



# PHILADELPHIA BAR ASSOCIATION

TESTIMONY OF THE CIVIL RIGHTS COMMITTEE OF THE  
PHILADELPHIA BAR ASSOCIATION

June 24, 1997

Karl Baker, Co-Chair

Good morning Representative George T. Kenney, Jr., and members of the Subcommittee on Courts of the House Judiciary Committee. My name is Karl Baker, and I am co-chair of the Civil Rights Committee of the Philadelphia Bar Association. On behalf of the Philadelphia Bar Association I would like to express our grave concern that House Bill 1288, if enacted, would: chill the constitutional rights of Pennsylvania citizens to petition for redress of grievances; reduce the ability of local government to supervise the police and hold them accountable; aggravate the climate of mistrust that already exists between a large segment of the community and the police; and lead to government suffering further monetary damages for allowing retaliatory prosecutions to be brought against citizens who have exercised their

First Amendment rights. Indeed, there is a serious question as to whether one section of the statute is constitutional on its face under the First and Fourteenth Amendments of the United States Constitution and Article I, Sections 7 and 26 of the Pennsylvania Constitution.

The Philadelphia Bar Association has been a consistent advocate for the civil rights and liberties of American citizens. Andrew Hamilton, the very embodiment of the Philadelphia Lawyer, laid the foundation for our constitutional right to criticize government in print when he rode to New York in 1735 and successfully represented John Peter Zenger at a jury trial before Sir William Cosby, Governor of the Colony of New York. During the McCarthy era of the 1950's it was the Philadelphia Bar Association that helped bring an end to prosecutions under the Smith Act by providing attorneys to present individuals who advocated disfavored ideas. More recently, the Philadelphia Bar Association, as a member of the Coalition for Police Accountability, has worked to establish a civilian police advisory board, and to strengthen procedures within the Police Department "to adequately and promptly process and review civilian

complaints alleging police misconduct." See Exhibits "A" and "B" ("Resolution Of The Philadelphia Bar Association Supporting Creation Of A Citizens/Police Advisory Board" and "Resolution supporting the passage of Bill 297").

House Bill 1288 threatens to erode the progress that has been made in promoting police accountability and good police-community relations. The Philadelphia Bar Association recognizes the very difficult job that police officers have, and the numerous dangers which they face. Nevertheless, every professional group must acknowledge that the public has the right to subject its members to scrutiny and discipline where they exceed or misuse their authority. As attorneys we know that our own colleagues overstep the line with some frequency. Yet we have never suggested that former clients should be prosecuted for bringing forward even groundless complaints to the Disciplinary Board of the Supreme Court of Pennsylvania. Given the considerable authority that police officers have been given, and the potential which that power has for misuse, they must also accept the burden of public scrutiny and citizens complaint.

House Bill 1288 would have a chilling effect upon the privilege of Pennsylvania citizens to exercise their First Amendment right to criticize government. What is perhaps the most startling aspect of this bill is that it has been brought forward at this particular time, when apparent problems of police misconduct and corruption demand that government be responsive to the concerns of the public.

In preparing for this testimony I reviewed recent evidence of police misconduct. I gathered together the 1974 report of the Pennsylvania Crime Commission (Section 5, "Corruption in the Philadelphia Police Department"),<sup>1</sup> the 1978 report of the Tucker Commission ("Philadelphia And Its Police: Toward A New Partnership - A Report by

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<sup>1</sup>. That report states in part

The Commission found that police corruption in Philadelphia is ongoing, widespread, systematic, and occurring at all levels of the Police Department. Corrupt practices were uncovered during the investigation in every police district and involved police officers ranging in rank from policeman to inspector. Specific acts of corruption involving improper cash payments to the police by gamblers, racketeers, bar owners, businessmen, nightclub owners, after-hours club owners, prostitutes, and others are detailed in the Report ....

Ibid at 96.

the Philadelphia Police Study Task Force")<sup>2</sup> the 1992 task force report of Police Commissioner Willie L. Williams ("Report Of The Advisory Group To Police commissioner Willie L. Williams On The September 12, 1991 Confrontations Between Police And Demonstrators")<sup>3</sup> and the 1996 report of the Police Advisory Commission on the Moises DeJesus case (In Re: Moises DeJesus, PAC No. 94-

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<sup>2</sup>. The Tucker Report commented:

Although corruption is not ordinarily a subject for extended comment in a management study of a police department, its scope in the Philadelphia Police Department, as evidenced by recent and ongoing investigations, establishes it as an obstacle to the effective management of the Department. An ongoing grand jury investigation into alleged corruption within the Philadelphia Police Department, conducted by the United States Attorney's Office for the Eastern District of Pennsylvania and staffed by the Philadelphia Office of the Federal Bureau of Investigation, has resulted in the indictment and (in the vast majority of cases) convictions of sworn Philadelphia police officers and high-ranking officials. Thirty-six police men have so far been indicted. Thirty-one have been convicted. Among those convicted are a deputy commissioner, two chief inspectors, two inspectors, one captain, six lieutenants, and one sergeant. The investigations are continuing and more indictments are likely.

Ibid. at 140.

<sup>3</sup>.

. . . The Advisory Group feels strongly that the interests of the Police Department and the public can be well served by the establishment of a permanent advisory board which is empowered to investigate and evaluate issues of public concern such as this group has done regarding the September 12th incident.

Ibid. at 28.

0015)<sup>4</sup> to illustrate the enormity and persistence of the problem of "policing the police." I eventually realized, however, that it was hardly necessary to do so, given the current focus on this problem in the local press. For example, a feature article in the June 18th edition of the Philadelphia Weekly comments:

A look at recent history shows that despite a series of task force investigations and departmental shakeups, police scandals have been a way of life in our city. ...

Consider:

+1984: Thirty officers, including a deputy commissioner, are caught running protection rackets for brothels and illegal gambling machines.

+1988: Four member of the Five Squad, an elite narcotics unit, are arrested on charges of racketeering, conspiracy and corruption.

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<sup>4</sup>. That report revealed why many IAD reports were never "founded."

The interviews before Internal Affairs ... were not calculated to exact the details concerning what had happened but constituted an effort by Internal Affairs to accept the officers' version without question or doubt rather than gather the facts. Often the police officer would not answer the question. Instead, his lawyer would. Not once did the interviewer from Internal Affairs object to such a response. Rarely did the interviewer from Internal Affairs ask a follow up question or request more specific detail.

Ibid. at 17.

+1989: Some 200 cases are thrown out when it is revealed that two officers cleared their backlog of unsolved cases by beating confessions out of suspects. Some people confessed to crimes committed while they were out of state; others confessed to incidents that later turned out not to be crimes at all, like concertgoers who couldn't find their cars and reported them stolen, only to find them later.

+1992: Citizen's Crime Commission, and Police Department's Strategies and Action Plan agree on sweeping reform proposals.

+1995: Six members of the new Five Squad are indicted. The 39th District scandal is underway.

Philadelphia Weekly, June 18, 1997, at 1, "Why Won't Lynne Abraham Wise Up?"

I understand that Mr. Bradley Bridge will comment on this latest scandal later in these proceedings. However, I would like to comment on the potential legal consequences of this legislation.

When our founding fathers adopted the Declaration of Rights of the Pennsylvania Constitution a decade before the Bill of Rights was written, they carefully preserved the right of the citizens of our Commonwealth to petition for the redress of their grievances. Although it uses different language from what was later included in Article One of the Bill of Rights, the drafters of the

Declaration of Rights were quite clear when they declared:

**The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers related to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury . .**

. .

Pa. Const., Art. I, Sec. 7. The United States Constitution more bluntly prohibits the passage of laws that abridge "the freedom of speech ... or the rights of the people ... to petition the government for a redress of grievances." U.S. Const., First Amendment.

These rights have been given jealous protection by the courts of this Commonwealth and the federal government. In the civil context of libel, the United States Supreme Court has held that an individual cannot be sued for making a complaint to the government against a public official, unless that individual has acted with "actual malice" - that is, with "knowledge that it was false or with reckless disregard of whether it was false



or not." McDonald v. Smith, 472 U.S. 479, 485, 105 S.Ct. 2787, 2791 (1985) (letters sent to President and Congress suggesting that candidate for local U.S. Attorney was not fit for the position). Justice Brennan explained the rationale for this standard of qualified immunity as follows:

As with the freedoms of speech and press, exercise of the right to petition "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," and the occasionally "erroneous statement is inevitable." New York Times Co. v. Sullivan, *supra*, 376 U.S. [254], at 270-271, 84 S.Ct. [710], 720-721. **The First Amendment requires that we extend substantial "'breathing space'" to such expression**, because a rule imposing liability whenever a statement was accidentally or negligently incorrect would intolerably chill "would-be critics of official conduct ... from voicing their criticism." 379 U.S., at 272 . . . .

472 U.S. at 486-487 (Brennan, J., concurring).

Where police officers have brought suit against those who have filed complaints, many states have gone beyond providing the qualified immunity protection offered by the United States Supreme Court under the First Amendment Sullivan standard. Instead, they have protected those civil defendants by extending to them the Common Law privilege of "absolute immunity," which is given to

litigants in judicial proceedings. Thus, in a case that was decided after the Supreme Court's decision in McDonald v. Smith, 472 U.S. 479, 485, 105 S.Ct. 2787, 2791 (1985), the Court of Appeals of Maryland declared:

Our society vests its law-enforcement officers with formidable power, the abuse of which is often extremely detrimental to the public interest. Citizen complaints of such abuses, and the administrative disciplinary procedure which has been developed to investigate these complaints, serve a public function of vital importance by providing a mechanism through which abuses may be reported to the proper authorities, and the abusers held accountable.

The viability of a democratic government requires that the channels of communication between citizens and their public officials remain open and unimpeded. Were complaints such as [the present one] not privileged, the possibility of incurring the costs and inconvenience associated with defending a defamation suit might well deter a citizen with a legitimate grievance from filing a complaint. We therefore conclude that the possible harm a false brutality complaint may cause to a law-enforcement officer's reputation, despite the procedural safeguards provided by the LEOBR [Law Enforcement Officer's Bill of Rights], is outweighed by the public's interest in encouraging the filing and investigation of valid complaints. Most other courts that have considered this issue have reached the same conclusion. (cites)

Miner v. Novotny, 304 Md. 164, 176, 498 A.2d 269, 274-275 (1985).

Similar results have been reached in the criminal context. Indeed, the leading case is from our own Pennsylvania Superior Court. See Commonwealth v. Bender, 248 Pa.Super. 504, 375 A.2d 354 (1977). In Bender two officers filed private criminal complaints against Bender, charging that he had harassed them by filing baseless complaints with the Internal Affairs Division (IAD) of the Pittsburgh Police Department and other agencies. The Commonwealth argued that the repeated filings with several agencies constituted harassment, because the defendant had been told that "that the officers followed appropriate procedures and that his complaint was, therefore, groundless." Id. at 513.

Although the Superior Court in other contexts had sustained such charges of harassment by drawing an inference that "the defendant intended to harass the victim and that his actions served no legitimate purpose," here it reached the opposite conclusion based upon Bender's First Amendment claim. Thus, it warned:

In the case at bar ... appellant's actions are ostensibly protected by both the United States and Pennsylvania Constitutions which guarantee citizens the right to petition the government for a redress of grievances and to speak freely. We should be extremely reluctant to infer a

criminal intent to harass solely from the filing of complaints with appropriate government agencies and the making of telephone calls during regular officer hours lest we impermissibly chill a citizen's constitutional freedoms.

Id. at 513 (cited with approval in Losch v. Borough of Parkesburg, Pennsylvania, 736 F.2d 903, 908 (3rd Cir. 1984), Commonwealth v. Wheaton, 409 Pa.Super. 622, 627 n.6, 598 A.2d 1017 (1991)).

Not only do our state and federal constitutions provided citizens with a shield against being prosecuted or sued by the police for having filed a complaint (whether or not that complaint is deemed to be "founded"), but the law provides citizens with a sword. Where a person suffers retaliation from the police for having filed a complaint, that person may seek damages both from the officer who filed the charges and any governmental unit that supported or encouraged that retaliatory action. Thus, in Losch v. Borough of Parkesburg, Pennsylvania, 736 F.2d 903, 907-08 (3rd Cir. 1984), the Third Circuit Court of Appeals declared that the "institution of criminal actions to penalize the exercise of one's First Amendment rights is a deprivation cognizable under § 1983 (the Civil Rights Act)."

In Losch two police officers brought charges<sup>5</sup> against an individual who posted a written warning on the door of the police station that he would have the District Attorney arrest the officers unless they stopped harassing and prosecuting members of his family. Not only did the state court dismiss the criminal charges against Losch, but when Losch brought suit in federal court, the Third Circuit upheld the defendant's right to pursue a Civil Rights suit against the officers who had him arrested. While the borough was granted a motion for summary judgement, the Third Circuit warned that government as an entity is responsible for damages under the Civil Rights Act "when execution of a government's policy or custom, **whether made by its lawmakers** or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Id. at 910.

If Bill 1288 were enacted by the Legislature, the official policy of the state of Pennsylvania would to encourage the prosecution of persons who have filed

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<sup>5</sup>. 18 Pa.C.S.A § 5504 ("Harassment by communication"), and 18 Pa.C.S.A. § 4702 ("Threats and other improper influence in official and political matters").

complaints against the police when the officer denies the allegations and the complaint is not "founded". The State of Pennsylvania, and local governments, will become liable for any such prosecution if which it fails to prove "actual malice" beyond a reasonable doubt. In contrast, in the subsequent civil trial, the citizen will only need to prove "by a preponderance of the evidence" that the officer acted to chill the plaintiff's right to petition for redress of grievance.

One possible exception to this scenario is where a supervisor files a complaint against an officer which is later determined to be unfounded. In such a case the officer may be able to file a private criminal complaint against the supervisor without having to worry that it would be construed as an effort to retaliate against the supervisor's exercise of the "right to petition for redress of grievance." It is not clear that a supervisor who files a complaint against an officer is entitled to the protection of the Redress of Grievances Clause of the First Amendment under these circumstances.

Finally, part of the statute may be unconstitutional on its face. Subsection (b) states that a law

enforcement agency must have every complainant read and sign a warning statement before it can accept a complaint. However, because the right to petition for redress of grievances is given preferred protection under the Constitution, government may not condition a grievant's access to administrative proceedings upon his or her willingness to sign a statement that would appear to chill that very right. Cf. Speiser v. Randall, 357 U.S. 513, 518, 78 S.Ct. 1332, 1338 (1958) (establishment of loyalty oath as a prerequisite to obtaining a tax exemption was an infringement intended to limit the exercise of free speech). Indeed, the refusal to accept a complaint from such a grievant could itself be actionable under the Civil Rights Act as a violation of the First and Fourteenth Amendments of the Constitution.

For all of the above reasons, I urge on behalf of the Civil Rights Committee of the Philadelphia Bar that this Committee recommend against the enactment of House Bill 1288. A better approach would be to welcome citizens' complaints, and to build a better working relationship between our police and the public based upon trust.

**RESOLUTION OF THE PHILADELPHIA BAR ASSOCIATION  
SUPPORTING CREATION OF A CITIZENS/POLICE ADVISORY BOARD**

**WHEREAS**, police protection is necessary to the maintenance of an orderly society;

**WHEREAS**, the recent riots in Los Angeles following the acquittals in the Rodney King case demonstrate that our communities require effective policing which is based on a cooperative relationship between police and the citizens they protect;

**WHEREAS**, in our own city, notwithstanding efforts by the Police Department to improve police-community relations, the Police Department received 451 complaints in 1991;<sup>1</sup>

**WHEREAS**, the city expended \$7,013,000 in 1991 and \$5,094,000 in 1990 as a result of complaints and litigation against police;<sup>2</sup>

**WHEREAS**, a violent confrontation erupted between Philadelphia police officers and demonstrators, including members of the AIDS activist group ACT UP, during a visit of President George Bush to Center City Philadelphia on September 12, 1991;

**WHEREAS**, on September 18, 1991, then Police Commissioner Willie L. Williams appointed a Citizens' Advisory Group to review and investigate incidents between demonstrators and the police on September 12, 1991;

**WHEREAS**, after a thorough investigation, the Advisory Group Report recommendations to the Police Department, including the establishment of a permanent advisory board empowered to investigate and evaluate issues of public concern such as the September 12 incident;

**WHEREAS**, procedures for civilian review of citizen complaints exist in 30 of the 50 largest cities in the United States, including New York, Houston, Chicago, San Francisco and the District of Columbia;<sup>3</sup>

**WHEREAS**, after assisting the Police Department for two years

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<sup>1</sup>Philadelphia Police Department, Internal Affairs Division, Strategies and Action Plans at 3 (May, 1992).

<sup>2</sup>Id. at 9.

<sup>3</sup>S. Walker & V. Bumphus, Civilian Review of the Police: A National Survey of the 50 Largest Cities, 1991 at 7 (April, 1991).



with strategic planning, the Citizens Crime Commission of the Delaware Valley in an April 29, 1992, letter to then Commissioner Williams recommends that the Department "[i]nstitute a Citizens/Police Advisory Commission to review and evaluate issues of public concern relating to police conduct and make recommendations to the Police Commissioner;" and

**WHEREAS**, the American Civil Liberties Union, Consumers' Education & Protective Association, Fellowship Commission, National Congress of Puerto Rican Rights, Norris Square Civic Association, Pennsylvania Prison Society, Philadelphia Lesbian and Gay Task Force, Public Interest Law Center of Philadelphia, Tenants' Action group and Women Organized Against Rape have endorsed the formation of a permanent citizens advisory group to the Police Department; and **THEREFORE**,

**BE IT HEREBY RESOLVED**, that the Philadelphia Bar Association shall take all appropriate actions to make its position known to the Police Department and to the general public; and

**BE IT FURTHER RESOLVED**, that the Board of Governors of the Philadelphia Bar Association authorizes the Chancellor to appoint individuals to participate in a coalition of groups supporting the creation of a permanent citizen and police Advisory Group and to make periodic reports to the Board of Governors on the coalition's research and recommendations concerning the duties, powers and organization of the Advisory Group.

Adopted by the Board of Governors: May 28, 1992

**RESOLUTION  
OF THE PHILADELPHIA BAR ASSOCIATION  
SUPPORTING THE PASSAGE OF BILL 297  
INTRODUCED IN CITY COUNCIL ON SEPTEMBER 17, 1992**

**WHEREAS, Bill 297 was introduced in City Council on September 17, 1992, and immediately endorsed by nine (9) Councilpersons;**

**WHEREAS, Bill 297 calls for the establishment within the Police Department of a comprehensive program and set of procedures designed to adequately and promptly process and review civilian complaints alleging police misconduct;**

**WHEREAS, current police directives establishing internal procedures governing the review of civilian complaints are not being enforced within the Police Department and are not being followed by police personnel;<sup>1</sup>**

**WHEREAS, a violent confrontation erupted between Philadelphia police officers and demonstrators, including members of the AIDS activist group Act-Up, during a visit by President George Bush to Center City Philadelphia on September 12, 1991;**

**WHEREAS, on September 18, 1991, former Police Commissioner Willie L. Williams appointed a Citizens' Advisory Group to review and investigate the confrontation which occurred between demonstrators and the police on September 12, 1991;**

**WHEREAS, after a thorough investigation, the Advisory Group published a report making numerous recommendations to the**

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<sup>1</sup>Executive Directive I-80.

Police Department and citing several police officers for misconduct and police abuse;

WHEREAS, on April 21, 1993, current Police Commissioner Richard Neal released a Summary of an internal police investigation the September 12 incident which criticized the report of the Willie Williams Advisory Group;

WHEREAS, the Summary issued by Police Commissioner Neal on April 21, 1993, revealed that the Police Department did not significantly discipline any of its police officers who were cited by the Willie Williams Advisory Group as having committed acts of misconduct and police abuse;

WHEREAS, in our own city, notwithstanding the efforts by the Police Department to improve police-community relations, the Police Department reviewed 451 complaints in 1991;<sup>2</sup>

WHEREAS, the city expended \$7,013,000 in 1991 and \$5,094,000 in 1990 as a result of complaints and litigation against police;<sup>3</sup>

WHEREAS, the American Civil Liberties Union, Act-up, the Asian American Bar Association of Delaware Valley, ASPIRA, Inc., of Pennsylvania, the Barristers Association, Black Clergy of Philadelphia and Vicinity, the Community Awareness Network, Consumer Education & Protective Association, the Delaware Valley Ecumenical Council, the Fellowship Commission, the Guardian Civic

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<sup>2</sup>Philadelphia Police Department, Internal Affairs Division, Strategies and Action Plans at 3 (May, 1992).

<sup>3</sup>Id. at 9.

League, the Hispanic Bar Association of Pennsylvania, the Institutional Law Project, the National Association for the Advancement of Colored People, the National Conference of Black Lawyers, the National Congress for Puerto Rican Rights, the National Lawyers Guild, New African Voices Alliance, the Pennsylvania Prison Society, the Philadelphia Lesbian and Gay Task Force, the Public Interest Law Center of Philadelphia, Tenants Action Group, Urban League of Philadelphia, Women Organized Against Rape and the Women's Law Project have endorsed the passage of Bill 297 and the establishment of a comprehensive program and set of procedures to adequately provide for the prompt and thorough review by the police of civilian complaints alleging police misconduct; and

**THEREFORE**, be it hereby resolved, that the Philadelphia Bar Association shall take all appropriate actions to make its position known to members of City Council, the Police Department and to the general public.

Adopted by the Board of Governors: May 20, 1993.