

Qualified Immunity in Law Enforcement

Lieutenant Joseph Chevis Jr., St. Charles Parish Sheriff's Office
Sergant William Schmierer, Baldwin County Sheriff's Office
Lieutenant Royce Starring, Lafayette Police Department
Lieutenant Jeffrey Hirsch, St. Charles Parish Sheriff's Office

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Abstract

Qualified immunity, when represented in law enforcement, has garnered national attention. History shows us how over the centuries, how the concept of qualified immunity was born and at times strained to its breaking point. It seems today, the phrase is tossed into every argument, whether being made by pundits, politicians, or police. It seems some have no idea of its purpose and accuse law enforcement of simply hiding behind the words that serve to protect law enforcement in applying their duties. Some agencies, across the nation barely cling to life because such immunity has saved their agencies from being completely overrun and dismantled by the Federal Government or watchdog groups. Have the pundits and politicians got it right? Are they correct when these groups say the idea of protecting law enforcement from lawsuits and arrest for carrying out unjust laws or engaging in what they see as abusive use of force? We shall look at the origins of qualified immunity and how its shaping was affected by the United States' ever-changing landscape. We then will examine how media uses the terminology. Are they just after soundbites or are they truly attempting to inform the viewers? We will explore and vet what evidence we can locate to see if this policy has vastly been a significant issue to those who live in the most at-risk communities, and lastly, try to understand if such concepts should still have merit in our current times. We hope that, though we are affected by this very topic, we can allow the data to speak for itself.

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This project's nature was to have four law enforcement officers, all from different jurisdictions and localities, take an honest look at qualified immunity. The purpose is to set aside our biases as law enforcement and let the unfiltered and unbiased research speak for itself. As the topic of increasing alleged abuse from law enforcement agencies grows, so do the complaints of unfair shielding caused by qualified immunity. However, this legal concept does not prevent officers' arrest or charging; it does offer relief from civil prosecutions from those who have been wrongly accused or arrested. For example, "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." (Legal Information Institute, n.d. para. 1)

One only needs to turn on the T.V. or thumb through social media platforms to see what appears to be a daily news event; alleged illegal officer use of force to effect an arrest or officer-involved shootings. News companies are quick to jump on flashy stories that guarantee the viewership, but are all too often non-existent following up on the investigations and trials when the attention fades away. What were once national headlines are now relegated to backpages or no coverage at all by the same news agencies that voraciously consumed these stories just months, weeks, or even days before. It leaves these writers in a state of confusion as to what their motive behind this could be. Could it be these pundits know qualified immunity will save these falsely accused officers in the end, or are they just willing to move on from soundbite to soundbite, not worrying about what damage they inflict? To progress our understanding, we will need to look more in-depth at how the media connects law enforcement with qualified immunity.

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Curiosity begs to know, how have our most at-risk communities have been affected by qualified immunity? Indeed, we would think there was little correlation between such specific protections and how police agencies conduct themselves. Has this caused an even greater rift between communities and the police? Certainly, mistrust is always present, but when flashy news headlines condemn police actions rife with misinformation, it only seems to make the lack of trust grow more vigorous. Is this concept lost on a community told that recourse and justice can only be found through litigation, only to find their hopes dashed when losses in Court are handed down? In a study conducted by Reuters News (2020), the news agency broke down thousands of cases at the State and Federal Court of appeals and the U.S. Supreme Court involving the use of force issues. The data shows how State and Federal Appellate Court decisions mirror those of the Supreme Court. In most circumstances, courts overwhelmingly ruled in favor of officers in both granting qualified immunity on their behalf or agreeing with their petitions for dismissal based on qualified immunity.

Now having new information we can say the data shows courts siding with law enforcement is the proper practice of granting qualified immunity, done so by following the clearly establish precedent. Pundits and the media say lawmakers are negligent and are hesitant to establish new precedent. Is there an ever-widening gap between police practices and the community allowing rouge officers to be heavy-handed and abusive or even get away with murdering an offender? If the data sets do not lie, we have to establish the pattern that has taken centuries to arrive to the place where we are today. To adequately do that, we must start when qualified immunity did not exist as a concept or the rule of law.

Literary Review

The growth of America was not unlike any other nation. We fought to secure our freedom and independence from England as a united effort, thus calling ourselves the United States (History, n.d. para 1). We sought a level of independence and liberty for all those who would call America home - or did we? During the growth of America, slavery was a common and well-established practice (Lumins, n.d. para 1). It took many years after the founding of America until its custom was seen as cruel and violent. The method of slavery was so tainted and divisive that it caused a seemingly insurmountable rift between the Northern and Southern states that led to the Civil War (History, n.d. para 1-17). Even though the outcome eliminated the practice of slavery, the Southern states were slow to acknowledge the freedoms granted to those of color.

“A new and dangerous group arose in Pulaski, Tennessee, when a veteran group of Confederate soldiers formed a group calling themselves the "Ku Klux Klan" (History, n.d. para 1). Though there is little agreement on why they chose that name for the group, there is no doubt of the powerful impact it immediately began having on the newly freed slaves in the South. After President Lincoln's assassination in 1865, it only took four years for the newly elected President, Ulysses S. Grant, to recognize the Klan as a powerful advocate for evil. Through the “Reconstruction Act of 1867” (The United States Senate, n.d. para 1), President Grant sought to rebuild the country and remove the stigma and traces of slavery. The Ku Klux Klan, however, had its diabolical agenda. They continued to reign terror upon the black citizens of the South, using murder and violence to establish fear in the hearts of blacks and anyone who would do business with them. The problem continued to grow and fester like an untreated wound until it reached a level that could not go untreated.

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“In 1871, President Grant and Congress passed "The Enforcement Act of 1871". Also known as the Ku Klux Klan Act, the act empowered the President to suspend the writ of habeas corpus to combat the Ku Klux Klan (KKK) and other white supremacy organizations. The act was passed by Congress and signed into law by President Grant on April 20, 1871. The act was the last of three Enforcement Acts passed by the United States Congress from 1870 to 1871 during the Reconstruction Era to combat attacks upon the suffrage rights of African Americans. The statute has been subject to only minor changes since then but has been the subject of voluminous interpretation by courts (Wikipedia, n.d. para 1).

Grant's request came due to the reports he was receiving of widespread racial threats in the South, particularly in South Carolina. President Grant felt that he needed to have his authority broadened before he could effectively intervene. After the act's passage, the President now had the unprecedented power, for the first time, to both suppress state issues on his initiative and to suspend the right of habeas corpus. This act eliminated the due process rights granted under the 5th and 14th Amendments.. President Grant wasted little time and did not hesitate to use this authority on numerous occasions during his presidency. His goal of dismantling the KKK was realized and “ended the first "Klan" uprising until the beginning of the 20th century” (Wikipedia n.d. para 2).

It took almost 100 years for the issues of racial prejudice to come to a head once again. In the decades spent trying to dismantle the Klan, the group had always maintained a foothold in the South. While conducting backwoods ceremonies and rituals, its secret society members enjoyed the power and privilege bestowed on our representatives, mayors, governors, and police officials. The Klan had spread its hateful roots into every fabric of governance. They were decisive and quick, making laws that segregated the black and white population, even making it

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illegal to intermingle blacks with whites. Accommodations for the black community were subpar at best. Great care was taken to ensure these United States citizens were treated as foreign invaders, with no quarter or respite being freely given.

After decades of continued abuse, a single incident would start a chain of events still being felt to this day. “On September 13, 1961, 15 pastors, including three black pastors, took taxis from Tougaloo, MS., into the nearby Jackson, Mississippi Trailways bus terminal to catch a bus to Chattanooga, TN. The men entered a coffee shop to have lunch before their departure, and two police officers stopped them. Officers David Allison Nichols and Joseph David Griffith asked the men to leave, and when the group refused to do so, they were arrested and jailed. All 15 pastors were charged for breach of peace, under a Mississippi code that "makes guilty of a misdemeanor anyone who congregates with others in a public place under circumstances such that a breach of the peace may be occasioned thereby, and refuses to move on when ordered to do so by a police officer" (Wikipedia, n.d. para 3). “They were brought to trial before the local Judge James Spencer who found them guilty of breach of peace and sentenced them to 4 months in jail and a \$200 fine. After raising money for bail, they appealed the case de novo in the Hinds County Court. Judge Russell Moore showing no violation of the law (directed verdict) on May 21, 1962, dismissed the case against the priests (Wikipedia, n.d. para 4.) “Represented by Carl Rachlin, the chief legal counsel at Congress of Racial Equality, the men sought damages in the Jackson district court before Judge Sidney Mize. They alleged the police and the local Judge had violated Title 42, Section 1983 of the 1871 Ku Klux Klan Act by false arrest and imprisonment for exercising their civil rights. However, the jury found in favor of the police, who said they were trying to prevent imminent violence from a gathered crowd, contradicting the priests' evidence” (Wikipedia, n.d. para 5).

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“On appeal, the Court of Appeals for the Fifth Circuit found that the local Judge was immune from liability for his decision. Although the appeal court found the Mississippi code unconstitutional, it found that "Mississippi law does not require police officers to predict at their peril which state laws are constitutional and which are not"(Wikipedia, n.d. para 5). This was the first time in America's history when the idea of qualified immunity was used to successfully end a civil judgment against those who held power to make laws and enforce them unjustly.

In 2020 there were an estimated 978 people shot and killed in the United States by police officers. This, along with Michale Brown, Breonna Taylor, and now the George Floyd cases, has rekindled the fire brewing the talks of qualified immunity. People have been holding a grave misconception of qualified immunity. The overall thought is that qualified immunity only applies to police officers. We, of course, know that not to be true. In addition to police officers, several categories of government workers, including prosecutors, judges, legislators, and high-level officials, enjoy both qualified immunity and *absolute* immunity—meaning that even if a court finds that absolute immunity does not apply, these workers are still entitled to qualified immunity (ij.org, 2020).

Contrary to popular belief, qualified immunity does not protect police officers or government officials who violate the law. It appears this erroneous perception is due to the way the media prefers to cover officer-involved shootings. It is also fair to contribute this fallacy to how the public uses social media to spread false versions of the events.

Lt. Royce Starring of Lafayette PD recalled how social media influenced society during an officer-involved shooting on August 21, 2020 involving members of his police department. Lt. Starring noted, as the events unfolded, it was live-streamed through social media platforms. Officers at Lafayette PD started receiving snippets of the video via text messages before the

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police department entirely knew of the event. Quick distribution of the video allowed people to manipulate and edit the video to influence the viewers' perception and garner support for the suspect. This incident manifested into the public's belief that the police officer committed some criminal offense and would never be held accountable for it. Lt. Starring says the police department is still dealing with reclaiming the PD's good stature in the aftermath of such reckless and thoughtless behavior.

Lt. Starring recalled that along with certain civil rights groups, the news media use their prospective outlets and social media platforms to display these negative videos to the public. News stations played the edited videos repeatedly, and it seemed to be on every local network, no doubt helping to boost their ratings. The media networks' repetitive showing of those videos helped influence groups that descended upon Lafayette screaming for fair justice. Civil rights or protest groups such as Black Lives Matter and NFAC (Not F--king Around Coalition) believed the lies being broadcast and relayed to the citizen about the Lafayette police operate under protection qualified immunity which prevents them from being prosecuted.

We know this is far from the truth. When a police officer in the performance of his duties commits an act in good faith, they can be protected by qualified immunity. The citizen assumes that police officers are automatically protected by qualified immunity. If a police officer commits a criminal act, they are not protected by qualified immunity. There has to be evidence of a civil rights violation or egregious acts committed by the officers for qualified immunity cases. That issue has to be brought before the Court, where the Judge can issue a summary decision. In the decision, the Courts must find that the Officer (s) involved knowingly acted in bad faith, from under the color of law with a specific interest to harm that individual's civil rights (Legal Information Institute n.d. para 5-10).

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In Arizona, the University of Arizona police responded to a domestic disturbance where Amy Hughes was welding a knife standing six feet away from her roommate. She was subsequently shot by a responding officer four times. Three other officers did not fire. In this case, the U.S. Supreme Court ruled that Officer was protected by qualified immunity (Morshedi, 2018). In the aftermath of numerous incidents involving police shootings and deaths at police officers' hands, some states are passing reforms to eliminate qualified immunity. Colorado was the first state to limit the use of qualified immunity (The Marshal Project, 2018), with Connecticut following suit (Forbes, 2020). New Mexico and Louisiana are currently attempting to pass their reforms.

In some cases of qualified immunity, some did not apply. In the George Floyd case, the Officer was indicted by a grand jury and awaiting trial (NPR, 2020). In the case of Breonna Taylor, one of the officers involved was charged criminally and resulted in the state changing the law where the police can no longer conduct “no knock” warrants (NPR, 2020). Suppose the news media and social media platforms continue to spread the belief that qualified immunity prevents officers from being sued for civil liabilities or civil rights violations; In that case, this wound can never be allowed to heal. Suppose officers do not act in good faith, commit crimes, or violate a person's civil or constitutional rights. In that case, they are arrested for the crime they commit and will most likely be sued for violating civil or constitutional rights.

In short, the media plays a massive role in the public perception of how police are protected by qualified immunity. Once a state starts to adopt modified versions of qualified immunity or eliminate it, the outcome could lead to police officers second-guessing their decisions. In a worst case scenario, the outcome could lead to police officers losing their jobs for

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failure to act, malfeasance in office, or make a fatal mistake that can lead to losing their lives while struggling to make a judgment call.

Qualified immunity appears to have affected the public and high-risk communities by straining already fragile relationships between law enforcement agencies and the communities they serve. According to the public, the trust between law enforcement officers and the community is broken (Thomas, D. n.d.). Qualified immunity seems to make it impossible to hold law enforcement responsible for wrongdoings. Is it fair that law enforcement officers can use their badge and their powers to abuse people? Officers took an oath to serve and to protect their communities. If an officer is guilty, he or she must be held accountable for their actions. Law enforcement's image is tarnished, as it has become a dangerous cycle of violence and mistrust.

Overcoming the misconceptions of qualified immunity is a challenge, but it is not impossible. Making the requirements of qualified immunity more stringent could help public officials begin gaining public trust once again. When ensuring public safety, officers can rebuild their trust by committing to a better understanding of their constitutional limitations while remembering they have sworn to be conservators of the law. Building and maintaining community trust is the cornerstone of successful policing and law enforcement (Homeland Security, n.d. para 1).

When repairing the existing relationship between the police and the community, we must enlist our youth. To help effect a positive future, we need to include the youth since they are our community's future leaders. Our youths have also become the victims of police-involved shootings, in-custody deaths, and racially stemmed profiling. This has led to a tense atmosphere, with negative behavior portrayed through rioting, looting, or violence against law enforcement.

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When we as humans "have an inability to recognize the need for each other, it widens the divide, and public safety has suffered as a result" (Partee, 2017 para 2). The accountability of fostering a better relationship falls on both law enforcement and the community. The two should be obligated to pursue the same goals and results. Through observation and introspection, interaction, and investment, law enforcement and their communities can foster transparency that the community and law enforcement crave for a healthier relationship.

By the lessons learned during Command College, we as an adaptive leader can show how introspection teaches law enforcement and the community to purge themselves of any behaviors, practices, or policies that could hinder closing the gap between them. Both can challenge each other on their contributions to the successes and failures of their relationships. Using these methods, we can instill ideals that reduce the friction caused by many years of contentious relationships.

Even though the days of Jim Crow laws have passed, police agencies must take it upon themselves to review their policies and monitor officers' performance. The excuse of "just following orders" is not acceptable any longer. By making conscious efforts to build partnerships with police officers, the community can learn policies and procedures where they now can dissolve potential for controversial incidents. Interaction allows both police officers and the community to find ways to solve problems and understand public safety. A good example many agencies use is a Citizen's Police Academy, as held by St. Charles Parish Sheriff's Office. Here is where the community members can learn a thorough understanding of the law enforcement profession's policies and procedures. When the community has an understanding of law enforcement duties, including inherent dangers, they can better understand critical incidents

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as they arise. Leading to less volatility and better understanding between the community and law enforcement.

Investment can be the most difficult to achieve of these three but is the most accredited. "When one party invests in another, it becomes tied to the successes and failures of the other party" (Partee, 2017 para 8). When officers work in some community regions, over time, the Officer should be aware of the difficulties, demographics, and history of that area. This evaluation should be a vital part of officers' development and can diminish issues in the community, as the officers are knowledgeable about their surroundings. The community should be willing to impart this knowledge to police officers through relaxed contact or formal training settings. Making these strides can repair the relationship between law enforcement agencies and their communities wholeheartedly with a combined effort.

As stated above, at-risk communities and law enforcement need the youth's help to bridge the gap in the failed relationship between the two. We can have catalogs of ideas, but if we do not put those creative ideas to work, what good do they do. Nothing breeds more mistrust than seeing police officers going free after what they were convinced was a guaranteed conviction for excessive use of force. It is easy to see where the confusion and anger come from when they only get their news in abbreviated stories, snippets, and flash headlines. The stories they read have no substance and lack any form of actual "news" in them. The only service it does is getting them to turn to social media platforms and begin an echo chamber of like-minded tweets and comments (Kuchera-Shutterstock, B. 2019). It is in this arena law enforcement must use the opportunity to educate them on legal matters. Due process, court proceedings, rules of evidence, and convictions need to be thoughtfully and thoroughly explained on a level an average person can understand. When matters of civil rights accusations are being bandied about, we need to

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explain the precedent of qualified immunity and its possible application in the pending case.

When people grasp those things they of which they have minimal knowledge, it helps ease the flash to anger over seemingly rigged systems.

Advocates for police reform are championing the call of abolishing Qualified Immunity, which seems to have become a critical focal point in the debate over racial injustice in today's policing. In 2020 the "George Floyd Justice in Policing Act" passed the House of Representatives but later died in the Senate. This Bill had stipulations that would have ended the Qualified Immunity Doctrine. In March of 2021, the House of Representatives passed a more targeted Bill, "Ending Qualified Immunity Act." The "Ending Qualified Immunity Act" was spearheaded by Congresswoman Ayanna Pressley from Massachusetts. The Bill states that police officers continue to escape accountability across the country when they break the law and are shielded from liability by the doctrine of qualified immunity. It furthers, in 1871, to help realize the promise of equality protected in the Fourteenth Amendment, Congress passed the Civil Rights Act of 1871 granting individuals the right to sue state and local officials who violate their rights, including police officers, under Section 1983. Since 1967, the Supreme Court has issued several decisions gutting this protection. By inventing the qualified immunity doctrine, which prevents police officers from being successfully sued for abuse of power or misconduct unless a prior case has "clearly established" that the abuse or misconduct is illegal - unique protection that no other profession holds. The Bill continued to state, the Court's broad interpretation of this doctrine allows police to violate constitutional rights with impunity, immunizing them for everything from unlawful traffic stops to brutality and murder. Finally, qualified immunity shields police from accountability, impede true justice, and undermine the constitutional rights of every person in this country. It is past time to end qualified immunity (Pressley, 2021).

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The Bill contains language and concepts that do not reflect the proper intention of the Qualified Immunity Doctrine. That being said, it is worth taking an objective look at the pros and cons that surround this widely debated topic. First, does the doctrine, in fact, shield law enforcement officers from unlawful acts? Per the language of the doctrine itself, it does not. Qualified immunity does not protect officials who violate "clearly established statutory or constitutional rights of which a reasonable person would have known. The doctrine is worded so that it does not protect the incompetent, or ones who would plainly violate the law. Furthermore, Qualified Immunity provides no protection against criminal prosecution. Qualified immunity is a judicial doctrine that shields public officials from frivolous civil suits unless their actions violated "clearly established law" (*Mullinex V. Luna*, 577 U.S. 7, 11, 2015).

However, the misinterpretation of the doctrine does not just lie within its opposition. In June, 2020, the National Association of Police Organizations submitted a letter to Congress in opposition to the George Floyd Justice in Policing Act. This particular Police organization represents approximately 240,000 Police Officers. In that letter, there were several incorrect assertions about Qualified Immunity. The most glaring was the assertion that removing the doctrine would open Officers to criminal liability. "With the change to qualified immunity, an officer can go to prison for an unintentional act that unknowingly broke an unknown law. We believe in holding officers accountable for their actions, but the consequence of this would be making criminals out of decent cops enforcing the laws in good faith" (Johnson, 2020). This erroneous assertion that Qualified Immunity has anything to do with criminal prosecution comes from one of the country's largest police unions.

Now that we understand the fallacies propagated by both sides of the issue let us look at the objective facts surrounding Qualified Immunity. Eliminating qualified immunity can open

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the flood gates for additional litigation and substantially negatively impact budgets. Since funding for law Enforcement budgets come from the citizens, ultimately, the citizens feel the adverse effects. We have seen this issue arise in states where politicians and pundits are screaming to defund the police, but the residents want more funding and a more significant police presence. Since this doctrine also covers numerous other government officials in their duties, abolishment would mean these agencies would not be able to act immediately for the good of the people. Regarding Law Enforcement, not having the protections afforded by Qualified Immunity could cause hesitation in life and death situations. This action could ultimately lead to injury and loss of life. As the authors of this study are all ranking members within their agencies, they all have personally witnessed, at their respective agencies, suffer from a lack of new applicants and the struggle with retention, and recruitment rates being negatively impacted.

Finally, does Qualified Immunity create and foster an unethical environment for Law Enforcement Officers to operate with impunity? The doctrine does not shield any official from criminal liability in any circumstance. It also does not shield any official from "knowingly" violating the rights of another, nor does it exempt any agency or organization from punitive damages that occur where the Officer may be protected. In this way, the organization has a vested interest in deterring unethical behavior. While operating in real-life scenarios, the criminal prosecution threats to the unethical Law Enforcement Officer far outweigh any punitive ramifications.

While there is a public outcry for police reform, the answer is not found in abolishing qualified immunity. It is a glance fix that can lead to far more long-term adverse effects than positive. Law enforcement is needed now more than ever, and a call to end qualified immunity

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could significantly decrease the desire to adhere to that calling. People can be deterred from the profession due to fear of frivolous legal action when faced with danger or a life-threatening situation. While reform is a good thing and sometimes vital, the reform here is not found in abolishing qualified immunity.

Conclusion

As we have examined the many layers surrounding qualified immunity, it is our stance that it is still a valuable and crucial part of the jurisprudence process. As law enforcement, we must be able to do our jobs without fear of reprisal from overly litigious lawyers seeking nothing more than their 15 minutes of fame. Does this mean we are free from the yoke of duty and responsibility? No, and far from it. We cannot turn a blind eye to the damage our profession has caused. We all have seen other agencies or officers who are still acting unacceptably and cringe at the impending onslaught of negative media coverage. We must comb through our policies and procedures and hold them up in the light of the new parameters our customers expect us to operate under. Because we endeavor to be adaptive leaders, this helps to grow and foster better relationships. Something as simple as allowing the members of the public or their appointees, such as representatives of minimalized groups, to sit in on our review process of use of force policies. Having a non-law enforcement input helps us stay grounded in the current trends and realities. Law enforcement should jump at the chance to explain their "why" to those representatives. The power to have them explain it to their community to educate those who misinterpret our intentions is priceless.

Being more open and transparent with the parts of the justice system we control is way past due. As the new and future leaders of our agencies, understanding this new generation is socially aware and driven by instantaneous information must be at the forefront of press releases

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and our Press Information Officer's actions. Police agencies all too often hide behind policies of trickling out information in drips and drabs because it may or may not affect the investigation.

We have seen agencies hide behind these policies even after the entirety of a case has been leaked or correctly surmised by pundits. These actions only add to our predisposition to hide our truths and protect the officers involved.

When an officer or agency violates a person's civil rights, everything should be done out in the open. Qualified immunity should not be employed to bail them out of the situation they placed themselves in. As we have gone through many leadership lessons, we know the warning signs to look for when we are looking within for meaningful changes. Are we still employing the toxic leader who is unwilling to make the changes to grow with the times? Have we taken steps to move our agency from good to great, or are we still clinging to those things that have always worked in the past, so we see no reason to change them? What are we teaching our staff when it comes to versatility, conflict management, or community leadership? Pinning down why there is a growing rift between the police and the public really is not hard to do, and though we do not always benefit from qualified immunity, it is not hard to see why the public feels the system is slanted against them. It is our responsibility to act now and swallow our pride when it comes to admitting past mistakes. Lessons learned through Emotional Intelligence help us control and change the factors that keep us rooted in past mistakes.

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