

Do Civil Rights Remedies Deter Police Misconduct?

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John Rappaport, [How Private Insurers Regulate Public Police](#), 130 **Harv. L. Rev.** 1539 (2017).

Constitutional tort remedies, like their common law counterparts, are presumed to deter future violations. But the inference of deterrence depends, of course, on a number of sub-inferences that may not hold. For example, deterrence may not obtain if the officer is indemnified and therefore does not feel the personal sting of a money judgment. In a recent [article](#), Professor Joanna Schwartz showed that officer indemnity is, in fact, nearly universal. But maybe deterrence might still obtain because the police department, which has to foot the bill of the indemnification agreement, will push its officers to obey the law. In another [article](#), however, Professor Schwartz showed that this might not happen because most departments carry liability insurance and the cost of indemnification will often simply disappear into a budget line item for insurance. If officers are indemnified, and departments are insured against any loss, how will constitutional tort actions have any deterrent force? Schwartz suggested at the end of her article that one avenue for deterrence might be found within the operation of the insurance agreements themselves and that further study was needed.

Professor [John Rappaport](#)'s fantastic new article, *How Private Insurers Regulate Public Police*, fills that need, and does so splendidly. To study an issue like this, one must dive deep into the insurance industry itself, and that is exactly what Rappaport did. His article is based on "interviews with over thirty insurance industry representatives, civil rights litigators, municipal attorneys, police chiefs, consultants and more." There is so much to the article that any summary will fail to do it justice, but briefly, Rappaport charts a chain of incentives that works as follows: police departments have an incentive to obtain liability insurance because it reduces risk. Insurance companies, in turn, have an incentive to reduce claims, thus increasing their profits. To reduce claims, insurance companies often encourage (or even require) education, training, accreditation, and other conditions that tend to improve officer compliance with the law, thus reducing claims. Departments have an incentive to follow insurance companies' guidance on these matters not just because they need and want liability insurance, but also because doing so may reduce the cost of premiums and deductibles.

Rappaport is careful not to claim that insurance certainly reduces police misconduct, for that claim would require much more than the qualitative research he presents. Moreover, Charles Epp has [collected data](#) that casts some doubt on the role of insurance in pushing police reform (though, as Rappaport notes, Epp's data is now nearly two decades old and did not focus on misconduct itself, but rather best practices). Nonetheless, Rappaport's study leaves little doubt that insurance plays a significant role in how departments handle officer training and personnel decisions. The inference of deterrence—to one degree or another—is thus reasonable in most cases.

What is especially attractive about deterrence-via-insurance is that, according to Rappaport's research, insurance companies may actually be better situated than police departments at avoiding future violations. This is because insurance companies are able to aggregate data from across jurisdictions and are able to better balance the cost of a specific violation against the cost of preventive measures. Insurance companies' capacities in this regard start to make them look like a government agency, which

naturally brings up the question of why an insurance company, rather than the government itself, is regulating the police.

Government has its own problems, however. Agencies, Rappaport notes, are often led by political appointees (or at least the politically minded) and thus must contend with complicated political concerns, such as the interests of police unions, periodic elections, and legislators who control the agency's funding. This is not to say, of course, that private insurance is always superior. Insurers are necessarily driven by a profit motive and will be far less concerned with constitutional violations that do not lead to high-dollar judgments. Racial bias, for example, is an enormous problem in policing (much as in life generally) but rarely plays a role in high value cases.

In sum, Rappaport's article brings the potential deterrent force of constitutional tort actions into clearer focus: The availability of a civil rights action gives rise to a demand for liability insurance. Firms in the resulting insurance market naturally seek ways to increase profits, one of which is to lower claims. And one way to lower claims is to demand better education, training, and other reforms by the insured. The article does not prove that the deterrent force always applies, and Rappaport does not claim otherwise. But for those who might contend that civil rights actions do not deter misconduct, the article offers an insightful and eminently reasonable account how they might (and in many instances, likely do) deter misconduct.

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