

# Article

## POLICING THE POLICE: COULD MANDATORY PROFESSIONAL LIABILITY INSURANCE FOR OFFICERS PROVIDE A NEW ACCOUNTABILITY MODEL?

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*When Eric Garner's mother, Gwen Carr, asked a Congressional Black Caucus panel on policing why the officer who killed her son with an illegal chokehold was still employed, the question hung in the air. Article co-author Professor Deborah Ramirez sat amongst the assembled experts who struggled to answer that day. This paper was born in that silence and in the inadequacies of those responses.*

*We begin by reviewing the current architecture of police accountability, examining civil litigation, criminal prosecution, civil service hiring practices, arbitrated internal disciplinary action and firings, civilian oversight boards, and body-worn cameras. We conclude that currently each of these mechanisms is substantially flawed and generally ineffective.*

*In response, we propose an innovative, market-based solution – mandatory professional liability insurance for police officers. Much the way that drivers with terrible records may be forced off the roads by high premiums, officers with the most dangerous histories, tendencies, and indicators might be “priced-out” of policing by premiums that reflect their actual risk of un-*

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*justified violence. Potential reductions or increases in premiums would create systemic effects by incentivizing both departments and individual officers to adopt policies, trainings, and procedures that are proven to lower risk. Insurance companies, an outside third-party removed from local politics, would be in an ideal position to assess indicators of risk actuarially and set premiums accordingly.*

*Empirically rigorous evidence suggests these indicators exist, that the most dangerous officers are identifiable and relatively rare. For example, Daniel Pantaleo, the officer who choked Eric Garner, had more sustained civilian complaints than 98% of the NYPD, and he was named in two civil suits alleging civil rights violations in the year before the incident. If he had paid an insurance premium commensurate with his record, perhaps he would have been forced to find another profession. Perhaps Eric Garner would still be alive.*

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## INTRODUCTION

*“We can’t solve problems by using the same kind of thinking we used when we created them.”<sup>1</sup>*

Eric Garner was arrested for allegedly selling untaxed cigarettes in Staten Island, N.Y. in 2014.<sup>2</sup> Video emerged of the arresting officer, Daniel Pantaleo, detaining Garner in a fatal chokehold on the sidewalk as he repeatedly gasped the words: “I can’t breathe.”<sup>3</sup> The officer involved in his death has remained on the force,<sup>4</sup> despite breaching department rules by using the chokehold.<sup>5</sup>

The journey of writing this article began the year after Mr. Garner’s death, at a Black Caucus congressional panel on policing in Washington D.C.<sup>6</sup> Some of the most prominent experts on policing were there. One person on the panel was Gwen Carr, Eric Garner’s mother. She asked why the officer who breached department policy and killed her son was still employed. The question hung in the room. No one could answer it.

The death of Eric Garner occurred in the midst of heightened tensions between police officers and minority civilians and the resulting Black Lives Matter movement. Gwen Carr’s question, thus, contributes to a broader discussion about problems in policing. In a recent *New York Times* op-ed, retired Philadelphia police commissioner Charles Ramsey said, “This is the most challenging period I have ever witnessed.”<sup>7</sup> As this article sets out, other senior and even rank-and-file officers feel the same. Recent high-profile deaths at the hands of police, like Eric Garner’s, have preceded and followed execution-style killings of police officers. In the immediate aftermath of these events on both sides of the thin blue line, trust between offic-

<sup>1</sup> This quote has been widely, and it seems incorrectly, attributed to Albert Einstein. The authors found conflicting research about its origin. Whether he said it or not, the sentiment of thinking in a new way about an existing problem is why this quote was used, but without attribution to him.

<sup>2</sup> Al Baker, J. David Goodman, Benjamin Mueller, *Beyond the Chokehold; The Path to Eric Garner’s Death*, N.Y. TIMES, June 13, 2015, <https://www.nytimes.com/2015/06/14/nyregion/eric-garner-police-chokehold-staten-island.html?mcubz=3>.

<sup>3</sup> *Id.*

<sup>4</sup> Sally Goldenberg, *Records Show Increased Earnings For Officer Involved In Garner Death*, POLITICO, Sept. 12, 2015, <http://www.politico.com/states/new-york/albany/story/2016/09/officer-in-eric-garner-death-boosts-overtime-pay-105359>; After years of delay, caused at least partially by a Department of Justice investigation, Daniel Pantaleo is currently scheduled to face an administrative trial to determine if he can keep his job. That trial is set for May 13, 2019. Mark Morales, *Four years after Eric Garner’s death, officer faces NYPD trial to see if he will keep his job*, CNN.COM Dec. 6, 2018, <https://www.cnn.com/2018/12/06/us/eric-garner-nypd-daniel-pantaleo/index.html>

<sup>5</sup> Baker et al., *supra*, note 2.

<sup>6</sup> The panel included Professor Deborah Ramirez, a co-author of this article, at the Congressional Black Caucus Foundation’s 46<sup>th</sup> Annual Legislative Conference at Washington D.C. on Sept. 16, 2016, sponsored by Rep. John Conyers (Michigan).

<sup>7</sup> Charles H. Ramsey, *Where to Go From the Anger in Charlotte*, N.Y. TIMES, Sept. 24, 2016, <https://www.nytimes.com/2016/09/25/opinion/sunday/where-to-go-from-the-anger-in-charlotte.html?mcubz=3>.

ers and the public eroded. This lack of trust seriously inhibits police legitimacy and effectiveness. Specifically, when individuals distrust or otherwise develop negative perceptions toward the police force – including the belief that officers act unlawfully, – it affects their willingness to recognize its authority, report crime, and act as witnesses.<sup>8</sup> This, in turn, hinders officers' ability to perform their job effectively.

The authors of this article interviewed police chiefs to understand their perspective. *Why do officers who shoot civilians or engage in risky or inappropriate policing remain in the force? How do police chiefs deal with such officers?* The answers were surprising, and the issues they raised are reflected in the article that follows. One police chief pithily explained: he can't hire the officers he wants, promote those who share his values, effectively discipline errant officers, and he can't fire them, or if he did, he risks having the decision overturned.<sup>9</sup> The next question was obvious, "What do you do with them?" The same chief said, "I put them on the front desk."<sup>10</sup> After Eric Garner's death, officer Pantaleo was put on desk duty, where he earned more money than being on the street.<sup>11</sup> The former chief of the Salt Lake Police Department put it this way: "In the last four years, we've learned an undeniable truth: America's police departments do not always hire and retain the best officers. We have to make it easier to fire dangerous cops, the ones who pose a threat to communities and to the profession."<sup>12</sup> About Pantaleo specifically he added, "Many would agree that Pantaleo, because he had a significant history of poor policing, should not have been working the day he approached Garner."<sup>13</sup>

In Section II, we explore the contentions of these policing experts, surveying the whole existing architecture of police accountability. Specifically, we critically examine the civil service hiring process, the scope of judicial oversight, police licensure and decertification procedures, the emerging technology of body-worn cameras, the effectiveness of civilian review boards, and the role of arbitration in police discipline. This thorough review largely confirms what these police chiefs relayed and what the continued employment of Daniel Pantaleo suggests: current mechanisms of police accountability are broken and largely ineffective.

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<sup>8</sup> Tom R. Tyler & Jeffrey Fagan, *Legitimacy And Cooperation: Why Do People Help the Police Fight Crime in Their Communities?* 6 *Oh.St. J. of Crim. L.* 231–275 (2008); Bennett Capers, *Crime, Legitimacy, and Testifying*, 83 *IND. L.J.* 835 (2008).

<sup>9</sup> Interview with William Evans, Former Police Commissioner, Boston Police Department, in Boston, MA (Sept. 9, 2016).

<sup>10</sup> *Id.*

<sup>11</sup> Goldenberg, *supra*, note 4.

<sup>12</sup> Chris Burbank, *Ending Police Brutality Starts With Firing Dangerous Cops*, HUFFPOST (Aug. 12, 2018), [https://www.huffpost.com/entry/opinion-michael-brown-ferguson-police-shootings\\_us\\_5b6b3859e4b0530743c67bd2](https://www.huffpost.com/entry/opinion-michael-brown-ferguson-police-shootings_us_5b6b3859e4b0530743c67bd2)

<sup>13</sup> *Id.*

In Section III, we propose mandatory professional liability insurance for police officers as a possible solution. We discuss the history of the idea in the policing context and examine the insurance markets for lawyers, doctors, and drivers as comparisons. Our hope is that just as drivers with established histories of reckless driving can be priced off the road by insurance premiums, so too, the most dangerous officers might be forced into another profession. The idea has the advantage of being market-based, aligning the financial interests of individual officers, police departments, municipalities, and insurance companies towards safer policing. Unlike many accountability measures, mandatory professional liability insurance has the added benefit of not being solely punitive; officers with histories indicating their professionalism and excellence can be financially rewarded with lower premiums.

In short, this article is an attempt to provide point-by-point answers to the question raised by Eric Garner's grieving mother, and to provide a dynamic, innovative solution to the problem of police accountability. While believing in the potential of mandatory professional liability insurance as a solution, we acknowledge that this article must be the beginning of a substantive discussion. There is much work left to be done. However, it is our contention that the long-standing accountability problem will only be solved with new and innovative ways of thinking.

## I. THE CURRENT ARCHITECTURE OF POLICE ACCOUNTABILITY: A CRITICAL REVIEW

### A. *Why Accountability Matters In Building Trust*

In an op-ed following Eric Garner's death, former St Louis police officer Redditt Hudson said the "national crisis in police-community relations" is best solved by severe punishment of police officers who violate citizens' rights.<sup>14</sup> "They must be held accountable for their actions," he said.<sup>15</sup> Accountability and trust are intertwined.

President Barack Obama expressed the need for public trust of police officers in a 2017 article in the Harvard Law Review.<sup>16</sup> In 2015, public attitudes towards the police in the United States reached its lowest in decades,<sup>17</sup> though this has since improved.<sup>18</sup> In turn, officers worry much more

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<sup>14</sup> Redditt Hudson, *Police Officers Who Violate Citizens' Rights Must Be Punished. Accountability Is The Only Way Forward*, GUARDIAN, Dec. 30, 2014, <https://www.theguardian.com/commentisfree/2014/dec/30/police-officers-violate-rights-punished-accountability>.

<sup>15</sup> *Id.*

<sup>16</sup> Barack Obama, *The President's Role In Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 840–45 (2017).

<sup>17</sup> Jeffrey 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>.

<sup>18</sup> Jim Norman, *Confidence in Police Back at Historical Average*, GALLUP, July 10, 2017,

than they did in the past about their personal safety.<sup>19</sup> Ambush-style shootings of police officers have risen<sup>20</sup> and several high-profile deaths of civilians<sup>21</sup> have raised important questions about police use of force, whether justified or not. Reform-minded police chiefs are listening.

David Brown, the former police chief in Dallas, several months before an ambush shooting in 2016 that claimed five of his officers, said: “Trust is hard to earn and easy to lose.”<sup>22</sup> San Francisco’s new police chief William Scott acknowledged “challenging times” for law enforcement but said that reform was needed to be “better at what we do,” in a way that was “legitimate in the eyes of the public.”<sup>23</sup>

In 2016, Pew recently surveyed 7,917 police officers<sup>24</sup> and found that more than nine out of ten felt less safe following recent high-profile shootings of police officers by civilians.<sup>25</sup> More than eight out of ten nearly always, often, or sometimes have serious concerns for their safety.<sup>26</sup> This survey was conducted before and after the police ambush killings in Dallas and Baton Rouge. Fear is clearly a strong motivator, but here too facts help provide a broader and dispassionate perspective. A total of 128 officers died on duty in 2017, mostly in road accidents, a 10% fall from 143 the year before.<sup>27</sup> Officer deaths from shootings fell by a third to forty-four after a spike the previous year, and the overall number of firearm-related deaths

<http://news.gallup.com/poll/213869/confidence-police-back-historical-average.aspx>.

<sup>19</sup> RICH MORIN, KIM PARKER, RENEE STEPLER & ANDREW MERCER, *BEHIND THE BADGE*, PEW RESEARCH CTR., 5, (Jan. 11, 2017). [http://assets.pewresearch.org/wp-content/uploads/sites/3/2017/01/06171402/Police-Report\\_FINAL\\_web.pdf](http://assets.pewresearch.org/wp-content/uploads/sites/3/2017/01/06171402/Police-Report_FINAL_web.pdf).

<sup>20</sup> Christopher Ingraham, *Ambush Killings Of Police Officers Has Hit A 10-Year High*, WASHINGTON POST, Nov. 21, 2016, [https://www.washingtonpost.com/news/wonk/wp/2016/11/21/ambush-killings-of-police-officers-has-hit-a-10-year-high/?utm\\_term=.291f8968d5ad](https://www.washingtonpost.com/news/wonk/wp/2016/11/21/ambush-killings-of-police-officers-has-hit-a-10-year-high/?utm_term=.291f8968d5ad).

<sup>21</sup> See e.g. John Bacon, *Mistrial In Murder Case Against Cop Who Shot Walter Scott*, USA TODAY, Dec. 5, 2016, <https://www.usatoday.com/story/news/nation/2016/12/05/judge-rejects-mistrial-request-cop-who-shot-walter-scott/94992510/>; see also Mitch Smith, *Minnesota Officer Acquitted in Killing of Philando Castile*, N.Y. TIMES, June 16, 2017, [https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&\\_r=0](https://www.nytimes.com/2017/06/16/us/police-shooting-trial-philando-castile.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news&_r=0); see also Lucia Walinchus & Richard Pérez-Peña, *White Tulsa Officer is Acquitted in Fatal Shooting of Black Driver*, N.Y. TIMES, May 17, 2017, <https://www.nytimes.com/2017/05/17/us/white-tulsa-officer-is-acquitted-in-fatal-shooting-of-black-driver.html>.

<sup>22</sup> Tasha Tsiaperas, *Dallas Police Chief Releases Use Of Force Data Friday At White House Event*, DALLAS MORNING NEWS, Apr. 22, 2016, <http://www.dallasnews.com/news/crime/2016/04/22/dallas-police-chief-to-release-use-of-force-data-friday-at-white-house-event>.

<sup>23</sup> Vivian Ho, *New Chief Sworn In, Says Reforms Will Boost SFPD’s Public Image*, S.F. CHRONICLE, Jan. 23, 2017, <http://www.sfgate.com/bayarea/article/New-chief-sworn-in-says-reforms-will-boost-10878318.php>.

<sup>24</sup> MORIN ET AL. *supra*, note 19, at 7.

<sup>25</sup> *Id.* at 4.

<sup>26</sup> *Id.* at 9.

<sup>27</sup> PRELIMINARY 2017 LAW ENFORCEMENT OFFICER FATALITIES REPORT, NAT’L LAW ENF. OFFICERS MEM’L FUND 1, available at [http://www.nleomf.org/assets/pdfs/reports/fatality-reports/2017/2017-End-of-Year-Officer-Fatalities-Report\\_FINAL.pdf](http://www.nleomf.org/assets/pdfs/reports/fatality-reports/2017/2017-End-of-Year-Officer-Fatalities-Report_FINAL.pdf).

was below the average for the last decade.<sup>28</sup> For further perspective, the peak for shooting deaths of officers (rather than all deaths) was in 1973, when eighty-four officers were killed.<sup>29</sup>

Compared with other countries, the perception in the United States about whether police are punished for violating the law is surprising low, according to a 2015 global survey.<sup>30</sup> A higher proportion of people surveyed in 58 of 101 other countries believed the police are punished for breaking the law.<sup>31</sup> The Pew survey also revealed that seven out of ten officers in the United States feel that poorly performing colleagues are not held accountable.<sup>32</sup>

The whole discussion of when police use fatal force is plagued by a lack of reliable data. In the wake of Michael Brown's death in Ferguson, Missouri, former FBI Director James Comey recounted asking his staff how many African Americans are killed by police in the United States.<sup>33</sup> They could not tell him, partially because police departments are not required to report these fatal incidents.<sup>34</sup> This moment generated a new FBI initiative to nationally track the fatal use of force.<sup>35</sup> Its pilot period ran from July 1, 2017 to December 31, 2017, with the initial report delivered to the office of Office of Management and Budget in September of 2018.<sup>36</sup> National FBI data collection began on January 1, 2019.<sup>37</sup> It will be the first time the government attempts to systemically track how many civilians are killed by police. While perhaps a step in the right direction, because reporting is completely voluntary, it inevitably produces incomplete data. While we await the FBI's full report (and perhaps even afterwards, given its voluntary reporting), we are left with the Washington Post's Fatal Force Project as the best source of data on the subject.<sup>38</sup> The project relies on reporters combing local news accounts and headlines to record information about fatal force incidents.<sup>39</sup> They found 991 civilians died at the hands of police in 2015, 963 in 2016, 987 in 2017, and 998 in 2018. Absent rigorous government da-

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<sup>28</sup> *Id.* at 1, 3.

<sup>29</sup> *Id.* at 1.

<sup>30</sup> RULE OF LAW INDEX 2015, WORLD JUSTICE PROJECT, 49 (2015), available at [https://worldjusticeproject.org/sites/default/files/documents/roli\\_2015\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/roli_2015_0.pdf).

<sup>31</sup> *Id.*

<sup>32</sup> MORIN ET AL., *supra*, note 19, at 14.

<sup>33</sup> James Comey, Director, Fed. Bureau of Investigation, Address at Georgetown University, *Hard Truths: Law Enforcement and Race*, (Feb. 12, 2015), <https://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race>.

<sup>34</sup> *Id.*

<sup>35</sup> Uniform Crime Reporting Project, Federal Bureau of Investigation, *National Use-of-Force Data Collection* (last visited Jan. 21, 2017) <https://ucr.fbi.gov/use-of-force>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Fatal Force*, WASHINGTON POST, <https://www.washingtonpost.com/graphics/national/police-shootings-2017/> (accessed Feb. 18, 2019)

<sup>39</sup> *Id.*

ta, we are left with the rough estimate that the police kill a little less than a thousand civilians a year, or about three people per day.<sup>40</sup> By contrast, 46 officers died in the line of duty due to civilian felony conduct in 2017 and 47 died in various accidents, unrelated to encounters with civilians.<sup>41</sup>

While the unjustified use of lethal force holds a privileged place in the discussion of police accountability, it is by no means the only way that police officers may abuse the public trust upon which their legitimacy rests. A racially motivated stop, other excessive force, or even garden-variety rudeness can all serve to undermine the community's trust in the police. Thus, while fatal shootings are the paradigmatic event examined by this paper, we do not intend to exclude a broader notion of accountability. Gwen Carr's question is inevitably part of a larger issue: to what extent are police officers held accountable across a whole spectrum of behaviors, from suboptimal performance to recklessness, to wanton malfeasance? With this broader understanding of accountability and its important implications for public trust in mind, the following section examines some of the existing methods of accountability, assessing the effectiveness of each in turn.

### *B. Hiring Of Police Officers: How The Civil Service System Impedes Reforming Police Chiefs*

Perhaps the most effective way to remove dangerous officers from the force is to not hire them in first place. However, police departments operate within a 'civil service' system that drastically limits their ability to choose whom to hire. A civil service system is defined as "the administrative service of a government or international agency exclusive of the armed forces; *especially* one in which appointments are determined by competitive examination."<sup>42</sup> Thus, police chiefs generally face obstacles in hiring, promoting, disciplining or firing officers on their own terms. Nineteen out of twenty of the most populated cities<sup>43</sup> in the United States operate within a civil service system for the recruiting, hiring and firing, and promotion of police officers.<sup>44</sup>

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<sup>40</sup> Boston Globe Editorial Board, *Fatal encounters with police should be documented nationally*, BOSTON GLOBE (Aug. 8, 2018), <https://www.bostonglobe.com/opinion/editorials/2018/08/08/fatal-encounters-with-police-should-be-documented-nationally/fmeG8RBVx2p5QxmdZk9j8K/story.html?event=event12>.

<sup>41</sup> Uniform Crime Reporting Project, Federal Bureau of Investigation, *Law Enforcement Killed and Assaulted, 2017* (last visited Aug. 22, 2018), <https://ucr.fbi.gov/leoka/2017/home>

<sup>42</sup> *Civil service system*, MIRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/civil%20service> (last visited October 22, 2017).

<sup>43</sup> Interactive Population Map, CENSUS 2010, <https://www.census.gov/2010census/popmap/> (showing that New York, Los Angeles, Chicago, Houston, Philadelphia, Phoenix, San Antonio, San Diego, Dallas, San Jose, Jacksonville, Indianapolis, San Francisco, Austin, Columbus, Forth Worth, Charlotte, Detroit, El Paso and Memphis are the largest twenty cities in America in descending order).

<sup>44</sup> N.Y. CIV. SERV. LAW § 58 (Consol. 1949); CAL. GOV'T CODE § 45004 (Deering 1947); 50 ILL. COMP. STAT. ANN. 705/6.1 (LexisNexis, 2000); TEX. LOC. GOV'T CODE § 143.006 (LexisNexis, 1987);

In an effort to cripple the influence of politicians in the hiring process for *federal* government jobs, Congress passed The Pendleton Act, in 1883,<sup>45</sup> which required that individuals be hired for jobs on merit with competitive tests, using the score to determine fitness for a position.<sup>46</sup> New York was the first state to adopt the civil service system.<sup>47</sup>

More than 130 years later, New York city<sup>48</sup>, Los Angeles<sup>49</sup>, Chicago<sup>50</sup>, Houston<sup>51</sup>, Philadelphia<sup>52</sup>, Phoenix<sup>53</sup>, San Antonio,<sup>54</sup> San Diego<sup>55</sup>, Dallas<sup>56</sup>, San Jose<sup>57</sup>, Jacksonville<sup>58</sup>, Austin<sup>59</sup>, Columbus<sup>60</sup>, Fort Worth<sup>61</sup>, Charlotte<sup>62</sup>, Detroit<sup>63</sup>, El Paso<sup>64</sup>, Memphis<sup>65</sup> and San Francisco<sup>66</sup> still use the civil service systems put into place in their cities in the late 1800s and early 1900s. All of these cities' civil service systems are run by boards or commissions, which are often made up of members appointed by "chief executives" of municipalities.<sup>67</sup> While these civil service systems minimize the influence of politics in the hiring of officers, the civil service scheme prevents police chiefs from having autonomy in basic management decisions. Many Civil Service Boards are statutorily charged with the creation and administration

8 PA. CONS. STAT. ANN. § 1172 (2014); PHOENIX, ARIZ. CODE OF ORDINANCES §2.; FLA. STAT. ANN. § 125.88 (LexisNexis, 2017); OHIO REV. CODE ANN. § 124.40 (LexisNexis, 2007); CHARLOTTE, N.C. CODE OF ORDINANCES § 4.61; MICH. COMP. LAWS SERV. § 38.508 (LexisNexis, 1935); TENN. CODE ANN. § 8-8-409 (1974) [hereinafter *Civil Service Statutes*].

<sup>45</sup> U.S. DEP'T OF STATE, THE STATUTES AT LARGE OF THE UNITED STATES OF AMERICA FROM DECEMBER, 1881, TO MARCH, 1883. AND RECENT TREATIES, POSTAL CONVENTIONS, AND EXECUTIVE PROCLAMATIONS 403 (U.S. Sec'y of State ed., Vol. XXII, Washington: Gov't Printing Office, 1883), <https://books.google.com/books?id=cDE3AAAAIAAJ&pg=PA403#v=onepage&q&f=false>.

<sup>46</sup> *Id.* at 404.

<sup>47</sup> Steven Greenhouse, *City to Press for Easing of Civil Service Requirements*, N.Y. TIMES, Jan. 6, 2011, <http://www.nytimes.com/2011/01/07/nyregion/07civil.html>.

<sup>48</sup> N.Y. CIV. SERV. LAW § 58 (Consol. 1949).

<sup>49</sup> CAL. GOV'T CODE § 45004 (Deering 1947).

<sup>50</sup> 50 ILL. COMP. STAT. ANN. 705/6.1 (LexisNexis, 2000).

<sup>51</sup> TEX. LOC. GOV'T CODE § 143.006 (LexisNexis, 1987).

<sup>52</sup> 8 PA. CONS. STAT. ANN. § 1172 (2014).

<sup>53</sup> PHOENIX, ARIZ. CODE OF ORDINANCES §2.

<sup>54</sup> TEX. LOC. GOV'T CODE § 143.006 (LexisNexis, 1987).

<sup>55</sup> CAL. GOV'T CODE § 45004 (Deering 1947).

<sup>56</sup> TEX. LOC. GOV'T CODE § 143.006 (LexisNexis, 1987).

<sup>57</sup> *Id.*

<sup>58</sup> FLA. STAT. ANN. § 125.88 (LexisNexis, 2017).

<sup>59</sup> TEX. LOC. GOV'T CODE § 143.006 (LexisNexis, 1987).

<sup>60</sup> OHIO REV. CODE ANN. § 124.40 (LexisNexis, 2007).

<sup>61</sup> TEX. LOC. GOV'T CODE § 143.006 (LexisNexis, 1987).

<sup>62</sup> CHARLOTTE, N.C. CODE OF ORDINANCES § 4.61.

<sup>63</sup> MICH. COMP. LAWS SERV. § 38.506 (LexisNexis, 1935).

<sup>64</sup> 50 ILL. COMP. STAT. ANN. 705/6.1 (LexisNexis, 2000).

<sup>65</sup> TENN. CODE ANN. § 8-8-409 (1974).

<sup>66</sup> N.Y. CIV. SERV. LAW § 58 (Consol. 1949).

<sup>67</sup> See *Civil Service Statutes*, *supra*, note 44.

of civil service examinations.<sup>68</sup> Candidates' scores on these examinations may be the determining factor of their eligibility for open positions within a police force.<sup>69</sup>

In 2016, the U.S. Department of Justice published a report on the advancement of diversity in law enforcement.<sup>70</sup> It cited several facets of civil service systems as deterrents for underrepresented communities from applying for civil service positions.<sup>71</sup> This includes the physical requirements that affect recruitment of women and the disparate impact of written examinations on minority candidates.<sup>72</sup> Additionally, the educational requirement followed by many civil service systems hinders diversification of police departments.<sup>73</sup> A candidate's veteran status also waives a certain number of required college credits in some cities,<sup>74</sup> further limiting a chief's autonomy in selecting future officers.

### C. *Why The Courts Consistently Fail To Hold Police Accountable*

Courts are often perceived as an important venue to hold police accountable for fatal use of force with criminal prosecutions. However, as events surrounding the death of Eric Garner showed, prosecutions of officers accused of committing crimes involved in their duties are extremely rare. But low rates of prosecution and conviction do not apply when applied to other offenses committed by officers, as this section outlines. We set out to explore why prosecutions, and convictions, are so rare.

A very useful case to examine closely is a fatal shooting in Oklahoma. In that case, concerned motorists in Tulsa called police when they saw an SUV in the middle of a tree-lined street in September 2016.<sup>75</sup> The driver,

<sup>68</sup> 8 PA. CONS. STAT. ANN. § 1172 (2014); FLA. STAT. ANN. § 125.88 (LexisNexis, 2017); OHIO REV. CODE ANN. § 124.40 (LexisNexis, 2007); CHARLOTTE, N.C. CODE OF ORDINANCES § 4.61; MICH. COMP. LAWS SERV. § 38.506 (LexisNexis, 1935); TENN. CODE ANN. § 8-8-409 (1974).

<sup>69</sup> See e.g., *Selection Process, Civil Service Commission*, CITY OF COLUMBUS, <https://www.columbus.gov/civilservice/uniformed-police-series/Police-Officer/> (last visited October 22, 2017) (describing the testing process for the city of Columbus which explains that, while candidates must pass all four tests ("phases") administered, candidates are placed on the "eligible list" based on their Phase III ("Columbus Oral Police Examination") examination score).

<sup>70</sup> U.S. DEP'T OF JUSTICE EQUAL EMPL'T OPPORTUNITY COMM'N, *ADVANCING DIVERSITY IN LAW ENFORCEMENT* (2016)

<sup>71</sup> *Id.* at 17–24.

<sup>72</sup> *Id.* at 20.

<sup>73</sup> *Id.*

<sup>74</sup> See e.g., *Chicago Police Officer Recruitment*, CHICAGO POLICE DEP'T, <https://home.chicagopolice.org/bethechange/chicago-police-officer-recruitment/> (last visited October 24, 2017); *Hiring Process*, N.Y. POLICE DEP'T, <http://www1.nyc.gov/site/nypd/careers/police-officers/po-hiring.page> (last visited October 24, 2017); *Requirements*, HPDCAREER.COM, <http://www.hpdcareer.com/requirements.html> (last visited October 24, 2017).

<sup>75</sup> Lucia Walinchus & Richard Pérez-Peña, *White Tulsa Officer is Acquitted in Fatal Shooting of Black Driver*, N.Y. TIMES, May 17, 2017, <https://www.nytimes.com/2017/05/17/us/white-tulsa-officer-is-acquitted-in-fatal-shooting-of-black-driver.html> (note there are inconsistencies in the spelling of the

Terence Crutcher, was described as acting “erratically,” and was later found to have PCP<sup>76</sup> in his system.<sup>77</sup> Footage from a police cruiser’s dashboard camera and a police helicopter showed him with his hands in the air, a fact that was the focus of intense media coverage.<sup>78</sup> But according to police, and the jury that was later to decide what happened, he ignored demands to stop, kept reaching for his pockets, and went towards his open car window when officer Betty Jo Shelby shot him.<sup>79</sup> He was simultaneously Tased by another officer when Shelby’s fatal shot hit Mr. Crutcher in the chest.<sup>80</sup>

Following the shooting, Shelby was charged with first-degree manslaughter.<sup>81</sup> The jury at trial was made up of eight women and four men.<sup>82</sup> Four jurors were African American.<sup>83</sup> After nine hours of deliberations, Shelby was found not guilty.<sup>84</sup>

What is particularly interesting about this high-profile case is that the jury gave the trial judge, and the public, a rare insight into their deliberations. Members requested that a letter, written by the foreman of the jury on behalf of all jurors, be released to the media.<sup>85</sup> The jury concluded that “any officer put in that situation at that *exact moment* and regardless of the skin color, gender or size of the suspect, would have performed the same way” because “that instant required action, which two officers took simultaneously.”<sup>86</sup> At the same time, the letter indicates they struggled to understand whether her training “allowed her to holster her service weapon and draw her Taser instead.”<sup>87</sup> If so, they believed, that could have saved his life.<sup>88</sup> That possibility, the letter went on, meant that “many on the jury could nev-

victim’s name in this and other media reports and the spelling of his name in the court docket, such as Terence, Terance, Terrance and Terrence).

<sup>76</sup> PCP’s chemical name is phenacyclidine.

<sup>77</sup> Walinchus & Pérez-Peña, *supra*, note 75.

<sup>78</sup> See e.g. Liam Stack, *Video Released in Terence Crutcher’s Killing by Tulsa Police*, N.Y. TIMES, Sept. 19, 2016, <https://www.nytimes.com/2016/09/20/us/video-released-in-terence-crutchers-killing-by-tulsa-police.html>.

<sup>79</sup> Lucia Walinchus, *Tulsa Officer Cites Her Training in Testimony About Fatal Shooting*, N.Y. TIMES, May 15, 2017, [https://www.nytimes.com/2017/05/15/us/tulsa-officer-shooting.html?\\_r=0](https://www.nytimes.com/2017/05/15/us/tulsa-officer-shooting.html?_r=0).

<sup>80</sup> Dakshayani Shankar, *Tulsa Cop Betty Shelby’s Past Under Scrutiny After Terence Crutcher Shooting*, N.B.C. NEWS, Sept. 24, 2016, <http://www.nbcnews.com/news/us-news/tulsa-cop-betty-shelby-s-past-under-scrutiny-after-terence-n651441>

<sup>81</sup> OKL. ST. tit. 21 § 711; State v. Shelby, No. CF-2016-5138 (Tulsa County D.C. May 19, 2017), <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=tulsa&number=CF-2016-5138&cmid=2986351>.

<sup>82</sup> Walinchus & Pérez-Peña, *supra*, note 75.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> State v. Shelby, No. CF-2016-5138, Doc. no. 1036155209 (Notice of Letter) (Tulsa County D.C. May 19, 2017), <http://www.oscn.net/dockets/GetCaseInformation.aspx?db=tulsa&number=CF-2016-5138&cmid=2986351> [hereinafter *Jury Letter*].

<sup>86</sup> *Id.* (emphasis in original) This letter is not paginated for pin cites.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

er get comfortable with the concept of Betty Jo Shelby being blameless for Mr. Crutcher's death."<sup>89</sup>

Interestingly too, the letter said that evidence presented showed it was her training, rather than fear, that prompted her to act.<sup>90</sup> The jurors said this that was evidenced by the fact that two officers acted simultaneously (one with a Taser and officer Shelby with her gun in firing the fatal shot).<sup>91</sup>

To prove first-degree manslaughter in the Shelby case, the prosecution relied on two parts of the relevant statute.<sup>92</sup> In short, these were based on a mistaken self-defense, and unnecessary use of force to prevent a crime.<sup>93</sup> In her defense, she had United States Supreme Court case law<sup>94</sup> and an Oklahoma statute about justifiable use of deadly force by a police officer.<sup>95</sup> As with all criminal cases, in shooting Mr. Crutcher, Shelby had to have acted with criminal intent. So the jury was left with deciding, beyond a reasonable doubt, whether an officer making a split-second call should face criminal liability in stopping the perceived threat posed by Mr. Crutcher, who was high on PCP, ignoring the officer, and reaching into his car window. If found guilty, Shelby faced a felony conviction and a four-year prison sentence. If found not guilty she would be blameless, at least in a criminal sense. The choice for the jurors was an 'all or nothing' one – which they were clearly uncomfortable with.

As many jurors do in such cases, they decided to acquit, but not without expressing their frustration about their dilemma. They asked for a detailed review of the encounter and said if Shelby had an opportunity to “subdue the subject with less lethal force,” then “her ability and judgment as an of-

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*; see also Lucia Walinchus, *Tulsa Officer Cites Her Training in Testimony About Fatal Shooting*, N.Y. TIMES, May 15, 2017, [https://www.nytimes.com/2017/05/15/us/tulsa-officer-shooting.html?\\_r=0](https://www.nytimes.com/2017/05/15/us/tulsa-officer-shooting.html?_r=0)

<sup>91</sup> *Jury Letter, supra*, note 85.

<sup>92</sup> OKL. ST. tit. 21 § 711(2) (“Homicide is manslaughter in the first degree . . . [w]hen perpetrated without a design to effect death, and in a heat of passion . . . by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide”; OKL. ST. tit. 21 § 711 (3) “Homicide is manslaughter in the first degree . . . [w]hen perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed.”

<sup>93</sup> In the first theory, it had to prove that Shelby caused Mr. Crutcher's death, with a deadly weapon, that it was “not excusable or justifiable” and that her conduct was “in a heat of passion.” OKL. ST. tit. 21 § 711(2). Under the second theory, the homicide was allegedly “perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed.” OKL. ST. tit. 21 § 711(3).

<sup>94</sup> See *Graham v. Connor*, 490 U.S. 386 (1989) (The court set an “objective reasonableness” standard to govern all claims that law enforcement officers, in violation of the Fourth Amendment, used excessive force in the course of an arrest); see also *Tennessee v. Garner*, 471 U.S. 1 (1985) (use of deadly force against a fleeing felon is unconstitutional). Both cases were grounded in the Fourth Amendment's right to be free from unreasonable seizures. U.S. CONST. amend. IV.

<sup>95</sup> OKL. ST. tit. 21 § 732(3) “A peace officer . . . is justified in using deadly force when . . . [t]he officer is in the performance of his legal duty or the execution of legal process and reasonably believes the use of the force is necessary to protect himself or others from the infliction of serious bodily harm.”

ficer under pressure has to be called into question,” to the extent that her return to police work should be seriously considered.<sup>96</sup>

The jury’s concern that she could have used her Taser, as her colleague had done, illustrates the crack into which these kinds of cases can fall. They are justified in the eyes of the law on the basis of an acquittal, yet (when viewing circumstances dispassionately) could *at least* be seen as inappropriate or excessive and at least a potential act for disciplinary, rather than criminal, sanction. Equally, the jury was uncomfortable that an acquittal made her blameless, at least criminally.

This case is emblematic of another problem: jurors do not believe that police officers who have mistakenly perceived a deadly threat and thus mistakenly used deadly force are criminals. Jurors think of these cases as instances where a police officer doing a dangerous job made a mistake in the line of duty. They often empathize with an officer who had to make an unexpected split-second life-or-death decision. They understand that the officer, with better training or a cooler head, might have made better decisions. Indeed, in Betty Jo Shelby’s case, jurors questioned her judgment as a police officer. But they also understand that the decision was made in an instant and in a moment of terror – it may be bad policing, poor judgment, or a mistake, but they hesitate to label it a criminal act.

Other recent criminal cases have shown that jurors are consistently uncomfortable, or simply unwilling, to convict a police officer engaged in their duties. A mistrial was declared in the murder trial of North Charleston, S.C., officer Michael Slager, who was filmed shooting Walter Scott in the back as he ran away.<sup>97</sup> One juror reportedly just refused to convict him.<sup>98</sup> Michael Slager pleaded guilty to violating Mr. Scott’s civil rights six months later.<sup>99</sup> Similarly in Cincinnati, Ohio, a mistrial was declared for the shooting of Sam DuBose, pulled over for a license plate violation by University of Cincinnati police officer Ray Tensing.<sup>100</sup> A second trial also led

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<sup>96</sup> *Jury Letter*, *supra*, note 85. News reports after the incident gave an insight into her work and personal history. Her disciplinary record with Tulsa police department was clear before the shooting. See Dakshayani Shankar, *Tulsa Cop Betty Shelby’s Past Under Scrutiny After Terence Crutcher Shooting*, N.B.C. NEWS, Sept. 24, 2016, <http://www.nbcnews.com/news/us-news/tulsa-cop-betty-shelby-s-past-under-scrutiny-after-terence-n651441>. But in her application for a previous position with Tulsa County Sheriff’s Office she admitted to two domestic incidents, including damaging an ex-boyfriend’s car after they split up.

<sup>97</sup> Jenny Jarvie, *Judge declares mistrial in case of former South Carolina police officer who killed Walter Scott*, L.A. TIMES, Dec. 5, 2016, <http://www.latimes.com/nation/la-na-south-carolina-police-shooting-20161205-story.html>.

<sup>98</sup> John Bacon, *Mistrial In Murder Case Against Cop Who Shot Walter Scott*, USA TODAY, Dec. 5, 2016, <https://www.usatoday.com/story/news/nation/2016/12/05/judge-rejects-mistrial-request-cop-who-shot-walter-scott/94992510/>.

<sup>99</sup> Alan Blinder, *Ex-Officer who Shot Walter Scott Pleads Guilty in Charleston*, N.Y. TIMES, May 2, 2017, <https://www.nytimes.com/2017/05/02/us/michael-slager-walter-scott-north-charleston-shooting.html>

<sup>100</sup> Mark Berman, *Jury Deadlocks In Second Trial Of Former University Of Cincinnati Officer Who Fatally Shot Samuel Dubose*, WASHINGTON POST, June 23, 2017,

to a hung jury.<sup>101</sup> In June 2017, Minnesota police officer Jeronimo Yanez was found not guilty of second degree manslaughter for shooting Philando Castile.<sup>102</sup> For all the complex racial dynamics of these cases, just as with Betty Jo Shelby's trial, juries do not seem to split down racial lines either. Even in racially charged deaths, juries are clearly uncomfortable with convicting police officers, whatever the racial makeup of the jurors.<sup>103</sup>

Criminal charges and convictions of fatal police encounters are extremely rare.<sup>104</sup> In 2015, The Washington Post reported that over the previous decade, just fifty-four police officers had been charged in connection with an on-duty shooting death.<sup>105</sup> This would be over a period in which around 10,000 people were shot and killed, if consistent with data gathered by The Guardian<sup>106</sup> and The Washington Post.<sup>107</sup> Of those fifty-four officers, an "overwhelming majority" of the people killed were unarmed.<sup>108</sup> The Washington Post said that was one of four common factors that prompted charges – the others being the existence of video evidence, the victim was

[https://www.washingtonpost.com/news/post-nation/wp/2017/06/23/second-trial-of-former-university-of-cincinnati-officer-who-fatally-shot-samuel-dubose-ends-with-deadlocked-jury/?utm\\_term=.0ea4b2b1c2f3](https://www.washingtonpost.com/news/post-nation/wp/2017/06/23/second-trial-of-former-university-of-cincinnati-officer-who-fatally-shot-samuel-dubose-ends-with-deadlocked-jury/?utm_term=.0ea4b2b1c2f3).

<sup>101</sup> Kevin Grasher & Sharon Coolidge, *Ray Tensing Jury 'Almost Evenly Split,' Judge Declares Second Mistrial*, CINCINNATI ENQUIRER, June 23, 2017, <https://www.cincinnati.com/story/news/2017/06/23/ray-tenzing-retrial-deliberations/422913001/>.

<sup>102</sup> Smith, *supra*, note 21.

<sup>103</sup> For instance, the jury in the second Ray Tensing murder trial, which led to a mistrial, was made up of ten white and two black members. See Sharon Coolidge and Kevin Grasha, *From 200-plus to 12: Jury Seated For Tensing Trial*, CINCINNATI ENQUIRER, Nov. 1, 2016, <http://www.cincinnati.com/story/news/tenzing/2016/10/31/200-plus-12-jury-selected-tenzing-trial/93085038/>. Yet, when a mistrial was declared, the jurors told the judge they were "almost evenly split" on a verdict, suggesting a potential 7-5 split on either side. See Mark Berman, *Jury Deadlocks In Second Trial Of Former University Of Cincinnati Officer Who Fatally Shot Samuel Dubose*, WASHINGTON POST, June 23, 2017, [https://www.washingtonpost.com/news/post-nation/wp/2017/06/23/second-trial-of-former-university-of-cincinnati-officer-who-fatally-shot-samuel-dubose-ends-with-deadlocked-jury/?utm\\_term=.0ea4b2b1c2f3](https://www.washingtonpost.com/news/post-nation/wp/2017/06/23/second-trial-of-former-university-of-cincinnati-officer-who-fatally-shot-samuel-dubose-ends-with-deadlocked-jury/?utm_term=.0ea4b2b1c2f3). Similarly, in the acquittal of Jeronimo Yanez in the shooting of Philando Castile, two members of the jury were black. See *Officer Yanez Found Not Guilty On All Counts In Castile's Death*, W.C.C.O., June 16, 2017, <http://minnesota.cbslocal.com/2017/06/16/jeronimo-yanez-verdict-philando-castile/>. A jury of four black and eight white members acquitted black Milwaukee officer Dominique Heaggan-Brown over the shooting death of Sylville Smith, who was also black. See Ivan Moreno, *Milwaukee Mayor Urges Peaceful Protest After Ex-Cop Cleared In Killing Of Black Man*, CHICAGO TRIBUNE, June 21, 2017, <http://www.chicagotribune.com/news/nationworld/midwest/ct-milwaukee-cop-dominique-heaggan-brown-20170621-story.html>.

<sup>104</sup> There is no central recording of this data, at least nationally, so the work is left to researchers who collect this information via media reports or the examination of court records.

<sup>105</sup> Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASHINGTON POST, Apr. 11, 2015, [http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm\\_term=.c8e5d668b145](http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.c8e5d668b145).

<sup>106</sup> *The Counted* database. *The Counted: People Killed By Police In The US (2016)*, GUARDIAN (accessed Oct. 15, 2017), <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database>.

<sup>107</sup> *Fatal Force*, *supra*, note 38.

<sup>108</sup> Kimberly Kindy & Kimbriell Kelly, *Thousands Dead, Few Prosecuted*, WASHINGTON POST, Apr. 11, 2015, [http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm\\_term=.c8e5d668b145](http://www.washingtonpost.com/sf/investigative/2015/04/11/thousands-dead-few-prosecuted/?utm_term=.c8e5d668b145).

shot in the back, inculpatory testimony from other officers, or claims of a cover-up.<sup>109</sup> Forty-three cases had one, and nineteen cases had at least two, of these factors.<sup>110</sup>

In reporting after the not guilty verdict in the 2017 trial of the Minnesota officer charged with the second-degree manslaughter of Philando Castile, these figures were updated.<sup>111</sup> Since 2005, eighty-two nonfederal law enforcement officers were charged in connection with an on-duty fatal shooting, of which twenty-nine (35%) were convicted of a crime.<sup>112</sup> Thirty-three (40%) were found not guilty.<sup>113</sup> Twenty cases were pending.<sup>114</sup>

Any perception that courts and juries are not as forgiving when police officers are involved in *other* criminal conduct, like off-duty violence, sexual assault, or theft is wrong.<sup>115</sup> A study of 6,724 cases in which officers were arrested<sup>116</sup> involved 5,545 nonfederal individual sworn officers, covering a seven-year period ending in 2011.<sup>117</sup> More than half of the arrests were made for a crime allegedly committed while the officer was on duty, and two thirds of the arrests were made by another agency other than the one that employed them.<sup>118</sup> The study did not differentiate between jury and non-jury trials, or a guilty plea, but in cases where there was a known outcome to a criminal charge, just over 71% of officers were convicted.<sup>119</sup> In fact, the more serious the offense, up to a point (as the fatal incidents show), the more likely a conviction would result.<sup>120</sup>

Families of fatal force victims can also seek judicial remedy via a federal civil rights lawsuit.<sup>121</sup> Previous law review articles have argued that their use as a way to regulate police behavior is ineffective.<sup>122</sup> An analysis

<sup>109</sup> *Id.*

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

<sup>111</sup> Mark Berman, *Minn. Officer Acquitted in Shooting of Philando Castile During Traffic Stop, Dismissed from Police Force*, WASHINGTON POST, June 17, 2017, <https://www.washingtonpost.com/news/post-nation/wp/2017/06/16/minn-officer-acquitted-of-manslaughter-for-shooting-philando-castile-during-traffic-stop/>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See generally Philip M. Stinson, John Liederbach, Steven P. Lab, Steven L. Brewer, *Police Integrity Lost: A Study of Law Enforcement Officers Arrested*, NAT'L CRIM. JUSTICE REF. SERV., Apr., 2016, <https://www.ncjrs.gov/pdffiles1/nij/grants/249850.pdf>.

<sup>116</sup> The study examined all offences reported in the media, which were then categorized as sexual assaults, violence, crimes involving drugs or alcohol and those motivated by profit.

<sup>117</sup> Stinson et al, *supra*, note 115, at 76.

<sup>118</sup> *Id.* at 77.

<sup>119</sup> *Id.* at 80.

<sup>120</sup> *Id.* at 81.

<sup>121</sup> Civil rights cases use the federal statute 42 U.S.C. § 1983.

<sup>122</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 URBAN L. J. 587 (argues that indemnification provides no deterrence for misconduct); Judith A.M. Scully, *Rotten Apple Or Rotten Barrel?: The Role Of Civil Rights Lawyers In Ending The Culture Of Police Violence*, 21 NAT'L BLACK L.J. 137, 150-152 (2009) (civil rights settlements are not kept on the personnel

of this issue will be discussed, *infra*, within the context of mandatory professional liability insurance.<sup>123</sup>

#### D. *Faults In The Decertification Process*

Withdrawing an officer's certification for sufficient misconduct represents an alternative method for forcing errant officers out of policing. In Daniel Pantaleo's case, this option was simply not available. New York is one of the states that does not use this form of accountability infrastructure, and it is in the minority. For states that do decertify, there are many additional accountability problems.

Certification of a police officer is analogous to a professional license. An important tool of accountability is the power to withdraw that certification.<sup>124</sup> Certification for officers is given in forty-nine states,<sup>125</sup> while forty-four states have some form of mechanism to *decertify* police or law enforcement officers, preventing a problem officer working in another department.<sup>126</sup> These organizations are generally referred to by the acronym P.O.S.T., Peace Officer Standards and Training.<sup>127</sup>

In the six states that do not decertify police officers, including New York,<sup>128</sup> a person will have a more powerful independent regulator to complain to about a bad haircut than a police officer's misconduct. For example, in Massachusetts, the work of barbers or hairdressers, manicurists or home inspectors require licenses that can be taken away<sup>129</sup> but there is no mechanism to withdraw a police officer's certification.<sup>130</sup> Law enforcement oversight can also be so weak in other states that *do* decertify officers that with

files of problem officers, which could reflect a clean record but multiple § 1983 claims); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1354–55 (2015) (describing the general ineffectiveness of § 1983 cases to incentivize reform); Alison L. Patton, Note, *The Endless Cycle of Abuse: Why 42 U.S.C. Section 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753 (1993) (discussion of why § 1983 fails to deter police brutality).

<sup>123</sup> See SECTION III-E-1, *infra*.

<sup>124</sup> See generally Loren T. Atherley & Matthew J. Hickman, *Officer Decertification and the National Decertification Index*, 16 POLICE Q. 420 (2012-13).

<sup>125</sup> The only state that does not have a Peace Officer Standards and Training organization that certifies officers is Hawaii, and the District of Columbia's P.O.S.T. entity does not certify. See MATTHEW J. HICKMAN, POST AGENCY CERTIFICATION PRACTICES, 2015, AMERICAN SOCIETY OF CRIMINOLOGY (Nov. 2016) (Conference paper).

<sup>126</sup> See Roger Goldman, *A Model Decertification Law*, 32 ST. LOUIS U. PUB. L. REV. 147, 147 n.3 (2012-13) (list of states and organizations with certification regimes); *id.*, n.4 (list of state statutes).

<sup>127</sup> See *id.* at 147.

<sup>128</sup> The states that still do not have a P.O.S.T. system that decertifies police officers are California, Hawaii, Massachusetts, New York, New Jersey, and Rhode Island.

<sup>129</sup> MASS. GEN. LAWS. ch. 112 § 1, 87u–jj, 222–223.

<sup>130</sup> See, e.g., *Division of Professional Licensure Boards*, OFFICE OF CONSUMER AFFAIRS & BUSINESS REGULATION (accessed June 10, 2017), <http://www.mass.gov/ocabr/government/oca-agencies/dpl-tp/dpl-boards/>.

respect to licensure, a cosmetologist is more accountable for a bad manicure than a police officer is for bad behavior.<sup>131</sup>

In Michigan, certification can be revoked when a false statement is submitted during the application process, an applicant has a relevant conviction less than seven years old, or if he or she commits or attempts a felony.<sup>132</sup> Having a DUI conviction,<sup>133</sup> driving while on drugs,<sup>134</sup> stalking,<sup>135</sup> assault and battery,<sup>136</sup> serious assault or an assault with an injury,<sup>137</sup> and possessing a controlled substance<sup>138</sup> are now new grounds for license revocation.<sup>139</sup> These offenses were only added in 2016.<sup>140</sup>

The relevant agency, Michigan's Commission on Law Enforcement Standards, assures the public that it revokes licenses for those officers who are "unfit."<sup>141</sup> But the law that gives it statutory authority makes no mention of disciplinary history as grounds to decertify.<sup>142</sup> So, "unfit" for the commission is limited to those guilty of a qualifying offense rather than non-criminal misconduct, or criminal conduct that is not prosecuted. Arguably, it is a watchdog with periodontitis – a few teeth, but weak ones.

Not surprisingly, a newspaper investigation in 2017 found several examples of Michigan officers allowed to resign, with no prosecution for criminal conduct, only to land jobs in other departments.<sup>143</sup> In fact, Michigan disqualifies officers at among the lowest rates in the United States.<sup>144</sup>

While it is among the worst, Michigan is not alone in having weak decertification processes. In reporting by the Wall Street Journal, similar examples were found in Pennsylvania, which did not decertify *any* officers

<sup>131</sup> See Louise Radnofsky, Zusha Elinson, John R. Emshwiller and Gary Fields, *Why Some Problem Cops Don't Lose Their Badges*, WALL ST. J, Dec. 30, 2016, <https://www.wsj.com/articles/why-some-problem-cops-dont-lose-their-badges-1483115066> (article uses Pennsylvania as an example of inadequate police oversight in comparison with other licensed professions).

<sup>132</sup> MICH. COMP. LAWS § 28.601 28.609(12) (felony defined here as a criminal offense punishable by more than a year in prison).

<sup>133</sup> MICH. COMP. LAWS § 28.601 257.625(1).

<sup>134</sup> MICH. COMP. LAWS § 28.601 257.625(8).

<sup>135</sup> MICH. COMP. LAWS § 28.601 750.411h.

<sup>136</sup> MICH. COMP. LAWS § 28.601 750.81.

<sup>137</sup> MICH. COMP. LAWS § 28.601 750.81a.

<sup>138</sup> MICH. COMP. LAWS §§ 28.601, 333.7403, 333.7404(2)(a), (b), (c).

<sup>139</sup> MICH. COMP. LAWS §§ 28.601, 257.625(12)(d).

<sup>140</sup> Michigan Commission on Law Enforcement Standards Act, 2016 Mich. Legis. Serv. P.A. 289 (codified as Mich. Comp. Laws § 28.601).

<sup>141</sup> M.C.O.L.E.S. Brochure, MICHIGAN COMMISSION ON LAW ENFORCEMENT STANDARDS, [http://www.michigan.gov/documents/mcoles/MCOLES\\_brochure2014\\_446542\\_7.pdf](http://www.michigan.gov/documents/mcoles/MCOLES_brochure2014_446542_7.pdf) (undated, accessed Aug. 1, 2017) (the file name suggests this was created in 2014).

<sup>142</sup> MICH. COMP. LAWS §§ 28.601–.616.

<sup>143</sup> Jim Schaefer & Gina Kaufman, *How Problem Cops Stay on Michigan's Streets*, DETROIT FREE PRESS, 2017, <http://www.freep.com/story/news/local/michigan/2017/07/09/how-problem-cops-stay-street/414813001/>.

<sup>144</sup> *Id.*

between 2012 and the time of the article's publication in 2016.<sup>145</sup> It had only decertified 31 officers in 12 years.<sup>146</sup> The decertification process in Louisiana is so ineffective that officers serving prison sentences are still, on paper, able to be police officers.<sup>147</sup> Since 1976, only six officers have ever lost their certification.<sup>148</sup> In Minnesota, a newspaper investigation in 2017 found that more than 140 officers with criminal convictions, some for serious and violent offenses, were still in law enforcement because of the weak jurisdiction of its P.O.S.T. entity.<sup>149</sup> However it should be noted that over the same time period, Georgia decertified 5,624 officers.<sup>150</sup> Having a decertifying agency depends on the political will to make them effective.

The problem of a failure to report conduct to the state-level certifying agency is a problem highlighted in an influential 2013 law review article by Professor Roger Goldman, an expert in this particular field of police accountability.<sup>151</sup> A conference paper prepared for the 2016 meeting of the American Society of Criminology said this problem remains.<sup>152</sup> While the vast majority of the forty-four states that have decertification power are obliged to be told when a police officer 'separates' from a department, in twenty of the forty-four P.O.S.T. entities with decertification power, it is up to that agency to find out if there was any underlying misconduct as the reason for a resignation or termination.<sup>153</sup> Instead, misconduct is often discovered in media reporting.<sup>154</sup>

There have been improvements in powers available to P.O.S.T. entities – all agencies are now able to decertify for a felony conviction (which was not always the case), and 57% are able to decertify for misconduct.<sup>155</sup> But this merely shows how weak these agencies continue to be. If decertification is only based on misconduct, in about half the states that have P.O.S.T. agencies, that suggests the rest, like Michigan, are merely window dressing – giving an appearance of oversight, but really only based on the hollow

<sup>145</sup> Radnofsky et al., *supra*, note 131.

<sup>146</sup> *Id.*

<sup>147</sup> Bryn Stole & Rebekah Allen, *Louisiana Less Likely To Strip Law Enforcement Officers Of Credentials Than Any Other State; Lawmakers Aim To Change That*, *ADVOCATE*, June 3, 2017, [http://www.theadvocate.com/baton\\_rouge/news/crime\\_police/article\\_e3f12332-464b-11e7-a4f4-f369e513d850.html](http://www.theadvocate.com/baton_rouge/news/crime_police/article_e3f12332-464b-11e7-a4f4-f369e513d850.html).

<sup>148</sup> *Id.*

<sup>149</sup> Jennifer Bjorhus & MaryJo Webster, *Shielded by the Badge: Convicted But Still Policing*, *STAR TRIBUNE*, Oct. 1, 2017, <http://www.startribune.com/minnesota-police-officers-convicted-of-serious-crimes-still-on-the-job/437687453/>.

<sup>150</sup> Radofsky et al., *supra*, note 131.

<sup>151</sup> See generally Goldman, *supra*, note 126.

<sup>152</sup> MATTHEW J. HICKMAN, *POST AGENCY CERTIFICATION PRACTICES*, 2015, PAGE 5, *AMERICAN SOCIETY OF CRIMINOLOGY* (Nov. 2016) (Conference paper).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 2.

guarantee of decertification only upon conviction of a felony or certain other crimes.

Finally, the National Decertification Index is designed to keep track of decertified officers across state lines. President Barack Obama's task force on policing recommended that it should cover all relevant agencies.<sup>156</sup> However, not all states contribute to it,<sup>157</sup> despite failed attempts by Congress to make reporting mandatory.<sup>158</sup> Even among states that do pass on the names of decertified officers, it is not widely used. Out of 17,985 police departments and agencies in the United States,<sup>159</sup> only about 1,400 have requested access to the database – despite it being available at no cost.<sup>160</sup>

While one cannot help but conclude that P.O.S.T boards are currently largely ineffective, we believe they might yet play important role. In fact, with enough political will, we propose at least one scenario below where they become a critical part of the solution.

#### *E. Why Body Worn Cameras Will Never Be The Complete Solution To Police Accountability*

Body-worn cameras (B.W.C.s) for police were not in place when Eric Garner's final moments were filmed. It took a bystander with a cell phone for the events leading to his death to be captured. In fact, New York city's police department will not fully adopt body cameras for all units until August 2019, but only after a police lawsuit tried to prevent them.<sup>161</sup> It is unclear whether officer Pantaleo knew he was being filmed during Mr. Garner's final moments, but objective research generally shows that B.W.C.s reduce the number of 'use of force' incidents against the public and complaints against police officers when worn routinely. In fact, video evidence (like that capturing Mr. Garner's death) has caused a significant rise in the number of upheld complaints against police in New York, bolstering their justification.<sup>162</sup>

<sup>156</sup> FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21<sup>ST</sup> CENTURY POLICING, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES 29–30 (2015), available at [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf) [hereinafter *President's Report*].

<sup>157</sup> *National Law Enforcement Decertification Index*, COMM'N ON ACCRED'N FOR L. ENF. AGENCIES 2–3 (participation increased from 30 states / P.O.S.T. agencies in 2011 to forty states in 2016), [https://www.calea.org/sites/default/files/NatlDecertificationIndex\\_PoliceFoundation.pdf](https://www.calea.org/sites/default/files/NatlDecertificationIndex_PoliceFoundation.pdf) (Oct. 2016).

<sup>158</sup> *Id.* at 4.

<sup>159</sup> *President's Report*, *supra*, note 156.

<sup>160</sup> Decertification Index, *supra*, note 157, at 2.

<sup>161</sup> Hilary Russ, *New York City Police To Wear Body Cameras Under Labor Settlement*, REUTERS, Jan. 31, 2017, <http://www.reuters.com/article/us-new-york-police-cameras-idUSKBN15G306>; *Body-worn Cameras*, NEW YORK POLICE DEPT., <https://www1.nyc.gov/site/nypd/about/about-nypd/equipment-tech/body-worn-cameras.page>.

<sup>162</sup> John Annesse & Graham Rayman, *Review Board Substantiates 30% Of Civilian Complaints Against NYPD Officers In December With Video Evidence*, N.Y. Daily News, Jan. 15, 2016, <http://www.nydailynews.com/new-york/30-civilian-complaints-nypd-substantiated-article-1.2497121>.

In Orlando, researchers examined the effect of B.W.C.s on police and public behavior.<sup>163</sup> They found use of force incidents halved among officers with cameras, while civilian complaints dropped by nearly two thirds.<sup>164</sup> A similar study in 2015 showed that use of force incidents in Rialto, California, more than halved and citizen complaints fell by nearly nine tenths.<sup>165</sup> In Birmingham, Alabama, complaints fell by more than two thirds and led to a drop of more than a third in the use of force by officers when they started adopting B.W.C.s.<sup>166</sup> Similar advantages were shown by a study in Arizona.<sup>167</sup> That said, a recent and much larger study conducted in Washington D.C. appeared to suggest B.W.C.s have little effect on police behavior.<sup>168</sup> However, while the Washington study has muddied the waters, the majority of other research appears to support the idea that B.W.C.s work for both sides of the thin blue line. In any event, using footage as an ‘impartial witness’ to events involving police officers (for evidence gathering of crimes, or monitoring of officer behavior, for instance) is a good reason to have them – whether or not B.W.C.s actually affect the behavior of officers or the public. In other words, even if they do not improve officer behavior, they still improve accountability. Their adoption also means those subject to use of force are not reliant on bystanders filming with cell phones.

In 2013, a sample number of police departments studied by the federal government showed more than three quarters of departments that responded had not adopted the technology.<sup>169</sup> Adoption based on more recent interest in the technology is likely to be higher, but a more up-to-date national picture is unclear. A survey in 2015 of 70 major cities in 39 states found nearly all were planning to adopt B.W.C.’s but less than a fifth were fully opera-

<sup>163</sup> Wesley Jennings, Mathew Lynch, Lorie Fridell, *Evaluating the Impact of Police Officer Body-Worn Cameras (BWCs): The Orlando Police Department (O.P.D.) Experience*, 43 J. CRIM. JUSTICE 480 (2015).

<sup>164</sup> *Id.* at 482.

<sup>165</sup> Barak Ariel, William Farrar, Alex Sutherland, *The Effect of Police Body-Worn Cameras on Use of Force and Citizens’ Complaints Against the Police: A Randomized Controlled Trial*, 31 J. QUANT. CRIM. 509, 523-24 (2015).

<sup>166</sup> Carol Robinson, *Birmingham Police Body Cameras Bring Drop In Use Of Force, Citizen Complaints*, BIRMINGHAM NEWS, Sept. 14, 2015, [http://www.al.com/news/birmingham/index.ssf/2015/09/birmingham\\_police\\_body\\_cameras\\_1.html](http://www.al.com/news/birmingham/index.ssf/2015/09/birmingham_police_body_cameras_1.html).

<sup>167</sup> Justin Ready & Jacob Young, *The Impact Of On-Officer Video Cameras On Police-Citizen Contacts: Findings From A Controlled Experiment In Mesa, AZ*, 11 J. EXP. CRIM. 445, 451-52 (2015) (officers wearing body cameras conducted fewer stop and frisk searches than those without them, made fewer arrests, and BWCs were much more likely regarded as helpful by officers who had them).

<sup>168</sup> Amanda Ripley & Timothy Williams, *Body Cameras Have Little Effect on Police Behavior*, *Study Says*, N.Y. TIMES, Oct. 20, 2017, <https://www.nytimes.com/2017/10/20/us/police-body-camera-study.html>; David Yokum, Anita Ravishankar & Alexander Coppock, *Evaluating the Effects of Police Body-Worn Cameras: A Randomized Controlled Trial*, (The Lab @ DC Office of the City Administrator, Working Paper No. ISPS17-028 2017), [http://bwc.thelab.dc.gov/TheLabDC\\_MPD\\_BWC\\_Working\\_Paper\\_10.20.17.pdf](http://bwc.thelab.dc.gov/TheLabDC_MPD_BWC_Working_Paper_10.20.17.pdf).

<sup>169</sup> LINDSAY MILLER, JESSICA TOLIVER & POLICE EXECUTIVE RESEARCH FORUM, *IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 2* (2014), <https://www.justice.gov/iso/opa/resources/472014912134715246869.pdf>.

tional.<sup>170</sup> The U.S. Department of Justice conducted another survey and established that 47% of surveyed police departments have adopted B.W.C.'s.<sup>171</sup> In any event, for many departments the adoption costs are simply too high, restrictions have been legislated that defeat the public oversight that justified them in the first place, and police unions in some cities have been reluctant to sanction them.

Departments in Indiana, Michigan and Connecticut have shelved plans for implementation, citing prohibitive storage costs.<sup>172</sup> In addition, some states have introduced legislation that categorizes footage as, by default, non-disclosable,<sup>173</sup> potentially undermining the cameras' public accountability and oversight purpose.<sup>174</sup>

Other departments have also been slow to adopt B.W.C.'s, partly because of union obstruction. In Boston, an attempt to start a pilot body camera program with 100 volunteers had to be mandated when not a single officer stepped forward<sup>175</sup> because the police union directed that nobody should volunteer.<sup>176</sup> The union also tried, unsuccessfully, to block their implementation in court.<sup>177</sup> Many other departments have faced similar legal

<sup>170</sup> MAJOR CITIES CHIEFS AND MAJOR COUNTY SHERIFFS, TECHNOLOGY NEEDS: BODY WORN CAMERAS, 7–8 (2015), <https://assets.bwbx.io/documents/users/iqjWHBFdfxIU/rvnT.EAJQwK4/v0>.

<sup>171</sup> *Justice Department Announces \$20 Million in Funding to Support Body-Worn Camera Pilot Program*, U.S. DEP'T OF JUSTICE (May 1, 2015), <https://www.justice.gov/opa/pr/justice-department-announces-20-million-funding-support-body-worn-camera-pilot-program>; BUREAU OF JUST. STAT., BODY-WORN CAMERAS ACQUIRED BY NEARLY HALF OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES (2018), <https://www.bjs.gov/content/pub/press/bwclea16pr.cfm>.

<sup>172</sup> Rick Callahan, *Some Police Departments Shelve Body Cameras, Cite Data Costs*, ASSOCIATED PRESS (Sept. 10, 2016), <http://bigstory.ap.org/article/f19d7270535f4202b92de1872278330f/some-police-suspend-body-cameras-or-hold-citing-costs>.

<sup>173</sup> See, e.g., 50 IL COMP. STAT. 706/10-20(b) (2016) (taking a default position that footage is exempted from open records legislation subject to exceptions); MINN. STAT. § 13.82 (2016) (classifying police body camera footage as non-public or private, subject to exceptions); MO. REV. STAT. § 610.100 (2016) (footage is regarded as a closed record until an investigation is complete); N.C. GEN. STAT. § 132-1.4A (2016) (footage is not a public record and can only be shown to a person featured in the recording, or their representative, and not copied); KAN. STAT. ANN. § 45-221(a)(10)(A)–(F) (BWC footage regarded as “criminal investigation records” and exempt from mandatory public records law disclosure).

<sup>174</sup> See Nick Wing, *Here's How Police Could End Up Making Body Cameras Mostly Useless*, HUFFINGTON POST (Oct. 10, 2015), [http://www.huffingtonpost.com/entry/police-body-camera-policy\\_us\\_5605a721e4b0dd8503079683](http://www.huffingtonpost.com/entry/police-body-camera-policy_us_5605a721e4b0dd8503079683); see also Amy Cajda, *When Public Records Aren't Made Public*, SLATE, Nov. 16, 2017, [http://www.slate.com/articles/news\\_and\\_politics/politics/2017/11/the\\_public\\_should\\_have\\_the\\_right\\_to\\_see\\_police\\_body\\_camera\\_footage.html?utm\\_content=bufferd8205&utm\\_medium=social&utm\\_source=facebook.com&utm\\_campaign=buffer](http://www.slate.com/articles/news_and_politics/politics/2017/11/the_public_should_have_the_right_to_see_police_body_camera_footage.html?utm_content=bufferd8205&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer).

<sup>175</sup> Jay Ransom, *100 Boston Police Officers To Wear Body Cameras*, BOSTON GLOBE, Aug. 16, 2016, <https://www.bostonglobe.com/metro/2016/08/16/boston-police-randomly-assign-body-cameras/oHwxC8DD391lpjBuNCnr0L/story.html>.

<sup>176</sup> Evan Allen, *Judge Grants Police Commissioner Authority For 100 Body Cameras*, BOSTON GLOBE, Sept. 19, 2016, <https://www.bostonglobe.com/metro/2016/09/09/judge-expected-issue-key-ruling-dispute-over-body-cameras-for-boston-police-officers/dGIlBUhuExoNZUpCbJr7JL/story.html>.

<sup>177</sup> *Id.*

attempts by unions to halt or slow down B.W.C. implementation.<sup>178</sup> In fact, research shows that non-unionized departments adopt B.W.C.'s at higher rates.<sup>179</sup>

In sum, while B.W.C.'s are widely seen as part of the solution of dealing with police misconduct, and protecting officers from frivolous complaints, their adoption and use is far from a complete one. Some departments will never adopt them because of costs or union obstruction, and states have been legislating their way toward making the cameras mere uniform adornments. So, while B.W.C.'s are useful, they are unlikely ever to be a complete accountability solution.

#### *F. Accountability Using Civilian Oversight Lacks Evidence Of Effectiveness*

Officer Daniel Pantaleo was investigated by New York's civilian oversight body, the Civilian Complaints Review Board, over his involvement in Eric Garner's death.<sup>180</sup> It took three years to recommend "departmental charges," the most serious recommendation the board could give, which could lead to suspension or discipline.<sup>181</sup> In July 2018, deciding that it would no longer wait for the Department of Justice to bring charges, the board charged Pantaleo with violating departmental regulations.<sup>182</sup> He will face an intra-department trial in May 2019, which may result in his dismissal.<sup>183</sup> However, the final decision on what discipline to impose still rests with the city's police commissioner.<sup>184</sup>

<sup>178</sup> See e.g. David Knutson, *Judge Won't Suspend Maplewood Police Body-Camera Policy*, PIONEER PRESS, Dec. 18, 2016, <http://www.twincities.com/2016/12/08/maplewood-police-union-body-camera-policy-lawsuit/> (Maplewood, MN); see also Noelle Phillips, *Denver Police Union Files Lawsuit Over Body Camera Program*, DENVER POST, Nov. 4, 2015, <http://www.denverpost.com/2015/11/04/denver-police-union-files-lawsuit-over-body-camera-program/> (Denver, CO); see also Brian Rokos, *Sheriff's Union Sues To Stop Body-Camera Use*, PRESS ENTERPRISE, Jan. 28, 2015, <http://www.pe.com/2015/01/28/riverside-county-sheriff8217s-union-sues-to-stop-body-camera-use/> (Riverside County, CA), see also Graham Lee Brewer, *Arbitrator Tells OKC Police To Shelve Body Camera Use*, THE OKLAHOMAN, June 14, 2016, <http://newsok.com/article/5504200>.

Graham Lee Brewer, *Oklahoma City Police, Union Reach Deal On Body Camera Program*, THE OKLAHOMAN, Nov. 29, 2016, <http://newsok.com/article/5528852>.

<sup>179</sup> Jeffrey S. Nowacki and Dale Willits, *Adoption Of Body Cameras By United States Police Agencies: An Organisational Analysis*, POLICING & SOC'Y, 6 (2016).

<sup>180</sup> Benjamin Mueller, *Review Board Recommends Stiffest Punishment for Officer in Garner Case*, N.Y. TIMES, Sept. 8, 2017, <https://www.nytimes.com/2017/09/08/nyregion/eric-garner-chokehold-review-board.html>.

<sup>181</sup> *Id.*

<sup>182</sup> Mark Morales, *NYPD officers in Eric Garner case will face internal trial*, CNN (July 21, 2018), <https://edition.cnn.com/2018/07/19/us/nypd-disciplinary-process-eric-garner/index.html>

<sup>183</sup> *Id.*; Mark Morales, *Four years after Eric Garner's death, officer faces NYPD trial to see if he will keep his job*, CNN (Dec. 6, 2018), <https://www.cnn.com/2018/12/06/us/eric-garner-nypd-daniel-pantaleo/index.html?no-st=1556122474>.

<sup>184</sup> Benjamin Weiser & J. David Goodman, *Police Dept. Gives Federal Investigators Ultimatum in Eric Garner Case*, NEW YORK TIMES (July 16, 2018), <https://www.nytimes.com/2018/07/16/nyregion/eric-garner-police-federal-deadline.html>

More broadly, civilian oversight of police, like that used in New York city, can be justified for a variety of reasons—but evidence of effectiveness is not one. There is simply a lack of research on whether this method of accountability has any impact at all, making it difficult to say what role civilian review boards have in efforts to improve accountability more broadly.

Decades of experimentation over the form and function of agencies, boards and individuals<sup>185</sup> that provide civilian oversight of policing have broadly led to three<sup>186</sup> or four<sup>187</sup> categories recognized by academics. There are entities that independently investigate complaints, review complaints dealt with internally by police departments, are a vehicle for appeals about a closed complaint investigation, and monitor or even proactively audit the work of police departments.<sup>188</sup>

The idea of involving civilians in the review of police behavior began in the 1920s and 1930s,<sup>189</sup> but only really took off in its present form in the 1970s.<sup>190</sup> The period leading up to that point led to another consequence that remains—a rapid expansion of police unions and their reliable opposition to additional accountability.<sup>191</sup>

There is a basic mathematical problem to this method of police accountability too. There are 17,985 police departments in the United States,<sup>192</sup> but only around 140<sup>193</sup> to 200<sup>194</sup> jurisdictions are covered by civilian oversight entities. Many of these jurisdictions are cities, which increases the proportion of *people* this accountability architecture is designed to help. But even here, their use is not universal. Of the twenty largest cities in the United States,<sup>195</sup> four have no civilian oversight of the kind envisioned by advocates.<sup>196</sup>

<sup>185</sup> Types of entities can be individuals (such as an ombudsman or auditor), boards, committees, or commissions, *see* JOEL MILLER, CIVILIAN OVERSIGHT OF POLICING 9, VERA INSTITUTE OF JUSTICE (2002).

<sup>186</sup> JOSEPH DE ANGELIS, RICHARD ROSENTHAL, BRIAN BUCHNER, CIVILIAN OVERSIGHT OF LAW ENFORCEMENT: A REVIEW OF THE STRENGTHS AND WEAKNESSES OF VARIOUS MODELS 6, NAT'L ASS'N FOR CIV'N OVERSIGHT OF L. ENF. (2016).

<sup>187</sup> SAMUEL WALKER, POLICE ACCOUNTABILITY; THE ROLE OF CITIZEN OVERSIGHT 62 (2001).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 21.

<sup>190</sup> *Id.* at 31–32.

<sup>191</sup> *Id.* at 27–28.

<sup>192</sup> *President's Report, supra*, note 156 at 29.

<sup>193</sup> DE ANGELIS ET AL, *supra*, note 186, at 6 (report says civilian oversight is in 144 jurisdictions); *see also Police Oversight by Jurisdiction (USA)*, NAT'L ASS'N FOR CIV'N OVERSIGHT OF L. ENF., [http://www.nacole.org/police\\_oversight\\_by\\_jurisdiction\\_usa](http://www.nacole.org/police_oversight_by_jurisdiction_usa) (last visited Aug. 30, 2017) (webpage listing 136 jurisdictions).

<sup>194</sup> *See* Martin Kaste, *Police Are Learning To Accept Civilian Oversight, But Distrust Lingers*, Fe. 21, 2015, N.P.R. <http://www.npr.org/2015/02/21/387770044/police-are-learning-to-accept-civilian-oversight-but-distrust-lingers> (article says there are “more than 200 civilian oversight entities” in the United States).

<sup>195</sup> *See supra*, section I.B.

<sup>196</sup> Not covered are: Jacksonville, Fl., Columbus, Oh., Fort Worth, Tx., El Paso, Tx. El Paso has a civilian advisory board that has no power to affect policy, and police commanders appoint all members,

Surprisingly, empirical evidence of civilian oversight's effectiveness is scant. National advocates for civilian oversight said in a 2016 report assessing current research that, in essence, there needs to be more civilian oversight entities to show that it works.<sup>197</sup> That is a difficult argument to make in isolation from any principled one, such as policing by consent.<sup>198</sup> There is not even a consensus on how oversight entities should be *measured* to begin to show whether they are effective or not.<sup>199</sup> This lack of evidence is not new and appears to have plagued the movement for some time.<sup>200</sup> In short, even assuming an explosion in the number of these entities, this method of oversight is also unlikely to ever be a complete solution to police accountability.

*G. Post Discipline: How Arbitration Appeals Can Thwart Attempts By Police Chiefs To Hold Errant Officers Accountable*

Officer Daniel Pantaleo is in the rare group of New York officers to get at least two sustained complaints before his chokehold of Eric Garner.<sup>201</sup> Those complaints clearly did not lead to his dismissal before the events in Staten Island. The proportion of sustained complaints in New York by its civilian review board stands at nearly a third.<sup>202</sup> But that is the result of a recent uptick. In Chicago, newspaper reporting about five years of internally-investigated complaints, up to and including most of 2015, found discipline was imposed 3% of the time.<sup>203</sup> Discipline was generally more severe for black officers, and a complaint more likely to be upheld for white com-

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see *Police Department*, CITY OF EL PASO, <https://www.elpasotexas.gov/police-department/community-policing/advisory-boards> (last visited Aug. 1, 2017).

<sup>197</sup> JOSEPH DE ANGELIS, RICHARD ROSENTHAL, BRIAN BUCHNER, CIVILIAN OVERSIGHT OF LAW ENFORCEMENT: ASSESSING THE EVIDENCE 9-10, NAT'L ASS'N FOR CIV'N OVERSIGHT OF L. ENF. (2016), available at [https://d3n8a8pro7vhmx.cloudfront.net/nacole/pages/161/attachments/original/1481727974/NACOLE\\_AssessingtheEvidence\\_Final.pdf?1481727974](https://d3n8a8pro7vhmx.cloudfront.net/nacole/pages/161/attachments/original/1481727974/NACOLE_AssessingtheEvidence_Final.pdf?1481727974) (the report said "there is a growing need for civilian oversight to demonstrate its organizational value," *id.* at 9, and that there was "relatively little empirical research" on civilian oversight, *id.* at 10)

<sup>198</sup> The father of modern policing, former British Prime Minister Sir Robert Peel, who as Home Secretary established London's Metropolitan Police, the first police service, established nine principles that, after the first principle of dealing with crime, include "[t]he ability of the police to perform their duties is dependent upon public approval of police actions." *Sir Robert Peel's Nine Principles of Policing*, N.Y. Times, Apr. 15, 2014, <https://www.nytimes.com/2014/04/16/nyregion/sir-robert-peels-nine-principles-of-policing.html>.

<sup>199</sup> DE ANGELIS ET AL., ASSESSING THE EVIDENCE, *supra*, note 197, at 9.

<sup>200</sup> See MILLER, *supra*, note 185, at 2 (noting that arguments in favor of civilian oversight entities are often based on untested and unproven assumptions).

<sup>201</sup> Al Baker & Benjamin Mueller, *Records Leak in Eric Garner Case Renews Debate on Police Discipline*, N.Y. TIMES, Mar. 22, 2017, <https://www.nytimes.com/2017/03/22/nyregion/nypd-eric-garner-daniel-pantaleo-disciplinary-records.html>.

<sup>202</sup> Annesse & Rayman, *supra*, note 162.

<sup>203</sup> Timothy Williams, *Chicago Rarely Penalizes Officers for Complaints, Data Shows*, N.Y. TIMES, Nov. 18, 2015, <https://www.nytimes.com/2015/11/19/us/few-complaints-against-chicago-police-result-in-discipline-data-shows.html>

plainants.<sup>204</sup> A 2008 study found only 5% of officers in Chicago account for half of the complaints received.<sup>205</sup>

When a complaint is investigated, at least sixteen states—including Illinois, but not New York—even give police extra statutory protections not given to the general public.<sup>206</sup> These protections vary, but they generally allow a “cooling off” period in response to a citizen complaint, the officer gets to know the name of the accuser and the allegations even before being questioned, and there are limits on the times and durations of interviews.<sup>207</sup>

Even when a complaint does reach the discipline stage, the decision of a police chief is likely to be overturned if it reaches arbitration. Arbitration does not appear to have ever been used by officer Pantaleo after his imposed discipline, but is explored here for a complete examination of this important issue, which was also raised by police chiefs we spoke to. The merit of arbitration in union contracts aside, arbitrators are often blamed when a fired officer is rehired or a suspension is reduced. Research shows that some criticisms, explained *infra*, are justified, but the failure of police chiefs to either seek or be given good legal advice is an additional and overlooked factor.

A case from Springfield, Massachusetts, is an instructive example. Narcotics detective Gregg Bigda was recorded on video threatening to plant a kilo of cocaine on two teenagers later accused of stealing an unmarked police vehicle.<sup>208</sup> They were arrested after a chase through the city’s suburbs in February 2016.<sup>209</sup> While trying to get information, Bigda threatened to “crush [their] skulls” and said he was “not hampered by the truth.”<sup>210</sup> The police commissioner for Springfield, John Barbieri, said the officer was only suspended rather than fired because of the likelihood of the decision be-

<sup>204</sup> *Id.*

<sup>205</sup> Craig B. Futterman, H. Melissa Mather & Melanie Miles, *The Use Of Statistical Evidence To Address Police Supervisory And Disciplinary Practices: The Chicago Police Department’s Broken System*, 1 DEPAUL J. FOR SOCIAL JUSTICE 251, 277 (2008).

<sup>206</sup> ARIZ. REV. STAT. § 38-1101 (LexisNexis 2014) (Arizona), CAL. GOV. CODE § 3304 (Deering, 2010) (California), DEL. CODE tit. 11 § 9200 et seq. (2014) (Delaware), FLA. STAT. §§ 112.532, 112.533 (2009) (Florida), 50 IL. COMP. STAT. 725/1 et seq. (2016) (Illinois), KY. REV. STAT. § 15.520 (LexisNexis 2015) (Kentucky), LA. REV. STAT. ANN. § 40:2531 (2017) (Louisiana), MD. CODE § 3-101 et seq. (2010) (Maryland), MINN. STAT. § 626.89 (2016) (Minnesota), NEV. REV. STAT. ANN. § 289.010 et seq. (LexisNexis 2005) (Nevada), N.M. STAT. ANN. § 29-14-4 (LexisNexis 1991) (New Mexico), R.I. GEN LAWS § 42-28.6 (2014) (Rhode Island), TEX. GOV’T CODE § 614.021 (2005) (Texas), VA. CODE ANN. § 9.1-500 (2018) (Virginia), W. VA. CODE § 8-14A-1 (1997) (West Virginia), and WIS. STAT. § 164.01 et seq. (1993) (Wisconsin).

<sup>207</sup> Mike Riggs, *Why Firing a Bad Cop Is Damn Near Impossible*, REASON, Oct. 19, 2012, <http://reason.com/archives/2012/10/19/how-special-rights-for-law-enforcement-m>.

<sup>208</sup> Stephanie Barry, *Springfield Narcotics Detective Suspended For Threatening Juvenile Suspects Who Stole Cop Car*, THE REPUBLICAN, Sept. 23, 2016, [http://www.masslive.com/news/index.ssf/2016/09/springfield\\_narcotics\\_detectiv\\_18.html](http://www.masslive.com/news/index.ssf/2016/09/springfield_narcotics_detectiv_18.html).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

ing overturned.<sup>211</sup> Media reports said Bigda also had a history of two dozen civilian complaints and past discipline for threatening a former girlfriend.<sup>212</sup> Sadly, the experience in Springfield is far from isolated.<sup>213</sup>

Disciplinary decisions are sometimes appealed to a civil service board or, for departments covered by collective bargaining agreements, to an arbitrator. In deciding a case the arbitrator considers due process, which includes a grievant's right to be heard and represented, a fair investigation, timely action, and notice of the exact allegations as grounds for discipline.<sup>214</sup> The arbitrator also considers general fairness, consistency of the discipline imposed in other similar cases, and – in a 'just cause' dismissal – whether progressive discipline was applied.<sup>215</sup> Many of these terms are generally broad, subject to wide interpretation and without universal agreement about meaning or application by arbitrators.<sup>216</sup> Under collective bargaining agreements, an employee, such as a police officer, has to be given an opportunity to rectify bad or unwanted behavior before progressive discipline starts – with some exceptions.<sup>217</sup>

Media reporting has repeatedly shown that from Boston, to Houston, to Oregon – a majority of disciplinary actions against police officers are overturned in arbitration.<sup>218</sup> Arbitrators often get the blame when a police disci-

<sup>211</sup> *Id.* (the article refers to a civil service appeal, but the officer would also likely have had the option of binding arbitration).

<sup>212</sup> Stephanie Barry, *Footage Shows Springfield Detective Gregg Bigda's Threats To Teen Suspects; Legal Experts Say Some Tactics Cross Line*, THE REPUBLICAN, Nov. 6, 2016, [http://www.masslive.com/news/index.ssf/2016/11/legal\\_experts\\_bigda\\_videos.html](http://www.masslive.com/news/index.ssf/2016/11/legal_experts_bigda_videos.html).

<sup>213</sup> See e.g. Gus Burns, *Former Chief Rips Inkster Police Department For 'Too Many Bad Apples'*, DETROIT NEWS, Apr. 1, 2015, [http://www.mlive.com/news/detroit/index.ssf/2015/04/ex-chief\\_inkster\\_police\\_depart.html](http://www.mlive.com/news/detroit/index.ssf/2015/04/ex-chief_inkster_police_depart.html). (former police chief said he recommended three firings while heading his department, but was overruled in arbitration on two occasions, and on the third occasion by the city manager); see also Brian Chasnoff, *Union Undermines Police Chief In Appeal Process*, SAN ANTONIO EXPRESS-NEWS, Feb. 12, 2016, [http://www.expressnews.com/news/news\\_columnists/brian\\_chasnoff/article/Union-undermines-police-chief-in-appeal-process-6827569.php](http://www.expressnews.com/news/news_columnists/brian_chasnoff/article/Union-undermines-police-chief-in-appeal-process-6827569.php) (arbitration overturned the chief's firing of an on-duty police officer who had been drinking in a bar and fatally shot his girlfriend's former partner in the back when the man ran away after firing at them).

<sup>214</sup> NORMAN BRAND & MELISSA BIREN, DISCIPLINE AND DISCHARGE IN ARBITRATION p 2-12 (3d ed. 2015) (note the pagination structure of this volume starts with chapter number, then page).

<sup>215</sup> See *id.* at pp 2-14 to 2-18 (investigations can be grounds for reversal of dismissal but should be unbiased; decisions must not be made before the investigation's completion, and arbitration should be based on available evidence at the time of the decision); see also *id.* at pp 2-41 to 2-42 (explanation of the general principles of progressive discipline, including warnings); see also *id.* at pp 2-75 to 2-76 (consistency of rule enforcement).

<sup>216</sup> See *id.* at pp 2-5 to 2-9 (discussion about the general nature of terms and interpretations of them)

<sup>217</sup> See, e.g., *id.* at p 2-43. Progressive discipline does not apply to more serious cases, such as theft, see *id.* at pp 7-2 to 7-3, or workplace violence, see *id.* at pp 8-19 to 8-20, as long as the investigation is thorough.

<sup>218</sup> Mike Beaudet, *Discipline for Boston police officers frequently overturned*, W.C.V.B., Feb. 18, 2016 (72% of arbitration decisions for Boston Police Department since 2007 have been overturned at arbitration), <http://www.wcvb.com/article/discipline-for-boston-police-officers-frequently-overturned/8231852>; Emily DePrang, *Crimes Unpunished*, TEXAS OBSERVER, July 10, 2013 (about two thirds of arbitration cases examined For Houston PD resulted in either overturned or reduced discipline),

pline is overturned.<sup>219</sup> However, while there is some basis for criticism, other factors are at work.

Academic study of police arbitration cases is thin. However, in an extensive and fascinating study in 1999, researchers analyzed 328 arbitration decisions on disciplinary action taken against officers with Chicago Police Department.<sup>220</sup> It found an even split on decisions – with 41% of being upheld, 40% being overturned, and the remaining 19% resulted in a reduction of suspension time.<sup>221</sup> The author concluded from the results that even though weaker cases are weeded out through negotiation or other procedures beforehand, arbitrators have a “self-interest” to be even-handed (demonstrated by the even split of decisions), because a reputation for siding with one side or another means they would not be appointed in the future.<sup>222</sup> Either that, or the need to be even-handed is internalized.<sup>223</sup> It is a controversial view.

A more recent court-ordered study in Oakland, California, gives a broader picture. The city’s police department has had a long history of scandal and claims of excessive force.<sup>224</sup> The study was produced following an arbitrator’s controversial decision to reinstate a police officer who shot and killed an unarmed civilian.<sup>225</sup> The report, published in 2015, urged a host of reforms, so that arbitration was no longer a “get out of discipline free card” for police officers.<sup>226</sup> The author reviewed the arbitration files for twenty-six sworn officers in the department, and 150 other Oakland police department (“O.P.D.”) internal discipline cases.<sup>227</sup> Arbitrators upheld disci-

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<https://www.texasobserver.org/crimes-unpunished/>; Maxine Bernstein, *Disciplining Portland Police Proves Challenging Task*, THE OREGONIAN, July 14, 2012 (at least half of the small number of discipline cases for Portland PD were overturned at arbitration), [http://www.oregonlive.com/portland/index.ssf/2012/07/disciplining\\_portland\\_police\\_p.html](http://www.oregonlive.com/portland/index.ssf/2012/07/disciplining_portland_police_p.html).

<sup>219</sup> See e.g. Conor Friedersdorf, *How Police Unions and Arbitrators Keep Abusive Cops on the Street*, THE ATLANTIC, Dec. 2, 2014, <http://www.theatlantic.com/politics/archive/2014/12/how-police-unions-keep-abusive-cops-on-the-street/383258/>; Alan Neuhauser, *Arbitration and the Revolving Door of Bad Cops*, U.S. NEWS & WORLD REPORT, Oct. 19, 2017, <http://www.usnews.com/news/national-news/articles/2016-10-19/bad-cops-back-on-the-street-dont-blame-arbitration>.

<sup>220</sup> Mark Iris, *Police Discipline in Chicago: Arbitration or Arbitrary?*, J. CRIM. L. & CRIMINOLOGY 233 (1999).

<sup>221</sup> *Id.* at 233–35 (if a fired police officer was then allowed to keep a job, perhaps with discipline, this was regarded as overturning a decision – hence only discipline that reduced suspension time was in the 19% mentioned).

<sup>222</sup> *Id.* at 240–41.

<sup>223</sup> *Id.* at 241.

<sup>224</sup> Curtis Skinner, *Scandal-tainted Oakland police department gets new chief*, REUTERS, Jan. 4, 2017, <http://www.reuters.com/article/us-california-police-idUSKBN14O27G>.

<sup>225</sup> (Need exact cite to case / order – reference so far from report of *Allen v. Oakland* and court order Court’s order of the appointment of a compliance director / monitor to oversee compliance of the agreement form that case, order dated February 2, or August 20, 2014).

<sup>226</sup> Edward Swanson, *Report of the Court-Appointed Investigator in Delphine Allen v. City of Oakland*, SWANSON & MCNAMARA, L.L.P., 1–3 (Apr. 16, 2015).

<sup>227</sup> *Id.* at 8–9

pline in only seven out of the twenty-six cases (about a quarter) that were reviewed in detail.<sup>228</sup>

Blame for this was partly attributed to vague O.P.D. policies and procedures,<sup>229</sup> inconsistency of discipline application by the department,<sup>230</sup> and inadequate internal investigations.<sup>231</sup> These were among the reasons given in other reports of arbitrators' decisions to overturn.<sup>232</sup>

The most stinging criticism was given in fifteen pages of the report, criticizing the Oakland City Attorney's Office and its dysfunctional relationship with the O.P.D..<sup>233</sup> It said there was a lack of "meaningful participation" by counsel at key stages of an investigation,<sup>234</sup> a lack of preparation<sup>235</sup> and a host of problems related to the appointment of outside counsel.<sup>236</sup> Attorney selection, lackluster litigation and failure to learn from previous decisions were also criticized.<sup>237</sup> So, if Oakland is typical, and subsequent reporting appears to show it is,<sup>238</sup> whether discipline is overturned can depend on police departments getting, and seeking, good legal advice.

Options for municipalities to challenge the decisions of arbitrators in court are limited.<sup>239</sup> One avenue is the inability to enforce a contract that is contrary to public policy.<sup>240</sup> Several states have used this where public policy is "well defined and dominant,"<sup>241</sup> such as cases of domestic violence by

<sup>228</sup> *Id.* at 10.

<sup>229</sup> *Id.* at 12.

<sup>230</sup> *Id.* at 17.

<sup>231</sup> *Id.* at 13.

<sup>232</sup> Maxine Bernstein, *Disciplining Portland police proves challenging task*, THE OREGONIAN, July 14, 2012 (misconduct cases were overturned because of a "shoddy investigation" or discipline for similar issues was less severe and inconsistent).

<sup>233</sup> Swanson, *supra*, note 226, at 20–34.

<sup>234</sup> *Id.* at 20.

<sup>235</sup> *Id.* at 21–23.

<sup>236</sup> *Id.* at 23–26.

<sup>237</sup> *Id.* at 27–33.

<sup>238</sup> See e.g., Dalton Bennett & John Sullivan, *How One Attorney Forces Police Chiefs To Rehire The Officers They Fire*, WASHINGTON POST, Nov. 23, 2017, [https://www.washingtonpost.com/investigations/how-one-attorney-forces-police-chiefs-to-rehire-the-officers-they-fire/2017/11/22/b7326d50-c7ac-11e7-b0cf-7689a9f2d84e\\_story.html?hpid=hp\\_hp-top-table-main\\_winning-attorney-1130am%3Ahomepage%2Fstory&utm\\_term=.b8b8f38d543a](https://www.washingtonpost.com/investigations/how-one-attorney-forces-police-chiefs-to-rehire-the-officers-they-fire/2017/11/22/b7326d50-c7ac-11e7-b0cf-7689a9f2d84e_story.html?hpid=hp_hp-top-table-main_winning-attorney-1130am%3Ahomepage%2Fstory&utm_term=.b8b8f38d543a) (story on a former police officer turned lawyer who exploits the missed deadlines, flawed investigations, and other mistakes of police officials to win reinstatement for fired officers).

<sup>239</sup> See e.g. *Boston v. Boston Police Patrolmen's Ass'n*, 477 Mass. 434 (2017) (Court upheld an arbitrator's decision to reinstate an officer fired for use of a chokehold on an unarmed suspect because the arbitrator's authority was not exceeded and the reinstatement award did not violate public policy).

<sup>240</sup> See e.g. *W.R. Grace & Co v. Local Union 759, Int'l Union of United Rubber*, 461 U.S. 757 (1983) (*quoting Hurd v. Hodge*, 334 U.S. 24, 34–35 (1948)) (arbitration award not found to be against public policy and upheld on other grounds).

<sup>241</sup> *Id.* at 766.

an officer,<sup>242</sup> or racism.<sup>243</sup> But these cases, where ‘public policy’ is used to overturn arbitration, are not common. Surprisingly, telling the truth is often seen by courts as not a good enough ‘public policy’ reason to overturn an arbitration decision when an officer is found to have lied.<sup>244</sup>

## II. MANDATORY PROFESSIONAL LIABILITY INSURANCE AS A SOLUTION

### A. *Introducing Mandatory Professional Liability Insurance For Police Officers*

Like doctors, lawyers, and professional drivers, police officers are currently subject to civil liability for their actions at work. However, unlike these other professions, police officers are not required to carry individual professional liability insurance. Instead, as we discuss at length below, they are almost always covered by a department-wide insurance policy or indemnified by the municipality that employs them. In a city-wide policy, the best and most professional police officers on the force subsidize the legal liability of their riskier colleagues. In cities that self-indemnify, the burden of tort judgements falls not on the offending officer, but on the taxpayers—the very community whose civil rights were deemed to have been violated. Neither provides an incentive for individual officers to adopt better policing practices. Neither realizes the fundamental purpose of punitive damages: punishing and deterring malfeasance.

The system of individualized mandatory professional liability insurance we propose would leverage the current legal regime to pressure individual officers to adopt safer practices and trainings. Just as drivers with particularly egregious driving histories might be forced off the road by high insurance premiums, officers with records of unjustified use of force, civilian complaints, domestic violence convictions, and other indicia of a dangerous

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<sup>242</sup> Compare *Decatur Police Benevolent and Protective Ass’n Labor Comm’n v. Decatur*, 968 N.E.2d 749 (Ill. App. Ct. 2012) (affirmed lower court’s decision that arbitrator’s reinstatement of police officer for domestic battery was against public policy); with *Kitsap Cnty. Deputy Sheriff’s Guild v. Kitsap Cnty.*, 167 Wash.2d 428 (2009) (appellate court incorrectly overturned an arbitrator’s decision to return a fired sheriff’s deputy to duty because there was no clear and well-defined public policy about lying).

<sup>243</sup> *State v. Henderson*, 277 Neb. 240 (2009) (arbitrator’s decision to reinstate a Nebraska state trooper who was a member of the Knights Party was against public policy of equal treatment).

<sup>244</sup> See e.g., *Kitsap Cnty. Deputy Sheriff’s Guild v. Kitsap Cnty.*, 167 Wn.2d 428, 437–38 (2009) (Officer reinstated, as per arbitrator’s decision, because Washington statutes have no “dominant expression of public policy that requires the automatic termination of an officer found to have been untruthful”); see also *State v. Pub. Safety Emp.s. Ass’n*, 257 P.3d 151 (Alaska, 2011) (arbitrator’s award to reinstate a state trooper for lying about misconduct during training held because there was no firm public policy against lying by a police officer); see also *Des Plaines v. Metro. Alliance Of Police*, 2015 IL App (1st) 140957 (2015) (case remanded because despite *presence* of a public policy of lying by a police officer engaged in misconduct, there was no consideration by the arbitrator of whether the officer would do it again).

history, might be forced into other careers. Officers with excellent records, those who continue to seek out the best trainings, can be appropriately rewarded with lower premiums.

This idea rests on two key premises. First, the widespread idea that police misconduct is concentrated amongst a few “bad apple” officers, and second, that those officers can be identified through objective indicators prior to a major civil rights violation or fatal shooting. A forthcoming and statistically rigorous paper by Kyle Rozema and Professor Max Schanzbach strongly supports both contentions.<sup>245</sup> Analyzing more than 50,000 civilian complaints against officers in Chicago, they found a statistically significant correlation between the officers with the highest number of complaints and the prospect of civil litigation payouts by the city.<sup>246</sup> Specifically, they found that “[t]he worst one percent of officers, as measured by civilian allegations, generate almost five times the number of payouts and over four times the total damage payouts in civil rights litigation.” On the other hand, officers below the 80<sup>th</sup> or 90<sup>th</sup> percentile by number of complaints were little different than officers receiving no complaints in probable liability.<sup>247</sup> Interestingly, the researchers controlled for neighborhood, finding that it was the individual officer which predicted the number of complaints and not the district they were assigned to.<sup>248</sup>

In a press release about the paper, the authors point to Jason Van Dyke, an officer convicted of second-degree murder for the on-duty shooting of Laquan McDonald, to illustrate the power of their findings.<sup>249</sup> Van Dyke had 20 civilian complaints at the time he murdered McDonald, placing him in the highest 3% of Chicago officers.<sup>250</sup> They could have just as easily pointed to Daniel Pantaleo, whose history of sustained complaints placed him in the highest 2% of officers.<sup>251</sup> Both cases also illustrates precisely how mandatory professional liability insurance might save a life. The city of Chicago ultimately paid \$5 million in damages pursuant to the Laquan McDonald case and New York City paid \$5.9 million to settle a civil suit by

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<sup>245</sup> Kyle Rozema & Max Matthew Schanzbach, *Good Cop, Bad Cop: Using Civilian Allegations to Predict Police Misconduct* AMERICAN ECON. J.: ECONOMIC POLICY (forthcoming 2019)

Available at SSRN: <https://ssrn.com/abstract=2866696> or <http://dx.doi.org/10.2139/ssrn.2866696>

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 33

<sup>248</sup> *Id.* at 26–27 (“In short, officers who are bad in one district are also bad in another district, and officers who were bad in the past are also bad in the future.”)

<sup>249</sup> Sam Charles, *Study: Civilian complaints ‘a valid predictor’ of police misconduct*, CHICAGO SUN TIMES (Sept. 10, 2018) <https://chicago.suntimes.com/politics/study-civilian-complaints-valid-predictor-of-police-misconduct/>

<sup>250</sup> *Id.*

<sup>251</sup> Al Baker & Benjamin Mueller, *Records Leak in Eric Garner Case Renews Debate on Police Discipline*, N. Y. TIMES, March 23, 2017 at A23, <https://www.nytimes.com/2017/03/22/nyregion/nypd-eric-garner-daniel-pantaleo-disciplinary-records.html>

Eric Garner's family.<sup>252</sup> If an insurance company were using metrics like civilian complaints to empirically evaluate the risk of payout and then setting Van Dyke's and Pantaleo's premiums accordingly, those premium would likely be prohibitively high. If they couldn't have paid that premium, he wouldn't have been policing, and perhaps Laquan McDonald and Eric Garner would still be alive.

### B. *A Brief History of the Idea*

This idea is not entirely new. The inspiration for this article – Eric Garner's mother's question to members of Congress—coincided with the lead up to a 2016 ballot initiative in Minnesota to introduce mandatory professional liability insurance for all police officers in Minneapolis.<sup>253</sup> The group Committee for Responsible Policing wanted to amend the city's charter to say:

Each appointed police officer must provide proof of professional liability insurance coverage in the amount consistent with current limits under the statutory immunity provision of state law and must maintain continuous coverage throughout the course of employment as a police officer with the city. Such insurance must be the primary insurance for the officer and must include coverage for willful or malicious acts and acts outside the scope of the officer's employment by the city. If the City Council desires, the city may reimburse officers for the base rate of this coverage but officers must be responsible for any additional costs due to personal or claims history. The city may not indemnify police officers against liability in any amount greater than required by State Statute unless the officer's insurance is exhausted. This amendment shall take effect one year after passage.<sup>254</sup>

In the end, electors did not get to vote on the issue.<sup>255</sup> It was rejected by the city council as ineligible for the ballot because it conflicted with state law.<sup>256</sup> A lawsuit by the campaign group to force it to be reinstated failed on those preemption grounds.<sup>257</sup> The city's police union joined the opposi-

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<sup>252</sup> Charles, *supra*, note 249; J. David Goodman, *Eric Garner Case Is Settled by New York City for \$5.9 Million*, N. Y. TIMES, July 14, 2015 at A1, <https://www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html>.

<sup>253</sup> *Bicking v. Minneapolis*, 891 N.W.2d 304 (Minn. 2017).

<sup>254</sup> *Id.* at 307.

<sup>255</sup> *Bicking v. Minneapolis*, No. A16-1339 (Minn. Aug. 31, 2016) (order affirming lower court dismissal of petition to introduce police insurance ballot question to amend Minneapolis City Charter).

<sup>256</sup> Minneapolis City Council Agenda, Regular Meeting, Aug. 5, 2016, <http://www.ci.minneapolis.mn.us/meetings/council/WCMSP-184483> (the council agreed with the city attorney not to ask the city clerk to transmit the ballot question to the county auditor).

<sup>257</sup> *Bicking v. Minneapolis*, 891 N.W.2d 304 (Minn. 2017) (full decision rejecting the ballot question on preemption grounds).

tion.<sup>258</sup> However, the approach is certainly an interesting solution to the issue of police accountability. Indeed, a city council member in Chicago suggested a variation of it for certain high-value claims without any cost implication for the base amount on the city.<sup>259</sup> A similar idea was also briefly brought forward as a bill in Maryland, but was quickly withdrawn.<sup>260</sup>

In fact, credit for the idea goes to Professor Noel Otu, of the University of Texas at Brownsville, who suggested mandatory professional liability insurance for police in a criminal justice journal in 2006.<sup>261</sup> Much of what was proposed for Minneapolis, and supported here, originates in that article.<sup>262</sup> Other scholars have subsequently examined the implications of liability insurance for police generally from a legal and insurance perspective.<sup>263</sup>

However, Professor Otu's concept took this one step further. We believe his brilliant idea is worth dusting off again, in light of recent attention on police-civilian shootings and the renewed interest in insurance as means of regulating police behavior. But before examining its virtues, and whether it might work in practice, for context we address some preliminary questions. Does insurance affect behavior? What analogs are there to the concept of mandatory liability insurance to guide the debate? Does insurance play a part in policing now, and if so, how? Reviewing existing research is vital to understanding how mandatory liability insurance for *individual* officers could be used to improve police practice and make officers accountable for misconduct.

In the sub-sections that follow, we look to lawyers and doctors in the context of mandatory professional liability insurance because they involve risks which are frequently insured. As will be explained, they are not a suitable comparison to the work of police officers. The lack of compulsion and the structure of insurance premiums do not provide the model we advocate. Instead, we compare the work of police officers – and implications of the idea – to that of motorists, where there is ample evidence about the effects of compulsory insurance, and the ways that premium rates affect behavior.

<sup>258</sup> *Id.* The Police Officers' Federation of Minneapolis opposed as an intervenor.

<sup>259</sup> Gilbert Villegas, an Alderman in Chicago, submitted the idea on Sept. 14, 2016, to the Finance Committee to amend the city's Municipal Code § 2-04-020, so that, *inter alia*, police officers would be required to carry insurance that would pay out for lawsuits or settlements over \$200,000 with minimum coverage of no less than \$2,000,000. It was proposed that the cost of this insurance would not be borne by the city at all.

<sup>260</sup> H.D. 890, 2015 Leg, Judiciary Comm. (Md, 2015).

<sup>261</sup> Noel Otu, *The Police Service And Liability Insurance: Responsible Policing*, 8 INT'L J. OF POLICE SCI. & MGMT. 294, 294–315 (2006).

<sup>262</sup> *Id.*

<sup>263</sup> See generally, John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539 (2017); see also Joanna Schwartz, *How Governments Pay: Lawsuits, Budgets, And Police Reform*, 63 U.C.L.A. L. REV. 1144 (2016); see also Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912–13 (2014).

*C. Learning From Other Professions: Lawyers, Doctors, and Moral Hazard*

When looking at the use of insurance as a means of affecting behavior in a particular profession, it is perhaps a source of embarrassment in a law review article that the legal profession is not a suitable place to start. Until the end of 2017, only Oregon mandated professional liability insurance for all lawyers in the state.<sup>264</sup> From January 2018, Idaho joined that short list.<sup>265</sup> The state bar in Oregon runs a separate non-profit fund, with each lawyer paying \$3,500 a year for \$300,000 in coverage and \$50,000 for legal expenses.<sup>266</sup> But lawyers in Oregon pay the same premium, no matter what their claim history.<sup>267</sup> Until 2013, lawyers who made claims from the liability fund paid a higher premium in the form of an additional payment.<sup>268</sup> It was based on a formula, devised by the fund itself, which underwent several revisions in its thirty-year history, and which created what the fund thought were anomalous results.<sup>269</sup> The additional charge on claimants was only assessing payouts made rather than risk or fault.<sup>270</sup> This additional payment, which effectively raised the premium for those affected, was eventually scrapped.<sup>271</sup>

In contrast, doctors are legally required to have medical malpractice insurance in seven states.<sup>272</sup> The vast body of scholarly research on medical

<sup>264</sup> OR. REV. STAT. § 9.080 (2)(a)(A) (2014) ('based' in this context is the lawyer's principal office).

<sup>265</sup> Idaho Supreme Court approved a recommendation by the Board of Commissioners of the Idaho State Bar to Idaho Bar Commission Rule 302(a)(5), requiring attorneys representing private clients to have professional liability insurance with \$100,000 minimum coverage per occurrence and a \$300,000 annual aggregate, [https://isc.idaho.gov/orders/Amended\\_Order\\_Amending\\_Idaho\\_Bar\\_Commission%20Rules\\_March%202017.pdf](https://isc.idaho.gov/orders/Amended_Order_Amending_Idaho_Bar_Commission%20Rules_March%202017.pdf).

<sup>266</sup> Coverage, OREGON STATE BAR PROF'L LIAB. FUND (accessed July 14, 2017), <https://www.osbplf.org/coverage/overview.html>.

<sup>267</sup> *Id.* The fund does offer an additional underwritten commercial product to supplement coverage. This product does increase premiums based on claim history, see *Excess Coverage*, OREGON STATE BAR PROF'L LIAB. FUND (accessed July 14, 2017), <https://www.osbplf.org/excess-coverage/overview.html>.

<sup>268</sup> An Assessment of the Special Underwriting Assessment (SUA), 2-4, Agenda (pages 72-74), Meeting of the Board of Governors, May 3, 2013, Oregon State Bar, [https://www.osbar.org/\\_docs/leadership/bog/agendas/20130503BOGagendaOPEN.pdf](https://www.osbar.org/_docs/leadership/bog/agendas/20130503BOGagendaOPEN.pdf).

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> OREGON STATE BAR PROFESSIONAL LIABILITY FUND ANNUAL REPORT 2013, PAGE 8, OREGON STATE BAR PROF'L LIAB. FUND, available at [https://www.osbplf.org/assets/documents/annual\\_reports/2013%20Annual%20Report%20FINAL.pdf](https://www.osbplf.org/assets/documents/annual_reports/2013%20Annual%20Report%20FINAL.pdf), (an end to the Special Underwriting Assessment).

<sup>272</sup> The states and relevant statutes are; Colorado (COLO. REV. STAT. § 13-64-301 (2016)), Connecticut (CONN. GEN. STAT. § 20-11b (2012)), Kansas (KAN. STAT. ANN. § 40-3402 (2012)), Massachusetts (MASS. GEN. LAWS ch.112 § 2), New Jersey (N.J. REV. STAT. § 45:9-19.17 (2013)), Rhode Island (R.I. GEN. LAWS § 42-14.1-2 (2013)) and Wisconsin (WIS. STAT. § 655.001 *et seq.*). Minimum levels of required coverage range from \$100,000 to \$1 million per claim and from \$300,000 to \$3 million for total coverage for a year.

malpractice insurance has focused on how actual and threatened *lawsuits* affect physician behavior, but there is a lack of research on how differing forms of medical malpractice insurance might alter conduct.<sup>273</sup> This is analogous to criticism about the use of civil rights lawsuits to regulate police.<sup>274</sup> However, it has been shown that when improvements to care were studied in obstetrics, one of the costliest medical fields to insure,<sup>275</sup> the number of lawsuits, and amounts paid, went down significantly.<sup>276</sup> This might suggest lower insurance premiums would follow – but it did not. Medical malpractice insurance uses “broad risk classes” (such as specialty) and does not fluctuate premiums based on outcomes or discipline in the same way that a motorist would be penalized with higher premiums if he or she had a poor driving history.<sup>277</sup> Except in a hospital setting, when a hospital will often add catastrophic injury insurance, experience is rarely a factor that is considered when calculating medical malpractice insurance premiums.<sup>278</sup> Other factors setting premiums are limits on the dollar amount of coverage, whether a doctor works full or part time, and what procedures are done within the insured doctor’s specialty.<sup>279</sup>

Observers point out those broad categories for doctors lead to the problem of low-risk practitioners subsidizing high-risk ones (in terms of performance within the same field) because in one locale, physicians in a particular specialty will broadly pay the same.<sup>280</sup> If premiums are expected to change behavior as they go up or down, this might also explain why prior *claims* experience by a doctor does not lead to a change in quality of care – the premium is unaffected.<sup>281</sup> So, what incentive is there to improve? At the moment, this does not come from higher insurance premiums. However, in medicine, there are a number of independent factors which might prevent increased individual premiums from affecting doctor behavior. We return to

<sup>273</sup> See, e.g., Christina Minami, Jeanette W Chung, Jane Holl, Karl Bilimoria, *Impact of Medical Malpractice Environment on Surgical Quality and Outcomes*, 218 J. AM. COLL. SURG. 271 (2016) (A meta-analysis of research examined twenty-nine studies, *id.* at 272, none of which examined a connection between risk of malpractice and adherence to standards of care, *id.* at 273, but all examined use of defensive medicine techniques, *id.* at 274).

<sup>274</sup> See Section III-E-1, *infra*, on the practical limitations of civil liability to hold police accountable.

<sup>275</sup> William Riley, Les W Meredith, Rebecca Price, Kristi K Miller, James W Begun, Mac McCullough & Stanley Davis, *Decreasing Malpractice Claims by Reducing Preventable Perinatal Harm*, 51 HEALTH SERVICES RESEARCH 2453, 2454 (2016) (Obstetricians are typically charged the highest or second highest amounts for medical liability insurance in the United States).

<sup>276</sup> William Riley, Les W Meredith, Rebecca Price, Kristi K Miller, James W Begun, Mac McCullough, & Stanley Davis, *Decreasing Malpractice Claims by Reducing Preventable Perinatal Harm*, 51 HEALTH SERVICES RESEARCH 2453–71 (2016).

<sup>277</sup> FRANK A. SLOAN & LINDSEY M. CHEPKE, *MEDICAL MALPRACTICE*, 9–11 (2008).

<sup>278</sup> *Id.* at 13–14.

<sup>279</sup> Email to one of the authors on Aug. 3, 2017, from Eric R. Anderson, Vice President of Marketing and Communications, Physician Insurance Association of America.

<sup>280</sup> SLOAN & CHEPKE, *supra*, note 277, at 9–11.

<sup>281</sup> *Id.* at 14.

the problem of broad risk classes and discuss potential solutions in the police accountability context while discussing implementation below.

### 1. *The Moral Hazard Concept*

An important aspect of insurance is moral hazard, a concept in economics and a consistent source of discussion since two important scholarly articles in the 1960s.<sup>282</sup> Yardage of shelf space is taken up with journals and books discussing the moral hazard concept – which, in essence, is the potential increased likelihood of risk-taking behavior when adverse consequences are fully insured.<sup>283</sup> It is believed this is mitigated partly by incomplete coverage, in the form of deductibles or caps.<sup>284</sup> How much care the insured person or entity takes (requiring monitoring and information) is also considered, and then factored into the amount charged by an insurer.<sup>285</sup> These factors pull against each other to set the price charged, and how much coverage is offered.<sup>286</sup>

In Oregon there is potential moral hazard involving badly performing lawyers. There is no penalty of higher premiums for those who do not perform to a certain standard, and therefore no incentive to either improve or not make a mistake in the first place. However, there is one aspect of the liability fund's function worth examining for the way it attempts to stave off moral hazard. The fund's officers want to actively reduce the number of claims made against it, and therefore the amount charged to all lawyers. So, free advisers are on hand to help lawyers evaluate their filing systems, calendars or accounting methods and offer ways of limiting the chances of a malpractice claim.<sup>287</sup> Another useful risk-reducing example of this effort is treatment of lawyers for addiction.<sup>288</sup> In a fund study, those who had been treated went from having the highest number of claims to well below the state average after five years.<sup>289</sup>

<sup>282</sup> Steven Shavell, *On Moral Hazard and Insurance*, 93 QUARTERLY J. OF ECON., 541 (1979) (the discussion in the 1960s began with how health insurance affected behavior, but by the time of Shavell's article, *id.*, the debate had moved to all types of insurance).

<sup>283</sup> Steven M. Cassidy, *Is Moral Hazard Really Moral Hazard?* 17 J. OF INS. ISSUES 105, 105 (1979); *see also id.* ("Every introductory insurance text book devotes at least some time to discussing moral hazard.")

<sup>284</sup> Shavell, *supra*, note 282, at 541-42.

<sup>285</sup> *Id.* at 541-42; *see also* Michael Faure & Roger Van den Bergh, *Compulsory Insurance for Professional Liability*, GENEVA PAPERS ON RISK & INS., 308, 316 (1989) (monitoring is vital to set rates and prevent moral hazard).

<sup>286</sup> Shavell, *supra*, note 282, at 542.

<sup>287</sup> *Services*, OREGON STATE BAR PROF'L LIAB. FUND (accessed July 18, 2017), <https://www.osbplf.org/services/financial-management.html>.

<sup>288</sup> *Oregon Attorney Assistance Program*, OREGON STATE BAR PROF'L LIAB. FUND (accessed July 14, 2017), <https://www.osbplf.org/oaap-services/>.

<sup>289</sup> Meloney Crawford Chadwick, *Hiding In Plain Sight: Recognizing Signs Of Impairment, And What To Do About It*, OREGON STATE BAR BULLETIN, Aug./Sept. 2006, <https://www.osbar.org/publications/bulletin/06augsep/addictionhiding.html>.

Under mandatory, individualized police liability insurance we propose, risk-limiting behavior like that offered by the Oregon fund would be in the financial interest of the insurance company seeking to limit payouts, the police department attempting to keep their base premium low, and individual officers who risk surplus charges to their individualized premiums. Not only penalties, but also incentives, like lower premiums, could be offered to the officer, department, or both. These mechanisms are explored in more detail, *infra*. But it bears noting that in the Oregon case, the fund's cost reduction incentive led it to proactively find ways to not only reduce malpractice claims, but to incentivize better organized, non-addicted lawyers. But some potential moral hazard for lawyers, and its negative effect on behavior, remains. The rate of claims made by lawyers in the state is much higher when compared with commercial legal malpractice insurance.<sup>290</sup> Ultimately, however, the advantages and disadvantages of the state bar's decision to eradicate a penalty are beyond the scope of this article.

There is an interesting footnote to this debate. In Idaho, the new requirement that all attorneys have professional liability insurance is based on the commercial insurance market rather than a pooled risk fund as operates in Oregon. There is certainly potential empirical research that could be conducted to determine how this new requirement affects behavior, and whether poorly performing lawyers, who are repeatedly subject to malpractice claims, are forced to leave the profession because of higher premiums. This kind of research could, in turn, bolster or undermine the idea advocated in this article.

#### *D. Taking Account of Individual Histories: Why Police Should Be Insured Like Drivers*

As a blunt instrument, the cost of, or inability to get, liability coverage for small municipalities has led to the closure of entire police departments, mainly because of lawsuits.<sup>291</sup> For instance, coverage for a small California

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<sup>290</sup> Carol Bernick, chief executive of the Oregon State Bar Professional Liability Fund, told one of the authors in a telephone conversation on Aug. 4, 2016, that a lawyer is not 'punished' financially when a claim is made, and the fund was 'fairly liberal' in opening a claim file, even when a lawyer merely called about a problem. In an email on July 31, 2017, Ms. Bernick said commercial insurance providers have a claim frequency of less than 5%, whereas the fund's claim frequency is about 12%.

<sup>291</sup> See, e.g., *Lincoln Heights Disbands Police Department*, CINCINNATI ENQUIRER, Oct. 17, 2014, <http://www.cincinnati.com/story/news/politics/2014/10/17/lincoln-heights-disbands-police-department/17450723/> (Lincoln Heights, OH); Reuben Vives, *Maywood To Disband Police Department*, L.A. TIMES, June 17, 2010, <http://articles.latimes.com/2010/jun/17/local/la-me-maywood-pd-20100617> (Maywood, CA); Brad Devereaux, *Oakley Shuts Down Police Department As Hopes For Liability Insurance Fall Through*, THE SAGINAW NEWS, Sept. 9, 2014, [http://www.mlive.com/news/saginaw/index.ssf/2014/09/village\\_of\\_oakley\\_shuts\\_down\\_p.html](http://www.mlive.com/news/saginaw/index.ssf/2014/09/village_of_oakley_shuts_down_p.html) (Oakley, MI); *Lack of Liability Insurance Shatters Police Dept. in Louisiana Town*, INSURANCE JOURNAL, Nov. 21, 2013, <http://www.insurancejournal.com/news/southcentral/2013/11/21/311948.htm> (Sorrento, LA); *City of Niota, Tenn., Loses Insurance Again, Shuts Down City Services*, INSURANCE JOURNAL, June 20, 2013, <http://www.insurancejournal.com/news/southeast/2013/06/20/296182.htm> (Niota, TN).

police department fell through when only one officer remained on the payroll because all of his remaining colleagues were either accused of fraud, or in the case of another, threatened an ex-girlfriend with a gun.<sup>292</sup> In a small Pennsylvania community, their insurer dropped police coverage after settling claims against both of its two police officers, including one who had previously been fired from a different department for exposing himself.<sup>293</sup>

Aside from the blunt effect of insurance being prohibitively expensive, are there more subtle effects of higher premiums, short of being unaffordable, that can actually *encourage* a change in behavior? In the context of compulsory liability insurance, the issue of coverage provided for lawyers and doctors provides only a sketch of an answer, as has been outlined. The complicated ways in which mandatory, individualized insurance affects driver behavior is a more apt comparison.

In order to use a car, a driver must be insured. If insurance is prohibitively expensive, they must either not drive or face criminal sanction for doing so without coverage. Ultimately, insurance is designed to provide coverage for loss in the event of an accident. The key question becomes: if you are regarded as a riskier motorist – does paying more affect whether you reduce that risk?

It has been shown that increasing premiums for bad driving does bring accidents down.<sup>294</sup> Increasing a deductible, the amount an insured driver must pay before coverage starts, also reduces the chance of another claim.<sup>295</sup> Higher prices for insurance also tend to make people more cautious, because those higher costs tend to reflect risk.<sup>296</sup> On the other hand, when Government tries to interfere with premium rates for motorists (to make them more affordable with subsidies), perverse results can emerge that make claims more likely – such as rate subsidies that actually encourage high-risk drivers to drive more.<sup>297</sup> This means that a purely market-based solution in regulating behavior with insurance (rather than just cover for losses) must be given market freedom, uncoupled from political interference, to be effective.

<sup>292</sup> Allison Gatlin, *Police Department Rebuild Costs King City Its Insurance*, THE CALIFORNIAN, Apr. 21, 2015, <http://www.thecalifornian.com/story/news/crime/2015/04/21/police-department-rebuild-costs-king-city-insurance/26149339/> (King City, CA).

<sup>293</sup> *Police Department Shuts Down After Settling Lawsuits Against 2 Officers*, W.T.A.E., Nov. 20, 2013, <http://www.wtae.com/article/police-department-shuts-down-after-settling-lawsuits-against-2-officers/7463871> (Port Marion, PA).

<sup>294</sup> Ibrahim M Abdalla Alfaki & Mouna Enaji, *Effect of Motor Insurance Premiums on Driver Behavior and Road Safety*, S3, J. ERGONOMICS (2014).

<sup>295</sup> Jennifer L. Wang, Ching-Fan Chung and Larry Y. Tzeng, *An Empirical Analysis of the Effects of Increasing Deductibles on Moral Hazard*, 75 J. OF RISK AND INS. 551, 554 (2008).

<sup>296</sup> Susan K. Laury, Melayne, Morgan McInnes, *The Impact of Insurance Prices on Decision Making Biases: An Experimental Analysis*, 70 J. OF RISK AND INS. 219, 230–31 (2003).

<sup>297</sup> Mary A. Weiss, Sharon Tennyson and Lauren Regan, *The Effects of Regulated Premium Subsidies on Insurance Costs: An Empirical Analysis of Automobile Insurance*, 77 J. OF RISK AND INS. 597–624 (2010).

The insurance industry has also been an advocate for reducing risk in the driving context. For instance, it supported mandating safety equipment, such as air bags in cars, to reduce the risk of bodily injury and the large payouts that result.<sup>298</sup> This was in spite of the consequence that minor accidents would be more expensive to repair because of air bag deployments.<sup>299</sup> Arguably, insurers would also likely advocate safer techniques or equipment if they had to cover individual police officers that would make their product cheaper for departments who met certain standards, used safer techniques or did not use dangerous equipment. For example, a recent study showed a statistically significant correlation<sup>300</sup> between the amounts of surplus military equipment police departments had under the 1033 program<sup>301</sup> and the increased likelihood of civilian deaths from use of force.<sup>302</sup> If a police department decides to bring in surplus military equipment under the program, the increased risk of civilian death and department liability would be reflected in a raised base premium, creating an incentive against police militarization.

In his 2017 article on the use of ‘private’ liability insurance (for municipalities) to regulate ‘public’ police, Professor John Rappaport made the same point.<sup>303</sup> Premiums are set based on a rating using claims history and other factors, and coverage can be denied or set at a high rate unless risk-reduction measures are put in place.<sup>304</sup> He grouped this effort into the categories of policy development,<sup>305</sup> education and training,<sup>306</sup> audit,<sup>307</sup> accreditation,<sup>308</sup> personnel,<sup>309</sup> and omnibus and structural reforms.<sup>310</sup> Even community outreach efforts, such as ‘Coffee With a Cop’ are, he pointed out, among the risk-reduction initiatives encouraged by municipal insurers.<sup>311</sup> Potential coverage denial and high premiums are the leverage. However, when insurance is used, the cost of coverage is met by the municipality rather than directly by the department, which does not see the benefit of

<sup>298</sup> Robert Kneuper and Bruce Yandle, *Auto Insurers and the Air Bag*, 61 J. OF RISK AND INS. 107, 110 (1994).

<sup>299</sup> *Id.*

<sup>300</sup> The usual caveat that correlation does not equal causation applies.

<sup>301</sup> The program got its name because it was § 1033 of the 1997 National Defense Authorization Act, which added 10 U.S.C. § 2576a to the U.S. Code, allowing the Department of Defense to sell or donate excess equipment to state and local law enforcement agencies. This has included MRAP armored vehicles, weapons, and grenade launchers, among other military hardware.

<sup>302</sup> Casey Delehanty, Jack Mewhirter, Ryan Welch, Jason Wilks, *Militarization And Police Violence: The Case Of The 1033 Program*, 4 RESEARCH & POLITICS 3 (2017).

<sup>303</sup> Rappaport, *supra*, note 263.

<sup>304</sup> *Id.* at 1554–55, 1564, 1569–70, 1574–86.

<sup>305</sup> *Id.* at 1574–76.

<sup>306</sup> *Id.* at 1576–82.

<sup>307</sup> *Id.* at 1582–84.

<sup>308</sup> *Id.* at 1584–85.

<sup>309</sup> *Id.* at 1585–86.

<sup>310</sup> *Id.* at 1586.

<sup>311</sup> *Id.* at 1573.

lower premiums. The idea of using mandatory professional liability insurance suggested in this article takes the concepts outlined by Professor Rapaport and applies them to individual officers. It is a natural progression from the status quo, and comes with a fundamental legal justification of forcing the violator to pay punitive damages.

Introducing a mandatory and individualized insurance policy to cover damages for police misconduct, as advocated here, implicates a potential moral hazard issue that can be compared to the driving context. When compulsory insurance for motorists was mandated in states that previously did not require it, there was an increase in the number of accident fatalities.<sup>312</sup> A motorist who faced a huge financial burden, or even ruin, by causing an accident had an incentive to be careful, and this effect is significant.<sup>313</sup> Those with insurance know they would be covered (partially or fully) in the event of an accident, and this encouraged riskier behavior, a classic moral hazard.<sup>314</sup> At first blush, this may appear to be an argument against compulsory individualized insurance for policing. After all, the last outcome anyone would want by its introduction would be even riskier policing. However, police behavior is very often already completely indemnified, as will be outlined in the next sub-section. While police officers are supposed to be held personally responsible for behavior that goes outside the bounds of their employment, this moral hazard already exists. Officers do not, or rarely, pay now. Therefore, it is extremely unlikely this effect would manifest itself.

*E. Eliminating Extreme Moral Hazard: How Individualized Professional Liability Insurance Restores The Fundamental Principles Undergirding Punitive Damages*

*1. The Current State of Police Indemnification*

Before we begin to discuss further the potential benefits of individualized insurance for police officers, we should first explain how victims are currently compensated for risky police behavior. In a civil rights action,<sup>315</sup> individual officers are sued personally,<sup>316</sup> because municipalities are only

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<sup>312</sup> See Alma Cohen & Rajeev Dehejia, *The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities*, 47 J. OF L. & ECON., 357, 388 (2004) (a study of all states and the District of Columbia examined state automobile insurance law, the level of uninsured motorists, demographics, and fatality rates between 1970–98 found a 2% increase for each percentage point decrease in insured motorists).

<sup>313</sup> *Id.* at 384 (2004) (“The magnitude of the effect is such that a .01 increase in the ratio of uninsured motorists leads to a 2% decrease in the number of fatalities per year”).

<sup>314</sup> See *id.* at 365.

<sup>315</sup> Federal civil rights cases use 42 U.S.C. § 1983.

<sup>316</sup> See *Smith v. Wade*, 461 U.S. 30, 56–58 (1983) (liability when there is a “reckless or callous indifference to the federally protected rights of others”).

supposed to be financially liable when an official policy at issue.<sup>317</sup> Municipal insurance coverage is one way of settling lawsuits where the officer's actions are not protected from a legal claim by qualified immunity. But many municipalities cover settlements out of their own budget, known as self-indemnification. Proponents of police indemnification point to several interests protected by the practice, perhaps most compellingly the increased likelihood that victims are compensated.<sup>318</sup> The numbers involved can be eye watering. In Chicago for instance, over eight years, the city paid \$350 million for the settlement of 1,400 lawsuits.<sup>319</sup> In New York, reporting indicates that the city paid \$384 million over five years.<sup>320</sup> Regardless of how a municipality covers claims, this structure often creates a 'double-layer' of moral hazard. Consequences of lawsuits are sometimes not even felt directly by the police department (because the municipality pays for coverage or settlements) and almost never felt by individual officers, an issue that has been raised in media reporting about police misconduct.<sup>321</sup> However, in Baltimore, reporting in early 2018 suggested a lack of patience by the mayor towards paying the punitive damages of police settlements.<sup>322</sup> The latter point, that officers pay little and very rarely, points to a second major issue – it defeats the reason punitive damages are awarded in the first place.

There is a fundamental legal justification why mandatory professional liability insurance for individual officers should be introduced. It would restore the principle upon which punitive damages are based. Generally, but especially for federal civil rights claims, punitive damages are supposed to deter and punish the violator. The U.S. Supreme Court has said that such damages should be paid directly by a law enforcement officer defendant who recklessly violated constitutional rights.<sup>323</sup> While a municipality can be forced to pay a claim if a *policy* directly causes a constitutional violation, that does not apply if a police officer clearly acts recklessly on his, or her,

<sup>317</sup> *Monell v. New York Dep't of Social Services*, 436 U.S. 658, 691 (1978) (the court held that a policy leading to a constitutional tort makes a municipality liable - but not an individual employee, solely based on *respondeat superior*), *overruling in part* *Monroe v. Pape*, 365 U.S. 167 (1961).

<sup>318</sup> For an interesting account of this and other justifications for police indemnification see, Teresa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 VILL. L. REV. 839 (2017).

<sup>319</sup> See, e.g., Angela Caputo, *After Juries Punish Officers, The Penalties Are Often Negotiated Away*, CHICAGO TRIBUNE, Feb. 10, 2017, <http://www.chicagotribune.com/news/local/breaking/ct-police-punitive-damages-met-20170212-story.html> (analysis of eight years' worth of records found the city paid \$350 million to resolve about 1,300 civil lawsuits).

<sup>320</sup> Yoav Gonen & Julia Marsh, *NYC has shelled out \$384M in 5 years to settle NYPD suits*, N.Y. Post Sept. 4, 2018, <https://nypost.com/2018/09/04/nyc-has-shelled-out-384m-in-5-years-to-settle-nypd-suits/>

<sup>321</sup> See, e.g. *id.* (punitive damages were awarded against individual police officers in 35 of 200 jury trials – excluding negotiated settlements - over eight years, but only stood in 14 of those cases).

<sup>322</sup> Ian Duncan & Luke Broadwater, *Baltimore Police Union Balks At Policy Requiring Officers To Pay Some Legal Damages Themselves*, BALTIMORE SUN, Feb. 7, 2018, <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-union-lawsuits-20180207-story.html>.

<sup>323</sup> *Smith v. Wade*, 461 U.S. 30, 56–58 (1983).

own.<sup>324</sup> In spite of that principle, research by Professor Joanne C. Schwartz, of U.C.L.A., has shown that police officers rarely pay damages for civil rights violations out of their own pocket.<sup>325</sup> In some ways, this makes sense. Realistically, financial settlements running into millions of dollars could not be paid by any police officer and, in turn, would make them judgment proof. But indemnity by jurisdictions in paying damages awarded against an individual officer's violations (whether by an insurance policy or self-indemnification) is eviscerating the entire reason why punitive damages are awarded in a civil rights lawsuit – to only force the violator to pay. This shifts the burden back to taxpayers. A police officer has virtually no skin in the game at all, even though, in theory, he or she is supposed to be held personally liable for civil rights violations. Mandating professional liability insurance would not allow this to continue.

More recent research on the topic of insurance by Professor Schwartz is extremely instructive.<sup>326</sup> For the first time she quantified how claims are settled when police officers rarely contribute. She found that all of the sixty-two largest municipalities she surveyed self-insure against police misconduct, and the highest *proportion*<sup>327</sup> of those do not ask police agencies for any a contribution for settlements nor a regular payment towards a risk pool.<sup>328</sup> But a majority of thirty-six police agencies either makes a payment or a contribution, or some form of hybrid between the two.<sup>329</sup> Of the thirty-eight smaller departments she surveyed, seventeen self-insure in a similar way to the larger departments, and twenty-one either contribute to a risk pool or buy private insurance.<sup>330</sup> For example, in Minneapolis, where the idea of liability insurance for police originated (not always with support), the city paid \$6.6 million for police misconduct claims over the three years up to and including 2015, setting this money aside in its budget.<sup>331</sup> So, here too, it is clear that for a large proportion of departments, the violations of errant officers is reduced to a line item, almost a cost of doing business,

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<sup>324</sup> *Monell v. New York Dep't of Social Services*, 436 U.S. 658, 691 (1978) (the court held that a policy leading to a constitutional tort makes a municipality liable - but not an individual employee, solely based on *respondeat superior*), *overruling in part* *Monroe v. Pape*, 365 U.S. 167 (1961).

<sup>325</sup> See, e.g., Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912-13 (2014) (In a study of 9,225 cases between 2006 and 2011 in 44 jurisdictions, police officers paid in 0.41% of cases, or 0.2% of the dollar amount, though that differed slightly in other jurisdictions that 'required' a contribution).

<sup>326</sup> Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, And Police Reform*, 63 U.C.L.A. L. REV. 1144 (2016).

<sup>327</sup> It is important to distinguish this from highest number, as a majority of other departments settle claims in a combination of different ways, making up a majority.

<sup>328</sup> Schwartz, *supra*, note 326, at 1165-67.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 1170.

<sup>331</sup> *Personal Liability Insurance For Minneapolis Cops Is A Lousy Idea*, STAR TRIBUNE, July 26, 2016, <http://www.startribune.com/personal-liability-insurance-for-minneapolis-cops-is-a-lousy-idea/388320521/>.

while *the officer pays nothing at all 99.5% of the time*.<sup>332</sup> Yet in a lawsuit, it is the individual officers who are sued, not the municipality (unless the claim relates to a policy). Even so, with indemnification, the violator is not paying. Indeed, a useful argument that has been made for making insurance compulsory in various professions is that when an ‘injurer’ causes losses greater than their personal wealth and they are not insured, the loss falls on society (by paying for lost earnings, health care or other publicly-funded programs).<sup>333</sup> As things stand, society pays in the guise of damages or settlements when municipalities self-indemnify, because their budgets are our tax dollars. These budgets are limited, and money spent on tort judgments is taken from other public programs, a point made poignantly by a former attorney for the city of Chicago:

[W]hen you had to budget more for [police] tort liability you had less to do lead poisoning screening for the poor children of Chicago. We had a terrible lead poisoning problem and there was a direct relationship between the two. Those kids were paying those tort judgments, not the police officers.<sup>334</sup>

If paying for civil rights violations with taxpayer money were not problematic enough, a recent study by the Action Center on Race and the Economy (ACRE) shows how the financing of these payments through municipal bonds drastically increases costs to tax payers and allows Wall Street investors to profit from police misconduct.<sup>335</sup> The five jurisdictions highlighted in the report took on \$837.8 million in debt in order to pay police brutality judgments. Taxpayers will pay approximately \$1.03 billion in interest and finance charges related to that debt, more than doubling the total cost.<sup>336</sup>

A new solution is needed. Municipal indemnification undercuts the punitive purposes of damages, places an enormous burden on cash-strapped local governments and allows investors to profit on the whole process. While these papers were written independently and contemporaneously, it

<sup>332</sup> See Jonah Newman, *How Emanuel’s Police Lawsuit Budget Puts More Burden On Taxpayers*, CHICAGO REPORTER, Oct. 19, 2016, <http://chicagoreporter.com/how-emanuels-police-lawsuit-budget-puts-more-burden-on-taxpayers/> (this article shows consistent under-budgeting for police misconduct cases by Chicago mayor Rahm Emmanuel, with borrowing supplementing the difference): see also Schwartz, *supra*, note 326 (this article deals with self-indemnification).

<sup>333</sup> Michael Faure & Roger Van den Bergh, *Compulsory Insurance for Professional Liability*, 14 GENEVA PAPERS ON RISK & INS., 308, 313 (1989) (Belgium uses a mixture of compensation funds and mandatory liability insurance to deal with the insolvency problem).

<sup>334</sup> Schwartz, *supra*, note 326, at 1178.

<sup>335</sup> Alyxandra Goodwin et al., *Police Brutality Bonds: How Wallstreet Profits From Police Violence*, ACTION CENTER ON RACE AND THE ECONOMY (June, 2018), <https://static1.squarespace.com/static/58d8a1bb3a041137d463d64f/t/5b330815562fa7d3babc1fd4/1530071089421/Police+Brutality+Bonds+-+Jun+2018.pdf>

<sup>336</sup> *Id.* at 4.

is telling that the ACRE report arrived at the same conclusion we have: mandatory individual liability insurance for police officers.<sup>337</sup>

## 2. *The Solution: Mandatory Professional Liability Insurance*

In Section II we rigorously pursued a police chief's contention that there were substantial internal constraints which left him essentially unable to hire, fire, discipline, or promote officers based on internal evaluations of their job performance and safety. Powerful police unions, arbitrators, and the civil service system left desk duty—a sort of police rubber room—as one of the only ways to keep the most problematic officers from endangering public safety. At the same time, municipal self-indemnification for civil rights judgments creates an enormous moral hazard; even in cases where the most egregious civil rights violations are proven in a court of law, officers can almost certainly count on paying no damages. Mandatory professional liability insurance addresses both problems.

First, it brings a new player into the scene, an independent third party with a financial stake in accurately and empirically assessing potential liability. We presume successful insurance companies must be able to do at least two things well: assess actuarial risk and set premiums accordingly. In the policing context this means using objective, evidence-based indicators (like the number of civilian complaints, discussed *supra*) to identify the officers that are most likely to be named in a multimillion-dollar law suit. While many disciplinary measures are “backward looking” in that they are responses to already documented misconduct, the risk prediction actuarial algorithms we anticipate insurance companies developing are oriented towards predicting future behavior. If the risk is concentrated in a small percentage of officers, insurance companies have strong financial incentive to find those specific officers, to raise their premiums to reflect their actual risk, and perhaps, to push them into another line of work.

Importantly, this solution exists outside of the disciplinary gridlock created by labor arbitration and police unions, institutions that we found effectively handcuff reforming police chiefs. Again, a look to driving is illustrative. Generally, if insurance is regarded as mandatory for a particular position such as a truck driver, valet, or school bus driver, an uninsurable worker with a bad driving history can be justifiably terminated.<sup>338</sup> In one arbitration case, a company could only get coverage if a particular cement delivery driver was fired.<sup>339</sup> His termination was recorded as non-disciplinary.<sup>340</sup> In two similar but separate cases, an ambulance driver and another driver for a printing company were each told they were eligible for

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<sup>337</sup> *Id.* at 27–28

<sup>338</sup> BRAND & BIREN, *supra*, note 214, at 4–5.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

reinstatement if they could each get coverage within forty-five days, and pay the excess, otherwise their terminations would stand.<sup>341</sup> This is exactly how insurance could work with individually mandated liability insurance policies for police officers.

Second, this proposal creates financial consequences for offending officers while still guaranteeing that victims receive compensation. The extreme moral hazard of the current system is thereby reduced. The threat of punitive damages can punish and deter, albeit indirectly via raised premiums. On the other hand, the offer of reduced premiums provide an incentive for officers to participate in vital trainings and programs. In this way, mandatory individual liability insurance aligns the financial interests of insurers, municipalities, police departments with the financial interests of individual officers. Carefully calculated premiums are both a fiscal carrot and a fiscal stick, encouraging all stakeholders to adopt policies, trainings, and reforms that reduce risk and along with it, liability.

Information about officer behavior in the context of liability insurance is vital. Generally, an important aspect of insurance markets is the ‘observation’ of an insured party’s behavior, so that the company can match the premium offered with the risk involved. A free flow of information prevents what is known as ‘adverse selection,’ where an insurer offers coverage at a rate that is too low to match the possibility that they will pay out a claim, which (as the name suggests) is adverse to the insurance company. Therefore, within any legislative framework to introduce insurance for police, a vital component is that insurers are fully informed about disciplinary records such as upheld complaints, criminal convictions or dispositions, and general data about a police department’s performance. Insurers would also need to be informed of settlements, whether or not the underlying conduct led to discipline, because their purpose is to paint the most accurate picture of the individual officer’s risk and set the premium accordingly.

As a free flow of information to an insurer affects their premium calculation, the requirement for complete and accurate data could, and should, be a precondition of individual coverage – with a retroactive loss or reduction of insurance cover (such as a lowering of the cap or an increase in deductible) if information supplied to the insurer is found to be incomplete. Indeed, annual renewal must also depend on all information supplied to the insurance company by officers. Coverage supplied based on data that is wrong or incomplete should lead to loss of coverage and, because it is a requirement of employment, lead to immediate termination. After all, police officers are expected to be truthful. This could also be another way to rid policing of those who are not, hopefully long before it matters in a police report or courtroom testimony. Untruthful statements in insurance forms could also be important impeachment evidence for ongoing, past or future prosecu-

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<sup>341</sup> *Id.* at 4–6.

tions or civil rights claims. The stakes for untruthful, deceptive, or incomplete statements and information should be high. For most officers who are simply honest, this would hardly be an onerous task.<sup>342</sup>

### 3. *The Risk of Police Disengagement*

Critics to the idea of mandatory professional liability insurance may argue that officers will simply disengage from dangerous policing situations. And certainly no one wants an officer under fire to be thinking about how their reaction to a life or death situation might affect their insurance premium. But this fundamentally misunderstands the stage at which we seek to intervene. We hope to ensure that the officer making that difficult, split-second decision has received the best possible training. We hope to influence who is behind the badge in that moment, having priced out officers with demonstrated histories of racial bias or poor performance. Furthermore, the insurance company is assessing risk of liability based on a violation of civil rights. Justified use-of-force incidents should not raise the premium.

Additionally, for some police departments, it appears that less policing is more effective. Evidence from New York suggests a reduction in the amount of police interactions can actually be positive when policing methods are not based on proven effectiveness. So, we hope our proposal will encourage *smarter* policing not necessarily more or less.

For example, the curtailing of stop and frisk in New York city after a court ruling on its impact on people of color<sup>343</sup> led to a drop of 98% of the kind of stops at issue.<sup>344</sup> But crime in the city continued to decline, and in 2018 reached record lows.<sup>345</sup> The predicted consequences of its demise – a rise in crime – simply did not materialize.<sup>346</sup> In other words, there was no practical reason to do it in the first place. More generally, among communities of color, black people in particular are stopped as pedestrians,<sup>347</sup> pulled

<sup>342</sup> Some significant information may – or at least should - be publicly available; domestic violence restraining orders, driving offenses, arrests, complaints against an officer etc.

<sup>343</sup> *Floyd v. New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013).

<sup>344</sup> See *Stop-And-Frisk Data*, N.Y. CIVIL LIBERTIES UNION, <https://www.nyclu.org/en/stop-and-frisk-data> (in 2013, the number of stop-and-frisk incidents was 532,911 and in 2016 there were 12,404 incidents, a mere 2.3% of the 2013 figure).

<sup>345</sup> Post Editorial Board, *Don't take the record-low NYC crime rates for granted*, N.Y. POST, (Dec. 27, 2018), <https://nypost.com/2018/12/27/dont-take-the-record-low-nyc-crime-rates-for-granted/>.

<sup>346</sup> Kyle Smith, *We Were Wrong about Stop-and-Frisk*, NATIONAL REVIEW, Jan. 1, 2018, <http://www.nationalreview.com/article/455035/new-york-city-stop-and-frisk-crime-decline-conservatives-wrong>.

<sup>347</sup> Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. OF THE AM. STAT. ASS'N. 813, 813–14 (2007) (Statistical model found that under New York City's stop-and-frisk policy, "minority groups were stopped more often than whites, both in comparison to their overall population and to the estimated rates of crime that they have committed").

over while driving,<sup>348</sup> searched,<sup>349</sup> arrested,<sup>350</sup> and shot<sup>351</sup> at higher rates than similarly situated whites.<sup>352</sup> While the mandatory professional insurance solution proposed in this article is facially race-neutral, we anticipate that any broad reduction in police misconduct will have a race-remedial effect, disproportionately *helping* people of color.

In Salt Lake City, Utah, the police department has been actively trying to de-escalate violent encounters with additional training.<sup>353</sup> Officers withdraw to provide distance with a subject to bide time and allow both to calm down and rethink options.<sup>354</sup> The police department even issues an award for the best de-escalation examples.<sup>355</sup> The result is that there was only 1 shooting deaths by Salt Lake City officers between 2015 and 2019.<sup>356</sup> Any effect on payouts for lawsuits in the city directly affects taxpayers, because it self-indemnifies its department against misconduct.<sup>357</sup> Mandatory professional liability insurance would encourage this kind of change more broadly. In any event, prevention of deaths and protection of all (including those who pose as danger to themselves or others because of a crisis) is, arguably, a better default position. However, it is worth noting that, as with the civil-

<sup>348</sup> Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States I* (Stanford Open Policing Project, Working Paper, 2017) <https://Sharad.com/papers/traffic-stops.pdf> (analysis of more than 60 million traffic stops found blacks more likely to be stopped relative to their share of the driving age population).

<sup>349</sup> *Id.* at 1 (“Among stopped drivers—and after controlling for age, gender, time, and location—blacks and Hispanics are more likely to be ticketed, searched, and arrested than white drivers.”); LYNN LANGTON & MATTHEW DUROSE, BUREAU OF JUSTICE STAT., NCJ 242937, POLICE BEHAVIOR DURING TRAFFIC AND STREET STOPS, 2011 (2013) (a lower percentage of white drivers stopped by police were searched (2%) than black (6%) or Hispanic (7%) drivers).

<sup>350</sup> Emma Pierson et al., *A large-scale analysis of racial disparities in police stops across the United States* 5–8 (Stanford Open Policing Project, Working Paper, 2017) <https://Sharad.com/papers/traffic-stops.pdf>, (analyzing arrest rates after traffic stops); Tammy R. Kochel Et. al., Effect of Suspect Race on Officers’ Arrest Decisions, 49 CRIMINOLOGY 473 (2011) (Meta-analysis of more than 40 studies found with “strong consistency” that non-whites are more likely to be arrested than whites in similar situations).

<sup>351</sup> Konrad Bresin & Yara Mekawi, *Is the evidence from racial bias shooting task studies a smoking gun? Results from a meta-analysis*, 61 J. OF EXPERIMENTAL SOCIAL PSYCHOLOGY 120 (2015) (meta-analysis of 42 laboratory studies finding that polices officers are quicker to shoot armed black targets, slower to not shoot unarmed black targets, and in general, “more likely to have a liberal shooting threshold for Black targets.”); Lorie Fridell & Hyeyoung Lim, *Assessing the racial aspects of police force using the implicit- and counter-bias perspectives*, 44 J. OF CRIM. JUSTICE 36 (2016).

<sup>352</sup> For an excellent overview see Kimberly Kahn & Karin Martin, *Policing and Race: Disparate Treatment, Perceptions, and Policy Responses*, 10 SOC. ISSUES AND POL’Y REV. 82, 85–88 (2016).

<sup>353</sup> *When Police Can Use Deadly Force, But Don’t*, K.S.T.U., May 17, 2017, <http://fox13now.com/2017/05/16/deadly-force-or-de-escalation/>.

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*; Kierra Dotson and Rick Aaron, *Police release body camera footage after deadly shooting of Salt Lake City rapper*, ABC NEWS, (Nov. 28, 2018), <https://www.abc4.com/news/local-news/police-release-body-camera-footage-after-deadly-shooting-of-salt-lake-city-rapper/1624828904>.

<sup>357</sup> Email to one of the authors from Matthew Rojas, Director of Communications, Office of the Mayor, Salt Lake City, received July 26, 2017, confirming that the city self-indemnifies the police department.

ian oversight, there has been criticism about the lack of scientific research about the effectiveness of de-escalation techniques.<sup>358</sup> The kind risk aversion that may be feared by our proposal would simply encourage more evidence-based or strategic thinking.

Smarter policing also includes improving internal policies and procedures. A police department can lower its insurance costs if it can show it meets basic minimum standards of professionalism through an accreditation process.<sup>359</sup> This was a process briefly addressed in Prof. Rappaport's article and worth another mention here.<sup>360</sup> The initial outlay can be expensive but can yield long-term benefits in managing financial risk from, among other things, civil lawsuits.<sup>361</sup> For those law enforcement agencies with an incentive to improve, there are pay offs to the bottom line.

### F. Implementation

In a speech in 1910, President Theodore Roosevelt said, "Nothing in the world is worth having or worth doing unless it means effort, pain, difficulty."<sup>362</sup> The authors of this article recognize the huge obstacles that would need to be overcome to turn an idea in a law review article into reality. However, we think it is worth the effort and difficulty. What follows, while not exhaustive, is our attempt to address some of the obstacles.

In his original article suggesting the idea of individual liability insurance policies for police, Professor Noel Otu said it should be mandated, that salaries should be increased to cover the base premium, and liability transferred from state entities to individual officers.<sup>363</sup> He also called for the U.S. Congress to legislate.<sup>364</sup> Federally, law enforcement officers are not obliged to have professional liability insurance for claims the federal government refuses to indemnify, but officers can get reimbursement for half the cost of policies they take out to cover such employment-based liability claims.<sup>365</sup>

<sup>358</sup> Sarah Zhang, *Police Training Is Seriously Lacking In Actual Science*, WIRED, Aug. 17, 2015, <https://www.wired.com/2015/08/police-training-seriously-lacking-actual-science/>.

<sup>359</sup> See *The Commission*, COMM'N ON ACCRED'N FOR LAW ENF'T AGENCIES (accessed July 25, 2017), <http://www.calea.org/content/commission> (details the organizations supporting the C.A.L.E.A.'s work and the purpose of its accreditation process); see also Richard W. Myers, *A Message from the Chair-A Solution for Small Agencies*, COMM'N ON ACCRED'N FOR LAW ENF'T AGENCIES (accessed July 25, 2017), <http://www.calea.org/content/message-chair-solution-small-agencies> (insurance companies "provide discounted rates for accredited agencies").

<sup>360</sup> Rappaport, *supra*, note 263, at 1584–85.

<sup>361</sup> William L. Wilcox, *Focus on Accreditation, A Small Police Department's Success*, F.B.I. LAW ENF'T BULLETIN, 18, 20, Feb. 2004.

<sup>362</sup> THEODORE ROOSEVELT, *THE WORKS OF THEODORE ROOSEVELT* 443, 455 (Herman Hagedorn, ed., Memorial ed., Vol. XVII, 1925). The speech was delivered on Nov. 4, 1910, to the Iowa State Teacher's Association.

<sup>363</sup> Otu, *supra*, note 261, at 309.

<sup>364</sup> *Id.*

<sup>365</sup> See U.S. General Services Administration Order CPO 9820.1, *available at* <https://www.gsa.gov/directives-library/professional-liability-insurance-98201-cpo>.

On Professor Otu's first points about the way a base premium would be covered, the authors agree – though perhaps more generally than a specific increase in pay. A better approach might be to guarantee that the municipality will always cover the base or average premium for all officers in a particular police department. At the same time, the premium for individual officers should be worked out on a purely actuarial method based on the best empirical research. Officers with histories that create a higher premium would be responsible for paying the difference between their premium and the departmental average. On the other hand, officers with histories that suggest they are lower risk should be able to recoup the difference between their lower premium and the departmental average as additional take-home pay. This gives insurance companies leverage over both the whole department and over individual officers. Should the department adopt safer policies, like mandatory de-escalation training, the average officer base premium would be reduced. Similarly, insurance companies can tie premium reductions to specific trainings and programs that are shown to lower risk and liability, giving individual officers a direct incentive to seek out such trainings. Departments and individual officers alike would face a simple choice: recoup the financial benefits of reducing risk or bear the cost of being less risk averse.

### *1. What if Insurance Companies Use Broad Risk Categories?*

So far, we assume that it will be in the financial best interest of insurance companies to limit claims by calibrating their premiums based on an individualized assessment of officer risk. But what if insurance companies prefer to treat officers like doctors rather than like motorists, substituting broad risk categories for an individualized assessment? It may turn out that easily assessable factors like the zip code of an officer's patrol or their rank are sufficiently correlated to liability such that the insurance companies need not choose to conduct an expensive individualized assessment when setting premiums.

Using broad risk categories recreates the problems associated with insuring the department at the municipal level, albeit on a slightly smaller scale. We believe this would capture some of the benefits of our proposal, but not be maximally effective. Adding a financial incentive for police departments to examine the polices, practices and officers that police a city's most dangerous neighborhood may lead to some of the outcomes we are after: fewer deaths and more trust. However, it would also fail to identify individual officers with a high-risk profile, those who may be walking the streets with untreated PTSD, a history of domestic violence, unaddressed racial biases, or a long history of sustained complaints. Instead, it may be seen as merely a tax on the officers with the most difficult and dangerous jobs in the department.

The question of whether insurance companies will choose to treat police officers like motorists, factoring individual attributes when setting pre-

miums, or like doctors, relying on broad risk categories, ultimately is beyond the scope of this paper. However, should insurance companies choose to rely on broad categories, we offer a contingency form of our proposal. In short, an invigorated certification process could assist or even require insurance companies to set individualized premiums according to a board-assessed risk score.

In Massachusetts, motorists may not renew their registration without proof of insurance.<sup>366</sup> Similarly, we propose that officers be required to regularly *recertify* on the condition that they present proof of insurance. At the same time that our re-imagined post board is reviewing the officer for recertification, they will also provide a liability risk score to the insurance company. This score would need to be the result of a wholistic, fair, and data-driven analysis.

Under a general statutory mandate to score liability risk and promote best practices, the precise formulation of this score should be a product of careful regulatory research, taking notice-and-comment input from police, insurance companies, activist groups, and the community. While this score should be the result of a regulatory process that considers all stakeholders, we propose several core factors: 1) routine background checks (to catch previously undisclosed criminal convictions); 2) a scored assessment of citizen complaints, with emphasis on those upheld; 3) performance review by a direct supervisor; 4) voluntary training and continuing education; 5) body camera footage review. The final two aspects warrant further comment and elaboration here.

Jeronimo Yanez, the officer who shot and killed Philando Castile, had recently attended a seminar entitled “The Bulletproof Warrior” which has been widely criticized as creating a paranoid and dangerous attitude in cops.<sup>367</sup> We believe the training and continuing education portion of the score can be used to de-incentivize programs that may make police more likely to shoot quickly, while supporting better, safer training. In the same vein, officers could be rewarded for seeking mental health supports like PTSD treatment or anger management classes. The board would be in an ideal position to evaluate empirical research about such interventions, ensuring that police training is data-driven. Private police training programs would be incentivized to demonstrate to the board that their programs work.

The use of footage from Body Worn Cameras would require balanced procedures. We propose that officers submit a designated number of examples of their best policing. These incidents would be balanced by an equal number of randomized samples and footage from any sustained complaint.

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<sup>366</sup> MASS. GEN. LAWS ch. 90 § 1A. A registration card is not required to be carried in a vehicle in Massachusetts, but proof of insurance must be given upon registration, which can be revoked for a failure to maintain insurance.

<sup>367</sup> Jennifer Bjorhus, *Officer who shot Castile attended ‘Bulletproof Warrior’ training*, STAR TRIBUNE (July 14, 2016).

This portfolio would give the board grounds to assess whether an officer followed policies, tried to de-escalate if it was appropriate, or adopted a default courteous tone until provoked to react otherwise. There may be formal, political, or even legal obstacles that prevent use of B.W.C. footage for this purpose,<sup>368</sup> but we believe the balanced nature of this approach belies those concerns.

## 2. *Other Implementation Concerns*

The following considerations apply whether the insurance company assesses risk directly or via a score from a re-imagined P.O.S.T. board.

First, there is a question as to whether officers would be responsible for their own coverage, or individual coverage is negotiated department-wide and provided to officers in the same way as health insurance. The latter would enable easier calculation of a department-wide average or base level, potentially provide multiple customers to an insurer (that could keep costs down as a group), and make it easier administratively. This is the approach we envision.

Legislating a requirement that officers carry individual insurance may not automatically imply that departments will pay for the base coverage as part of their compensation. However, given the strength of police unions described above, we do not anticipate that any implementation which results in a net decrease in officer pay would be politically feasible. It may also be feasible to simply legislate that departments pay a base portion of their officer's coverage. We leave the precise form of these requirements to the legislative committees that will need to study them prior to implementation.

Another path to implementation is to follow the lead in Baltimore, where it was reported in early 2018 that the city threatened to refuse to pay some settlements against individual officers.<sup>369</sup> The city already has a history of refusing to pay punitive damages in cases where actual malice is proven, while still paying the actual damages.<sup>370</sup> We propose that as a municipal policy, cities refuse to indemnify the first \$75,000 of damages against officers. Given the power of police unions, this takes considerable political courage, but we anticipate that it would force the widespread adoption of professional liability insurance without the need for legislation or litigation. Brave politicians can certainly make a case to the public for refusing to cover damages for misconduct, as it is the individual officer who ought to

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<sup>368</sup> See e.g. 50 IL. COMP. STAT. 706/10-20(a)(9) (this law only allows use of body worn camera footage for disciplinary purposes after a formal complaint, a use of force has occurred, there is a potential complaint from another specified statute, or footage corroborates other evidence).

<sup>369</sup> Duncan & Broadwater, *supra*, note 322.

<sup>370</sup> *Id.*

be held liable for acting outside of their employment not the taxpaying citizenry who have been harmed by this misconduct.

If cities like Baltimore eventually refuse to pay for misconduct claims, it will be in an officer's own interest to get insured – so this idea may come sooner than we thought when we embarked on this journey. The only issue then is what that insurance looks like and how premiums are calculated. For now, the best approach is probably the one taken in Minneapolis – that communities, when successful in a vote, impose their democratic will with a municipality-wide ballot backed by enabling state legislation. For states that are reluctant to introduce such legislation, ballot initiatives would be needed statewide. New legislation should also foreclose a need for protracted contract negotiations with police unions. In a municipality-specific ballot, a favorable result should then force a police chief to listen to the views of the electorate and get in line to introduce it, or get out of the way in favor of someone who will.

#### CONCLUSION

In the end, Glen Carr's question persists. How is the officer that killed her son still employed? In short, we found every major mechanism of police accountability to be substantially flawed or generally ineffective. The civil service system constrains hiring and promotion. Juries remain hesitant to issue verdicts and judgements against officers in all but the most egregious cases. P.O.S.T boards are toothless, and civilian oversight lacks evidence of effectiveness. Body-worn cameras are promising, but there are substantial implementation concerns that suggest they will never be a full solution. Arbitration agreements often block effective discipline actions by police chiefs. New ideas are sorely needed.

At the same time, department-wide insurance and municipal self-indemnification already underwrite policing. Even when the most egregious violations are proven in court, officers are unlikely to pay a dime towards the judgment. In the course of indemnifying police misconduct, cities rack up huge debts and turn to Wallstreet for financing. Unsurprisingly, the banks take their cut, perhaps more than doubling the total taxpayer burden through finance fees and interest.

In response, we propose an innovative and market-based solution: mandatory professional liability insurance. This idea has the potential to break open a stagnant status quo in which we all await the seemingly inevitable news of another tragic shooting, another needless death. Empirical, statistically rigorous research suggests that we can find the next Daniel Pantaleo or Jason Van Dyke before the nation has reason to learn their name. The objective, evidence-based rigor of the actuarial algorithm exists outside of complicated local politics and stands beyond the reach of overly protective arbitrators. Insurance companies are well positioned to perform this risk assessment and to set premiums in such a way that the most dangerous police,

the few but foul “bad apples” are priced out of the profession all together. The time for a full embrace of this idea has come.

