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ORGANIZING FOR ACCOUNTABILITY: COMMUNITY LEGAL CLINICS AND POLICE COMPLAINTS

IRINA CERIC*

RÉSUMÉ

Cet article donne un bref aperçu des débuts et de l'évolution des mécanismes ontariens de traitement des plaintes contre la police et décrit sommairement la procédure actuelle, pour s'étendre ensuite sur ses lacunes. L'auteur y traite du rôle d'une clinique juridique communautaire dans la promotion des droits et d'une réforme à cet égard. Elle examine les nouvelles stratégies de droit en matière de mauvaise conduite policière, de même que les anciennes, et explique comment les cliniques pourraient contribuer à une réforme de la police et à l'éducation juridique de la population en vue d'améliorer la procédure de traitement des plaintes.

I. INTRODUCTION

Police killings are a stark reminder that police accountability is not a theoretical or academic concept. Instead it is a necessary, potentially life-saving governing principle of democracy, and should be an integral part of any policing system.¹

The police, almost by definition, wield enormous power, possessing legally sanctioned rights to stop, search, arrest, charge, use force, and kill.² Even in the best of circumstances, the result is an inherent power imbalance between the police and their civilian subjects; this imbalance is far greater in the communities of the poor and marginalized. Any discussion of police-complaints processes and their significance must be located within this context, one that recognizes that police accountability goes to the heart of the most intimate of citizen-state relationships, affecting not only the criminal-justice system, but broader issues of poverty, racism, homelessness, and informal economies³ and, in turn, the social movements that address those issues. Police-complaint mech-

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1. Community Coalition Concerned about Civilian Oversight of Police, *In Search of Police Accountability: Report of the Community Coalition Concerned about Civilian Oversight of Police* (Toronto, 1997) [unpublished].
2. See *Criminal Code*, R.S.C. 1985, c. C-46 at s. 25(1).
3. I use this phrase to refer to economic activity outside the regulated, formal economy, including work in the sex trade, panhandling, "street work" such as cleaning windshields, and drug sales.

anisms are integral to a functioning police force, supplying bargaining power to the subject-police relationship and serving as a primary tenet of overall accountability. As a result, studies and task forces have repeatedly called for effective police-complaints mechanisms,⁴ yet the problem of how to best address the failure of those mechanisms and the still-larger issue of police misconduct remains a contentious one at both the legislative and community level, and among police officers and their associations.

The police-complaints procedure has also presented crucial questions for organizations that provide services and support to groups that have traditionally borne the brunt of police misconduct—questions that boil down to a choice of unquestioning participation, absolute withdrawal, or constructive engagement in the process. At Parkdale Community Legal Services (PCLS), law students have traditionally assisted clients with filing complaints against police, but recent changes to the police-complaints system, which have effectively eliminated civilian oversight of the complaints process, have led PCLS staff and students to question the effectiveness and prudence of participating in the formal police-complaints proceedings. This debate has added to pre-existing concerns about police retribution against complainants, the lack of adequate and appropriate remedies, and the inability of the complaints process to produce fundamental changes to police conduct or policy. The debate is now shifting to a strategic consideration of how to provide meaningful alternatives to existing police-complaints procedures for members of the community who have been victims of police misconduct, or violence through community-focused legal clinics, the consideration of which is the focus of this article.

Added to these concerns is a practical one that appreciates that a legal clinic, like any organization that professes more than charity in the face of poverty, must rely to some extent on its reputation in the community. To the extent that policing is seen as an important issue by members of the community, individually or collectively, community legal clinics must have some response that goes beyond filling out a complaints form and leaving any resolution in the hands of the police. This is not to suggest that clinics have to react with equal vigilance to every possible issue, but it does mean recognizing that the modern police force is an inextricable element of the poverty regime perpetuated by neo-liberal governments: police are both the “occupying army” ensuring that the full force of the law can be applied to the poor every day, and the most visible oppositional force to collective action at the grassroots. Such opposition requires creative, flexible, and multi-pronged strategies from organizers and reformers.

The starting point of this article is a short history of police-complaints mechanisms in Ontario, and a brief outline of the current process, the shortcomings of which are discussed in greater detail. Two primary alternatives to a formal complaints processes

4. See generally C.E. Lewis, “Police Complaints in Metropolitan Toronto: Perspectives of the Public Complaints Commissioner” in A.J. Goldsmith, ed., *Complaints Against the Police: The Trend to External Review* (New York: Oxford University Press, 1991) 153.

are canvassed. The first is a discussion of litigation strategies, such as traditional common law claims and more novel constitutional challenges specifically aimed at the substance of the complaints process itself, as opposed to lawsuits focused on the underlying police misconduct. Examples drawn from U.S. jurisprudence will be used to consider the likely success of a test case brought on behalf of Canadian complainants. The second and perhaps more obvious project is participation in a collective, community-based organization, coalition, and/or campaign aimed at addressing policing issues. Therefore, I propose to examine previous PCLS initiatives in the context of the legal clinic system and the work of other Toronto groups and campaigns. While this analysis is necessarily focused on the possible role of legal clinics, I approach it within the context of general community-organizing principles, locating any conclusions outside of a strictly legal or individualistic framework. This article has two separate but related objectives: providing a legally based analysis of—and a community-oriented, political response to—the police-complaints process.

II. HISTORY AND CONTEXT: POLICE COMPLAINTS AND COMMUNITY RESPONSE

Understanding the evolution of the police-complaints system in Toronto specifically, and Ontario more generally, requires an understanding of the broader objectives and motivations underlying the system's development. In a general sense, these goals may be seen as the promotion of accountability, or at least the appearance of it, reduction of police misconduct, and improvement in police-community relations. Police-complaints processes, as a particular aspect of policing policy and procedure, have been inextricably tied to general public discourse on policing, but at times they have taken on particular salience, especially in times of crises of legitimacy, when public opinion toward police is inflamed following controversial or notorious incidents, and those times when less visible, yet pernicious or systemic problems are seen to be ignored or inadequately addressed. As catalysts, both developments may be seen as versions of the same fundamental problem, despite having enormously different effects and requiring differential responses from police and the community. In analyzing the forces affecting on police-complaints mechanisms, it has been suggested that the starting point must be a rejection of the "bad apple" theory of police misconduct, in place of a systemic approach that evaluates political influence, police culture, and community response.⁵ Such an analysis is necessary in order to evaluate different strategies for dealing with police misconduct and to comply with the overall approach of Ontario legal clinics to law reform and community organizing, an approach focused on collective, long-term responses to legal and legally entwined problems.⁶

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5. D. Martin, "Organizing for Change: A Community Law Response to Police Misconduct" (1993) 4:1 *Hastings Women's L.J.* 131 at 138.
 6. See, for example, J.E. Mosher, "Poverty Law: A Case Study" in Ontario Legal Aid Review, *Report of the Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services*, vol. 3 (Toronto: Publications Ontario, 1997) (Chair: John D. McCamus) 913 at 933-36.

A. The Evolution of the Police-Complaints Process

Even located in this complex context, the development of Ontario's police-complaints process was both protracted and contentious: seven years elapsed before the initial recommendation of an independent civilian commissioner of complaints resulted in a three-year pilot project.⁷ The reasons for this delay were largely political, as police associations, community organizations, and members of the provincial government debated over the form that a complaints system ought to take, particularly the scope of any civilian oversight or participation. Fuelled by the controversy generated by a series of high-profile allegations of police misconduct, there were no fewer than four official inquiries into the complaints process between 1975 and 1980, all of which produced reports. Two unsuccessful police-complaints bills were introduced into the legislature.⁸ In 1981, an Act⁹ instituting a pilot complaints project in Metropolitan Toronto was proclaimed, establishing the Office of the Public Complaints Commissioner (PCC), and allowing for significant civilian participation in the review of public complaints against the police. The pilot project would become permanent in 1984, maintaining much of the same structure and role, along with some key changes.¹⁰

The 1984 legislation¹¹ created a Public Complaints Investigation Bureau, a separate division within the police force staffed by experienced officers which had the resources and "staff to effectively receive, record and investigate complaints and inquiries."¹² The Bureau was required to supply interim progress reports of all complaints investigations to the complainants, the officers named in the complaint, and the PCC. Completed investigations were reported to the Chief of Police, the complainant, the officers investigated, and the PCC, whereupon the Chief or a designate could mediate a resolution between the complainant and the police, call for a disciplinary hearing, or "take no further action."¹³ As a result, much of the initial investigation and decision-making remained vested within the police force, although the PCC could investigate complaints (and under limited circumstances, initiate complaints). The PCC could review the decision of a Chief at the request of a complainant, an officer who had been investigated, or if it was in the public interest to do so. Upon review of an investigation, the PCC could appoint a board of inquiry to reconsider the matter and inquire into activities beyond those usually considered under the rubric of police misconduct.¹⁴ Throughout the process, the PCC was to monitor individual complaints and make recommendations about police policies, as significant issues arose in the

7. Lewis, *supra* note 4 at 154.

8. A. Goldsmith & S. Farson, "Complaints Against the Police in Canada: A New Approach" (1987) *Crim. L.R.* 615 at 616.

9. *Metropolitan Police Force Complaints Project Act*, S.O. 1981, c. 63, repealed.

10. Goldsmith & Farson, *supra* note 8 at 620.

11. *Metropolitan Toronto Police Force Complaints Act*, S.O. 1984, c. 63 [hereinafter *MTPFCA*].

12. *Ibid.* at s. 5.

13. *Ibid.* at s. 90.

14. Goldsmith & Farson, *supra* note 8 at 620.

course of the PCC's work.¹⁵ This function should be seen as significant as the PCC's investigative role, because it allowed for consideration of systemic problems and consolidation of individual complaints into a report that would be seen by the Chief, police associations, the Attorney-General, and the Solicitor-General—thereby placing complaints within a political forum. In 1990, this complaints legislation was incorporated into the *Police Services Act*, (PSA)¹⁶ giving the PCC jurisdiction over the entire province of Ontario.

Everything changed in November 1997, when the Conservative government gutted the complaints section of the PSA, disbanding the Police Complaints Commissioner, and drastically reducing opportunities for civilian oversight.¹⁷ The new system is overseen to some extent by the Ontario Civilian Commission on Police Services (OCCPS), a provincial body that predated the PSA amendments and does not deal exclusively, or even primarily, with police complaints. The loss of the PCC is the current system's biggest liability, as all investigations are internal and performed exclusively by the police; even reviews to the OCCPS can do no more than transfer a complaint to another police service in the province. Unlike the PCC, the OCCPS is not made aware of a complaint unless the complainant brings it to them; there is no automatic and central oversight of all complaints in the province. Further, the OCCPS cannot intervene in a complaint on its own accord; again, the complainant must initiate any review.¹⁸

Other major changes included the immediate division of all complaints into two categories—policy or service—differentiating the review options available for each type of complaint, and allowing only those directly affected to make complaints. Under the previous system, eyewitnesses and others closely affected were also potential complainants, while the 1981 pilot project had allowed anyone aware of any incident to make third-party complaints.¹⁹ Investigation and evaluation of complaints was also changed, giving the Chief of Police much greater decision-making power. The Chief can now decide not to deal with a complaint for three reasons: if it was not filed within six months of the incident, if it is “frivolous, vexatious, or made in bad faith,” or if the complainant was not directly affected by the incident.²⁰ (last modified: 2 July 1999). This is the current system—one that has moved from significant civilian oversight to almost exclusive internal resolution.

B. The PCLS “Police Story”

PCLS involvement in policing issues has been inconsistent, varying over time as a result of staff and student interest and other community efforts and activities. These barriers to involvement will be considered later, following a brief excursion through

15. *MTPFCA*, *supra* note 11 at s.21.

16. R.S.O. 1990, c. P. 15 [hereinafter PSA].

17. *Police Services Amendment Act*, 1997, S.O. 1997, c. 8.

18. Ontario Civilian Commission on Police Services, *Resolving Complaints: Your Guide for Filing Complaints About Police Conduct, Services and Policies in Ontario* (Toronto: OCCPS, n.d.).

19. Goldsmith & Farson, *supra* note 8 at 620.

20. Toronto Police Service, *Professional Standards: Public Complaints Process*, online: Toronto Police Service <http://www.mtps.on.ca/professionalstandards/complaint.html>

PCLS history, a history that has been fairly well documented in the literature, if not within the clinic itself.²¹ Since 1971, when PCLS opened its doors as one of Canada's first community legal-aid clinics, policing issues have formed a significant proportion of the clinic's work. In addition to its in-house work, PCLS has worked in coalition with community groups working on policing issues, groups whose names, numbers, and successes have varied over the years.

The early 1990s saw an especially concerted move towards policing work at PCLS, with clinic co-director Dianne Martin (a former criminal defence lawyer) and other staff and students involved in a project aimed at exposing police misconduct, using the "techniques of organizing, outreach, lobbying, law reform, casework and central coordination of information to find remedies."²² This project had its genesis in PCLS's involvement in a public inquiry²³ into allegations of serious misconduct in the Toronto police force's Internal Affairs Unit. PCLS represented a woman who had reported an officer who had extorted sexual favours from her, only to find that he received a lenient internal penalty instead of facing criminal charges, and that promises of anonymity made to her were not kept.²⁴ PCLS's goal during the inquiry was twofold: to represent the clinic's client as a starting point, and to advocate to broaden the scope of the inquiry and create a public record, providing a basis for future reform.²⁵ During the same period, PCLS's Landlord and Tenant Division was involved in work against homelessness and became involved in a project run by Street Health, a progressive health care organization, which found that unacceptable numbers of homeless people suffered physical violence at the hands of the police.²⁶ Street Health's report resulted in the formation of the Coalition Against Police Violence, of which PCLS became a member.

As a result of these two projects, PCLS began using specific strategies to address police misconduct and violence, particularly collecting case histories of people reporting police assaults, providing referrals for legal action, assistance with filing to the PCC (anonymously, if necessary), outreach and educational work to other organizations, and generally providing a community base for information and history.²⁷

PCLS work was in turn preceded by the work of community groups such as Citizens Independent Review of Police Activities (CIRPA), a coalition formed in 1981 to monitor police misconduct and provide an alternative to the formal police-complaints

21. R. Kuszelewski & D. Martin, "The Perils of Poverty: Prostitutes' Rights, Police Misconduct, and Poverty Law" (1997) 35 *Osgoode Hall L.J.* 835; R. Kuszelewski, "Clarion Call for Action on the Police" (1992) vol. 8 (N.S.) no. 2 *Law Union News* 1; Martin, *supra* note 5.

22. Kuszelewski & Martin, *supra* note 21 at 846-47.

23. Ontario Commission on Police Services into the Policies, Practices and Procedures of the Internal Affairs Unit of the Metropolitan Toronto Police Force, June 1990.

24. Martin, *supra* note 5 at 169.

25. *Ibid.*

26. Kuszelewski & Martin, *supra* note 21 at 13.

27. *Ibid.*

process.²⁸ CIRPA offered a 24-hour complaint line, referrals, and legal information, and collected data from complaints to use in law reform work. The then newly formed PCC stated that CIRPA's activities were useful in raising issues beyond the PCC's scope.²⁹

There is a dense history of activism on police issues in Toronto, and many groups have emerged, often spurred by tragic events or particularly nefarious misconduct. Any list would necessarily include groups such as the Black Action Defence Committee, formed in 1988 after the acquittal of a police officer charged with the shooting death of a black man and still active on policing issues, including participation in public inquiries; Anti-Racist Action, a youth-based group who found themselves a target of the police unit assigned to investigate hate groups; the recent Coalition Against Racist Police Violence, which also worked on incidents outside of Toronto such as the death of native activist Dudley George; as well as agencies (for example, the Toronto Rape Crisis Centre/Multicultural Women Against Rape) and organizations with a broader focus (for example, Chinese Canadian National Council, Urban Alliance on Race Relations).

PCLS's current policing activities have focused on Community Action Policing (CAP), the so-called targeted policing program. CAP, the Toronto police force's \$2 million 1999 summer program, allowed additional officers to patrol "problem areas," with a focus on increased police presence and preventative measures, including surveillance and interviews with people not suspected of any crime. PCLS was among the founders of the Coalition Against Targeted Policing (CATP) and has continued some of the work initiated by the group, most notably the CopWatch Hotline, a phone line located at PCLS to provide information and gather reports.

III. TODAY'S CHALLENGES: ISSUES AND PROBLEMS

A. The Police-Complaints Process

Perhaps the current police-complaints system is best evaluated in the context of bias. Since the general tenet in Canadian law is that perception of bias is as important and as damaging as actual bias, the current police-complaints system can neither be perceived as fair nor be considered fair, since police generally investigate themselves, with only minimal and ineffectual civilian oversight in the form of OCCPS. This analysis is supported by recent complaints statistics:

- From May 1998 to May 1999, 531 complaints were filed, with 162 dismissed outright (almost one-third) and only 148 actually investigated.³⁰

28. Martin *supra* note 5 at 171.

29. *Ibid.*

30. G. Abbate, "Complaints Against Cops Often Scrapped" *The Globe and Mail* (20 October 1999) A11.

- 1% of complaints resulted in disciplinary action against police officers. During the time of the PCC, the level was 5%—still low, but the drop is significant.³¹
- During the time of the PCC, there were also more complaints filed, an average of 750 per year.³²

Even before the 1997 changes, complainants had mixed expectations and reviews of their participation in the formal complaints process. A 1994 study of Toronto complainants found that about a quarter of new complainants did not know who would investigate their complaint, but that 70% of those who thought that their complaint would be investigated by the police did not think that was a good thing.³³ After the study participants were informed of the complaints process, 56% thought that the investigation would be more fair with an outside investigation, and 40% stated “that police should not investigate themselves.”³⁴ The complainants were also largely unfamiliar with the PCC, but even of those who knew of its existence, 43% stated that they did not think that it would make a difference in the handling of their complaint.³⁵ Perhaps the most telling response came from the group of complainants who had completed the process: only 14% thought they had received a fair investigation, while 35% thought that the police were biased, 16% felt that not all the evidence was looked at, and 5% thought that the police had lied.³⁶ The study concluded that the “most salient feature in the minds of complainants remains the fact that the police investigate the police,”³⁷ and that “many complainants remain angry and alienated as a direct result of their experience of making a formal complaint against the police.”³⁸ While these conclusions were no doubt disheartening at the time, their significance in today’s context is even greater: if complainants were dissatisfied while the PCC remained in place, the only plausible inference is that it is even worse today. In fact, the beliefs of the complainants in the 1994 study are borne out by comparisons between internal and external complaints mechanisms that have repeatedly revealed that internal review systems are problematic and often doomed to fail.³⁹

The public’s seeming distrust of the police-complaints process and the reluctance of those who have experienced police violence or harassment to engage in the process is exacerbated by the perceived lack of remedies. If only 1% of complaints result in

31. *Ibid.*

32. Goldsmith & Farson *supra* note 8 at 621.

33. T. Landau, “When Police Investigate Police: A View from Complainants” (July 1996) *Can. J. Criminology* 219 at 300-01.

34. *Ibid.* at 301.

35. *Ibid.* at 304.

36. *Ibid.* at 306.

37. *Ibid.* at 309.

38. *Ibid.* at 310.

39. A.J. Goldsmith, “External Review and Self-Regulation: Police Accountability and the Dialectic of Complaints Procedures” in A.J. Goldsmith, ed., *Complaints Against the Police: The Trend to External Review* (New York: Oxford University Press, 1991) 13 at 19.

disciplinary action against offending officers,⁴⁰ the impetus to get involved is simply not present. And getting involved in the complaints system is not easy for many of those who are victims of police misconduct. First and foremost, would-be complainants must overcome the primary barrier of identification of one's problem with the police as a legal problem rather than a personal matter, subject to a complaints system and at least the promise of redress.⁴¹ Some of the further barriers are more obvious but can be equally daunting: an inability to speak and/or write English or French (there is no longer an interpretation service available, as there was at the PCC), literacy (complaints must be made in writing), and the necessity of having a mailing address to receive replies.

For some of the most vulnerable would-be complainants there is also the risk of retaliation;⁴² if one is often in contact with the police, especially the same officers, filing a complaint that will be investigated by the same police force can be a dubious proposition. Considering the meagre results available, opening oneself to possible retaliation may not seem worth it, particularly for people who already feel threatened by criminal charges or as a result of being "known" to the police.⁴³ Retaliation can take many forms, from increased harassment, to the unwanted attention that accompanies those with reputations as "troublemakers," to the laying of criminal charges directly resulting from the complaint, as occurred in one notorious PCLS case.⁴⁴ Finally, complainants must consider that they will be required to prove any allegations made in their complaints, that proof is required on a criminal standard—beyond a reasonable doubt—and that given the resources on the other side, it is very likely that it will seem as though it is the complainant, rather than the police, on trial.⁴⁵

Beyond the fate of individual complaints and complainants, the fact is that police complaints contribute little to fundamental change in policing policy or behaviour. The current complaints system is simply too fragmented, and the number of complaints so small, that the police can very well afford to ignore individual complaints. Since there is no longer a province-wide clearinghouse of all complaints and the recurrent issues and problems arising from them, the system as a whole simply does not register on any level where significant decisions are made. The system's shortcomings are further exacerbated by the political context in which policing in Ontario is located: police associations enjoy unprecedented power, prestige, and access to decision makers; police ask for and receive ever-increasing budgets; and policing as social control of the poor, marginalized, and politically active in the form of targeted policing and "safe streets"⁴⁶ legislation has become overt and even

40. Abbate, *supra* note 30.

41. Mosher, *supra* note 6 at 917-18.

42. See *Ibid.* at 20-21.

43. Interview with Mary Birdsell, staff lawyer, Justice for Children and Youth, 11 February 2001.

44. In 1996, a PCLS client was charged with mischief after filing what police considered to be a false complaint. The student caseworker who filed the complaint was subpoenaed to testify against the complainant during the criminal trial, although his subpoena was later withdrawn.

45. Kuszelewski & Martin, *supra* note 21 at 13.

celebrated. In other words, the dearth of meaningful options within the police-complaints process is mirrored by a lack of political will to address the issues raised by complainants.

B. The Community-Focused Legal Clinic Approach

Critique is always difficult, even when it comes in the form of considered and constructive internal review, yet it is a necessary part of any organization's growth and progress. In terms of policing, PCLS's work has been stymied by several factors: lack of institutional memory, a lack of "fit" among the clinic's other areas of work and the precarious nature of reactive or defensive *ad hoc* organizing, which also affects other groups and potential coalition partners. The first of these problems is perhaps the most ironic, since former PCLS staff members have repeatedly stressed the importance of the clinic as a central base for organizing or a "permanent home for reform,"⁴⁷ specifically because of its "history, stability and resources."⁴⁸ Yet staff and student interest in policing does vary over time, particularly among students, who are themselves a transitory element within the clinic, yet do most of the day-to-day casework. Lawyers and community legal workers (CLWs) are generally permanent employees of clinics and represent the most likely source of collective memory in terms of past strategies, activities, resources, and victories. Unfortunately, the volume of work undertaken by most clinic staff and students tends to drain energy away from anything but the most pressing matters, meaning that organization of resources or the passing on of project histories requires extraordinary persistence and a commitment to the cause.

The difficulty of maintaining institutional memory is only increased by the fact that policing does not have an obvious home among the types of law that make up the community legal clinic's "menu" as defined in Ontario's *Legal Aid Services Act*: housing and shelter, income maintenance, social assistance, human rights, health, employment, and education.⁴⁹ It has been suggested that policing ought to be distributed among all working groups within the clinic system, in an effort to create a co-ordinated base for law reform.⁵⁰ At PCLS, for example, the CopWatch hotline is being shared by students in all divisions and is being co-ordinated by one of the articling students.

The final and perhaps most overarching difficulty in legal clinics' approach is that policing work is often reactive and *ad hoc*, usually as a result of violence, such as a police shooting, or as a reaction to a particular policy or legal development, such as CAP or a public inquiry. Perhaps these sorts of catalysts are needed to overcome the energy gap noted above, but this type of organizing can be extremely problematic, not

46. *Safe Streets Act, 1999*, S.O. 1999, c. 8.

47. Martin, *supra* note 5 at 172.

48. Kuszelewski & Martin, *supra* note 21 at 13.

49. *Legal Aid Services Act, 1998*, S.O. 1998, c. 26, s. 2.

50. Martin, *supra* note 5 at 174.

only in practical terms such as those of institutional memory, but more important, in terms of consistency and credibility, among allies and opponents. Forever reacting does not allow for the real work that is required to achieve fundamental change, in policing as with any other issue, because it does not foster the creation of alternatives in either process and resources, or contribute to a collective paradigm shift in police accountability, and does not allow for policing issues to be included in multi-issue coalitions and movements. Always playing defence, without any regard for offensive tactics or strategy, is not a problem limited to community legal clinics, by any means, nor is it something for which blame can be laid, but it is something that activists and lawyers alike must remain mindful of.

IV. SOLUTIONS: FROM COMPLAINTS TO COMMUNITY

A. Legal Strategies: New and Old

Although the use of the law to address police misconduct in Canada is not new, traditional legal strategies have not been utilized to the extent they could be, and new and creative forms of legal action remain to be explored. The most common civil proceedings have been those based on the tort actions of negligence, battery,⁵¹ and malicious prosecution,⁵² and, to a lesser extent, assault and false imprisonment. The novel actions refer to an emerging area of U.S. law that has yet to be tested in Canada: constitutionally based liability for failure to provide an adequate police-complaints process. Each of these doctrines has its own specific problems in terms of establishing liability, but its application is also limited by the general barriers to justice faced by would-be plaintiffs: inability to pay for legal counsel, the unavailability of legal aid for such actions,⁵³ the possibility of being held liable for costs if the action is unsuccessful, and the difficult-to-quantify yet important elements of time, energy, and loss of privacy. These barriers are slightly altered when the plaintiff is represented by a community legal clinic, although the result is more a shifting of burdens than an elimination of risk or barriers. Litigation strategies, especially novel test cases, are notoriously resource-hungry and could easily drain the capacity of the average clinic. These problems are by no means minor, but in the current context of police culture and provincial policy, the pressing need for concerted and offensive legal strategies to combat police misconduct outweighs the potential hazards.

Finally, any consideration of legal strategies and policing requires the acknowledgment that as public authorities, the police enjoy a level of legal immunity, particularly as set out in the *Public Authorities Protection Act (PAPA)*.⁵⁴ Statutory protections only apply, however, when public authorities act within the scope of their statutory or other

51. See, for example, *Berntt v. Vancouver (City)* (1997), 33 C.C.L.T. (2d) 1 (B.C.S.C.), reversed on other grounds (1999), 174 D.L.R. (4th) 403 (B.C.C.A.).

52. See, for example, *Nelles v. Ontario* (1989), 49 C.C.L.T. 217 (S.C.C.).

53. Tort actions for damage are not eligible for Legal Aid certificate coverage: Legal Aid Ontario, *Improving Legal Aid in Ontario: A Guide to Legal Aid Services and Hourly Maximums* (June 1999) at 19. See also *Legal Aid Service Act, 1998*, *supra* note 49 at s. 13(3)(e).

54. R.S.O. 1990, c. P.38 [hereinafter *PAPA*].

public duty; when that duty is exceeded, the protections no longer apply.⁵⁵ As a result, plaintiffs alleging police misconduct are likely not bound by the *PAPA*, so long as the misconduct falls outside of what would be considered statutory duty or authority, and the police are not able to demonstrate honest belief that they were acting in the course of duty.⁵⁶

i. *The Common Law Tradition*

Perhaps the most notorious civil suit against the police in negligence is the *Jane Doe* case,⁵⁷ the culmination of one woman's 12-year battle for accountability and redress that followed her realization that the man who had raped her in her own apartment was a serial rapist with a specific pattern of violence that the police were aware of but did not share with women in the rapist's neighbourhood. *Jane Doe* received general damages of \$175,000, and \$37,301 in special damages, as well as the vote of Toronto City Council urging the police not to appeal, and an apology from then chief of police David Boothby. *Jane Doe's* legal victory was certainly an inspiring one, but it is not a case that would have been within reach of many would-be plaintiffs: the novel legal issues raised attracted experienced lawyers willing to work *pro bono*, the plaintiff had much support within the feminist community, and she was able to bear the personal toll that a lawsuit can take. Yet negligence as a legal doctrine is probably the most accessible of the tort claims available.

Unlike the more archaic intentional torts, negligence requires no specific intent, and the other legal tests required to sustain an action fit well within the types of incidents involving police that are likely to result in litigation and the evidence that is likely to exist. There can be little argument with the proposition that police owe a duty of care to citizens. "Caring," in fact, is the basis of their very existence, just as the phrase "To serve and protect" suggests. The question of how far that duty extends is raised only in cases where the matter is one of omission, as in *Jane Doe*, rather than commission, as would be the case where plaintiffs suffered injury or loss as a result of police (mis)conduct. Standard of care may be established both by reference to stated police policy and by comparison to other police forces, although the question of what is "reasonable" police behaviour may at times proceed without the benefit of a good example.

In comparison, the intentional torts have much more specific doctrinal requirements. This rigidity is particularly evident in the tort of malicious prosecution, which requires that the plaintiff demonstrate "malice, or a primary purpose other than that of carrying the law into effect."⁵⁸ The test for battery is less onerous, requiring the plaintiff to

55. See, for example, *Croft v. Durham (Regional Municipality) Police Services Board* (1993), 15 O.R. (3d) 216 (C.A.).

56. *Ibid.*

57. *Jane Doe v. Toronto (Metropolitan) Commissioners of Police* (1998), 160 D.L.R. (4th) 697 [hereinafter *Jane Doe*].

58. *Nelles v. Ontario*, *supra* note 52 at 229.

prove that she was injured by the direct act(s) of the defendant, who has to prove absence of both intent and negligence, to escape liability.⁵⁹

Additionally, within the particular context of student-run clinics, tort claims would generally be limited to claims of \$6,000,⁶⁰ as law students do not have standing before the Ontario Superior Court of Justice and are limited to civil actions in the Small Claims Courts. Since substantial tort claims would require the active participation of supervising lawyers in any court proceedings, it would seem that these cases should be limited to test cases or those to which the clinic has a substantial commitment for other reasons. This limitation also addresses the fact that tort claims are almost by definition particular to the individual plaintiff and do little, if anything, to support broader arguments for law reform or changes in police policy or practice, with limited exceptions such as *Jane Doe*.⁶¹

ii. *Claiming Damages: Charter Breaches Arising out of Inadequate Complaints*

A growing body of U.S. law has found municipalities liable for failure to provide adequate investigation of complaints against the police. Beginning with the 1987 case *Fiacco v. Rensselaer*,⁶² U.S. courts have held that deliberate indifference to police misconduct can be demonstrated by failure to reasonably investigate complaints.⁶³ The starting points in attempting to apply this reasoning to the Canadian context is section 1983 of the U.S. federal code,⁶⁴ which legislates the right to bring civil actions for deprivation of constitutional rights and provides the statutory basis for bringing claim. This requirement of legislative authority to claim damages for constitutional breaches does not represent a particularly onerous hurdle for prospective Canadian plaintiffs. Section 24(1) of the *Canadian Charter of Rights and Freedoms*⁶⁵ allows for the enforcement of Charter rights or freedoms through legal action before a court of competent jurisdiction and makes available a wide range of remedies, so long as they are appropriate and just in the circumstances of the case.⁶⁶ The most common remedies for Charter breaches have been changes to legislation (for example, reading in or out of certain clauses) and injunctive relief during proceedings, but damages for Charter breaches have been awarded,⁶⁷ although action for damages under section 24(1) will

59. *Dahlberg v. Naydiuk* (1969), 10 D.L.R. (3d) 319 at 328-329.

60. On April 2, 2001, this maximum increased to \$10,000.

61. See, for example, the report of the City of Toronto's Audit of the Metro Toronto Police Sexual Assault Squad: J. Griffiths, C.A., *Review of the Investigation of Sexual Assaults – Toronto Police Service* (Toronto: City Auditor, 1999).

62. 783 F.2d 319 (2d Cir. 1986) [hereinafter *Fiacco*].

63. H.G. Beh, "Municipal Liability for Failure to Investigate Citizen Complaints Against Police" (1998) 25 *Fordham Urban L.J.* 209 at 231.

64. 42 U.S.C. § 1983 (1979).

65. Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 192* (U.K.), 1982, c. 11, [hereinafter the *Charter*].

66. P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) at 37.2(g).

67. E. Meehen *et al.*, *The 1999 Annotated Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1998) at 716-17.

generally preclude a declaratory action for invalidity under section 52 of the *Constitution Act, 1982*,⁶⁸ and damages for *Charter* breach may not be granted where damages under other heads of damage are granted, even if there is proof of a *Charter* breach.⁶⁹

The doctrine of deliberate indifference in relation to municipalities as set out by the United States Supreme Court in *City of Canton v. Harris*⁷⁰ requires a three-part analysis:

- examination of the municipal program in question (in this case, the supervision and training of officers), particularly whether the program's inadequacy was likely to result in constitutional violations;
- demonstration of culpable deliberateness in terms of the municipality's decision-making process in developing policy and programs, an inquiry which requires a standard higher than negligence;
- causation on a but-for basis, expressed as proof that the municipality's inadequate program actually caused the constitutional injury.⁷¹

The *Canton* deliberate-indifference test is an onerous one for potential plaintiffs, requiring specific evidence of municipal policy and procedure, a close causal connection, and records indicating the intentions of decision makers, such as minutes of meetings and debates.

Elements of this analysis have already been recognized in Canadian decisions about the tort liability of public authorities, where courts have differentiated between policy decisions and the carrying out of that policy in a reasonable manner. The Supreme Court of Canada has held that policy decisions are not reviewable, but that actions undertaken as a result of policy are reviewable and that unreasonable procedure can lead to liability in tort.⁷² This analysis, although borrowed from tort law, ought to underscore plaintiffs seeking to hold municipalities liable for the provision of inadequate police-complaints processes, since the focus of litigation is on the quality of procedures, not their presence or absence. In this respect, Ontario's move from a complaints system characterized by overarching civilian oversight in the form of the PCC to one based largely on internal review is itself significant, and depending on the legislative history, could be seen as either a policy decision or an operational decision within a static policy of commitment to police accountability, as is suggested by the Declaration of Principles set out in the *PSA*.⁷³

Having met the preliminary legal hurdles of legislative authority and the standard of deliberate indifference, the basis for police-complaints *Charter* cases is the question of

68. *Guimond v. Quebec (Procureur general)*, [1996] 3 S.C.R. 347.

69. *Jane Doe*, *supra* note 57 at 701.

70. 489 U.S. 378 (1989) [hereinafter *Canton*].

71. *Beh*, *supra* note 63 at 223-25.

72. *Just v. B.C.*, [1989] 2 S.C.R. 1228.

73. *PSA*, *supra* note 16 at s. 1.

whether a more effective system to address citizen complaints would have prevented the officer from inflicting a constitutional injury upon the plaintiff. The necessary premise at the core of this claim is whether effective citizen complaint review would have led to better performance by the errant police officer.⁷⁴

In other words, police misconduct in the absence of municipal failure to adequately supervise their staff does not give rise to liability; it is the failure to adequately address misconduct that establishes liability.⁷⁵ There are three routes to meeting this central burden and establishing that inadequate complaints procedures made it likely that a plaintiff's constitutional rights would be violated by a police officer.⁷⁶ The first involves attempting to prove that a police force has a "climate of lawlessness" as a result of rampant misconduct, and that the offending officer(s) acted as a result of this environment. The second method looks to the history and background of the offending officer(s) and attempts to demonstrate that misconduct condoned in the past allowed the pattern of behaviour to continue unchecked. Finally, a plaintiff can also use an officer's employment record to argue that had previous incidents been addressed in an adequate and timely manner, the officer would have been disciplined or terminated prior to the incident in question.

All three methods require detailed evidence of the resolution of complaints laid by the public and, to a lesser extent, internal discipline mechanisms. The court in *Fiacco* held that unproven and/or unsustained complaints should nevertheless be entered into evidence, as the response to all complaints is significant in determining the adequacy of a complaints system and that complaints that were not investigated simply underscore a plaintiff's claim that complaints are not taken seriously and do little to prevent future misconduct.⁷⁷ The last methods require access to the records of particular officers, an issue that has received considerable attention in the criminal courts. Two recent cases considered the disclosure of records held by the PCC, OCCPS, and Chief of Police, and while both held that such records may be disclosed to the defendant in a criminal proceeding, they differed on the approach. In *R. v. Altunamaz*,⁷⁸ the court held that records held by the PCC and OCCPS are third-party records and could be disclosed only through the process set out in *R. v. O'Connor*,⁷⁹ which requires that the defence prove that the documents are likely to be relevant. In a case decided only one month later,⁸⁰ the court held that documents in control of the Police Service, OCCPS, and PCC are to be disclosed in the same manner as any other materials in the possession of the Crown, as per *R. v. Stinchcombe*.⁸¹ How these cases translate into

74. Beh, *supra* note 63 at 226.

75. *Ibid.* at 215-16.

76. *Ibid.* at 229.

77. *Ibid.* at 231-32.

78. [1999] O.J. No. 2262 (Ont. Sup. C.J.).

79. (1995), 103 C.C.C. (3d) 1 (S.C.C.).

80. *R. v. Scaduto*, [1999] O.J. No. 1906 (Ont. Sup. C.J.).

81. (1991), 68 C.C.C. (3d) 1 (S.C.C.).

the civil courts remains to be seen, as plaintiffs do not enjoy the same level of disclosure rights⁸² as criminal defendants, and the issue of privilege would certainly be relevant in regards to records relating to disciplinary actions and other legal or quasi-legal police activities.

Nonetheless, Canadian legal clinics should seriously consider filing such a claim as a test case. The requirements as set out by the U.S. jurisprudence could be met with an ideal plaintiff: an incident related to the denial of *Charter* rights, demonstrable loss or injury, and most important, evidence of similar misconduct in the past that had been complained about, yet remained unchecked by the complaints system. Such an action would not be easy to sustain and would certainly have the high resource costs discussed above, but it would be a "political case" in the best sense of the words. Considering the lack of political will in regards to policing issues, a high-profile case would allow for the possibility of legal precedent on the side of police accountability and would provide a focal point for renewed public debate on the issues that are simply not being heard. While focusing on litigation can merely divert scarce energy and resources away from political organizing, there have also been movements and issues that have benefited from a two-pronged approach to social change; it is arguable, and likely true, that police accountability could be one of those issues.

B. Community Organizing for Accountability

Despite the critique raised above, the community legal-clinic system requires a systematic, cohesive approach to policing issues. While the following discussion is not meant to be a blueprint, having an insufficient base in province-wide clinic debate and consensus, several areas of clinics' policing activities require clarification and consideration in terms of tactics and goals. It appears clear, however, that the overall goal must be one of providing viable alternatives to participation in the police-complaints system as it is currently constructed. Clinics also need to remain vigilant in the sense of being prepared to capitalize on political and legal opportunities for police reform as they arise, by maintaining sufficient resources, human and otherwise, within the clinic network and individual communities to allow for a quick, coherent response to issues or events.

i. Working with Individual Would-Be Complainants

Like many other clinics, PCLS does not currently have an official policy on assisting people with filing police complaints and, as a result, there is no uniform approach to working with individual would-be complainants who come to the clinic through the CopWatch line or as neighbourhood walk-ins. The most common current practice consists of fully advising people interested in filing police complaints about the complaints process, the outcomes they can expect, and the possible risks involved in making a formal complaint. If the person still wishes to file a complaint, she is either given the resources to do it on her own or PCLS may assist her, the decision being made case by case basis. This strategy is not meant to scare or discourage complain-

82. See *Ontario Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 at Rule 30.

ants, but rather, should be seen as a sort of “informed consent.” In all likelihood, a formal policy would probably not differ significantly from the process outlined, although the benefits of consistency and authority would be welcome, as would the internal debate required during the formulation of a policy. Another Toronto clinic with a history of involvement in policing issues shares a similar approach. Justice for Children and Youth has no official clinic policy on police complaints, and while clinic lawyers will provide information about the complaints process, they will generally advise clients to wait until after the conclusion of any criminal matters before proceeding with a complaint.⁸³

In addition, clinics can offer assistance with other strategies to would-be complainants, particularly in regards to media work, referrals to community groups, legal advice, or support services. This approach demands an analysis of each person’s motivation in seeking to file a complaint, as various goals (for example, having one’s voice heard, creating a public record, working out anger) will suggest various strategies. Personal characteristics are also relevant in this context, in terms of developing strategies appropriate to a person’s situation, particularly if it is a vulnerable one, and also because the success of any resulting strategy depends on continued participation and commitment.

ii. *Policing Hotlines*

Ideally, the CopWatch hotline and other like services will serve as more than a repository of sad stories. The reference point for these projects is CIRPA’s work in the early 1980s, particularly its highly effective and multi-purpose phone line. Getting to that point requires commitments from clinic staff or development of a volunteer base of people willing to serve as intake workers for the hotline and a co-ordinator within the clinic who is able to provide continuous support to the project. Community partners are needed not solely for simple outreach and human resources, but also as allies who will provide support when needed (for example, during events or at moments of political opportunity) and lend the hotline credibility by underscoring its status as a grassroots, community-based project, and helping to overcome a common reluctance to engage in any aspect of the legal system, including clinics. Once these elements are in place, clinics can plan on maximizing a hotline’s possible applications:

1. *Publicizing Bad Cop/Bad Policy Stories*

When the CopWatch hotline was initiated, one of the primary functions was to collect stories specific to the targeted policing program and to publicize them as a way of countering government and media support for CAP, providing an alternative record of the program’s effects.⁸⁴ Such action, whether in the form of a press conference, Web site, printed release, or community presentation remains necessary. In the absence of the PCC, a non-governmental provincial clearinghouse of such reports would be especially useful for law reform and/or lobbying.

83. Mary Birdsell, *supra* note 43.

84. Committee to Stop Targeted Policing, *Who’s the Target? An Evaluation of Community Action Policing* (Toronto: August 2000).

2. *Maintaining an Alternative Database of Policing*⁸⁵

Another initial goal of the hotline was to keep track of police divisions, individual officers, common practices, and problems and the like, in order to organize specific campaigns around discreet targets. This method would grant the reports of anonymous complainants much of the same resonance as those of people willing to be named, and allows for the elucidation of patterns and realities that generally go unnoticed. Such a tactic requires both the promotion of the hotline to the particular community in order to build up a critical mass of complainants, and sufficient time—to collect complaints and the confidence of callers. As in all this work, consistency is key, in the sense that people are often made more vulnerable by exercising their legal rights and agitating politically, meaning that allies and/or organizers cannot abandon a project or its constituency halfway through.

3. *Education about Legal Rights*

The final goal of the CopWatch hotline was to provide an opportunity for people to receive free, reliable information about their legal rights, and this was a central component of the Community Forum launching the hotline. There is an on-going debate amongst legal workers and activists on whether public education about legal rights and police power is a useful tactic or an exercise that exposes people to unnecessary risk. Within the Ontario clinic system, however, education about rights in general has come to be seen as work of central importance and is often predicated on a view that to withhold such information is to underestimate the street smarts and survival skills of those people who have the most exposure to police work.⁸⁶ Further, demystification of the law has been a longstanding goal of all community legal work, and in this context can “dispel disempowering myths about the police force,”⁸⁷ allowing for the construction of the collective knowledge base required for political organizing.

iii. *Long-term Commitments*

For clinics that have identified policing as an issue of importance and where the energy to do work on police issues persists, a focus on the local community and constituency and relevant local concerns ought to be a primary consideration, although combined with a perspective on broader provincial and national trends. The clinic’s catchment area should be cross-referenced with the local police divisions, allowing clinic staff to get to know the individual officers patrolling local streets and to develop “relation-

85. An issue that arose during the set-up of the CopWatch hotline was whether solicitor-client privilege would attach to any reports or documentation arising from callers. Section 89(2) of the Legal Aid Services Act, 1998, *supra* at note 49, provides that “[a]ll legal communications between a lawyer, student or service-provider at a clinic, student legal aid services society or other entity funded by the Corporation . . . and an applicant for legal aid services are privileged in the same manner and to the same extent as solicitor-client communications.” While it is not clear that all callers would be considered “applicant[s] for legal aid services,” community partners stated that simply being physically located within a legal clinic provided the hotline with an additional measure of security.

86. See, for example, Community Legal Education Ontario, *Police Powers: Stops and Searches: Know Your Rights!* (Toronto: CLEO, 1999).

87. Martin, *supra* note 5 at 173.

ships” with officers and other division personnel in order to facilitate discussion and resolution of concerns. Such an approach should not be seen as co-opting or participating in sanctioned ‘community policing’ programs, but rather as part of a commitment to being vigilant and visible where others cannot be. If necessary, clinic staff and other policing project participants should be in the streets just as the police are, but providing visible opposition and monitoring misconduct. Targeted policing and community-policing projects in poor neighbourhoods requires a counterweight in the form of organizations that reject a “law and order” agenda yet remain willing to debate policing issues and act on them.

V. CONCLUSIONS

Within the current police-complaints system, community legal clinics need to provide viable alternatives to the formal police-complaints process in the form of community-based information gathering and sharing coupled with a willingness to engage in campaigns aimed at police and governmental decision makers. As legal organizations, however, clinics should also be developing legal strategies to address the shortcomings and failures of the complaints system, particularly in the form of test-case legislation. Above all, legal clinics must be allies, willing to use their legitimacy and resources to work for change, within both the legal system and the community.

The current police-complaints system is not working, and it cannot be perceived as fair. Community legal clinics should be attempting to tip the balance in the favour of accountability and justice.

