



# AGREEMENT FOR EFFECTIVE AND CONSTITUTIONAL POLICING

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## Scope/ Goal

- The Special Litigation Section is one of several Sections in the Civil Rights Division. We work to protect civil rights in the following areas:

3) the rights of people who interact with state or local police or sheriffs' departments;

Goal should be similar – Police Chief/ DOJ

To protect the civil rights of all people, while ensuring that communities have confidence in their departments



# DOJ Process

## Question Asked:

- How do you keep the Civil Rights Division from investigating my police Department?

## Should the Question be:

- How do we deliver police services in an effective manner that complies with the Constitution.
- Limit Inconsistency



# The Violent Crime Control and Law Enforcement Act of 1994

## 42 U.S.C §14141

It is unlawful for state or local law enforcement officers to engage in a “pattern or practice” of conduct that deprives persons of rights protected by the Constitution or laws of the United States.



# 42 U.S.C §14141

- Statute authorizes the U.S. Attorney General to conduct investigations and, if warranted, file civil litigation to eliminate a “patter or practice” of misconduct.
- The “Special Litigation Section” of the DOJ Civil Rights Division is charged with reviewing and investigating allegations of a pattern of misconduct
- <http://www.justice.gov/crt/about/spl/findsettle.php>

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## History of DOJ

PERF Report – Civil Rights Investigations of Local Police July 2013

### DOJ Consent Decree and MOA Start Dates

1994	1995	1996	1997	1998	1999	2000	2001	2002	2003
Violent Crime Control and Law Enforcement Act of 1994			Pittsburgh Police Dept. Steubenville OH Police Dept.		New Jersey State Police	Montgomery County MD Police Dept. Highland Park IL Police Dept.	Los Angeles Police Dept. Metropolitan Police Dept. (D.C.)	Detroit Police Dept. Cincinnati Police Dept. Buffalo NY Police Dept.	Mt. Prospect IL Police Dept. Villa Rica GA Police Dept.
2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Prince George's County MD Police Dept.					U.S. Virgin Islands Police Dept.	Beacon NY Police Dept. Orange County FL Sheriff's Office		New Orleans Police Dept. Warren OH Police Dept. Seattle Police Dept. East Haven CT Police Dept. Puerto Rico Police Dept.	Univ. Of Montana Office of Public Safety and Missoula Police Dept.

# Targeting the Police

- **The Holder Justice Department declares open season on police departments**
- The current assistant attorney general for civil rights, Thomas Perez, told a conference of police chiefs in June 2010 that the Justice Department would be pursuing “pattern or practice” takeovers of police departments much more aggressively than the Bush administration, eschewing negotiation in favor of hardball tactics seeking immediate federal control.

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## 42 U.S.C §14141

- “Pattern or Practice” investigations occur only in jurisdictions where there is sufficient preliminary evidence of a pattern of unlawful conduct or systemic practices underlying the misconduct.
- Steps Taken:
  - Investigation
  - Findings Letter
  - Civil Actions / Consent Decree

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## 42 U.S.C §14141

- Primary Reasons for DOJ Intervention
  - Excessive Force
  - Ineffective Internal Affairs Systems
  - Patterns and trends of misconduct being ignored or not being addressed effectively
    - Policy Development
    - Supervision
    - Training
    - Discipline

## 42 U.S.C. § 1983

**Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state . . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.**

## **Monell v. Department of Social Services**

- U.S. Supreme Court (436 U.S. 658 (1978))
- Monell finds that Section 1983 applies to municipalities and local governmental units when policies or official procedure were responsible for violation of federally protected rights.
  - Failure of Policy
  - Failure to Supervise
  - Failure to Investigate
  - Failure to Train

## ***Monell v. Dept. of Social Services (1978)***

- Supreme Court held that local governments may be sued for damages as well as declaratory and injunctive relief whenever;
- “the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance regulation, or decision officially adopted and promulgated by that body’s officers. Moreover...local governments... may be sued for constitutional deprivations visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body’s decision making channels.”

# § 1983 claim under *Monell*

- Thus, to prevail on a § 1983 claim under Monell, the plaintiff must prove:
  - (1) the existence of an official policy or custom of such longstanding to have the force of law;
  - (2) pursuant to which one or more municipal employees violated the plaintiff's civil rights.

## Ladder of Liability



CHIEF/ CEO-MUNICIPALITY

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OFFICERS

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# Deliberate indifference

- Deliberate indifference is demonstrated when the “inadequacy is so obvious, and . . . so likely to result in the violation of constitutional rights, that the policymakers . . . can reasonably be said to have been deliberately indifferent[.]”
  - A choice made from among various alternatives;
  - A knowing choice, usually made with some state of mind;
  - A choice made with some knowledge or appreciation of what the consequences of the choice will/might be.



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## Establish Agency Liability

- In one of several ways:
  - 1. Unconstitutional Policy
  - 2. Decision or Act by Policymaker
  - 3. Unconstitutional Practice or Custom
    - Failure to Discipline or Supervise
    - Failure to Investigate
    - Failure to Train
    - Failure to Screen



## **According to Justice Scalia: Hudson v. Michigan**



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

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## **Common Police Practices**

- Policies and Training Generally
- Supervision and Management
- Stops, Searches and Arrests
- Use of Force- OIS Investigation, Garrity
- Bias Based Policing
- Civilian Complaints, Internal Affairs Investigations and Discipline
- Early Intervention Systems
- Community Engagement and Oversight
- Technology- Cell Phones and Taping Officers
- Police Interaction with Mentally Ill
- Gender Bias, Transgender and Sexual Assaults
- Crowd Management

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# Start with the Policy....



## Policies and Training Generally

- Policies and procedures shall reflect and express the Department's core values and priorities, and provide clear direction to ensure that officers lawfully, effectively, and ethically carry out their law enforcement responsibilities.

# Unconstitutional Policy

- Establish liability by proving that the alleged unconstitutional actions resulted from the execution of a formal policy statement, ordinance or regulation officially adopted by the municipality.
- An official policy is fairly easy to discern; it is usually found in written policy statements, ordinances, and regulations.

# Unconstitutional Policy

- A policy is an official policy, a deliberate choice of a guiding principle or procedure made by the municipal official who has final authority regarding such matters.
- Model Policies Available
  - IACP and PERF Guidelines
- DOJ Civil Rights Division
  - Finding Letters
  - Consent Decrees

# Policy Development

- Develop and implement policy and procedure manuals that include the following functions:
  - Field operations, including patrol, supervision task forces, and special operations;
  - Internal investigations, including case and records management, administrative investigations, confidential investigations, parallel criminal and administrative investigations, audits, and officer drug testing;
  - Use of force reporting, reviews, and investigations, including both Supervisor and IA force investigations and reviews; and in-custody death reviews;
  - Criminal investigations; Bias based policing, Search and seizure, Investigatory detention
  - Field and in-service training.

## *Brady v. Maryland*

- Shall develop a policy governing its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.
- As part of this policy, PD shall track and maintain records of all officers who have been determined to have been deceptive or untruthful in any legal proceeding, Internal Affairs investigation, or other investigation.
- Shall make these records available to prosecutors.



## Failure To Train

## Training

- Shall ensure that all relevant personnel have received, read, and understand their responsibilities pursuant to the policy or procedure,
  - including the requirement that each officer or employee report violations of policy;
  - that supervisors of all ranks shall be held accountable for identifying and responding to policy or procedure violations by personnel under their command; and
  - that personnel will be held accountable for policy and procedure violations.

# City of Canton v. Harris

389 U.S. 378 (1989)

- Held: Municipalities have an affirmative duty to train employees in core tasks.
- Inadequate law enforcement training may form the basis for a civil rights claim where the failure to train amounts to deliberate indifference to the rights of persons whom the police come into contact with.

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# City of Canton v. Harris

389 U.S. 378 (1989)

- The focus must be on the adequacy of a training program in relation to the duties the officers are expected to perform and the identified deficiency, in a city's training program.
- This will occur when the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been **deliberately indifferent** to the need.

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# Supervision



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## IT ALL STARTS WITH SUPERVISORS

- Shall ensure that supervisors have the knowledge, skills, and ability to provide close and effective supervision to each officer under the supervisor's direct command;
- provide officers with the direction and guidance necessary to improve and develop as police officers; and to identify, correct, and prevent officer misconduct.

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# Supervisory Training

- Shall provide a minimum of 32 hours of in-service training each year to each officer, in addition to any specialized training for officers in certain units, supervisors, etc., and in addition to the one-time training required by this Agreement.
- Shall provide mandatory supervisory, leadership, and command accountability training, tailored to each level of supervision and command

# Supervisory Training Program

- Shall include instruction in the following topics:
  - techniques for effectively guiding and directing officers and promoting effective and ethical police practices;
  - de-escalating conflict;
  - evaluation of written reports;
  - reviewing and investigating officer uses of force;
  - responding to and investigating allegations of officer misconduct;
  - Risk assessment and risk management;
  - evaluating officer performance;
  - appropriate disciplinary sanctions and non-disciplinary corrective action; and
  - using the Risk Management System to facilitate close and effective supervision.



# Areas of Concern

- **Span of Control**

- an adequate number of supervisors are deployed in the field to provide supervision consistent with generally accepted professional standards. (1-8, 1-10)

- **Unity of Command**

- Supervisors of field operation, investigation, and specialized units should provide daily field presence and maintain an active role in unit operations.

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## Use of Force

# USE OF FORCE

- Shall ensure that officers use non-force techniques to effect compliance with police orders whenever feasible;
- Use physical force only when necessary;
- Use physical force in a manner that avoids unnecessary injury to officers and civilians; and
- De-escalate the physical use of force at the earliest possible moment.

## Use of Force Principles

- Uses of force, regardless of the type of force or weapon used, shall abide by the following requirements:
  - officers shall use advisements, warnings, and verbal persuasion, when possible, before resorting to physical force;
  - physical force shall be de-escalated immediately as resistance decreases ;
  - supervisors shall determine whether the action or inaction of officers using physical force, or of other officers on scene, resulted in the need to use physical force;
  - officers will use disengagement, area containment, surveillance, waiting out a subject, summoning reinforcements, and/or calling in specialized units, when possible, in order to reduce the need for physical force and increase officer and civilian safety;

# Use of Force Principles

- officers shall allow individuals time to submit to arrest before physical force is used wherever possible;
- officers shall not use neck holds or a strike to the head with a hard object, except where lethal force is authorized;
- using physical force against persons in handcuffs is prohibited except in emergencies in which a reasonable officer would believe that bodily harm to another person or persons is imminent;
- unholstering and pointing a firearm at an individual constitutes a use of force and shall be limited accordingly; and
- immediately following a use of physical force officers and, upon arrival, a supervisor, shall inspect and observe subjects for injury or complaints of pain and provide any necessary medical care. This may require an officer to provide emergency medical care until professional medical care providers are on scene.

# General Use of Force Policy

- The comprehensive use of force policy shall include all force techniques, technologies, and weapons, both lethal and less-lethal, that are available to officers.
- The comprehensive use of force policy shall clearly define and describe each force option and the circumstances under which use of such force is appropriate

# Use of Firearms

- Officers shall not possess or use unauthorized firearms or ammunition, or obtain service ammunition from any source
- Officers shall not fire at or from a moving vehicle, unless use of lethal force is justified by something other than the threat from the moving vehicle; shall not intentionally place themselves in the path of or reach inside a moving vehicle; and where possible shall attempt to move out of the path of a moving vehicle before discharging their weapon.

# Electronic Control Weapons

- Shall limit the use of ECWs to only those situations in which such force is necessary to protect the officer, the subject, or another party from immediate physical harm.
- Unless it would present a danger to the officer or others, officers shall issue a verbal warning to the subject that the ECW will be used prior to use. Where feasible, the officer will defer ECW application a reasonable time to allow the subject to comply with the warning.

# Electronic Control Weapons

- ECWs will not be used where such deployment may cause serious injury or death from situational hazards, including falling, drowning, losing control of a moving vehicle, or becoming ignited from the presence of a potentially explosive or flammable material or substance, except where lethal force would be permitted.

# Electronic Control Weapons

- After one standard ECW cycle (5 seconds), the officer shall reevaluate the situation to determine if subsequent cycles are necessary. Officers shall be trained in the risks of prolonged or repeated ECW exposure, including that exposure to the ECW for longer than 15 seconds (whether due to multiple applications or continuous cycling) may increase the risk of death or serious injury. Officers shall clearly articulate and justify each and every cycle used against a subject in a written Use of Force Report.

# Electronic Control Weapons

- ECWs shall not be used in drive stun mode as a pain compliance technique
- ECWs shall be used in drive stun mode only to supplement the probe mode to complete the incapacitation circuit, or as a countermeasure to gain separation between officers and the subject so that officers can consider another force option.

# Electronic Control Weapons

- ECWs may not be used against pregnant women, elderly persons, children, visibly frail persons or persons with a slight build and persons in medical or mental crisis, except where lethal force would be permitted, or the officer has reasonable cause to believe there is an imminent risk of serious bodily self-harm and lesser force options are not feasible.

# Use of Force Reporting

- All officers using or observing force above un-resisted handcuffing shall report in writing, before the end of shift, the use of force in a Use of Force Report. The Use of Force Report shall include:
  - (a) a detailed account of the incident from the officer's perspective;
  - (b) the reason for the initial police presence;
  - (c) a specific description of the acts that led to the use of force;
  - (d) the level of resistance encountered; and
  - (e) a description of every type of force used.

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# Use of Force Reporting

- Officers who use or observe force and fail to report it, shall be held strictly accountable, and face discipline up to and including termination, regardless of whether the force was reasonable.
- Each officer in a position to see or hear a use of force shall complete a Use of Force Report, before the end of the shift, documenting the officer's own actions and observations.

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# Use of Force Reporting

- Officers' Use of Force Reports (whether primary or supplemental) shall completely and accurately describe the use of force.
- Officers who use or observe force shall notify their supervisors immediately following any use of force or upon receipt of an allegation of unreasonable or unreported use of force by any officer.

# Use of Force Reporting

- Absent exceptional circumstances, the direct supervisor of any officer using force, upon notification of a use of force or allegation of excessive force, shall respond to the scene of the use of force.
- If a supervisor is unable to respond to the scene, the supervisor shall document in the case file the exigent circumstances preventing his or her presence. The direct supervisor of any officer using force shall review all uses of force



# Use of Force Reporting

- Each supervisor shall complete and document a use of force supervisory review using a Supervisor's Force Review Report, within 72 hours of learning of the use of force.
- Where a reviewing supervisor repeatedly conducts deficient investigations, the supervisor shall receive the appropriate corrective action, including training, demotion, and/or removal from a supervisory position.

## OIS INVESTIGATIONS



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# Office Involved Shooting Hot Topics

- Proper Policy and Operations Procedure
- Public Safety Statement
- Reviewing Videos – When and How?
- Scene Walk Through
- Interviews of Witness officers
- Interviews of Subject Officers
  - Waiting Periods of Investigations
  - Criminal vs. Administrative
  - Voluntary, Miranda and Garrity

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## Interview of Subject Officer

- DOJ language- Delay of compelled interview when criminal investigation occurring.
  - Voluntary Interviews-
  - Miranda Interview-
  - Compelled statement-
- 11/23/2011 SPD – Special Litigation issued *Garrity* recommendation letter.

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# Miami PD – DOJ

7/9/2013

- Reasonable cause to believe that MPD engages in a pattern or practice of excessive use of force with respect to firearm discharges.
- Among other findings, our investigation uncovered a number of troubling MPD practices, including deficient tactics and supervision, as well as significant delays and substantive deficiencies in deadly force investigations

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## Early Identification System

- Shall develop, implement and maintain an early identification system ("EIS") to support the effective supervision and management of officers and employees, including the identification of and response to potentially problematic behaviors as early as possible .

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# Community Engagement

- Shall create robust community relationships and engage constructively with the community to ensure collaborative problem-solving, ethical and bias-free policing, and increase community confidence in the Department.

## CONDUCTING INTERNAL AFFAIRS INVESTIGATIONS



# Reporting Misconduct

- Shall require that all officers and employees report apparent misconduct by another officer or employee to a supervisor or directly to IA for review and investigation.
- Where apparent misconduct is reported to a supervisor, the supervisor shall immediately document and report this information to the Chief.

# Complaint Information

- Shall develop and implement a program to ensure broad knowledge throughout the community about how to make misconduct complaints, and the availability of effective mechanisms for making misconduct complaints.
- Individuals shall be able to submit misconduct complaints through the PD and City websites and these websites shall include complaint forms and information regarding how to file misconduct complaints.

# Complaint Intake

- Complaint forms and related informational materials shall be made available and posted in English and Spanish.
- shall revise policy and train all officers and supervisors to ensure that all officers properly handle complaint intake

# Complaint Intake

- Shall accept all misconduct complaints including:
  - anonymous and third-party complaints, for review and investigation.
  - Complaints may be made in writing or verbally, in person or by mail, telephone (or TDD), facsimile, or electronic mail.

# Complaint Investigation

- Manner which Complaints will be received
- Manner in which complaints will be tracked
- Manner which complaints will be investigated.
- Length of time to accept complaint, process, acknowledge and investigate.
- Create and utilize a discipline matrix

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## Arrest and Search

# Arrest

- An officer shall immediately notify a supervisor when effectuating a felony arrest, an arrest where the officer used force, an arrest for obstructing or resisting an officer, any disorderly conduct type arrest, or a custodial arrest for a vehicle infraction, and the supervisor shall, absent exceptional circumstances, immediately respond to the scene.
- A supervisor shall document in the case file the exceptional circumstances preventing his or her presence.

# Supervisor Review

- The responding supervisor shall approve or disapprove the officer's arrest recommendation, based on the existence of justifiable probable cause and policy.
- At the time of presentment at headquarters, a watch commander or supervisor shall visually inspect each detainee or arrestee for injury, interview the detainee or arrestee for complaints of pain, and ensure that the detainee or arrestee receives medical attention from an appropriate medical provider, as necessary. The watch commander or supervisor shall document the results of the visual inspection in writing.



# Investigatory Stops and Detentions

- Shall conduct investigatory stops or detentions only where the officer has reasonable suspicion that a person has been, is, or is about to be engaged in the commission of a crime.
- shall not use demographic category as a factor, to any extent or degree, in establishing reasonable suspicion or probable cause, except as part of an actual and credible description of a specific suspect in an ongoing investigation.

## Searches

- Shall not use demographic category in exercising discretion to conduct a warrantless search or to seek a search warrant, except as part of an actual and credible description of a specific suspect in an ongoing investigation.

# Stop and Search Data Collection

- A requirement that prior to making traffic stops, officers notify dispatch about known information, including the number of occupants of the vehicle, the perceived race or ethnicity of the occupants, and a description of the basis for the stop;
- A detailed description of the justification necessary for officers to make stops and arrests;

## Requirements

- A requirement that all stops, searches, and seizures be documented in an Incident Report that records:
  - the officer's name and badge number;
  - date, time, and location of the stop;
  - duration of the stop;
  - the apparent race, color or ethnicity of the individual, based on the police officer's reasonable observation and perception;
  - the suspected violation that led to the stop;
  - whether any contraband or evidence was seized from any individual, and nature of the contraband or evidence;
  - the post-stop action taken with regard to the violation (including a warning, a citation, an arrest, or a use of force); and
  - whether any search was conducted, the kind of search conducted, the basis for the search, whether the search was consensual or non-consensual, and the outcome of the search.



## Record Officer Conduct

## Record Officer Conduct

- Shall ensure that onlookers or bystanders may witness, observe, record, and/or comment on officer conduct, including stops, detentions, searches, arrests, or uses of force in accordance with their rights
- Officers shall respect the right of civilians to observe, record, and/or verbally comment on or complain about the performance of police duties occurring in public, and PD shall ensure that officers understand that exercising this right serves important public purposes.

# Record Officer Conduct

- Individuals observing stops, detentions, arrests and other incidents shall be permitted to remain in the proximity of the incident unless there is an actual and articulable law enforcement basis to move an individual, such as: an individual's presence would jeopardize the safety of the officer, the suspect, or others in the vicinity; the individual violates the law; or the individual incites others to violate the law.

# Record Officer Conduct

- Individuals shall be permitted to record police officer enforcement activities by camera, video recorder , cell phone recorder, or other means, unless there is an actual and articulable law enforcement basis to deny permission.
- Individuals shall be permitted to record police officer enforcement activities by camera, video recorder , cell phone recorder, or other means, unless there is an actual and articulable law enforcement basis to deny permission.

# Record Officer Conduct

- Officers shall not threaten, intimidate, or otherwise discourage an individual from remaining in the proximity of or recording police officer enforcement activities.
- Officers shall not detain, prolong the detention of, or arrest an individual for remaining in the proximity of, recording or verbally commenting on officer conduct directed at the individual or a third party, unless there is an actual and articulable law enforcement basis for the detention.

# Record Officer Conduct

- Officers shall not seize or otherwise coerce production of recorded sounds or images, without obtaining a warrant, or order an individual to destroy such recordings.
- Where an officer has a reasonable belief that a bystander or witness has captured a recording of critical evidence related to a felony, the officer may secure such evidence for no more than three hours while a legal subpoena, search warrant, or other valid order is obtained.

**The End....**

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