



## Why are cops rarely charged or convicted when they kill in the line of duty?

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A grand jury declined to indict police officers involved in the death of Daniel Prude in Rochester last year. That's not a huge surprise.

A grand jury convened to investigate the death of Daniel Prude – a Black man who was experiencing a mental health crisis during a fatal encounter with Rochester police last spring – declined to charge any of the officers involved in Prude's arrest, during which a mesh hood was placed over his head. The results of the grand jury's vote set off protests in Rochester and New York City this week, and prompted questions about why officers would not be held legally accountable for Prude's death.

But the grand jury's choice not to indict the officers involved follows a pattern; juries rarely charge or convict police officers for the deadly use of force. That pattern is especially pronounced when considering instances of Black people who are killed by police – officers weren't charged with homicide in the death of Breonna Taylor last year, nor was ex-NYPD Officer Daniel Panteleo indicted in the death of Eric Garner in 2014.

To find out more about the process of holding officers accountable for the use of deadly force and what policy changes might alter that process, City & State reached out to experts on criminal justice and policing, including Clark Neily, vice president for criminal justice at the Cato Institute; Nicole Smith Futrell, an associate professor and supervising attorney in the Criminal Defense Clinic at CUNY Law School; Deborah Ramirez, professor at the Northeastern University School of Law; and Nick Turner, president and director of the nonprofit Vera Institute of Justice in New York.

Responses have been edited for length and clarity.

### **What factors explain why police officers who kill in the line of duty are so rarely charged or convicted of murder or manslaughter?**

**Nick Turner:** I want to take a moment to reflect that Daniel Prude, George Floyd, Breonna Taylor, Tony McDade, Eric Garner, and so many others should be alive today. Systemic policing reform and developing anti-racist systems to support public safety is long overdue. Attorney General Letitia James' actions reflect that she has vigorously pursued justice and transparency in

this case and shares my disappointment in the Prude outcome. There are several factors that contribute to police officers who kill in the line of duty rarely being charged or convicted of murder or manslaughter. In this case, the legal protections afforded to officers make it harder to bring charges against them. Though protections vary by jurisdiction, officers generally have a defense to criminal conduct if their actions were “reasonable” under the circumstance. This “reasonableness” standard gives officers wide latitude to avoid culpability – especially if they can argue that their actions were consistent with training norms in their department. For example, in Daniel Prude’s case, as abhorrent as the officer’s actions were, the Office of the Attorney General’s investigation (see page 23) found their actions consistent with Rochester police training.

**Clark Neily:** I think there are two basic reasons why police who kill in the line of duty are rarely charged. First, the standard articulated by the Supreme Court, which is sometimes referred to as the “reasonably scared cop rule,” allows police to use lethal force when they reasonably fear for their own safety. Given the realities of the job, however, that test is extraordinarily easy to satisfy and can include anything from a furtive gesture to the failure to obey an officer's commands. Jurors applying such a lenient standard will generally credit an officer's testimony that he or she was afraid in the moment, even if it turns out after that there was no reason to be, which means that prosecutors will be correspondingly reluctant to bring charges. The second reason police who kill are rarely charged is even more straightforward: Prosecutors have a massive conflict of interest in making decisions about whether to pursue criminal charges against the very same police officers whom they depend on to bring them cases and testify in those cases in order to help win convictions.

**Nicole Smith Futrell:** There are many legal, social, and cultural factors that explain why police officers are so rarely charged when they kill in the line of duty. There is a traditional narrative that regards police officers as heroes on the front line who are trusted to protect, serve, and hold the threads of our social order together. The mainstream public is just now beginning to acknowledge what many in marginalized communities have long known: a legacy of racism, violence, and unequal treatment pervades this country’s legal and social order. As the tragic killing of Daniel Prude and the subsequent police cover up demonstrates, police officers often make social challenges worse, and institutional practices allow them to do so with impunity. Police culture does not value transparency. It relies on self-protection, concealment, and evasion. Additionally, the legal standards that govern the use of force generally center on the perspective of the officer and their decision making in the heat of the moment. The law gives police officers the benefit of the doubt, and the juries and judges who use discretion when hearing these cases in the grand jury, or in the rare instance at trial, also tend to defer to police officers.

**Deborah Ramirez:** It would be better if we established a system of police accountability that did not try to resolve accountability issues only through the lens of deadly force incidents. We need to prevent, detect and deter police misconduct before it escalates into deadly force. To do so, I advocate a system of professional liability insurance.

**What is the role of grand juries specifically in this process, and why do they rarely indict in cases of police killings – particularly in the deaths of Black people?**

**Nicole Smith Futrell:** The grand jury is a group of local people who consider the evidence presented by a prosecutor to determine whether a person should be charged with a criminal offense. The grand jury does not decide on guilt or innocence, but rather decides whether an

indictment, which is the basis for felony prosecution, will be filed. In cases that don't involve police officers, grand juries almost always return an indictment after a prosecutor's presentation. But data shows that when cases involving a police officer as the suspect are presented, grand juries rarely vote to indict. There are many reasons for this. First, the prosecutor holds a very influential role in the grand jury. They select which witnesses and facts to present, tell the jurors what the charge is, what the legal standards are and how to weigh the evidence. Unlike juries at trial, the grand jury process operates with no judge, defense counsel, or spectators. When you combine these factors with the reality that prosecutors depend on police officers to establish all the other cases they prosecute, many rightly question whether prosecutors use their outsized influence with grand juries to protect police officers. Second, it's important to think of grand juries as what they are: a microcosm of larger society, reflecting the prevailing conscious and subconscious views people hold about race, who is deemed credible, and whose humanity matters.

**Clark Neily:** Grand juries decide whether there is sufficient evidence for the government to pursue particular charges against a particular defendant, in which case they will issue an indictment. We have seen repeated examples of grand juries declining to indict police who killed people under circumstances where it seems virtually certain that any non-law enforcement officer would have been prosecuted. There can be many reasons for this, including a general tendency to credit police and a reluctance to second-guess their decisions in the field. Unfortunately, there is also evidence that prosecutors often present police-related cases to grand juries differently than they do with cases in which the defendant is not a police officer. In particular, prosecutors tend to present both inculpatory evidence and exculpatory evidence in cases involving police shootings so that grand jurors can have a fuller appreciation of the complete factual context. That is a luxury that ordinary defendants typically do not enjoy; instead, prosecutors generally present only the most damning evidence in order to ensure an indictment when the defendant is not a member of law enforcement.

**Deborah Ramirez:** Why no convictions? Jurors do not believe that police officers who have mistakenly perceived a deadly threat and thus mistakenly used deadly force are criminals. They view these cases as situations where a police officer doing a dangerous job made a mistake in the line of duty. They often empathize with an officer who had to make a split second decision. They understand that the decision may have been made in an instant and in a moment of confusion, misinformation or terror. It may be bad policing, poor judgement or a mistake, but jurors hesitate to label it a criminal act.

**Nick Turner:** While grand juries are meant to provide communities with power to guard against prosecutorial abuse, there are many other factors at play. In this case, I think the below factors played a role in this unjust outcome as James' office has made clear that their office presented the most comprehensive case possible. (1) Devaluing of Black lives. Deaths of Black people aren't viewed as seriously as deaths of white people, which can impact juror decisions. An example is the disparity in who gets the death penalty. Research shows that killing a white person makes it much more likely that you will receive the death penalty than if you take a Black person's life. (2) Implicit bias. Biases against Black people often appear in the broad "reasonableness" assessment of an officer's actions because jurors are socialized to believe that Black people are more dangerous and therefore greater force by officers may seem acceptable.

**What, if any, laws or policies can or should be changed by the state Legislature or other local policymakers to ensure accountability for cops who kill in the line of duty?**

**Clark Neily:** Legislators should raise the standard for the use of lethal force by police from “objectively reasonable” to “necessary,” as California did in 2019. They should also create a special unit within the state attorney general's office to handle the investigation and prosecution of killings by police officers in order to address the conflict of interest that local prosecutors necessarily face in handling cases. Finally, legislators should make it easier to sue police officers by eliminating the qualified immunity doctrine, which is a defense that enables rights-violating police to escape liability if it was not “clearly established” that the particular misconduct they engaged in was unlawful at the time they committed it. Of course, civil liability is neither a panacea nor a substitute for a criminal conviction, but it is far better than nothing and can send a powerful signal to other police officers to exercise more care in their use of lethal force.

**Deborah Ramirez:** In order to prevent, detect and deter police officers from misconduct, including the unlawful use of deadly force, legislators should require all officers to carry professional liability insurance. Doctors, for example, carry professional liability insurance. When they operate on the wrong leg or commit malpractice, insurance companies price them out of medicine long before they kill someone. Similarly, when police officers engage in misconduct or reckless policing, they should be priced out of policing long before their conduct escalates into a deadly encounter. Insurance companies price bad drivers off the roads. They should begin to price reckless police officers out of policing. An insurance system uses early warning indicators to weed out bad officers before they shoot. They could use these indicators: Prior civil judgements against the officer for police misconduct; domestic violence restraining orders; convictions for drunk driving; convictions for assault; a high number of civilian complaints; a number of prior disciplinary proceedings; and prior excessive use of force. There is a bill pending in New York that would require all officers to carry professional liability insurance.

**Nicole Smith Futrell:** There are some baseline measures that get raised when a grand jury declines to indict: greater transparency of police data and records, as well as grand jury proceedings; improving officer de-escalation training; amending use of force laws; shifting civil suit payouts from taxpayer funding to police insurance policies; and making sure that officers who are fired for misconduct are not rehired by other police departments. While some of these changes would be more useful than others, I am not entirely hopeful about the ultimate impact of reforms that rely on the criminal legal system as it currently exists for accountability. Having the New York Attorney General's office, as opposed to local prosecutors in Rochester, handle the grand jury presentation of Daniel Prude's killing happened because of a reform, and yet we are still searching for accountability. Accountability means responding to the fact that a police killing is only the most extreme manifestation of the routine police violence that happens every day. What if, for example, experienced, community based mental health first responders rather than police officers trained to use physical force and “spit hoods” responded to Daniel Prude's mental health crisis? The proposals that are most interesting to me are the ones that come from organizers who challenge us to reduce the scope and power of policing, invest in community-based social resources and supports, and reconsider what accountability for those who cause harm looks like.

**Nick Turner:** In this case, James' office did file for release of the grand jury minutes, which is rare, in and of itself. A judge granted that motion, which is incredibly rare in New York, and a

great step in the direction of transparency and accountability. This ought to happen automatically in grand jury proceedings involving police killings in the line of duty. In terms of Vera's recommendations, New York has the reasonableness standard. In 2019, California tightened the use of force standard from reasonable to necessary, which requires officers to have a greater justification before using deadly force. We recommend legislation in cases involving police killings, requiring immediate disclosure of evidence to an independent body. Officers should be automatically suspended during the investigation period. Suspensions usually happen in practice in New York, but it's not automatic by any means. Finally, Vera champions community-based approaches that can improve outcomes for people experiencing behavioral health challenges. For example, in 2019, Eugene, Oregon's, health-based CAHOOTS teams resolved almost 20% of the city's total 911 calls. You can learn more about alternatives to police-based approaches [here](#).