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Who Can Police the Police?

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ABSTRACT

Recent police killings have prompted a national conversation about the need for police reform. Most of the conversation has concerned the types of reforms that might improve policing. Equal consideration should be given to which actors can most effectively pursue these reforms. In this Essay, I suggest three qualities that police reformers need in order to influence police behavior: sufficient leverage such that law enforcement will respond to their pressures, recommendations, or demands; sufficient motivation to engage in their reform efforts; and sufficient resources to do their work. I use this framework to assess the efficacy of those most commonly called upon to reform the police, propose strengthening reformers in the areas in which they are lacking, and suggest ways in which reformers might collaborate to draw on their comparative strengths.

I. INTRODUCTION

Several recent high-profile police killings have focused national attention on longstanding concerns about police bias, police violence, and the lack of police accountability.¹ There appears to be a growing consensus that police need to change and that most are not going to change themselves.² The questions, then, are what reforms are needed and who can help advance them.

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¹ For one discussion of shifting attitudes about policing, see Wesley Lowery, *On Policing, the National Mood Turns Toward Reform*, WASH. POST (Dec. 13, 2015), https://www.washingtonpost.com/national/on-policing-the-national-mood-turns-toward-reform/2015/12/13/1174ef1e-a03f-11e5-a3c5-c77f2cc5a43c_story.html [<http://perma.cc/7Z4AS-HJBL>].

² See Sarah Childress, *How the DOJ Reforms a Police Department like Ferguson*, FRONTLINE (Mar. 4, 2015), <http://www.pbs.org/wgbh/frontline/article/how-the-doj-reforms-a-police-department-like-ferguson/> [<http://perma.cc/YWZ5-KAWZ>] (quoting Dean Erwin Chemerinsky as saying that “[i]t’s often hard to reform police departments without external intervention”); David A. Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 574 (2012) (observing “the nearly universal assumption that police simply cannot police themselves, and that it is foolish to imagine

Much has been written about the first question—the ways in which law enforcement agencies should change. Commentators have pushed for a number of reforms in law enforcement agencies’ policies and practices, including the increased use of body cameras, more rigorous investigations of officer misconduct, more frequent imposition of discipline for officer wrongdoing, increased data collection, increased diversification of police forces, and trainings and policies aimed at minimizing implicit biases and building trust and legitimacy in policed communities.³

Although scholars, advocates, commissions, and government officials have no end of suggestions about *how* law enforcement agencies should change, the second question—*who* is best situated to advance these reforms—has received less attention. There are a number of entities engaged in interventions that might lead to police reforms. The U.S. Department of Justice (DOJ) investigates and sues departments engaged in systemic misconduct. Insurers advise smaller jurisdictions about how to reduce liability risk, and may increase deductibles or limit coverage when a jurisdiction cannot reduce its

otherwise.”). As Professor Sklansky notes, these positions are not universally held. Law enforcement has, over the past several decades, “vigorously insisted that they have both the responsibility and the capacity to manage their own affairs—including matters of discipline—free of external interventions.” Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department “Pattern or Practice” Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 8 (2003). The United States Supreme Court has also expressed confidence that “the increasing professionalism of police forces, including a new emphasis on internal police discipline” works to deter civil rights violations by law enforcement. See *Hudson v. Michigan*, 547 U.S. 586, 598 (2006).

³ For a discussion of the effects of body cameras, see for example, Christopher Mims, *What Happens When Police Officers Wear Body Cameras*, WALL ST. J. (Aug. 18, 2014, 5:28 AM ET), <http://on.wsj.com/1w6CocS> [<https://perma.cc/QY6F-C96F>]. For a discussion of the importance of rigorous internal investigations and officer discipline, see for example, Stephen W. Hawkins, *Police Brutality Must Be Punished If We Want Real Justice for Michael Brown*, GUARDIAN (Aug. 14, 2014, 12:45 PM EDT), <http://www.theguardian.com/commentisfree/2014/aug/14/police-brutality-punished-justice-for-michael-brown-ferguson> [<https://perma.cc/SUKT-BEZN>] (“[A]ll officers responsible for abuses should be adequately disciplined and, where appropriate, prosecuted.”). For the lack of data about law enforcement practices and the need for such data, see for example, Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119 (2013). For discussions of the importance of diversifying law enforcement, see for example, U.S. DEPT. OF JUSTICE, PRINCIPLES FOR PROMOTING POLICE INTEGRITY 18 (U.S. Government Printing Office, 2001) (“Law enforcement agencies should seek to hire and retain a diverse workforce that can bring an array of backgrounds and perspectives to bear on the issues the agencies confront and the choices they must make in enforcing the law.”). For suggestions to address implicit bias through changes in hiring, training, policies, and supervision, see for example, Tracey G. Grove, *Implicit Bias and Law Enforcement*, POLICE CHIEF (Oct. 2011), http://www.policiechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=2499&issue_id=102011 [<https://perma.cc/KK6D-6G6N>]. For the importance of building trust and legitimacy in law enforcement, see for example, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING 9 (May 2015). For a discussion of efforts to use trainings to shift officers from a “warrior” to “guardian” mentality, see for example, Kimberly Kindy & Zoeann Murphy, *Creating Guardians, Calming Warriors*, WASH. POST (Dec. 10, 2015), <http://wapo.st/police-training> [<http://perma.cc/AW8H-ZQ79>].

liability exposure. Plaintiffs bring civil suits against officers and departments for violations of their constitutional rights. Defendants seek to suppress unconstitutionally seized evidence in individual cases. Non-governmental organizations, protestors, and reporters raise public awareness of police wrongdoing and pressure government officials and law enforcement agencies to act. Prosecutors bring criminal charges against officers. Elected officials enact laws regulating the police. Blue ribbon commissions investigate troubled departments after high-profile events. Civilian overseers review misconduct claims brought against police and recommend changes in departments' policies and practices. Commentators have criticized and applauded the ability of these various actors to influence law enforcement, but have done so without broader reflection about the qualities that might make reformers successful in their efforts.⁴

In this Essay, I offer a framework with which to evaluate the relative strengths and limitations of those engaged in efforts to reform the police.⁵ I contend that police reformers need three qualities to have any hope of influencing police behavior: sufficient *leverage* such that law enforcement will respond to their pressures, recommendations, or demands; sufficient *motivation* to engage in their reform efforts; and sufficient *resources* to do their work.⁶

Of course, this taxonomy oversimplifies the challenges of reforming the police. It assumes that law enforcement can, in fact, improve through the pressures of outsiders. It glosses over what reform efforts should be pursued and how the impact of those reform efforts could be measured. And it assumes that it is possible to measure the precise amount of leverage, motivation, and resources various reformers possess—an especially difficult task given that reformers often work serially or simultaneously, in parallel or in concert, to press for reforms.

Despite these limitations, this taxonomy has three important virtues. First, it offers a framework with which to understand the strengths and limitations of those engaged in police reform efforts. Second, it highlights ways in which the leverage, motivation, and

⁴ For commentators' discussions of the strengths and limitations of various reformers, see *infra* Part II.E. For discussion of the need for this type of framework and some comparative institutional analysis, see Rachel Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 809–16 (2012).

⁵ As I suggest in the Conclusion, this framework could also be used to evaluate the strengths and limitations of those engaged in other types of reform efforts.

⁶ This Essay considers which entities are best situated to influence police behavior, not which entities are best situated to *design* police reforms. Were I considering that question, I would likely focus on three completely different qualities: access to information, expertise, and legitimacy. I discuss these qualities briefly in Part II.E, but the question of who should design police reforms merits more sustained attention.

resources of current reformers might be adjusted to improve their efficacy. And, third, by enabling comparison of the strengths and limitations of various reformers, it facilitates creative thinking about ways in which they might most productively collaborate. Although police reformers already regularly work together, my framework can encourage partnerships that draw on reformers' complementary strengths.

II. DEFINITIONS

I contend that police reformers need at least some amount of three qualities—leverage, motivation, and resources—to have any hope of influencing police behavior. Before considering the extent to which those currently engaged in police reform efforts possess each of these three qualities, I will define key terms.

A. Police Reformers

I define police reformers broadly to include all entities engaged in efforts to improve policing. Police reformers employ a range of means to achieve this end. Some push for specific reforms. For example, when the DOJ enters into a settlement agreement or consent decree with a law enforcement agency, it negotiates for a set of reforms including clearer use of force policies; more robust supervision, investigation, and discipline of officers; and data collection about department practices.⁷ Civilian auditors and blue ribbon commissions also make specific policy, supervision, and training recommendations.⁸ And federal, state, and local elected officials enact laws and regulations that require departments to change their behavior in concrete ways.⁹

Other reformers take a bottom-up approach—they sanction wrongdoing and thereby aim to pressure law enforcement officers and agencies to improve without setting out exactly what those

⁷ See *infra* note 25 and accompanying text (describing core reforms advocated by the DOJ in its investigations).

⁸ For reports from blue ribbon commissions recommending changes to law enforcement policies and practices, see INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT (1991); JAMES G. KOLTS ET AL., THE LOS ANGELES COUNTY SHERIFF'S DEPARTMENT (1992); RAMPART INDEP. REVIEW PANEL, A REPORT TO THE LOS ANGELES BOARD OF POLICE COMMISSIONERS CONCERNING THE OPERATIONS, POLICIES, AND PROCEDURES OF THE LOS ANGELES POLICE DEPARTMENT IN THE WAKE OF THE RAMPART SCANDAL (2000). For examples of recommendations made by civilian overseers, see NYC Civilian Complaint Review Board, *Policy Recommendations*, <http://www.nyc.gov/html/ccrb/html/news/policy.shtml> [https://perma.cc/U3WM-LSK7] (reports written by New York City's Civilian Complaint Review Board, recommending changes to chokehold practices and changes to vertical patrols in New York City Housing Authority).

⁹ See *infra* notes 84 & 85 and accompanying text (describing laws passed by elected officials).

improvements should be. For example, when a criminal defendant moves to suppress unconstitutionally seized evidence, the court's decision to suppress is intended in part to punish the involved officer and agency, and thereby encourage performance improvements—more care by the officer, or increased supervision or discipline by the department.¹⁰ Criminal prosecutions and civil suits are similarly intended to punish those who violate the law, deter other officers, and push officials to adopt reforms that might prevent future wrongdoing.¹¹

Police reformers also vary in the intended targets of their reform efforts: Some aim to address policies and practices across an entire department, while others focus on the behavior of individual officers. Reformers also focus on different types of policing problems: criminal suppression motions challenge the unconstitutional collection of information or evidence by law enforcement; civil damages actions generally challenge police behavior that results in compensable injury or property damage; and state and federal legislation has tended, at least recently, to regulate data collection, body cameras, and the investigation of officer-involved deaths.¹²

In this Essay, I do not assess whether it is better to advocate for specific reforms or to sanction wrongdoing and thereby pressure officers and agencies to change their behavior; whether it is better to apply pressure on individual officers or agencies as a whole; or whether certain types of policing problems are more important to address than others. Instead, I assume that each reformer's work plays a valuable role in efforts to improve policing and focus, instead, on each reformer's ability to succeed in its efforts.

B. Leverage

“Leverage” refers to the pressure that a reformer can place on law enforcement agencies and officers to change their behavior. Most reformers have leverage by dint of their power to sanction. Prosecutors can bring criminal charges against officers. Civil plaintiffs can bring

¹⁰ See *infra* note 60 and accompanying text (describing the intended effects of suppression decisions).

¹¹ See *infra* note 46 and accompanying text (describing the intended effects of civil damages actions); *infra* note 76 and accompanying text (describing the intended effects of criminal prosecutions).

¹² See, e.g., Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 425–46 (2012) (finding that Fourth Amendment excessive force claims are litigated almost exclusively in civil suits whereas claims related to investigatory stops are litigated almost exclusively in criminal suppression motions); *Law Enforcement Overview*, NAT'L CONFERENCE OF STATE LEGISLATURES (Apr. 15, 2016), <http://www.ncsl.org/research/civil-and-criminal-justice/law-enforcement.aspx> [https://perma.cc/C3LY-5TWC] (describing state lawmakers' recent efforts to regulate law enforcement).

damages actions against officers and departments. Criminal defendants can bring motions to suppress. Federal, state, and local governments can withhold money from law enforcement agencies that do not adopt certain policies. The DOJ can sue a law enforcement agency when the agency refuses to adopt recommended reforms.

Police reformers can also have leverage over law enforcement if some benefit will accrue to the officers or officials who adopt the reformers' recommendations. For example, public entity liability insurers can reduce insurance premiums for law enforcement agencies that reduce their claims payouts, become accredited, or hire a risk manager. The federal government can give law enforcement agencies grant money for community policing initiatives and body cameras. Whether in the form of a carrot or stick, a police reformer's leverage is its power to cause law enforcement agencies or officers to adjust their behavior.

Some have observed that police will not truly improve if they are merely responding to carrots and sticks. Instead, reforms will endure only when "the police organization itself is involved in the process and, ultimately, when reform involves not simply adherence to rules in the face of punitive sanctions, but a change in the organizational values and systems to which both managers and line officers adhere."¹³ This may be so—the DOJ's efforts, for example, may be more successful and enduring when it engages law enforcement officers and other stakeholders in the process of designing and implementing reforms.¹⁴ Yet I maintain that police reformers generally need some leverage to ensure law enforcement engages in the reform process: The DOJ may collaborate with a law enforcement agency's officers and officials to design and implement reforms but, at the end of the day, the DOJ relies on and benefits from its leverage to sue an agency that does not participate in the collaborative process.

C. Motivation

"Motivation" refers to reformers' commitments to their reform goals. A reformer can be motivated by any number of interests—ideological, moral, altruistic, economic, or political. The interests

¹³ Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 848 (1999); accord Kami C. Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 524 (2008) (describing the importance of stakeholder involvement in DOJ investigations of law enforcement agencies).

¹⁴ I discuss the role of community and stakeholder involvement in designing reforms *infra* Part II.E.

underlying a reformer's motivation may impact the types of reforms it pursues—a politically motivated legislator might introduce body camera legislation because it is popular with her constituents, whereas an economically motivated public entity liability insurer might recommend that its insureds adopt a certain use-of-force policy because it is likely to reduce liability costs. For the purposes of this discussion, I do not take a position on which types of motivations lead to the most effective reform efforts. Instead, I assume that reformers motivated by a wide range of interests can influence policing in productive ways. I focus, instead, on the need for reformers to be motivated to do their work.

Presumably, anyone engaged in police reform efforts has at least some motivation to pursue those efforts. Yet a police reformer's motivation can be compromised in at least two different ways. First, the reformer may have multiple priorities or responsibilities, and so its motivation may be diminished if police reform efforts are not its most urgent priority. Second, a reformer may have other priorities or responsibilities that conflict with its motivation to pursue police reforms. Prosecutors, for example, have authority to prosecute law enforcement officers for criminal misconduct, but their motivation to do so may be compromised by their desire to maintain positive relationships with officers in the same agency, who play an important role in their other investigations and prosecutions.¹⁵

D. Resources

“Resources” refer to the time, money, and personnel necessary for each type of reformer to pursue its reform goals. Resources should be understood on both a micro and macro level. At a micro level, each individual reformer needs sufficient time, money, and personnel to pursue its work with regard to the officer or agency that is the immediate target of its efforts. At a macro level, each type of reformer will ideally have sufficient resources to pursue its reforms broadly, across many law enforcement officers and agencies.¹⁶

Comparing the resources of the DOJ and criminal defendants illustrates how the resources question plays out at a micro and macro level. At a micro level, the DOJ needs far more resources to investigate a troubled law enforcement agency than an individual criminal

¹⁵ See *infra* notes 81–83 and accompanying text.

¹⁶ I do not have an answer to an obvious next question: *how many* law enforcement agencies and officers would a reformer ideally be able to reach? I assume for the purposes of this discussion that more is better, although additional thought should be given to the ideal scope of each reformer's reach.

defendant needs to bring a motion to suppress. Even so, the DOJ appears to be far better resourced than criminal defendants on a micro level. The DOJ staffs its pattern and practice investigations with several attorneys and can spend years compiling evidence about a law enforcement agency's practices.¹⁷ In contrast, public defenders are notoriously overworked; in some jurisdictions, defense attorneys have only minutes to spend on each of their cases and so may not vigorously litigate—or even file—meritorious motions to suppress.¹⁸

On a macro level, however, criminal defendants have a resource advantage over the DOJ. There is just one DOJ but millions of criminal defendants who might make suppression motions.¹⁹ To be sure, a DOJ investigation is aimed at addressing policies and practices across an entire department, while a suppression motion is aimed at the behavior of an individual officer (even if a successful motion can have a broader impact on police behavior).²⁰ But even with this caveat, criminal defendants as a whole have far more resources at a macro level than does the DOJ to pursue their efforts in agencies across the country.

E. Influence

This Essay engages with a narrow but important question—what entities are best situated to influence police behavior. This Essay does not, however, address *how* the police should change or which entities are best situated to design police reforms. I am focused not on who has the capacity to craft police reforms but on who has the muscle to ensure those reforms are adopted.

Some police reformers work toward both goals simultaneously. For example, the DOJ, civilian overseers, and blue ribbon commissions both design police reforms and press police to adopt those reforms. Others—

¹⁷ See Rachel Harmon, *Limited Leverage: Federal Remedies and Policing Reform*, 32 ST. LOUIS U. PUB. L. REV. 33, 48–49 (2012) (describing the costs associated with the DOJ investigation of the Maricopa County Sheriff's Office).

¹⁸ See Hannah Levintova, *Charts: Why You're in Deep Trouble if You Can't Afford a Lawyer*, MOTHER JONES (May 6, 2013, 5:00 EST), <http://www.motherjones.com/politics/2013/05/public-defenders-gideon-supreme-court-charts> [<https://perma.cc/J293-VYGF>] (reporting that, on average, public defenders in New Orleans have seven minutes to spend on each of their cases, public defenders in Detroit have thirty-two minutes to spend on each of their cases, and public defenders in Atlanta have fifty-nine minutes to spend on each of their cases); see also *infra* note 62 and accompanying text.

¹⁹ See FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES (2012), <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/persons-arrested/persons-arrested> [<http://perma.cc/TQ5J-4KF9>] (reporting over 12 million arrests by law enforcement in 2012). Note that not all of these arrestees are charged with a crime.

²⁰ See *infra* notes 68–70 and accompanying text for further discussion of the leverage of successful suppression motions.

like prosecutors, civil plaintiffs, and criminal defendants—may press the police to change without playing a direct role in determining what those changes should be. And some—researchers, for example—may design reforms without playing a direct role in encouraging police to adopt them. I am agnostic about whether those pressing police to adopt reforms should also play a role in designing those reforms. But I do believe that the question of who is best situated to influence the police can be disaggregated from the question of who is best situated to design reforms.

Were I considering which entities are best situated to design police reforms, I would not focus on leverage, motivation, and resources. Instead, I expect that I would focus on three completely different qualities: sufficient *access to information* about the law enforcement agency or agencies that would be subject to reforms so that it would be possible to determine the scope and nature of the pathologies that need addressing; sufficient *expertise* in policing so that proposed interventions would address those pathologies; and sufficient *legitimacy* with law enforcement and other stakeholders such that proposed reforms would be embraced—or at least accepted—by those most directly impacted by them.²¹

Further consideration should be given to which entities are engaged in efforts to design police reforms, and whether those entities have sufficient information, expertise, and legitimacy to do their work. This Essay, however, is focused on who is best situated to influence police behavior and so does not engage with these important questions.

III. APPLICATIONS

Having argued that police reformers need leverage, motivation, and resources, I now consider the leverage, motivation, and resources possessed by those most commonly called upon to reform the police. In this Part, I aim to describe both the structural characteristics of these actors and the ways in which they actually behave, although I have glossed over complexities in both areas and readers may disagree with my characterizations of each reformer's strengths and weaknesses. Note also that these descriptions of reformers are not wholly, or even primarily, my own; other commentators have made many of the observations and critiques that I describe. Nevertheless, situating commentators' observations within my framework—as observations

²¹ See *supra* notes 13–14 and accompanying text (discussing the importance of this type of collaboration when designing reforms).

about leverage, motivation, and resources—helps illuminate reformers’ relative strengths and weaknesses and facilitates comparison.

I have organized this discussion in four subparts, each of which focuses on a group of reformers that share similar strengths and weaknesses: (1) reformers with lots of leverage but limited resources (the DOJ and public entity liability insurers); (2) reformers with strong motivations but limited leverage (civil plaintiffs, criminal defendants, and non-governmental actors including advocacy groups and the media); (3) reformers with lots of leverage but mixed motivations (prosecutors and elected officials); and (4) reformers whose leverage, motivation, and resources depend upon the preferences of the government officials who create them (blue ribbon commissions and civilian overseers). For each reformer, I briefly describe their work and then assess their leverage, motivation, and resources.

A. Reformers with Lots of Leverage but Limited Resources

First, I consider two reformers—the DOJ and public entity liability insurers—that each have significant leverage over law enforcement agencies but are limited by their resources on a macro level.

1. The Department of Justice.

In 1994, the DOJ was granted statutory authority to investigate law enforcement agencies for systemic constitutional violations.²² Since that time, the DOJ has investigated at least sixty-seven law enforcement agencies for racial bias, excessive force, and other constitutional violations.²³ Six of these investigations are still ongoing; of the sixty-one investigations that have been resolved, twenty-nine have resulted in binding agreements overseen by monitors, eight have resulted in agreements by jurisdictions to reform without oversight, and twenty-four have resulted in other resolutions including, in some instances, a series of recommendations without a court mandate but with the potential for further investigation and litigation.²⁴ In the

²² See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103–322, 108 Stat. 1796 (1994).

²³ Kimbriell Kelly et al., *Forced Reforms, Mixed Results*, WASH. POST (Nov. 13, 2015), <http://www.washingtonpost.com/sf/investigative/2015/11/13/forced-reforms-mixed-results/> [https://perma.cc/9HQE-NWXZ].

²⁴ See *id.* (reporting that nine investigations remained open at the time the article was published). Note, however, that the DOJ has since resolved its police practices investigations of Miami, Florida; Ferguson, Missouri; and Newark, New Jersey. All three involve oversight by monitors. For information about the agreements in these and other cases, see generally *Special Litigation Section Cases and Matters*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/crt/special-litigation-section-cases-and-matters0#police> [https://perma.cc/4B8K-RCX4].

consent decrees and settlements it has entered into with law enforcement agencies, the DOJ has negotiated for a consistent set of policies that require better collection of data, improved assessment of problem officers, and improved civilian complaint procedures.²⁵

Leverage. The strength of the DOJ's statutory authority to investigate and sue law enforcement agencies lies in its leverage to demand that reforms occur.²⁶ That leverage is aimed at the leadership of those law enforcement agencies and the leadership of the cities and counties in which those agencies are located. For those agencies that the DOJ investigates, its leverage is the threat that the DOJ will sue if the agency does not voluntarily improve or agree to enter into an enforceable agreement. When the DOJ has sued law enforcement agencies, it has only lost once—all other cases have resulted in a consent decree.²⁷ The Department's leverage post-consent decree is the threat of continued judicial oversight and, perhaps, being held in contempt by the court overseeing that consent decree. However, that leverage only lasts so long as a court has jurisdiction over the case and court monitors to review the department's practices.²⁸

Motivation. The motivation of the DOJ to investigate and prosecute law enforcement agencies currently seems quite strong, but depends in no small part on the priorities of the President in office. In 2009, just as

²⁵ For descriptions of the core reforms mandated by the DOJ, see Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reform*, 62 STAN. L. REV. 1, 18–19 (2009); Samuel Walker, *The New Paradigm of Police Accountability: The U.S. Justice Department "Pattern or Practice" Suits in Context*, 22 ST. LOUIS U. PUB. L. REV. 3, 7–9 (2003).

²⁶ See Katherine Skiba & Anne Sweeney, *Historic Probe of Chicago Police Expected to Be Long and Costly*, CHI. TRIB. (Dec. 12, 2015, 6:15 PM), <http://www.chicagotribune.com/news/ct-chicago-police-civil-rights-probe-met-20151212-story.html> [<https://perma.cc/6MGQ-TEJL>] (quoting Stephen Rushin, who has studied the DOJ investigations, as saying, "The No. 1 good thing about these federal interventions is they force local municipalities to face the issue of police misconduct head-on. . . . [T]here's a bunch of structural and organizational reasons, without federal interventions, that make it easy for cities to push those difficult decisions off their plate.").

²⁷ John Swaine & Ciara McCarthy, *Department of Justice Sues City of Ferguson to Force Criminal Justice Reforms*, GUARDIAN (Feb. 10, 2016, 5:22 PM EST), <http://www.theguardian.com/us-news/2016/feb/10/ferguson-department-of-justice-lawsuit-police-reforms> [<https://perma.cc/6F9A-GYFX>]. The DOJ is currently appealing its one loss at trial. *Id.*

²⁸ Scholars, journalists, and the DOJ itself have been measuring the effects of DOJ consent decrees during and after court supervision. For studies examining the effects of DOJ investigations, see Sarah Childress, *Inside 20 Years of Federal Police Probes*, FRONTLINE (Dec. 14, 2015), <http://www.pbs.org/wgbh/frontline/article/inside-20-years-of-federal-police-probes/> [<https://perma.cc/Q9TY-E9QG>] (finding that, after reaching out to all agencies investigated by the DOJ, "Most of those who entered into agreements to reform, and even a few who didn't, said the process had improved the department in terms of training, equipment and best practices."); CHRISTOPHER STONE ET AL., *POLICING LOS ANGELES UNDER A CONSENT DECREE: THE DYNAMICS OF CHANGE AT THE LAPD* (2009), <http://assets.lapdonline.org/assets/pdf/Harvard-LAPD%20Study.pdf> [<http://perma.cc/8PEC-UKZ8>] (examining changes to the Los Angeles Police Department following its consent decree with the DOJ); *cf.* Kelly et al., *supra* note 23 (describing difficulties in measuring impact of DOJ interventions).

Barack Obama assumed the presidency from George W. Bush, the consensus was that, “hampered by limited resources and inadequate political commitment, the Justice Department has brought too few cases.”²⁹ During President Obama’s tenure, the DOJ much more aggressively used its power to take legal action against law enforcement.³⁰

Resources. It is the DOJ’s resources that are most often criticized as inadequate to the task of reforming law enforcement agencies. The DOJ appears to have sufficient resources on a micro level—in other words, it has the resources to conduct the investigations it undertakes. Yet, on a macro level, the DOJ does not have the resources to mount investigations for more than a small sliver of the approximately 18,000 law enforcement agencies across the country.³¹ Each investigation can take thousands of hours of attorney time over several years, and currently there are only eighteen attorneys in the DOJ’s Civil Rights Division that investigate the practices of law enforcement agencies full time.³² The Obama administration recently asked Congress for an additional \$2.5 million for the unit that investigates law enforcement agencies, reporting that current investigations plus “increased demand for action on police misconduct” has “outstripped the Division’s available resources.”³³ But a few million dollars may not solve the DOJ’s resource problem. As Rachel Harmon has observed, “If any significant number of the nation’s large police departments are structurally deficient, the Justice Department is unlikely—under the Obama Administration or any other—to have sufficient resources to investigate and sue every problematic police department.”³⁴

²⁹ Harmon, *supra* note 25, at 2.

³⁰ See Kelly et al., *supra* note 23 (describing the uptick in DOJ investigations since Barack Obama took office).

³¹ See Stephen Rushin, *Federal Enforcement of Police Reform*, 82 FORDHAM L. REV. 3189, 3230 (2014) (estimating that the DOJ can investigate fewer than 0.02% of the nation’s law enforcement agencies each year).

³² See Ryan J. Reilly, *Chicago Case Could Overwhelm Tiny DOJ Unit That Investigates Police Civil Rights Abuses*, HUFFINGTON POST (Dec. 7, 2015, 5:26 PM EST), http://www.huffingtonpost.com/entry/chicago-justice-department_5665a85ee4b08e945ff005d9 [<http://perma.cc/VN69-J78Z>]. Note that other divisions of the DOJ investigate criminal civil rights violations by individual officers, and discrimination on the basis of race, color, national origin, sex, religion, and disability. See U.S. DEP’T OF JUSTICE, ADDRESSING POLICE MISCONDUCT LAWS ENFORCED BY THE DEPARTMENT OF JUSTICE, <http://www.justice.gov/crt/addressing-police-misconduct-laws-enforced-department-justice> [<https://perma.cc/7NM7-YPPZ>].

³³ *Id.*

³⁴ Harmon, *supra* note 25, at 3–4.

2. Public entity liability insurers.

The vast majority of law enforcement agencies in the country are small and many rely on insurance through public entity risk pools or private insurers.³⁵ In prior research I have found that these insurers take a number of steps to reduce their insured's liability exposure: Insurers examine trends in past claims and notify their members of those trends, develop model policies, and offer trainings to their members.³⁶

Leverage. Insurers have significant leverage over the law enforcement agencies they insure—the threat that they will raise premiums or withdraw coverage for law enforcement agencies that become too risky to insure. When agencies are sued multiple times, insurers sometimes threaten to limit or deny coverage unless the department makes a specific policy or personnel change.³⁷ Agencies that have failed to follow insurers' recommendations have lost their insurance coverage and ceased to exist.³⁸

Motivation. Municipal insurers should have strong motivations to reduce liability exposure through claims review, policy development, and training—it is, after all, critical to their bottom line to do so. Presumably, insurers are only motivated to pressure police to adopt the types of reforms that will decrease their liability exposure. Insurers likely have less motivation to prevent misconduct that does not result in costly injuries—victims of these types of violations are unlikely to find lawyers to represent them and are unlikely to recover significant damages if they do sue.³⁹ But insurers should have strong motivations to pursue policing reforms that can lead to reductions in liability costs.

Resources. Like the DOJ, public entity liability insurers appear to have enough resources, at a micro level, to review claims and engage in

³⁵ For the frequency with which smaller jurisdictions rely on liability insurance, see Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV. 1144, 1170 (2016); John Rappaport, *How Private Insurance Regulates Public Police*, 130 HARV. L. REV. (forthcoming 2017).

³⁶ See Schwartz, *supra* note 35, at 1189; see also John Rappaport, *An Insurance-Based Typology of Police Misconduct*, 2016 U. CHI. LEGAL. F. 369, 377–78 (“[I]nsurers use a variety of tools to tame in police violence . . . [S]ome even engage in classroom instruction.”); Rappaport, *supra* note 35.

³⁷ See Schwartz, *supra* note 35, at 1189.

³⁸ *Id.*

³⁹ See *infra* notes 47–49, and accompanying text (describing how interpretation of fee-shifting doctrines discourages plaintiffs' attorneys from representing plaintiffs with limited damages). For further discussion of public entity liability insurers' limited motivation to prevent “low-dollar” harms, and limited ability to predict or prevent “long-tail” harms, see Rappaport, *supra* note 36, at 399.

risk management.⁴⁰ Public entity liability insurers can price insurance premiums at a level that allows them to engage in these reform efforts. But, like the DOJ, public entity liability insurers can only reach a limited number of law enforcement agencies and therefore have resource limitations at a macro level. While the DOJ's resources are limited by their budgetary allocation from Congress, insurers' resources are limited by the market for their product: they can only influence those law enforcement agencies that purchase insurance.⁴¹ How big a resource problem this is depends on how one looks at it. The vast majority of law enforcement agencies are small and rely on insurance. On the other hand, the vast majority of officers—and, presumably, the vast majority of lawsuits—are in self-insured jurisdictions.⁴²

B. Reformers with Strong Motivations but Limited Leverage

Here, I consider three types of reformers—civil plaintiffs, criminal defendants, and non-governmental actors (including advocacy groups and the press)—each of which has strong motivations to engage in police reform efforts but limited leverage over law enforcement agencies.

1. Civil plaintiffs.

Plaintiffs whose rights have been violated can sue law enforcement officers and departments. The Supreme Court's standing doctrine makes it difficult for a plaintiff to bring claims for injunctive relief against law enforcement; accordingly, plaintiffs rely primarily on damages actions.⁴³ Civil damages actions are assumed not only to

⁴⁰ See Rappaport, *supra* note 36, at 369.

⁴¹ One could also look at this as a leverage problem; insurers have lots of leverage over agencies that purchase insurance but no leverage over agencies that are self-insured. Because my definition of macro-level resources concerns the ability of a reformer to pursue their efforts across a broad number of agencies, I have framed this limitation as one of resources.

⁴² See Schwartz, *supra* note 35, at 1160.

⁴³ See *Los Angeles v. Lyons*, 461 U.S. 95, 101–05 (1983) (finding no standing to seek injunctive relief because there was not a “real and immediate” threat of future injury). Despite the limitations announced in *Lyons*, several successful civil suits have sought injunctive relief to address stop-and-frisk practices, racial disparities in traffic stops, and systemic police abuses. See, e.g., John M. Glionna, *Oakland Pays for Police Abuse*, L.A. TIMES (Feb. 20, 2003), <http://articles.latimes.com/2003/feb/20/local/me-oakland20> [<http://perma.cc/DD8V-E2FT>] (describing settlement of class action against the Oakland Police Department, which included payment of \$10.9 million and systemic reform of the department); Joseph Goldstein, *Judge Rejects New York Stop-and-Frisk Policy*, N.Y. TIMES (Aug. 12, 2013), <http://www.nytimes.com/2013/08/13/nyregion/stop-and-frisk-practice-violated-rights-judge-rules.html> [<https://perma.cc/8BTK-LTS9>] (describing the *Floyd* class action challenging stop-and-frisk practices in New York City). These types of civil suits seeking injunctive relief function much like the DOJ's interventions, forcing policy changes with the leverage of judicial oversight.

compensate plaintiffs for their injuries, but also to deter future misconduct.⁴⁴ Commentators have observed that press coverage of suits can create political pressures to reform.⁴⁵ And payouts are expected to make individual officers and departments change their behavior to avoid being sued again.⁴⁶

Motivation. Plaintiffs and their attorneys may be motivated by any number of interests—to punish individual defendants, to reform law enforcement, to have their day in court, or to get paid. Regardless of the nature of plaintiffs' motivations, those motivations are likely to be strongly held. In order for a civil case to be filed, a plaintiff must be motivated enough to seek out an attorney or file a complaint on her own. Assuming that the plaintiff's attorney has taken the case on contingency, the attorney's motivations will be equally strong—she is, after all, investing her time and money in a case for which she will recover nothing unless the plaintiff prevails. Assuming the attorney is taking seriously her responsibility to zealously advocate on behalf of her client, she will have strong motivations to prevail regardless of how she is being paid.

Resources. On a micro level, whether an individual plaintiff has sufficient resources to litigate her claims will likely depend on whether a lawyer will agree to take her case. Plaintiffs, generally speaking, do not have the resources necessary to finance a suit against law enforcement. Congress addressed this resource issue in 1976 by passing a fee-shifting statute to allow prevailing plaintiffs to recover reasonable attorney's fees from government defendants.⁴⁷ Yet various limitations on fee-shifting awards mean that plaintiffs' attorneys cannot rely on the promise of fee shifting, even for a case that is strong on the merits.⁴⁸ As a result, attorneys are most likely to bring cases on behalf of plaintiffs who have suffered significant monetary damages (such that

⁴⁴ See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 727 (1999) (Scalia, J., concurring) (“[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 Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (“[T]he damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future.”); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (“Deterrence . . . operates through the mechanism of damages that are compensatory” (emphasis omitted)).

⁴⁵ See Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 861 (2001).

⁴⁶ For illustrations of the Supreme Court's reliance on these assumptions, see Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 892–98, 955 (2014).

⁴⁷ For a history of Section 1988, the fee-shifting statute, see Paul D. Reingold, *Requiem for Section 1983*, 3 DUKE J. CONST. L. & PUB. POL'Y 1 (2003).

⁴⁸ See *id.* at 19–21 (describing limitations on Section 1988 and explaining that these limitations discourage attorneys from accepting cases with strong proof of liability but low damages).

the attorney could be adequately paid through a contingency arrangement if fee shifting is unavailable), or on behalf of a class of plaintiffs who have suffered less costly injuries (assuming they can satisfy class certification requirements). Attorneys aiming to recover a fee are unlikely to agree to represent an individual plaintiff who has suffered minimal damages, even if proof of liability is strong.⁴⁹ Plaintiffs in such cases can proceed *pro se*, but are unlikely to have the financial resources or expertise to litigate their claims effectively.

On a macro level, whether there are enough attorneys to represent plaintiffs in civil suits against the police likely depends on where those plaintiffs live. In a prior study, I observed that a person mistreated by the police in El Paso, Texas, is far less likely to find an attorney to represent him than a person mistreated by the police in New York City.⁵⁰ This is so not only because there are fewer attorneys bringing these types of cases in El Paso, but also because regional variations in judges' application of qualified immunity and other doctrines, city attorney practices, and community norms likely influence how cases are valued and, thus, whether an attorney will be inclined to take a case on contingency.⁵¹

Leverage. Civil rights damages actions likely suffer most for lack of leverage. Lawsuits can create indirect pressures to reform, especially if the case involves compelling facts reported on in the press.⁵² And suits that announce new legal rules can impact police trainings and management.⁵³ But, for a host of reasons, individual officers and police

⁴⁹ Attorneys representing their clients *pro bono* will be less constrained by this financial calculation, but even attorneys taking cases *pro bono* may seek to recover attorneys' fees if they prevail.

⁵⁰ Schwartz, *supra* note 46, at 917 n.137.

⁵¹ *Id.* at 917.

⁵² See, e.g., Gilles, *supra* note 45, at 858–67 (describing the “informational” and “fault-fixing” functions of constitutional damages actions); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1681 (2003) (describing how negative publicity regarding lawsuits “can trigger embarrassing political inquiry and even firings, resignations, or election losses.”). I have argued that law enforcement agencies could also learn a great deal about their officers' conduct by reviewing information in lawsuits, but have found that few law enforcement agencies do so. See Joanna C. Schwartz, *Introspection Through Litigation*, 90 NOTRE DAME L. REV. 1055, 1081–83 (2015); see also SAMUEL WALKER, POLICE ACCOUNTABILITY: THE ROLE OF CIVILIAN OVERSIGHT 100–01 (2001) (“One of the notable failures of both police departments and other city officials has been their neglect of modern concepts of risk management and in particular their refusal to examine incidents that result in litigation and seek to correct the underlying problems.”).

⁵³ For example, a decision by the California Supreme Court that “tactical conduct and decisions preceding the use of deadly force are relevant considerations under California law in determining whether the use of deadly force gives rise to negligence liability” caused the Los Angeles Police Commission to change the ways in which it evaluates whether force used by its officers was proper. See Patrick Healy, *LAPD Commission Adds to Guidelines for Review of Police Use of Force*, NBC L.A. (Feb. 18, 2014), <http://www.nbclosangeles.com/news/local/LAPD-Commission-Adds-to-Guidelines-for-Review-of-Police-Use-of-Force-246094151.html>

departments have little to fear with regard to damages actions. People who believe they have been mistreated by the police rarely sue.⁵⁴ Restrictive interpretations of constitutional principles limit the number of people who can prove violations by law enforcement.⁵⁵ Qualified immunity protects individual officers from liability for federal constitutional violations unless they are “plainly incompetent” or “knowingly violate the law.”⁵⁶ And complex and taxing municipal liability standards make it exceedingly difficult to prevail against a city or county on a claim.⁵⁷

Even when civil rights plaintiffs prevail in damages actions, that success may not create leverage over the involved law enforcement officers and agencies. In prior research, I found that law enforcement agencies rarely collect or analyze information about the litigation history of their officers, that suits rarely have negative ramifications for officers’ employment, and that officers are virtually always indemnified.⁵⁸ Successful lawsuits may have negative political consequences for law enforcement agencies—the city council or mayor may use a large payout to pressure agency officials to improve. It is difficult to measure the power of these political pressures. But it is clear that these political pressures rarely translate into financial pressures; municipal budgeting practices usually insulate police

[<http://perma.cc/HP5K-SDVX>] (quoting *Hayes v. County of San Diego*, 305 P.3d 252, 639 (Cal. 2013)). Note, however, that current qualified immunity doctrine—which allows courts to dismiss cases without deciding whether a constitutional right was violated—presumably makes it less likely for courts to announce new federal constitutional standards in civil cases. See Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J., 913, 927 (2015).

⁵⁴ See Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 CARDOZO L. REV. 841, 863 (2012) (citing evidence suggesting that people who believe they have been harmed by the police sue only approximately one percent of the time and offering possible explanations for the low filing rate).

⁵⁵ For discussions of the Supreme Court’s use of force doctrine, see Rachel A. Harmon, *When is Police Violence Justified?*, 102 NW. U. L. REV. 1119, 1125–40 (2008). For discussions of the Supreme Court’s Fourth Amendment doctrine as it relates to stop-and-frisk practices, see Devon W. Carbado, Cheryl I. Harris & Kimberlé Williams Crenshaw, *Racial Profiling Lives On*, N.Y. TIMES (Aug. 14, 2013), <http://www.nytimes.com/2013/08/15/opinion/racial-profiling-lives-on.html> [<https://perma.cc/6AQ5-NP4A>]; cf. Leong, *supra* note 12, at 427 (finding, based on a study of appellate Fourth Amendment decisions, that civil plaintiffs prevailed almost half the time whereas criminal defendants prevailed just ten percent of the time).

⁵⁶ *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

⁵⁷ See generally David J. Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. § 1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183 (2005) (describing the difficulty of establishing municipal liability).

⁵⁸ See Joanna C. Schwartz, *Myths and Mechanics of Deterrence: The Role of Lawsuits in Law Enforcement Decisionmaking*, 57 UCLA L. REV. 1023, 1076–77 (2010); Schwartz, *supra* note 46, at 936–37.

department budgets from feeling any financial consequences of lawsuit payouts.⁵⁹

2. Criminal defendants.

When officers involved in an investigation or arrest violate the Constitution—by failing to give *Miranda* warnings, or by seizing evidence without a valid warrant or probable cause—criminal defendants and their attorneys can seek to have statements or evidence excluded from trial. A primary purpose of the exclusionary rule is to deter officers from violating the law in future investigations and arrests.⁶⁰

Motivation. Defendants are highly motivated to suppress evidence when they can; doing so will, presumably, increase a defendant's chances of winning at trial or negotiating an attractive plea deal. Defense counsel zealously advocating on behalf of their clients share those motivations, although there are stories—particularly in jurisdictions without public defender offices, in which judges appoint attorneys to represent indigent defendants—of defense counsel whose primary goal is “to curry favor with the judge by getting a quick guilty plea from the client.”⁶¹

Resources. At a micro level, criminal defendants and their attorneys are notoriously resource-constrained; attorneys in many public defender offices must represent hundreds of clients at a time without resources to adequately investigate their clients' cases and mount their strongest defenses.⁶² These resource limitations likely mean that some meritorious suppression motions are never made and that others are made ineffectively. Yet, on a macro level, criminal defendants are well resourced compared to other types of police reformers—almost everyone charged with a felony and approximately two-thirds of people charged with misdemeanors are represented by counsel, either hired or appointed.⁶³ No other police reformer—with the

⁵⁹ See generally Schwartz, *supra* note 35.

⁶⁰ See Thomas K. Clancy, *The Fourth Amendment's Exclusionary Rule as a Constitutional Right*, 10 OHIO ST. J. CRIM. L. 357, 357 (2012) (summarizing the Supreme Court's reliance on a deterrence rationale for the exclusionary rule).

⁶¹ Stephen B. Bright, *Turning Celebrated Principles into Reality*, CHAMPION, Feb. 2003, at 6, 7 (quoting “an experienced criminal defense lawyer in Houston”).

⁶² See generally ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE (Dec. 2004), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/lis_sc_laid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf [<http://perma.cc/F2F9-EDRV>]; *supra* note 18 and accompanying text (describing public defenders' limited resources).

⁶³ See Caroline Wolf Harlow, *Defense Counsel in Criminal Cases*, BUREAU OF JUST.

exception of criminal prosecutors—are as plentiful. And with counsel, even overburdened counsel, comes some success: Best estimates are that 300,000 criminal cases are dismissed each year as a result of Fourth Amendment violations.⁶⁴ In contrast, my prior research suggests that plaintiffs recover money in fewer than 8000 civil damages actions alleging police misconduct each year.⁶⁵

Leverage. The exclusionary rule gives criminal defendants and their attorneys limited leverage over law enforcement. The exclusionary rule does nothing to prevent unconstitutional conduct in the vast majority of police interactions that do not result in seizures of evidence or arrests.⁶⁶ And the exclusionary rule's many exceptions and limitations mean that searches and seizures will often be found in conformance with the Constitution.⁶⁷

When a court does suppress evidence, this decision can create leverage in one of two ways. First, if a court announces a new interpretation of the Fourth Amendment in its ruling, law enforcement agencies may change their trainings to comply with the ruling.⁶⁸

STATISTICS (2000) at 1, <http://www.bjs.gov/content/pub/pdf/dccc.pdf> [<https://perma.cc/77Q7-RDJN>].

⁶⁴ See Sklansky, *supra* note 2, at 580.

⁶⁵ In my police indemnification study, which included law enforcement agencies that employed approximately twenty percent of the law enforcement officers across the country, I found 9225 police misconduct cases over a six-year period in which plaintiffs recovered money. See Schwartz, *supra* note 46. Based on these figures, jurisdictions employing all officers across the country pay plaintiffs to resolve approximately 7687 police misconduct cases each year.

⁶⁶ See Harmon, *supra* note 17, at 39 (“[E]xcluding evidence cannot influence officers or departments uninterested in using illegally obtained evidence in a criminal prosecution, and it cannot discourage unconstitutional conduct that is unlikely to produce evidence.”); Sklansky, *supra* note 2, at 581–82 (“[R]ecent empirical work on street-level policing underscores not only that the exclusionary rule is largely powerless in cases the police do not expect to take before a judge, but also that this category constitutes the majority of the cases in which the police operate.”); Walker, *supra* note 2, at 18 (“[M]ost police activities remain uncovered by any Court decision. If an illegal search does not result in prosecution and conviction, for example, there is no grounds for an appeal under *Mapp*.”).

⁶⁷ See, e.g., Harmon, *supra* note 25, at 10 (“[T]he [exclusionary] rule is riddled with exceptions and limitations, many of which are inconsistent with using the exclusionary rule as an effective deterrent of police misconduct”); Richard M. Re, *The Due Process Exclusionary Rule*, 127 HARV. L. REV. 1885, 1887–88 (2014) (describing recent Supreme Court decisions as “establish[ing] the doctrinal basis for radically curtailing the circumstances in which the Fourth Amendment exclusionary rule might apply.”).

⁶⁸ See, e.g., Lawrence Rosenthal, *Seven Theses in Grudging Defense of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 525, 543 (2013) (“After the Court prohibited random stops of motorists to check their licenses and registration in *Delaware v. Prouse*, the District of Columbia Police Department almost immediately overhauled its policies to comply with the new ruling. More recently, after the Court held that the installation and subsequent use of a GPS device to monitor a vehicle’s movements was a ‘search’ within the meaning of the Fourth Amendment in *United States v. Jones*, the FBI’s general counsel reported that the decision caused the agency to turn off nearly 3,000 monitoring devices.”); Sklansky, *supra* note 2 (observing that California law enforcement agencies stopped training their officers not to conduct warrantless searches of trash,

Second, when a court decides to suppress evidence but does not announce a new legal rule, that decision may impact the individual officer whose conduct is found to be unconstitutional. The consequences of that ruling for the involved officer depend, however, on the recordkeeping practices of the police department and prosecutor.

In some jurisdictions, prosecutors keep track of courts' decisions to suppress evidence or dismiss cases as a result of officers' dishonesty or unconstitutional behavior; prosecutors who keep these so-called *Brady* lists may resist working with such officers because evidence of their past misdeeds will have to be turned over to defense counsel.⁶⁹ In these jurisdictions, the threat of a suppression decision may pressure officers not to behave dishonestly or unconstitutionally, and a finding of dishonesty or unconstitutional behavior may cause department officials to take action against the misbehaving officer. In other jurisdictions, however, prosecutors do not keep track of suppression decisions and do not inform individual law enforcement officers and agencies when courts suppress evidence or dismiss cases as a result of officers' unconstitutional behavior.⁷⁰ In these jurisdictions, suppression decisions will likely have less impact on officer and agency practices.

3. Non-Governmental actors.

A wide range of non-governmental groups advocate for police reforms and protest when police abuses occur, including the ACLU, NAACP, Black Lives Matter, local non-profits, church groups, and unions.⁷¹ There are also a number of reporters who cover policing issues for newspapers, television, radio, and Internet news sites, and

a requirement of California constitutional law, after the United States Supreme Court rejected this prohibition); Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121 (2001) (examining how California law enforcement agencies trained officers to comply with a Supreme Court decision).

⁶⁹ See, e.g., Christian McPhate, *Local Brady List Exists: District Attorney's Office Says It Keeps Track of County Officers' Conduct*, DENTON RECORD-CHRONICLE (July 2, 2015), <http://www.dentonrc.com/local-news/local-news-headlines/20150702-local-brady-list-exists.ece> [<https://perma.cc/2U3E-WKF4>]; Tony Shin, *DA Keeps "Dishonest Cops" List*, NBC7 SAN DIEGO (May 18, 2011, 6:56 AM PDT) <http://www.nbcsandiego.com/news/local/Exclusive-DA-Has-Secret-List-Of-Law-Enforcement-Officers-122114294.html> [<https://perma.cc/6DKR-QM3L>].

⁷⁰ See Schwartz, *supra* note 58, at 1079–80 (describing studies); see also Kathryn Haake, *Missoula Prosecutors: No Official 'Brady Cop' List; Officer with Label Still Employed*, MISSOULIAN (Apr. 25, 2015), http://missoulia.com/news/local/missoula-prosecutors-no-official-brady-cop-list-officer-with-label/article_5d3a6d57-95d6-572d-a5fc-0b24a8a116ec.html [<https://perma.cc/VM4E-AMAE>].

⁷¹ See, e.g., Michael Dresser & Luke Broadwater, *NAACP, ACLU, Other Groups Call for Police Reform in Maryland*, BALTIMORE SUN (July 23, 2015, 7:21 PM), <http://www.baltimoresun.com/news/maryland/freddie-gray/bs-md-ci-police-panel-20150723-story.html> [<http://perma.cc/49E7-4M42>] (describing a variety of advocacy groups' efforts in Baltimore).

document both individual instances of misconduct and systemic failures.⁷² It is more difficult to characterize the motivation, resources, and leverage of this motley crew of non-governmental actors. Yet they are included in this discussion because they play an important role in police reform efforts.

Motivation. Only those reporters and non-governmental groups engaged in police reform efforts should be understood to be police reformers; unlike the other entities I have described, this is a self-selecting group. As a result, the non-governmental actors engaged in police reform efforts generally have strong motivations to do their work. Some groups and reporters may have other responsibilities or interests that take time away from their police reform efforts. But those engaged in police reform efforts do not, generally speaking, have priorities or responsibilities that conflict with their motivations to pursue police reforms.

Resources. Non-governmental groups engaged in police reform efforts have widely varying amounts of resources; an organization like the ACLU has far more resources than does a local non-profit organization, and a reporter at *The New York Times* has far more resources than a blogger on *Huffington Post*. The costs of their activities also vary; a full-page advertisement in a newspaper will cost far more than a Twitter campaign, and it will cost far more to send a network news reporter to investigate a troubled department than it will cost a local reporter to share her observations of that same department.

There is not, however, a direct correlation between the amount of resources a reporter or group has and the impact of their efforts. Efforts by *The Guardian* and *The Washington Post* to collect data on the number of people killed by the police in 2015 took far more resources than it took organizers to begin using the Black Lives Matter hashtag, yet both efforts have been extremely influential.⁷³ With so much variation in the amount of resources possessed by different non-governmental actors, and so much variation in the amount of resources needed by these actors to engage in reform efforts, it is hard to draw any overarching conclusions in this area. It seems, though, that non-

⁷² See, e.g., Jeremy Borden, *How a Little Known, Uber-Driving Freelancer Brought the Lawsuit that Forced Chicago to Release a Police Shooting Video*, COLUM. JOURNALISM REV., Nov. 25, 2015.

⁷³ See Jannell Ross, *How Black Lives Matter Moved from a Hashtag to a Real Political Force*, WASH. POST (Aug. 19, 2015), <https://www.washingtonpost.com/news/the-fix/wp/2015/08/19/how-black-lives-matter-moved-from-a-hashtag-to-a-real-political-force/> [https://perma.cc/PZL6-SEYW] (observing that Black Lives Matter, which began as a hashtag, has become what *The New York Times* has called “the 21st Century’s first civil rights movement”); *infra* Part IV.B.1 (describing the effects of reporting by *The Guardian* and *The Washington Post*).

governmental actors engaged in police reform efforts can generally find ways to make productive use of the resources they have.

Leverage. While non-governmental groups possess strong motivations, they have no direct leverage over law enforcement. Unlike elected officials, these groups cannot pass laws requiring law enforcement agencies to change. And unlike criminal defendants, civil plaintiffs, and criminal prosecutors, these groups cannot officially sanction individual officers for violating the law. Yet these non-governmental groups do have the ability to raise awareness about instances of police misconduct and systemic problems and can, as a result, increase the motivations of elected officials to advance reforms.⁷⁴

C. Reformers with Lots of Leverage but Mixed Motivations

Here I consider two types of police reformers—criminal prosecutors and elected officials—that have significant leverage over law enforcement but may not be motivated to pursue police reforms.

1. Criminal prosecutors.

Criminal prosecutors should be understood as police reformers. Prosecutions for criminal conduct should deter or incapacitate offending officers, and the threat of prosecution should have a more general deterrent effect.⁷⁵

Leverage. The threat of prosecution should create significant leverage—deterrence theory, at least, imagines that the threat of being arrested and going to prison could influence officer behavior.⁷⁶ Yet, for several reasons, prosecutions and convictions are rare: Many states have very high standards for criminal conviction, prosecutors infrequently bring criminal charges against the police, and juries' proven sympathies for law enforcement make convictions difficult to

⁷⁴ See, e.g., Thomas B. Edsall, *How Much Do Black Lives Matter to the Presidential Campaign?*, N.Y. TIMES (Nov. 11, 2015), http://www.nytimes.com/2015/11/11/opinion/campaign-stops/how-much-do-black-lives-matter-to-the-presidential-campaign.html?_r=0 [<https://perma.cc/J9QF-F2HG>] (“The onslaught of confrontations between blacks and the police, as well as intense coverage on TV and online of college campus protests and of the Black Lives Matter movement, have decisively affected the Democratic Party’s position on a core issue: the use of force to maintain public order.”); *infra* Part IV.B.1 (describing how newspapers’ tallies of people killed by the police in 2015 prompted the federal government to improve its data collection efforts).

⁷⁵ My focus here is on prosecutors’ ability to bring criminal charges against law enforcement officers, although prosecutors can also play a role in reforms if they keep so-called *Brady* lists of officers whose credibility has been damaged. See *supra* note 69 and accompanying text (describing *Brady* lists and their effects).

⁷⁶ Walker, *supra* note 2, at 19 (observing that criminal prosecutions of police officers is a “reform strategy . . . based on the expectation that successful conviction will both remove bad officers from the police department and deter future misconduct by other officers.”).

win.⁷⁷ The unlikelihood of prosecution and criminal conviction may mute prosecutors' leverage to some degree, although the threat of prosecution—even if remote—might still impact officers' behavior. And when a prosecutor does, in fact, prosecute an officer, that prosecution likely carries a great deal of leverage with that officer and his colleagues.

Resources. Criminal prosecutors appear to feel some resource constraints on a micro level. Reduced state and federal budgets have recently required prosecutors' offices to reduce the number of attorneys, investigators, and paralegals they have on staff.⁷⁸ But available evidence suggests that prosecutors' offices have more resources than their most frequent adversaries; in 2007, "total spending by state prosecutors offices nationwide exceeded that of public defender offices by nearly \$3.5 billion."⁷⁹

Like criminal defendants, criminal prosecutors are well resourced on a macro level. There are more than 2300 state prosecutors' offices across the country and these offices employ approximately 78,000 attorneys, investigators, paralegals, and support staff.⁸⁰

⁷⁷ See, e.g., Shaila Dewan & Timothy Williams, *More Police Officers Facing Charges, But Few See Jail*, N.Y. TIMES (Dec. 29, 2015) <http://www.nytimes.com/2015/12/30/us/more-police-officers-facing-charges-but-few-see-jail.html> [<https://perma.cc/FKP2-SNLB>] (reporting an expert's view that "[e]ven with indictments, juries will remain reluctant to convict police officers absent evidence of malice"); David Packman, *The Problem with Prosecuting Police in Washington State*, CATO INSTITUTE (Feb. 27, 2011, 12:55 AM), <http://www.policemisconduct.net/the-problem-with-prosecuting-police-in-washington-state/> [<http://perma.cc/ZTG4-3LCQ>]. Packman's article describes research from the Cato Institute's National Police Misconduct Statistics and Reporting Project, which found 3238 criminal prosecutions and 1063 convictions over a twenty-one month period. The study found that law enforcement has lower conviction and incarceration rates, and shorter sentences, than civilians charged with similar crimes. *Id.* Law enforcement seem especially unlikely to be criminally charged in cases involving excessive force. Criminal prosecutions for police killings rose in 2015 but remain extremely rare. See Henry Gass, *Police Facing Prosecution More Often, but It's Still Rare*, CHRISTIAN SCI. MONITOR (Oct. 28, 2015), <http://www.csmonitor.com/USA/Justice/2015/1028/Police-facing-prosecution-more-often-but-it-s-still-rare> [<http://perma.cc/D7FC-Y5AP>]. For a description of legal standards that make it challenging to win a conviction of a police officer, see Monu Bedi, *Towards a Uniform Code of Police Justice*, 2016 U. CHI. LEGAL F. 13, 24–28 ("[S]tates continue to treat officers differently, although end up doing so in a partial and inconsistent way. . . . These unique features may help explain why oppression charged are rarely brought against police officers.").

⁷⁸ See Michelle Tuccitto Sullo, *State Prosecutors Says Budget Cuts Could Mean 50 Layoffs*, CONN. LAW TRIB. (Feb. 12, 2016), <http://www.ctlawtribune.com/id=1202749666727/State-Prosecutors-Says-Budget-Cuts-Could-Mean-50-Layoffs?mcode=0&curindex=0> [<https://perma.cc/Z9EC-4JBR>].

⁷⁹ Levintova, *supra* note 18.

⁸⁰ Steven W. Perry & Duren Banks, *Prosecutors in State Courts, 2007-Statistical Tables*, BUREAU OF JUSTICE STATISTICS (Dec. 2011), <http://www.bjs.gov/content/pub/pdf/psc07st.pdf> [<https://perma.cc/98M7-773Q>]; Sam Wright, *This Time It's Prosecutors on the Chopping Block*, ABOVE THE LAW (June 2, 2015, 3:00 PM), <http://abovethelaw.com/2015/06/this-time-its-prosecutors-on-the-chopping-block/> [<https://perma.cc/N4VJ-34SS>].

Motivation. Prosecutors' greatest limitation as reformers likely lies with their motivations. As many have observed, local prosecutors reliant on police officers to help investigate and prosecute their other cases may be wary of bringing criminal charges against officers.⁸¹ As an appellate public defender explains:

Prosecutors and police officers who work in the same jurisdiction are part of the same team . . . and their allegiances reflect that. Prosecutors rely on local police officers to make arrests, investigate cases, interrogate suspects and testify at trial. Police officers, in turn, rely on prosecutors to convert their arrests into convictions and assist with investigations. It's bizarre to expect a full-throttle prosecution of one teammate by the other.⁸²

Commentators have argued that this wariness reveals itself at multiple stages of the criminal process: the decision to charge; the type of evidence and argument presented before the grand jury; and the presentation at trial.⁸³

⁸¹ See Michele L. Jawando & Chelsea Parsons, *4 Ideas That Could Begin to Reform the Criminal Justice System and Improve Police-Community Relations*, CTR. FOR AM. PROGRESS (Dec. 18, 2014) <https://www.americanprogress.org/issues/civil-liberties/report/2014/12/18/103578/4-ideas-that-could-begin-to-reform-the-criminal-justice-system-and-improve-police-community-relations/> [http://perma.cc/8MDF-9QJN] ("The perception, real or perceived, is that local prosecutors have far too great of an interest to protect and justify the actions of local law enforcement."); Blacks in Law Enforcement in America, *Why It's Almost Impossible to Reform America's Police* (Aug. 29, 2015), <http://www.bleausa.org/why-its-almost-impossible-to-reform-americas-police/> [http://perma.cc/GD7K-ZU69] ("[P]rosecutors are not incentivized to doubt every story of the cops they work with daily. In addition to working together on criminal cases, many state and local prosecutors are elected officials who rely on political support from police. And prosecutors often run on their conviction stats, further disincentivizing them from questioning the people who supply the cases that keep them in office.").

⁸² Joshua Deahl, *Police Killings Call for New Kind of Prosecutor*, BLOOMBERG VIEW (Dec. 4, 2014, 4:55 PM EST), <http://www.bloombergview.com/articles/2014-12-04/police-killings-call-for-new-kind-of-prosecutor> [http://perma.cc/XY2G-YBYJ].

⁸³ For criticisms of the Chicago prosecutor's decision to wait over a year before bringing charges against the Chicago Police Department officer who shot Laquan McDonald, see Leon Neyfakh, *Why Did It Take More than a Year to Charge the Officer Who Shot Laquan McDonald*, SLATE (Nov. 25, 2015, 4:41 PM) http://www.slate.com/articles/news_and_politics/crime/2015/11/laquan_mcdonald_kim_foxx_on_why_anita_alvarez_mishandled_the_jason_van_dyke.html [http://perma.cc/68BB-UPKB]. For criticisms of the prosecutor's grand jury strategy regarding Darren Wilson, who killed Michael Brown in Ferguson, Missouri, see David Zucchino, *Prosecutor's Grand Jury Strategy in Ferguson Case Adds to Controversy*, L.A. TIMES (Nov. 25, 2014, 8:49 PM), <http://www.latimes.com/nation/la-na-ferguson-da-analysis-20141126-story.html> [http://perma.cc/H5RF-JC5R]. For criticisms of the prosecutor's presentation to the grand jury considering charges against officers involved in the death of Tamir Rice, see Ari Melber, *The Tamir Rice Case Shows How Prosecutors Twist Grand Juries to Protect Police*, WASH. POST (Dec. 29, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/12/29/in-tamir-rices-case-the-grand-jury-process-was-turned-upside-down/> [http://perma.cc/BHF4-VLCA]; Jamil Smith, *The Tamir Rice Rule*, NEW REPUBLIC (Dec. 29, 2015), <https://newrepublic.com/article/126737/tamir-rice-rule> [http://perma.cc/D7ZD-XGDT]. For criticisms of the Los Angeles County district attorney's office,

2. Elected officials.

Elected officials at the federal, state, and local levels—including mayors, legislatures, governors, city councils, and the President—can pass laws that regulate police behavior. The federal government has recently changed rules regarding the distribution of military equipment to law enforcement agencies and has taken steps to improve federal collection of force data.⁸⁴ State and local governments have passed laws mandating the use of police body cameras, requiring data collection about force, establishing independent review of officer-involved deaths, banning chokeholds, and creating databases with information about officers who have been fired.⁸⁵ Legislators can also hold hearings about police practices.⁸⁶

Leverage. Elected officials can pass legislation or enact orders requiring law enforcement agencies to implement reforms. This power presumably creates significant leverage over law enforcement to change their behavior to conform to those laws and orders. However, this leverage is not absolute—some law enforcement agencies refuse to enforce legislation and others may quietly fail to comply.⁸⁷ Government

which has declined to bring charges against Sheriff's Department deputies later prosecuted by the United States Attorney, see Joel Rubin, *Feds Exposed Jail Abuse that D.A.'s Office Failed to Find*, L.A. TIMES, Dec. 26, 2015, at A1.

⁸⁴ See, e.g., Gregory Korte, *Obama Bans Some Military Equipment Sales to Police*, USA TODAY (May 18, 2015, 5:04 PM EDT), <http://www.usatoday.com/story/news/politics/2015/05/18/obama-police-military-equipment-sales-new-jersey/27521793/> [<http://perma.cc/LQY7-GE56>]; *infra* Part IV.B.1 (describing federal initiatives to improve federal data collection about police killings).

⁸⁵ For discussions of particular laws, see, for example, Kim Geiger & Jeremy Gorner, *Rauner Signs Police Body Camera Bill into Law*, CHI. TRIB. (Aug. 12, 2015, 6:06 PM), <http://www.chicagotribune.com/news/local/politics/ct-bruce-rauner-police-body-camera-bill-met-0713-20150812-story.html> [<http://perma.cc/V9YJ-HZVX>] (describing Illinois state law requiring departments with body cameras follow specific policies expanding training, banning chokeholds, requiring independent investigation of officer-involved deaths, and creating a database of fired officers); Patrick McGreevy, *Brown Signs Legislation to Protect Minorities from Racial Profiling and Excessive Force*, L.A. TIMES (Oct. 4, 2015, 3:00 AM), <http://www.latimes.com/local/politics/la-me-pol-sac-brown-racial-profiling-20151004-story.html> [<http://perma.cc/6W3W-N2W6>] (describing California law requiring data collection about police stops and reports of police interactions that cause serious injury or death). For a discussion of legislative activity around body cameras more generally, see Kimberly Kindy et al., *Of 138 Bills, Only Eight Provide a Pathway to Police Body Cameras*, WASH. POST (Oct. 8, 2015), <https://www.washingtonpost.com/graphics/national/body-cam-legislation/> [<http://perma.cc/H3VS-NG4J>].

⁸⁶ For a discussion of the values of legislative investigation, see Mary M. Cheh, *Legislative Oversight of Police: Lessons Learned from an Investigation of Police Handling of Demonstrations in Washington, D.C.*, 32 J. LEGIS. 1 (2005).

⁸⁷ See, e.g., Erica Goode, *Sheriffs Refuse to Enforce Laws on Gun Control*, N.Y. TIMES (Dec. 15, 2013) <http://www.nytimes.com/2013/12/16/us/sheriffs-refuse-to-enforce-laws-on-gun-control.html> [<https://perma.cc/2JPB-V9MJ>] (describing sheriffs' refusal to follow Colorado gun control laws); Hillary Niles, *Despite Mandate, Traffic-Stop Race Data Remain Elusive in Vermont*, SEVEN DAYS VT. (Jan. 13, 2016), <http://www.sevendaysvt.com/vermont/despite-mandate-traffic-stop-race-data-remain-elusive-in-vermont/Content?oid=3111020> [<https://perma.cc/5FED-UTFA>] (reporting that

officials' leverage is limited also by the scope of their authority; Congress cannot, for example, require local law enforcement agencies to pass body camera laws.⁸⁸ Congress can, however, provide grants to encourage such laws be passed, and can condition federal money on data collection or passage of policies.⁸⁹

Resources. Resources to enact laws and other regulations should not be much of a problem for elected officials on a micro or macro level. Governments have sufficient resources to pass laws regulating police behavior, and there are elected officials around the country at federal, state, and local levels situated to enact reforms that would impact practices in every law enforcement agency around the country. The most significant resource issue for elected officials concerns the cost of implementing the reforms they enact. Because these costs do not impact elected officials' power to pass laws regulating police behavior, but may instead dampen elected officials' appetites to pass such laws, I view this as more relevant to officials' motivations than to their resources.

Motivation. Motivation is the most significant constraint for elected officials. Officials are responsive to multiple constituencies, including community groups pushing for reforms and law enforcement organizations and unions opposing them. Even when elected officials support reforms in theory, their motivation can be dampened by the cost of implementation. Trainings, body cameras, data collection, and internal affairs investigations all cost money, and if elected officials pass laws requiring such changes they must also consider how to pay for them. Of course, elected officials will also have to figure out how to pay for these types of reforms if they are mandated by outside entities—the DOJ or a public entity liability insurer, for example. But when outsiders mandate these types of reforms, elected officials have little choice but to comply. In contrast, elected officials deciding whether to adopt reforms voluntarily will weigh the costs of reforms in their calculations.⁹⁰ Government officials' motivation to enact police

Vermont requires police officers to record the race of people stopped, but the data collected is "largely inaccessible" and "no one even knows if all of law enforcement is complying with the mandate to collect the data in the first place.").

⁸⁸ Gabrielle Levy, *Congress Left Behind in Rush for Police Reform*, U.S. NEWS (May 5, 2015, 4:23 PM), <http://www.usnews.com/news/articles/2015/05/05/congress-left-behind-in-rush-for-police-reform> [<http://perma.cc/HU6K-KEA2>] (describing the limits of Congressional power to pass police reforms).

⁸⁹ *Id.* (reporting that Congress could but has not yet conditioned grants to the police "based on state and local compliance with training and prosecutorial recommendations or . . . thorough data collection on police-caused deaths.").

⁹⁰ See, e.g., Steven Deere, *Ferguson Consent Decree May Be Derailed Because of Cost*, ST. LOUIS POST-DISPATCH (Feb. 7, 2016), <http://www.stltoday.com/news/local/ferguson-consent->

reform measures depends, then, on the salience of conflicting pressures regarding the need for and consequences of those reforms.⁹¹

D. Reformers Whose Qualities Depend on the Government Officials Who Created Them

Finally, I consider two types of reformers—blue ribbon commissions and civilian oversight bodies—whose motivations, resources, and leverage depend to a significant extent on the manner in which these entities are created and staffed. Despite this variability, both types of reformers consistently have insufficient leverage to demand adoption of the reforms they recommend.

1. Blue ribbon commissions.

For over a century, elected officials have responded to concerns about police misconduct by creating commissions to investigate and report on the extent and underlying causes of that misconduct.⁹² These commissions are sometimes referred to as “blue ribbon commissions” given the credentials of those usually appointed to serve on them. Often, commissions are formed to investigate policing practices in individual departments.⁹³ Sometimes, commissions are formed to examine policing issues nationwide.⁹⁴ Commissions’ reports generally describe the policing practices they have observed and offer recommendations to address the problems that they find.

decree-may-be-derailed-because-of-cost /article_5ca413ad-91d1-5874-ab74-e595bd0205ce.html [https://perma.cc/6MBK-X6MX] (describing city council opposition to reforms proposed by the DOJ because of their costs); Jake Grovum, *States Struggle to Pay for Police Body Cameras*, PEW CHARITABLE TRUSTS (May 1, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/5/01/states-struggle-to-pay-for-police-body-cameras> [http://perma.cc/DLE2-TBJX] (describing difficulties funding police body cameras).

⁹¹ The relative salience of conflicting pressures can shift quickly. In Chicago, for example, the City Council voted unanimously to approve its agreement with the police union in 2014. After video was released of the shooting of Laquan McDonald, in November 2015, the City Council’s Black Caucus “vowed to work with other caucuses and other of [their] colleagues to review the FOP contract to make sure there are tougher policies and sanctions against police officers who do egregious or illegal acts.” Steven Cohen, *The Next Fight for Racial Justice: Police Union Reform*, NEW REPUBLIC (Dec. 2, 2015), <https://newrepublic.com/article/124811/next-fight-racial-justice-police-union-reform> [https://perma.cc/PAN6-7366].

⁹² See Hon. Harold Baer, Jr. & Joseph P. Armao, *The Mollen Commission Report: An Overview*, 40 N.Y.L. SCH. L. REV. 73, 73 (1995) (describing twenty-year cycles of “corruption, scandal, reform, backslide, and fresh scandal” in New York City dating back to the Lexow Committee Report of 1894).

⁹³ See, e.g., *id.* (describing a series of commissions investigating the New York City Police Department).

⁹⁴ See, e.g., FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, *supra* note 3.

Motivation. The strength of the motivations of blue ribbon commissions depends to a significant extent on the motivations of the individuals appointed to serve on those commissions—which depends, in turn, on the motivations of the government officials who appoint the commissioners. Some blue ribbon commissions have been criticized for the motivations of their leaders. For example, the blue ribbon commission appointed by California Governor Pat Brown to investigate the causes of the Watts rebellion wrote a report that has been characterized as “a compromise at best, a whitewash at worst.”⁹⁵ The limitations of the report have been attributed in part to the chairman of the blue ribbon commission, John McCone, described as a “conservative Los Angeles figure” appointed by Governor Brown “to mollify conservatives.”⁹⁶

In contrast, the blue ribbon commission appointed by Los Angeles Mayor Tom Bradley to investigate the Los Angeles Police Department following the beating of Rodney King wrote a report described as a “harsh indictment of the Los Angeles Police Department”⁹⁷ and was praised for its “unanimous call for its sweeping reform.”⁹⁸ Those who consider that commission successful attribute its success in no small part to the temperament, drive, and talents of the chairman of the commission, Warren Christopher.⁹⁹ To be sure, not everyone agrees that the Christopher Commission was a success; it too has been called a “white wash.”¹⁰⁰ But the broader point remains—a commission’s motivation to unearth underlying causes of dysfunctional policing and recommend reforms depends on the motivations of its leader and members. Much, therefore, rests on the preferences of the government officials who appoint the members of the commission.

Resources. Government officials who decide whether to convene a blue ribbon commission also determine what resources the commission

⁹⁵ Bill Boyarsky, *Echoes of the McCone Commission*, L.A. TIMES (May 3, 1991), http://articles.latimes.com/1991-05-03/local/me-1112_1_christopher-commission [https://perma.cc/3UTN-L7BD]; see also *Report on Watts Rioting Assailed by California Group*, SPARTANBURG HERALD-JOURNAL, Jan. 23, 1966, at A6 (describing critical findings about the McCone Commission Report by the California Advisory Committee to the United States Commission on Civil Rights).

⁹⁶ See Boyarsky, *supra* note 95.

⁹⁷ Robert Reinhold, *Violence and Racism Are Routine in Los Angeles Police, Study Says*, N.Y. TIMES (July 10, 1991), <https://www.nytimes.com/books/98/02/08/home/rodney-report.html> [https://perma.cc/SA9T-LAWA].

⁹⁸ Frank Stoltze, *Warren Christopher’s Legacy in Los Angeles*, CAL. REP. (Mar. 25–27, 2011), <http://audio.californiareport.org/archive/R201103251630/c> [https://perma.cc/5JDD-BBGJ].

⁹⁹ *Id.*

¹⁰⁰ Michael Novick, *From the Archives: LA’s Christopher Commission: Elite Blueprint for ‘Enlightened’ Repression*, DE-COLONIZE L.A. (May 24, 2015, 2:32 PST), <http://ara-la.tumblr.com/post/119751320415/from-the-archives-las-christopher-commission> [https://perma.cc/MXG4-EHNP].

will have to do its work. At a micro level, commissions are typically required to work quickly and diligently, but are also typically given a large staff to help accomplish their goals. The McCone Commission had 100 days to do its work and during that time the members of the commission interviewed 530 witnesses and held sixty-four meetings; the seventy-member staff reported working twelve- to fourteen-hour days.¹⁰¹ The Christopher Commission also had 100 days to produce a report and, during that time, its staff of more than sixty lawyers spoke with more than fifty expert witnesses and more than 150 community representatives, interviewed more than 500 current and former Los Angeles Police officers, and studied voluminous data including four years of use of force reports and civilian complaints.¹⁰² Although blue ribbon commissions generally have sufficient resources to do their work, there are relatively few blue ribbon commissions convened to evaluate law enforcement agency practices, making them under-resourced at a macro level.

Leverage. Blue ribbon commissions likely suffer most for their lack of leverage over law enforcement agencies. Unlike the DOJ, which has the power of judicial oversight to force agencies to undertake policy and organizational changes, blue ribbon commissions have no power to demand that law enforcement agencies undertake recommended changes.¹⁰³ There may be political pressure for a law enforcement agency to adopt changes recommended by a commission, but the commission itself does not have power to order that changes occur. Moreover, commissions are temporary; once a commission is disbanded and government and press attention is drawn to other issues, the commission's recommendations may fall by the wayside.¹⁰⁴ For these reasons they are, as Laurie Levenson has written, "more likely to serve as a historical chronicle of police abuse, rather than a cure."¹⁰⁵

¹⁰¹ Daniel Dawsey, *25 Years After the Watts Riots: McCone Commission's Recommendations Have Gone Unheeded*, L.A. TIMES (July 8, 1990), http://articles.latimes.com/1990-07-08/local/me-455_1_watts-riots [https://perma.cc/978U-TCCN].

¹⁰² INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT ii–iii (1991).

¹⁰³ See Walker, *supra* note 25, at 21 (concluding that blue ribbon commissions "suffer from one inherent weakness: they lack the capacity to implement their own recommendations. By their very nature, commissions are temporary bodies that disband once the final report is released. Reports typically lie on the shelf with their recommendations unimplemented. . . . Before long, the political momentum for reform wanes, as the original crises fades into memory and public attention, particularly the attention of the news media moves on to new crises.").

¹⁰⁴ See SAMUEL WALKER & CAROL A. ARCHBOLD, THE NEW WORLD OF POLICE ACCOUNTABILITY 52 (2d ed. 2014) (describing limitations of blue ribbon commissions).

¹⁰⁵ Laurie L. Levenson, *Police Corruption and New Models for Reform*, 35 SUFFOLK U. L. REV. 1, 13 (2001).

2. Civilian overseers.

Over the past few decades, civilian oversight has emerged as a means of advancing police reforms. There are hundreds of civilian oversight agencies across the United States that review civilian complaints and/or audit law enforcement practices more generally.¹⁰⁶ Civilian overseers take a wide variety of forms, with differences in the size of their staff and budgets, as well as their qualifications, responsibilities, authority, access to information, and reporting structure.¹⁰⁷ The two main categories of civilian overseers are civilian review boards and civilian auditors. Civilian review boards are generally charged with investigating civilian complaints. In the alternative or in addition, jurisdictions may appoint civilian auditors to review not only allegations of individual officer wrongdoing, but also police practices more generally.¹⁰⁸

Motivation. Some civilian overseers are criticized for being overly sympathetic to law enforcement, and others are criticized for being overly hostile. This variation may be attributable in part to differences in the nature of overseers' responsibilities. Some overseers are expected to work with multiple entities; the law enforcement agency they are charged with supervising, the mayor or city council, and the public.¹⁰⁹ Overseer bodies may be structured in this way as a means of bridging

¹⁰⁶ See Martin Kaste, *Police Are Learning to Accept Civilian Oversight, but Distrust Lingers*, NATIONAL PUBLIC RADIO (Feb. 24, 2015, 1:33 AM ET), <http://www.npr.org/2015/02/21/387770044/police-are-learning-to-accept-civilian-oversight-but-distrust-lingers> [<https://perma.cc/8AND-H95Q>].

¹⁰⁷ See Erika Aguilar, *SoCal Cities Debate the Pros and Cons of Police Oversight Models*, 89.3 KPCC (July 30, 2015), <http://www.scpr.org/news/2015/07/30/53450/socal-cities-debate-the-pros-and-cons-of-police-ov/> [<http://perma.cc/724K-BLNN>] (reporting "more than 200 models of police oversight to choose from").

¹⁰⁸ See WALKER & ARCHBOLD, *supra* note 104, at 55. Civilian auditors are also sometimes referred to as a monitor or inspector general. See Samuel Walker, *Governing the American Police: Wrestling with the Problems of Democracy*, 2016 U. CHI. LEGAL. F. 615, 641 ("In 1993 a new form of citizen oversight appeared as an alternative to the traditional citizen review board . . . combining the functions of traditional review boards with those of auditor/inspectors general[.]").

¹⁰⁹ See Merrick Bobb, *Civilian Oversight in the United States*, 15, http://capg.ca/wp-content/uploads/2013/05/Civilian-Oversight-of-the-Police-in-the-United-States-M.Bobb_.pdf [<http://perma.cc/YP93-YPKP>] ("Monitors are accountable to different constituencies. First, each is accountable to the law enforcement agency to provide assistance or reports calculated to focus police management on internal decision-making, policy formulation, and efforts to responsibly anticipate and manage liability risk. More importantly, a monitor is accountable to the public at large to provide a thorough and fair appraisal of law enforcement, and to make the heretofore mystery-shrouded, internal processes of the police more transparent and comprehensible."); Chris Stone, *Get the Politics Out of Policing*, OPEN SOCIETY FOUNDATIONS (Dec. 4, 2015), <https://medium.com/open-society-foundations/get-the-politics-out-of-policing-fa41df0206c9#hzy1jggel> [<http://perma.cc/U29V-8DA8>] (criticizing the civilian auditor in Chicago and advocating for an independent body to investigate officer involved shootings and share information with prosecutors and the public).

the gap between these constituencies. But this feature can also be a bug: Chicago's auditor has been criticized for becoming co-opted by law enforcement.¹¹⁰ Other civilian overseers have a narrower role—to evaluate allegations of police misconduct—and are not expected to collaborate with the law enforcement agency they oversee, reducing the likelihood of mixed motivations. Yet, even with this more straightforward arrangement, overseers have been criticized for their lack of motivation.¹¹¹ Elected officials are often responsible for appointing auditors and board members, and those officials' need to respond to multiple constituencies may lead them to appoint people with tepid or mixed motivations.¹¹²

Resources. As with blue ribbon commissions, government officials decide whether to create civilian review boards and auditors, and how many dollars and staff members their overseer should have. The amount of resources civilian overseers need depends in part on their roles and responsibilities. Overseers with subpoena power and the authority to conduct their own investigations will need more resources than overseers who have authority only to review investigations that have been conducted by the police department's internal affairs division.¹¹³ Some auditors appear to have sufficient resources to do meaningful work.¹¹⁴ Other civilian overseers have been criticized for not having the resources—measured in dollars and staff—to effectively exercise the oversight authority they possess.¹¹⁵

¹¹⁰ See Monica Davey & Timothy Williams, *Chicago Pays Millions but Punishes Few in Killings by Police*, N.Y. TIMES (Dec. 17, 2015), <http://www.nytimes.com/2015/12/18/us/chicago-pays-millions-but-punishes-few-in-police-killings.html> [<https://perma.cc/65SX-Z68N>].

¹¹¹ See, e.g., Andrew J. Tobias, *U.S. Department of Justice Criticizes Cleveland Police Department's Civilian Review Board as Opaque, Ineffective*, CLEVELAND PLAIN DEALER (Dec. 4, 2014), http://www.cleveland.com/forcing-change/index.ssf/2014/12/us_department_of_justice_criti.html [<https://perma.cc/3KK2-V7KF>] (reporting that Cleveland's Civilian Review Board has "wide-ranging power . . . including the ability to issue subpoenas and compel witnesses" but was criticized by the DOJ for its inadequate reviews and lack of transparency).

¹¹² For further discussion of this possibility, see Walker, *supra* note 108.

¹¹³ See THE CATO INSTITUTE'S NATIONAL POLICE MISCONDUCT REPORTING PROJECT, CIVILIAN BOARDS, <http://www.policemisconduct.net/explainers/civilian-review-boards/> [<https://perma.cc/B45A-KKK3>].

¹¹⁴ See *infra* note 174 and accompanying text (describing recommendations made by civilian overseers and adopted by local governments).

¹¹⁵ *Id.*; see also Todd Lighty et al., *Chicago's Flawed System for Investigating Police Shootings*, CHI. TRIB. (Dec. 5, 2015, 1:35 AM), <http://www.chicagotribune.com/news/watchdog/ct-chicago-police-accountability-20151204-story.html> [<http://perma.cc/N432-SUCS>] ("Studies, including a December 2014 review by former federal prosecutor Ronald Safer, have found that [the Chicago monitor's] caseloads are too large, while critics and even some supporters say its investigators are overmatched in cases that can be complex."); Gary L. Wright & Fred Clasen-Kelly, *CMPD Review Panel Rules Against Citizens—Every Time*, CHARLOTTE OBSERVER (Feb. 16, 2013, 8:56 PM), <http://www.charlotteobserver.com/news/local/crime/article9086771.html> [<http://perma.cc/7PAQ-DACT>] (quoting the executive director of the American Civil Liberties Union of Colorado as saying that, in

Civilian overseers' macro-level resources fall somewhere in the middle of the range of current reformers. There have been far more civilian oversight bodies created than there have been DOJ investigations.¹¹⁶ On the other hand, there are fewer resources for civilian oversight at a macro level than there are for criminal prosecutors and defendants.¹¹⁷

Leverage. Civilian overseers, like blue ribbon commissions, have limited leverage over law enforcement agencies. Although civilian boards can investigate allegations of misconduct, none can impose their own discipline; the most they can do is recommend to the chief of police that an officer be disciplined.¹¹⁸ Similarly, civilian auditors do not have direct leverage over law enforcement. Civilian auditors are not in the law enforcement agency's chain of command and instead report on their findings to the city council or mayor.¹¹⁹ Like blue ribbon commissions, civilian auditors can draw the attention of government officials to problems and recommend reforms, but they cannot compel law enforcement agencies to adopt their recommendations.¹²⁰

E. Conclusion

This Part has described the leverage, motivation, and resources possessed by nine police reformers. One could quibble with the ways in which I have characterized reformers' strengths and weaknesses with regard to each of these qualities. My descriptions additionally generalize about the strengths and limitations of various reformers: Not all prosecutors, for example, have motivations constrained by allegiances to law enforcement.¹²¹ My descriptions in this Part are not

many cities, civilian review boards are "underfunded and understaffed").

¹¹⁶ The National Association for Civilian Oversight of Law Enforcement (NACOLE) lists 135 oversight organizations on its website. See Nat'l Assoc. for Civilian Oversight of Law Enforcement, *Police Oversight by Jurisdiction*, http://www.nacole.org/police_oversight_by_jurisdiction_usa [<https://perma.cc/RW3U-ZFTS>] (last visited July 23, 2016). In contrast, the DOJ has investigated approximately sixty-seven law enforcement agencies. See Kelly et al., *supra* note 23.

¹¹⁷ See *supra* notes 63 (describing criminal defendants' macro-level resources) & 80 (describing prosecutors' macro-level resources).

¹¹⁸ See Walker, *supra* note 108, at 635 ("From the perspective of the Schwartz Framework, review boards have no Leverage whatsoever. They can make recommendations regarding the disposition of citizen complaints, but have no power to compel a disposition or disciplinary action." And "Auditors/inspector generals do not have the power to compel implementation of their recommendations.").

¹¹⁹ For a description of police auditor model and reporting structure, see Walker, *supra* note 25, at 24–25.

¹²⁰ WALKER & ARCHBOLD, *supra* note 104, at 195.

¹²¹ For example, "[n]o one could accuse Baltimore state's attorney Marilyn Mosby of dragging her feet on the decision to file charges over the death of Freddie Gray, who suffered a fatal spinal injury in police custody on April 12 [2015]." Editorial, *A Prosecutor's Rush to Judgment in*

meant to be definitive assessments of the strengths and weaknesses of each of these reformers. Instead, they are intended to situate familiar observations about reformers' strengths and weaknesses within a consistent framework—as observations about leverage, motivation, and resources.

Viewing reformers' characteristics in terms of leverage, motivation, and resources helps to illuminate their comparative strengths and weaknesses. Some reformers have lots of leverage but limited resources—the DOJ and public entity liability insurers fall into this category. Other reformers have strong motivations but limited leverage—civil plaintiffs, criminal defendants, and non-governmental actors should be included in this group. Some reformers have lots of leverage but mixed motivations, including prosecutors and elected officials. And some reformers' leverage, motivation, and resources are dependent on the elected officials responsible for creating them—blue ribbon commissions and civilian overseers.

Baltimore, CHI. TRIB. (May 1, 2015, 7:31 PM), <http://www.chicagotribune.com/news/opinion/editorials/ct-baltimore-police-mosby-homicide-charges-freddie-gray-riot-edit-0503-jm-20150501-story.html> [<http://perma.cc/22UL-CLRV>]. Instead, officers charged in the case sought to get Mosby removed on the ground that she brought the charges for personal and political gain. See Oliver Laughland & Jon Swaine, *Baltimore: Freddie Gray Police Threaten to Sue State's Attorney Marilyn Mosby*, GUARDIAN (May 8, 2015), <http://www.theguardian.com/us-news/2015/may/08/baltimore-freddie-gray-police-threaten-to-sue-marilyn-mosby> [<http://perma.cc/C7SA-W3QR>]. The motion was denied. See Sheryl Gay Stolberg, *Baltimore Judge Lets Officers' Charges Stand and Refuses to Remove Prosecutor*, N.Y. TIMES (Sept. 2, 2015), <http://www.nytimes.com/2015/09/03/us/hearing-baltimore-freddie-gray.html> [<https://perma.cc/MNT4-FAP4>].

REFORMERS' RELATIVE LEVERAGE, MOTIVATION, AND RESOURCES

	Leverage	Motivation	Resources (Micro)	Resources (Macro)
Department of Justice	Dark	Diagonal	Dark	Light
Liability Insurers	Dark	Medium	Dark	Light
Civil Plaintiffs	Light	Dark	Medium	Medium
Criminal Defendants	Light	Dark	Light	Dark
Non-Governmental Actors	Light	Dark	Medium	Medium
Criminal Prosecutors	Dark	Light	Medium	Dark
Elected Officials	Dark	Diagonal	Dark	Dark
Blue Ribbon Commissions	Light	Diagonal	Dark	Light
Civil Overseers	Light	Diagonal	Diagonal	Medium

This Table attempts to illustrate reformers' relative leverage, motivation, and resources. The darkest colored cells represent areas of the most strength and the lightest cells represent areas of greatest weakness. Cells with diagonal lines represent areas especially likely to fluctuate depending on shifts in political will.

IV. INNOVATIONS

Having described the strengths and limitations of various police reformers' leverage, motivation, and resources, I now offer two suggestions—inspired by this framework and its application—to improve reformers' efficacy. First, reformers' leverage, motivation, and resources should be adjusted to address their weaknesses. Second, police reformers with complementary strengths and weaknesses should collaborate.

A. Adjust Reformers' Leverage, Motivation, and Resources

I have argued that most police reformers are lacking in one or more of three important qualities—leverage, motivation, or resources. One possible response is to adjust the characteristics or powers of each of these entities to strengthen them in the areas in which they are lacking.¹²² As illustrations of this approach, the following are suggestions to increase the leverage of civil plaintiffs, the motivations of prosecutors, and the resources of the DOJ. Similar adjustments could be made to other reformers to shore up their leverage, motivation, and resources.

1. Increasing the leverage of civil plaintiffs.

Civil plaintiffs and their attorneys have insufficient leverage over law enforcement officers and agencies—officers and agencies are rarely sued, stringent legal standards make it difficult for plaintiffs to prevail, and even when plaintiffs do prevail, money awarded in civil damages actions is rarely taken from the pockets of officers or the budgets of law enforcement agencies.¹²³ There are multiple ways of increasing civil plaintiffs' leverage, although some adjustments are less realistic than others. For example, plaintiffs and their attorneys would presumably have more leverage over law enforcement if qualified immunity were eliminated but—given recent Supreme Court decisions—those advocating for this adjustment should not hold their breath.¹²⁴ A more realistic avenue to increase civil plaintiffs' leverage may be to require individual officers and law enforcement agencies to bear more financial costs of liability.¹²⁵

¹²² I have focused here on ways to strengthen reformers in areas of relative weakness. It might also be that enhancing a reformer in an area of relative strength will increase its effectiveness. For example, I have suggested that prosecutors' greatest weakness is their motivation, but have noted that stringent legal standards for criminal liability limit prosecutors' leverage to some extent. One option to increase prosecutors' effectiveness is to increase their motivation, as I discuss *infra* notes 133–135 and accompanying text. An alternative way to increase prosecutors' effectiveness might be to further strengthen their leverage. Presumably, if legal standards for criminal liability were reduced, prosecutors' mixed motivations would matter less. For suggestions about how to adjust criminal standards, see Bedi, *supra* note 77.

¹²³ As described *supra* notes 35, 41–42 and accompanying text, insurers can impose financial pressures on law enforcement agencies and jurisdictions resulting from lawsuits, but do not insure the largest law enforcement agencies that are the presumptive targets of the vast majority of police litigation. See Schwartz, *supra* note 35, at 1210.

¹²⁴ See, e.g., *Mullenix v. Luna*, 136 S.Ct. 305, 310–11 (2015) (holding that an officer who shot and killed someone in their car, despite a less-lethal available alternative and against the explicit instruction of a supervisor, did not violate clearly established law and so was entitled to qualified immunity).

¹²⁵ For more detailed articulations of this suggestion see Schwartz, *supra* note 46, at 954;

Local governments are currently experimenting with approaches to make their law enforcement officers and agencies feel the financial effects of payouts. In prior research, I found that law enforcement officers employed by eighty-one law enforcement agencies across the country are virtually always indemnified, meaning that they almost never contribute financially to settlements and judgments in cases brought against them.¹²⁶ Yet I did find two jurisdictions—New York City and Cleveland—that occasionally require officers to contribute to settlements.¹²⁷ In New York City, it appears that the City’s Comptroller negotiates for these contributions as a form of punishment when the Internal Affairs Bureau or the Civilian Complaint Review Board has substantiated an allegation of misconduct.¹²⁸

In another study, I found that the majority of large, self-insured jurisdictions pay settlements and judgments with no financial consequences for the involved law enforcement agencies. But I did find ten jurisdictions that require their law enforcement agencies to pay settlements and judgments from their budgets and must take money from other budgetary needs when their litigation costs are higher than expected, and also allow their law enforcement agencies to use the surplus when they spend less than expected on lawsuits.¹²⁹ I additionally found six jurisdictions that require their law enforcement agencies to contribute to a jurisdiction-wide central risk management fund; these agencies adjust their payments based on their liability risk, and experience tangible financial consequences of these increases and decreases.¹³⁰ Although making law enforcement agencies bear the costs of settlements and judgments does not eliminate misconduct in these agencies, this budgetary arrangement does appear to serve as additional encouragement to law enforcement policymakers and supervisors to examine and respond to liability risks.¹³¹ Presumably, requiring officers to contribute to settlements and judgments when they have engaged in misconduct will also increase civil plaintiffs’ leverage. Jurisdictions should continue to experiment with both approaches, and examine the impact of these budgetary arrangements on the behaviors of agencies and officers.

Schwartz, *supra* note 35, at 1207–08.

¹²⁶ See Schwartz, *supra* note 46, at 912.

¹²⁷ See *id.* at 954 (describing practices in New York City and Cleveland).

¹²⁸ See *id.* at 928.

¹²⁹ See Schwartz, *supra* note 35, at 1180.

¹³⁰ See *id.* at 1186.

¹³¹ See *id.* at 1202.

2. Strengthening prosecutors' motivations.

Prosecutors suffer from conflicting motivations; they rely on police officers to assist in criminal prosecutions and may, therefore, be wary of bringing criminal charges against them. Accordingly, many have argued that prosecutors investigating police misconduct should be independent—not reliant on cooperation with that jurisdiction's law enforcement officers for their other prosecutions.¹³² This notion appears to be gaining traction in several jurisdictions. New York State has announced that the State's Attorney General's office will investigate police-involved deaths when the victims were unarmed.¹³³ State and federal legislators have introduced bills that would require independent prosecutors to investigate police-involved killings and decide whether police should be criminally charged.¹³⁴ Other states require independent investigations of police-involved killings with information about the incident then turned over to local prosecutors.¹³⁵ By separating the powers and responsibilities of prosecutors—with one prosecutor's office investigating and prosecuting police officers who have violated the law, and another prosecutor's office collaborating with law enforcement officers on other types of criminal prosecutions—

¹³² Commentators may disagree about how “independent” an independent prosecutor should be—whether prosecutorial power should be delegated to a permanent special prosecutor, to the state attorney general, or to individuals appointed on an ad hoc basis. Editorial Board, *Police Abuse Cases Need Special Prosecutors*, WASH. POST (Dec. 6, 2014), https://www.washingtonpost.com/opinions/police-abuse-cases-need-special-prosecutors/2014/12/06/fcf57e28-7cd6-11e4-b821-503cc7efed9e_story.html [<https://perma.cc/4XUR-3QDT>].

¹³³ See Mark Berman, *New York Will Have a Special Prosecutor Look into Some Deaths at the Hands of Police*, WASH. POST (July 10, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/07/10/new-york-will-have-a-special-prosecutor-look-into-some-deaths-at-the-hands-of-police/> [<http://perma.cc/Z4M6-Y6PA>] (describing an executive order by Governor Cuomo that the State's Attorney General's office will investigate police-involved killings when the victim was unarmed).

¹³⁴ See, e.g., Greg Hinz, *Congressmen Want Independent Prosecutors in Police Shooting Cases*, CRAIN'S (Dec. 11, 2015), <http://www.chicagobusiness.com/article/20151211/BLOGS02/151219965/congressmen-want-independent-prosecutors-in-police-shooting-cases> [<http://perma.cc/F5JL-RGQB>] (describing bill that would cause jurisdictions to lose federal funds if they failed to turn over police-involved killings to independent prosecutors); Dennis Romero, *Law Would Create Independent Prosecutor for Deadly Police Shootings*, L.A. WEEKLY (June 10, 2015), <http://www.laweekly.com/news/law-would-create-independent-prosecutor-for-deadly-cop-shootings-5669987> [<http://perma.cc/B8NX-K7VP>] (describing California State Assembly bill that would create independent prosecutor who would investigate police shootings, quoting Assemblyman Kevin McCarty as saying “District attorneys will no longer have to worry about investigating the police with whom they work so closely. . . . No one should be able to police themselves.”); Holly Yan & Ashley Fantz, *Police Kill Teen: Why Wisconsin's Investigation Will Be Different*, CNN (Mar. 10, 2015, 12:48 PM ET), <http://www.cnn.com/2015/03/10/us/wisconsin-police-shooting-rules/> [<http://perma.cc/83YE-HAUN>] (reporting that twelve states “have proposed measures about appointing special prosecutors for, or providing independent investigation in, officer-involved deaths”).

¹³⁵ See Yan & Fantz, *supra* note 134.

prosecutors can discharge both responsibilities without conflicting motivations.

3. Stretching the Department of Justice's resources.

The DOJ has a great deal of leverage and motivation, but is constrained by limited resources. Although the DOJ could benefit from more attorneys to conduct more investigations, and regularly seeks additional funding from Congress for this purpose, the DOJ's resource problems cannot be solved with more money alone. As Attorney General Lynch has observed, the DOJ "cannot litigate [its] way out of this problem . . . it is not the Department's intention to engage in an investigation or a review of every police department across the country."¹³⁶

The DOJ has stretched their available resources by creating additional programs to work with the law enforcement agencies that are seeking to improve. President Obama created an alternative program in the Community Oriented Policing Services (COPS) office for law enforcement agencies interested in reform.¹³⁷ The COPS office's work may require fewer resources, but it also creates less leverage; it "has no legally-binding authority and relies on the consent of local leaders who may be reluctant to agree to major overhauls that could include their firing."¹³⁸ Similarly, the DOJ has a Community Relations Service, described as the Department's "Peacemaker," that works to resolve tensions between law enforcement agencies and communities.¹³⁹ Like the COPS office, the Community Relations Service has no leverage over agencies; it "is not an investigatory or prosecutorial agency, and it does not have any law enforcement authority."¹⁴⁰

An alternative approach may be for the DOJ to use its investigations and prosecutions to impact practices in more agencies. For example, Rachel Harmon has proposed a three-part strategy to address the DOJ's resource limitations: Sue the worst large law enforcement agencies; create a safe-harbor provision for law

¹³⁶ Carrie Johnson, *Justice Department Hopes Investigation Will Create a "Stronger" Baltimore*, NPR (May 8, 2015, 4:15 ET), <http://www.npr.org/sections/itsallpolitics/2015/05/08/405246568/justice-dept-hopes-police-investigation-will-create-a-stronger-baltimore> [<https://perma.cc/52J2-9SM3>].

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Dan Hinkel, *Feds to Help Waukegan Police Repair Strained Relations with Community*, CHI. TRIB. (Dec. 29, 2015), <http://www.chicagotribune.com/news/watchdog/ct-waukegan-police-federal-intervention-met-20151229-story.html> [<https://perma.cc/8P LZ-ZGS7>].

¹⁴⁰ *What We Do*, DEPT OF JUSTICE CMTY. RELATIONS SERV., <https://www.justice.gov/crs> [<https://perma.cc/ML4S-N9B9>].

enforcement agencies that agree to implement a standard set of reforms and demonstrate their progress toward meeting these reforms; and provide departments with information about common law enforcement problems and strategies to address those problems.¹⁴¹ This proposal does not entirely address the DOJ's resource constraints—as Harmon recognizes, it would be challenging to identify which departments are the worst, and reforms designed for the largest departments might not be appropriate for the vast majority of law enforcement agencies, which are small.¹⁴² But Harmon's proposed approach does address some of the Department's resource constraints. And, as the next Subpart will describe, collaboration with other reformers could fill some of the remaining gaps.¹⁴³

B. Coordinate Reform Efforts

A second approach to strengthen the efficacy of police reformers is for each to coordinate with other reformers that have complementary strengths. The suggestion that reformers work in partnership or in parallel is far from novel. Although I have, thus far, focused on the strengths and limitations of individual police reformers, they rarely operate in isolation. Indeed, each of the reformers I described in Part II has been engaged in some way in police reform efforts following recent high-profile killings by police. For example, following the death of Freddie Gray in Baltimore, the DOJ opened an investigation of the Baltimore Police Department; the local prosecutor filed criminal charges against the involved officers; Gray's survivors negotiated a \$6.4 million wrongful death settlement; the Maryland Attorney General passed guidelines restricting racial profiling; and the mayor sought additional funding for the city's much-criticized civilian review board.¹⁴⁴

¹⁴¹ Harmon, *supra* note 25, at 36–42.

¹⁴² *See id.* at 5–6.

¹⁴³ *See infra* Part IV.B.3.

¹⁴⁴ For a discussion of the DOJ investigation and criminal charges brought against officers involved in Freddie Gray's death, see Matt Apuzzo & Sheryl Gay Stolberg, *Justice Department Will Investigate Baltimore Police Practices*, N.Y. TIMES (May 7, 2015), http://www.nytimes.com/2015/05/08/us/politics/justice-department-will-investigate-baltimore-police-practices-after-freddie-gray-case.html?_r=0 [<https://perma.cc/WGZ4-23YU>]. For a description of the civil settlement, see Keith L. Alexander, *Baltimore Reaches \$6.4 Million Settlement with Freddie Gray's Family*, WASH. POST (Sept. 8, 2015), https://www.washingtonpost.com/local/crime/baltimore-reaches-64-million-settlement-with-freddie-grays-family/2015/09/08/80b2c092-5196-11e5-8c19-0b6825aa4a3a_story.html [<http://perma.cc/2WY7-AKYQ>]. For a description of the Maryland Attorney General's guidelines, see Kevin Rector & Michael Dresser, *Amid National Law Enforcement Debate, Md. Attorney General Condemns Police Profiling*, BALT. SUN (Aug. 25, 2015, 7:27 AM), <http://www.baltimoresun.com/news/maryland/bs-md-police-training-and-policies-20150825-story.html> [<http://perma.cc/CZ57-YNZE>]. For a description of additional funding sought for the civilian review board, see Yvonne Wenger & Luke Broadwater, *Rawlings-Blake Seeks \$2 Million for*

Under such circumstances, it is difficult to isolate and assess the effectiveness of individual reformers. The more apt question in such circumstances may be whether this constellation of reformers together has sufficient leverage, motivation, and resources to successfully advance reforms.

Some police reformers regularly collaborate not only following high-profile tragedies like the death of Freddie Gray, but also in the regular course of their work. For example, the work of blue ribbon commissions, civilian overseers, and elected officials are already closely intertwined. Elected officials convene blue ribbon commissions to evaluate troubled police departments; those blue ribbon commissions' recommendations often include the appointment of a civilian overseer; the civilian overseer, once appointed, recommends police reforms; and elected officials may then adopt those reforms.

This collaboration makes sense—blue ribbon commissions and civilian overseers have similar strengths and weaknesses that complement those possessed by elected officials. Blue ribbon commissions and civilian overseers may have strong motivations to recommend reforms, but lack leverage to demand that reforms be enacted. Elected officials have leverage to demand reforms but motivations that are guided by the interests of their constituents—interests that historically have not placed police reforms at the top of officials' agendas.¹⁴⁵ In some instances, elected officials may be motivated to engage in police reforms and they rely on reports and recommendations by blue ribbon commissions and auditors to determine which reforms are best.¹⁴⁶ In other instances, the reports and recommendations of blue ribbon commissions and civilian overseers may increase public pressure on elected officials—and thus, officials' motivation—to enact those reforms.

Below, I describe four additional collaborations between police reformers with complementary strengths. These collaborations are between: (1) elected officials and the media, (2) public defenders and criminal prosecutors, (3) the DOJ and civil plaintiffs, and (4) civilian overseers and liability insurers. Some of these collaborations are already in place and others are suggestions that reformers could adopt. Some are voluntary collaborations by two reformers, and others are involuntary—one reformer takes advantage of another without their

Lawyers to Respond to U.S. Probe of Police, BALT. SUN (Dec. 7, 2015, 10:03 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-police-review-board-staff-20151207-story.html> [<http://perma.cc/T8QU-W7DR>].

¹⁴⁵ See *supra* notes 90–91 (describing mixed motivations of elected officials).

¹⁴⁶ See *supra* Part II.E for a discussion of police reformers' roles in designing reforms.

cooperation or consent. Each example draws on reformers' complementary strengths in the areas of leverage, motivation, and resources.

1. Elected officials and media.

Elected officials have significant leverage to impose changes on law enforcement, but have motivations that are guided by the interests of constituents and other stakeholders who may not prioritize police reforms. At least some members of the media have great motivation to reveal relevant information about policing and the resources to do so, but limited direct leverage to advance reforms. Recently, the motivation and resources of two news outlets—*The Washington Post* and *The Guardian*—combined with the leverage of the federal government to improve federal data collection about police killings.

Commentators have long complained about the lack of good data collected by federal agencies about law enforcement misconduct.¹⁴⁷ The federal government has long had the authority to collect data from police departments about police misconduct but has never exercised the full power of its authority because, as Rachel Harmon has concluded, “[t]he administrative agencies responsible for that data collection are heavily influenced by law enforcement interests.”¹⁴⁸ As one example, the DOJ has long collected data about the number of people killed by law enforcement officers each year, but has relied on law enforcement agencies voluntarily to report killings when they occur.¹⁴⁹ The DOJ considered the data it collected about officer-involved killings to be so flawed that it suspended this data collection effort altogether in 2014.¹⁵⁰

In 2015, *The Washington Post* and *The Guardian* criticized the lack of data collected by the federal government about the number of

¹⁴⁷ See, e.g., Matthew J. Hickman et al., *Toward a National Estimate of Police Use of Nonlethal Force*, 7 CRIM. & PUB. POL'Y 563, 565 (2008); Colin Loftin et al., *Underreporting of Justifiable Homicides Committed by Police Officers in the United States, 1976-1998*, 93 AM. J. OF PUB. HEALTH 1117, 1119–20 (2003); Michael R. Smith, *Toward a National Use-of-Force Data Collection System: One Small (and Focused) Step Is Better than a Giant Leap*, 7 CRIM. & PUB. POL'Y 619, 621 (2008).

¹⁴⁸ Harmon, *supra* note 3, at 1134.

¹⁴⁹ Oliver Laughland et al., *Justice Department Trials System to Count Killings by U.S. Law Enforcement*, GUARDIAN (Oct. 5, 2015, 7:15 PM), <http://www.theguardian.com/us-news/2015/oct/05/justice-department-trials-system-count-killings-us-law-enforcement-the-counted> [http://perma.cc/KJG7-Q2LL]; Tom McCarthy, *The Uncounted: Why the U.S. Can't Keep Track of People Killed by Police*, GUARDIAN (Mar. 18, 2015, 10:19 AM), <http://www.theguardian.com/us-news/2015/mar/18/police-killings-government-data-count> [http://perma.cc/JT6D-BQJ8].

¹⁵⁰ See sources cited *supra* note 149 for a description of the DOJ's decision to stop collecting this data.

civilians killed by law enforcement officers and began collecting their own data about police killings.¹⁵¹ As Frank Zimring has described, the two newspapers' open-source data collection efforts revealed more than double the number of police-involved killings than were reported through the federal government's channels.¹⁵²

In October 2015, the U.S. Attorney General announced that it would begin to collect open-source records about police killings and then confirm reports with law enforcement agencies and others; a process "near-identical to the one employed by" *The Guardian*.¹⁵³ It appears that the data collected by *The Guardian* and *The Washington Post* not only provided the federal government with a workable methodology, but also gave them the motivation to act. FBI Director James Comey observed, when describing federal efforts to collect data, that "it is 'ridiculous [and] embarrassing' that the Guardian and the Washington Post . . . were 'becoming the lead source of information about violent encounters between police and civilians.'"¹⁵⁴ In other words, the information gathered and disseminated by *The Guardian* and *The Washington Post* about police killings motivated the federal government to improve its data collection efforts.

This is just one example of the influence of the media on elected officials, offered because the causal relationship between the media's reporting and elected officials' actions is so clear. There are, however, many other instances in which press reports appear to be among the reasons that elected officials decide to take action regarding law enforcement.¹⁵⁵

2. Criminal defendants and prosecutors.

Criminal defendants and their attorneys have resources on a macro level, and strong motivations, but lack leverage. One reason for criminal defendants' limited leverage is the fact that criminal prosecutors in some jurisdictions do not collect information about suppression decisions or findings of unconstitutional behavior by the

¹⁵¹ See Oliver Laughland & Jamiles Lartey, *Counting Police Killings in the U.S.: Landmark Stories That Led to Change*, GUARDIAN (Dec. 9, 2015, 12:50 AM) <http://www.theguardian.com/us-news/2015/dec/09/counting-police-killings-landmark-stories> [<http://perma.cc/TGJ2-SJS6>].

¹⁵² See Frank Zimring, *How Many Killings by Police?*, 2016 U. CHI. LEGAL. F. 691, 703–05 ("Two newspapers are in the process of providing detailed accounts of each case of police killings . . . at least double the levels reported in the SHR and Vital Statistics categories as well as the most recently published ARD estimates.").

¹⁵³ Laughland et al., *supra* note 149.

¹⁵⁴ See Laughland & Lartey, *supra* note 151.

¹⁵⁵ See, e.g., *supra* note 74 and accompanying text (describing the pressure press reports can place on elected officials).

police. Yet criminal prosecutors can use information about prior suppression decisions to assert significant leverage over law enforcement if they choose to do so.¹⁵⁶ A recent initiative in New York City—the Legal Aid Society’s Cop Accountability Database—combines the motivation of criminal defendants with the leverage of criminal prosecutors in ways that might lead to police reforms.¹⁵⁷

Every day, criminal defendants are prosecuted based on the testimony of police officers. Public defenders’ best arguments for suppression or against conviction are often associated with officers’ credibility on the stand.¹⁵⁸ And one of the best ways to undermine an officer’s credibility is to point to prior constitutional violations or allegations of misconduct. Yet, in New York City and other jurisdictions, public defenders are regularly denied requests for officers’ personnel records, internal affairs investigations, and reports that might reveal misconduct.¹⁵⁹ Even when they win their requests for an officer’s personnel records, these records may not contain crucial information—including information about civilian complaints, civil lawsuits, and criminal cases in which evidence was suppressed based on concerns about the officer’s credibility or conduct.¹⁶⁰

The unmet need for information about allegations of police misconduct caused the city’s largest public defender’s office—New York City’s Legal Aid Society—to begin collecting this information itself. Started in 2014, the Cop Accountability Database includes information from a number of different sources, including so-called *Brady* letters

¹⁵⁶ See *supra* note 69 and accompanying text (describing how prosecutors’ *Brady* lists can create leverage over police officers and officials).

¹⁵⁷ See Leon Neyfakh, *The Bad Cop Database*, SLATE (Feb. 13, 2015, 11:43 AM), http://www.slate.com/articles/news_and_politics/crime/2015/02/bad_cops_a_new_database_collects_information_about_cop_misconduct_and_provides.html [<http://perma.cc/YT93-RWWH>].

¹⁵⁸ See Jay Symopoulos, *100’s of Attorneys Build Tool to Document Bad Cops: Introducing the “Cop Accountability Program”*, THE FREE THOUGHT PROJECT (Feb. 18, 2015), <http://thefreethoughtproject.com/bad-cop-database/> [<http://perma.cc/3KLD-M3FL>].

¹⁵⁹ See *id.* (describing the difficulty of getting police officers’ disciplinary records under New York law); David Uberti, *How New York Protects Police Records from Public View*, COLUMBIA JOURNALISM REV. (Dec. 23, 2014), http://www.cjr.org/b-roll/how_new_york_protects_police_r.php [<http://perma.cc/8RSZ-XYPU>] (describing protections of investigations of officer misconduct under New York law); see also Jonathan Abel, *Brady’s Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 STAN. L. REV. 743 (2015) (describing different practices regarding prosecutors’ access to and use of information in police disciplinary files); BLACKS IN LAW ENFORCEMENT IN AMERICA, *Why It’s Almost Impossible to Reform America’s Police* (Aug. 29, 2015), <http://www.bleausa.org/why-its-almost-impossible-to-reform-americas-police/> [<https://perma.cc/GD7K-ZU69>] (reporting that police disciplinary records are protected from disclosure under Maryland law); Robert Lewis et al., *Is Police Misconduct a Secret in Your State?*, WNYC NEWS (Oct. 15, 2015), <http://www.wnyc.org/story/police-misconduct-records/> [<https://perma.cc/MD43-JS7M>] (surveying laws protecting disclosure of police disciplinary history across the country).

¹⁶⁰ See Uberti, *supra* note 159.

containing exculpatory material (including evidence about officer credibility and other officer misconduct) that is provided to criminal defendants by prosecutors, information from civil lawsuits, findings at criminal trials that officers were not credible, news reports about officer wrongdoing, and complaints against officers filed with New York City's Civilian Complaint Review Board.¹⁶¹ When fully operational, the database will have an accessible web interface that will be designed for smartphones and tablets for easy use in the courthouse.¹⁶² Public defenders will be able to enter an arresting officer's last name (along with other available identifiers) and the database will produce all the information that has been collected about that officer.¹⁶³

Public defenders have strong motivations to collect and use this information about law enforcement officers because the information will help them to represent their clients.¹⁶⁴ If a review of the data reveals numerous lawsuits against an arresting officer alleging unconstitutional searches under similar circumstances, the attorney could use those prior suits in a motion to suppress evidence illegally seized by the officer. Prosecutors may decide to file lesser charges—or drop charges altogether—after being confronted with Database records regarding prior suppression hearing decisions, civilian complaints, and other information that raise questions about the credibility of an arresting officer.

Criminal defendants and public defenders generally have little direct leverage over law enforcement officers. As described above, decisions that announce new legal standards influence officers' training, but agencies and officers may never learn of suppression decisions if prosecutors do not inform them.¹⁶⁵ The Cop Accountability Database, however, gives criminal defendants and their attorneys access to information that may increase their likelihood of success in suppression motions and may thereby cause prosecutors to use their leverage to push for improvements in policing. Presumably, as public defenders use this Database to challenge officers' arrests, some officers

¹⁶¹ Neyfakh, *supra* note 157 (describing the Database); Jason Tashea, *Clicking for Complaints: Databases Create Access to Police Misconduct Cases and Offer a Handy Tool for Defense Lawyers*, 102 A.B.A. J. 17 (2016).

¹⁶² Neyfakh, *supra* note 157.

¹⁶³ *See id.*

¹⁶⁴ As Cynthia Conti-Cook, the creator of the Database, has explained, evidence of officer misconduct culled from the Database “takes the judge’s attention away from what your client did wrong to get here, and puts more of a burden on the police officer to prove that your client actually did something.” *Id.*

¹⁶⁵ *See supra* note 68–70 and accompanying text (describing limited leverage of suppression decisions when prosecutors do not keep track of them).

may become hindrances to prosecutors trying to build their cases.¹⁶⁶ When this happens, prosecutors may pressure the NYPD to re-assign or take action against officers whose past conduct makes it difficult for them to take the stand. And perhaps this pressure from prosecutors will serve as leverage to make the New York City Police Department take some sort of action to better supervise or manage their officers.

There is some evidence that the Database is already having an impact: the New York City Police Department has begun working with local prosecutors to collect impeachment material on their officers that would “minimize[e] the likelihood prosecutors will be surprised in court.”¹⁶⁷ Time will tell if the Cop Accountability Database also encourages prosecutors to push for policing reforms.

3. The Department of Justice and civil plaintiffs.

The DOJ has significant leverage—it can sue law enforcement agencies for injunctive relief and use the power of the court to ensure that those changes are made. Yet the DOJ has limited resources and so can pursue investigations of only a small number of agencies. Plaintiffs and their attorneys have more resources on a macro level, but limited leverage—rigorous standing requirements make it difficult for individual plaintiffs to sue for injunctive relief and money awarded in damages suits have limited impact on officers and agencies. Collaborations between the DOJ and civil plaintiffs and their attorneys could take advantage of the DOJ’s leverage and plaintiffs’ macro-level resources.

One such collaboration, proposed by Myriam Gilles, would be to amend Section 14141, which grants power to the DOJ to investigate law enforcement agencies, to allow individuals to bring claims under the statute alleging a pattern or practice of constitutional violations by a law enforcement agency.¹⁶⁸ Gilles proposes that, following such an amendment, victims of police misconduct could file a petition with the DOJ.¹⁶⁹ The DOJ would then investigate the plaintiffs’ claims and could decide whether to quash the petition, proceed with the case on its own,

¹⁶⁶ See, e.g., *supra* note 69 (describing prosecutors’ uses of *Brady* lists).

¹⁶⁷ Robert Lewis, *When a Cop’s Right to Privacy Undermines Our Right to a Fair Trial*, WNYC NEWS (Oct. 14, 2015), <http://www.wnyc.org/story/when-a-cops-right-to-privacy-undermines-our-right-to-a-fair-trial/> [<https://perma.cc/3GC8-8U8G>].

¹⁶⁸ See Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1418 (2000).

¹⁶⁹ *Id.*

or deputize the private citizen(s) to litigate the case pursuant to Section 14141.¹⁷⁰

This arrangement would give civil plaintiffs' attorneys leverage they would not otherwise have, as current standing requirements make it exceedingly difficult for plaintiffs to bring cases seeking injunctive relief against law enforcement agencies.¹⁷¹ This arrangement would also give the DOJ resources it does not otherwise have. Currently, the DOJ employs fewer than twenty attorneys that conduct "pattern or practice" investigations of law enforcement agencies.¹⁷² By allowing civil plaintiffs' attorneys to litigate these cases, the DOJ would increase their person-power by orders of magnitude. Gilles contends that plaintiffs' attorneys would be willing to bring these cases because findings in these pattern and practice cases could have preclusive effect in subsequent damages actions.¹⁷³ I would allow prevailing plaintiffs bringing pattern and practice claims to recover attorneys' fees under Section 1988 as an additional incentive. With or without the possibility of attorneys' fees, this collaboration between the DOJ and civil plaintiffs' attorneys would build on the strengths of each and mitigate their corresponding weaknesses.

4. Civilian overseers and public entity liability insurers.

Another possible collaboration would be between civilian overseers and public entity liability insurers. Civilian overseers often recommend changes in policing policies and practices but do not have the leverage to demand law enforcement agencies adopt those changes. Elected officials have the leverage to demand that overseers' recommendations be adopted—and sometimes they do.¹⁷⁴ But elected officials may not have the motivation to demand such changes if it is not in their political interest to do so.

Public entity liability insurers are well situated to use their leverage to advance civilian overseers' proposed reforms. Public entity liability insurers, like elected officials, have leverage over their

¹⁷⁰ See *id.*

¹⁷¹ *Id.* at 1451. Note, however, that this suggestion—which seeks to get around the standing requirements in *Lyons*—might be found unconstitutional for that very reason. See *supra* note 43 and accompanying text for a discussion of *Lyons*.

¹⁷² See *supra* note 32 and accompanying text (describing the resources of the DOJ).

¹⁷³ Gilles, *supra* note 168, at 1451–52.

¹⁷⁴ For example, Samuel Walker's contribution to this symposium describes reports written by police auditors in Los Angeles County, San Jose, Washington, D.C., and New York City that revealed problems in the departments' policies and practices that were subsequently corrected. See Walker, *supra* note 108, at 646 ("The first police auditors in 1993 included . . . significantly altered the political dynamics in the city regarding the police.").

insureds to demand policy and personnel changes recommended by civilian overseers; they can limit coverage or deny it altogether if a department does not comply with their demands.¹⁷⁵ But public entity liability insurers may sometimes have stronger motivations than elected officials to demand that such changes be made. While elected officials' motivations will be defined primarily by the interests of their constituents and other government actors (including law enforcement), public entity liability insurers are motivated primarily by financial incentives—they want to take steps that will reduce their liability risk. Some reforms recommended by overseers may be unpalatable to an elected official, but embraced by an insurer motivated to reduce liability costs.

Accordingly, civilian overseers should, when possible, work with public entity liability insurers to advance their recommendations.¹⁷⁶ Not every overseer will be able to take advantage of insurers' leverage. Indeed, this type of collaboration will only work if a civilian overseer is in a jurisdiction that relies on public entity liability insurance.¹⁷⁷ In addition, this type of collaboration will only be effective if an insurer views an overseer's recommendations as a promising means of reducing liability costs. But if civilian overseers can convince insurers that their recommended reforms will reduce liability risk, insurers can pressure their insured departments to adopt those reforms. An insurer may simply recommend that the insured departments adopt the overseer's reforms, or may condition continued coverage or premium rates on adoption of the reforms. Through this arrangement, insurers' leverage is used to advance civilian overseers' recommendations.

¹⁷⁵ See *supra* notes 37–38 and accompanying text (describing the leverage of public entity liability insurers).

¹⁷⁶ John Rappaport has suggested a similar collaboration between public entity liability insurers and state attorneys general. See John Rappaport, *How Private Insurers Regulate Public Police*, THE CLS BLUE SKY BLOG (Mar. 3, 2016), <http://clsbluesky.law.columbia.edu/2016/03/03/how-private-insurers-regulate-public-police/> [https://perma.cc/Q953-TDGW] (“Insurance regulators 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.”).

¹⁷⁷ Many overseers are located in self-insured jurisdictions like Los Angeles, Chicago, and New York that are immune to the pressures of public entity liability insurers. This type of collaboration will therefore be impossible in this type of large jurisdiction. There are, however, civilian oversight agencies in a number of smaller jurisdictions that likely rely on insurance to some degree; this proposal is directed to those types of jurisdictions. For a list of civilian oversight agencies, see Nat'l Assoc. for Civilian Oversight of Law Enforcement, *supra* note 116 (listing smaller jurisdictions including Claremont, CA; Brattleboro, VT; Clarkstown, NY; Corvallis, OR; and Evanston, IL).

C. Conclusion

All entities involved in efforts to reform the police need leverage, motivation, and resources to do their work. Yet each entity engaged in police reform efforts has weaknesses in one or more of these areas. These weaknesses can be cured either by adjusting individual reformers' powers and characteristics, or through collaborations between reformers that have complementary strengths and weaknesses. Some collaborations will be intentional and coordinated—such as the collaborations I have proposed between the DOJ and plaintiffs, and civilian overseers and public entity liability insurers. Others, like the Cop Accountability Database, are involuntary—one reformer pushes another reformer to act, without their collaboration or consent, and thereby takes advantage of their strengths. The four examples of collaborations offered here are illustrative but many more come to mind. The key to these proposed collaborations is that each draws on reformers' complementary strengths in the areas of leverage, motivation, and resources.

V. CONCLUSION

Recent police tragedies have focused national attention on the need for police reform. This Essay offers a framework for understanding the qualities that police reformers need; situates current commentary about reformers within this framework; suggests several approaches to strengthen reformers' leverage, motivation, and resources; and recommends coordination between reformers to capitalize on their strengths.

Although this Essay is focused on strategies for police reformers, its lessons are not limited to those working to change law enforcement. Reformers endeavoring to improve public school education, prison conditions, immigrants' rights, or address any other governmental or institutional concern need sufficient leverage, motivation, and resources to succeed in their efforts. Recognizing the need for each of these three qualities can guide strategies and collaborations in these and other reform efforts.