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Organizing for Change: 
A Community Law Response 
to Police Misconduct

by Dianne L. Martin*

This paper addresses the problem of police misconduct in a historical and theoretical context that examines prior efforts at reform and argues for the development of a new, collaborative approach. This examination critiques the domination of legal strategies in the past and looks for community-based initiatives with a view to achieving fundamental structural change. The context is local and particularized in the City of Toronto and in a community legal clinic. The lessons, it is argued, are universal. Clinic files, media accounts, and inquiry records are drawn upon to center the discussion in the "real world" of poverty, perception, and public response.

PREFACE

Pictures of riots in Los Angeles in the wake of the acquittal of the four police officers criminally charged with the brutal beating of Rodney King resonate with the images of the riots that erupted there in 1965, also sparked by the arrest of a black man, and remind us that the harm caused by unredressed police misconduct is not a new problem. Nor is it a problem limited to cities marred by extreme violence or overtly out-of-control police forces. Police violence, perjury, systemic racism, and sexism are as likely to be problems in Canada, in a city such as Toronto, with its relatively low crime rate and its "ideal" forum for civilian review (discussed in some detail in this paper), as anywhere. Police misconduct, moreover, is highly resistant to resolution. Indeed, it is its ubiquitous, entrenched nature that calls for innovative responses and collaborative lawyering practices. The challenge, for theorists and practitioners alike, is to interrogate

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the dominant analysis of and responses to the problem and to envision more satisfactory solutions. This paper offers a beginning.

I. INTRODUCTION

First presented at a symposium entitled "The Theoretics of Practice," held in January 1992 at Hastings Law School, this paper offers both a feminist definition and analysis of police misconduct and an argument for the application of an alternative approach to its reform. This alternative strategy grows out of the theory and practices of a particular community-based legal clinic. The legal clinic combines community organizing and education, individual casework, and law reform initiatives in relatively equal measures in its approach to the legal issues that affect a low-income community. These methods are presently being used to address the problem of police misconduct in an initiative that also demonstrates the practical value of critical analysis.


Canadian, American, British, and occasionally other sources are utilized in this paper, as both the legal rules and the political climate in which police function are more similar than different throughout the common law world. The particularized focus, however, is on Toronto, a metropolitan center of some 3.2 million people with a police force of 7,000 members (some 5,700 actual peace officers). Crime rates in Canada are relatively low (the national homicide rate is lower than that recorded in many United States cities) but are widely reported in the press and are perceived by the citizens of Toronto as very threatening. The police

1. For example, in 1990 there were a total of 656 homicides (which includes murder, manslaughter, and infanticide) in all of Canada (a population of approximately 27 million), of which 502 were cleared. Violent crime represents nine percent of overall crime figures in Canada; Statistics Canada compares 246 violent crimes per 100,000 versus 667 per 100,000 in the United States. Canadian Centre for Justice Statistics, Canadian Crime Statistics (1991) (on file with author). The media tend to pay close attention to the release of these statistics and both report on them and incorporate them into more subjective pieces detailing "growing fear." See, e.g., Canadian Press, Violent Crime up 52% in 80's, THE TORONTO STAR, Mar. 27, 1992.

2. See supra note 1 for typical reporting of government crime statistics. The media both covered the fear and perhaps fed it. See, e.g., Patricia Owen, Living With The Fear of Crime, THE TORONTO STAR, Mar. 22, 1992, at B1 (more people are trying to protect themselves, but are they overreacting?). The article notes that only one-half of one percent of homeowners will ever actually meet a burglar, but that rarity is never mentioned in crime reporting. Jim Wilkes, 2 Ontario Cities Top National List for Murder Rate, THE TORONTO STAR, Mar. 4, 1992. Sudbury, Ontario is the "murder capital of Canada" with seven murders in 1991, a murder rate of 4.65 per 100,000. Toronto was eleventh at 2.70, based on the Greater Toronto Region population and 103 murders. The city itself had eighty-six, the same as in 1989 and twenty-six more than the previous high in 1987.
enjoy a fairly high degree of community support, and police critics are viewed with some suspicion. That said, there is a growing willingness to recognize problems in “police-community relations,” and an increasingly vocal minority community is detailing concerns about issues such as police violence and racism. For example, a demonstration of solidarity over the acquittals in the Rodney King case planned for May 4, 1992, broke down into a significant “riot” of looting and vandalism that shocked the city. The demonstration was planned by the Black Action Defence Committee. This organization came together in Toronto in 1988 in the wake of the acquittal of a police officer in the shooting death of a partially disabled black man, armed with a paring knife, in his own home. The organization drew parallels between the acquittals in the King case and recent cases in the Toronto area. A month earlier, two officers had been acquitted of all charges arising out of the shooting death of an unarmed black youth who was killed by police shots fired through the rear window of the stolen car he was driving. Two days before the planned demonstration, another black youth suspected of drug trafficking was shot and killed by police officers in a Toronto alley. Media coverage of the incidents and the riot made the race connection.

In the late 1970s, similar public concerns voiced about police misconduct and existing police-controlled complaint mechanisms led to the establishment of a civilian review agency to deal with complaints of misconduct from members of the public in Toronto. The Office of the Po-

3. For example, an editorial in the largest of Toronto’s three daily papers expressed concern about a judge who disbelieved police officers who testified before him and then insisted on seeing the results of an internal police investigation regarding his rulings. Editorial, Judge Matlow Crossed the Line, THE TORONTO STAR, Aug. 18, 1991, at A4. The editorial writer took the view that belief in the possibility of a cover-up was tantamount to joining a campaign against the police, revealing that he believes the police capable not only of lying but also of covering up. Matlow presented himself as an advocate in a campaign against Ontario’s policing system. That position was criticized as being utterly incompatible with his judicial role.


5. Clare E. Lewis, the current head of the complaint commission, details the history of the system as a response to growing public concern in Clare E. Lewis, Police Complaints in Metropolitan Toronto: Perspectives of the Public Complaints Commissioner, in COMPLAINTS AGAINST THE POLICE: THE TREND TO EXTERNAL REVIEW 153-76 (Andrew J. Goldsmith ed., 1991) (on file with author) [hereinafter COMPLAINTS AGAINST POLICE].
lice Complaints Commissioner (PCC) is authorized to provide independent review and resolution of citizen complaints (including sanctioning officers found guilty of misconduct) while leaving most initial investigations of complaints in police hands. The system is frequently praised and offered as a model for other jurisdictions and was extended to cover all police forces in the province in 1991. Concern about misconduct remains high, however, and, particularly for vulnerable and minority members of the community, remains an issue of fear.

The issue of police misconduct has been taken up in the Toronto community of Parkdale, home to a unique project of Osgoode Hall Law School of York University and the Ontario Legal Aid Plan — Parkdale Community Legal Services (PCLS). Parkdale is a low-income community in Toronto’s west end, which is ethnically heterogenous and has an av-

6. Municipal police forces in Ontario are governed by provincial legislation, THE POLICE SERVICES ACT, R.S.O. ch. 15 (Can. 1990) [hereinafter POLICE SERVICES ACT], which governs everything from jurisdictional questions to discipline and citizen complaints. Part VI of the Act sets out the full disciplinary regime, including a civilian oversight component. Citizen complaints are investigated first by police officers assigned to the “Police Complaint Bureau.” Details of complaints and progress of the investigation are reported monthly to the office of the Public Complaint Commissioner (PCC), who may intervene at any time. The results of the police investigation of the complaint are then provided to the chief or his designate for a determination. He may mediate a resolution between the citizen and the subject officer, order a disciplinary trial (as above), or “take no further action.” If the citizen is dissatisfied with the result (ninety percent of complaints result in “no further action”), she may appeal the result to the PCC. The PCC will review the police investigation and may reinvestigate the complaint, either in the event of an appeal or if he is dissatisfied with the investigation, and may order a trial before a “Public Complaint Tribunal,” a three-person tribunal chaired by one of a panel of lawyers appointed by the Attorney General along with one member each from panels composed of appointees from the local Police Association (police union) and the Attorney General. The tribunal has full disciplinary powers up to and including dismissal. Additional civilian control is imposed in the case of serious injury caused by a police officer in the course of duty; all police shootings or conduct resulting in serious injury must be investigated by an independent civilian body, responsible to the Ministry of the Solicitor General, the “Special Investigations Unit.”

7. See, e.g., Werner E. Petterson, Police Accountability and Civilian Oversight of Policing: An American Perspective, in COMPLAINTS AGAINST POLICE, supra note 5, at 280-83.

8. The experience of street people who are victims of police violence was described in a recent report. The victims have all refused to make formal complaints about their allegations for fear of police reprisals. Ten percent of the sample (458: 106 women and 352 men) reported an assault by police in the past year. Of these, 35.6 percent had been assaulted more than once. Eileen Ambrosio, Dilin Baker, Cathy Crowe & Kathy Hardill, THE STREET HEALTH REPORT 28 (1992) (on file with author) (study of the health status and barriers to health of homeless women and men in the City of Toronto and the Toronto Health Care Fund).

techniques of organization, outreach, lobbying, law reform, casework, and central coordination of information.\textsuperscript{13}

B. THE THEORY

The admittedly eclectic methodology of this paper draws on the work of feminists who look to the insights of social theorists such as Antonio Gramsci\textsuperscript{14} to develop an analysis that addresses the ideological, hegemonic role played by the police and that supports the importance of grounding a strategy of resistance to that role in counter-hegemonic practices such as education and coalition-building. In this approach, compliance with and acceptance of the prevailing social order is seen as relying in large part on a shared and unquestioned perception that certain relations are inevitable, a matter of "common sense."\textsuperscript{15} Thus the role of the police in advancing and preserving both that consensus and common sense support for its tenets is as much symbolic and ideological as it is coercive. Indeed, state-sanctioned force (by the police) to coerce compliance is intended to be used rarely and to be available as a threat as much

\textsuperscript{13} The project was recently described by a PCLS staff lawyer in the newspaper of a progressive lawyers' organization. Ray Kuszelewski, Clarion Call for Action on Police, 8 (N.S.) THE LAW UNION NEWS, Fall 1992, at 1-13 (on file with author). See also infra notes 139-46 and accompanying text.

\textsuperscript{14} The sources of this approach are varied. In her introduction, The Shifting Boundaries of Public and Private, in WOMEN AND THE STATE 16-20 (Anne Showstack Sassoon ed., 1987), Anne Showstack Sassoon draws the connection she made through her research and writing on Gramsci to the value of his insights and analysis to contemporary feminism, particularly in regard to the debate around the state and ideology:

The women's movement has insisted that women's personal experience is political, be it articulated in consciousness raising groups or more informally through the kind of networks of friends and acquaintances which women have always established. It provides the raw material for intellectual and political work as well as solidarity. This coincides with a lesson from Gramsci's writings. He argues that the necessary starting point for a better understanding of the world must be a critical analysis of people's common sense.


\textsuperscript{15} The term "common sense," denoting the unquestioning acceptance of precepts and mores, was first used by ANTONIO GRAMSCI, SELECTIONS FROM PRISON NOTEBOOKS 323-33 (Quinton Hoare and Geoffrey Nowell Smith eds. and trans., 1986) (from "the study of philosophy") (on file with author).
verage income significantly lower than that of metropolitan Toronto as a whole. Much of the housing stock is low-income and in poor repair. The largest mental hospital in the province is located in Parkdale, as is the highest concentration of group homes and rooming houses in the city.\textsuperscript{10} PCLS is mandated to address the legal needs of the low-income residents of this community and is required by its statement of \textit{Goals and Objectives} to

(1) . . . establish, maintain and operate a community legal clinic within and for the benefit of the Parkdale community in Toronto, Ontario, and in connection with this and subject to the applicable laws of Ontario from time to time, to provide advice, assistance, representation, education and research to both individuals and groups, and to organize, carry on and participate in such other activities as may from time to time seem expedient for the benefit of the Parkdale community.

(2) In the course of providing services as aforesaid, to participate with a university school of law in the education and training of students of law.\textsuperscript{11}

This mandate has given the Clinic the opportunity to provide innovative, community-controlled legal services to Parkdale residents for more than twenty years with an equal focus on law reform, organizing, and casework. Originally very much a product of the “Just Society” movement of the 1970s (not unlike the American “War on Poverty”), the Clinic has been committed to grass-roots organizing, coalition-building, and law reform since its inception.\textsuperscript{12} Staffed by law students as the front line caseworkers within a relatively well-funded system of legal aid, PCLS has seen its mandate as being at the cutting edge of legal services, working “on the margins” of poverty law. This new tradition is presently being brought to bear on the entrenched and resistant problem of police misconduct and bias. The Parkdale police project is collecting case histories (while protecting confidentiality), refusing to permit any individual complaint to be isolated, discredited, or forgotten. The project is working to expose the lie about misconduct (that it did not happen) using multiple

\textsuperscript{10} Id. at 3.

\textsuperscript{11} Id. at 6. Twenty law students per semester work under the joint supervision of a community legal worker and a staff lawyer.

as anything. Consent and acceptance of rules and mores by the majority of citizens is ultimately essential to a stable regime.

Although mandated to uphold and enforce the law, the police themselves recognize that they are to interpret this directive in compliance with a far more fundamental imperative: the maintenance of order. Their actions and their public performance, within and through the criminal law, serve a hegemonic role that is designed to reinforce and reproduce actions that ensure containment of the underclass, protection of property, and the replication of existing social relations. 16

Popular misconceptions about police misconduct include, for example, the belief that police misconduct is the result of the odd "bad apple" or that it will be eliminated through better training. These kinds of beliefs serve a common end and are the building blocks of that hegemony. Thus, exposing the fallacies in these "common sense" propositions is a first step in a strategy that attempts to build a different consensus with different values. This strategy highlights tactics such as community outreach and education and coalition-building around policing issues between groups frequently divided by existing power relations: racial minorities, working-class whites, feminist activists working against violence and pornography, and neighborhood activists working against drugs and prostitution, for example. 17

Exposing the ideological and mystifying role and function of law in

16. Hegemony, in the sense of an overarching consensus for the status quo, is central to Gramsci's analysis. See GRAMSCI, supra note 15, at 12-14 (from "the intellectuals"). As Currie, et al., point out, this well-understood hegemonic function is rarely explored by criminologists. Currie et al., infra note 22, at 29-31. This aspect of policing, suggested in BOX, infra note 18, was exhaustively explored in RICHARD V. ERICSON, MAKING CRIME: A STUDY OF DETECTIVE WORK 1-22 (1981) and RICHARD V. ERICSON, REPRODUCING ORDER: A STUDY OF POLICE PATROL WORK 1-25 (1982) (both on file with author). Both works examine the day-to-day lives of patrol officers and detectives, their exercise of discretion, and the extent to which they function to replicate existing power relations. See also McBARNET, infra note 29.

17. Some feminist theorists are questioning the strategies that have failed to achieve strong coalitions through reliance on law and order and "race-neutral" tactics. See Dawn Currie, Battered Women and the State: From The Failure of Theory to a Theory of Failure, 1 J. HUM. JUST. 77 (1990) (critiquing the focus on criminal justice strategies in wife-assault work). In an analysis of anti-pornography strategies, she notes that penal legislation will (once again) merely drive porn underground while conveying the false message that the state has been responsive to feminist concerns. Dawn H. Currie, Representation and Resistance: Feminist Struggles against Pornography, in ANATOMY OF GENDER: WOMEN'S STRUGGLE FOR THE BODY 191, 195-97 (Dawn H. Currie and Valerie Raoul eds., 1992); see also Noga A. Gayle, Black Women's Reality and Feminism: An Exploration of Race and Gender, in ANATOMY OF GENDER: WOMEN'S STRUGGLE FOR THE BODY 232-42 (Dawn H. Currie and Valerie Raoul eds., 1992). Movements such as the Toronto-based "Women Against Racist Policing" and the United States-based "Fund for a Feminist Majority" are pushing theory and questioning feminist practice around the criminal law and the police all over North America. See, e.g., infra text accompanying note 123.
sustaining these common sense fallacies is equally important, however. The demystification of law is central to the Parkdale strategy, which de-centers law by emphasizing community organizing and education. At the same time, individual problem-solving through casework, test cases, and law reform litigation have a role to play in a community-law response so long as these initiatives are recognized as being part of, rather than central to, that response. Reaching and preserving a balance among these strategies is an important aspect of the PCLS police reform project.

C. THE METHODOLOGY

"Police misconduct," as it is used in this article, refers to a wide range of police behavior. It includes both serious, overt acts of violence and abuse of authority as well as the more hidden, systemic abuses that are manifested in racist and sexist attitudes—failure to act, for example, in wife assault situations—and resistance to true public accountability. The more vivid term "police crime" is usually limited to overt criminal conduct, such as corrupt practice or brutality, for example, and is included in the broader definition. These forms of police misconduct are difficult to prove and difficult to profile from traditional sources. Much of it occurs in secret, away from corroborative witnesses, and concerns vulnerable and low-status victims whose complaints, if they are made at all, are relatively easy to dismiss or ignore. More often than not it is not willful misconduct at all but rather a reflection of systemic biases and assumptions about race, class, and gender. In order to address this reality, traditional academic sources such as cases, texts, and published studies are used to define the parameters of the issue, while less traditional sources, such as clinic files, media accounts, and inquiry records, are drawn upon to situate the discussion in the "real world" of poverty, perception, and public response.

This approach is not without its difficulties, of course. Media accounts, for example, may be the only factual references available to provide details of a relevant event, but they must be understood as representing an interpretation of the event, not an original source. In these cases, the newspaper stories are offered for the "truth of their contents," as it were, but with a clear recognition of the methodological risks. More frequently, media accounts are included and discussed in order to provide a window into popular understanding of an event or issue and a vehicle for shaping that understanding. This mixture of anecdotal news accounts,

18. "Misconduct" is widely used in this broad sense in the criminology literature. For example, it is used in this sense in all the articles in a recent collection dealing with the subject. See COMPLAINTS AGAINST POLICE, supra note 5. Misconduct is distinguished from crime in STEVEN BOX, Police Crime, in POWER, CRIME AND MYSTIFICATION 80-119 (1983).
19. The work of criminologists such as Richard Ericson exemplifies this use of
secondary sources, court records, and reported cases is not offered as an empirical study of police misconduct generally or particularly. It is intended, rather, to provide a backdrop to the thesis that the problem (police misconduct) is a complex matter that has not been responsive to unitary tactics such as traditional legal challenges, but might well respond to more collaborative and community-based strategies.

This article first offers a broad definition of police misconduct and then identifies an over-reliance on legal tactics as a weakness of prior reform initiatives. In searching for new strategies to address the problem, the article then examines police resistance to change, police response to critics in the context of police practice and structure, and the strictures of the dominant ideology. Finally, the localized response of a poverty law clinic centered in a large law school in Toronto, Ontario, is described as an option for police reform.

II. THE NATURE OF THE BEAST:
What police misconduct is (and isn't)

Police culture and structure are widely recognized by scholars as playing a fundamental role in police misconduct.20 Despite considerable attention to the subject, or at least to community-police relations and complaints of misconduct, however, there has been little fundamental change in that structure or culture for many years. Analyses written more than twenty-five years ago seeking to understand the causes of the riots in Watts and black ghettos all over America might have been written last week in their identification of the root causes of poverty and despair and in their description of police misconduct as the spark that ignited the Los Angeles riots of 1992.21

20. See COMPLAINTS AGAINST POLICE, supra note 5, at 19-27; JOHN SEWELL, POLICE URBAN POLICING IN CANADA 175-99 (1985) (a critical examination of contemporary police issues); CLIFFORD D. SHEARING, ORGANIZATIONAL POLICE DEVIANCE: ITS STRUCTURE AND CONTROL 83-110 (1981) (a collection of critical criminology pieces from Canada, the United States, and Britain); BOX, supra note 18, at 80-95.

The lack of progress is not for lack of attention; many options for reform have been proposed or introduced over the years. Apart from addressing misconduct through civilian review systems, reform (and scholarly) attention has been focused recently on concepts such as "community policing," as a way to make police forces more accountable to an undifferentiated community, or on improved training to address issues such as systemic racism. However, the optimism of the 1980s around these initiatives has given way to recognition that citizen complaint and review schemes largely have been unsuccessful at reducing police misconduct or at increasing public accountability.

In a collection of articles detailing police accountability systems around the world (including England, Australia, Canada, and United States cities including Chicago, Pittsburgh, Philadelphia, and San Francisco), Andrew Goldsmith identifies failed attempts to reduce misconduct or to increase community confidence in police accountability in those jurisdictions. He notes that "the widely attributed failure of internal complaints mechanisms reflects a loss of public confidence in the way in which the police have responded previously (or more to the point, have not responded) to expressions of citizen dissatisfaction and to evidence of misconduct more generally within their own ranks."22

Other reform initiatives frequently advanced, such as community policing, better training, etc., are also being criticized for failing to touch the core of the problem. Paul Gordon points out that such reform efforts must be scrutinized closely, as often the "community relations officers" and "community liaison committees" that may form a part of community constricted). The Los Angeles riots of May 1992 are beginning to evoke similar commentary in the popular press, and the media are identifying the parallels. See, e.g., Colin MacKenzie, Causes Similar, Temper Distinct; Technology May Have Changed Since Watts Erupted in 1965, But the Images of Racial Inequality in Los Angeles Remain the Same, THE GLOBE AND MAIL, May 2, 1992, at A12. Politicians in both Canada and the United States draw the same parallels (although they are criticized for doing so for self-serving purposes). David Olive, THE GLOBE AND MAIL, May 9, 1992, at D4. Racial violence has been hijacked by community leaders to serve their own cynical ends. (Prime Minister) Brian Mulroney snapped at the chance to draw a parallel between the L.A. riots and the Reform Party’s agenda of limiting immigration and dismantling multicultural programs, stopping just short of lumping (Reform Party leader) Preston Manning in with Daryl Gates. (George Bush was criticized for using the riots as an opportunity to “trash” the social reform agendas of Democratic presidents “who held office before most of the rioters were born.”)

22. COMPLAINTS AGAINST POLICE, supra note 5, at 15-61, 73-83, 227-63. See also Dawn Currie, Walter DeKeseredy & Brian Maclean, Reconstituting Social Order and Social Control: Police Accountability in Canada, 2:1 J. HUM. JUST. 29, 33-37 (1990). The authors identify the failure of both the police to respond internally to misconduct and of scholars to address police intransigence on the issue. They argue for the use of locally conducted and controlled victimization surveys to determine satisfaction with policing and to inform local police community liaison panels in a “left Realist model” of criminology.

22.
policing initiatives are merely add-ons that only make policing more intrusive. He also challenges the panacea of “improved training” as well, concerned that often that training focuses on the failures of the policed to have adequate knowledge or skills to understand their place and role in the larger society. This premise produces training that teaches that uncomprehending and ignorant ethno-cultural minorities deserve tolerance for their failings, thus locating this approach within, not against, racism.23 That is, it teaches that minorities, rather than police attitudes, cause the tension.

These failures, and this loss of confidence, reflect at the very least a failure to understand the entrenched nature of misconduct as a product of a police culture actively sustained by the broader culture. Instead, many reform initiatives have been blinded by myths and fallacies that are fundamental to policing, as it is and as it has been practiced for a very long time, and foiled by a resistance to external pressures and insights that is a fundamental tenet of the police culture everywhere. Works describing, if not critiquing, “police culture” are widely available24 and will not be replicated here. Instead, some of the fallacies about misconduct will be critiqued, and the role of misconduct within the broader culture will be examined, in order to replace a common sense appreciation of police misconduct with a critical one.

A. THE “BAD APPLE” MYTH

If we have made The Street, then we have also made the Street Cop. Whatever the street cop does, he does it in our names and in accordance with the principles and laws we have caused, through our energy or our apathy, to be instituted and enforced. It follows that his defeats are our defeats, his sins are our sins, and his grace is our grace.25

Reform initiatives that assume that the basic operation is sound and merely needs some enhancement or fine tuning to respond to contemporary demands also assume that what misconduct occurs is isolated and exceptional, the misdeed of the rare “bad apple.” This common sense fallacy is damaging to both police officers and to affected communities as it neither solves the problem nor speaks to the day-to-day realities of

24. See supra note 16 and accompanying text.
either group. Police officers resent what they take to be uninformed interference. The community continues to be frustrated as it seeks accountability. It is not helpful or honest simply to consider the issue as a question of police deviance; the wider social context in which police culture and structures operate is equally implicated.

When policing is seen as an inevitable and necessary evil, it is very difficult even to suggest making fundamental changes to policing models, let alone to achieve them. Fear of crime and violence puts pressure on police services for protection and maintenance of a stable social order. Unquestioning adherence to the belief that the police do their work fairly, effectively, and without unlawful violence or bias is the price to be paid for this protection. More specifically, as a particular order is sought to be maintained, police officers are recruited and rewarded as its unquestioned standard-bearers.

The delegation of responsibility for “order” or “stability” to the police is often believed to be basic to the contemporary policing function. Werner Petterson, for example, refers to the disparate interpretations of social order, from various sectors of the community, that the police are asked to maintain as basically reflecting the “prevailing moral consensus of society.”26 However, the police have been given (or have taken upon themselves) an impossible task in communities where such consensus does not truly exist. However, the belief in such a consensus preserves and fosters a policing status quo. More critically, Richard Ericson describes the interaction between the goal (preservation of a status quo) and the action (assumption of a consensus) and observes that

the police have defined, and had defined for them, a mandate so broad that it includes responsibility for crime control, other deviance control, and ultimately social order. The police have taken on this responsibility for social processes that are beyond the possibility of any one group’s control in that they are embedded in the social, cultural, political and economic structures of society.27

Steven Box offers an even more pointed explanation for the relationship of police crime to the needs of the wider society. He argues that there is a level of police misconduct — in the questioning of dangerous suspects, for example — that has been accepted by both the police and the public as a “necessary evil” in the exercise of their duties. Thus only the rare exception is considered in practical terms to be unacceptable.28

26. Petterson, supra note 7, at 265.
28. Box, supra note 18, at 80.
The relationship is complex. At one level, the myth of the police as even-handed, even-tempered protectors of community values operates to mask the existence of any but the most rare and exceptional misconduct. At the same time, at a more "worldly" level, a degree of misconduct is tolerated, even expected, as the police fulfill the subtext of their mandate: to do society's "dirty work" in the way they see fit.

Many institutions contribute to the belief that whatever the police do, and however they do it, must be "okay." The ideology of the rule of law, of fairness and due process, for example, acts to cloak police work in an aura of legitimacy. An assumption that is implicit in accepting and supporting the exceptional power to use force and invasive measures that has been granted to the police is that the power they wield in enforcing the criminal law is bounded and contained by strict limitations and ultimate accountability in a court of law in accordance with the requirements of due process. When this legitimacy is challenged by evidence of police corruption or abuse of authority, a form of cognitive dissonance results and transmutes that evidence into palatable forms. What is palatable is a restricted and essentially non-threatening perception of the scope and nature of police misconduct.

The common result of community-initiated complaints, for example, is that despite overwhelming evidence that police misconduct is a systemic problem, both the community and the police are made comfortable believing that misconduct, if it is acknowledged at all, is nothing more than the isolated incidence of misbehavior by "bad apples." The fallacies inherent in this perception are numerous. Police misconduct encompasses a wide range of acts and omissions, from securing and maintaining convictions of innocent people and the unjustified use of excessive force to overpolicing and harassment of minorities and systemic failures to respond adequately to woman-battering. With a definition of misconduct that makes the connections between these phenomena, neither the harm it causes nor its nature can be dismissed as merely isolated aberrant con-

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30. ERICSON, supra note 16, at 97-101, identifies the use of internal discipline rules and procedures to maintain the belief that misconduct is limited to "bad apples" both within the police culture itself and, of course, in the community at large. See also BOX, supra note 16. This comforting belief was manifested in Toronto by Metro Chairman Alan Tonks' refusal to attend an anti-racism rally held in the wake of the May 4, 1992 riots. He is reported as saying: "The police force is not a racist institution. Some individuals are, but there are checks and balances on them." Jack Lakey and Michael Tenszen, 300 Police Corral Crowd, THE TORONTO STAR, May 8, 1992, at A1.
duct.

Some questionable conduct, such as a "fleeing felon" shooting, receives substantial media attention, forcing the wider community to acknowledge the incident. Much more remains hidden, denied, and ignored. The experience of Parkdale Community Legal Services in its representation of poor people supports the view that all police misconduct is in part a product of the extent to which we as a society have been stripped of our personal and collective responsibility for the maintenance of social harmony in exchange for the production and reproduction of an order31 that is manifested in an unequal and oppressive status quo.

In this context, all police misconduct is systemic, the product of institutionalized policies and practices, both officially and unofficially sanctioned. Whether it contributes to a wrongful conviction, a wrongful injury and death, or to further isolation and despair for those whose trust is abused or whose claim for protection has been ignored, the utter banality of the attitudes and practices that produce the troubling claims of misconduct needs to be understood. That understanding then becomes available to deconstruct the quite valid claim that much misconduct is either not deliberate or was not maliciously motivated.

The contention that all "cops" are dishonest, brutal bigots is as fallacious as the more widely held belief that "our cops are tops" and only occasionally fall into human error. Both propositions contribute to the maintenance of a police culture that presents an almost unbreachable face toward critics and reformers. On the other hand, a reform initiative, such as the PCLS project, that rejects these myths and works to expose the fallacies through community education and outreach, acts against this trend.

B. POLICE METHODS: THE END JUSTIFIES (AND DETERMINES) THE MEANS

The end of contemporary policing — the maintenance of a mythical "order" 32 — both defines and preordains the means utilized. The pursuit of an elusive state of order justifies police action that keeps people in their place using whatever means are necessary. The means that attract the most public attention, such as extortion of confessions, perjury, ma-

31. See discussion of the police "reproduction of order" role, supra notes 26-30.
32. A compliant workforce, a large (and compliant) surplus pool of labor to draw upon, and clean, orderly neighborhoods with consistent and rising property values are the "American dream." The police role in maintaining the dream is sometimes overt, as in police intervention in labor disputes or the "war on drugs," infra note 54, but often covert, sustaining a hetero-patriarchy in the prosecution of prostitutes and other deviant women, infra notes 49-53, a reluctance to assist certain classes of women in domestic disputes, infra notes 62-63, and reinforcement of racist stereotypes, infra note 60.
nipulation of witnesses and evidence, reliance on bigoted stereotypes, and the use of excessive force, may result in the death, injury, or imprisonment of innocent people. These acts differ only in degree, however, from the unspoken canon of police work inculcated with the donning of the uniform and encouraged and nurtured every day of a police officer's life: secrecy, authoritarianism, an exaggerated respect for "order," and a cynical reliance on force to respond to anything that does not fit within that rigid model, such as a young black male driving an expensive car in a white neighborhood.

Police work is inherently conservative, in the literal sense. Promotion is hierarchical, loyalty to colleagues is unquestioned, and the use of force is the primary directive. Techniques of investigation and crime control rely on perceptions of "who doesn't fit" and reinforce cynicism, authoritarianism, and stereotyped thinking. An aggressive and courageous response to danger and a capacity to dominate any policing situation are inculcated and reinforced daily and ensure police isolation and cynicism, as non-police officers are seen as wimps and fools who need protection or as criminal "scum." Misconduct issues are thus structural and not amenable to redress through training or recruiting alone — and not simply caused by "bad apples."³³

Each time a community insists that street prostitution or drug trafficking be dealt with firmly by the police, i.e. "Dirty Harry" is needed,³⁴ the result is that the wider society has sent the police a clear message. When the "rule of law" conflicts with an overriding need for social order,³⁵ the rule of law must serve the pursuit of order, rather than justice.³⁶ The result of the ambiguity of this message has been the development of a seemingly impenetrable arsenal of police-specific techniques shrouded in legal rhetoric used to avoid accountability and change and to respond

³³. John Sewell identifies "danger" and "authority" as the two most powerful forces instrumental in shaping police responses to people and situations. SEWELL, supra note 20, at 175-99. For a similar (although more sympathetic to police officers) analysis of police work, criminologist Claude Vincent identifies behavioral tendencies fundamental to the police role as: secrecy, cynicism, stereotyped thinking (reinforced by training to be acutely observant of that which does not fit), and decisiveness. CLAUDE M. VINCENT, POLICE OFFICER 117-67 (1990).

³⁴. Box, supra note 18, at 81, identifies the "Dirty Harry problem" as the mystification of police crime into a necessity if the police are to "get their man" and protect us.

³⁵. Such needs include reassurance that Irish Republican Army terrorist bombers have been apprehended or that the "drug menace" is being dealt with. See discussions infra notes 40-44, 54.

³⁶. There is some sign that this preference for order is changing. In a discussion of the release of Annie Maguire and her family in the last of the IRA pub-bombing wrongful-conviction cases, infra notes 40-44, the role of the courts is examined. John Gray, The Crime of Being Irish: Uncomfortable Questions About the "Finest Justice System in the World," THE GLOBE AND MAIL, Mar. 15, 1991.
defensively to critics and reformers. The manifestations are both public, as in the case of police-induced wrongful convictions, and private, as in selective enforcement and harassment of particular communities. It is important to draw the connections between them, as they reveal different aspects of a tightly constructed culture that successfully resists any change and, indeed, will change only when it is in our own best interests.

1. Wrongful convictions

Police malfeasance (and judicial reluctance to recognize it) has played an important role in most wrongful-conviction cases throughout the common law world. The scenario is always similar: an unpopular or powerless accused, a heinous crime, a community demanding action, and a police force determined to use any means necessary to provide it. Indeed, in almost all cases of wrongful conviction, except perhaps those caused by honestly mistaken eyewitness identification, police misconduct plays a central role in the crafting of a case designed to achieve a conviction. Once an arrest has been made, the police conclusion that they "have their man" justifies — indeed mandates — the production and distortion of evidence to achieve a conviction. The possibility of an unpopular or stereotyped defendant achieving a fair trial in these circumstances is slight indeed.

These cases frequently capture media attention. The reversal in Los Angeles of the wrongful convictions of Clarence Chance and Benny Powell was covered quite extensively in Toronto. News accounts report that the men were convicted of the 1975 killing of a sheriff's deputy. New evidence from a New Jersey private investigator, Jim McCloskey, revealed that police withheld from the defense the fact that a prosecution witness, a jailhouse informant, had implicated two other people as well and had failed two lie detector tests, and that three other prosecution witnesses had been pressured by police to testify falsely against Chance. Los Angeles police chief Daryl Gates, one of the original investigators, held a press conference to support the conviction despite the revelations.

A few days later, another Toronto newspaper reported on the wrongful conviction for robbery in Los Angeles in 1924 of discharged soldier James Preston. Preston was convicted on the basis of an incorrect identi-

37. The phenomenon generally, and as exhibited through individual cases, is seen as newsworthy. For examples of stories about the phenomenon, see Thomas Gabor and Julian Roberts, *How the Innocent End Up Behind Bars*, THE TORONTO STAR, Feb. 12, 1992, at A21. Jim Middlemiss, *Guilty Until Proven Innocent*, CANADIAN LAWYER 20 (Nov. 1991) (on file with author), cites a (United States) Criminal Justice Research Center study that one-half to one percent of all convictions are of innocent people.

fication and misleading police fingerprint evidence. The police investigators are described as having dropped a (false) tip to the presiding judge that fingerprints had been found that matched Preston's. A police fingerprint examiner, disturbed by this deception, kept looking for the person who matched the prints, finally finding him (a look-alike for Preston) after Preston, who had been sentenced to eleven years, had spent eighteen months in jail. 39

However, some wrongful convictions do raise issues regarding systemic problems with police behavior. None have so challenged perceptions about the criminal justice system as the overturning of Irish Republican Army (IRA) bombing cases in Britain. The IRA had claimed credit for the bombing of pubs in Guildford, Birmingham, and Manchester that killed scores of innocent bystanders in the 1970s. Public demands for arrests and convictions were naturally loud. These demands may well have contributed to the wrongful conviction and imprisonment of innocent men and women in all the pub-bombing cases: the “Guildford Four,”40 the “Birmingham Six,”41 and the “Maguire Seven,”42 to name the most famous.

In order to ensure convictions, the British police used unlawful means. They extorted false confessions and then perjured themselves to ensure the admissibility of those statements in court; they manipulated and suborned witnesses, including experts; and they centered their investigative efforts on building a false case rather than detecting the actual bombers, some of whom remain at large. Although appeals to the courts were initially fruitless, a massive media campaign, diligent continuing


40. Three young men and a young woman were brutally interrogated and forced to sign false confessions, which amounted to the only substantive evidence against them. Even in the face of reliable evidence from the real IRA bombers, the authorities maintained that the “Four” were also guilty (revising the number of “bombers” involved) until evidence of police perjury and alteration of evidence was uncovered. GRANT MCKEE AND ROSS FRANEY, TIME BOMB: IRISH BOMBERS, ENGLISH JUSTICE, AND THE GUILDFORD FOUR (on file with author); Editorial, Lessons from Guildford, 139 NEW LAW JOURNAL 1441 (1989); R. v. Richardson et al, Court of Appeal, Oct. 19, 1990 (The Times) (on file with author).


42. An Irish housewife and her family living in Manchester were convicted on circumstantial evidence of conspiracy to injure and of preparation of the bombs used in the pub-bombing cases on circumstantial evidence. The police had failed to disclose significant evidence that ultimately utterly discredited their forensic case. Gray, supra note 36 (discussing the case of Annie Maguire and her family).
research, investigation, and pressure finally resulted in the reopening of their cases. 43

Police actions alone did not account for the convictions, of course. A judiciary unable or unwilling to acknowledge even the possibility of police malfeasance played an important role. The clearest expression of judicial attitudes toward allegations of police impropriety anywhere remains Lord Denning's chilling comment in the Birmingham Six case that to permit a lawsuit against the police for their treatment of the accused would suggest it may be possible that the police had lied to put innocent men behind bars. He described this possibility as "an appalling vista" that he would not countenance. 44

A similar pattern of police misconduct and judicial blindness led to and sustained the wrongful conviction of a young Nova Scotian MicMac Indian, Donald Marshall, Jr., who spent eleven years in prison for the murder that he did not commit of a black youth. The introduction to a subsequent Royal Commission Inquiry demonstrates how easy it is to present someone as obviously guilty:

When Donald Marshall, Jr., was convicted and sentenced to life imprisonment in 1971 for murdering Sandford William Seale, most observers of the day probably assumed it was a "routine" murder case, thoroughly investigated, conscientiously prosecuted and fairly adjudicated by appropriate authorities in the criminal justice system.

The evidence seemed compelling enough. According to apparently independent "eyewitnesses," two young men got into an argument in a Sydney park one night. One stabbed the other. He died. The eyewitnesses identified Marshall as the assailant and Seale as the victim. Little wonder it took a jury less than four hours to find Donald Marshall, Jr., guilty of murder.

But despite all those seemingly reasonable assumptions, the reality, as we now know, is that Donald Marshall, Jr., did not murder Sandy Seale. He spent 11 years in prison for a crime he did not commit.

What went wrong? 45

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43. See supra notes 40-42. All three cases have marked similarities. Susan Edwards, From Scapegoats to Sacrificial Lambs: The Guildford Four Affair, 139 NEW L.J. 1449 (1989) (describing the campaign led by Lord Devlin and the implications of the extent of police perjury and brutality).


45. Foreward, ROYAL COMMISSION ON THE DONALD MARSHALL, JR., PROSECUTION: DIGEST OF FINDINGS AND RECOMMENDATIONS, VOL. 1, 1 (1989) (on file with author)
Racism was a factor in Donald Marshall's case, just as anti-Irish bigotry played a role in the IRA prosecutions. In the Marshall case this bias found expression in police failure to disclose relevant evidence to the defense and their suborning of witnesses to give perjured testimony. Teenage acquaintances of both Marshall and the victim were questioned repeatedly by police until they finally falsely identified Marshall as the killer. Their subsequent recantations (and earlier denials that Marshall was involved) were never disclosed to the defense. Nor was information from the real killer's daughter. Three years after Marshall's conviction, the daughter of Seale's actual killer, a middle-class, middle-aged white man named Roy Esbary, told a friend (who passed the information on to a Royal Canadian Mounted Police constable) that she had reported information about her father being covered in blood the night of the murder. Information that Esbary was confessing to the murder came to police attention from more than one source; constant pressure from Marshall's lawyer, and ultimately the media, forced a new appeal.46

Once again the courts were reluctant to acknowledge the role played by the police in the wrongful conviction. The Nova Scotia Court of Appeal reluctantly overturned Marshall's conviction when the actual killer confessed; the court claimed that Marshall's conviction was his own fault.47 The appeal court's attitude and the complicity of prosecuting counsel, as much as the circumstances of the wrongful conviction itself, led to a Royal Commission Inquiry, which exonerated Marshall, ordered compensation to him, and named bigotry and complacency as the true authors of the injustice.48

2. Selective enforcement: Sex, drugs and . . .

Routine hidden incidents of misconduct have as powerful an impact on communities as do high-profile cases of wrongful conviction or violence. These routine incidents of misconduct reflect and reinforce race, class, and gender bias in a myriad of ways. The process of identifying
and naming this covert malfeasance was central to the evolution of the PCLS police reform project and is an essential step in any counter-hegemonic strategy.

Sex

Police abuse of marginalized women, such as prostitutes, arises from and reproduces the classic whore/madonna stereotype. The police distinguish “good girls” from “bad” and use and abuse prostitutes because they are viewed as valueless women, available for the provision of sexual services to them as well as to clients, without any claim to even minimal protection. Police hassling, for information or on general principle, is almost a constant in the lives of street prostitutes and has been documented in PCLS files. 49 More dramatic complaints of extortion of sexual services by police officers are beginning to surface in Toronto and elsewhere. In the course of representing a woman whom a police officer victimized by requiring her to provide sexual services, PCLS raised the broader question of assaults on prostitutes at a Public Inquiry into the internal affairs unit of the Metropolitan Toronto Police Force. 50 An officer known on the streets of Toronto as “sperm whale” has been reported as using his hand gun to extort oral sex from street prostitutes with impunity. 51 An Oakland police officer has been charged with kidnapping six women while on duty on his late-night shifts and forcing them to choose between submitting to sex acts or being arrested. 52 More serious allegations have been made that the Sacramento police have been involved in the murder of prostitutes. The force has been reported as referring to the deaths of the prostitutes as “NIH — No Humans Involved,” suggesting the depth of their dehumanizing stereotypes. 53

Drugs

It is critical to recognize, however, the double message that the com-

50. See Junger Inquiry, infra notes 127–30 and accompanying text.
51. The evidence, complaints made by prostitutes about this officer, came out at the Junger Inquiry, infra notes 124–25. The complaints received media attention, but to date little else has been done. Glen Cooley, Charging Police Officers Too Risky for Prostitutes, NOW, Oct. 31–Nov. 6, 1991, at 21; Andrew Duffy, Prostitutes Say Officer Extorts Sex, Probe Told, THE TORONTO STAR, Oct. 22, 1991, at A6.
munity sends to the police. For example, the "War on Drugs" campaign has very successfully prompted community demands for more police protection and action. The sense of order, of taking action, that a strong police presence evokes is not only welcomed, it is sought out. That the police intervention often affects primarily marginalized women, racial minorities, and people with AIDS is recognized, but that recognition does not result in changes in policies or behavior.

The tension between the community desire for law and order and police mistreatment of marginalized groups take many forms. For example, PCLS' work with low-income tenants uncovered "block busting" by unscrupulous real estate developers in the Parkdale community of Toronto. The developers encouraged drug use in a building and then called for a police crackdown to "clean out the building" to avert rent control and rental protection legislation by emptying the building. More commonly, residents concerned about the presence of drug use and drug trafficking in their building or neighborhood are offered remedies such as a heightened police presence and mandatory evictions of residents even suspected of drug infractions. The media increasingly appear to be ambivalent about these measures and supportive of the PCLS policy of opposing the evictions and searching for community solutions, an approach that has informed the police reform project as well.

III. THE ROLE OF LAW

Police culture alone is insufficient to explain police misconduct or, equally important, to understand why it persists seemingly unchecked. The context in which misconduct manifests itself and is dealt with is of equal importance, and the law is a significant part of that context. "Law," both normatively and structurally, is as essential to police offi-


56. I use the term in the sense that critical legal theorists have used it in their program of deconstruction. See Alan Hunt, The Critique of Law: What is Critical about Critical Legal Theory?, 14 J.L & Soc. 5 (1987). It is primarily the criminal law that is at issue, both because it is central to policing and because of the power of its message of control with "justice." Herbert Packer was instrumental to analyses of the purpose of the criminal law, with his distinction between "due process" and "crime control" models. PACKER, supra note 28, at 283. British criminologist Doreen McBarnet brings a more stringent analysis, exposing the frailties (and the deadly
cers as it is to lawyers. The enforcement of laws by a police force free from political interference and answerable only to "the law" is seen by many as the sacred trust of the police in a democracy. The doctrine of "constabulary independence" is widely cited by the police as an answer to demands for more civilian control and is sometimes expressed in terms of "keeping politics out of policing," a proposition that obscures the political foundation of the policing function.

This powerful truism has frequently resulted in reform strategies dominated and circumscribed by legal norms and limitations in result, if not in content or focus. Even when the object of a reform strategy has been to change attitudes and practices through a combination of media campaigns, organizing efforts, and lobbying, the most common responses have been narrow and legalistic, such as criminal charges against officers for excessive force in the execution of their duty, minor changes in legislation governing complaints against the police, and directives concerning wife-assault. These outcomes have been markedy unsuccessful in changing police attitudes and practices. The police are almost inevitably exonerated of this type of criminal charge, complaint mechanisms.
quickly become bureaucratized and ineffective, and police protection for victims such as battered women remain illusory. One can trace the failure of these responses to reach the structural roots of police misconduct to the "legalization" of the various issues.

A. LEGALIZING THE ISSUES

The response of legal institutions to social issues such as police misconduct is essentially individualized and rule-driven, and thus highly effective at containing and directing public demands and concerns. Moreover, the response of "law" has often served a legitimating function for the police and their governing authorities. It has been a common strategy, for example, to permit, if not encourage, the "legalizing" of an issue as a means of containing and limiting actual change. 61 This tendency operates both as a function of the ideological role of law and in more instrumental ways through the interaction of client (officer or complainant), lawyer, and tribunal (court or disciplinary body). The use of a legal model of dispute-resolution always means that conflicts are removed from their contexts, cleansed and analyzed into legally remedial "issues." These re-framed conflicts are then resolved in a forum where the police are very much at home: a courtroom. It is not surprising, then, that whatever victories are achieved do not produce substantive change. Three seemingly unrelated concerns, and police response to them, illustrate the point: wife-assault, police brutality, and complaints against the police.

1. Wife-assault: Private violence

Police reluctance to interfere in domestic disturbances in order to protect battered women has been a long-standing problem. 62 However,
the transformation of the battered women's movement, from a grass-roots movement working for systemic social change into a group of lobbyists struggling for legalistic responses, provides a classic example of the legal-ization of a complex social issue. As government at all levels and police were forced to address wife-battering, broad demands were narrowed by these agencies into the criminal law paradigm. Ultimately, as government was forced by political pressure to acknowledge the problem, and to express willingness to find solutions, it did so by committing the resour-ces of the criminal justice system. The government pledge to eradicate wife-battering was thus expressed in the powerful slogan, "Wife Assault: It's a Crime," a response that served to silence the demand that violence against women be addressed systematically. Instead, directives and regulations, such as "mandatory charge — no drop" policies, were implement-ed.63 This narrow, legalistic response is at best inadequate. For many women, such a response offers no remedy at all. The experience of PCLS students working with battered women, particularly minority women, is that access to community supports is far more relevant than legal solu-tions. Indeed, many minority women are reluctant to bring the police into their homes at all.64

2. Police use of deadly force: Public violence

The demand that charges be brought against police officers who use excessive or deadly force in the execution of their duty has left the public disillusioned and the underlying problem of police brutality unredressed. The 1979 police shooting of Jamaican immigrant Albert Johnson, disori-ented, when he was in despair over previous encounters with police bru-tality and armed only with a garden tool, galvanized Toronto's black

with author); Sentences Are Not Severe — Staff Inspector Archibald Discusses the Subject — Women's Loyalty to Husbands, THE TORONTO STAR, Feb. 27, 1992, at A6 (regarding the treatment in the Toronto court system of men who beat their wives).

63. Gillian Walker has traced the phenomenon in Canada in a discourse analysis. She analyzes the claims of the battered women's movement from the 1970s and the parliamentary hearings where those claims were met with legal remedies (although legal remedies were initially only a small part of the demands). GILLIAN A. WALKER, FAMILY VIOLENCE AND THE WOMEN'S MOVEMENT (1990). In the United States, this "legalization" was more overt. A lawsuit for negligence in providing protection to a battered woman was central to United States strategies addressing policing and wife-assault. Kathleen J. Ferraro, The Legal Response to Woman Battering in the United States, in WOMEN, POLICING, AND MALE VIOLENCE: INTERNATIONAL PERSPECTIVES supra note 62, at 155-84.

64. Dianne Martin and Janet Mosher, The Criminal Sanction and Domestic Vio-lence, a report submitted to the Social Sciences and Humanities Research Council of Canada (analysis of the response of minority women to police intervention). See also Currie, supra note 17. Minority women who have both experienced and witnessed racism from the police are placed in a difficult position. They wish safety but do not wish to subject their partners to police racism or violence.
community into action. Most of the public outcry centered on a call for criminal charges against the officers responsible for the shooting. However, the dead man's widow and children also brought a civil suit. This legalized strategy primarily benefitted the police; the officers were acquitted, and the lawsuit was settled in a secret agreement with no admission of liability. The opportunity to explore the systemic issues raised by the case, specifically racism and the treatment of mentally ill persons, was lost.

Since the Johnson case, police shootings of black youths have continued out of proportion to the percentage of blacks in the population. Toronto's black community continues to call for criminal charges against offending officers and urges other reforms, ranging from increased minority hiring by the police and better policing to a more accountable civilian review system and the criminalization of racism. Predictably, the response to the demand for these reforms has been painstakingly slow and limited in scope. Moreover, the filing of criminal charges against the offending officers has been ineffective in bringing about real change. To date, no officer in Toronto has been convicted of a serious criminal offense in connection with shooting a black suspect. On the contrary, the police seem to have grown even more skilled at defusing public concern. Recently in Toronto Marion Neal, a black youth, was shot by police when he refused to get out of his car. He had been caught by a speed trap and stopped by P.C. Rapson, a traffic officer, who justified the shooting by claiming that he believed the youth was going for a gun. During the trial, the evidence revealed that the young man was unarmed and had been reaching for the hand brake. The victim's criminal record featured strongly in the case (although the identity of the victim was unknown to the officer at the time of the shooting), in a successful tactic designed to associate black criminality with police risk.

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67. Kirk Makin, Widow Gets Settlement From Police in Shooting, THE GLOBE AND MAIL, Feb. 13, 1988, at A1. By holding the details of the settlement secret, the police — individually and collectively — avoid accountability. While an individualized strategy such as a lawsuit may well result in a settlement that is acceptable to an individual plaintiff, the result obtained does not serve broader reform goals.
68. See supra note 60.
A few months later two officers were acquitted of murder and firearm charges in a neighboring municipality. Wade Lawson, a seventeen-year-old unarmed black youth with no criminal record, was shot and killed by police on December 8, 1988. He was shot in the back of the head, police bullets shattering the rear window of the stolen car he was driving. An all-white jury accepted the defense that the officers fired in self-defense and were fearful because of Lawson's failure to stop and his acceleration away. Days after the Rodney King demonstrations and the shooting of another black youth, the Attorney General announced that there were no grounds on which to appeal and that the acquittal would stand.

3. Police discipline: Whose tool is it?

The failure of public complaint and internal discipline regimes to change police behavior provides a further illustration of the inadequacy of reform strategies that concentrate on legalistic solutions. The police are trained to view the criminal law as their "tool." This perception sus-


The youth's subsequent brushes with the law were treated as news. See, e.g., New Charges Laid Against Teen Shot by Constable, THE TORONTO STAR, Nov. 6, 1991, at A5; Shot Teen Jailed 90 Days for Trafficking in Drugs, THE TORONTO STAR, Nov. 28, 1991, at A7.

70. Farrell Crook, Officers Cleared in Fatal Shooting of Teenager in Car, THE TORONTO STAR, Apr. 9, 1992, at A1; Bob Mitchell and Farrell Crook, Officers Cleared in Lawson Death; Slain Teenager's Mother "Disappointed" by Verdict, THE TORONTO STAR, Apr. 9, 1992, at A7; Farrell Crook, Grieving Mother Prays Slain Son Will Get Justice, THE TORONTO STAR, Apr. 11, 1992, at A4 (Evelyn Lennon-Lyon describes her son Wade Lawson as "sweet" and "respectful," not the thief he was portrayed as at the officer's trial; his mother said Wade Lawson had choices: he was an accomplished athlete who could have made a career of playing basketball).

71. See supra note 4.

72. The Attorney General indicated he would be seeking changes in the laws around the right of police to use deadly force in "fleeing felon" cases and as a needed reform in jury-selection procedures that permitted the all-white jury. Paula Todd, Rapson's Acquittal Won't be Appealed, THE TORONTO STAR, Nov. 28, 1991, at A7 (Attorney General Howard Hampton says province has no grounds to appeal the acquittals of the officers in the Wade Lawson shooting); Farrell Crook and Bob Mitchell, "I Just Can't Believe It," Mother Says, THE TORONTO STAR, May 9, 1992, at A4. The prosecution may appeal a verdict of not guilty only on an error of law. CRIMINAL CODE OF CANADA, R.S.C. ch. C-46, § 676(1)(a) (1985).

73. See supra note 18.

74. Ericson, supra note 27. At the same time, the rule of law is taken for granted as the formal standard against which "deviance" should be measured and judged.
tains them in their work and their efforts to deflect public criticism and demands for public accountability. It encourages the arrogant belief that as members of the police force they are immune from criminal liability, and it dominates the structure and procedures governing the disposition of citizen complaints. Although the police are frequently bitter about the "protection" granted to accused people by the criminal law, they exhibit an almost evangelical belief in the criminal trial process when it frees a police officer who has been accused of criminal conduct arising out of violence that the police perceive to be necessary.

An examination of the Metropolitan Toronto Police Force attitudes toward internal employment discipline illustrates this phenomenon. Despite clear rulings from the courts that disciplinary proceedings against officers under the Police Act are not penal or quasi-criminal, but rather administrative and disciplinary in nature, the proceedings remain shrouded in quasi-criminal trappings. The police force uses the procedure set out in the Police Services Act as a forum analogous to the criminal courts for the disposition of serious misconduct allegations against its officers, whether brought as citizen complaints or not. In serious cases, criminal defense lawyers, rather than labor or administrative lawyers, represent the accused officer. Formal "briefs," identical to those used in criminal prosecutions, are prepared. The practices and procedures followed, from providing "particulars" and "disclosure" to "setting dates" and imposing "sentences," reflect this perception and reinforce the adversarial and punitive aura of the proceedings. Members of the public participating as victim witnesses are isolated from the process and are rarely satisfied by the outcomes of the hearings, while individual officers are selected as scapegoats by police management.

To the police, the criminal law is a sword as well as a shield. It was used effectively in this way in the early 1980s to discredit allegations of torture made against members of the Toronto Police Hold-Up Squad.

75. For example, the well-known police distrust of courts (cf. VINCENT, supra note 33) and disdain for criminals who "demand all the safeguards of due process . . . assumes thereby that they [the safeguards] exist." Doreen McBarnet, Arrest: The Legal Context of Policing, in THE BRITISH POLICE 24-40 (1979) (on file with author).
76. Officers were reported to be relieved by their acquittals but confident that "justice would be done" in the Rodney King, Marion Neal, and Wade Lawson cases. See supra notes 21, 69, 70.
77. Re Trumblay et. al. 55 O.R.2d 570, 590 (Can. 1986), and cases cited therein (on file with author).
78. See supra note 6.
79. COMPLAINTS AGAINST POLICE, supra note 5, at 15-61.
80. Ericson, supra note 27, at 97-101, notes the scapegoating and identifies the management goals in this style of discipline. See also Submissions on Behalf of Jane Doe: Ontario Civilian Commission of Police Services Inquiry [hereinafter Junger Inquiry] (on file with author), Parkdale Community Legal Services, infra notes 124-25.
Criminal lawyers representing several unrelated men and boys realized that their clients had all described a unique form of torture used to extort confessions: the placing of a plastic bag over their heads and faces to produce a sense of suffocation, a technique known as "dry submarining." The possibility of collusion among the unrelated accused was extremely remote, and the lawyers, in the absence of an independent body to review citizen complaints, brought the cases to the attention of the Police Commission (the predecessor body to the Police Services Board). The victims' decision to seek a systemic remedy rather than press criminal charges against the officers (which would be unlikely to succeed) was the focal point of the police department's attack on defense lawyers representing the injured suspects. The defense lawyers were denounced for their lack of respect for the law, for calling for a public inquiry by the police commission, and for recommending that all police interrogations be videotaped as a condition of admissibility into evidence against the accused.

The strategic use of the special relationship that exists between police officers and the criminal law was taken even further in the case of an officer who was ordered to resign when the public complaint tribunal found him responsible for a serious assault on a suspect that ruptured the suspect's testicles and dislocated his knee. The Police Association, the police union, which had earlier "declared war" on the public complaints tribunal, was outraged when the officer was denied the opportunity to "clear" himself of the charges in a criminal trial. A police officer member of a neighboring Police Association filed a criminal charge in order to

81. See infra note 82. Similar allegations have been substantiated in Chicago in an Amnesty International report (the first ever done on a U.S. city for police brutality) and massive lawsuit alleging torture (including "dry submarining") of suspects over a twelve-year period. The allegations did not surface publicly, however, until 1989. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: ALLEGATIONS OF POLICE TORTURE IN CHICAGO, ILLINOIS AI Index AMR/51/42/90 (Dec. 1990); Salim Muwakkil, New Trends in Brutality From Chicago's Finest, IN THESE TIMES, July. 10-23, 1991, at 7.


83. GREENSPAN AND JONAS, supra note 82, at 175-96. Greenspan denigrates critics of police abuse in general and the Toronto Hold-Up Squad in particular.

84. Id. The allegations, and the reforms sought, received considerable media attention, even in the Toronto newspaper most biased toward police. Lorrie Goldstein, Taping of Cops Rejected; Group Wants Video Eye on Police, TORONTO SUN, Feb. 26, 1982, at 30.

give the officer that opportunity. However, the Attorney General stayed
the proceedings on the ground that it was an abuse of the criminal pro­
cess to lay a charge with no honest belief (based on reasonable and prob­
able grounds) that an offense had occurred, foiling the officer’s bid to
clear himself in what he and his colleagues perceived to be a forum more
sympathetic to them than the one operating under the Police Complaint
Commissioner.86

B. LEGALIZING THE FACTS: PATROLLING THE DATA87

The law is not the only tool used by the police. Indeed, the law
alone, without a concomitant control over the facts, is relatively sterile.
However, few modern institutions are as successful as the police at shap­
ing the discourse concerning them. Police control of information is ex­
traordinary in the initial shaping of the facts of an incident or arrest to
conform to policing goals and legal or psychiatric discourse,88 through
the presentation of the same facts in court, to portrayal of the case or of
police work generally in the media.89 Policing discourse shapes public
understanding of social order,90 resisting outside, non-police control and
criticism through the use of press releases, “tips” to favored reporters
(and punishment of critical reporters through denial of information), and
staged media events.91 The impact ranges from ensuring that there is no

86. CRIMINAL CODE OF CANADA, ch. C-46 R.S.C. §579 (1985). This statute autho­
rizes the Attorney General of a province to enter a stay of criminal proceedings.
Charges may be reactivated at any time within a year of the stay. If they are not,
the charge is deemed “never to have been commenced.” They were not reactivated in
this case. The agent of the Attorney General, in placing his reasons for the stay on
the record, noted that Weller’s “conviction” by the Police Complaint Tribunal had
been upheld on appeal to the Divisional Court. There was no doubt that the charge
had been laid as a device, demonstrating a troubling belief in the tendency of crimi­
nal courts to acquit police officers who harm citizens in the execution of their duty.
Her Majesty the Queen v. Terence Weller, Ontario Court (Provincial Division) Apr.
21, 1988, before Judge J. Kerr, Scarborough (unreported) (on file with author).
87. The phrase was coined by Richard Ericson, supra note 19.
88. Robert Menzies and Dorothy Chunn detail this phenomenon in the context of
the arrest and diversion of mentally ill offenders. Robert Menzies, Survival of the
Sanest: Order and Disorder in a Pre-Trial Psychiatric Clinic (1989); Dorothy
Chunn and Robert Menzies, Gender, Madness and Crime: The Reproduction of Patri­
archal and Class Relations in a Psychiatric Court Clinic, 1 J. Hum. Just. 33, 37
(1990). The police role is implicit in work addressing sexist stereotypes that permeate
the criminal justice system. Kathleen Daly, Rethinking Judicial Paternalism: Gender,
Work-Family Relations and Sentencing, 13 Gender & Society 9 (1989); Kathleen
Daly, Criminal Justice Ideologies and Practices in Different Voices: Some Feminist
89. Ericson, supra note 19.
90. Currie et al., supra note 22, at 29.
91. Ericson, Negotiating Control, supra note 19, at 123-25. The use of the
media and the promotion of policing discourse by the Toronto force was the subject
of a doctoral thesis that powerfully documents police skill at harnessing public opin-
doubt in the mind of the public that the guilty party has been apprehended to deflecting and shaping criticism and ensuring public support for increases in manpower.92

1. Police, lies, and videotape

Police control over the gathering and presentation of evidence is so complete that even in the absence of judicial complicity the police can generally rely on winning any courtroom credibility battle. However, police frequently take extralegal steps to ensure victory. When the legitimacy of policing is challenged directly, as in a disciplinary proceeding, overt lying is widely recognized as a common occurrence. Andrew Goldsmith quotes a senior police officer as admitting, “We believe that police officers will normally tell lies to prevent another officer from being disciplined or prosecuted, and this is the belief of senior officers who handle complaints and discipline cases.”93

The players in the criminal justice system generally accept police lying as somehow natural, almost expected, behavior. Doreen McBarnet points out how far this acceptance extends. In a study of arrests, she identifies the degree to which sociologists of policing believe that rules of law are irrelevant to controlling police behavior because they assume that the police break formal rules in fulfilling their functions. This supposed “given” is where the analysis begins.94

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93. COMPLAINTS AGAINST POLICE, supra note 5, 22-23, 28-30. SEWELL, supra note 20, quotes from an early decision from Toronto’s Civilian Review Board. The tribunal members were as shocked by the perjury of fellow officers as by the misconduct itself. Mr. Justice Morand, conducting a Royal Commission investigation of police brutality in Toronto in the 1970s, noted (and was shocked by) the same thing; his very legalistic solution was to increase the regulations concerning officers’ notebooks and forms detailing the use of force. Morand, J., ROYAL COMMISSION INQUIRY INTO METROPOLITAN TORONTO POLICE PRACTICES (1976) [hereinafter MORAND INQUIRY].

94. McBarnet, supra note 75, at 25, 27.
The manipulation of evidence by the police in high-profile wrongful-conviction cases is easily recognized as "going too far." However, similar distortion of the facts or outright perjury, particularly in confession cases, suggests that, to the police, defining "truth" to achieve a police goal is as much a tool of the job as understanding the law or knowing how to use a stick and a gun. The wrongful-conviction cases merely represent the worst-case scenario, which permits an understanding of the phenomenon in other contexts and illustrates the inadequacy of legalistic solutions alone in addressing ingrained police attitudes and behaviors.

For example, police interrogations throughout the common law world are theoretically closely bound by the legal rules that govern the admissibility of statements. In practice, inside the closed world of the police interview room, legal rules offer only an illusion of protection.

A recent decision of the Australian high court addresses the dichotomy precisely. The court set aside a conviction based on a disputed confession and ruled that in the future all juries must be warned of the dangers of convicting on disputed confessions in the absence of corroboration. The court recognized the extent to which the police control the information about an interrogation that is ultimately presented in court: "[I]t is comparably more difficult for an accused person held in police custody without access to legal advice or other means of corroboration to have evidence available to support a challenge to police evidence of confessional statements than it is for such police evidence to be fabricated."

A recent Canadian study of police interrogations and confessions law suggests that the police "push the law to its limits, slip through loopholes and employ technicalities" and cannot be trusted "to obey the rules society imposes on the way they question suspects." The study's ultimate conclusion has significance far beyond confession law and is equally applicable to police misconduct generally: "Police do not so much break the law as use it to suit their own needs." However, the process is not

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95. This aspect of the English pub-bombing was widely featured in media discussions (along with judicial acceptance of police perjury). See supra notes 40-44.


98. Id. at 53. This tendency has been identified in the United States as well where the implementation of mandatory "Miranda" warnings were widely studied. Miranda v. Arizona, 384 U.S. 436 (1966). As Gerald Caplan notes, amicus briefs to the Supreme Court from both defense lawyers and prosecutors opposing mandatory warnings relied on the "fact" that police will "stretch the truth" to appear to be acting correctly (without actually changing behavior). Gerald M. Caplan, Questioning Miranda, 38 VAND. L. REV. 1417, 1461 (1985). Studies of police compliance following Miranda
simply a uni-directional conspiracy by the police to present false evidence; rather, police understanding of both their role and the expectations created by legal rules and procedures as to their performance combine to produce a “script” that the police see as a necessity.99 Moreover, the most common response to police misconduct in procuring confessions, setting new rules for making notes and preserving evidence, for example, is precisely the response that is most easily circumvented by the police. Manipulating the evidence to ensure that their conduct fits within the legal rules by which they are bound is described by Steven Box as simply “business as usual” for police officers:

They take “law and order” which originally meant the application of law rather than arbitrary justice to help maintain order, and transform it into the imposition of order (perceived through a conservative lens) by the application (legal or otherwise) of law (as interpreted by the police).100

2. Limit the critics: Patrol the agenda

That “business as usual” most definitely includes resisting the implementation of rules or practices that might restrict the police understanding of their mandate. The skills that generally succeed in convincing judges to accept their version of what occurred during an interrogation — that is, manipulation or obfuscation of facts or mutual corroboration of the decided-upon version of the facts — are utilized in other contexts to respond to criticism from outsiders or to co-opt an issue and diminish critics. The by-now-clichéd image of the embattled police closing ranks and firming the “thin blue line”101 is almost a prime imperative when conduct that is accepted by the officers as a normal function of policing, such as the use of excessive force, is criticized.102 Incidents of officers


99. Ericson and Baranek illustrate the extent to which courtroom expectations shape testimony. ERICSON AND BARANEK, supra note 56, ch. 7. Vincent describes part of the process that leads to the development of this skill as frustration or embarrassment with the product of one’s testimony: the “good” officer gets better at providing the evidence that will result in a conviction while the “bad” officer merely lies. VINCENT, supra note 33, at 91-95.

100. BOX, supra note 18, at 96.

101. This expression, or others like it, is now commonly used. The concept — that the police are a slender shield between anarchy and order — reflects their deepest sense of themselves. See BOX, supra note 18, at 93. It is reflected as well in the title and content of Carsten Stroud’s popular book THE BLUE WALL: STREET COPS IN CANADA, supra note 25.

102. VINCENT, supra note 33, at 129, quotes an experienced officer as saying quite
lying or falsifying notebooks or police records to assist a "brother" facing external disciplinary action are identified too frequently to dismiss as exceptions.103 This tendency is not, however, publicly acknowledged, for obvious reasons. The recent statement by a police commissioner that police will lie in court to support a brother officer has led to a decision to hold an inquiry into the commissioner's "bias." Comments that "some police lie in court to protect their partners" were reported in the media. In an interview on September 6, 1991, the police commissioner was reported as saying

[T]here's a lot of mistrust in Peel toward the police . . . . Let's say there's an unlawful act committed by police — excessive force for instance — and a member of the community complains . . . . The partner of this officer will go to court and lie on the witness stand in defence of his fellow officer. I find this appalling. These are police words against the words of the complainant. So, as a result, complainants are hesitant to come forward.104

However, practices designed to deflect criticism and to protect police are not limited to denial and obfuscation. The police target their critics, derail inquiries with sophisticated litigation and media strategies, and transform unpopular initiatives back into the old practices in their efforts to preserve the status quo.105 Reform initiatives that fail to understand

bluntly, "No one will turn in his buddy when it is a question of brutality or questionable use of force."

103. See id. The behavior of the officer who laid the charge in the Weller case to assist him to "clear his name" was only one questionable act of many. The Police Complaint Tribunal was shocked, as it had been in the Footman case, by the falsification of arrest reports and collusion in preparing false notes of the arrest that was uncovered. See supra notes 93, 102. Justice Morand found instances of altered notebooks and police records and concocted testimony in his inquiry. See supra note 93. See also McBarnet, supra note 75; COMPLAINTS AGAINST POLICE, supra note 5; BOX, supra note 18, at 80-81.

104. Although later, at her swearing in, the commissioner denied saying "that some police lie in court," Peel police chief Robert Lunney is reported as being "deeply disturbed" about her alleged comments. "I am aware that these comments have been denied, but neither have they been retracted by the newspaper in question." The police were successful in obtaining an inquiry into her conduct. Peel Police Seek Inquiry Into Lying Charge; Mary Nholim: Newest Police Board Member Denies Making Comments, THE TORONTO STAR, Sept. 19, 1991, at A4.

105. The use of a leading criminal lawyer to denounce critics of the Hold-Up Squad, GREENSPAN AND JONAS, supra note 82, is but one example of this technique, although potentially a very effective one, as it was aimed at silencing defense lawyers. Dramatic denunciations and threatened court disruptions are also common and receive substantial media attention. Activist's Deputation Sparks Walkout By Police Chief, THE TORONTO STAR, Dec. 13, 1991, at A6; Report Sparks Row at Police Inquiry: Judgments Attacked as "McCarthyism" and "Grandstanding," THE TORONTO
these tactics are unlikely to achieve substantive change.

Police response in Toronto to pressure for the implementation of electronic recording of interrogations as standard police practice demonstrates the scope of the techniques used by police to deflect criticism and circumvent new rules designed to curb their conduct. In the wake of a wave of publicity about allegations of torture brought by criminal lawyers representing robbery suspects, the police response was typical. They hired a leading criminal lawyer to denounce the lawyers, recommended a study of the matter, and then purported to agree to begin using recording equipment in their interrogations in the future. The police then began what they described as the difficult process of introducing the equipment into practice and reviewing the results of a pilot project implemented and operated over the next four years. However, when the pressure decreased with the passage of time and in the absence of fresh allegations of extreme abuse, police action in introducing and requiring the recording of interrogations fell off both the public and private agenda. In 1990, with fresh allegations of serious misconduct against the Hold-Up Squad (including officers who had been implicated in the 1981 allegations), the


107. In the midst of an investigation by the PCC into the allegations against the Hold-Up Squad, the Squad hired criminal lawyer Edward Greenspan as its spokesperson and offered to co-operate with a video recording project. GREENSPAN, supra note 82, at 178. Sidney Linden, the first Public Complaint Commissioner (appointed early in part as a result of the controversy surrounding these allegations), investigated the cases and recommended that criminal charges be considered in two of seventeen cases. The charges were never laid. He also considered the videotaping proposal and supported it: “I am confident that the problem that arose in the Scottish experiment [questioning outside the reach of tape recorders, continued secrecy of interrogations, taping only the product] will not be reflected in Toronto. In my view, the Metropolitan Toronto Police Force will see the real value that arises from the use of video equipment and will understand that it not only protects police officer’s interests, but the interests of the suspects as well.” LINDEN, supra note 82, at 130.

108. The proposal had never been simply for videotaping a confession achieved after questioning; its purpose was to record electronically the entire interrogation process, a much greater intrusion into police behavior. Joyce Miller, Summary, in THE AUDIO-VISUAL TAPING OF POLICE INTERVIEWS WITH SUSPECTS AND ACCUSED PERSONS BY HALTON REGIONAL POLICE FORCE: AN EVALUATION (Law Reform Commission of Canada 1988) (on file with author). The pilot project was seen as highly effective, reducing complaints about police misconduct during interrogations significantly without markedly reducing the number of “confessions.” Halton, however, is not a major urban center, and its crime rate is relatively low.
issue of electronically recording interrogations was raised once more.\textsuperscript{109} Not surprisingly, no real changes in interrogation procedures were ever made. Ten years after the issue reached public prominence, no independent record exists of the most contentious interrogations; members of this infamous squad have merely added some new language justifying the absence of a recording to their court testimony in support of the confessions on which they routinely rely.\textsuperscript{110}

At the same time, the police aggressively promote their version of the facts through the media. The near-fatal shooting in Toronto of a black high-school student at a warehouse burglary,\textsuperscript{111} shortly after the acquittal of Constable Rapson in the Marion Neal shooting,\textsuperscript{112} was met promptly with an explanation by the police that the shooting was an accident.\textsuperscript{113} Following the shooting, the police moved quickly to do “damage control.” The common claim of self-defense in the face of danger from a black criminal was incredible given the fact that the young man was not armed; despite his apparent involvement in the burglary, the victim was an honor student, basketball star, and brother of a police officer on a neighboring police force.\textsuperscript{114}

Although the law requires that all police shootings in Ontario must be independently investigated by a civilian unit established to ensure an

\textsuperscript{109} R. v. Bounhai Lim and Baouaphani Nola, unreported ruling #3 on voir dire, released Apr. 18, 1990 (Can. S.C.O.) (on file with author). Mr. Justice Doherty excluded confession evidence in a ruling that was very critical of the Hold-Up Squad. The explanation for the continued failure to record was not accepted (it “wasn’t their practice,” an unlikely position given that Staff Inspector Craddock was one of the officers who had hired Edward Greenspan and agreed to use electronic recording some six years earlier). The court identified the issue: “The police appear to have set the stage for a battle of credibility on the voir dire and excluded any independent source of information which would have supported one side or the other.” \textit{Id.} at 4-6.

\textsuperscript{110} Shortly after \textit{Lim}, in the same courthouse, a judge rejected his criticism in another Hold-Up Squad case. The judge accepted the police explanation that video equipment was not readily available, without reference to the use of an easily available audio recorder or the history of promises made by the force about the implementation of routine electronic recording of interrogations. R v. Miguel, Ontario District Court, May 11, 1990 (unreported) (on file with author).


\textsuperscript{112} See supra note 69 and accompanying text.


unbiased examination of the circumstances, the existence of a secret protocol between the Special Investigation Unit and the police was revealed in this case. By giving the force involved "first crack" at the evidence, the agreement appears to allow the police an opportunity to conceal incidents of misconduct despite the clear intent of the legislation to avoid such complicity. The officer who shot the young man has been charged, but it is too early to determine how successful the strategy of pressing charges will be, since the case has not yet been tried. That the release of exculpatory information was deliberate is without doubt, as the explanation that the shooting was accidental was volunteered at a press conference held specifically for that purpose.

IV. CONCLUSION: WHERE DO WE GO FROM HERE?

To advance a reform agenda aimed at reducing police misconduct and increasing police accountability, responses to police misconduct issues must be developed that limit the trap of "legalization" while simultaneously exposing the connection between dramatic, overt acts of abuse and misconduct that attract media attention and the subtle, systemic, and structural influences that reinforce and nourish racism, classism, homophobia, and gender bias among the police. It is important not only to critique traditional legal strategies, but also to transform them and make them work for those who suffer from the systemic abuse of police power. The legal system is neither willing nor equipped to make this transformation. It disproportionally jails blacks and minorities, whitewashes deaths caused by the police, and offers little real protection from racist and sexist violence.

This is not an assertion that criminal prosecutions, police proposals, and demands for institutional responsiveness should not be incorporated into the strategy for change. However, the priority given to these legal strategies should be reassessed. More fundamentally, new coalitions are needed: between women working against male violence and defense lawyers arguing for the rights of accused individuals; between poverty activists and community legal clinics and those fighting for prison and police reform. The dichotomy between demands for protection and strict enforcement of criminal sanctions and the class and race bias that translates those claims into selective, violent policing must be addressed.

115. See supra note 6. All such incidents are to be investigated by the Special Investigations Unit.
117. See supra note 113.
A. TRUTHTELLING: RECLAIM THE AGENDA

The ability of police to direct the discourse of policing is by no means absolute.\(^{118}\) The increasing willingness of mainstream press outlets to challenge and question police practices has weakened police power to promote the hegemony of policing. Influential public inquiries have been held, and the civilian review agency has been improved, partly in response to the exertion of adverse public pressure in Toronto. More importantly, the media, which is becoming more critical of the continuing racist, sexist, and violent police responses, is placing the issue of systemic bias on the public agenda.\(^{119}\)

The Royal Commission Inquiry into Metropolitan Toronto Police Practices, conducted by Justice Morand, was sparked by media attention focused on allegations of extreme brutality against suspects in custody and was called to “clear the air” about the shocking allegations. Other inquiries were held for similar reasons, and all recommended improvements in the public complaint process.\(^{120}\) Although these inquiries were essentially narrow and legalistic in focus, the record created and the experience of participants encourages future reforms.

More wide-ranging inquiries and Royal Commissions have produced recommendations and conclusions that have entered public discourse. The “Marshall Inquiry”\(^{121}\) addressed the possibility of a racist police force and justice system imprisoning an innocent man. Shortly after the inquiry issued its report, the police shooting of an unarmed native leader on the streets of Winnipeg and the acquittal of whites in the brutal rape of a young native woman in Northern Manitoba led to a broad inquiry into aboriginal justice that identified the systemic racist nature of policing and

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118. Ericson, challenging both the “effects” approach of psychologists and the “dominant ideology approach” of sociologists, identifies the importance of the media as a source of “alternative justice” and justice reform. ERICSON, supra note 19, at 219-23, 236.


120. MORAND INQUIRY, supra note 93; ARTHUR MALONEY, THE METROPOLITAN TORONTO REVIEW OF CITIZEN-POLICE COMPLAINT PROCEDURE TORONTO (1975); CARDINAL G. E. CARTER, OFFICE OF THE CARDINAL, REPORT TO THE CIVIC AUTHORITIES OF METROPOLITAN TORONTO AND ITS CITIZENS (1979) (on file with author).

121. See MARSHALL COMMISSION, supra note 45.
justice in general. The trial of Los Angeles police officers for the Rodney King beating provided a similar opportunity. The Fund For The Feminist Majority made lengthy submissions to the Independent Commission on the Los Angeles Police Department that influenced the final report, particularly the findings as to "Racism and Bias Affecting the Use of Excessive Force."

B. RECLAIM THE LAW

Although individualized legal actions rarely advance systemic change on their own, legal strategies can provide important support to an agenda for change. For example, participation in proceedings such as public inquiries offers at least two potential benefits. Although it may be anticipated that the police will make every effort to restrict the scope of an inquiry into their conduct, these proceedings provide an opportunity to advance a more broadly based agenda and to create a public record, which may provide a basis for future reform work. The recent experience of Parkdale Community Legal Services at such an inquiry suggests this tactic may well succeed.

The Ontario Civilian Commission of Police Services responded to allegations of serious improprieties against the elite Internal Affairs Unit of the Metropolitan Toronto Police Force in its handling of the case of an officer involved with an escort service. Gordon Junger, while living with a prostitute, was filmed on an escort call in a "sting" set up by Internal Affairs with the assistance of his girlfriend. He resigned. Media disclosure of a resignation agreement that promised the withdrawal of charges and the destruction of the evidence against him prompted the inquiry. At that inquiry, Parkdale Community Legal Services represented

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124. Currie et al., supra note 22, are critical of inquiries, such as the Morand Inquiry, as individualizing and legitimating. There is no question they have that tendency. However, it is neither necessary nor inevitable that this be so. T. Sher Singh, Police Commission Inquiry Must Go On, THE TORONTO STAR, July 20, 1991, at A27. Internal Affairs was represented at this inquiry by Edward Greenspan, who had earlier assisted the Hold-Up Squad in its media strategy, supra note 83. He subsequently represented one of the officers charged (and acquitted) in the Wade Lawson shooting, supra note 70.

125. The commission ultimately supervises all police forces in the Province. Municipal Police Services Boards report to it, and it serves as a Police Services Board to the Ontario Provincial Police, which is a force analogous to state police forces in the United States. See supra note 6.

126. A unit answers directly to the chief and is mandated to investigate serious or systemic misconduct or corruption.
a woman dissatisfied with the Internal Affairs investigation of an officer who had used his status to extort sexual favors from her. He had been permitted to plea bargain a lenient penalty in internal disciplinary proceedings, no criminal charges had been laid against him, and a promise of anonymity made to her had not been kept. PCLS obtained standing on her behalf at the inquiry and worked to broaden its scope. 127

PCLS involvement on behalf of this sympathetic victim contributed to the production of an extraordinary record on the extent of police resistance to public accountability, which received wide media attention. 128 Evidence of Internal Affairs' treatment of the two cases, particularly that of Jane Doe, demonstrated that Internal Affairs routinely failed to notify the Police Complaints Commissioner that a public complaint had been received, as required by the Police Services Act. 129 Some 192 files alleging serious misconduct had never been scrutinized by the Police Complaints Commissioner, nor had the complainants been given a right to appeal a decision about the handling of their complaints.

Internal Affairs asserted that it believed allegations of "criminal" misconduct did not require notification to the PCC, a claim supported by senior officers right up to the chief. 130 Clearly, Internal Affairs sought to drastically limit the scope of the Public Complaints Commission civilian review. Internally developed practices and procedures ensured that the vast majority of serious allegations of misconduct were beyond civilian review. The revelation of this practice at the inquiry brought it to an end. 131

127. Inquiry established June 1990 by the Ontario Commission on Police Services into the policies, practices and procedures of the Internal Affairs Unit of the Metropolitan Toronto Police Force. See Junger Inquiry, supra note 80. "Jane Doe" was granted standing, and the case of officer Brian Whitehead was included in the inquiry in March 1991.

128. Alan Story, A Submission to the Ontario Police Commission public inquiry into the internal investigation of alleged wrongdoing by Metro Toronto police officers; Parkdale Community Legal Services per Dianne L. Martin, Submissions on Behalf of Jane Doe, OCCP Inquiry (on file with author and Commission). Glenn Cooley, Police Offenders Easy Ride, Now, Oct. 24-30, 1991, at 10 (“Police authorities are a soft touch when disciplining officers who cross the line into illegality. What would have happened to you or me if we had been sentenced for that assault [on Jane Doe]? It sends the message that police officers can be aggressive and violent and the cost is minimal”); Glenn Cooley, Police Board Lawyer Opposing Special Bias Probe, Now, Sept. 5-11, 1991, at 23 (on file with author) (article reports lawyer Dianne Martin saying she fears there is systemic discrimination in the way the police department’s internal affairs unit treats complaints made by women against officers of the force); Rosie DiManno, Surprise Query at Police Probe Raises Questions, The Toronto Star, Nov. 6, 1991, at A7. See also supra note 17.

129. See supra note 6.


In addition to demonstrating the degree to which the "ends justify the means" in the matter of the resignation agreement (which the police described as a "con" on Junger’s lawyer), PCLS raised serious questions about the adequacy of responses by the force to issues of sexual assault and harassment of vulnerable women by police officers. Allegations from prostitutes about violent sexual assaults perpetrated by an officer (or officers) known on the street as “sperm whale” were referred to a morality squad for investigation when the offending officer was reputed to be the member of a morality squad. Although the impact of such a step was acknowledged by investigators, it was supported by the unit commander. That same commander testified that he would not discipline a junior officer who failed to “take action” in accordance with directives on wife-assault because he viewed those directives as an improper restriction on constabulary independence.

The panel heading the inquiry strongly criticized the performance of Internal Affairs and the attitudes reflected by its performance. In regard to the treatment of PCLS client Jane Doe in particular, and toward women complainants in general, the inquiry acknowledged the operation of systematic bias: “The force was simply too eager to deflect public criticism from itself. It reacted defensively and in the process disregarded the interests of an individual who was twice victimized — by the original offence and by the police disciplinary system.”132

C. RECLAIM THE AGENDA: COALITIONS AND COMMUNITY

Ultimately, only persistent political pressure will effect significant change in policing practices. Toronto’s highly praised133 model for civilian review was developed in response to a series of public inquiries134 and mounting public pressure concerning the increased incidence

8. Jack Lakey, Watchdog Entitled to Complaints Files, Eng Concedes, THE TORONTO STAR, Aug. 30, 1991, at A7. It is troubling, but not surprising, that after years of struggling against police resistance, the current commissioner, shortly before the revelations at the Junger Inquiry, expressed optimism about his agency’s triumph over that resistance. Lewis, supra note 5, at 153-76.
132. THE ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES, REPORT OF AN INQUIRY — INTO ADMINISTRATION OF INTERNAL INVESTIGATIONS BY THE METROPOLITAN TORONTO POLICE FORCE 58-76 (1992) (see chapter 9, Treatment of Victims). The commission was equally critical of the resignation agreement: “Either way the actions of the force demonstrate a tremendous lack of integrity . . . . If a police force would act dishonourably to get rid of one of its own officers, can the public count on it to act honourably in cases involving civilians?” Id. at 29.
133. Petterson, supra note 7.
134. The Morand Inquiry, supra note 93, was perhaps the most influential. Parkdale Community Legal Services also took part in this inquiry. The clinic brief proposed closer contact between the police and the community, including an active role for community members in the administration of police activities. Justice Morand responded favorably to the submissions.
of police misconduct, including a succession of police shootings,\textsuperscript{135} a massive raid on gay bath houses that ultimately produced almost no convictions,\textsuperscript{136} and allegations of torture in the questioning of robbery suspects.\textsuperscript{137} However, these events were connected in an effective way only through consensus pressure.

The PCLS police reform project is drawing on an earlier project in its collaborative approach. In the summer of 1981, six years after the first reports recommending civilian control of the police complaint process were issued, the individuals and community organizations most targeted by the misconduct — blacks and visible minorities, gays and lesbians, suspects in custody, and those who worked with them — formed a coalition to respond directly to community concerns. Citizens Independent Review of Police Activities (CIRPA) formed itself into an effective community voice. CIRPA members, working out of a progressive alderman's office, undertook an ambitious project of community-driven review, operating a twenty-four-hour citizen complaint hotline and offering support, advice, and legal referrals to individuals filing complaints against the police. CIRPA used data from complaints received through the hotline to develop initiatives for law reform. Police supporters used claims that CIRPA was a hotbed of dangerous radicals and that it exaggerated complaints and exacerbated police-community relations to undermine the group's reputation. At the same time, the newly formed official civilian review agency, the PCC,\textsuperscript{138} acknowledged CIRPA's role as helpful at raising and addressing issues beyond the PCC's scope.\textsuperscript{139} CIRPA, primarily a voluntary organization, disbanded four years later.

It has been suggested\textsuperscript{140} that organizations such as CIRPA inevitably become co-opted by policing discourse and thus do not represent a

\textsuperscript{135} The Johnson shooting was the critical spark. See Complaints Against Police, \textit{supra} note 5, at 65-67.

\textsuperscript{136} Described in Sewell, \textit{supra} note 20, at 184.

\textsuperscript{137} See \textit{supra} notes 80-84. For a review of this history, see Lewis, \textit{supra} note 5, at 153-76; see also Sewell, \textit{supra} note 20, at 181-86.

\textsuperscript{138} The Office of the Police Complaint Commissioner (PCC), \textit{supra} note 6.


\textsuperscript{140} A masters' thesis on CIRPA details its initial effectiveness but suggests the members were ultimately co-opted into the "policing discourse" and that the process is almost inevitable with "extra-governmental" reform groups. However, many of the members of CIRPA are active in a new reform coalition, Metropolitan Toronto Police Reform Coalition (MTPRC), and show no sign of having been coopted. McMahon, \textit{supra} note 139.
basis for long-term changes in police accountability and conduct. Although this paper has documented the challenges faced by community-based reform initiatives, it would be ahistoric to fail to recognize the long-term importance of such initiatives. Community-based response depends upon the enduring importance of such initiatives to individual victims and the experience and insight of the organizers. These resources are not lost when a group disbands. However, the relearning of scattered knowledge and the reclaiming of critical history takes precious time and energy, as community concern about a new police reform issue sparks "new" reform initiatives. Preservation of that history, that record, is essential to reform initiatives that seek structural change.

D. A PERMANENT HOME FOR REFORM: THE PCLS RESPONSE

A legal community clinic established recognition of the enduring nature of police misconduct, the importance of sustained pressure for change, and the need for support among individuals and communities in a police reform initiative. Parkdale Community Legal Services, building on previous ad hoc experience with policing issues, has made a police reform project a clinic-wide priority.

The involvement of a stable, respected community legal clinic associated with a major law school is important in many ways. Institutional resources are frequently unavailable to groups and individuals working on potentially divisive and frequently unpopular projects like police misconduct, so ad hoc, reaction-driven initiatives tend to dominate. The alliance of skilled organizers and lawyers with the intellectual support of the law school provides needed support. Moreover, law students, aside from valuable legal and community work, will help to insure continuity and the preservation of an institutional memory in researching and writing law reform papers each term.

141. For example, PCLS has served as counsel at the Morand Inquiry and the Junger Inquiry and as representative in individual police misconduct cases regarding protection of assaulted women and tenants' disputes with their landlords.
142. The PCLS board of directors adopted the initiative at its February 1992 meeting, relying in large part on student initiatives. See Lee Mitchell, A Proposal to the Board of Directors of Parkdale Community Legal Services for the Establishment of a PCLS Policing Project (on file with author). The proposal was based on Lee Mitchell, Police Misconduct and Community Response (Dec. 1991) (unpublished manuscript on file with the Intensive Programme In Poverty Law, Parkdale Community Legal Services/Osgoode Hall Law School).
143. See supra notes 9-11 and accompanying text.
144. The establishment of the project was advanced by the paper by Lee Mitchell, supra note 142. That intellectual work has continued this term with a paper analyzing "community policing." Alan Story, The Community Policing Bandwagon: Should We Hop Aboard (Apr. 1992) (unpublished manuscript on file with Intensive Programme in Poverty Law, Osgoode Hall Law School).
munity and institutions, earned over twenty years, lends weight to proposals for fundamental change and shields unpopular critics of the police from police and institutional reprisals. Finally, the clinic's commitment to community education and organizing, casework, and law reform as inextricably interconnected in the redress of social injustice will advance the goal of limiting reliance on legalistic or superficial strategies. As one of the staff lawyers stated:

[T]he history, stability and resources of my community-based employer provide me with a certain credibility and ability that cannot be matched by most private practitioners. Simply put, this clinic provides a base. That base can provide moral and physical support or expertise. Or it can be the headquarters for strategizing or the clearing house for information for project workers.

1. Community education and organizing

The clinic is initiating a number of community education projects to provide basic information about rights to groups and individuals. The clinic's work with street people, the homeless, prostitutes, and recent immigrants has highlighted both the need and potential for such information. A card outlining "your rights with the police" in several languages and emergency phone numbers is being prepared for distribution. This is basic work, but it has not been done for many years. Information engenders confidence, both in individuals ready to "fight back" and in those too demoralized to do so, and serves to dispel disempowering myths about the police force. An information "kit" is also being developed for distribution to community groups, with law students prepared to conduct information sessions. The clinic is also a member of the new Metropolitan Toronto Police Reform Coalition, and staff lawyers and students have not only attended meetings but also produced materials and proposals for the coalition.

2. Casework

The project is providing support to individuals who have complaints about police misconduct and will help focus spontaneous community responses to these specific incidents. Essential legal and support services

145. See supra notes 9-11.
146. The board, in approving the project, provided for board approval for involvement in any major litigation, in recognition of both the demands such litigation places on the clinic and the need to ensure that the litigation in fact has transformative potential.
148. CIRPA produced and distributed such a card with considerable success. See supra notes 138-40.
for victims of police misconduct is not readily available from the practicing bar in Toronto and can be augmented by student client support, research, and summary advice as a resource for lawyers in this field. The clinic is currently involved in this work supporting a woman whose arm was broken by police during a recent demonstration. At the same time, providing these services creates a valuable organizing tool for community-based organizations working on issues of systemic racism and gender bias and identifies law reform cases and possibilities.

3. Law reform

Researchers are producing an intake information sheet to collect data to show that particular incidents are not isolated or unique. At the same time, casework is analyzed for test-case potential. In a current case, the clinic is representing a civilian employee of the Toronto force in a sexual harassment claim. Apart from challenging the rule that denies the victim standing at a disciplinary hearing, the clinic has developed a harassment protocol for the Police Services Board.

The clinic director is assigning police reform cases to lawyers throughout the clinic, so that policing law reform initiatives and research are being integrated into all four divisions: Family, Housing, Worker's Rights, and Immigration. The goal is to create a coordinated, community-based demand for fundamental change.

4. Endnote

If a people deserve the government they choose, it is equally true of the policing they receive. Policing that targets minorities, celebrates brutality, and acts as its own judge and jury does not persist without support from those with the power to insist on a different model. At the same time, the problems (like drug trafficking, violence, robbery, and rape) supposedly addressed by current police methods are not mere chimeras of right-wing scare-mongerers. They exist and produce pain and despair. It is time to abandon the politics of convenience and expediency and truly address the structural forces that define crime and control. The riots that returned to Los Angeles after twenty-five years of inaction and arrived in Toronto in their wake will be a holocaust twenty-five years from now if the lessons learned and relearned are not applied now.

149. The woman, a respected black artist, was seriously injured and then charged with assaulting a police officer. The details of the case are being held confidential. File Reference: “Winsom” (on file with author). As well as providing direct support, the clinic is working with a support group and has referred her to experienced criminal and civil counsel who have agreed to represent her pro bono with the clinic’s assistance. Id.
150. The file is being held confidential. File Reference: “A.B.” (on file with author).
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