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POLICE USE OF LETHAL FORCE: A TORONTO PERSPECTIVE

By JOHN D. ABRAHAM*, JOHN C. FIELD**, RICHARD W. HARDING***,
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I don't think these things follow a general trend or a general pattern. And it is very difficult to predict the future. . . . [Y]ou can have eight people killed . . . in a short period of time then you may go along for two or three years and have none.¹

The needless resort to deadly official force does more than nullify a criminal suspect's right to trial. It may ignite community anger, especially among the urban poor who feel put upon by society and its guardians of justice. Police forces need constant reminder that they can contribute to the violence they deplore.²

I. GENERAL INTRODUCTION

Society has a vital interest in ensuring that the use of lethal force by the police occurs only in circumstances in which such force conforms exactly with the law. A police force, therefore, must be accountable in two ways: first, the use of lethal force must be subject to public control through known statutory rules and regulations which, in turn, must reflect the reasonable needs and exigencies of law enforcement; second, after-the-fact investigation must be conducted so as to facilitate the public control of police practices. If these standards of accountability are not met, Westley's analysis may well become applicable to Canadian society in the 1980's.

[T]he customs of the police as an occupational group give rise to a distortion of statutory law, so that the law in force, as it affects the people of the community, can be said to arise in part from the customs of the police. The nature and genesis of the law in force and its relationship to statutory law are questions of great significance in a society that increasingly comes to depend on formalized social controls.³

The importance of police accountability is strikingly illustrated by recent revelations regarding the use of force by British police. From 1970-79, 245 persons died in police custody, 143 from unnatural causes, yet in none of these cases were proceedings taken against a policeman.⁴ The law of culpable homicide, in both its murder and its manslaughter forms, is a general law theoretically applicable to every citizen. If in practice, however,

the trend of preventing the legality of a certain kind of situation from ever being tested is distinct and continuous enough, then in a real sense the law has come to be changed with regard to that kind of situation. The law may remain on the statute book, but a privileged group will come to know that it is a paper law only, that no sanction will ever be brought to bear upon them for its 'breach.'⁵

This potentially formidable challenge to the legal system is exemplified by the American experience where in the ten-year period beginning in 1966 more than 6,000 men, women and children, ranging in age from ten to eighty-one, were shot to death by policemen.⁶ In only a handful of cases was the legality of the policeman's conduct tested by criminal prosecution. Most

¹ *Toronto Star*, March 19, 1980 at A8, col. 6, quoting Jack Ackroyd, Chief of Metropolitan Toronto Police Dep't.

² *New York Times*, June 11, 1980 at A30, col. 1 leader commenting on race riots in Miami, Florida.

³ Westley, *Violence and the Police: A Sociological Study of Law, Custom and Morality* (Cambridge: M.I.T. Press, 1970) at 10.

⁴ Comment, "Scotland Yard: Raub, Bertrug Bestechung," *Der Spiegel*, 18 Feb. 1980 162 at 162.

⁵ Harding, *Police Killings in Australia* (Ringwood, Vict.: Penguin, 1970) at 16.

⁶ *New York Times*, Nov. 26, 1979 at A21, col.

shootings were simply deemed justified by the police department concerned after an internal investigation has been conducted, an assessment which would usually receive the automatic *imprimatur* of the coroner. Yet, as has been demonstrated in a Chicago study, facts revealed even by cursory police investigations frequently raised a credible case of criminal misconduct by the police themselves.⁷ A later study has shown that between twenty-five and fifty percent of the victims were unarmed, and that the majority of such persons were fleeing from non-violent crimes such as car-theft or other larcenies.⁸ A third study, analysing 1,500 police killings in the United States, found that very few cases were referred for prosecution and that only three resulted in criminal punishment.⁹ In combination, this data gives cause for concern.

The Canadian situation is quantitatively far less alarming than that in the U.S., but the issues remain the same. In the nine-year period between 1970-78, ninety-three persons were killed by what the Ministry of the Solicitor-General terms "legal intervention." Of these, eighty-eight were killed by police use of firearms. The police of Quebec (with 38 victims) and Ontario (19 victims) dominated the statistics. In addition, between two and three times that number were wounded by police use of firearms,¹⁰ a figure that warrants concern inasmuch as the difference between a shot which kills and one which wounds is often fortuitous.¹¹

The Ontario Police Commission, which oversees the activities of all police forces in the province, has been slow to recognize police use of force

⁷ See Harding and Fahey, *Killings By Chicago Police, 1969-70: An Empirical Study* (1972-73), 46 S. Cal. L. Rev. 284; See also Milton *et al*, *Police Use of Deadly Force* (Washington: Police Foundation, 1977).

⁸ *Supra* note 6.

⁹ Kobler, *Police Homicide in a Democracy* (1975), 31 J. of Soc. Issues 163 at 164; See also Safer, *Deadly Weapons in the Hands of Police On Duty and Off Duty* (1971-72), 49 J. of Urban Law 565 at 566.

¹⁰ Statistics Canada: "Causes of Death, 1950-1960" Catalogue #84-514; "Causes of Death, 1958-1964," Catalogue #84-519; "Causes of Death" Annual (1965-1978), Catalogue #84-203; "Causes of Death" Annual (1970-1978), Catalogue #84-203. All prepared by the Ministry of the Solicitor General Statistics Division, March 1980. See also *Ministry of the Solicitor General, Statistics Handbook—Selected Aspects of Criminal Justice* (March 8, 1976) at 128.

¹¹ In fact, the use of the word "fortuitous" may be mis-stating the reality of the situation. The manner in which officers of the Metro Toronto Police Force are instructed to use their firearms necessarily means that the victim's chances for survival are slim. Officers are taught to shoot at the largest part of the body in order to have the maximum chance of stopping the person. The rationale for this approach is that in a stress situation where the officer's life is threatened, there may be many reasons for missing a small target such as an arm or a leg. In that case, missing the target by two inches may be significant, while if the shot is aimed at the torso, the bullet still has a good chance of stopping the person; *per* Staff Sgt. R. Devonshire, weapons training officer at the Metro Police College, testifying at the trial of Police Constables Inglis and Cargnelli in the shooting of Albert Johnson, Oct. 31, 1980. This thinking would seem to be borne out by the cases studied herein: in spite of their training, more than 30% of the shots fired by the officers involved (5 out of 14) missed their intended targets. It should also be added that the reported figures are likely to be understated, since some police forces have failed to make returns to the Ministry about this matter.

as being an important area of concern; only since 1978 has it collected data on the matter. In that year there were eighteen shootings, seven of them fatal; and in 1979 there were fifteen shootings, six of which were fatal.¹² These figures reflect a substantial increase over the earlier years of the decade, an increase which is in large part attributable to the fact that in the twelve-month period from August 1978 to August 1979 eight persons¹³ were shot and killed by members of the Metropolitan Toronto Police Force. It is for this reason that an examination of the use of police force in Toronto is an important component of the Ontario perspective and, indeed, of a Canadian perspective. Case studies from this period should begin to shed light, for the first time in Canada, on the appropriateness of the laws governing police use of force, police policy and tactics in this area and possible procedural defects in the administration of justice in such situations.¹⁴

II. THE LEGAL FRAMEWORK

A. The Criminal Code

In Canada the primary source of legal control over the use of deadly force lies with the federal Parliament by virtue of the *British North America Act, 1867*.¹⁵ The *Criminal Code*,¹⁶ enacted under the authority of section 91(27) of the *British North America Act, 1867*, creates a number of offences relating to death caused by unnatural means which are potentially relevant to the use of force by police. These include murder¹⁷ and manslaughter, the latter encompassing death "by means of an unlawful act"¹⁸ and "by criminal

¹² Interview with Walter Lee, Police Advisor to the Ontario Police Commission (March 3, 1980).

¹³ The eight victims within that one year period were Hans Nattinen, Andrew "Buddy" Evans, Steven Kalemis (see *infra* note 112), Michael Wawryniuk, William Elie, Aquilino Torcato, Albert Johnson and Paul Reid. The Misztal shooting referred to *infra* occurred in August 1977, and is included here as illustrative of a problem which seems to recur as a pattern in subsequent cases. The Reid case on the other hand is somewhat unique in that it involved the taking of a hostage. The facts were that Reid, age 16, an escapee from an adult training centre in Brampton, was holding a young girl at knifepoint in the top floor of a house. When it appeared that Reid was about to harm the girl, he was shot by Superintendent Frank Barbetta who had been attempting to negotiate with Reid: *Globe and Mail*, Aug. 24, 1978 at 5, col. 6.

¹⁴ It should, perhaps, be noted that an initial analytical defect stems from the very difficulty of obtaining access to the primary sources for this type of research, viz. the transcripts of inquests, because of the prohibitively high costs involved. At an inquest the evidence is recorded on tape and it is only transcribed upon request and for the fee of \$2.50 a page. The court reporter at the Coroner's Court indicated that to her knowledge, apart from parts of the *Evans* inquest, no request had been made for a transcript for any of the other inquests into police shootings. Because of the prohibitive cost of transcripts, the authors had to work out an arrangement with the court reporter to listen to the actual tapes in the courtroom itself. It is considered, however, that the methodology adopted by the authors i.e. interviews with counsel, perusal of newspaper reports and listening to the most obviously pertinent parts of inquest tapes and, where possible, attendance at trials or inquests, has sufficed for what may turn out to be only a preliminary study.

¹⁵ 30 & 31 Victoria, c. 3 (U.K.).

¹⁶ R.S.C. 1970, c. C-34.

¹⁷ *Id.*, ss. 212, 213.

¹⁸ *Id.*, ss. 205(5) (a), 217.

negligence.”¹⁹ Criminal negligence in turn involves proof beyond a reasonable doubt that the accused “showed wanton or reckless disregard for the lives or safety of other persons.”²⁰

Sections 25(1), 25(3), 25(4) and 27 of the *Criminal Code* also set out circumstances of justification for the infliction of death; these are potentially of great significance to the use of lethal force by police. Section 26, on the other hand, imposes criminal responsibility upon anyone who exceeds what is justified under sections 25 and 27.

Section 25(1) (b) is the general provision that justifies a police officer, where he is “required or authorized to do anything in administration or enforcement of the law,” to do that which he is authorized to do, provided that he acts on reasonable and probable grounds. If, objectively, he meets this criterion, then he may use “as much force as is necessary for that purpose.” What force is necessary, where death is caused, is limited by sections 25(3) and 25(4). Section 25(3) addresses itself to situations in which the police officer and his ultimate victim are in actual confrontation: a person “is not justified in using force that is intended or likely to cause death or grievous bodily harm unless he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or anyone under his protection from death or grievous bodily harm.” Section 25(4) is concerned with fugitive arrests and codifies the Canadian common law version of the fleeing felon rules:

A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, . . . is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.

The threshold legal question, in considering the scope of this section, is: when may a person be arrested without warrant? Section 450(1) supplies the answer to this question in a form which goes far beyond the original fleeing felon rule:

A peace officer may arrest without warrant

- (a) a person who has committed an indictable offence or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence,
- (b) a person whom he finds committing a criminal offence, or
- (c) a person for whose arrest he has reasonable and probable grounds to believe that a warrant is in force within the territorial jurisdiction in which the person is found.²¹

¹⁹ *Id.*, ss. 205(5) (b), 202, 203, 217.

²⁰ *Id.*, s. 202.

²¹ Note that s. 450(1) (b), in referring to a “criminal” offence, encompasses a mere summary offence.

In *R. v. Biron* [1976] 2 S.C.R. 56 at 74, 59 O.L.R. (3d) 409 at 422, 117 C.R.N.S. 109 at 117, the Supreme Court of Canada held that “finds committing” in s. 450(1) (b) is to be read “finds apparently committing”. As such, it refers only to factual and not legal guilt. Therefore, an officer may arrest someone who the officer believes on reasonable and probable grounds is committing a summary conviction offence whether or not that person could actually be found guilty in law and be convicted of that offence.

It has been held that the scope of section 25(4) allows a peace officer pursuing a person whom he is proceeding to arrest for theft to use his revolver to attempt to prevent the man's escape. Thus, in one case an officer, becoming tired while chasing a suspect, fired a shot with the intention of wounding the man. At the ensuing criminal trial, it was held that the officer was justified in his use of force to prevent the escape.²² In another case, a policeman was found to be justified when he fired what was intended to be a warning shot which ricocheted, killing the fugitive. The policeman had found the victim committing a theft, and when he began to be outdistanced in the chase he had fired the shot that caused the offender's death.²³ On the other hand, it has been held, in the context of the law of civil negligence, that an officer who is entitled by law to fire at a fugitive deliberately may nevertheless be negligent in permitting his firearm to discharge inadvertently, causing injury to the fugitive.²⁴ It is questionable how well this line of reasoning fits with the law of criminal negligence.²⁵ It does seem relatively clear, however, that in exercising his right to use force during the pursuit of a fugitive, a policeman will not be justified in showing wanton or reckless disregard for the lives and safety of innocent bystanders.²⁶

Section 25(4) confers immunity "unless the escape can be prevented by reasonable means in a less violent manner." This provision has also been the subject of judicial interpretation. It may be argued that there is an emerging theme that the question of what means are reasonable will vary with changing technology. Thus, in the 1907 case of *R. v. Smith*, it was noted that the jury must "bear in mind that the accused [a police officer who shot and killed a fleeing suspect] heard the clatter of a horse and buggy following him" so that he might have called upon this conveyance to help him in his pursuit of the victim, who was escaping on foot, as an alternative to shooting him.²⁷ In a more modern setting, Thurlow J. indicated what facts the jury should consider in determining whether or not reasonable and less violent means were available to prevent the escape of a fleeing suspect:

Nor am I satisfied . . . that all other means of preventing McDonald's escape had been exhausted. Hilker [the police officer who fired the shot that killed one of the passengers in the car in which McDonald was fleeing] and Sandford had a police patrol car in working order, with which they could give chase. It was equipped with a radio with which they could keep in contact with Constable Keary. Hilker knew that the chase had been going on for some time and that

²² *R. v. Smith* (1907), 7 W.L.R. 92, 17 Man. R. 282, 13 C.C.C. 326 (K.B.).

²³ *Maratzear v. C.P.R.* (1920), 69 D.L.R. 230, 27 R.L.N.S. 81, 37 C.C.C. 297 (Que. Ct. of Review).

²⁴ *Beim v. Goyer* [1965] S.C.R. 638, (1965), 57 D.L.R. (2d) 253, [1966] 4 C.C.C. 9.

²⁵ It is inherently illogical to argue that an act, if done advertently, is completely justifiable in law; yet, if done inadvertently will be criminally negligent in that it shows "wanton or reckless disregard for the lives or safety of other persons." The criminal law normally proceeds on the basis that acts are *more*, not less likely to be criminal if done advertently.

²⁶ *Priestman v. Colangelo*, [1959] S.C.R. 615, 19 D.L.R. (2d) 1, 124 C.C.C. 1; *A.G. Can. v. Sandford* (1957), 11 D.L.R. (2d) 115, 118 C.C.C. 93 (Ex. Ct.).

²⁷ *Supra* note 22, at 96 (W.L.R.), 287 (Man. R.), 331 (C.C.C.).

Constable Keary had been and still was in close pursuit; he knew that Constable Keary had radio communication close at hand with which he might summon further assistance. . . . He does not suggest in his evidence that his firing was the only means left of stopping the Chevy car but says that he felt the possibility of hitting a tire and thus stopping the car was very good. In my opinion, his firing was done without regard to the question of whether or not there were other less violent means available for preventing McDonald's escape and when there were, in fact, other means for accomplishing that purpose in a less violent manner.²⁸

Whatever the circumstances, *R. v. Smith* remains authority for the proposition that "[s]hooting is the very last resort. Only in the last extremity should a police officer resort to such a dangerous weapon as a revolver in order to prevent the escape of an accused person who is attempting to escape by flight."²⁹

Despite the refinements created by the case law, one can say that section 25(4) has adopted the common law fleeing felon rule and has gone far beyond it, so that now virtually every type of criminal activity can lawfully attract the use of deadly force by police to prevent the suspect's escape. It is pertinent to remind oneself of the social and historical origins of the common law rule. At one time all felonies (and treason) were capital offences so that it could be presumed that a suspected felon facing death upon capture would be desperate to evade capture, to the point of being prepared to kill the person seeking to arrest him. Moreover, the means of subsequent detection were crude and inefficient, so that unless apprehension could be immediate there might well be no apprehension at all. With those factors in mind, and in view of Canada's abolition of capital punishment,³⁰ the penal justification for the use of lethal force in making a fugitive arrest is anachronistic, bearing no relation to present realities.

This rule of fugitive arrest has been subjected to criticism and amendment in numerous jurisdictions. In Australia, for example, where the formal legal position has been judicially developed to a point equivalent to section 25(4), the Federal Law Reform Commission has stated:

It appears to the Commission that the fleeing felon rule is too draconian for modern conditions. It is most clearly inappropriate where the identity of the offender is known and where there is every reason to suppose that he is not dangerous. The use of force likely to result in death or grievous bodily harm should not be a power available at large, but only one which is exercisable when reasonably necessary under all the circumstances. . . . The predominant criterion of whether the use of lethal or dangerous force is justified should be the dangerousness of the fleeing offender.³¹

In the United States, the American Law Institute's *Model Penal Code* takes a similar approach. In fugitive situations the use of deadly force will

²⁸ *Sandford*, *supra* note 26, at 127 (D.L.R.) 105 (C.C.C.).

²⁹ *Supra* note 22, at 95 (W.L.R.), 286 (Man. R.), 330 (C.C.C.); See also *Sandford*, *supra* note 26, at 126 (D.L.R.), 103-104 (C.C.C.), where this passage was cited with approval.

³⁰ *The Criminal Law Amendment Act (No. 2)*, 1976, S.C. 1974-75-76, c. 105.

³¹ Australian Law Reform Commission, *Report No. 2 (Interim), Criminal Investigation* (1975), para. 54.

be justified only when the felonious conduct itself involves a substantial risk that the person to be arrested will cause death or serious bodily harm if he escapes.³² Seven states, including New York³³ and Illinois,³⁴ have enacted versions of this Code. A further eight states, while formally adhering to the fleeing felon rule, have allowed state courts to establish the specific circumstances in which deadly force may be used.³⁵ An argument, based on the American *Bill of Rights*, that a rule which permits the use of deadly force to apprehend a non-dangerous fleeing felon contravenes the felon's right not to be deprived of life without due process appears now to have run into a *cul-de-sac*.³⁶ One can say, nevertheless, that the fugitive arrest rule is a matter of genuine concern and debate in the United States, even though the great majority of jurisdictions adhere to a legal position essentially similar to that of section 25(4) of the *Criminal Code*.

The remaining legal source of justification, section 27, relates to the use of force to prevent the commission of an offence. Anyone, not just a police officer, will be justified in using as much force as is reasonably necessary to prevent the commission of an offence (i) for which, if it were committed, the person committing it would be liable to be arrested without warrant, and (ii) which would be likely to cause immediate and serious injury to the person or property of anyone. Reasonably necessary force may in principle include deadly force. While the first prerequisite, paralleling section 25(4), seems unduly wide in that such a wide range of offences are subject to arrest without warrant, the second prerequisite limits the scope of the section. Although the inclusion of threats to property as a sufficient threshold is not completely satisfactory, the section nevertheless avoids the major criticism levelled at section 25(4) by establishing a better balance between the competing interests.

As noted earlier, section 26 provides that a person who is authorized to use force will nevertheless be criminally responsible for use of such force to excess, "according to the nature and quality of the act that constitutes the excess." Thus, where a police officer uses force which falls outside the protection of the relevant section of the Code and kills a person in doing so, he may be guilty of manslaughter or even murder.

³² *Model Penal Code*, (Proposed Official Draft, 1962) § 3.07(2)(b)(iv)(1)(2); See also Farris, *Substantive Due Process and the Use of Deadly Force Against the Fleeing Felon* (1977-78), 7 *Cap. U. L. Rev.* 497.

³³ *N.Y. Penal Law*, §35-30(1)(a) (McKinney, 1975).

³⁴ *Ill. Rev. Stat.*, ch. 38, §7-5(a)(2) (1973).

³⁵ See Farris, *supra* note 32, at 498.

³⁶ In the American case of *Mattis v. Schnarr*, 547 F.2d 1007 (8 Cir. 1976), the Court of Appeals held a fleeing felon statute which permitted the use of deadly force to prevent the escape of a non-dangerous felon to be unconstitutional as a deprivation of the felon's right to life without due process of law. However, the Sixth Circuit Court of Appeals, in *Wiley v. Memphis Police Dept.*, 548 F.2d 1247, 76 U.S.L.W. 3215 (6 Cir., 1977), upheld the Tennessee statute permitting the use of deadly force to prevent a non-dangerous felon's escape. The United States Supreme Court has declined to resolve the conflict between the decisions of the two Courts. See Farris, *supra* note 32.

B. *The Police Act of Ontario*

The next level of control exerted on police use of potentially lethal force is in the hands of the provinces under their power to make laws for the administration of criminal justice.³⁷ Only Ontario and British Columbia have in fact asserted their jurisdiction in this area by attempting to regulate the use of firearms in law enforcement. The other provinces have either left the development of policy in this area to the R.C.M.P. or have only made a token legislative intervention.³⁸

The operative provision under *The Police Act* in Ontario is Regulation 679.³⁹ The British Columbia regulations are identical.⁴⁰ Section 8 of Regulation 679 deals with situations in which the officer is permitted to draw his revolver, and section 9 regulates the circumstances in which he may thereafter discharge it. Section 8 requires merely a subjective belief by the officer that the drawing of his gun is necessary for the protection of life or the apprehension or detention of a person whom he believes to be dangerous. Section 9, on the other hand, requires that before deadly force can be used, other means of arrest must be insufficient and that the officer should believe, on reasonable and probable grounds, that the person being arrested is "dangerous."

It is submitted that the formulation of the rule in British Columbia and Ontario regulations requiring the offender to be "dangerous" has not effectively added anything to the *Criminal Code* restrictions or police discretionary use of firearms. In an American case⁴¹ the Court concluded that when a felon escapes pursuit he is free to commit other felonies and must therefore be considered dangerous for the purposes of the State's legislation or police use of deadly force. Whether or not the same broad interpretation of the "dangerous" requirement would be adopted by the two Canadian jurisdictions is not clear; however, the scope for such an interpretation does exist. In fact a recent report commissioned in Ontario⁴² pointed out the problems with the sections as they stand with respect to the word, "dangerous," and its possible broad application. In recognition of this problem the Report recommends that "dangerous" be removed from sections 8 and 9(b) of Regulation 679 and that the words "of a person whom he believes may

³⁷ *The British North American Act, 1867*, 30 & 31 Vict., c. 3, s. 92(14) (U.K.).

³⁸ Alberta is one province that has made a token gesture in the regulations of its *Police Act*, R.S.A. 1970, c. 278, to assert jurisdiction over the use of firearms by municipal police by making it an offence to one who "fails to exercise discretion and restraint in the use and care of firearms" (A. Reg. 179/74, s. 17(i)(iii)). *The Police Act* of Prince Edward Island, R.S.P.E.I. 1974, c. P-9, provides an example of a statute whose only reference to firearms control is through the *Criminal Code* of Canada. Section 8 grants to its municipal police officers "all the powers, privileges, rights and immunities conferred upon any policeman, police constable, constable or peace officer under the *Criminal Code*..."

³⁹ R.R.O. 1970, R. 679.

⁴⁰ B.C. Reg. 602/77, s. 4(1)(2).

⁴¹ *Wiley*, *supra* note 36.

⁴² *Report on the Task Force on the Use of Firearms by Police Officers*, Judge F. John Greenwood, chairman (submitted to the Solicitor General of Ontario, November 1980).

cause death or grievous bodily injury to some person," be substituted therein.⁴³

Two comments should also be made about Regulation 679, subsections 8 and 9, as it stands. First, in adopting the desirable criterion of the dangerousness of the offender, *The Police Act* cannot, of course, in any way derogate from the policeman's right to use deadly force conferred by the *Criminal Code*. Consequently, the only sanction for its breach is administrative, a job sanction within the police service. From the policeman's point of view, the differing standards of expected conduct are likely to be confusing, and from the public's point of view *The Police Act* sanctions must seem ineffective. Second, it is desirable that such an important area of social policy should be dealt with uniformly throughout the country, especially in a policing context where members of one police force—the R.C.M.P.—may well find themselves carrying out their duties in different provinces in the course of their careers. The *Criminal Code* is thus the appropriate place in which to express whatever law enforcement policy is finally adopted.

C. *Additional Guidelines*

It is commonplace for individual police departments to have their own internal guidelines on the use of firearms.⁴⁴ The importance of such a practice is inversely proportional to the degree of generality with which the main rules are legislatively expressed:

A clearly stated policy removes much of the uncertainty that can surround many situations confronting both individual officers and department administrators, and will certainly help to resolve subsequent legal issues that may arise after a shooting incident.⁴⁵

While the additional guidelines cannot conflict with, or derogate from, the law as laid down by the *Criminal Code* and, in Ontario, by *The Police Act* regulations, they may attempt to implement *de facto* greater restrictions or to clarify the scope of the authority granted to the police by law. One should be aware, however, that it is a common feature of many police departmental firearms policies, at least in the United States, that they seem to be more restrictive than they really are:

The Kansas City Police Department, for example, on the first page of its firearms order, states: "[a]n officer is equipped with a firearm to defend himself or others against deadly force, or the threat of imminent deadly force." Two pages later, the policy authorizes the use of deadly force against certain fleeing felons regardless of immediate danger.⁴⁶

Another American police department, in the south-west, had until 1968 a policy which in its entirety read: "Never take me out in anger; never put me back in disgrace."⁴⁷

⁴³ *Id.* at 12, 13 and 35. Note that the recommendation for s. 9(b) refers to "bodily harm."

⁴⁴ See Milton, *supra* note 7, at 43-59.

⁴⁵ *Id.* at 59.

⁴⁶ *Id.* at 48.

⁴⁷ *Id.* at 47.

In Canada generally, and especially outside of Ontario and British Columbia, the scope of discretion that is left in the hands of individual officers by the statutory provisions is apparently vast. If the *Criminal Code* were the only source of guidance in the use of deadly force, police officers would often find themselves making policy in individual cases, rather than being the instruments through which a clear policy is applied to a given set of facts. On the one hand,

Police discretion is absolutely essential. It cannot be eliminated. Any effort to eliminate it would be ridiculous. Discretion is the essence of police work, both in law enforcement and in service activities. Police work without discretion would be something like a human torso without legs, arms, or head.⁴⁸

On the other hand, there exists a real interest in limiting and guiding that discretion:

The reason [for limiting and guiding discretion] is that out of a thousand officers, no matter how well screened, a large portion may be expected to abuse their power to a considerable extent, and some—perhaps only a few—are likely to engage in occasional abuse of power that is quite serious. This statement about the basic nature of the human being is not controversial.⁴⁹

The Metropolitan Toronto Police Department internal policy on the use of force restates the fact that the use of firearms is governed by the *Criminal Code* provisions and by *The Police Act* Regulation 679. What further regulations the Department may have on firearms use, however, were not made available for the conducting of this research and are not available to the public generally.⁵⁰ This is indeed unfortunate, for if the issue of controlling the use of force by the police is to be dealt with effectively, ultimate control

⁴⁸ Davis, *Police Discretion* (St. Paul: West, 1975) at 140.

⁴⁹ *Id.* at 143-44.

⁵⁰ *The Royal Commission Inquiry into Civil Rights* (Toronto: Queen's Printer, 1971) [hereinafter, the *McRuer Report*] was indeed critical of the rules that allowed this situation to exist. Section 16 of *The Police Act* states that a "board may by by-law make regulations not inconsistent with the regulations under section 72 for the government of the police force, for preventing neglect or abuse, and for rendering it efficient in the discharge of its duties", but as was stated at 2131-32 of the *McRuer Report*:

By reason of the definition of "regulation" in the Regulations Act, no regulation or by-law passed by a board under the section . . . is subject to the filing and publication provisions of that Act. The result is that regulations and by-laws passed by boards of commissioners of police which are part of the law of Ontario are not available to the members of the public affected by them.

....

No doubt, it would not be practical to have all regulations governing all police forces approved by the Lieutenant Governor in Council. Nevertheless, there should be some control over regulations made by a by-law of a board of commissioners of police passed under section 15 [now s. 16] and some central place where they may be seen by members of the public. We have been advised that at least one board has refused public access to such by-laws. They are part of the law of Ontario and should be open to the public.

We recommend that all regulations made by boards of commissioners of police . . . be approved by the Ontario Police Commission, be filed with it and be open for public inspection. Despite these recommendations and the passage of time, the law has remained unaltered. Access to the regulations is still denied: letter from Deputy Chief of Police James Noble to John Abraham (December 5, 1980).

must lie with the public itself and police discretion must be exercised in accordance with society's values. Yet the lack of availability of police department internal regulations makes enlightened public review and assessment impossible. In the final analysis one must look to the political complacency or indifference which permits this form of police insulation to continue to exist as the source of this failure.

III. EXPECTED PATTERNS OF POLICE USE OF DEADLY FORCE

This topic has hitherto received no attention in Canada. By contrast, in the last decade there has been a substantial amount of research in Australia⁵¹ and the United States.⁵² The tone and style of Canadian policing can be expected to be related to that in each of those countries: Australia, because of the common nexus with British traditions and also because of strikingly similar geographic and demographic features and the United States because of its pervasive influence over so many aspects of Canadian social development. That being so, it is instructive to consider what patterns are present in the police use of deadly force and the community control of it in those two countries. This will provide a context in which to assess that part of the Canadian picture which was examined.

A. *Confrontation Arrests*

In both countries, encounters with violent offenders who had a present ability and an apparent willingness to continue to use violence to avoid arrest were the most common occasions during which police used deadly force.⁵³ Overwhelmingly, the victim was armed with a firearm; but offenders armed with such disparate weapons as knives, fernhooks, iron-bars and heavy dog-chains were also killed by police.⁵⁴

Such killings fall most clearly within the area of legal justification and social acceptability, particularly when the victim himself possesses a firearm. If the police officer or another citizen is genuinely endangered, or reasonably thought to be endangered, there can be no sensible basis for criticizing the officer involved.

This latter point leads on to a sub-theme, tangibly present in the United States though barely hinted at in Australia—that of the “throw-gun”. The temptation for police authorities to move a killing of dubious legality into the category of justifiability, by the simple expedient of putting an unregistered handgun on the corpse and constructing an appropriate tale around

⁵¹ See Harding, *Police Killings in Australia*, *supra* note 5; Harding, *Changing Patterns of the use of Lethal Force by Police in Australia* (1975), 8 *Aust. and N.Z. J. of Criminology* 125.

⁵² Milton, *supra* note 7; Kobler, *supra* note 9; Safer, *supra* note 9; Farris, *supra* note 32; Harding and Fahey, *supra* note 7.

⁵³ See Harding (1975), *supra* note 51, at 126-7; Harding and Fahey, *supra* note 7, at 292-93; Milton, *supra* note 7.

⁵⁴ See Harding (1975), *supra* note 51, *passim*; Harding and Fahey, *supra* note 7, at 293.

this fact, has sometimes been too great to resist. By its very nature it is not an easy phenomenon to document.⁵⁵

B. *Fugitive Arrests*

As mentioned earlier, a disquietingly high proportion of killings by American police fall into this category. Such cases inevitably raise the question of the appropriateness of the legal rule itself.⁵⁶ In turn, the very existence of the legal rule almost invites ill-considered or even reckless practices by police in the use of firearms. Thus, minor criminals, possessing no dangerous propensities, may be killed, while bystanders and other police officers are placed at great risk.⁵⁷

C. *Training and Tactics*

The above mentioned point leads to another prominent theme, that of poor training and tactics. In this context, *Police Tactics in Armed Operations*, an important new treatise by Greenwood⁵⁸ is worth noting. In this work, Greenwood, an experienced English police superintendent, places tactical and training considerations within a strategic context, thus providing a theoretical framework within which to analyse police use of deadly force. Greenwood begins by drawing the distinction between imprecise operations, in which the object is to locate, and precise ones, in which the object is to arrest. He points out the dangers of confusing the two and of permitting them to merge. He emphasizes, too, the crucial importance of "containment," that is the stabilizing of a situation, if possible, in order to gain time to plan and organize the details of an operation. Greenwood then considers, in a practical way, tactics which would be appropriate to a wide variety of armed operations, but always with the same objective—to minimize the danger to the police, the public and the criminal as well. The criminal, seeing exactly where he stands, is more likely to make a realistic assessment of the wisdom of surrender, while the police, possessing the self-confidence of well-trained and firmly commanded men seeking to attain a precise objective, will not shoot unnecessarily or indulge in such dangerous practices as firing warning or wounding shots. By the same token, when the moment of final confrontation does arrive, the moral and legal positions of the police will intersect with their skills so as to justify completely the use of deadly force.

This is not the place to develop Greenwood's arguments comprehensively. What his book highlights is the lack of an overall strategy in the police use of firearms. In the United States, the Hollywood-style "shoot-out" has been altogether too familiar a spectacle, while in Australia a fundamental

⁵⁵ See Harding and Fahey, *supra* note 7, at 292-93, 291-98, and the Thomas O'Malley case file referred to at 293 n. 28.

⁵⁶ *Supra* note 30 and see text accompanying notes 6-8, 20-36, *supra*.

⁵⁷ See Harding (1975), *supra* note 51, at 133-35.

⁵⁸ (Boulder, Colorado: Paladin Press, 1979).

The author is not to be confused with the author of *The Report on the Task Force on the Use of Firearms by Police Officers*; *supra* note 42.

ambivalence and uncertainty among the police has led to a situation in which shootings have sometimes been engaged in too readily. Other times, the gun has been used dangerously as a symbol of authority.

D. *The Operation of the Criminal Justice System*

As already described, a virtually impassable filter prevents killings by police being tested by criminal proceedings. This is so even where it can be demonstrated that there exists a *prima facie* case of such a strength which, had the killing been committed by someone other than a policeman, there would have been a laying of a criminal charge. The analysis thus far suggests that police are virtually immune from the threat of criminal proceedings,⁵⁹ which is tantamount to being above the law. There are several factors which explain why this has been so in Australia and the United States, factors which might be expected to be no less true in Canada. Foremost among these factors is that the police are the principal investigators of incidents of police use of deadly force. Westley describes the context in which this dominance over investigation operates:

Public hostility includes the policeman in his symbolic status. It includes an assessment of collective responsibility or guilt by association, in terms of which every member of the force is made responsible for the actions of the individual officer. The result is that the individual policeman finds that his own interests have been forcibly identified with those of the group. Any action that incriminates or smears a member of the force has the same impact on all the others before the bar of public opinion. . . .

Through the hostility and through the stereotype, the police become a close, social group, in which collective action is organized for self-protection and an attack on the outside world. These become expressed in two major rules. The vehicle of self-protection is the rule of silence—secrecy. The vehicle of attack is the emphasis on the maintenance of respect for the police.⁶⁰

This is not merely sociological theorizing. It has been demonstrated⁶¹ that the police inexplicably run into blank walls when investigating such incidents, fail to follow obvious lines of important inquiry, and anticipate too readily what their investigation will ultimately reveal. Exclusive or dominant police control over such investigations constitutes an enduring barrier against thorough and skeptical law enforcement.

Of course, police are not the exclusive charging authorities in either Australia or the United States. If, in a given set of circumstances, it is clear that there is a triable criminal case, why does not some other authority—the State's Attorney, the Coroner, the Crown Law Department, the Special Prosecutor—initiate the criminal process? The reasons are twofold: either such authorities are completely dependent on the result of the police's own investigation, or, where they possess a theoretically independent investigative function, they are concerned with the need to maintain day-to-day, ongoing

⁵⁹ See Harding (1970), *supra* note 5, *passim*; Harding and Fahey, *supra* note 7, *passim*.

⁶⁰ Westley, *supra* note 3, at 110-11.

⁶¹ Harding (1970), *supra* note 5, at 100-103, 126-28, 178-80.

co-operation with police authorities for the satisfactory execution of their tasks.⁶²

IV. TORONTO PATTERNS OF POLICE USE OF DEADLY FORCE

The most notable feature of the small sample of cases examined is the complete absence of the use of deadly force against fleeing felons. Whether this was fortuitous or planned, the authors could not be sure. Evidence that was given at the inquest into the death of Andrew (Buddy) Evans, however, suggests that the view was held at the training level that section 25(4) of the *Criminal Code* was far too wide in its scope and was not taught to police recruits in those terms. That is not necessarily to say that this represented a considered view and policy of the training staff generally, but it certainly was an operative point of view:

Question (to Staff Sergeant Clive Paul, instructor at the Aylmer Police College): What did you teach then? And did your superiors know this?

Answer: I'm not sure if they did. Each instructor is allowed a certain degree of latitude in his class, and this is one section I have never liked and have steered away from. I know it is in the criminal law, I know it is written that way, but as a policeman of many years I use a rule of thumb. If somebody is coming at you, by all means use what necessary force you need to defend yourself. If, however, he has his back to you, he is running away, presenting no danger, I never would personally, shoot the man who is running away no matter what offence it is. That is my personal opinion.⁶³

This view is not just more restrictive than that of section 25(4) of the *Criminal Code* but even than that of section 9 of Regulation 679 of *The Police Act*. It would be instructive to discover whether the absence of fugitive deaths was uniform in Toronto and throughout Canada.⁶⁴

A second feature, much less surprising was the absence of any hint that the "throw-gun" technique has been used in Toronto. Even if present, such a phenomenon is exceedingly difficult to identify. Further, it may be that "throw-gun" practices are characteristic of a much higher kill-rate than exists in Toronto.

The bulk of the Toronto cases, in fact, were confrontation situations of clear legal justification. Yet, as will be seen, each case also raises to some extent the question of police tactics and training for armed operations. The victims in the cases of this type considered here were: Alexander Misztal, William Elie, Acquilino Torcato, Hans Nattinen and Michael Wawryniuk.

A. *Alexander Misztal*

On August 15th, 1977, police received at least five telephone calls from area residents complaining that a man had threatened them with a gun.

⁶² See Harding and Fahey, *supra* note 7, at 296, 298-300.

⁶³ *Evans Inquest*, Coroner's Court, Municipality of Metropolitan Toronto, Proceedings of Sept. 7, 1979, at 29.

⁶⁴ The phenomenon of fugitive shootings does exist to be studied in Canada, however. On November 8, 1980, a prison escapee was shot in Toronto while being pursued on foot by an R.C.M.P. corporal. The man was unarmed at the time. (*Globe and Mail*, Nov. 10, 1980 at 5), col. 5.

Constables Abraham Bailey and Robert McKinley, responding to a radio call regarding the complaints, arrived at the scene prior to an Emergency Task Force (ETF) unit that was also notified of the complaints. The two constables sighted a man walking and Constable Bailey called to him, saying: "Sir, come here. I would like to talk to you." The man started walking past the car, and Bailey again spoke to him, saying: "Sir, stop. I want to talk to you." The man turned around and came to the door of the police cruiser. He then pulled up his clothes with his left hand and pulled out a revolver with his right, pointing the gun inches from Bailey's face. Bailey, who had his gun drawn and placed between his right leg and the inside of the car door, raised his revolver and fired two shots through the open window, hitting the man in the chest and killing him.⁶⁵ The officers then got out of the car and one of them kicked the gun out of Misztal's hand, at which point they realized that it was a toy because of the odd, clattering sound it made when it hit the sidewalk.⁶⁶

The shooting death of Misztal was clearly justifiable under the provisions of section 25(3) of the Criminal Code. Constable Bailey was acting on reasonable and probable grounds pursuant to his duty to investigate what was probably a criminal offence. When he subsequently raised his gun and shot Misztal, he did what he believed, on reasonable and probable grounds, to be necessary for the preservation of his own life. The fact that it was later ascertained that the gun was a toy gun did not detract from the reasonableness of Bailey's belief. The replica was very realistic and was described as a "collector's item" of the sort bought for display by those collectors who did not want to put a real revolver on display.⁶⁷ The jury at the coroner's inquest into the incident found that under the circumstances the officer's life was in jeopardy, that Bailey's conclusion to the same effect was justifiable, and that he acted appropriately "in circumstances where there was no feasible alternative."⁶⁸

Yet, when one recalls Greenwood's analysis of tactics, one wonders whether the situation should ever have arisen. By remaining seated in their cruiser, the policemen left themselves in the worst possible place to contain or stabilize a potentially dangerous situation: the suspect was mobile while they were static. Their very tactics enabled Misztal to put them in a position of apparently mortal danger, thereby creating the need and the legal justification for killing him. To say this is less to criticize the young officers than to raise questions concerning the quality of their training.

B. *William Elie*

The incident which led to Elie's death began with a telephone call at 8:00 p.m. wherein the caller stated that he and a friend had been threatened

⁶⁵ Constable Bailey, *Misztal Inquest* testimony, *Globe and Mail*, Nov. 22, 1977, at 5, col. 3.

⁶⁶ *Globe and Mail*, Aug. 17, 1977 at 5, col. 4.

⁶⁷ *Toronto Star*, Aug. 17, 1977 at B1, col. 1.

⁶⁸ Verdict of the Coroner's Jury in the *Misztal Inquest*, Nov. 22, 1977.

by a man with a gun in the elevator of a high-rise apartment building near a shopping mall. The description of the man was passed on to the police officers on duty in that area. The description was found to match Elie, who had a criminal record dating back to 1972, including a number of assault and weapons charges.⁶⁹

At about 8:30 p.m., Elie drove his white station wagon into the parking lot of the shopping mall. He got out of the vehicle and started walking towards the beer store. Almost simultaneously, three police cars, one of which was unmarked, entered the parking lot. Five police officers jumped from their cars with their guns drawn and shouted a number of orders at Elie, who until this time was completely unaware of the police presence.⁷⁰ Elie's reaction was to draw what was apparently a revolver and to turn to face the police with his right arm extended in front of him, holding the apparent gun. It seemed reasonable and probable to the police that Elie would shoot at them.⁷¹

The first shot fired hit Elie in the chest and passed through him. It was later found on the floor of the L.C.B.O. store in the mall. Following this, according to one eyewitness, Elie again raised the gun. The officers fired four shots in what was described as a "volley."⁷² Two missed Elie, one struck him in the chest and another hit him in the head. Of the two that missed, one was never found and one was later discovered in the ceiling of the *Dominion* store in the mall. The whole incident, from the moment the police first shouted to Elie, lasted between five and ten seconds.

In its verdict, the Coroner's jury stated:

[the] gunshot wounds [were inflicted] by police officers in their line of duty. . . . We the jury unanimously agree that under the circumstances the officers had no alternative but to take the action they did.⁷³

Evidently, the officers were justified in their actions under section 25(3) of the *Criminal Code*. The testimony of the officers to the effect that their own lives or the lives of other officers were threatened supports such a conclusion. The fact that Elie was armed only with a toy gun would not affect this conclusion, since it was found that the gun bore a genuine resemblance to a real gun, and that it would therefore be reasonable for the officers to believe that Elie was in fact armed with a real gun.

Nevertheless, the appropriateness of the police response to the Elie situation must be reviewed critically, for that response raises questions regarding police tactics in general. The coroner's jury recommended that "police offi-

⁶⁹ *Globe and Mail*, May 10, 1979 at 5, col. 2.

⁷⁰ The evidence at the inquest indicated that some officers shouted, "Freeze," another shouted, "Drop it," yet another said, "This is the Police, Drop it." (Summation of Counsel for the family, *Elie Inquest*, June 15, 1979.)

⁷¹ Summation of Counsel for the police officers involved, *Elie Inquest*, June 15, 1979.

⁷² *Id.*

⁷³ Verdict of the Coroner's Jury in the *Elie Inquest*, June 15, 1979.

cers take a protected position before taking any vital course of action."⁷⁴ Implicit in this recommendation is the recognition that the police did not fully consider the consequences of their chosen course of action. As the jury noted: "A few seconds delay may result in a saving of a life or lives."⁷⁵

That the police failed to assume protected positions before initiating the confrontation is only one criticism that may be levelled against their tactics. The whole plan of attack suffered from a lack of co-ordination. For example, until the three police vehicles arrived at the plaza, none of the officers was aware that the others would be there to back them up.⁷⁶ Why it was necessary, moreover, for them to approach Elie with guns drawn is unclear; Elie was walking towards the beer store with his back to the police and there was no suggestion that he was about to rob the store. Indeed, it appears that Elie was entirely unaware of the police until after they had called to him.⁷⁷ Even that calling was not the single command of one officer, but rather the mixed, and perhaps confusing, commands of all.⁷⁸ The greatest failing of police tactics, then, was the utter failure to take advantage of the element of surprise; instead, they impulsively created a highly pressured and dangerous situation to which the victim's reaction was unpredictable.

In these circumstances it is likely that, had one of the errant police bullets struck an innocent bystander, a cause of action against the police for negligence would have arisen. This possibility stems from the police having chosen to force a confrontation in a crowded public place without due regard for the safety of others. The whole incident, in fact, was a text-book example of how not to conduct an armed operation efficiently. The question of legal justifiability arose only as a consequence of operational incompetence.

C. *Aquilino Torcato*

On the morning of June 11, 1979, Aquilino Torcato died from a gunshot wound to the head, fired by P.C. Clark of the ETF. Torcato had a history of heavy drinking. Consequently, on June 5, 1979, his wife left him, taking with her the couple's son and daughter. On the morning of June 11, he was alone in his house at 590 Palmerston Avenue.⁷⁹ Sergeant R. Prior and Constable R. Dunford arrived shortly before 1:00 a.m. to investigate a complaint and found two teenagers wrestling in the street. The officers approached the youths to ask for identification and were informed by them that they had heard noises behind the Torcato house. Sergeant Prior detained

⁷⁴ *Id.* This recommendation is only a limited response to the issues raised in relation to the police procedure at the shopping mall and the inquest verdict is disappointing in this respect.

⁷⁵ *Id.*

⁷⁶ See the testimony of P.C. Graham, *Elie Inquest*, June 12, 1979.

⁷⁷ At the inquest it was stated to be "proper procedure" for the officers to draw their guns in a situation such as this and to shout "freeze" or words to that effect: *supra* note 70.

⁷⁸ *Supra* note 73.

⁷⁹ Testimony of Emilia Torcato, *Torcato Inquest*, Sept. 24, 1979.

the two and sent Constable Dunford around behind 590 and 588 Palmerston Avenue to investigate. On his way back out to the street, Dunford was shot at through a window at 590 but was not injured.

The officers reacted by calling for assistance. By 1:22 a.m., when the ETF unit arrived, three more shots had been fired, all apparently within the house.⁸⁰ At 1:40 a.m., Sergeant Burke, a trained negotiator, arrived.⁸¹ At 2:00 a.m. the police extinguished the street lights on Palmerston Avenue and the ETF members took up their positions blocking off the side streets and surrounding the Torcato house. Until the men had taken up their positions no attempt had been made to contact Torcato. Finally, at 2:30 a.m., Constable Douglas Clark, the leader of the ETF unit, was informed that attempts to reach Mr. Torcato by telephone had been unsuccessful. At this point, he decided to attempt entry into the house.

Still uncertain as to the proper name of the occupant, Clark approached the front door of the house and found it locked. Kicking it three times, he called: "Aquilino Torquillino, this is the police, throw down your weapons, come out the front door, you won't be hurt."⁸² He repeated these words several times and, upon hearing no response, retreated from the house.

At 2:40 a.m., as a result of the failure to make verbal contact with Torcato and because there was a perceived danger to members of the ETF and the public, the decision was made by the command post to fire tear gas into the house. Three cannisters were fired over the next nine minutes as the police waited. More shots were heard coming from within the house. Clark continued to call to Torcato, repeating the same phrases used in the first attempt at contact. It was not until 3:10 a.m., however, twenty-five minutes after the first use of tear gas, that the trained negotiator, Sergeant Burke, attempted to get through to Torcato, using a bull horn.⁸³ During these hours, a total of three officers (including P.C. Clark and Sergeant Burke) had attempted to establish contact with Torcato; none of them was successful.

The officers continued to wait, periodically repeating their attempts to speak with Mr. Torcato. At 4:30 a.m., another round of tear gas was fired into the house, precipitating the final chain of events. Although no further shots were heard to come from within, at 4:52, calls of "Help me. Help me. Help Me." repeated over and over, emanated from the house, apparently from the basement. The police had by this time concluded that Torcato was alone in the house. They were, however, apparently unaware of his possibly

⁸⁰ Testimony of Sgt. R. Prior, *Torcato Inquest*, Sept. 25, 1979.

⁸¹ In 1977, a 32 member team of negotiators was chosen from the ranks of the force and trained to work in concert with the ETF in hostage-taking incidents and on occasions such as this. Sgt. Burke was in charge of the negotiating team in the *Torcato* case and he testified that this was the first incident of this type in which he had been involved since that training. (Testimony of Sgt. E. Burke, *Torcato Inquest*, Sept. 26, 1979.)

⁸² Testimony of P.C. Clark, *Torcato Inquest*, Sept. 27, 1979.

⁸³ Although Clark was in command of the E.T.F. unit, he testified at the *Torcato Inquest* that he was not aware of the use of the bull horn at any time during the morning. (Sept. 27, 1979)

drunken state and there had been no effort made to contact his wife or children.⁸⁴

At 4:56 a.m., concerned that Torcato may have been hurt and conscious of the continuing danger to the members of the ETF unit on the street, the police decided that Constables Clark, Draper and Doyle should again try to enter the house. Clark later stated on cross-examination that, had it not been for the repeated cries of "help," they would not have entered the house at this time.⁸⁵ The wisdom of moving, however, from a contained situation (for the ETF unit should have been able to place itself in a safe position) to a dynamic and unpredictable one may be questioned.

Be that as it may, once inside, the constables "cleared" the house entirely, leaving the basement, from where the calls for help continued to come, until the last. By the time the officers had stationed themselves in the kitchen, the tear gas had effectively cleared and their vision was not impaired. The situation was once more contained and stable. Clark, however, then turned on the basement light from a switch at the top of the stairway leading to the basement and called: "Aquilino, throw down your weapon, come to the base of the stairs. You won't be harmed," and again: "Aquilino, what's the trouble? We can't help you if you won't talk to us." The police then heard a shuffling sound and Clark saw what looked like a shot gun barrel moving towards the base of the stairs. Clark shouted to the others: "He's got a gun" and started to step backwards away from the top of the stairway. Torcato, on the other hand, began to ascend the stairs, with the gun at his hip, angled upwards toward Clark whose own gun was pointed away from Torcato.

Clark called to Torcato: "Police. Drop the gun. Drop it, drop it, drop it," but the man continued to advance. Clark backed up towards the kitchen with the intention of getting around a corner but found his way obstructed by furniture. By this time Torcato had reached the top of the stairs and stopped with his gun aimed at Clark's lower body. Torcato then raised the gun so that he was aiming above the head of the constable, but ultimately lowered it again, pointing it at Clark's upper body. At this point, Clark testified, he felt his life was in danger and he fired one shot at Torcato from a distance of six feet, striking the victim in the upper chest and left side of his face and causing instantaneous death.⁸⁶ The time of death was found to be 5:17 a.m.

There can be no doubt that the killing of Aquilino Torcato comes within the justification provisions under section 25(3) of the *Criminal Code*. With Torcato positioned only six feet from Clark holding a gun pointed at the latter's face and upper body, Clark had reasonable and probable grounds to believe that it was necessary, for the purpose of preserving his own life, to use force that was likely to cause death. The jury in the Torcato inquest

⁸⁴ In fact, at the time of his death Torcato was found to have had a blood alcohol content of 142 milligrams per 100 millilitres of blood: Verdict of the Coroner's Jury, *Torcato Inquest*, Oct. 5, 1979.

⁸⁵ Testimony of P.C. Clark, *supra* note 82.

⁸⁶ *Id.*

found that Clark had fired his gun "in defence of his own life and in the pursuit of his sworn duties as a police officer."⁸⁷

Although the shot fired by Clark in the circumstances in which he found himself was justifiable, it was not inevitable that the complaint about a disturbance in the street would lead to the death of a man. Indeed, a number of events occurred during those early morning hours, as a result of the police handling of the situation, which may well have increased the likelihood that the crisis would be resolved in a violent manner. In particular, one may note that twice the situation was contained, yet twice by police decision it was made dynamic and unpredictable again. This was a fundamental tactical error by the police. Had the situation remained static, there would have been time and opportunity to evaluate alternative approaches and choose which to follow. The criticism may be more fundamental than this, for even while the situation was contained the police at the scene failed to develop alternative approaches. Given the view of the commanding officer that, had they been able to establish verbal contact with Torcato, it "would have been a different ball game altogether,"⁸⁸ it was remarkable that the trained negotiator available to the police was not utilized until 3:10 a.m., after a series of moves had already been made which must have struck Torcato as unduly hostile.

Hand in hand with the failure to contact Torcato and to strike the proper chord in negotiations was the failure of the police to contact Torcato's family. In the same way that verbal contact with the victim would have enlightened the officers on the scene as to the nature of the crisis, communication with the family would have provided the police with facts about Torcato's background, in particular his tendency to drink, that might have led them to attempt an approach different from that ultimately employed. Anna Torcato, Aquilino's daughter, testified that her father was emotionally unstable when he was drunk.⁸⁹ She also stated that he was a very proud man and that he viewed his home as his castle. If ordered to come out of the house, his reaction would likely be to refuse. Similarly, he would respond to the intrusion of the tear gas into his home by "fighting back." Torcato's wife's testimony was in the same vein, indicating that, had Aquilino been ordered to come out of the house, he would have refused and would, in fact, have become more angry. Emilia Torcato also supported her daughter's claim that Anna or both of the couple's children could have talked Aquilino into coming out of the house, had they been asked to do so.⁹⁰ Anna Torcato further testified that, had she been contacted by the police during those early morning hours, her advice would have been that her father was probably drunk and that they should "stop the tear gas and leave him alone until he fell asleep."⁹¹

⁸⁷ Verdict, Coroner's Jury in the *Torcato Inquest*, Oct. 5, 1979.

⁸⁸ Testimony of Inspector J. Crawford, *Torcato Inquest*, Sept. 27, 1979.

⁸⁹ Testimony of Anna Torcato, *Torcato Inquest*, Sept. 24, 1979.

⁹⁰ Testimonies of Anna and Emilia Torcato, *Torcato Inquest*, Sept. 24, 1979.

⁹¹ Testimony of Anna Torcato, *supra* note 89.

When the question was put to Constable Clark as to whether he would have considered containing Torcato in the basement until the man was sober, Clark replied that the question was "impossible to answer."⁹² The obvious question as to whether or not knowledge that Torcato was drunk would have prompted the police to take a different course of action at any time was not pressed on the constable. It is, however, easy to speculate that knowledge of the victim's condition would have made the time factor working on the side of the police that much more crucial, and Anna's information that Aquilino viewed his home as his castle, the integrity of which he would act to maintain, might have had some influence on the ETF's use of tear gas.

Knowledge of Torcato's emotional instability might also have persuaded the police to call the Crisis Intervention Unit at the Toronto East General Hospital to enlist their expertise in dealing with the situation. One inspector considered the possibility that Torcato might have been suicidal, but testified that he did not consider it necessary to contact the Crisis Centre.⁹³ The jury at the inquest into the shooting noted the failure to contact the Crisis Intervention Unit and recommended that in future the Metro Police Force should extend co-operation between itself and other agencies in Toronto, such as the Crisis Intervention Unit, in order to utilize their special skills in future incidents of this kind.⁹⁴

The inquest jury also recommended "that the Metropolitan Police Department and in particular the Emergency Task Force and Negotiation Teams be given as much training . . . as feasible in the area of psychology and human relations as it relates to negotiation techniques."⁹⁵ Such a recommendation is important in view of recurring incidents involving the police and people who are emotionally distressed, drunk or who have histories of mental disorders. While the ETF did have a negotiator with background training in these areas at the scene and although the evidence does show some realization of the importance of using such a negotiator, that negotiator was nevertheless underutilized. This might suggest that more than just a select few within the police force require an intimate knowledge of negotiating techniques.⁹⁶

⁹² Testimony of Clark, *supra* note 82. The question was put to Clark on cross-examination by Counsel for the family, Brian Finlay. Finlay did not press the question again nor did he pursue the matter any further. Clark, on the other hand, whose testimony had to this point been very clear and his manner very co-operative, became suddenly quite defensive. In reply to Finlay's questions he gave very curt, sharp answers with no more than was absolutely necessary to answer each question. He left no doubt from his tone of voice that he thought any line of questioning that suggested alternatives to the way the police managed the whole affair was a waste of time.

⁹³ Testimony of Inspector Crawford, *supra* note 88.

⁹⁴ *Supra* note 87.

⁹⁵ *Id.*

⁹⁶ In January 1980, the Metropolitan Toronto Police Force instituted a new course in crisis intervention at the Metro Police College. The emphasis in the course is placed on stressing the alternatives to the "going in with guns blazing" attitude. It is estimated that it will take three years for the force to pass through the course: Information obtained in an interview with Sgt. Hembruff, Metro Toronto Police (March 4, 1980.)

The atmosphere created by the police on Palmerston Avenue in the early morning of June 11, 1979, was perhaps best described by Alex Fisher, an area resident. According to Mr. Fisher, "the tragedy [was], I'm sure if it was somebody that knew him they could have got the gun off him. The man was really not that vicious." Fisher himself would have been prepared to volunteer to go over and talk to Torcato, but as he said, "the police had us convinced that it was open warfare."⁹⁷ While one cannot ignore the contribution that Torcato himself made to that atmosphere of "warfare" by his failure to respond to efforts to contact him, it remains the function of the ETF to attempt to defuse the situation. The questionable use or non-use of the trained negotiator, however, along with the failure even to try to contact Torcato's family, and the possibly inadequate investigation into the background of the character whom they were confronting may have exacerbated the situation and contributed to its unfortunate outcome.

D. Hans Nattinen

At 7:55 p.m. on August 7, 1978, Hans Nattinen, 66, a Finnish immigrant, was shot in the heart and killed by ETF Officer Raymond McKinnon (a member of the four-man ETF team in the Torcato case). The event which precipitated the shooting was Nattinen's having pointed a handgun at certain ETF officers, including McKinnon. The gun was later found to be unloaded, with a rusty barrel and a broken handle. A coroner's jury subsequently held that the situation fell within section 9(1)(a) of Regulation 679 of *The Police Act* and, indeed, section 25(3) of the *Criminal Code*. A review of the facts leading up to the shooting, however, does raise questions, especially in view of specific recommendations advanced by the jury. After recommending the officers be cited for the "excellent manner in which the emergency was handled" and the "courage, intelligence and restraint" which they displayed "under extremely dangerous and unusual circumstances," it recommended that:

the public be made more aware that . . . immediately following an unfortunate accident of this nature, a police department investigation is held and the conduct of all concerned is thoroughly examined by the department. A Coroner's Inquest is then held where all facets of the incident is [sic] brought out and thoroughly examined to ensure that everything possible was done to preserve life.⁹⁸

It is in the light of these statements that the facts of the case may be briefly outlined. At the inquest, evidence was led that police and ETF officers had been sent out in response to a telephone call wherein the caller, after stating that he was holding hostages, said: "Send me a pig. I want to blow his head off and I've got hostages here."

After arriving at the address, a second story apartment, police cordoned off a six-block area, while an ETF squad, wearing bullet-proof vests, climbed to the second floor and called to the man to come out. When he did not reply the squad unanimously decided to force entry rather than wait or use

⁹⁷ *Globe and Mail*, June 12, 1979 at 18, cols. 8 and 9.

⁹⁸ Verdict, Coroner's inquest, Oct. 25, 1978.

tear gas as they understood Nattinen was holding hostages and might harm them.⁹⁹ (According to some accounts, however, three tear gas cannisters were fired through the door into the apartment, moments before entry.)¹⁰⁰ Upon breaking the door down, Officer McKinnon and another ETF officer encountered a man brandishing a revolver in firing position. The two ETF officers fired their high-velocity rifles from the hip, at a distance of three feet. The second officer's shot missed Nattinen, ricocheted and hit a third ETF officer on the back of the neck; Constable McKinnon's bullet hit Nattinen in the heart and killed him.¹⁰¹

The actions of the ETF officers raise some questions about the police procedure and the confrontation strategy employed (especially in light of the last statement in the Coroner's Jury's recommendations). It is not clear whether any real attempts were made to find out if Nattinen was actually holding hostages. In fact he was not. The actions of the police, surprisingly enough, were based on the assumption that he was holding hostages. Had there been hostages, it is clear that they, too, would have been exposed to danger. The fact that one officer's shot hit another policeman, moreover, suggests that the hasty confrontation prejudiced the safety of the police themselves. All this may have been avoided through negotiation for a peaceful resolution of the incident.¹⁰²

Early police reports stressed the urgency of the situation and the victim's history of alcoholism.¹⁰³ The police could not have known that the victim's gun was unloaded: "[t]hey had the decision to shoot or be shot."¹⁰⁴ What was not mentioned was that the police had hastily forced the confrontation. Police statements also bolstered the theory, first advanced by the newspapers, that Nattinen had successfully used the police to effect his suicide. ("Lone drunk: did he seek cop's bullet?" [*Toronto Star*]; "Empty gun pointed—Man police shot may have been suicidal, officer says" [*Globe and Mail*].)¹⁰⁵ This possibility, however, is not mentioned in later reports of the inquest testimony. At the inquest, witnesses testified that Nattinen was sick from drinking and needed professional help and an associate of Nattinen, Otto Manninen, testified that the victim had voiced a hate for the police about three weeks before his death.¹⁰⁶

The issue of the original phone call was also never really resolved. Nattinen's sister, Kaisa Nattinen, testified that her feeling was that somebody else made the call. According to earlier evidence given at the inquest by the

⁹⁹ *Globe and Mail*, Oct. 25, 1978 at 5, col. 6.

¹⁰⁰ *Globe and Mail*, Aug. 8, 1978 at 5, col. 6.

¹⁰¹ *Globe and Mail*, Oct. 25, 1978 at 5, col. 7.

¹⁰² One wonders why the Police Force has bothered to train a special team of negotiators for the "crisis situation" if they are not made use of in these situations.

¹⁰³ *Globe and Mail*, Aug. 8, 1978 at 5, col. 5.

¹⁰⁴ *Id.*

¹⁰⁵ *Toronto Star*, Aug. 9, 1978 at A3, col. 8, *Globe and Mail*, Aug. 9, 1978 at 5, col. 1.

¹⁰⁶ *Globe and Mail*, Oct. 24, 1978 at 5.

police, the caller had no accent, and Kaisa stated that her brother had a noticeable accent, especially when drunk, and that he didn't have the words "hostage" or "pig" in his vocabulary.¹⁰⁷ The police received the call on a special line not easily available to the public and the number was not found in Nattinen's room or in his possession. One investigating officer speculated that Nattinen might have been given the number by someone else or have taken it down when he was at the police station on an earlier occasion for drunkenness. He admitted the possibility, however, that Nattinen did not make the call, and the issue was left unresolved.

While the Nattinen shooting falls within the statutory self-defence provisions, it is submitted that the very tactics and procedure of the ETF precipitated the use of deadly force and it remains doubtful whether, in the words of the coroner's jury, "everything possible was done to preserve life."¹⁰⁸

E. Michael Wawryniuk

On November 11th, 1978, Michael Wawryniuk, aged 73, was shot and killed by Metropolitan Toronto Police Constable David Keates, 25, as the deceased, wielding two kitchen knives, lunged at the constable. Police had been called to the Wawryniuk home around 4 a.m. by one Victor Klemarow who had seen Wawryniuk at the house holding a knife "and laughing a really mad laugh."¹⁰⁹ Suspecting that Wawryniuk might be mentally ill,¹¹⁰ police approached the house with their guns drawn. While there was no independent witness able to testify as to exactly what followed, the story, even as recounted by Constable Keates raises questions as to the appropriateness of the police response. Keates stated that after entering the open front door into a poorly lit hallway, he was able to discern Wawryniuk, a shadow holding two knives. At that moment Wawryniuk let out a "loud scream." Constable Keates said he checked the attacker with his hip, momentarily stunning the man, and then fired once when the man lunged at his face with a knife. When Wawryniuk lunged again, Keates shot a second time, thinking that his first shot had missed.¹¹¹ In fact it had not; Wawryniuk died of a massive intra-abdominal hemorrhage resulting from wounds to his lower stomach and side.

The Coroner's jury found that Keates' use of the firearm was in self-defence, having occurred in circumstances contemplated by section 25(3) of the *Criminal Code* and section 9(1)(a) of Regulation 679 of *The Police Act*. One may still question, however, whether from the start there might not have been alternatives to the police approaching the house with their guns drawn. Was that really the only tactic that could be used in such a situation? Had the police checked Wawryniuk's record through the station, they would have found that he was suffering from a mental problem that was briefly

¹⁰⁷ *Globe and Mail*, Oct. 26, 1978 at 5, col. 5.

¹⁰⁸ Verdict of Coroner's Jury in the *Nattinen Inquest* (Oct. 25, 1978) Recommendation 3 [Emphasis added.]

¹⁰⁹ *Globe and Mail*, Nov. 13, 1978 at 5, col. 8.

¹¹⁰ *Globe and Mail*, Jan. 9, 1979 at 2, col. 5.

¹¹¹ *Id.*

outlined on the supplementary records of arrest from an earlier charge of being in possession of a dangerous weapon and, thus, they might have been more cautious in their approach and in their confrontation with the deceased. Indeed, the situation was a classic case for locating and containing rather than for immediately attempting to arrest, a judgment which was substantiated *ex post facto* by the discovery that the suspect was intoxicated.

Even given the decision to confront Wawryniuk, however, a question arises as to the social or operational necessity of using deadly force. Are not the police trained adequately to disarm suspects without having to use their firearms, particularly suspects as elderly as the deceased? If not, why not? It does seem that the primary *defensive* training police receive is in use of their guns. In another case, that of the killing of Steven Kalemis, the Coroner's jury stated in their recommendations:

This means that the police response to violence will tend to be their ultimate sanction—death. . . . We suggest that training in the use of less lethal applications of force such as the night stick or unarmed combat might be fruitfully examined.¹¹²

The same comment could properly be made with respect to the Wawryniuk case.

F. *Andrew Evans*

This case is the first to be described in which the legality, as well as the wisdom or the tactical necessity, of police conduct is seriously in issue. It is also the first in which there are racial implications, at least insofar as the reactions and perceptions of the particular minority group—blacks—are concerned. It is perhaps unfortunate that the other case examined in which serious questions arose publicly as to the legality of police conduct—that of Albert Johnson—also concerned a black.¹¹³ Although the jury in the Evans inquest expressly disclaimed any findings of racism on the part of police, they later implied some inner-dissatisfaction with the state of racial relations. They urged that:

. . . *all parties concerned* recognize the fact that Human Race Relations is a complex issue and that improvements, of necessity and by human nature, will be slow and tedious and *that they act* accordingly. [Emphasis added.]¹¹⁴

The Evans case also raises questions as to the efficacy of the inquest procedure in cases where there are fundamental factual problems and value conflicts dividing the interested parties. These questions are discussed later.

¹¹² *Globe and Mail*, Dec. 7, 1978 at 4, col. 2. The circumstances of the case were as follows:

On October 16, 1978, the police were called to intervene in a domestic dispute. While three police officers were at the house, Kalemis attacked one of them with a knife. He succeeded in stabbing the constable once and was poised, ready to strike again when the other officers shot him.

With regard to alternative methods of disarming suspects and training in this area, the recently instituted course at the Metro Police College is intended to meet this criticism. It is hoped that the course will build confidence in the officers in their ability to resort to means other than firearms in order to defend themselves, and thus provide a realistic alternative to the use of the gun, (see, *supra* note 96.)

¹¹³ See text accompanying footnotes 127-144, *infra*.

¹¹⁴ Verdict of Coroner's Jury, Oct. 3, 1979, Recommendation 32(f).

The alleged facts leading up to the fatal shooting of Evans were as follows. Evans and his brother had been involved in a *contretemps* with a "bouncer" at a downtown discotheque. The man allegedly had threatened Evans with a knife. The following night, just as the discotheque was about to close, the brothers returned. Evans, a large man, was carrying a machete wrapped in a green garbage bag. The "bouncer" telephoned the police. Shortly thereafter Evans was confronted by two young officers, one of whom, P.C. Clark,¹¹⁵ was to eventually shoot and kill Evans. Clark's evidence, supported by that of his partner, was that in resisting arrest Evans had dispossessed Clark of his nightstick and was threatening him with it at close range. Upon Evans' failure to respond to a warning, Clark fired the fatal shot. Other testimony was given that Evans had surrendered before Clark fired. One witness said he had dropped the nightstick and had his arms raised, while another deposed that he had dropped his arms to his side in a gesture of non-aggression.¹¹⁶

The result of the lengthiest inquest in the history of Ontario was that the jury favoured the evidence of the police witnesses. A finding was made that Clark had reasonable and probable grounds in self-defence to fire at Evans.¹¹⁷ Obviously the jury was in a better position to weigh the circumstances than someone who reads the transcript and listens to the tapes and its conclusion must certainly be accepted at face value. Nevertheless, real questions arise as to the appropriateness of inquest proceedings to shed light on what really eventuated in such circumstances. Furthermore, once again the tactical sense and training of the officers is open to criticism.

Part of the problem, admittedly, may have been the inexperience of the particular officers involved. This, however, is no excuse. The initial reaction of the officers was to get to the scene and into action as soon as possible. Unfortunately, when problems arose, the young constables were neither clear as to exactly what to expect of each other, nor what to do. Constable Milne confessed that, when Buddy Evans resisted arrest, "I stood back and it was like a stand-off then; we just stood watching him. I didn't know what action the other officer was going to take, and I was waiting."¹¹⁸ A newspaper reporter who was at the scene testified that he thought that the officers were young, inexperienced and scared on the street.¹¹⁹ A senior officer who later arrived testified that there was no policy in the department calling for young inexperienced constables to "cool the situation down and wait until the senior officers arrive."¹²⁰

Where the training and tactics applied by the police in the Evans case

¹¹⁵ The P.C. Clark involved in this case is not the same officer who fired the fatal shot in the *Torcato Inquest*.

¹¹⁶ Evidence of T. Musgrave (*Globe and Mail*, Aug. 24, 1979 at 5) and Preston Evans (Transcript of his evidence, delivered at the *Evans Inquest*), at 52-53.

¹¹⁷ Verdict of Coroner's Jury in the *Evans Inquest*, Oct. 3, 1978, Jury Conclusion 9.

¹¹⁸ *Evans Inquest*, transcript of P.C. Milne's evidence. at 9.

¹¹⁹ *Id.* at 26.

¹²⁰ Testimony at *Evans Inquest*.

seem to have been particularly lacking is in the area of crowd control. The problem stemmed primarily from the racial overtones of the killing; as news of Evans' death spread, the crowd became "really agitated" and death threats were made against the officers.¹²¹ The appearance of two black officers on the scene helped little, as the people in fact became more abusive to them than they were to the white policemen.¹²² One officer even began fighting with a bystander who was attempting to attack a fellow officer. In the words of the same officer:

The crowd seemed to be getting more unruly, and after I had hit him frankly they became quite ugly . . . fights broke out between the blacks on the scene. You know, one would attempt to get towards an officer and the other would grab him to prevent him from going there. And then they would fight. It was very loud.¹²³

In response to all this, the police decided to "clear the area." This involved assembling people in one central location and proceeding to caution them to move away. If a person refused to comply, he would be arrested for breaching the peace.¹²⁴ One officer at the scene admitted that he had no knowledge of any special units equipped to handle crowd control,¹²⁵ while another, when asked about his experience with crowd control, replied that he had "possibly" had a brief lesson.¹²⁶ It seemed, rather, that training had dealt with riot control, virtually ignoring the problem of how to minimize violence, tension and conflict. While there can be no doubt that situations such as that which arose in the present case are immensely difficult to handle, it is equally clear that the police response, apart from being *ex tempore* and poorly planned, was administered by officers whose training for such situations was seriously inadequate.

G. *Albert Johnson*

The case of Albert Johnson holds the distinction of being the only case in the twenty-four year history of the Metropolitan Toronto Police Force in which police officers have faced trial on charges of manslaughter as a result of a shooting on duty. The Crown's charge of manslaughter was based on the allegation that Johnson's death was "unlawful as the result of unlawful entry into Mr. Johnson's home and events which took place during a short period of time between that entry and a point in time shortly before the shooting."¹²⁷

The police were brought to Johnson's home by a telephone call from a person who said that Johnson was creating a disturbance. Soon after the police reached the scene, Johnson appeared and approached them from a laneway beside the house, swearing and shouting at them to get off his property. He then went into his house and the police decided to leave, satisfied

¹²¹ *Evans Inquest*, transcript of evidence of P.C. Smith, at 19.

¹²² *Id.* at 17.

¹²³ *Id.* at 14.

¹²⁴ *Id.* at 36.

¹²⁵ *Evans Inquest*, testimony of Sgt. Eberspaecher, at 69.

¹²⁶ *Id.* at 36.

¹²⁷ *Globe and Mail*, March 29, 1980 at 5, col. 6.

that there was no need for any further action and that Johnson would calm down.¹²⁸ Before leaving, however, they decided to put out a small fire that was burning in Johnson's garage. As they walked toward the back of the house, the officers claimed that they heard shouting and the screaming of women and children in the house and as they passed an open window, Johnson spat at one of them. Recalling Johnson's violent tendencies and fearing for the safety of those in the house, two of the officers, Inglis and Cargnelli, decided to arrest him.

Receiving no response from Johnson when they asked him to come out of the house, the officers kicked open the back door and entered the kitchen. Both Johnson and his wife were in the kitchen. Everything was quiet for an instant.¹²⁹ Then, Inglis said, "You are under arrest," and reached out to grab Johnson, whereupon a struggle ensued. Johnson was "apparently in a frenzy, swinging his arms around, shouting."¹³⁰ During the struggle, Johnson was struck on the forehead by Cargnelli's flashlight, opening up a cut. Mrs. Johnson admonished the two officers not to hurt her husband. Johnson soon broke away and entered the living room. The two officers followed and again struggled with Johnson who managed again to get free and run up the stairs.

At this point P.C. Cargnelli returned to his car to call for assistance, and the third officer, Constable Dicks, who by this time had entered the house, began to usher the family outside. When Cargnelli returned Johnson was at the top of the stairs wielding a garden implement. Constable Inglis shouted, "Look out, he's got an axe!" As Johnson descended the stairs, both Inglis and Cargnelli feared that he would throw the "axe." They drew their revolvers and Inglis fired. The first shot missed Johnson who jumped down the remaining stairs still holding the garden implement. At this point Inglis fired the fatal shot, Johnson having approached to within three or four feet of him. In his testimony, Inglis stated that before firing the second shot he had retreated as far as he was able, his further movement being blocked by furniture.¹³¹

The conflicting allegations and testimony on which the Crown's charge of manslaughter was based were to the effect first, that all was quiet inside the house before the entry of Inglis and Cargnelli. Mrs. Johnson was cooking, her sister and one of the children were watching television and the other daughter was upstairs playing. Therefore there was no justification for the officers' entry.¹³² Second, even if the entry was justified on reasonable and probable grounds, the Crown contended that inside the house everything was

¹²⁸ Transcripts of *R. v. Inglis and Cargnelli*, (Unreported), Testimony of P.C. Inglis, Nov. 6, 1980.

¹²⁹ *Id.*, Testimony of P.C. Cargnelli, Nov. 7, 1980.

¹³⁰ *Id.*, Testimony of P.C. Inglis, Nov. 6, 1980.

¹³¹ *Id.*, Testimony of P.C. Inglis, Nov. 7, 1980.

¹³² Summation of Crown Attorney William Morrison in *R. v. Inglis and Cargnelli* (Nov. 12, 1980). Morrison also pointed out in his summation to the jury that there was no independent "citizen's" confirmation of the officers' (including P.C. Dicks') testimony of screaming in the house before Inglis and Cargnelli entered.

outwardly calm. The factors that prompted the decision to enter and arrest Johnson could not be seen to exist in fact. Rather than inquiring as to Mrs. Johnson's well-being and taking the opportunity to extricate themselves from the situation, the officers decided to proceed with the arrest, initiating the struggle and using more force than was necessary in the process. During the confrontation, Johnson continued to retreat, first running to the living room and then to the second floor of the house. At one point Mrs. Johnson had attempted to stop the struggle in order to protect her husband. There was ample opportunity for the officers to remove themselves from the situation of immediate confrontation.

A less significant aspect of the Crown's case was the testimony given by Johnson's nine year old daughter. In her evidence (not given under oath) she stated that her father had surrendered and had dropped the garden implement and that he was then forced to kneel down before Inglis shot him.¹³³ In light of the conflicting testimony, however, this allegation did not play an important role in the Crown's case.

At their jury trial in County Court, Constables Inglis and Cargnelli were acquitted. The case was not appealed by the Crown. While the acquittal is determinative of the prosecution's failure to prove guilt beyond a reasonable doubt, the verdict does not preclude questioning of certain aspects of the incident outside of criminal responsibility. As the trial judge told the jury, if Constable Inglis felt himself in danger when Johnson appeared with the garden implement, he was entitled to use force, even if Johnson was responding to an assault initiated by the officers.¹³⁴

Considering such an assault and whether the officers were justified in entering Johnson's home, the recurring theme of forced confrontation by the police is again present. In this regard a point may be made. On their evidence, the only change in the situation between the time of the officer's initial decision to leave and their subsequent decision to enter the house was their perception of potential harm to those inside. Inglis and Cargnelli testified that before entering, they were convinced, on the basis of the cries and screams, that the residents of the house were in immediate danger. Once having obtained entry, however, there was no evidence to substantiate their fears that those in the house were in any danger. Further, there was no evidence offered by the officers that once inside they made any inquiries as to the residents' well-being or safety. Constable Inglis testified that when he and Cargnelli entered, he saw Johnson and others in the kitchen. Cargnelli stated that Johnson quieted down for a "split second" when the officers entered the room.¹³⁵ Although there was an ensuing struggle, the evidence of the officers was that this exchange took place only after Constable Inglis approached Johnson and informed him that he was under arrest. Despite the resolution of the issue of guilt of the trial, serious doubts remain as to the efficacy and wisdom of pursuing the confrontation with Johnson.

¹³³ *Globe and Mail*, Oct. 28, 1980 at 5, col. 1; *Toronto Star*, Oct. 28, 1980 at A7, col. 5.

¹³⁴ *Toronto Star*, Nov. 14, 1980 at A2, col. 5.

¹³⁵ *Supra* note 128, Testimony of P.C. Cargnelli, Nov. 7, 1980.

A further aspect of this case which is of central importance in view of the number of instances of the police use of lethal force involving persons such as Johnson is the nature of police procedures when dealing with mentally ill or disturbed persons.¹³⁶ Sergeant Morrison, testifying at the trial, noted that police officers at the scene retain the discretion to forget about the arrest and to leave a mentally disturbed person alone. Further, he stressed that the officer was to refrain from doing anything likely to upset such individuals unless it was absolutely necessary.¹³⁷ It seems questionable whether the officers who attended at Johnson's house, on the basis of their actual conduct, can be said to have been adequately trained in this regard.

In the final analysis, and despite the outcome of the trial, one of the most significant aspects of the case is that the trial took place at all. It has been stressed that killings by police have not been dealt with by the investigative and judicial processes on an equal basis with killings by persons other than police. The most interesting aspect of the Johnson killing from this point of view was the investigative procedure used. Although a senior Metro Toronto police officer had immediately after the shooting expressed his belief in the necessity of the officers' actions,¹³⁸ then Chief of Police Adamson decided to ask the Ontario Provincial Police to investigate the matter. The "code of secrecy," identified by Westley and illustrated by Harding in cases of this sort¹³⁹ is less strong when police from other forces are entrusted with the investigation.¹⁴⁰ It is likely that the investigation was thus carried out with a degree of thoroughness and independence that might not otherwise have been brought to bear.¹⁴¹ Certainly the procedure was quite atypical for the Metropolitan Toronto Police Force; one senior officer stated that it was the first time in his twenty years on the homicide squad that he had heard of another force being called in to investigate a death in Toronto.¹⁴²

¹³⁶ See, *Wawryniuk Inquest*, text accompanying notes 109-112; *Torcatto Inquest*, text accompanying notes 89-97; *Nattinen Inquest*, text accompanying notes 98-108.

¹³⁷ *Supra* note 130, Testimony of Sgt. Morrison, Oct. 31, 1980.

¹³⁸ See the statements attributed to senior officers of the Metropolitan Toronto Police Force in the *Toronto Star*, August 27, 1979 at A3, col. 3. This propensity to anticipate what a proper investigation will certainly show is found in other jurisdictions and is in fact part and parcel of the standard police response to such incidents: see Harding (1975), *supra* note 51, at 130; Harding and Fahey, *supra* note 7, at 296; see also *infra* note 141.

¹³⁹ See Harding (1970), *supra* note 5, Harding (1975), *supra* note 50, Harding and Fahey, *supra* note 7, *passim*.

¹⁴⁰ See Harding (1975), *supra* note 51, at 130-1.

¹⁴¹ In fact, the initial handling of the matter before the O.P.P. was asked to conduct the investigation suggests strong grounds for this belief. For example, the garden implement said to have been wielded by Johnson was handled a number of times by Metro policemen before it was finally tested for fingerprints. It was not photographed at the scene of the shooting, but was taken to the police station and photographed there several hours after the shooting took place. (Testimony of Metro Police Sgt. Mann, *supra* note 130; see also, *Toronto Star*, Oct. 23, 1980 at A2, col. 4). There did not seem to be any great concern regarding the legality of the actions of Constables Inglis and Cargnelli shown in the initial investigation. It is suggested that the carelessness at this stage can be attributed to an assumption that there had been no wrongdoing in the killing of Albert Johnson.

¹⁴² *Globe and Mail*, Aug. 28, 1979 at 1, col. 9.

Furthermore, in an attempt to avoid any possible allegations of bias and a less than full trial, the prosecuting attorney was brought to Toronto from Kitchener and the judge came from Ottawa for the trial. The heavy security for the courtroom was provided by the Ontario Provincial Police. Yet it is disturbing that after all of this, the president of the Metro Toronto Police Association stated: "I'm just wondering the necessity for it [the trial] in the first place," and went on to suggest that the usual inquest ordered (under *The Police Act*, Regulation 679)¹⁴³ when a policeman fires his gun in the line of duty would have been sufficient.¹⁴⁴

V. PROCEDURAL DEFECTS IN THE ADMINISTRATION OF JUSTICE

A. *The Investigation*

The cases examined in this paper highlight the principal procedural defects. Foremost among them is the investigation of these incidents by the police themselves. Since this limits the utility of the coroner's inquest as a means of discovering the truth, it is important to understand the rules that govern this initial stage of the investigation.

At present, section 11 of Regulation 679 of *The Police Act* outlines the procedure to be followed where deadly force has been used.¹⁴⁵ Subsection 1 requires an investigation to be made. The report of this investigation must go to the Chief of Police, the Board of Police Commissioners and eventually to the Ontario Police Commission which may review the procedure and scope of the investigation.¹⁴⁶ While this seems to indicate a progressive pattern of investigation, the whole focus appears to be remedial in the sense of overseeing any bureaucratic irregularities. The root issue of who controls the investigation from the beginning is unaffected. The police have had total control from the initial investigation to the disciplinary stage.

The police strongly resist any change in this investigative pattern, even in the face of carefully documented abuses or failures shown in recent inquiries.¹⁴⁷ The real problems and genuine community concern seem not to influence their position in any manner. Thus, a police advisor on the Ontario

¹⁴³ See text, accompanying notes 152-59, *infra*.

¹⁴⁴ *Toronto Star*, Dec. 6, 1980 at B4, col. 2; see also *Globe and Mail*, Nov. 14, 1980 at 2, col. 2.

¹⁴⁵ R.R.O. 1970, R. 679.

¹⁴⁶ If there is no board of commissioners of police, the chief of police submits the report to a "committee of council" (*i.e.*, a committee composed of the head or acting head of council and two other members thereof appointed by council).

¹⁴⁷ See the Report to the *Metropolitan Toronto Board of Commissioners of Police* by Arthur Maloney Q.C. (Report dated May 12, 1975), and Ont., *Royal Commission into Metropolitan Toronto Police Practices* (Toronto: Queen's Printer, 1976). At 137 of the latter Report it was noted:

There is, without question, a feeling among many officers particularly but not confined to the lower ranks that it is wrong to give evidence that will reflect poorly on a fellow officer.

There is a tendency among policemen to cover up each other's errors and to keep silent concerning improper actions of brother officers.

Police Commission has argued that any tinkering with the present system would undermine the structure and morale of a police force and its internal disciplinary machinery.¹⁴⁸ Professor Grant, a former Chief Inspector of the London, England, Metropolitan Police, however, has commented:

In theory, of course, police officers are answerable to the criminal law, the civil law, and the internal disciplinary procedures of the police force to which they belong. In practice, the whole area is shot through by discretionary decisions which are either immune from or not readily amenable to, judicial or other review. As long as the police investigate the police, and their potential prosecutor is the same official who works with them—the police being one day a witness for the Crown and the next day “an officer suspected of police misbehaviour”—then there seldom exists the basis for a thorough and disinterested prosecution of a case brought by a complainant against the police.¹⁴⁹

If this is true in relatively minor matters, *a fortiori*, it is true in matters which could conceivably lead to the laying of a very serious criminal charge such as manslaughter.

While the Johnson case adopted a more acceptable mode of investigation, it was, of course, quite exceptional. Yet the public has evidently recognised that there is a wider need for similar procedures. The jury in the Evans case, the only other case in this study which raised substantial problems as to legalities rather than operational practices, stated as one of its recommendations:

When there is a loss of life as a result of a shooting by any member of a police force in the Province of Ontario, the Attorney General of Ontario [should] be required to appoint a neutral police force or a commission to conduct an investigation into the shooting and submit their findings to the Attorney General for further action as necessary.¹⁵⁰

This, of course, would be a cumbersome and often overblown procedure. What is needed is a simple, day-to-day procedure whereby investigations are subject to some external scrutiny.¹⁵¹

¹⁴⁸ Interview with Mr. Walter Lee (March 3, 1980).

¹⁴⁹ Grant, “The Police: Organization, Personnel and Problems”, in MacDonald and Humphrey, eds., *The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms* (Toronto: Butterworths, 1979) 405-24, at 417.

It should be noted that since this article was written, the Attorney General, Roy McMurtry, has mandated that Crown Attorneys no longer may make decisions on whether or not to prosecute police officers who perform duty within their judicial district. Such cases are now referred to the Attorney General’s office for decisions and if prosecution is affirmed a Crown Counsel from a different judicial district is appointed by the Attorney General’s office to conduct this prosecution. While this second step is not new, the first is and is to be commended as a recognition of the potential conflicts which can easily arise and is a step in the right direction.

(Information obtained in an interview with Professor Alan Grant, March 11, 1980)

¹⁵⁰ Recommendation #7 in the Verdict of the Coroner’s Jury in the *Evans Inquest*.

¹⁵¹ The recent history of attempts to inculcate some degree of external supervision into the public complaints procedures of the Toronto and other Ontario police forces is rather depressing from this point of view. Bill 114 in 1977 was to have established an independent Complaints Commissioner with power to appoint investigators in certain situations where complaints were lodged with the police, with a further overriding power to take over the investigation of any complaint which would otherwise be handled

B. *The Inquest*

In Canada, because of the constitutional allocation of criminal law power to the federal government, there would be difficulties in a province establishing inquest procedures that, as at common law, could be directed towards the criminality of conduct causing death and lead to the committal of the person for trial on the basis of the evidence heard in that forum. *The Coroners Act* of Ontario is typical of those in the other provinces in that it makes it explicit that the Coroner's Court is not one of criminal record and that the jury may not make any determination of criminal responsibility.¹⁵² The function of an inquest is simply to inquire into and determine who the deceased was, and how, when, where and by what means he came to his death.¹⁵³ To be admissible, any evidence presented to the inquest must be relevant to determination of at least one of these issues.¹⁵⁴ The inquest is non-adversarial in nature while being investigative in the limited way described.

Yet because, in the case of killings by police, interested parties have a stranglehold on investigation, and also because there is a strong likelihood that the inquest will be the only public forum protected by privilege from the laws of libel, the temptation is very strong for other interested parties, such as the relatives of the deceased, to attempt to turn the proceeding into a wide-ranging investigative one. When this happens, the inquest may be subjected to enormous procedural strains which it cannot readily absorb. The fact that the Coroner will not be a legally-qualified person may tend to exacerbate the problem.¹⁵⁵

The inquest into the death of Buddy Evans exemplifies all of this. Parties represented by counsel were: the Crown; the Chief of the Metropolitan

by the police themselves. The Bill was abandoned (See *An Act to Amend the Police Act*, Bill 114, 1977 (31st Legis., Ont. 1st Sess.)). Bill 201 of 1979 represented a retreat from the degree of external control over the complaint and investigation process sought by Bill 114. In this later attempt at reforming the complaints procedure, the police were to retain control of the investigative stage of the process through the Public Complaints Investigation Bureau, a branch of the Metropolitan Toronto Police force. While the adjudicative stage was to be handled by an independent Board, the Public Complaints Commissioner under Bill 201 would not have any overriding authority to investigate complaints. The Bill was defeated (See *The Metropolitan Police Force Complaints Project Act*, 1979, Bill 201, 1979 (31st Legis., Ont. 3rd Sess.)). Subsequent to the writing of this article, a new bill has been introduced dealing with the same problems and which advocates a procedure similar to that of Bill 201.

¹⁵² *The Coroners Act*, 1972, S.O. 1971-72, c. 98, s. 25(2).

¹⁵³ *Id.*, s. 25(1).

¹⁵⁴ *Crown's Newsletter*, October 1973, "An Analysis of *The Coroners Act, 1972*", at 38.

¹⁵⁵ See generally the *Evans Inquest*. The tensions generated in this proceeding culminated in an action in the Divisional Court (later an appeal to the Ontario Court of Appeal) alleging bias by the Coroner: see *Re Evans and Milton* (1979), 24 O.R. (2d) 181, 97 D.L.R. (3d) 687, 46 C.C.C. (2d) 129 (C.A.), *leave to appeal denied*, S.C.C. April 27, 1979. See also the comments of Coroner Milton during the testimony in the *Evans Inquest* of Sgt. Paul (at 14):

Mr. Pinkofsky, you can sit down, and Mr. Prives too really, because the pressures have now become so involved that I am completely lost, because if you start asking questions on a correct law on the use of force I am in no position to know what the answer is and only a Judge can say this is correct.

Toronto police force; Constable Clark (who had fired the fatal shot); and the Evans family. Constantly, it seemed, Mr. Pinkofsky, who represented the family, was searching for an angle which the other three parties were trying to deny or suppress. The conflict was so marked and the Coroner's adjudications so unsatisfactory to Pinkofsky that the matter eventually ended up in the Court of Appeal on a motion from Pinkofsky to appoint a sheriff to select a new jury, prohibit continuation of the inquest until a new jury was selected, retain independent investigators to take over the investigation and to change the presiding Coroner.¹⁵⁶ It was alleged that bias arose from the selection of the jury by Metro Police and the investigation by the police themselves and from the fact that the Coroner chose to follow the standard procedure of appointing a member of the Toronto police force as her constable in relation to the proceedings, even though there was the discretion to appoint a constable from another force; also, it was alleged that the Coroner herself displayed bias in the manner of her investigative statement. The arguments failed in the Divisional Court, Reid J. dissenting.¹⁵⁷ The frustration felt by counsel for the relatives of the deceased, however, was understandable. Appearing in a case of great public concern, Pinkofsky was confined largely to pursuing formal matters which were not really in dispute. As he himself put it:

Surely that's why we have inquests in Ontario. Surely they are not to put a rubber stamp on the fact that the man's name really was Buddy Evans and that the bullet really went through his heart and that it was really John Clark who fired it. The reason is to bring out recommendations that will help us move slowly, ever onward, to prevent future deaths, either in nursing homes, hospitals or involving police officers, or otherwise.¹⁵⁸

Of course, this is to put the problem somewhat disingenuously. Mr. Pinkofsky understood, as did the Coroner and the press, that a recommendation for the future would carry with it implicitly a comment about the particular police conduct, thus creating *de facto* a basis for prosecution. When, eventually, the jury brought in its findings the media covered them almost as if Clark had been acquitted on a first-degree murder charge. Thus, the *Toronto Star* reported that "Metro Police Constable John Clark's long ordeal is over today."¹⁵⁹

Although the Law Reform Commission's 1971 review of the *Coroners Act* was incorporated almost *in toto* into amending legislation, it does seem that in this sort of case the inquest is and will remain an unsatisfactory procedure. In this regard, Ontario and Canada can be contrasted with other jurisdictions which, free from constitutional complexities, at least have the potential to develop the inquest into an effective control mechanism for the use of deadly force by police.¹⁶⁰

¹⁵⁶ *Re Evans and Milton, id.*

¹⁵⁷ See the judgment of Reid J., *id.*

¹⁵⁸ *Evans Inquest, Voir Dire*, June 5, 1979 at 3.

¹⁵⁹ *Toronto Star*, Oct. 4, 1979 at A1, col. 1.

¹⁶⁰ The constitutional complexity arises from the fact that the criminal law power of the Federal Parliament—to legislate with regard to "the criminal law . . . including procedure in criminal matters" (*The British North America Act, 1867*, 30 & 31 Vict., c. 3, s. 91(27) (U.K.))—would seem to exclude Provincial legislatures from assigning traditional, common law criminal power to the coroner's court.

C. *Civil Actions*

As policing the criminality of police conduct is the primary concern, civil actions are at best a peripheral solution to the problem. Nevertheless, their indirect value is potentially real because: a) the police force and, in financial reality, the municipality, will normally have to bear the resulting financial loss; b) the cases attract media attention and c) the cases establish (albeit for a different purpose, with a different burden of proof, and in a different forum) something definite about the quality of police conduct. This reasoning applies, of course, to civil actions arising out of any type of police misconduct, not just that which results in death.

In the United States, this approach to the problem has gradually developed, particularly since the passage of the *Civil Rights Act* in 1970.¹⁶¹ In Canada there is no equivalent action for "deprivation of constitutional rights"; an ordinary tortious claim for negligence causing death is all that may be available. The inhibitions and barriers are, however, formidable. They arise, again, primarily out of police control of investigation. The only case known to the authors in which this line of action was explored, despite seeming a relatively clear one, had to be settled out of court for a trivial sum of money.¹⁶² Civil actions do not seem likely to develop significantly in Canada as a means of testing the legality of police conduct.

VI. CONCLUSIONS AND SUGGESTIONS FOR REFORM.

The use of deadly force by Toronto police does not yet constitute a crisis. It does raise some substantial problems, however, and unless they are sensitively dealt with they could coalesce and ripen into a crisis. The available evidence does not, unfortunately, suggest that police, administrative and political authorities perceive how volatile this social issue could become. The comment by Chief Ackroyd, quoted in the prologue to this article, indicates too great a willingness to rely on fortune in a situation that is amenable to positive management.

The outstanding feature emerging from the cases studied is how uniformly crude is the tactical sense of the police who become involved in these situations. There is a pervasive air of "let's get in there and sort out the situation," a belief that the only form of action is confrontation. This was particularly so in the cases involving Nattinen, Wawryniuk, Evans and Johnson. Even in the Torcato case where there was a stand-off this was not for some clear and coherent strategic objective. All too quickly there was a reversion to the "get in there" approach. Such a striking pattern cannot be due to the idiosyncrasies of those officers who happen to be called to the scene. It inevitably reflects fundamental training defects in the Metro police. Interestingly, these defects are as evident in the conduct of the specially established crisis intervention squad, the ETF, which dealt with the Nattinen and Torcato cases. The formation of that squad did not evidently harbinge a change of

¹⁶¹ 42 U.S.C. §1983 (1970); see also Milton, *supra* note 7, *passim*.

¹⁶² See the case of Angelo Nobrega, killed May 4, 1969. The relatives of the deceased settled an action for alleged negligence against the responsible officer for \$3,500. (*Toronto Star*, Feb. 15, 1977 at B1, col. 1).

strategic perception of such problems, but merely a police determination to rush in even more effectively.

The Nattinen and Elie cases and, to a lesser extent, the Misztal case, also indicate woeful training. In the first case the police allowed themselves to be placed in a tactically disadvantageous situation which, in turn, dictated the level of response which became necessary. In the second instance the police completely failed to take advantage of overwhelming numerical and tactical superiority so as to deal with the situation quietly. Once again the legality of their actions was not in question; but one may wonder whether the legalities were really intended to protect police from the consequences of operational incompetence. Further, the Johnson and Wawryniuk cases indicate that there may be a special training problem in relation to dealing with the mentally disabled. As a matter of urgency, the police should modernize their training programmes so as to bring them into line with current knowledge and experience.¹⁶³

As has been shown with fugitive arrests, recent cases do not seem to have involved operational reliance upon the legal rights conferred by section 25(4) of the Code. There is a hint¹⁶⁴ that this may be in part attributable to the training programme as it relates to the use of force in such situations. If so, that is fine. Non-reliance upon the fugitive arrest rule, however, should be firmly entrenched into the law itself. Otherwise, it is inevitable that there will be operationally unnecessary killings protected by the law. The section should be amended in terms which do not prohibit the killing of fugitives altogether but relates the use of deadly force to the perceived dangerousness of the fleeing offender.

If training is appropriate and the legal rules are amended so as to discourage reckless or melodramatic practices, it is likely that the number of cases of dubious legality will be reduced or at least held in check. Nevertheless, it is desirable that an external element be injected into the investigation of such killings. There is a demonstrated danger that police do not bring the required skepticism and toughness to the case.

Even though a version of the various legislative proposals for bringing some external element into the investigation of citizen complaints against the Toronto police has been introduced, it is not really appropriate. It does not make specific reference to wrongful killing but implements broad language concerning police misconduct which will most likely be applied to larger police abuses.¹⁶⁵

The device of bringing in another police force, as in the Johnson case, is not wholly satisfactory either, depending as it does on the decision of the Chief of Police. What is required is an ordinary, undramatic way of injecting an external element. In the United States the state's attorney or district attorney not infrequently possesses his own investigative officers. This provides

¹⁶³ *Supra* note 42.

¹⁶⁴ See text accompanying notes 62-64, *supra*.

¹⁶⁵ See *supra* note 151.

a possible model, though it must be conceded that to vest the Attorney General's office with such a force is simply not the Canadian tradition. It is a difficult problem and perhaps for now the *ad hoc* response of the sort exemplified by the Johnson case is the best that one can realistically hope for.

To the extent that provincial legislation purports to affect legalities in the area of regulations and departmental guidelines, it is liable to be confusing to police forces and individual officers; and to the extent that it is clear but not uniform it is undesirable. Further refinement of the law on the justifiable use of force should, preferably, be contained in the *Criminal Code*; failing that, there should be discussions leading to uniform provincial legislation.

The inquest is a highly unsatisfactory forum to use to attempt to ascertain the true facts leading to any particular killing by police.¹⁶⁶ Yet, in the absence of any effective alternative in which the public and the relatives of the deceased can see for themselves that a genuinely objective evaluation is being made, it will continue to be used by disaffected parties. It is, therefore, crucial to evolve an alternative procedure.

Possibly, building upon the notion of the Attorney General possessing a small investigative team of his own, consideration could be given to resuscitating for this limited purpose the old grand jury procedure, although it would seem that the present constitutional situation dictates that such a step be taken by the federal government. In the United States, this has had some efficacy in such situations.¹⁶⁷

Clearly the logic of seeking greater public accountability and external control of a police force which, after all, is granted its authority by that "external" source, cannot seriously be questioned. This need is especially acute in the police use of lethal force.

Thus, the cases we have examined indicate that in Ontario the police use of deadly force constitutes a measurable problem and that no part of that problem is as yet unmanageable. In the public interest the statutory rules and administrative controls should be amended in order to confront this problem before it escalates.

¹⁶⁶ See text accompanying notes 152-60, *supra*.

¹⁶⁷ See Harding and Fahey, *supra* note 7 at 294-98.