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ARTICLE

HOW PRIVATE INSURERS REGULATE PUBLIC POLICE

*John Rappaport*

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## 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, however, as the police are notoriously resistant to change. Yet one powerful policy lever has been overlooked: police liability insurance. Based on primary sources new to legal literature and interviews with over thirty insurance industry representatives, civil rights litigators, municipal attorneys, police chiefs, 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.*

*This 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 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 is significant to any comprehensive program of police reform.*

*The Article also makes three 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 only enforce the Constitution, but also construct its meaning. 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 away its moral valence, insurers may advance the law’s aims.*

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*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.<sup>1</sup> 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.<sup>2</sup> Thousands have taken to the streets in protest.<sup>3</sup> Activists have called upon every branch and level of government to intercede, and political leaders have begun to heed these calls.<sup>4</sup> Municipalities have paid millions in settlements.<sup>5</sup> Prosecutors have finally begun to put police of-

<sup>1</sup> See, e.g., Elliott 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> [https://perma.cc/4ARW-K4L4]; Nick Wing, *16 Numbers that Explain Why Police Reform Became an Even Bigger Story in 2015*, HUFFINGTON POST (Dec. 29, 2015, 8:00 AM), [http://www.huffingtonpost.com/entry/police-reform-numbers-2015\\_us\\_5672e150e4b0688701dc7a54](http://www.huffingtonpost.com/entry/police-reform-numbers-2015_us_5672e150e4b0688701dc7a54) [https://perma.cc/2L9G-QMRG]; see also Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391 (2016).

<sup>2</sup> 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> [https://perma.cc/4C5M-GPZ5].

<sup>3</sup> 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 AM), <https://www.theguardian.com/us-news/2014/dec/13/marchers-protest-police-brutality-new-york-washington-boston> [https://perma.cc/CQR7-CAYE].

<sup>4</sup> See, e.g., *Law Enforcement Overview*, NAT'L CONF. ST. LEGISLATURES (May 29, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx> [https://web.archive.org/web/20150608230138/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 issues during 2015 sessions").

<sup>5</sup> See, e.g., Monica Davey, *Chicago Pays \$5 Million to Family of Black Teenager Killed by Officer*, N.Y. TIMES (Apr. 15, 2015), <http://www.nytimes.com/2015/04/16/us/chicago-pays-5-million-to-family-of-black-teenager-killed-by-officer.html> [https://perma.cc/9PFZ-HM92] (reporting a \$5 million settlement in the case of Laquan McDonald); Richard Fausset, *Walter Scott Family Reaches a \$6.5 Million Settlement for South Carolina Police Shooting Case*, N.Y. TIMES (Oct. 8, 2015), <http://www.nytimes.com/2015/10/09/us/walter-scott-settlement-reached-in-south-carolina-police-shooting-case.html> [https://perma.cc/3W4W-VTJ8]; Sheryl Gay Stolberg, *Baltimore Announces \$6.4 Million Settlement in the Death of Freddie Gray*, N.Y. TIMES (Sept. 8, 2015), <http://www.nytimes.com/2015/09/09/us/freddie-gray-baltimore-police-death.html> [https://perma.cc/N59F-NLNF] (reporting \$6.4 million settlement, which "[l]egal specialists said . . . was in line with settlements for recent racially charged police misconduct cases," including that of Eric Garner, whose estate settled for \$5.9 million).

ficers at the defendant's table.<sup>6</sup> Progress will be slow, we know, because the police are notoriously difficult to change.<sup>7</sup> 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. These insurance policies shield the government from financial responsibility, often including punitive damages, for common law and constitutional torts such as assault and battery, excessive force, discrimination, false arrest, and false imprisonment.<sup>8</sup> 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.<sup>9</sup> This is a major blind spot: “[I]t is unsound to discuss *any*

<sup>6</sup> See, e.g., Ian Simpson, *Prosecution of U.S. Police for Killings Surges to Highest in Decade*, REUTERS (Oct. 26, 2015, 7:07 AM), <http://www.reuters.com/article/us-usa-police-idUSKCN0SK17L20151026> [<https://perma.cc/SV4D-U9EX>].

<sup>7</sup> See, e.g., CMTY. RELATIONS SERV., U.S. DEP'T OF JUSTICE, PRINCIPLES OF GOOD POLICING: AVOIDING VIOLENCE BETWEEN POLICE AND CITIZENS 18 (rev. 2003), <https://www.justice.gov/archive/crs/pubs/principlesofgoodpolicingfinal092003.pdf> [<https://perma.cc/9C5L-XT87>] (“[T]he 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* 27 (2d ed. 2014) (“[T]he challenge of sustaining [police] reforms is enormous.”); Wesley G. Skogan, *Why Reforms Fail*, 18 *POLICING & SOC'Y* 23, 23 (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).

<sup>8</sup> See, e.g., BRECKENRIDGE INS. GRP., PUBLIC ENTITY (2015), [http://www.breckgrp.com/wp-content/uploads/2015/04/Brokerage\\_PUBLIC-ENTITY\\_042814.pdf](http://www.breckgrp.com/wp-content/uploads/2015/04/Brokerage_PUBLIC-ENTITY_042814.pdf) [<https://perma.cc/T2S4-MV7M>] (listing “Civil Rights Violations/Discrimination” among available “enhancements”); TRAVELERS INDEM. CO., “BUT, IT WILL NEVER HAPPEN TO US, RIGHT?” (2009) (on file with the Harvard Law School Library) (advertising coverage for “allegations of civil rights violations such as excessive force” and for punitive damages); *Police Professional Liability*, PROF. GOVERNMENTAL UNDERWRITERS, INC., [https://pgui.com/?page\\_id=22](https://pgui.com/?page_id=22) [<https://perma.cc/YNT9-gTL6>] (including some punitive damages and “civil rights violations” among “Selected Policy Features”); *Professional Liability*, APEX INS. SERVICES, <http://apexinsurance.com/professional-liability> [<https://perma.cc/Q8FZ-ASGY>] (advertising coverage for “Intentional Acts,” “Violation of Civil Rights,” and “Assault & Battery”); *Public Entities: Law Enforcement Liability*, TRIDENT PUB. RISK SOLUTIONS, <https://www.argolimited.com/trident/product/law-enforcement-liability-public-entities> [<https://perma.cc/PU5J-V434>] (advertising coverage for “Civil rights violations,” “False arrest,” and “Canine/equine exposures”).

<sup>9</sup> In a recent article, Professor Joanna Schwartz observes that some municipalities carry liability insurance — and that “pressures and obligations imposed by . . . insurers are an important and underappreciated consequence of liability” — concluding that “[f]urther research should explore 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*, 63

objective that might be imputed to [the 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.”<sup>10</sup>

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.”<sup>11</sup> Implicit in this thinking is an assumption that the threat of tort liability would, absent indemnification through insurance, deter police misconduct by making the police internalize the cost of any harms they cause.<sup>12</sup> 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 writ-

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UCLA L. REV. 1144, 1149, 1207 (2016) [hereinafter Schwartz, *How Governments Pay*]; see also Joanna C. Schwartz, *Who Can Police the Police?*, 2016 U. CHI. LEGAL F. 437, 438 (listing insurers among potential “police reformers”). For discussion outside the legal academy of the role of police liability insurance, see CHARLES R. EPP, MAKING RIGHTS REAL 130, 134 (2009) (including insurance among a list of variables in a regression analysis to explain the degree of “legalized accountability” among police agencies); and Candace McCoy, *How Civil Rights Lawsuits Improve American Policing*, in HOLDING POLICE ACCOUNTABLE 111, 142–46 (Candace McCoy ed., 2010).

<sup>10</sup> Gary T. Schwartz, *The 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.”).

<sup>11</sup> *Minn. GOP Convention Officials Bought Liability Coverage in First Time Deal*, INS. J. (Sept. 5, 2008), <http://www.insurancejournal.com/news/national/2008/09/05/93407.htm> [<https://perma.cc/49KG-3XN4>] (quoting activist Michelle Gross).

<sup>12</sup> See, e.g., *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (plurality opinion) (“[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 governments to engage in conduct that might result in constitutional violations”).

ing 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, the insurer may be better positioned than the government to reform police behavior.<sup>13</sup> 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 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 reintroduce, or possibly even enhance, constitutional tort law’s deterrent effects.<sup>14</sup>

Through the lens of this theoretical framework, and based on trade literature and interviews with over thirty insurance industry representatives, civil rights litigators, municipal attorneys, police chiefs, 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 by 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 theoretical contributions that weave throughout the Parts that follow. First, the Article inverts the traditional model of governance as *public* regulation of *private* action. That insurance may be understood as “regulation” — in the sense of standard setting and enforcement — is a notion increasingly familiar to legal audiences.<sup>15</sup> Insurers, we know, enforce (or undermine) com-

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<sup>13</sup> See 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”).

<sup>14</sup> See KENNETH S. ABRAHAM, *THE LIABILITY CENTURY* 228–29 (2008) (describing how “a version of tort law’s deterrence function has slowly been incorporated into insurance,” *id.* at 228). 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).

<sup>15</sup> For multiple 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.”); and Carol A. Heimer, *Insuring More, Ensuring Less: The Costs and Benefits of Private Regulation Through*

mon 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,<sup>16</sup> medical malpractice,<sup>17</sup> corporate governance,<sup>18</sup> employment practices,<sup>19</sup> motion pictures,<sup>20</sup> environmental hazards,<sup>21</sup> firearms,<sup>22</sup> and personal injury.<sup>23</sup> This Article shows how the regulation-by-insurance phenomenon extends as well to *public* actors, whose behavior private insurers regulate according to *constitutional*, and not just statutory or common law, commands.<sup>24</sup>

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*Insurance*, in EMBRACING RISK, *supra*, at 116, 119 (describing “insurance’s role as one of the main regulatory institutions of contemporary societies”). On the related concept of insurance as “governance,” see RICHARD V. ERICSON ET AL., INSURANCE AS GOVERNANCE (2003); and SUSAN STRANGE, THE RETREAT OF THE STATE 133–34 (1996) (describing insurers’ increasing “authority” over the world’s market and political 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,” *id.* at 133).

<sup>16</sup> See, e.g., 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 (1996); Leslie C. Levin, *Regulators at the Margins: The Impact of Malpractice Insurers on Solo and Small Firm Lawyers*, 49 CONN. L. REV. (forthcoming 2017), <https://ssrn.com/abstract=2800620> [<https://perma.cc/6AAM-NRNK>]; Rick Swedloff & Tom Baker, *Insurers as Bumblebees in the Garden of Law Firm Norms* (2016) (unpublished manuscript) (on file with Harvard Law School Library).

<sup>17</sup> See, e.g., Katherine Baicker & Amitabh Chandra, *The Effect of Malpractice Liability on the Delivery of Health Care*, 8 F. HEALTH ECON. & POL’Y, 2005, art. 4; Bernard Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988–2002*, 2 J. EMPIRICAL LEGAL STUD. 207 (2005).

<sup>18</sup> BAKER & GRIFFITH, *supra* note 14.

<sup>19</sup> See, e.g., Francis J. Mootz III, *Insurance Coverage of Employment Discrimination Claims*, 52 U. MIAMI L. REV. 1 (1997); Shauhin Talesh, *Legal Intermediaries: How Insurance Companies Construct the Meaning of Compliance with Antidiscrimination Laws*, 37 LAW & POL’Y 209 (2015).

<sup>20</sup> See 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, 6:43 AM), <http://www.slate.com/id/2119328> [<https://perma.cc/4EQQ-7FSC>].

<sup>21</sup> See, e.g., Sarah E. Light & Eric W. Orts, *Parallels in Public and Private Environmental Governance*, 5 MICH. J. ENVTL. & ADMIN. L. 1 (2015); 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).

<sup>22</sup> See Tom Baker & Thomas O. Farrish, *Liability Insurance and the Regulation of Firearms*, in SUING THE GUN INDUSTRY 292 (Timothy D. Lytton ed., 2005).

<sup>23</sup> STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW 12–18 (1989).

<sup>24</sup> The single paper that discusses private regulation of public actors — in the United Kingdom — notes that “there is very little evidence available as to how widely public bodies take out insurance policies (as opposed to self-insuring) and even less relating to the extent to which insurers use their contractual power to ‘regulate’ the conduct of public bodies.” Colin Scott, *Private Regulation of the Public Sector: A Neglected Facet of Contemporary Governance*, 29 J.L. & SOC’Y 56, 65 (2002).

Second, and closely related, the Article illustrates how, in the course of regulating, insurers not only *enforce* the Constitution, but also *construct its meaning*.<sup>25</sup> 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.”<sup>26</sup> The notion that elected officials and administrative agencies engage in constitutional construction is by now familiar.<sup>27</sup> I show that insurance companies do so too. And they do so in ways that state actors typically do not — for example, insurers explicitly prioritize constitutional rights on consequentialist grounds. What is more, the discretion baked into substantive constitutional doctrine (frequently grounded in “reasonableness”), coupled with qualified immunity, ensures that courts rarely overturn insurers’ constitutional pronouncements.

The recognition that insurers construe the Constitution contributes, second, to legal and sociolegal 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.”<sup>28</sup> 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.”<sup>29</sup> Perhaps surprisingly, by denaturing the law in this way and

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<sup>25</sup> This happens because the most salient standard of police liability asks whether the police have violated the Constitution. 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. *See, e.g.,* *Howlett v. Rose*, 496 U.S. 356, 375 (1990) (holding a state law sovereign immunity defense unavailable in a § 1983 action brought in state court).

<sup>26</sup> Ernest A. Young, *Constitutionalism Outside the Courts*, in *THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION* 843, 861 (Mark Tushnet et al. eds., 2015).

<sup>27</sup> On the role of legislatures, see, for example, *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* (Richard W. Bauman & Tsvi Kahana eds., 2006); and 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). 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, 801–02 (2010) (defining and describing the concept of administrative constitutionalism); Gillian E. Metzger, *Administrative Constitutionalism*, 91 *TEX. L. REV.* 1897 (2013); and Bertrall L. Ross II, *Embracing Administrative Constitutionalism*, 95 *B.U. L. REV.* 519 (2015).

<sup>28</sup> Jeb Barnes & Thomas F. Burke, *The Diffusion of Rights: From Law on the Books to Organizational Rights Practices*, 40 *LAW & SOC’Y REV.* 493, 494 (2006); *see, e.g.,* EPP, *supra* note 9; 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 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); Shauhin 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).

<sup>29</sup> *Cf.* Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 *CONN. INS. L.J.* 1, 11–12 (2005) (discussing how insurers transform law into rules of thumb that deemphasize individual fault and facilitate efficient resolution);



stripping away its moral valence, insurers may actually advance the law's aims. Insurers remove legal principles from the realm of moral and legal contestation, which may render them more palatable to the police, who are not made to feel that they are doing something immoral by endeavoring to enforce the criminal law aggressively.<sup>30</sup> The fight over police accountability, in this worldview, is no longer a battle between good and evil, right and wrong, but rather 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."<sup>31</sup> In fact, given widespread indemnification of both individual *and* municipal liability for constitutional torts committed by police,<sup>32</sup> 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 unfolds as follows. Part I lays the foundation. It 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 risk, focusing on loss prevention, underwriting, and rating.

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

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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 19, at 211, 226–28 (arguing that "insurance field actors . . . recontextualize antidiscrimination laws around a nonlegal risk logic that dominates discourse concerning what constitutes discrimination," *id.* at 211).

<sup>30</sup> See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 25 (1992) ("When punishment rather than dialogue is in the foreground of regulatory encounters, it is basic to human psychology that people will find this humiliating, will resent and resist in ways that include abandoning self-regulation.").

<sup>31</sup> Margo Schlanger, *Operationalizing Deterrence: Claims Management (in Hospitals, a Large Retailer, and Jails and Prisons)*, 2 J. TORT L., no. 1, 2008, at 1.

<sup>32</sup> See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (finding that municipalities indemnify police officers over 99% of the time).

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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 insurers write police liability policies.

Part II is the Article's heart. Based on interviews with thirty-three 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 some insurers take to prevent loss under the liability policies they write — that is, how insurers work to reduce some types of police misconduct. Insurers' methods include education and policy guidance on topics ranging from the quotidian (for example, effecting an arrest) to the high-profile (for example, strip searches<sup>33</sup> and “high-excitement risk like PIT maneuvers,”<sup>34</sup> vehicle pursuits in which the police force a fleeing car to lose control and stop). Insurers also help municipalities train their officers. For example, by 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 “cop 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 agencies about the likelihood they will be hit with politically embarrassing lawsuits. My evidence suggests that these 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. They undertake insurer-prescribed “performance improvement plans” and changes in oversight structure. 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

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<sup>33</sup> *The Search for the Best Strip Search Policy*, TRAVELERS INDEMNITY CO.: PUB. F. (2010), [https://www.travelers.com/iwcm/Distribution/2010/06\\_June/7627/article-1.html](https://www.travelers.com/iwcm/Distribution/2010/06_June/7627/article-1.html) [<https://perma.cc/52UA-CCXT>].

<sup>34</sup> *Municipalities*, BERKSHIRE INS. GROUP, <https://www.berkshireinsurancegroup.com/municipalities> [<https://perma.cc/H4UL-Y3GX>].

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the quantity of policing. In extreme cases, municipalities have shut down their police forces after insurance coverage vanished.

My principal objective is to show that insurance companies can and do shape police behavior — or, at the least, that they influence policies, practices, and personnel decisions that are themselves proven or presumed to impact 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 unusually aggressive about managing police risk,<sup>35</sup> and that most insurers take a more laissez-faire approach. In that case, my findings suggest that we might improve police behavior by using the law to encourage insurers to regulate more closely. Similarly, I do not prove that insurers today are actually reducing police misconduct relative to self-insurance. In fact, the study that's come closest to testing this proposition might be read to suggest the opposite, although there are significant caveats that I discuss.<sup>36</sup>

Part III poses and provisionally answers some normative and empirical questions about the system Part II describes. First, what *can* we say about the present effect of insurance on the rate of police misconduct? For one thing, even if insurers desire to reduce *liability* for police misconduct, there are ways to accomplish this without actually reducing police misconduct itself. 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? 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?

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 had “ripple effects” throughout the insurance industry.<sup>37</sup> Insurers responded by ensuring that police agencies promulgated adequate policies on the use of force and related risks. After some time, however, attention waned as other sources of municipal liability captured insurers' focus. Today,

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<sup>35</sup> Perhaps such insurers, for example, were more likely to respond to my initial interview inquiry. For more on methodology, see *infra* note 42.

<sup>36</sup> See *infra* pp. 1591–601.

<sup>37</sup> 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 the Rodney King incident “caused concerns in every jurisdiction over liability exposures”).

in light of recent events, insurers find themselves “back in the soup.”<sup>38</sup> 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.”<sup>39</sup> Their success could pay dividends to us all.

## I. THE PROVISION OF POLICE LIABILITY INSURANCE

I begin, in section I.A, with some basic insurance concepts and terminology. Section I.B gives a brisk history of the market for police liability insurance. Section I.C provides a current overview of the market, 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 I.C also discusses the considerations that inform a municipality’s decision of how and with whom to insure. Section I.D walks through the terms of a typical police liability policy.

My subject is county and local law enforcement, whose officers make up the vast majority of officers nationwide;<sup>40</sup> I use the terms “municipal” and “police” to embrace both the county and city levels. Insurance for state and federal law enforcement is not within the Article’s scope, but may be a fruitful subject of future research.<sup>41</sup>

<sup>38</sup> Telephone Interview with Commercial Insurer F, *supra* note 37.

<sup>39</sup> *Id.*; accord Telephone Interview with Commercial Broker B (July 22, 2015) (agreeing that underwriters have become deeply concerned with police liability since Ferguson); see Zusha Elinson & Dan Frosch, *Cost of Police-Misconduct Cases Soars in Big U.S. Cities*, WALL STREET J. (July 15, 2015, 10:30 PM), <http://www.wsj.com/articles/cost-of-police-misconduct-cases-soars-in-big-u-s-cities-1437013834> [<https://perma.cc/59JT-H28Z>] (“[I]nsurers and lawyers who defend police say current scrutiny of law enforcement is broadly affecting the resolution of lawsuits.”); see also Roberto Cenicerros, *Scandals Can Influence Police Liability Coverage*, BUS. INS. (June 4, 2000, 12:00 AM), <http://www.businessinsurance.com/article/20000604/ISSUE01/10002637/scandals-can-influence-police-liability-coverage> [<https://perma.cc/9YC5-XKYK>] (discussing the effect of police scandals on rates and coverage nationwide).

<sup>40</sup> Compare BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 238250, FEDERAL LAW ENFORCEMENT OFFICERS, 2008, at 1 (2012), <https://www.bjs.gov/content/pub/pdf/fleo08.pdf> [<https://perma.cc/X7J7-E99Q>] (reporting roughly 120,000 full-time sworn federal officers in 2008), with BRIAN A. REAVES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 233982, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 1 (2011), <https://www.bjs.gov/content/pub/pdf/csleao8.pdf> [<https://perma.cc/FA3L-GKP5>] (reporting roughly 765,000 full-time sworn state and local officers in 2008).

<sup>41</sup> As in the local systems, it appears that the federal government is the real party in interest when federal officers are sued. It typically 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 (1999). The federal government also pays half of any insurance premiums for individual professional liability policies that officers purchase. See Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 636, 110 Stat. 3009, 3009-363 to -364 (1996) (codified as amended at 5 U.S.C. § 5941 note (2012) (Reimbursements Relating to Professional Liability Insurance)). Those policies provide for counsel if the government declines a representation request and indemnify officers up

My description draws largely from primary sources including insurance policies and applications, promotional and educational materials put out by insurers, trade literature, and thirty-three interviews with police chiefs and members of the insurance 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, nonidentifying descriptors except where a subject did not request anonymity and his identity is clear (or knowable) from context.<sup>42</sup>

### A. Conceptual Overview of Liability Insurance

*Insurance* 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*.<sup>43</sup> In exchange, the insured pays a *premium* to the insurer that should approx-

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to \$2 million per plaintiff. *Federal Employee Professional Liability — Benefit Highlights*, STARR WRIGHT USA, <http://www.wrightusa.com/products/federal-employee-professional-liability/-/benefit-highlights> [<https://perma.cc/892L-7VPV>]; see also Pillard, *supra*, at 78 n.62.

<sup>42</sup> The interviews were conducted by telephone and ranged from twenty minutes to over an hour in duration. They were semi-structured, revolving around a basic set of common questions but also seizing on additional topics that interview subjects raised. Typewritten notes were recorded simultaneously. 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 generally 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,” *id.* at 43); Patrick Biernacki & Dan Waldorf, *Snowball Sampling: Problems and Techniques of Chain Referral Sampling*, 10 SOC. METHODS & RES. 141 (1981) (describing the method as “widely used,” *id.* at 141, and exploring some of its difficulties). I ceased interviewing new subjects when responses became repetitious.

<sup>43</sup> 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); and Gary T. Schwartz, *Insurance, Deterrence and Liability*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 335 (Peter Newman ed., 1998). For more capacious and theoretical conceptions of “insurance,” see Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653, 653–57 (2013); Baker & Simon, *supra* note 15, at 7–10; and Cohen, *supra* note 16, at 310–14.

imate the insured's expected losses plus some margin for administrative costs and, where applicable, profits. *Liability insurance*, specifically, protects the insured in the event he is sued on a legal claim covered by the policy, at which point the insurer typically has both a right and duty to defend the suit.

It is worth considering why the parties enter into these arrangements. In many contexts, 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 \$1000 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 \$1000 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 reduce the risk by aggregating it with many others (from other insureds).<sup>44</sup> An insurer can also *diversify* its risks across multiple lines of business and profit by investing the premiums it collects. It can, in addition, access reinsurance markets that allow it to cede some or all of the risk it insures 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, important here, the government. The government is risk neutral, we typically assume, because it can spread its risks across a broad base of taxpayers and diversify them by owning varied investments.<sup>45</sup>

There are several reasons why the government nonetheless might wish to purchase insurance.<sup>46</sup> First, the assumption of risk neutrality, even if sometimes valid, may prove false in certain circumstances. A municipality contemplating a loss large in size relative to its tax base, for example, may exhibit risk aversion because covering the loss would require drastic (and politically unpopular) measures.<sup>47</sup> 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 fund large

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<sup>44</sup> 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. Risks are uncorrelated, or statistically independent, “when the occurrence of one event does not alter the probability of the other.” Priest, *supra* note 43, at 1540 n.98.

<sup>45</sup> See, e.g., 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); Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1666 n.164 (2006) (collecting sources).

<sup>46</sup> For helpful discussions, see Serkin, *supra* note 45, at 1666–70; and Christopher Serkin, *Insuring Takings Claims*, 111 NW. U. L. REV. 75 (2016).

<sup>47</sup> Freeman, *supra* note 45, at 38.

payouts.<sup>48</sup> 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 of human capital — then the entity itself may appear risk averse as well.<sup>49</sup> And third, the government may value services such as loss prevention, which the insurer bundles with the promise of indemnification.<sup>50</sup> Because the insurer is responsible for paying any losses not averted, its advice is especially credible.<sup>51</sup> The advice 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.<sup>52</sup>

Insurers have loss-prevention programs for several reasons.<sup>53</sup> 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 benefits the insurer. An insurer that can reduce risk efficiently, moreover, can offer lower premiums and gain market share. It can also use its loss-prevention program to help find “good risk” — customers willing to adopt loss-control measures are more likely to be profitable customers whose behavior results in fewer losses.

Liability insurance is commonplace today, but it was not always so. At common law, in fact, liability insurance was thought to violate public policy.<sup>54</sup> The reason relates to what we today call *moral hazard*. Moral hazard is the propensity of insurance to reduce the insured’s in-

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<sup>48</sup> See THOMAS W. RYNARD, *INSURANCE AND RISK MANAGEMENT FOR STATE AND LOCAL GOVERNMENTS* § 1.01 (2009). Smoothing taxation may reduce the political cost of adverse judgments and settlements by buffering any effect on home values, for example. See Brian Galle & Kirk J. Stark, *Beyond Bailouts: Federal Tools for Preventing State Budget Crises*, 87 *IND. L.J.* 599, 612–13 (2012) (discussing why households may value governmental fiscal stability).

<sup>49</sup> See BAKER & GRIFFITH, *supra* note 14, at 72–76; Schwartz, *supra* note 10, at 322 n.40; cf. Jennifer H. Arlen, *Should Defendants’ Wealth Matter?*, 21 *J. LEGAL STUD.* 413, 419–20 (1992) (arguing that corporations exhibit risk aversion because their managers “are highly dependent on the financial well-being of their corporate employer,” *id.* at 420).

<sup>50</sup> See Ben-Shahar & Logue, *supra* note 13, 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 W. Smith, Jr., *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 (pointing to conflicts of interest between managers and owners due to divergent time horizons as one basis for corporate insurance); and Göran Skogh, *The Transactions Cost Theory of Insurance: Contracting Impediments and Costs*, 56 *J. RISK & INS.* 726 (1989) (arguing that insurance clauses are added to contracts in part because of the transaction costs associated with contracting).

<sup>51</sup> See Cohen, *supra* note 16, at 343; Mayers & Smith, *supra* note 50, at 288.

<sup>52</sup> Schwartz, *supra* note 10, at 356.

<sup>53</sup> For a theoretical proof that loss-prevention initiatives can increase insurer profits, see Harris Schlesinger & Emilio Venezian, *Insurance Markets with Loss-Prevention Activity: Profits, Market Structure, and Consumer Welfare*, 17 *RAND J. ECON.* 227, 235–37 (1986).

<sup>54</sup> See ABRAHAM, *supra* note 14, at 17.

centives to prevent harm.<sup>55</sup> 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. Moral hazard 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.<sup>56</sup> I focus on the two that most plainly resemble “regulation”: loss prevention and underwriting, including rating (or price setting).<sup>57</sup> Both are *ex ante* interventions deployed before a covered harm occurs, in contrast with *ex post* interventions designed to manage loss from a past occurrence.<sup>58</sup>

An insurer engages in *loss prevention* by helping an insured identify and implement techniques for reducing the risk of loss. Insurers have access to data that allow them to assess and price the effect of particular precautions on risk — such as whether an antitheft device is cost-effective in reducing the risk of auto theft. Insurers convey their knowledge to policyholders in various ways. They publish newsletters and other guidance; hold or subsidize training sessions; write and review operational policies and protocols; perform on-site visits and risk audits; and implement what Professors Omri Ben-Shahar and Kyle Logue call “private safety codes” — codes of conduct with standards stricter than governmental regulations, managed and audited by third parties such as accreditation agencies.<sup>59</sup>

*Underwriting* is the process in which an insurer collects information about an applicant for insurance and decides whether to offer coverage, for what risks, and under what terms. Underwriting is closely linked to *rating*, or price setting. Together, underwriting and rating can discourage risky behavior by the insured in several ways.

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<sup>55</sup> See generally Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237 (1996) (tracking the history of the concept of moral hazard from its use by nineteenth-century insurance providers to its present-day usage); Steven Shavell, *On Moral Hazard and Insurance*, 93 Q.J. ECON. 541 (1979) (developing a model for better understanding moral hazard in cases where insurers do not observe care). Technically, I refer here only to *ex ante*, not *ex post*, moral hazard. See Baker, *supra*, at 270.

<sup>56</sup> See, e.g., Baker & Farrish, *supra* note 22, 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 13, at 205–16; Heimer, *supra* note 15, at 121–22. For a helpful table summarizing these devices, with citations to canonical literature, see Baker & Siegelman, *supra* note 10, at 178 tbl.7.2.

<sup>57</sup> See Baker & Swedloff, *supra* note 56, at 1420–22.

<sup>58</sup> Claims management, for example, can take on a regulatory cast as well. See Schlanger, *supra* note 31 (arguing that claims-management efforts, traditionally aimed at minimizing the costs associated with *ex post* moral hazard, can have the second-order effect of regulating the harm associated with *ex ante* moral hazard).

<sup>59</sup> See Ben-Shahar & Logue, *supra* note 13, at 211–12; see also Davis, *supra* note 16, at 216–20.



The insurer can deny coverage or cancel (or refuse to renew) a policy unless the insured adopts certain loss-prevention measures. It can use *differentiated premiums*, charging more 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.<sup>60</sup> 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.<sup>61</sup> A policy with no deductible is called a *first-dollar* policy.

*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.<sup>62</sup> The demand for coverage seems to have risen, as one would expect, with the pace of constitutional tort litigation, which ticked upward after *Monroe v. Pape*<sup>63</sup> in 1961 and continued to rise through the 1960s and '70s.<sup>64</sup> By 1976, one national study found, 65% of surveyed municipalities carried insurance to protect their employees;<sup>65</sup> many of the insurance programs were still young.

In the mid-1970s, the supply of municipal liability insurance contracted. By one account, premiums doubled between 1974 and 1976.<sup>66</sup> Municipal managers began to worry about coverage stability; one police department reportedly shut down in 1976 after its insurer cut ties.<sup>67</sup> Relief was not forthcoming. Premiums continued to rise and, by late 1977, alarms sounded as many police agencies found them-

<sup>60</sup> See KENNETH S. ABRAHAM, *DISTRIBUTING RISK* 71–74 (1986).

<sup>61</sup> 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).

<sup>62</sup> Telephone Interview with Commercial Insurer A (July 20, 2015) (stating that the National Sheriffs' Association has run an insurance program since the 1960s); see *Colson v. Lloyd's of London*, 435 S.W.2d 42 (Mo. Ct. App. 1968) (discussing “False Arrest Insurance” in effect since at least 1964, *id.* at 43, and mentioning a “master policy issued to the National Sheriff's [sic] Association,” *id.* at 45).

<sup>63</sup> 365 U.S. 167 (1961) (holding state officials, including police officers, amenable to suit under § 1983 even when they violate state law, *Monroe*, 365 U.S. at 187).

<sup>64</sup> EPP, *supra* note 9, at 71–72 (describing the rising number of police misconduct cases in the 1970s and early '80s); Kevin Krajick, *The Liability Crisis: Who Will Insure the Police?*, POLICE, Mar. 1978, at 33, 33 (describing the same for 1967 to 1971); see also Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 325 n.249 (1965) (reporting that, only two years after *Monroe*, § 1983 litigation had grown by approximately 60%).

<sup>65</sup> CHARLES S. RHYNE ET AL., *TORT LIABILITY AND IMMUNITY OF MUNICIPAL OFFICIALS* 343 (1976).

<sup>66</sup> NAT'L LEAGUE OF CITIES, *THE NEW WORLD OF MUNICIPAL LIABILITY* 3 (1978).

<sup>67</sup> See EPP, *supra* note 9, at 95; Krajick, *supra* note 64, at 33.

selves uninsured.<sup>68</sup> Then — and only then — did the law enforcement community begin to express “dismay about legal liability.”<sup>69</sup> Yet, around the same time, market conditions actually began to improve. Coverage expanded and prices plummeted. This trend continued for about half a decade.<sup>70</sup> Then, in early 1983, new signs of trouble appeared. Reinsurers began to fold at a rate of one per month.<sup>71</sup> Before long, the market spiraled downward. The resulting crisis affected many lines of liability insurance, but municipalities were some of the hardest hit.<sup>72</sup> Police liability insurance, for practical purposes, had vanished. Governments panicked. A number of municipalities shut down their police forces entirely rather than operate without insurance.<sup>73</sup>

The causes of the crisis remain unclear.<sup>74</sup> It was popular at the time to blame the “epidemic” of constitutional tort litigation fueled by proliferating plaintiffs’ attorneys and civil liberties groups.<sup>75</sup> Today,

<sup>68</sup> See EPP, *supra* note 9, at 95; Krajick, *supra* note 64, at 34; Robert F. Thomas, Jr., *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 66, at 3 (reporting in April 1978 that municipal liability insurance was extremely expensive or even unavailable).

<sup>69</sup> EPP, *supra* note 9, at 95.

<sup>70</sup> Mark Ferraro, *Municipal Liability Insurance Crisis 1* (Nat’l League of Cities, Working Paper, 1987); see also Gene C. Lai & Robert C. Witt, *Changed Insurer Expectations: An Insurance-Economics View of the Commercial Liability Insurance Crisis*, 10 J. INS. REG. 342, 343 (1992).

<sup>71</sup> Ferraro, *supra* note 70, at 2.

<sup>72</sup> See RYNARD, *supra* note 48, § 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. TRIB., Aug. 15, 1985, at 1; Meg Fletcher, *Public Entity Dilemma: Go Bare or Bust*, BUS. INS., July 8, 1985, at 1; and Scott J. Higham, *Municipalities Have No Assurance of Getting Insurance*, MORNING CALL (Sept. 19, 1985), [http://articles.mcall.com/1985-09-19/news/2480572\\_1\\_liability-policies-liability-insurance-insurance-pools](http://articles.mcall.com/1985-09-19/news/2480572_1_liability-policies-liability-insurance-insurance-pools) [https://perma.cc/PAD2-XAND].

<sup>73</sup> See, e.g., Church, *supra* note 72, at 17–18.

<sup>74</sup> See, e.g., Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399, 399 (1987); Lai & Witt, *supra* note 70, at 347 (“The exact causes of the commercial liability insurance crisis have never been agreed upon by the various concerned parties . . . .”); Kyle D. Logue, *Toward a Tax-Based Explanation of the Liability Insurance Crisis*, 82 VA. L. REV. 895, 896 (1996); Priest, *supra* note 43, at 1523–24; Ralph A. Winter, *The Liability Crisis and the Dynamics of Competitive Insurance Markets*, 5 YALE J. ON REG. 455, 463 (1988).

<sup>75</sup> See EPP, *supra* note 9, at 95–97. There were a remarkable number of changes during this period to the law of civil rights liability. For example, liability was expanded. See, e.g., *Smith v. Wade*, 461 U.S. 30 (1983) (holding that punitive damages were available from individual defendants); *Patsy v. Bd. of Regents*, 457 U.S. 496 (1982) (holding that the exhaustion of state remedies was not required for action under § 1983); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (holding that § 1983 liability was available for the violation of federal statutory law); *Owen v. City of Independence*, 445 U.S. 622 (1980) (holding that a municipality had no qualified immunity under § 1983); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) (holding that municipalities were amenable to suit under § 1983); *Wood v. Strickland*, 420 U.S. 308 (1975) (holding that there is no qualified immunity if the officer *should have known* the state of the law). Additionally, attorney’s fees

“[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.”<sup>76</sup> The *underwriting cycle* “refers to the tendency of premiums and restrictions on coverage and underwriting to rise and fall as insurers tighten their standards in response to the loss of 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.”<sup>77</sup>

The crisis proved temporary but indelibly changed 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 vary 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, usually within one state, to finance a risk, typically by pooling or sharing that risk.<sup>78</sup> The entities themselves own and govern the pool.<sup>79</sup> Technical-

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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 as amended at 42 U.S.C. § 1988 (2012)). And avenues to nonpecuniary relief were closed, which may have funneled some additional plaintiffs into damages actions. See, e.g., *Rizzo v. Goode*, 423 U.S. 362 (1976) (holding that there was very narrow standing to seek injunctive relief against police practices); *O’Shea v. Littleton*, 414 U.S. 488 (1974) (holding the same). For an overview covering these developments and more, see PETER H. SCHUCK, *SUING GOVERNMENT* 47–51 (1983).

<sup>76</sup> Baker & Siegelman, *supra* note 10, at 187–88 (citations omitted).

<sup>77</sup> BAKER & GRIFFITH, *supra* note 14, at 55.

<sup>78</sup> Although single-state pools predominate, it is not unheard of for a pool to have members in more than one state. See, e.g., *About MPR*, MIDWEST PUB. RISK, <http://www.mprisk.org/about> [<https://perma.cc/9MJ4-KDEU>] (comprising public entities in both Missouri and Kansas). On the variation in legal structure across 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) (2009) (“corporation”), with ALASKA STAT. § 21.76.030 (2016) (“cooperative agreement”), and MO. REV. STAT. § 537.625 (2000) (“association”). On the regulatory requirements to which pools are subject, see KEN BUSH, *RISK FINANCING: CAPTIVE RISK POOLS FOR PUBLIC ENTITIES* (2003); RYNARD, *supra* note 48, § 31.03[2]-[4]; Doucette, *supra*, at 543–62; and Michelle Baurkot, *Into the Pool*, BEST’S REV., Apr. 1998, at 47, 48–49. 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) (2015); 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> [<https://perma.cc/R7CA-PMUQ>]. 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); Peter C. Young, *Risk Pools*, in *ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY* 1065 (Jack Rabin ed., 2003); and compare with Tom Baker & Rick Swedloff, *Mutually Assured Protection Among Large U.S. Law Firms* 8–23 (Univ. Pa. Law Sch. Faculty Scholarship Paper No. 1658, 2017), <http://scholarship.law.upenn>

ly, 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 same degree as a commercial insurer.<sup>80</sup> 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 exchange for a *contribution*.<sup>81</sup> Underwriting, loss prevention, and claims management look similar in the two contexts.<sup>82</sup> 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.<sup>83</sup> The pools survived — in fact, they proliferated. A 1991 survey found that 44% of municipalities purchased police liability coverage from pools.<sup>84</sup> Roughly 500 pools operate today nationwide.<sup>85</sup>

### C. The Contemporary Market for Police Liability Insurance

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

There are no comprehensive data on the breakdown of the contemporary market for police liability insurance among the three major forms: commercial coverage, risk pooling, and self-insurance. It seems to vary from state to state. In some states, the pools are strong and there

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.edu/cgi/viewcontent.cgi?article=2659&context=faculty\_scholarship [https://perma.cc/J4UT-33F5], which describes similar heterogeneity among mutual insurers in the market for large law firm lawyers' professional liability coverage.

<sup>79</sup> See Doucette, *supra* note 78, at 538–39. A few states have “state funds,” which are organized differently than traditional pools. 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 (2000) (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 state funds and pools appear to be immaterial for present purposes, however. See generally RYNARD, *supra* note 48, § 31.02.

<sup>80</sup> See Doucette, *supra* note 78, at 546, 549, 551, 556.

<sup>81</sup> See BUSH, *supra* note 78, at 3, 9. Pools may have developed this terminology deliberately to distinguish themselves from insurance companies. See NIXON, *supra* note 78, at 11.

<sup>82</sup> 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”).

<sup>83</sup> D. Michael Enfield, Managing Dir., Marsh & McLennan, Inc., Outline of 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 78, at 546–47 (describing additional “reemergence of private insurers into the municipal insurance markets,” *id.* at 546, in the late 1990s).

<sup>84</sup> ICMA & WYATT CO., LAW ENFORCEMENT OFFICIALS LIABILITY INSURANCE: CURRENT STATUS — 1991, at 5 (1991) [hereinafter ICMA REPORT].

<sup>85</sup> NIXON, *supra* note 78, at 3. Even so, one recent report maintains that “[i]t may be too soon to determine” whether pools are here to stay. *Id.* at 14.

is little or no competition from commercial carriers; the vast majority of municipalities get their coverage from pools.<sup>86</sup> In other states, the breakdown is more even. And in at least one state, Indiana, there are no pools that cover police liability risk.<sup>87</sup>

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 residents — tend to join pools.<sup>88</sup> Midsized entities are divided, with the majority — some estimate 70% — in pools and the rest insured by commercial carriers.<sup>89</sup> The pooling figure is higher for cities than for counties.<sup>90</sup> And the largest municipalities — the big cities and counties, certainly those with over 500,000 or 750,000 residents, and some well below that point — *self-insure*.<sup>91</sup>

Table 1 gives some examples of how different cities insure and how much they pay in premiums or liability costs.

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<sup>86</sup> 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, at 15, 16 (reporting that about 85% of California cities belonged to pools).

<sup>87</sup> See Doucette, *supra* note 78, 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 A, *supra* note 62; Telephone Interview with Commercial Insurer B (Aug. 21, 2014); Telephone Interview with Consultant A (Aug. 27, 2014).

<sup>88</sup> See Young, *supra* note 78, at 1068 (asserting that 94% of pool participants are under 10,000 in population, and the rest are under 100,000); 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). *But see* Schwartz, *How Governments Pay*, *supra* note 9, at 1163 (asserting that municipalities under 100,000 are covered by pools or commercial insurers); *Public Entities: Law Enforcement Liability*, *supra* note 8 (marketing commercial coverage exclusively to towns under 100,000).

<sup>89</sup> Telephone Interview with Commercial Insurer D (Oct. 9, 2014) (estimating that of municipalities with populations under 750,000 people, 70% insure 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 87 (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).

<sup>90</sup> Telephone Interview with Trade Ass'n A (Sept. 15, 2014).

<sup>91</sup> Telephone Interview with Commercial Broker A, *supra* note 88 (estimating that municipalities over 500,000 are likely to self-insure); Telephone Interview with Commercial Insurer D, *supra* note 89 (estimating that municipalities over 750,000 typically self-insure). *But see* Schwartz, *How Governments Pay*, *supra* note 9, at 1163 (estimating that jurisdictions with more than 100,000 residents are more likely to be self-insured). See generally ICMA REPORT, *supra* note 84, 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).

TABLE 1

City	Ins. Type	2013 Pop. (Est.) <sup>92</sup>	Avg.				% Budget to Payments/ Premiums	% Police Budget to Payments/ Premiums
			Avg. Budget '12-'14 (millions)	Avg. Police Budget '12-'14 (millions)	Payments/ Premiums '12-'14 (millions)			
Chicago (IL) <sup>93</sup>	Self- Insured	2,718,782	\$8,310.06	\$1,345.85	\$52.86	0.64%	3.92%	
Columbus (OH) <sup>94</sup>	Self- Insured	822,553	\$1,534.92	\$283.86	\$0.48	0.03%	0.17%	
Kansas City (MO) <sup>95</sup>	Self- Insured	467,007	\$1,349.86	\$222.38	\$2.62	0.19%	1.18%	
Pocatello (ID) <sup>96</sup>	Risk Pool	54,350	\$70.96	\$12.42	\$0.15	0.21%	1.21%	
Lincolnton (NC) <sup>97</sup>	Private	10,743	\$25.11	\$2.87	\$0.04	0.14%	1.23%	
Evansville (WI) <sup>98</sup>	Risk Pool	5,124	\$14.80	\$0.95	\$0.04	0.26%	4.06%	
Hedwig Vill. (TX) <sup>99</sup>	Risk Pool	2,638	\$4.66	\$1.55	\$0.02	0.43%	1.30%	

<sup>92</sup> *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2013*, U.S. CENSUS BUREAU, <https://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml> (follow "Annual Population Estimates" hyperlink; then select 2013 version of table) (estimating 2013 populations based on 2010 Census data).

<sup>93</sup> For municipal budget and annual payments data, see Schwartz, *How Governments Pay*, *supra* note 9, app. B at 1224. For police budget data, see *id.* app. C at 1230.

<sup>94</sup> For municipal budget and annual payments data, see *id.* app. B at 1226. For police budget data, see COLUMBUS DIV. OF POLICE, 2014 ANNUAL REPORT 1 (2014); and COLUMBUS DIV. OF POLICE, 2013 ANNUAL REPORT 36 (2013).

<sup>95</sup> For municipal budget and annual payments data, see Schwartz, *How Governments Pay*, *supra* note 9, app. B at 1227. For police budget data, see KANSAS CITY, MO. POLICE DEP'T, APPROPRIATED BUDGET 2012-2013, at i (2014); KANSAS CITY, MO. POLICE DEP'T, APPROPRIATED BUDGET 2012-2013, at i (2013); and KANSAS CITY, MO. POLICE DEP'T, APPROPRIATED BUDGET 2012-2013, at i (2012).

<sup>96</sup> For municipal budget data, see CITY OF POCATELLO, CITIZEN'S FINANCIAL REPORT 9-10 (2015). For police budget and annual payments data, see Schwartz, *How Governments Pay*, *supra* note 9, app. E at 1234.

<sup>97</sup> For municipal budget data, see CITY OF LINCOLNTON FIN. DEP'T, COMPREHENSIVE ANNUAL FINANCIAL REPORT 99 (2015). For police budget and annual payments data, see Schwartz, *How Governments Pay*, *supra* note 9, app. E at 1234.

<sup>98</sup> For municipal budget data, see CITY OF EVANSVILLE, FINANCIAL STATEMENTS WITH INDEPENDENT AUDITOR'S REPORT, at v (2014). Municipal budget data is not available for 2014. For police budget and annual payments data, see Schwartz, *How Governments Pay*, *supra* note 9, app. E at 1234.

<sup>99</sup> For municipal and police budget data, see CITY OF HEDWIG VILL., BUDGET FISCAL YEAR 2014 SUMMARY (2014); and CITY OF HEDWIG VILL., BUDGET FISCAL YEAR 2012 SUMMARY (2012). Municipal budget data is not available for 2013. For annual payments data, see HEDWIG VILL., LIABILITY DECLARATIONS OF COVERAGE (June 12, 2013) (on file with the Harvard Law School Library); and HEDWIG VILL., LIABILITY DECLARATIONS OF COVERAGE (Aug. 14, 2012) (on file with the Harvard Law School Library).

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.<sup>100</sup> (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 pay-as-you-go basis. For present purposes, I refer to all municipalities that decline to purchase primary coverage on the market (that is, 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.<sup>101</sup>

Numerous factors inform a municipality’s choice of how to insure its police liability risk. I run through some of them briefly here for two reasons. 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 even gestures in that direction, municipalities often bend to preserve their preferred insurance relationship. Second, and relatedly, flagging the perceived strengths and weaknesses of the different insurance mechanisms implies 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 autonomy-based objections to a market-insurance mandate. I rely here largely on the views of the industry experts I interviewed, supplemented by trade and academic literature.<sup>102</sup>

<sup>100</sup> See RYNARD, *supra* note 48, § 31.04.

<sup>101</sup> 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).

<sup>102</sup> Prior scholarship has explored the choice set insurance consumers confront in other contexts. See, e.g., Baker & Swedloff, *supra* note 78 (manuscript at 42–44) (detailing differences between stock and mutual insurers in the large-law-firm lawyers’ professional liability insurance market); Cohen, *supra* note 16, 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). 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).

(a) *Pricing.* — Municipalities, like most consumers, consider pricing when deciding how to insure; price may even be a municipality's primary or sole consideration.<sup>103</sup> Under frequently prevailing market conditions, pools can offer lower prices because they skim no profit from the contributions they collect.<sup>104</sup> The spread between a pool contribution and a commercial premium might be 10 to 20%.<sup>105</sup> At the same time, municipalities sometimes leave pools when commercial carriers offer lower prices;<sup>106</sup> this is especially likely during a soft market, when commercial carriers compete heavily to get their hands on premium dollars. Pools' prices are 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.<sup>107</sup>

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 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."<sup>108</sup> Market insurance may also create certain cost-saving economies of scale by spreading fixed costs among a larger group of insureds.

(b) *Specialization.* — Pools, I was frequently told, are more familiar with municipalities and policing risk than commercial carriers are, which attracts some municipalities.<sup>109</sup> Some pools have policing spe-

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<sup>103</sup> See, e.g., Telephone Interview with Commercial Insurer F, *supra* note 37; see also PUB. RISK MGMT. ASS'N & PUB. ENTITY RISK INST., 2005 COST OF RISK SURVEY 7 (2005) (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. See Telephone Interview with Trade Ass'n A, *supra* note 90.

<sup>104</sup> E.g., Telephone Interview with Commercial Insurer F, *supra* note 37; see also Roberto Cenicerros, *Market Conditions Putting Squeeze on Public Entities*, BUS. INS. (June 10, 2001, 12:00 AM), <http://www.businessinsurance.com/article/20010610/ISSUE01/10004308/market-conditions-putting-squeeze-on-public-entities> [<https://perma.cc/4ZYM-DYSK>] (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.

<sup>105</sup> Young, *supra* note 78, at 1069.

<sup>106</sup> Telephone Interview with Consultant A, *supra* note 87.

<sup>107</sup> See Rynard, *supra* note 102, at 127 ("[O]ver the long run, the local government may not realize any cost savings by risk pooling.").

<sup>108</sup> Priest, *supra* note 43, 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).

<sup>109</sup> See Telephone Interview with Commercial Insurer G (Sept. 9, 2014); Telephone Interview with Commercial Insurer H (Aug. 27, 2014) (describing its practice of not focusing loss prevention on operational details of policing, but rather on general risk-management principles); Telephone Interview with Risk Pool C (July 6, 2015).



cialists on staff, who are typically former officers.<sup>110</sup> But so do some commercial carriers, especially those that market themselves as public-entity experts.<sup>111</sup> So while the average pool may be more specialized than the average commercial carrier, there is expertise in both segments of the market.

(c) *Relationships*. — Many pools function like an extension of the municipalities that make them up.<sup>112</sup> Member municipalities, ideally, regard the pool as their business partner and resource rather than an authoritarian figure telling them “thou shall not do this.”<sup>113</sup> Pools are reputedly less likely to settle litigation against the police, which is viewed as a sign of loyalty to their members.<sup>114</sup> And unlike commercial insurers, which come and go from the market as they ride the insurance cycle, “pools are there through thick and thin.”<sup>115</sup> Pools also foster collective efficacy and responsibility among their members: high-performing members can encourage troubled municipalities to take loss prevention more seriously and advise them about its implementation.<sup>116</sup>

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 governments on their members’ behalf.<sup>117</sup> 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

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<sup>110</sup> See, e.g., Telephone Interview with Police Chief B (Aug. 3, 2016) (praising expertise of pool’s law enforcement specialist); Telephone Interview with Risk Pool A, *supra* note 86; Telephone Interview with Risk Pool B, *supra* note 86; Telephone Interview with Risk Pool C, *supra* note 109.

<sup>111</sup> See, e.g., Telephone Interview with Commercial Broker A, *supra* note 88; Telephone Interview with Commercial Insurer A, *supra* note 62; Telephone Interview with Commercial Insurer G, *supra* note 109.

<sup>112</sup> See, e.g., Telephone Interview with Trade Ass’n A, *supra* note 90; NIXON, *supra* note 78, at 15 (“One of the fundamental advantages of pools is that they know their members.”).

<sup>113</sup> Telephone Interview with Risk Pool D (Sept. 2, 2014).

<sup>114</sup> See, e.g., *id.* Professor Ronen Avraham identifies the insurer’s motivation to settle claims the insured would want to litigate as a distinct instance of “reverse moral hazard.” Avraham, *supra* note 43, at 90; see Patricia M. Danzon, *Liability and Liability Insurance for Medical Malpractice*, 4 J. HEALTH ECON. 309, 319–20 (1985).

<sup>115</sup> Telephone Interview with Commercial Insurer F, *supra* note 37; 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,” *id.* at 103).

<sup>116</sup> See Telephone Interview with Consultant B (Aug. 16, 2014); see also Telephone Interview with Risk Pool D, *supra* note 113 (acknowledging this dynamic but characterizing it as rare); Waldman et al., *supra* note 101, at 75 (“[P]eer pressure is a powerful goad to efficiency.”); cf. Cohen, *supra* note 16, 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 102, at 148.

<sup>117</sup> See Telephone Interview with Commercial Insurer G, *supra* note 109.

commercial insurance for patronage purposes, in order to support local industry.<sup>118</sup>

(d) *Loss-Prevention Services.* — Consistent with the previous point, pools are often said to work more closely with municipalities to implement proactive loss-prevention programs.<sup>119</sup> Pools allow smaller municipalities to coordinate and leverage economies of scale to purchase loss-prevention services they otherwise could not afford, like the use of expensive computerized training equipment.<sup>120</sup> Pools may also help overcome free-rider problems and other economic disincentives municipalities and commercial insurers may face in developing novel loss-prevention strategies.<sup>121</sup> One expert told me that pools spend more of every dollar on loss prevention: 2 to 5 cents per dollar on loss control versus commercial carriers' 0.75 to 1 cents per dollar.<sup>122</sup> At the same time, the quality of pools, and their loss-prevention services, varies widely.<sup>123</sup> And “[d]ue to budget restraints, 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.”<sup>124</sup>

The corporate law suggests that the largest public entities, in contrast, may benefit little from insurers' loss-prevention services, as they are more likely to have their own risk-management departments and

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<sup>118</sup> See Telephone Interview with Risk Pool C, *supra* note 109.

<sup>119</sup> See, e.g., Telephone Interview with Commercial Insurer G, *supra* note 109; Telephone Interview with Commercial Insurer I (Apr. 18, 2014); Telephone Interview with Consultant A, *supra* note 87; Telephone Interview with Risk Pool C, *supra* note 109; Telephone Interview with Risk Pool E (Sept. 2, 2014); cf. CAROL A. HEIMER, REACTIVE RISK AND RATIONAL ACTION: MANAGING MORAL HAZARD IN INSURANCE CONTRACTS 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 102, 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).

<sup>120</sup> Telephone Interview with Commercial Insurer F, *supra* note 37; 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).

<sup>121</sup> See HEIMER, *supra* note 119, at 64–65 (explaining how small mutual insurers can overcome collective action problems by, for example, passing on savings to all policyholders, which encourages information sharing); SUGARMAN, *supra* note 23, at 16 (“After determining how an insured could lower its tort exposure, [an insurance] company might lose the business to a competitor who takes advantage of the results of such a study but can offer lower rates because it did not make the initial outlay.”).

<sup>122</sup> Telephone Interview with Commercial Insurer C (Aug. 18, 2014). One explanation may be that pools see greater return on investment in loss prevention due to solidarity and longer-term relationships. Cf. Swedloff & Baker, *supra* note 16 (manuscript at 31). There may also be selection effects, as municipalities interested in risk management opt into pools.

<sup>123</sup> Telephone Interview with Commercial Insurer E, *supra* note 101; Telephone Interview with Commercial Insurer F, *supra* note 37.

<sup>124</sup> NIXON, *supra* note 78, at 12.

sophisticated information bases.<sup>125</sup> This may drive down demand for external insurance mechanisms among these entities. The extent to which this corporate law insight translates to the municipal context, however, is unclear.<sup>126</sup>

(e) *Financial Stability*. — Commercial carriers may be better capitalized and financially steadier than pools;<sup>127</sup> they are also more closely regulated. Commercial insurers are better diversified because their risk pools are larger and draw from varied industries and locales. In contrast, one pool 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.<sup>128</sup> Some pools have folded under financial strain.<sup>129</sup> Of course, this can happen and indeed *has* happened to commercial carriers as well.<sup>130</sup> Commercial carriers, in addition, are thought to be more vulnerable than pools to the pendulum swings of the insurance cycle.<sup>131</sup> Financial stability is almost certainly one reason that most of the self-insured municipalities are large — their broad tax bases and big budgets allow them to ab-

<sup>125</sup> ABRAHAM, *supra* note 14, at 233.

<sup>126</sup> See ARCHBOLD, *supra* note 120, 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, *id.* at 10).

<sup>127</sup> *E.g.*, Telephone Interview with Commercial Insurer A, *supra* note 62; see also NIXON, *supra* note 78, at 1.

<sup>128</sup> *E.g.*, Telephone Interview with Commercial Broker B, *supra* note 39; Telephone Interview with Commercial Insurer G, *supra* note 109; see Greenwald, *supra* note 88, at 6. Because all of a pool's member municipalities are in the same state, moreover, unfavorable changes in state law can create highly correlated risks. See Jan M. Ambrose et al., *The Economics of Liability Insurance*, in HANDBOOK OF INSURANCE 315, 325 (Georges Dionne ed., 2d ed. 2013) (explaining that changes in legal precedent can influence many claims simultaneously and in the same direction).

<sup>129</sup> *E.g.*, Telephone Interview with Commercial Insurer G, *supra* note 109; see also NIXON, *supra* note 78, at 9 (reporting that pool managers surveyed in 2011 raised concerns about “[p]otential pool insolvency”); Baurkot, *supra* note 78, at 49 (“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 78, at 543 (discussing some pools’ “solvency problems”); Waldman et al., *supra* note 101, at 75 (reporting that a large Michigan pool was underfunded by around \$21.5 million).

<sup>130</sup> CRESSWELL & LONDON-MURRAY, *supra* note 89, at 40 (“Officials told stories of A-rated insurers . . . that suddenly collapsed, leaving municipalities without coverage and with exposure for all existing claims.”).

<sup>131</sup> See Don Jones, Nat’l League of Cities, Remarks at the Fourth National Conference of State Advisory Commissions on Intergovernmental Relations Counterpart Agencies, in ADVISORY COMM’N ON INTERGOVERNMENTAL RELATIONS, GOVERNMENTS AT RISK: LIABILITY INSURANCE AND TORT REFORM (1987); Cenicerros, *supra* note 104 (describing how pools build up reserves to hedge against market conditions). *But see* Rynard, *supra* note 102, at 127 (“The risk pool is subject to the same cyclical patterns as the commercial insurers . . .”).

sorb the shock of large judgments and settlements that might seriously damage a smaller city.<sup>132</sup>

(f) *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.<sup>133</sup> 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 Pacific's executive leadership, the pool readmitted the municipality on probationary status.<sup>134</sup>

(g) *Autonomy*. — Some municipalities prefer commercial coverage because commercial carriers, which tend to be less aggressive about loss prevention, leave them greater autonomy over their policing operations.<sup>135</sup> Self-insurance buys greater autonomy still.<sup>136</sup> Self-insurance also preserves municipal control over litigation defense, given that external insurers typically insist on the right to defend and settle litigation.<sup>137</sup>

2. *The Pervasiveness of Private Influence*. — Earlier I asserted that police liability insurance inverts the ordinary model of governance, which imagines public regulation of private actors. Yet I just described a market in which the majority of municipalities insure with intergovernmental risk pools rather than commercial carriers. Substantiating my initial claim, and showing that it describes more than some aberrational corner of the market, therefore requires more work. Consistent with literature detailing the pervasive private role in public administration,<sup>138</sup> I show how a slew of private parties 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 describe insurers' loss-prevention techniques.

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<sup>132</sup> See Schwartz, *How Governments Pay*, *supra* note 9, at 1174 (discussing how smaller jurisdictions "feel the financial effects of lawsuits more acutely").

<sup>133</sup> Telephone Interview with Consultant A, *supra* note 87; Telephone Interview with G. Patrick Gallagher, President, The Gallagher-Westfall Grp. (Aug. 20, 2014); Telephone Interview with Risk Pool E, *supra* note 119.

<sup>134</sup> Telephone Interview with Risk Pool E, *supra* note 119.

<sup>135</sup> See, e.g., Telephone Interview with Commercial Insurer H, *supra* note 109.

<sup>136</sup> See Greenwald, *supra* note 88, at 1.

<sup>137</sup> See, e.g., Telephone Interview with City Counsel A (June 25, 2015); Telephone Interview with Commercial Insurer A, *supra* note 62.

<sup>138</sup> See, e.g., Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 543 (2000) (proposing "a conception of governance as a set of negotiated relationships between public and private actors").

First, some pools, while public in formal structure and outward appearance, in fact are dominated by private personnel.<sup>139</sup> “Historically, pools have relied heavily on third-party providers to supply services,” including underwriting, loss prevention, and legal counsel.<sup>140</sup> For example, the Ohio Municipal Joint Self-Insurance Pool is an unincorporated, statutory, tax-exempt risk-sharing system.<sup>141</sup> All of the day-to-day management of the pool, however, is conducted by the JWF Specialty Company in Indiana, a subsidiary of ONI Risk Partners.<sup>142</sup> Likewise, the League of Minnesota Cities Insurance Trust contracts with Berkley Risk for underwriting and claims management.<sup>143</sup> Berkley Risk is a subsidiary of W.R. Berkley Company, a commercial insurer.<sup>144</sup> 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.<sup>145</sup> By one account, roughly 35% of pools are staffed this way.<sup>146</sup>

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.<sup>147</sup> The most prominent consul-

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<sup>139</sup> 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, 13 (noting that some pools have become “controlled by the insurance companies or other service contractors with which they do business”).

<sup>140</sup> Young, *supra* note 78, at 1067; *see also id.* at 1068 (noting that, in some pools, “management has been completely outsourced”).

<sup>141</sup> *About Us*, OHIO MUN. JOINT SELF-INS. POOL, <http://www.omjsp.com/aboutus.html> [<https://perma.cc/YNU3-Y2T7>].

<sup>142</sup> Telephone Interview with Commercial Insurer A, *supra* note 62; *About Us*, JWF SPECIALTY, <http://www.onirisk.com/jwf-specialty/about-us.asp> [<https://perma.cc/LW9P-SUB3>]; *About Us*, *supra* note 141.

<sup>143</sup> Telephone Interview with Risk Pool A, *supra* note 86.

<sup>144</sup> *About*, BERKLEY RISK, <https://www.berkleyrisk.com/Pages/About.aspx> [<https://perma.cc/HDJ7-VTZZ>].

<sup>145</sup> Telephone Interview with Risk Pool A, *supra* note 86; *cf.* Haggerty, *supra* note 86, at 15–16 (describing a California city that “started its own insurance company,” *id.* at 15, 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[s],” *id.* at 16, and marketed by another private servicer); *About Us*, WIS. COUNTY MUTUAL INS. CORP., <http://www.wisconsincountymutual.org/about-us.html> [<https://perma.cc/D4GK-BXDQ>] (identifying a commercial servicer as the pool’s private general administrator); *Risk Management Services*, IND. MUN. INS. PROGRAM, <http://www.indianamip.com/services.html> [<https://perma.cc/6X8N-TZA7>] (describing risk-management services provided by private pool administrator on behalf of commercial carrier for pool members).

<sup>146</sup> NIXON, *supra* note 78, at 3.

<sup>147</sup> *See, e.g., About Us*, SKIDCAR SYS., <http://www.skidcar.com/about> [<https://perma.cc/BH2U-W3ZE>] (advertising services to “public safety agencies facing tighter budgets”); CIRMAT, INC., <http://www.sashley.com> [<https://perma.cc/QY2Z-YZFT>] (advertising “Consulting in Risk Management and Training,” including “Police Deadly Force Consultation,” “Policy Review & Devel-

tants are retired police officers and administrators 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.<sup>148</sup> These consultants help bridge the cultural gap that separates insurers from police; they understand risk management but speak police vernacular.<sup>149</sup>

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*.<sup>150</sup> Reinsurance is insurance for insurance companies.<sup>151</sup> 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.<sup>152</sup>

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

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opment,” “Law Enforcement Training,” and other services); *Services*, RUSSELL CONSULTING, LLC, <http://russell-consulting.org/services> [<https://perma.cc/SUE2-9ULG>] (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”).

<sup>148</sup> Telephone Interview with Consultant A, *supra* note 87.

<sup>149</sup> See Telephone Interview with Commercial Insurer G, *supra* note 109; see also Roberto Cenicerros, *Policing Their Own Risks: Formal Risk Management Growing in Law Enforcement*, BUS. INS. (Aug. 9, 1998, 12:00 AM), <http://www.businessinsurance.com/article/19980809/ISSUE01/10005724/policing-their-own-risks> [<https://perma.cc/6T7V-TJXS>] (reporting officer’s view that “[e]ffective risk management in law enforcement takes an insider to do the job well”).

<sup>150</sup> See, e.g., MASS. GEN. LAWS ch. 40M, § 4(B)(1) (2010) (requiring pools to purchase excess insurance); see also Young, *supra* note 78, at 1069 (“[P]ools have begun to purchase more commercial insurance . . .”).

<sup>151</sup> For an introduction to reinsurance principles, see Aviva Abramovsky, *Reinsurance: The Silent Regulator?*, 15 CONN. INS. L.J. 345, 350–55 (2009); and Mendoza, *supra* note 78, 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 *id.* at 65.

<sup>152</sup> See Abramovsky, *supra* note 151, at 364–65; see also Telephone Interview with Commercial Insurer F, *supra* note 37 (estimating average pool retention at \$500,000 or above). There are frequently additional layers above the first layer of reinsurance as well. See BAKER & GRIFFITH, *supra* note 14, at 53–54 (describing “tower[ed],” *id.* at 53, structure of insurance policies).

Cities.<sup>153</sup> Yet, according to the executive director of a leading trade association, it is “universally true” that commercial insurers are somewhere in the picture.<sup>154</sup> Commercial insurance might be “behind” the public reinsurance — NLC Mutual reportedly reinsures with Lloyd’s of London and Willis Re.<sup>155</sup> 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.<sup>156</sup>

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 price the aggregate risk accordingly.<sup>157</sup> 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 majority of pools.”<sup>158</sup> 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”<sup>159</sup> and “symbiotic.”<sup>160</sup>

Third, insurers frequently outsource risk management to private organizations. The Commission on Accreditation for Law Enforcement Agencies (CALEA) seems most common. CALEA is an independent, nonprofit corporation with a professional staff and a board that includes members from business and academia along with law enforcement.<sup>161</sup> CALEA audits and certifies agencies that have

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<sup>153</sup> NLC MUTUAL INS. CO., <https://www.nlcmutual.com> [<https://perma.cc/L94v-Q386>]; *see also About Us*, COUNTY REINSURANCE LTD., <http://www.countyreinsurance.org/#/about-us> [<https://perma.cc/RD3z-9LCQ>].

<sup>154</sup> Telephone Interview with Trade Ass’n A, *supra* note 90.

<sup>155</sup> Telephone Interview with Consultant A, *supra* note 87.

<sup>156</sup> Telephone Interview with Risk Pool B, *supra* note 86.

<sup>157</sup> Telephone Interview with Trade Ass’n A, *supra* note 90; *see* Mendoza, *supra* note 78, at 125 (“It is critical for the reinsurer to know the pool is proactive in risk management . . . .” (quoting pool official)).

<sup>158</sup> Mendoza, *supra* note 78, at 101 (quoting former senior official from the Association of Governmental Risk Pools).

<sup>159</sup> *Id.* at 116.

<sup>160</sup> *Id.* at 125 (quoting industry experts); *see also* Telephone Interview with Commercial Insurer G, *supra* note 109. For a similar observation in a different context, *see* Baker & Swedloff, *supra* note 78 (manuscript at 22–25).

<sup>161</sup> *The Commission*, CALEA, <http://www.calea.org/content/commission> [<https://perma.cc/TDR5-A5ZE>].

met specified risk-management criteria; insurers either fund the accreditation process or reward agencies that have completed it.<sup>162</sup>

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.”<sup>163</sup> Standard & 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.<sup>164</sup> One expert estimated that “two handfuls” of pools are rated in this way.<sup>165</sup> 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 was told, lost members when its credit rating went down.<sup>166</sup> The credit rating also likely affects reinsurance pricing.<sup>167</sup>

#### 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.<sup>168</sup> Increasingly, a municipality purchases the police policy as part of a commercial general liability policy, although standalone police policies, called “monoline” policies, do still exist.<sup>169</sup> There are no comprehensive data on whether insurers are writing police liability on an occurrence or

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<sup>162</sup> See *infra* p. 1584. 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).

<sup>163</sup> Baurkot, *supra* note 78, at 49.

<sup>164</sup> TEX. MUN. LEAGUE INTERGOVERNMENTAL RISK POOL, REPORT TO STANDARD & POOR’S ON THE TEXAS MUNICIPAL LEAGUE INTERGOVERNMENTAL RISK POOL’S STRUCTURE, OPERATIONS AND INITIATIVES 59–60 (2015).

<sup>165</sup> Telephone Interview with Commercial Insurer F, *supra* note 37.

<sup>166</sup> *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).

<sup>167</sup> See Telephone Interview with Commercial Insurer A, *supra* note 62 (agreeing that this pricing effect seems likely, though disclaiming personal knowledge).

<sup>168</sup> See Telephone Interview No. 2 with Commercial Insurer F (July 15, 2016) (asserting that police liability coverage documents have become more uniform over past two decades). On the standardization of insurance forms generally, including possible movement away from the standardization norm, see Avraham, *supra* note 43, at 96–98; and Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263 (2011).

<sup>169</sup> Compare Telephone Interview with Commercial Insurer F, *supra* note 37 (insurer has written police liability only as part of commercial general liability for the past ten years), with Telephone Interview with Commercial Insurer G, *supra* note 109 (insurer still writes some monoline policies).



claims-made basis, but the general trend seems to be from the former to the latter.<sup>170</sup>

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.’”<sup>171</sup> Covered loss includes punitive damages (where law permits) unless they are explicitly excluded.<sup>172</sup> “Law enforcement activities” simply means “[t]hose activities conducted by” the municipality’s law enforcement agency.<sup>173</sup> 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.’”<sup>174</sup> The meat of the policy is found in the definition of “personal injury.”<sup>175</sup> 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,”

<sup>170</sup> Compare ICMA REPORT, *supra* note 84, at 6 (reporting in 1991 that 61.6% of law enforcement liability policies were occurrence based), with ALBERT P. AMATO, REINSURANCE REFERENCE GUIDE 117 (2012) (stating that claims-made is the most common type of law enforcement liability policy form). On the differences between occurrence-based and claims-made policies, see ABRAHAM, *supra* note 60, at 49–50.

<sup>171</sup> In the text, I quote language from a sample commercial policy. NAT’L CAS. CO., LAW ENFORCEMENT LIABILITY COVERAGE FORM 1, [http://euclidps.com/wp-content/uploads/2014/05/Law\\_Enforcement\\_LI\\_PE\\_PL\\_2\\_0802.pdf](http://euclidps.com/wp-content/uploads/2014/05/Law_Enforcement_LI_PE_PL_2_0802.pdf) [<https://perma.cc/A8KK-S4X2>]. The terms of a pool’s coverage memorandum are quite similar. See, e.g., TEX. MUN. LEAGUE INTERGOVERNMENTAL RISK POOL, LIABILITY COVERAGE DOCUMENT 9 (2014), <http://www.tmlirp.org/filestore/uw/Liability%2010-1-14.pdf> [<https://perma.cc/C4MB-2SAD>]. For more publicly available examples, see *Am. Safety Cas. Ins. Co. v. City of Waukegan*, 776 F. Supp. 2d 670, 684–85, 688–89 (N.D. Ill. 2011); *Gulf Underwriters Ins. Co. v. City of Council Bluffs*, 755 F. Supp. 2d 988, 998, 1003–04 (S.D. Iowa 2010); *N. River Ins. Co. v. Broward Cty. 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); *City of Lee’s Summit v. Mo. Pub. Entity Risk Mgmt.*, 390 S.W.3d 214, 218 (Mo. Ct. App. 2012); *Nat’l Cas. Ins. Co. v. City of Mount Vernon*, 515 N.Y.S.2d 267, 268–69 (App. Div. 1987).

<sup>172</sup> B. Darrell Child, *Law Enforcement Liability: A Specialty-Market Risk*, AM. AGENT & BROKER, Apr. 1995, at 29, 32. On the insurability of punitive damages, see George L. Priest, *Insurability and Punitive Damages*, 40 ALA. L. REV. 1009 (1989).

<sup>173</sup> NAT’L CAS. CO., *supra* note 171, at 5.

<sup>174</sup> *Id.*

<sup>175</sup> See Harry F. Brooks, *Public Entity Risk Management — Part VII*, AM. AGENT & BROKER, May 1994, at 22, 22.

“[v]iolation of property rights,” and “[w]rongful entry, eviction or other invasion of the right of public occupancy.”<sup>176</sup>

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.<sup>177</sup> It also excludes any claim “[b]rought about or contributed to by fraud, dishonesty, bad faith or malicious act(s) of an insured,”<sup>178</sup> though many policies restrict this exclusion to “criminal” acts.<sup>179</sup> 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 or criminally, he will not be covered.<sup>180</sup> The *municipality*, however, will still be covered unless it knew about and consented to the officer’s conduct.<sup>181</sup> And the municipality may still decide to indemnify the officer for any damages levied against him.<sup>182</sup> The insurer, moreover, will still *defend* the officer, subject to a “reservation of rights,” until he is *convicted* of a crime.<sup>183</sup> I was told that, in practice, police liability policies are understood to be broad and that the policy exclusions are not especially relevant.<sup>184</sup>

<sup>176</sup> NAT’L CAS. CO., *supra* note 171, 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. App. Ct. 1993); *Colson v. Lloyd’s of London*, 435 S.W.2d 42, 47 (Mo. Ct. App. 1968); and *Am. Mgmt. Ass’n v. Atl. Mut. Ins. Co.*, 641 N.Y.S.2d 802, 808 (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); *see also* *City of Newark v. Hartford Accident & Indem. Co.*, 342 A.2d 513, 518 (N.J. Super. Ct. App. Div. 1975) (same, *in dicta*).

<sup>177</sup> NAT’L CAS. CO., *supra* note 171, at 2.

<sup>178</sup> *Id.*

<sup>179</sup> *E.g.*, Email from Risk Pool C to author (July 28, 2016, 9:24 AM) (on file with the Harvard Law School Library).

<sup>180</sup> For an explanation of why insurance policies typically exclude intentional acts, see Priest, *supra* note 172, at 1023–26.

<sup>181</sup> Telephone Interview with Commercial Insurer A, *supra* note 62; *see also* KEETON, *supra* note 82, § 5.4(b), at 292 (“[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 Liability Insurance*, 41 COLUM. L. REV. 26, 43 (1941).

<sup>182</sup> *See* Schwartz, *supra* note 32, at 923–25 (finding that municipalities often indemnify officers in these circumstances).

<sup>183</sup> *See* Telephone Interview with Commercial Insurer E, *supra* note 101; Telephone Interview with Commercial Insurer F, *supra* note 37; *see also* Email from Risk Pool A to author (July 27, 2016, 4:23 PM) (on file with the Harvard Law School Library); Email from Risk Pool C to author, *supra* note 179.

<sup>184</sup> Telephone Interview with Commercial Insurer A, *supra* note 62; Telephone Interview with Commercial Insurer E, *supra* note 101; Telephone Interview with Commercial Insurer F, *supra* note 37; *see also* Rick Swedloff, *Uncompensated Torts*, 28 GA. ST. U. L. REV. 721, 741–44 (2012)

## II. HOW INSURERS REGULATE THE POLICE

With the basic concepts and cast of characters in place, this Part details how exactly insurers regulate the police. In section II.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 II.B, I explain how insurers use the *underwriting* and *rating* processes 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 and rating incentives.<sup>185</sup> I then discuss the regulatory role of reinsurers in section II.C. Section II.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 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 six buckets: policy development, education and training, audits, accreditation, personnel, and omnibus and structural reforms. 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.<sup>186</sup> Still, the six categories that follow capture the bulk of the strategies insurers use to prevent and mitigate loss.

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(discussing how “[v]ictims, courts, and policymakers,” *id.* at 741, have worked around the intentional-tort exclusion to tap into insurance coverage).

<sup>185</sup> See HEIMER, *supra* note 119, 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.”).

<sup>186</sup> See, e.g., Telephone Interview with Risk Pool D, *supra* note 113; COFFEE WITH A COP, <http://coffeewithacop.com> [<https://perma.cc/Z6KX-5TBX>]; see also Kate Zernike, *Camden Turns Around with New Police Force*, N.Y. TIMES (Aug. 31, 2014), <https://www.nytimes.com>

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.”<sup>187</sup> 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.<sup>188</sup>

Insurers shape police policies in several ways. First, some insurers review and provide suggestions on agency policies, or retain a consultant to do the same.<sup>189</sup> Insurers’ feedback can range from minor tweaks to substantial policy recommendations.<sup>190</sup> 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.”<sup>191</sup> 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 we can see legal norms subtly change form in insurers’ hands. One insurer I interviewed, for example, insisted that her firm reviews agency policies only from a “risk-management perspective,” not a legal one.<sup>192</sup> But, of course, the “risk” being managed here is the risk of legal liability; that is, 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 — again, 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 re-

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/2014/09/01/nyregion/camden-turns-around-with-new-police-force.html [https://perma.cc/U3RW-D3AM] (describing community outreach efforts in Camden).

<sup>187</sup> McCoy, *supra* note 9, at 112; *see also* HEIMER, *supra* note 119, at 24 (describing insurers’ insight that, to control their agents, policyholders must establish routines from which it is hard for their agents to deviate).

<sup>188</sup> *See, e.g.*, CNA, LAW ENFORCEMENT LIABILITY APPLICATION (2006) (on file with the Harvard Law School Library).

<sup>189</sup> *See, e.g.*, Telephone Interview with Consultant B, *supra* note 116; *see also* Child, *supra* note 172, at 32–33.

<sup>190</sup> *See, e.g.*, *The Search for the Best Strip Search Policy*, *supra* note 33 (“In general, Travelers advises law enforcement agencies and detention facility administrators to avoid blanket strip search practices.”).

<sup>191</sup> SAMUEL WALKER, POLICE ACCOUNTABILITY 93 (2001).

<sup>192</sup> Telephone Interview with Commercial Insurer E, *supra* note 101.

cast the law in a “nonlegal risk logic” that strips it of its moral valence.<sup>193</sup>

The second way insurers shape police policy is by furnishing fully-formed model policies and procedures, or detailed guidelines for their promulgation.<sup>194</sup> Again, outside consultants often do the legwork, sometimes bundling the provision of policies with training on policy content.<sup>195</sup> 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 include only “a ‘limited’ number of ‘standards’” (as opposed to “rules”) in their use-of-force policies.<sup>196</sup> And insurers encourage attention to policy choices that likely relate to liability but are typically thought to fall outside the law’s ambit, such as a psychological-testing requirement for hiring.<sup>197</sup>

Finally, some insurers fund or subsidize subscriptions to a turnkey policy-writing service from a company called Lexipol.<sup>198</sup> 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.<sup>199</sup> 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

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<sup>193</sup> Talesh, *supra* note 19, at 211; *id.* at 233 (describing “a disconnect between the moral tones in which legislators, judges, and lawyers discuss antidiscrimination law and the risk tones that insurers use that suggest that litigation is inevitable and needs to be managed (rather than a sign of morally wrongful conduct that must be eradicated)”).

<sup>194</sup> See, e.g., *Cutting Law Enforcement Training — A Costly Choice*, TRAVELERS INDEMNITY CO.: PUB. INT. (2010), [https://www.travelers.com/iwcm/Distribution/2010/11\\_November/PSS/4.html](https://www.travelers.com/iwcm/Distribution/2010/11_November/PSS/4.html) [<https://perma.cc/XQA6-U8CB>] (advertising provision of “a CD-ROM of law enforcement policies”).

<sup>195</sup> See, e.g., Telephone Interview with Consultant A, *supra* note 87; see also Telephone Interview with Commercial Insurer D, *supra* note 89 (insurer provides access to a law firm’s website that contains model policies and procedures).

<sup>196</sup> TRIDENT INS. SERVS., USE OF FORCE POLICY ELEMENTS, [https://d1hks021254gle.cloudfront.net/wp-content/uploads/sites/12/2016/12/Trident\\_LEL\\_Use\\_of\\_Force\\_Policy\\_Elements.pdf](https://d1hks021254gle.cloudfront.net/wp-content/uploads/sites/12/2016/12/Trident_LEL_Use_of_Force_Policy_Elements.pdf) [<https://perma.cc/T698-VV6T>].

<sup>197</sup> TRIDENT INS. SERVS., EMPLOYMENT HIRING PROGRAM, [https://d1hks021254gle.cloudfront.net/wp-content/uploads/sites/12/2016/12/Trident\\_Employment\\_Hiring\\_Program.pdf](https://d1hks021254gle.cloudfront.net/wp-content/uploads/sites/12/2016/12/Trident_Employment_Hiring_Program.pdf) [<https://perma.cc/PC9M-L32V>].

<sup>198</sup> Telephone Interview with Police Chief D (July 18, 2016) (describing insurer’s support for Lexipol); Telephone Interview with Risk Pool B, *supra* note 86 (pool heavily subsidizes Lexipol subscription); Telephone Interview with Risk Pool D, *supra* note 113 (pool provides subscription outright).

<sup>199</sup> *Law Enforcement: Custom Policy Content*, LEXIPOL, <http://www.lexipol.com/law-enforcement> [<https://perma.cc/UJ85-5MPS>].

events.”<sup>200</sup> Officer participation is verifiable.<sup>201</sup> I spoke with one of the founders of Lexipol, an attorney and thirty-three-year police veteran. He recalled having peddled the Lexipol concept unsuccessfully to police chiefs in the 1990s. The idea took off, he explained, only after it caught the eye of police liability insurers.<sup>202</sup>

2. *Education and Training.* — A “widely held assumption about the insurance industry” is that “insurers have expertise in acquiring and sorting sophisticated information.”<sup>203</sup> 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.<sup>204</sup> To adapt a metaphor from the work of Professors Rick Swedloff and Tom Baker, insurers are “bumblebees” in the garden of law enforcement best practices.<sup>205</sup> One police chief, for example, told me that his insurer approaches “progressive” agencies to pilot new ideas; if they work, the insurer can then tout this initial success to encourage other agencies to follow suit.<sup>206</sup> In a variation on this theme, another chief described how his agency started using telematics to monitor officers’ vehicle use; the insurer then picked up the idea and marketed it to other municipalities in the pool.<sup>207</sup>

Insurers use a multipronged attack to convey loss-prevention 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.<sup>208</sup> A recent newsletter by a major reinsurer, for example, addresses the use of excessive force.<sup>209</sup> The

<sup>200</sup> *Law Enforcement: Daily Training Bulletins*, LEXIPOL, <http://www.lexipol.com/law-enforcement> [https://perma.cc/2FAV-VM3Z].

<sup>201</sup> *Id.*; see also David Lesh, *A Blueprint for Reducing Lawsuits Against Police*, PUB. RISK, Aug. 2002, at 14, 16.

<sup>202</sup> Telephone Interview with Gordon Graham, Founder, Lexipol (Aug. 29, 2014).

<sup>203</sup> Ben-Shahar & Logue, *supra* note 13, at 210.

<sup>204</sup> See, e.g., Telephone Interview with Commercial Insurer E, *supra* note 101 (describing focus on raising municipal awareness of hot topics in policing).

<sup>205</sup> Swedloff & Baker, *supra* note 16, at 2.

<sup>206</sup> Telephone Interview with Police Chief A (Aug. 8, 2016).

<sup>207</sup> Telephone Interview with Police Chief B, *supra* note 110.

<sup>208</sup> See, e.g., *Changing Rules on Vehicular Searches*, WILLIS HRH POOLING PRAC.: RISK CONTROL BULL. (May 2009), [http://www.willis.com/Documents/Publications/Services/Pooling/Pooling\\_Bulletin\\_Law\\_Enforcement.pdf](http://www.willis.com/Documents/Publications/Services/Pooling/Pooling_Bulletin_Law_Enforcement.pdf) [https://perma.cc/9PMP-K4K6]; *Police Volunteers*, MUNICH REINSURANCE AM., INC.: FOCUS ON (May 2012), [https://www.munichre.com/site/mram-mobile/get/documents\\_E574031337/mram/assetpool.mr\\_america/PDFs/3\\_Publications/Research\\_Spotlight/focuson\\_police\\_volunteers.pdf](https://www.munichre.com/site/mram-mobile/get/documents_E574031337/mram/assetpool.mr_america/PDFs/3_Publications/Research_Spotlight/focuson_police_volunteers.pdf) [https://perma.cc/9WQG-7M44]; *The Search for the Best Strip Search Policy*, *supra* note 33; *The Use of Pepper Spray in Schools*, WILLIS POOLING PRAC.: RISK CONTROL BULL. (Feb. 2008), [http://www.willis.com/Documents/Publications/Services/Pooling/Pooling\\_Bulletin\\_Pepper\\_Spray.pdf](http://www.willis.com/Documents/Publications/Services/Pooling/Pooling_Bulletin_Pepper_Spray.pdf) [https://perma.cc/4J7R-4TUX].

<sup>209</sup> See *Police — Excessive Use of Force*, MUNICH REINSURANCE AM., INC.: FOCUS ON (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](https://www.munichre.com/site/mram-mobile/get/documents_E876514504/mram/assetpool.mr_america/PDFs/3_Publications/Research_Spotlight/FOCUS%20ON_Excess-Force.pdf) [https://perma.cc/ZRD2-SCVF].

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 deployment standards for the use of military equipment.<sup>210</sup>

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 “legal survival skills for police” or “case law boot camp.”<sup>211</sup> Insurers also facilitate access to online video lessons and other multimedia training resources delivered through news feeds or social media.<sup>212</sup> 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 the *Miranda*<sup>213</sup> rule and Fourth Amendment doctrine.<sup>214</sup>

Insurers also work with agencies to nurture in officers the skills, characteristics, and judgment necessary to do their jobs responsibly. For example, insurers encourage or require insured agencies to train

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<sup>210</sup> *Id.* There are countless other examples. To give one more, Travelers Insurance published a strip-search newsletter in 2010 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.” *The Search for the Best Strip Search Policy*, *supra* note 33.

<sup>211</sup> Telephone Interview with Risk Pool A, *supra* note 86; *see also* Telephone Interview with Consultant B, *supra* note 116 (describing having conducted, on behalf of insurers, “hands-on” training on use of force, internal affairs, discipline, transportation of prisoners, and other topics); Telephone Interview with Police Chief B, *supra* note 110 (describing the convenience of having the pool bring training to the agency); Telephone Interview with Police Chief C (July 20, 2016) (discussing driving training); Telephone Interview with Risk Pool B, *supra* note 86 (describing two classroom courses).

<sup>212</sup> *See, e.g.*, Telephone Interview with Consultant A, *supra* note 87 (online roll call training, which verifies participation); Telephone Interview with Risk Pool D, *supra* note 113 (online daily training bulletin); Telephone Interview with Risk Pool E, *supra* note 119 (online training platform provided through outside vendor); *see also* WILLIS POOLING PRAC., GETTING TO KNOW YOU (2014), [http://www.willis.com/documents/publications/services/pooling/20141212\\_Willis\\_Pooling\\_Practice\\_Getting\\_To\\_Know\\_You.pdf](http://www.willis.com/documents/publications/services/pooling/20141212_Willis_Pooling_Practice_Getting_To_Know_You.pdf) [<https://perma.cc/B4WL-RX3P>] (describing RSS feeds with video and audio clips); *Law Enforcement Training Videos*, IND. MUN. INS. PROGRAM, [http://www.indianamip.com/law\\_enforcement.html](http://www.indianamip.com/law_enforcement.html) [<https://perma.cc/AGA4-GT5D>] (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: Myths and Truths”).

<sup>213</sup> *Miranda v. Arizona*, 384 U.S. 436 (1972).

<sup>214</sup> *See* Telephone Interview with Risk Pool A, *supra* note 86.

(and retrain) 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.<sup>215</sup> They also furnish grants to fund the agencies’ own loss-prevention training initiatives.<sup>216</sup> Some of the training insurers provide, again, addresses topics generally seen to fall outside law’s purview but that nonetheless may be causally related to socially undesirable behavior. For example, experts mentioned training officers in reading body language or reducing implicit racial bias.<sup>217</sup> Handling stress on the job is another topic that came up.<sup>218</sup> Officers who deal with stress poorly may be more likely to lose control and engage in misconduct.<sup>219</sup>

One noteworthy training technology is the virtual-reality simulator, designed to develop good judgment and self-control in high-risk situations involving a vehicle pursuit or the use of force.<sup>220</sup> Most of the experts I asked regard these simulators as valuable training tools.<sup>221</sup> Early empirical research backs up this impression, at least as for the use of force.<sup>222</sup> As one expert explained, unlawful police shootings

<sup>215</sup> AWC RISK MGMT. SERV. AGENCY, MEMBER STANDARDS (2013) (on file with the Harvard Law School Library) (requiring agencies to retrain officers every three years in enumerated topics and to have each officer undergo certified Taser training before Taser use); *Cutting Law Enforcement Training — A Costly Choice*, *supra* note 194 (encouraging agencies not to cut training programs when budgets are tight).

<sup>216</sup> Telephone Interview with Risk Pool C, *supra* note 109; Telephone Interview with Risk Pool E, *supra* note 119; *see also* Telephone Interview with Police Chief B, *supra* note 110.

<sup>217</sup> Telephone Interview with Risk Pool A, *supra* note 86; Telephone Interview with Risk Pool C, *supra* note 109.

<sup>218</sup> *See* Telephone Interview with Risk Pool C, *supra* note 109.

<sup>219</sup> *See, e.g.*, DANIEL CRUSE & JESSE RUBIN, DETERMINANTS OF POLICE BEHAVIOR 5 (1973) (“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 10–11 (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 269, 269–72 (2005) (summarizing studies finding that chronic work stress causes burnout, which is positively and significantly related to the use of force).

<sup>220</sup> *See, e.g.*, *Law Enforcement Simulator Systems*, DORON PRECISION SYSTEMS, INC., <http://www.doronprecision.com/police-law-enforcement-driving-simulation-training-systems-driver-simulators.html> [<https://perma.cc/HNH8-GQ44>]; *Law Enforcement Training Solutions*, MEGGITT TRAINING SYSTEMS, <http://meggittrainingsystems.com/Law-Enforcement> [<https://perma.cc/N6W7-5MSN>]; MILO RANGE, <http://www.milorange.com> [<https://perma.cc/ZU36-7BW5>]; *Police Simulators*, FAAC INC., <http://www.faac.com/policesimulators.htm> [<https://perma.cc/754V-QDJX>]; VIRTRA, <http://www.virtra.com> [<https://perma.cc/N4JY-7AHD>]; *About Us*, *supra* note 147.

<sup>221</sup> *E.g.*, Telephone Interview with Commercial Insurer E, *supra* note 101; Telephone Interview with Consultant A, *supra* note 87 (agreeing, though cautioning that simulators can teach harmful lessons if not operated correctly).

<sup>222</sup> *See* CRAIG BENNELL & NATALIE J. JONES, THE EFFECTIVENESS OF USE OF FORCE SIMULATION TRAINING 6 (2005), <http://www.publicsafety.gc.ca/lbrr/archives/cnmcs-plcng/cnooooo32136920-eng.pdf> [<https://perma.cc/72AY-UXPW>]; *see also* Jennifer Armstrong et al., *Monitoring the Impact of Scenario-Based Use-of-Force Simulations on Police Heart Rate:*



stem from poor judgment, not poor marksmanship.<sup>223</sup> Traditional training methods like shooting practice at a firearms range can develop the latter skill but, unlike simulators, not the former. Yet simulators are expensive, too much for many municipalities to afford.<sup>224</sup> Leveraging economies of scale, insurers facilitate access to simulator training by purchasing the machines or covering or subsidizing their use.<sup>225</sup>

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 officers.”<sup>226</sup> “This uncertainty in legal authority,” the argument goes, “results in a lack of institutional guidance and leaves police officers to exercise their own discretion.”<sup>227</sup> While I accept 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.<sup>228</sup> Insurers urge agencies to incorporate into their poli-

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*Evaluating the Royal Canadian Mounted Police Skills Refresher Program*, W. CRIMINOLOGY REV., Apr. 2014, at 51, 57; Evelyn-Rose Saus et al., *The Effect of Brief Situational Awareness Training in a Police Shooting Simulator: An Experimental Study*, 18 MIL. PSYCHOL. S3, S15–S18 (2006).

<sup>223</sup> See Telephone Interview with Gordon Graham, *supra* note 202.

<sup>224</sup> 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.rstar.com/article/20120822/NEWS/308229922> [<https://perma.cc/2RD8-FNCB>] (\$50,000); Holli Deal Saxon & Jim Healy, *Simulator Gives Statesboro Police Realistic Training*, STATESBORO HERALD, Nov. 5, 2015, at 1 (\$78,000); 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> [<https://perma.cc/U6B9-H65T>] (\$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/virta> [<https://perma.cc/36DM-U5ZP>] (\$300,000).

<sup>225</sup> See Telephone Interview with Commercial Insurer E, *supra* note 101 (noting that some pools own simulators); Telephone Interview with Consultant A, *supra* note 87 (same); Telephone Interview with Risk Pool B, *supra* note 86 (noting that the pool sends officers to use driving simulator in state capital and reimburses fees for training on use-of-force simulator); Telephone Interview with Risk Pool C, *supra* note 109 (noting plans to purchase driving simulator); Telephone Interview with Risk Pool E, *supra* note 119 (noting reimbursement of fees for use of driving simulators owned by state agency); *Loss Control*, ALA. MUN. INS. CORP., <http://www.amicentral.org/loss-control> [<https://perma.cc/Y7C5-U9KT>] (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).

<sup>226</sup> Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 446 (2012); see also Rachel A. Harmon, *When Is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1127, 1143 (2008).

<sup>227</sup> Leong, *supra* note 226, at 447.

<sup>228</sup> The classic citation is H. LAURENCE ROSS, *SETTLED OUT OF COURT* (1970), which describes how auto insurers translate the “very complex and perplexing” formal model of driving negligence, *id.* at 98, into straightforward and mechanical rules of thumb. *Id.* at 98–101.

cies a “use-of-force continuum” that (much more concretely) specifies what degree of force is appropriate in different scenarios.<sup>229</sup> 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.<sup>230</sup>

A major reinsurer’s newsletter on strip searches nicely illustrates the point. The column was penned in the wake of *Florence v. Board of Chosen Freeholders*,<sup>231</sup> in which the U.S. Supreme Court rejected a Fourth Amendment challenge to a jail policy of strip searching all detainees admitted to the jail’s general population, including those arrested on minor offenses.<sup>232</sup> Again, the insurer pins its advice to the Fourth Amendment. “In the situation where a strip search is justified,” the newsletter 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.”<sup>233</sup> The standards proposed seem basically laudable — 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.

To give one additional 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.”<sup>234</sup> 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.<sup>235</sup>

The point of these examples is not to dispute the fidelity or utility of the materials, but merely to point out that the insurer’s analysis is doing meaningful interpretive work — it does not merely recite lan-

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<sup>229</sup> See, e.g., *Police — Excessive Use of Force*, *supra* note 209; TRIDENT INS. SERVS., *supra* note 196.

<sup>230</sup> *Police — Excessive Use of Force*, *supra* note 209 (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)).

<sup>231</sup> 132 S. Ct. 1510 (2012).

<sup>232</sup> See *id.* at 1518.

<sup>233</sup> *Strip Searches in Jails*, MUNICH REINSURANCE AM., INC.: FOCUS ON (May 2012) (emphasis added), [http://www.munichre.com/site/mram-mobile/get/documents\\_E2059710005/mram/assetpool\\_mr\\_america/PDFs/3\\_Publications/Research\\_Spotlight/focuson\\_ss\\_jails.pdf](http://www.munichre.com/site/mram-mobile/get/documents_E2059710005/mram/assetpool_mr_america/PDFs/3_Publications/Research_Spotlight/focuson_ss_jails.pdf) [https://perma.cc/5CA6-44NM].

<sup>234</sup> TRIDENT INS. SERVS., LAW ENFORCEMENT CONTROLS FOR THE NEXT DECADE (on file with the Harvard Law School Library).

<sup>235</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218, 220–22, 248–49 (1973).

guage from court opinions. 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. Forgoing 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.<sup>236</sup>

My research did not examine *how* insurers interpret the Constitution, in a methodological sense. (It is a little hard to picture insurers poring through the *Federalist Papers* and ratification debates.) But analogous work from the employment context suggests one plausible possibility. Even though “workplace bullying” is currently not illegal in the general case, Professor Shauhin Talesh explains, insurers that write employment practices liability coverage spend “considerable time” discussing the issue.<sup>237</sup> Partly this is to stay ahead of the law, as states consider workplace-bullying bans. But it's also because “alleged victims of bullying” presently “use a variety of existing legal causes of action to pursue these claims, including defamation, intentional infliction of emotional distress, negligent hiring and supervision, and assault and battery.”<sup>238</sup>

In the law enforcement context, too, insurers have liability concerns that are formally unrelated to constitutional law, but that relate to subjects that constitutional law also touches. And when insurers construe constitutional decisions, they suffuse them with these non-constitutional, risk-based concerns. To return to the strip-search example, the Supreme Court's constitutional ruling doesn't speak to the

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<sup>236</sup> 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, 657 (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 law 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 IOWA L. REV. 261, 314 (1995) (“In constitutional tort cases, the intersection of qualified immunity and many other types of constitutional standards . . . affords a degree of double-counting to the government . . .”).

<sup>237</sup> Talesh, *supra* note 19, at 227–28.

<sup>238</sup> *Id.* at 228.

sex of the searcher or the conditions of the search environment. But insurers may know from experience that opposite-sex searchers invite lawsuits based on sexual misconduct or negligent training or supervision. And forcing detainees to strip in squalid conditions may sound in reckless endangerment. So insurers — “us[ing] a risk-based logic and institutionaliz[ing] a way of thinking anchored toward risk management and reduction”<sup>239</sup> — make recommendations on those points, and end up baking them into constitutional law itself.

In addition to interpreting constitutional rights, insurers also set their rank order, 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.<sup>240</sup> Agency policies regarding these tasks, the consultant told me, are “need to know”; policies regarding all other tasks — including some that seem normatively significant, such as interrogation — are “need to consult.”<sup>241</sup> As I explain in more detail in other work, insurers invest relatively little effort in preventing this latter sort of constitutional harm because little money is on the line.<sup>242</sup> Jurists, in contrast, have largely resisted such crass ranking of constitutional entitlements.<sup>243</sup>

3. *Audits.* — Good policies are a good start, but ensuring continued compliance with agency policy over time has challenged police reformers. Most insurers I spoke to conduct audits to see how well the agencies they insure are implementing policies and procedures and attending to loss prevention generally.<sup>244</sup> Audits take place on both a

<sup>239</sup> *Id.* at 211.

<sup>240</sup> See GALLAGHER, *supra* note 126, at 52–63.

<sup>241</sup> Telephone Interview with G. Patrick Gallagher, *supra* note 133. Travelers Insurance also encourages focus on the “highest risk exposures,” including “Use of Force” and “Search and Seizure.” *Cutting Law Enforcement Training — A Costly Choice*, *supra* note 194.

<sup>242</sup> See John Rappaport, *An Insurance-Based Typology of Police Misconduct*, 2016 U. CHI. LEGAL F. 369.

<sup>243</sup> See, e.g., Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 628 (1989) (“[T]here is no such distinction between, or hierarchy among, constitutional rights.”); *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 561 (1976) (“The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other.”); *Silveira v. Lockyer*, 328 F.3d 567, 568–69 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc) (“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.” *Id.* at 569). *But cf.* *Lakeside v. Oregon*, 435 U.S. 333, 341 (1978) (“In an adversary system of criminal justice, there is no right more essential than the right to the assistance of counsel.”).

<sup>244</sup> *Cf.* BARDACH & KAGAN, *supra* note 13, 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 13, at 236–37 (“Monitoring is often done more effectively by insurers that develop regulatory practices and technologies that the government lacks.” *Id.* at 236.). In at least one state, the pool does not audit its member agencies

regular and as-needed basis. The experts I interviewed reported conducting regular audits ranging from semiannually to once every three years.<sup>245</sup> Some insurers use online updates between audits or encourage self-audits in addition.<sup>246</sup>

Insurers send auditors or consultants to visit insured agencies, sometimes for two to three days at a time.<sup>247</sup> Auditors typically tour the facilities and meet with the chief, sheriff, or other important agency executives, and sometimes with the city manager as well.<sup>248</sup> Auditors might also review police reports, internal affairs files, and other liability-related documentation.<sup>249</sup> They may go out in the field with the chief<sup>250</sup> or other officers.<sup>251</sup> One pool even sends personnel to patronize “cop bars,” listen, and observe, being careful to dispatch new faces each time to maintain cover.<sup>252</sup> Auditors evaluate and in some cases score the audited agencies and discuss with agency leadership how the agency can better manage risk.<sup>253</sup>

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.<sup>254</sup> 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

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because the State Board of Peace Officer Standards and Training does. *See* Telephone Interview with Risk Pool A, *supra* note 86.

<sup>245</sup> *See* Telephone Interview with Commercial Insurer A, *supra* note 62 (every three years); Telephone Interview with Risk Pool D, *supra* note 113 (annually); Telephone Interview with Risk Pool E, *supra* note 119 (semiannually).

<sup>246</sup> *See, e.g.*, Telephone Interview with Risk Pool E, *supra* note 119 (employing periodic online updates); TRIDENT INS. SERVS., LAW ENFORCEMENT MANUAL COMPLIANCE (2016), [https://d1rhkso21254gle.cloudfront.net/wp-content/uploads/sites/12/2016/12/Trident\\_LEL\\_Compliance\\_with\\_Manual.pdf](https://d1rhkso21254gle.cloudfront.net/wp-content/uploads/sites/12/2016/12/Trident_LEL_Compliance_with_Manual.pdf) [<https://perma.cc/95EE-ER6P>] (providing guidelines for self-audits).

<sup>247</sup> *See, e.g.*, Telephone Interview with Risk Pool D, *supra* note 113; *see also* GALLAGHER-WESTFALL GRP., POLICE AUDIT AND RISK ASSESSMENT (PARA) QUESTIONNAIRE (2013) (on file with the Harvard Law School Library) (providing a twenty-seven-page questionnaire to collect information from an agency being audited).

<sup>248</sup> Telephone Interview with Commercial Insurer A, *supra* note 62; Telephone Interview with Risk Pool B, *supra* note 86; Telephone Interview with Risk Pool C, *supra* note 109.

<sup>249</sup> Telephone Interview with Consultant A, *supra* note 87; Telephone Interview with Risk Pool D, *supra* note 113.

<sup>250</sup> Telephone Interview with Risk Pool B, *supra* note 86.

<sup>251</sup> *Id.* (noting that auditors may accompany officers on ride-alongs).

<sup>252</sup> Telephone Interview with Risk Pool D, *supra* note 113.

<sup>253</sup> *See* Telephone Interview with Commercial Insurer A, *supra* note 62; Telephone Interview with Consultant A, *supra* note 87; Telephone Interview with Police Chief C, *supra* note 211 (describing helpful biannual “best practices” review).

<sup>254</sup> *See* Telephone Interview with Risk Pool C, *supra* note 109; *cf.* Telephone Interview with Commercial Insurer A, *supra* note 62.

four people.<sup>255</sup> Continued coverage might then be predicated on cooperation with insurer-recommended initiatives or the guidance of chosen consultants.<sup>256</sup>

4. *Accreditation.* — Many insurers encourage police agencies to obtain accreditation from a recognized accreditor like CALEA. Premium discounts for accreditation can run in the ballpark of 20% to 25%.<sup>257</sup> To gain CALEA accreditation, a police department must adopt and demonstrate compliance with an extensive set of standards that is supposed to reflect industry best practices. It must also pass an on-site review by a team of CALEA-trained assessors. Reaccreditation occurs every three years.<sup>258</sup> Insurer support for accreditation is naturally understood as a way of outsourcing policy review and auditing functions to the accreditation agencies.<sup>259</sup>

There is some evidence suggesting that CALEA-accredited agencies are less risky,<sup>260</sup> but there is also evidence going the other way.<sup>261</sup>

<sup>255</sup> Telephone Interview with Consultant B, *supra* note 116.

<sup>256</sup> See Telephone Interview with Commercial Insurer D, *supra* note 89.

<sup>257</sup> See McCoy, *supra* note 9, at 145 (quoting police executive who reported 16.7% discount for accreditation); Telephone Interview with Commercial Insurer G, *supra* note 109 (mentioning discount of 20–25%); 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> [<https://perma.cc/T9T4-QZQH>] (reporting 33% discount); see also Telephone Interview with Commercial Insurer A, *supra* note 62 (noting that rates may vary depending on accreditation); *Risk Management, Liability Insurance, and CALEA Accreditation*, CALEA [hereinafter CALEA, *Risk Management*], <http://www.calea.org/content/risk-management-liability-insurance-and-calea-accreditation> [<https://perma.cc/887Y-X26V>] (maintaining “list of liability insurance providers known to CALEA to offer some type of financial incentive to CALEA accredited agencies”). Some insurers also reimburse their insureds for the fees associated with obtaining accreditation. Telephone Interview with Risk Pool C, *supra* note 109. Accreditation can increase the odds that an insurer will offer coverage. See Telephone Interview with Commercial Insurer G, *supra* note 109. Some states have state-level accreditation as well. See, e.g., Telephone Interview with Police Chief D, *supra* note 198 (explaining that risk pool helped develop a state-level accreditation system more affordable than CALEA).

<sup>258</sup> See Garcia, *supra* note 257 (discussing accreditation process and upkeep); see also *Law Enforcement Program: Process*, CALEA, <http://www.calea.org/content/law-enforcement-program-process> [<https://perma.cc/6VN2-PBJW>] (describing on-site assessment and reaccreditation process); *Law Enforcement Program: The Standards*, CALEA, <http://www.calea.org/content/law-enforcement-program-standards> [<https://perma.cc/CW2U-NYU4>] (stating requirement of compliance with standards); *Standards Titles*, CALEA, <http://www.calea.org/content/standards-titles> [<https://perma.cc/AG7G-95YV>] (listing standards).

<sup>259</sup> On the potential advantages of outsourcing arrangements, see HEIMER, *supra* note 119, at 206–09.

<sup>260</sup> CALEA, *Risk Management*, *supra* note 257 (linking to studies by pools finding “positive correlation between accreditation and loss reduction”).

<sup>261</sup> See David Packman, *Can Accreditation Affect Police Misconduct Rates?*, CATO INST. (Nov. 29, 2009, 3:45 AM), <http://www.policemisconduct.net/can-accreditation-affect-police-misconduct-rates> [<https://perma.cc/9ZR3-55HD>] (finding that the average CALEA-accredited agency reports *more* misconduct than does the average similarly sized agency); see also ROBERT J. GIROD, *POLICE LIABILITY AND RISK MANAGEMENT* 8 (2014) (reporting tensions in the evidence regard-

None of the studies in either direction is rigorous or peer reviewed. And even if a negative 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.<sup>262</sup> Another cautioned that, for too many departments, “accreditation is a project[,] not a process,” which “does not lead to continuous improvement.”<sup>263</sup>

5. *Personnel.* — It is now conventional wisdom that a few “bad apple” police officers commit a disproportionate amount of misconduct and likewise receive a disproportionate number of citizen complaints.<sup>264</sup> Based on this finding, police scholars have touted the out-sized benefits of “early warning systems” designed to pick out these bad apples before they rot.<sup>265</sup> Without necessarily employing the same terminology, insurers, too, analyze agency data to determine whether certain officers are contributing excessively to the agency’s aggregate risk. Some insurers pressure agencies to “correct,” or even terminate, these problem officers.<sup>266</sup> We know that the insurers succeed at least some of the time.<sup>267</sup> Even police chiefs can be vulnerable when insurers pressure municipal leadership to make a change.<sup>268</sup> One consultant

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ing the effects of accreditation); William G. Doerner & William M. Doerner, *Police Accreditation and Clearance Rates*, 35 POLICING 6 (2012) (finding no effect of accreditation on clearance rates); William G. Doerner & William M. Doerner, *The Diffusion of Accreditation Among Florida Police Agencies*, 32 POLICING 781 (2009) (doubting that Florida accreditation nurtures organizational change). 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 113.

<sup>262</sup> Telephone Interview with Consultant A, *supra* note 87.

<sup>263</sup> Email from G. Patrick Gallagher, President, The Gallagher-Westfall Grp., to author (Aug. 15, 2016, 7:23 PM) (on file with the Harvard Law School Library).

<sup>264</sup> See, e.g., HERMAN GOLDSTEIN, POLICING A FREE SOCIETY 171 (1977); SAMUEL WALKER ET AL., RESPONDING TO THE PROBLEM POLICE OFFICER: A NATIONAL STUDY OF EARLY WARNING SYSTEMS 2.4–2.6 (2000), <https://www.ncjrs.gov/pdffiles1/nij/grants/184510.pdf> [<https://perma.cc/6TCT-EL5Z>]; 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: OVERVIEW OF NATIONAL AND LOCAL DATA 1, 8–9 (1999); Barbara E. 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).

<sup>265</sup> See, e.g., WALKER & ARCHBOLD, *supra* note 7, at 137–77; WALKER ET AL., *supra* note 264; Armacost, *supra* note 264, at 527.

<sup>266</sup> See Telephone Interview with Risk Pool D, *supra* note 113. 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 109.

<sup>267</sup> 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), <http://www.timesfreepress.com/news/local/story/2013/aug/24/officers-tied-to-beating-fired/116923> [<https://perma.cc/Z4UR-63E8>] (reporting that mayor said city’s coverage would have been dropped if two officers involved in misconduct had been allowed back on duty).

<sup>268</sup> Rob Karwath, *Calumet City Will Lose Police Liability Insurance*, CHI. TRIB., Mar. 29, 1988, at 4 (reporting council member’s comment that city’s insurance cancellation was “a final

I interviewed was unabashed about his power to effect changes at the top, recalling more than one occasion on which a police chief had been dismissed after the city manager had retained him for a management study.<sup>269</sup> Reading between the lines a bit, I inferred that he brandishes this track record to secure cooperation from chiefs who initially resist implementing his loss-prevention advice.

6. *Omnibus and Structural Reforms.* — In extreme cases, often as a last resort before terminating coverage, some insurers demand major reforms that cut across or transcend the categories just described. California risk pools, for example, have placed a number of cities on “performance-improvement plans” (PIPs) that require departmental policy revision, intensified auditing, and personnel changes.<sup>270</sup> And a Wisconsin pool pressured a disorganized, multijurisdictional task force to consolidate supervision and oversight at the state level after several botched raids.<sup>271</sup> Theoretically, there is no limit to the forms and combinations of loss-prevention initiatives insurers might develop.

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argument for the mayor to pick a new police chief from outside the department” when the interim chief retired); *Tennessee Mayor: Had to Fire Police Chief to Keep Insurance*, INS. J. (Mar. 25, 2010), <http://www.insurancejournal.com/news/southeast/2010/03/25/108458.htm> [https://perma.cc/QCS7-EGEN] (reporting mayor’s assertion that “he had no choice” but to fire police chief accused of misconduct because the city “could lose its liability insurance coverage” if the chief remained).

<sup>269</sup> Telephone Interview with G. Patrick Gallagher, *supra* note 133.

<sup>270</sup> See, e.g., Sarah Favot, *Irwindale at Risk of Losing Insurance Due to Allegations of Corruption*, PASADENA STAR-NEWS (Sept. 8, 2013, 7:49 PM), <http://www.pasadenastarnews.com/government-and-politics/20130908/irwindale-at-risk-of-losing-insurance-due-to-allegations-of-corruption> [http://perma.cc/3VTR-UNY7] (describing PIP requiring city to hire a “full-time human resources manager” and notify insurer of various events); Juliette Funes, *After Troubled History, La Puente Works on Completing 7-Point Improvement Plan to Keep Insurance*, PASADENA STAR-NEWS (Mar. 3, 2012, 12:01 AM), <http://www.pasadenastarnews.com/article/ZZ/20120303/NEWS/120308387> [https://perma.cc/WG76-F4WF]; Allison Gatlin, *Police Department Rebuild Costs King City Its Insurance*, CALIFORNIAN (Salinas) (Apr. 21, 2015, 10:21 PM), <http://www.thecalifornian.com/story/news/crime/2015/04/21/police-department-rebuild-costs-king-city-insurance/26149339> [https://perma.cc/7LDZ-E3U9] (describing PIP “targeting perceived gaps in Police Department policies and procedures”); Jeff Gottlieb & Ruben Vives, *Maywood Didn’t Meet Insurer’s Conditions*, L.A. TIMES (June 25, 2010), <http://articles.latimes.com/2010/jun/25/local/la-me-maywood-20100625> [https://perma.cc/KS2T-QXUW]; Memorandum from Jonathan Shull, Exec. Dir., Cal. Joint Powers Ins. Auth., to Exec. Comm., Cal. Joint Powers Ins. Auth. 2 (May 11, 2015), [http://cjpia.org/docs/default-source/agendas-and-minutes/ec\\_agenda\\_special\\_5-11-2015.pdf](http://cjpia.org/docs/default-source/agendas-and-minutes/ec_agenda_special_5-11-2015.pdf) [https://perma.cc/TME7-6GFA] (describing Calexico PIP calling for insurer oversight of employee discipline and “internal review of Police Department policies and procedures”).

<sup>271</sup> See Jim Collar, *MEG Changes Reach Critical Stage*, NORTHWESTERN (Oshkosh), June 23, 2002, at C1; Ed Lowe, *Insurer Targets MEG Changes*, POST-CRESCENT (Appleton), Jan. 6, 2002, at C1; see also *Who We Are and What We Do*, LAKE WINNEBAGO AREA METROPOLITAN ENFORCEMENT GROUP, <https://www.co.winnebago.wi.us/meg-unit> [https://perma.cc/BTU7-QDDB].



### B. Underwriting and Rating

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, to which I have alluded already, is underwriting and rating — the processes 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 and rating 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 applications reveal the sorts of information insurers find relevant to their underwriting decisions.<sup>272</sup> Unsurprisingly, it largely overlaps with the information insurers impart to their insureds through loss-prevention programs. That is, the more a municipality is attending 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 and rating.

Specifically, insurers gather data in eight categories<sup>273</sup>: (1) general information, such as the municipality's population and any significant operations, like a college or amusement park;<sup>274</sup> (2) policies and procedures on high-risk issues like the use of force, copies of which municipalities must attach;<sup>275</sup> (3) education and training requirements, as well

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<sup>272</sup> See, e.g., Telephone Interview with Commercial Insurer A, *supra* note 62 (describing application and renewal process and explaining that application questions drive underwriting and rating).

<sup>273</sup> See, e.g., ONI RISK PARTNERS, LAW ENFORCEMENT LIABILITY APPLICATION, <http://www.onirisk.com/pdfs/Insurance/JWF-Applications/Law-Enforcement-Liability-Application.pdf> [<https://perma.cc/9GKM-LZFA>]; PROF'L GOVERNMENTAL UNDERWRITERS, INC., POLICE PROFESSIONAL LIABILITY INSURANCE APPLICATION (2014), [https://pgui.com/wp-content/uploads/2016/01/PO-DRWN-PPL-1010-06\\_14-PGU-Police-New-Bus-Application.pdf](https://pgui.com/wp-content/uploads/2016/01/PO-DRWN-PPL-1010-06_14-PGU-Police-New-Bus-Application.pdf) [<https://perma.cc/W9VJ-Bk9Q>].

<sup>274</sup> Other general information includes moonlighting policies and contractual arrangements with other entities for policing services. See PROF'L GOVERNMENTAL UNDERWRITERS, INC., *supra* note 273.

<sup>275</sup> See Harry F. Brooks, *Public Entity Risk Management — Part II*, AM. AGENT & BROKER, Oct. 1993, at 12, 14; Child, *supra* note 172, 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. See PROF'L GOVERNMENTAL UNDERWRITERS, INC., *supra* note 273.

as accreditation;<sup>276</sup> (4) 911 dispatching protocols; (5) jail operations, where applicable;<sup>277</sup> (6) personnel, including whether the department employs part-time auxiliary officers or police dogs;<sup>278</sup> (7) 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 municipalities the factors that will likely affect the insurers' underwriting and rating decisions. This creates an incentive for municipalities to ensure that they are able, insofar as practicable, to provide answers that will result in favorable 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.<sup>279</sup> Withholding coverage embarrasses the municipality and puts it in a tough position, often forcing a choice between self-insurance and commercial coverage from the pricey "surplus market."<sup>280</sup> Self-insurance exposes the municipality to the risk of disruptive tax fluctuation; the self-insured City of Inkster, Michigan, to give one example, was forced to raise property taxes by about \$179 per household to cover a \$1.4 million settlement.<sup>281</sup> And in the extreme, as I mentioned earlier, coverage denial can even lead a municipality to shutter its police force and contract for policing services from the surrounding county or a neighboring jurisdiction.<sup>282</sup>

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<sup>276</sup> See Brooks, *supra* note 275, at 14; Harry F. Brooks, *Loss-Control Techniques for Public Entities*, AM. AGENT & BROKER, Apr. 1997, at 15, 16 ("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 applicants; training on the use of batons, mace, control holds, stun guns, and canines; and in-service training updates. See, e.g., sources cited *supra* note 273.

<sup>277</sup> Typical questions ask about jail operations manuals, capacity constraints, inspections, and audio and video recordings. See, e.g., ONI RISK PARTNERS, *supra* note 273.

<sup>278</sup> "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*, TRENDING "@ IRONSHORE" (Oct. 1, 2015), <http://www.ironshore.com/blog/police-excessive-force-raises-liability-risk-scrutiny> [<https://perma.cc/7Z9W-Q4N8>].

<sup>279</sup> See, e.g., Telephone Interview with Commercial Insurer F, *supra* note 37; Telephone Interview with Commercial Insurer G, *supra* note 109; Telephone Interview with Risk Pool B, *supra* note 86.

<sup>280</sup> See, e.g., Telephone Interview with Commercial Insurer G, *supra* note 109.

<sup>281</sup> Abby Phillip, *Why the Poor Often Pay for Police Misconduct with Their Pocketbooks*, WASH. POST (June 3, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/06/03/why-the-poor-and-disadvantaged-often-pay-for-police-misconduct-with-their-pocketbooks> [<http://perma.cc/D7DF-8WSR>]. Inkster has about 25,000 residents and a median income of \$26,500. *Id.*

<sup>282</sup> See, e.g., Schwartz, *How Governments Pay*, *supra* note 9, at 1190-92 & nn.165-75 (collecting four examples of police departments that closed due to premium increases or termination of cov-

An insurer, for example, might review a municipality's police policies and procedures and refuse to write if they are inconsistent with industry best practices.<sup>283</sup> 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.<sup>284</sup> And a municipality with a significant history of police abuse claims, one broker explained, would have considerable trouble getting coverage at all.<sup>285</sup> 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.<sup>286</sup> This might include, for instance, a promise to fire a particular officer.<sup>287</sup>

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.<sup>288</sup> My interviews generally confirmed this to be the case,<sup>289</sup> 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.<sup>290</sup> Insurers that do use feature rating talked about adjusting premiums based on the existence and quality of agency policies and compliance with training

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erage and procured policing services from another jurisdiction); Church, *supra* note 72, at 17–18 (reporting that police patrols were suspended in two towns and that 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), <http://www.timesfreepress.com/news/local/story/2013/jun/19/chattanooga-niota-shutting-down/111182> [<http://perma.cc/M64F-SR49>] (reporting that city's “police department is closed” after pool pulled coverage); Opinion, *Liability Insurance in Crisis*, N.Y. TIMES (Mar. 4, 1986), <http://www.nytimes.com/1986/03/04/opinion/liability-insurance-in-crisis.html> [<https://perma.cc/9B2R-UMXQ>] (reporting that “police in West Orange, N.J., had to stop patrolling in cars they could no longer insure”).

<sup>283</sup> Telephone Interview with Commercial Insurer G, *supra* note 109.

<sup>284</sup> Telephone Interview with Commercial Insurer E, *supra* note 101.

<sup>285</sup> See Telephone Interview with Commercial Broker B, *supra* note 39.

<sup>286</sup> Telephone Interview with Risk Pool B, *supra* note 86 (kicked out a member, which was later readmitted); Telephone Interview with Risk Pool D, *supra* note 113 (expelled two members that were not cooperating with loss control); see also Telephone Interview with G. Patrick Gallagher, *supra* note 133 (retained by pools to conduct risk assessments of troubled municipalities, with negative findings resulting in expulsion from the pool).

<sup>287</sup> Telephone Interview with Commercial Insurer G, *supra* note 109. Of course, if the officer gains employment with another law enforcement agency, the insurer has not reduced aggregate social loss — it has merely displaced some expected harm.

<sup>288</sup> See sources cited *supra* note 273–78 and accompanying text.

<sup>289</sup> See, e.g., Telephone Interview with Commercial Broker B, *supra* note 39; Telephone Interview with Risk Pool A, *supra* note 86; see also ICMA REPORT, *supra* note 84, 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”).

<sup>290</sup> See Telephone Interview with Commercial Insurer F, *supra* note 37; Telephone Interview with Risk Pool D, *supra* note 113; Telephone Interview with Risk Pool E, *supra* note 119.

and other loss-prevention initiatives.<sup>291</sup> One insurer, for example, raises premiums by 20% for failure to comply with recommended best practices.<sup>292</sup> With similar effect, some insurers give discounts — again around 20 or 25%, as mentioned above — to agencies accredited by CALEA or a similar body.<sup>293</sup> 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.<sup>294</sup> 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.”<sup>295</sup>

3. *Deductibles and Self-Insured Retentions.* — Many experts I interviewed stressed the importance of deductibles and self-insured retentions in managing moral hazard. They require all municipalities to retain some risk through one of these mechanisms.<sup>296</sup> 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.<sup>297</sup> Municipalities need to have “skin in the game,” one expert advised;<sup>298</sup> the more risk they retain, said another, “the more religion they get.”<sup>299</sup> Conversely, one police chief told me that his agency's pool sometimes waives the deductible if the agency has consistently followed the pool's advice.<sup>300</sup>

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.<sup>301</sup> The loss-

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<sup>291</sup> Telephone Interview with Commercial Insurer E, *supra* note 101 (attesting to making inquiries about how policies are promulgated and reviewed and how training works); Telephone Interview with Commercial Insurer G, *supra* note 109 (attesting to considerations of the existence and quality of policies); Telephone Interview with Consultant A, *supra* note 87 (attesting to adjusting premiums based on adherence to policy and training); Telephone Interview with Consultant B, *supra* note 116 (stating that some insurers give discounts to agencies that adopt insurer-approved model policies); Telephone Interview with Risk Pool C, *supra* note 109 (attesting to notifying underwriters about obstinate agencies, which are warned of a possible contribution increase).

<sup>292</sup> Telephone Interview with Risk Pool B, *supra* note 86.

<sup>293</sup> See sources cited *supra* note 257.

<sup>294</sup> Telephone Interview with Risk Pool B, *supra* note 86.

<sup>295</sup> Telephone Interview with Commercial Insurer F, *supra* note 37.

<sup>296</sup> See, e.g., Telephone Interview with Commercial Insurer A, *supra* note 62; Telephone Interview with Commercial Insurer D, *supra* note 89.

<sup>297</sup> Telephone Interview with Commercial Insurer D, *supra* note 89; Telephone Interview with Risk Pool B, *supra* note 86.

<sup>298</sup> Telephone Interview with Commercial Insurer F, *supra* note 37.

<sup>299</sup> Telephone Interview with Commercial Insurer G, *supra* note 109.

<sup>300</sup> Telephone Interview with Police Chief C, *supra* note 211.

<sup>301</sup> Telephone Interview with Commercial Insurer A, *supra* note 62.

prevention coordinator for a pool of small and midsized cities, however, told me that his pool does write first-dollar policies and that occurrences among his members are fairly rare.<sup>302</sup> And of course, if the deductible is too *large*, then the *insurer* may have little skin in the game.

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 their standard policy forms. In addition, insurers can use *line limits* to encourage improvements in specific areas. For example, if a department has an inadequate policy governing high-speed car chases, its insurer might impose a sublimit on claims stemming from such pursuits.<sup>303</sup>

### C. *The Regulatory Role of Reinsurers*

Reinsurers, though one step removed from the police agencies themselves, are also active regulators. Just like primary insurers, 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 the more assertively the reinsurer will pursue loss prevention.<sup>304</sup> 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.

Many of the loss-prevention measures taken by reinsurers 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 incentives.<sup>305</sup> Where primary insurers encourage agencies to seek accreditation from CALEA, reinsurers encourage pools to seek “recognition” from the Association of Governmental Risk Pools.<sup>306</sup> And

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<sup>302</sup> Telephone Interview with Risk Pool E, *supra* note 119 (attesting to offering a deductible option that few cities select); see also BRECKENRIDGE INS. GRP., *supra* note 8 (advertising “first dollar or SIR on all lines or risks”); *Mississippi Municipal Liability Plan*, MISS. MUN. SERV. CO., <http://msmsc.com/about/liability-plan> [<https://perma.cc/H37E-W7VR>] (“[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 84, at 19 (reporting deductibles on municipal police liability policies in 1991).

<sup>303</sup> Telephone Interview with Commercial Insurer D, *supra* note 89.

<sup>304</sup> Mendoza, *supra* note 78, at 76; see Telephone Interview with Commercial Insurer D, *supra* note 89.

<sup>305</sup> See Mendoza, *supra* note 78, at 83–84.

<sup>306</sup> See *id.* at 85–86 (quoting emails from reinsurance underwriter).

where primary insurers pressure police agencies to cut ties with problem officers, reinsurers urge pools to disassociate from problem municipalities.<sup>307</sup>

Reinsurers commonly view their role as supporting primary insurers' loss-prevention initiatives. This often entails funding insurers' loss-prevention programs.<sup>308</sup> A reinsurer, for example, might subsidize a pool's purchase of a use-of-force simulator or pay for the online training program the pool provides to its members.<sup>309</sup> It might give grants to pools to audit their member agencies or bring in speakers to provide live training.<sup>310</sup> 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 scenes.<sup>311</sup>

More generally, in everything they do, insurers operate against the backdrop of reinsurance underwriting and rating. 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 . . ." <sup>312</sup> 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 programs, and may partly explain why some pools obtain ratings from credit agencies.<sup>313</sup> As part of the

<sup>307</sup> Telephone Interview with Commercial Insurer F, *supra* note 37.

<sup>308</sup> See, e.g., *id.*

<sup>309</sup> Telephone Interview with Risk Pool C, *supra* note 109; Telephone Interview with Risk Pool E, *supra* note 119.

<sup>310</sup> Telephone Interview with Commercial Insurer C, *supra* note 122; Telephone Interview with Commercial Insurer G, *supra* note 109.

<sup>311</sup> Telephone Interview with Risk Pool E, *supra* note 119.

<sup>312</sup> Mendoza, *supra* note 78, at 74 (quoting senior official from Missouri Housing Authorities Property and Casualty, Inc.).

<sup>313</sup> Telephone Interview with Commercial Insurer C, *supra* note 122; Telephone Interview with Commercial Insurer E, *supra* note 101; see Mendoza, *supra* note 78, at 74–102 (describing, based on a survey of pools, how reinsurers influence pools' underwriting, claims management, and financial planning); see also Abramovsky, *supra* note 151, at 375–405 (describing how reinsurance functions like private regulation); Telephone Interview with Risk Pool B, *supra* note 86 (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).

credit-rating process, ratings agencies review pools' liability management,<sup>314</sup> a positive rating implies good risk management, which in turn may lower reinsurance rates.<sup>315</sup>

#### 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, complicating the straightforward account in which angry voters demand change from politically accountable officials.<sup>316</sup> 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.<sup>317</sup> 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, many police agencies care about professionalism — about being seen as doing things “the right way.”<sup>318</sup> Professionalism is reputational currency. Insurers understand this, and they hire experienced former officers to help them bridge the cultural gap and repack-age loss prevention as a set of techniques to enhance police profession-

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<sup>314</sup> See STANDARD & POOR'S RATINGS SERVS., ENTERPRISE RISK MANAGEMENT 23–24 (2013); STANDARD & POOR'S RATINGS SERVS., INSURERS: RATING METHODOLOGY 35–37 (2013).

<sup>315</sup> See Telephone Interview with Commercial Insurer A, *supra* note 62 (agreeing that this pricing effect seems likely, though disclaiming personal knowledge).

<sup>316</sup> 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); Lawrence Rosenthal, *A Theory of Governmental Damages Liability: Torts, Constitutional Torts, and Takings*, 9 U. PA. J. CONST. L. 797 (2007). For a review of relevant work, see Schwartz, *How Governments Pay*, *supra* note 9, at 1151–56.

<sup>317</sup> See Telephone Interview with Risk Pool D, *supra* note 113; Telephone Interview with Trade Ass'n A, *supra* note 90.

<sup>318</sup> See, e.g., Telephone Interview with Consultant A, *supra* note 87; Telephone Interview with Police Chief B, *supra* note 110; see also Christopher Stone & Jeremy Travis, *Toward a New Professionalism in Policing*, J. INST. JUST. & INT'L STUD., no. 13, 2013, at 11; DAVID ALAN SKLANSKY, HARVARD KENNEDY SCH. & NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, NCJ 232676, THE PERSISTENT PULL OF POLICE PROFESSIONALISM 1 (Mar. 2011), <https://www.ncjrs.gov/pdffiles1/nij/232676.pdf> [<https://perma.cc/9QC8-M49C>].

alism.<sup>319</sup> On this view, rising insurance premiums signal an increasing likelihood of a reputation-threatening liability event.<sup>320</sup>

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 insurer stated, for example, that if his pool gets 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.<sup>321</sup> Other experts, however, were pessimistic, reporting that politicians often fail to demand necessary changes even when coaxed by their insurers.<sup>322</sup>

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 are insured against liability for misconduct and, moreover, they are told that liability drains the pot of money available for raises and equipment.<sup>323</sup> The latter tale may not always be true, but sometimes it is. In a recent empirical study, Professor Joanna Schwartz found that some police agencies do feel, in a budgetary sense, the impact of financial payouts.<sup>324</sup> It is not the case, as many have believed,<sup>325</sup> that the money for insurance premiums, judgments, and settlements always comes out of general treasury funds.<sup>326</sup> Schwartz's qualitative findings are also

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<sup>319</sup> See EPP, *supra* note 9, 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,” *id.* at 22, and discussing the connection between avoiding liability and maintaining professional standards); GALLAGHER, *supra* note 126, 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.”).

<sup>320</sup> See Baker & Swedloff, *supra* note 56, at 1419 (“Insurance prices are highly credible loss prevention signals . . .”); *cf.* 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 reduce individual consumer bias in risk decisions).

<sup>321</sup> Telephone Interview with Risk Pool B, *supra* note 86.

<sup>322</sup> See Telephone Interview with G. Patrick Gallagher, *supra* note 133; Telephone Interview with Risk Pool E, *supra* note 119; *see also* Telephone Interview with Risk Pool B, *supra* note 86 (reporting that sheriffs tend to be more resistant than police chiefs because sheriffs are elected rather than appointed).

<sup>323</sup> Telephone Interview with Consultant A, *supra* note 87; *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.”).

<sup>324</sup> Schwartz, *How Governments Pay*, *supra* note 9, at 1195.

<sup>325</sup> *See id.* at 1153 n.29 (collecting sources).

<sup>326</sup> *Id.* at 1192.



consistent with my own — police officials in these paying jurisdictions, she finds, report that lawsuits impact their daily operations.<sup>327</sup>

### 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 and empirical questions. Perhaps the most pressing of these is whether insurers elevate or lower the level of police misconduct. I take up this question in section III.A. I consider the potential problem of overregulation by insurers in section III.B. In section III.C, I ask whether police liability insurance makes the police less democratically accountable. I contemplate in section III.D how the presence of insurers in the system may affect the content of criminal procedure law. And in section III.E, I explore how we might regulate insurers to increase social welfare.

#### A. *Does Police Insurance Reduce Police Misconduct?*

In Part II, I described the ways in which liability insurers regulate police agencies in an effort to reduce misconduct. Whether liability insurance actually does reduce misconduct relative to tort liability (that is, self-insurance or the absence of insurance) is a separate — and quite difficult — question. Recall the basic intuition that liability insurance tends to *increase* harm by reducing the insured's incentive to take care — this is moral hazard. Insurers deploy an arsenal of weapons to combat moral hazard, such as risk-responsive rating, deductibles, policy limits, and loss-prevention programs — everything I've detailed above. The question is whether these weapons are more effective at reducing misconduct (even after accounting for moral hazard) than simply having the municipality bear the risk itself.

One argument in the affirmative might be that bearing the risk of tort liability gives a municipality the *motivation* to reduce misconduct, but not the *know-how*. Insurers have the know-how.<sup>328</sup> Yet if the municipality lacks information, theoretically it could hire consultants to tell it what to do. The response here, perhaps, is that bundling loss prevention with insurance coverage is more effective because an insurer giving loss-prevention advice has “skin in the game,” and is also more efficient because of synergies with underwriting and claims man-

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<sup>327</sup> See *id.* at 1199–200; see also Telephone Interview with Police Chief C, *supra* note 211 (asserting that, if insurance rates go up, the police budget will tighten); Joseph L. Colletti, *Risk Management: How Do You Know They Know?*, 31 J. CAL. L. ENFORCEMENT, no. 3, 1997, at 16, 18 (“[L]ower pay out for claims results in more funds for department programs and the purchase of needed equipment.”).

<sup>328</sup> See Ben-Shahar & Logue, *supra* note 13, at 203.

agement.<sup>329</sup> This may be right, but it's not self-evidently so. Ultimately, it's an empirical question to which I lack an answer.

Here is a different way to think through the question: to the extent that civil liability deters police misconduct, it necessarily works through mediating actors who force the police to internalize the costs of the harms they inflict. The question is whether the insurer or, say, the city comptroller is the better mediator of cost-internalization. There are plausible (but again, not self-evidently correct) arguments that the insurer might have the edge. The comptroller may have a complex political profile that prevents her from standing up to the police the way an independent, outside insurer can. She may have less information than the insurer does or, lacking comparable financial incentives, may do less with the information she has. But then the question might be, why would such a comptroller buy insurance? Again, my data do not explain.

Despite the theoretical indeterminacy and the lack of any confident answers to the related empirical questions, it may be useful to walk through some of the reasons for optimism — and skepticism — about the effects of insurance on the rate of police misconduct. Optimism first: “It is usually the case,” Professor Carol Heimer argues in her influential work, “that the [municipality] 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.”<sup>330</sup> “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.”<sup>331</sup>

Some evidence bears out this theory in the policing context. To the extent that researchers have identified successful strategies for combating police misconduct, insurers have been reasonably effective at inducing police agencies to use them. For example, insurers typically require police agencies to 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 — at least when officers are properly trained on policy content.<sup>332</sup> Insurers also

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<sup>329</sup> This is thought to be part of why risk-neutral corporations purchase insurance. See Mayers & Smith, *supra* note 50, at 288; Schwartz, *supra* note 10, at 356.

<sup>330</sup> HEIMER, *supra* note 119, at 14.

<sup>331</sup> *Id.* At the same time, role theory suggests that assigning loss-prevention duties to law enforcement officials may alter those officials' preferences. Cf. B.J. Biddle, *Recent Developments in Role Theory*, 12 ANN. REV. SOC. 67, 73–74 (1986) (indicating that identifiable social positions and norms in formal organizations may encourage actors to conform to expectations for their institutional roles).

<sup>332</sup> See, e.g., ALPERT ET AL., *supra* note 323, 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. JUST.

facilitate the use of body-worn cameras and training simulators, both of which, research suggests, can reduce the inappropriate use of force.<sup>333</sup>

This is not to say that self-insured municipalities make *no* use of these loss-prevention strategies. Numerous self-insured agencies use body cameras, for example.<sup>334</sup> Whether *insured* municipalities would do so *if* they were self-insured is a different question, however. As one police chief stressed in our conversation, most law enforcement agencies are small and unsophisticated;<sup>335</sup> they are not the self-insured behemoths we typically think of, like Chicago and New York. And even the Chicagos and New Yorks may do surprisingly little loss prevention. Professor Carol Archbold surveyed the 354 largest municipal agencies about their risk-management programs. Most of these agencies, presumably, were self-insured. Only 14 of the 354 — a little under 4% — employed an in-house risk manager.<sup>336</sup> Based on these data and more, Archbold concluded that “risk management programs are still in the infancy stage of being embraced by police agencies,”<sup>337</sup> and other experts agree.<sup>338</sup> Worse yet, “the vast majority of the over 18,000 law en-

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POL’Y REV. 727, 737 (2015) (electronic stun weapons); James J. Fyfe, *Police Use of Deadly Force: Research and Reform*, 5 JUST. Q. 165 (1988) (firearms). *But see* Email from G. Patrick Gallagher, *supra* note 263 (asserting, based on professional experience, that often “[p]olicy is not connected to training”).

<sup>333</sup> On body-worn cameras, see, for example, 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. QUANTITATIVE CRIMINOLOGY 509, 525 (2015); and Wesley G. Jennings et al., *Evaluating the Impact of Police Officer Body-Worn Cameras (BWCs) on Response-to-Resistance and Serious External Complaints: Evidence from the Orlando Police Department (OPD) Experience Utilizing a Randomized Controlled Experiment*, 43 J. CRIM. JUST. 480, 485 (2015). *But see* Barak Ariel et al., Research Note, *Wearing Body Cameras Increases Assaults Against Officers and Does Not Reduce Police Use of Force: Results from a Global Multi-Site Experiment*, 13 EUR. J. CRIMINOLOGY 744 (2016). On simulators, see sources cited *supra* notes 220–25. As noted earlier, there is mixed evidence on whether accreditation, which many insurers promote, tends to reduce loss. *See supra* notes 257–63 and accompanying text.

<sup>334</sup> Cf. David Gelles, *Taser International Dominates the Police Body Camera Market*, N.Y. TIMES (July 12, 2016), <https://www.nytimes.com/2016/07/13/business/taser-international-dominates-the-police-body-camera-market.html> [<https://perma.cc/UBX9-WYAK>] (“[B]ody cameras are worn by officers in dozens of big cities including Los Angeles, New York, Chicago, Washington and . . . Dallas.”).

<sup>335</sup> Telephone Interview with Police Chief D, *supra* note 198; *see also* Telephone Interview with Commercial Insurer A, *supra* note 62 (opining that most small municipalities have no in-house risk-management program).

<sup>336</sup> *See* ARCHBOLD, *supra* note 120, 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.

<sup>337</sup> *Id.* at 25.

<sup>338</sup> *See* GALLAGHER, *supra* note 126, at 10 (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, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV.

forcement agencies across the country have no outside reviewers to assist with accountability efforts” either.<sup>339</sup>

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,” he said.<sup>340</sup> According to this expert, self-insured municipalities do not, for example, tend to participate in risk-management conferences, potentially missing out on valuable information exchange.<sup>341</sup>

There are, nevertheless, several reasons to be skeptical about the effects of insurance on police misconduct. First, as I noted at the outset, I do not claim that the sample of insurers I interviewed is representative.<sup>342</sup> I cannot rule out the possibility that a substantial share of insurers are inattentive to loss prevention. Some of the experts I spoke to raised this possibility. One reinsurer, for example, said that, while many pools are serious about managing municipal risk, others are “country club pools” more concerned with maintaining friendly relationships. The loss-prevention programs at many pools, he added, had become “routine.”<sup>343</sup> Another expert described the pools as not especially sophisticated.<sup>344</sup>

Still, these same two experts also said that pools, on the whole, are getting better rather than worse.<sup>345</sup> And the snapshot I’ve taken in this Article, it bears note, captures a soft insurance market.<sup>346</sup> In a soft market, insurers tend to be more lax about underwriting, and less forceful about loss prevention, as they compete for premium dollars

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1023, 1028 (2010) (finding that the largest police agencies “only rarely have information about” lawsuits filed against them or their officers); OFFICE OF INSPECTOR GEN., CITY OF CHI., ADVISORY CONCERNING CLAIMS ANALYSIS AND RISK MANAGEMENT 1, 5 (2016) (finding that, in a two-year period, Chicago had paid \$146.3 million for police misconduct and other public safety claims, *id.* at 5, but that Chicago “does not currently have a comprehensive risk management program,” *id.* at 1, and that the Department of Finance’s claims-review process “excludes police excessive force and misconduct claims,” *id.* at 5). *But see* Telephone Interview with Commercial Insurer E, *supra* note 101 (asserting, based on professional experience, that municipalities with self-insured retentions usually have risk-management programs in place).

<sup>339</sup> Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1097 (2015).

<sup>340</sup> Telephone Interview with Commercial Insurer D, *supra* note 89.

<sup>341</sup> *Id.*

<sup>342</sup> Even if it were, response bias may have led the insurers to exaggerate their efficacy — though my written sources and interviews with police chiefs partly allay this concern.

<sup>343</sup> Telephone Interview with Commercial Insurer F, *supra* note 37.

<sup>344</sup> Telephone Interview with G. Patrick Gallagher, *supra* note 133.

<sup>345</sup> *See* Telephone Interview with Commercial Insurer F, *supra* note 37; Telephone Interview with G. Patrick Gallagher, *supra* note 133; *accord* Mendoza, *supra* note 78, 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)).

<sup>346</sup> *E.g.*, Telephone Interview No. 2 with Commercial Insurer C (Sept. 29, 2015); Telephone Interview No. 2 with Commercial Insurer D (Oct. 13, 2015).

and market share. Harder markets typically entail more exacting standards for municipalities striving to maintain coverage and keep rates down.<sup>347</sup>

A second reason for skepticism is that “not all ‘loss prevention’ to the insurance company results in loss prevention to society.”<sup>348</sup> If an insurer refuses to cover or renew a municipality because its police agency is a “bad risk” — leaving the municipality bare — and the agency’s officers continue to commit misconduct, the insurance company has decreased its own liability but has not reduced social loss.<sup>349</sup> Or, as the point is sometimes put, there can be a gap between “liability prevention” (what the insurer wants) and “loss prevention” (what society wants).<sup>350</sup> It is possible, in particular, that the “blue wall of silence” — the refusal of many police to report on a colleague’s wrongdoings<sup>351</sup> — 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.

Perverse incentives are a real concern, though the problem may be smaller than it first appears. As an initial matter, it is far from clear that an insurer’s stance on the “blue wall of silence,” when compared to deep-set cultural and institutional forces, meaningfully affects whether a close-lipped police culture predominates. But more importantly, precisely because the “blue wall of silence” may weaken general deterrence of police misconduct, insurers may just as well oppose the practice 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. The reasoning here tracks a debate from the medical context: “Insurers and hospital lawyers . . . long discouraged doctors from apologizing to harmed patients for fear that such apologies might fuel lawsuits.”<sup>352</sup> A “growing number of hospitals, doctors and insurers,” however, now believe “that apologies may end up saving some of the

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<sup>347</sup> See BAKER & GRIFFITH, *supra* note 14, at 55 (“[N]o snapshot of the underwriting process can present an adequate basis for understanding insurance underwriting over time.”).

<sup>348</sup> Cohen, *supra* note 16, at 327.

<sup>349</sup> *Cf. id.*

<sup>350</sup> See Baker & Siegelman, *supra* note 10, at 180 n.15.

<sup>351</sup> See, e.g., Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237 (1998) (defining the term as “an unwritten code in many [police] departments which prohibits disclosing perjury or other misconduct by fellow officers, or even testifying truthfully if the facts would implicate the conduct of a fellow officer”).

<sup>352</sup> Rachel Zimmerman, *Doctors’ New Tool to Fight Lawsuits: Saying “I’m Sorry,”* WALL STREET J. (May 18, 2004, 11:59 PM), <http://www.wsj.com/articles/SB108482777884713711> [<https://perma.cc/3L89-KLCM>].

huge sums paid out to settle disputes over medical care.”<sup>353</sup> Academic researchers agree.<sup>354</sup> The same reasoning may well apply in the policing context.

Finally, there is the study I mentioned at the Article’s outset. As part of a larger project about how municipalities internalize the law, Professor Charles Epp collected data in 2000 on numerous organizational and environmental characteristics, including insurance coverage, for “838 police departments drawn from a stratified random sample of United States cities.”<sup>355</sup> He predicted, as I would have, that “departments covered by liability insurance are likely to be more attentive to 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.”<sup>356</sup> 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.<sup>357</sup> They were also less likely to take extensive corrective actions against offending officers.<sup>358</sup> These findings, Epp noted, “support the common claim[] . . . that liability insurance blunts the impact of liability pressure.”<sup>359</sup>

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, on the other hand, best practices and corrective actions — 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.<sup>360</sup> Even if they had been, they would not necessarily hold

<sup>353</sup> *Id.*; see also Kevin Sack, *Doctors Say “I’m Sorry” Before “See You in Court,”* N.Y. TIMES (May 18, 2008), <http://www.nytimes.com/2008/05/18/us/18apology.html> [<https://perma.cc/GZ8W-CK2J>].

<sup>354</sup> See, e.g., Benjamin Ho & Elaine Liu, *Does Sorry Work? The Impact of Apology Laws on Medical Malpractice*, 43 J. RISK & UNCERTAINTY 141, 163 (2011) (finding that apology laws, which encourage doctors to apologize by rendering apologies inadmissible in court, reduce average payment size and settlement time).

<sup>355</sup> EPP, *supra* note 9, at 116–17, 234.

<sup>356</sup> *Id.* at 241–42.

<sup>357</sup> *Id.* at 134. Epp used the term “legalized accountability” for what I’m calling “best practices.” *Id.* at 117–29.

<sup>358</sup> *Id.* at 134–35.

<sup>359</sup> *Id.* at 134.

<sup>360</sup> See *id.* at 247, 249. Epp’s survey question about insurance coverage may also 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, 10:22 PM). This question is less straightforward than it first appears. First, given that coverage through a pool is not technically “insurance,” see *supra* note 80 and accompanying text, it’s not clear how municipi-

today, some seventeen years later.<sup>361</sup> Nor were the relationships causal — it may be that the municipalities that experienced high rates of misconduct felt more justified in purchasing insurance.<sup>362</sup> 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’ uses of force.”<sup>363</sup>

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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 think, is getting police agencies to seize upon what we know. If insurers do this better than municipal officials, it is possible that insurance reduces misconduct. The challenge is determining whether this is so.

### 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 mentioned earlier, we might become concerned about the places where insurer and social preferences diverge. An insurer providing police liability coverage is doing something close to optimizing the municipality’s level of liability — it wants the municipality to take all measures to reduce liability, as long as they are *cost-justified*. The concern that insurers may *underregulate* has run throughout the Article. Indeed,

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palties 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 9, at 1162 n.61 (describing disagreement among experts).

<sup>361</sup> 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 9, 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). Today, as far as I can tell, nearly all of them self-insure. See *supra* note 91 and accompanying text. As a result, it is unclear whether and to what extent the negative relationship between insurance and best practices persists.

<sup>362</sup> See HOWARD C. KUNREUTHER ET AL., INSURANCE AND BEHAVIORAL ECONOMICS 116–18 (2013) (explaining that consumers tend to treat insurance as a short-term investment and often cancel coverage if no loss is suffered).

<sup>363</sup> EPP, *supra* note 9, at 134 (citing McCoy, *supra* note 9).

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 importantly, 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 squeezing 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.<sup>364</sup> Imagine a loss-prevention measure that costs  $\$X$  and averts  $\$Y$  of expected liability, but also reduces expected 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  $X + Z < Y$ .

There are at least three responses. First, although it is theoretically possible that loss prevention hampers police work, there is little to substantiate this fear.<sup>365</sup> It is also possible that loss prevention *facilitates* 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 temper the potential overregulation problem. This may be why we do not see insurers trying to disarm the police, for example. A municipality that wants its police to take more risks than its insurer will allow will, buoyed by public support for crime control (and assuming market alternatives), find a more lenient insurer and pay higher premiums.<sup>366</sup> And third, loss prevention that reduces the incidence of rights violations may enhance the popular legitimacy of the police, potentially encouraging voluntary compliance with the law and cooperation with policing efforts.<sup>367</sup>

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<sup>364</sup> See Armacost, *supra* note 264, at 475 (discussing the “perceived gains of aggressive policing”); cf. Swedloff & Baker, *supra* note 16 (manuscript at 7–8) (observing that lawyers’ professional liability insurers “share the downside risk,” *id.* at 7, of law firms’ risky but potentially profitable decisions, “but not the upside,” *id.* at 7, and so “carriers may incentivize more precaution than is necessarily good for law firms,” *id.* at 8).

<sup>365</sup> See, e.g., Stephen Rushin & Griffin Edwards, *De-Policing*, 102 CORNELL L. REV. (forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2757809](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757809) [<https://perma.cc/EZL9-QWYQ>] (reviewing and critiquing the literature on the effects of police regulation on crime, and finding that federally mandated reform under 42 U.S.C. § 14141 (2012) leads to a slight and temporary uptick in crime rates).

<sup>366</sup> See Cohen, *supra* note 16, at 343–44, 343 n.131 (citing Mayers & Smith, *supra* note 50, at 288–89) (making the point for legal and corporate liability insurers).

<sup>367</sup> See, e.g., Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513, 535 (2003).



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.<sup>368</sup>

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 compromise 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.<sup>369</sup>

### C. Democratic Accountability

In his canonical work *Suing Government*, Professor 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.<sup>370</sup> It takes Schuck only one paragraph to dismiss the possibility. “[I]nsurance contracts and indemnification laws,” Schuck predicts, “would, unless proscribed by statute, inevitably contain certain limitations upon coverage.”<sup>371</sup> These limitations would leave many official defendants judgment-proof, shortchanging plaintiffs and undermining deterrence.<sup>372</sup> Moreover, Schuck observed, writing in 1983: “[M]unicipalities apparently experienced serious difficulties in obtaining insurance coverage for official liability even before the recent expansion of liability.”<sup>373</sup> 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 per-

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<sup>368</sup> See Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 673 (2015) (“[I]n the administrative state, in contrast to classical constitutional theory, the abuse of government power is not something to be strictly minimized, but rather optimized.”).

<sup>369</sup> See Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 540 (1999).

<sup>370</sup> SCHUCK, *supra* note 75, at 109–10.

<sup>371</sup> *Id.* at 110.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

sonnel 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.”<sup>374</sup>

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.<sup>375</sup> 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 — that is, 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?<sup>376</sup>

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 is constantly subjected to, and even solicits, “influence” from private industry.<sup>377</sup> Unless Schuck is prepared to do away with all of

<sup>374</sup> *Id.*

<sup>375</sup> On insurance contracts, see *supra* note 184 and accompanying text. On indemnification policies, the qualified immunity standard, and municipal liability doctrine, see Schwartz, *supra* note 32, at 890.

<sup>376</sup> Schuck’s concerns foreshadowed a large literature on “privatization.” See, e.g., Avihay Dorfman & Alon Harel, *Against Privatisation as Such*, 36 OXFORD J. LEGAL STUD. 400 (2016); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003); Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003).

<sup>377</sup> See, e.g., BENEDICTE BULL ET AL., THE WORLD BANK’S AND THE IMF’S USE OF CONDITIONALITY TO ENCOURAGE PRIVATIZATION AND LIBERALIZATION 38–40 (2007), <https://www.duo.uio.no/bitstream/handle/10852/32692/Bull.pdf> [<https://perma.cc/C8WE-Q96C>] (discussing how, in some cases, international financial institutions may have pressured developing countries to make policy changes through offers of conditional financial aid); Scott, *supra* note 24, at 57, 62 (discussing “systematic oversight of government (akin to regulation) carried out by private (that is, non-state or non-governmental) actors,” *id.* at 57, including private certification of public compliance with quality standards, credit ratings agencies, and organizations given statutory or contractual mandates to regulate public bodies); see also Thomas Kaplan, *Mayor de*

these arrangements, he needs some theory about why private influence is especially objectionable here, which he does not provide. One possibility is that policing is special because it concerns the state's authority to use force and intrude on individual liberty interests.<sup>378</sup> Yet American policing has never been exclusively public.<sup>379</sup> *Private regulation of the police*, moreover, is distinct from, and less obviously problematic than, *private policing* itself.

Second, the people — through their democratically elected representatives and officials appointed by those representatives — *chose* to retain this outside help, with all that the help entails.<sup>380</sup> 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.<sup>381</sup> 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.<sup>382</sup> It is not clear how it would *enhance* democratic accountability to prohibit the electorate from choosing the option it prefers.

There is an additional concern about democratic accountability, however: 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

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*Blasio's Hired Guns: Private Consultants Help Shape City Hall*, N.Y. TIMES (Nov. 4, 2015), <https://www.nytimes.com/2015/11/05/nyregion/mayor-de-blasios-hired-guns-private-consultants-help-shape-city-hall.html> [https://perma.cc/75PR-CXPW]. See generally Freeman, *supra* note 45 (discussing coordination between governmental and private actors in facilitating infrastructure development as well as postdisaster reconstruction).

<sup>378</sup> See, e.g., David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1188 (1999).

<sup>379</sup> See *id.* at 1171–93; see also Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 439–62 (2005).

<sup>380</sup> 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 16, at 343.

<sup>381</sup> 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 9, at 1170.

<sup>382</sup> See, e.g., Bill Oram, *Durham: Call a Cop, Tualatin Wants All Our Money*, OREGONIAN (Jan. 29, 2010, 7:42 AM), [http://www.oregonlive.com/tualatin/index.ssf/2010/01/durham\\_call\\_a\\_cop\\_tualatin\\_wants\\_all\\_our\\_money.html](http://www.oregonlive.com/tualatin/index.ssf/2010/01/durham_call_a_cop_tualatin_wants_all_our_money.html) [https://perma.cc/SA5X-6SJD] (“Durham does not have its own police department. For 20 years, Durham has paid a flat rate [for] police work provided by Tualatin cops.”); *Community Policing and Contract Cities*, PINELLAS COUNTY SHERIFF’S OFF., <http://www.pcsoweb.com/community-policing-and-contract-cities> [https://perma.cc/3PHW-DBPP] (“Thirteen cities in Pinellas County contract with the Sheriff’s Office for primary law enforcement services.”).

the municipality that employs him will indemnify him.<sup>383</sup> And the municipality is similarly undeterred because it simply spreads the cost of the judgment among its many taxpayers.<sup>384</sup> If civil liability is to deter, the taxpayers must convert these monetary costs into political ones, punishing the responsible officials at the ballot box (if punishment they deserve).<sup>385</sup> 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.

This 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 is more likely to enhance democratic accountability than to deplete it.

First, many who believe that lawsuits deter police misconduct point to reputational harms as the reason why. It seems unlikely that the financing mechanism through which obligations 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.<sup>386</sup>

Third, in many jurisdictions, lawsuits challenging police conduct are actually quite rare — major lawsuits are low-probability, high-consequence events.<sup>387</sup> Well-known behavioral biases may lead the

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<sup>383</sup> 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, 590 (2000).

<sup>384</sup> See *id.* (“Who does pay for police misconduct? The taxpayers do. In the overwhelming majority of civil rights cases of police misconduct in New York State, the taxpayer pays every dollar of the settlement or judgment.”).

<sup>385</sup> See, e.g., *City of Chicago v. Sturges*, 222 U.S. 313, 323–24 (1911) (“[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.” *Id.* at 324.).

<sup>386</sup> 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.”).

<sup>387</sup> See sources cited *infra* note 413.

electorate, and the policymakers they have elected, to discount the risk of liability too much, essentially down to zero.<sup>388</sup> By converting these large but improbable potential liabilities into insurance premiums, insurance may help to “bring home” the risk of police misconduct, making it harder to ignore.<sup>389</sup> Insurance forces municipalities to pay for risky police activities regardless whether those activities happen to cause harm, which often depends on “the fortuities of chance” rather than any moral consideration.<sup>390</sup> Put slightly differently, insurance premiums, if priced correctly, tell policymakers about the likelihood of suit. This information 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.<sup>391</sup> 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.<sup>392</sup>

#### 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 Professor Marc Galanter's classic typology of litigants. Galanter divided the world into “one-shotters” and “repeat players.”<sup>393</sup> Civil rights plaintiffs who sue the police are one-shotters

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<sup>388</sup> See, e.g., CASS R. SUNSTEIN, WORST-CASE SCENARIOS 21–24 (2007); see also Jonathan S. Masur, *Probability Thresholds*, 92 IOWA L. REV. 1293 (2007) (discussing circumstances in which individuals inflate, *id.* at 1332–36, or discount, *id.* at 1305–22, low-probability risks).

<sup>389</sup> See Ben-Shahar & Logue, *supra* note 13, at 199–200. Of course, insurers can also fall prey to behavioral biases that lead to irrational discounting. See, e.g., 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).

<sup>390</sup> See Schwartz, *supra* note 10, at 324; see also *id.* at 323–24 (describing this “ethical appeal” of tort liability insurance).

<sup>391</sup> Cf. BAKER & GRIFFITH, *supra* note 14, at 202–20 (advocating SEC-mandated disclosure of information about corporate purchases of directors and officers insurance); Galle & Stark, *supra* note 48, at 633–34 (proposing competitive rankings to encourage local officials to establish rainy day funds).

<sup>392</sup> See, e.g., *Letter Confirms, Municipal Risk Pool Dumps Quartzsite*, DESERT FREEDOM PRESS (Oct. 14, 2012), <http://thedesertfreedompress.blogspot.com/2012/10/letter-confirms-municipal-risk-pool.html> [https://perma.cc/EXU7-6UGN].

<sup>393</sup> Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974); see also Catherine Albiston, *The Rule of Law and*

in Galanter's argot. The municipal interests they sue are more likely to be repeat players. The insurers that defend the officers and municipalities, then, are something like "super-repeat-players," in that they each represent a large number of municipalities, each of which itself may be 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 player.<sup>394</sup> 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.<sup>395</sup> We would therefore expect repeat players to settle "bad" cases and litigate "good" ones.<sup>396</sup> 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.<sup>397</sup>

Supposing that Galanter is right — and I tend to think he is — for what rules do insurers play? It is tempting to think that insurers would favor the restriction of liability exposure, which would minimize payouts under the policies they write. Perhaps this is true. 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."<sup>398</sup> 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,

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*the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869, 870–71 (1999).

<sup>394</sup> Galanter, *supra* note 393, 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.

<sup>395</sup> *Id.* at 100.

<sup>396</sup> See *id.* at 100–03; see also Miller & Wright, *supra* note 386, at 773–74 (making a similar argument in the policing context).

<sup>397</sup> Galanter, *supra* note 393, at 122; see also Frank B. Cross, *The Judiciary and Public Choice*, 50 HASTINGS L.J. 355, 361 (1999); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 66–87 (1991).

<sup>398</sup> Kent D. Syverud, *On the Demand for Liability Insurance*, 72 TEX. L. REV. 1629, 1634 (1994); see also *id.* at 1634–35 (reasoning that "the more widely a particular activity is insured, the more likely it is to give rise to a lawsuit," *id.* at 1634, and "the larger the amount (or fraction) of potential liability that is insured, the larger the awards and settlements," *id.* at 1635); Bovbjerg, *supra* note 10, at 1678 ("[I]nsurance enables far more resources to flow through liability channels than otherwise would."); Steven W. Pottier & Robert C. Witt, *On the Demand for Liability Insurance: An Insurance Economics Perspective*, 72 TEX. L. REV. 1681, 1700–02 (1994) (finding Professor Kent Syverud's argument "basically reasonable," *id.* at 1700).

and life insurers — at regulating policing risks.<sup>399</sup> They almost certainly are.

What insurers care about most is not necessarily that liability exposure is limited, but that it's *predictable*. As Professor Kenneth Abraham explains, “[i]nsurance operates most comfortably with stochastic events, in which the probability of the frequency and magnitude of insured losses that will be suffered by a group of policyholders is highly predictable.”<sup>400</sup> “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.”<sup>401</sup>

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.<sup>402</sup>

Second, insurers want the law to be *nonretroactive*. As one commentator put it, insurers “vehemently object to unpredictable change.”<sup>403</sup> 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.<sup>404</sup> 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.”<sup>405</sup>

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<sup>399</sup> Cf. Ben-Shahar & Logue, *supra* note 13, at 217–19 (“[F]irst-party insurers are poorly equipped, and liability insurers are relatively well equipped, to regulate consumer product risks.” *Id.* at 217–18.).

<sup>400</sup> Kenneth S. Abraham, *Environmental Liability and the Limits of Insurance*, 88 COLUM. L. REV. 942, 946–47 (1988).

<sup>401</sup> *Id.* at 947; see also 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).

<sup>402</sup> 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”).

<sup>403</sup> Bovbjerg, *supra* note 10, at 1668.

<sup>404</sup> See, e.g., John Bernard Corr, *Retroactivity: A Study in Supreme Court Doctrine “As Applied,”* 61 N.C. L. REV. 745, 746 (1983).

<sup>405</sup> See Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 26–42 (2002) (reviewing the law of qualified immunity and nonretroactivity and explaining how both

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 to taxpayers) supplies a potential novel justification for these beleaguered judicial doctrines. Yet one could also look at the issue quite differently. If we think that, on average and in the long run, the law will “move in a desirable direction,” then perhaps the norm should be *maximal* retroactivity.<sup>406</sup> There are tools insurers can use to protect themselves from catastrophic retroactive liability — like policy limits, exclusions, and claims-made forms. And if an agency’s premiums were exorbitant notwithstanding these measures, perhaps something is rotten in the agency that warrants a second look.

### 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.<sup>407</sup> One insurer I interviewed, for example, expressed reluctance to advise police agencies on personnel matters for fear of exposure under employment-related laws.<sup>408</sup> Creating safe harbors from liability — targeted toward these pockets of activity — might free insurers to regulate more closely.<sup>409</sup>

Second, market insurance struggles to regulate effectively its most diminutive customers — what one insurer called “commodity clients.”<sup>410</sup> These small municipalities are abundant in this “country of

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concern “the novelty of the law being made,” *id.* at 38); *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”).

<sup>406</sup> Kyle D. Logue, *Legal Transitions, Rational Expectations, and Legal Progress*, 13 J. CONTEMP. LEGAL ISSUES 211, 213 (2003); *cf.* Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509 (1986) (demonstrating general inefficiency of relief from effects of legal transitions).

<sup>407</sup> *Cf.* John Dwight Ingram, *Liability of Insurers for Negligence in Inspection of Insured Premises*, 50 DRAKE L. REV. 623 (2002) (discussing “whether, by inspecting for purposes of underwriting and loss control, the insurer may become liable for injuries resulting from negligent inspection of the insured premises,” *id.* at 624–25).

<sup>408</sup> Telephone Interview with Risk Pool C, *supra* note 109.

<sup>409</sup> *See* Kyle D. Logue, *Encouraging Insurers to Regulate: The Role (if Any) for Tort Law*, 5 U.C. IRVINE L. REV. 1355, 1381–82 (2015).

<sup>410</sup> Telephone Interview with Commercial Insurer D, *supra* note 89. Recent work suggests the same dynamic appears in the context of lawyers’ professional liability insurance. *Compare* Swedloff & Baker, *supra* note 16 (describing how insurers regulate large law firm policyholders), *with* Levin, *supra* note 16 (finding that legal malpractice insurers do little to regulate their solo and small-firm policyholders).



small towns” (as another insurer put it).<sup>411</sup> 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.<sup>412</sup> 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.<sup>413</sup>

Paradoxically, then, the large municipalities for which experience rating and loss prevention should work best, and whose police agencies commit the lion’s share of misconduct,<sup>414</sup> are the very municipalities that tend to self-insure.<sup>415</sup> And the ones that buy insurance present some serious practical problems for insurers. One potential solution, at least in theory, could be to *forbid* these small municipalities to insure. Prohibiting insurance can be socially beneficial in certain circumstances.<sup>416</sup> Yet there are ways in which small municipalities benefit disproportionately from insurance coverage. The lower the 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 op-

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<sup>411</sup> Telephone Interview with Commercial Insurer F, *supra* note 37; see also, e.g., CRESSWELL & LONDON-MURRAY, *supra* note 89, at x (stating that 82% of New York municipalities have fewer than 10,000 residents).

<sup>412</sup> See HEIMER, *supra* note 119, at 203–05; Baker & Swedloff, *supra* note 56, at 1446; Schwartz, *supra* note 10, at 357.

<sup>413</sup> See ABRAHAM, *supra* note 14, at 231; Telephone Interview with Commercial Insurer A, *supra* note 62 (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, *Municipal Liability*, in MICH. MUN. LEAGUE, HANDBOOK FOR MUNICIPAL OFFICIALS — OPERATIONS 77, 77 (2004) (observing that, of pool’s over 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, 112 (2014) (finding that 27% of surveyed police departments had no reported incidents of misconduct during the approximately two-year reporting period); and Telephone Interview with Commercial Insurer I, *supra* note 119 (asserting that many of the company’s insured municipalities had never tendered a police liability claim).

<sup>414</sup> See Eitle et al., *supra* note 413, at 112–14.

<sup>415</sup> SUGARMAN, *supra* note 23, at 14 (noting that the firms most amenable to experience rating tend to self-insure). In another sense, there is no paradox: the large municipalities are also best positioned to self-insure because they have the largest experience base and can absorb considerable financial shocks.

<sup>416</sup> An entity that is not judgment-proof, but which might escape liability for wrongdoing, will desire to purchase full liability coverage. See 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, 176 n.28.

erations.<sup>417</sup> A small municipality may also have less experience, and therefore greater difficulty, monitoring defense counsel's service.<sup>418</sup> It may simply be less sophisticated and in greater need of loss-prevention advice.<sup>419</sup> 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 for insurers, 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.<sup>420</sup> At present, some insurers write first-dollar police liability policies for small municipalities.<sup>421</sup> 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."<sup>422</sup> It is also a bad use of premium dollars from the perspective of the municipality (and thus the taxpayers), because "[t]he primary function of insurance is to spread the risk of losses that policyholders cannot effectively bear themselves."<sup>423</sup> "If insurance were restructured to include large copayments by policyholders," Abraham explains, "it could simultaneously and more effectively spread the most severe losses and help to prevent losses from occurring."<sup>424</sup> 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 of how the law might regulate the police by regulating insurers 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

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<sup>417</sup> Schwartz, *supra* note 10, at 356.

<sup>418</sup> *See id.*

<sup>419</sup> Telephone Interview with Police Chief D, *supra* note 198.

<sup>420</sup> *See* HEIMER, *supra* note 119, 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 43, at 73 n.94. This may be part of why many municipalities 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.

<sup>421</sup> *See supra* note 302 and accompanying text.

<sup>422</sup> ABRAHAM, *supra* note 14, at 237.

<sup>423</sup> *Id.*

<sup>424</sup> *Id.*

insurance for all police operations?<sup>425</sup> 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.<sup>426</sup> Nor can we be certain that the benefits that (by hypothesis) flow from voluntary insurance transactions would remain if those transactions were compelled by law; a forced relationship may be less productive than a voluntary one.<sup>427</sup> 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 this regulatory mechanism. I tackle this complication separately in related work.<sup>428</sup>

## 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.<sup>429</sup> Not only has this led to

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<sup>425</sup> If police liability insurance increases the amount of police misconduct, we would want to determine why, and then design regulation to neutralize the pathology. Were that to fail, we might consider restricting the availability of insurance coverage or eliminating it altogether.

<sup>426</sup> 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, 11, 14, 16.

<sup>427</sup> See Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 82 (1996) (“[I]n a compulsory system, insurers are no longer assured of the cooperation of their insureds in determining insurability and rating the risk.”).

<sup>428</sup> See generally Rappaport, *supra* note 242.

<sup>429</sup> See SAMUEL WALKER & CHARLES M. KATZ, *THE POLICE IN AMERICA* 70 (2008) (observing that “[t]he big departments dominate public thinking about the police” and that “almost

an incomplete theoretical model of policing, but it has also 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.<sup>430</sup> 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.

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no research has been done on small departments, even though they are more representative of policing in America”).

<sup>430</sup> 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. See, e.g., *Education*, LIBERTY MUTUAL INS. CO., <https://www.libertymutualgroup.com/business-insurance/industry-insurance/school-insurance> [<https://perma.cc/B843-YHFT>]; *K-12 Public Schools Insurance*, TRAVELERS INDEMNITY CO., <https://www.travelers.com/business-insurance/public-entities/school> [<https://perma.cc/W9XN-2LND>]. The 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?