
Volume 35, Number 3/4 (Fall/Winter 1997)
Special Issue on Parkdale Community Legal Services
(PCLS)

Article 33

The Perils of Poverty: Prostitutes' Rights, Police Misconduct, and Poverty Law

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Citation Information

Kuszelewski, Ray and Martin, Dianne L. "The Perils of Poverty: Prostitutes' Rights, Police Misconduct, and Poverty Law." *Osgoode Hall Law Journal* 35.3/4 (1997) : 835-864. <http://digitalcommons.osgoode.yorku.ca/ohlj/vol35/iss3/31>

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Abstract

This article is divided in two parts. In Part I, Ray Kuszelewski details the history of setbacks in representing street prostitutes faced by community-based initiatives at Parkdale Community Legal Services (PCLS). It is a personal, anecdotal, account of the clinic's evolutionary role in tackling the perils of poverty for street prostitutes. In Part II, Dianne Martin complements the first section by addressing the specific problem of police misconduct. The commentary is historical and theoretical in examining prior efforts at reform and argues for the development of a new, collaborative approach. The context is local and particularized in a community legal clinic. The authors use clinic files, media accounts, and inquiry records to centre the discussion in the "real world" of poverty, perception, and public response.

THE PERILS OF POVERTY: PROSTITUTES' RIGHTS, POLICE MISCONDUCT, AND POVERTY LAW[©]

BY RAY KUSZELEWSKI* AND DIANNE L. MARTIN**

This article is divided in two parts. In Part I, Ray Kuszelewski details the history of setbacks in representing street prostitutes faced by community-based initiatives at Parkdale Community Legal Services (PCLS). It is a personal, anecdotal, account of the clinic's evolutionary role in tackling the perils of poverty for street prostitutes. In Part II, Dianne Martin complements the first section by addressing the specific problem of police misconduct. The commentary is historical and theoretical in examining prior efforts at reform and argues for the development of a new, collaborative approach. The context is local and particularized in a community legal clinic. The authors use clinic files, media accounts, and inquiry records to centre the discussion in the "real world" of poverty, perception, and public response.

Cet article est divisé en deux parties. Dans la première, Ray Kuszelewski relate l'histoire des difficultés rencontrées par *Parkdale Community Legal Services* à l'occasion de la représentation de prostituées. Il s'agit d'un compte rendu personnel et anecdotique du rôle évolutionniste joué par la clinique, laquelle s'est attaquée aux périls de la pauvreté dans le monde de la prostitution. Dans la deuxième partie, Dianne Martin complète la première partie de l'article en abordant le problème particulier de l'inconduite des policiers. Elle examine d'un angle historique et théorique les efforts faits précédemment en vue d'une réforme et préconise le développement d'une nouvelle approche fondée sur la collaboration. Le contexte est local et spécifique à une clinique juridique communautaire de Toronto. Les auteurs utilisent des dossiers de la clinique, des comptes rendus des médias et des rapports d'enquête afin de situer la discussion dans la «vraie réalité» de la pauvreté, des perceptions et des réactions du public.

I. INTRODUCTION	836
II. THE KUSZELEWSKI PERSPECTIVE: PROSTITUTES' RIGHTS AND POVERTY LAW	837
III. THE MARTIN PERSPECTIVE: POLICE MISCONDUCT, POVERTY LAW, AND CHANGE	844
A. <i>The Methodology</i>	847
B. <i>Police Methods: The End Justifies (and Determines) the Means: Selective Enforcement: Sex, Drugs, and ...</i>	848

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1. Sex	849
2. Drugs	849
IV. THE ROLE OF LAW	850
A. <i>Wife Assault: Private Violence</i>	852
B. <i>Police Use of Deadly Force: Public Violence</i>	853
V. A REFORM AGENDA: WHERE DO WE GO FROM HERE?	854
A. <i>Truthtelling: Reclaim the Agenda</i>	855
B. <i>Reclaim the Law</i>	856
C. <i>Coalitions and Community</i>	858
D. <i>A Permanent Home for Reform: The PCLS Response</i>	860
1. Community education and organizing	861
2. Casework	862
3. Law reform	862
VI. CONCLUSION	863

I. INTRODUCTION

This short memoir is intended to capture a unique chapter in Parkdale's history—the representation of street prostitutes and efforts to combat police misconduct in the late 1980s and early 1990s. Although PCLS has been concerned with both issues before (and still does some police misconduct work) this period brought some important and challenging work into the clinic.¹ Essentially, this type of work is not usually done by community clinics; criminal law cases are generally left to the private defence bar, regardless of their poverty law implications, and PCLS has generally followed this pattern.

¹ Whether either has received particular attention, or become a part of regular casework has been in large part a product of the interest and expertise of staff and students. For example, in part because of the interest of then-graduate student Richard (Dick) Evans, PCLS made submissions in 1975 on behalf of a client to a Royal Commission led by the Honourable Mr. Justice Donald R. Morand into police practices in Metropolitan Toronto. The inquiry was sparked by media attention focussed on allegations of extreme brutality against suspects in custody, and was called to "clear the air" about the shocking allegations. See Ontario, Royal Commission into Metropolitan Toronto Police Practices, *Report of the Royal Commission into Metropolitan Toronto Police Practices* (Toronto: The Commission, 1976) (Commissioner: D.R. Morand) [hereinafter *Morand Commission Report*]. As well, Parkdale represented street prostitutes on criminal charges when Dianne Martin was a student in 1974-76.

There are a number of reasons for this resistance. There is a sort of stigma, as well as a streak of illicit glamour, associated with criminal defence work, and both have played a role in the decisions to limit drastically any such work that the students or the clinic might take on. The stigma attached, in some minds, to criminal defence work generally can itself be a barrier in community legal work. Apart from the negative association, poor people are the most frequent victims of crime, just as they are most often the perpetrators on which the justice system focuses. Organizing efforts and general credibility could both be harmed if PCLS had to turn clients away because of conflicts over representing the person who broke their window or stole their bicycle.² The glamour, spurious or not, represents another barrier. Law students are notorious for wanting to take every case that comes in the door, and for those inclined toward litigation, criminal defence work is undoubtedly exciting. Once the word was out in the community and within the clinic that PCLS would do criminal cases, there has been a real fear that the criminal work would override other cases. There are also concerns about expertise, and about doing work for which legal aid certificates are, or should be, available. There are so many claims and demands on a community legal clinic's resources that there are serious issues around becoming involved in matters for which, theoretically at least, individual lawyer representation is available. That said, some criminal justice issues touch matters that lie at the heart of a community law mandate—to address in a systematic and holistic manner the legal barriers and burdens of poverty. For their lack of credibility alone, prostitutes and victims of police misconduct represent classes of clients who have a real need for the assistance of a clinic such as Parkdale.

II. THE KUSZELEWSKI PERSPECTIVE: PROSTITUTES' RIGHTS AND POVERTY LAW

Prostitution cases were the first to be added to PCLS's criminal caseload in November 1988 after community issues and student research identified this work as a worthy claimant for the clinic's resources. Police misconduct cases were added in December 1991, following a similar evaluation by the clinic.

² This was in part the rationale for the clinic policy to not represent men charged with woman abuse. For an explanation of that policy see "PCLS Clinic Manual 6.17—Policy on Spousal Assault" (1997) 35 Osgoode Hall L.J. 777.

In November 1988 the PCLS Prostitutes' Rights Committee, a clinic community legal worker-driven group, presented a recommendation to the board of directors that the clinic represent women charged with a first offence of communicating for the purposes of prostitution, in violation of then section 195.1 of the *Criminal Code*.³ The recommendation requested further that the board develop law reform and organizing strategies for the prostitutes' community needs. The recommendation was developed based upon research of both students and the community legal worker, ultimately prepared as a student research paper.⁴ The issue faced the clinic squarely, as street prostitutes plied their trade on the traditional Parkdale stroll, which included the front steps of the clinic.

The board approved the request and PCLS officially began to represent the concerns of prostitutes, both as individuals and as collectives. From this juncture, PCLS developed policy procedure and training for the students in the family and welfare group. As well, the articling students began the criminal representation and outreach for first-offender street prostitutes in Parkdale. It was also recognized that landlord and tenant issues, as well as workers' rights issues, might arise after a *Criminal Code* charge was processed.⁵ In February 1989, PCLS hired me to supervise the landlord and tenant group. Although I had only been called to the bar two years earlier, I often represented street prostitutes in the criminal courts.

Although the clinic's action was mainly advertised by word of mouth, street prostitutes soon found out about the clinic's new specialization. The prostitutes did have support from the Canadian Organization for the Rights of Prostitutes (CORP) as well as community organizations such as the Parkdale Community Health Centre. PCLS then became another support agency for the prostitutes' struggles in the courtroom. All of these groups, while limited by standard financial burdens of public agencies, did assist issues relating to prostitutes. At PCLS, the students themselves responded actively, volunteering to do casework and writing papers addressing pertinent legal issues.

One of the earlier issues that confronted the clinic was how to deal with the common claim by clinic clients that they had been "stiffed" by johns—given cheques that bounced. Students were faced with a very

³ R.S.C. 1985, c. C-46.

⁴ S. Fericean, "Street Prostitutes, Legal Clinics, and the Community" (Intensive Program in Poverty Law, Osgoode Hall Law School, York University, 1988) [unpublished].

⁵ See Memorandum to PCLS Management Team and Board, re: Amendment to Caseload Criteria (November 1988) [unpublished].

specific issue: did street prostitutes have a legal remedy when dealing with unpaid accounts? In December 1989, as a response to this question, clinic student Colin Brown wrote a legal memorandum on the issue of "Immoral Contracts."⁶ His conclusion suggested that there was a legal remedy. As a result, the clinic attempted to sue in contract for the outstanding client debts.

In one case, a demand letter was written to the debtor suggesting payment before the commencement of the legal proceedings. Immediately before the proceedings commenced, a man quickly rushed through the reception area of the clinic offices and dropped an envelope on the desk of the receptionist. The envelope contained the amount of the debt—in cash. In another case, an attempt to file a statement of claim in the Toronto small claims court was hindered by a clerk who read the claim and simply and unilaterally stated that such claims could not be accepted by the court.

Advocates learned quickly that police would not hesitate to use any tactic to observe street people, irrespective of its legality. Police would routinely take polaroid photographs of street prostitutes without charging them with an offence. When confronted, police officers took the position that there was no law prohibiting them from doing so. They rationalized the need by saying that prostitutes routinely lied regarding their identification, so pictures were required to identify them correctly.

Another continuing tactic was to send decoy male police officers into the street to pose as johns in order to catch street prostitutes "communicating."⁷ This was considered to be a legitimate legal covert activity. The complementary tactic was to send decoy female police officers into the street to pose as hookers in order to catch johns communicating. The question soon became, who is communicating? How can the police decoy both the johns and the prostitutes in the act of communicating? Why is it that the decoy police, in both circumstances, are always on the receiving end of the communication, or is there communication coming from them too?

With the permission of a client, the defence of entrapment⁸ was attempted in the Old City Hall provincial court. At the time, all of the communicating charges were mustered into one courtroom, to be dealt with by one entrenched provincial court judge. It was a time when prostitutes were jailed and johns were set free with a donation of a few

⁶ [Unpublished].

⁷ *Criminal Code*, *supra* note 3, s. 213(1)(c).

⁸ See *R. v. Mack*, [1988] 2 S.C.R. 903, for a statement about the law of entrapment in Canada.

hundred dollars to the court sally-ann. It was a time when the sergeant in charge of the morality squad stood at the side of the courtroom and traded quips and winks with the presiding judge, as the court listened to the defence stand for their clients.

The defence of entrapment holds that, as officers of the court, the police cannot "test" the moral character of a citizen by offering the act which would define the criminal charge. Here, you cannot hold yourself out as a "john" or "hooker" and act in such a way as to test the opposite in order to lure them into the criminal act. In our case, the facts were that the "john"-cop pulled up to the curb, in front of the client, with the window rolled down and looked at her—that was the initial communication—illegal in our view.

At this hearing the defence subpoenaed the sergeant in charge of the morality squad as well as a professor whose expertise was in communications. At the trial, the defence called the sergeant and began questioning him with respect to training of police officers in the morality squad regarding the methods of "catching" communicating offenders. The judge disallowed the defence from questioning the police sergeant, saying that he was not interested in what police officers were told to do as part of their training.

The defence then called upon the professor. The judge asked why this witness was called, and upon explaining the purpose of the witness the judge disallowed the witness from testifying, claiming that he knew what communicating was without the need of any evidence from the witness.

The client was found guilty and sentenced to a term of incarceration. The defence appealed, citing the denial of full answer and defence under section 7 of the *Canadian Charter of Rights and Freedoms*.⁹ The summary conviction appeal court judge ruled that regardless of the trial judge's rulings on the witnesses, the defence was given the right to fully argue its case, thereby leaving no ground for appeal.

At that time, a similar case was successful in Alberta.¹⁰ Such are the beginning lessons of dealing with a non-traditional client base. There was some success but PCLS faced an overall difficulty in maintaining an effective legal presence. As a New York defence counsel put it:

⁹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

¹⁰ *R. v. Dubois*, [1991] 111 A.R. 289 (Prov. Ct.), rev'd [1993] A.W.L.D. 098 (Alta. Q.B.).

[T]he actual situation in this city is that prostitution is accepted by everyone—police, judges, clerks and lawyers. Arrest and prosecution are purely gestures that have to be made to keep up the facade of public morality. The method of dealing with it is simply a form of harassment What happens to prostitutes matters to no one. They're no threat, but the law keeps picking them up [T]he whole system bleeds them sexually and economically. They put out and pay their fines. Public decorum is satisfied because whores are arrested. This is the justice men bestow on women.¹¹

The landlord and tenant division, in its more traditional role, was meanwhile dealing with issues of homelessness and poor rooming house conditions. One of the recurring issues was the police behaviour when dealing with the homeless and roomers. Put plainly, the simplest and most obvious legal rights of those clients were being abused. The abuses included verbal and physical assault and illegal evictions.

Attempts were made to “educate” local police divisions, with the help of their education officers, through presentations of “the law” according to a PCLS perspective. These attempts were resisted by those legally trained enforcers unhappy in hearing from another “asshole” about the “scum.” Suddenly, policing became the tie between representing street prostitutes and tenants. Why was it that both tenants and street prostitutes voiced similar concerns regarding the violation of their basic legal rights? A new direction for the clinic was evolving.

In 1989 Dianne Martin, fresh from the trenches of the criminal bar, joined PCLS as the academic director. She brought with her a working-class knowledge of the streets and their criminal justice relations. At the same time, the prostitutes' community addressed issues of policing and acknowledged the role of PCLS in an award-winning documentary entitled, “Prowling by Night.” The clinic continued to represent street prostitutes in their court appearances but it was clear that caselaw alone would not change the existing relations between prostitutes and the criminal justice system.

Prostitution as a matter of concern loomed large in Parkdale as the 1990s gentrification of the community continued. Suddenly, the term “my community” became the mantra of the new Parkdale landed gentry, a minority of less than 20 per cent of Parkdale homeowners who were surprisingly joined by the call of those few who lived in and around the Parkdale stroll.

At that time, the issue of prostitution had not faded in the minds of the government or the judiciary. In a 1991 address to the Elizabeth Fry Society, the Honourable Justice Beverley McLachlin of the Supreme Court of Canada spoke about prostitution and noted that, “some would

¹¹ N. Roberts, *Whores in History—Prostitution in Western Society* (New York: Harper Collins, 1992) at 291.

argue, the police continue to be the true arbiters of legal policy concerning prostitution."¹² PCLS knew this through its own limited experience.

By 1993, the issue of street prostitution erupted publicly in Parkdale. The landed gentry claimed Parkdale for its own, ignoring and attacking the work of the various community agencies, including PCLS, in the neighbourhood whose work and relationships pre-existed their arrival. It was not uncommon to read about the landlord and tenant group work in the revitalization of run-down rooming houses as an attack on those who defended the addicted or criminal poor, or as an active support of drug use and criminal behaviour. However, it was on the issue of street prostitution that the battle lines would be drawn and defended.

By 1993, the Parkdale Affirmative Action Committee (PAAC), the self-proclaimed voice against drug use and street prostitution, had its members picketing the street corners frequented by prostitutes. They hoped to eliminate the prostitutes from "their" neighbourhood. The question became, however, whether the new residents really were concerned with the prostitutes or whether they were just concerned with the neighbourhood's image. My experience was that the new residents' efforts represented nothing more than selfish short-term concerns, rather than assisting the prostitutes in their struggle to escape poverty. A prostitute in *Whores in History* notes:

Everyone's discussing what should be done for the prostitute, what kind of laws should be made for her Are they going to do the same thing with shop-keepers or journalists? What right have they got to always want to make decisions for us? To protect us from pimps! That's the excuse. From the beginning of time they've always made a song and dance about pimping to avoid listening to our problems, to muffle our voices. On the left, on the right, among feminists, among Christians, everyone wants to protect us.¹³

By that time, PCLS had moved its offices from the centre of the community to warehouse space on Dufferin Street. Prostitutes, through a new voice given by their own street outreach organization, Maggie's, continued to request support in this latest battle against arbitrary authority.

Gwendolyn, a sex trade worker and artist created "Prowling By Night," a video which depicted the treatment of street prostitutes by the police. PCLS was featured as *the* legal resource for sex trade workers. The title of the video reflected a *Criminal Code* charge with which police

¹² The Hon. B. McLachlin, "Crime and Women: Feminine Equality and the Criminal Law—An Address to the Elizabeth Fry Society" (Calgary, Alta., 1991) [unpublished].

¹³ Roberts, *supra* note 11 at 298.

threatened street prostitutes if the prostitutes did not move along from their traditional street spots. The charge could never be laid, however, since prowling by night can only practically be laid against an individual who is found with burglary tools on private property at night.¹⁴

The picketing property owners harassed the working women to the point that tempers flared and there was fear that if violence erupted the street prostitutes would take the brunt of the punishment, both physically and legally. Discussions between prostitutes and PCLS legal staff evaluated the various options from capitulation to a vigorous counter campaign. The counter campaign was chosen. The *Criminal Code* makes it an offence to watch and beset anyone who has a legal right to do what they are doing.¹⁵ Prostitution is not illegal, so the picketing amounted to watching and besetting. Additionally, there could be civil suits filed against the picketers for interfering in the legal relations between the prostitute and her client.

A public statement was issued by PCLS to that effect. The result was outrage. Politicians of every stripe and from all levels of government railed against the clinic for taking a stand on the side of the prostitutes. People complained to the board of directors about a clinic out of control, and the upshot of the publicity was that a public debate began within political circles as well as within the community on how to address the situation. Legalization, decriminalization, red light districts, or further criminalization were all put forward by the various interest groups.¹⁶ The City of Toronto approached the provincial and federal governments for help. There was no help to come.

Film-maker Geoff Bowie created "Zero Tolerance,"¹⁷ a film depicting this community battle surrounding the issues of prostitution and drug use in Parkdale. Eventually the PAAC would fade away. But the issues surrounding prostitution have not faded. The moment was seized and it dissipated, but not for the lack of trying. The clinic continued its work in representing sex trade workers.

¹⁴ *Criminal Code*, *supra* note 3, s.177.

¹⁵ *Ibid.* s. 423(1)(f).

¹⁶ See, for example, D. Chapman, "The Dial-A-Date Solution: Councillor Objects to Legal Red-Light District" *The Toronto Sun* (3 August 1995) 7; and J. Downing, Opinion, "A Neighborhood in Ruins" *The Toronto Sun* (27 April 1994) 11.

¹⁷ TV Ontario (23 September 1993). The film was written by Geoff Bowie and John Bingham; produced by Janice Dawe; cinematography by Lionell Simmons.

III. THE MARTIN PERSPECTIVE: POLICE MISCONDUCT, POVERTY LAW, AND CHANGE¹⁸

The development of a practice and a theory of community clinic action on police misconduct was a gradual process at PCLS. The issue was gaining increasing prominence in Toronto generally, staff and students at the clinic coincidentally shared experience with and concern about the issues, and some unique opportunities for organizing and law reform presented themselves. In the result, by early 1991, PCLS was taking an active role in initiatives around police accountability. My experience with that effect was the foundation of an article published in the *Hastings Women's Law Journal*.¹⁹ That piece has been excerpted and rewritten for this special issue of the *Osgoode Hall Law Journal*.

The police enjoy a fairly high degree of community support and police critics are viewed with some suspicion.²⁰ That said, there is a growing willingness to recognize problems in "police-community relations," and an increasingly vocal minority community voice is detailing concerns about issues such as police violence and racism. For example, a demonstration of solidarity over the acquittals in the Rodney King case planned for 4 May 1992, broke down into a significant "riot" of looting and vandalism that shocked the city. The demonstration was planned by the Black Action Defence Committee (an organization that came together in Toronto in 1988 in the wake of the acquittal of a police officer in the shooting death in his own home of a partially crippled

¹⁸ An earlier version of this work was first presented at a symposium entitled "The Theoretic of Practice," held in February 1992 at Hastings College of the Law, University of California, San Francisco. This portion of the article offers both a feminist definition and analysis of the phenomenon of police misconduct, and an argument for the application of an alternative approach to its reform. That alternative strategy grows out of the theory and practices of PCLS; a practice which combines community organizing and education, individual casework, and law reform initiatives in relatively equal measures in its approach to the legal issues that affect a low-income community. Those methods were used to address the problem of police misconduct, in an initiative that also demonstrates the practical value of critical analysis.

¹⁹ D.L. Martin, "Organizing for Change: A Community Law Response to Police Misconduct" (1993) 4 *Hastings Women's L.J.* 131.

²⁰ For example, this editorial in the largest of Toronto's three daily papers, expressed concern about a judge who disbelieved police officers who testified before him and then insisted on seeing the results of an internal police investigation into his rulings. Editorial, "Judge Matlow Crossed the Line" *The Toronto Star* (18 August 1991) A24. The editorial writer took the view that belief in the possibility of a cover-up was tantamount to joining a campaign against the police: "Revealing that he believes the police capable not only of lying but of covering up, Matlow presented himself as an advocate in a campaign against Ontario's policing system. That is utterly incompatible with his judicial role."

black man, armed with a paring knife) and drew parallels between the acquittals in the King case, and recent cases from the Toronto area. A month earlier, two officers were acquitted of all charges arising out of the shooting death of an unarmed black youth who was killed by police shots fired through the rear window of the stolen car he was driving. Two days before the planned demonstration, another black youth suspected of drug trafficking was shot and killed by police officers in a Toronto alley. Media coverage of the incidents and the riot made the race connection.²¹

Similar public concerns about police misconduct and existing police controlled complaint mechanisms voiced in the late 1970s led to the establishment of a civilian review agency to deal with complaints of misconduct from members of the public in Toronto.²² The Office of the Police Complaints Commissioner (PCC) was mandated to provide independent review and resolution of citizen complaints (including the authority to sanction officers found guilty of misconduct), while leaving most initial investigations of complaints in police hands.²³ The system

²¹ K. Toughill, "Black Man Shot Dead by Undercover Police Officer. Gunfire in backyard ends pre-dawn chase" *The Toronto Star* (3 May 1992) A1; A. Duffy, J. Hall & B. DeMara, "Hundreds riot downtown after anti-racism protest" *The Toronto Star* (5 May 1992) A1; G. Abbate *et al.*, "Yonge St. trashed as justice protest turns into rampage: Acting police chief says rally organizers to blame for 'saddest day' in his career" *The [Toronto] Globe and Mail* (5 May 1992) A1.

²² C. E. Lewis, the head of the complaint commission in the early 1990s, details the history of the system as a response to growing public concern: "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* (Oxford: Clarendon Press, 1991) 153.

²³ Municipal police forces in Ontario are governed by provincial legislation, *Police Services Act*, R.S.O. 1990, c. P.15 [hereinafter *PSA*], which covers everything from jurisdictional questions to discipline and citizen complaints. Until November 1997, Part VI of the *PSA* set out the full disciplinary regime, including a civilian oversight component. Citizen complaints were investigated at first instance by police officers assigned to the Public Complaints Investigation Bureau of a police force. Details of complaints and progress of the investigation were reported monthly to the office of the Public Complaints Commissioner (PCC), which could intervene at any time. The results of the police investigation of the complaint was then provided to the chief or the chief's designate for a determination. He or she could mediate a resolution between the citizen and the subject officer, order a disciplinary trial (as above) or, "take no further action."

If the citizen was dissatisfied with the result (90 per cent of complaints result in "no further action"), he or she could appeal the result to the PCC. The PCC reviewed the police investigation and may reinvestigate the complaint, either in the event of an appeal, (or if he is dissatisfied with the investigation), and may order a trial before a "Public Complaint Tribunal," a three-person tribunal chaired by one of a panel of lawyers appointed by the attorney general along with one member each from panels composed of appointees to the local police association (police union), and the attorney general. The tribunal had full disciplinary powers up to and including dismissal.

Additional civilian control is imposed in the case of serious injury caused by a police officer in the course of duty; all police shootings or conduct resulting in serious injury must be investigated by an independent civilian body responsible to the Ministry of the Solicitor General, the "Special

was frequently praised and offered as a model for other jurisdictions and was extended to cover all police forces in the province in 1991,²⁴ but concern about misconduct remained high, and particularly for vulnerable and minority members of the community, an issue of fear continued.²⁵ This system of handling citizen complaints was repealed in late-1997. Under the new system, most complaints will be investigated by the chief of the department against which the complaint was made. It is too early to tell what impact such rules will have, but it appears to represent an ominous trend for advocates of independent review of police misconduct.²⁶

This was the context in which the issue of police misconduct was taken up in the Toronto community of Parkdale, coordinated by PCLS. In many respects, Parkdale was an ideal community for such an initiative, and remains so today. Parkdale is a low income community in Toronto's west end; ethnically heterogenous,²⁷ its average income is significantly lower than that of the city as a whole. Much of the housing stock is low income and in poor repair. The largest mental hospital in the province is located in Parkdale, as is the highest concentration of group homes and rooming houses in the city.²⁸

The PCLS tradition of using systemic and community-based legal strategies was brought to bear on the entrenched and resistant problem of police misconduct and bias. The Parkdale police project had a number of goals (e.g., to collect case histories, while protecting confidentiality, and refusing to permit any individual complaint to be isolated, discredited and forgotten). The project's aim was to expose the lie about misconduct (that it did not happen) and to use multiple

Investigations Unit.”

²⁴ See, for example, W.E. Petterson, “Police Accountability and Civilian Oversight of Policing: An American Perspective” in Goldsmith, ed., *supra* note 22, 280.

²⁵ The experience of street people who are victims of police violence was described in a recent report on health. The victims have all refused to make formal complaints about their allegations for fear of police reprisals. Ten per cent of the sample (458 women and 352 men) reported an assault by police in the past year, while 35.6 per cent had been assaulted more than once: E. Ambrosio, *et al.*, *The Street Health Report: A Study of the Health Status and Barriers to Health of Homeless Women and Men in the City of Toronto* (Toronto: Health Care Fund, 1992) at 28.

²⁶ See *Police Services Amendment Act, 1997*, S.O. 1997, c. 8, Part V, repealing Parts V and VI of the *PSA*, *supra* note 23.

²⁷ D.L. Martin, ed., *Intensive Programme in Poverty Law at Parkdale Community Legal Services, Cases and Materials*, vol. I. (Toronto: Osgoode Hall Law School, 1991) at 3.

²⁸ *Ibid.*

techniques of organizing, outreach, lobbying, law reform, casework, and central coordination of information to find remedies.²⁹

Exposing the ideological and mystifying role and function of law in sustaining these common sense fallacies was recognized as being equally important, however. The demystification of law was central to the Parkdale strategy, which de-centred law, and emphasized community organizing and education. At the same time, individual problem solving through casework, and test case and law reform litigation, were seen also as having a role to play in a community law response, so long as these initiatives were recognized as being part of, rather than central to, that response. Reaching and preserving a balance among these strategies was an important aspect of the PCLS police reform project.

A. *The Methodology*

The term "police misconduct" as it is used here refers to a wide range of police behaviour. It includes both serious, overt acts of violence and abuse of authority, as well as the more hidden, systemic abuses that are manifested in racist and sexist attitudes, failure to act, for example in wife assault situations, and resistance to true public accountability. The more vivid term "police crime" is usually limited to overt, criminal conduct, such as corrupt practice or brutality, for example, and is encompassed by the broader definition.³⁰ These forms of police misconduct are difficult to prove and difficult to profile from traditional sources. Much of it occurs in secret, away from corroborative witnesses; much police misconduct concerns vulnerable and low status victims whose complaints, if they are made at all, are relatively easy to dismiss or ignore. More is not even wilful misconduct at all, but rather a reflection of systemic biases and assumptions about race, class and gender. In order to address this reality and to develop a theoretical foundation for the project, we relied on traditional academic sources, such as cases, texts, and published studies. At the same time, we drew upon less traditional sources, including clinic files, media accounts, and inquiry

²⁹ The project was described by Ray Kuszelewski in the newspaper of a progressive lawyers' organization: R. Kuszelewski, "Clarion Call for Action on Police" (1992) 8 *The Law Union News* 1.

³⁰ "Misconduct" is widely used in this broad sense in the criminology literature. For example, it is used in this sense in all of the articles in a recent collection dealing with the subject: Goldsmith, ed., *supra* note 22. Misconduct is distinguished from crime by S. Box in *Power, Crime and Mystification* (London: Tavistock, 1983) at 80-119.

records to locate the discussion in the “real world” of poverty, perception, and public response.

It is also important to appreciate how partial our understanding of an issue like police misconduct often is. The PCLS involvement in the issue serves to sharpen that picture. Some questionable conduct, such as a “fleeing felon” shooting, receives substantial media attention, forcing the wider community to acknowledge the incident. Much more remains hidden, denied, and ignored. The experience of PCLS in its representation of poor people supported the view that all police misconduct is, in part, a product of the extent to which we as a society have been stripped of our personal and collective responsibility for the maintenance of social harmony in exchange for the production and reproduction of an order³¹ that is manifested in an unequal and oppressive status quo. In this context, all police misconduct is systemic, the product of institutionalized policies and practices, both officially and unofficially sanctioned. Whether it contributes to a wrongful conviction, a wrongful injury and death, or to further isolation and despair for those whose trust is abused or whose claim for protection has been ignored, the utter banality of the attitudes and practices that produce the troubling claims of misconduct needs to be understood. That understanding then becomes available to deconstruct the quite valid claim that much misconduct was either not deliberate or was not maliciously motivated.

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

*B. Police Methods: The End Justifies (and Determines) the Means:
Selective Enforcement: Sex, Drugs, and ...*

Routine, hidden incidents of misconduct have as powerful an impact on communities as high profile cases of wrongful conviction or violence, reflecting and reinforcing race, class, and gender bias in a myriad of ways. The process of identifying and naming that covert

³¹ See, for example, Petterson, *supra* note 24.

malfeasance was central to the evolution of the PCLS police reform project, and is an essential step in any counter-hegemonic strategy.

1. Sex

Police abuse of marginalized women, such as prostitutes, arises from and reproduces classic whore/madonna stereotyping, as the police distinguish "good girls" from "bad" and use and abuse prostitutes as valueless women, available for the provision of sexual services to them as well as to clients, without any claim to even minimal protection. Police hassling, for information or on general principle, is almost a constant in the lives of street prostitutes and has been documented in PCLS files.³² More dramatic complaints of extortion of sexual services by police officers are beginning to surface publicly in Toronto and elsewhere. PCLS was able to raise the broader question of assaults on prostitutes in the course of representing a woman who had been extorted by a police officer at a public inquiry into the internal affairs unit of the Metropolitan Toronto Police force.³³ An officer known on the streets of Toronto as "sperm whale" has been reported as using his hand gun to extort oral sex from street prostitutes with impunity.³⁴

2. Drugs

At the same time, it is critical to recognize the double message that the community sends to the police. For example, the "War on Drugs" campaign has very successfully prompted community demands for more police protection and action. The sense of order, of taking action, that a strong police presence evokes is not only welcomed, but it is also sought out. This police intervention often impacts primarily on

³² E. Whitmore, "Police Enforcement of Street Prostitution" (Intensive Program in Poverty Law, Osgoode Hall Law School, York University, 1989) [unpublished].

³³ See Parkdale Community Legal Services, *Submissions on Behalf of Jane Doe: Ontario Civilian Commission on Police Services Inquiry* (Toronto: 1991) [unpublished] [hereinafter *Jane Doe Submissions*]. See also Ontario, Civilian Commission on Police Services, *Report of an Inquiry into Administration of Internal Investigations by the Metropolitan Toronto Police Force* (Toronto: The Commission, 1992) [hereinafter *Junger Inquiry Report*].

³⁴ The evidence of complaints made by prostitutes about this officer came out at the Junger Inquiry, *infra* notes 56-61, and received media attention, but to date little else has been done: G. Cooly, "Charging Police Officers Too Risky for Prostitutes" *Now* (31 October-6 November 1991) 21; and A. Duffy, "Prostitutes Say Officer Extorting Sex, Probe Told" *The Toronto Star* (22 October 1991) A5.

marginalized women, racial minorities, and people with AIDS. It is noteworthy that this police role does not result in changes in policies or behaviour.

The contradictions will come in various forms. For example, PCLS's work with low income tenants uncovered "block busting" by unscrupulous real estate developers in Parkdale by inviting drug use into a building and then calling for a police crackdown to "clean out the building" (a device to avert rent control and rental protection legislation by emptying the building).³⁵ More commonly, residents concerned about the presence of drug use and drug trafficking in their building or neighbourhood, will be offered remedies such as a heightened police presence and mandatory evictions of residents even suspected of drugs infractions. The media appear to be increasingly ambivalent about these measures, and supportive of the PCLS policy of opposing the evictions and searching for community solutions (an approach which has informed the police reform project as well).³⁶

IV. THE ROLE OF LAW

Police culture alone is an insufficient cause for explaining police misconduct, or, of equal importance, understanding why it persists seemingly unchecked. As the context in which misconduct manifests and is dealt with is of equal concern, the law is a significant part of that context. "Law,"³⁷ both normatively and structurally, is as essential to

³⁵ C. Milne, "The War On Drugs: A Call For The White Flag" (Intensive Program in Poverty Law, Osgoode Hall Law School, York University, 1990) [unpublished].

³⁶ Rosie DiManno attempts to question the wisdom of all the tactics: "Harsh Drug-fighting Measures Should Be Dropped" *The Toronto Star* (17 December 1990) A7. See also B. Livesey, "A Dangerous Drug-war Weapon" *The [Toronto] Globe & Mail* (19 February 1990) A7; and R. James, "Proposed Drug Evictions, Curfew Need Further Study, Tonks Says" *The Toronto Star* (29 September 1990) A24.

³⁷ I use the term in the sense that critical legal theorists have used in their program of deconstruction; see: A. Hunt, "The Critique of Law: What is Critical about Critical Legal Theory?" (1987) 14 *J.L. & Soc'y* 5. It is primarily the criminal law that is in issue, both because it is central to policing, and second, because of the power of its message of control with "justice." Herbert Packer was instrumental to analyses of the purpose of the criminal law, with his distinction between "due process" and "crime control" models: H.L. Packer, *The Limits of the Criminal Sanction* (Stanford: Stanford University Press, 1968) at 283. British criminologist Doreen McBarnet brings a more stringent analysis, exposing the frailties (and the deadly serious function) of the ideology of fairness in the administration of criminal justice: D.J. McBarnet, *Conviction: Law, the State and the Construction of Justice* (London: MacMillan, 1981). Ericson, in addition to his other work, documents the dissonance between the "rights" of accused persons and the reality of the operation of law: R.V. Ericson & P.M. Baranek, *The Ordering of Justice: A Study of Accused Persons as*

police officers as it is to lawyers.³⁸ The enforcement of laws by a police force free from political interference and answerable only to "the law" is seen by many as the sacred trust of the police in a democracy. The doctrine of "constabulary independence" is widely cited by the police as an answer to demands for more civilian control and is sometimes expressed in terms of "keeping politics out of policing," a proposition which obscures the political foundation of the policing function.³⁹

This powerful truism has frequently resulted in reform strategies dominated and circumscribed by legal norms and limitations, in result, if not in content or focus, however.⁴⁰ Even when the object of a reform strategy has been to change attitudes and practices through a combination of media campaigns, organizing efforts, and lobbying, the most common responses have been narrow and legalistic. Criminal charges against officers for excessive force in the execution of their duty, minor changes in legislation governing complaints against the police, and directives concerning wife assault are some cases in point. These outcomes have been markedly unsuccessful in changing police attitudes and practices. The police are almost inevitably exonerated of this type of criminal charge;⁴¹ complaint mechanisms quickly become

Dependants in the Criminal Process (Toronto: University of Toronto Press, 1982) at 41-75.

³⁸ R.V. Ericson, "Police Use of Criminal Rules" in C.D. Shearing, ed., *Organizational Police Deviance: Its Structure and Control* (Scarborough, Ont.: Butterworths, 1981) 83, notes that the criminal law is the police officers' tool in reproducing order. It is a resource, not a restraint. This function of "law" as it relates to lawyers has been analyzed frequently by students of both law and sociology. See also R. Cotterell, *The Sociology of Law: An Introduction* (London: Butterworths, 1984).

³⁹ See, for example, J. Sewell, *Police: Urban Policing in Canada* (Toronto: Lorimer, 1985). It is an idea with considerable power, as evidenced in a charge for theft brought against a reporter and those who leaked a copy of the upcoming federal budget (retrieved from a copy room): *R. v. Appleby* (1990), 78 C.R. (3d) 282 (Ont. Prov. Ct). The charges were stayed on the basis that the officer who laid them had no real subjective "belief" that a crime had occurred, but laid them from "excessive zeal." Although a case was not made out for either the reality or reasonable grounds for perception of political interference in use of the criminal process because no evidence was led that the influence came from the "top down," this is a "blind eye" case in many ways.

⁴⁰ The failure of litigation and legal strategies to either "hear" clients, or even to actually achieve any real benefits has been extensively critiqued in poverty law circumstances. See, for example, R. E. Rosenblatt, "Legal Entitlement and Welfare Benefits" in D. Kairys, ed, *The Politics of Law: A Progressive Critique* (New York: Pantheon, 1982) 262; and D. Pearce, "Welfare is Not for Women: Toward a Model of Advocacy to Meet the Needs of Women in Poverty" (1985-86) 19 *Clearinghouse Rev.* 412.

⁴¹ Media accounts of this type of charge against police officers frequently summarize the history of similar charges. The history, of course, may be used for different purposes; either to confirm that the police were justified in their conduct, or to confirm that the courts are unwilling to act against this police conduct. C. Chancellor, "Sadly, L.A. Verdict Was No Surprise" *The Toronto Star* (1 May 1992) A29 (writing from Akron Ohio, Chancellor details other acquittals); a summary of some of the acquittals of Metro Toronto officers since 1980 was printed as a side bar to the

bureaucratized and ineffective. For instance, police protection for battered women remains illusory. One can trace the failure of these responses to reach the structural roots of police misconduct to the “legalization” of the various issues.

A. *Wife Assault: Private Violence*

Police reluctance to interfere in a domestic disturbance in order to protect an assaulted woman is a problem of long standing.⁴² However, the transformation of the battered women’s movement, from a grass roots movement working for systemic social change into a group of lobbyists struggling for legalistic responses, provides a classic example of the legalization of a complex social issue. As government and police were forced to dialogue around wife battering, broad demands were narrowed by these agencies into the criminal law paradigm. Ultimately, governments were forced by political pressure to acknowledge the problem, and to express willingness to finding solutions. They did so by committing the resources of the criminal justice system. The government’s pledge to eradicating wife battering was thus expressed in the powerful slogan, “wife assault: its a crime,” a response that served to silence the demand that violence against women be addressed systemically. Instead, directives and regulations, such as “mandatory charge—no drop” policies were implemented.⁴³ This narrow, legalistic response is inadequate at best. For many women, such a response offers

acquittal of the officers in the Wade Lawson shooting: “Metro officers cleared since 1980” *The Toronto Star* (9 April 1992) A32. Of ten officers charged with causing a serious injury, none has been convicted.

⁴² Historical analysis is revealing about both the root of the attitudes and their longevity: see J. Radford, “Women and Policing: Contradictions Old and New” in J. Hamner, J. Radford, & E. Stanko, eds., *Women, Policing, and Male Violence: International Perspectives* (New York: Routledge, 1989) c. 2; L. Gordon, “Family Violence, Feminism, and Social Control” in J. Lewis, ed., *Labour and Love: Women’s Experiences of Home and the Family 1850-1940* (London: Basil Blackwell, 1986); and “Wife-Beaters in Toronto Courts; Sentences Are Not Severe—Staff Inspector Archibald Discusses the Subject—Women’s Loyalty to Husbands” *The Toronto Star* (10 June 1905), reprinted *The Toronto Star* (27 February 1992) A6.

⁴³ Gillian Walker has traced the phenomenon in Canada in a “discourse analysis.” She analyzes the claims of the Battered Women’s Movement from the 1970’s and the parliamentary hearings where those claims were met with legal remedies (although legal remedies were initially only a small part of the demands): G. A. Walker, *Family Violence and the Women’s Movement: The Conceptual Politics of Struggle* (Toronto, University of Toronto Press, 1990). In the United States, the “legalization” was more overt. A lawsuit for negligence in providing protection to a battered woman was focal to U.S. strategies around policing and wife assault: K.J. Ferraro, “The Legal Response to Woman Battering in the United States” in Hamner, Radford & Stanko, eds., *supra* note 42, c. 7.

no remedy at all. The experience of PCLS students working with assaulted women, particularly minority women, is that access to community support is far more relevant than legal solutions. Indeed, many minority women are reluctant to bring the police into their homes at all.⁴⁴

B. *Police Use Of Deadly Force: Public Violence*

The demand that charges be brought against police officers who use excessive or deadly force in the execution of their duty has left the public similarly disillusioned, and the underlying problem unredressed. In 1979, Metropolitan Police officers shot Jamaican immigrant Albert Johnson in his own home. He was armed only with a garden tool. His death galvanized the black community of Toronto into action. Most of the public outcry centred on a call for criminal charges against the officers responsible for the shooting.⁴⁵ However, the dead man's widow and children also brought a civil suit.⁴⁶ This legalized strategy primarily benefitted the police; the officers were acquitted and the lawsuit was settled in a secret agreement with no admission of liability.⁴⁷ The opportunity to explore the systemic issues raised by the case, specifically racism and the treatment of mentally ill persons, was lost.

Since the Johnson case, police shootings of black youth have continued out of all proportion to their numbers in the population.⁴⁸ Toronto's black community continues to call for criminal charges against offending officers and urges other reforms; ranging from increased

⁴⁴ D.L. Martin & J. Mosher, *The Criminal Sanction and Domestic Violence* (Report Submitted to the Social Sciences and Humanities Research Council of Canada), subsequently published as D.L. Martin & J. Mosher, "Unkept Promises: Experiences of Immigrant Women With the Neo-Criminalization of Wife Abuse" (1995) 8 C.J.W.L. 3.

⁴⁵ Each story on the case ended with the demand for charges. See, for example, B. Keddy, "Widow Recalls Sequence of Events that led to Shooting" *The [Toronto] Globe and Mail* (2 August 1979) A2.

⁴⁶ Police efforts to have the suit dismissed following the police officers acquittal failed; "Johnson Kin Can Proceed with Civil Suit" *The [Toronto] Globe and Mail* (7 October 1981) A5.

⁴⁷ K. Makin, "Widow Gets Settlement from Police in Shooting" *The [Toronto] Globe and Mail* (13 February 1988) A1.

⁴⁸ See, for example, H.J. Glasbeek, *A Report on Attorney-General's Files, Prosecutions and Coroners Inquests Arising Out of Police Shootings in Ontario to the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Commission on Systemic Racism in Ontario Criminal Justice System, 1993); and Commission on Systemic Racism in the Ontario Criminal Justice System, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: The Commission, 1995) (Co-chairs D.P. Cole & M. Gittens).

minority hiring by the police, better policing, to a more accountable civilian review system and the creation of a crime of racism. Predictably, the response to the demand for other reforms has been painstakingly slow and limited in scope, and filing criminal charges against the offending officers has been ineffective to bring about real change. To date, no officer has been convicted of a serious criminal offence in connection with shooting a black suspect.

V. A REFORM AGENDA: WHERE DO WE GO FROM HERE?

To advance a reform agenda aimed at reducing police misconduct and increasing police accountability, responses to police misconduct issues must be developed that limit the trap of “legalization,” while simultaneously exposing the connection between dramatic, overt acts of abuse and misconduct that attract media attention, and the subtle, systemic and structural influences that reinforce and nourish racism, classism, homophobia, and gender bias among the police. Not only is it important to critique traditional legal strategies, but legal strategies must be transformed, and made to work for those who suffer from the systemic abuse of police power. The legal system, which disproportionately jails blacks and minorities, whitewashes deaths caused by the police, and offers little real protection from racist and sexist violence, is neither willing nor equipped to make this transformation. This is not an assertion that criminal charges, police responses, and demands that institutions of power be made responsive should not be incorporated into the strategy for change. However, the priority given to these legal strategies should be reassessed. More fundamentally, new coalitions are needed: between women working against male violence and defence lawyers advocating for the rights of individual accused; between poverty activists and community legal clinics and those fighting for prison and police reform. The dichotomy between demands for protection and strict enforcement of criminal sanctions, and the class and race bias that translates those claims into selective, violent policing, must be addressed.

A. Truthtelling: Reclaim the Agenda

Police skill at directing the discourse of policing is by no means absolute.⁴⁹ The increasing willingness of mainstream press outlets to challenge and question police practices has weakened police power to promote the hegemony of policing. Influential public inquiries have been held, partly in response to the exertion of adverse public pressure in Toronto. More importantly, the media, which is becoming more critical of the continuing racist violence and sexist police responses, is placing the issue of systemic bias on the public agenda.⁵⁰ The Morand Commission was sparked by media attention focused on allegations of extreme brutality against suspects in custody, and was called to “clear the air” about the shocking allegations. Other inquiries were held for similar reasons. All recommended improvements in the public complaint process.⁵¹ Although these inquiries were essentially narrow and legalistic in focus, the record created and the experience of participants serves to support future reforms. More wide ranging inquiries and Royal Commissions have produced recommendations and conclusions that have entered public discourse. The *Marshall Inquiry Report*⁵² made the possibility of a racist police force and justice system imprisoning an innocent man part of public discourse. Shortly after the *Marshall Inquiry Report* was released, the police shooting of an unarmed native leader on the streets of Winnipeg, and the acquittal of whites in the brutal rape of a young native woman in northern Manitoba, led to a

⁴⁹ See R.V. Ericson, “Mass Media, Crime, Law, and Justice” (1991) 31 *Brit. J. Criminology* 219 at 220-26, 236-38. Ericson challenges both the “effects” approach of psychologists and the “dominant ideology approach” of sociologists, and identifies the importance of the media as a source of “alternative justice” and justice reform.

⁵⁰ The mainstream media was immediately critical in coverage of one of the latest shootings in Toronto: K. Hann, “Cops gun down mugging suspect” *The Toronto Sun* (4 December 1991) 2; H. Stancu, “Police shoot robbery suspect after downtown foot chase” *The Toronto Star* (4 December 1991) A7; “Metro police shoot black suspect” *The [Toronto] Globe and Mail* (4 December 1991) A2; “Police shot unarmed man” *The Toronto Star* (5 December 1991) A1; “Gunshock: latest shooting rekindles fears that officers hit the pavement armed with guns instead of strategy” *Now* (12-18 December 1991) 12; and “Fear rides alongside officers, police say” *The Toronto Star* (6 December 1991) A2.

⁵¹ See *Morand Commission Report*, *supra* note 1; A. Maloney, *Report to the Metropolitan Toronto Board of Commissioners of Police Review of Citizen-Police Complaint Procedure* (Toronto: Board of Commissioners of Police; 1975); and G.E. Carter, *Report to the Civic Authorities of Metropolitan Toronto and its Citizens* (Toronto: Office of the Cardinal, 1979).

⁵² See Royal Commission on the Donald Marshall Jr. Prosecution, *Commissioner's Report: Findings and Recommendations* (Halifax: The Commission, 1989) (Chairman: T.A. Hickman) [hereinafter *Marshall Inquiry Report*].

wide ranging inquiry into Aboriginal justice that identified the systemic racist nature of policing and justice generally.⁵³

B. *Reclaim the Law*

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

The Ontario Civilian Commission of Police Services⁵⁴ responded to allegations of serious improprieties against the elite Internal Affairs Unit⁵⁵ of the Metropolitan Toronto Police Force in its handling of an officer involved in an escort service. Gordon Junger, while living with a prostitute, was filmed on an escort call in a "sting" set up by Internal Affairs, with the assistance of his girlfriend. He resigned. The disclosure in the media of a controversial resignation agreement that promised the withdrawal of charges and the destruction of the evidence against him, prompted the inquiry. At that inquiry, PCLS represented a woman whose victimization by an officer who had used his badge as a weapon to extort sexual favours from her had also been investigated by Internal Affairs. She wanted to determine why no criminal charges had been laid against him, why he had been permitted to plea bargain a lenient penalty in internal disciplinary proceedings, and why a promise of anonymity made to her had not been kept. PCLS obtained standing at

⁵³ Manitoba, Aboriginal Justice Inquiry, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Aboriginal Justice Inquiry, 1991) (Commissioners: A.C. Hamilton & C.M. Sinclair).

⁵⁴ This is the body that ultimately supervises all police forces in the province. Municipal police services boards report to it, and it serves as a police services board to the Ontario Provincial Police.

⁵⁵ It is a unit that answers directly to the chief of police and is mandated to investigate serious or systemic misconduct or corruption.

the inquiry on her behalf, after it had already begun to sit, and worked to broaden the scope of the inquiry.⁵⁶

The involvement of PCLs on behalf of a sympathetic victim contributed to the production of an extraordinary record of the extent of resistance to public accountability, which received wide media attention.⁵⁷ Evidence of how Internal Affairs dealt with the two cases, particularly that of Jane Doe, led to the revelation that Internal Affairs routinely failed to notify the Police Complaints Commissioner that a public complaint had been received, in accordance with the *Police Services Act*.⁵⁸ The result was that some 192 files alleging serious misconduct had never been scrutinized by the PCC. The explanation offered, that Internal Affairs believed that allegations of "criminal" misconduct did not require notification to PCLs was supported by senior officers right up to the chief.⁵⁹ Clearly, the "end" sought by Internal Affairs in regard to civilian review was to drastically limit the scope of the PCC to inquire into misconduct. Internally developed practices and procedures, designed to ensure that the vast majority of serious allegations of misconduct would be beyond civilian review, were the means used to achieve this end. The revelation of this practice at the inquiry brought it to a result.⁶⁰ In addition to demonstrating the degree to which the "ends justify the means" in the matter of the resignation agreement (which the police described as a "con" on Junger's lawyer),

⁵⁶ See *Jane Doe Submissions*, *supra* note 33; and *Junger Inquiry Report*, *supra* note 33. "Jane Doe" (as she was known) was granted standing and the case of officer Brian Whitehead was included in the inquiry in March 1991.

⁵⁷ See G. Cooley, "Police Offenders Easy Ride" *Now* (24-30 October 1991) 10:

Police authorities are a soft touch when disciplining officers who cross the line into illegality. What would have happened to you or me if we had been sentenced for that assault? (the assault on Jane Doe)—It sends the message that police officers can be aggressive and violent and the cost is minimal.

See also R. DiManno, "Surprise query at police probe raises questions" *The Toronto Star* (6 November 1991) A7; and G. Cooley, "Police Board Lawyer Opposing Special Bias Probe" *Now* (5-11 September 1991) 23, reporting that lawyer Dianne Martin said she feared there was systemic discrimination in the way the police department's internal affairs unit treated complaints made by women against officers.

⁵⁸ *Supra* note 23.

⁵⁹ See A. Duffy, "Complaints hidden by police" *The Toronto Star* (22 August 1991) A2.

⁶⁰ See S. Ritchie, "192 police files demanded, probe told" *The Toronto Star* (28 August 1991) A6; Editorial, "What are cops hiding?" *Share* (29 August 1991) 8; and J. Lakey, "Watchdog entitled to complaints files Eng concedes" *The Toronto Star* (30 August 1991) A7. It is troubling, but not surprising, that after years of struggling against police resistance, the police commissioner, shortly before the revelations at the Junger Inquiry, expressed optimism about his agency's triumph over that resistance.

the involvement of PCLS in the inquiry in regard to the Whitehead case raised serious questions about the adequacy of responses by the police department to issues of sexual assault and harassment of vulnerable women by police officers. The evidence established that allegations from prostitutes about violent sexual assaults perpetrated by an officer (or officers) known on the streets as “sperm whale” were referred to the morality squad for investigation, when it was known that the offending officer was reputed to be a member of that morality squad. Although the impact of such a step was acknowledged by investigators, it was supported by the unit commander, Inspector A. Maher. That same commander testified that he would not discipline a junior officer who failed “to take action” in accordance with directives on wife assault, because he viewed those directives as an improper restriction on constabulary independence.

The performance of internal affairs, and the attitudes reflected, were criticized very strongly by the panel heading the inquiry. In regard to the treatment of Jane Doe in particular, and toward women complainants in general, the inquiry acknowledged the systemic bias operating. It maintained that, “[t]he force was simply too eager to deflect public criticism from itself. It reacted defensively and in the process disregarded the interests of an individual who was twice victimized—by the original offence and by the police disciplinary system.”⁶¹

C. Coalitions And Community

Ultimately, only persistent political pressure will effect significant change in policing practices. Toronto’s highly praised model for civilian review was developed in response to a series of public inquiries⁶² and mounting public pressure concerning the increased

⁶¹ *Junger Inquiry Report*, *supra* note 33, c. 9. The inquiry was equally critical of the resignation agreement; “Either way the actions of the force demonstrate a tremendous lack of integrity If a police force would act dishonourably to get rid of one of its own officers, can the public count on it to act honourably in cases involving civilians?": *ibid.* at 29.

⁶² The *Morand Commission Report*, *supra* note 1, was perhaps the most influential one. PCLS submitted a brief proposing an active role for community members in the administration of police activities. Justice Morand, at 156-57, responded favourably to the submissions:

I am not convinced that the Police Force needs to be as secure from public exposure as some officers believe. ... [S]ome officers left me with the impression that they were far too sensitive to public scrutiny of matters which were often of little consequence. ... I find the Parkdale proposal ... sufficiently attractive in principle to warrant further exploration.

incidence of police misconduct, including a succession of police shootings, a massive raid on gay bath houses that ultimately produced almost no convictions,⁶³ and allegations of torture in the questioning of robbery suspects.⁶⁴ However, these events were only connected in an effective way through consensus pressure. The PCLS police reform project drew on an earlier project in its collaborative approach.

In the summer of 1981, six years after the first reports recommending civilian control of the police complaint process were issued, the individuals and community organizations most targeted by the misconduct—blacks and visible minorities, gays and lesbians, suspects in custody, and those who worked with them—formed a coalition to respond directly to community concerns. Citizens Independent Review of Police Activities (CIRPA) formed itself into an effective community voice. CIRPA members, working out of a progressive alderman's office, undertook an ambitious project of community-driven review, operating a twenty-four hour citizen complaint hotline and offering support, advice, and legal referrals to individuals filing complaints against the police. CIRPA used data collected on the complaints received through the hotline to develop initiatives for law reform. Police supporters used claims that CIRPA was a hotbed of dangerous radicals, that it exaggerated complaints, and exacerbated police-community relations, all to undermine the group's reputation. At the same time, its role was receiving acknowledgement from the newly formed civilian review agency, the PCC, as helpful at raising and addressing issues beyond the scope of the new review agency.⁶⁵ CIRPA, a primarily voluntary organization, disbanded four years later.

It has been suggested⁶⁶ that organizations such as CIRPA inevitably become co-opted by policing discourse, and thus do not represent a basis for long term changes in police accountability and

⁶³ The incident was described in Sewell, *supra* note 39 at 184.

⁶⁴ See E.L. Greenspan & G. Jonas, *Greenspan, The Case for the Defence* (Toronto: Macmillan, 1987) at 175ff; and S.B. Linden, *Report on the Investigation of Allegations Made Against Some Members of the Metropolitan Toronto Police Hold-up Squad* (Toronto: Office of the Public Complaints Commissioner, 1984). For a review of this history, see also Lewis, *supra* note 22; and Sewell, *supra* note 39 at 181-86.

⁶⁵ See M.W. McMahon, *CIRPA: A Case Study of the Reform Process and the Police Institution* (M.A. Thesis, Centre for Criminology, University of Toronto, 1983) at 41. Much of the data appears in: M.W. McMahon & R.V. Ericson *Policing Reform: A Study of the Reform Process and Police Institution in Toronto* (Toronto: Centre for Criminology, University of Toronto, 1984).

⁶⁶ McMahon, *supra* note 65, details CIRPA's initial effectiveness but suggests the members were ultimately co-opted into the "policing discourse," and that the process is almost inevitable with "extra-governmental" reform groups.

conduct. A community-based response depends upon the enduring importance of such initiatives to individual victims, and the experience and insight of the organizers. These resources are not lost when a group disbands. However, the relearning of scattered knowledge, the reclaiming of critical history, takes time and energy that are not always available, as community concern about a new police reform issue sparks "new" reform initiatives. Preservation of that history, that record, is essential to reform initiatives that seek structural change.

D. *A Permanent Home for Reform: The PCLS Response*

Recognition of both the enduring nature of police misconduct, and the importance of sustained pressure for change and support to individuals and communities harmed by it led to establishing a police reform initiative based in PCLS. Building on previous ad hoc experience with policing issues⁶⁷ has made a police reform project a clinic-wide priority.⁶⁸

The involvement in this issue of a stable, respected community legal clinic associated with a major law school was important in many ways. Institutional resources are frequently unavailable to groups and individuals working on potentially divisive and frequently unpopular projects like police misconduct, with the result that ad hoc, reaction-driven initiatives dominate. The injection of skilled organizers and lawyers allied with the intellectual support of the law school was seen as providing needed support. Moreover, the involvement of law students, apart from the valuable legal and community work they are able to do, helped to insure continuity and the preservation of an institutional memory in the researching and writing of mandatory law reform papers each term.⁶⁹ The clinic's credibility with both the

⁶⁷ The clinic acted as counsel at the Morand Inquiry, and the Junger Inquiry, and also provided periodic representation in individual police misconduct cases. As well, the various students and staff at the clinic have done day-to-day work with police around the protection of assaulted women and tenants in disputes with their landlords, for example.

⁶⁸ The PCLS board of directors adopted the initiative at its February 1992 meeting, relying in large part on student initiatives. See L. Mitchell, "A Proposal To The Board Of Directors Of Parkdale Community Legal Services For The Establishment Of A P.C.L.S Policing Project" [unpublished]. The proposal was based on an earlier essay: L. Mitchell, "Police Misconduct and Community Response" (Intensive Program In Poverty Law, Osgoode Hall Law School, York University, December 1991) [unpublished].

⁶⁹ See, for example, A. Story, "The Community Policing Bandwagon: Should We Hop Aboard" (Intensive Program in Poverty law, Osgoode Hall Law School, York University, April 1992) [unpublished].

community and institutions, earned over more than twenty years, may serve to lend weight to proposals for fundamental change, while serving as a buffer between unpopular critics of the police and institutional reprisals. Finally, the clinic's commitment to treating community education and organizing, case work, and law reform as inextricably interconnected in the redress of social injustice will limit reliance on legalistic or superficial strategies.⁷⁰ As one of the staff lawyers supervising law students working on the project put it:

[T]he history, stability and resources of my community-based employer provide me with a certain credibility and ability that cannot be matched by most private practitioners. Simply put, this clinic provides a base. That base can provide moral and physical support or expertise. Or it can be the headquarters for strategizing or the clearing house for information for project workers.⁷¹

1. Community education and organizing

The clinic initiated a number of community education projects to provide basic information about rights to groups and individuals. The clinic's work with street people and the homeless, prostitutes, and recent immigrants highlighted both the need for such information and its potential. A card outlining "Your rights with the police" and emergency phone numbers was prepared for distribution in several languages. This is basic work, but it has not been done for many years.⁷² Information engenders confidence both in individuals ready to "fight back" and in those too demoralized to do so, and serves to dispel disempowering myths about the police force. An information "kit" was also developed for distribution to community groups, with law students prepared to conduct information sessions. The clinic was also a member of the new "Metro Police Reform Coalition" and staff lawyers and students consistently attended meetings, but also produced materials and proposals for the coalition.

⁷⁰ In approving the project, the clinic's board required that its approval be sought prior to any involvement in major litigation, in recognition of both the demands such litigation places on the clinic and the need to ensure that the litigation in fact has transformative potential.

⁷¹ Kuszelewski, *supra* note 29.

⁷² CIRPA produced and distributed such a card with considerable success reported.

2. Casework

The project provided support to individuals with complaints about police misconduct, and helped to focus spontaneous community responses to these specific incidents. Essential legal and support services for victims of police misconduct is not readily available from the practising bar in Toronto. Student client support, research and summary advice provided a resource to the lawyers carrying the brunt of this work. The clinic became involved in this work by supporting a woman whose arm was broken by police during a demonstration.⁷³ At the same time, providing these services created a valuable organizing tool for community based organizations working on issues of systemic racism and gender bias and identified law reform cases and possibilities.

3. Law reform

Law reform research projects included producing an intake information sheet to collect data with which to respond to assertions like those often made by opponents of police reform that a particular incident is isolated or unique, for example. At the same time, casework was analyzed for test case potential. The clinic represented a civilian employee of the Toronto police in a sexual harassment claim.⁷⁴ Apart from challenging the rule that denies the victim standing at a disciplinary hearing, the clinic also developed a harassment protocol and presented it to the Police Services Board.

The clinic director assigns police reform cases to lawyers across the clinic, depending on skill and interest with the result that policing law reform initiatives and research are being integrated into all four divisions; family, housing, workers' rights, and immigration. The goal was to create a coordinated, community based demand for fundamental change.

⁷³ The woman, a respected black artist, was seriously injured and then charged with assaulting a police officer. The details of the case were held confidential. PCLS File Reference: "Winsom." As well as providing support, the clinic worked with a support group and referred her to experienced criminal and civil counsel who agreed to represent her *pro bono* with the assistance of the clinic.

⁷⁴ This file was also held confidential. PCLS File Reference: "A.B."

VI. CONCLUSION

If a people deserves the government they choose, it is equally true of the policing they receive. Policing that targets minorities, celebrates brutality, and acts as its own judge and jury does not persist without support and condonation from those with the power to insist on a different model. At the same time, the problems supposedly addressed by current police methods—including drug trafficking, violence, robbery and rape—are not mere chimeras of right-wing scaremongers. They exist and they also produce pain and despair. It may be that the 1990s will be our last opportunity to abandon the politics of convenience and expediency and to truly address the structural forces that define crime and control. The riots that returned to Los Angeles after twenty-five years of inaction and arrived in Toronto in their wake, will be a holocaust twenty-five years from now if the lessons learned and relearned are not applied now.

The initial project has survived a number of staff changes at PCLS, and has evolved in different directions, depending on skill, interest, and expertise. However, the focus has continued to be on giving a voice to the most vulnerable and on keeping a record of their words. Former staff lawyer Julia McNally developed a number of unique initiatives. Staff lawyer Jacquie Chic is now responsible for this work and has continued the best of these traditions, ensuring that this work continues to be responsive to community claims and political realities.

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Were you there?

As a result of incidents occurring in the elevators, lobby, and courtyard of West Lodge Towers on Saturday, August 12, 1972, members of the Parkdale Tenants' Association have laid charges of assault and theft against Phil Wynn. If you were a witness to any of these incidents, please contact the Parkdale Tenants' Association immediately.

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Single
Parents**



Dianne Martin (centre) and Joanne Michaud (right), 1989