

The Washington Post

Opinions

Cops can ignore Black Lives Matter protesters. They can't ignore their insurers.



By **John Rappaport** May 4

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In 2010, the police department in Rutledge, Tenn., was riven by scandal. The police chief, a 12-year department veteran, had been charged with assault and was under investigation by state authorities. But that wasn't what Mayor Danny Turley cited when he fired the top cop that year. Turley "had no choice," he said — his "hands were tied" — because the city could have lost its liability insurance if the chief kept his job. That would have left Rutledge responsible for paying out on future lawsuits, potentially crippling its small budget. So the insurance company got its way, and a police officer got an early retirement.

My research on municipal liability insurance turned up this and other examples of police chiefs — including some reform-minded administrators — who owe their jobs to pushy insurance adjusters. The insurance companies (with names like National Casualty, JWF Specialty and Genesis) offer policies that reimburse cities held liable for harm their law enforcement officers inflict. The coverage is broad: It often includes intentional acts such as discrimination or assault and battery, as well as punitive damages, which are meant to punish egregious misbehavior. There is no national data about the size of this insurance market, but it's big. Lawsuits stemming from recent shootings by officers, such as those of Laquan McDonald in Illinois and Walter Scott in South Carolina, have settled in the ballpark of \$6 million per case.

The arrangement creates a potential moral-hazard problem — a risk that insured municipalities will be less vigilant against police misconduct than they'd be in the absence of insurance. But it also empowers insurers,

which are committed to strategies of “loss prevention.” In an age when police departments, backed by politicians and powerful unions, are said to resist complaints about brutality and abuse, some insurance companies are playing an unheralded role: as private regulators of police activity.

Insurers work closely with police departments on policies and training. Do you want to know how to conduct a strip search without violating the Constitution? Travelers Insurance has a pamphlet on that. Insurers provide video libraries and online training systems, and they even do some classroom instruction. The companies sometimes bring in outside consultants — usually police veterans — to do this work or send departments off-the-shelf rules from policy-writing services such as Lexipol. Insurance companies also subsidize the use of otherwise prohibitively expensive use-of-force virtual-reality simulators. The Kentucky League of Cities Insurance Services, for example, purchases three new simulators every three years and circulates them among the agencies it covers. Early academic research shows that these simulators help cops prevent crises and decrease the number of unjustified shootings.

Underwriters don't just train; they follow up, too. Audits are common. Insurance officers review internal documentation, make site visits and do ride-alongs. Many keep a “watch list” of departments that have been having problems and audit them more frequently and intensely. My favorite audit technique is from an insurer out West who said she sends representatives to visit “cop bars” incognito to listen to the local gossip.

And when they uncover problems that may turn into lawsuits, insurers pressure agencies to make changes or even terminate “bad apples” from the beat. In Irwindale, Calif., the California Joint Powers Insurance Authority forced the police department to implement a “performance improvement plan” in 2013 in order to keep its coverage. That same year, the city of Niota, Tenn., fired two officers even though the charges against them (in connection with a beating) had been dismissed. The city's insurer had threatened to drop its coverage if the officers went back on duty.

The carrots and sticks here all have to do with the availability and pricing of coverage. Both affect the public treasury directly; the consequences of “going bare” can be severe. Inkster, Mich., recently raised property taxes by an average of \$178 per household to finance a seven-figure settlement involving a police officer. In extreme cases, municipalities have even shut down their police forces after their insurers pulled coverage. Niota has been down that road; so have Point Marion, Pa.; Sorrento, La.; Lincoln Heights, Ohio; and Maywood, Calif.

Civil rights activists have often claimed that police departments are unaccountable — a complaint that intensified after the shooting of Michael Brown in Ferguson, Mo., and the birth of the Black Lives Matter

movement. But if police leaders sometimes avoid political accountability, they still answer to their underwriters, which therefore have significant leverage over them.

If politicians wanted to, my research suggests, they could use that leverage to effect change. State insurance commissioners and regulators could lead the charge. How?

Small municipalities, such as Ferguson, are abundant in our country but pose a challenge for insurers' loss-prevention programs. Because the premiums these municipalities pay are relatively small, it is often infeasible for insurers to discount rates enough to compensate for the expense of loss prevention. (This is why a property insurer that covers a skyscraper will send inspectors to the premises but my homeowner's insurer will not.) It's not economical for insurers to tailor their loss-prevention efforts or pay close enough attention to make small-town premiums accurately reflect their risk.

Here, insurance regulators could do two things to help companies manage departments more effectively. First, they could require municipalities under a certain size to pool their risks and resources before purchasing insurance on the commercial market. (Many towns do this already.) Individualization would still be difficult, but bulk loss-prevention programs could help small departments implement better training and policies.

Second, regulators could require insurers to impose a deductible so that cities bear some financial responsibility for the losses they cause. At present, some insurers write "first-dollar" (i.e., no-deductible) police liability policies for small municipalities. This makes it harder for them to demand better police skills: Why expend the effort if your insurer will cover the consequences anyway?

One hurdle is that certain types of police misconduct are difficult for insurers to regulate, even when they have a financial incentive to do so. The best example is shoddy policing that leads to wrongful convictions, such as using suggestive eyewitness tactics, false or coerced confessions, faulty forensic evidence or bogus informant testimony. Wrongful-conviction claims can be tremendously costly, but they're tricky for insurers because of the long delay between the misconduct and the filing of a lawsuit — and because of their low frequency. They're what's called a "high-impact, low-probability" risk. Research shows that insurers misunderstand how to predict these events. Sometimes they seem to discount the risk altogether, while other times they fixate on the magnitude of recent losses and exaggerate the risk of the next major one.

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But there are areas where insurers could wield their power more effectively. At the moment, companies tell me, they don't calibrate premiums based on the risk characteristics known to affect the likelihood of wrongful convictions. So, for example, insurers could raise rates for agencies that don't record interrogations on video (which helps avoid false or coerced confessions) or that don't use double-blind lineup procedures (which reduce erroneous witness identifications). Insurers could work with state attorneys general or other law enforcement experts to devise a list of risk-related features that underwriters should (or must) consider when setting rates. They could also cap the amount of coverage available for wrongful-conviction claims.

Regulators might also insist that insurers cover wrongful convictions on a claims-made basis. Police liability coverage traditionally has been written on an occurrence basis, meaning it indemnifies acts taken during the policy period, regardless of when a suit is filed, even if it's long into the future. Policyholders tend to like this feature, but it makes pricing very difficult for insurers. Claims-made policies, by contrast, cover suits filed during the policy year for injuries caused in the past. The insurer need not predict long-term claim exposure, which means it can price its coverage more confidently. Better pricing, in turn, usually means better control of risk.

Finally, and most sweeping, cities could be required to have insurance. Most smaller towns have it, but places with large budgets and many taxpayers (cities with more than, say, a few hundred thousand residents) typically self-insure. This may partly explain why we hear so little about police liability insurance — because academics and the media tend to focus their attention on policing in places like New York and Chicago. But if insurance can help regulate police conduct, then those who want to reform departments should think about requiring them to have it. A mandate wouldn't be without drawbacks — or controversy — but if our policing problems continue, we shouldn't let a little controversy scare us away.

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