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Investigation of the Newark Police Department

United States Department of Justice
Civil Rights Division

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I. EXECUTIVE SUMMARY

The Department of Justice opened an investigation of the Newark Police Department ("NPD" or "the Department") in May 2011, after receiving serious allegations of civil rights violations by the NPD, including that the NPD subjects Newark residents to excessive force, unwarranted stops, and arrests, and discriminatory police actions.

This investigation of Newark's policing practices was conducted jointly by the Special Litigation Section of the Civil Rights Division and the United States Attorney's Office for the District of New Jersey (collectively, "DOJ") pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141"), Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("Title VI"), and the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3789d ("Safe Streets Act"). Section 14141 prohibits government authorities from engaging in a pattern or practice of law enforcement misconduct that violates individuals' constitutional or federal statutory rights. Title VI and the Safe Streets Act together prohibit discrimination on the basis of race, color, sex, religion, or national origin by the recipients of certain federal funds.

The investigation benefited from the assistance of the NPD and the City of Newark ("City"), which provided access to officers, command staff, documents, and available data. The DOJ also received input from other criminal justice stakeholders, including members of the community, law enforcement organizations, advocacy groups, unions representing NPD officers, and others who shared their experiences with the NPD.

This report sets out the DOJ's investigative findings. In sum, and as discussed further below, this investigation showed a pattern or practice of constitutional violations in the NPD's stop and arrest practices, its response to individuals' exercise of their rights under the First Amendment, the Department's use of force, and theft by officers. The investigation also revealed deficiencies in the NPD's systems that are designed to prevent and detect misconduct, including its systems for reviewing force and investigating complaints regarding officer conduct. The investigation also identified concerns that do not appear to amount to patterns of constitutional misconduct, but which nonetheless are significant and warrant consideration by the NPD. These concerns relate to the NPD's practices in dealing with potentially suicidal detainees, the NPD's sexual assault investigations, and the impact of the NPD's policing on the LGBT community.

The City of Newark is diminished, and the NPD rendered less effective, by these patterns and practices of unconstitutional conduct. The NPD's policing practices have eroded the community's trust, and the perception of the NPD as an agency with insufficient accountability has undermined the confidence of other Newark criminal justice stakeholders as well. Fixing the problems this investigation identified will not only make Newark a more equitable community, but also a safer one. As the NPD stated in its Transparency Policy, General Order 2013-03, "[i]t is a fundamental principle that the public's trust and cooperation is essential to the Newark Police Department's effectiveness . . . . The Department cannot prevent future crimes without commitment and cooperation from the community . . . ."

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As discussed more fully in the body of this report, there is reasonable cause to believe that the NPD has engaged in a pattern or practice of:

- **Effecting stops and arrests in violation of the Fourth Amendment.** Approximately 75% of reports of pedestrian stops by NPD officers failed to articulate sufficient legal basis for the stop, despite the NPD policy requiring such justification. During the period reviewed, the NPD made thousands of stops of individuals who were described merely as "milling," "loitering," or "wandering," without any indication of reasonable suspicion of criminal activity. In addition, a review of the NPD's arrest reports raised concerns that, in some subset of NPD narcotics arrests, officers have failed to report completely or accurately the circumstances of those arrests.

- **Policing that results in disproportionate stops and arrests of Newark's black residents.** The NPD stops black individuals at a greater rate than it stops white individuals. As a result, black individuals in Newark bear the brunt of the NPD's pattern of unconstitutional stops and arrests. This investigation did not determine whether the disparity is intentional or is otherwise legally unjustified. Regardless, this experience of disproportionately being subjected to stops and arrests in violation of the Fourth Amendment shapes black residents' interactions with the NPD, to the detriment of community trust, and makes the job of delivering police services in Newark more dangerous and less effective.[1]

- **Retaliating against individuals who question police actions.** In violation of the First Amendment, NPD officers have detained and arrested individuals who lawfully object to police actions or behave in a way that officers perceive as disrespectful.

- **Using unjustified and excessive force in violation of the Fourth Amendment.** In more than twenty percent of the NPD force incidents reviewed, the force as reported appeared unreasonable and thus in violation of the Constitution. Further, there has been substantial underreporting of force by NPD officers, and most NPD use of force investigations have been too inadequate to support reliable conclusions about whether an officer's use of force—including deadly force—was reasonable.

- **Subjecting individuals to theft by NPD officers in violation of the Fourth and Fourteenth Amendments.** The investigation revealed evidence of theft of

[1] As this report was being finalized, the American Civil Liberties Union's New Jersey affiliate (ACLU-NJ) released the results of its review of NPD stop statistics. The ACLU-NJ review was limited to a subset of summary stop data the NPD now publishes on its website. As explained below, the DOJ obtained direct access to the NPD's source records and the DOJ investigation thus included analysis of more precise information, including the location of stops, the documented justification, whether the stop was a pedestrian or vehicle stop, and descriptions of post stop activity such as searches and frisks. Like the DOJ investigation, the ACLU-NJ review of different, but more recent data identified racial disparities in NPD stops.

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> citizens' property and money by officers, specifically in the NPD's specialized units such as the narcotics and gang units, and in the prisoner processing unit at the Green Street Cell Block. The NPD has conducted inadequate investigations into theft complaints, failed to take corrective action against offending officers, and declined to implement the methods recommended by its own investigators that could prevent future theft by officers.

The finding of a pattern or practice of unlawful conduct within a law enforcement agency does not mean that most officers violate the law. Nor does a pattern or practice reflect that a certain number of officers have violated the law, or that the number of unlawful acts have reached a particular threshold. *See United States v. Peachtree Tenth Corp.,* 437 F.2d 221, 227 (5th Cir. 1971) ("The number of [violations) ... is not determinative ...., [no] mathematical formula is workable, nor was any intended. Each case must turn on its own facts"). Rather, the touchstone is whether the unlawful conduct appears more typical than isolated or aberrant. A pattern or practice exists where the conduct appears to be part of usual practice, whether officially sanctioned by policy or otherwise. *See, e.g., Int'l Bhd. Of Teamsters v. United States,* 431 U.S. 324, 336 (1977) (a pattern or practice is "more than the mere occurrence of isolated or 'accidental' or 'sporadic'" acts; instead it must be a "regular rather than the unusual practice").

The patterns of constitutional violations described in this report result in significant part from a lack of accountability and review systems within the NPD. The NPD has neither a functioning early warning system nor an effective internal affairs structure. Those inadequacies undermine the Department's ability to identify and address officer misconduct. The NPD's data collection and analysis, and its system for regular review of officer use of force, are similarly deficient.

One indication of the ineffectiveness of the NPD's internal affairs system is that the Internal Affairs Unit ("IA") sustained only one civilian complaint of excessive force out of hundreds received from 2007 through 2012. While there is no "right" rate at which force complaints should be sustained, only one finding of unreasonable force out of hundreds of complaints over a six-year period is symptomatic of deeply dysfunctional accountability systems. The NPD also has failed to adequately collect or analyze data about officers' use of force, stops, or arrests. Nor has the NPD taken adequate steps to implement an early warning system that would track and identify officers' problematic behavior. As a result of these systemic deficiencies, the NPD does not discern or respond to problematic trends in officer conduct that could constitute or lead to misconduct.

Nor has the NPD provided officers with the tools necessary to support constitutional policing, such as adequate training, clear and easily accessible policies, and meaningful supervisory direction. Basic deficiencies have included the failure to ensure that NPD officers actually have access to the policies they are supposed to follow, to regularly update policies, and to provide or track necessary training. Supervisory review of officer actions, including use of force and arrests, has been lax. The cumulative effect of these deficiencies is an organization that is too prone to shield officers from accountability, and insufficiently focused on protecting constitutional rights.

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The responsibility for correcting the NPD's unconstitutional policing practices lies at every level within the Department. NPD supervisors and command leadership must ensure that officers receive the training, guidance, and direction necessary to police effectively and constitutionally, and clearly communicate to officers that constitutional policing and effective law enforcement are not in tension with each other, but rather are interdependent. Officers must act within the parameters that the law places on stops, searches, and arrests, and avoid escalating interactions to the point where they use force unnecessarily. The NPD further must collect and analyze data related to stops, searches, and arrests, so that it can minimize the disparate impact of its enforcement efforts and avoid bias in policing. NPD leadership must also ensure that, when officers do violate policy or the law, they are held accountable and that corrective action, including discipline, is effective, fair, and consistent.

All of these findings, as well as proposed remedies, have been discussed with City officials and NPD leadership, and the City and NPD have pledged to quickly and thoroughly address these problems. To that end, the City and DOJ have reached an Agreement in Principle that will form the foundation of a comprehensive, judicially enforceable and independently monitored agreement to implement significant reform.

The Agreement in Principle, which is attached, addresses each of the patterns of constitutional violations described in this report. The Agreement requires the City to establish a civilian oversight entity for the NPD and additional mechanisms for effective community engagement to help ensure the sustainability of reforms and to foster positive relations between the NPD and the Newark community. The City, NPD, and DOJ agree that the NPD will review and revise its policies, training, and internal oversight mechanisms, particularly regarding the use of force and stop, search and arrest practices. The NPD also will provide officers with proper guidance regarding individuals' exercise of their First Amendment rights. The NPD will develop and implement accountability and supervisory practices to prevent, detect, and address unlawful stops, searches, and arrests and unreasonable force, and to detect and prevent theft by officers. The NPD will revise its internal affairs practices to ensure effective complaint intake, objective investigations of misconduct, and fair and consistent discipline. The NPD will also enhance its collection and analysis of data so that it can better understand its enforcement practices and ensure their effectiveness and constitutionality.

Throughout the investigation of the NPD's practices, all parties have recognized that Newark is a challenging city to police, given its significant level of crime and its budget constraints. The DOJ acknowledges in particular the skills and dedication of the many Newark police officers who abide by the rule of law and commit themselves daily to the difficult, and too often thankless, job of protecting public safety. The findings of this investigation are not meant to detract from these officers' efforts. Indeed, many of the investigative findings underscore the need for the NPD and the City to better support and direct its officers.

Alongside this appreciation for the difficulties of police work, all parties agree that any NPD policies or practices that violate civil rights must be identified and remedied. This shared respect for individuals' civil rights reflects not only the fundamental importance of these rights, but also an understanding that repeated civil rights violations make policing less effective and more dangerous. The DOJ looks forward to working cooperatively with the City and the NPD—

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as well as with the many other important stakeholders in this process, including community members and police unions—to carry out these reforms.

II. BACKGROUND

A. Investigation and Methodology

The DOJ provided notice to the City and the NPD of its investigation pursuant to Section 14141, Title VI, and the Safe Streets Act on May 9, 2011, and that the investigation would focus on allegations of excessive force; unconstitutional stops, searches, and seizures; discriminatory policing on the basis of race, ethnicity, national origin, sexual orientation, and gender identity; risk of harm to detainees confined in holding cells; and retaliation by officers against individuals who legally attempt to observe or record police activity.

The team investigating the NPD's police practices consisted of experts in police practices, and lawyers and other staff from the DOJ. Police practice experts included current and former police chiefs and supervisors from other jurisdictions, who provided expertise on law enforcement issues, as well as an expert in the collection and analysis of police-related data.

The investigation included intensive on-site review of NPD practices and procedures. The team conducted interviews and meetings with NPD officers, supervisors, and command staff, and participated in "ride-alongs" with officers and supervisors. The team also met with representatives of police fraternal organizations, conducted numerous community meetings, met with advocates and other individuals, and interviewed a wide array of local, regional, and federal stakeholders in the Newark criminal justice system, including representatives of the Essex County Prosecutor's Office ("ECPO"), the Essex County Public Defender's Office, the Newark Municipal Prosecutor's Office, and the Federal Bureau of Investigation. The team set up a toll-free number and email address to receive information related to the NPD. The DOJ also worked with NPD's contracted data management vendor to obtain substantial amounts of data related to NPD stops and arrests.

Throughout this report, specific facts and incidents are included as examples and illustrations, but the conclusions reflect the entirety of the information received, and are not based only on the individual events described here.

B. Newark, New Jersey and the Newark Police Department

Newark is New Jersey's largest city, with a population of 277,140 people, according to the 2010 census. Newark's population is racially and ethnically diverse: 53.9% black, 26.4% white, and 19.8% other or unknown.[2] Of the entire population, approximately 33.9% identify themselves as Hispanic or Latino, with 30.6% identifying as non-black Hispanic.

[2] This demographic breakdown for the population used in this report differs slightly from the percentages in the overall 2010 census for Newark. The breakdown in this report is calculated on a block-by-block basis, a smaller geographic unit than the U.S. Census Bureau uses to calculate data. This breakdown is a more accurate figure for assessing NPD's policing practices within precinct and sector geographic boundaries.

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The NPD currently employs approximately 1,000 sworn officers, and is still recovering from the layoff of 167 officers at the end of 2010 due to budget cuts. The Department is led by a Police Director, appointed by the Mayor of Newark and approved by the Newark City Council, and a Chief of Police, who reports to the Police Director. The NPD is composed of four precincts and additional bureaus and special units, including the Detective Bureau, the Special Operations Division, and the Support Services Bureau. All of these report to the Chief, whereas the Director directly oversees the Internal Affairs Unit,[3] the Training Section, and the Administration Bureau.

General Orders and Director's Memoranda set forth the NPD's policies and procedures.[4] The investigation included a review of the NPD's written policies, procedures, and training materials. To gain a complete picture of the NPD's police practices, the team also reviewed myriad records and reports completed by NPD officers to document their activities and enforcement actions. When officers conduct a traffic or pedestrian stop, they are required to complete a *Field Inquiry Report* which, by policy, must include the legal support for the stop. If officers make an arrest, or take some other enforcement action, they are required to complete an *Incident Report* in which the officer is required to describe the legal support for the arrest, the elements of the alleged offense, and, if force was used, a narrative description of the nature of and reason for the use of force. Officers using force are required also to complete a *Use of Force Report*, which consists of data fields to complete, but provides no space for any narrative description of the force used or its justification. A supervisor is required to sign the Use of Force Report to document that the force has been reviewed and approved.

When an individual complains that an officer committed misconduct, the NPD's internal affairs unit is required to conduct an administrative investigation of the allegation and document its investigation and findings in an *Internal Affairs Investigation Report.* The NPD's internal affairs unit also is required by policy to conduct an administrative investigation of all officer-involved shootings, whether or not they result in any complaint, and independent of any criminal investigation of the incident. These shooting investigations also are documented in an Internal Affairs Investigation Report. The administrative investigation of a shooting differs from a criminal investigation in that the administrative investigation is focused on determining whether the shooting violated departmental policy and was a reasonable use of force, rather than whether the shooting was potentially criminal. This investigation included close review of a representative sample of each category of these reports.

Three separate unions represent NPD officers: the Fraternal Order of Police Lodge No. 12 ("FOP"), the Superior Officers' Association ("SOA"), and the Deputy Chiefs' Association ("DCA"). All three unions have collective bargaining contracts with the City. SOA members

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[3] During the course of the investigation and drafting of this report, the name of the NPD's internal investigations unit changed. At present, the NPD organizational chart no longer lists a specific "Internal Affairs" unit, although the Office of Professional Standards ("OPS"), of which IA was previously a sub-unit, still appears in the chart. NPD staff use the terms OPS and Internal Affairs interchangeably. This report refers to the NPD's internal investigations unit as Internal Affairs or "IA."

[4] These policies and procedures are informed by the New Jersey State Attorney General's Office guidelines for law enforcement agencies, which apply to all municipalities in New Jersey. These guidelines are available at http://www.state.nj.us/lps/dcj/agguide.htm.

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may also join the FOP to obtain that union's legal defense benefits. Separately, NPD officers may also join the Newark Police Benevolent Association which advocates on behalf of NPD officers and also offers legal defense benefits, but is not the collective bargaining unit. The NPD currently does not have any form of civilian oversight, although the previous mayor announced a plan to establish a civilian-led police oversight panel in 2013.

III. FINDINGS

A. STOPS AND ARRESTS

The NPD's stops and arrests are problematic in a number of respects. The NPD engages in a pattern or practice of effecting pedestrian stops without reasonable suspicion of criminal activity, in violation of the Fourth Amendment. In addition, the NPD's response to perceived disrespect violates the First and Fourth Amendments. Further, an uncertain number of the NPD's narcotics-related arrests appear to violate the Fourth Amendment.

1. Stops

Generally, a search or seizure is unreasonable "in the absence of *individualized* suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000) (emphasis added). There is reasonable cause to believe that the NPD nonetheless engages in a widespread pattern or practice of making pedestrian stops without such individualized suspicion.[5] This conclusion is based on review of NPD policies, stop reports for a three-and-a-half year period, arrest records, IA files, site visits to the NPD, interviews with stakeholders in the criminal justice system, and information provided by community members.

a. Legal Standards

Under the Fourth Amendment, law enforcement officers may briefly detain an individual for investigative purposes if the officers possess reasonable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1, 21 (1968). Reasonable suspicion to conduct a stop may be "the result of any combination of one or several factors: specialized knowledge and investigative inferences, personal observation of suspicious behavior, information from sources that have proven to be reliable, and information from sources that—while unknown to the police—prove by the accuracy and intimacy of the information provided to be reliable at least as to the details contained within that tip." *United States v. Nelson*, 284 F.3d 472, 478 (3d Cir. 2002) (internal citations omitted). Courts have interpreted the Fourth Amendment's guarantee against unreasonable searches and seizures to mean that law enforcement officers must satisfy escalating legal standards of "reasonableness" for each level of intrusion upon a person—stop, search, seizure, and arrest.

While reasonable suspicion is evaluated by looking at the totality of circumstances, an officer must be able to "articulate specific reasons justifying [the] detention." *Johnson v. Campbell*, 332 F.3d 199, 206 (3d Cir. 2003); *see also United States v. Robertson*, 305 F.3d 164,

[5] The investigation focused on pedestrian stops and did not assess the NPD's vehicle stop practices.

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167 (3d Cir. 2002). A stop must be based on something more substantial than an "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 392 U.S. at 27. The officer must be able to point to some particular and objective manifestation that the suspect was, or was about to be, engaged in criminal activity. *United States v. Cortez*, 449 U.S. 411, 417 (1981); *see also United States v. Brown*, 448 F.3d 239, 246 (3d Cir. 2006); *Johnson*, 332 F.3d at 206.

The Third Circuit has found that a stop is unconstitutional where an officer thinks an individual's behavior is "suspicious" but is not able to articulate why or link it to criminal activity. *Johnson*, 332 F.3d at 210 (report that plaintiff was pacing and acting agitated, followed by officer's observation of plaintiff sitting in a car reading the newspaper, did not give rise to articulable suspicion that plaintiff was about to commit a crime). Similarly, an officer may not stop individuals based only on a generalized description of appearance that could apply widely, when the officer has not observed suspicious activity by those individuals. *See Brown*¸ 448 F.3d at 248-52 (stop was unconstitutional when officer stopped two individuals he observed hailing a taxi based on description of robbery suspects as two black males, ages 15 to 20, wearing dark clothing).

Nor is an individual's mere presence in a particular neighborhood or area—even "an area of expected criminal activity" or "a high crime area"—sufficient "to support a reasonable, particularized suspicion that the person is committing a crime." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000); *see also United States v. Bonner*, 363 F.3d 213, 217 (3d Cir. 2004); *United States v. Roberson*, 90 F.3d 75, 81 (3d Cir. 1996) (mere presence on a corner known as a "hot corner" for drug sales does not support reasonable suspicion to justify a stop). Rather, while presence in a high crime area may be a factor, police must make their determination of reasonable suspicion upon the individual's actions.

b. NPD Stops Have Routinely Violated the Fourth Amendment

The NPD uses a Field Inquiry Report to document stop activity by officers, and NPD policy requires that the report contain sufficient facts to demonstrate reasonable suspicion for a stop.[6] Reports failing to meet reasonable suspicion standards are to be rejected by the reviewing supervisor, and corrective training conducted to prevent a recurrence. Therefore, in theory, the Field Inquiry Report offers the best record of the NPD's stop activities. However, the NPD's use of Field Inquiry Reports is not entirely consistent with its policy, as NPD officers also use Field Inquiry Reports to document encounters other than stops for which reasonable suspicion is not required, such as witness interviews.

To ensure that the review assessed the NPD's core pedestrian stop practices and not other encounters, the review of Field Inquiry Reports was conservatively limited to those in which the individual was described as a suspect, instead of a witness, and subject to a warrant check. By this measure, during the period of January 2009 to June 2012, NPD officers completed 39,308 Field Inquiry Reports, each documenting a pedestrian stop. Of those 39,308 encounters, the officer did not record *any* justification for the stop on 6,200 occasions (15.8%). These encounters were excluded from further analysis. DOJ investigators analyzed a sample of one-

[6] NPD GO 97-8 (Revised 7/1/2000).

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third (n=10,179) of the Field Inquiry Reports that recorded a justification for the stop. In approximately 75% of these remaining Reports, the officers failed to articulate reasonable suspicion to justify the stop, as required by NPD policy.[7] *Cf. Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y. 2013) (finding violations of class members' Fourth Amendment rights where statistical analysis revealed that 6% of stops lacked reasonable suspicion).

In particular, thousands of the stops—all of which were at least long enough to run warrant checks—involved individuals who were described merely as "milling," "loitering," or "wandering," without any indication of criminal activity or suspicion. Some of those were augmented with a notation that the "milling," "loitering," or "wandering" was taking place in high-crime areas, high-narcotics areas, or high-gang activity areas. Officers also routinely stopped and ran warrant checks for individuals solely for being present in high-crime areas, near scenes of suspected or reported crimes, or simply "in areas." Without any indicator of criminal activity or suspicion of an intent to engage in criminal activity, these reasons do not constitute reasonable suspicion to detain an individual, and are therefore constitutionally deficient. Yet, the reports demonstrate that these have been the most common type of pedestrian stops made by NPD officers.[8]

While poor report-writing may amplify the number of stops that appear unjustified, the repeated reliance on these insufficient justifications strongly suggests that NPD officers do not appreciate what is legally required for reasonable suspicion of criminal activity. Moreover, the frequent use of certain types of illegitimate justifications for stops, combined with the failure of reviewing supervisors to reject reports that contain them, suggests that the NPD has tolerated its officers' stopping people for reasons that do not meet constitutional muster.

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[7] This high rate of unjustified stops may actually understate the problem. For example, if the Field Inquiry Report indicated that the stop was dispatch-initiated rather than officer-initiated, the review did not consider the stop insufficiently justified, even where the report did not articulate facts that would justify a stop. Similarly, stop reasons referencing quality of life citations were also generally not included in the "no reasonable suspicion" category because the majority of behaviors giving rise to quality of life citations are evident by observation. However, stop reasons consisting solely of the fact that an individual was arrested *were* included in the "no reasonable suspicion" category for reasons explained later in this section. Even when excluding this latter category of stops, the analysis shows that officers failed to articulate reasonable suspicion in 69% of the Field Inquiry Reports reviewed. In addition, if this analysis had considered the 15.8% of reports that recorded no justification for the stop to be insufficient, approximately 93% of the stops would have been considered unsupported by articulated reasonable suspicion.

[8] Backseat detentions are another troubling aspect of NPD stop practices. Being placed in the backseat of a police vehicle can be a humiliating and often frightening experience. Police departments should use this practice only in strict accordance with the law. In Newark, there were credible complaints from community members that NPD officers routinely detain people and place them in the backs of police vehicles for significant periods of time and without cause, and then release them without actually filing charges, or even informing the individuals of the reasons for detention. It is difficult to assess the extent of this practice because of the lack of written documentation, in violation of policy, of the officers' action. NPD policy (GO No. 09-03) requires officers to document detentions in Incident Reports, even when an officer subsequently releases an individual without bringing the person to the precinct for processing or filing formal charges. However, like other NPD documentation requirements assessed, this policy does not appear to have been consistently followed, reviewed, or enforced. The NPD should ensure that backseat detentions are used only as appropriate for officer safety or other legitimate reasons and should enforce its policies that require documenting this activity.

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These deficiencies in the NPD's stop practices were also reflected in IA investigations of complainants that officers used excessive force, discussed more fully later in this report. Nineteen percent—almost one in five—of those IA files described a stop without a constitutional justification. If the initial stop that culminated in the use of force was itself unjustified, any use of force, whether otherwise appropriate or not, is troubling, and perhaps unconstitutional.

At least part of this pattern of unlawful stops can be traced to NPD policies and training. NPD policy includes "[h]igh crime areas and the type of activity that takes place there" and "[p]roximity to scene of a crime" in its list of "reasonable suspicious factors to stop a person."[9] Although the policy provides examples for each of these factors that include the factor *plus* additional information (*i.e.* high crime area *plus* exchange of currency and objects by the individual, proximity of scene of crime *plus* individual matches a description or is engaged in activity such as running or hiding), the policy does not clearly state that any of those factors alone are insufficient and that additional information is *required* to establish reasonable suspicion. This lack of clarity in NPD policies effectively promotes a view that living or simply being in a high-crime area is criminally suspicious. This violates the Fourth Amendment's fundamental tenet requiring *individualized* suspicion to justify deprivation of liberty by law enforcement. The lack of clarity may also result in inadequate documentation of stops that might actually have been constitutional but were not fully described.

In addition to stopping individuals based on their mere presence in high crime areas, NPD officers also have too often stopped pedestrians for other impermissible reasons. For example, NPD officers illegally stopped individuals whom officers perceived to react negatively to the presence of police officers, without any additional indicia of criminal activity. *See, e.g.*, *Bonner*, 363 F.3d 217-18 (flight upon noticing police, without some other indicia of wrongdoing, is not grounds for reasonable suspicion). Officers also have impermissibly stopped individuals solely because they were in the presence of an arrestee or other suspicious person, without any other articulated indicia of criminal activity. *See Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) ("[A] search or seizure of a person must be supported by probable cause particularized with respect to that person."). Specific examples of these types of reasons for stops include: "Actor Upon Noticing Our Presents [sic] Changed His Direction of Travel," "Observed Actor Hid Behind A Car When He Observed Police Car," and "Subject Was In the Company of a Female Who Was Cited For Drinking."

NPD officers also regularly have justified stops based solely on information or evidence discovered after the stop was initiated. Examples include "Individual Was Stopped on Bicycle No Proper ID" and "A Record Check of the Above Individual Revealed an Open Warrant." The reasonableness of a stop is determined based on "facts available to the officer *at the moment of the seizure*." *Terry*, 392 U.S. at 20-21 (emphasis added); *Johnson*, 332 F.3d at 205; *see also Brown*, 448 F.3d at 245 (attempt to escape after stop was irrelevant in determining reasonableness of stop because attempt to escape occurred after stop was initiated).

Similarly, officers have justified stops based on the fact that the individual was ultimately arrested. Typical examples of these justifications include "Arrested," "CDS Arrest," "Narcotics

[9] *See* NPD GO 97-8 (Revised 7/1/2000).

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Arrest," and "Individual Arrested for [charge]." This is constitutionally impermissible: an officer must first have reasonable suspicion of criminal activity in order to conduct a stop, and the discovery of evidence during or after the stop that provides probable cause for arrest cannot be used to retroactively establish reasonable suspicion for the stop. *See Wong Sun v. United States*, 371 U.S. 471, 484-85 (1963). Because the stop was not justified in the first place, the subsequent search and arrest are the direct result of impermissible police activity and are invalid.

c. Unconstitutional Stop Practices Undermine Effective Policing and Officer Accountability

The NPD's unconstitutional stop practices negatively affect not only Newark's residents but also the NPD's ability to effectively police the City. First, the practice erodes the community's trust, as individuals feel that they will be treated as criminals based on where they live or spend time, rather than on how they act. Indeed the NPD's own stop policy warns that "[t]he indiscriminate use of stopping and questioning individuals will be detrimental to the positive community relations that this Department strives to obtain." And representatives from other criminal justice agencies, advocates, and community members reported throughout the investigation that many Newark residents have come to expect that officers might stop, record-check, and search them at any time without any justification at all. One individual characterized this experience as "just part of living in Newark." As with the NPD's Quality of Life citation practices discussed later in this report, residents perceive these stops as harassment by police. Research has shown, and individuals interviewed during this investigation recounted, that witnesses who experienced such stops are less likely to accept police legitimacy and to provide assistance to police during investigations.

Second, stops without adequate justification result in the over-collection, and improper retention and use, of personal information. NPD policy states that information about individuals in the NPD's database is relevant for evaluating the veracity and reliability of their statements in the future. As a result, NPD officers' unjustified stops can have long-lasting and substantial consequences for people's lives, as well as for the NPD's ability to hold officers accountable for misconduct. For example, as discussed later in this report, the NPD's IA may improperly discredit the complaint of an individual in part because the individual has multiple recorded encounters with police.

The NPD's undisciplined stop practices also increase the risk that officers, without appropriate guidance to distinguish between appropriate and inappropriate justifications for conducting stops, may rely on impermissible factors such as an individual's race, color, or ethnicity. The NPD should be particularly attentive to this concern in light of the disproportionate impact its stop and arrest practices have on Newark's black residents, which is discussed below.

2. Arrests

Although NPD officers generally write reports that facially appear to establish probable cause to arrest, those reports have reflected two categories of problematic practices. First, there is reasonable cause to believe that the NPD has engaged in a pattern or practice of unconstitutional arrests for behavior perceived as insubordinate or disrespectful to officers—

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often charged as obstruction of justice, resisting arrest, or disorderly conduct. Second, there is reasonable cause to believe that some number of NPD narcotics arrest reports may not have accurately described the circumstances leading to arrest, and that the NPD has not addressed this problem. This assessment of NPD arrest practices is based on: a review of a random sample of 100 arrest reports and associated incident reports from a three-and-a-half year period, January 2009 to June 2012; NPD policy; IA files; Use of Force Reports; site visits to the NPD; interviews with stakeholders in the criminal justice system; and information provided by community members.

a. Legal Standards

Probable cause to arrest an individual exists "when the information within the officer's knowledge at the time of the arrest is sufficient to warrant a reasonable officer to believe that an offense has been or is being committed by the person to be arrested." *Paff v. Kaltenbach*, 204 F.3d 425, 436 (3d Cir. 2000). In determining whether an officer had probable cause to make an arrest, courts consider the totality of the facts and circumstances known to the officer at the moment the arrest was made. *Wright v. City of Philadelphia*, 409 F.3d 595, 602 (3d Cir. 2005). The constitutional validity of the arrest does not depend on whether the suspect actually committed any crime, and probable cause cannot be retroactively established or disproven by the fact that the suspect later pleads guilty, is found guilty, or is acquitted. *See id.; Johnson*, 332 F.3d at 211. The totality of the circumstances test is objective: the question is whether "an officer would be justified in believing that an actual offense was being committed," not whether an officer subjectively believed there was probable cause to make an arrest. *Johnson*, 332 F.3d at 214. An officer's erroneous belief that a suspect's actions constitute criminal activity is irrelevant if the available evidence would not support that conclusion. *Id.*

Officers may not arrest individuals for exhibiting behavior that is disrespectful or obnoxious, but legal, and must be mindful that some speech challenging or objecting to police action is protected by the First Amendment. Police officers "are expected to endure significant burdens caused by citizens' exercise of their First Amendment rights," including "provocative and challenging" speech and gestures. *Gilk v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011); *City of Houston, Tex. v. Hill*, 482 U.S. 451, 461 (1987); *see also Swartz v. Insogna*, 704 F.3d 105, 110 (2d Cir. 2013) ("[A] *reasonable* police officer would not have believed he was entitled to initiate the law enforcement process in response to giving the finger."); *Sandul v. Larion*, 119 F.3d 1250 (7th Cir. 1997) (extending middle finger and shouting profanity protected by the First Amendment); *Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1377-78 (9th Cir. 1990) (while police officers "may resent having obscene . . . gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment.").

b. "Contempt of Cop" Arrests, Seizures, and Citations Have Violated the Fourth and First Amendments

The Supreme Court has recognized that the First Amendment protects verbal challenges to police action, holding that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Hill*, 482 U.S. at 462-63. NPD officers have

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engaged in a pattern of violating constitutional rights by detaining and arresting individuals who lawfully object to police actions or behave in a way that officers perceive as disrespectful. These types of arrests are sometimes referred to as "contempt of cop" arrests, and are often charged as obstruction of justice, resisting arrest, or similar offenses, even though the behavior has not met the legal standards for such charges. Contempt of cop detentions and arrests in retaliation for questioning or expressing criticism of police violate individuals' rights under both the Fourth and First Amendments.[10]

The NPD's arrest reports and IA investigations, including some incidents involving unreasonable uses of force, reflect numerous instances of the NPD's inappropriate responses to individuals who engage in constitutionally protected First Amendment activity, such as questioning or criticizing police actions.

For example, in one IA investigation, an individual was arrested after he questioned officers' decision to arrest his neighbor. The individual alleged that officers immediately proceeded to use force against him. The officers' own version of events, reporting that the individual told them loudly and "in a belligerent manner" that they could not arrest his neighbor, did not establish probable cause for the officers' decision to arrest the man for obstructing the administration of law.

In another incident, officers reported that a woman standing outside her apartment yelled profanity and spat in their direction. According to the officers, based on this conduct, they decided to arrest her for aggravated assault and disorderly conduct and used "physical contact" to effect the arrest. According to the woman, she had publicly criticized an officer for questioning a street vendor about a permit. Although the officers' and complainant's accounts of the incident differ, the officers' own explanation of the incident—that they used force and arrested the woman in response to her using profanity and spitting towards them—provides insufficient justification for their actions.

In another example, a civilian complainant alleged that a plainclothes detective used force and arrested him after he walked away from the detective. The IA investigation revealed that the detective first observed a group of people standing near the street and deemed them suspicious based solely on "the area" they were in. The detective's report indicates that, although he had observed no criminal activity, he announced police presence and "*randomly* approached one actor" (emphasis added) and ordered him to stop. The individual attempted to walk away from the detective, and allegedly used profanity toward the detective while the

[10] In addition to the examples of First Amendment violations discussed here, prior to the initiation of this investigation, there were several highly publicized incidents where NPD officers prohibited citizens from recording police action. NPD ultimately settled at least three of the resulting lawsuits, and promulgated a Director's memorandum in the fall of 2011 with guidance on individuals' right to record police. However, this investigation found that NPD has not fully corrected the practice of inappropriately prohibiting individuals from recording the police, and needs to issue more detailed policies to guide officer behavior. For example, the current policy states that individuals have a First Amendment right to record police activities but gives officers the discretion to order individuals to stop recording if they "truly interfere with legitimate law enforcement operations." The policy does not explain or provide examples of the types of conduct that might amount to such interference and thus does not provide sufficient guidance to officers on how to lawfully exercise their discretion.

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detective continued to issue verbal commands for him to stop. The complainant alleged that the detective grabbed him from behind and he turned in response. It is not clear from the detective's report when he first touched the individual, but the report states that the individual turned around, raised his hands and reached for the detective's wrists, suggesting that the officer had already initiated his use of force. The detective's report indicates he pushed the individual up against the hood of a car, before arresting him for resisting arrest, obstructing the administration of law, and disorderly conduct. The Supreme Court has consistently held that a refusal to cooperate with the police, without more, does not furnish the minimal level of objective justification needed for a detention or seizure. *Florida v. Bostick*, 501 U.S. 429, 437 (1991); *see also Wardlow*, 528 U.S. at 125.

In addition to a pattern of unjustified arrests in which individuals are formally charged, there is evidence that, in violation of the Constitution, the NPD has seized and detained individuals or issued unjustified Quality of Life citations in retaliation for protected conduct.

For example, in one incident investigated by the NPD's IA, the complainants alleged that a plainclothes officer stopped an individual on the street. Two complainants were present and one, unaware that the plainclothes officer was a police officer, asked the officer why she had stopped the individual. According to that complainant, the officer slammed him to the ground and used a choke hold on him. The second complainant then asked the officer why she was choking the other observer. The officer allegedly kicked the second complainant in the ribs and placed both individuals in handcuffs. In her interview with IA, the officer stated that she "bumped into" the first complainant causing him to fall on the ground. She admitted detaining the two individuals after they became "loud and hostile." Both individuals were ultimately released from handcuffs and issued Quality of Life citations for disorderly conduct. The municipal court later refused to adjudicate the citations.

In another excessive force complaint investigated by IA, two officers dispersing crowds at a high school following a large fight reported that a student spat on the ground in front of the officers. One officer reported to the IA investigator that he then grabbed the juvenile by his arm, "placing" his head against the hood of the police cruiser. The second officer confirmed this account. The juvenile was ultimately frisked, given a summons and released when his father arrived on the scene. Several of the IA files reviewed contained similar descriptions of officers detaining, arresting, or issuing citations to individuals perceived to have spat in the general direction of the officers, giving credence to these complaints and indicating that this practice may be more widespread.

The NPD's exercise of its police power to respond to "contempt of cop" behavior is part of the pattern of unreasonable stops and arrests by NPD officers, and consistent with the pattern of unreasonable force discussed below. A police officer's job is difficult, requiring a thick skin and patience. Unfortunately, rather than using de-escalation techniques and acting within the constraints of the Constitution when confronted with disrespectful behavior, NPD has engaged in a pattern and practice of taking immediate offensive action, without regard to whether that conduct complies with the law.

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c. Narcotics Searches and Arrests Have Violated the Fourth Amendment

There is reasonable cause to believe that the NPD's pattern of unlawful arrests extends to its narcotics arrests. NPD narcotics-related arrest reports reflect a strikingly high number of instances in which officers did not have to conduct a search to find the narcotics that provided the probable cause for the arrest. These numbers, and the circumstances of these arrests, suggest that some number of these narcotics arrest reports have been inaccurate. While this investigation did not determine which, or how many, arrest reports suffered such deficiencies, it is troubling that the NPD appears neither to have noticed this pattern nor to have taken appropriate steps to ensure that officers write accurate, reliable narcotics arrest reports that reflect legitimate searches.

Out of a sample of 100 reports documenting NPD arrests between January 2009 and June 2012, 58 documented arrests on narcotics-related charges. The overwhelming majority of these narcotics arrests and associated incident reports contained remarkably similar language to support officers' reasonable suspicion to stop the individual. According to the narratives written by officers, in at least 46 of the 58 narcotics arrest reports in the sample, officers reportedly did not have to conduct a search in order to find narcotics. Rather, officers reported, using similar language, that suspects either voluntarily and immediately offered or discarded an otherwise concealed CDS (controlled dangerous substance) to the police upon mere announcement or recognition of police presence, or that the CDS was "in plain view" of the officers when they approached the suspects. In the "plain view" scenarios, individuals often were purportedly seated in cars holding clear plastic baggies in front of them or on their laps and officers could "immediately" see the contraband, even though the report indicated that the subject's back was to an officer, or that the officer had not yet approached the car.

The concerns raised by these reports may be partly explainable by poor report writing, and some portion of these plain view narcotics arrests may also reflect that NPD practices are far too opportunistic, with some officers' relying too heavily on only the most obvious violations. Nonetheless, the sheer frequency with which NPD officers report finding contraband in plain view, sometimes in what appear to be less than plausible circumstances, makes it difficult to ascribe this problem to these dynamics alone. Indeed, police practice experts reviewing these reports observed that, in their experience reviewing such narcotics arrest reports in multiple jurisdictions across the country, the proportion of narcotics arrests in Newark that did not require a search is markedly high. These expert observations are consistent with concerns expressed by community members and other criminal justice stakeholders in Newark. The NPD and the City of Newark should engage a broad spectrum of criminal stakeholders, including the Essex County Public Defender's Office and the Essex County Prosecutor's Office, to determine how widespread this problem may be and develop an effective plan to combat it.[11]

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[11] Improved report writing within NPD would also yield stronger cases for prosecution. One of the NPD arrest files reviewed also contained a report about the same incident written by Essex County Sheriff's Department officers, providing an opportunity to compare these two agencies' accounts of the same incident. In marked contrast to the canned language used in narratives written by NPD officers, the Essex County report contained many details

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Prior to this investigation, the NPD apparently had not recognized this pattern in its arrests. This is due in part to the NPD's insufficient accountability systems, such as adequate supervisory review, that are discussed later in this report. When this pattern was brought to their attention, City and NPD officials noted the brazen, open-air drug markets that plague Newark as a potential explanation for the high proportion of plain view arrests, and maintained that the NPD's arrest reports accurately reflect the encounters. It is doubtless true that many of these arrest reports are accurate, and the review of these reports did not attempt to include an evaluation of the overall merits of any particular arrest, or examine the work of any particular officer. Rather, the prevalence of instances in which officers purportedly recovered drugs without the need for a search, together with the circumstances of those arrests as described by the reports, indicated that some portion of NPD arrest reports may have been inaccurate and that the NPD does not have the systems in place to reliably detect such deficient reports so that it can ensure that the underlying circumstances of the stop, search, and arrest are lawful.[12]

B. DISPARATE IMPACT BASED ON RACE

This investigation found that black people in Newark have been stopped and arrested at a significantly higher rate than their white and Hispanic counterparts. This disparity is stark and unremitting. Approximately 80% of the NPD's stops and arrests have involved black individuals, while Newark's population is only 53.9% black. Black residents of Newark are at least 2.5 times more likely to be subjected to a pedestrian stop or arrested than white individuals. Between January 2009 and June 2012, this translated into 34,153 more stops of black individuals than white individuals. The disparity persists throughout the city regardless of whether sectors have highly concentrated black residential populations or comparatively fewer black residents.[13]

This investigation did not determine whether this disparity reflects intentional race discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, or whether this disparity is avoidable or unnecessary, in violation of Title VI or the Safe Streets

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specific to the incident, including individualized descriptions of the suspects and specific actions giving rise to probable cause, locations of officers, approximate lengths of time of observation of actions by officers, reasons specific to the incident that led the officer to conclude they had reasonable suspicion or probable cause, and a plausible sequence of events.

[12] It is important also to note that, for the purposes of this investigation, the question was not whether arrestees were engaged in drug activity; rather, it was whether NPD officers were acting in accordance with fundamental constitutional requirements, such as individualized reasonable suspicion to support a detention, legal authority to support a search, and probable cause to support an arrest. The fact that an officer actually discovers evidence during or after a stop or search that provides reasonable suspicion for the stop or probable cause for the arrest does not render the officer's actions constitutional. *See Wong Sun*, 371 U.S. at 484-85. Nor does the fact that some of the individuals arrested and charged in the narcotics arrests reviewed pled guilty or were convicted in state court determine whether a Fourth Amendment violation in the arrest process occurred, or preclude consideration of this issue by a federal court in a subsequent Fourth Amendment challenge. *Haring v. Prosise*, 462 U.S. 306, 314-23 (1983); *Anela v. City of Wildwood*, 790 F.2d 1063, 1068-69 (3d Cir. 1986). Similarly, the Supreme Court has recognized that there are various incentives for a defendant to plead guilty independent of whether there may have been a Fourth Amendment violation. *Prosise*, 462 U.S. at 318-19.

[13] As this report was being finalized, the ACLU-NJ released the results of its own review of stop data that NPD publishes on its website. The ACLU-NJ's review of this different, more recent data also showed racial disparities in NPD stops.

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Act. As discussed in the Legal Standards section below, policing that has a disparate impact on members of a particular race may be unlawful not only where it is intentional, but also where it is unintentional, but avoidable.

Nonetheless, regardless of *why* the disparity occurs, the *impact* is clear: because the NPD engages in a pattern of making stops in violation of the Fourth Amendment, Newark's black residents bear the brunt of the NPD's pattern of unconstitutional policing. This undeniable experience of being disproportionately affected by the NPD's unconstitutional policing helps explain the community distrust and cynicism that undermines effective policing in Newark. In individual interviews and group meetings, many community and criminal justice stakeholders consistently described Newark as a city where black residents, and particularly black men, fear law enforcement action, regardless of whether such action is warranted by individualized suspicion. They indicated that unjustified stops by NPD officers have become so routine that many members of the black community have ceased feeling a sense of outrage and simply feel a sense of resignation.

These conclusions about the racially disparate impact of the NPD's policing practices are based on an analysis of NPD data obtained directly from the NPD's data management vendor because the NPD does not maintain, track, or analyze demographic data for its law enforcement actions in a manner that could be relied upon for the close scrutiny required by this investigation. Further refinement of the systems and analysis of this data are necessary to more fully understand the nature and cause of this disparate impact, and the NPD should implement systems to collect and analyze this data as part of its effort to ensure that unlawful racially discriminatory policing does not occur.

1. Legal Standards

Discriminatory policing in violation of the Equal Protection Clause of the Fourteenth Amendment may arise from either an explicit classification or a facially neutral policy or practice that is implemented or administered with discriminatory intent. *See United States v. Armstrong*, 517 U.S. 456, 457 (1996); *Washington v. Davis*, 426 U.S. 229, 239-40 (1976). Discriminatory policing under the Fourteenth Amendment includes selective enforcement of the law based on race. *Whren v. United States*, 517 U.S. 806, 813 (1996). In addition, Title VI and the Safe Streets Act prohibit law enforcement agencies that receive federal financial assistance, such as the NPD, from engaging in intentional discrimination or in law enforcement activities that have an unjustified disparate impact based on race, color, or national origin. The Safe Streets Act provides that "[n]o person in any State shall on the ground of race, color, religion, national origin, or sex be … subjected to discrimination under or denied employment in connection with any programs or activity" receiving federal funds. 42 U.S.C. § 3789d(c)(1). Title VI establishes that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance." 42 U.S.C. § 2000d. Title VI's implementing regulations prohibit law enforcement agencies from using "criteria or methods of administration" that have a disparate impact based on race, color, or national origin. 28 C.F.R. § 42.104(b)(2); *see also Alexander v. Sandoval*, 532 U.S. 275, 281-82 (2001). Thus, under these statutes, discriminatory impact may be unlawful even where it is not intentional.

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2. Failure to Track and Analyze Appropriate Data With Respect to Race

A full understanding of the race-based effects of the NPD's policing practices is made more difficult by the NPD's failure to track and analyze data with respect to race, which is unusual, and at odds with sound policing practices, for a police department in a major city, especially one with such diversity. Although NPD Field Inquiry forms track race, and the Arrest Report and Incident Report forms track race and ethnicity, the NPD does not use this demographic data to analyze and inform its policing practices. In fact, when requested to produce basic data on stops and arrests that included race, the NPD was unable to do so because the NPD has not enabled its records management system to provide this information. Indeed, the NPD has not implemented any systems through which it can effectively monitor and assess the race-based effects of its policing practices. This failure is particularly surprising as the NPD has adopted a COMSTAT process similar to the one pioneered by the New York Police Department ("NYPD") to help command staff ensure that the Department is policing effectively. Although the NYPD COMSTAT process includes tracking and analysis of policing activities by race, the NPD chose not to incorporate those features, meaning that NPD can use COMSTAT to analyze crime rates, but not to analyze the impact of its enforcement efforts on different racial or ethnic groups.

Moreover, the NPD does not collect race and ethnicity data for any of the Quality of Life citations it issues, which made it impossible to use these forms to help determine the accuracy of widespread complaints from the community that the NPD uses Quality of Life citations in a racially discriminatory manner. These deliberate decisions by the NPD when the process was implemented make it difficult for anyone within or outside of NPD to assess the racial impact of NPD's policing.

After persistent efforts spanning approximately one year in which the NPD was unable to provide comprehensive data, the DOJ ultimately arranged to work directly with the vendor that created the NPD's record management system to gain access to the raw data, including demographic information on race and, where tracked, ethnicity, for NPD stop and arrest activities from January 2009 through June 2012. Although there are deficiencies in this data resulting from the NPD's inconsistent record-keeping practices and lack of corrective supervisory review, the sheer volume of the available records provided a sufficiently reliable data set to analyze.

Further study of these numbers and their explanations is warranted, particularly because the data show that Newark's black residents bear a disparate burden of stops, searches, and detentions that violate the Fourth Amendment. Without carefully tracking, analyzing, and addressing the racially disparate effects of its law enforcement activities in Newark, the NPD will be unable to fully understand and respond to this divisive disparity, and will face greater difficulty gaining the community trust and legitimacy required for effective and constitutional policing.

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3. NPD's Unconstitutional Stop, Search, and Arrest Practices Have Had a Disparate Impact on Black People in Newark

The disparate impact of the NPD's stop, search, and arrest practices appears to be an additional harm stemming, at least in part, from the same poor policing practices that result in stops, searches, and arrests that violate the First and Fourth Amendments. NPD officers, failing to apply constitutional and legal standards for stops, searches, and arrests, appear to have substituted their own judgments for these standards in determining when a stop, search, or arrest is justified. Without meaningful supervisory review, this practice increases the opportunity for officers to rely—consciously or unconsciously—on impermissible factors such as an individual's race when conducting law enforcement actions.

In addition to the broad statistical evidence of disparate impact set out below, there is more specific evidence that, while not conclusive, supports a conclusion that the NPD's failure to require its officers to adhere to legal standards for stops facilitates impermissible reliance on race. For example, NPD officers used the conclusory phrase "suspicious person," without articulating any facts that establish actual reason for suspicion, to justify approximately 1,500 stops conducted during the three-and-a-half year time period reviewed.[14] Of these 1,500 illegal "suspicious person" stops, 85% were stops of individuals identified by officers as black, and 15% were stops of individuals identified as white, a proportion starkly inconsistent with Newark's demographic breakdown.

a. Pedestrian Stop Practices

Community perceptions of disparate treatment by the NPD are confirmed by the data. NPD officers documented a total of 52,235 pedestrian stops between January 2009 and June 2012.[15] Overall, 80.9%, or 42,234, of these stops were of black individuals; 15.5%, or 8,081, were of white individuals (which includes a large number of Hispanic individuals); and 3.7%, or 1,920, of the stops were of individuals identified as "other races" or "unknown." In comparison, according to 2010 U.S. census data, Newark's population is 53.9% black, 26.4% white, and 19.8% other races.[16] While the NPD conducted approximately 111 stops per 1,000 residents for white people, the NPD conducted approximately 283 stops per 1,000 residents for black people.

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[14] As discussed previously, identifying someone as a "suspicious person," without articulating any factual basis for that suspicion, does not establish a legal basis for a stop.

[15] This analysis included all pedestrian stops, not just those that were accompanied by a warrant check. This was done because the analysis sought to discover the demographic impact of all police-initiated pedestrian stops.

[16] Because pedestrian stops are more likely to stop persons who actually live in Newark than are vehicular stops, residential population (census) provides a useful benchmark for conducting a preliminary analysis to discern whether a pattern of racially disparate policing appears to exist. While using residential population as a benchmark for measuring the rate of people subjected to law enforcement activity relative to the potential population of people who could have been subjected to such activity is not a perfect fit, it is adequate, and was the best benchmark available, given NPD's failure to collect, track, and analyze demographic data. Residential population for this analysis was calculated on a block-by-block basis. Of the 26.4% of Newark's population that is white, 14.7% also are Hispanic according to the 2010 census data. However, because, until January 2014, the NPD's stop data did not include ethnicity, this stop analysis considered race but not ethnicity. By contrast, as discussed below, the arrest data did include ethnicity during the period this investigation was conducted.

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This means that black individuals in Newark have been 2.5 times more likely on average to be subjected to a pedestrian stop by an NPD officer than white individuals.

In addition to being 2.5 times more likely to be stopped than their white counterparts, black individuals in Newark also have been 2.7 times more likely on average to be subjected to searches and 3.1 times more likely to be subjected to frisks by the NPD. NPD officers conducted 34,153 more stops, 13,174 more searches, and 12,130 more frisks of black individuals than of white individuals over three-and-a-half years. Yet, according to the NPD's documentation, the likelihood that a search or frisk by the NPD recovers evidence is essentially the same for both racial groups. The likelihood of recovering evidence during a frisk is 13.6% for whites and 12.7% for blacks, and the likelihood of recovering evidence during a search is 14.2% for whites and 14.8% for blacks.[17] Thus, not only are the unconstitutional stop practices of the NPD falling most heavily on black individuals, but those massively additional stops are not yielding more evidence of crime. In other words, the stops are both impermissible *and* ineffective.

These racial disparities characterized every one of the NPD's policing precincts and sectors, regardless of the racial makeup of those areas. For example, in the 3rd Precinct, which covers the southeast area of the city and has a relatively low black residential population (22%), black individuals have been stopped at a rate 5.5 times that of their white peers, with stops of black individuals totaling 4,819 and stops of white individuals totaling 2,194, despite white residents' comprising 55% of the population. In the 4th Precinct, which covers the western area of the city, and where the residential population is heavily black (85%), black people accounted for 95%, or 14,693 of the stops, compared to 4%, or 572, stops of white people. When the precincts are broken down by sector, in 12 of Newark's 29 sectors (including sectors from each of the four precincts), black people have been stopped at a rate more than 4 times that of white people. In some sectors in the 3rd Precinct, the stop rate for black individuals exceeded ten times the stop rate for white individuals.

b. Arrest Practices

The analysis of arrests by NPD officers over the three-and-a-half year period are almost identical to the analysis of pedestrian stops over that time period. Out of the 84,396 arrests in the three-and-a-half year period reviewed, 66,888, or 79.3%, were arrests of black people, while black residents accounted for 53.9% of Newark's population. By comparison, only 5,567, or 6.6%, were arrests of white people, while non-Hispanic white residents account for 11.6% of Newark's population.[18] Stated differently, black individuals were 2.6 times more likely to be

[17] These evidence recovery rates are provided for race-comparison reasons only. The NPD's actual evidence recovery rates likely are materially lower than this, given the methodology of this review, which restricted the dataset of stops reviewed to those in which a warrant check was run, and the likelihood that the NPD did not complete this report for all stops.

[18] Although there were anecdotal accounts of mistreatment of Hispanic individuals by NPD officers based on perceived ethnicity and national origin, particularly when these individuals have sought assistance from the police, the arrest data reviewed as part of this investigation did not show a disparity in arrests of Hispanics. Out of the 84,396 arrests, 10,277, or 12.2%, were arrests of Hispanic non-black individuals, compared to Hispanic non-black individuals accounting for 30.6% of Newark residents. As noted above, because the NPD's stop data did not track

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arrested than white individuals in Newark. As with stops, the disparity held true across all NPD precincts and sectors. It is also consistent throughout most categories of arrests, based on charges reported at the time of arrest. It is crucial that the NPD implement data collection and analysis so that it can more fully understand the nature and causes of these racial disparities.

4. Quality of Life Citation Practices Have Been Ineffective and Have Facilitated Abuse

Community members, criminal justice stakeholders, and NPD officers and stakeholders widely recounted complaints about the NPD's use of Quality of Life citations (commonly referred to by officers and community members as "blue summonses"). These citations are issued by NPD officers pursuant to Newark's Municipal Code. Officers and residents alike perceive that the NPD issues these citations in order to satisfy quotas rather than to improve public safety. This perception alienates many community members and there is some evidence that calls into question the effectiveness of NPD's use of Quality of Life citations on reducing crime in Newark.

During various time periods in recent years, NPD leadership reportedly instituted a quota to encourage officers to increase the number of citations issued. Officers' eligibility for overtime and desirable assignments apparently were linked to meeting the Quality of Life citation quota, thus giving officers an incentive to issue more. Although there was conflicting information about whether a formal quota still exists, the perception of at least an unofficial quota persists among officers.

There were consistent reports from a variety of stakeholders that, in recent years, the NPD's increased emphasis on the use of the citations, coupled with poor training,[19] has disproportionately and ineffectively targeted black individuals. Because the NPD does not track race and ethnicity for citations, the DOJ could not confirm the accuracy of this perception. However, given the racially disparate effects of the NPD's stop practices, the allegations that the citations disparately affect the black community have some basis.[20]

Moreover, complaints from NPD officers and—particularly in public housing projects—the community allege that the NPD's practice of requiring officers to issue high numbers of citations results in officers' focusing on convenient targets, rather than on the individuals involved in serious criminal activity. Issuing high numbers of citations, particularly if this

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ethnicity until January of 2014, this investigation did not include an analysis of stops of Hispanics in Newark. Further inquiry is necessary to determine more conclusively whether the NPD's police activities have a disparate impact on Hispanics.

[19] That lack of appropriate training concerning Quality of Life citations results in officers' improper issuance of citations is supported by the fact that these citations are dismissed by the municipal and county prosecutor's offices approximately thirty percent of the time.

[20] Community members and groups also raised concerns that the NPD inappropriately uses Quality of Life citations to target people with mental illness, people with disabilities, and seniors. During the site visit, members of the NPD command staff lacked a sufficient understanding and sophistication about issues related to mental illness and disabilities, highlighting the need for training on these issues. Some community members reported that seniors and people with disabilities are terrified of calling the police because they perceive that NPD officers will assume that they have mental health concerns and will treat them like suspects.

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practice is seen as focused on low level targets of opportunity rather than the individuals more likely to be involved in serious criminal activity, alienates potential allies in the community who might otherwise be helpful as witnesses, or in providing information related to crime.

C. USE OF FORCE

There is reasonable cause to believe that the NPD has engaged in a pattern or practice of unconstitutional force in violation of the Fourth Amendment. Relying primarily on officers' own descriptions of and justifications for the force they used, this review found that more than twenty percent of NPD officers' reported uses of force were unreasonable and thus violated the Constitution. The investigation also revealed significant underreporting of force by NPD officers. This pattern and practice of unreasonable force both results from and is evidenced by failures in policy, supervision, investigation, training and discipline.

1. Legal Standards

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. The use of excessive or unnecessary force by a law enforcement officer during an arrest or stop is considered an "unreasonable" seizure that violates the Fourth Amendment. *Graham v. Conner*, 490 U.S. 386, 394 (1989). The assessment of reasonableness and, therefore, constitutionality of an officer's use of force is objective. Just as an officer's bad intentions will not render an objectively reasonable use of force unconstitutional, an objectively unreasonable use of force is unconstitutional, even where the officer had good intentions. *Id*. at 397. Determining whether the use of force was reasonable requires carefully balancing the risk of bodily harm that the officer's actions pose to the individual in light of the threat to the public that the officer was trying to eliminate. *Scott v. Harris*, 550 U.S. 372, 383 (2007). In *Graham*, the Supreme Court noted that, in order to properly balance these interests, courts must examine the totality of the circumstances, including the severity of the crime, whether the subject posed an immediate threat to the officer or public safety, and whether the suspect was actively resisting arrest or attempting to escape. *Id*.

2. NPD Format for Reporting and Tracking Force

The NPD's use of force policy appropriately charges officers to use the "minimum force necessary to effect a lawful arrest" and officers must be able to "justify the degree of force used." General Order 63-02. The policy requires that officers clearly document all uses of force in an Incident Report and complete a separate Use of Force Report, both of which are to be submitted to a supervisor for review and approval. The Use of Force Report (Form DPI:2000) ("Force Report") is a paper form intended to track the specific details about use of force incidents. The Incident Report Form (Form DPI:802) ("Incident Report") is an electronic record contained in the NPD's Record Management System ("RMS") that officers complete for all arrests, crime reports, uses of force and other incidents. Only the Incident Report includes a place to include a narrative description of an officer's actions. The Force Report provides space to indicate what force was used, what resistance was encountered and whether there were injuries, but its format makes it impossible for a reviewer to tell what happened, especially in situations where more than one type of force is used, or force is used against more than one person. Upon approval,

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supervisors are to forward copies of both reports to the Office of the Police Director, Internal Affairs, and the Police Academy. In addition, the policy requires each precinct or unit to maintain file copies of the Incident, and Use of Force Reports (and any associated Arrest Reports).

The policy requires copies of Use of Force Reports to be forwarded to IA, where they are to be entered into a computerized case management system, IAPro, and for the Police Academy to retain them for "future purposes."[21] In apparent conflict with this policy, although IAPro appears to contain a record noting the occurrence of each use of force, very little of the data from the Use of Force Report is actually entered into the NPD's data system for tracking or further analysis. The omission of this detailed data from any electronic database limits the ability of the NPD to track and analyze officer use of force practices for accountability, training, or officer safety purposes.

3. NPD's Unreasonable Use of Force

With the assistance of experts, the team reviewed all 82 of the NPD's IA investigations of allegations of excessive force for the eighteen-month period, from January 2010 to June 2011.[22] In 67 of these investigative files, IA determined that NPD officers had used force and IA then made efforts to conduct an investigation.[23] Yet, IA did not find the force used by officers in any of these investigations to be unreasonable. In fact, IA sustained only one excessive force allegation in the six-year period from 2007 to 2012.

The DOJ's review yielded very different results. Upon evaluating the information in these 67 files, the investigation concluded that 14 incidents involved the use of unreasonable force by NPD officers, some of which are described below. In 27 other incidents, the documentation of the internal affairs investigation lacked sufficient information to allow an assessment of whether the force was reasonable.

In addition to its review of IA investigations, the team also evaluated the NPD's Force and Incident Reports for the nine-month period from January 1, 2011, to October 4, 2011 by selecting a statistically significant, random sample of 100 out of 336 incidents for review. Because the Force Reports included only officers' accounts, without any documented investigation or additional information gathering by the NPD, such as interviews with victims or third-party witnesses, the review simply examined whether the officers provided sufficient

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[21] The policy does not describe what those future purposes might entail, apart from an additional requirement for IA to include in its monthly reports a summary of all uses of force and firearm discharges that occurred.

[22] To assess the NPD's use of force, the team reviewed NPD's Force Reports, Incident Reports, Internal Affairs investigations of excessive force allegations, and investigations of shootings in which officers were involved. Because this review of individual incidents relied on the same documentation that was available at the time of the incidents to the NPD's direct supervisors and IA investigators, it permitted an assessment of both the reasonableness of each force incident and the supervisory or investigatory process that followed. Interviews with NPD officials, from line officers to NPD leadership, were also critical to evaluating the NPD's use of force, as was information from other law enforcement stakeholders, community groups and individuals.

[23] In 15 of these 82 investigations, the NPD either affirmatively concluded that the incidents did not occur, or was unable to confirm that the allegations involved NPD officers and halted the investigation. As a result, these investigation files contained insufficient information for review and were excluded.

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justification for their uses of force in their own reports. Similar to the results of the IA force investigation review, in nearly one third of the Force and Incident Reports reviewed, the force appeared unreasonable, and thus in violation of the Fourth Amendment, based on the officer's own description of the nature of and reason for the use of force. In a significant number of additional incidents the reporting was too unclear to permit an assessment of whether the force used was reasonable. Force appeared reasonable on its face in only a little more than half of the 100 Force and Incident Reports reviewed.[24]

a. Examples of NPD's Use of Unreasonable Force

The overall impression of this review is that NPD officers escalate common policing situations, in which force should be unnecessary or relatively minimal, to situations in which they use significant force, sometimes unreasonably. Taken as a whole, the investigation revealed that NPD officers too often use open and closed fist strikes, especially to the head of the subject. In many cases, these actions were not necessary for the officer to control the situation and seemed to be simply retaliatory.

The NPD's own force documents helped explain why many in the community perceive NPD officers as needlessly escalating incidents, rather than as officers committed to protecting their community. Indeed, the NPD appears to be a department that too frequently turns to force as its first option when dealing with the public.

In one incident, for example, while an officer was escorting an intoxicated 140-pound, 69-year-old man from a store, the man grabbed the officer's upper chest. The officer reported that he punched the man twice in the face in response.

In another incident, a man suffered a concussion, loss of consciousness, and bruises and cuts after a detective in plainclothes struck him several times in the face with a closed fist. The detective's incident report indicates that the man swung first, but acknowledged that the detective had startled the man with his sudden presence behind him. The police practice experts who reviewed this incident for this investigation noted this response did not appear to be a defensive or control tactic, but rather was retaliatory. Additionally, a sergeant on the scene admitted during the IA investigation that, although he had kicked the man, he did not complete a Force Report as required by policy. Despite the severity of his injuries, the man was not taken to the hospital until he complained of mouth pain at the police station. Further, while the man's hospital records were included in the investigative file, the loss of consciousness and concussion were barely acknowledged in the investigator's summary, and appear not to have been discussed with the complainant.

Another aspect of the pattern of unreasonable force is the number of incidents in which officers appeared to respond with significant force against individuals who questioned police activities, sometimes, in the language of one police report, "in a loud and hostile manner." In an incident more fully discussed in the assessment of arrest practices above, according to a citizen

[24] Because the information available in these reports was less than that available in an internal affairs investigation, the review of the use of force reports was limited to an assessment of whether the officer's own report of the incident adequately justified the officer's actions.

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complaint, when a man asked a plainclothes officer why another individual had been stopped, the officer reportedly slammed the man to the ground and used a choke hold on him. When the man's female cousin asked why the officer was choking her cousin, the officer kicked her in the ribs and placed both individuals in handcuffs. Both the officer's account and the IA investigation are incomplete, raising questions about the reliability of the investigation: while the complainants alleged specific details, including a choke hold and a kick, the officer's account was minimal and uninformative, reporting only that she and other officers "quelled" the behavior.

The investigation uncovered that officers also have used force in furtherance of an investigation rather than to effect a lawful arrest or prevent harm. In an incident in January 2011, two officers decided to conduct a "well-being check" of a man and woman whom they observed arguing, and called over to them. As the couple approached the officers, the officers reportedly observed the man put something into his mouth and ordered him to spit it out. When the man did not comply, one officer immediately placed him in a choke hold to prevent him from swallowing the item. The choke hold was unsuccessful. After the man had swallowed the item, he reportedly refused to give the officers his hands to be cuffed and was "taken to the ground and given two strikes to the side of his head." Although the officer's report states that he acted for the man's safety as well as to prevent him from swallowing the item, the encounter at that point was voluntary and the officers had not established a basis for any seizure. Although police officers may use reasonable force to secure or prevent the destruction of evidence while conducting a lawful arrest, they must have constitutionally adequate grounds for doing so. In this and similar incidents, NPD officers have used force before establishing probable cause to justify a seizure, as is required by the Constitution. Additionally, in this instance the NPD failed to scrutinize the use of a choke hold as a potentially deadly use of force that likely was unreasonable in response to the man's resistance.

b. Lack of Effective System for Use of Force Reporting and Review

The pattern of using unreasonable force is both perpetuated and further evidenced by significant problems with the NPD's force reporting and review practices. First, although NPD policies in many (but far from all) respects comport with contemporary best practices, the NPD does not always follow its own force policies, contributing to and reflecting the pattern of unreasonable use of force. Second, the NPD lacks a robust process for supervisory review of officers' use of force by first-line supervisors. Third, the NPD often fails to refer serious use of force cases to the Essex County Prosecutor's Office for review for criminal prosecution. When the NPD has referred cases, the criminal referral prematurely has ended the NPD's administrative investigations of serious force, including officer-involved shootings.

i. NPD's Force Reporting and Supervisory Review Systems

Consistent with the discussion above describing a culture that facilitates unreasonable force, the review revealed an unacceptable tolerance within the NPD for Force Reports that are insufficient to permit meaningful review. In particular, officers' reports repeatedly failed to describe the actions that prompted the use of force. Instead, officers frequently have made conclusory statements that a person was "resisting arrest," "flailing his arms," or "swinging his shoulders," without providing the facts that would permit an assessment of whether the level of

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resistance warranted the level of force used in response. Similarly, officers often documented their actions with vague, conclusory, and non-descriptive language that failed to describe what force they used and why, such as:

- "appropriate amount of force to effect a lawful arrest"
- "necessary level of physical force"
- "placed under arrest after a struggle"
- "all necessary force"

Other problematic descriptions of force indicated only that, after some unspecified amount and type of force, the subject was placed in handcuffs:

- "administered several compliance holds to handcuff and then escort"
- "attempted to handcuff him as he violently resisted being handcuffed. [Officers] eventually were able to place [the suspect] into handcuffs."
- "after several attempts … [three officers] were finally able to put handcuffs on the suspect."

Such descriptions make it impossible for a supervisor, investigator, or outside reviewer to determine whether the force used by officers in these situations was reasonable, or even whether the officers' tactics raise officer safety concerns. Yet, there was no indication in the records that supervisors questioned the adequacy of officers' force descriptions, or requested additional information. In fact, of more than 300 Force Reports reviewed as part of this investigation, supervisors approved every use of force description, including those DOJ found to be deficient.

It is widely accepted and understood in the field of modern policing that, without meaningful review of officers' use of force, it is more difficult to detect and correct uses of unreasonable force and officer safety issues, or to identify training needs, poor tactics, policy failures or inadequate equipment. Without routine, thorough force review, officers may become less careful about whether they use force consistently with policy or law. Poor decisions, bad tactics, and lax adherence to policy and law can reinforce themselves over time and become a part of the culture. Without effective supervisory review, the lines of accountability throughout the Department weaken, making it more difficult for leadership to promote and ensure its operational mandates and vision.

The NPD's Force Report, meant to facilitate NPD's tracking and assessment of officer force, instead facilitates both poor reporting and ineffective review. The Force Report is intended to track the specific details when force is used, including the name, age and race of the individual(s) involved, the level of resistance the officer encountered, the type of force used, and whether anyone was injured or received medical treatment. While these are all important details for the NPD to document and track, the Force Report's usefulness as a management tool is undermined by its failure to require a narrative description of the event and an explanation of the connection between an individual's behavior and the officer's use of force. For example, when

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an officer uses more than one type of force, the Force Report provides no way of indicating which force was used first or what behavior prompted it. Similarly, if force was used against multiple individuals, the form offers a reviewer no way of discerning what force was used against which specific individual. By contrast, the New Jersey State Attorney General's Guidelines on Use of Force include a model Use of Force Report—albeit last revised in 2001—that, although organized differently, does require information regarding what force was used against a specific individual when multiple individuals are involved.

Pursuant to NPD policy, NPD officers are instead instructed to describe their uses of force in the narrative of the Incident Report Form, a separate electronic form. Although Force Reports and Incident Reports can be cross-referenced by the unique, computer-generated Criminal Complaint Number assigned to every incident, the NPD does not file the two reports together. Indeed, completed Force Reports are routed differently through the NPD than their related Incident Reports, and they are neither tracked nor routinely evaluated together by NPD supervisors. Thus, unless supervisors match up each Force Report with its corresponding Incident Report (a time-consuming process completed for this investigation), supervisors reviewing Force Reports do not see the accompanying narrative in the Incident Report that, theoretically at least, describes what happened. Nor is there any other mechanism within the NPD to ensure that this comprehensive force review occurs: IA staff reported that, although they track the number of force incidents, they have no responsibility to review individual officers' Force Reports to ensure that the reports are accurate and complete.

Exacerbating these problems, the NPD tolerates significant underreporting of force by its officers. In 30% of the Incident Reports reviewed that described a use of force, the officer did not complete the required Force Report. Similarly, in at least a dozen of the approximately 87 internal affairs investigations of force complaints, officers reported uses of force during internal affairs interviews that they had failed to document contemporaneously in Force Reports. Thus, if the complainants in these cases had not come forward to pursue allegations of excessive force, there would have been no record that these officers even had used force.

The NPD has not held officers accountable for failing to document their uses of force, even though this is a clear violation of the NPD's use of force policy,[25] and the NPD's IA policy requires investigators to pursue evidence that an officer violated department rules or engaged in other misconduct, even if that misconduct was not the basis for the original complaint.[26] The NPD's tolerance of officers' failure to report force therefore suggests that NPD condones such behavior, and may well significantly contribute to the widespread underreporting of force.

Acknowledging the deficiencies in the NPD's use of force reporting and review systems, NPD's leadership reports that it has created a Use of Force Review Board to more closely assess uses of force and patterns of officer behavior. While establishing such a board is a necessary component of an adequate force review system, the NPD must also ensure that officers diligently report force and that supervisors, or dedicated force investigators, are equally diligent in their reviews.

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[25] *See* GO 63-02 at 9.
[26] *See* GO 05-04 at 14.

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ii. NPD's Administrative and Criminal Force Review Systems

NPD also has mishandled serious use of force incidents that require both criminal and administrative review, including cases where officers have used deadly force. In particular, the NPD often has failed to refer serious use of force cases to the ECPO to be considered for criminal prosecution, and when the NPD has done so, the criminal referral inappropriately has ended the NPD's administrative investigation.

1. Failure to Appropriately Review Cases Involving Serious Use of Force

The NPD's policies require IA to refer to the ECPO any complaint "where a preliminary investigation indicates that the accused officer may have engaged in a criminal act or used force which resulted in serious bodily injury or death."[27] IA staff reported that all excessive force allegations are referred to the ECPO, not just allegations involving serious bodily injury or death as required by policy. However, this claim was not substantiated by the review of IA files. Instead, the review shows that, in practice, some excessive force files are referred to the ECPO, some are reviewed internally only by IA, and still others may be reviewed only at the command level without ever being assessed by IA.

This review revealed multiple instances in which credible complaints of potentially criminal uses of force were not referred to prosecutors for review, even though by any objective measure they should have been. For example, in one investigation a complainant alleged that he was physically assaulted by four officers at the Green Street Cell Block. He reported suffering a broken nose, lacerated lip and bruises to his cheek. Officers acknowledged administering blows to the complainant's torso after they had already taken him to the ground. This review determined that the force used appeared excessive and potentially criminal under the relevant legal standards, but the NPD never referred this case to the ECPO.

When the NPD has referred excessive force allegations to the ECPO and the ECPO has declined to prosecute the case, the NPD routinely has closed the administrative case with little additional investigation. Some NPD investigators expressly have relied on the prosecutor's decision not to proceed to justify an exoneration recommendation. One IA investigator wrote in support of his recommendation to clear an officer that the ECPO "determined there was insufficient evidence to warrant criminal prosecution. Therefore, the actions of the officers were within the legal realm of their responsibilities and functions as Newark Police Officers." There are numerous other cases where the investigator received notice of non-prosecution from the ECPO, and closed the investigation mere days later.[28] *See Garcia v. City of Newark*, 2011 WL 689616 *4 (D.N.J. Feb 16, 2011) (noting, in a civil case alleging that NPD officers engaged in excessive force, that NPD's "IA investigator . . . stated that he has never sustained an excessive force allegation unless the Prosecutor had already found sufficient evidence to bring a criminal charge.").

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[27] *Id.* at 9.

[28] The IA investigators usually requested written statements from the accused officers, but this appears to have been a formality, based on the subsequent lack of investigation and quick closure of the file.

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The standard for criminal conviction and the standard for sustaining an administrative complaint are significantly different, and a decision by the ECPO not to prosecute criminally does not mean that an officer acted legally or in keeping with NPD policies. The NPD's practice results in failures to sufficiently investigate serious uses of force and recommend appropriate disciplinary action, and is contrary to both the expectations of the ECPO and the New Jersey Attorney General's IA Guidelines, which require that the NPD take appropriate administrative action even when cases are not criminally prosecuted. N.J. AG Guidelines at 20.

2. Inadequate Review of Officers' Use of Deadly Force

The most significant and "intrusive" use of force is the use of deadly force, which can result in the taking of human life, "frustrat[ing] the interest of . . . society in judicial determination of guilt and punishment." *Tennessee v. Garner*, 471 U.S. 1, 9 (1985). Because deadly force poses such a high risk, it must be closely reviewed and controlled by a police department to ensure that it is used only when justified. Deadly force incidents, such as officer-involved shootings, also often draw substantial attention to the Department, and can be a source of significant tension with the community when a police department responds inappropriately.

NPD's handling of officer-involved shootings has fallen strikingly short of generally accepted police practices. The NPD has not conducted adequate administrative investigations to determine if officer-involved shootings violate NPD policy. Indeed the investigations of all 29 officer-involved shootings between May 2010 and January 2012 were generally incomplete.[29] This deficiency is partly due to how the NPD has handled its split jurisdiction with the ECPO for shootings involving law enforcement officers. The ECPO conducts the criminal investigation, while the NPD retains authority for the administrative review. However, as with its handling of other serious uses of force as described above, the NPD has misunderstood or misapplied the distinction between criminal and administrative investigations and abdicated its independent responsibility to conduct an administrative investigation to determine whether officer-involved shootings violate NPD policy or present officer safety concerns.

Criminal and administrative investigations of officer-involved shootings are both critical processes for a police department and the community it serves. A criminal investigation assesses the lawfulness of the use of force and may result in prosecution. The administrative review assesses whether the incident involved any violation of policy and whether it raises any tactical, training, or other concerns for the agency. The NPD starts an administrative investigation after each officer-involved shooting, but always suspends the administrative investigation while the ECPO conducts a criminal review. A blanket rule of not conducting an administrative investigation of a shooting pending completion of the criminal review is problematic due to the unnecessary delay it imposes, but it is less troubling if the administrative investigation restarts once it is clear it will not interfere with a potential criminal prosecution. However, it appears that the NPD has not resumed its administrative review of the use of force once the ECPO has completed its criminal review and declines to prosecute. This is consistent with all IA

[29] Of these 29 officer-involved shootings, thirteen were confirmed hits, twelve were confirmed misses, and four were of unknown effect. According to NPD reports, five of the shootings resulted in critical injuries and four were fatal.

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investigators' statements that, once a criminal review is initiated, they are precluded from taking administrative action regarding the use of deadly force, although they may investigate and take action for any other rule violations that may be identified.

Therefore, when the NPD suspends its administrative investigation pending criminal review, the NPD effectively ends its review of the incident.[30] The NPD's files do not include material gathered by the ECPO for its criminal review, and the NPD has not itself collected or considered critical evidence, or its absence.[31] For example, some files lack photographs or diagrams of the scene or even a clear description of a subject's injuries. Others lack a coroner's report discussing the cause of death. The files do not contain statements from the subjects of the shootings, or any indication that the investigator tried to obtain such statements. The NPD's response to officer-involved shootings appears to have been based only on the perspective of officers who were involved as witnesses and friendly civilian witnesses. The lack of thoroughness of NPD's officer-involved shooting investigations is reflected in the brevity of the investigative files: one investigation file of a fatal shooting was nine pages long, and another file where the shooting left the subject in critical condition was twelve pages.

As a result of the NPD's practice of not conducting meaningful administrative investigations, shootings that violate policy, but have not been criminally prosecuted, have avoided review. Except in the extremely rare instance where a shooting is prosecuted criminally, there is no possibility of holding officers accountable, or determining whether there were training or other failures. Indeed, while the NPD's lack of investigations made it impossible to draw firm conclusions about any shooting based upon the investigative file, at least one appeared unreasonable based solely on the documents available.

The NPD's weak investigations of officer-involved shootings provide a patina of oversight that is wholly insufficient to determine whether shootings are justified. Further, because it has conducted no investigation, the NPD has had little information to assess the need for changes to training, equipment, policies or tactics that may be placing officers and civilians at risk. By not conducting thorough investigations followed by appropriate disciplinary action when warranted, the NPD fails to deter officers from using deadly force unnecessarily and decreases public confidence that the NPD is exercising appropriate supervision and review.

D. THEFT

There is reasonable cause to believe that NPD officers have engaged in a pattern or practice of theft from civilians, and that the NPD has taken inadequate measures to prevent, investigate, and remediate incidents and allegations of such theft.

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[30] While there is no good rationale for the NPD's practice of dispensing with an administrative review altogether, delaying initiation of the administrative review may be the result of the potentially confusing guidance offered in the Attorney General's guidelines on how departments should proceed in these situations. During the course of this investigation the Attorney General's Office expressed its interest in considering modifications to its guidelines to provide greater clarity.

[31] With the potential exception of Grand Jury secrecy and similar requirements, there is no legal barrier to including information from a criminal investigative file in an administrative investigation.

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1. Legal Standards

Law enforcement officers who extort and rob persons of their property violate the Fourth and Fourteenth Amendment rights of those individuals. *See e.g., Hernandez v. Borough of Palisades Park Police Dep't*, 58 Fed. Appx. 909, 912 (3d Cir. 2003); *see also United States v. McClean*, 528 F.2d 1250 (2d Cir. 1976).

2. Theft by NPD Officers

The team reviewed numerous documents produced by the NPD, including general orders, audits, disciplinary histories for officers assigned to the Narcotics and Gang Bureau, and all thirty IA files provided by the NPD involving allegations of theft or lost property. The evidence makes clear that theft from arrestees has been more than an aberration limited to a few officers or incidents within NPD. Examples of the problem include allegations of theft of money and drugs during arrests and allegedly deliberate failure to return money and property such as wallets, cell phones, jewelry, and car keys upon arrestees' release by the NPD.[32]

The NPD has been aware for several years that theft by some of its officers is a serious problem. The Special Investigations Unit and IA have conducted several reviews of officers with high numbers of theft complaints.[33] Some of the officers reviewed in the NPD's internal reports had more than ten complaints of theft in a period of two to three years, and many additional complaints of other misconduct, generated both internally, by the NPD, and externally, by civilians. The NPD's reviews concluded that theft of civilians' property and money by officers was particularly problematic in the NPD's specialized units, such as narcotics and gangs, and in the prisoner processing unit at the NPD's Green Street Cell Block.[34] Moreover, these reports reflected that theft had become a problem not only with line officers, but also with more highly ranked officers and supervisors. Yet the NPD did not sustain any of the misconduct complaints of theft against any of the officers with the largest number of incidents. Further, the NPD's internal documents mirror the many accounts of NPD theft alleged by community members and other criminal justice stakeholders, including law enforcement. Indeed, while the DOJ's investigation was ongoing, there were several high-profile incidents of alleged theft by NPD officers.

The issue of theft is especially evident at the Green Street holding facility. On several occasions the Essex County Jail has rejected the property bags of prisoners transferred from Green Street because of discrepancies between prisoner property and their corresponding inventory forms. A late 2009 NPD memorandum indicated that property bags were being opened and money or property removed at Green Street. The NPD installed video cameras in the Prisoner Processing Division to determine who was stealing from the property bags. In 2011 the

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[32] Review of this issue was hindered by the deficiencies in IA investigations discussed later in this report, as well as NPD's inability to provide all of the documents requested. Specifically, the NPD was unable to provide documents evidencing actions taken in response to the policy recommendations made by the Special Investigations Unit or to confirm that no additional documents existed.

[33] According to an NPD internal memorandum, ten officers generated 42 investigations of theft complaints in a two-and-a-half year period.

[34] The NPD holds detainees at a 58-cell facility on the lower level of its building at 31 Green Street.

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cameras recorded two officers—including a supervisor—disabling the camera. Although these two officers were charged with misconduct, neither was ever disciplined for tampering with the video cameras: the NPD terminated one officer for unrelated reasons and allowed the other to retire without sanctioning him, even though he had been being found guilty in a police trial regarding this incident.

The ECPO also has expressed concern with the handling of arrestees' property by the NPD. In one instance of theft (where a prisoner's property bag was found to have been ripped open and fixed with a staple), the matter was referred to the ECPO for criminal investigation. After more than a year of investigating this incident, the ECPO declined prosecution in March 2012, noting that "even though it is evident that a theft did occur, no specific officer can be identified for prosecution." The ECPO also noted that "after a thorough investigation, it appears that the NPD's' general orders regarding the custody and inventory of prisoners' property at 31 Green Street ha[ve] been fundamentally deficient for some time," but that the ECPO hoped the new holding facility in police headquarters on Clinton Avenue "is better equipped to safeguard prisoners' personal property." Although the NPD had planned to transfer its detention operations from Green Street to the new police headquarters on Clinton Avenue, that transition has been delayed indefinitely.

3. NPD Practices Have Failed to Adequately Address Theft by Officers

Despite its awareness of the theft problem, the NPD has not enforced its own rules regarding theft prevention, has conducted inadequate investigations into theft complaints, has failed to take corrective action against offending officers, and has not taken other steps it knows are necessary to prevent or effectively respond to theft allegations. The NPD has failed to follow through on the recommendations of its own internal audits and reviews regarding theft, including reassigning the problem officers out of specialized units, video monitoring the Prisoner Processing Division, and requiring supervisors to inspect and document prisoner property. Instead, the NPD has routinely allowed officers with multiple theft complaints to be assigned to or remain in units with the most opportunity for theft, and then—contrary to its own recommendations—has failed even to monitor or conduct internal integrity checks of these officers.

The NPD's lax response to allegations of theft by officers is longstanding and remained evident during this investigation. For example, despite the 2009 memorandum and other information alerting the NPD to problems in its property room, an early 2013 visit to the property room revealed that many obvious, easily correctable deficiencies still lingered: the property room door did not automatically lock; valuables other than cash were not stored as securely as cash; documentation of property was limited to a handwritten log book; property was not counted and inventoried by at least two people; and there appeared to be no systematic inspection of property bags for damage.

a. Failure to Adequately Screen Candidates for Specialized Units

Accusations of theft and corruption are most often leveled against officers in specialized units—particularly the various narcotics, gang, and street crimes units—where officers often come into contact with individuals carrying large sums of money. The NPD is well aware of this

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pattern: a 2010 internal review showed that the officers with the most theft complaints had been assigned almost exclusively to specialized units like the Central Narcotics Enforcement Team, the precinct Narcotics Enforcement Teams, the Narcotics Gang Enforcement Bureau, and the Street Crimes Task Force. Recognizing that inadequate screening has allowed such problems to occur, the NPD's Special Investigations Unit recommended a policy of thoroughly reviewing an officer's IA history before assignment to a specialized unit. Despite the clear need for such a policy, the NPD did not act on this recommendation.

Nor has the NPD implemented screening measures to ensure assignment of officers with appropriate and tested integrity to these units. Newark's assignment policy, General Order 96-08, includes general requirements for an officer's becoming a member of a specialized unit: two years on patrol before a police officer can join a precinct narcotics enforcement team; two years of experience on a precinct narcotics team or anti-crime unit before a detective can join the Centralized Narcotics Division. This bare two-year service requirement may be waived for department "need," a term not defined in the policy.

The NPD's assignment policy does not include any other criteria, let alone rigorous, objective, integrity-based criteria designed to minimize the possibility of theft or other forms of corruption, such as the absence of any history of dishonesty, theft, or similar allegations. Of most concern among these deficiencies is the lack of any prohibition against assigning officers with multiple theft complaints—even sustained theft complaints—to specialized units. The policy instead places a restriction on assignments in instances where an officer affirmatively requests a particular assignment, and provides that such a request will be denied if the officer has a pending "major" disciplinary case, discipline greater than three days' suspension within the past twelve months, or two prior findings of guilty by trial board within the past twelve months. Other than these very narrow restrictions, the assignment policy does not limit selection of officers for the units, even if they have had prior discipline for theft, have been the recipients of multiple theft allegations, or other integrity-related complaints (e.g., truthfulness, falsifying reports, etc.). The assignment policy does not set a maximum number of theft complaints for candidates or otherwise discuss what kind of disciplinary history would be acceptable. These inadequate screening procedures allow officers with multiple theft complaints to be assigned to a specialized unit or transferred to another specialized unit while continuing to accumulate integrity-related complaints.

b. Failure to Follow the NPD's Established Rotation Policy

Rotating personnel out of specialized units is an essential tool for combating theft and corruption in police departments. NPD policy clearly recognizes as much, stating in General Order 96-08 that rotation is an "effective method at controlling police misconduct" designed to "minimize complacency and prevent corruption." According to the rotation policy, officers are limited to two years in a narcotics unit and one year in a vice unit before they must be rotated to another assignment. The policy also requires the Human Resources Unit to notify officers in advance of the expiration of their term that they should submit a request for transfer.

Although command staff emphasized the importance of such a rotation procedure in interviews during the investigation, the NPD largely has failed to enforce its "mandatory" policy. Many of the NPD officers with the highest number of theft complaints remained in specialized

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units beyond the maximum amount of time provided in the rotation policy. In fact, in several instances where memoranda made specific recommendations to enforce the rotation policy and rotate the officers with the highest number of theft complaints out of their units, the NPD did not transfer these officers for many months, and in some instances, transferred them to other specialized units with similar opportunities for theft. In one egregious example, an internal report recommended a transfer for an officer with more than ten theft complaints in just four years, but this officer was not transferred to a non-specialized unit (i.e., a unit that did not focus on narcotics or vice) until ten months later, more than two years after he had initially been identified as one of the officers with the most theft complaints lodged against him. Indeed, in the three years *after* this officer was first identified as a top offender he accumulated an additional six theft complaints.

Not only has the NPD ignored its own rotation policy, but the policy is itself inadequate. While the policy sets a maximum amount of time in a particular specialized unit *(e.g.,* two years in narcotics), there is no restriction on the number of rotations in a specialized unit or on transfers from one specialized unit to another, and then back again. There is also no requirement that officers who accumulate one or more theft or other integrity-related complaints will be rotated out of these assignments before the maximum time has elapsed. The fact that officers in specialized units continued to accumulate civilian complaints underscores the importance and effectiveness of adhering to a rigorous and regular rotation policy.

c. Failure to Monitor Problem Officers or Conduct Integrity Tests

The NPD itself recommended integrity tests and closer monitoring in 2010 in connection with the NPD's internal review of officers with the highest number of theft complaints. Although such measures are an integral tool for combating theft, there is no information suggesting that the NPD took any action on these important recommendations.

As part of a comprehensive approach to reducing the incidence of theft, the NPD should conduct regular integrity tests not only in response to allegations against specific officers, but routinely throughout the Department, both on a random and a targeted basis. The NPD should monitor officers suspected of theft, including those with high numbers of complaints.

E. INADEQUATE MISCONDUCT INVESTIGATIONS HAVE CONTRIBUTED TO THE PATTERN OF CONSTITUTIONAL VIOLATIONS

An effective system for investigating complaints of officer misconduct is a basic component of any department's accountability. Such a system requires the prompt and thorough investigation of civilian complaints; the sustaining of those complaints when they are supported by a preponderance of the evidence; and the imposition of fair and consistent discipline when appropriate. By contrast, a police department that fails to adequately investigate civilians' allegations of misconduct through its IA system tacitly permits officers to engage in such conduct. *See Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir. 1996) (holding that a deficient internal investigation process is evidence of a custom tolerating the tacit use of excessive force by police officers).

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Much like the IA system assessed in *Beck*, the NPD's system for investigating civilian complaints appears to have been "structured to curtail disciplinary action and stifle investigations into the credibility of the City's police officers." *Id*. While the NPD has severely and inconsistently disciplined officers for internal rule violations, there are serious deficiencies in the NPD's handling of civilian complaints that translate to a lack of accountability for serious misconduct.[35] For example, as noted above, according to the NPD's own records, IA sustained only one misconduct complaint of excessive force in the six-year time period from 2007 through 2012. Every police department is different and there is no threshold percentage of sustained complaints that a law enforcement agency must attain in order to demonstrate that its investigations of misconduct complaints are effective. Nonetheless, it is worth noting that the NPD's failure to sustain more than one excessive force complaint in six years is implausible on its face and appears significantly aberrant: a 2006 Bureau of Justice Statistics Special Report found that large municipal police departments sustained an average of 8% of citizens' complaints about police use of force.[36]

Similarly, summaries of IA investigations involving complaints of theft from 2009 to 2011 and disciplinary histories of officers assigned to the Central Narcotics Unit in August 2011 (which included more than fifty theft complaints over six years against these officers) indicated that the NPD sustained allegations against only two officers.[37] This means that officers with high numbers of credible complaints that have not been adequately investigated by the NPD, as discussed below, have continued to work on the force, often in the specialized unit from which the complaints originate, without any discipline or other corrective action, such as re-training or increased supervision.[38]

The NPD's low rate of sustaining civilian complaints has not been limited to allegations of theft or excessive force. In 2010, only 38 out of 814 (4.6%) complaints by civilians were sustained. In 2011, only 29 out of 601 (4.8%) civilian complaints were sustained. In 2012, 38 of 561 (6.8%) civilian complaints were sustained. This slight increase between 2011 and 2012 appears to have resulted from an increase in the number of relatively low-level "demeanor"

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[35] The assessment of NPD's IA and disciplinary processes included a review of the NPD's policies and general orders related to IA and the disciplinary process, IA data on complaint intake and adjudication provided by the NPD, annual reports, an external audit conducted by the ECPO, interviews of IA command staff, the commanders responsible for making disciplinary decisions, and officers familiar with the disciplinary process, and a review of all of the IA files provided by the NPD where individuals alleged that they were subjected to excessive force, unlawful arrests, or theft during a period of approximately 18 months, from January 2010 to June 2011. In addition, members of the community and advocates provided feedback about their experience pursuing complaints through the NPD's IA process.

[36] *Citizen Complaints about Police Use of Force*, Bureau of Justice Statistics Special Report, June 2006. The report did not address whether an 8% sustained rate is appropriate or acceptable. The report further noted that many factors, including variations between departments in complaint intake, review and documentation processes, can skew data in either direction.

[37] Although certain documents reflect that administrative charges were sustained against these two officers in 2009 for failing to properly document the receipt of a prisoner's property, the NPD provided no information whether these officers went to police trial on these charges, or whether they were ever disciplined.

[38] Poor record-keeping by the NPD and incomplete production of requested records prevented a review of all theft-related IA files and the outcome of all investigations.

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complaints sustained. These sustained complaints were generally either ancillary to criminal charges (in which another law enforcement agency had already charged the officer with an offense), or were for low-level rule violations such as "neglect of duty" or "language" (e.g. derogatory speech). Overall, it has been exceedingly rare for the NPD to sustain citizen complaints of misconduct, particularly serious misconduct.

The NPD is far more likely to sustain complaints against officers when the complaint is made by another NPD officer or a supervisor. The sustained rates of internally generated complaints, while decreasing, are strikingly high: of the 653 internal complaints filed in 2010, 453 (69.3%) were sustained. In 2011, of the 291 internal complaints filed, 171 (59%) were sustained, and in 2012, 285 internal complaints were filed and 153 (53.6%) were sustained.

The NPD has been aware of deficiencies in its internal affairs system since at least February 2011, when a federal court found that the NPD condoned police officers' use of excessive force by failing to adequately investigate civilian complaints. The ruling in *Garcia v. City of Newark*, No. 08-1725 (SRC), 2011 WL 689616 at *4 (D.N.J. Feb. 16, 2011), was based in part on expert testimony that "it is the custom, practice and policy of the [Newark Police Department] to stringently discipline any misconduct against the organization itself but pay little or no attention to complaints from citizens, especially those regarding use of force." 2011 WL 689616 at *4 (D.N.J. Feb 16, 2011) (unpublished). Although, the district court issued this opinion just three months before this investigation commenced, the NPD appears to have done little since the court's admonishment to improve its practices. Indeed, the NPD reduced the staffing of its IA by more than half in 2011 and 2012, making it more difficult to adequately investigate allegations of officer misconduct.

1. Overview of NPD's Internal Affairs Process

The NPD's IA process begins when the complainant completes a form called an Investigation of Personnel Report ("IOP"). A complaint can be filed by a civilian ("external" complaint) or by a member of the Department ("departmental" or "internal" complaint). The NPD then divides complaints into two categories: major offenses and minor offenses. Major offenses are those that may result in a penalty of more than five days of suspension, and minor offenses are those where the penalty may not exceed five days. The list of major offenses is not exhaustive, and in practice is highly variable.[39] Unlike many modern police agencies, NPD policy does not set out the presumptive punishment for various categories of offenses: that failure reduces transparency and compromises consistency in discipline.

Once categorized by IA, minor and major offenses follow two separate processes. Each precinct has a dedicated Integrity Control Officer ("ICO") who is responsible for investigating allegations of minor offenses. Minor offenses are typically resolved at a "Disciplinary

[39] The NPD's General Order categorizes the following as major offenses, and specifies that the list is not exhaustive: criminal offenses or allegations of criminal acts; aggravated insubordination; unauthorized discharge of firearms; refusal to submit to drug screening; and violations of Radio Discipline. *See* General Order 93-2 ("Disciplinary Process"), April 1, 2010, at 4.

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Conference," where a precinct or division commander conducts an administrative review of the alleged offense.[40]

By contrast, the NPD's IA unit investigates major offenses. NPD policies require that the IA investigator document the investigation in a report and recommend one of four findings: Exonerated, Sustained, Not Sustained, or Unfounded.[41] The IA Commander, who is responsible for managing IA's daily operations, the IA Executive Officer (the second-in-command), and the Police Director subsequently review the report and either accept the investigator's recommendation, override it and issue a different finding, or ask the investigator to seek additional evidence. If, after that review, an allegation against an employee is ultimately "sustained," a formal Complaint Against Personnel ("CAP") is initiated, charging the officer with the relevant policy violation. Once a CAP is filed, the NPD's complaint adjudication process is triggered and the accused officer is notified to appear before the Trial Board.

The Trial Board is a three-member panel consisting of the Police Director's designee and two commanders.[42] NPD policy mandates that Trial Board proceedings "shall be informal" and the parties are not bound by the rules of evidence.[43] The policy states "[t]he sole purpose of the Trial Board is to determine the facts and situations surrounding a case," and to "determin[e] the truth." [44] Although a sustained finding by Internal Affairs amounts only to a charge and is not a formal finding of guilt or innocence, Trial Board members reported that their main function is to sustain the decisions of Internal Affairs.[45] Officers similarly perceive that the Trial Board makes decisions about an officer's guilt or innocence before the evidence against the officer is tested at the hearing.

Pursuant to state law, disciplinary sanctions imposed through the Trial Board process may be appealed through the Office of Administrative Law and the Civil Service Commission, and then to the Superior Court of New Jersey. The NPD can impose administrative sanctions prior to the completion of the appeal process. NPD staff reported that it can take more than two years to complete this process, which potentially magnifies the burden imposed on officers by an arbitrary disciplinary decision.

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[40] *See* General Order 93-2.
[41] *See* General Order 05-04 ("IA"), September 21, 2005 at 14:
Exonerated: When the evidence indicates that the act complained of did in fact occur but the action taken by the officer was legal and the officer was in compliance with Department policies and procedures, or an incident occurred and the officer was not involved.
Sustained: When the facts support the complaint and the Investigator reasonably believes that the incident occurred and that involved officers(s) engaged in the violation of Department policy/procedure and/or Criminal Law/Ordinances.
Not sustained: When the facts and/or investigation fails to disclose sufficient information to clearly prove or disprove the allegation or when material conflicts in the evidence are resolved in favor of the accused employee.
Unfounded: Indicates that the act complained of did not occur and the complaint is false.
[42] *See* General Order 93-02 ("Disciplinary Process"), April 27, 2011 at 3.
[43] *See* G.O. 93-02 at 8.
[44] *See* G.O. 93-02 at 8.
[45] *See* G.O. 93-02 at 8.

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2. Investigative Deficiencies

a. Failure to Collect Evidence from Complainants

IA records reflect that IA investigators failed to make consistent attempts to follow up with complainants to clarify critical facts. Similarly, community members reported filing complaints with IA and receiving little or no subsequent contact from investigators. In order to conduct an effective investigation, investigators must exhaust reasonable means to contact a person, including telephone calls and in-person attempts, and document what steps were taken to do so. Moreover, in cases alleging serious misconduct such as excessive force, where the complaint is credible upon review, the NPD should move forward with the investigation, even if the complainant cannot be reached.

b. Failure to Objectively Assess Evidence from Officers, Complainants, and Witnesses

When investigating civilian complaints, NPD investigators have routinely failed to probe officers' accounts or assess officer credibility. IA investigators have not, for example, inquired further when officers' Force Reports or interviews with subjects have included non-descriptive language such as the "necessary level of force" or "minimum force necessary." Investigators instead appeared to have presumed that officers had not used excessive force or committed other violations alleged, even when that presumption was plainly refuted by the weight of the evidence.

Consistent with the NPD's practice of accepting officers' accounts with little critical analysis, investigators failed to give statements from complainants and witnesses sufficient weight. And investigators generally discredited statements that did not support accused officers' accounts. For example, a complainant alleged that an officer threatened to hurt him, pulled him into the precinct bathroom, beat him, and pushed him through the bathroom window, shattering the glass and causing lacerations to the front and back of his head. A witness reported seeing the officer threaten the complainant, force him into the bathroom, and throw him into the window. She then observed the complainant having seizures and a group of officers enter the bathroom and shut the door. In exonerating the officer, IA concluded that the incident did occur, but accepted without question the officer's description in the incident report that the officer "lunged forward to close the gap that was between him and [the complainant] after [the complainant] threw a punch at him. His forward momentum caused their bodies to collide, which caused [the complainant] to fall forward and into the window." The investigator never interviewed the officer and ignored the complainant's and corroborating witness's statements.

Even minor conflicts between complainant and witness accounts have often been deemed fatal to a complainant's credibility, whereas IA investigators have not similarly probed conflicts between officers' statements or Force Reports. In one record, five witnesses confirmed the complainant's allegation that officers beat him repeatedly during his arrest. One witness provided the names of four additional witnesses who also observed the arrest, but the IA investigator never contacted any of them. And even though medical records documented the complainant's injuries, the investigator recommended a finding of "not sustained" because the

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officers uniformly denied witnessing or using excessive force, and because the witnesses' accounts, which all described excessive force, had minor differences among them.

In another record, a complainant reported that an officer struck him repeatedly with a waffle grill. The investigator accepted the officer's version of the facts despite conflicting information in his Force Report and subsequent reports. Although the officer's report documented only that he had used "hands/fists," he later reported that he inadvertently struck the complainant on the head with a waffle grill in self-defense. Instead of probing this inconsistency, the IA investigator exonerated the officer and noted that the use of force was "reported and filed with complete transparency."

This elevation of officer credibility, and simultaneous unwarranted discounting of complainant and civilian witness accountability, helps perpetuate patterns of misconduct. *See Beck*, 89 F.3d 966, 974 (finding that failure to adequately investigate IA complaints of misconduct permitted officers to engage in misconduct and this failure, in part, was fueled by a pattern of giving little weight to the accounts of credible witnesses who supported the complainant's version of the facts while being overly favorable towards officers' statements).

c. Unequal Treatment of Officer and Complainant History

The NPD's bias in favor of officers was particularly evident in IA's reliance on complainants' criminal histories while discounting officers' disciplinary histories. Investigators often have questioned complainants about their arrest histories during interviews, run checks of complainants' criminal histories, and used this information to impugn complainants' credibility, bolster the credibility of officers, and support findings that officers should be exonerated. Generally, a complainant's criminal history should not be used in resolving a misconduct complaint unless there is a genuine issue of credibility. To its credit, the NPD's leadership recently acknowledged that this practice is problematic and that investigators should cease routinely checking and invoking complainants' criminal histories.

The NPD's inappropriate use of criminal histories has resulted in premature terminations of investigations and inaccurate assessments of available evidence. For example, IA reports commonly have referred to a complainant's criminal history in the "findings" section of the report, noting that, for example, the complainant's "criminal history would lead a prudent person to believe that he has the probability to be less than truthful," or the complainant's prior crimes demonstrated a "pattern of anti-authority behavior and an unstable relationship with law enforcement."

Investigators' improper emphasis on complainants' criminal history has not been limited to considering criminal convictions. Some IA records also have included consideration of NPD reports of previous stops of complainants, or incident and arrest reports from previous arrests, even where no conviction resulted. This is especially problematic because, as detailed in this report, the NPD's stop and arrest practices have not comported with constitutional requirements and have resulted in unjustified stops. In one file, the investigator checked the complainant's criminal history and compiled related incident and arrest reports for offenses dating back to 1996 – offenses that predated the complainant's allegation of excessive force by fourteen years. In recommending that the officer be exonerated, the investigator relied in part on the complainant's

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criminal history to question the complainant's version of the facts. In other IA investigations, investigators reviewed the complainants' juvenile court records and called the prosecutor's office to inquire about details of the complainant's previous arrests not captured in reports.

In stark contrast, investigators have given no weight to accused officers' disciplinary history, even when that history has demonstrated a pattern of similar allegations of misconduct. While investigators typically have included the officer's disciplinary history in the IA record, those references appear perfunctory, with no indication that the disciplinary history should affect credibility determinations or other aspects of the investigation. For example, in one force investigation, an officer had 55 entries in his IA history over four years, including 26 use of force incidents. Both numbers are comparatively high but were not addressed in the investigation. In another force investigation, the officer's 70 entries in his IA history over six years, including 40 use of force incidents, were not considered by the investigator.

An officer's tendency to elicit certain types of allegations by civilians should be considered highly relevant in an IA investigation. *See Beck*, 89 F.3d 966, 973 (recognizing that a "system of investigation [where] each complaint was insulated from other prior and similar complaints and treated in a vacuum" is "sterile and shallow"). However, the NPD has taken the reverse approach, scrutinizing complainants' criminal records, but routinely ignoring officers' disciplinary histories.

d. Discouraging Complainants Through Miranda Warnings

The New Jersey Attorney General's Internal Affairs Guidelines appropriately mandate that a complainant must be accorded all appropriate protections when the complaint arises from an incident where the complainant has been charged with a criminal offense. N.J. AG Guidelines at 27-28. Accordingly, contact with such a complainant must be coordinated through his or her defense counsel. *Id*. However, the guidelines also appropriately state that the need to issue *Miranda* warnings is triggered only "whenever the questioning of an individual is custodial in nature."[46] *Id*. at 40 ("The question is whether a reasonable person would believe that he or she is free to leave."); *see Miranda v. Arizona*, 384 U.S. 436 (1966). When a civilian voluntarily meets with an investigator in furtherance of an administrative complaint of police misconduct, and remains free to leave the interview at any time, the interview is neither custodial nor an interrogation. *See Stansbury v. California*, 511 U.S. 318, 322 (1994) ("An officer's obligation to administer *Miranda* warnings attaches, however, 'only where there has been such a restriction on a person's freedom as to render him 'in custody.'") (citing *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); *see also Alston v. Redman*, 34 F.3d 1237, 1244 (3d Cir. 1994) ("Because the presence of *both* a custodial setting and official interrogation is required to trigger the *Miranda* right-to-counsel prophylactic, absent one or the other, *Miranda* is not implicated.")

[46] The fact that a complainant may have been arrested during the course of the incident about which he is filing a complaint does not change a voluntary interview by Internal Affairs into a custodial interrogation. *See, e.g.*, *Minnesota v. Murphy*, 465 U.S. 420, 430-31 (1984) (Although the probation officer questioned probationer about a crime, the interview with the probation officer, which was "arranged by appointment at a mutually convenient time," and where probationer was "not physically restrained and could have left the office" did not amount to custodial interrogation.).

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Despite these limitations, NPD investigators routinely have given *Miranda* warnings to complainants, and sometimes witnesses, before taking their statements. Over a quarter of the misconduct investigation files reviewed documented *Miranda* warnings to complainants.

This practice is not only unnecessary and demonstrates a lack of understanding of the purpose of *Miranda* warnings, but it inappropriately suggests to complainants and witnesses that they are being questioned as suspects in a criminal case instead of as potential victims or witnesses of police misconduct. Ultimately, it can intimidate and discourage victims' and witnesses' participation in the complaint process. Indeed, NPD records included examples where the *Miranda* warning either prompted complainants to end the interview or dissuaded complainants from moving forward with their complaints. For example, in one record the complainant stated that he was unsure about moving forward with his complaint because the investigator asked him to sign a *Miranda* waiver.

This practice is out of the norm for police departments across the country, and the NPD's leadership acknowledged that it is inappropriate and may discourage complainants from coming forward.

3. NPD's Application of Discipline

The way in which the NPD determines appropriate discipline in sustained cases is also seriously flawed.[47] First, the NPD has no set presumptive penalties for particular violations. As a result, the Trial Board can impose the same punishment for an officer's failure to report to work on time as for the officer's use of excessive force against a civilian. Similarly, officers can receive vastly disparate discipline for committing similar offenses. While Trial Board members report that they consider past Board disciplinary decisions when meting out discipline, this practice appears to be haphazard and to rely heavily on Board members' recollections.[48] The current system also lacks guidance for what mitigating or aggravating circumstances might warrant consideration in determining the appropriate penalty. This means there is no structured, transparent way for the NPD to take into account the particular circumstances of the incident in determining discipline. And, with no guidelines for disciplinary penalties, there is no opportunity, much less requirement, for the NPD to explain why penalties diverge in seemingly similar cases. Accordingly, officers have no way to form a reliable expectation of the consequences for misconduct.

Officers also report that the Trial Board's decisions appear to be arbitrary. For example, officers have complained that some officers were not disciplined after testing positive for drugs or driving under the influence, while others were terminated for the same conduct. Disciplinary penalties appear inordinately harsh in some instances, particularly in response to internal

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[47] This is not a new problem. The independent consultants that reviewed the Department's IA system in 2007 recommended "a complete review" of the disciplinary system due to the widespread perception that it is "administered in an arbitrary and capricious manner," "often unnecessarily focus[es] on minor violations of rules and regulations," and has historically operated on a "patronage system."

[48] NPD reports that it plans to appoint a permanent chairperson who will participate in all Trial Board proceedings as a means of ensuring consistent decision-making. However, such a position is insufficient by itself to ensure objective decision-making and is not an adequate replacement for formal and transparent standards.

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complaints, and weak or nonexistent in others, mainly in response to misconduct complaints from civilians. For example, the NPD has not disciplined an officer for engaging in excessive force in more than five years. Yet an NPD officer who assisted a disabled tractor-trailer was suspended for 30 days for failing to strictly abide by the Department's towing policy and other minor rule violations, despite the officer's almost otherwise flawless disciplinary record.

Without transparent, objective criteria to guide and document disciplinary decisions, the NPD is ill equipped to persuasively respond to the widespread belief, both within and outside the Department, that discipline is meted out, at least in part, based on how well-liked or well-connected an officer is. The NPD can and should work with officers and community members to develop disciplinary sanctions that make sense, and a system for imposing discipline that is transparent, consistent, and fair.

F. INADEQUATE SUPERVISION HAS CONTRIBUTED TO THE PATTERN OF CONSTITUTIONAL VIOLATIONS

1. Failures in Supervision and Management

Effective supervision is critical to the operation of any police department. It is particularly important for supervisors in the field, where the requirements of law and policy are at risk of being misapplied in the heat of the moment, or even disregarded completely. Through consistent daily interactions, supervisors can shape and guide officers' conduct and help them learn from their mistakes. They are able to identify problems and act immediately to prevent or minimize harm. For example, a supervisor on the scene can identify an arrest made without sufficient probable cause and order the citizen's immediate release. Similarly, a more experienced supervisor at the scene of a use of force might be able to advise an officer of alternative techniques to minimize or avoid using force in future similar encounters.

Unfortunately, the NPD does not take full advantage of its chain of command to promote accountability and constitutional policing. When officers use force, the NPD does not require supervisors to respond to the scene, where they would be able to conduct an immediate initial assessment of the incident. Further, although supervisors are required to approve officers' Force Reports, the approval confirms only that the report was completed. Similar concerns are manifest with respect to the NPD's stops and arrests. With nearly three quarters of documented stops lacking an articulation of reasonable suspicion, it is clear that supervisors are not reviewing and holding officers accountable for their actions.

By not requiring meaningful review of officer actions by supervisors, the NPD loses a principal benefit of their supervision. During the investigation NPD leadership acknowledged that NPD officers and supervisors often view each other as peers rather than superiors and subordinates, making it more difficult for supervisors to properly scrutinize officers under their command.

2. Absence of an Effective Early Warning System

Early warning systems are a significant component of police department supervision and risk management systems across the country. Such systems are comprised of one or more

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databases that track, and make it possible to analyze, various facets of officer activity, including stops, arrests, uses of force and misconduct complaints. That analysis, in turn, allows departments to identify outlier units and individuals whose behaviors are undermining their own successes. Early warning systems identify patterns of activity by officers and groups of officers for supervisory review and intervention. Once an officer is identified for review by the Early Warning System, a supervisor should conduct a comprehensive written review and provide an array of individualized alternatives for resolving any problems identified during the review, such as counseling, training, additional supervision or monitoring, and action plans for modifying future behavior. By identifying problematic trends and behavior as they develop, early warning systems enable management to provide direction and take corrective action before serious problems occur. Early warning systems also can be critical components of a City's system for managing risk and liability, as police leadership is responsible for responding appropriately to officers with a history of problems. *See Beck*, 89 F.3d at 973 (finding that when an officer receives multiple similar complaints over a short time period, it can be inferred that the Chief of Police knew, or should have known, of the officer's propensity for violence when making arrests). Especially in larger departments where an officer's problematic behavior may otherwise continue undetected for some time, early warning systems have become valuable tools for effective and supportive officer supervision.

To be effective, early warning systems require not only a reliable, accurate, and complete computer database, but strong policies and protocols that allow the Department to use the data to identify and change problematic officer behavior. Unfortunately, the NPD has failed to implement such a system. Since 2006, the NPD has used commercial case management software called IAPro. IAPro includes some early warning functionality, including the ability to generate alerts when officers reach specified thresholds, such as a certain number of misconduct complaints over a specified period. The NPD apparently did not use this capability at all until 2010. In 2010, NPD tested an early warning system based on IAPro called the "Performance Monitoring System." This system was designed to use IAPro's alert features to identify NPD officers with multiple records in the system, who would then be subject to increased training and supervision rather than formal disciplinary action. Although this feature was reportedly implemented in late 2010 and identified approximately 100 officers for monitoring, the NPD could not provide documentation regarding the details or outcomes. And, in August 2011, NPD personnel provided only tentative and inconsistent answers about whether and how the Performance Monitoring System was being applied. However, there was general consensus that monitoring had stopped for most, if not all, of the officers initially identified, and that no others had been placed on monitoring. No alternative tracking or early warning system was formally implemented to replace the Performance Monitoring System, although NPD has asserted that it is now making efforts to increase the use of IAPro to identify officers for corrective action.

The NPD's attempts at implementing an early warning system have been undermined not only by its failure to use the information it gathers, but also by the poor quality and inconsistency of the information itself. There are significant, widespread data failures in areas critical to evaluating whether officers are in need of support and intervention. Although a principal purpose of an early warning system is to promote awareness of developing issues before they become problems, it appears that the NPD does not inform supervisors and district commanders of pending complaint investigations and charges against officers under their command. At a

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minimum, the complaint information in an early warning system should include: allegations, investigation outcomes (e.g., guilty, sustained, dismissed); charges against officers; and discipline imposed. The NPD's system has not consistently included these data, which can make it impossible for NPD supervisors to properly identify and hold officers accountable for patterns of problematic behavior.

The NPD's use of inconsistent terminology when entering data further complicates accountability efforts. For example, the NPD tracks uses of physical force in IAPro as "physical force," but omits the more specific description of the type of force used that is recorded on the Force Report. As a result, supervisors reviewing data in IAPro have no way of knowing what types of force are actually being used by their officers, and therefore are limited in their ability to detect an emerging problematic trend, or respond most effectively.

In sum, the NPD's nascent efforts to implement a meaningful early warning system faltered some time ago, and efforts to restart this program have been insufficient and unsuccessful. This failure to institute an effective early warning system underscores the NPD's lack of sufficient, sustained commitment to monitoring officers' complaint and disciplinary histories and the supervision and intervention necessary to change problematic behavior.

G. DEFICIENT TRAINING PRACTICES HAVE CONTRIBUTED TO THE PATTERN OF CONSTITUTIONAL VIOLATIONS

1. Inadequate Officer Training

NPD officers' patterns of misconduct are consistent with the NPD's failure to provide adequate training and sufficiently track the training it does provide. At the outset of this investigation, a random sample of 212 officers' training cards—reportedly the NPD's primary record of officers' training—reflected that only two officers attended training in 2011. One had attended a class on drug, crime and terrorist vehicle interdiction, the other on a fingerprint and facial recognition software package. Although the NPD claimed that many other officers had attended training, there was no supporting documentation. The NPD must maintain a detailed, current record management system so it can effectively track and monitor what training has been offered and completed by its officers.

In addition to the sample of training cards, the NPD provided a schedule of the training it offered from 2009 to 2011.[49] That schedule showed a decline in training opportunities in 2011, when compared to the preceding years. In addition, the training identified in the NPD's records appeared limited to external specialty classes that certain officers were authorized or directed to attend. The NPD's officer training records did not document any regular annual training on routine police practices and current legal developments, such as those related to use of force, or search and arrest practices. Although the NPD reports that such matters are covered in refresher training presented annually by the legal advisor from the ECPO, that training reportedly was provided to only 280 NPD members in 2010 and to 418 members in 2011. Moreover, the NPD could not provide a syllabus of the training, but related that it covered several definitions of

[49] We have repeatedly asked Newark to provide updated training information, but have not been provided any.

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force, review of actual use of force, and examples of permissible uses of force in the NPD. There was no indication that this training was tailored to the NPD's particular force training needs, or was part of an overall NPD training plan.

Based on a recently provided summary of training activities, the NPD appears to have increased specialized and subject-specific training opportunities for officers in 2012 and 2013. However, attendance at the annual training sessions provided by the ECPO legal advisor declined to 124 officers in 2012 and only 55 officers in 2013. This decline is of particular concern because these sessions, while far too limited in length and scope, nonetheless stand as NPD's closest analog to the annual use of force training that is standard in well-run police agencies.

The investigation also raised concerns that the NPD also may have underemphasized the importance of regular firearms qualification. Regular firearms qualification helps ensure that officers can fire their weapons accurately and appropriately in a variety of conditions. It is a critical component of officer and public safety. The New Jersey State Attorney General's Guidelines and NPD policy require officers to qualify twice annually, with at least 90 days between qualifications. The policy does not prohibit officers who do not qualify from carrying their weapons, and only precludes them from working outside employment. This is an inadequate sanction. Officers who do not qualify with their firearms should be prohibited from carrying their firearms and be required to requalify promptly.

A review of firearms qualification records in the early stages of this investigation raised concerns that a significant number of officers might not have satisfied the twice annual qualification requirement in 2011. However, a recent training summary from the NPD indicates that all officers may have qualified with their firearms in 2012 and 2013, although the information that the NPD provided was not sufficiently detailed to allow for confirmation of this assertion. Further, this information indicates that as many 77 officers in 2012 and 67 officers in 2013 may not have qualified twice, as required by NPD policy. Nonetheless, if these numbers are confirmed, the NPD appears to have improved the rate at which officers qualify on their firearms in recent years, but the NPD should take steps to ensure that all officers comply with the policy and the accurate records.

2. Inadequate Training of Internal Affairs Investigators

In addition to the numerous deficiencies with the NPD's IA policies, procedures, and practices, the NPD has failed to appropriately train its investigators. NPD command staff and officers, IA investigators, and Integrity Compliance Officers ("ICO") consistently reported that investigative experience has not been required to become an investigator. The NPD is well aware of its IA training needs. In 2007, the City hired a consulting firm to conduct an analysis of the NPD's organizational structure and operational methodology.[50] The consultants interviewed members of the Department, conducted focus groups and reviewed documents. Their analysis included a review of the NPD's Internal Affairs system. The consulting firm warned that the

[50] The goal of the analysis was to provide the City with recommendations on how to reduce crime through increased effectiveness and efficiency within NPD.

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NPD's investigators "receive[] no formal training" and emphasized that IA must be "staffed with quality personnel." Those training deficiencies remain. For example, one ICO interviewed had been on the job for three months, yet had not received any training, even though, prior to becoming an ICO, he had never been in a detective position or received any formal training on how to conduct investigations. The 2007 assessment also recommended that all investigators receive training in interview techniques, evidence collection, search and seizure law, administrative law, and advanced IAPro user training. Yet, the NPD's Deputy Chief of Training and Support reported that there is no required training specifically for IA investigators. While a statewide training class is available, he reported that it has been difficult for the NPD to get its investigators into the program. This failure must be addressed if the NPD is to ensure adequate investigations of officer misconduct.

IV. OTHER AREAS OF CONCERN

At the beginning of the investigation, the DOJ notified the City that its review would include allegations of gender-biased policing with respect to criminal investigations of sexual assault, bias related to sexual orientation and gender identity, and risk of harm to detainees confined in the NPD's holding cells. While the available evidence does not support a finding of a pattern or practice of misconduct in any of these areas, the investigation revealed potential issues or deficiencies in some practices that warrant further examination by the NPD.

A. Gender-Biased Policing

A review of a sample of NPD sexual assault files and interviews of the supervisor of the NPD's special victims division and relevant staff at the ECPO who handle or supervise sexual assault prosecutions revealed crucial deficiencies in the way the NPD has responded to and investigated sexual assault complaints. This deficiency is, in part, grounded in what appears to be ignorance or bias concerning victims of sexual assault, as evidenced by comments made by several command staff during interviews and a review of a sample of sexual assault investigative files. Specifically, there is evidence that some NPD officers and detectives have made mistaken assumptions about who can or cannot be a "true" victim of sexual assault. This includes views that sex workers, employees of nightclubs or adult establishments, and women who consumed alcohol with an assailant cannot be legitimate sexual assault claimants.

The NPD's problematic response to sexual assault complaints is also structural, embedded in procedural problems with the way the NPD has handled sexual assault investigations. The NPD has not made significant efforts to provide vital support for victims such as referrals to counseling services or a competent liaison to assist them who is not the detective investigating the matter.

Nor has the NPD evidenced an understanding of the emotional rollercoaster a sexual assault victim might experience, especially with regard to whether to participate in investigative and legal proceedings. Partly because of this, the NPD has stopped some sexual assault investigations prematurely. Often, as soon as the complainant indicates she or he may not want to move forward, the NPD has brought the complainant in to sign a declination form, without recognizing that complainants often change their minds several times throughout the charging and prosecution process.

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In addition, investigators have appeared to ignore basic investigatory steps, such as checking the alleged assailant's criminal record even when the assailant's name and date of birth are known. For example, in one incident the investigator spoke to the alleged assailant, who acknowledged having had sexual intercourse with the complainant. But there was no further investigation, including no evidence that the investigator ran a record check. A record check would have determined whether the alleged assailant had an open warrant, and could have influenced the direction of the investigation. The NPD should revise its practices to better serve sexual assault complainants, and therefore better protect the public from sexual assaults.

B. Green Street Cell Block Suicide Prevention Policies and Practices

In response to several suicides at the NPD's Green Street Cell Block, this investigation reviewed the holding facility's suicide prevention measures. In assessing jail suicide precautions, the Third Circuit applies a three-part test to establish a violation: (1) the detainee had a "particular vulnerability to suicide," (2) officials knew or should have known of that vulnerability, and (3) acted with "reckless indifference" to the detainee's vulnerability. *Colburn v. Darby Upper Tp.*, 838 F.2d 663, 669 (3d Cir. 1988) (holding that allegation of a jail's custom of inadequate monitoring for potential suicides could sustain a cause of action). Reckless indifference requires a level of culpability that is at least higher than a negligent failure to protect, such that the custodian either knew or should have known of a strong likelihood of self-harm. *Colburn v. Upper Darby Tp.*, 946 F.2d 1017, 1024 (3d Cir. 1991).

The Cell Block is comprised of fifty cells for males and eight cells for females, and is where the NPD holds detainees prior to their initial court appearance and subsequent transfer into the custody of Essex County. Detainees are usually held in the Cell Block for fewer than 24 hours. The NPD provides no special or additional training to officers who are assigned to the holding facility, and some officers report that assignment to the holding facility is undesirable, and commonly perceived as an informal punishment. The layout of the Cell Block offers only limited lines of sight into the cells, and the cells all contain suicide hazards such as exposed cross bars which could be used as hanging points.[51]

The hours immediately following arrest are a period of heightened risk of suicide, and the NPD must be able to identify suicidal detainees and immediately take precautions. General Order 08-08 requires intake officers to conduct a screening of all detainees entering the Cell Block,[52] which includes checklist items for "Mental/Emotional Problems" and "Suicidal/Aggressive Behavior."[53] However, because officers have received no specific training regarding custodial operations in the cell block, it is unclear that the intake screening is effective in identifying potentially suicidal detainees.

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[51] During this investigation, the NPD completed construction of a new police headquarters at Clinton Avenue that includes a modern holding facility which would likely mitigate concerns regarding suicide hazards. However, the NPD recently informed the DOJ that it will not be moving operations to the Clinton Avenue facility. As a result of this change in plans, the United States may seek additional remedies to ensure NPD ensures adequate suicide precautions are maintained at Green Street.

[52] *See* GO 08-08 at 11.

[53] Prisoner Intake and Medical Status Report (Form DP1:1885-2).

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If a detainee is determined to be at risk, the General Order authorizes the cell block supervisor "to employ extraordinary measures to protect a prisoner from self harm," including but not limited to: placement in a cell that is easily viewable, constant observation, 15-minute checks, and referral to the EMS or the hospital. During a site visit, however, NPD officers working in the Cell Block acknowledged that only one of the options in the written policy was available: any detainees they believe to be suicidal are automatically sent to the hospital for assessment, where they remain until they are medically or psychologically cleared. NPD officers described no other precautions or steps they would take with potentially suicidal detainees. The discrepancy between policy and practice was evident in a review of the NPD's documentation of suicide and suicide attempts, which showed also that suicidal detainees are not always sent to the hospital, raising concerns that the NPD's current suicide prevention policies, practices, and training create an unacceptable suicide risk to future Green Street detainees if not corrected.

C. Policing Related to Sexual Orientation and Gender Identity

During the investigation there was anecdotal evidence that the NPD has engaged in discriminatory policing practices based on sexual orientation or gender identity. The investigation did not produce evidence sufficient to demonstrate a pattern or practice in this area. The LGBT community expressed concerns about the NPD's lack of responsiveness to complaints about violent assaults against LGBT individuals, as well as harassment of female transgender persons by NPD officers—including the mistaken assumption that all female transgender persons are prostitutes. They also described a lack of cultural competence and insensitivity by NPD officers when engaging the LGBT community, and the transgender community, in particular.

The NPD does not appear to have any policy or training that would provide officers guidance on how to interact respectfully and effectively with LGBT individuals.[54] Community advocates report that NPD command staff are amenable to training on LGBT issues, although none had yet occurred. The NPD should engage with the LGBT community around the concerns noted, and develop training on policing related to sexual orientation and gender identity.

V. CONCLUSION

The patterns of misconduct identified by this investigation present both a challenge and an opportunity for the NPD. The City of Newark took an important first step by acknowledging the community's concerns and cooperating with the investigation. Further, during the course of the investigation, the City initiated efforts to modify and improve its practices in some of the areas identified in this report. Most importantly, the City and NPD have already reached an Agreement in Principle with the United States to remedy the problems identified by this investigation.

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[54] GO 03-04, "Biased-Based Policing" directs officers to enforce the law in a "fair and impartial manner" but does not provide any guidance on how that is to be accomplished with respect to any protected class, including race, gender and sexual orientation, apart from an admonition to comply with the Fourth Amendment and an acknowledgment in its introduction of the Fourteenth Amendment's guarantee of equal protection under the law for all who live in the United States.

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An effective and long lasting remedy to these violations will require the full and sustained commitment from the City's leadership, as well as from the members of the NPD and the residents of Newark. Only a true partnership between the NPD and the broader community will establish a foundation for simultaneously respecting the rights of all Newark residents, effectively preventing crime, and better preparing and protecting officers. The DOJ is fully committed to working with the City, the NPD, and the Newark community to ensure that this effort is successful.