Abusive police officers evade punishment through an array of legal roadblocks to accountability

Police officers who abuse citizens usually escape punishment because of an array of legal doctrines that stack the law in an officer's favor.

That was true before the murder of George Floyd and killing of Breonna Taylor and it's true after the uprising that those events caused.

The guilty verdict and stiff sentence for Derek Chauvin, Floyd's murderer, felt like a watershed moment to many Americans. President Biden called the verdicts a "giant step toward justice" and the 22.5 year sentence "appropriate."

But a look at police accountability nationwide shows that little has changed. In most places, the long-standing legal roadblocks to police accountability remain unaltered.

In the past 18 months, 35 states have defeated bills to eliminate or weaken qualified immunity – a big legal roadblock – and 33 states still allow no-knock raids like the one that led to Taylor's killing.

The George Floyd Justice in Policing Act of 2021 – which would have eliminated many roadblocks – died in Congress. A few states and cities passed limited police reforms, but most reform bills failed. Some states, such as Missouri, went the opposite direction and erected new legal roadblocks to accountability. "Defunding the police" became the political poison that hurt Democrats in the 2020 election and resulted in the big defeat of a Minneapolis ballot measure to replace

the police department.

“There has been change since Ferguson but some of the fundamentals remain stuck,” says David A. Harris, a law professor at the University of Pittsburgh and expert on law enforcement.

A personal body shield with the word “Press” is seen near a picnic table as protesters gather in a park in Portland, Oregon. (Photo by Maranie Rae Staab via AP)

Consider the welter of legal impediments to accountability:

Qualified immunity. Willful intent. Objective reasonableness. The Law Enforcement Officers’ Bill of Rights. Union arbitration. Closed misconduct records. An ineffective and closed national database of police misconduct. “Wandering cops” who misbehave and move to a new department where they will often offend again. A “blue wall of silence” where officers refuse to testify against one another. Union arbitration that protects abusive and untruthful officers from punishment.

All are escape hatches that allow the portion of officers who are abusive to keep their badges despite sexual assaults, excessive force, false reports, cover-ups and perjury.

At times an abusive officer gets the benefit of the doubt, on top of the benefit of the doubt, on top of the benefit of the doubt.

Here are some of ways the legal system helps abusive police officers:

- **The Law Enforcement Officers' Bill of Rights** allows an accused officer to get his story straight before questioning, which gives police rights that citizens don't have.
- **The "objective reasonableness" standard** that applies in most cases of abuse requires the jury to see the facts through the officers' eyes rather than second-guessing them.
- **Qualified immunity** means that even when an officer is found to have violated a citizen's rights, the case is almost always thrown out. If the violation has not been clearly established in the law – which it almost never has been – the case is dismissed.
- **Police unions fight accountability.** If a police department disciplines an officer, police friendly arbitrators often throw out the punishment – as they have done in Chicago and Philadelphia. Union negotiated contracts in some cities automatically expunge records of misconduct.
- **Willful intent** makes it hard for the Justice Department to win criminal civil rights convictions against officers because prosecutors have to prove that the officer acted with "bad purpose."

Most of these special rights for police are not required by the Constitution. Judges, legislators and union negotiators have created them, stacking the deck in favor of accused

officers and against abused citizens.

Some judicially created doctrines run counter to the laws they interpret. A post-Civil War Congress passed the Ku Klux Klan Act, now codified as Section 1983, to protect newly freed slaves from the violence of officers acting under color of law. But qualified immunity and objective reasonableness give the officer the benefit of the doubt over the victim the law was written to protect.

COURTS ALLOW DEADLY POLICE PRACTICES

Dangerous police policies – which the International Association of Chiefs of Police (IACP), Police Executive Research Forum (PERF) or Justice Department recommend against – continue to be commonplace and are upheld in the Supreme Court:

- **High-speed police chases.** One person dies every day as a result of a high-speed police chase, even though most chases start with minor traffic stops, and one-third of those killed are innocent civilian bystanders. At least 13,000 people were killed during pursuits between 1979 and 2017. The Supreme Court has supported police in chase cases, but the IACP recommends against high-speed chases for traffic violations.
- **Chokeholds.** Across the nation, 134 people have died from "restraint asphyxia" over the past 10 years, even though the Justice Department warned 26 years ago that bound suspects could die if not rolled off their stomachs.
- **No-knock raids.** 94 people were killed during no-knock raids from 2010 to 2016. The Justice Department recommends against no-knock raids unless an officer's safety is at risk. It would halt no-knock raids that are based solely on the prospect that drugs could be destroyed after a knock.
- **Shooting at moving cars.** The Supreme Court allows police

to shoot into moving cars even though the IACP recommends that police should almost never shoot at or from a moving vehicle.

- **Failing to de-escalate.** The Supreme Court does not require police to de-escalate confrontations that could become deadly. But the IACP and the Justice Department recommend de-escalation. The IACP recommends "taking action or communicating verbally or nonverbally during a potential force encounter in an attempt to stabilize the situation and reduce the immediacy of the threat."
- **Shooting at mentally ill suspects.** One-fourth to one-third of the 1,000 people killed by police every year are having a mental crisis or are emotionally disturbed. Many officers are poorly trained for these situations. Police typically get 58 hours of firearms training contrasted to 8 hours for de-escalation tactics and 8 hours for handling medical emergencies.
- **Seizing millions in cash on the nation's highways.** Police regularly seize tens of thousands of dollars from cars they stop on the road, even though the motorist is not arrested for a crime. Police departments keep the money taken in these civil asset forfeitures.
- **Misconduct leading to false convictions.** Coercive interrogations, faulty identification techniques and failure to turn over exculpatory evidence have led to false convictions and long jail sentences served by people who were wrongfully convicted. About 1,000 of the 2,900 people exonerated since 1989 had been wrongfully convicted based on police misconduct.

FEW PROSECUTIONS, FEW CONVICTIONS

Abusive police are seldom prosecuted and those prosecuted usually aren't convicted. Police kill about 1,000 people each year, according to a Washington Post database, but few go to prison or lose their jobs.

Philip M. Stinson, a cop turned criminal justice professor at Bowling Green State University, keeps the statistics. Since 2005, 121 officers have been charged with murder or manslaughter in nonfederal cases involving killings on-duty. Of the 95 cases that have concluded, fewer than half – 44 – resulted in convictions and then often to lesser charges.

Federal prosecutions and convictions for violating a citizen's civil rights also are rare and often unsuccessful because of a high burden of proof – "willful intent" to violate a citizen's constitutional right.

Between 1990 and 2019, federal prosecutors filed criminal civil rights charges against an average of 41 officers a year – even though they get referrals 10 times greater, reports the Transactional Records Access Clearinghouse at Syracuse University.

In recent years, federal prosecutors declined to file charges in the deaths of Eric Garner in Staten Island, Michael Brown in Ferguson and Tamir Rice in Cleveland.

One of the Justice Department's most prominent prosecutions this year ended badly for the government despite strong evidence. A group of white officers brutally beat a Black undercover officer during Black Lives Matter street protests in St. Louis in 2017. Two of those involved turned state's evidence. And racist emails showed the officers relished the opportunity to beat Black protesters.

But defense lawyers portrayed the federal prosecutors as carpetbaggers from Washington. After two trials only one officer was convicted by a jury and he was sentenced to only a year and a day in prison – even though federal sentencing guidelines called for 10 years and his own lawyers recommended two. In an attempt to drum up sympathy for their client, the defense lawyers portrayed their client as a victim of a department "where being cavalier about violence, particularly

racial violence, was far too prevalent."

During the Trump administration, the Justice Department refused to use one of its most potent legal weapons against police misconduct, pattern-or-practice suits. After the Rodney King beating in 1991, Congress gave the Justice Department the power to conduct investigations of local police departments to look for patterns of unconstitutional policing. When they found them, as they did in Ferguson in 2015, they entered into consent decrees to force reform. President Obama's Justice Department initiated a record number of 25 pattern-or-practice cases.

But former President Donald Trump and former Attorney General Jeff Sessions strongly opposed that kind of federal interference into local law enforcement. There was only one such case during his entire administration. "There was probably no stronger opponent in Congress to this tool than Sessions," says Harris, the law professor and police expert at the University of Pittsburgh.

Attorney General Merrick Garland reversed the Trump policy in announcing after the Chauvin verdict that he was starting a pattern-or-practice investigation of the Minneapolis police and would revitalize that legal tool in other cities.

LITTLE ACCOUNTABILITY

A year-long investigation of police misconduct sponsored by the Pulitzer Center on Crisis Reporting employed a team of 15 college journalists who filed dozens of Freedom of Information requests nationwide. They found:

- Most states – 32 including D.C. – keep records of police misconduct secret or difficult to access, although the number of states opening records has increased recently with New York, California, Massachusetts and Illinois opening up.

- A national database that keeps track of about 31,000 officers who have lost their badges doesn't release the information to the public.
- In Illinois, 81 Chicago police officers lost their badges in the past two decades, but only after they were investigated for 1,706 prior complaints — 21 per officer on average.
- In New York, the repeal of a law blocking access to past complaints opened records to a whopping 323,911 complaints of abuse over the past 35 years.
- In Philadelphia, two-thirds of the 170 officers the police department wanted to fire for misconduct in recent decades stayed on the force through union arbitration. Former Police Commissioner Charles Ramsey said, "I've had people that I've had to fire more than once" because union arbitration got them rehired.
- In St. Louis, the police unions are effectively segregated, white officers have gotten away with assaulting black colleagues, police used unconstitutional "kettling" techniques to trap and assault demonstrators and misbehaving officers often get jobs with forgiving suburban departments that welcome aggressive tactics like high-speed chases.
- In Portland, a federal court found that federal agents targeted journalists and court observers last summer in what it described as a "shocking pattern of misconduct" that violated First Amendment rights.
- In California, an investigation found that 630 people who had been officers since 2008 had been previously convicted of a crime. The convictions of these and other officers were not known because California did not decertify officers for misconduct until a reform law passed over union opposition this fall. Meanwhile, in Los Angeles, a new progressive prosecutor is reviewing more than 340 police killings over the past decade.
- In Florida, considered a model of police accountability, about 1,500 officers are on the street each year despite

having been fired previously by Florida agencies. These officers are more likely than rookies to offend, according to a Yale Law Journal article on wandering officers who misbehave in one place and get hired in another.

A FEW BAD APPLES?

Police are popular and police unions stress that only a few bad apples abuse citizens.

Wayne C. Beyer, a national expert on civil rights suits against police, says a tiny fraction of police stops and arrests ends up in a successful civil rights lawsuit.

There is only one successful civil rights lawsuit out of every 1,000 arrests and every 23,000 calls for service, he says.

Of all citizens stopped, 60 percent say the stop was justified and 81 percent say the police behaved properly. Of U.S. residents who had contact with police, 5.2 percent of Blacks said use of force was threatened, while 2.6 percent of whites said it was threatened.

“This idea of widespread police misconduct is misleading,” said Beyer.

But reformers say that databases show that bad apples are counted in the tens of thousands, especially when counting officers who stand by silently during brutality.

When New York’s misconduct records finally were opened to the public this spring, the database included 323,911 records involving 81,550 current or former New York Police Department officers. About 20,000 had five or more substantiated cases. Yet only 12 of the 20,000 were forced out of the department.

In addition, the national database of officers who lost their badges is 31,000-plus, although the names are secret.

Harris, the Pitt law professor, says the release of police misconduct records is a key to reform. “You can’t have real accountability with the public unless you are willing to share information with the public,” he said.

DEFUNDING AND ABOLITION BACKFIRE

During the summer of 2020, after the deaths of Floyd and Taylor, Black Lives Matter protesters and civil rights advocates called for defunding or abolition of the police.

Police reform proposals that had emerged from Ferguson were suddenly too moderate. Campaign Zero apologized for not going far enough. Brittany Packnett, a Ferguson leader, said at the time, “Divestment from the institution of policing – and reinvestment in Black communities – is the necessary central strategy of this moment.”

But the defund/abolish movement backfired politically when Trump used defunding as a political cudgel against Democrats. Exit polls showed the attack was effective. The crushing defeat of the Minneapolis “defunding” proposal in 2021 illustrated that calls for defunding or abolition of police departments had lost support.

Efforts to end qualified immunity – the big legal roadblock to accountability – failed almost everywhere. 35 bills to end qualified immunity lost in state legislatures over the past 18 months. New Mexico, Connecticut, Massachusetts and Colorado passed bills initially written to restrict qualified immunity, but once unions finished lobbying, only Colorado’s actually accomplished that purpose.

The most successful police reforms passed since the Floyd and Taylor cases have been restrictions on police chokeholds and no-knock raids, says police expert Beyer.

Before Floyd’s murder, only Tennessee and Illinois had bans on hold techniques. Now 17 states have enacted laws that ban or

restrict holds and 48 cities have implemented changes in the use of neck restraints – including Los Angeles, Sacramento, San Diego, Denver, Washington, Miami, Boston, Minneapolis, New York, Austin, Dallas, Houston, Salt Lake City and Seattle.

In addition, the Biden Justice Department issued a new policy on September 13, prohibiting "chokeholds" and "carotid restraints" unless the officer has a reasonable belief that the subject of such force poses an imminent danger of death or serious physical injury to the officer or to another person." But the policy applies only to federal law enforcement officers – not the cop on the street.

Meanwhile, five states passed laws prohibiting or restricting no-knock warrants – Oregon, Florida, Virginia, Utah, and Maine.

In addition, 15 cities, including Orlando, Louisville, Santa Fe, and Indianapolis have passed no-knock warrant bans or severe restrictions.

Still there are 33 states that allow no-knock warrants either by law or court decision, Beyer says.

The Justice Department announced on September 13, 2021, that federal law enforcement agents would be required to limit the use of "no-knock" entries. "[A]n agent may seek judicial authorization to conduct a 'no-knock' entry only if that agent has reasonable grounds to believe at the time the warrant is sought that knocking and announcing the agent's presence would create an imminent threat of physical violence to the agent and/or another person. . . ."

This means federal agents can't justify no-knock raids based solely on the possibility that evidence, like drugs, will be destroyed by knocking.

In other important reforms, Illinois passed a law ending cash bail and increasing accountability for repeat police

offenders. Massachusetts and California overcame police union opposition to pass police decertification laws that could take badges from misbehaving officers.

In addition, four states gave their attorneys general the power to investigate patterns or practices of police misconduct, much like the Justice Department does. Those states are Illinois, Colorado, Virginia and Massachusetts.

Pro-police measures passed in some redder states. Florida has stiffened penalties for crimes during demonstrations, such as mob intimidation and defacing property and monuments. Iowa, which unanimously restricted the use of chokeholds after Floyd's death, is considering a Law Enforcement Officers' Bill of Rights and Missouri passed one.

The U.S. House passed the Floyd bill but it died in the Senate when negotiations between Sens. Tim Scott, R-S.C., and Cory Booker, D-N.J., broke down this fall.

Harris, the Pitt police expert, said "that bill would be extraordinarily good across the board. It beefs up what the government can do with pattern or practice. It cuts into qualified immunity that really has to go because it lets really cruel police actions go unpunished when there hasn't been a prior court ruling about that particular cruel practice."

But Harris adds, "There can be change even if it's not national." If Congress can't pass a federal law, he says, it will be up to state and local governments to pass reforms that limit police use of force, increase transparency and improve accountability.

In the Chauvin trial, Minnesota required the jury to apply the tough "objective reasonableness" standard that makes it hard to convict officers. That standard requires a judge or jury to see the police action "from the perspective of a reasonable officer on the scene." They can't second-guess a decision made

in the heat of the moment.

That objective reasonableness standard comes from the 1989 U.S. Supreme Court decision Graham v. Connor. What many people don't realize is that states and municipalities can adopt new use of force standards that hold police to a higher standard of conduct. A few jurisdictions have done that in the past year but not many.

One thing states and cities can do is "raise the bar for the use of force," Harris said in an interview. "What people forget is that the Supreme Court set a minimum standard for the protection of citizens from state action by police. While states can't give citizens less protection, they can create more. In the last year we've seen some movement in that direction."

As long as the objective reasonableness standard remains in place, says Harris, few officers will be convicted. "At the end of the trial, the jury is told the officer feared for his life, the suspect was reaching for a gun and don't second guess him," says Harris. "And it takes only one person to hang the jury."

PROGRESSIVE PROSECUTORS V. UNIONS

Police unions became common and powerful in the 1970s in reaction to the civil rights movement, which often targeted police brutality. The police unions have argued that the nation's 700,000 police should have due process protections when they are accused of wrongdoing; only few "bad apples" abuse citizens, they say, but the honest officer often suffers from frivolous complaints.

One big victory for the police unions in New York was passage of a 1976 provision of the New York Civil Rights Act, 50a, which closed records of police misconduct. The argument was that the law protected the civil rights of police officers by

shielding them from harassment for frivolous complaints.

In another victory in 1973, Maryland became the first of 16 states that adopted a Law Enforcement Officers' Bill of Rights, extending procedural protections to officers that made it difficult to discipline them. Typically these bills of rights delayed internal investigations, expunged old records of misconduct and required that officers instead of civilians investigate complaints. The bill of rights was blamed for hindering the 2015 investigation of the death of Freddie Gray who suffered a spinal injury in police custody in Baltimore.

Both New York's 50a and the Maryland Law Enforcement Officers' Bill of Rights were repealed after the Floyd murder.

Harris says one impetus toward police reform is the election of so-called "progressive prosecutors" around the country, from Philadelphia, Baltimore and Boston to St. Louis, Chicago and Kansas City, Missouri, to San Francisco to Los Angeles.

"What they want to do," says Harris, "is limit using cash bail, reduce prosecution of minor offenses like drugs and sex work, increase the use of diversion programs and establish conviction integrity units" to uncover wrongful convictions.

Many of these progressive prosecutors have ended up in pitch battles with police unions, often controlled by white officers.

One practice in particular has led to conflict – the so-called Brady lists of officers whose prior conduct and untruthfulness in investigations prevent them from testifying. St. Louis has a list of 55. Baltimore's list of problem officers is about 300.

Philadelphia's District Attorney Larry Krasner found a "damaged goods" file of tainted officers when he took over four years ago. Now the DA's Conviction Integrity Unit Police Misconduct Disclosure Database has 750 officers, many of whom

prosecutors will not call to testify.

Krasner has complained that the Police Department has failed to turn over important documents on misconduct and redacts some of them so they are impossible to make out. Last summer he went to court asking that the department be held in contempt for withholding the information. “The only people being helped by the system are the small number of dirty cops,” he said.

The head of the Fraternal Order of Police in Philadelphia complained of “lost wages, damages to reputation and professional harm” when prosecutors release names of officers they will not call to the stand. “Are they going to be vilified forever, are they going to be blackballed forever?” asked John McNesby, the union president. McNesby referred to Krasner supporters as a “lynch mob” of criminals. Krasner won re-election this year despite stiff union opposition.

In St. Louis, Police Officers Association business manager Jeff Roorda has called progressive St. Louis prosecutor, Kim Gardner, the worst prosecutor in the country. He said she should be removed either “by force or by choice.” St. Louis police who beat demonstrators during a 2017 protest sent each other texts with highly offensive racial slurs directed at Gardner and the demonstrators.

In November, one of the progressive prosecutors, Jean Peters Baker in Jackson County, Missouri, won Kansas City’s first conviction of a white officer for killing a Black citizen. A judge found Eric DeValkenaere guilty of second degree involuntary manslaughter and armed criminal action for shooting Cameron Lamb in his pickup truck as he backed out of his garage. DeValkenaere did not have a search warrant to confront Lamb in his home, the judge said.

“Justice was gotten today,” Baker said.

Another progressive prosecutor, St. Louis County Prosecuting

Attorney Wesley Bell, also had a success in November using a "restorative justice" approach to settle a prosecution of a Ladue, Missouri, police officer who accidentally shot a suspected grocery store shoplifter in the back in 2019. The officer, Julia Crews, said she meant to use a taser but pulled her pistol instead. Crews apologized on Zoom to Ashley Hall, who forgave her and accepted a $2 million payment from the city. Prosecutor Bell dropped the felony assault charge against Crews.

Bell imported the increasingly popular restorative justice approach from Washington, D.C., which has used it in 150 cases. Said Bell, "This is an example of accomplishing the ideal, which is healing and justice."

The initial batch of a dozen progressive prosecutors has grown to about 70, according to Fair and Just Prosecution, a national legal group supporting their reforms. Some prosecutors have boldly reopened investigations of police shootings where their predecessors had cleared officers of wrongdoing.

Los Angeles District Attorney George Gascón, elected in 2020, promised to reopen four police shooting cases during his campaign. Now he has brought together legal experts, community leaders and law students to review more than 340 police killings over the past decade where his predecessor had cleared police of wrongdoing.

José Garza, the elected district attorney in Austin, Texas, was a public defender before he was elected as prosecutor. He has obtained indictments in two recent police killings from 2019 and 2020, including the death of Jose Ambler II, who died after having been repeatedly tasered after fleeing a traffic stop.

Not all reviews end up in prosecution, however. Bell, the St. Louis County prosecutor who replaced veteran law-and-order

prosecutor Bob McCulloch, reviewed the Ferguson shooting death of Michael Brown and decided – as McCulloch and federal prosecutors had – that there wasn't enough evidence to file criminal charges against former Officer Darren Wilson.

Bell put it this way: "Although this case represents one of the most significant moments in St. Louis's history, the question for this office was a simple one: Could we prove beyond a reasonable doubt that when Darren Wilson shot Michael Brown he committed murder or manslaughter under Missouri law? After an independent and in-depth review of the evidence, we cannot prove that he did."

Pulitzer student reporting fellows Kallie Cox, Sojourner Ahebee, Felicia Hou and Karen Kurosawa contributed to the reporting. Cox, from Southern Illinois University reported on Illinois. Ahebee, Hou and Kurosawa, from Stanford University, reported on Philadelphia, New York and California.

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