

*University of Connecticut School of Law*  
*Connecticut Public Interest Law Journal*

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*Year 2004*

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Police Brutality and Citizen Complaints

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## Book Review

### **POLICE BRUTALITY AND CITIZEN COMPLAINTS**

POLICE BRUTALITY (Jill Nelson ed., 2000)

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Harvey Gee<sup>1</sup>

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#### Introduction

The Rodney King beating of March of 1991 has become one of the most infamous cases of contemporary police brutality to date.<sup>2</sup> On February 4, 1999, Amadou Diallo, a twenty-two-year-old immigrant from Guinea, was shot nineteen times and killed by members of the New York Police Department's Street Crime Unit.<sup>3</sup> Haitian immigrant, Abner Louima, was sodomized by a New York police officer in a Brooklyn Station House.<sup>4</sup> In San Francisco, there was a dramatic standoff between students at Thurgood Marshall High School and baton wielding police who were summoned to break up a hallway fight.<sup>5</sup> Some of the sixty responding officers allegedly used excessive force to break up a crowd gathered to watch a fight and then police handcuffed innocent bystanders.<sup>6</sup>

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<sup>2</sup> See Derrick Bell, *Police Brutality: Portent of Disaster and Discomforting Divergence*, in POLICE BRUTALITY 88, 96 (Jill Nelson ed., 2000).

<sup>3</sup> Jill Nelson, *Introduction*, in POLICE BRUTALITY: AN ANTHOLOGY 9, 9 (Jill Nelson ed., 2000).

<sup>4</sup> See Richard Austin, *Under the Veil of Suspicion: Organizing Resistance and Struggling for Liberation*, in POLICE BRUTALITY 206, 213-14 (Jill Nelson ed., 2000).

<sup>5</sup> See Ray Delgado, *S.F.'s Marshall High Principal Quits; Decision Follows Dramatic Standoff Between Student and Police*, S.F. CHRON., Oct. 17, 2002, at A23; Ray Delgado, *Dust Hasn't Settled Over Thurgood Marshall Fracas*, S.F. CHRON., Nov. 29, 2002, at 2; Ray Delgado, *S.F. High School Reopens After Melee/Marshall Parents Confront Officials*, S.F. CHRON., Oct. 16, 2002, at A23.

<sup>6</sup> See Ray Delgado, Jaxon Van Derbeken, & Nanette Asimov, *Melee Closes S.F. High School/ Melee Closes High School in San Francisco*, S.F. CHRON., Oct. 12, 2002, at A17.

Jill Nelson's anthology, *POLICE BRUTALITY*, provides the necessary starting point for a meaningful conversation about the serious problem of police brutality.<sup>7</sup> Nelson defines the problem, and explains its origins in American history. The anthology compiles twelve compelling essays written by lawyers, academics, writers, and police officers who examine the roots of the police presence in African American communities in America, the role of cultural stereotyping and racial profiling in police misconduct, and the reasons why police brutality perpetuates.<sup>8</sup> In the final analysis, *Police Brutality*, is a thoughtful examination of a continual problem that plagues America.

Most of the essays featured share the following primary themes: (1) The vast majority of police minority interactions are routine instances of police abuse that often go unnoticed; and (2) Young Black males have been targeted by law enforcement under the guise of investigative profiling. Law enforcement officials engage in rational discrimination. "They say that the majority of criminal perpetrators are Blacks. Therefore, their argument goes, a greater number of Black males will be stopped and searched."<sup>9</sup> These minor incidents "set the tone for the more egregious acts of police brutality."<sup>10</sup> According to University of Maryland Professor Katheryn K. Russell:

Not only has police brutality been widely defined as a Black problem; it has been positioned as a problem for which Blacks are solely to blame. This sleight-of-hand reasoning mirrors arguments that have been offered to justify police practices that target minority citizens . . . Some suggest that the disproportionately high levels of police abuse against Blacks and Latinos can be explained by their high rates of offending.<sup>11</sup>

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<sup>7</sup> See generally Barbara E. Armacost, *Organization Culture and Police Misconduct*, 73 GEO. WASH. L. REV. 453, 459-464 (2004); Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 46 HASTINGS L.J. 677, 684-690 (1996); Sa'id Wekili & Hyacinth E. Levs, *Police Brutality: Problems of Excessive Force Litigation*, 35 PAC. L.J. 171, 188 (1994).

<sup>8</sup> The contributors are Robin D. G. Kelley, Frank Moss, Derrick Bell, Claude A. Clegg III, Katheryn K. Russell, Patricia J. Williams, Stanley Crouch, Arthur Doyle, Ishmael Reed, Richard Austin, Flores Alexander Forbes, and Ron Daniels.

<sup>9</sup> Austin, *supra* note 4, at 209.

<sup>10</sup> Katheryn K. Russell, "What Did I Do to Be So Black and Blue?": *Police Violence and the Black Community*, in *POLICE BRUTALITY* 135, 146 (Jill Nelson ed., 2000).

<sup>11</sup> *Id.* at 138.

[F]or many Blacks police killings tap into long-held fears of unprovoked, random, brutal attacks, inexplicable except for their being of the wrong race, in the wrong place, at the wrong time. This historical legacy is directly linked to the visceral, negative reaction many Blacks today have toward the police. This fear, however, is not represented in mainstream portrayals of Black attitudes toward police.<sup>12</sup>

Police brutality is a national problem. “African Americans seem to be disproportionately the victims of police abuse, given the overall racial composition of New York City.”<sup>13</sup> On the West Coast, a study “concluded that in Oakland, California, unfounded arrests of African Americans occurred at twelve times the rate of whites.”<sup>14</sup>

There are measures available that may alleviate the problem of police harassment or misconduct. New York University Law Professor Derrick Bell suggests:

There are many methods of increasing police efficiency, such as community policing and reducing the inherent fear of Blacks by hiring more persons of color who are familiar with the communities in which they work.<sup>15</sup>

Even though *Police Brutality* only lightly touches the subject, the concept of expanding the use of civilian review boards appears to be a prelude to a large and more serious conversation about police brutality in America today. These civilian-operated boards would serve to inject civilian judgment into the appraisal of police misconduct.<sup>16</sup> A proper disciplinary system should take into account both the interest of protecting individuals from improper police methods, and promoting effective law enforcement.<sup>17</sup>

A strong case can be made for citizens' complaints to be administered by groups of civilians that are not affiliated with the police department.<sup>18</sup>

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<sup>12</sup> *Id.* at 143.

<sup>13</sup> Austin, *supra* note 4, at 209.

<sup>14</sup> *Id.* (citing Steven R. Donziger, *THE REAL WAR ON CRIME* 102 (Harper Perennial 1996).

<sup>15</sup> Bell, *supra* note 2, at 89-90.

<sup>16</sup> See Merrick Bobb, *Civilian Oversight of the Police in the United States*, 22 ST. LOUIS U. PUB. L. REV. 151, 163 (2003).

<sup>17</sup> *Id.*

<sup>18</sup> See also Tara L. Senkel, Note, *Civilians Often Need Protection From the Police: Let's Handcuff Police Brutality*,

For instance, such a forum exists in San Francisco. In November 2003, under the shadows of grave consternation over police accountability, San Francisco voters passed a police oversight reform measure, requiring more accountability from the police department.<sup>19</sup> It places police accountability measures into the City Charter. The Charter Amendment restructures the San Francisco Police Commission and grants additional powers to the civilian-run Office of Citizen Complaints (OCC).<sup>20</sup> The measure increases the Police Commission from five to seven members and splits the power to appoint commissioners between the mayor and the supervisors.<sup>21</sup> The supervisors' approval is now required to remove a commissioner. Prior to the measure's passage, the mayor had sole authority to appoint and remove commissioners.<sup>22</sup>

In the face of continual obstruction of the investigations of complaints against officers, the Charter Amendment is expected to: (1) make the Police Commission more representative and diverse by expanding the Commission from five to seven members and splitting the appointment power between the Mayor and the Board of Supervisors; (2) increase the Police Commission's independence by staggering the terms of Commissioners and preventing removal without the consent of the Supervisors; (3) make clear that the Office of Citizen Complaints must have access to all necessary records in conducting its investigations; and (4) give the Office of Citizen Complaints the power to bring cases directly to the Police Commission, preventing cases from being dismissed. The Amendment, would be consistent with the goal of having a properly administered complaint review system; serving both the interests of the police and the interests

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15 N.Y.L. SCH. J. HUM. RTS., 385, 415 (1999).

<sup>19</sup> See Demian Bulwa, *Police Union Taps Harris in D.A. Runoff / Ammiano backs incumbent Hallinan*, S.F. CHRON., Nov. 27, 2003 at A21; Press Release, American Civil Liberties Union, San Francisco Board of Supervisors Approves to Charter Amendment to Strengthen Police Accountability, (July 16, 2003), available at <http://www.aclunc.org/pressrel/030716-police.html>.

<sup>20</sup> See Supervisor Tom Ammiano, Jake McGoldrick, Matt Gonzalez, Charter Amendment, 5-8 (June 27, 2003). The OCC presently operates under the purview of the city Police Commission. Commission members and the OCC director serve at the mayor's pleasure. See Herbert A. Sample, S.F. *Board to Tackle Police Reforms*, SACRAMENTO BEE, July 13, 2002, available at [www.Sacbee.com/content/news/California/story/7024882p=7973384c.html](http://www.Sacbee.com/content/news/California/story/7024882p=7973384c.html). The Charter requires the Police Department to provide "full and prompt cooperation" with the OCC, which also enjoys investigatory powers, though it cannot issue subpoenas. *Id.* Other states have also adopted similar civilian boards. A bill was introduced earlier this year in New Jersey to establish a Civilian Board of Review to review and investigate complaints and allegations of State Police misconduct. 2004 Bill Tracking N.J. A.B. 1545, available at [http://www.njleg.state.nj.us/2004/Bills/A2000/1545\\_I1.HTM](http://www.njleg.state.nj.us/2004/Bills/A2000/1545_I1.HTM).

<sup>21</sup> See S.F.'s *Police Watchdogs Could Get Louder Bark*, CONTRA COSTA TIMES, July 18, 2003, at 4.

<sup>22</sup> *Id.*

of the community.<sup>23</sup> Public confidence, critical to an effective police department, would be also be further encouraged by a well-run and well-publicized complaint review system.<sup>24</sup>

Citizen complaints can also be handled by way of mediation. Unlike a traditional police complaint process, which results in punishment of police officers, mediation is conciliatory in nature and is focused on the resolution of a conflict.<sup>25</sup> Mediation of civilian grievances against police officers could follow the traditional stages of mediation. Sessions would begin with an introduction-in which the ground rules are laid out. This would be followed by a joint session in which opening statements are made by each side; information is gathered; direct communication is established between the parties; the parties have the opportunity to vent; and the mediator begins to build trust. Internal private caucuses with each side and later private caucuses follow. The process is then brought to closure in the final session.

Samuel Walker and Carol Archibold have recently pointed out that few mediation programs exist to handle civilian complaints.<sup>26</sup> They suggest that mediation is a viable alternative way to handle complaints against the police. Walker and Archibold explain:

The adversarial nature of citizen complaint procedures, both internal and external, involves the following elements: a citizen complaint is investigated to determine whether there is sufficient evidence to sustain it, the accused officer enjoys a presumption of innocence; disposition of the complaint is based on the strength of the evidence; and if the complaint is sustained, the finding is referred to the police chief executive for disciplinary action. Citizen review procedures are different from internal police procedures to the extent that they provide some input into the process by people who are not sworn police officers<sup>27</sup> . . . [I]t forces police officers to face their accusers and to account for their behavior, mediation

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<sup>23</sup> See Harold Beral & Marcus Sisk, Note, *The Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499, 500 (1964).

<sup>24</sup> *Id.*

<sup>25</sup> See Samuel Walker & Carol Archibold, *Mediating Citizen Complaints Against the Police: An Exploratory Study*, 2000 J. DISP. RESOL. 231, 233 (2000).

<sup>26</sup> *Id.* at 231.

<sup>27</sup> *Id.* at 232.

also potentially dissolves the impersonality of contemporary policing and builds bonds of understanding.<sup>28</sup>

Unfortunately, such mediation programs have been met with resistance by police departments and police unions who perceive any benefits to be greatly outweighed by the costs needed for such programs.<sup>29</sup>

California's Penal Code Section 148.6,<sup>30</sup> which makes it a misdemeanor to knowingly file a false charge of police misconduct, is one of the obstacles in making police officers accountable for possible misconduct. Section 148.6 (a)(1) is a general law against filing false allegations against police officers, and it provides:

Every person who files *any* allegation of misconduct against any peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, knowing the allegation to be false, is guilty of a misdemeanor.<sup>31</sup>

Here, I would argue that California Penal Code 148.6 and similar laws in other states may be well-intended, but nevertheless, they are harmful to the goal of an open and responsive citizen complaint process, and have a chilling effect on truthful citizen complaints of police misconduct. An open, accessible, and customer-friendly complaint process is essential for developing and maintaining positive relations with the community.<sup>32</sup> According to Law Professor Daniel Tokagi, a former American Civil Liberties Union attorney, the law needs to be eliminated to, “‘retain an open channel of communication’ between the public and law enforcement.”<sup>33</sup> He emphatically asserts, “We all know that people in this country have the right to remain silent. But they also have the right not to remain silent . . . Every citizen has a basic right to speak out against police misconduct.”<sup>34</sup>

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<sup>28</sup> *Id.* at 241.

<sup>29</sup> *See Id.* at 236-37.

<sup>30</sup> *See* CAL. PENAL CODE § 148.6 (Deering 2004).

<sup>31</sup> *Id.* (Section 148.6 does not define the "knowledge" requirement) (emphasis added).

<sup>32</sup> *See* U.S. Department of Justice, *Principles of Promoting Police Integrity* 7 (2001).

<sup>33</sup> David Kravets, *High Court Weighs Role of Free Speech in Police Complaints: False Accusations are Now a Crime*, SAN DIEGO UNION-TRIB., Oct. 9, 2002, at A4 (quoting Daniel Tokagi).

<sup>34</sup> Press Release, American Civil Liberties Union, ACLU Challenges California Criminal Law That Chills Citizen Complaints Against Police, Feb. 29, 2000, *available at* <http://archive.aclu.org/news/2000/n022900b.html>.

With regard to California's version of the law, there actually exists a split in the circuit. In *People v. Stanistreet*<sup>35</sup>, the California Supreme Court reversed the appellate court's finding that Penal Code Section 148.6 is facially unconstitutional. The Supreme Court held that: (1) Section 148.6 does not violate free speech rights embodied in the First Amendment; and (2) statutory provision governing offenses of knowingly filing a false charge of police misconduct are not facially overbroad.<sup>36</sup> The ruling stemmed from the 1998 convictions of Oxnard residents Shaun Stanistreet and Barbara Atkinson for filing a false accusation that an Oxnard police officer exposed himself to about 50 teenagers at a Police Athletics League awards banquet.<sup>37</sup>

The charges proved to be false. A jury found Atkinson and Stanistreet guilty of violating section 148.5, filing a false report of a criminal offense; and section 148.6, subdivision (a)(1), knowingly filing a false charge of police misconduct. On appeal to the appellate division of the superior court, Atkinson and Stanistreet asserted that section 148.5 was inapplicable and section 148.6 was facially unconstitutional.<sup>38</sup>

In reversing the appellate division of the superior court, the California Supreme Court determined that Section 148.6 "proscribes only constitutionally unprotected speech."<sup>39</sup> Accordingly, the Court concluded that the statute is valid. Under the Supreme Court's decision in *R.A.V. v. St. Paul*,<sup>40</sup> the Court reasoned that the criminal sanction of Penal Code 148.6 has "a favored status that justifies the regulation without reference to the content of the speech . . . ."<sup>41</sup>

On March 3, 1999, the plaintiff in *Hamilton v. City of San Bernardino*<sup>42</sup> was stopped by San Bernardino Peace Officers while riding his bicycle. The officers pulled plaintiff off his bicycle, searched him, landed on top of him, and placed a knee in his chest while continuing to

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<sup>35</sup> 29 Cal.4th 497, 58 P.3d 465 (2002).

<sup>36</sup> *Id.* at 501, 58 P.3d at 467. See Bob Egelko, *Court Backs Cop on Complaint Law/Falsely Accusing Officers a Crime*, S.F., CHRON., Dec. 6, 2003, at A26 ("To the delight of police groups and the dismay of civil libertarians, the state Supreme Court . . . upheld a California law that makes it a crime to file knowingly false complaints against law enforcement officers").

<sup>37</sup> See 29 Cal.4th at 501, 58 P.3d at 467.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 506, 58 P.3d at 470.

<sup>40</sup> 505 U.S. 377 (1992).

<sup>41</sup> 29 Cal.4th. at 512, 58 P.3d at 474.

choke him.<sup>43</sup> After he was released from police custody, plaintiff went to the San Bernardino Police Department to lodge a citizen's complaint.<sup>44</sup> The watch commander gave plaintiff a complaint form and informed him that if he knowingly filed a false complaint, he could be prosecuted under Section 148.6.<sup>45</sup> The watch commander also told plaintiff that he did not believe that he had suffered any injuries.<sup>46</sup> Plaintiff noted that the form for filing a citizen's complaint contained a printed statement informing him of the possibility of criminal prosecution under section 148.6 if any of the statements in a complaint against the officers was false.<sup>47</sup> Because of the written and oral threats of prosecution under the statute, plaintiff decided not to file a citizen's complaint against the officers for their unreasonable stop, search, seizure, and the use of excessive force against him.<sup>48</sup>

The *Hamilton* court held that Section 148.6, under the strict scrutiny standard, impermissibly discriminated on the basis of the content of the speech that it criminalizes, and thus, is violative of the free speech clause.<sup>49</sup> The *Hamilton* court was particularly concerned that the statute targeted specific viewpoints “[s]ection 148.6 treats a defamatory complaint for misconduct against a peace officer, knowing the complaint to be false, differently from defamatory complaints against other public officials.”<sup>50</sup>

Individuals who file false complaints of misconduct against peace officers can be prosecuted under Section 148.6, while individuals who knowingly make false complaints against other public officials are not subject to prosecution.<sup>51</sup> The *Hamilton* court determined that, “[t]here is nothing distinguishable regarding the position or duties of peace officers which would support treating them differently from other public- officials.”<sup>52</sup> The court also found that,

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<sup>42</sup> 107 F.Supp.2d 1239 (C.D. Cal. 2000).

<sup>43</sup> *Id.* at 1240.

<sup>44</sup> *Id.* at 1240-41.

<sup>45</sup> *Id.* at 1241.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1248.

<sup>50</sup> *Id.* at 1243.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1246.

"Defendants have not demonstrated that peace officers lack effective opportunities for rebutting such statements compared to other public officials."<sup>53</sup> According to the court, the statute and was not narrowly tailored to serve a compelling state interest.<sup>54</sup>

The controversy over the statute is likely to continue, as evidenced by a recent federal appeal to the Ninth Circuit. Recently, an appellant sought federal habeas review of his conviction for falsely claiming excessive force against a police officer. The Criminal Justice Legal Foundation and the American Civil Liberties Union of Southern California have joined in the litigation.<sup>55</sup>

There are other states that have criminal laws specifically targeting citizen complaints of peace officer misconduct. For example, under Minnesota Statutes section 609.505:

Whoever informs a law enforcement officer that a crime has been committed, knowing that it is false and intending that the officer shall act in reliance upon it, is guilty of a misdemeanor. A person who is convicted a second or subsequent time under this section is guilty of a gross misdemeanor.<sup>56</sup>

Since its passage, there have been a number of convictions under section 609.505.<sup>57</sup>

In Minnesota, there is a long history of strained relations between the police and minority residents.<sup>58</sup> These tensions have remained tenacious, given the number of controversial high profile police misconduct cases and reports of brutality, especially in the Twin Cities. For example, in 1990, Tysel Nelson was shot in the back by a Minneapolis police officer.<sup>59</sup> A pattern of violence continues a decade later. In 2001, allegations of excessive force were made against Minnesota police officers who shot and killed a mentally ill Somali man wielding a

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 1247.

<sup>55</sup> Chaker v. Crogan, No. 03-56885 (9<sup>th</sup> Cir., filed July 1, 2003).

<sup>56</sup> Minn. Stat. Ann. § 609.505 (2003).

<sup>57</sup> See, e.g., U.S. v. Davis, 174 F.3d 941 (8th Cir. 1999).

<sup>58</sup> See Dan Olson, *A Tale of Two Police Departments*, STAR-TRIBUNE, Nov. 23, 2003, available at [http://news.minnesota.publicradio.org/features/2003/11/24\\_olsond\\_chiefs](http://news.minnesota.publicradio.org/features/2003/11/24_olsond_chiefs).

<sup>59</sup> See Rosalind Bentley & David Chanen, *Accused Officer's Sister Squares Off with The City Inc.*, STAR-TRIBUNE, Nov. 3, 2003, at 1B.

machete and crowbar.<sup>60</sup> Then in the summer of 2002, Minneapolis police shot and wounded an 11-year old boy during a drug raid in the Jordan neighborhood.<sup>61</sup> In the fall of 2003, Rickey Jones, a professional photographer, was working downtown at a party when he witnessed police officers brutalizing a man and caught the event on film.<sup>62</sup> The problem of police brutality in Minnesota has become so widespread that it became the subject of a recent public demonstration in front of City Hall.<sup>63</sup> Perhaps fanning the flames of community anti-police animus was the recent allegations of police brutality made by twenty-four year old Stephen Porter.<sup>64</sup> He claims that during a drug raid, two Minneapolis police officers sexually assaulted him with the handle of a toilet plunger.<sup>65</sup> Despite the long standing problem of police brutality in Minnesota, the state has enacted a statute that states, "Whoever informs a law enforcement officer that a crime has been committed, knowing that it is false and intending that the officer shall act in reliance upon it, is guilty of a misdemeanor. A person who is convicted a second or subsequent time under this section is guilty of a gross misdemeanor."<sup>66</sup>

Similarly, in Nevada it is a misdemeanor to "knowingly file[] a false or fraudulent written complaint or allegation of misconduct against a peace officer for conduct in the course and scope of his employment . . . ."<sup>67</sup> In 2002, a federal district court held Nevada Revised Statute 199.325,<sup>68</sup> a statute functionally similar to California's Section 148.6, to be a facially unconstitutional, content-based restriction on speech.<sup>69</sup> In *Eakins*, the plaintiff took exception to the way he was treated by Reno police officers and wrote a letter to Reno Mayor Jeff Griffin, who turned the letter over the Reno Police Department. The police construed the letter as an

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<sup>60</sup> See Amy Mayron, *Police Conduct Inquiry Denied*, ST. PAUL PIONEER PRESS, July 28, 2002, at C1.

<sup>61</sup> See *supra* note 60.

<sup>62</sup> See Margaret Zack, *Judge Sends Tape of Fracas to FBI For Study*, STAR-TRIBUNE, Sept. 12, 2003, at 3B.

<sup>63</sup> See David Hawley, *Marchers Protest Alleged Police Brutality*, ST. PAUL PIONEER PRESS, Nov. 1, 2003, at B2.

<sup>64</sup> See, e.g., Rosalind Bentley, *Porter's Life Has Held One Constant: Turmoil*, STAR-TRIBUNE, Nov. 8, 2003, available at 2003 WL 5547837; Rosalind Bentley, *Accused Officer's Sister Squares Off with The City Inc.*, STAR TRIBUNE, Nov. 6, 2003, available at 2003 WL 5547707; Howie Padilla & Terry Collins, *Accuser is Arrested in Drug Raid*, STAR TRIBUNE, Nov. 20, 2003, available at 2003 WL 5548756.

<sup>65</sup> *Id.*

<sup>66</sup> MINN. STAT. § 609.505 (2003).

<sup>67</sup> NEV. REV. STAT. 199.325 (2001).

<sup>68</sup> *Id.*

<sup>69</sup> *Eakins v. Nevada*, 219 F. Supp.2d. 1113, 1118-21 (D. Nev. 2002).

official complaint and jailed plaintiff for fourteen hours under the 1999 law making it a crime to knowingly falsely accuse a peace officer of misconduct.<sup>70</sup>

The *Eakins* court found no legitimate "secondary effects"<sup>71</sup> to justify the -content-based distinction between peace officers and other public officials, and concluded that there were other content-neutral alternatives available in Nevada perjury statutes<sup>72</sup> which serve to deter individuals from filing false reports of police misconduct.<sup>73</sup>

The problems associated with such laws also extend to the Pacific Northwest, and illustrate the continued tensions between the First Amendment and the practice of reporting police misconduct. For example, the Washington State law that criminalizes a person for making a false statement to any public servant, not just police officers has also been recently challenged. According to the Vancouver, Washington Police Department:

The law regarding making false or misleading statements is printed at the bottom of the Complaint Form. Please read this carefully. Making a false or misleading material statement to a public servant is a crime. Police department employees who are the subject of frivolous or malicious statements may have legal recourse against a false accuser.<sup>74</sup>

In 2004, in a Washington State case which has received a great deal of attention, involving a challenge against a Seattle police officer was brought. In that case, a woman faces a potential punishment of up to a year in jail and a \$5,000 fine for making a false statement to a public servant.<sup>75</sup>

Significantly, Cincinnati has been enforcing the Ohio law against accusers who file false complaints against law enforcement officers.<sup>76</sup> But it was not until two years ago, that the

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<sup>70</sup> See Elaine Goodman, *Man Challenges Law Banning Lying About Police Misconduct*, RENO GAZETTE-J, June 26, 2002, at 1.

<sup>71</sup> 219 F.Supp.2d at 1120.

<sup>72</sup> *Id.* at 1121 (citing NEV. REV. STAT. 199.120, 199.145).

<sup>73</sup> *Id.*

<sup>74</sup> Vancouver Police Department Complaints, available at <http://www.ci.vancouver.was.us/vanpd/complaint.htm>.

<sup>75</sup> Hector Castro, *Officer's Accuser Faces Charges: Impact of Rare "False Statement to Public Servant" Case is Debated*, SEATTLE POST-INTELLIGENCER, Jan. 24, 2004-at B1.

<sup>76</sup> See, e.g., *Officer's Accuser Admits to Lying*, THE CINCINNATI POST, Nov. 1, 2003, available at <http://www.cincypost.com/2003/11/01/false110103.html>.

Akron police department strictly enforced the relatively new state law making it a first degree misdemeanor to, “knowingly file a complaint against a peace officer that alleges that the peace officer engaged in misconduct in the performance of the officer’s duties if the person knows that the allegation is false.” A violation is punishable by up to six months in jail and a \$1,000 fine. It is being enforced in response to increasingly large number of merit-less complaints.<sup>77</sup>

In Akron, 84 people filed complaints against officers in 2001. Nine were deemed legitimate and resulted in an officer being disciplined in some form. In 58 of the cases, the officer was exonerated or the incident was determined to have happened. The rest of the complaints were either withdrawn, could not be substantiated, or are still pending.<sup>78</sup>

The stepped up enforcement of the law has not been without criticism. Jillian Davis, an American Civil Liberties Union attorney in Cleveland, remarks that “People are being potentially put in jeopardy for filing a complaint... This will make people think four or five times about filing a complaint.”<sup>79</sup> The Elyria Municipal Court held a similar view in *Ohio v. English*,<sup>80</sup> when it held that section 2921.15 is unconstitutional. In that case, defendant, George English, an African American, and his friend, Leonard Rose, a white male, filed an “Elyria Police Department Officer Involved Citizen Complaint Report,” claiming that police officers called English a “nigger,” and his friend an “asshole,” when they were told to leave a restaurant. The police officers just happened to be in the restaurant at the time the waitress told them to leave. The police officers were exonerated of the charges after an investigation by the Elyria Police Department concluded that the words were not used.<sup>81</sup>

The *English* court was the first Ohio court to interpret section 2921.15, thus, it looked to other states for guidance.<sup>82</sup> It relied heavily on the California cases, *Hamilton* and the lower

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<sup>77</sup> OHIO REV. CODE ANN. § 2921.15 (Anderson 2004); See Phil Trexler, *Conviction for False Cop Report is Reversed: Courts Finds Man Didn’t File Formal Complaint*, AKRON BEACON JOURNAL, Feb. 5, 2004, at 4 (“After a stream of bogus brutality complaints, Akron police pledged two years ago to start arresting those bringing false allegations against them”).

<sup>78</sup> Stephanie Warsmith, *False Complaints May Draw Charges: Akron Police to Enforce Law That Forbids Citizens From “Knowingly” Lying About Officer Misconduct*, AKRON BEACON JOURNAL, Jan.10.2002, at A1.

<sup>79</sup> *Id.*

<sup>80</sup> 120 Ohio Misc. 2d 16, 776 N.E.2d 1179 (2002).

<sup>81</sup> *Id.* at 17, 776 N.E.2d at 1180.

<sup>82</sup> *Id.* at 18, 776 N.E.2d at 1181.

court decision in *Stanistreet*, and adopted their reasoning in finding that section 2921.15 is an unconstitutional violation of the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>83</sup> According to the *English* court, it was:

not aware of any Ohio statute that makes it a crime to file a false complaint against any public official except a police officer or peace officer. Any person can file a false complaint against the President, Governor, mayor, United States Senator or Congressman, state senator or representative, city councilperson, fireman, paramedic, judge, prosecutor, or any other public official except peace officers, and it not a crime. RC 2921.15 singles out peace officers and places them into a special privileged category making it a crime to file a false complaint against them, and, therefore, this statute is unconstitutional . . . RC 2921.15 is content-based. It classifies-defamatory statements against peace officers differently from similar complaints against all other public officials and creates a distinction based on the content of the complaint, whether the targets of the complaints are peace officers or other public officials.<sup>84</sup>

Last year, a New York State Senate Bill sought to codify legislation creating criminal liability for making false accusations against a police officer or correction officer. In New York, such a violation constitutes a class E felony.<sup>85</sup> But many of these laws have recently been challenged. Currently, there is no penalty for filing a false complaint of police abuse on the federal level. An individual may simply file a complaint with the Civil Rights Division of the U.S. Department of Justice. But a federal law criminalizing false complaints against police officers may be on the horizon. These examples illustrate the continued tensions between the First Amendment and the practice of reporting police misconduct, and they demonstrate why section 148.6 and its close cousins in other states, need to be examined more closely.

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<sup>83</sup> *Id.* at 20, 776 N.E.2d at 1182-83.

<sup>84</sup> *Id.*, 776 N.E.2d at 1183.

<sup>85</sup> A.B. 5607, 226th Ann. Leg. Sess. (N.Y. 2003).

The First Amendment to the United States Constitution, expressly provides that, “Congress shall make no law . . . abridging the freedom of speech . . . .”<sup>86</sup> Although the First Amendment constrains the federal government, the Fourteenth Amendment has been held to make it applicable to states’ conduct as well. Few constitutional rights are so zealously protected as freedom of expression.<sup>87</sup> Any governmental regulation that restricts the content of speech, generally receives the highest form of judicial scrutiny.<sup>88</sup>

At the heart of the First Amendment is the principle that government may not so tile the expressive playing field, particularly when it comes to criticism of public officials. The First Amendment concludes, “The right of the people . . . to petition the Government for redress of grievances”. This stands alongside the great rights of freedom of speech, press, and assembly, which combined, represent the “interrelated components of the public’ exercise of its sovereign authority.”<sup>89</sup>

Over the years, the right to petition has been stretched far beyond its literal language of “petitions,” “redress,” and “grievances.”<sup>90</sup> In modern times, the right to petition covers any peaceful, legal attempt to promote or discourage government action at any level and in any of the

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<sup>86</sup> U.S. CONST. amend. I.

<sup>87</sup> See generally, *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46 (1988); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Keyishan v. Board of Regents*, 385 U.S. 589 (1967).

<sup>88</sup> Speech is not restricted to verbal expression. The secondary effects doctrine allows courts to apply intermediate scrutiny to an ordinance that is content-based if the ordinance is targeted at suppressing the “secondary effects” of the speech and not the speech itself. The United States Supreme Court has a strong tradition of affording First Amendment protection to expressive conduct or symbolic speech. See *Stromberg v. California*, 283 U.S. 359, 368-70 (1931) (holding that the display of a red flag is protected speech). The Court has also afforded similar protection to the burning of the American flag; and other expressive conduct. See e.g., *United States v. Eichman*, 496 U.S. 310, 317-18 (1990) (flag burning); *Texas v. Johnson*, 491 U.S. 397, 418-20 (1989) (burning of flag as expressive conduct); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 290 (1984) (sleeping overnight on public grounds); *Schacht v. United States*, 398 U.S. 58, 60-63 (1970) (wearing of a military uniform); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 514 (1969) (wearing of a black armband).

<sup>89</sup> *McDonald v. Smith*, 472 U.S. 479, 489 (1985) (Brennan, J., concurring).

<sup>90</sup> See George W. Pring & Penelope Canan, *SLAPPS: GETTING SUED FOR SPEAKING OUT* 16 (Temple University Press 1996) (“Protected activities include all means of expressing views to government: filing complaints, reporting violations of law, testifying before government bodies, writing letters, [and] lobbying legislatures . . .”).

three branches.<sup>91</sup> The Petition Clause, and our political ideals encourage Americans to engage in open and frank debate on public issues.<sup>92</sup>

Importantly, in *Garrison v. Louisiana*,<sup>93</sup> the Supreme Court set forth the minimum standard applicable to criminalizing false or defamatory speech against public officials. The *Garrison* Court extended the “actual malice” standard of *New York Times v. Sullivan*<sup>94</sup> to strike down a criminal defamation statute where malice was presumed from a lack of justifiable motive, and held that “only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions.”<sup>95</sup> One can look to California’s law as an example of the possible constitutional infirmities of a statute that criminalizes one’s right to complain against a police officer.

There is not clearly established federal law concerning the issue of whether Penal Code 148.6 violates the First Amendment, since it may or may not fit within one of the three exceptions to content-and viewpoint-based restrictions set forth in *R.A.V. v. City of St. Paul*.<sup>96</sup> In that case, the Court addressed the First Amendment implications that arise when a particular type of otherwise proscribe-able speech is criminalized under some, but not all, circumstances. The petitioner in *R.A.V.* was charged with burning a cross.<sup>97</sup> The Supreme Court found that the

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<sup>91</sup> See e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Missouri v. Nat’l Org. for Women, Inc.*, 620 F.2d 1301 (8<sup>th</sup> Cir), cert. denied 449 U.S. 842 (198); *McDonald v. Smith*, 472 U.S. 479 (1985).

<sup>92</sup> In this country the right of the people to complain to responsible governmental officials about the manner in which the complainant believes himself or herself to have been abused by public officials and other public employees is a fundamental, constitutional one expressly reserved to the people . . . If that right is denied, our government will no longer be representative of the will of the people, which representation is the cornerstone of our republican form of government . . . The First Amendment does not provide that only truthful petitions for redress may be filed.

*Miner v. Novotny*, 481 A.2d 508, 511-513 (Md. Ct. Spec. App. 1984) (footnote omitted); See also *Pring & Canan*, *supra* note 92, at 16:

The right does not hinge on whether the citizen is right or wrong, wise or foolish, well intentioned or mean spirited. That way lies government censorship. The right assumes that error and abuse will happen and relies not on censorship but on the competitiveness of truth in a free market of ideas.

<sup>93</sup> 379 U.S. 64 (1964).

<sup>94</sup> 376 U.S. 254 (1964).

<sup>95</sup> *Garrison*, 379 U.S. at 74.

<sup>96</sup> 505 U.S. 377 (1992).

<sup>97</sup> *Id.* at 380 (quoting St. Paul, Minn., Legis. Code § 292.02 (1990)). While the popular perception is that the case was powered by cross-burning, it was actually centered on the First Amendment. See generally, Edward J. Cleary,

ordinance discriminated on the basis of content by “impos[ing] special prohibitions on those speakers who express views on disfavored subjects,” and that such content-based distinctions violate the First Amendment because “[t]he government may not regulate use based on hostility - - or favoritism -- towards the underlying message expressed.”<sup>98</sup> Although the decision in *Garrison* made clear that “the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection,”<sup>99</sup> the Court in *R.A.V.* stated for the first time that such statements “must be taken in context.”<sup>100</sup> In other words, these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.) not that they are categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated to their distinctively proscribable content. Thus, the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.<sup>101</sup>

The rationale expressed by the U.S. Supreme Court in *R.A.V.* was clarified further in *Virginia v. Black*,<sup>102</sup> where the Court considered a First Amendment challenge to an ordinance that made it a crime to burn a cross to intimidate anyone for any reason. The Court found that, “unlike the statute in *R.A.V.*, the Virginia statute does not single out for opprobrium only that speech directed toward one of the specified disfavored topics.”<sup>103</sup> Although a plurality of the Court found that the evidentiary provision of the statute, as manifested through the jury instructions (which provided that the burning of a cross was prima facie evidence of an intent to discriminate) rendered it unconstitutional,<sup>104</sup> as to the prohibition on cross burning itself,<sup>105</sup> a majority of the Court concluded that:

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BEYOND THE BURNING CROSS: THE FIRST AMENDMENT AND THE LANDMARK R.A.V. CASE (Random House 1994).

<sup>98</sup> *Id.* at 391, 386.

<sup>99</sup> 379 U.S. at 75.

<sup>100</sup> 505 U.S. at 383.

<sup>101</sup> *Id.* at 383-84.

<sup>102</sup> 538 U.S. 343 (2003).

<sup>103</sup> *Id.* at 32 (quotations omitted).

<sup>104</sup> *Id.* at 391.

<sup>105</sup> *Id.* at 366-67.

The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R.A.V.* and is proscribable under the First Amendment.<sup>106</sup>

Justice Werdegar of the California Supreme Court noted in *Stanistreet* that:

In many police misconduct situations, it inevitably will come down to the word of the citizen against the word of the police officer of officers, in which case law enforcement authorities will conduct an investigation to determine who is telling the truth . . . Prospective complainants cannot help but be aware of these realities when deciding whether to go forward with their complaints by signing the statute's required admonition. Realistically, some complainants are likely to choose *not* to go forward -- even when they have legitimate complaints.<sup>107</sup>

Another commentator remarked:

If the complainant has corroborating witnesses, they often suffer from the same credibility problems as the complainant. In many cases, the only witnesses to the incident are other police officers; the phenomenon of police officers covering for their colleagues through silence or prevarication is well documented and apparently widespread. Coupled with the heavy burden of proof in a criminal case and likely juror

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<sup>106</sup> *Id.* at 363.

<sup>107</sup> *Stanistreet*, 127 Cal. at 645, 58 P.3d at 513-14 (Werdegar, J., concurring).

identification with the law enforcement officer, these evidentiary problems render prosecutions of police officers difficult to win and thus infrequently brought.<sup>108</sup>

Needless to say, debate on public issues and criticism of peace officers, just as with other public officials, is speech “at the very center of the constitutionally protected area of free discussion.”<sup>109</sup> The Government may not prosecute for the purpose of deterring people from exercising their right to protest official misconduct and petition for redress of grievances.<sup>110</sup> “The protection of the political processes, including the debate of public issues in an uninhibited, robust, and wide-open manner, even if it includes unpleasantly sharp attacks on government, and public officials, is at the core of protected First Amendment values.”<sup>111</sup>

A statute that regulates speech critical of public officials and which implicitly requires the critic to guarantee the truth of every factual assertion made to the police for fear of statutorily imposed civil and potential criminal liability could result in self-censorship and discourage public debate. The truth or falsity of some claims cannot be easily determined and may cause some potential complainants to be persuaded not to file a complaint for fear of prosecution under the statute.<sup>112</sup> This is particularly troublesome in cases where the complaints are made based on weak evidence and when the same entity against which the complaint is made will be investigating the accusations.<sup>113</sup> “Some cases support the police view that citizen complaints are filed by malefactors just seeking leverage to reduce legitimate charges against themselves.”<sup>114</sup> However, these cases represented a small percentage of this type of case generally.<sup>115</sup> In fact, there is no credible evidence indicating that intentional false complaints against police officers

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<sup>108</sup> Marshal Miller, Note, *Police Brutality*, 17 YALE L. & POL'Y REV. 149, 152 (1998).

<sup>109</sup> *Rosenblatt*, 383 U.S. at 85.

<sup>110</sup> “The inconvenience of [going to] headquarters might discourage some citizens from complaining ---particularly on minor matters ---if that were the only place complaints could be lodged.” Note, *The Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499, 501(1964).

<sup>111</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>112</sup> See *New Hampshire v. Allard*, 813, A.2d 506, 510 (2002)(“[T]he fear of being prosecuted under laws prohibiting false speech may deter the promulgation of valuable and protected speech. This concern is particularly acute in the context of police misconduct . . . [S]uch allegations will often pit the word of a civilian eyewitness against the testimony of several police officers. Moreover, these cases create a situation wherein the accused persons are members of the body responsible for investigating the complaint and filing charges”).

<sup>113</sup> See *Id.*

<sup>114</sup> *Supra* note 92.

are common. Nor is there any evidence that intentional false complaints are a serious problem for police departments.

Likewise, the real possibility of prosecution may serve to intimidate would be complainants. Less weight may be given to the uncorroborated allegations of criminals compared to officer's testimony in "one-on-one" situations where the only witnesses are the arresting officer and the person charged. "Questions of credibility are of paramount importance in resolving brutality claims, since most brutality takes place in secret: in interrogation rooms or back alleys."<sup>116</sup> Because some allegations are made not knowing of its falsity at the time of the form's completion, the ordinance sweeps within its ambit protected as well as unprotected speech, and is therefore constitutionally invalid because it is overbroad. If California's law is found to be constitutional, this would also place the future of other similar ordinances in serious doubt as well.

To be sure, Nelson's *POLICE BRUTALITY* outlines a major contemporary problem. The anthology is, at most times, intriguing and absorbing. The diversity of the authors will appeal to a myriad of readers. However, readers will still be left with the real remaining question of how public policy should be changed to reduce police abuse. As I have pointed out, much more needs to be done to alleviate police misconduct. The establishment of neutral citizen review boards and the use of mediation systems represent only modest proposals to start the process of addressing this continual and ever increasing social problem. Hopefully, the issues discussed both in *POLICE BRUTALITY* and this review will persuade readers that an open channel of communication must be opened and maintained in all cities concerned with effective community oriented policing services. Such a dialogue, paired with increased attention, will achieve more measured results in decreasing police abuses and increasing trust between citizens, then say, passing and enforcing more state laws that potentially violate a citizen's First Amendment rights.

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<sup>115</sup> *Id.*

<sup>116</sup> Susan Bandes, *Tracing the Pattern of No Pattern: Stories of Police Brutality*, 34 *LOY. L.A. L. REV.* 665, 669 (2001). ("Those who attempt to corroborate allegations of brutality are often dismissed as untrustworthy or self-serving, because they are often friends or relatives of the complainant, or gang members, or people who have had brushes with the law, or uneducated and inarticulate, or, for a variety of other reasons, easy to marginalize").