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Why Insurance Contracts Might be the Trick to Police Reform


Jack Preis

How do lawsuits deter misconduct? That is an issue that Professor Joanna Schwartz has written about before, and her latest article on the topic, How Governments Pay: Lawsuits, Budgets and Police Reform, could not be more timely. Over the past year, our county has witnessed dramatic instances of police abuse and the public is understandably demanding reform. Schwartz’s terrific article explains why civil rights actions may fail to instigate reform, and suggests how insurance contracts, of all things, can play a role in fixing this problem.

To understand how lawsuits deter, consider a reckless driver. You know, the type that takes corners too fast, sends texts while on the interstate, and whips past school buses with flashing lights. What will it take for the driver to finally reform herself? Well, first of all, she’ll probably get a bunch of tickets. If she gets tired of paying the tickets and fears losing her license, she’ll probably start driving more carefully. Aside from the tickets, however, the driver may end up getting sued when her reckless behavior finally causes an accident. Even though her insurance company will likely pick up the tab for any judgment, the company is likely to jack up her premiums after it pays the damages. In the end, the driver’s recklessness is going to cost her a lot of money. And this will probably convince her to become a safer driver.

Compare the reckless driver to a reckless cop—the type that stretches the facts to get a warrant, is quick deploy her Taser, and sees probable cause underneath every hoodie. What will it take for the cop to reform herself? Do reckless cops get “tickets” like reckless drivers do? The answer is almost uniformly no. Misbehaving cops are rarely subject to criminal prosecution. What about a lawsuit, then? Just like drivers, cops don’t pay their own judgments; instead, it is the employer, acting as an insurer, that pays the judgment. If the civil rights actions work like tort actions, the employer/insurer will eventually decide to “drop” the insured by firing the reckless cop. And the cop (as well as her peers who witness this process) will decide to act more appropriately.

But that assumes an enormous question: do civil rights actions work like tort actions? To figure that out, we would need to know whether the party who has the power to fire the misbehaving officer is also the party who pays the judgment. If the police chief sees his budget depleted by a reckless cop, he is likely to take corrective action. But if the judgment is paid by a third party, and the chief never suffers any ill effects, it is far less likely that he will address the problem.

So who pays judgments and settlements in civil rights actions against police officers? This is what Professor Schwartz serves up in her new article. Using FOIA requests and an immense amount of less formal gumshoeing, Schwartz catalogued the ways in which 100 of our nation’s law enforcement agencies satisfy lawsuits against
Schwartz’s study is impressive in scope. She obtained data from 62 of the 70 largest law enforcement agencies in the country and from 38 small and mid-sized agencies. The agencies included large jurisdictions like Baltimore, Los Angeles and New York City as well as tiny hamlets like Waterloo, Nebraska (with only a single sworn officer). Some agencies operated at the state level (like the Maryland State Police), some operated at the county level (like the Polk County Sherriff’s Office in Florida) and some operated at the municipal level (like the Newark Police Department). All told, Schwartz’s study accounts for 26% of the nation’s 765,000 law enforcement officers.

It is difficult to do justice in this small space to Schwartz’s many findings, but here are three important takeaways:

- Half of the agencies in her study were required to “financially contribute in some manner to the satisfaction of lawsuits brought against them.” (P. 3) Of course, this means that half were not required and it is fair to assume that those agencies faced little financial pressure to minimize lawsuits. (Schwartz is careful to note that, even if agencies do not face financial pressure, they may still face political pressure to reform themselves (P. 19).)
- To the extent an agency is forced to bear some financial responsibility for a lawsuit, the responsibility will normally come in three forms: (1) the agency pays the judgments or settlements directly, (2) the agency makes regular contributions to a jurisdiction-wide fund, which in turns pays the judgments or settlements, or (3) the agency pays premiums to a private insurer, which then pays the judgments or settlements.
- Most interestingly, even if an agency is required to bear financial responsibility for a lawsuit, the agency may not actually suffer any actual financial loss. Agencies often receive funding from their jurisdiction for litigation expenses. Thus, even if money is going out the agency’s front door to pay for legal costs, that same money is often coming in the back door as part of the agency’s annual budgetary allotment.

Schwartz’s most interesting insight, in my mind, is that “outside insurers may be better situated than self-insured jurisdictions to place financial pressures on law enforcement agencies.” (P. 37) Private insurers can, and presumably will, “condition low deductibles and continued coverage on personnel and policy changes.” But the leaders of a jurisdiction (such as a mayor or city council) will often find this option unappealing for two reasons.

First, imposing financial costs on a police department will almost certainly carry political costs for elected officials. Not every mayor will wish to face off with her police chief, even if the city budget can be trimmed a bit. Second, in large jurisdictions, any threat to withdraw funding for lawsuits would be empty. When a small agency loses insurance coverage and has to be dissolved (a phenomenon that Schwartz documents (P. 28-29)) the jurisdiction can often obtain law enforcement services from a neighboring jurisdiction. Large agencies, however, cannot cover gaps in enforcement in this way. The New York City Police Department, as Schwartz nicely puts it, is likely “too big to fail.” (P. 37)

If Schwartz is correct on this point—and it seems to me she is—then an interesting irony arises: outsourcing is often thought to decrease government accountability, but outsourcing here would seem to increase government accountability. This may suggest a larger truth here about outsourcing: where politicians are prone to ignore or minimize constitutional mandates, a private company, being guided by dollars and cents rather than politics, can force government to adhere to its constitutional obligations. The trick is to make sure company profits and constitutional adherence are positively correlated.

In sum, Professor Schwartz’s article is a large step forward in a field that has been operating on fuzzy assumptions for far too long. By bringing an immense amount of data to the table, the article will enable scholars and policymakers to move closer to the elusive goal of institutional reform.

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