



The Fitting Outcome in the George Floyd Trial Shouldn't Detract From Fundamental Criminal Justice Reforms

Qualified immunity and scant criminal prosecutions still shield cops whose brutality violates the constitutional rights of suspects

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1

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Convictions were handed down Thursday in the federal trial of Thomas Lane, J. Alexander Kueng, and Tou Thao, the three ex-Minneapolis police officers who watched as former officer Derek Chauvin murdered George Floyd by asphyxiation, ignoring Floyd's pleas that he couldn't breathe. The killing of Floyd, a Black man, triggered protests nationwide as a gruesome video of his death at the hands of Chauvin, a white policeman, went viral. All four officers were fired, and Chauvin was subsequently convicted of Floyd's murder in state court and sentenced to more than 20 years in prison.

With Thursday's guilty verdicts against the other three officers on the scene, the haunting memory of George Floyd's final moments has once again commanded the nation's attention. But our response to Floyd's death requires more than guilty verdicts in a rare police prosecution brought about by an unlikely video and unprecedented public outrage. Lasting change requires a system-wide reform of something known as "qualified immunity" — an arbitrary legal doctrine that creates an environment that excuses tragedies like Floyd's murder, prevents redress for the victims, and complicates the work of good cops trying to protect the public. Qualified immunity involves civil lawsuits, not criminal trials like that of Lane, Kueng and Thao, but the doctrine's perversities have compounded the problems created by historically scant prosecutions of police, complicating even a criminal case like this one.

The trial itself illustrates the problem.

The U.S. Department of Justice brought the three ex-officers to trial on two counts of "Deprivation of Rights Under Color of Law," a federal statute designed to prevent public officials from violating a person's constitutional rights. Thao and Keung were convicted of failure to intervene against Chauvin's use of unreasonable force, and all three officers were convicted of deliberate indifference to George Floyd's medical needs. While their guilt on these charges might seem obvious from the video, the trial's outcome was hardly a foregone conclusion. The verdict followed two days of tense deliberations as the jury navigated 38 pages of instructions on a legal issue with little developed case law.

True, the prosecution's pre-trial brief appears stuffed with highly persuasive legal precedents. Take, for instance, this one from *Nance v. Sammis*: "A police officer who fails to act to prevent the use of excessive force may still be held liable where (1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring." Based on these criteria, there's little doubt that *all three* officers were liable for failing to intervene while Derek Chauvin kneeled on George Floyd's neck.

There's just one problem: *Nance* is a *civil* case, meaning it involved a lawsuit against the police; it's not a *criminal* case, where the officers face a prison sentence. In fact, *most* of the cases the prosecution cited in the substantive portion of its brief were civil cases, a point the brief essentially concedes in a footnote. But criminal charges like the ones the three men are currently facing differ from civil lawsuits: Criminal guilt requires the ex-officers' violations to be "willful."

The Department of Justice's brief cited no direct authority on what constitutes a "willful" failure to act in the Eighth Circuit, where the men were tried. During the trial's closing arguments, one prosecutor tried characterizing "willfulness" as simply knowing what the law is and not following it. In contrast, a defense attorney, relying on the model jury instructions for the charge, emphasized that it requires a "bad purpose" or "improper motive." There was plenty of room for jurors to disagree about what standard to use without case law to set things straight.

The lack of case law speaks volumes about the current state of police accountability. True, there are many reasons for the dearth of court opinions — criminal cases generally produce less settled law, since the cases may plead out or yield unappealable "not guilty" verdicts. But not least among the reasons for the lack of authority is the fact that the government simply does not prosecute police officers that often. The Police Crime Database records that just 220 officers nationwide have been charged with murder or intentional manslaughter in the span of 12 years. Compare that to the database of police shootings kept since 2015 by *The Washington Post*, which has recorded around 1,000 shooting deaths *every year* — a number that doesn't include deaths from other causes, like asphyxiation. Prosecutors have little incentive to scrutinize the actions of police officers, whom they regularly rely on during their investigations.

Scant prosecution partially explains why the three ex-officers weren't responsive to the law's requirement that police intervene to prevent the use of excessive force. The fuller picture, though, has as much to do with civil law. Civil lawsuits alleging police misconduct vastly outnumber criminal prosecutions of police, because victims of police misconduct are far more willing to enforce their rights via civil lawsuits than prosecutors are to bring criminal charges against police (which is why the prosecution relied so heavily on civil cases in its brief). In theory, then, police departments ought to prioritize teaching officers to intervene when constitutional violations occur — if not to ward off the rare criminal charge, then at least to ward off expensive lawsuits.

But in the 1960s, the U.S. Supreme Court invented a legal defense that now prevents the majority of citizens' excessive-force claims against police from ever reaching trial, blunting the impact of civil lawsuits on police departments. The Court's doctrine, called "qualified immunity," requires anyone suing over a deprivation of their constitutional rights to first prove

that another person in the same legal jurisdiction has already sued successfully for nearly identical reasons.

The doctrine results in maddening decisions. Consider this court ruling in a case that the Supreme Court deemed unworthy of review just one month after George Floyd's death: "[Officer] Vickers is entitled to qualified immunity because ... there was no clearly established law making it apparent to any reasonable officer in Vickers's shoes that his actions in firing at the dog and accidentally shooting [a child] would violate the Fourth Amendment."

Few people would agree that a police officer shouldn't even be brought to trial because they were the first officer in their jurisdiction to shoot at a dog, miss, and hit a child instead. But courts now regularly subject civil suits against police to this exacting standard. In a dark irony, that not only makes police departments less attentive to the requirements of the law; crucially, it also muddies the meaning of a "willful" constitutional violation in criminal cases, where officers can essentially blame their departments for failing to provide proper guidance on their obligations.

Consider, for instance, that a major focus of the three ex-officers' defense during their trial was that their actions were consistent with their training, and that the Minneapolis Police Department spent minimal time teaching them when and how to take action if a fellow officer was violating someone's fundamental rights. Indeed, in his testimony, Kueng noted that intervention was brought up once during training, but never practiced. No doubt one of the jury's difficulties in reaching a verdict was that the defendants had plausibly argued that they did not know their duties required anything other than deference to Chauvin, who was the senior officer "in charge of the scene."

These training deficiencies can be found in far too many police departments, where attentiveness to citizens' constitutional rights has atrophied in the environment of near-zero accountability created by the twin problems of qualified immunity in civil cases and the government's reluctance to prosecute police on criminal charges. Alarming, there have even been examples of police departments *retaliating* against officers who attempt to intervene or de-escalate a dangerous situation. Former officer Cariole Horne was fired for stopping another officer who was beating a man who had already been handcuffed. And former officer Stephen Mader was fired for trying to talk down a suicidal man waving an unloaded gun.

The bottom line is that many police departments won't emphasize that police are required to break rank if they see a senior officer like Chauvin endangering a man, because the departments generally don't have much *incentive* to. For every case like George Floyd's, where bystanders catch police violence on video, there are scores more where press statements describing a "medical incident" go unscrutinized by prosecutors, and where the victims — or their surviving family — get shut out of civil courts by qualified immunity.

Ending qualified immunity would change this dynamic. Civil lawsuits give departments a hefty incentive to make substantive changes to their training of police officers in the use of force, because it puts their money on the line. The \$27 million settlement the city of Minneapolis paid to George Floyd's family was the largest pretrial settlement of a wrongful death claim in history, and it's unlikely the city wants to squeeze its budget to find a sum like that again.

Yet that settlement was unique — the result of enormous public pressure in an unusually visible case. Removing qualified immunity would force police departments to pay attention even when the public isn't. Police departments may be unlikely to see criminal charges brought against their officers, but the potential penalties from civil suits, which are far more common, would cause them to make intervention a focus.

That's why citizens looking for widespread police reform should support efforts to end qualified immunity. The Supreme Court, unfortunately, seems unwilling to reconsider its contrived doctrine, and proposed fixes in Congress have stalled. But Colorado, New Mexico, and New York City all passed important reforms in the wake of George Floyd's death. These measures bypass the qualified immunity granted in federal courts by making police liable for unconstitutional misconduct in *local* courts. The laws also explicitly provide that qualified immunity will not shield police from local liability, and each statute makes clear that officers must intervene when they see unjustified police violence.

The new laws are especially focused on ensuring that police departments, and at times even individual officers, are held directly liable for unconstitutional misconduct. This provides real incentives to the departments to remove the proverbial "bad apples" from their midst and to provide more training to officers on de-escalation and intervention. The added instruction will lead to fewer abuses, and, in turn, make it harder for offending officers to avoid criminal penalties by pleading that their duties were unclear. Note that nothing in these laws would make police officers liable for split-second mistakes.

In the end, police stand to benefit, too. Confidence in policing has fallen to historic lows, with only a slim majority of Americans backing the institution. George Floyd's tragic death sparked a necessary discussion about the role of race in our criminal justice system, and amid that conversation, Black Americans' confidence in police sits at its second lowest level ever — with the lowest being right after Floyd was murdered. There's evidence that public confidence would recover if bad cops were held accountable for their actions, removing a major cause of street protests that have roiled and polarized the country. This, in turn, would help good cops do their jobs.

But most importantly, ending qualified immunity ensures police departments and police officers have the right training and incentives to stop using excessive force against suspects. The officers involved with George Floyd's death were held accountable this week. But now we must strive for a future where police officers do not stand by as a man they've restrained cries for help, but instead stand up and demand that the man be allowed to breathe.

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