

Allocating the Costs of Police Misconduct Litigation: Available Evidence and a Research

Agenda

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Civil rights lawsuits against law enforcement and other government officials are intended to advance two paired goals: compensation and deterrence. The payment of settlements and judgments has long been expected by courts, scholars, and policymakers not only to make plaintiffs whole, but also to discourage police officers from engaging in future misconduct and encourage police officials to make personnel and policy changes designed to reduce the likelihood of future harms.¹ State and local budgeting and indemnification rules play a significant role in whether and to what extent damages awards in civil rights cases achieve their intended goals of compensation and deterrence. In order to advance the compensatory and deterrence goals of civil rights suits, it is not enough to have liability rules structured so that people whose constitutional

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¹ For Supreme Court decisions expressing this view see, for example, *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 727 (1999) (Scalia, J., concurring) (writing that Section 1983 “is designed to provide compensation for injuries arising from the violation of legal duties, and thereby, of course, to deter future violations”) (citation omitted); *City of Newport v. Fact Concerts*, 453 U.S. 247, 269 (1981) (explaining that awards against cities will cause policymakers to “discharge...offending officials”); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 495 (1986) (Powell, dissenting) (explaining that awards against the threat of being sued means that “if there is any doubt about the constitutionality of their actions, officials will ‘err on the side of protecting citizens’ rights.”) (citation omitted). For evidence of this point of view in Congress, see, for example, S. Rep. No. 94-1101, at 2, *as reprinted in* 1976 U.S.C.C.A.N. 5908, 2 (explaining the need for plaintiffs’ attorneys to receive fees when they prevail in a case under Section 1983 because “[i]f private citizens are to be able to assert their civil rights, and if those who violate the Nation’s fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court.”). For scholarly expectations that civil rights suits compensate and deter see, for example, *See, e.g.*, Richard H. Fallon, Jr. & Daniel Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1788 (1991); (arguing that a damages award against a city police department “does not require discontinuation of [unconstitutional] practices,” but “exerts significant pressure on government and its officials to respect constitutional bounds”); Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 Ga. L. Rev. 845, 854-55 (2001) (predicting that judgments may harm officers’ career prospects or have “immense political costs (in the sense of everyday workplace politics)”); Pamela S. Karlan, *The Paradoxical Structure of Constitutional Litigation*, 785 Fordham L. Rev. 1913, 1918 (2007) (observing that the threat of being sued can “induce the government to change its policies”); Fred O. Smith, *Formalism, Ferguson, and the Future of Qualified Immunity*, 93 Notre Dame L. Rev. 2093, 2109 (2018) (explaining that, even if officers are indemnified, being sued “has implications for one’s credit history and background checks, which routinely ask about civil judgments”).

rights have been violated are afforded relief.² Budgeting rules must be structured such that people whose rights have been violated are, in fact, compensated; and the money paid should have financial or other consequences for officers and policymakers that discourage future similar conduct. These consequences should not, however, *overdeter* officers or policymakers.

First, the paper describes the ways in which damages awards are currently budgeted for and paid in civil rights lawsuits against law enforcement, and the ways in which the prevailing practices in this area undermine the compensatory and deterrence goals of Section 1983. Second, this paper describes some ways in which budgeting and indemnification rules might be restructured to better achieve these paired goals. This analysis includes both ongoing experimentation by state and local governments and insurers, as well as proposals that could be considered. Finally, this paper suggests a research agenda to better understand the impact of lawsuit payouts and information on police behavior.

I. The Current State of Affairs

In this Part, I offer an overview of civil rights liability, and the ways in which civil rights liability is currently budgeted for and paid in jurisdictions across the country. At the outset, it is worth noting that there is variation in practices in this area, both depending on region and depending on the size and type of law enforcement agency. This description flags these differences, but does not explore them with the depth they deserve.

A. An Overview of Civil Rights Causes of Action and Liability

When a person believes that they have been wronged by a law enforcement officer, they can bring three types of claims.³ First, a plaintiff can file an action against an individual officer under 28 U.S.C. Section 1983 for a violation of their federal constitutional rights. Second, a plaintiff can file a Section 1983 claim against the municipality—often referred to as a *Monell* claim—alleging that a municipal custom or policy caused the violation. In the alternative, or in addition, officers and local governments in many jurisdictions can be sued for state torts that arise from the same

² This paper does not examine whether liability rules are properly structured. Instead, it assumes that those rules are properly structured and asks how the payment of settlements and judgments in these cases should be allocated.

³ For further discussion of these types of claims and regional variation in the challenges associated with bringing them and succeeding, see generally Joanna C. Schwartz, *Civil Rights Ecosystems*, 118 Mich. L. Rev. 1539 (2020).

facts as the constitutional claim—including assault, battery, false arrest, false imprisonment, and negligence—and, in some states, officers can be sued for the violation of the state Constitution. Although we do not have comprehensive information about the number of civil rights cases filed against law enforcement each year or the amount paid in those cases, available evidence suggests thousands of people file civil rights lawsuits against the police each year and that hundreds of millions of dollars are awarded in these cases annually.⁴

B. How Settlements and Judgments Are Paid

Settlements and judgments in civil rights lawsuits against law enforcement are paid through a combination of indemnification rules, budgeting arrangements, and insurance policies. This subpart aims to describe these arrangements.

1. Indemnification of Individual Officers

Police officers virtually never contribute to settlements and judgments entered against them. During a six-year study period, among forty-four of the largest law enforcement agencies across the country, 9225 police misconduct lawsuits were resolved with payments to plaintiffs. In 99.6% of those 9225 cases, local governments satisfied the entirety of the awards.⁵ Officers were made to contribute just 0.02% of the \$735 million paid to plaintiffs in these cases. And in the thirty-seven smaller agencies in the study, no officer contributed to any settlement or judgment in a police misconduct case. This subpart explains the state laws and local practices that produce this result.

Most local governments have indemnification agreements with their law enforcement officers, providing that if the officer is sued the city will be responsible for paying for defense counsel and any settlement or judgment in the case.⁶ State statutes require or allow local governments to have these types of indemnification agreements, although there is significant variation among the states about the level of discretion they give local governments to craft their own indemnification protections, and the extent to which they mandate or allow local governments to deny

⁴ See, e.g., Joanna C. Schwartz, *Police Indemnification*, 85 NYU L. Rev. 885 (2014) (finding that, in eighty-one jurisdictions, over a six-year period, more than \$735 million was awarded to plaintiffs in 9225 police misconduct suits).

⁵ See *id.* (describing these findings).

⁶ Some local governments have no formal policy on indemnification, or have a policy of not indemnifying their officers. For descriptions of the practices in El Paso, Texas, one jurisdiction that does not have a policy of indemnifying their officers, see *id.*

indemnification to officers who have engaged in willful or malicious conduct, conduct that violates criminal law, or punitive damages awards.⁷

My research suggests that local jurisdictions often satisfy their officers' legal liabilities even when they have just cause to deny officers indemnification under the terms of their indemnification statutes. Although jurisdictions had discretion to decline indemnification to law or policy, or acted in bad faith, jurisdictions rarely exercise that discretion. Police officers were not required to contribute to settlements and judgments even when they were disciplined, fired, criminally prosecuted, or sent to prison.⁸

Although local governments usually indemnify their officers, I have found multiple instances in the course of my research when local government officials sometimes threaten not to indemnify their officers for strategic gain—to reduce potential settlements or reduce jury awards after trial.⁹ I have also learned of instances in which local governments do, in fact, exercise their discretion to decline to indemnify their officers. In those instances, the officer is held personally responsible for the entirety of a settlement or judgment entered against them. But even when this occurs, law enforcement officers rarely pay. Instead, plaintiffs and their attorneys tend to look for deeper pockets—claims against the municipality or against officers who will be indemnified.¹⁰ And if they are unable to prevail on a claim against a deeper pocket?¹¹ I have learned of some instances in which plaintiffs do pursue officers individually. But in these cases, the plaintiffs do not attempt to collect the entire judgment. Instead, they eke out a token amount that the officer can pay. Far more often, I hear stories of plaintiffs and their attorneys dropping the case if they cannot find a way to recover from the government. In other words, the most likely result is not that the officer will go bankrupt, but that the plaintiff will go home empty handed.

⁷ See generally Aaron Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 Geo. L.J. (forthcoming 2020) (describing these state law indemnification provisions).

⁸ See *id.*

⁹ See *id.* (describing these examples).

¹⁰ These dynamics are described in See Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 Geo. L.J. (forthcoming 2020).

¹¹ Further research should explore the frequency with which officers are denied indemnification. My prior research, Schwartz, *supra* note 4, examines how frequently officers *contribute*, but does not capture the frequency with which officers are denied indemnification but are not required to contribute to any settlement or judgment.

2. Payments from Cities and Insurers

If individual police officers do not pay settlements and judgments in lawsuits brought against them, how are these payments made? Larger jurisdictions tend to be self-insured, and so pay settlements and judgments from their budgets; smaller jurisdictions tend to have municipal liability insurance, so do not directly pay these awards but, instead, pay premiums to their insurer.¹² These payments—directly to the plaintiffs in self-insured jurisdictions, and to insurers in insured jurisdictions—tend to have limited impact on the budgets of the law enforcement agencies whose officers’ incurred the award.

In a study, I examined how 100 cities, counties, and states across the country budget for and pay settlements and judgments in police misconduct cases.¹³ Included are 62 of the 70 largest jurisdictions across the country, and 38 smaller agencies. The law enforcement agencies I studied are diverse in location, size, and type.

I found that half of the law enforcement agencies in my study and close to 60% of the largest agencies in my study are required to contribute in some manner to the payment of settlements and judgments against their officers. But I also found that these budgeting arrangements do not predictably translate into financial effects. One would assume that a police department that pays settlements and judgments from its budget would be financially impacted by those settlements – a spike in payouts would require the department to cut back on other costs, and a reduction in payouts would free up money for other purposes. It is these financial effects that are expected to incentivize law enforcement personnel to reduce litigation and associated misconduct. But local budgeting arrangements sometimes mute these effects.

FIGURE 1: FREQUENCY WITH WHICH MONEY IS TAKEN FROM BUDGETS OF SIXTY-TWO LARGEST AGENCIES

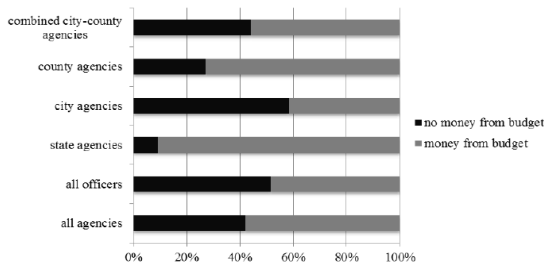
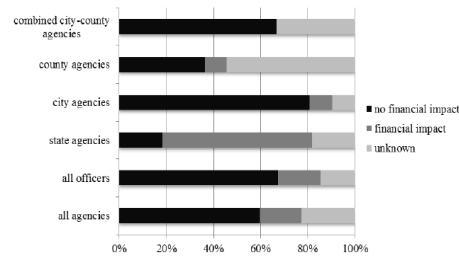


FIGURE 2: FINANCIAL EFFECT OF LAWSUIT PAYOUTS ON LARGEST SIXTY-TWO AGENCIES



¹² For a discussion of the frequency with which smaller jurisdictions rely on municipal liability insurance, see Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. Rev. 1144, 1163 n. 65-66 (2016).

¹³ See Schwartz, *supra* note 1212 (describing these findings in detail).

For example, seven of the nineteen jurisdictions in my study that have their law enforcement agencies pay settlements and judgments at least partially from their budgets report that the particularities of the budgeting arrangements mute the financial effects of suits. In these jurisdictions, the law enforcement agencies receive a set amount of money for litigation costs that cannot be used for other purposes when lawsuits decrease, and when litigation costs rise above the budgeted amount, the excess is paid from general funds. Even when money is not taken from the law enforcement agency's budget, there may be political or other non-economic impacts of these payouts. Requiring a department to satisfy lawsuits from their budgets may make officials more aware of the costs of these suits, and the need to get additional money allocated for lawsuits creates the opportunity for governance conversations between law enforcement and city or county officials. But, after what might be uncomfortable conversations, the money is paid without financial effects on the agency.

Smaller jurisdictions typically rely on insurance—either municipal risk pools or commercial insurance. My research reflects that the money paid toward insurance premiums generally comes from central funds. Although insurers shield local governments from direct financial consequences of suits brought against them and their officers—leading, one might expect, to moral hazard—available evidence suggests that some municipal liability insurers have conditioned low premiums and deductibles on local governments' risk management efforts. John Rappaport and I have both found, in separate studies, examples of municipal liability insurers that identify areas of liability risk and work with their insureds to reduce those risks.¹⁴ Smaller jurisdictions that purchase insurance or participate in government risk pools report that the insurers and pools may demand changes in personnel and policies as a condition of continued coverage; departments that do not comply have lost coverage and ceased to exist. Although these departments may not financially contribute to the satisfaction of settlements and judgments, high litigation costs can nevertheless impact operations of law enforcement agencies in insured jurisdictions.

C. Learning from Litigation

Thus far, I have described the ways in which lawsuits are budgeted for and paid, and evidence that those payments rarely have a direct financial effect on the officers named in the cases or the

¹⁴ See generally John Rappaport, *How Private Insurers Regulate Public Police*, 130 Harv. L. Rev. 1539 (2017); Schwartz, *supra* note 1212.

police departments that employ them. Settlements in civil rights damages actions could nevertheless impact officer and department behavior if the information in these suits was gathered and analyzed for personnel and policy lessons that would reduce the likelihood of future harms. Municipal liability insurers appear to do this type of analysis—at least some do, to some degree.¹⁵ But in my research, I have found that law enforcement agencies in self-insured jurisdictions rarely make efforts to learn from the lawsuits brought against them and their officers.¹⁶

The larger police departments across the country have hundreds or thousands of Section 1983 suits filed against them and their officers each year, alleging excessive force, unlawful searches, and other constitutional violations. There is a great deal of information generated in each of these suits – the allegations in the complaint, depositions and documents exchanged by the parties, decisions by the court, trial proceedings (occasionally), and the ultimate disposition of the case. Yet, when I studied police department practices around the country I found that very few departments gather and analyze any of this information. When lawsuits are filed, the city or county attorney will defend the case, the money to satisfy any settlement or judgment will be paid out of the city’s general budget, and the vast majority of departments will not keep track of which officers were named, what claims were alleged, what evidence was unearthed during discovery, what resolution was reached in the case, or what amount was paid.

There are some exceptions to this rule—departments that have made efforts to gather and analyze information from lawsuits brought against their officers.¹⁷ I studied five of these departments and found that lawsuit data proved valuable to these departments’ performance-improvement efforts: suits have alerted departments to incidents of misconduct, and the information developed during the course of discovery and trial has been found to be more comprehensive than that generated through internal channels. Information generated during litigation is, undeniably, flawed: the adversarial process produces biased and sometimes irrelevant information about a relatively small number of misconduct allegations, and the slow pace of litigation means that a case may not be resolved until several years after the underlying event. But departments that have gathered and analyzed information from lawsuits mitigate these flaws by

¹⁵ See *supra* note 14 and accompanying text.

¹⁶ These findings are described in detail in Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. Rev. 1023 (2010).

¹⁷ These findings are described in detail in Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 Cardozo L. Rev. 841 (2012).

gathering information from each stage of litigation, reviewing data in context with other available information, and using independent auditors to consider what the data may show.

II. State and Local Reforms

Current arrangements to budget for and pay settlements and judgments in police misconduct suits do not reliably achieve either of these suits' goals: compensation and deterrence. If a plaintiff is awarded relief, the compensation goal is likely to be met—most plaintiffs are paid through central government or insurance funds, and that arrangement makes sense because individual officers are unlikely to have the resources to satisfy settlements and judgments in these cases. But the compensation goal is unlikely to be met when officers are denied indemnification but plaintiffs are unlikely to pursue an officer individually who does not have resources. And when local governments threaten not to indemnify, judges and juries may reduce plaintiffs' awards or plaintiffs may agree to settle for less than they are entitled.

The ways in which settlements and judgments are paid appears often to undermine the deterrence goals of these suits. Deterrence appears to work in a promising form for local governments that are insured: Increases in civil rights payouts can translate to higher premiums and insurers can demand personnel and policy changes as a condition of continued coverage. But in self-insured jurisdictions, law enforcement agencies' budgets are generally unaffected by lawsuit payouts and there appears to be little systematic effort to learn from lawsuits. Individual officers appear almost completely protected from financial or other consequences of lawsuits brought against them: officers are virtually never required to contribute to settlements and judgments entered against them, and because few law enforcement agencies gather and analyze information from lawsuits brought against officers they are unlikely to impact officers' employment.

State and local governments interested in strengthening the compensatory and deterrent power of civil rights suits should budget for and pay settlements and judgments in police misconduct suits in a manner that advances three objectives: 1) people awarded settlements and judgments in civil rights suits should assured compensation; 2) there should be financial or other tangible consequences for officers and police departments that violate the law to discourage future similar

misbehavior; and 3) budgeting and payment rules should be structured in ways that avoid strategic undermining of the first and second goals.

This part focuses first on one statute that has been enacted—Colorado’s SB 217—that potentially achieves all three of these objectives. This part then discusses additional approaches to achieve one or more of these goals—some have already been enacted, and others have been proposed. Although I describe Colorado’s bill and several other proposals as promising ways to allocate the costs of police misconduct litigation, the actual effects of these proposals on officer and department behavior are, as yet, unknown. It is, therefore, critically important to examine the impact of the newly-enacted Colorado statute—and other proposals—to determine their efficacy. I address these research questions in the final part of this paper.

1. Colorado’s SB 217

Colorado’s recently passed SB 217 arguably accomplishes each of the three objectives outlined above. The bill has received significant press attention for providing a state law cause of action invulnerable to dismissal on qualified immunity grounds. But it additionally provides that if a peace officer’s employer concluded that the officer “did not act upon a good faith and reasonable belief that the action was lawful,” then the officer will not be indemnified for five percent of the judgment or settlement of \$25,000, whichever is less.¹⁸ If this money is not recoverable from the officer, the public entity will pay the full amount of the settlement or judgment. And there is no obligation to indemnify if the officer was convicted of a crime for the conduct alleged in the lawsuit.

The Colorado statute ensures that there is some financial consequence for an officer who has acted in bad faith. Although this provision has been described as creating a significant sea-change, exposing officers to unprecedented degrees of personal liability, Colorado’s indemnification statute has long allowed public entities to deny officers indemnification if they acted willfully or wantonly. SB 217 is actually more modest than Colorado’s prior indemnification statute. Whereas Colorado’s prior statute allowed jurisdictions to deny indemnification—exposing officers to liability for the totality of any settlement or judgment entered against them—SB 217 only requires that an officer pay a small portion of any settlement or judgment. And although Colorado’s prior

¹⁸ Colorado S.B. 217.

indemnification statute had no hardship clause for officers, SB 217 excuses officers from any obligation to contribute to a settlement or judgment if they do not have the financial means to make the payment. The indemnification provision in SB 217 is a novel approach to imposing some—but not overwhelming—costs on officers if they have acted in bad faith.

The “bad faith” component of Colorado’s indemnification statute also addresses concerns that officers will be financially sanctioned for settlements and judgments when they have done nothing wrong. It is true that settlements may sometimes be entered into, even when a jurisdiction believes that its officer acted appropriately, because going to trial is too risky. It is also true that juries may sometimes enter verdicts on behalf of plaintiffs when the government does not believe their employee was in the wrong. These concerns are mitigated by the fact that officers will not be automatically sanctioned for any settlement and judgment—they are required to contribute only if the employer finds they have acted in bad faith.

The Colorado statute also ensures that almost all plaintiffs will be compensated. The Colorado statute obligates local governments to pay the totality of settlements and judgments in cases in which officers have *not* been found to have acted in bad faith, unless they are convicted of a crime. This promise of indemnification is perhaps even more significant of a change than the requirement that officers contribute when they have acted in bad faith. As is described above, although officers very rarely pay anything towards settlements and judgments entered against them, local governments can and sometimes do use the threat that they will deny indemnification strategically, to reduce the amount paid to plaintiffs in settlement or to reduce jury verdicts after trial. Colorado’s SB 217 takes this kind of strategic use of indemnification discretion off the table. I disagree with the exception for criminal convictions—in my view, if an officer violates the law while acting within the course and scope of his employment, his government employer should be held responsible. But the certainty of indemnification absent a criminal conviction is a noted improvement to the prior Colorado statute and the state of affairs in many jurisdictions across the country.

Finally, the Colorado statute at least conceivably requires local governments to pay attention to the information revealed in lawsuits against their officers. Local governments’ decisions about whether officers should contribute to settlements and judgments turns on whether they have acted in bad faith. Accordingly, officials deciding whether to require officers to contribute to settlements

and judgments should review the information in the suit—and, perhaps, will use that information for other policy and personnel decisions.

2. Other Methods to Financially Sanction Officers

There are other possible state or local reforms, beyond the Colorado statute, to financially sanction officers when they have engaged in wrongdoing while also ensuring that the compensatory goals of civil rights suits are met. One state or local reform that would both ensure plaintiffs' compensation and create financial sanctions for officers—but has not yet been enacted—is to require police officers to carry personal liability insurance. In 2016, a Minneapolis group called the Committee for Professional Policing pushed for a ballot measure that would have required police officers to carry professional liability insurance. The city would have paid the basic insurance premium. But if an officer's premium rose—presumably due to lawsuits or other risky behavior—the officer would have been responsible for paying the difference. This approach would allow plaintiffs to recover damages (from the insurer) when their rights were violated, and those payouts would have financial consequences for the officer (in the form of increased premiums) moving forward. There is an added benefit of this approach—union contracts and other political pressures can make it very difficult to fire officers. Minnesota's insurance proposal would have created financial pressures for poorly performing officers to choose a different line of work. Ultimately, the proposal did not go on the ballot because it conflicted with the state's indemnification statute.¹⁹ But a jurisdiction in a state with more a more discretionary indemnification statute could explore this type of arrangement.

Local government officials can also decide to require officers to contribute to settlements and judgments entered against them as a condition of settlement. For example, in my study of police indemnification practices, I learned that New York required officers to personally contribute to settlements or judgments in thirty-four cases (out of 6887) during the six-year study period.²⁰ These officers were not denied indemnification entirely. Instead, they were required to contribute to settlements in cases in which the department found that the officers violated policy. Their contributions were modest—ranging from \$250 to \$25,000. The median contribution was \$5000

¹⁹ Emma Nelson, *Minnesota Supreme Court Upholds Minneapolis Decision on Police Insurance Ballot Measure*, StarTribune (Mar. 15, 2017).

²⁰ See Schwartz, *supra* note 4.

for officers alleged to have engaged in misconduct while off-duty; \$3750 for officers alleged to have engaged in sexual misconduct; \$1625 for officers alleged to have abused process; and \$1000 for officers named as defendants in cases alleging false arrest, unreasonable search, and excessive force. One could debate whether more New York City Police officers should have been required to contribute, or whether they should have been required to contribute more money. But this type of contribution assures that plaintiffs whose rights have been violated will be made whole, while creating a financial sanction for officers found to have violated policy.

3. *Creating Greater Pressures on Police Departments*

Municipal liability insurers have played a promising role in identifying risky behavior by law enforcement agencies and creating pressure—through increased premiums or the denial of coverage—for agencies to improve.²¹ Therefore, any state or local efforts to increase the impact of lawsuits on police department practices should export how liability insurers might play an even more significant role in incentivizing local governments to reduce misconduct. John Rappaport has suggested, for example, that insurance regulators require insurers to impose a deductible on cities so that they bear some financial responsibility for their losses.²² He has also suggested that insurers—perhaps with the assistance of regulators—could do a better job of calibrating premiums to reflect rare but very serious harms like wrongful convictions. And he has proposed that more cities—including larger cities—could rely more heavily on liability insurance.

For self-insured jurisdictions, there are a few approaches to consider. For example, police departments could be required, as a condition of payment of settlements and judgments from central funds, to gather information from lawsuits brought against them and analyze those suits individually and in the aggregate for lessons. Los Angeles County requires that the Sheriff's Department submit a Corrective Action Plan when asking the County Board of Supervisors to approve a settlement.²³ That Corrective Action Plan identifies whether there are any policy changes suggested by the facts of the case. But the County does not require that the Sheriff's Department do a periodic accounting of trends in lawsuits brought against it for lessons.

²¹ See *supra* note 14 and accompanying text.

²² John Rappaport, *Cops Can Ignore Black Lives Matter Protestors. They Can't Ignore Their Insurers*, Washington Post (May 4, 2016).

²³ See, e.g., Corrective Action Plan, Christopher Pettersen, et al. v. County of Los Angeles, <http://file.lacounty.gov/SDSInter/bos/supdocs/103624.pdf>

In New York City, the Comptroller’s office has created a program called ClaimStat to track lawsuit payouts in cases against different government agencies and trends in cases that they have used to work with the police department and other agencies to reduce costs.²⁴ A recently-introduced bill in the New York State Assembly seeks to make data about lawsuits against police officers publicly available, so that taxpayers and researchers can analyze trends in cases.²⁵

The deterrent effect of suits could also be strengthened if more police departments were required to pay settlements and judgments from their budgets. Some jurisdictions already require their law enforcement agencies to do so, but more could experiment with this arrangement. It is difficult to know what effect these payments might have on police department behavior. When I interviewed six officials in departments whose budgets are impacted by lawsuit payouts, several reported that those payouts influence their behavior and that of other supervisory personnel. As an official at the California Highway Patrol explained: “We are always getting feedback on what happens on the street and we know that we are going to feel it in our budget if we don’t.”²⁶ None of the officials with whom I spoke indicated that imposing these types of financial pressures on law enforcement agencies negatively impacted their work.

III. A Research Agenda

Part II described a number of ways to strengthen the compensatory and deterrent powers of civil rights litigation. But these approaches, while promising in theory, need to be studied and their promise evaluated.

The top of any research agenda in this area should be to study the impact of Colorado’s SB 217 on police department and officer practices. Research should explore how local governments in Colorado are responding to SB 217—including the frequency with which they find officers have acted in bad faith, requiring officers to contribute to settlements and judgments, and the frequency with which officers are found not to have the resources to make the contribution. Researchers should also examine whether local governments are responding in a more systematic way to the

²⁴ <https://comptroller.nyc.gov/reports/claimstat/reports/claimstat-a-data-driven-approach-to-driving-down-costs-and-protecting-taxpayer-dollars/>

²⁵ See Denis Slattery, *State Senate Bill Would Require NYC to Disclose Details of NYPD Settlements*, NY Daily News (Dec. 7, 2020).

²⁶ See Schwartz, *supra* note 12.

provisions of SB 217: some jurisdictions, for example, have preemptively declared that they will never find their officers have acted in bad faith or require them to contribute to a settlement or judgment.²⁷ Research should also attempt to assess what impact the indemnification provisions have on officer conduct: whether and to what extent allegations of misconduct, other indicia of police conduct, and lawsuit filings are affected by passage of the statute. Surveys could also be done to better understand what impact the threat of litigation has on officers' conduct—both in Colorado and in other places. The challenge of evaluating the indemnification provisions of SB 217 is that the bill made wide-ranging changes to policing, many of which have nothing to do with how lawsuits are budgeted for and paid.²⁸ Accordingly, any study design will need to try to isolate the impact of the indemnification provisions on policing.

Similar research could be done to try to understand how New York City's requirement that officers (infrequently) contribute (modestly) to settlements and judgments impacts officer behavior. Research could also further explore the impact of taking settlements and judgments from police departments' budgets in jurisdictions that have this arrangement.

Pilot projects in partnership with local governments could increase the connections between litigation and risk management efforts in the ways that I have outlined—by requiring police leadership or city risk management personnel to analyze trends in lawsuit filings and payouts for lessons, or working more closely with municipal liability insurers.

²⁷ Allison Sherry, *Colorado Law Can Now Hold Officers Liable for Acting In Bad Faith. But Greenwood Village And Others Are Trying To Buck That Policy*, CPR News (July 9, 2020), <https://www.cpr.org/2020/07/09/colorado-police-officer-accountability-law-greenwood-village-westminster-defy-policy/#:~:text=Colorado%20Law%20Can%20Now%20Hold%20Officers%20Liable%20For%20Acting%20In%20Bad%20Faith.&text=Greenwood%20Village%20passed%20a%20resolution,and%20counties%2C%20from%20doing%20that>.

²⁸ For example, Colorado's SB 217 requires officers to wear body-worn cameras; requires the department of public safety to create an annual report of uses of force and other misconduct; prohibits certain uses of force in response to protests or demonstrations; creates a state law cause of action for violation of the state Constitution without the protections of qualified immunity; creates a new use of force standard; and prohibits chokeholds. *See* Colorado General Assembly, SB20-217, Enhance Law Enforcement Integrity Bill Summary, at <https://leg.colorado.gov/bills/sb20-217>.