *Risk Pools*, *in* ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY 1065 (Jack Rabin ed., 2003).

[78] *See* Doucette, *supra* note 77, at 538-39. A few states have "state funds" rather than intergovernmental pools, which are organized differently. A state fund is established by statute; it preexists and is somewhat independent of the public entities that are its members. *See, e.g.*, Mo. Rev. Stat. § 537.700 et seq. (establishing the Missouri Public Entity Risk Management Fund). The directors may include state-level officials and gubernatorial appointees. *See, e.g.*, *id.* § 537.710. The differences between funds and pools appear to be immaterial for present purposes, however. *See generally* RYNARD, *supra* note 46, § 31.02.

[79] *See* Doucette, *supra* note 77, at 546, 549, 551, 556.

exchange for a "contribution."[80] Underwriting, loss prevention, and claims management look similar in the two contexts.[81] Putting formalities to one side, pools are essentially small mutual insurers.

At the outset, it was unclear whether pools would last or whether they were merely a stopgap until the market for private coverage recovered. Starting around 1987, the market did stabilize, and some commercial insurers began to offer coverage once again.[82] The pools survived—in fact, they proliferated. In 1991, one survey found, 44% of municipalities purchased police liability coverage from pools.[83] Roughly 500 pools operate today nationwide.[84]

C. The Present-Day Market for Police Liability Insurance

1. Commercial Insurance, Risk Pooling, and Self-Insurance

There are no comprehensive data on the breakdown, by type of provider, of the market for police liability insurance today. The answer seems to vary from state to state. In some states, the pools are strong and there is little or no competition from commercial carriers; the vast majority of municipalities get their coverage from pools.[85] In other states, the breakdown is more even. And in at least one state, Indiana, there are no pools that cover police liability risk.[86]

---

[80] *See* Bush, *supra* note 77. Pools may have developed this terminology deliberately to distinguish themselves from insurance companies. *See* NIXON, *supra* note 77, at 11.

[81] *Cf.* ROBERT E. KEETON, BASIC TEXT ON INSURANCE LAW §8.5, at 569 (1971) (observing that "the different types of insuring organizations have tended to become more alike both in formal structure and in practical performance").

[82] D. Michael Enfield, Managing Director, Marsh & McLennan, Inc., Remarks to the ABA National Institute on Municipal Liability (Oct. 30-31, 1987), *in* MUNICIPAL LIABILITY: THE SEARCH FOR THE DEEP POCKET 185, 187 (1987); *see also* Doucette, *supra* note 77, at 546-47 (describing additional "reemergence of private insurers into the municipal insurance markets" in the late 1990s).

[83] ICMA & WYATT CO., LAW ENFORCEMENT OFFICIALS LIABILITY INSURANCE: CURRENT STATUS—1991, at 5 (1991) [hereinafter ICMA Report].

[84] NIXON, *supra* note 77, at 3. Even so, one recent report maintains that it "may be too soon to determine" whether pools are here to stay. *Id.* at 14.

[85] *See, e.g.*, Telephone Interview with Risk Pool A (July 9, 2015) (reporting little commercial participation in primary insurance market); Telephone Interview with Risk Pool B (June 29, 2015) (same); *see also* Alfred G. Haggerty, *California City Launches New Carrier*, NAT'L UNDERWRITER, Nov. 15, 1993 (reporting that about 85% of California cities belonged to pools).

[86] *See* Doucette, *supra* note 77, at 559-61. Although Doucette wrote over a decade ago, several of the experts I interviewed confirmed that Indiana still has no pool that covers police liability risk. Telephone Interview with Commercial Insurer

Still, despite this national variation, certain patterns emerge. (Even these generalities, however, are tentative, and the data sometimes conflict.) In many states, small municipalities—under, say, 100,000 people—tend to join pools.[87] Medium-sized entities are divided, with the majority—some estimate 70%—in pools and the rest insured by commercial carriers.[88] The pooling figure is higher for cities than for counties.[89] And the largest municipalities—the big cities and counties, with over 500,000 or 750,000 residents—*self-insure*.[90] In its ideal form, self-insurance is not the same as simply "going bare." Self-insurance involves setting aside an amount of money, calculated much like a premium, sufficient to cover future potential losses, and engaging in proactive risk management just like insurers encourage their policyholders to do.[91] (Indeed, many sophisticated pools are actually self-insured cooperatives even though, in operation, they look much like commercial insurers.) Some self-insured municipalities, however, engage in little risk management and finance liability obligations on a

---

A, *supra* note 61; Telephone Interview with Commercial Insurer B (Aug. 21, 2014); Telephone Interview with Consultant A (Aug. 27, 2014).

[87] *See* Judy Greenwald, *Pros and Cons Seen in Municipal Pools; Some Risk Managers Prefer To Control Own Destiny*, BUS. INS., May 16, 1994, at 6; Telephone Interview with Commercial Broker A (June 23, 2015) (asserting that pools comprise predominantly towns under 100,000); Young, *supra* note 77, at 1068 (asserting that 94% of pool participants are under 10,000 in population, and the rest are under 100,000). *But see* Schwartz, *How Governments Pay*, *supra* note 10, at 13 (asserting that municipalities under 100,000 are covered by pools *or* commercial insurers); Public Entity Insurance Program, *supra* note 9 (marketing commercial covearge exclusively to towns under 100,000).

[88] Telephone Interview with Commercial Insurer D (Oct. 9, 2014) (estimating that municipalities below 750,000 insure 70% in pools, 10% with commercial carriers, and 20% with commercial coverage purchased through a trade association program). *But see* Telephone Interview with Consultant A, *supra* note 86 (responding that 70% estimate is too high); *see also* SYDNEY CRESSWELL & MICHAEL LANDON-MURRAY, TAKING MUNICIPALITIES TO COURT 3 (2013) (reporting that, as of 2013, roughly 40% of New York municipalities were members of statewide pool).

[89] Telephone Interview with Trade Association A (Sept. 15, 2014).

[90] Telephone Interview with Commercial Insurer D, *supra* note 88 (estimating that municipalities over 750,000 typically self-insure); Telephone Interview with Commercial Broker A, *supra* note 87 (over 500,000). *But see* Schwartz, *How*, *supra* note 10, at 13 (over 100,000 self-insure). *See generally* ICMA Report, *supra* note 83, at 13 (providing data showing proportion of public entities of various sizes that purchased police liability insurance in 1991, and concluding that "[t]he larger the public entity, the more likely it is self insured"); Louis P. Vitullo & Scott J. Peters, *Intergovernmental Cooperation and the Municipal Insurance Crisis*, 30 DEPAUL L. REV. 325, 336 (1981) (explaining why self-insurance is practical for only the largest entities).

[91] *See* RYNARD, *supra* note 46, § 31.04.

pay-as-you-go basis. For present purposes, I refer to all municipalities that decline to purchase primary coverage on the market (i.e., from either a commercial carrier or a pool) as self-insured, but when contrasting market insurance with self-insurance, it is worth bearing in mind that self-insurance encompasses a range of philosophies toward managing risk.[92]

Numerous factors inform a municipality's choice of how to insure. Running through some of them briefly here serves two purposes. First, my basic argument—that insurers can effect change within police agencies—depends on establishing that municipalities respond to insurers' incentives. This becomes more plausible with the recognition that municipalities have preferences, sometimes strong ones, about their choice of insurance mechanism. When an insurer threatens to terminate coverage, or gestures in that direction, municipalities often bend to preserve their preferred arrangement. Second, and relatedly, flagging the perceived strengths and weaknesses of the various insurance mechanisms identifies correlative advantages and disadvantages of potential legal interventions in the marketplace. For example, if many municipalities favor self-insurance because of the greater autonomy it affords, then policymakers can expect objections to a market-insurance mandate on autonomy grounds.

Prior scholarship has explored the choice set consumers confront in other insurance market contexts.[93] In order to tailor the discussion to our context, I rely here largely on the views of the industry experts with whom I spoke, supplemented with citation to trade and academic literature.[94]

Pricing. The experts I interviewed agreed that municipalities, like most consumers, consider pricing when deciding how to insure. One even suggested that price can be a municipality's primary or sole

---

[92] Steven Waldman et al., *The Surge in Self-Insurance*, NEWSWEEK, Mar. 7, 1988, at 74 (describing good and bad forms of self-insurance); *see also* Telephone Interview with Commercial Insurer E (July 23, 2015) (opining that some self-insureds have good risk management and adequate capitalization, but others do not).

[93] *See, e.g.*, Cohen, *supra* note 17, at 314-45 (comparing self-insurance, contract insurance, and market insurance); Isaac Ehrlich & Gary S. Becker, *Market Insurance, Self-Insurance, and Self-Protection*, 80 J. POL. ECON. 623 (1972); Henry Hansmann, *The Organization of Insurance Companies: Mutual Versus Stock*, 1 J.L. ECON. & ORG. 125 (1985).

[94] For an overview of the tradeoffs a municipality faces when choosing between a pool and commercial insurance, including some points not mentioned here, see Thomas W. Rynard, *The Local Government as Insured or Insurer: Some New Risk Management Alternatives*, 20 URB. LAW. 103, 148-52 (1988).

consideration.[95] Under frequently prevailing market conditions, pools can offer lower prices because they skim no profit from the contributions they collect.[96] The spread between a pool contribution and a commercial carrier's premium might be 10 to 20%.[97] Others observed, however, that municipalities sometimes leave pools after being enticed by commercial carriers' lower prices;[98] this is especially likely during a soft market, when commercial carriers compete heavily to get their hands on premium dollars. Pools' prices are more provisional, too; a pool that fails to collect sufficient contributions to cover losses may require a special, retroactive contribution, which commercial carriers will not do.[99]

It is tempting to assume that self-insurance is less expensive than market coverage, but this is not necessarily the case. "Even if the premium charged to each member of [a market insurance] pool is slightly greater than the true expected loss, it is still less than the cost of self-insurance, because self-insurance necessarily requires taking into account a greater range of possible outcomes."[100] Market insurance also creates certain cost-saving economies of scale.

Specialization. Pools, I was frequently told, are more specialized and more familiar with municipalities and policing risk than commercial carriers are.[101] Some pools have policing specialists on

---

[95] *E.g.*, Telephone Interview with Commercial Insurer F, *supra* note 34; Telephone Interview with Consultant B (Aug. 16, 2014); *see also* 2005 COST OF RISK SURVEY, *supra* note 8, at 7 (reporting that "seeking competitive insurance through insurance carriers or pooling arrangements" was the most common measure used to reduce the cost of risk in a national survey). State tax law may affect the after-tax prices of the different insurance options. Telephone Interview with Trade Association A, *supra* note 89.

[96] *E.g.*, Telephone Interview with Commercial Insurer F, *supra* note 34; *see also* Roberto Ceniceros, *Market Conditions Putting Squeeze on Public Entities*, BUS. INS., June 11, 2001, at 10 (describing municipalities that join pools to escape rising commercial rates); Meg Fletcher, *Public Entities Plunge into Self-Insurance Pools*, BUS. INS., July 15, 1985, at 3, 25.

[97] Young, *supra* note 77, at 1069.

[98] Telephone Interview with Consultant A, *supra* note 86.

[99] *Id.*; *see* Rynard, *supra* note 94, at 127 (explaining why, "over the long run, the local government may not realize any cost savings by risk pooling").

[100] Priest, *supra* note 40, at 1543; *see also* SYDNEY CRESSWELL & MICHAEL LANDON-MURRAY, ASSESSING THE FISCAL IMPACT OF LAWSUITS ON NEW YORK STATE MUNICIPALITIES 4-5 (2011) (discussing expenses incurred by self-insured municipalities).

[101] Telephone Interview with Commercial Insurer G (Sept. 9, 2014); Telephone Interview with Commercial Insurer H (Aug. 27, 2014) (does not focus loss prevention on operational details of policing, but rather general risk-management principles); Telephone Interview with Risk Pool C (July 6, 2015).

staff, who are typically former officers.[102] But so do some commercial carriers, especially those that market themselves as public-entity experts.[103] So while the average pool may be more specialized than the average commercial carrier, there is expertise to be found in both segments of the market.

Relationships. Many pools, experts told me, function like an extension of the municipalities that make them up.[104] Member municipalities regard the pool as their business partner and resource rather than an authoritarian figure telling them "thou shalt not do this."[105] Pools are reputedly less likely to settle litigation against the police, which is viewed as a sign of loyalty and commitment to their members.[106] And unlike commercial insurers, which come and go from the market as they ride the insurance cycle, pools are there "through thick and thin."[107] Pools also foster collective efficacy and responsibility among their members—high-performing members can communicate with and encourage troubled municipalities to take loss-prevention more seriously.[108]

---

[102] *See, e.g.*, Telephone Interview with Risk Pool A, *supra* note 85; Telephone Interview with Risk Pool B, *supra* note 85; Telephone Interview with Risk Pool C, *supra* note 101.

[103] *See, e.g.*, Telephone Interview with Commercial Insurer A, *supra* note 61; Telephone Interview with Commercial Insurer G, *supra* note 101; Telephone Interview with Commercial Broker A, *supra* note 87; *see* Doucette, *supra* note 77, at 547.

[104] *See, e.g.*, Telephone Interview with Trade Association A, *supra* note 89; NIXON, *supra* note 77, at 15 ("One of the fundamental advantages of pools is that they know their members.").

[105] Telephone Interview with Risk Pool D (Sept. 2, 2014).

[106] *See, e.g.*, Telephone Interview with Risk Pool D, *supra* note 105. Ronen Avraham identifies the insurer's motivation to settle claims the insured would want to litigate as a type of "reverse moral hazard." Avraham, *supra* note 40, at 90; *see* Patricia M. Danzon, *Liability and Liability Insurance for Medical Malpractice*, 4 J. HEALTH ECON. 309, 319-20 (1985).

[107] Telephone Interview with Commercial Insurer F, *supra* note 34; *see* Kenneth S. Abraham, *The Rise and Fall of Commercial Liability Insurance*, 87 VA. L. REV. 85, 101-03 (2001) (describing how the insurance crisis turned "[w]hat was once a cooperative relationship" between commercial insurers and their policyholders "into an adversarial one").

[108] Telephone Interview with Consultant B, *supra* note 95; *see also* Telephone Interview with Risk Pool D, *supra* note 105 (acknowledging this dynamic but characterizing it as rare); Greenwald, *supra* note 87, at 6; Waldman et al., *supra* note 92 ("[P]eer pressure is a powerful goad to efficiency."); *cf.* Cohen, *supra* note 17, at 340 ("Mutuals trade off the costs of reduced diversification [relative to stock insurers] against the benefits of improved loss prevention. Mutuals can … enhance compliance with loss prevention measures by having their members monitor each other." (footnote omitted)); Hansmann, *supra* note 93, at 148 (similar).

One expert suggested that, precisely because they are an extension of local government entities, pools also may be more effective than commercial carriers at lobbying state government on their members' behalf.[109] Commercial carriers can compete along this dimension, however, by contracting with local agents familiar with hometown politics. In fact, one expert speculated that some towns may choose commercial insurance for patronage purposes, in order to support local industry.[110]

Loss-prevention services. Consistent with the previous point, pools are often said to work more closely with municipalities to implement proactive loss-prevention programs.[111] Pools allow smaller municipalities to coordinate and leverage economies of scale to purchase loss-prevention services they otherwise could not afford.[112] They may also help to overcome free-rider problems and other economic disincentives to the development of new loss-prevention strategies by municipalities and commercial insurers.[113] One expert told me that pools spend more of every dollar on loss prevention: 2-4 cents versus commercial carriers' 0.75-1.[114] Still, I was reminded several times that the quality of pools, and their loss-prevention services, varies widely.[115] And "[d]ue to budget constraints, pools may not be aware of some of the more robust risk management database systems available that include options such as predictive modeling and warehousing."[116]

---

[109] Telephone Interview with Commercial Insurer G, *supra* note 93.

[110] Telephone Interview with Commercial Insurer A, *supra* note 61; Telephone Interview with Risk Pool C, *supra* note 101.

[111] *See, e.g.*, Telephone Interview with Commercial Insurer G, *supra* note 101; Telephone Interview with Commercial Insurer I (Apr. 18, 2014); Telephone Interview with Risk Pool C, *supra* note 101; Telephone Interview with Risk Pool E (Sept. 2, 2014); Telephone Interview with Consultant A, *supra* note 86; *cf.* CAROL A. HEIMER, REACTIVE RISK AND RATIONAL ACTION 50-51, 61-66 (1985) (describing how, historically, mutual fire insurance companies emphasized loss prevention, while stock (commercial) insurers emphasized loss-spreading instead); Hansmann, *supra* note 93, at 147-48 (arguing that conflicts of interest and free-rider problems disadvantage stock insurers relative to mutuals in researching and implementing loss-prevention measures).

[112] Telephone Interview with Commercial Insurer F, *supra* note 34; *see* CAROL A. ARCHBOLD, POLICE ACCOUNTABILITY, RISK MANAGEMENT, AND LEGAL ADVISING 51 (2004) (describing how insurance agents and risk assessors can provide risk-management services to smaller municipalities that cannot finance a dedicated risk manager); Esenberg, *supra* note 34, at 74 (similar).

[113] *See* HEIMER, *supra* note 93, at 64-66; SUGARMAN, *supra* note 24, at 16.

[114] Telephone Interview with Commercial Insurer C (Aug. 18, 2014).

[115] Telephone Interview with Commercial Insurer E, *supra* note 92; Telephone Interview with Commercial Insurer F, *supra* note 34.

[116] NIXON, *supra* note 77, at 12.

At the opposite end of the spectrum, the corporate literature suggests that the largest entities may benefit little from insurers' loss-prevention services, as they are more likely to have their own risk-management departments and sophisticated information bases.[117] This may drive down demand for external insurance mechanisms among these entities. The extent to which this insight translates to the municipal context, however, is unclear.[118]

Financial stability. A few experts noted that commercial carriers may be better capitalized and more financially stable than pools; they're also more closely regulated.[119] Commercial insurers are better diversified because their pools of risk are larger and draw from different industries and locales. One member with a run of big claims could threaten a pool's existence or, at the least, lead the pool to levy special assessments on the other members to cover the losses.[120] The experts recalled examples of pools that had folded under financial strain.[121] Of course, this can and has happened to commercial carriers as well.[122] Commercial carriers are also thought to be more vulnerable than pools

---

[117] ABRAHAM, *supra* note 15, at 233.

[118] *See* ARCHBOLD, *supra* note 112, at 25 (asserting that internal risk-management programs "are still in the infancy stage of being embraced by police agencies"); G. PATRICK GALLAGHER, SUCCESSFUL POLICE RISK MANAGEMENT 10-15 (2014) (describing the "absence of emphasis on risk management" as a "glaring deficiency" in police leadership).

[119] *E.g.*, Telephone Interview with Commercial Insurer A, *supra* note 61; *see also* NIXON, *supra* note 77, at 15.

[120] *E.g.*, Telephone Interview with Commercial Insurer G, *supra* note 101; Telephone Interview with Commercial Broker B, *supra* note 36; *see* Greenwald, *supra* note 87, at 6. Because all of a pool's member municipalities are in the same state, moreover, unfavorable changes in state law can create a highly correlated risk. *See* Jan M. Ambrose et al., *The Economics of Liability Insurance*, *in* HANDBOOK OF INSURANCE 315, 325 (G. Dionne ed., 2d ed. 2013) (explaining that changes in legal precedent can influence many claims simultaneously and in the same direction).

[121] *E.g.*, Telephone Interview with Commercial Insurer G, *supra* note 101; *see also* NIXON, *supra* note 77, at 9 (reporting that pool managers surveyed recently raised concerns about "[p]otential pool insolvency"); Baurkot, *supra* note 77, at 45 ("A.M. Best believes … that a number of smaller pools may be in financial trouble as competitive pressures make it difficult for them to operate profitably."); Doucette, *supra* note 77, at 543 (discussing some pools' "solvency problems"); Waldman et al., *supra* note 92 (reporting that a large Michigan pool was underfunded by around $21.5 million).

[122] CRESSWELL & LANDON-MURRAY, *supra* note 100, at 40 ("Officials told stories of A-rated insurers … that suddenly collapsed, leaving municipalities without coverage and with exposure for all existing claims.").

to the pendulum swings of the insurance cycle.[123] Financial stability is almost certainly one reason that all of the self-insured municipalities are large—their broad tax bases and big budgets allow them to absorb the shock of large judgments and settlements that might seriously damage a smaller city.[124]

Alternatives. Not all municipalities will confront the same choice set when deciding how to insure. Some municipalities, for example, carry commercial coverage because there were no available pooling options—or none of adequate quality—or because they were kicked out of a pool.[125] The City of Pacific, Washington, for example, was reportedly expelled from its pool in 2012 due to unstable (and thus risky) governance. It was forced to obtain much more expensive coverage on the commercial market. After changes in the City's executive leadership, the pool readmitted Pacific on probationary status.[126]

Autonomy. Some municipalities prefer commercial coverage because commercial carriers, which may tend to be less aggressive about loss prevention, leave them greater autonomy over their policing operations.[127] Self-insurance buys even greater autonomy still.[128] Self-insurance also preserves municipal control over litigation defense, given that external insurers typically insist on the right to defend and settle litigation.[129]

2. The Pervasiveness of Private Influence

I promised early on to show how police liability insurance inverts the ordinary model of governance as public regulation of private actors. Here, I said, it is the private actors that regulate the public ones. Yet I just described a market in which the majority of municipalities insure

---

[123] NIXON, *supra* note 77, at 11; Ceniceros, *supra* note 96, at 10 (describing how pools build up reserves to hedge against market conditions); Don Jones, Nat'l League of Cities, *in* ADVISORY COMM'N ON INTERGOV'TAL RELATIONS, STAFF INFO. REP. SR-7, GOVERNMENTS AT RISK: LIABILITY INSURANCE AND TORT REFORM (1987). *But see* Rynard, *supra* note 94 at 127 ("The risk pool is subject to the same cyclical patterns as the commercial insurers ….").

[124] *See* Schwartz, *How Governments Pay*, *supra* note 10, at 18-19 (discussing how smaller jurisdictions "feel the financial effects of lawsuits more acutely").

[125] Telephone Interview with Risk Pool E, *supra* note 111; Telephone Interview with Consultant A, *supra* note 86; Telephone Interview with G. Patrick Gallagher (Aug. 20, 2014).

[126] Telephone Interview with Risk Pool E, *supra* note 111.

[127] *See, e.g.*, Telephone Interview with Commercial Insurer H, *supra* note 101.

[128] *See* Greenwald, *supra* note 87, at 6.

[129] *See, e.g.*, Telephone Interview with Commercial Insurer A, *supra* note 61; Telephone Interview with City Counsel A (June 25, 2015).

with intergovernmental risk pools rather than commercial carriers. Substantiating my initial claim, and showing that it describes more than some small, aberrational corner of the market, therefore requires more work, to which I turn now. A slew of private parties, I will explain, exert influence over the police even in municipalities that self-insure or obtain coverage through a pool. I introduce these actors briefly in this section and then detail their involvement in Part II, where I cover insurers' loss-prevention techniques.

First, some pools, while public in formal structure and outward appearance, in fact are dominated by private personnel.[130] "Historically, pools have relied heavily on third-party providers to supply services" such as underwriting, loss prevention, and legal counsel.[131] For example, the Ohio Municipal Joint Self-Insurance Pool is an unincorporated, statutory, tax-exempt risk-sharing system for Ohio municipalities.[132] All of the day-to-day management of the pool, however, is conducted by the JWF Specialty Company in Indiana, a subsidiary of Old National Insurance.[133] Likewise, the League of Minnesota Cities Insurance Trust contracts with Berkley Risk for underwriting and claims management.[134] Berkley Risk is a subsidiary of W.R. Berkley Company, a commercial insurer.[135] Berkley Risk staff are fully integrated into the pool's operation. In fact, one pool executive claimed not to know whether some of his colleagues work for one or the other entity. Berkley Risk employees have two sets of business cards and two sets of bosses.[136] By one account, roughly 35% of pools are staffed this way.[137]

---

[130] *See* Rodd Zolkos, *Individual Pools Make Their Own Future: Panel Advises Municipal Self-Insurance Pools To Meet Members' Needs*, BUS. INS., June 22, 1998, at 13 ("[S]ome pools have become so controlled by the insurance companies or other service contractors with which they do business that they've lost touch with local government.").

[131] Young, *supra* note 77, at 1067; *see also id.* at 1068 (noting that, in some pools, "management has been completely outsourced").

[132] *About Us*, OHIO MUN. JOINT SELF-INS. POOL, http://www.omjsp.com/aboutus.html (last visited Aug. 31, 2015).

[133] *Id.*; Telephone Interview with Commercial Insurer A, *supra* note 61; *About Us*, JWF SPECIALTY CO., https://www.oldnationalins.com/jwf-specialty/about-us.asp (last visited Aug. 31, 2015).

[134] Telephone Interview with Risk Pool A, *supra* note 85.

[135] *About*, BERKLEY RISK, https://www.berkleyrisk.com/Pages/About.aspx (last visited Aug. 31, 2015).

[136] Telephone Interview with Risk Pool A, *supra* note 85; *see also About Us*, WIS. CTY. MUT. INS. CO., http://www.wisconsincountymutual.org/about-us.html (last visited Aug. 31, 2015) (identifying pool's private general administrator); *Risk Management Services*, IND. MUN. INS. PROGRAM, http://www.indianamip.com/services.html (last visited Aug. 31, 2015) (describing risk-management services

Even when pools have their own independent staffs, many rely heavily on *consultants and vendors* from the private sector to implement their loss-prevention programs.[138] The most prominent consultants are retired police officers, including retired chiefs, who are retained to write or review departmental policies, conduct risk audits, or train officers on high-risk operations. One consultant told me about a telephone hotline, staffed by consultants, that pools can call for advice on challenging issues like the use of drones.[139] These consultants help bridge the cultural gap that separates insurers from police; they understand risk management but speak police vernacular.[140]

Second, the coverage I have described so far is only one of what are typically several layers of protection. Pools limit the amount of police liability they will cover, and even self-insured municipalities do not retain all of their risk. Indeed, what I have casually described as self-insured municipalities are really mostly municipalities with substantial *self-insured retentions*. That is, these municipalities commit to manage and finance their own risk up to a certain defined level. Both pools and self-insured municipalities typically contract—and sometimes are required by law to contract—with *reinsurance carriers*.[141] Reinsurance

---

provided by private pool administrator on behalf of commercial carrier for pool members); Haggerty, *supra* note 85 (describing a California city that "started its own insurance company," to be managed by a commercial servicer that would "provide or contract for all essential insurance company operations and services, including underwriting, actuarial, claims, loss prevention, reinsurance, accounting, statistical and state filing" and marketed by another private servicer).

[137] NIXON, *supra* note 77, at 3.

[138] *See, e.g.*, CIRMAT, INC., http://www.sashley.com (last visited Aug. 31, 2015) (advertising "consulting in risk management and training," including "Police Deadly Force Consultation," "Policy Review & Development," "Law Enforcement Training," and other services); LAAW INT'L, INC., http://laaw.us (last visited Jul. 20, 2015) (offering "Supervisory Audits" and "Law Enforcement Training"); *Services*, RUSSELL CONSULTING, LLC, http://russell-consulting.org/services/ (last visited Aug. 31, 2015) (listing "Management" and "Evidence Room Audits," assistance with selection of an interim chief of police, and on-site training in "Verbal Judo" and "Active Shooter Response"); SKIDCAR SYS., http://www.skidcar.com (last visited Aug. 31, 2015).

[139] Telephone Interview with Consultant A, *supra* note 86.

[140] *See* Telephone Interview with Commercial Insurer G, *supra* note 101; *see also* Roberto Ceniceros, *Formal Risk Management Growing in Law Enforcement*, BUS. INS., Aug. 10, 1998 (reporting officer's view that "[e]ffective risk management in law enforcement takes an insider to do the job well").

[141] *See, e.g.*, MASS. GEN. LAWS ch. 40M, § 4(B)(1) (requiring pools to purchase excess insurance); *see also* Young, *supra* note 77, at 1069 ("[P]ools have begun to purchase more commercial insurance ….").

is insurance for insurance companies.[142] For example, a pool might retain the first $500,000 of risk and purchase *excess of loss* insurance from a reinsurer that kicks in when one of its members incurs a loss that surpasses that point.[143]

Some of these reinsurers are also public creations, like NLC Mutual Insurance Company, a member-owned reinsurer that brings together twenty-eight risk pools sponsored by the National League of Cities.[144] Yet, according to the executive director of a leading trade association, it is "universally true" that commercial insurers are somewhere in the picture.[145] Commercial insurance might be "behind" the public reinsurance—NLC Mutual reportedly reinsures with Lloyds of London and Willis Re.[146] Or it might be "above" the public reinsurance. For example, Citycounty Insurance Services (CIS), an Oregon pool, issues coverage to its members with a $5 million cap. CIS retains the first $500,000 of risk on most of its lines of coverage. It provides the next layer of coverage, from $500,000 to $2 million, by purchasing reinsurance from the Oregon Public Entity Excess Pool, a public creation. And from $2 million and up, CIS reinsures with companies like Lloyd's of London and Munich Re.[147]

Reinsurers do not typically manage municipal risk directly. But they vet insurers and pools to make sure that *they* are attending to loss prevention, and they price the aggregate risk accordingly.[148] In doing so, they exert a regulatory force: "As I have observed and worked with pools the past 34 years," one industry expert recalled, "I came to the realization that reinsurers do in fact 'call the shots' for the vast

---

[142] For an introduction to reinsurance principles, see Aviva Abramovsky, *Reinsurance: The Silent Regulator?*, 15 CONN. INS. L.J. 345, 350-55 (2009), or Mendoza, *supra* note 77, at 63-67. The reinsurance pools purchase is typically (if not always) "treaty reinsurance," in which the pool cedes to the reinsurer a portion of an entire line of business, rather than "facultative reinsurance," in which a pool purchases reinsurance for a specific risk. *See* Mendoza, *supra* note 77, at 65.

[143] *See* Abramovsky, *supra* note 142, at 364-65; *see also* Telephone Interview with Commercial Insurer F, *supra* note 34 (estimating average pool retention at $500,000). There are frequently additional layers above the first layer of reinsurance as well. *See* BAKER & GRIFFITH, *supra* note 15, at 53-54 (describing "towered" structure of insurance policies).

[144] NLC MUT. INS. CO., https://www.nlcmutual.com/ (last visited Aug. 31, 2015); *see also About Us*, CTY. REINSURANCE LTD., http://www.countyreinsurance.org/#/about-us (last visited Nov. 12, 2015).

[145] Telephone Interview with Trade Association A, *supra* note 89.

[146] Telephone Interview with Consultant A, *supra* note 86.

[147] Telephone Interview with Risk Pool B, *supra* note 85.

[148] Telephone Interview with Trade Association A, *supra* note 89; *see* Mendoza, *supra* note 77, at 125 ("It is critical for the reinsurer to know the pool is proactive in risk management ...." (quoting pool official) (internal quotation marks omitted)).

majority of pools."[149] At bottom, although pools and commercial insurers are competitors in the market for primary coverage, they are nonetheless tightly intertwined in reinsurance relationships that experts describe as "mutually dependent" and "symbiotic."[150]

Third, insurers frequently outsource risk management to private organizations. The Commission on Accreditation for Law Enforcement Agencies, or CALEA, is the name most frequently uttered. CALEA is an independent, nonprofit corporation with a professional staff and a board that includes members from business and academia along with law enforcement.[151] CALEA audits and certifies agencies that have met specified risk-management criteria; insurers either fund the accreditation process or reward agencies that have completed it.[152]

Finally, in at least some cases, credit rating agencies are involved as well. In 1998, ratings agency A.M. Best, referring to pools, reported that it had "rated a number of public entity-like insurance companies since the early 1990s."[153] Standard and Poor's rates the Texas Municipal League Intergovernmental Risk Pool. As part of its operations report to the ratings agency, the pool recently touted its loss-prevention initiatives, including details about police training in the use of force and high-stress decisionmaking.[154] One expert estimated that "two handfuls" of pools are rated in this way.[155] The rating signals stability and security to a pool's current and potential members, especially in states in which the pools are lightly regulated; one pool, I

---

[149] Mendoza, *supra* note 77, at 101 (quoting former senior official from the Association of Governmental Risk Pools) (internal quotation markets omitted).

[150] *Id.* at 116, 124 (internal quotation marks omitted); *see also* Telephone Interview with Commercial Insurer G, *supra* note 101.

[151] *The Commission*, CALEA, http://www.calea.org/content/commission (last visited Nov. 22, 2015).

[152] *See infra* text accompanying notes 235-240. The accreditation agencies, at least in theory, may in turn be subject to tort liability for failing to take reasonable care in setting private regulatory standards. *See* Peter H. Schuck, *Tort Liability to Those Injured by Negligent Accreditation Decisions*, 57 LAW & CONTEMP. PROBS. 185 (1994).

[153] Baurkot, *supra* note 77, at 45.

[154] Report to Standard & Poor's on the Texas Municipal League Intergovernmental Risk Pool's Structure, Operations and Initiatives (Jan. 26, 2015), http://www.tmlirp.org/filestore/fin/SandP/sandp2014narrative.pdf

[155] Telephone Interview with Commercial Insurer F, *supra* note 34.

was told, lost members when its credit rating went down.[156] The credit rating also likely affects reinsurance pricing.[157]

D. The Typical Terms of Coverage

It may be helpful at this point to walk through some of the pertinent provisions of a typical police liability policy.[158] Increasingly, the police policy is part of a commercial general liability policy purchased by the municipality, although stand-alone police policies, called "monoline" policies, do still exist.[159]

The municipality is the "named" or "primary" insured under the policy; all of the municipality's police officers are additional insureds. In the basic coverage provision, the insurer agrees, subject to certain limits, to "pay on behalf of the insured all 'loss' resulting from 'law enforcement wrongful act(s)' which arise out of and are committed during the course and scope of 'law enforcement activities."[160] Covered loss includes punitive damages (where law permits) unless they are

---

[156] *Id.*; *cf.* Harry F. Brooks, *Public Entity Risk Management and Insurance—Part V*, AM. AGENT & BROKER, May 1992, at 12, 12 (advising agents and brokers to examine financial, actuarial, and reinsurance arrangements of unregulated pools).

[157] *See* Telephone Interview with Commercial Insurer A, *supra* note 61 (agreeing that this pricing effect seems likely, though disclaiming personal knowledge).

[158] On the standardization of insurance forms, including possible movement away from the standardization norm, see Avraham, *supra* note 40, at 96-98; *see also* Abraham, *supra* note 40, at 656 (stating that "virtually all property-casualty insurance policies … are standard-forms used by most insurers").

[159] *Compare* Telephone Interview with Commercial Insurer F, *supra* note 34 (has written police liability only as part of commercial general liability for the past 10 years), *with* Telephone Interview with Commercial Insurer G, *supra* note 101 (still writes some monoline policies).

[160] In the text I quote language from a sample commercial policy. Law Enforcement Liability Coverage Form, Nat'l Cas. Co. 1, http://euclidps.com/2/wp-content/uploads/2014/05/Law_Enforcement_II_PE_PL_2_0802.pdf. The terms of a pool's coverage memorandum are quite similar. *See, e.g.*, Liability Coverage Document, Tex. Mun. League Intergov'tal Risk Pool 9 (Oct. 1, 2014), http://www.tmlirp.org/sites/default/files/docs/Liability%2010-1-14.pdf. For additional examples, see Am. Safety Cas. Ins. Co. v. City of Waukegan, 776 F. Supp. 2d 670, 684-85, 688, 689 (N.D. Ill. 2011); Gulf Underwriters Ins. Co. v. City of Council Bluffs, 755 F. Supp. 2d 988, 998, 1004-05 (S.D. Iowa 2010); N. River Ins. Co. v. Broward Cnty. Sheriff's Office, 428 F. Supp. 2d 1284, 1286 (S.D. Fla. 2006); Coregis Ins. Co. v. City of Harrisburg, No. 1:03-CV-920, 2006 WL 860710, at *2 (M.D. Pa. Mar. 30, 2006); Nat'l Cas. Ins. Co. v. City of Mt. Vernon, 515 N.Y.S.2d 267, 268-69 (N.Y. App. Div. 1987); City of Lee's Summit v. Mo. Pub. Entity Risk Mgmt., 390 S.W.3d 214, 218 (Mo. Ct. App. 2012).

explicitly excluded.[161] "Law enforcement activities" simply means "[t]hose activities conducted by" the municipality's law enforcement agency.[162] A "law enforcement wrongful act" is "any actual or alleged act, error or omission, neglect or breach of duty by the insured while conducting 'law enforcement activities' which results in: a. 'personal injury'; b. 'bodily injury'; or c. 'property damage.'"[163] The meat of the policy is found in the definition of "personal injury."[164] The sample policy I quote here defines "personal injury" to include "[a]ssault and battery," [d]iscrimination, unless insurance thereof is prohibited by law," "[f]alse arrest, detention or imprisonment, or malicious prosecution," "[h]umiliation or mental distress," "[v]iolation of civil rights protected under 42 USC 1981 et sequential or State law," "[v]iolation of property rights," and "[w]rongful entry, eviction or other invasion of the right of public occupancy."[165]

The policy excludes any claim made against the insured "[a]rising out of the deliberate violation of any federal, state, or local" law "committed by or with the knowledge and consent of the insured" where liability results.[166] It also excludes any claim "[b]rought about or contributed to by fraud, dishonesty, bad faith or malicious act(s) of an insured."[167] The exclusions are read from the viewpoint of each insured. This means that, if an officer is found to have deliberately violated the law or acted maliciously, he will not be covered;[168] the *municipality*, however, will still be covered unless it knew about and consented to the

---

[161] Darrell Child, *Law Enforcement Liability: A Specialty-Market Risk*, AM. AGENT & BROKER, Apr. 1995, at 32. On the insurability of punitive damages, see George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009, 1020-22 (1989).

[162] Nat'l Cas. Co., *supra* note 160, at 5.

[163] *Id.*

[164] *See* Harry F. Brooks, *Public Entity Risk Management—Part VII*, AM. AGENT & BROKER, May 1994, at 22, 22; Child, *supra* note 161 at 29, 30.

[165] Nat'l Cas. Co., *supra* note 160, at 5-6. For opinions upholding insurance policy provisions covering compensatory and punitive damages for discrimination and other willful misconduct, see Dixon Distrib. Co. v. Hanover Ins. Co., 612 N.E.2d 846, 855-57 (Ill. Ct. App. 1993); Colson v. Lloyd's of London, 435 S.W.2d 42, 47 (Mo. Ct. App. 1968); Am. Mgmt. Ass'n v. Atl. Mut. Ins. Co., 641 N.Y.S.2d 802, 808 (N.Y. Sup. Ct. 1996). *But see* Hartford Accident & Indem. Co. v. Village of Hempstead, 397 N.E.2d 737, 744 (N.Y. 1979) (proscribing coverage of punitive damages for civil rights violations); City of Newark v. Hartford Accident & Indem. Co., 342 A.2d 513, 518 (N.J. Super. Ct. App. Div. 1975) (same, in dicta).

[166] Nat'l Cas. Co., *supra* note 160, at 2.

[167] *Id.*

[168] For an explanation of why insurance policies typically exclude intentional acts, see Priest, *supra* note 77, at 1023-26.

officer's conduct.[169] And the municipality may still decide to indemnify the officer for any damages levied upon him.[170] I was told that, in practice, police liability policies are understood to be broad and that the policy exclusions are not especially relevant to practitioners.[171]

II. HOW INSURERS REGULATE THE POLICE

With the basic concepts and cast of characters in place, this Part details how exactly it is that insurers regulate the police. In Section A, I describe the various *loss-prevention* techniques insurers employ in an effort to reduce the number and magnitude of police-inflicted harms. In Section B, I explain how insurers use the *underwriting* process to create incentives for police agencies to cooperate with those loss-prevention initiatives. That is the basic, two-part structure of regulation-by-insurance: loss prevention backed by underwriting incentives.[172] I then discuss the regulatory role of reinsurers in Section C. Section D shows how my findings contribute to the debate over the uncertain effects of "making governments pay." Throughout Part II, I highlight some of the features that make regulation-by-insurance in this setting not only practically but also theoretically significant. In particular, when insurers regulate the police, they construe, enforce, and transform constitutional principles, stretching prevailing understandings of who interprets our Constitution.

A. Loss Prevention

Loss prevention, as I use the term, is a broad concept encompassing all of an insurer's efforts to convey to an insured municipality—either directly or through a third party—information intended to help reduce

---

[169] Telephone Interview with Commercial Insurer A, *supra* note 61; *see also* KEETON, *supra* note 81, §5.4(b), at 292-93 ("[I]t is not enough to preclude coverage for a named or additional insured of a policy that the harm was intentionally caused from the point of view of another named or additional insured of the same policy."); James A. Fischer, *The Exclusion from Insurance Coverage of Losses Caused by the Intentional Acts of the Insured: A Policy in Search of a Justification*, 30 SANTA CLARA L. REV. 95, 148 (1990); Mary Coate McNeely, *Illegality as a Factor in Insurance*, 41 COLUM. L. REV. 26, 43 (1941).

[170] *See* Schwartz, *supra* note 30, at 923-25 (finding that municipalities indemnify officers in these circumstances).

[171] Telephone Interview with Commercial Insurer A, *supra* note 61.

[172] *See* HEIMER, *supra* note 93, at 28 (arguing that insurers must always couple underwriting with loss prevention and that "[n]either tactic will work alone"); *id.* at 63 ("And though much advice was only advice, policyholders might be required to pay higher premiums if they disregarded the advice and therefore increased risk.").

the incidence and magnitude of covered harms. Insurers work with municipalities on loss prevention throughout the life of the coverage relationship, often communicating frequently. I have sorted insurers' loss-prevention techniques into five buckets: policy development, education and training, audits, accreditation, and personnel. There are some loss-prevention measures that do not fit comfortably into any of my categories. Some insurers, for example, encourage community outreach efforts like "Coffee with a Cop" in the hope of improving police-community relations and reducing harmful occurrences.[173] Still, the five categories that follow capture the bulk of the strategies insurers told me they use to prevent and mitigate loss.

1. Policy Development

There can be little doubt that insurers influence the content of police policies and procedures. According to one commentator, in fact, the "most important reason" that litigation against municipalities has been "powerful as an accountability device" is that "insurance companies [have] demanded that police improve their policies and practices in adherence to constitutional requirements and thus avoid monetary payouts to injured citizens."[174] Insurers prioritize policies on certain high-risk matters such as the use of force, vehicle "hot" pursuit, domestic violence, and the handling of intoxicated or mentally ill individuals.[175]

Insurers shape these policies in several ways. First, some insurers review and provide suggestions on agency policies, or retain a consultant to do the same.[176] Insurers' feedback can range from small

---

[173] *See, e.g.*, Telephone Interview with Risk Pool D, *supra* note 105; COFFEE WITH A COP, http://coffeewithacop.com/ (last visited Nov. 17, 2015); *see also* Kate Zernike, *Camden Turns Around with New Police Force*, N.Y. TIMES, Sept. 1, 2014, at A1 (describing community outreach efforts in Camden).

[174] Candace McCoy, *How Civil Rights Lawsuits Improve American Policing*, *in* HOLDING POLICE ACCOUNTABLE 111, 112 (Candace McCoy ed., 2010); *see also* HEIMER, *supra* note 93, at 24 (describing insurers' insight that, to control their agents, policyholders must establish routines that make it hard for their agents to deviate).

[175] *See, e.g.*, Law Enforcement Liability Application, CNA, https://www.oldnationalins.com/pdfs/Insurance/JWF-Applications/Law-Enforcement-Liability-Application.pdf.

[176] *See, e.g.*, Telephone Interview with Consultant B, *supra* note 95; Child, *supra* note 161, at 32-33.

tweaks to substantial policy recommendations.[177] Policing expert Samuel Walker has argued that, "[o]f all the roles and activities that oversight agencies can play, policy review is the one most likely to produce organizational change and thereby achieve long-term improvements in policing."[178] Walker was writing about oversight by citizen groups, not insurers, but the basic point still holds.

The policy-review process is one of the places one can see legal norms subtly change form in insurers' hands. One insurer I interviewed insisted that her firm reviews agency policies only from a "risk-management perspective," not a legal one.[179] But, of course, the "risk" being managed here is the risk of legal liability, *i.e.*, the risk that the law will be broken and damages due. I am skeptical that the concepts of "legal" and "risk management" can be disentangled so cleanly. An insurer assessing whether an agency policy adequately manages risk—*i.e.*, the risk of legal liability—would be hard-pressed not to form and convey an opinion about what the law requires. If I am right, by taking a "risk-management perspective," most insurers will not avoid legal judgment at all, but will instead recast the law in a "nonlegal risk logic" that strips it of its moral valence.[180]

The second way insurers shape police policy is by furnishing fully formed model policies and procedures, or detailed guidelines for their promulgation.[181] Again, outside consultants often do the legwork, sometimes bundling the provision of policies with training on policy content.[182] Model policy development entails more than simply regurgitating commands from statutes and constitutional rulings. Insurers, for example, take positions on form in addition to substance: one insurer's guidelines advise municipalities to "[i]nclude a 'limited' number of 'standards'" (as opposed to "rules") in their use-of-force

---

[177] *See, e.g.*, Travelers Ins., *supra* note 31 ("In general, Travelers advises law enforcement agencies and detention facility administrators to avoid blanket strip search practices.").

[178] SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CITIZEN OVERSIGHT 93 (2001).

[179] Telephone Interview with Commercial Insurer E, *supra* note 92.

[180] Talesh, *supra* note 20, at 211.

[181] Telephone Interview with Commercial Insurer F, *supra* note 34; Travelers Ins., *Cutting Law Enforcement Training—A Costly Choice*, IN THE PUBLIC INTEREST (Nov. 2011), https://www.travelers.com/iwcm/Distribution/2010/11_November/PSS/4.html (advertising provision of "a CD-ROM of law enforcement policies").

[182] Telephone Interview with Consultant A, *supra* note 86; *see also* Telephone Interview with Commercial Insurer D, *supra* note 88 (provides access to a law firm's website that contains model policies and procedures).

policies.[183] And insurers encourage police attention to issues that likely relate to liability but are typically thought to fall outside the law's ambit, such as including a psychological-testing requirement in a hiring policy.[184]

Finally, some insurers fund or subsidize subscriptions to a turnkey policy-writing service from a company called Lexipol.[185] Founded in 2002, Lexipol provides customizable, state-specific policy content for police agencies. The company employs a team of "legal and public safety professionals" that "constantly monitor[s] and review[s] government legislation and case decisions" to keep the policies up to date.[186] The service also includes an integrated training component—daily training bulletins at roll call present officers with "real-life, scenario-based training exercises emphasizing high-risk, low-frequency events."[187] Officer participation is verifiable.[188] I spoke with one of the founders of Lexipol, an attorney and 33-year police veteran. He recalled having shopped the Lexipol concept unsuccessfully with police chiefs in the 1990s. The idea took off, he explained, only after it caught the eye of police liability insurers.[189]

2. Education and Training

A "widely held assumption about the insurance industry" is that "insurers have expertise in acquiring and sorting sophisticated

---

[183] Trident Risk Points: Operational Policies & Procedures: Use of Force Policy Elements, Trident Ins. Servs. (July 2012), https://www.argolimited.com/media/03C10U7X865H/docs/en_US/9a5e44de9e07465726bcb14894240b67ba9c4565/5PLYTFCP9D5H/Trident-LEL-Use-of-Force-Policy-Elements-2012.pdf.

[184] Trident Risk Points: Operational Policies & Procedures: Law Enforcement Employment Hiring Policy, Trident Ins. Servs. (July 2012), https://www.argolimited.com/media/03C10U7X865H/docs/en_US/10f723258ac7d261004bd82fd2e6bb887c04bd54/7OC1HCX5Y526/Trident-LEL-Employment-Hiring-Policy-2012.pdf.

[185] Telephone Interview with Risk Pool B, *supra* note 85 (heavily subsidizes Lexipol subscription); Telephone Interview with Risk Pool D, *supra* note 105 (provides subscription outright).

[186] *Law Enforcement Custom Policy Content*, LEXIPOL, http://www.lexipol.com/law-enforcement (last visited Aug. 31, 2015).

[187] *Law Enforcement Daily Training Bulletins*, LEXIPOL, http://www.lexipol.com/law-enforcement/#horizontalTab2 (last visited Aug. 31, 2015).

[188] *Id.*; *see also* David Lesh, *A Blueprint for Reducing Lawsuits Against Police*, PUB. RISK, Aug. 2002, at 14, 16.

[189] Telephone Interview with Gordon Graham (Aug. 29, 2014).

information."[190] This makes police insurers a natural clearinghouse for information about breaking developments in the law as well as new technologies and training strategies with loss-reducing potential.[191]

Insurers use a multi-pronged attack to convey this information to municipalities. Collectively, insurers release a huge amount of educational literature in the form of newsletters, white papers, email updates, blogs, and so on.[192] A recent newsletter by a major reinsurer, for example, addresses the use of excessive force.[193] The newsletter reviews recent Department of Justice investigations and public survey data documenting widespread concerns; quickly summarizes the relevant constitutional cases; walks through some of the "contributing factors that may influence an officer's decision to use excessive force," including inadequate training and a lack of accountability; and surveys potential reforms, such as body-worn cameras, involvement of outside personnel in training and investigating use-of-force complaints, and training and deployments standards for the use of military equipment.[194]

Insurers reinforce these written materials with live and multimedia instruction. Personnel from one pool, for example, take a nine-city road trip each spring, conducting classroom workshops with names like

---

[190] *See* Ben-Shahar & Logue, *supra* note 14, at 210-11; Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223, 1241-42 (2004).

[191] *See, e.g.*, Telephone Interview with Commercial Insurer E, *supra* note 92 (focuses on raising municipal awareness of hot topics in policing).

[192] *See, e.g.*, Willis HRH Pooling Practice, *Changing Rules on Vehicular Searches*, POOLING RISK CONTROL BULLETIN (May 2009), http://www.willis.com/Documents/Publications/Services/Pooling/Pooling_Bulletin_Law_Enforcement.pdf; Willis Pooling Practice, *The Use of Pepper Spray in Schools*, POOLING RISK CONTROL BULLETIN (Feb. 2008), http://www.willis.com/Documents/Publications/Services/Pooling/Pooling_Bulletin_Pepper_Spray.pdf; Focus On: Police Volunteers, Munich Re (May 2012), http://www.munichre.com/site/mram-mobile/get/documents_E574031337/mram/assetpool.mr_america/PDFs/3_Publications/Research_Spotlight/focuson_police_volunteers.pdf; Travelers Ins., *supra* note 31.

[193] *See, e.g.*, Focus On: Police—Excessive Use of Force, Munich Re (May 2015), https://www.munichre.com/site/mram-mobile/get/documents_E876514504/mram/assetpool.mr_america/PDFs/3_Publications/Research_Spotlight/FOCUS%20ON_Excess-Force.pdf.

[194] *Id.* There are countless other examples. To give just one more, Travelers Insurance put out a strip search newsletter in 2010—"The Search for the Best Strip Search Policy"—that self-consciously told its insurance agents that, "[w]hile it is important for [them] to be sensitive to the operational challenges jails face, they can play an important role in helping their clients understand the potential for liability, as well as identify alternatives for these clients that may bolster defensible strip search policies." Travelers Ins., *supra* note 31.

"legal survival skills for police" or "case law boot camp."[195] Insurers also facilitate access to online video lessons and other multimedia training resources delivered through RSS (Real Simple Syndication) feeds or social media.[196] Some insurers even produce their own training modules; one pool, for example, works with outside consultants to produce a one-hour online training program each month on topics such as *Miranda* and Fourth Amendment doctrine.[197]

Insurers also work with agencies to nurture in officers the skills, characteristics, and judgment necessary to do their job responsibly. For example, insurers encourage or require insured agencies to train (and re-train) their officers on certain topics at specified intervals, or to provide "certified" training programs on high-risk tasks like the use of electronic stun weapons.[198] They also furnish grants to agencies to fund the agencies' own loss-prevention training initiatives.[199] Some of the training insurers provide, again, addresses topics generally seen to fall outside law's purview but nevertheless causally related to misconduct or other socially undesirable behavior. For example, experts mentioned training officers in reading body language or reducing implicit racial bias.[200] Handling stress on the job is another topic that came up.[201]

---

[195] Telephone Interview with Risk Pool A, *supra* note 85; *see also* Telephone Interview with Risk Pool B, *supra* note 85 (two classroom courses); Telephone Interview with Consultant B, *supra* note 95 (describing having conducted, on behalf of insurers, "hands-on" training on use of force, internal affairs, discipline, transportation of prisoners, and other topics).

[196] *See, e.g.*, Telephone Interview with Risk Pool D, *supra* note 105 (online daily training bulletin); Telephone Interview with Risk Pool E, *supra* note 111 (online training platform provided through outside vendor); Telephone Interview with Consultant A, *supra* note 86 (online roll call training, which verifies participation); *Law Enforcement Training Videos*, IND. MUN. INS. PROGRAM, http://www.indianamip.com/law_enforcement.html (last visited Aug. 31, 2015) (listing dozens of training videos covering topics such as "Straight Baton Techniques," "Line Officer Tactical Shotgun," "Basic and Power Handcuffing Techniques," and "The Miranda Rule"); Willis Pooling Practice, Getting To Know You (Dec. 12, 2014), http://www.willis.com/documents/publications/services/pooling/20141212_Willis_Pooling_Practice_Getting_To_Know_You.pdf (describing RSS feeds with video and audio clips).

[197] Telephone Interview with Risk Pool A, *supra* note 85.

[198] Member Standards, AWC Risk Mgmt. Serv. Agency, Jan. 2013 (on file with author) (requiring agencies to re-train officers every three years in enumerated topics and to have each officer undergo certified Taser training before Taser use); Travelers Ins., *supra* note 181 (encouraging agencies not to cut training programs when budget is tight).

[199] Telephone Interview with Risk Pool C, *supra* note 101; Telephone Interview with Risk Pool E, *supra* note 111.

[200] Telephone Interview with Risk Pool A, *supra* note 85; Telephone Interview with Risk Pool C, *supra* note 101.

Officers who deal with stress poorly may be more likely to lose control and misbehave.[202]

One noteworthy training tool is the use of virtual-reality simulators designed to develop good judgment and self-control in high-risk situations involving vehicle pursuits and the use of force.[203] Most of the experts I asked believe these simulators are a valuable training tool.[204] Early empirical research backs up this impression, at least as to the use of force.[205] As one expert explained, unlawful police shootings stem

---

[201] Telephone Interview with Risk Pool C, *supra* note 101.

[202] *See, e.g.*, DANIEL CRUSE & JESSE RUBIN, DETERMINANTS OF POLICE BEHAVIOR 5 (1973) (reporting, based on field study, that "the amount of stress seems to have a good deal of effect on the behavior of the officer"); GAIL A. GOOLKASIAN ET AL., COPING WITH POLICE STRESS 10 (1986) (reporting findings that stress can negatively affect work performance, though noting studies' limitations); Ronald J. Burke & Aslaug Mikkelsen, *Burnout, Job Stress and Attitudes Towards the Use of Force by Norwegian Police Officers*, 28 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 269, 269-72 (2005) (summarizing studies finding that chronic work stress causes burnout, which is positively and significantly related to the use of force); Nicolien Kop & Martin C. Euwema, *Occupational Stress and the Use of Force by Dutch Police Officers*, 28 CRIM. JUST. & BEHAV. 631 (2001) (reaching a similar finding); Manny Fernandez, *Officer Was Under Stress When He Arrived at Texas Pool Party, Lawyer Says*, N.Y. TIMES, June 10, 2015, at A15 (describing lawyer's assertion that McKinney, Texas police officer who was videotaped tackling a black teenager in a bikini outside a pool party was under stress after responding to two earlier calls involving a suicide and attempted suicide); Mark Bond, *The Impact of Stress and Fatigue on Law Enforcement Officers and Steps To Control It*, INPUBLICSAFETY (Feb. 24, 2014), http://inpublicsafety.com/2014/02/the-impact-of-stress-and-fatigue-on-law-enforcement-officers-and-steps-to-control-it (asserting that officer stress can lead to fatigue, which in turn can lead to misconduct and "inappropriate reactions to a situation").

[203] *See, e.g.*, SKIDCAR SYS., http://www.skidcar.com (last visited Aug. 31, 2015); *Highest Rated Driving Simulator*, FAAC INC., http://www.faac.com/policesimulators.htm (last visited Aug. 31, 2015); *Law Enforcement Simulator Systems*, DORON PRECISION SYS., INC., http://www.doronprecision.com/police-law-enforcement-driving-simulation-training-systems-driver-simulators.html (last visited Aug. 31, 2015); VIRTRA, http://www.virtra.com/ (last visited Aug. 31, 2015); MILO RANGE, http://www.milorange.com (last visited Aug. 31, 2015); *Law Enforcement Training Solutions*, MEGGITT TRAINING SYS., http://meggitttrainingsystems.com/Law-Enforcement (last visited Aug. 31, 2015).

[204] *E.g.*, Telephone Interview with Commercial Insurer E, *supra* note 92; Telephone Interview with Consultant A, *supra* note 86 (agreeing, though cautioning that simulators can teach harmful lessons if not operated correctly).

[205] *See* Craig Bennell & Natalie J. Jones, The Effectiveness of Use of Force Simulation Training: Final Report (Can. Police Research Ctr., Technical Report TR-01-2005, 2003), http://www.publicsafety.gc.ca/lbrr/archives/cnmcs-plcng/cn000032136920-eng.pdf; *see also* Evelyn-Rose Saus et al., *The Effect of Brief Situational Awareness Training in a Police Shooting Simulator: An Experimental Study*, 18 MILITARY PSYCH. S3 (2006).

from poor judgment, not poor marksmanship.[206] Traditional training methods like shooting practice at a firearms range can develop the latter skill but, unlike the simulators, not the former. Yet simulators are expensive, too much for many municipalities to afford.[207] Leveraging economies of scale, insurers facilitate access to simulator training by purchasing simulators or covering or subsidizing their use.[208]

In the process of educating and training police officers, insurers—deliberately or not—engage in constitutional interpretation. Take the use of force as an example. Criminal procedure scholars have complained that Fourth Amendment "excessive force doctrine is extraordinarily abstract" and "fails to provide guidance to police

---

[206] *See* Telephone Interview with G. Patrick Gallagher, *supra* note 125.

[207] Although the most stripped-down simulators sell for around $50,000, more sophisticated systems quickly hit six figures. *See, e.g.*, Chris Green, *Rockford Police Debut $50,000 Use-of-Force Training Simulator*, ROCKFORD REG. STAR (Aug. 22, 2012, 9:04 PM), http://www.rrstar.com/article/20120822/NEWS/308229922 ($50,000); Holli Deal Saxon, *Simulator Brings Realistic Training to Police*, STATESBORO HERALD, http://www.statesboroherald.com/section/1/article/71037/ ($78,000); Jeff Adelson, *Simulator Brings Realism to Police Training in St. Tammany Parish*, NOLA.COM (Nov. 30, 2009, 10:35 PM), http://www.nola.com/northshore/index.ssf/2009/07/simulator_brings_realism_to_po.html ($122,000 in 2005); Hayley Ringle, *Tempe's VirTra Systems Offers Realistic Use-of-Force Training*, PHX. BUS. J. (Nov. 4, 2014, 11:59 AM), http://www.bizjournals.com/phoenix/blog/techflash/2014/11/virtra-systems-brings-virtual-reality-to-police.html (quoting average cost of $200,000); Stephanie Sanchez, *AWC Public Safety Institute Offers High Tech "Use of Force" Simulator*, KAWC (Oct. 29, 2015), http://kawc.org/post/awc-public-safety-institute-offers-high-tech-use-force-simulator ($250,000); Issie Lapowsky, *The Virtual Reality SIM That Helps Teach Cops When To Shoot*, WIRED (Mar. 30, 2015, 7:00 AM), http://www.wired.com/2015/03/virtra/ ($300,000); Telephone Interview with Risk Pool B, *supra* note 85 (estimating price of driving simulator at $250,000 plus staffing and shooting simulator at $500,000).

[208] *See* Telephone Interview with Commercial Insurer E, *supra* note 92 (some pools own simulators); Telephone Interview with Consultant A, *supra* note 86 (same); Telephone Interview with Risk Pool B, *supra* note 85 (sends officers to use driving simulator in state capital and reimbursing fees for training on use-of-force simulator); Telephone Interview with Risk Pool C, *supra* note 101 (plans to purchase driving simulator); Telephone Interview with Risk Pool E, *supra* note 111 (reimburses fees for use of driving simulator owned by state agency); *Loss Control*, ALA. MUN. INS. CORP., http://www.amicentral.org/loss-control (last visited Aug. 31, 2015) (advertising "an advanced, computer-controlled driver training vehicle" on which training is available "year around [sic] throughout the state at a minimal cost to our members," as well as a "digitally interactive firearms training system, … available statewide through appointment" with a dedicated coordinator).

officers."[209] "This uncertainty in legal authority," the argument goes, "results in a lack of institutional guidance and leaves police officers to exercise their own discretion."[210] While I do not quibble with the claim that Fourth Amendment doctrine is abstract, what the argument ignores is that various intermediaries—including, importantly, insurers—step in to give the law fuller content. Insurers strongly encourage agencies to incorporate into their policies a "use-of-force continuum" that specifies what degree of force is appropriate in different scenarios.[211] Moreover, they specifically tie this continuum to constitutional law, advising, for instance, that, "if an officer acts outside of the applicable policy and/or training in the use of force, … such acts could be found by a court to be 'objectively unreasonable'" and thus unconstitutional.[212]

A major reinsurer's newsletter on strip searches also nicely illustrates the point. The newsletter was penned in the wake of *Florence v. Board of Chosen Freeholders*,[213] in which the U.S. Supreme Court rejected a Fourth Amendment challenge to a New Jersey jail's policy of strip-searching all detainees who will be admitted to the jail's general population, including those arrested on minor offenses.[214] Again, the insurer pins its advice to the Fourth Amendment. "In the situation where a strip search is justified," the column instructs, "the manner in which the search takes place must be reasonable in order to meet Fourth Amendment standards. *Therefore*," it continues, "searches should be conducted in a professional manner using a searcher of the same sex, conducted without physical contact under sanitary conditions, and done with a degree of privacy."[215] The standards

---

[209] Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 446 (2012); *see also* Rachel Harmon, *When Is Police Violence Justified?*, 102 NW. U.L. REV. 1119, 1127, 1143 (2008).

[210] Leong, *supra* note 209, at 447.

[211] *See, e.g.*, Focus On: Police—Excessive Use of Force, Munich Re (May 2015), https://www.munichre.com/site/mram-mobile/get/documents_E876514504/mram/assetpool.mr_america/PDFs/3_Publications/Research_Spotlight/FOCUS%20ON_Excess-Force.pdf; Trident Risk Points: Operational Policies & Procedures: Suggested Controls for Electronic Stun Weapons, Trident Ins. Servs. (July 2012), https://www.argolimited.com/media/03C10U7X865H/docs/en_US/dad1345ec51a64376baf01f33f257328aa66bfd5/G5V9I05T5956/Trident-LEL-Electronic-Stun-Weapon-Policy-2012.pdf.

[212] Munich Re, *supra* note 193 (citing Graham v. Connor, 490 U.S. 386 (1989)).

[213] 132 S. Ct. 1510 (2012).

[214] *See id.* at 1518.

[215] Focus On: Strip Searches in Jails, Munich Re (May 2012), http://www.munichre.com/site/mram-mobile/get/documents_E2059710005/mram/assetpool.mr_america/PDFs/3_Publications/Research_Spotlight/focuson_ss_jails.pdf (emphasis added).

proposed seem basically laudatory—and they might be plausible, if highly cautious, inferences from dicta in *Florence*—but they certainly are not compelled by the Court's opinion. The opinion, for example, says nothing about using a searcher of the same sex or conducting searches in clean locations.

The point is not to dispute the fidelity or utility of the newsletter, but merely to point out that the insurer's analysis is doing meaningful interpretive work—it does not merely recite language from court opinions.[216] Judicial decisions on the law of constitutional criminal procedure do not answer every question police officers confront on the job. Insurers frequently fill in the gaps, and they pitch their gap-filling guidance as constitutional law, or at least they frame it in the language of constitutional law.[217] Forgiving constitutional standards, coupled with the doctrine of qualified immunity, then ensure that insurers' interpretations will stick. As long as an insurer's legal advice is reasonable, for example—even if it is incorrect, and contravenes what the courts ultimately determine the law to be—an officer who follows the advice will not be held liable for harms that result.[218]

---

[216] To give one last example, another insurer's materials include a list of "4th Amendment Concerns" regarding liability for searches, and state that search warrants "are not required if officers are … [s]earching individuals under their voluntary, written consent." Trident Ins. Servs., Law Enforcement Controls for the Next Decade, https://www.argolimited.com/media/03C10U7X865H/docs/en_US/0dae73e43ca35e0f44d1f482e6601873e742306b/SZ2D35C34I7O/Trident-LEL-Controls-for-the-Next-Decade-Presentation-2012.pdf. Requiring written (as opposed to oral) consent may be good loss-prevention policy, but it is not, as the materials suggest, required by Fourth Amendment doctrine. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[217] *Cf.* Ben-Shahar & Logue, *supra* note 14, at 234 (explaining that "liability insurers are often the agents that translate … vague legal standards into a set of concrete, sometimes very specific rules").

[218] *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (pinning qualified immunity to the "objective reasonableness of an official's conduct, as measured by reference to clearly established law"); *see also* Malley v. Briggs, 475 U.S. 335, 341 (1986) ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law."). Although qualified immunity would not protect a municipality that adopted an unconstitutional policy or practice, *see* Owen v. City of Independence, 445 U.S. 622 (1980), many of the Court's constitutional tests themselves have some sort of deferential "reasonableness" component. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 388 (1989) (holding that excessive force claims "are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard"). Indeed, the resulting body of lawn respecting individual liability, critics have charged, incorporates a "double standard of reasonableness." Anderson v. Creighton, 483 U.S. 635, 648 (1987) (Stevens, J., dissenting); *see, e.g.*, Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81

In addition to interpreting constitutional rights, insurers also rank-order them, teaching insureds that some rights are, at least for practical purposes, more important than others. One prominent consultant developed a list of twelve high-risk critical tasks that give rise to the lion's share of police liability.[219] Agency policies regarding these tasks, the consultant told me, are "need to know"; policies regarding all other tasks—including some that seem normatively salient, such as interrogation—are "need to consult."[220] Insurers invest relatively little effort in preventing this latter sort of constitutional harm.[221] Jurists, in contrast, have largely resisted such crass ordinal comparison of constitutional entitlements.[222]

3. Audits

A particularly nettlesome challenge for police reformers has been ensuring continued compliance with agency policies over time. Most insurers I spoke to audit the agencies they insure to check how well the agencies are implementing policies and procedures and attending to

---

IOWA L. REV. 261, 314 (1995) (arguing that, "[i]n constitutional tort cases, the intersection of qualified immunity and many other types of constitutional standards … affords a degree of double-counting to the government").

[219] *See* G. PATRICK GALLAGHER, SUCCESSFUL POLICE RISK MANAGEMENT 52-63 (2014).

[220] Telephone Interview with G. Patrick Gallagher, *supra* note 125. Travelers Insurance also encourages focus on the "highest risk exposures" including "Use of Force" and "Search and Seizure." Travelers Ins., *supra* note 181.

[221] *See* John Rappaport, *An Insurance-Based Typology of Police Misconduct*, 2016 U. CHI. LEGAL F. __ (forthcoming).

[222] *See, e.g.*, Silveira v. Lockyer, 328 F.3d 567, 568-69 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) ("It is wrong to use some constitutional provisions as springboards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us. As guardians of the Constitution, we must be consistent in interpreting its provisions.… Expanding some [constitutional provisions] to gargantuan proportions while discarding others like a crumpled gum wrapper is not faithfully applying the Constitution; it's using our power as federal judges to constitutionalize our personal preferences."); Parks v. "Mr. Ford," 556 F.2d 132, 154 (3d Cir. 1977) (Gibbons, J., concurring) ("I would not adopt the hierarchical approach to constitutional values … because I know of no principled basis upon which to say that the national law in one area is less entitled to implementation by virtue of the Supremacy Clause than the national law in another area."); Isaacs v. Bd. of Trustees of Temple Univ., 385 F. Supp. 473, 485 (E.D. Pa. 1974) ("It is difficult, and perhaps impossible, to arrange federal constitutional rights in an ascending hierarchy of value.").

loss prevention generally.[223] Audits take place on both a regular and as-needed basis. The experts I interviewed reported conducting regular audits ranging from semi-annual to once every three years.[224] Some insurers use online updates in between audits or encourage self-audits in addition.[225]

Insurers send auditors or retained consultants to visit insured agencies, sometimes for two to three days at a time.[226] Auditors typically tour the facilities and meet with the chief, sheriff, or other important agency executives, and sometimes with the city manager as well.[227] Auditors might also review police reports, internal affairs files, and other liability-related documentation.[228] They may go out in the field with the chief or other officers.[229] One pool even sends pool personnel to patronize "cop bars," listen, and observe, being careful to dispatch new faces each time to maintain cover.[230] Auditors evaluate and in some cases score the audited agencies and discuss with agency leadership how the agency can better manage risk.[231]

---

[223] *Cf.* BARDACH & KAGAN, *supra* note 14, at 272 (observing that, in the face of liability threats, businesses commonly "submit to inspections by the loss control representatives dispatched by liability insurance companies"); Ben-Shahar & Logue, *supra* note 14, at 236-37 ("Monitoring is often done more effectively by insurers that develop regulatory practices and technologies that the government lacks."). In at least one state, the pool does not audit its member agencies because the state board of peace officer standards and training (POST) does. *See* Telephone Interview with Risk Pool A, *supra* note 85.

[224] Telephone Interview with Commercial Insurer A, *supra* note 61 (every three years); Telephone Interview with Risk Pool D, *supra* note 105 (annual); Telephone Interview with Risk Pool E, *supra* note 111 (semi-annual).

[225] Telephone Interview with Risk Pool E, *supra* note 111 (requires periodic online updates); Trident Risk Points: Operational Policies & Procedures: Monitoring Compliance with Law Enforcement Manual, Trident Ins. Servs. (July 2012), https://www.argolimited.com/media/03C10U7X865H/docs/en_US/1ff185e22af3a5c38781aa76ee68fcccad4ee5e6/IQJ40V3Z1A83/Trident-LEL-Compliance_with-Manual-2012.pdf (providing guidelines for self-audits).

[226] Telephone Interview with Risk Pool D, *supra* note 105; Telephone Interview with Consultant A, *supra* note 86.

[227] Telephone Interview with Commercial Insurer A, *supra* note 61; Telephone Interview with Risk Pool B, *supra* note 85; Telephone Interview with Risk Pool C, *supra* note 101.

[228] Telephone Interview with Risk Pool D, *supra* note 105; Telephone Interview with Consultant A, *supra* note 86.

[229] Telephone Interview with Risk Pool B, *supra* note 85; Telephone Interview with Risk Pool D, *supra* note 105.

[230] Telephone Interview with Risk Pool D, *supra* note 105.

[231] Telephone Interview with Commercial Insurer A, *supra* note 61; Telephone Interview with Consultant A, *supra* note 86.

Many insurers keep a separate "watch list" for municipalities experiencing problematic loss runs. These municipalities are audited more frequently and sometimes more intensely. Meetings might include members of the board of the pool, for example, and top city officials.[232] One consultant told me that, when called in for this type of audit, he typically spends two to five days at the agency with a team of up to four people.[233] Continued coverage might then be predicated on cooperation with insurer-recommended initiatives or the guidance of chosen consultants.[234]

4. Accreditation

Many insurers encourage police agencies to obtain accreditation from a recognized accreditation agency like CALEA.[235] To become accredited, a police department must adopt and demonstrate compliance with an extensive set of standards that incorporates industry best practices. It must also pass an on-site review by a team of CALEA-trained assessors. Reaccreditation occurs every three years.[236]

---

[232] Telephone Interview with Commercial Insurer A, *supra* note 61; Telephone Interview with Risk Pool C, *supra* note 101.

[233] Telephone Interview with Consultant B, *supra* note 95.

[234] Telephone Interview with Commercial Insurer D, *supra* note 88.

[235] Accreditation can increase the odds that an insurer will offer coverage. *See* Telephone Interview with Commercial Insurer G, *supra* note 101. It can lower rates as well. *See* Telephone Interview with Commercial Insurer A, *supra* note 61; Telephone Interview with Commercial Insurer G, *supra* note 101; *see also Risk Management, Liability Insurance, and CALEA Accreditation*, CALEA, http://www.calea.org/content/risk-management-liability-insurance-and-calea-accreditation (last visited Aug. 31, 2015) (maintaining list of "liability insurance providers known to CALEA to offer some type of financial incentive to CALEA accredited agencies"); Ileana Garcia, *Slidell Police Accreditation Keeps the Department's Insurance Rate Low*, SLIDELL SENTRY-NEWS, *reprinted in* CALEA UPDATE MAG., Feb. 2001, http://www.calea.org/calea-update-magazine/issue-75/accreditation-works/slidell-police-accreditation-keeps-departments-in; McCoy, *supra* note 174, at 145 (quoting police executive who reported 16.7% discount for accreditation). Some insurers also reimburse their insureds for the fees associated with obtaining accreditation. Telephone Interview with Risk Pool C, *supra* note 101.

[236] *See* Garcia, *supra* note 235, at __ (discussing accreditation process and upkeep); *see also Standards Titles*, CALEA, http://www.calea.org/content/standards-titles (last visited Nov. 22, 2015) (listing standards); *Law Enforcement Program: The Standards*, CALEA, http://www.calea.org/content/law-enforcement-program-standards (last visited Nov. 22, 2015) (stating requirement of compliance with standards); *Law Enforcement Program: Process*, CALEA, http://www.calea.org/content/law-enforcement-program-process (last visited Nov. 22, 2015) (describing on-site assessment and reaccreditation process).

Crediting accreditation is naturally understood as a way of outsourcing policy review and auditing functions to the accreditation agencies.[237]

There is some evidence suggesting that CALEA-accredited agencies exhibit reduced liability risk,[238] but there is also evidence going the other way.[239] None of the studies in either direction is rigorous or peer-reviewed. And even if a relationship between accreditation and aggregate loss does exist, it is not necessarily causal. One expert I interviewed observed that, in his experience, the police executives who undertake accreditation are the same ones already concerned about police professionalism.[240]

5. Personnel

It has become conventional wisdom that a relatively small number of "bad apple" police officers commit a disproportionate amount of misconduct and receive a likewise disproportionate number of citizen complaints.[241] Based on this finding, police scholars have touted the outsized benefits of "early warning systems" designed to identify these bad apples before they rot.[242] Without necessarily employing the same terminology, insurers, too, analyze agency data to determine whether certain officers are contributing excessively to the agency's aggregate

---

[237] On the potential advantages of outsourcing arrangements, see HEIMER, *supra* note 93, at 206-09.

[238] CALEA, *supra* note 235 (linking to studies by pools finding "positive correlation between accreditation and loss reduction").

[239] *See* David Packman, *Can Accreditation Affect Police Misconduct Rates?*, CATO INST.: NAT'L POLICE MISCONDUCT REPORTING PROJECT (Nov. 29, 2009, 3:45 AM), http://www.policemisconduct.net/can-accreditation-affect-police-misconduct-rates/ (finding that CALEA-accredited agencies report *more* misconduct than the average similarly sized agency); *see also* ROBERT J. GIROD, POLICE LIABILITY AND RISK MANAGEMENT 8 (2014) (reporting tensions in the evidence regarding the effects of accreditation). The uncertain effects of accreditation have made some insurers skeptical that pursuing accreditation is cost-justified. *See, e.g.*, Telephone Interview with Risk Pool D, *supra* note 105.

[240] Telephone Interview with Consultant A, *supra* note 86.

[241] *See, e.g.*, HERMAN GOLDSTEIN, POLICING A FREE SOCIETY 171 (1977); Kenneth Adams, *What We Know About Police Use of Force*, *in* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, USE OF FORCE BY POLICE 1, 8-9 (1999); Barbara Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 459-60 (2004); Christopher J. Harris, *The Residual Career Patterns of Police Misconduct*, 40 J. CRIM. JUST. 323, 324 (2012); Samuel Walker et al., Responding to the Problem Officer: A National Study of Early Warning Systems 2.4-2.6 (2000), https://www.ncjrs.gov/pdffiles1/nij/grants/184510.pdf.

[242] *See, e.g.*, WALKER & ARCHBOLD, *supra* note 7, at 137-77; Armacost, *supra* note 241, at 527; Walker et al., *supra* note 241.

risk. Some insurers pressure agencies to "correct," or even to terminate, these problem officers, sometimes at pains of cancelling coverage.[243] We know that the insurers succeed at least some of the time.[244] Even police chiefs can be vulnerable when insurers pressure municipal leadership to make a change.[245] One consultant I interviewed was unabashed about his power to effect changes at the top, recalling more than one occasion on which police chiefs had been dismissed after a city manager retained him for a management study.[246] Reading between the lines a bit, I got the sense that he brandishes his track record to secure cooperation from chiefs who initially resist implementing his loss-prevention advice.

B. Underwriting

Lurking behind everything I have said about loss prevention is a crucial question: Why do police agencies cooperate with insurers' loss-prevention initiatives? Why, at the urging of insurers, do they change their policies, train their officers differently, open their doors to invasive audits, and even fire police professionals? The answer, at which I have already hinted, is underwriting—the process by which insurers evaluate a risk to decide what coverage, if any, to offer or renew, and for what price. Control over the availability and pricing of coverage gives the insurers the leverage to effect change within police agencies. Underwriting decisions also serve to educate agencies about the likelihood of suit.

As part of the underwriting process, insurers amass information from extensive applications they require municipalities to submit, along with site visits in some cases. The policy applications reveal the sorts of

---

[243] *See* Telephone Interview with Risk Pool D, *supra* note 105. Other insurers, in contrast, expressed reluctance to be seen as meddling in personnel matters for fear of liability exposure under employment-related laws. *See, e.g.*, Telephone Interview with Risk Pool C, *supra* note 101.

[244] *See, e.g.*, Alex Green, *Niota Officials Tied to Beating Fired; They Say Insurance Company Forced the Action*, TIMES FREE PRESS (Chattanooga), Aug. 24, 2013 (quoting mayor's report that city's coverage would have been dropped if two officers involved in misconduct had been allowed back on duty).

[245] Rob Karwath, *Calumet City Will Lose Police Liability Insurance*, CHI. TRIBUNE, Mar. 29, 1988 (reporting council member's comment that city's insurance cancellation was "the final argument for the mayor to pick a new police chief from outside the department" when the interim chief retired); *Rutledge Mayor "Had No Choice" in Firing: Police Chief Refused To Resign; City at Risk of Losing Insurance*, KNOXVILLE NEWS-SENTINEL, Mar. 23, 2010 (reporting mayor's assertion he "had no choice" but to fire police chief accused of misconduct because "the city was at risk of losing its liability insurance" if chief remained (internal quotation marks omitted)).

[246] Telephone Interview with G. Patrick Gallagher, *supra* note 125.

information insurers find relevant to their underwriting decisions.[247] Unsurprisingly, it largely overlaps with the information insurers impart to their insureds through loss-prevention programs. That is, the more a municipality is doing to attend to loss prevention by adopting and maintaining compliance with adequate policies, training officers responsibly, controlling or cutting ties with problem officers, and so on, the more favorably an insurer will regard the municipality during underwriting.

Specifically, insurers gather data in eight categories:[248] (1) general information, such as the municipality's population and any significant operations within the jurisdiction, like a college or amusement park;[249] (2) policies and procedures on high-risk issues like the use of force, copies of which municipalities must attach;[250] (3) education and training requirements, as well as accreditation;[251] (4) 911 dispatching protocols; (5) jail operations, where applicable;[252] (6) personnel, including whether the department employs part-time auxiliary officers or police dogs;[253] (7)

---

[247] *See, e.g.*, Telephone Interview with Commercial Insurer A, *supra* note 61 (describing application and renewal process and explaining that application questions drive underwriting).

[248] *See, e.g.*, Police Professional Liability Insurance Application, Prof'l Gov'tal Underwriters, Inc. (May 1999), https://www.scui.com/jackson/pdfs/broke_pub_entity_apps/PGUI-Police_Prof_App-Darwin.pdf; Law Enforcement Liability Application, CNA, https://www.oldnationalins.com/pdfs/Insurance/JWF-Applications/Law-Enforcement-Liability-Application.pdf.

[249] Other general information includes moonlighting policies and contractual arrangements with other entities for policing services.

[250] *See* Harry F. Brooks, *Public Entity Risk Management—Part II*, AM. AGENT & BROKER, Oct. 1993, at 12, 14; Child, *supra* note 161, at 32-33. More specific prompts ask whether a policies-and-procedures manual exists, how often it is revised and by whom, how it is distributed and taught, whether the agency conducts procedures-compliance monitoring, and whether it requires and follows up on use-of-force reports.

[251] *See* Brooks, *supra* note 250, at 14; Harry F. Brooks, *Loss-Control Techniques for Public Entities*, AM. AGENT & BROKER, Apr. 1997, at 15 ("Perhaps the major underwriting consideration in police professional liability insurance is the training of police officers."). Applications ask about the minimum education requirements for officers; background investigation and psychological testing of job applicants; training on the use of batons, mace, control holds, stun guns, and canines; and in-service training updates.

[252] Typical questions ask about jail operations manuals, capacity constraints, inspections, and audio and video recordings.

[253] "Risk exposure for public law enforcement entities has changed, thereby requiring that broader underwriting factors be taken into consideration, such as size of the police force, size of the city, prior department claims' experience, reoccurring altercations and, often, racial and/or ethnic diversity of the police force." Susan Kostro, *Police Excessive Force Raises Liability Risk Scrutiny*,

prior insurance information; and (8) claims history, typically extending back five years.

In addition to generating useful information for the insurers, the applications communicate to the municipalities the factors that will likely affect the insurers' underwriting decisions.[254] This creates an incentive for municipalities to ensure that they are able, insofar as practicable, to provide answers that will result in favorable underwriting responses. When they cannot, insurers respond in several ways.

1. Coverage Denial

Neither commercial carriers nor pools are required to write coverage for any particular municipality. Many experts I interviewed attested to using the denial or nonrenewal of coverage as a tool to encourage desirable behavior.[255] Withholding coverage puts a municipality in a tough position, often forcing a choice between self-insurance and commercial coverage from the pricey "surplus market."[256] In the extreme, as I mentioned earlier, coverage denial can even lead a municipality to shutter its police force.[257]

An insurer, for example, might review a municipality's police policies and procedures and refuse to write if they are inconsistent with

---

TRENDING "@" IRONSHORE (Oct. 1, 2015), http://www.ironshore.com/blog/police-excessive-force-raises-liability-risk-scrutiny.

[254] *Cf.* Schlanger, *supra* note 29, at 18 (discussing how reporting requirements foster consideration by the reporters of otherwise overlooked issues).

[255] *See, e.g.*, Telephone Interview with Commercial Insurer E, *supra* note 92; Telephone Interview with Commercial Insurer F, *supra* note 34; Telephone Interview with Commercial Insurer G, *supra* note 101; Telephone Interview with Risk Pool B, *supra* note 85.

[256] *See, e.g.*, Telephone Interview with Commercial Insurer G, *supra* note 101.

[257] *See, e.g.*, Church, *supra* note 71, at 17, 18 (reporting that police patrols were suspended in two towns and five counties closed their jails due to a lack of coverage); Tyler Jett, *City of Niota, Tenn., Shutting Down. Again.*, TIMES FREE PRESS (Chattanooga), June 19, 2013 (reporting that city's "police department is closed" after pool pulled coverage); *Liability Insurance in Crisis*, N.Y. TIMES, Mar. 4, 1986, at A26 (reporting that "police in West Orange, N.J., had to stop patrolling in cars they could no longer insure"); Schwartz, *How Governments Pay*, *supra* note 10, at 28-29 & nn.133-39 (collecting four examples of police departments that closed due to premium increases or termination of coverage); *cf.* Ed Leefeldt, *Far-Reaching Implications Confront Insurers in the Trayvon Martin Case*, FINE PRINT (Apr. 5, 2012), http://www.insure.com/blog/far-reaching-implications-confront-insurers-in-the-trayvon-martin-case.html ("Absent strict rules, insurance companies are likely to shut down Neighborhood Watch programs, particularly those sponsored by police, because the liability for the municipality is huge.").

industry best practices.[258] Or it might insert a contingency—called a "subjectivity" in insurance parlance—into its quote, making the offer of coverage contingent on the agency's revision of its procedures.[259] And a municipality with a significant history of police abuse claims, one broker explained, would have considerable trouble getting coverage at all.[260] Similarly, an insurer might drop coverage from a municipality that ignores the insurer's loss-prevention advice or fails to follow through on a promise made to the insurer.[261] This might include, for instance, a promise to fire a particular officer.[262]

2. Differentiated Premiums

On their face, the data collected in insurance applications suggest that insurers engage in both feature-rating and experience-rating—that is, both the police agency's characteristics and policies and its past loss history influence the premium price. My interviews generally confirmed this to be the case,[263] although a few insurers seemed to suggest that premiums were predominantly, if not exclusively, experience-rated with little to no consideration of a municipality's risk-management efforts.[264] Insurers that do use feature-rating talked about adjusting premiums based on the existence and quality of agency policies and compliance with training and other loss-prevention initiatives.[265] With similar effect, some insurers give discounts to

---

[258] Telephone Interview with Commercial Insurer G, *supra* note 101.

[259] Telephone Interview with Commercial Insurer E, *supra* note 92.

[260] Telephone Interview with Commercial Broker B, *supra* note 36.

[261] Telephone Interview with Risk Pool B, *supra* note 85 (kicked out a member, which was later readmitted); Telephone Interview with Risk Pool D, *supra* note 105 (expelled two members that were not cooperating with loss control); Telephone Interview with G. Patrick Gallagher, *supra* note 125 (retained by pools to conduct risk assessments of troubled municipalities, with negative findings resulting in expulsion from the pool).

[262] Telephone Interview with Commercial Insurer G, *supra* note 101.

[263] *See, e.g.*, Telephone Interview with Commercial Broker B, *supra* note 36; Telephone Interview with Risk Pool A, *supra* note 85; *see also* ICMA Report, *supra* note 83, at 25 (finding that "premiums for local governments with a history of claims are higher than those paid by local governments with no claims' [sic] history").

[264] Telephone Interview with Commercial Insurer F, *supra* note 34; Telephone Interview with Risk Pool D, *supra* note 105; Telephone Interview with Risk Pool E, *supra* note 111.

[265] Telephone Interview with Commercial Insurer E, *supra* note 92 (inquires about how policies are promulgated and reviewed and how training works); Telephone Interview with Commercial Insurer G, *supra* note 101 (considers existence and quality of policies); Telephone Interview with Risk Pool B, *supra* note

agencies accredited by CALEA or a similar body.[266] Many pools also refund excess contributions to their members annually. That is, if the collected contributions exceed the pool's total losses in a given year, the pool will distribute the excess to its members as cash refunds or credits against future contributions.[267] This creates an incentive for members to reduce aggregate losses. In an extreme case, differentiated premiums can become functionally equivalent to a coverage denial, as in the case when a pool "prices a member out" to the "standard market."[268]

3. Deductibles and Self-Insured Retentions

A number of experts I interviewed stressed the importance of deductibles and self-insured retentions in managing moral hazard. Many informed me that they require all municipalities to retain some risk through one of these mechanisms.[269] Raising the deductible or self-insured retention is also one of the first ways an insurer might attempt to coax good behavior from a recalcitrant agency.[270] Municipalities need to have "skin in the game," one expert advised;[271] the more risk they retain, said another, "the more religion they get."[272] One insurer relayed that, in his experience, pools that do not require members to assume a deductible—those that write *first-dollar coverage*—tend to have problems controlling risk.[273] The loss-prevention coordinator for a pool of small and mid-sized cities, however, told me that his pool does

---

85 (raises contributions by 20% for failure to comply with recommended best practices); Telephone Interview with Risk Pool C, *supra* note 101 (notifies underwriting about obstinate agencies, which are warned of a possible contribution increase); Telephone Interview with Consultant A, *supra* note 86 (premiums adjusted based on adherence to policy and training); Telephone Interview with Consultant B, *supra* note 95 (some insurers give discounts to agencies that adopt insurer-approved model policies).

[266] *See, e.g.*, Telephone Interview with Commercial Insurer G, *supra* note 101 (20-25% discount for CALEA).

[267] Telephone Interview with Risk Pool B, *supra* note 85.

[268] Telephone Interview with Commercial Insurer F, *supra* note 34.

[269] *See, e.g.*, Telephone Interview with Commercial Insurer A, *supra* note 61; Telephone Interview with Commercial Insurer D, *supra* note 88.

[270] Telephone Interview with Commercial Insurer D, *supra* note 88; Telephone Interview with Risk Pool B, *supra* note 85.

[271] Telephone Interview with Commercial Insurer F, *supra* note 34.

[272] Telephone Interview with Commercial Insurer G, *supra* note 101.

[273] Telephone Interview with Commercial Insurer A, *supra* note 61.

write first-dollar policies and that occurrences among his members are fairly rare.[274]

4. Limits

Underwriters can also manage risk by imposing limits on the amount of liability they're willing to insure. All police liability policies have some ceiling, but insurers sometimes impose a cap on a particular insured that differs from the default limit in the insurer's standard policy forms. In addition, insurers can use *line limits* to encourage improvements in very particular areas. For example, if a department has an inadequate policy governing high-speed car chases, its insurer might impose a line limit on claims stemming from such pursuits.[275]

C. The Regulatory Role of Reinsurers

Reinsurers, though one step removed from the police agencies themselves, are also active regulators. Just as primary insurers do, by assuming the risk of police liability, reinsurers develop the incentive to invest in cost-effective mechanisms to reduce police misconduct. As a rule of thumb, the sooner the reinsurer's liability kicks in—the lower the "attachment point"—the stronger this incentive will be, and so the more assertively the reinsurer will pursue loss prevention. A reinsurer that backs a pool with a $100,000 self-insured retention, that is, will be more proactive about preventing loss than if the retention were $1 million.[276]

Many of the loss-prevention measures reinsurers take mirror, at one step removed, the primary insurers' techniques. So, where primary insurers review police agencies' policies and procedures for incorporation of industry best practices, reinsurers review primary insurers' coverage documents for incorporation of loss-prevention

---

[274] Telephone Interview with Risk Pool E, *supra* note 111 (offers a deductible option that few cities select); *see also* Public Entity Solutions, *supra* note 9 (advertising "first dollar or SIR on all lines or risks"); *Mississippi Municipal Liability Plan*, MISS. MUN. SERV. CO., http://msmsc.com/about/liability-plan (last visited Aug. 31, 2015) ("[T]he Liability Plan has been able to provide first dollar coverage for municipal exposures including, but not limited to, … law enforcement liability."). *See generally* ICMA Report, *supra* note 83, at 19 (reporting deductibles on municipal police liability policies in 1991).

[275] Telephone Interview with Commercial Insurer D, *supra* note 88.

[276] *See* Telephone Interview with Commercial Insurer D, *supra* note 88; Telephone Interview with Commercial Broker A, *supra* note 87; Mendoza, *supra* note 77, at 76.

incentives.[277] Where primary insurers encourage agencies to seek accreditation from CALEA, reinsurers encourage pools to seek "recognition" from the Association of Governmental Risk Pools.[278] And where primary insurers pressure police agencies to cut ties with problem officers, reinsurers urge pools to disassociate from problem municipalities.[279]

Reinsurers commonly view their role as supporting the primary insurers' loss-prevention initiatives. This often entails funding insurers' loss-prevention programs.[280] A reinsurer, for example, might subsidize a pool's purchase of a use-of-force simulator or pay for the online training program it provides to its members.[281] It might give grants to pools to audit their member agencies or bring in speakers to provide live training.[282] And reinsurers may fund pools' own loss-prevention grant programs; that is, when a police agency receives a loss-prevention grant from its insurer, the funds may actually come from the reinsurer behind the insurer.[283]

More generally, in everything they do, insurers operate against the backdrop of reinsurance underwriting. As one pool official put it: "The impact upon the pricing and availability of reinsurance … is on my mind, influencing each and every decision that I make."[284] When setting reinsurance rates, reinsurers examine how well insurers manage risk among their insureds. How is the insurer's risk-management department staffed? Does it provide sample policies and procedures? If so, how are they communicated to the insureds? Is their adoption required? How does the insurer handle problematic agencies? How often does the insurer audit its insureds? How does information from risk management and claims management flow back to and inform the insurer's underwriting? The answers to these questions, along with the insurer's loss history and the results of any audit, help a reinsurer decide whether to write a policy and what rates to set. This gives insurers an incentive to improve their underwriting and loss-prevention

---

[277] *See* Mendoza, *supra* note 77, at 78, 83-84.

[278] *See id.* at 85.

[279] Telephone Interview with Commercial Insurer F, *supra* note 34.

[280] *See, e.g.*, *id.*

[281] Telephone Interview with Risk Pool C, *supra* note 101; Telephone Interview with Risk Pool E, *supra* note 111.

[282] Telephone Interview with Commercial Insurer C, *supra* note 114; Telephone Interview with Commercial Insurer G, *supra* note 101.

[283] Telephone Interview with Risk Pool E, *supra* note 111.

[284] Mendoza, *supra* note 77, at 74 (quoting senior official from the Missouri Housing Authorities Property and Casualty, Inc.) (alteration in original).

programs.[285] This may partly explain why some pools obtain ratings from credit agencies. As part of the credit-rating process, ratings agencies review pools' liability management; a positive rating implies good risk management, which in turn should lower reinsurance rates.[286]

D. A Note on Making Governments Pay

A rich and evolving literature debates whether and how the threat of civil liability deters wrongdoing by government actors.[287] Without taking a firm position on these questions, I detour briefly here to add my qualitative findings to the mix. At the end of the day, insurers can essentially threaten only to hike rates or increase a municipality's financial exposure by capping coverage, raising the deductible or self-insured retention, or, in a serious case, terminating coverage. That is, insurers can threaten only pecuniary harm. For the most part, insurers report success at getting police officials to respond to these incentives. The interesting theoretical question is why, given that public dollars, not personal ones, will be used to satisfy any financial obligation.

I asked this question—why police officials mind if premiums go up—in every interview. The responses varied, but three themes emerged. First, police agencies care about "professionalism"—about being seen as doing things "the right way."[288] Professionalism is reputational

---

[285] Telephone Interview with Commercial Insurer C, *supra* note 114; Telephone Interview with Commercial Insurer E, *supra* note 92; Mendoza, *supra* note 77, at 74-102 (describing, based on survey of pools, how reinsurers influence pools' underwriting, claims management, and financial planning); *see also* Telephone Interview with Risk Pool B, *supra* note 85 (describing how pool's representatives traveled to London to meet with Lloyd's of London, which resulted in a rate decrease, and how its reinsurers come on-site to review the pool's performance); Abramovsky, *supra* note 142, at 375-405 (describing how reinsurance functions like private regulation).

[286] *See* Telephone Interview with Commercial Insurer A, *supra* note 61 (agreeing that this pricing effect seems likely, though disclaiming personal knowledge).

[287] *See, e.g.*, Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001); Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000). Joanna Schwartz reviews the relevant work in a recent working paper. *See* Schwartz, *How Governments Pay*, *supra* note 10, at 5-8.

[288] *See, e.g.*, Telephone Interview with Consultant A, *supra* note 86; David Alan Sklansky, *The Persistent Pull of Police Professionalism*, *in* NEW PERSPECTIVES IN POLICING (Mar. 2011), https://www.ncjrs.gov/pdffiles1/nij/232676.pdf; Christopher Stone & Jeremy Travis, *Toward a New Professionalism in Policing*, 2013 J. INST. JUST. INT'L STUD. 11 (2014).

currency. Insurers understand this, and they hire experienced former officers to help them bridge the cultural gap and repackage loss prevention as "professionalism enhancement."[289] On this view, rising insurance premiums signal an increasing likelihood of a reputation-threatening liability event.[290]

Second, insurers are adept at translating financial incentives into political ones. Unlike a court, which can only issue an order and let the chips fall where they may, an insurer can pick up the phone and call the city manager or the mayor to generate political pressure on police leadership. One expert, for example, told me that, if his pool is getting resistance from a poorly performing municipality, he will alert the city manager that the city's costs are rising because of the police, and furnish charts comparing the city's costs to those of comparable members.[291] Some experts, however, were more pessimistic, reporting that politicians often fail to demand necessary changes even when coaxed by their insurers.[292]

Third, the financial consequences themselves are sometimes sufficient to motivate change. One veteran consultant explained that most police officers do not understand the extent to which they're insured against liability for misconduct and, moreover, they're told that liability saps the pool of money available for raises and equipment.[293] The latter tale may not always be true, but sometimes it is. In a recent empirical study, Joanna Schwartz found that some police agencies do feel, in a budgetary sense, the impact of financial payouts. It is not the

---

[289] *See* EPP, *supra* note 10, at 20-24, 97-98, 108-09 (asserting that "what agency officials fear most about liability is the threat of public embarrassment and reputational damage" and discussing the connection between avoiding liability and maintaining professional standards); GALLAGHER, *supra* note 219, at 10 ("If risk management concepts drive police performance there will be two solid effects: liability will be decreased and organizational professionalism will be enhanced.").

[290] *See* Baker & Swedloff, *supra* note 54, at 1419 ("Insurance prices are highly credible loss prevention signals ...."); *see also* Susan K. Laury & Melayne Morgan McInnes, *The Impact of Insurance Prices on Decision Making Biases: An Experimental Analysis*, 70 J. RISK & INS. 219 (2003) (finding that actuarially fair insurance premiums can debias individual consumers' risk decisions).

[291] Telephone Interview with Risk Pool B, *supra* note 85.

[292] Telephone Interview with Risk Pool E, *supra* note 111; Telephone Interview with G. Patrick Gallagher, *supra* note 125; *see also* Telephone Interview with Risk Pool B, *supra* note 85 (reporting that sheriffs tend to be more resistant because they are elected rather than appointed).

[293] Telephone Interview with Consultant A, *supra* note 86; *see also* GEOFFREY P. ALPERT ET AL., POLICE PURSUITS 151 (2000) ("Perhaps the best justification for effective law enforcement risk management measures is the funding that can be reallocated, from law enforcement liability ... premiums, to critical law enforcement needs such as increased personnel, new equipment or training.").

case, as many have believed,[294] that the money for insurance premiums, judgments, and settlements always comes out of general treasury funds.[295] Schwartz's qualitative findings are also consistent with my own—police officials in these paying jurisdictions, she finds, report that lawsuits impact their daily operations.[296]

III. QUESTIONS AND IMPLICATIONS

The realization that a vast private industry stands between our legal institutions and the police, and changes the way the police behave, raises numerous normative questions. Perhaps the most pressing of these is whether insurers raise or lower the level of police misconduct. I take up this question in Section A. I consider the potential problem of overregulation by insurers in Section B. In Section C, I consider whether police liability insurance makes the police less democratically accountable. In Section D, I ask how the presence of insurers in the system may affect the content of criminal procedure law. And in Section E, I explore how we might use the law to regulate insurers to increase social welfare.

A. Does Police Insurance Reduce Police Misconduct?

At this point a cautionary note is due. I have focused on describing the ways in which liability insurers can influence police agencies in an effort to reduce misconduct. I have not, however, proven that liability insurance today *actually does reduce police misconduct*. This is a difficult empirical question. The theory, and the shreds of evidence I have gathered, point in each direction. The empirical study that comes closest to examining this question, which I discuss below, looks bad, but there are good reasons to think it is not the final word.

Let me begin with my greatest reason for optimism. Although there are no rigorous studies attempting to measure the effect of insurance on the rate of police misconduct, there *are* studies that test the effect of some of the tools that insurers use in their loss-prevention programs. For example, insurers typically require police agencies to promulgate

---

[294] *See* Schwartz, *How Governments Pay*, *supra* note 10, at 7 n.26 (collecting sources).

[295] *Id.* at 30.

[296] *See id.* at 32-33; *see also* Joseph L. Colletti, *Risk Management: How Do You Know They Know?*, 31 J. CAL. L. ENFORCEMENT, 1997, at 16, 18 ("[L]ower pay out for claims results in more funds for department programs and the purchase of needed equipment."); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1676 (2003).

and maintain adequate policies on vehicle pursuits, the use of force, and other high-risk conduct. Studies suggest that these policies do, on balance, reduce the covered harms.[297] Other research has found that body-worn cameras and training on use-of-force simulators, which insurers also encourage, reduce the inappropriate use of force.[298] The basic point is that, to the extent researchers have identified successful strategies for reducing police misconduct, insurers seem to be doing a pretty good job of coaxing police agencies into using them.[299] They also encourage additional reforms like community outreach and stress management that, while not rigorously proven to help, many believe to be promising as well. To put the point slightly differently, if all of the insurers' efforts fail, it is not clear what will work.

This is not to say that self-insured municipalities make no use of these loss-prevention strategies. But market insurers are more likely to locate control over loss prevention outside the municipality, which can make it more effective. "It is usually the case," Carol Heimer explains, "that the [insured] will have mixed reactions to loss prevention, being interested in loss-prevention activity only as long as it does not divert too much time and energy from other, more rewarding activities."[300] "By encouraging the relocation of loss-prevention activities to organizations that do not benefit from neglecting them," Heimer continues, "insurers increase the likelihood that these activities will actually be carried out."[301] In addition, the development and implementation of loss-prevention technology is in many cases a public good, making it difficult, at least in theory, to motivate investment by individual municipalities, which will not capture all of the benefits.

---

[297] *See, e.g.*, ALPERT ET AL., *supra* note 293, at 15 (high-speed pursuits); Stephen A. Bishopp et al., *An Examination of the Effect of a Policy Change on Police Use of TASERs*, 26 CRIM. J. POL'Y REV. 727 (2015) (electronic stun weapons); James J. Fyfe, *Police Use of Deadly Force: Research and Reform*, 5 JUST. Q. 165 (1988) (firearms).

[298] On body-worn cameras, see Barak Ariel et al., *The Effect of Police Body-Worn Cameras on Use of Force and Citizens' Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANT. CRIMINOLOGY 509 (2015); Cole Zercoe, *Body Camera Study: Denver Police See Drop in Arrests, UOF Complaints* (Sept. 4, 2015), POLICEONE, http://www.policeone.com/police-products/body-cameras/articles/9485301-Body-camera-study-Denver-police-see-drop-in-arrests-UOF-complaints/. On simulators, see sources cited *supra* notes 203-208. As noted earlier, there is mixed evidence on whether accreditation, which many insurers promote, tends to reduce loss. *See supra* notes 238-240 and accompanying text.

[299] *But see* Rappaport, *supra* note 221, at __ (arguing that insurers promote loss-prevention technologies much more aggressively in some policing contexts than others).

[300] HEIMER, *supra* note 93, at 14.

[301] *Id.*

Insurers and outside organizations like accreditors can help overcome these collective action problems.[302]

There is some evidence that bears out this theory in the policing context. Carol Archbold surveyed the 354 largest municipal law enforcement agencies—a good share of which, presumably, are self-insured—about their risk-management programs. Only 14 of the 354—a little under 4%—reported having any risk-management initiatives.[303] Based on these data, Archbold concluded that "risk management programs are still in the infancy stage of being embraced by police agencies."[304] Likewise, one reinsurer I interviewed speculated that many large, self-insured municipalities would be better off with primary coverage from the market. Absent some external accountability mechanism, municipalities can become "insular"; according to this expert, self-insured municipalities do not, for example, tend to participate in risk-management conferences, and thus potentially miss out on valuable information sharing.[305]

There are several reasons to be cautious, however. First, as I noted at the outset, I make no claim that the sample of insurers I interviewed is representative. I cannot rule out the possibility that a substantial share of insurers are insufficiently attentive to loss prevention, and thus may increase (through moral hazard), rather than decrease, the amount of covered misconduct. Some of the experts I spoke to raised this possibility. One reinsurer, for example, said that, while many pools are serious about managing members' risk, others are "country club pools" more concerned with maintaining friendly relationships. And the loss-prevention programs at many pools, he added, had become

---

[302] *See id.* at 14-15 & n.9.

[303] *See* ARCHBOLD, *supra* note 112, at 62, 77-79. The other agencies relied on police legal advisors, city or county attorneys, or private contract attorneys to handle liability issues. *See id.* at 77-79.

[304] *Id.* at 25; *see also* GALLAGHER, *supra* note 219, at 10-15 (calling the "absence of emphasis on risk management" a "glaring deficiency" in policing); WALKER & ARCHBOLD, *supra* note 7, at 230 (asserting that "very few police agencies use risk management"); Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1095-1101 (2015) (reviewing evidence that few police departments have risk managers); Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023 (2010) (finding that the largest police agencies only rarely learn from lawsuits filed against them or their officers); Telephone Interview with Commercial Insurer A, *supra* note 61 (opining that most small municipalities have no in-house risk-management program). *But see* Telephone Interview with Commercial Insurer E, *supra* note 92 (asserting, based on professional experience, that municipalities with large self-insured retentions usually have risk management programs in place).

[305] Telephone Interview with Commercial Insurer D, *supra* note 88.

"routine."[306] Another expert described the pools as not especially sophisticated.[307]

Still, these same two experts also said that pools, on the whole, are getting better rather than worse.[308] And the snapshot I've taken in this Article, it bears note, captures a soft insurance market.[309] In a soft market, insurers tend to be more lax about underwriting, and less forceful about loss prevention, as they compete for premium dollars and market share. Harder markets typically entail more exacting standards for municipalities striving to maintain coverage and keep rates down.[310]

Second, "not all 'loss prevention' to the insurance company results in loss prevention to society."[311] If an insurer refuses to cover or renew a municipality because its police agency is a "bad risk," the municipality then goes bare, and the agency's officers continue to commit misconduct, the insurance company has decreased its own liability but has not reduced social loss.[312] Or, as the point is sometimes put, there can be a difference between "liability prevention" (what the insurer wants) and "loss prevention" (what society wants).[313] It is possible, in particular, that the "blue wall of silence"—the refusal of many police to report on another officer's wrongdoings—increases social loss (by reducing the expected sanction for misconduct, and thus weakening deterrence) yet decreases liability (by depriving complainants of evidence necessary to mount a case). One worries that insurers' incentives may point in the wrong direction here.

This is a real concern, although it may not be as grave as it first appears. As an initial matter, it is far from clear that insurers' stance on the "blue wall of silence," when compared to deep-set cultural and institutional forces, meaningfully affects whether a closed-lipped police culture predominates. But more important, precisely because the "blue

---

[306] Telephone Interview with Commercial Insurer F, *supra* note 34.

[307] Telephone Interview with G. Patrick Gallagher, *supra* note 125.

[308] Telephone Interview with Commercial Insurer F, *supra* note 34; Telephone Interview with G. Patrick Gallagher, *supra* note 125; *accord* Mendoza, *supra* note 77, at 125 ("Pooling as a whole is finally beginning to ideologically move from the mindset of a 'country-club' attitude to a small mutual insurance enterprise." (quoting pool official) (internal quotation marks omitted)).

[309] *E.g.*, Telephone Interview No. 2 with Commercial Insurer C (Sept. 29, 2015); Telephone Interview No. 2 with Commercial Insurer D (Oct. 13, 2015).

[310] *See* BAKER & GRIFFITH, *supra* note 15, at 55-56 ("[N]o snapshot of the underwriting process can present an adequate basis for understanding insurance underwriting over time.").

[311] Cohen, *supra* note 17, at 327.

[312] *See id.*

[313] Baker & Siegelman, *supra* note 11, at 180 n.15.

wall of silence" may weaken general deterrence of police misconduct, insurers may just as well oppose the policy as support it. That is, even if the "blue wall" may reduce expected liability in any particular case, it may *increase* expected liability in the aggregate by emboldening officers to break the rules. For obvious reasons, this cuts against insurers' long-term business objectives.

Finally, there is the study I mentioned at the beginning of this Section. As part of a larger project about how municipalities internalize the law, Charles Epp collected data in 2000-2001 on numerous organizational and environmental characteristics, including insurance coverage, for 838 police departments drawn from a stratified random sample of American cities.[314] He predicted, as I would have, that "departments covered by liability insurance are likely to be more attentive to the threats of legal liability than departments that are self-insured" because "[i]nsurance companies are known to press their organizational clients to adopt policies aimed at reducing their exposure to legal liability."[315] His results, however, showed just the opposite. Epp found that departments were *less* likely to adopt a host of best practices related to the use of force if they carried liability insurance.[316] They were also less likely to take extensive corrective actions against offending officers.[317] These findings, Epp noted, "support the common claim[] … that liability insurance blunts the impact of liability pressure."[318]

I am not sure what lessons to draw from Epp's findings. Though they concern me, I am disinclined to generalize them too broadly. As an initial matter, Epp did not test the relationship of interest here, between liability insurance and the rate of police misconduct. He tested the relationship between insurance, on the one hand, and best practices and corrective actions, on the other hand—the latter of which *might* be a proxy for misconduct. The associations he found, moreover, were neither substantively large nor statistically significant at the conventional level.[319] Even if they had been, they would not necessarily

---

[314] EPP, *supra* note 10, at 116-17.

[315] *Id.* at 241-42.

[316] *Id.* at 134. Epp used the term "legalized accountability" for what I'm calling "best practices." *Id.* at 117-29.

[317] *Id.* at 134-35.

[318] *Id.* at 134.

[319] *See id.* at 247, 249. Epp's survey question about insurance coverage also may have created some noise. Epp asked municipalities whether they "purchase[d] insurance coverage for matters related to police liability." Email from Charles R. Epp to Author (Nov 23, 2015, 4:22 PM CST). While the question may seem straightforward, it's less so than it first appears. First, given that coverage through a pool is not technically "insurance," *see supra* 79 and accompanying text,

hold today, some fifteen years later.[320] Nor were the relationships causal—it may be that the municipalities that experienced high rates of misconduct felt more justified in purchasing insurance.[321] Epp himself warns that his results "are not necessarily the final word on the influence of liability insurance," and notes that other work "has persuasively argued that insurance companies" in the 1980s "placed pressure on police departments to improve their systems of control over officers' use of force."[322]

There is a sense among policing scholars that we actually know a good deal about how to reduce at least certain strains of police misconduct. The problem, many have claimed, is getting police agencies to seize upon what we know. Insurers appear to me to be well positioned to do just this, although more work is required before concluding that they're having the desired effect.

B. The Risk of Overregulation

Insurers have potential as surrogate regulators of the police partly because their preferences substantially align with the public's: less misconduct is generally a good thing. But upon closer inspection, as I alluded to earlier, we might become concerned about the places where insurer and social preferences diverge. An insurer providing police

---

it's not clear how municipalities that belonged to pools would answer this question; at the least, it's not clear that all would answer "yes." Second, based on my discussions with industry participants, it is not clear to me that all municipalities that carry a large self-insured retention would answer the same way. Some might respond in the negative because, for practical purposes—given that their insurance rarely if ever kicks in—they think of themselves as self-insured. As a point of reference, some experts consider a municipality that carries a $250,000 self-insured retention to be "self-insured"; others set the bar much higher or take the position that only a municipality that purchases absolutely no liability coverage of any kind can rightly assume this label. *See* Schwartz, *How Governments Pay*, *supra* note 10, at 12 n.49 (describing disagreement among experts).

[320] Epp found that the prevalence of best practices correlated positively with agency size up to a point, but then turned negative for "very large" agencies. EPP, *supra* note 10, at 134, 247. When Epp conducted his survey, roughly half of these very large agencies purchased insurance. Email from Charles R. Epp to Author (Nov 23, 2015, 3:10 PM CST). Today, as far as I can tell, nearly all of them self-insure. *See supra* note 90 and accompanying text. As a result, it is unclear whether and to what extent the negative relationship between insurance and best practices persists.

[321] *See* HOWARD C. KUNREUTHER ET AL., INSURANCE AND BEHAVIORAL ECONOMICS 116-18 (2012) (explaining that consumers tend to treat insurance as a short-term investment and often cancel coverage if no loss is suffered).

[322] EPP, *supra* note 10, at 134 (citing McCoy, *supra* note 174).

liability coverage is doing something close to optimizing the municipality's level of liability—it wants the municipality to take all, but only, *cost-justified* measures to reduce liability. The concern that insurers may *underregulate* has run throughout the Article. Indeed, what motivates the entire examination of insurers' regulation is the fear that, if insurers indemnify without regulating sufficiently, moral hazard will increase police misconduct. In response, I have given reason to believe that some insurers, at least, seem to take loss prevention seriously. But perhaps more important, I have shown that insurers have influence over the police, such that, if they do regulate too loosely, we might tighten the screws on the insurers as a way of putting pressure on the police.

But what about the opposite concern—that insurers may *overregulate* the police? After all, an insurer does not internalize the benefits of aggressive—and risky—crime fighting; or, equivalently, the insurer does not internalize the cost of arrests and prosecutions foregone by a police force suffocated by private regulation.[323] Imagine a loss-prevention measure that costs $X and averts $Y of liability, but also reduces crime-fighting benefits by $Z. The insurer will consider the measure to be cost-justified if $X<Y$; for the municipality, though, the question instead is whether $\underline{X+Z}<Y$.

There are at least two responses. First, although it is theoretically possible that loss prevention hampers police work, I have not seen data that substantiate this fear.[324] It is also possible that loss prevention facilitates more and better police work by reducing the incidence of costly and inconvenient lawsuits that distract from the agency's core mission. Second, assuming sufficient competition, the market should sort out the overregulation problem. This may be why we do not see insurers trying to disarm the police, for example. Simply put, a municipality that wants its police to take more risks than its insurer

---

[323] *See* Armacost, *supra* note 241, at 475 (discussing the "perceived gains of aggressive policing").

[324] *See, e.g.*, Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996) (finding substantial methodological flaws in many older studies purporting to show that *Miranda* hamstrings law enforcement, but conceding, after reporting results of new original research, that *Miranda* does create social costs, such as increasing the likelihood that suspects will not cooperate and lowering the conviction rate slightly). *But see* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839 (1996) (critiquing Leo's study and arguing that *Miranda* depresses the confession rate more than Leo finds).

will allow will, buoyed by public support for crime control, find a more lenient insurer and pay higher premiums.[325]

If we dig any deeper, we quickly arrive at deep-seated conflicts about constitutional theory. One who takes a classical, deontological view of constitutional law would, I presume, urge municipalities to take all practicable measures to reduce the risk of harm from police activity, regardless of cost. The deontologist, that is, would worry that insurers don't go far enough, and would not worry about so-called overregulation. A consequentialist, however, may have the opposite concern—that insurers go too far, and may prohibit some socially beneficial police activities, because they do not internalize the benefits of successful law enforcement.[326]

Obviously my aim is not to persuade readers to choose one side in this philosophical debate. The most I can say is that, in the roughest possible sense, we might think of the path insurers take as a compromise between these two competing theories. We may get a little more regulation than consequentialists want and a little less than would please the deontologists. This may be the best we can do in a regime in which the Constitution does not specify the theory according to which it should be implemented.[327]

C. Democratic Accountability

In his canonical work *Suing Government*, Peter Schuck argues for expanded governmental liability to deter official wrongdoing. Confronting the question of implementation, Schuck imagines a system in which the government is required to indemnify or insure officials for liability-related costs they incur.[328] It takes Schuck only one paragraph to dismiss the possibility. "[I]nsurance contracts and indemnification laws," Schuck predicted, "would, unless proscribed by statute, inevitably contain certain limitations upon coverage."[329] These limitations would leave many official defendants judgment-proof, shortchanging plaintiffs and undermining deterrence.[330] Moreover,

---

[325] *See* Cohen, *supra* note 17, at 343-44 (citing Mayers & Smith, *supra* note 47, at 288) (making the point for legal and corporate liability insurers).

[326] *See* Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U.L. REV. 673 (2015) (arguing that, in the modern administrative state, unlike in classical constitutional theory, the abuse of state power is something to be optimized rather than strictly minimized).

[327] *See* Richard H. Fallon, Jr., *How To Choose a Constitutional Theory*, 87 CALIF. L. REV. 535 (1999).

[328] SCHUCK, *supra* note 32, at 109-10.

[329] *Id.* at 110.

[330] *Id.*

Schuck observed, writing in 1983, "municipalities apparently experienced serious difficulties in obtaining insurance coverage for official liability even before the recent expansion of liability."[331] Self-insurance, therefore, would likely be the only option. And finally, "insurers that underwrite risks of liability for official misconduct would presumably insist upon some influence over the agency policy and personnel decisions that affect the magnitude of those risks, a private interference with public administration that would surely be politically and morally, even if not legally, objectionable."[332]

Schuck's first two objections are pragmatic, and the passage of time has borne out neither. Neither insurance contracts nor indemnification laws contain many meaningful exclusions; both provide coverage in all but the most aberrant cases.[333] And the hardening market during which Schuck wrote eventually did soften; most municipalities are able to purchase insurance if they want it. This leaves us with Schuck's third, normative objection. Schuck correctly predicted that municipal liability insurers would typically insist on, or at least attempt to gain, influence over policy and personnel decisions that affect the risks they insure. Tolerating the role that insurers play, therefore, requires responding to Schuck's claim that such influence is "politically and morally" objectionable.

Unfortunately, Schuck does not elaborate on his opposition, so its precise nature remains unclear. I suspect that there is really one objection, not two—*i.e.*, the "political" and "moral" objections are one and the same—and that it stems from a concern about undue private influence over public administration. Whither democratic accountability, I imagine Schuck saying, when unelected and profit-driven insurers call the shots?

If I have Schuck right, at least two significant flaws undermine his position. First, in objecting to private influence here, Schuck seems to assume a highly idealized model of governance in which public actors have total control over public administration. In reality, however—perhaps more today than when Schuck wrote, to be fair—the government constantly solicits "influence" from private industry.[334] Unless Schuck is prepared to do away with all of these arrangements, he needs some theory about why private influence is especially objectionable here, which he does not provide. Second, the people—

---

[331] *Id.*

[332] *Id.*

[333] On insurance contracts, see *supra* note 171 and accompanying text. On indemnification laws, see Schwartz, *supra* note 30, at 890.

[334] *See, e.g.*, Thomas Kaplan, *Mayor de Blasio's Hired Guns: Private Consultants Help Shape City Hall*, N.Y. TIMES, Nov. 4, 2015.

through their democratically elected representatives and officials appointed by those representatives—*chose* to retain this outside help, with all that the help entails.[335] That is, the people chose to trade some degree of governmental autonomy in exchange for what they hoped would be lower liability costs and protection from catastrophic risk. A populace with different preferences would make a different choice—a stronger preference for autonomy pushes toward self-insurance or, at the least, more expensive coverage from an insurer with a more lenient loss-prevention program.[336] At the opposite end of the spectrum, some municipalities, fearing liability exposure, have abolished their police agencies altogether and contracted with third parties to provide policing.[337] It is not clear how it would *enhance* democratic accountability to prohibit the electorate from choosing which option it prefers.

There is an additional concern about democratic accountability, however, which is that insurance may dampen feedback from the liability system that is crucial to the public's efforts to monitor their representatives. Putting insurance aside, even a large tort judgment will not deter an individual officer from wrongdoing, goes a common refrain, because the municipality that employs him will indemnify him.[338] And the municipality is similarly undeterred because it simply spreads the cost of the judgment among its many taxpayers. If civil liability is to deter, the taxpayers must convert these monetary costs into political ones, punishing the responsible officials at the ballot box

---

[335] Effective loss prevention may require some authority over the insured: "A purveyor of loss prevention services must be able to say no to his client, which requires some degree of independence from the client." Cohen, *supra* note 17, at 343.

[336] Although self-insurance is most common among the largest jurisdictions, some small and mid-sized jurisdictions self-insure as well. Schwartz, *How Governments Pay*, *supra* note 10, at 13 n.53, 16.

[337] *See, e.g.*, *Community Policing and Contract Cities*, PINELLAS CTY. SHERIFF'S OFFICE, http://www.pcsoweb.com/community-policing-and-contract-cities (last visited Nov. 24, 2015) ("Thirteen cities in Pinellas County contract with the Sheriff's Office for primary law enforcement services."); Bill Oram, *Durham: Call a Cop, Tualatin Wants All Our Money*, OREGONIAN (Jan 20. 2009, 7:42 AM), http://www.oregonlive.com/tualatin/index.ssf/2010/01/durham_call_a_cop_tualatin_wants_all_our_money.html ("Durham does not have its own police department. For 20 years, Durham has paid a flat rate [for] police work provided by Tualatin cops.").

[338] *See, e.g.*, Richard Emery & Ilann Margalit Maazel, *Why Civil Rights Lawsuits Do Not Deter Police Misconduct: The Conundrum of Indemnification and a Proposed Solution*, 28 FORDHAM URB. L.J. 587 (2000).

(if punishment they deserve).[339] Insurance, we might fear, disrupts this mechanism of democratic accountability by spreading the costs of constitutional liability even further, across the entire pool of insureds and all of *their* taxpayers, until they are essentially imperceptible.

The objection is ultimately an empirical one. The possibility that insurance spreads the risk of police wrongdoing so broadly as to relieve the polity of any felt responsibility for the costs of that wrongdoing deserves further thought. In truth, I am skeptical that the *additional* loss-spreading from insurance—beyond that the tax base already provides—really makes a difference. But even assuming it does, there are nevertheless several reasons to think that, in the end, insurance more likely enhances democratic accountability than depletes it.

First, many who believe that lawsuits deter police misconduct point to reputational harms as the key. It seems unlikely that the financing mechanism through which judgments are ultimately satisfied reduces the reputational costs to the responsible officers; the superiors who hired, trained, and managed them; or the politicians who appointed those superiors. Second, taxpayers who are unaware of the municipality's insurance arrangement will continue to believe that they are materially affected by adverse judgments. This describes most taxpayers, in all likelihood—the media only occasionally discusses liability insurance when reporting on payouts attributable to police misconduct.[340]

Third, in many jurisdictions, lawsuits challenging police conduct are actually quite rare—major lawsuits are low-probability, high-consequence events.[341] Well-known behavioral biases may lead the electorate, and the policymakers they have elected, to discount the risk of liability too much, essentially down to zero.[342] By converting these large but improbable liabilities into insurance premiums, insurance may help to "bring home" the risk of police misconduct, making it harder to ignore.[343] Insurance forces municipalities to pay for risky

---

[339] *See, e.g.*, City of Chicago v. Sturgess, 222 U.S. 313, 323-24 (1911) (explaining that municipal liability is "calculated to stimulate the exertions of the indifferent and the law-abiding to avoid the falling of a burden which they must share with the lawless").

[340] *See* Marc L. Miller & Ronald F. Wright, *Secret Police and the Mysterious Case of the Missing Tort Claims*, 52 BUFF. L. REV. 757, 769 (2004) ("A good number of stories mention payments to be made by the city, but only a few offer details about the relevant budget lines or insurance policies that cover the payments to plaintiffs.").

[341] *See* sources cited *infra* note 366.

[342] *See, e.g.*, CASS R. SUNSTEIN, WORST-CASE SCENARIOS 21-24 (2007).

[343] *See* Ben-Shahar & Logue, *supra* note 14, at 199-200. Of course, insurers can also fall prey to behavioral biases that lead to irrational discounting. *See, e.g.*,

police activities regardless whether those activities happen to cause harm, which often depends on "the fortuities of chance" rather than any moral consideration.[344] Put slightly differently, insurance premiums, if priced correctly, tell policymakers about the likelihood of suit. This should facilitate political oversight of the police. Publicizing premiums, and making them readily comparable to the premiums paid by similar jurisdictions, would facilitate democratic accountability as well.[345] And if their signals are ignored, insurers can convert rising liability risk into actionable events—for instance, by threatening to drop coverage unless reforms are made.[346]

D. Law's Content

I argued above that insurers construe the law while implementing it—while translating judicial opinions, for example, into workable rules for daily life—and in that sense influence what police officers understand the law to be. I now wish to take a step back and consider how insurers, and the institution of insurance, affect the content of those judicial opinions—that is, how they affect the substance of criminal procedure law at a more abstract level, before they help translate it into practice.

What I have in mind is Marc Galanter's classic typology of litigants. Galanter divided the world into "one-shotters" and "repeat players."[347] Civil rights plaintiffs who sue the police are one-shotters in Galanter's argot. The municipal interests they sue are repeat players. The insurers that defend the officers and municipalities, then, we might call "super-repeat-players," in that they each represent a large number of municipalities, each of which itself is a repeat player. Galanter's insight was that one-shotters and repeat players "play the litigation game differently," such that "we would expect the body of 'precedent' cases … to be relatively skewed toward those favorable to" the repeat

---

Howard C. Kunreuther & Mark V. Pauly, *Behavioral Economics and Insurance: Principles and Solutions*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF INSURANCE LAW 15, 21-23 (Daniel Schwarcz & Peter Siegelman eds., 2015).

[344] *See* Schwartz, *supra* note 11, at 323-24 (describing this "ethical appeal" of tort liability insurance).

[345] *Cf.* BAKER & GRIFFITH, *supra* note 15, at 202-20.

[346] *See, e.g.*, Letter from Ann Gergen, President, Ariz. Mun. Risk Retention Pool, to Laura Bruno, Interim Town Manager, Town of Quartzsite (Oct. 5, 2012) (on file with author).

[347] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); *see also* Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869 (1999).

player.[348] A one-shotter, for example, will attempt to maximize the outcome in his single case. A repeat player, in contrast, cares about its entire set of cases, and thus can "play for rules" that will favorably influence the outcomes of future disputes.[349] We would therefore expect repeat players to settle "bad" cases and litigate "good" ones.[350] That judges may prioritize the interests of "the more organized, attentive and influential of their constituents," which tend to be repeat players, augments these strategic advantages.[351]

Supposing that Galanter is right—and I tend to think he is—what rules do insurers play for? It is tempting to think that they would favor the restriction of liability exposure, which would minimize payouts under the policies they write. But, of course, a world without liability exposure is no place for a liability insurer! Liability insurers need the threat of liability—substantial liability, really—to stay in business. And their business, some think, actually tends to exert an *expansionary* force on liability rules. For a variety of reasons, that is, liability insurance does not simply respond to liability; "liability insurance promotes liability."[352] This effect may be socially beneficial in the policing context to the extent that liability insurers are better than first-party insurers—like health, disability, and life insurers—at regulating policing risks.[353] They almost certainly are.

What insurers care about most is not that liability exposure is limited, but that it's *predictable*. As Kenneth Abraham explains, "[i]nsurance operates most comfortably with stochastic events, in which the probability of the frequency and magnitude of insured losses that

---

[348] Galanter, *supra* note 347, at 98, 102. Galanter goes on to argue that, while the plaintiffs' bar helps even the playing field somewhat, "this is short of overcoming the fundamental strategic advantages" of the repeat players. *Id.* at 118.

[349] *Id.* at 100.

[350] *See id.* at 100-03; *see also* Miller & Wright, *supra* note 340, at 773-74 (making a similar argument in the policing context).

[351] Galanter, *supra* note 347, at 122; *see also* Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355 (1999); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 66–87 (1991).

[352] Kent D. Syverud, *On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629, 1634 (1994); *see* Bovbjerg, *supra* note 11, at 1678 (arguing that Syverud's thesis "seems generally correct, though … exaggerate[d]"); Steven W. Pottier & Robert C. Witt, *On the Demand for Liability Insurance: An Insurance Economics Perspective*, 72 TEX. L. REV. 1681 (1994) (calling Syverud's argument "that liability insurance promotes liability … basically reasonable in the long run"); *see also* ABRAHAM, *supra* note 15, at 224-26; Ralph A. Winter, *The Liability Insurance Market*, J. ECON. PERSP., Summer 1991, at 134.

[353] *Cf.* Ben-Shahar & Logue, *supra* note 14, at 217-19.

will be suffered by a group of policyholders is highly predictable."[354] "When faced with excessive uncertainty regarding these probabilities," Abraham continues, "an insurer may be as risk averse as individual policyholders because it cannot estimate its probable success in diversifying risk through pooling, and because it cannot determine the correct price to charge for its risk-bearing services."[355]

From this we can identify two characteristics that insurers should want the law to possess. First, insurers benefit from legal principles that are *clear*. Whether good or bad for their policyholders, if a legal principle is clear, insurers are better able to price its effect. We might, on this rationale, expect insurers to urge courts to choose rules over standards.[356] Second, insurers want the law to be *nonretroactive*. As one commentator put it, insurers "vehemently object to unpredictable change."[357] They have strong incentives to prevent unforeseeable payouts that were not priced into the premiums they previously collected. Constitutional tort law, proceeding as it does in a common law fashion, poses a problem for insurers, then, because common law decisions were (and are) presumptively retroactive.[358] We should therefore expect insurers to be proponents of doctrines that limit the effects of "new law" in the criminal justice system, including qualified immunity and nonretroactivity, and to favor a broad definition of what law is "new."[359] In fact, to the extent we believe police liability insurance to be socially beneficial, the desire to ensure that policing risks remain insurable (at reasonable cost) supplies a potential novel justification for these beleaguered judicial doctrines.

---

[354] Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 946-47 (1988).

[355] *Id.* at 947; *see* Robert Kneuper & Bruce Yandle, *Auto Insurers and the Air Bag*, 61 J. RISK & INS. 107 (1994) (describing how auto insurers lobbied for air bags because they protect against the types of injuries that result in the most unpredictable damage awards).

[356] *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 608 (1992) (concluding that rules "will tend to provide clearer notice than standards to individuals at the time they decide how to act").

[357] Bovbjerg, *supra* note 11, at 1668.

[358] *See, e.g.*, John Bernard Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied"*, 61 N.C. L. REV. 745, 746 (1983).

[359] *See* Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 38 (2002) (reviewing the law of qualified immunity and nonretroactivity and explaining how both concern "the novelty of the law being made"); *see also* Butler v. McKellar, 494 U.S. 407, 415 (1990) (defining as "new" any rule the correctness of which was "susceptible to debate among reasonable minds").

E. The Role of Insurance Law

Finally, what role might law play in regulating the market for police liability insurance? How might we regulate police, that is, by regulating their insurers? Consider three examples. First, fear of incurring tort liability—for negligently undertaking to provide risk-reduction services—may affect the way in which some insurers are willing to regulate the police.[360] One insurer I interviewed, for example, expressed reluctance to advise police agencies on personnel matters for fear of exposure under employment-related laws.[361] Creating safe harbors from liability—targeted toward these pockets of activity—might free insurers to regulate more closely.[362]

Second, market insurance struggles to regulate effectively its most diminutive customers—what one insurer called "commodity clients."[363] These small municipalities are abundant—the United States is a "country of small towns," as another insurer put it.[364] And they pose a number of challenges for insurers' loss-prevention programs. Because the premiums these municipalities pay are relatively small, it is often infeasible for insurers to discount rates enough to compensate for the expenses of loss prevention. Nor is it cost-effective for insurers to individualize loss prevention or engage in the monitoring necessary to link premiums to care.[365] If claims are infrequent, moreover, there may be no "substantial base of losses" from which insurers can experience-rate their policies in a statistically valid way.[366]

---

[360] *See, e.g.*, John Dwight Ingraham, *Liability of Insurers for Negligent Inspection of Insured Premises*, 50 DRAKE L. REV. 623 (2002); Peter H. Schuck, *Tort Liability to Those Injured by Negligent Accreditation Decisions*, 57 LAW & CONTEMP. PROBS. 185 (1994).

[361] Telephone Interview with Risk Pool C, *supra* note 101.

[362] *See* Kyle D. Logue, *Encouraging Insurers To Regulate: The Role (If Any) for Tort Law* (Univ. of Mich. Law Sch. Law & Econ. Research Paper Series, Paper No. 15-001, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2547358.

[363] Telephone Interview with Commercial Insurer D, *supra* note 88.

[364] Telephone Interview with Commercial Insurer F, *supra* note 34; *see, e.g.*, CRESSWELL & LANDON-MURRAY, *supra* note 100, at x (stating that 82% of New York municipalities have fewer than 10,000 residents).

[365] *See* HEIMER, *supra* note 93, at 203-05; Baker & Swedloff, *supra* note 54, at 1446; Schwartz, *supra* note 11, at 357.

[366] *See* ABRAHAM, *supra* note 15, at 231; SUGARMAN, *supra* note 24, at 14 (noting that the firms most amenable to experience rating tend to self-insure); Telephone Interview with Commercial Insurer A, *supra* note 61 (describing the difficulty of insuring small municipalities that experience no loss for long stretches, punctuated by occasional large losses). On the infrequency of claims in some small municipalities, see Kevin Murphy, Mich. Mun. League, *Municipal Liability*, *in* HANDBOOK FOR MUNICIPAL OFFICIALS—OPERATIONS 77, 77 (2004) (observing that,

Paradoxically, then, the large municipalities for which experience rating and loss prevention should work best, and whose police agencies commit a disproportionate amount of misconduct, are the very municipalities that tend to self-insure.[367] And the ones that buy insurance present some serious practical problems for insurers. One potential solution could be to *forbid* these small municipalities to insure. Prohibiting insurance can be socially beneficial in certain circumstances.[368] Yet there are ways in which small municipalities benefit disproportionately from insurance coverage. The lower number of occurrences a municipality experiences, "the more pure risk [it] faces, for the less able [it] is to pool or average out risks within [its] own operations."[369] A small municipality may also have less experience, and therefore greater difficulty, monitoring defense counsel's service.[370] And, of course, a smaller tax base makes it harder to absorb the shock of a large judgment or settlement.

There are two solutions that might work better than an insurance prohibition. First, insurance regulators could require small municipalities to pool their risks and resources before purchasing coverage on the commercial market. This would make at least some additional loss-prevention measures cost-effective, even if individualization may remain challenging. Second, regulators might require small municipalities to carry a deductible or self-insured retention, which forces them to share in all losses.[371] At present, some

---

of pool's 500 member entities, "[m]any of them go years without an insurance claim"); *see also* David Eitle et al., *The Effect of Organizational and Environmental Factors on Police Misconduct*, 17 POLICE Q. 103 (2014) (finding that 27% of surveyed police departments had no reported incidents of misconduct during the one-year reporting period); Telephone Interview with Commercial Insurer I, *supra* note 111 (asserting that many of the company's insured municipalities had never tendered a police liability claim).

[367] *See* Eitle et al., *supra* note 366, at 112-14.

[368] An entity that is not judgment-proof, but which might escape liability for wrongdoing, will desire to purchase full liability coverage. Steven Shavell, *On the Social Function and the Regulation of Liability Insurance*, 25 GENEVA PAPERS ON RISK & INS. 166, 176 n.32 (2000). But the level of care it will be led to take will be lower than optimal, because its expected liability will be less than expected harm. *Id.* If insurers do not link premiums to care, forbidding coverage may be the socially desirable policy if the benefits of the entity's enhanced incentives to take care outweigh the costs, if any, of forcing the entity to bear the risk. *See id.* at 175-76 & n.28.

[369] Schwartz, *supra* note 11, at 356.

[370] *Id.*

[371] *See* HEIMER, *supra* note 93, at 205. A deductible does create some reverse moral hazard, as the insurer has the right to defend but bears no responsibility for costs below the deductible amount. *See* Avraham, *supra* note 40, at 73. This may

insurers write "first-dollar" police liability policies for small municipalities.[372] From a social perspective, "[t]his practice … undermines the capacity of insurance to promote loss prevention, because ordinary policyholders have so little at stake in the risk of high-probability, low-severity losses."[373] It is also a bad use of premium dollars from the perspective of the municipality (and thus the taxpayers), because the "primary function of insurance is to spread the risk of losses that policyholders cannot effectively bear themselves."[374] "If insurance were restructured to include large copayments by policyholders," Kenneth Abraham explains, "it could simultaneously and more effectively spread the most severe losses and help to prevent losses from occurring."[375] Insurance regulators could consider banning first-dollar police liability policies or requiring a substantial deductible or retention as a regulatory default rule.

My third and final example is the most sweeping. Suppose subsequent empirical research finds that, in the aggregate, police liability insurance reduces police misconduct. Would we want the law to mandate insurance for all police operations?[376] To be sure, a mandate would override the voluntary choice some municipalities had made to self-insure, and economic theory typically presumes that voluntary transactions are efficient. Here, however, to the extent that self-insurance controls police misconduct poorly compared to market insurance, self-insurance imposes costly externalities on the rest of society, which market insurance would reduce.

A market-insurance mandate may introduce new costs as well. For instance, a self-insured municipality forced to buy insurance on the market might have concerns about the quality of service the insurer would provide, the lack of municipal control, and monitoring and contracting costs.[377] Nor can we be certain that the benefits that (by hypothesis) flow from voluntary insurance transactions would remain if

---

be part of why many municipalities seem to choose a self-insured retention instead of a deductible—with a self-insured retention, the municipality retains control over litigation defense until the retention is exhausted.

[372] *See supra* note 274 and accompanying text.

[373] ABRAHAM, *supra* note 15, at 237.

[374] *Id.*

[375] *Id.*

[376] If police liability insurance increases the amount of police misconduct, we would want to determine why, and then design regulation to neutralize the pathology. Barring that, we might consider restricting the availability of insurance coverage or eliminating it altogether.

[377] *See* John Hood & Peter C. Young, *The Risk Management Implications of Outsourcing Claims Management Services in Local Government*, 5 RISK MGMT., no. 3, 2003, at 7.

those transactions were compelled by law; a forced relationship may be less productive than a voluntary one. These hurdles are not insurmountable, though. One potential accommodation would be a "soft mandate" that requires the purchase of market insurance *or* proof of an adequate in-house loss-prevention program.

If future empirical research about the effects of liability insurance on police misconduct is favorable, an insurance mandate should at least be on the table among the possible policy responses. I should caution, though, that even mandatory insurance would leave regulatory gaps. Regulation-by-insurance, it turns out, may work better or worse depending on the type of police misconduct being managed. Certain kinds of misconduct, like racial profiling, are largely resistant to regulation-by-insurance, and others, like the sorts of bad acts that lead to wrongful convictions, require tweaks to the regulatory mechanism. I tackle this complication separately in related work.[378]

IV. CONCLUSION

This Article is a first attempt to map the universe of police liability insurance. That this territory has gone uncharted for so long reflects, perhaps, a "big city bias" that has focused scholarly attention on the minority of municipalities that self-insure. Not only has this led to an incomplete theoretical model of policing, but also it has overlooked what may be a powerful institutional ally in efforts to reduce police misconduct in municipalities both large and small.

Additional research might fill in details my first pass has omitted, or pick up where I have left off. How, for example, do insurers affect the litigation and settlement of police misconduct claims? How does insurance for state and federal law enforcement compare to municipal-level insurance? Can we quantify the effects of police liability insurance on police misconduct? Through the opposing forces of risk management and moral hazard, insurance has the potential to make police behavior either better or worse. The likelihood that it has no effect at all, and thus can continue to be ignored, seems vanishingly small.

It is also unlikely that policing is the only context in which private insurers are construing the Constitution and regulating public actors. Public school districts, for example, purchase liability insurance.[379] The

---

[378] *See generally* Rappaport, *supra* note 221.

[379] *Education*, LIBERTY MUTUAL INS., https://www.libertymutualgroup.com/business-insurance/industry-insurance/school-insurance (last visited Jan. 30, 2016); *Public Schools*, TRAVELERS INS., https://www.travelers.com/business-

public-school setting presents a host of constitutional issues from free speech to due process in disciplinary proceedings. How are insurers shaping the path of the law in that arena? Where else is their influence felt? And what other private institutions join them in interpreting the Constitution outside the courts?

---

insurance/specialized-industries/public-sector/public-schools.aspx (last visited Jan. 30, 2016).