

BUILDING CAPACITY:

How Police Departments Can Drive Positive Change Without Federal Intervention

July 2019

On my honor, I will never
betray my badge,
my integrity,
my character or the
public trust.

I will always have the
courage to hold myself
and others accountable
for our actions.

*I will always uphold
the Constitution,
my community,
and the agency I serve.*

Prepared by:

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Introduction

Federal intervention in local police agencies is disruptive, expensive, and often occurs after a high-profile incident that strains community relations and damages public perception of a department. But through understanding the concepts and strategies found in 1,500 pages of consent decree documents, many departments can identify areas for improvement and develop new training and policies to strengthen police practices and procedures before they lead to incidents or patterns of behavior that significantly damage public trust. This report seeks to translate lessons learned across 20 years of consent decrees into an accessible checklist for police executives to proactively enhance their departments and strengthen community partnerships without the cost, scrutiny, and disruption of federal oversight.

Since the Violent Crime Control and Law Enforcement Act of 1994, the U.S. federal government, through the Department of Justice (DOJ), has the authority to investigate the actions of police departments on the limited grounds of constitutional behavior. Since its passage the DOJ has conducted 69 formal investigations under the authorizing Section 14141.¹ The investigations have addressed areas related to unlawful use of force, racially biased policing, and unlawful stops, searches, and arrests, among other topics. In recent years, with the advent of readily accessible cameras, police actions, good and bad, are routinely captured by the public. Incidents with tragic outcomes often immediately go viral and serve to erode trust and confidence in the police by the community. Even before the widespread use of hand-held cameras, high-profile incidents brought issues of police-community relations and police conduct to the forefront of the DOJ and indeed, the whole nation's attention.

These incidents sometimes provoked a federal investigation by the U.S. Department of Justice's Civil Rights Division (known as CRT) and such investigations often resulted in a finding that a police agency engaged in a pattern or practice of unconstitutional policing, where police practices and behavior are found to be in violation of the U.S. Constitution. This has most often related to 4th Amendment rights (the right against unreasonable searches and seizures), 5th Amendment rights (the right against self-incrimination and double jeopardy and the right to due process of law and a grand jury), and 14th Amendment rights (the right to U.S. citizenship, due process protections, and equal protection of the law). Section 14141 authorized the Department of Justice to sue police departments for engaging in "a pattern or practice of conduct" that violates Constitutional or federal rights. These pattern or practice cases are investigated, litigated, and enforced by the Special Litigation Section of the Department's Civil Rights Division often in coordination with the local United States Attorney's Office. (See Appendix I for an overview of the federal authority and process related to such investigations.) In 21 cases between 1997 and 2017 (see Table 1), the outcome was a set of court-enforced reforms in the form of a consent decree designed to remedy the violations. While these investigations and subsequent consent decrees

¹ *The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present*, U.S. Department of Justice (2017).

are intended to change the culture and behavior of individual police agencies, few agencies that are not under investigation use the detailed findings and remedies to review and strengthen their own agencies.

These agreements require a substantial commitment of resources from the jurisdictions that are legally bound to comply. Consent decree jurisdictions typically are required to support personnel dedicated to implementing reforms and working toward compliance, invest in new and expensive technology, and cover the cost of a court monitor. For example, the New Orleans Police Department spent more than \$10 million on the consent decree and Seattle spent at least \$5 million.² In addition, it can take years for departments to become fully compliant. For those jurisdictions where a consent decree has been closed, the average length of time a department was operating under the consent decree was over seven years. Of course, unconstitutional policing can be expensive even without a federal consent decree, because many cities pay out millions of dollars annually in civil lawsuits. But, the economic impact of these insurance settlements is typically not felt as much because they are often paid by insurance companies.

Perhaps more importantly, in places where unconstitutional policing has been alleged and shown to exist, police-community relations are inevitably weakened and levels of distrust increase. This is in conflict with one of the pillars of good community policing: strong community partnerships, which are fundamental to safety and modern policing. Law enforcement agencies would be well-advised to take steps to ensure that they do not find themselves as a defendant in a lawsuit and party to a consent decree.

The best law enforcement agencies should see the requirements found in consent decrees to be the floor and they should, in fact, be aiming higher. For example, just because an officer can use force does not mean that an officer should use force and pursuing approaches to encourage limiting the use of force overall is an appropriate goal. Certainly, constitutional policing and effective crime reduction strategies are not incompatible and both can be achieved.

Many departments operate with policies that have been in place for decades; many do not have the financial or legal resources for regular and comprehensive policy updates; and departments are not required to be accredited which can serve as a mechanism for a routine review of the legality and currency of policies. Most police executives do not train, preach, or promote behaviors that are on their face unconstitutional – and yet, those behaviors happen. Rigorous review of policies and practices against the benchmarks of consent decrees could be one step of several to prevent that horrible incident that receives international attention and scrutiny or to have in place the infrastructure to make sure that a horrible incident is not exemplary of a deeper pattern of unconstitutional policing.

² Bloomberg, May 27, 2015, "A 'Pattern or Practice' of Violence in America."
<https://www.bloomberg.com/graphics/2015-doj-and-police-violence/>

Table 1: Consent Decree Jurisdictions³

Jurisdiction	Year of Agreement	Status
Pittsburgh, PA	1997	Closed
Steubenville, OH	1997	Closed
State of New Jersey	1999	Closed
Los Angeles, CA	2001	Closed
Detroit, MI	2003	Closed
Prince George's County, MD	2004	Closed
Virgin Islands	2009	Open
Warren, OH	2012	Open
Seattle, WA	2012	Open
East Haven, CT	2012	Open
New Orleans, LA	2013	Open
Puerto Rico	2013	Open
Portland, OR	2014	Open
Albuquerque, NM	2014	Open
Los Angeles County, CA	2015	Open
Cleveland, OH	2015	Open
Maricopa County, AZ	2015	Open
Meridian, MS	2015	Open
Ferguson, MO	2016	Open
Newark, NJ	2016	Open
Baltimore, MD	2017	Open

³ This analysis does not include the Chicago Police Department, which came under a consent decree in January 2019 after this review began. In addition, a number of CRT investigations resulted in memoranda of agreement (MOA), which unlike consent decrees that are actively overseen by a federal court, are enforceable only as a potential breach of a contract action between the United States and the local jurisdiction. This analysis does not include MOAs. Between 2011 and 2017 some jurisdictions engaged in the DOJ's Collaborative Reform Initiative, in which agencies voluntarily engaged in federally-supported review and reform. Those agencies are also not included in this analysis.

Consent decrees are typically detailed and prescriptive documents that outline mandated changes in areas such as policy, training, supervision practices, and data collection and analysis. Implicitly embedded in the collection of these legal documents are the foundations of constitutional policing. Said another way, they are steps that a group of police agencies are mandated to implement to ensure that police actions do not violate the rights of community members. The guidance woven throughout these consent decrees can be of value to all police agencies because they provide a vetted set of policies and practices to ensure that an agency is complying with the Constitution. However, with a cumulative 1,500 plus pages of legal writing, such value is hard to extract, especially by busy police executives. To date, cross-jurisdictional analysis of police reforms driven by consent decrees has been limited.⁴ Indeed, prominent policing scholars have noted that these powerful consent decrees could inform reform efforts in agencies across the country.⁵

The Crime and Justice Institute (CJI) reviewed the consent decrees for the 21 jurisdictions listed in Table 1, identified the most common issues, and summarized the mandated requirements for the purpose of easy consumption by law enforcement leaders. The intent is to provide any police executive or stakeholder the opportunity for easy self-assessment of the agency's alignment with policies, trainings, and practices extracted from consent decrees. In doing so, police executives can preemptively recognize and address areas that are not in sync with this vetted set of constitutional guidelines and issues that could, if left unchecked, result in costly outside intervention. Ultimately, compliance with constitutional policing can facilitate improved community support and increased legitimacy.

⁴ A 2017 report by CRT describes the history and process of its pattern and practice work, and provides an accounting of which jurisdictions addressed which issues but does not provide a summary of the content of required reforms. In addition, evaluations of individual agencies post-reform have been conducted but do not synthesize the work across jurisdictions.

⁵ As cited in *The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present*, U.S. Department of Justice (2017); Samuel J. Walker and Morgan Macdonald, *An Alternative Remedy for Police Misconduct*, 19 Civ. Rights L.J. 479, 480 (2009). See also Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 Buff. Crim. L. Rev. 815, 845 (1999); Myriam E. Gilles, *Reinventing Structural Reform Litigation*, 100 Colum. L. Rev. 1384, 1407 (2000); Richard Jerome, *Police Reform: A Job Half Done*, ACS Issue Brief (2004) at 5; Rushin, Stephen. *Federal Intervention in American Police Departments*. Cambridge University Press. 2017.

Methods

Twenty-one jurisdictions that are or were party to a federal consent decree are included in this review.⁶ Jurisdictions that were investigated by CRT but where no pattern or practice of unconstitutional policing was established are not included and jurisdictions that reached a memorandum of agreement rather than a consent decree are also not included.⁷

Consent decree documents are the “road maps” for the work of the affected police agencies and provide a level of detail that can be instructive to other police agencies. While there is variation in the length and level of detail of the documents, they are largely consistent in structure, style, and content. The cumulative pages for the 21 consent decrees included in this analysis is 1,515 pages. Those pages, and the specific requirements itemized in the paragraphs of each consent decree document, serve as the primary information source for this assessment. Another key source document is the January of 2017 report from the Civil Rights Division at the Department of Justice. That report, and an accompanying online guide, summarize CRT’s work related to Section 14141. CRT’s categorization of which jurisdictions were required to address which topics serves as the basis for identifying the most common issues addressed by consent decrees. As shown in Table 2, the three most common issues, as identified by CRT, are:⁸

- ❖ Unlawful use of force (17 jurisdictions)
- ❖ Unlawful stops, searches, and arrests (14 jurisdictions)
- ❖ Biased policing (13 jurisdictions)

These topics serve as the framework for this review. As the most common issues, they are topics that police executives should prioritize and are most deserving of operational and supervisory attention. Trouble in these three areas often results in damage to police community relations and, as such, public safety. Appendix II provides a formatted tool to facilitate a department’s assessment of the extent to which it is aligned with the guidance embedded in consent decrees.

The CRT guide also identified “key paragraphs” within the individual consent decrees by topic area.⁹ The key paragraphs from each jurisdiction include the specific requirements that jurisdictions are or were required to achieve. CJI compiled the relevant requirements across consent decrees for the three identified topics. CJI then analyzed the compiled content and conducted a qualitative review that identified

⁶ DOJ, US. *The Civil Rights Division’s Pattern and Practice Police Reform Work: 1994-Present*. United States Department of Justice, Civil Rights Division. (January 2017)

⁷ See Glossary for information about memorandum of agreement.

⁸ Consent decrees have addressed numerous other issues such as detention, juvenile arrests, and investigations. Resources available for this review did not allow for a comprehensive assessment of all topics addressed in consent decrees.

⁹ DOJ, US. “An Interactive Guide to the Civil Rights Division’s Police Reforms.” United States Department of Justice, Civil Rights Division. (2017).

themes and common or similar language and required reforms. The content below represents the synthesis of that qualitative review.

Table 2: Most Common Areas of Reform by Jurisdiction

Unlawful Use of Force	Unlawful Stops, Searches, and Arrests	Biased Policing
Albuquerque Baltimore Cleveland Detroit East Haven Ferguson Los Angeles Sheriff Los Angeles PD New Orleans Newark Pittsburgh Portland Puerto Rico Seattle Steubenville Virgin Islands Warren	Baltimore Cleveland Detroit East Haven Ferguson Los Angeles Sheriff Los Angeles PD New Orleans Newark Pittsburgh Puerto Rico Seattle State of New Jersey Steubenville	Baltimore Cleveland East Haven Ferguson Los Angeles Sheriff Los Angeles PD New Orleans Newark Pittsburgh Puerto Rico Seattle State of New Jersey Steubenville

Limitations

This analysis is intended to provide valuable information for law enforcement leaders, but this approach is not without limitations. The research team analyzed consent decrees only. A larger analysis including all issues covered by consent decrees (not just the most frequent) and including the memoranda of agreement might produce a more holistic depiction of the issues that can lead to federal intervention. In addition, a review of the investigation findings documents themselves could be of great value. Such a review would provide more insight into the causes and factors behind the patterns or practice of unconstitutional behavior beyond the remedies themselves. Another limitation of our review relates to how consent decrees have evolved over time. More recent consent decrees (e.g., Baltimore and Ferguson) have been more prescriptive and include a greater level of detail than some of the earlier documents (e.g., Pittsburg and Steubenville), which means this assessment is skewed toward the requirements of later agreements. In addition, CRT’s identification and cataloguing of consent decree “key paragraphs” proved to not be as comprehensive and accurate as initially expected. As such, some paragraphs that were actually relevant to this review may be inadvertently omitted.

It is worth noting that this report does not assess the outcomes or effectiveness of federal engagement; rather, it analyzes the universe of consent decrees to identify the

issues at the core of federal engagement. Other works have begun to assess the effectiveness across consent decrees including a 2017 book by Stephen Rushin¹⁰ among other work, but there is a need for additional, rigorous research on the overall effectiveness of consent decrees. Lastly, it should be said that this tool for self-assessment is not a substitute for comprehensive, individualized review and analysis that departments can undertake to understand the extent to which their own policies, training, and practices are aligned with the vetted practices of the profession related to use of force, stops, searches and arrests, and biased policing.

¹⁰ Rushin, Stephen. "Federal Intervention in American Police Departments." Cambridge University Press. 2017

Use of Force

Issues related to unlawful use of force (UOF) are the most commonly addressed issues in consent decrees. Indeed, only a handful of jurisdictions covered in this review did not address issues related to unlawful use of force and the large majority (17 out of 21) of consent decrees did. Police officers using force on citizens is a necessary but often uncomfortable and tension-ridden component of policing. This is especially true in the age of cell phone pictures and videos and the speed at which stories can spread by social media and the internet. Clarity around when and how force can be used is critical. Unfortunately, police agencies' UOF policies and training are consistently missing information and guidance that are critical to officers using force appropriately and legally. For many of the jurisdictions included in this review, and many departments that have not been involved in a consent decree, UOF policies have proven to be incomplete, lacking specific language and direction, and unclear on selected important issues. Police agencies would benefit greatly from a review of their own UOF policies and training against a list of reforms that departments under consent decrees have been required to implement.

The key areas that emerged from our review of reforms related to use of force, discussed below, include general policies and training, allowable uses of force, classification of uses of force, de-escalation, officer reporting, investigation, and devices and actions related to UOF.

General Contents of UOF Policies and Training

While individual departments' use of force policies and training are designed locally and comply with the legal requirements of individual states, elements of any use of force policy and training are necessary for adherence to the U.S. Constitution. The characteristics of using force in the line of duty are that it be necessary, reasonable, and proportional.¹¹ As articulated in several consent decrees: "Only the force reasonably necessary under the totality of circumstances shall be used to lawfully perform department duties and resolve confrontations effectively and safely." Generally, the contents of department policy and training requirements related to the use of force should be both clear and comprehensive. They should provide guidance to officers on ways in which force can be used that are constitutional, legal, and in line with generally accepted policing practices and current professional standards.

In addition to the legal standards that department UOF policies should meet, they should also be explicit about conditions that do *not* justify use of force. Department policies should explicitly prohibit using force in certain circumstances and should require training that re-enforces those prohibitions. Examples of UOF prohibitions include:

- ❖ Use of force should not be retaliatory in nature or used as punishment
- ❖ Use of force should not be objectively unreasonable

¹¹ *Graham v. Connor*, 490 U.S. 386 (1989)

- ❖ Use of force should not be used against individuals who only verbally confront officers and do not impede a legitimate law enforcement function

Training on use of force with an emphasis on restricting it to force that is necessary, reasonable, and proportional is a crucial component to ensure officers are using force in ways that are constitutional, legal, and within policy. It is beyond the scope of this effort to provide a comprehensive account of everything that should be included in use of force training. In those consent decrees that have a focus on force, the jurisdictions are required to offer use of force training that is “high quality and comprehensive”. Use of force training should be part of the initial training of recruits as well as annual in-service training. Additional use of force training should also be offered to supervisors. Department policies related to use of force should be regularly reviewed and updated and any policy revisions should inform the training.

Departments’ required levels of reporting, investigation, and review of use of force incidents should be increasingly rigorous as the severity of the level of force increases. (Details about use of force incident documentation and components of use of force investigations are discussed below.) Departments should have mechanisms in place to hold officers accountable who use force in ways that are not objectively reasonable or not in line with policy. This process requires well-trained and monitored supervisors as well as robust systems for chain of command review. Adherence to use of force policies and the oversight of use of force reviews are necessary to ensure a department is operating in a way that is consistent with the expectations of the U.S. Constitution. Officers and supervisors could be, depending on the nature of an infraction, subject to corrective action, discipline, possible criminal prosecution, or possible civil liability.

The field of policing, and the topic of use of force in particular, have received notable attention recently from the public, media, professional associations, and researchers. As such, policies and practices that are considered best practices or industry standards continue to evolve and change. Therefore, departments should utilize regular reviews of policies and training related to use of force to ensure that they are keeping up with the best thinking and latest state of practice.

Recap: General Use of Force Policies and Training

- ✓ Using force in the line of duty should be necessary, reasonable, and proportional
 - ✓ UOF policy should be clear and comprehensive
 - ✓ Policy should outline prohibitions for use of force
 - ✓ Training on UOF should be required of recruits, in-service, and supervisors
 - ✓ Reporting, investigation, and review of use of force incidents should be increasingly rigorous with severity of force
 - ✓ Officers who use force in ways that are not objectively reasonable should be held accountable
 - ✓ Departments should utilize regular reviews of UOF policies and training to ensure they are keeping up with the best thinking and latest state of practice
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Allowable Uses of Force and Classification of Use of Force

Use of force policies should be explicit about when and how the use of varying levels of force are permitted and it is critical that the use of force policy clearly articulates when use of force is allowable and appropriate. Definitions of the types of force available and the corresponding levels of force should be clearly outlined. The specific details about what is allowable and what is not allowable under different circumstances varies across departments. Specific examples from consent decrees of when force is allowable include:

- ❖ After officers have identified themselves as officers
- ❖ After officers allow individuals the opportunity to submit to arrest or comply with instructions
- ❖ After officers use advisements, warnings, and verbal persuasion
- ❖ After officers communicate to the subject and other officers that the use of the weapon is imminent to allow the subject an opportunity to comply

Obviously, a range of tactics and weapons are available to police officers that, when utilized, are considered to be a reportable use of force. It is important for departments to be clear about the classification of the various types of use of force as such classification should have implications for reporting, investigative, and review purposes. The classification system used for reporting, investigating, and reviewing use of force incidents should correspond to the amount of force used and/or the outcome of the force. The level of review mandated and any subsequent accountability should become more rigorous as the level of force increases. One motivation for clarity around classification and varying responses by use of force type is to ensure that the more serious incidents receive the most supervisory attention and resources.

Several consent decrees include articulated factors that should be considered when determining appropriate classification for use of force incidents. Departments should ensure that their UOF policy takes into account an agreed-upon set of factors when classifying force. Some of the factors for classification include:

- ❖ Potential of technique or weapon to cause injury or disability
- ❖ Physical vulnerability of the subject (including age and understanding of commands)
- ❖ Degree of actual injury or disability
- ❖ Degree of pain experienced
- ❖ Duration of force
- ❖ Potential for abuse or misuse of weapon or force
- ❖ Complaint by the subject
- ❖ Degree of restraint
- ❖ Impairment of the functioning of any organ

Except for incidents in which the lowest levels of force are used, unless policy or circumstance dictates otherwise, such as pointing a weapon or handcuffing without resistance, supervisors should respond to the scene and assist in determining the

classification of the level of force. Such classification should be based on policy and facts relevant to the specific incident. In instances in which multiple uses of force were used, and perhaps multiple officers were involved, the incident should be classified, reported, and investigated at the highest level of force used by any officer.

Recap: Allowable Uses of Force and Classification

- ✓ Policies should be explicit about when the use of different levels of force is allowed
 - ✓ The level of review should become more rigorous as the level of force increases
 - ✓ Use of force classification should have implications for reporting, investigative, and review purposes
 - ✓ Factors to be considered when determining appropriate classification for use of force incidents should be clearly articulated
 - ✓ When multiple uses of force are used, the incident should be classified at the highest level of force used
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De-escalation

Numerous consent decree jurisdictions have been required to improve and expand training related to de-escalation strategies and tactics. In recent years, the expansion of de-escalation practices has grown in prevalence and they are increasingly considered a best practice. Examples include the Memphis Crisis Intervention Team (CIT) Model and PERF's Integrating Communications, Assessment, and Tactics (ICAT) training guide. The implementation of Crisis Intervention Teams and the use of CIT-trained officers in instances where the subject may be experiencing mental health issues have reduced the need for deadly use of force. In other instances, taking cover, slowing the situation down, increasing space, and improving communication techniques (e.g., not shouting commands, using other officers) have produced better safety results and saved lives. Department policy should clearly outline the expectations related to de-escalation and using force proportionally and required training should reinforce those expectations.

Departments should provide officers with the tools and skills needed to resolve confrontations using the least amount of force necessary to achieve compliance or arrest. De-escalation techniques should be used whenever it is possible and appropriate before resorting to or escalating force. Departments should train officers on appropriate, verbal de-escalation techniques as an alternative to the use of increasing levels of force and encourage officers to make arrests and gain compliance without resorting to higher levels of force. Force used should be deemed proportional to the level of resistance or threat encountered. In practice, officers too often conduct themselves in such a manner as to escalate situations, which can lead to higher levels of force being used. De-escalation techniques are intended to change the trajectory of a situation to avoid the need to use force.

Consent decree jurisdictions have been required to employ an array of strategies in order to reduce the need for force and to increase officer and civilian safety. For example, departments should train officers on disengagement, area containment, surveillance, waiting out a subject, summoning reinforcements, and calling in specialized units as appropriate as a set of strategies to help lower the need to use force. Training scenarios should include situations in which officers reduce force levels as a subject's behavior changes. In addition, at least half of the consent decrees have required that officers should immediately reduce the level of force as the threat or level of resistance diminishes. Departments should recognize and support officers who achieve public safety goals while avoiding use of force and those who change the trajectory of a situation through de-escalation.

Recap: De-escalation

- ✓ Officers should be provided with training, tools, and skills needed to resolve confrontations without resorting to force or to use the least amount of appropriate force
 - ✓ Officers should immediately reduce the level of force as the threat or level of resistance diminishes
 - ✓ Departments should recognize and support officers who achieve public safety goals while avoiding use of force
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Initial Officer Reporting

Documentation related to use of force incidents is a major component of numerous consent decrees. Consent decree jurisdictions have been required to improve clarity and transparency around what should be documented, when, and by whom. The following highlights the nature and extent of documentation and reporting that have been required in consent decrees. Any police agency would benefit from benchmarking their own policies and practices against the items presented below.

What Should Be Reported?

While the specifics across consent decrees differ in their detail, practice is clearly improved when policy delineates the types of force incidents that are required to be reported. Initial reporting of use of force incidents should be done in writing and verbal notification of a supervisor is not sufficient. Many departments have purchased off the shelf reporting systems for the data collection around UOF reporting and review.

In terms of the content of what a use of force report should include, the details again vary across departments, though there are some common requirements for data collection, analysis, and reporting included in consent decrees. Departments should be explicit about what information is required to be included in a use of force report by stipulating it in policy and/or outlining it in report templates. Use of force reports

should include detailed information that is specific to the incident. Officers should not be allowed to use “conclusory statements, boilerplate, or canned language” in their reports. This particular requirement is part of at least eight consent decrees suggesting that this problematic language is a persistent pattern in police departments. Data elements that are often required for use of force reports include:

- ❖ Reason for the initial police presence
- ❖ Whether incident occurred during an officer initiated call or a call for service
- ❖ Efforts to de-escalate situation to avoid use of force and minimize the level of force used
- ❖ Actions necessitating the use of force / narrative description of the events preceding the use of force
- ❖ Type(s) of force used
- ❖ Level of resistance encountered
- ❖ Description of the care given after force used
- ❖ Officer's name and badge number
- ❖ Description of any injuries or complaint of injuries to the subject, the officer, and any other members of the public
- ❖ Any medical treatment, refusal of treatment, or hospital data
- ❖ Name, race, and gender of all persons involved
- ❖ Presence and location of witnesses at the scene and names and contact information for witnesses
- ❖ Severity of the crime at issue
- ❖ Whether the individual involved was arrested or cited, and if so, the charges, date, time, and location of the incident
- ❖ District or area where force occurred
- ❖ Signatures of officer and immediate supervisor
- ❖ Force options available to the officer
- ❖ Existence of any body-worn camera or in-car camera audio or other video footage

In instances where officers have been found to omit relevant material information or include inaccurate information in their use of force reports, those individuals should be held accountable. Depending on the level of severity, this may include disciplinary action.

[Who Should Submit and Receive Use of Force Reports?](#)

The officer utilizing force should submit a use of force report. In instances in which multiple officers were involved in the incident or witnessed the incident, those officers should be required to submit a use of force report as well.

[When Should Use of Force Reports be Submitted?](#)

Providing guidance on the required timing of the initial reporting of use of force is also important. Again, while the specifics differ department to department, generally notification of a supervisor or commanding officer after a use of force incident should

be done immediately or as soon as is practical. Several jurisdictions required that initial reporting of a use of force incident be done by the end of the shift in which the incident occurred or within 24 hours of the incident. In addition, supervisors should be required to report use of force incidents to shift commanders, generally by the end of the shift in which the force occurred.

Recap: Initial Officer Reporting

- ✓ Policy should delineate the types of force incidents that are required to be reported
 - ✓ Departments should be explicit about what information is required in a use of force report
 - ✓ Departments should not only require that officers personally involved report use of force incidents, but also officers who observe such incidents should be required to make a report
 - ✓ Notification of a supervisor or commanding officer after a use of force incident should be done immediately or as soon as is practical
-

Investigation

Investigations and reviews of use of force incidents are a notable component of several consent decrees. The elements of an investigation are broken down by supervisory investigation, force investigation teams (FIT), and force review boards (FRB).

One somewhat unconventional position of DOJ is that administrative investigations should start immediately, even when there is a possibility of a criminal prosecution.¹² Because of *Garrity v. New Jersey*, 385 U.S. 493 (1967), which provides that prosecutors cannot use the administratively compelled statements of officers against them, most departments wait until the conclusion of the criminal investigation to start the administrative investigation. DOJ's position is that considering how rare criminal prosecution is, how long criminal investigations usually take, and how important it is that officers who violate policy be held accountable administratively, that administrative investigations should start before evidence becomes stale. Of course, precautions should be taken to ensure that where there is overlap that the administrative investigation does not taint the criminal one.

Supervisory Investigation

The first stage in a post-incident investigation is a supervisory review and investigation of the incident. Department policy should be clear and detailed on a supervisor's responsibilities after a use of force incident. Consent decrees provide some guidance on who is appropriate to lead the investigation. The supervisor who responds to the scene and initiates an investigation should hold a permanent rank higher than any involved officer. For those incidents where an on-scene supervisor is required, the

¹² https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/seattlepd_TA_11-23-11.pdf

supervisor of the involved officer should upon notification immediately report to the scene to initiate an investigation and ensure that the incident is properly classified. For instances in which the use of force is classified at a serious or high-level, the responding supervisor should immediately notify a FIT when one exists. Supervisors who are personally involved in any type of force should not conduct the investigation and the department should require a supervisor of a higher rank who was not involved in the incident to conduct the investigation.

Department policy should outline the responsibilities of supervisors upon arrival at the scene. The specific duties of supervisors upon arrival vary across locations. However, the following duties are included in consent decrees:

- ❖ Identify and collect evidence, including physical evidence, audio and video recordings, photographs, and documentation of injuries or the absence of injuries
- ❖ Locate civilian witnesses and arrange for interviews
- ❖ Record interviews with subject and any witnesses, who should be interviewed separately
- ❖ Separate officers involved in incident until interviewed and prohibit group interviews
- ❖ Flag for retention and review body-worn camera footage or any in-car video related to the incident
- ❖ Canvass area for surveillance cameras and attempt to obtain copies voluntarily
- ❖ Photograph scene and location
- ❖ Photograph any departmental or private property damaged
- ❖ Photograph subject and all injuries or claims

Clarity about the required content of a supervisory review is also important and should include a detailed narrative of the incident that describes the use of force by officers and resistance by members of the public, attempts at de-escalation, the sequence of events, a description of any evidence collected, whether the use of force was objectively reasonable, whether any policy was violated (in the use of force itself or the trajectory of events), and any concerns related to training, tactics, or equipment. In short, a supervisory review should provide a commanding officer a complete understanding of the incident. Similar to the initial officer report after a use of force incident, department policy should specify the timeframe for supervisors to complete and submit their use of force investigation. Several consent decrees require such reviews to be done within 72 hours of the incident, unless a commanding officer approves an extension. For supervisors who do not conduct and complete investigations and reviews in accordance with department policy, those supervisors should be held accountable.

Force Investigation Teams

Force investigation teams (FIT) are a relatively new type of specialized unit in the world of policing and have become increasingly prevalent in recent years. Several

consent decrees require the establishment of and outlined roles and responsibilities for such teams. The names of the teams and where they are located within a department varies but examples include Baltimore's Special Investigation Response Team (SIRT), Newark's Serious Force Investigation Team (SFIT), and Force Investigation Teams (FIT) in New Orleans, Seattle, and Cleveland. While some of the details related to force investigation teams vary across cities, the requirements and responsibilities of such teams are described very similarly.

Force investigation teams typically are responsible for conducting reviews and investigations of the most serious or high-level use of force incidents. Department policy should articulate the types of instances in which a FIT investigates a use of force incident. Some scenarios where a FIT has jurisdiction for an investigation include:

- ❖ Any serious use of force (where serious is defined by individual agencies)
- ❖ Any use of force indicating apparent criminal conduct by an officer
- ❖ Any use of force by an officer of a rank higher than sergeant
- ❖ Any incident where an individual has died while in, or as an apparent result of being in, custody¹³
- ❖ As ordered by the chief or superintendent or his/her designee

FIT reviews generally include both an administrative review and a criminal review as appropriate. FIT investigations not only review the particulars of a use of force incident, they also review and make recommendations with an eye toward any potential changes to department-wide policies, training, or equipment. Departments vary on whether a FIT is a permanent assignment but the teams are typically multidisciplinary. Departments have been required to establish a training curriculum and procedures manual that are specific to a FIT's roles and responsibilities. FIT investigations are generally required to be completed within 30 or 60 days of an incident. Upon completion of an investigation a report and/or presentation is often delivered to a force review board.

Force Review Boards

Requirements related to a force review board (FRB) are included in one third of the reviewed consent decrees including Newark, Cleveland, Albuquerque, New Orleans, Ferguson, Puerto Rico, and Seattle. Typically, such boards review use of force incidents for adherence to law and department policy. They then make recommendations on policy and training revisions as a result of use of force incidents. Department policy should be clear on what is in the FRB's purview and what is and is not to be considered as part of their review. Consent decrees often provide guidance on who should be included on such boards. Members have included: chief or his/her designee, training supervisors, representative from an office of professional standards, and a representative of internal affairs. Police personnel from districts in which a use of force incident occurred are also often included. Boards generally are required to review an

¹³ In some cases, a homicide unit could also be involved.

incident within a specified timeframe such as 45 days or 90 days after a case has been submitted to the board.

Recap: Investigation

- ✓ Supervisor of the involved officer should upon notification immediately report to the scene to initiate an investigation and ensure that the incident is properly classified
 - ✓ Department policy should outline the responsibilities of supervisors upon arrival at the scene of a use of force incident
 - ✓ A supervisory review should provide a commanding officer a complete understanding of the incident in which force was used
 - ✓ FIT should conduct investigations of serious or high-level use of force incidents
 - ✓ FIT should also make recommendations toward any potential changes to department-wide policies, training, or equipment
 - ✓ Departments should establish a training curriculum and procedures manual that are specific to FIT's roles and responsibilities
 - ✓ A FRB should review use of force incidents for adherence to law and department policy and make recommendations on policy and training revisions
-

Data Collection and Sharing

Consent decrees also require significant reforms related to improving departments' use of force data collection and data sharing capabilities. Taking an aggregate look at use of force incidents, in addition to a deep-dive into individual cases, gives departments the opportunity to evaluate use of force practices and identify areas for improvement department-wide. This management review can provide a window into officer and supervisor behavior; identify opportunities to improve management, training, and policy; help understand and manage problem behavior, and thus limit and manage liability; and ultimately improve officer safety, community safety, and trust and confidence of members of the community.

All information and documentation related to use of force incidents should be compiled and maintained in a centralized location. This includes, but is not necessarily limited to, officer use of force reports, supervisor reviews, any internal investigations, and other supporting materials such as body worn camera footage and witness interviews. Departments should develop and utilize a uniform electronic reporting system as the foundation for any aggregate examination of the data. A department's electronic reporting systems should record all information obtained in the initial use of force report and the supervisor review. (See above discussion for recommended data elements for initial officer reporting and supervisor investigation.) In addition, such electronic systems often also track information related to a subject's perceived mental health or medical condition, use of drugs or alcohol, presence of a disability, any

injuries to an officer or subject or complaints of injury, whether an officer or subject received medical attention, whether and which offenses the subject was charged with, the number of shots fired by an officer for firearms-related incidents, and whether the subject was armed or unarmed. The data system should also track the length of time between the use of force incident and completion of each step of the follow-up process (e.g., submission of initial officer report, completion of supervisor review, etc.).

The value of collecting, compiling, and analyzing data related to use of force is to facilitate learning within a department. Departments should establish regular reporting mechanisms within the department and the community where permitted. An annual report that summarizes the findings of analyses of use of force data is one approach required of several consent decrees. Where law permits, departments should endeavor to share data, analysis, and findings publicly facilitating transparency.¹⁴

Recap: Data Collection, Analysis, and Sharing

- ✓ All information and documentation related to use of force incidents should be compiled and maintained in a centralized location
 - ✓ Departments should develop and utilize a uniform electronic reporting system which can serve as the foundation for any aggregate examination of the data
 - ✓ Departments should establish regular reporting mechanisms on use of force data such as an annual use of force report
 - ✓ Departments should endeavor to share data, analysis, and findings publicly, where law permits
-

Devices and Actions

Several consent decrees include requirements related to the use of specific devices or weapons and force techniques. The discussion below does not represent a comprehensive account of policies, procedures, and training related to various devices and actions. But rather highlights areas related to selected devices and actions that are identified in several consent decrees. Department policy should provide clear guidance on all weapons, force techniques, and technology available to officers. That guidance should clearly define and describe the various force options and the appropriate circumstances under which the various types of force are appropriate and consistent with possible resistance types. Departments should require officers meet training and certification requirements for authorized weapons. Policy should ensure that officers meet training and certification requirements before being permitted to carry and use authorized weapons. In addition, officers should only be permitted to

¹⁴ For examples of use of force reports and publicly shared data see Los Angeles PD (http://www.lapdonline.org/use_of_force), Seattle PD (https://www.seattle.gov/Documents/Departments/Police/Publications/2019_Annual_UoF_Report.pdf), and Newark PD (<http://npd.newarkpublicsafety.org/statistics/transparency>).

use the department-approved weapons for which they are trained and certified, unless warranted by extenuating circumstances.

Firearms

Requirements related to firearms – their use, training, and other related issues – are a significant component of several consent decrees. The following discussion does not present a comprehensive account of policies, procedures, and training related to firearms, but rather highlights issues identified in multiple agencies found to be engaged in unconstitutional policing.

Departments should train for and require proper techniques for unholstering, displaying, pointing, and aiming a firearm. The specific policy language varies across police agencies but examples include:

- ❖ Prohibit exhibiting or pointing a firearm at a person unless officer reasonably believes situation may escalate to create imminent threat of serious injury or death to officer or another person
- ❖ Prohibit the drawing or exhibiting a firearm unless the circumstances surrounding the incident create a reasonable belief that a situation may escalate to the point where lethal force would be authorized

Departments should document and track unholstering and pointing of firearms and all discharges of firearms. Data on firearms discharges should be reported and shared in an annual use of force report.

Policy should also clearly articulate when the use of firearms is prohibited such as firing warning shots, using it as an impact weapon, and shooting through a door or window when the target is not clearly in view. Several consent decrees restrict or prohibit firing at a moving vehicle. While the specific requirements language differs across jurisdictions, compliance with consent decrees and best practice prohibit officers from firing at a moving vehicle except in limited circumstances where such action would counter an imminent threat of death or serious physical injury to the officer or another person. At the same time, officers should be prohibited from placing themselves intentionally into the path of an oncoming vehicle and should be required to make efforts to move out of the path rather than discharging a firearm.

Departments should require all officers to be trained and remain certified for each firearm they are authorized to carry on duty. Officers who do not complete training or maintain certification should be required to relinquish the corresponding department-issued firearm immediately. Officers who fail to qualify after remedial training after a reasonable amount of time should face disciplinary action, up to and including termination of employment. Officers should not possess or use unauthorized firearms or ammunition or equipment for which they are not trained and certified to use.

Electronic Controlled Weapons

Electronic controlled weapons (ECWs) are also known as conducted electrical weapons (CEWs) or are often referred to by the commercial product name, Tasers. These devices grew in prevalence in police departments over the last few decades and departments that include ECWs as one of their force options should provide clear guidance on who can use them, when they can be used, and how their use should be documented. The use of ECWs is addressed in several consent decrees and the specific instances under which ECWs can be deployed varies across police agencies. For departments that employ ECWs, providing clarity on the appropriate use of this type of force is key. Only officers who have completed training and are certified in using such a device should be allowed to carry and use ECWs. At least five consent decrees require that officers carry the device in their weak-side holster. This is to reduce the chances of accidentally drawing and/or firing a firearm.

Many departments require that officers issue a verbal warning prior to deploying the weapon and that they defer application for a reasonable time to allow the subject to comply with the warning. Officers need to consider several factors in a given circumstance to determine whether use of an ECW is reasonable and appropriate. Such factors include the subject's age, size, physical and mental condition, and the feasibility of lesser force options. Many departments permit the use of an ECW only after less intrusive means are attempted or determined to be ineffective, actions in sync with the principle of de-escalation discussed above.

The allowable level of application of ECWs should also be clear. Generally, each application (often lasting 5 seconds or less) should be considered a separate use of force and each application must be assessed individually as a justifiable use of force. Officers should reevaluate the situation to determine if additional applications are necessary after each use. Officers should consider that a subject's compliance with commands during and immediately following a cycle may be limited. More than one ECW at a time should not be activated against a subject.

Departments vary regarding what levels of ECW application are allowable but some examples include:

- ❖ Applying not more than three cycles of an ECW against a subject during a single incident unless lethal force is justified
- ❖ Cycling continuously of ECWs is permitted only under exceptional circumstances where it is necessary to handcuff a subject under power
- ❖ Transitioning to alternative control measures if a subject does not respond to ECW applications (rather than using more ECW cycles)
- ❖ Recognizing that exposure to the ECW for longer than 15 seconds may increase the risk of death or serious injury

Departments should be clear not only about when ECW use is allowable but also identify circumstances in which ECW use is specifically prohibited. Examples from consent decrees of *prohibited* use include:

- ❖ Solely as a compliance technique or to overcome passive resistance
- ❖ When a deployment may cause serious physical injury or death from situational hazards, including falling, losing control of a moving vehicle, or becoming ignited from the presence of potentially explosive or flammable materials or substances, except where lethal force is authorized
- ❖ When the subject is visibly pregnant, apparently elderly, a child, visibly frail, has obviously low body mass, or is in apparent medical crisis, except where lethal force is authorized or is the only other option
- ❖ On fleeing persons who do not pose a threat of physical harm to officers, other civilians, or themselves
- ❖ Intentionally targeting a subject's head, neck, or genitalia except where lethal force would be permitted or where the officer has reasonable cause to believe there is an imminent risk of serious physical injury

Departments should monitor and evaluate the use of ECWs by collecting and analyzing data stored on the device and data compiled from use of force reports. Some departments conduct regular audits of ECW use by comparing downloaded data from the devices with officers' use of force reports.

Other Devices and Actions

The consent decrees included in this review cover a variety of issues related to devices, weapons, and other actions. The following issues related to use of force were some of the more commonly addressed:

- ❖ **Handcuffing:** Department policy should prohibit the use of force against handcuffed or otherwise restrained suspects. Certain exceptions to this prohibition have been identified such as using force on a handcuffed person when it is objectively reasonable that the individual's actions must be immediately stopped to prevent imminent or ongoing injury to any person and when it is objectively reasonable and necessary under the circumstances to stop an assault, escape, significant destruction of property, or as necessary to fulfill other law enforcement objectives.
- ❖ **Chokeholds:** Department policy should prohibit the use of chokeholds or neck holds except when lethal force is authorized.
- ❖ **Medical help:** When force is used, regardless of the type of force or weapon used, officers should immediately do an inspection and observe the subject for injury or complaints of pain resulting from the use of force. Many policies require officers to summon medical assistance and provide emergency first aid until medical care providers arrive.

Recap: Devices and Actions

- ✓ Policy should prohibit exhibiting or pointing a firearm at a person unless an officer reasonably believes that a situation may escalate to create imminent threat of serious injury or death to officers or other persons
 - ✓ Policy should articulate when the use of firearms is prohibited such as firing warning shots, firing at a moving vehicle, using it as an impact weapon, and shooting through a door or window when a target is not clearly in view
 - ✓ All officers should be trained and remain certified for each firearm they are authorized to carry on duty
 - ✓ Departments should require that officers issue a verbal warning prior to deploying an ECW and defer application for a reasonable time to allow the subject to comply with the warning
 - ✓ Departments should permit the use of an ECW only after less intrusive means have been attempted or determined to be ineffective
 - ✓ Departments should be clear not only about when ECW use is allowable but also identify circumstances in which ECW use is specifically prohibited
 - ✓ Department policy should prohibit the use of force against handcuffed or otherwise restrained suspects with certain limited exceptions
 - ✓ Department policy should prohibit the use of chokeholds or neck holds except when lethal force is authorized
 - ✓ Officers should immediately do an inspection and observe the subject for injury or complaints of pain resulting from the use of force
-

Stops, Searches, and Arrests

Issues related to unlawful stops, searches, and arrests are one of the most common issues addressed by the 21 consent decrees included in this review, second only to unlawful use of force. Practices and policies related to unconstitutional stops, searches, and arrests were covered in 14 of the 21 consent decrees. The relevant issues below are organized around voluntary stops, involuntary stops, searches, citations and arrests, as well as the documentation and data analysis of these activities.

All of the consent decrees that addressed issues related to stops, searches, and arrests include requirements on training. While it is beyond the scope of this review to provide guidance on the specific content of such training, it is vital that officers receiving initial and in-service training on the requirements of the Fourth Amendment and related law and on department policies related to stops, searches, and arrests.

All of the consent decrees that addressed stops, searches, and arrests also included provisions related to proper documentation and review of relevant data. Highlights and examples of what should be documented related to stops, searches, and arrests are included below.

Stops

Voluntary Stops/Interactions

Community policing is a cornerstone of good policing and a critical component of community policing is community engagement. Departments interested in strengthening their community ties and trust should encourage officers to engage in regular, voluntary, social contact with the individuals that live and work in the areas they serve. Officers should interact with community members in a friendly, courteous, and professional manner. Departments can facilitate such interactions by requiring training on community policing and good communication skills and strategies as well as training supervisors to encourage such voluntary interactions.

Consent decrees include details on how officers should conduct themselves during voluntary stops and non-custodial interviews including:

- ❖ Introducing themselves by name
- ❖ Confirming that individuals are free to leave
- ❖ Informing persons being stopped that providing ID is voluntary
- ❖ Informing persons being stopped if they are being recorded
- ❖ Not using a person's failure to answer questions or their efforts to end an encounter to justify an investigatory stop, search, citation, or arrest

Involuntary, Investigatory Stops

Issues related to involuntary, investigatory, or Terry stops¹⁵ have been common for departments required to implement consent decree-driven reforms. Below are some

¹⁵ *Terry v. Ohio*, 392 U.S. 1 (1968).

highlights of the required reforms for departments that have been found to be engaging in unlawful stops.

Similar to voluntary stops, consent decrees provide some guidance on how officers should conduct themselves during such encounters. Even in instances where a stop is not voluntary, officers should act with professionalism and courtesy. They should introduce themselves, if possible, state the reason for the stop, inform an individual that they are not free to leave, and not detain an individual any longer than necessary.

Department policy should clearly prohibit officers from conducting involuntary stops when there is no reasonable suspicion based on facts. Policy should also *prohibit* stops based only on:

- ❖ Geographic location without other facts
- ❖ An individual's response to the presence of police officers, such as an individual's attempt to avoid contact with an officer
- ❖ The relationship to or proximity to others suspected of criminal activity
- ❖ Information discovered after the stop
- ❖ An individual's demographic category as a factor in determining reasonable cause

For vehicle stops, department policy should only allow stops in instances where there is probable cause that the driver has committed a traffic violation, or where there is reasonable suspicion based on specific and articulable facts that the vehicle or an occupant of the vehicle has been, is, or is about to be engaged in the commission of a crime.

Documentation

Similar to use of force incidents, documentation of stops is a critical element of reforms, as well as for performance management and accountability. When documenting a stop in a written report (electronic or otherwise), officers should not be permitted to use conclusory, boilerplate, or canned language. Rather, the reasonable suspicion in the case of investigatory stops should be documented in language that is clear and specific to the incident.

While the particular items that are required in the documentation for stops vary from jurisdiction to jurisdiction, stop-related information includes:

- ❖ Race, ethnicity, gender, and age of the person stopped or driver
- ❖ Location of the stop, including the street address or nearest intersection
- ❖ Specific, individualized description of the facts that establish reasonable suspicion to make a stop, prior to the stop being made
- ❖ Approximate duration of the stop
- ❖ Outcome of the stop
- ❖ Whether the driver was asked to exit the vehicle for vehicle stops

Stopped persons should be provided a record of their encounter. Officers should provide supervisors documentation of all stops by the end of their shift or within some established timeframe.

Recap: Stops

- ✓ Departments should encourage officers to engage in regular, voluntary, social contact with community members in a friendly and professional manner
 - ✓ Department policy should clearly prohibit officers from conducting involuntary stops when there is no reasonable suspicion based on facts
 - ✓ Stops should be documented and include articulable reasonable suspicion for the stop and specific details about the stopped individual(s)
 - ✓ When documenting a stop in a report, officers should not be permitted to use conclusory, boilerplate, or canned language
-

Searches

Department policy should prohibit certain actions related to frisks and searches including¹⁶:

- ❖ Considering any demographic category in determining whether to conduct a search or to seek a search warrant
- ❖ Conducting warrantless searches except where officers have consent to search or have probable cause that a person has committed, is committing, or is about to commit a crime or possesses unlawful contraband
- ❖ Conducting a frisk or pat down during an investigatory stop except where officers have reasonable suspicion that a person is armed
- ❖ Relying on information known to be incorrect to justify a warrantless search or to seek a search warrant

Regarding consent searches, policy should articulate that consent for a search should be freely given by the subject of the search and not be based on intimidation or coercion. Persons who consent to a search should be provided with a consent to search form and the purpose of the form should be clearly explained. The explanation and form should convey that members of the public have the right to refuse, limit, and revoke consent at any time. Officers should be provided training on civilians rights related to consent searches.

Sufficient guidance should also be provided on strip searches. Consent decrees outline required practices related to strip searches including:

- ❖ Explaining to the subject why they are being strip searched

¹⁶ A frisk or pat down is limited to a person's outer clothing for weapons. A search is an officer looking for evidence and is not restricted to weapons.

- ❖ Allowing strip searches only when there is probable cause of concealed contraband or a dangerous weapon
- ❖ Giving the subject an opportunity to produce voluntarily the suspected item, unless doing so would compromise officer safety or risk destruction of evidence
- ❖ Requiring strip searches be approved by rank supervisor prior to the search
- ❖ Requiring strip searches be conducted in a setting that ensures the privacy of the individual
- ❖ Requiring strip searches be conducted by trained officers who are the same sex as the subject and with the least number of personnel necessary as witnesses

One of the themes to emerge from this review of consent decrees is the importance of establishing review processes related to searches and arrests. Reviewing such processes should involve several individuals in an officer's chain of command and establish accountability mechanisms for officers found to be violation of law or policy. Supervisors should review search reports and arrest reports within a specified timeframe and with an eye toward the lawfulness of an encounter and compliance with department policy. Supervisors should document and report to command staff search and arrest reports deemed to be unsupported by probable cause or found in violation of department policy. In those instances, along with reports deemed otherwise deficient, supervisors should take appropriate corrective action including but not limited to releasing the subject, recommending non-disciplinary corrective action for the involved officer, or referring the incident for administrative or criminal investigation.

Documentation

Applications for search warrants should provide an accurate, complete, and clear description of the offense, the place or thing to be searched, the scope of the search, and the time and method of the search. Departments should maintain a log of search warrant applications that includes information about the officer who applied for the warrant and the supervisor who reviewed the application.

Regarding field interviews or stops without warrants, much of the preferred documentation relevant is the same as the preferred documentation of stops described above. Additional information for collection that is specific to searches includes:

- ❖ Whether officers conducted a weapons frisk or pat down and, if so, the specific and articulable facts establishing reasonable suspicion that the individual was armed and dangerous
- ❖ Whether officers conducted a search based on probable cause and, if so, the facts establishing probable cause to conduct a search
- ❖ Whether officers asked any person(s) to consent to a search, and whether such consent was given
- ❖ Whether officers found any unlawful weapons, narcotics, or other contraband during a search, and the nature of such contraband

Recap: Searches

- ✓ Department policy should prohibit certain actions related to searches such as prohibiting the use of a demographic category as part of the reason for the stop, conducting warrantless searches with certain exceptions, and relying on information known to be incorrect to justify a warrantless search or to seek a search warrant, among other prohibitions
 - ✓ Departments should provide clear guidance on civilians' rights and best practices for consent searches and strip searches
 - ✓ Supervisors should review search reports and arrest reports within a specified timeframe and with an eye toward whether an encounter was lawful and in compliance of department policy
-

Arrests

Policies and practices related to arrests is another topic that is addressed in multiple consent decrees. While departments' full set of policies and training related to citations and arrests will be more comprehensive than included below, key issues that require attention in consent decree jurisdictions are highlighted. Without exception, it is clear that departments should explicitly prohibit the use of informal and formal arrest quotas. Department policy should ensure the following related to arrests:

- ❖ Officers issue citations or make arrests only when there is probable cause to believe a person has committed, is committing, or is about to commit a criminal infraction or citable offense
- ❖ Officers not rely on information known at the time it is received that it is materially false or incorrect
- ❖ Officers may not consider race, color, ethnicity, national origin, religion, gender, disability, sexual orientation, or gender identity in effecting an arrest
- ❖ Officers should ensure that an arrestee receives medical attention from an appropriate medical provider
- ❖ Supervisors should visually inspect arrestees for injury, interview arrestees for complaints of pain, and ensure that the arrestee receives medical attention from an appropriate medical provider

Recap: Arrests

- ✓ Departments should explicitly prohibit the use of informal and formal arrest quotas
 - ✓ Officers should not rely on information known at the time it is received that it is materially false or incorrect
 - ✓ Officers should not consider race, color, ethnicity, national origin, religion, gender, disability, sexual orientation, or gender identity in effecting an arrest
-

Reviews, Data Collection, and Sharing

Establishing review and accountability processes are a key component of consent decrees that are designed to address unconstitutional policing. Review processes should be established around the execution and reporting of stops, searches, and arrests. As a first step, departments should require that supervisors review reports on stops, searches, and arrests for completion, accuracy, and compliance with law and policy. Supervisory review should be mindful of and reject language that is boilerplate, descriptions that are lacking sufficient detail, information that is inconsistent, and articulation of legal reasoning that is inadequate. Department policy should establish timelines within which supervisory reviews of stop, search, and arrest reports are completed.

Similar to the above discussion on use of force, departments should utilize electronic data collection systems for stops, searches, and arrests regardless of outcome. Such systems facilitate consistent data collection and a department-level understanding of these core police activities. Any such data collection systems must comply with state and federal privacy standards around personally identifying information.

Several consent decrees require departments to conduct an analysis of stop and search data on at least an annual basis to ensure patterns and trends are monitored. While the details of such analysis are beyond the scope of this effort, examples of useful measures include:

- ❖ Percent of investigatory stops that uncover criminal activity
- ❖ Nature of criminal activity uncovered
- ❖ Percentage of frisks that result in the discovery of an unlawful weapon
- ❖ Percentage of searches that result in the discovery of contraband
- ❖ Nature of contraband uncovered
- ❖ Rate of stops, searches, and arrests by race and ethnicity

Departments should regularly publish and share publicly reports that summarize findings of stop, search, and arrest data analysis. Such information sharing can serve to improve transparency and help bolster community understanding of police activities and police/community relations.

Recap: Review and Data Collection and Sharing

- ✓ Departments should require that supervisors review reports on stops, searches, and arrests for completion, accuracy, and compliance with law and policy
 - ✓ Department policy should establish timelines within which supervisory reviews of stop, search, and arrest reports are completed
 - ✓ Departments should regularly publish and share publicly reports that summarize findings of stop, search, and arrest data analysis
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Bias Free Policing

Establishing policies, procedures, and training that help to support bias-free and fair and impartial policing is a component of more than half of the consent decrees reviewed. Department policies and practices should allow all individuals to receive police services in a non-discriminatory fashion. Departments should clearly affirm that they strive to deliver police services that are equitable, respectful, and free of unlawful bias, in a manner that promotes broad community engagement and confidence in law enforcement. Department systems and policies should ensure that all members of the public receive equal protection of the law.

It should be made clear to officers through policies, training, and consistent communication from leadership and supervisors that biased policing is strictly prohibited and unacceptable. Bias-free policing principles should be integrated into all aspects of the workings of a police department including management, policies and procedures, job descriptions, recruitment, training, personnel evaluations, resource deployment, tactics, and accountability systems. For example, discriminatory policing or other bias based on protected characteristics should be considered when evaluating officer performance and making hiring and promotion decisions.

Departments should establish comprehensive policies that prohibit discrimination on the basis of selected characteristics. Fair and impartial policing extends to all protected classes under federal, state, and local laws such as race, ethnicity, national origin, gender, age, religion, sexual orientation, gender identity, or disability. Department policy should explicitly prohibit officers from considering demographic categories when taking any law enforcement action or refraining from any law enforcement action, except when such information is part of an actual and credible description of a specific suspect in an ongoing investigation that also includes other appropriate non-demographic identifying factors. A discrimination-free approach should apply to all department-related activities including programs and initiatives, not just the provision of police services. Police practices, policies, and programming must fully recognize the inherent dignity of all individuals, regardless of their protected characteristics.

In instances when an allegation of bias on the part of a police officer is made, department policies should clearly outline the response to such allegations, including the responsibilities of supervisors, the role of internal affairs, and the required timeframe within which a department response is expected. When a violation has been determined, officers should be subject to discipline, and, where appropriate, termination or criminal prosecution.

Departments should collect and analyze data regularly to examine policing actions and activities for discriminatory practices. Departments should strive to conduct at regular intervals data-based assessments of the impact of police programs, initiatives, activities, and services to determine whether they impose a disparate impact on the basis of protected characteristics. Specifically, departments should conduct

assessments of misconduct complaints involving discrimination, use of force, vehicle and pedestrian stops, searches, and arrests. Departments should also audit activities to uncover inappropriate or unlawful behavior themselves in the absence of an affirmative complaint.

Training

Training is a cornerstone of bias-free policing and is a critical component of several consent decrees. Bias-free policing training, also referred to as fair and impartial policing, should be required of all personnel including officers, supervisors, command staff, and leadership. Training should emphasize that discriminatory policing is a violation of department policy and that officers found in violation will be subject to discipline. In addition, other required training on police actions such as stops, searches, arrests, and use of force should address how to employ such police actions in a non-discriminatory manner. The duration and frequency of bias-free policing training varies across consent decree jurisdictions, though it is not uncommon to see a call for refresher training. Because the lessons on fair and impartial policing are relevant to all areas of operations, annual booster training seems appropriate. What is important is that the department be clear about who is expected to participate in the training, for how long, and how often.

Regarding curriculum and frequency of the training, the specifics and level of detail vary across consent decrees. What follows is a compilation of the specific topics and issues that have been included in bias-free policing training:

- ❖ Methods and strategies for more effective policing that relies upon nondiscriminatory factors
- ❖ Implicit bias and minimizing its impact on policing
- ❖ The importance of police legitimacy and how it is impacted by implicit bias and discriminatory policing
- ❖ Constitutional and other legal requirements related to equal protection and unlawful discrimination
- ❖ Methods, strategies, and techniques for interacting with diverse populations, including LGBT individuals, persons who are homeless, and persons who are economically disadvantaged
- ❖ Existence/impact of arbitrary classifications and stereotyping
- ❖ Identification of racial or ethnic profiling practices, and police practices that have a disparate impact on certain demographic categories
- ❖ Self-evaluation strategies to identify racial or ethnic profiling
- ❖ Methods, strategies, and techniques to reduce misunderstanding, conflict, and complaints due to perceived bias or discrimination, including problem-oriented policing strategies
- ❖ Protection of civil rights as central part of police mission and essential to effective policing
- ❖ Principles and goals of procedural justice

- ❖ Differences and similarities between police and community perspectives related to discriminatory policing
- ❖ Specific history and racial challenges of a city
- ❖ Key decision points where discriminatory policing can happen at both the incident and strategic-planning levels
- ❖ How to identify biased police practices when reviewing investigatory stop, arrest, and use of force data (for supervisors)
- ❖ How to evaluate and respond to a complaint of biased police practices (for supervisors)

Recap: Bias Free Policing

- ✓ Departments should clearly affirm that they strive to deliver police services that are equitable, respectful, and free of unlawful bias, in a manner that promotes broad community engagement and confidence in law enforcement
 - ✓ Bias-free policing principles should be integrated into all aspects of the workings of a police department including management, policies and procedures, job descriptions, recruitment, training, personnel evaluations, resource deployment, tactics, and accountability systems
 - ✓ A discrimination-free approach should apply to all department-related activities including programs and initiatives, not just the provision of police services
 - ✓ Bias-free policing training, also referred to as fair and impartial policing, should be required of all personnel including officers, supervisors, command staff, and leadership
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Conclusion

Over the last two decades as the DOJ has been establishing a body of work around consent decrees, it has implicitly been developing a vetted set of guidelines related to constitutional policing. This review is intended to assist police executives, city managers, council members, and other community leaders by distilling a large volume of legal writing to a practical self-assessment.

Several themes emerged from this review and compilation. First, increased clarity through policies is good practice. For example, rather than policy simply stating that a supervisor should report to the scene of a use of force incident, it should provide details on what the expectations are of the supervisor upon arrival. Second, enhanced documentation and review increases accountability. Departments are stronger when they are able to monitor their own practices, identify problem areas, and act on those problems. Third, increased data and information sharing – both within the department and with the public – serve to enhance transparency.

This review is not intended to be a comprehensive account of constitutional policing practices. However, if a department's policies, training, and practices are well aligned with the guidelines outlined above, the department will be well on its way to ensuring its members are engaging in constitutional policing related to use of force, stops, searches, and arrests, and bias-free policing. Conversely, this self-assessment may help identify vulnerabilities in a department in which current policy and practice are out of sync with such guidelines. Police leaders should not wait for outside intervention when it comes to constitutional policing and they should be continuously paying attention to these issues.

Glossary

Unless otherwise noted, the following definitions are derived from the U.S. Department of Justice's Civil Rights Division's Special Litigation Section January 2017 report, "The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present."

4th Amendment rights: The right against unreasonable searches and seizures (of persons, houses, papers, and effects) and for only those warrants issued with probable cause and specific description.

5th Amendment rights: The right against self-incrimination and double jeopardy and the right to due process of law and a grand jury.

14th Amendment rights: The right to U.S. citizenship, due process protections, and equal protection of the law.

Civil Rights Division of the Department of Justice: Created in 1957 by the enactment of the Civil Rights Act of 1957, the Civil Rights Division (CRT) of the Department of Justice works to uphold the civil and constitutional rights of all Americans, particularly some of the most vulnerable members of our society. The CRT enforces federal statutes prohibiting discrimination on the basis of race, color, sex, disability, religion, familial status and national origin. Pattern or practice cases are investigated, litigated and resolved by the Special Litigation Section of the CRT, sometimes assisted by the local U.S. Attorney's Office.

Consent decree: A reform agreement negotiated between the CRT and a local jurisdiction to resolve the findings of the CRT investigation. Consent decrees are overseen by a federal court and an independent monitoring team. The lead independent monitor is appointed by the court, and agreed upon by both the Division and the investigated party, but reports directly to the court. The CRT has entered into twenty-two federal consent decrees to date.

Findings documents: Sometimes referred to as a "Findings Letter", "Findings Report", or "Investigation Report". This document presents the information and evidence that the CRT gathered in the course of its investigation. It describes the steps the CRT took to complete its investigation and presents findings of the investigation. It represents a diagnosis of a law enforcement agency's problems and the foundation for a plan to treat the root causes of those problems.

Memorandum of agreement (MOA): An alternative resolution to a pattern or practice finding, an MOA is enforceable in federal court as a contract between the U.S. and the local jurisdiction. Such an outcome generally occurs when the issues to be addressed are relatively narrow and it is believed that that the jurisdiction has the capacity to accomplish and sustain reform without ongoing court oversight. The CRT has entered into twenty federal MOA to date.

Independent monitoring team: The independent monitoring team is generally the agent of the court overseeing the reform agreement and is independent from the Department of Justice and the local jurisdiction, although most monitoring teams are jointly agreed upon by the CRT and the local jurisdiction before being appointed by the court. Monitors act as an intermediary between the CRT, the local jurisdiction, and the court and assist in resolving disputes.

Violent Crime Control and Law Enforcement Act of 1994: Among other things, this law authorized the Attorney General to investigate and litigate cases involving “a pattern or practice of conduct by law enforcement officers” that violates Constitutional or federal rights. Under this authority, the CRT of the Department of Justice may obtain a court order requiring state or local law enforcement agencies to address institutional failures that cause systemic police misconduct. These cases are commonly referred to inside the CRT as “pattern or practice cases” or “14141 cases” after the section of the U.S. Code codifying this authority, 42 U.S.C. § 14141 .

Appendix I: Federal Authority and Process

Section 14141 of the Violent Crime Control and Law Enforcement Act of 1994 authorizes the Department of Justice to sue police departments for engaging in “a pattern or practice of conduct” that violates Constitutional or federal rights. These pattern or practice cases are investigated, litigated, and enforced by the Special Litigation Section (CRT) of the Department’s Civil Rights Division. Agencies considered for investigation are identified by the CRT through complaints received from various local stakeholders, as well as through the CRT’s own research. After learning that an agency may be engaging in systemic misconduct, the CRT attorneys conduct a preliminary assessment to determine whether there is reasonable cause to believe a pattern or practice violation exists. Hundreds of preliminary assessments have been conducted since 1994. Other factors are taken into consideration, such as the national and local context or whether another form of federal intervention would be a better fit. A high-profile incident alone will not trigger an investigation by the CRT, as the goal of 14141 involvement is systemic reform and institutional change.

If CRT does recommend opening a formal investigation, one is initiated upon the Assistant Attorney General’s approval. The investigation includes a comprehensive review of the local department’s policies, procedures, and other relevant data, such as incident reports. Interviews are conducted with relevant department staff and community stakeholders, and observations are collected during patrol ride-alongs. CRT investigates both whether and why a pattern or practice of unconstitutional policing exists. At the culmination of the formal investigation, some of which last multiple years, the Division issues a report (or letter) detailing its findings.¹⁷ If CRT does not find a pattern or practice of police misconduct, the investigation is closed. For those cases in which CRT does find a pattern or practice of police misconduct, the federal government negotiates a reform agreement with the local agency to address the institutional failures identified as causing systemic unconstitutional policing.

Like the investigation stage, the negotiation process can last multiple years. The foundation of consent decrees are CRT’s findings documents, which both diagnose the agency’s problems and present a treatment plan. The agreements are “designed to support constitutional and effective policing and restore trust between police and communities.” CRT has found that: “Federal court oversight is often critical to address broad and deeply entrenched problems and to ensure the credibility of the reform agreement’s mandates.” The court appoints an independent monitoring team that helps an agency comply with the terms of the agreement and report their progress back to the court. When a federal judge finds that the agency has sufficiently sustained compliance with the agreement, the agreement is terminated. As every agency

¹⁷ DOJ, US. “Roundtable on State and Local Law Enforcement Police Pattern or Practice Program 42 USC § 14141: Background Briefing Paper. United States Department of Justice, Civil Rights Division, Special Litigation Section.” (2010).

experiences challenges differently, satisfying the federal agreement has taken some agencies a few years, and others over a decade.

Since the first pattern or practice investigation of the Pittsburgh Police Department in 1997, CRT has opened 69 formal investigations. Of those investigations, 41 have resulted in reform agreements between the federal government and the local agency, and 21 resulted in consent decrees.

Appendix II: Self-Assessment Tool

Assessing Your Police Department Against Constitutional Benchmarks



Prepared by the Crime and Justice Institute, July 2019

Police departments often operate with decades-old policies. Many police departments don't have the financial or legal resources for regular and comprehensive policy updates. Police departments are also not required to be accredited, which can serve as a mechanism for a routine review of the legality and currency of policies. Many additional reasons exist.

Since 1994, several dozen police departments in the U.S. have been scrutinized by the federal government after patterns or practices were alleged to be in violation of the U.S. Constitution, while other police departments have been sued by plaintiffs and activist groups for similar reasons. One result of federal intervention, a consent decree,¹ ensures a police agency complies with the Constitution and engages in constitutional policing. The guidance woven into consent decrees provides vetted, prescriptive, and detailed steps to ensure police actions do not violate the rights of community members. Ultimately, constitutional policing facilitates improved community support and increased legitimacy.

The Crime and Justice Institute (CJI) reviewed consent decrees spanning 20 years and 21 jurisdictions, identified the most common issues, and summarized the mandated requirements in a format that is accessible and useful to police leaders. Few agencies not under investigation use consent decree findings and remedies to review their own agencies; nor do they link the cost of civil lawsuits (often paid by insurance companies) to the need for changes in policy and practice. This checklist is intended to be a self-assessment for police executives or other interested parties to identify vulnerabilities and strengthen a department without the cost, scrutiny, and disruption of external oversight.

The checklist is organized around three of the most frequently addressed issues in consent decrees:

- Use of Force
- Stops, Searches, and Arrests
- Bias Free Policing

While the self-assessment can serve as a benchmark for constitutional policing, it is *not* intended to be a comprehensive examination. The items below can be complex and nuanced and presenting them as a yes or no question risks oversimplification. However, this high-level evaluation can identify areas in need of greater attention and review and we recommend using it as a way to gauge your department's strengths and vulnerabilities.

The full report by CJI is available at crj.org/divisions/crime-justice-institute/, under "publications."

¹ The 1994 Violent Crime Control and Law Enforcement Act gave the federal government the power to sue police agencies if agencies exhibit a pattern and practice of violating people's civil rights. A consent decree is an agreement between a police department and the U.S. Department of Justice to change those practices.

USE OF FORCE (UOF)

1. GENERAL POLICIES	YES	NO	PARTIALLY	COMMENTS
Our officers use necessary, reasonable, and proportional force in the line of duty.				
Our UOF policy is clear and comprehensive.				
Our UOF policy outlines prohibitions for UOF.				
UOF training is required of recruits, in-service, and supervisors.				
Our reporting, investigation, and review of UOF incidents are increasingly rigorous with severity of force.				
Our officers who use force in ways that are not objectively reasonable are held accountable.				
Our department utilizes regular reviews of UOF policies and training to ensure we are keeping up with the best thinking and latest state of practice.				

2. ALLOWABLE USES OF FORCE AND CLASSIFICATION	YES	NO	PARTIALLY	COMMENTS
Our policies are explicit about when the use of different levels of force is allowed.				
Our level of review is more rigorous as the level of force increases.				

Our UOF classification has implications for reporting, investigative, and review purposes.				
We clearly articulate the factors we consider in determining appropriate classification for UOF incidents.				
We classified at the highest level of force used when multiple uses of force are used.				

3. DE-ESCALATION	YES	NO	PARTIALLY	COMMENTS
We provide our officers with training, tools, and skills needed to resolve confrontations without force or the least amount of appropriate force.				
Our officers immediately reduce the level of force as the threat level or level of resistance diminishes.				
We recognize and support officers who achieve public safety goals while avoiding UOF.				

4. OFFICER REPORTING	YES	NO	PARTIALLY	COMMENTS
Our policy delineates which types of force incidents are required to be reported.				
We are explicit about what information is required in a UOF report.				
We not only requires that officers personally involved in UOF incidents make a report, but also officers who observe UOF incidents.				

We require a supervisor or commanding officer be notified immediately after a UOF incident or as soon as is practical.				
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5. INVESTIGATION	YES	NO	PARTIALLY	COMMENTS
Upon notification, the supervisor of our involved officer(s) immediately reports to the UOF scene to initiate an investigation and ensure the incident is properly classified.				
Our policy outlines the responsibilities of supervisors upon arrival at the scene of a UOF incident.				
All supervisory reviews provide our commanding officers a complete understanding of the UOF incident.				
Our Force Investigation Team (FIT) conducts investigations of all serious or high-level UOF incidents.				
Our FIT makes recommendations of any potential changes to department-wide policies, training, or equipment.				
We have an established training curriculum and procedures manual specific to FIT roles and responsibilities.				
Our Force Review Board reviews UOF incidents for both adherence to law and to department policy and makes recommendations on policy and training revisions.				

6. DATA COLLECTION AND SHARING	YES	NO	PARTIALLY	COMMENTS
All information and documentation related to UOF incidents is compiled and maintained in a centralized location.				
We utilize a uniform electronic reporting system that serves as the foundation for aggregate examination of UOF data.				
We have regular reporting mechanisms on UOF data, such as an annual UOF report.				
We share UOF data, analysis, and findings publicly, where law permits.				

7. DEVICES AND ACTIONS	YES	NO	PARTIALLY	COMMENTS
Our policy prohibits exhibiting or pointing a firearm unless an officer reasonably believes that a situation may escalate to create imminent threat of serious injury or death to officers or other persons.				
Our policy articulates when the use of firearms is prohibited, such as firing warning shots, firing at a moving vehicle, using it as an impact weapon, and shooting through a door or window when a target is not clearly in view.				
All of our officers are trained and remain certified for each firearm they are authorized to carry on duty.				
We require our officers issue a verbal warning prior to deploying an Electronic Controlled Weapon (ECW) and that they defer application for a reasonable time to allow the subject to comply with the verbal warning.				

We permit the use of an ECW only after less intrusive means have been attempted or determined ineffective.				
We are clear when ECW use is allowable and identify circumstances in which ECW use is specifically prohibited.				
Our policy prohibits UOF against handcuffed or otherwise restrained suspects, with certain limited exceptions.				
Our policy prohibits the use of chokeholds or neck holds, except when lethal force is authorized.				
Our officers immediately do an inspection and observe the subject for injury or complaints of pain resulting from UOF.				

STOPS, SEARCHES, AND ARRESTS

8. STOPS	YES	NO	PARTIALLY	COMMENTS
We encourage officers to engage in regular, voluntary, social contact with community members in a friendly and professional manner.				
We prohibit officers from conducting involuntary stops when there is no reasonable suspicion based on facts.				
Our stops are documented and include articulable reasonable suspicion for the stop, in addition to specific details about the stopped individual(s).				
When documenting a stop in a report, our officers are not permitted to use conclusory statements, boilerplate, or canned language.				

9. SEARCHES	YES	NO	PARTIALLY	COMMENTS
We prohibit certain actions related to searches such as the use of a demographic category as part of the reason for the stop, conducting warrantless searches with certain exceptions, and relying on information known to be incorrect to justify a warrantless search or to seek a search warrant, among other prohibitions.				
We provide clear guidance on civilians' rights and best practices for both consent and strip searches.				
Our supervisors review search and arrest reports within a specified timeframe and with an eye toward if the encounter was lawful and in compliance of our policy.				

10. ARRESTS	YES	NO	PARTIALLY	COMMENTS
We explicitly prohibit the use of informal and formal arrest quotas.				
Our officers do not rely on information known at the time received to be materially false or incorrect.				
Our officers do not consider race, color, ethnicity, national origin, religion, gender, disability, sexual orientation, or gender identity in effecting an arrest.				

11. REVIEW, DATA COLLECTIONS, AND SHARING	YES	NO	PARTIALLY	COMMENTS
We require our supervisors to review reports on stops, searches, and arrests for completion, accuracy, and compliance with both the law and our policy.				
Our policy establishes timelines for completed reviews by supervisors of stop, search, and arrest reports.				
We regularly publish reports that summarize findings of stop, search, and arrest data analysis, and share publicly.				

BIAS FREE POLICING

12. BIAS FREE POLICING	YES	NO	PARTIALLY	COMMENTS
<p>We clearly affirm that we strive to deliver police services that are equitable, respectful, and free of unlawful bias in a manner that promotes broad community engagement and confidence in law enforcement.</p>				
<p>Our department integrates bias-free policing principles into all aspects of our work, including management, policies and procedures, job descriptions, recruitment, training, personnel evaluations, resource deployment, tactics, and accountability systems.</p>				
<p>We utilize a discrimination-free approach to all department-related activities including programs and initiatives, not just the provision of police services.</p>				
<p>Bias-free policing training (also referred to as fair and impartial policing) is required of all personnel including officers, supervisors, command staff, and leadership.</p>				