



How the police protect themselves from prosecution

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If justice delayed is justice denied, the justice accomplished in Monday's firing of New York City police officer Daniel Pantaleo, who in 2014 killed Eric Garner with a chokehold while he begged for his life, was constricted to the smallest possible measure. As Garner's mother, Gwen Carr, said to reporters Monday, "Yeah, Pantaleo, you may have lost your job, but I lost a son."

Coming as it does five years after Garner's death, this termination is remarkable in two senses.

Measured against normal employment standards — the sort that would apply to me and probably you or indeed almost anyone, even those in dangerous roles — it is remarkable that the firing took this long. A man is dead. An unarmed man who stood accused of pennies' worth of tax evasion is dead. A man who, per the video of his final moments, posed no threat to the officers harassing him. Were his killer anyone but a police officer, were Pantaleo clad in any other uniform as he squeezed the breath out of Garner, it is impossible to imagine he would have remained employed. Ordinary people whose moments of poor behavior or ill judgment have gone viral have lost their jobs over much less. An offensive joke or an uncouth tweet is enough to get you the boot. If your on-the-job conduct *killed a man*, you would not continue to be on the job.

And yet measured against the employment standards police in America enjoy, it is remarkable Pantaleo's termination happened at all.

"Growing up, many of us were taught that we should hold people in power to a higher standard. Yet, so very often, protections for police officers cut precisely the other way," Jonathan Blanks, a research associate in the Cato Institute's Project on Criminal Justice, told me. "Officers violate people's rights, sometimes even killing them, and they are not held accountable for their lethal mistakes. They aren't prosecuted for killing unarmed people if they can convince a judge or prosecutor they were scared; they are often not fired or even reprimanded for their error; and even when there is a wrongful death settlement, boilerplate language explicitly denies that the municipality or the officer accept any blame for the incident."

There are many reasons for this disparity. One, as detailed earlier today by my colleague Joel Mathis, is the bargaining power of police unions, which in addition to more reasonable tasks busy themselves with keeping cops employed even after gross misconduct. But unions aren't the sole factor here.

Another is a legal doctrine called "qualified immunity." This means that for a cop "to be held liable in a federal civil rights case," Blanks explained, "the violation had to be 'clearly established' in that federal jurisdiction." Thus a violation deemed novel may not be prosecuted, and that lack of accountability is self-perpetuating, as barring the initial suit will in turn fail to set

the precedent needed for future prosecution of the same type of violation. For example, in 2015, the Supreme Court sided with police officers who repeatedly shot a mentally ill woman in her group home after she brandished a bread knife at them while they attempted to detain her for a psychological evaluation. The court's majority held that the shooting did not violate clearly established law.

Qualified immunity is an invention of the Supreme Court, not a law passed by Congress. It carves out an enormous loophole in a section of federal civil rights law known as Section 1983, which says any state agent who while acting in an official capacity violates anyone's "rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." That seems like a straightforward accountability measure — but qualified immunity frequently renders it toothless.

Also often relevant is legislation called a "law enforcement officer bill of rights" (LEOBOR). Pushed by police unions, these laws erect an incredible institutional barrier to firing cops like Pantaleo. If a police department operating under a typical LEOBOR decides to investigate a complaint against an officer, it begins by notifying the accused and his union.

"That's where the special treatment begins, but it doesn't end there," writes Reason's Mike Riggs. "Unlike a member of the public, the officer gets a 'cooling off' period before he has to respond to any questions," Riggs continues. "Unlike a member of the public, the officer under investigation is privy to the names of his complainants and their testimony against him before he is ever interrogated. ... Unlike a member of the public, the officer under investigation cannot be 'threatened with disciplinary action' at any point during his interrogation." If any of these rules — and there are many more — are violated during the investigation, it may be dropped altogether.

Some LEOBOR protections, like the requirement that interrogations include reasonable breaks for meals and rest, strike me as a good thing, something to be accorded to all suspects instead of denied to police. Too many others, like allowing the accused to review his accusers' testimony *before* making his own, are an obvious manipulation of justice. The effect is to give departments little incentive to fire bad cops.

New York is not among the states with a LEOBOR on the books, but Pantaleo's department functions under a number of LEOBOR-style policies. New York is "one of only three states ... that has a law specifically shielding police misconduct records from the public," and the NYPD regularly allows officers who commit serious offenses, including while on duty, to keep their positions. After he killed Garner, Pantaleo spent half a decade on desk duty, was given a substantial raise, and was assigned a bodyguard at taxpayers' expense. And though his NYPD trial did finally lead to his firing this week — well, I repeat the maxim about justice delayed.

All told, "the courts, the legislatures, union contracts, and even juries provide so much cover for police officers that it's a wonder any of them are held to the slightest account," Blanks concluded in our conversation. The accountability applied to Pantaleo — who was not indicted by a grand jury or federal investigation — was slight indeed.