

Being Reactive Can be Detrimental to your Constitutional Policing

Description

Having dedicated my career to ensuring effective operations of police agencies, I believe what is currently happening is the most discouraging thing I have ever witnessed. It is disappointing on two levels; the first thing that upsets me is how quickly law enforcement lost the support of its citizens, especially when no one disagrees that the actions of one officer were not proper. And second, how quickly police executives around the country accepted the demands of those who have no basis of knowledge in how to guide the operations of their police departments. My mission has always been to promote constitutional policing and encourage community trust through transparency, procedural justice, and police legitimacy. Press reports are currently stating there are no standards for use of force, which is truly not accurate. We have spent years devoted to creating those policies and understanding how they best work for the community and the police officers who protect them. We understand what it takes to make all of these pieces work.

The topic of conversation, which I believe is a necessary one, is the effect of being reactive, rather than proactive, in situations such as the one in which we currently find ourselves following the death of George Floyd. Being reactive is detrimental to your agency. It is detrimental to the success of your officers and detrimental to ensuring constitutional policing. If you are reading this article and your use of force policy does not prohibit choke holds except for in deadly force situations, include de-escalation language, or you do not have language regarding bystander liability, then you need to strongly consider the operational challenges that you're facing in your agency. These requirements have been part of constitutionally sound policies for many years.

When it comes to the operation of law enforcement, history matters. When it comes to the operations of law enforcement, the law matters. We cannot allow those who lack foundational knowledge to force us to be reactive, which will ultimately impede the sound operational standards of our agencies. Being methodical in the development of policy, procedure and operational standards in a police department is done for a purpose; to ensure that agencies follow clearly established law and the history of that clearly established law. The law, and the history surrounding the establishment of that law, identify the foundation for law and provides an explanation for the decisions made when creating it.

More importantly, the purpose of sound policies, effective training and clear supervision is to ensure effective decision-making by your officers on patrol. In order for decision-making to be effective, the officers must have confidence; confidence in the system and confidence in the policy. That confidence is destroyed when policies are continually changed in a reactive response to demands of individuals who may not be looking to obtain the best out of our law enforcement, but to only promote continued inconsistency. Inconsistency is what causes a lack of confidence, which inhibits the officer's ability to be discretionary with confidence and boils down to poor decision-making.

History Matters

While this is another event in the continued history of law enforcement, the history of this country, it is amazing how quickly history is forgotten every time an incident like this occurs. We all agree that the

actions of the officer during the George Floyd incident were improper, unethical and criminal in nature, but it is important to remember how we got here. History has repeated itself many times over the years, including significant portions of history that has developed law enforcement into effective and constitutional policing. We started in the mid-1960s with the race riots, which led to the Kerner Commission and the Kerner Commission report in 1967. The Kerner Commission's focus was to look at deep-seated hostility and antagonism between police and minorities and to examine the criminal justice system after the Civil Rights movement.

The Kerner Commission found that since police were the most visible component of the criminal justice system, the changes in law enforcement operation would benefit everyone in the network. These changes were placed into three categories: professionalism, accountability, and community policing. There was then a request (at that point a recommendation) to improve police accountability in order to eliminate and reduce police harassment; and to establish the adequate grievance mechanisms in which citizens could more easily lodge complaints against misconduct by law enforcement officers through a discussion in examining who we hire, why we hire them and what we do with them once we hire them.

The Kerner Commission was codified into law by the United States Supreme Court in 1978 with the *Monell* decision which we will discuss below. The application of effective policy, training and supervision progressed through the 2014 death of Michael Brown in Ferguson, Missouri. After 2014, there were two significant documents that guided the operation of law enforcement: the investigative report produced by the Department of Justice on March 4th, 2015, and the final report of the President's Task Force for 21st Century Policing, produced in May of 2015. These documents were developed to examine ways to foster trust and understanding between police agencies and the communities they serve to identify programs and activities that promote the reduction of crime while promoting public trust. In fact, the President's Task Force did not find that police were not operating effectively, they found that there was a failure in the criminal justice system, along with a broken social services system. That Report fell upon deaf ears because the finding was not the desired result.

What is baffling is that the conclusion of the President's Task Force report has since then been forgotten. The overarching recommendation found that the President should support and provide funding for the creation of a national crime and justice task force that would allow evaluations of all components of the criminal justice system for the purpose of making recommendations to the country on comprehensive criminal justice reform. This would allow the country to promote programs that take a comprehensive and inclusive look at community-based initiatives to address the core issues of poverty, education, health and safety.

The President's Task Force report identified six pillars: building trust and legitimacy, policy, technology, community policing, training, and officer wellness. These pillars became the guideposts for law enforcement operations in 2015. What is scary is how quickly we threw those all away in one week following the actions of the officer in the George Floyd incident. We are not thinking about the implications of such actions to the 680,000 other officers in our country.

The Law Matters

Law enforcement operation is required to follow the clearly established law in this country, the clearly established law that guides the decision-making of law enforcement officers. The law matters. If we throw the law away, this means that we are going back to a point in history where our operations were not as constitutionally sound or effective as they are today. This will cause a return to a time where we

were not always protecting the constitutional rights of our citizens.

In 1978 the Supreme Court ruled in a case called *Monell v. Department of Social Services*, (436 U.S. 658 (1978)) and it held that Section 1983 civil rights liability applies to municipalities and local governmental units when policies or official procedures are responsible for the violation of federally protected rights. This legal standard has guided law enforcement operations throughout the country since 1978, focusing on identifying and clarifying means to prevent constitutional deprivations of citizens visited pursuant to governmental custom, even if such a custom had not received formal approval through the body's decision-making channels. In order to find an agency liable, the law required an existence of an official policy or custom of such longstanding to have the force of law pursuant to which one or more municipal employees violated the plaintiff's civil rights.

In 2006, in a case called *Hudson v. Michigan*, the Supreme Court held that:

We now have increasing evidence that police forces across the United States take the Constitutional rights of citizens seriously. There have been wide-ranging reforms in the education, training, and supervision of police officers. Numerous sources are now available to teach officers and their supervisors what is required of them under this Court's cases, how to respect constitutional guarantees in various situations, and how to craft an effective regime of internal discipline. Moreover, modern police forces are staffed with professionals; it is not credible to assert that internal discipline, which can limit successful careers, will not have deterrent effect!

Conclusion

This country should not allow history to repeat itself. Executives should not allow individuals to force reactive means that dismantle years of research, legal case law and legal decisions to meet the needs of those that may just be looking for a manner in which to manipulate clearly established law. The basis of operations is to ensure that officers understand, identify and operationally support mechanisms and means to support the constitutional rights of our citizens. The actions of one officer do not reflect the hard work and dedication of law enforcement to the protection of civil rights in this country. While some may never understand the operational requirements of law in history, we owe it to our officers on the street to provide clarity, to assist them in their decision-making, to promote confidence, and to provide our support. I ask you to reconsider reactive responses as they are only undermining law enforcement's history of hard work and dedication in this country.

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