

WHAT WOULD IT LOOK LIKE? (IF YOU HAD CRIMINAL & CIVIL JUSTICE) MODEL LEGISLATIVE AND POLICY REFORMS THAT ARE NEEDED FOR MORE POLICE & PROSECUTORIAL ACCOUNTABILITY.

Michael (Oshoosi) Wright, Ph.D., J.D.

arropoint@yahoo.com

January, 2015

The aim of this working paper or “brief” is to (1) Identify and enumerate the issues of police accountability of current concern, (2) to write Model Codes and administrative language that reform current practices and standards, (3) to popularize the issues in pamphlets and teach-ins for dissemination and (4) for the presentation to legislative, judicial, and administrative officials with arguments needed to support radical reform in municipal police operations. These proposals for an **Omnibus Bill on Police Accountability** are respectfully submitted.

1.

Local Modeling of National Police Practices Reform Proposals Need Support

Congressman Hank Johnson’s (African-American Dem., Georgia) three bills in Congress.

--“**Police Accountability Act**,” HR-5831, 113th Congress, 2012-2014

--“**Stop Militarizing Law Enforcement Act**,” HR-5478, 113th Congress, 2012- 2014

--“**Grand Jury Reform Act**,” HR-5830, 113th Congress, 2012-2014

2.

Proposed Police Accountability Reforms or Enactments in the Areas of Criminal Law. *

Criminal law jurisprudence mainly involves four areas of law: Criminal law, Constitutional law, Criminal Procedure, and the law of Evidence. In addition to local municipal rules and guidelines for police operations (“Policies and Procedures”) these are the areas—among others—in which legal reform is needed.

--**Grand jury transparency in police misconduct cases** should include immediate release of transcripts (with names of jurors redacted). Better yet, enactment of a law that eliminates the use of local district attorneys in Grand Juries in police excessive use of force cases, in favor of special prosecutors will better protect the public. The California Rules of Criminal Procedure and California Penal Code (and California Penal Code, Title IV, Chaps 1-4 and Local Rules of Court) must be revised accordingly.

**Though the references herein are to California law, they are applicable to the laws of all states.*

1 © Michael F. Wright, 2015, All Rights Reserved

--**Mandatory special prosecutors** starting with or without Grand Jury case presentations is required.

California law allows them to come from the private bar upon appointment by the state's Attorney General, and upon the convening of a state-wide Grand Jury, at the request of the Court or the county Grand Jury (with or without the concurrence of a local district attorney; see Cal. Penal Code 2§3§ 914-924). His or her sole mandate is to represent the People in investigations of possible crimes and the presentation of evidence in the pursuit of 'true bill' indictments; including in police misconduct cases. The burden of proof shall be on the moving party to show "probable cause" to indict (more than a reasoned suspicion but not necessarily by a preponderance" of the evidence) in order to return a "true bill" of indictment. [Note: an advantage of grand jury use is that testimony of witnesses can, under oath, be compelled]. California Rules of Criminal Procedure (Penal Code) enactment is needed to require this in police misconduct cases.

--**Evidence Code clarifications** that require there be no legal presumptions of police officer credibility that is higher than other types of witnesses are needed. The standard must use a "reasonable person" criterion; not a "reasonable police officer" standard. This is the current law in some respects, but courts have departed from it. Hence, this needs to be spelt out in the California Evidence Code and in California Jury Instructions (Penal Code). California Evidence Code and California Penal Code revisions are needed.

--**Criminal law reform in the law of homicide.** Police officers must not use lethal force in apprehending a possible criminal in any instance where the crime being stopped or intervened in would not, otherwise, expose the alleged criminal, if convicted, to a death penalty sentence. The only exception would be in cases where the officers *reasonably* perceived and believed that their lives, or the lives of other persons, were in immediate danger of extinction. (This is similar to laws in many cities that now outlaw high speed chases in urban areas, regardless of how motivated the police are to apprehend a suspect). California Penal Code revision to the defense of "justification" is needed.

--**Reform to the law of trespass.** There shall lie no crime of trespass charged against any individual or group of individuals for entry into, nor protests in, any public space that is otherwise open to the public at the time (and for the duration of time) that the protests are occurring. California Penal and Civil Code revisions are needed.

--**Legislation that will track the racial disparities** in "prosecutorial discretion." This is one of the most egregious areas of criminal law injustice: prosecutors are notorious for over-charging African-American suspects of crime with the aim of raising bail amounts, thus, forcing defendants into unjust plea bargains. This must stop. And the way to stop it is to demand semi-annual audits of racially (and gender) disparities in prosecution discretion in charging decisions and in sentencing recommendations in the form of "racial impact statements."

California Penal and Government Code enactments are needed.

--Change of Venue Motions: Exception in Cases Alleging Police Misconduct

Re-crafting statutes addressing defense motions for changes in trial venue are needed in cases of official police misconduct. Typically, by statute, adverse pre-trial *publicity* (not citizenry anger) serves as a basis for change of venue motions by defense attorneys in criminal proceedings. District attorneys and special prosecutors were not deemed by legislatures as having a valid motives for so moving.

However, in cases of official police misconduct, the statutes need to be modified so as to preclude such motions so that “the People” (as in “The People of the State of...vs. John Doe”) can seek justice in these cases, as a matter of public interest and policy, to directly hold police officers accountable in the jurisdictions where said officers are employed, exercising life or death decision- making powers over the citizens and where their alleged crimes were committed.

These motions are abused in contemporary society in police misconduct cases where the principle of avoiding “adverse pre-trial publicity” is wrongfully conflated to include the motive of avoiding the angst of the local citizenry on a theory of vindicating the constitutional due process rights of the accused to a fair and impartial trial.

The Constitutions of the nation and of the states have no interests in nor provisions for guarantying a defendant a trial *in a venue free of citizen angst* regarding abusive official local police conduct. The concept of “adverse (local) publicity” in these cases is often misapplied and, indeed, an anachronism in the age of cable television, the Internet, and ubiquitous social media that, on a daily basis, cross international boundaries, let alone county lines. California Penal sec. 1033 must be re-drafted to reflect this needed limitation on defense-initiated change of venue motions.

3.

California Police Accountability Reforms or Enactments in the Areas of Civil Law and Constitutional Rights Violations: Consequences.

--Enforcement of personal liability of police officers and prosecutors in civil rights violation cases (at least at the level it now exists in federal law) are needed in the laws of the states as well. By limiting civil “qualified immunities” (non-accountability) for the on-the-job conduct of police officers (and district attorneys) in the government codes of the several states; especially in California (when the wrongdoing arguably involves civil and constitutional rights violations) will further protect the citizenry. Examples of prosecutorial misconduct lie in sabotaging “Brady” motion compliance (delaying or ignoring their duties to hand over to defense counsel all prosecutorial evidence pointing to inculpation and exculpation in a timely way), or “bait and switch” surveillance applica-

tions wherein police and district attorneys substitute in the phone numbers of their real targets in an application for surveillance that is ostensibly directed at a phony target for whom it might be easier to claim “search probable cause.” Civil Code, Civil Procedure and Government Code enactments are needed.

--**Individual Police must reimburse local municipalities** to a reasonable extent, by a “means test,” for all costs in damages that municipal jurisdictions pay out to civilian complainants for their individual misconduct when such conduct was found, in a court of law, to be criminal in nature or implicated a criminally negligent, reckless or intentional act of wrongdoing on the officer’s part from which an unlawful disregard for any fundamental constitutional right of an alleged criminal can be inferred. Competent evidence shall include or be inferred from statements and the objective conduct of the officer involved.

Police officers may (or must) privately purchase malpractice insurance policies, perhaps union-provided and paid for, to indemnify local municipalities for damages arising from their egregious misconduct that results in the loss of life or bodily integrity where the wrongful actions implicated violations of the victim’s fundamental constitutional and civil rights. California Civil, Government and Insurance Code enactments are needed in this area of state law.

--**While police have 1st Amendment freedom of speech rights**, their public counter-protests, when carried on in a period when mass protests of civilian complainants are occurring and in the same jurisdiction, must yield to an overriding duty to avoid a chilling effect on the freedom of expression and association of the citizenry so as to avoid a professional conflict of interest and impermissible dual relationship with the public. California Government Code enactment is needed to address this point.

--**Police officer unions should be held liable** for active, aggressive, or passive-aggressive slow-downs and collusions as a form of police political protest. Civil Code enactment is needed.

--**Prohibition on sales of toy guns**; civil liability. Any manufacturer, marketer, distributor, wholesaler, or retailer that has a part in the distribution or sale of a toy gun or pellet gun that is used in the commission of a crime or is implicated in the death or injury of any person because of the mistaken identity of the gun as a real firearm shall be civilly liable for damages arising from a suit sounding in negligence or wrongful death. Exemplary (punitive) damages shall be available to a prevailing plaintiff in appropriate circumstances arising from repeated violations of this (these) statutes. These toys shall be regarded as ‘attractive nuisances’ and ‘dangerous instrumentalities.’ Civil Code, Health & Safety Code, and Commercial Code enactments are needed.

4.

Best Practices: Mandatory Reforms in Police Administrative and Community Policing Should Be Written Into Local and State Law.

--**Police Review Commissions are needed in every county** that have the authority to administer oaths, create official records, subpoena witnesses, and report-out to the public and to the offices of county district attorneys and the state Attorney General's office, its findings; unhampered by local police personnel boards and rules protecting the personnel records of police officers from disclosures in excessive use of force cases. California Government Code revisions are needed.

--**All uniformed police must wear name tags**, with white printed letters no smaller than one inch high (if worn on the front) and three inches high (if worn on the back) that contain at least the first initial and full last name of the officer. Significant penalties must be exacted on any law enforcement officer that fails to do so at all times, up to and including job termination. California Government Code revisions are needed.

--**Camera and voice recorder activation**—procedures and penalties: All officers must wear and activate both devices whenever exiting a vehicle in order to approach a suspected wrong-doer or witness to a crime. Significant penalties must be exacted on any law enforcement officer that fails to do so at all times, up to and including job termination. Police departments must keep, in perpetuity, all recordings, unadulterated, that are related to all police misconduct claims.

Real-time and synched video/voice recordings are important to use in order to know what police officers actually say to a suspect; like "drop the gun, or I'll shoot!" to a suspect that had a gun (or cellphone) attached to his belt. *Compliance* with an order like this will likely produce a fatal outcome for the victim that will be later justified as an 'impulsive' response by the policeman to a (claimed) 'furtive act' provocation by the victim when the suspect tries to comply—to his or her everlasting detriment. Video footage, after being lawfully seized and searched (by warrant or subpoena) must be stored only on the camera (or removable device) and after a copy of it, being deposited in a police evidence locker. It *shall not* be uploaded onto any computer server for any wider distribution. Additionally, facial recognition software, linked to these field cameras, must not be used. California Government Code enactment is needed to require voice/visual recordation (with the same instrument), subject to these limitations, of police field encounters.

--Police department policy must include directives that assert that police officers have an affirmative duty to avoid civil and constitutional rights violations, to refuse to comply with unlawful orders that violate such rights,

to report their observations or knowledge of such violations by fellow officers to their Internal Affairs departments and, without retaliation, to the County Civilian Police Review Boards alluded above. Civil Code and Penal Code (Chap. 6.5, "Internal Investigations") and local police Policies and Procedures revisions are needed.

--**Special police jurisdictions, including, for example, the BART (Transportation Authority)** in the case of northern California), must not prevent protected (protest) speech and demonstrations directed toward them, the "state (public) actors" that BART officials are, and may only impose "time, manner, and method" (of protests) restrictions on free speech and protests and, even then, only in the least restrictive ways.

When police departments of any kind (especially BART police) are themselves the targets of free speech protests, in fashioning a response to the protests, they must vigorously seek to enable and protect the expression of free speech (and the protestors) to every extent possible under the circumstances and, in any event, must first use graduated interventions designed to apply the least restrictive or constrictive "time, manner and method" measures possible.

And when it is judged that arrests must be made in response to civil disobedient speech, the arrests must be made by allied police forces, under regional mutual aid agreements, so as to avoid (1) an institutional conflict of interest in the operations of the targeted police station or institution and (2) the imposition of a chilling effect on 1st Amendment rights (and the U.S. Constitution's Preamble that prescribes the right for anyone or any group to petition governmental authority (public or "state" actors) for redress of the public grievances of protestors.

Damages shall be available in a suit at law to any victims of the repression of free speech, except for the least restrictive "time, manner and method." This requires enactments and revision of the Government Code and the Civil Code of the State of California.

--**Freedom from racial profiling involve rights prescribed under** the 1st, 4th, 5th, 6th, 8th, and 14th Amendments to the Constitution of the United States. in regard to criminal law jurisprudence ("equal treatment under the law"). That is, no intentional "racial profiling" nor unintentional conduct that has disproportional racially discriminatory effects or "adverse impact on a minority group members can be tolerated by these Amendments to the U.S. Constitution). The states have similar constitutional provisions as well.

Similarly, intentional or passive-aggressive failures to collect, store and report factual evidence or information relating to crimes to the detriment of a minority group members *who are victims of crime* must not be tolerated). California Civil Code and local Police Policies and Procedures revisions are needed.

-- **Police department policies must state that each citizen has a right to physically resist an unlawful arrest** by anyone (including police officers) with a reasonable amount of force and cannot be convicted of any crime, variously called “resisting arrest” or “interference in a police action,” where a resisting person’s conduct was based on a good faith and reasonable belief that his or her lawful and constitutional rights were being violated, or was the victim of excessive police violence and force. (This right is enshrined in the 4th and 5th Amendments of the Constitution of the United States according to courts in various states—including California-- of this country). California Government and Penal Code changes are needed.

--**Prohibition of perverse Incentives to conduct police programs that tend to violate the civil and constitutional rights** of minorities and other ‘protected classes’ must be written into law. *Perverse Incentives*, like bonuses and promotion advantages to officers who conduct ‘stop and frisk’ operations, ‘broken window policing,’ “zero tolerance” policies and excessive ticketing, traffic stops, field detentions and arrest quotas in minority communities (as well as other types of programs, like ‘drug sweeps’) on the basis of intentional bias or on the basis of an adverse impact (disproportional impact) against the protected groups of ‘race,” “alienage,” “religion,” or “gender.” California Government and Penal Code revisions are needed.

--**Mandatory data collection and action reviews of statistics on law enforcement patterns** is needed on ethnic and gender groups’ rates of stops and detentions, arrests, and complaints of misconduct must kept for no fewer than ten years. California Government Code enactments are needed.

--**The elimination of local civil procedures that mandate arbitration of police misconduct claims** or time consuming administrative reviews thus allowing civilian complainants to go into state court directly and quickly and be availed of the more effective discovery, protective orders, and evidence preservation orders more effectively. California Civil, Labor and Government Code enactments are needed; especially in regard to (or the complete repeal of) the “**Peace Officers’ Bill of Rights.**”

--**Explicit prohibition and hefty personal fines for by-stander intimidation** to prevent recordation of police conduct in public or private places where police stops are occurring so long as the bystander is not, reasonably construed, interfering in a police operation. And, in relation to this, retaliation against any person who, as a bystander, recorded police activity. All recordings must be copied if the police seize the recordings as evidence (and obtain a proper search warrant to seize the potential evidence) and the original recordings and recording equipment must be returned to the rightful owner within 72 hours. California Government, Penal, Evidence and Civil Code enactments are needed to dissuade intimidation and provide damages to victims of retaliation.

5.

State Legislative Resolutions Are Needed to Reaffirm the Constitutional Rights of Minorities.

--Sense of the Legislature/Congress Resolutions to oppose police shows that glorify police violations of the civil, the constitutional rights and the ordered liberties enumerated in the U.S. Constitution (like the right in the Constitutions preamble, not the Bill of Rights, to petition governmental authority without repression for the redress of public grievances) in all television programming, movies and gaming videos. State Assembly and Senate Resolution is needed.

--State legislative policy reforms may also be needed in the areas of police residency requirements (not to be confused with “community policing” as a concept) and police demilitarization, as well. (Policy changes in these two areas are complicated and are presently beyond my brief to make specific recommendations; because I sense that these two areas are rife with opportunities to prescribe “policy” and law changes that will produce counter-intuitive results. However, Rep. Hank Johnson (D-Atlanta, Georgia) has introduced legislation that, I believe, is addressing these subjects, from the federal level “downward” (as it were).

For this period, therefore, I will confine my remarks to the twenty-one so “legal reforms” (using California as a model) that are co-extensive with “community policing” or “community control” of policing precepts now being discussed nationwide.

IN CONCLUSION

The goal in this “brief” has been to educate all persons, especially young activists, on how things—whatever things they endeavor to change—actually work and maintain themselves; in this case, the laws enabling (or failing to stop) “police abuses.” Flowing in its wake (for activists, hopefully) there will, ideally, flow a deeper understanding of the political-economic forces that direct police activity, on the one hand, and the specific rules that bear on police conduct and limitations, in their service, on the other. That is, at least once they comprehend how the legal structure has been “set up” to facilitate the police doing what they do they will have a better chance of understanding the methods or mechanisms the rulers use to effect control and, from there, to understand who they are and, thereupon, to help connect the bloody dots of capitalism.

A different benefit, hopefully, will accrue for local and regional policy-makers. This brief should alert them to the multifaceted issues they would, of necessity, have to—in concert, if not simultaneously outright—opine and legislate on if they are serious about “leveling the playing field” to any degree between the police, on the one hand, and the citizenry, on the other. A ‘gestalt’ or ‘big picture,’ I think, will be most useful for them. I hope to have provided one in these areas of public concern.

In conclusion, issue-focused “demands” (all social demands usually are, in their nature, “reform” proposals, however radically inspired) must be based on “issues”—especially legal ones. And, as the great Frederick Douglas once asserted, ‘Power concedes nothing without a demand; it never did and it never will,’ it is obvious, at least to me, that the “Black Lives Matter” movement (and similar groupings) must—in the near term —crystallize some concrete issues, especially legal ones, and demands for legal enactments (for better or worse) or run an unacceptably grave risk of burning itself out on the thin fuel of “activism” for its own sake. This may sound a little over-stated but it was Fanon, was it not (and for situations just like the ones facing us, no less), who wrote “...Fervor is the preferred weapon of the impotent”? (The Wretched of the Earth, 1961). The better view, at this point, is for the Movement to formulate specific and radically encompassing legislative and administrative policy “demands” on the system—from which rallying slogans, ‘talking points,’ and indices of discernible success (or failure) in achieving any of them--can obtain.

Activists would be well advised to instigate information and protest marches and rallies, involving thousands of people, on a sustained basis *at the doors of legislative halls and police unions*, as well as toward their usual targets of protest.

ABOUT THE AUTHOR:

**** Copyright, 2015, Michael Wright, Ph.D., J.D., All Rights Reserved. Dr. Wright is a life-long socialist activist and theoretician. In addition he is a professional forensic psychopathologist with a forty-year history of consultation to the courts and in the criminal justice mental health system. He does not practice the profession of law and is not a member of the bar of any state. Dr. Wright is also a priest of Oshoosi and Oya in the Cuban Santeria-Lucumi variant of in the Yoruba religion (and is often called “Michael Oshoosi” for that reason). His Ph.D. is from the Wright Institute, Berkeley (1976), and the J.D. is from the Boalt Hall School of Law (U.C. Berkeley, 1981). His first “Movement” activity was in 1960 when, as a child of 13, he joined picket lines in Harlem, NYC, against Woolworth’s Inc., to support the student sit-ins in Greensboro, NC. From 1965-1969 he worked with the Student Nonviolent Coordinating Committee (SNCC) in Alabama, Georgia, and Chicago, Illinois. In 1971 he was on the Board of Directors of the National Black Economic Development Conference which was the first organization to demand reparations from the Establishment (the national churches and synagogues, in that instance) for perpetration of, collusion in, and profiteering from slavery and “Jim Crow” laws. Since then he has maintained connections to the Movement for socialism and social justice.***