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Official Oppression: A Historical Analysis of Low-Level Police Abuse and a Modern Attempt at Reform

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OFFICIAL OPPRESSION: A HISTORICAL ANALYSIS OF LOW-LEVEL POLICE ABUSE AND A MODERN ATTEMPT AT REFORM

by David S. Cohen*

If people complained about us every time we kicked somebody's ass, I'd be in big trouble. I can't think of a single day when I didn't put my hands on somebody.

—Anonymous Police Officer¹

[R]esidents in this neighborhood tended to regard police officers as corrupt, abusive and violent. After the attendant publicity surrounding [these problems], had the men not run when the cops began to stare at them, it would have been unusual.

—United States District Judge
for the Southern District of
New York, Harold Baer, Jr.²

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1. Jerome H. Skolnick & James J. Fyfe, *Above the Law: Police and the Excessive Use of Force* 116 (1993) (quoting a "bright, highly motivated, and well-educated young officer assigned to a crime-ridden inner-city district").

2. *United States v. Bayless*, 913 F. Supp. 232, 242 (S.D.N.Y. 1996) (referring to four men in the Washington Heights section of Manhattan who had run from the police when the officers looked at them), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996). In a despicable display of the judiciary bowing to pressure from the executive, the legislature, and the public, Judge Baer vacated his decision in *Bayless* less than three months after he handed it down. Referring to the statement quoted in the epigraph, Judge Baer subsequently wrote, "[U]nfortunately the hyperbole (dicta) in my initial decision not only obscured the true focus of my analysis, but regretfully may have demeaned the law-abiding men and women who make Washington Heights their home and the vast

INTRODUCTION

Police occupy a complex position in our society: They are a unique arm of the government entrusted with immense power to be used both for and against the people they are sworn to protect. Their salaries are paid by the people whom they are obligated to protect.³ Though this situation seems harmless enough, the people from whom the police are protecting the general population also pay their salaries. Additionally, the police force⁴ is the only institution within our society that has the authority to use force to control problems within this country.⁵ This fact escalates the position of police in society sketched here from complex to intensely problematic. The situation is

majority of the dedicated men and women in blue who patrol the streets of our great City." *United States v. Bayless*, 921 F. Supp. 211, 217 (S.D.N.Y. 1996). That a federal judge even considered accepting (and did accept for exactly 2 months and 9 days) the argument that it was reasonable for people in Washington Heights to fear the police is significant. However, more importantly, Judge Baer's cowardly reversal of opinion and obsequious apology do not mitigate the truth of the statement he wrote in the first opinion.

For a more complete account of the political maelstrom created by the first *Bayless* opinion, see Don Van Natta, Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. Times, April 2, 1996, at A1.

3. In supporting some form of civilian review of police actions, former U.S. Attorney General Ramsey Clark stated, "Ultimately, the police are responsible to the public, not to the Chief of Police." Ramsey Clark, *Crime in America* 143 (1970), *quoted in* Douglas W. Perez, *Common Sense About Police Review* 88 (1994); *see also* Skolnick & Fyfe, *supra* note 1, at 35 ("[P]olice are law enforcement officers, sworn to uphold the Constitution, trained and paid by the public to maintain a civilized process of law.").

4. As used here, "police" includes other institutions definitionally separate from the local police force yet whose functions and characteristics are the same, because abuse by any actors within these institutions has a similar sting to it. For example, federal marshals and FBI agents are included in this term. Also, "police" includes institutions that can perform the same functions as the local police in special situations. The military and the national guard fall into this category.

5. Egon Bittner, *The Functions of Police in Modern Society*, in *Thinking About Police: Contemporary Readings* 48 (Carl B. Klockars & Stephen D. Mastrofski eds., 1991). Bittner's oft-cited normative definition of the police fully states this role: "[T]he role of the police is best understood as a mechanism for the distribution of non-negotiable coercive force employed in accordance with the dictates of an intuitive grasp of situational exigencies." *Id.*

complicated further by the fact that encounters with police may be the most visible interaction people have with the justice system.⁶

This Article addresses a problem that arises from this particular position that police occupy—the everyday instances of misuse of force by police officers with a particular emphasis on the effects of this misuse on minority and poor communities. Before discussing this problem, however, the different forms of force must be defined so that the discussion that follows is properly focused. This is not an easy task.⁷

There is a wide range of definitions of police misuse of force. Hubert Locke notes that to some, “any unwarranted or unwelcome police conduct may constitute brutality.”⁸ This definition obviously suffers from overbreadth because most interaction between the police and anyone other than crime victims is “unwelcome,” yet some is perfectly justified.⁹ Toward the other extreme, the state of Delaware has

6. Victor Kappeler, et. al., *Forces of Deviance: Understanding the Dark Side of Policing* 175 (1994) (stating that “the police are the most visible symbol of the justice system”).

7. Egon Bittner states:

In sum, the frequently heard talk about the lawful use of force by the police is practically meaningless and, because no one knows what is meant by it, so is the talk about the use of minimum force. Whatever vestigial significance attaches to the term “lawful” use of force is confined to the obvious and unnecessary rule that police officers may not commit crimes of violence. Otherwise, however, the expectation that they may and will use force is left entirely undefined. . . . In fact, our expectation that policemen will use force, coupled with our refusals to state clearly what we mean by it (aside from sanctimonious homilies), smacks of more than a bit of perversity.

Egon Bittner, *The Functions of Police in Modern Society: A Review of Background Factors, Current Practices, and Possible Role Models* 38 (1970), cited in Wayne A. Kerstetter, *A Procedural Justice Perspective on Police and Citizen Satisfaction with Investigations of Police Use of Force: Finding a Common Ground of Fairness*, in *And Justice for All: Understanding and Controlling Police Abuse of Force* 228–29 (William A. Geller & Hans Toch eds., 1995).

8. Hubert G. Locke, *The Color of Law and the Issue of Color: Race and the Abuse of Police Power*, in *And Justice for All*, *supra* note 7, at 134 (further noting that “any definition or category which designates too much ultimately describes nothing useful”).

9. “In the vast majority of instances, force is necessarily used to protect the safety of officers or citizens. Officers frequently could not carry out their responsibilities without resorting to necessary force.” Milton Mollen, et. al., *Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department: Commission Report* 21 (1994) [hereinafter *Mollen Commission Report*].

a provision in its criminal code which states that provisions for inchoate criminal offenses shall not "apply to any law enforcement officer or the officer's agent while acting in the lawful performance of duty."¹⁰ This part of the Delaware criminal code expressly applies only to a limited subset of crimes. However, the spirit, if not the letter, of the provision might be carried to an extreme with police possibly interpreting it to give them free rein over the citizenry. Somewhere between these two extremes, though, lies the misuse of authority and the use of excessive force.

A more appropriate definition of misuse of authority and use of excessive force can be found in the Christopher Commission Report. The Christopher Commission, the independent commission established in Los Angeles in the wake of the Rodney King beatings, defined misuse of force by negative inference from its definition of the proper use of force: "An officer may resort to force only where he or she faces a credible threat, and then may use only the minimum amount necessary to control the suspect."¹¹ Curbing a subset of this category of misuse of force is the focus of this Article.

Everyday instances of misuse of force by police officers, such as those instances described by the police officer in the first quotation in the epigraph, are the focus of the analysis here. Included in this category are instances of low level brutality, verbal abuse, and harassment.¹² The exact number and frequency of these incidents is difficult to determine because the abuses often go unreported,¹³ nonetheless, these incidents certainly happen often enough to function

10. Del. Code Ann. tit. 11, § 542 (1995).

11. Independent Comm'n on the L.A. Police Dep't, Report of the Independent Commission on the Los Angeles Police Department ix (1991) [hereinafter Christopher Commission Report].

12. Perez describes these different terms in detail in Common Sense, *supra* note 3, at 23-26. *Excessive force* is "more typical and important than all other forms of police mispractice combined . . .," yet defining precisely "excessive force in a meaningful way is the premiere limitation of review of police conduct." *Id.* at 24. "Police use of excessive force is also an important topic because of the amount of physical abuse that occurs, or that people believe occurs, on the streets of America." *Id.* *Verbal abuse* "is a common category in complaints lodged against the police. It includes racial slurs, as well as general discourtesy. . . . Verbal abuse of citizens by police is commonplace everywhere. It is the singularly most-reported type of complaint-generating behavior . . ." *Id.* at 25. *Harassment* can take "the form of illegal detentions of suspects and illegal searches by police." *Id.*

13. *Id.* at 27-28.

as an important determinant of much of the citizenry's attitudes toward the police.¹⁴

This Article is not concerned with extreme forms of violence by police officers because these types of abuse are more visible and more likely to be prosecuted. Extreme forms of violence by police include deadly unnecessary force¹⁵ and unwarranted brutal beatings.¹⁶ Because this violence is largely obvious when it happens, prosecutors are more likely to bring the full brunt of the law upon the police officers involved.¹⁷

That the use of force disparately impacts people of color and poor people should not come as a surprise. The police, as protectors of the existing distribution of wealth and privileges, naturally target those at "the bottom of the heap."¹⁸ This targeting falls along race- and class-based lines, thus creating a disparate impact on people of color and poor people. An obviously troubling result of this disparate impact is that people of color and poor people grow hostile toward the police and see the police as a threat rather than a comfort.¹⁹ As Egon Bittner notes,

14. Locke, *supra* note 8, at 142. Locke notes several studies which find that people of color and poor people are more likely to have a negative view of the police and are more likely to have filed complaints against the police. *Id.*

15. For a good analysis of what comprises "deadly force," its incidences, the reasons behind it, and methods to control it, see William A. Geller & Michael S. Scott, *Deadly Force: What We Know, in Thinking About Police*, *supra* note 5, at 446-76.

16. For an example of this brutal beating, see Skolnick & Fyfe, *supra* note 1, at 33-37 (describing the 1990 senseless retaliatory beating of Adolph Archie in custody after he shot a police officer but posed no further threat to the officers detaining him). The Mollen Commission Report, *supra* note 9, also describes incidents of beatings in relation to police corruption. *See id.* at 2, 28.

17. Whether they do or not, is another question. *See infra* note 82 and accompanying text; *see also* Carl B. Klockars, *A Theory of Excessive Force and Its Control, in And Justice for All*, *supra* note 7, at 13.

18. *See* Bittner, *supra* note 5, at 37 (finding that police will inherently target racial minorities and the poor because of the nature of "invidious social comparisons [that] locate [them] at the bottom of the heap").

19. This perception was the driving force behind a recent highly-publicized and widely-criticized Southern District of New York case. *See* discussion *supra* note 2. In ruling that a car stop was not reasonable and thus evidence of approximately 34 kilograms of cocaine and 2 kilograms of heroin had to be suppressed, Judge Harold Baer based his conclusion on the fact that, for the residents of the poor, mostly African-American and Hispanic neighborhood of Washington Heights in Manhattan, distrusting the police was reasonable. *United States v. Bayless*, 913 F. Supp. 232, 242 (S.D.N.Y.), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996). If the first decision had stood, the suppression of this evidence and the subsequent unlikely prosecution would have been evidence of the

"[if] it is believed that police work is crude, then within a very considerable range of relative degrees of subtlety, whatever police [officers] will be seen doing will be seen as crudeness."²⁰

The practical effects of this building resentment are disastrous. The public support for police in urban areas, locations where police need the help and cooperation of the citizenry the most, is decreasing.²¹ Adding fuel to the fire, abuse and mistreatment by the police increase the people's mistrust and disrespect.²² Perhaps most significant in terms of a visible effect is that a person manifesting a mistrusting and disrespectful attitude toward the police is more likely to be harassed and arrested.²³ Ultimately, a vicious causal chain forms: abuse of discretion caused by race- and class-based animus which, in turn, causes disrespect and further abuse of discretion and misuse of force. Accordingly, one way to break this chain reaction is to stop the everyday low-level use of force by police officers.

To curb this troubling problem, this Article suggests the increased use of the criminal code by creating a provision based on Article 243 of the Model Penal Code: Official Oppression. Part I of this

drastic effects that police misuse of force has for the police, government, and people.

As politics would have it, though, Judge Baer reversed his own decision less than three months after his first was handed down. *See* discussion *supra* note 2. This political manipulation is evidence of the high stakes involved in the police's everyday treatment of people of color and poor people.

20. Bittner, *supra* note 5, at 39.

21. Peter K. Manning, *Economic Rhetoric and Policing Reform*, in *The Police and Society: Touchstone Readings* 376 (Victor E. Kappeler ed., 1995). Very recent examples of this resentment are provided by the current events in St. Petersburg, Florida and Pittsburgh, Pennsylvania. In St. Petersburg, a grand jury's refusal to indict an officer for the shooting death of an African-American motorist sparked intense backlash in the African-American community. Mireya Navarro, *Officials in St. Petersburg Call Racial Unrest 'Calculated'*, N.Y. Times, Nov. 15, 1995, at B8. In Pittsburgh, an all-white jury's acquittal of an officer for the death of another African-American motorist brought city-wide protests. Robyn Meredith, *In Pittsburgh, White Officer's Acquittal Brings Protest March*, N.Y. Times, Nov. 15, 1995, at B8. One can imagine that without a background of everyday abuse, these reactions would surely have been more tempered.

22. *See* Skolnick & Fyfe, *supra* note 1, at 16.

23. Donald Black, *The Social Organization of Arrest: Citizen Discretion*, in *Thinking About Police*, *supra* note 5, at 341. Michael Brown describes what he calls the "attitude test" to which police subject anyone they encounter. "A rough but accurate definition of the attitude test is that the person confronted by police authority must exhibit acceptance of that authority and deference to the officer and his admonishments." Michael Brown, *Nonenforcement: Minor Violations and Disturbances*, in *Thinking About Police*, *supra* note 5, at 292.

Article grounds the discussion of police misuse of force by tracing the history of the institution of policing from the days of vigilantes and constables to the emergence of a permanent professional organization of individuals charged with the task of maintaining order through the threat of and the actual use of force. This Section emphasizes the effect of the evolving nature of the police on misuse of force and its historical connection to racism and oppression. Part II of this Article looks in detail at the terminology of and law surrounding the Model Penal Code provision. Many states have enacted some form of this provision and have enforced it in various ways. Part III will examine how this provision can be used to combat the low-level instances of police misuse of force detailed above. A modified version of Article 243 of the Model Penal Code is a promising solution that can focus attention on the problems mentioned above. This Article will then conclude that effective enforcement of Article 243 should be accompanied by popular monitoring of the police and an institutional refocusing of the police force. Only then could the tools of the criminal law be used to make progress in the fight for the dignity of the oppressed.²⁴

I. A RACE- AND CLASS-ORIENTED HISTORY OF POLICE AND EXCESSIVE USE OF FORCE

Every police encounter with a citizen carries a sizeable amount of history with it.²⁵ This baggage includes the institutional history of the

24. Unfortunately, the changes argued for in this Article probably would be only a piecemeal solution without society-wide reform because, in a society that constantly competes for resources and wealth, the police will always side with the wealth and the oppressors against the oppressed. History has shown this to be true, *see infra* notes 26-76 and accompanying text, and attempts at reform can only do so much against the weight of history and power. This troubling aspect of reform is discussed *infra* at notes 147-48 and accompanying text.

25. Victor Strecher notes this phenomenon with respect to the individual experiences and backgrounds of particular individuals involved in a citizen-police encounter. He states that each person involved in an encounter does not bring "an objective, assumption-free state of mind" into the encounter. Victor G. Strecher, *People Who Don't Even Know You*, in *The Police and Society*, *supra* note 21, at 209. The above epigraph from the first *Bayless* (and notably not the second) opinion noted the effect that history has on individual encounters as well. *United States v. Bayless*, 913 F. Supp. 232, 242 (S.D.N.Y.), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996).

The history discussed in this section, however, includes a broader concept—the history of the institution of policing and the cultural history of the people involved. An excellent example of this play of history in ordinary events comes from a recent media

police, the entire history of race and power relations in this country, and the past and present use of excessive force and the various attempts to curb it. These factors all contribute to the prevalence of excessive force, and they should be examined before proposing any solutions to the problem.

A. A History of the American Institution of the Police

The history of the police as an institution has a definite progression that can be traced through fluid historical periods.²⁶ The details of this progression are discussed here.

In the founding days of this country, no organized government institution known as the police existed. Rooted in the revolutionary spirit of the times, American people distrusted formal authority. This distrust meant that there was a "surprising consensus oppos[ing] the establishment of a formal police organization, because everyone, property holders and workers alike, feared the force of an organized police."²⁷ Historian Richard Maxwell Brown identifies this sense of distrust as part of a unique American tradition of lawlessness.²⁸ Compounding this trend of lawlessness was the problem of resources. An organized police force would take financial and judicial resources most rural areas lacked and most cities did not want to devote to the issue.²⁹ Nonetheless, the tradition of lawlessness combined with the lack of resources did not mean that control of crime and maintenance of order were missing; rather, this tradition meant there was merely no

account of a warrantless police raid. "The pure terror of the incident, if the family's charges are true, conjured historical images of white-robed Ku Klux Klansmen raiding Black homes, hungry to lynch a Black man." Yusef Salaam, *Cops Raid, Devastate a Family Home, No Warrant, Reason or Apology*, *Amsterdam News*, Jan. 20, 1996, at 1.

26. Strecher warns, though, that the history of police should not be seen as broken into distinct eras. "[E]ras' have the appearance of . . . neatly encased sausages linked tenuously or not at all by social continuities of American History. There is little reference to social context and no clear recognition of the interplay of change and continuity in social institutions, roles, values, structures, economics, technology and political development." Victor G. Strecher, *Revising the Histories and Futures of Policing*, in *The Police and Society*, *supra* note 21, at 71. This Article will attempt to avoid this pitfall by showing the tensions that existed in each "era," which then caused the evolution and progression to the next "era."

27. Skolnick & Fyfe, *supra* note 1, at 69.

28. Richard Maxwell Brown, *Vigilante Policing*, in *Thinking About Police*, *supra* note 5, at 71.

29. *Id.* at 66.

centralized mechanism for the specific purpose of accomplishing these goals.

What existed in place of a formal institution were rudimentary and makeshift groups of people coming together to instill order. In populous areas, law enforcement took the form of a "loose system of sheriffs, constables, and night watchmen."³⁰ These formal law enforcement agents usually had no trained personnel to help them with their state- or locally-appointed role. The members of the patrols were ordinary people who were required to help maintain order as part of their role in the community. There was no pay involved because there were no resources to support it. With less formal training and authority, these agents also played a more varied role than modern police: their responsibilities ranged from enforcing the law, to monitoring the streets and slaughterhouses, to lighting the street lamps, or to calling out the weather.³¹ With this amateur status, these loose initial efforts at policing were largely ineffective because people freely resisted even modest enforcement efforts.³²

Outside metropolitan areas, the most common form of "lawlessness" as a means of keeping order was vigilante policing. Most vigilante policing occurred in the frontier areas.³³ These vigilantes, consisting of people from largely the upper and middle classes,³⁴ used extralegal force to drive out people who were unwanted from the area and to punish people who had committed wrongs. With seemingly noble intentions, vigilante groups often lost focus of their lofty goals and let their passions and biases emerge as driving forces of the movement.³⁵

30. Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 830 (1994).

31. *Id.* at 831.

32. *Id.* at 831-32.

33. Brown, *supra* note 28, at 58-66. There was a definite moral overtone to the vigilante policing in these areas. "Vigilante action was a clear warning to disorderly inhabitants that the newness of settlement would provide no opportunity for eroding the established values of civilization." *Id.* at 58.

34. *Id.* at 63-64. Class lines differentiated the roles people played within vigilante groups. "The vigilante leaders were drawn from the upper level of the community. The middle level supplied the rank-and-file." *Id.* at 64.

35. Brown identifies two different models of vigilante justice: the socially constructive model that dealt with a problem straightforwardly and then disbanded and the socially destructive model which let its emotions run loose and would devolve into "an anarchic and socially destructive vigilante war." *Id.* at 66. This latter form "attracted a fringe of sadists and naturally violent types. Often these men had criminal tendencies and were glad to use the vigilante movement as an occasion for giving free rein to their

As Professor Carol Steiker notes, vigilante justice "was not the professional arm of government that we now associate with law enforcement; rather, it was the force of lay people brought to bear on suspected wrongdoers in their own communities."³⁶ However, the authority of the mob was not much different than the authority the police have now: a group of citizens enforcing community norms against those who transgress them. In a time of slavery and racial inequality, vigilante justice was frequently just another example of racist oppression by those with the authority of the state.³⁷

In the mid part of the nineteenth century, faced with an increase in the population and an apparent need to quell disorder, the public recognized the need for an organized group of people charged with using force to enforce the law and maintain order. The first police departments took their cue from the model developed in England by Robert Peel: "overt reactive patrol forces capable of operating in large or small units."³⁸ These units consisted of professionally trained and salaried officers. Historian Wilbur R. Miller points out that, in comparison to the English police who had impersonal authority rooted in legal powers and restraints, the first American police had personal authority rooted in everyday contact and closeness to citizens.³⁹ Key to

unsavory passions." *Id.* at 67.

36. Steiker, *supra* note 30, at 832.

37. Vigilante justice that has the power of law behind it has continued throughout American history despite the emergence of an organized police force. Lynching of African Americans in the South after slavery is one form of vigilante justice that had the effect of legal police enforcement. See C. Vann Woodward, *The Strange Career of Jim Crow* 173-74 (3d ed. 1974); David Oshinsky, "Worse Than Slavery": Parchman Farm and the Ordeal of Jim Crow Justice 100-06 (1996). See generally W. Fitzhugh Brundage, *Lynching in the New South: Georgia and Virginia 1880-1930* (1993). Also, the modern-day enactment of laws such as Megan's law in New Jersey almost encourages and sanctions extralegal violence against people whom the state has identified as irredeemable and socially undesirable. See Jenny A. Montana, Note, *An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey's Megan's Law*, 3 J.L. & Pol'y 569, 575-78 (1995) (noting how the law encourages lawlessness among the citizenry); *Whitman Latest to Urge Laws on Notices of Sex Offenders*, N.Y. Times, Aug. 6, 1994, at A24; Ruth Bonapace, *Can Sex Offenders Really Be 'Cured?'*, N.Y. Times, Aug. 21, 1994, at 13NJ1.

38. Mark H. Moore & George L. Kelling, *"To Serve and Protect": Learning from Police History*, 70 Pub. Interest 53 (1983).

39. Wilbur R. Miller, *Cops and Bobbies, 1830-1870*, in *Thinking About Police*, *supra* note 5, at 75 (studying mainly the first New York police); Mark H. Haller, *Chicago Cops, 1890-1925*, in *Thinking About Police*, *supra* note 5, at 90 (stating that in the Chicago police force's formative years, "the police had strong ties to local politics, neighborhood institutions, and ethnic communities. Neither their training nor the civil service system

this more informal source of authority was the connection the early American police had to politics.⁴⁰ This connection to politics, coupled with the personal authority the officers displayed, perpetuated the American people's distrust of authority.⁴¹

And rightfully so. With the formation of the first police came the first instances of formalized abuse of authority and misuse of force. Official corruption emerged as a result of the combination of the police force's close proximity to and interaction with the citizenry and the large amounts of discretion with which the officers were entrusted.⁴² Furthermore, the new organizational structure of the police created "the potential for unprecedented incursions upon individual liberties."⁴³ Also dangerous was the uneven and political enforcement of the laws based on the closeness of political actors and law enforcement.⁴⁴

Corresponding to the rise of the first police forces, police violence emerged as an essential part of policing. Police were called on to use force to punish both those who were arrested and those who were merely unruly, to pressure those arrested into talking, and to maintain their authority in the neighborhood.⁴⁵

As a consequence of the immense corruption and ineffectiveness of the original formations of the police, a movement formed in the early 1900s to reform police departments through professionalization.⁴⁶ The organizational structure of the departments was altered to conform with the highly structured, more accountable, and precisely routinized military hierarchy.⁴⁷ Technology began to play a large role in policing as

provided an alternative orientation toward a formal system of rules or laws.").

40. See generally George L. Kelling & Mark H. Moore, *The Evolving Strategy of Policing*, in *The Police and Society*, *supra* note 21, at 5-8.

41. Moore & Kelling, *supra* note 38, at 54.

42. Being closer to the citizens, the police were more susceptible to requests for "favors" (otherwise known as bribes) and were tools of the politicians for the collection of coerced political "contributions" (otherwise known as extortion). See Haller, *supra* note 39, at 88; Kelling & Moore, *supra* note 40, at 8.

43. Steiker, *supra* note 30, at 833.

44. Moore & Kelling, *supra* note 38, at 54.

45. Haller, *supra* note 39, at 94-95.

46. Many of the characteristics of this "era" of political policing are apparent as well today. See *supra* note 26. The political nature of the police commissioner in major cities is a prime example. Also, the corruption scandals of this century have all been rooted in close contacts between the police and the people.

47. See Albert J. Reiss, Jr., *Police Organization in the Twentieth Century*, in *Modern Policing* 51-97 (Michael H. Tonry & Norval Morris eds., 1992) (describing the transformation to bureaucratic organization within police departments); Skolnick & Fyfe,

the car, the telephone, and the two-way radio changed the nature and effectiveness of the profession.⁴⁸ A focus on the numbers and statistics of policing emerged as well. The statistics of calls answered, average response time, arrests made, and crimes committed became a large indicator of success or failure.⁴⁹

Along with this militaristic sense of policing came an increase in problems involving police relations with people. At the same time leading advocates of reform decried police brutality,⁵⁰ problems arose based on several factors. The individual police officers and the police as an institution had too much power in the eyes of many because they functioned as discrete actors apart from popular control.⁵¹ Furthermore, the reform movements took the police off the beat and moved them into police cars where they were more isolated from the people they policed. This isolation created a sense of an adversarial relation between the police and the people.⁵² Rhetoric of war also emerged as the police began to view the citizens as enemies toward whom they had to evince a "siege mentality that alienate[d] the officer from the community."⁵³ Because war is based on adversarial positioning and conflict, the natural outcome is police violence against the community while pursuing the elimination of crime.

Responding to some of the concerns of the militarization of the police force, some scholars have advocated and some police chiefs have implemented a reform called community policing. One of the most

supra note 1, at 113-33 (discussing the impact of the view that "cops are soldiers" on police enforcement and attitudes). For an essay on one of the major personalities in the reform movement, August Vollmer, see Nathan Douthit, *August Vollmer, in Thinking About Police*, *supra* note 5, at 101-14.

48. Reiss, *supra* note 47, at 51.

49. Skolnick & Fyfe, *supra* note 1, at 125-28.

50. August Vollmer stated that "under no circumstances can we countenance brutality of any kind in the police department." Douthit, *supra* note 47, at 108.

51. See Robert M. Fogelson, *Reform at a Standstill, in Thinking About Police*, *supra* note 5, at 121. This perception that police being separate from politics created problems followed the period in time during which people were criticizing the police for being *too* connected to politics. A middle ground seems to exist in most cities today: the commissioner's office is connected to politics, yet the individual officers are not hired based on political patronage. This middle ground does not mean that complaints about the police cease to exist, but it is reflected in the lack of complaints about the political nature (or lack thereof) of the police.

52. Reiss, *supra* note 47, at 53; Moore & Kelling, *supra* note 38, at 50, 58.

53. Christopher Commission Report, *supra* note 11, at xiv; see also Skolnick & Fyfe, *supra* note 1, at 116-33.

influential pieces of scholarship that paved the way for this reform is an article titled "Broken Windows: The Police and Neighborhood Safety."⁵⁴ The important aspect of this policing strategy is for the police to attend to the non-emergency everyday needs and problems of the individual communities they patrol and to solve these problems before they escalate into fear, disorder, and violence. To paraphrase the metaphor used by Wilson and Kelling, the authors of "Broken Windows," if there's one broken window in a local building, the police should fix it. Doing so will prevent the disorderly from getting the idea that the building and area are run down. In turn, people in the area will be prevented from thinking no one cares and therefore have free rein to break other windows in the building and engage in criminal activity.⁵⁵ This form of policing emphasizes restoration of order in the community over simple crime solving.

Key to community policing is the officer's increased role in the community. Describing the New York City Police Department's Community Patrol Officer Program, Michael Farrell identified three essential aspects to this increased role: the officer has increased accountability within the community for order maintenance as well as crime control; the officer has greater identification with the community because she knows the residents and business people within the beat area; and the officer develops proactive strategies with the community to deal with order problems.⁵⁶ The officer plays the roles of "planner, problem solver, community organizer, and information exchange link."⁵⁷

Even though more police contact with the community addresses some of the flaws of the more distant professionalized police force, new problems develop with this form of community policing. Besides the

54. J. Wilson & George Kelling, Jr., *Broken Windows: The Police and Neighborhood Safety*, 1982 Atlantic Monthly 29, reprinted in J. Wilson, *Thinking About Crime* 75 (1985). "Community policing" is often used in the literature interchangeably with the term "problem-oriented policing." See Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, in *Thinking About Police*, *supra* note 5, at 480-94. For the purposes of this Article, the distinction is not that important. Important are the characteristics that these forms have in common and that this Article discusses: the increased contact the police have with individuals and the community and the increased discretion of the individual officer in her interaction with the people.

55. Wilson & Kelling, *supra* note 54, at 78-79.

56. Michael Farrell, *The Development of the Community Patrol Officer Program: Community-Oriented Policing in the New York City Police Department*, in *Community Policing* 73, 76-77 (J. Greene & Stephen Mastrofski eds., 1991).

57. *Id.* at 78-79.

theoretical problems associated with any social program based on the amorphous term "community,"⁵⁸ there is the additional problem of police officers imposing upon the community a form of order that is different from that which the community wants.⁵⁹ Furthermore, in a community in which there are different racial and ethnic sub-communities, the officer must refrain from enforcing the bigotry of one sub-community against another.⁶⁰ Street justice, in the form of "kicking ass" as Wilson and Kelling describe, is another problem as officers gain increased discretion and are told that they are there to impose order.⁶¹

B. Class and Race Complexities

This very capsulized description of the evolution of the police role in American society would not be sufficient without a more in-depth account of the interplay of class and race in these changing concepts of policing.

Class, order, and power are inherently linked, and the history of policing illustrates this nexus. Vigilante movements targeted the "lower people and outlaws [because they] represented the main threat to the reconstruction of the community"⁶² The founding of the formal police force in New York had roots in both the propertied class' and the established working class' desire to control the lowest rungs of

58. The essence of this problem is that no one can define what exactly constitutes a community. For a thorough critique of using the notion of community as the basis of social policy, see Iris Marion Young, *Justice and the Politics of Difference* 226-56 (1990).

59. Most importantly, the officer might have problems understanding the concepts of order and community of cultures and classes other than her own. See Strecher, *supra* note 25, at 218-20 (describing the "culture shock" that middle-class white police officers experience).

60. Wilson and Kelling note that the officer would have to recognize that the outer limit of her authority is "to help regulate behavior, not to maintain the racial or ethnic purity of a neighborhood." Wilson & Kelling, *supra* note 54, at 85. This answer, however, leaves too much discretion in the police, and they have consistently mishandled race. See *infra* text accompanying notes 69-76.

61. See Gary W. Sykes, *Street Justice: A Moral Defense of Order Maintenance Policing*, in *The Police and Society*, *supra* note 21, at 139-54; see also Wilson & Kelling, *supra* note 54, at 85. One report in New York City notes the rise of complaints of police brutality, especially by African-American and Hispanic citizens, after the institution of community policing there. John A. Barnes, *NYC Police Chief William Bratton*, *Investor's Business Daily*, Inc., June 1, 1995, at A1.

62. Brown, *supra* note 28, at 64.

the working class.⁶³ Decades later, during the early twentieth century, union members were victims of police oppression when the police were called in to bust strikes and thwart organizing.⁶⁴ Today, an entire class of crime, so-called “quality of life” offenses, is defined largely as what the poor do—sleep in the streets, beg for money, squeegee unwilling car drivers’ windshields, etc.⁶⁵

Because the traditional role of the police is to enforce order upon the lower classes, it is beyond dispute that the poor and disempowered are inherently more likely to find themselves at the receiving end of police brutality.⁶⁶ In fact, as Egon Bittner points out, the nature of the police as an institution controlled by those with more power mandates that “some persons will receive the dubious benefit of extensive police scrutiny merely on account of their membership in those social groupings which invidious social comparisons locate at the bottom of the heap. . . . [This group includes] the poor living in urban slums”⁶⁷ Furthermore, and more to the heart of the matter, Peter Manning notes that competition for the scarce resource of the police creates a situation in which “money differentiates the audiences served” and produces invidious distinctions between those who receive the benefit of policing (protection) and those who receive the brunt of policing (brutality).⁶⁸

63. Miller, *supra* note 39, at 74. These “lowest rungs” corresponded with the influx of immigrants into New York at the time. Immigrants would work for a lower wage than the established working classes. Thus, unions saw them as a threat to members’ jobs. In a different vein, the propertied classes saw these new people as a threat to American democracy because of their rising influence and increasing populations. *Id.*

64. Crime and Social Justice Assocs., *The Iron Fist and the Velvet Glove*, in *The Police and Society*, *supra* note 21, at 87 (“The police did not shoot or beat the corporate executives of Carnegie Steel, the Pullman Company, or the Pennsylvania Railroad who subjected their workers to long hours, physical danger, and low pay; instead, they shot and beat the workers who protested against that exploitation.”).

65. Clifford J. Levy, *Council Approves Restrictions on Beggars*, N.Y. Times, Sept. 12, 1996, at B4 (“The New York City Council approved a bill yesterday that would allow the police to arrest squeegee men, beggars at automatic teller machines and other aggressive panhandlers.”); see Haywood Burns, *Johannesburg on the Hudson?*, Newsday, July 13, 1994, at A28 (critiquing New York’s enforcement of quality of life crimes); Barnes, *supra* note 61, at A1 (detailing the types of crimes included under “quality of life” offenses in New York City).

66. See Carl B. Klockars, *The Legacy of Conservative Ideology and Police*, in *The Police and Society*, *supra* note 21, at 350 (acknowledging that “the focus of the police effort is disproportionately on the activities of the poor and ignores for the most part the crimes and delicts of corporate and white collar criminals”).

67. Bittner, *supra* note 5, at 37.

68. Manning, *supra* note 21, at 384.

Race, of course, has played an equally important role in the shaping of police behavior in this country. In their article reviewing police history, "The Evolving Strategy of Policing: A Minority View," Hubert Williams and Patrick Murphy trace the history of policing from a race-conscious perspective.⁶⁹ As noted above, the suppression of non-Anglo immigrant communities played a large part in the formation of organized police forces.⁷⁰ Controlling slave revolts through slave patrols, suppressing urban race riots, controlling freed slaves, and participating in organized lynchings were common practices for eighteenth-century and early nineteenth-century police. Williams and Murphy note that reform movements have not succeeded in alleviating these problems of race and the police. Instead, police have worked within the new models of reform and have continued to oppress.⁷¹ The professionalization reform movement is faulted because of its focus on law. "Relying on law . . . as the source of police authority had many desirable aspects for those provided full protection by the law. Once again, however, for those who lacked both political power and equal protection under the law, such a transformation could have little significance."⁷² The community policing movement is faulted for different reasons. "Under [conditions of poverty that plague inner city communities of color], it is unreasonable to expect that the residents of the inner city will have the characteristics—whether social, economic, or political—that are required to sustain the partnership required of the community policing approach."⁷³

As has been previously discussed, the most dangerous site of police oppression has been at the convergence of class and race. Skolnick and Fyfe note that in the early part of this century

police were not necessarily antagonistic to black persons so long as they did not violate caste understandings. When blacks behaved in their caste-appointed roles, they were treated pleasantly enough. Davis, Gardner, and Gardner found, however, that individual police were strongly

69. Hubert Williams & Patrick V. Murphy, *The Evolving Strategy of Police: A Minority View*, in *The Police and Society*, *supra* note 21, at 29-52.

70. *See supra* note 63 and accompanying text.

71. Williams & Murphy, *supra* note 69.

72. *Id.* at 44. This concern about focusing on law for the protection of the oppressed is addressed in Part III.C.2. *See infra* notes 140-45 and accompanying text.

73. Williams & Murphy, *supra* note 69, at 49.

antagonistic toward troublesome or “uppity” Negroes who showed less than proper respect for police authority. “They are,” they write, “firmly convinced of the Negro’s inherent inferiority, of his lack of control, of his proneness to lie and steal; and they regard any Negro who resists a policeman as a ‘bad nigger,’ one who must be ‘taken care of’ unofficially.”⁷⁴

This type of brutality related to the intersection of class and race has continued to this day, whether it surfaces in the form of harassing people of color for walking through upscale neighborhoods (which may be their own)⁷⁵ or, more to the essence of the criminal law, in the form of serious crime and severe punishments being defined by what poor people of color do.⁷⁶

Ultimately, the race- and class-based harm inflicted throughout the history of policing has had two major effects. First, there is an extraordinary sense of pain and anger coming from years of being systematically abused by those who have sworn to protect these communities. This pain and anger is multiplied by the sense that nothing is being done about the problem. Second, the police specifically and government generally have lost the trust and cooperation that these communities have to offer. Pervasive and systematic abuse lowers trust in the government and ruins what hope there is for cooperation between the government and the people.

74. Skolnick & Fyfe, *supra* note 1, at 33 (quoting Allison Davis et. al., *Deep South: A Social Anthropological Study of Caste and Class* 503 (1941)).

75. See Derrick Bell, *Race, Racism and American Law* 341 n.41 (3d ed. 1992) (citing *Kolender v. Lawson*, 461 U.S. 352 (1983), and *State v. Dean*, 543 P.2d 425, 426 (Ariz. 1975)); see also *United States v. Bayless*, 913 F. Supp. 232, 240 (S.D.N.Y.) (“What I find shattering is that in this day and age blacks in black neighborhoods and blacks in white neighborhoods can count on little security for their person.”), *vacated*, 921 F. Supp. 211 (S.D.N.Y. 1996).

76. See generally Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System That Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines’ Classification Between Crack and Powder Cocaine*, 25 U. Tol. L. Rev. 215 (1994); Dorothy E. Roberts, *Crime, Race, and Reproduction*, 67 Tulane L. Rev. 1945, 1954–61 (1993); Laura A. Wytsma, Comment, *Punishment for “Just Us”—A Constitutional Analysis of the Crack Cocaine Sentencing Statutes*, 3 Geo. Mason Indep. L. Rev. 473 (1995). For a look at how the definition of crime was constructed in this manner in the late 1800s, see Oshinsky, *supra* note 37, at 40–41.

C. Problems With Frequently Used Legal Approaches to Dealing With Police Abuse

A quick look at common attempts to deal with this problem reveals that there is substantial work to be done. One of the most frequently mentioned solutions is civil litigation charging the police with constitutional and civil rights violations. Section 1983 of Title 42 of the United States Code authorizes a cause of action for any person deprived "of any rights, privileges, or immunities secured by the Constitution and laws" by a wrongdoer acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."⁷⁷ Many obstacles exist to this cause of action. The defense of qualified immunity is a powerful defense that courts may easily apply to prevent an officer from being held liable for low-level abuse.⁷⁸ Also, holding a municipality liable for the actions of an officer is very difficult under the municipal liability doctrine which requires the municipality to "implement[] or execute[] a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers."⁷⁹ Professor Derrick Bell notes that

where blacks allege harm that is as serious [as the flagrant cases that reach the Supreme Court and make new law], though perhaps less dramatic; where, as so often is the case, the responsibility for the racial injustices is not the blatantly illegal acts of a few policemen but reflects policies authorized or condoned by the entire police force, often in conjunction with the full law enforcement establishment, the judicial response [in § 1983 litigation] is listless, procedural, unresponsive.⁸⁰

For the purposes of this Article, it is thus obvious that § 1983 does not reach the low-level police uses of force that permeate the history of

77. 42 U.S.C. § 1983 (1994).

78. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding that public officials are entitled to a qualified immunity defense from "liability for civil damages insofar as their conduct does not violate clearly established . . . rights of which a reasonable person would have known").

79. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690 (1978).

80. Bell, *supra* note 75, at 323.

police relations with communities of color.⁸¹ Similarly, the criminal law as it now stands suffers from this deficiency in that only extraordinarily sensational crimes by the police can be effectively prosecuted.⁸²

If the law is to improve relations between these communities and the police and reduce the incidences of brutality, it must find another way to prevent and respond to the illegal searches, harassing arrests, and physical and verbal abuse police visit upon certain historically disadvantaged groups of people every day. Implementing an altered version of Article 243 of the Model Penal Code is a possible solution that can account for these more routine yet equally troublesome problems.

II. THE CRIME OF OFFICIAL OPPRESSION

As a solution to this problem, I propose using a criminal code provision based on Article 243 of the Model Penal Code, the crime of Official Oppression. In this section, I will present the language of this provision, analyze its comments, and look briefly at the states that have similar provisions in their criminal code and how they have used it.

A. The Crime of Official Oppression

Article 243 of the Model Penal Code provides:

A person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity commits a misdemeanor if, knowing that his conduct is illegal, he:

(1) subjects another to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien or other infringement of personal or property rights; or

81. For a sampling of the recent literature on § 1983 and police abuse, see Sa'id Wekili & Hyacinth E. Leus, *Police Brutality: Problems of Excessive Force Litigation*, 25 Pac. L.J. 171 (1994); Matthew V. Hess, Comment, *Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct*, 1993 Utah L. Rev. 149; Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 Hastings L.J. 753 (1993).

82. See Skolnick & Fyfe, *supra* note 1, at 196-98. Skolnick and Fyfe also address the issue that the mores of our society dictate that professional misconduct is better dealt with in the ranks of the profession rather than by public prosecution. This comment is addressed *infra* in the text after note 135.

(2) denies or impedes another in the exercise or enjoyment of any right, privilege, power or immunity.⁸³

The language covers a broad range of official or purportedly official activity to avoid the catch-22 that an official committing a crime is not acting in his official capacity.⁸⁴ Article 243 provides for a mens rea of "knowingly," necessitating that the officer know that his conduct is illegal,⁸⁵ thus, mistake of law is a defense to this crime.⁸⁶

The drafters of the Model Penal Code included a detailed comment that parses the different aspects of this crime: its history, scope, requirement of official capacity, allowance for acting under a pretense of official status, mens rea, and grading.⁸⁷ Overall, the drafters intended this provision to cover a large range of official acts and misconduct. The proposed crime is a misdemeanor because the drafters understood that it "is a residual statute designed to reach official depredations that are not otherwise criminal but that nevertheless should be prosecuted as an abuse of authority."⁸⁸ More serious crimes by officials would be prosecuted under the particular code provision for that crime.⁸⁹

Article 243 broadens the scope of the crime beyond that which was included at common law. The common law and early codifications of the crime of official oppression included only those abuses of office that were done for the officer's "own selfish or vindictive reasons."⁹⁰ Thus, the punished crimes of officers were more likely to be crimes that we now consider corruption.⁹¹ The Model Penal Code's codification of

83. Model Penal Code § 243.1 (1985).

84. *Id.* cmt. 3. at 296. The initial ineffectiveness of federal anti-discrimination law was rooted in this "under color of law" exception. *See* Bell, *supra* note 75, at 291-96. The Supreme Court finally rejected this argument in *Screws v. United States*, 325 U.S. 91 (1945).

85. The Model Penal Code defines this mens rea as: "*Knowingly*. A person acts knowingly with respect to a material element of an offense when: if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist" Model Penal Code § 2.02(2)(b)(i) (1985).

86. Model Penal Code § 243.1, cmt. 5 at 299 (1985); *id.* § 2.04(1)(a) (mistake of law).

87. *Id.* § 243.1, cmts. 1, 6.

88. *Id.* § 243.1, cmt. 2.

89. *Id.*

90. B. Finberg, Annotation, *What Constitutes Offense of Official Oppression*, 83 A.L.R.2d 1007, 1008 (1995).

91. *Id.*

official oppression, though, includes all illegal conduct regardless of the motive of the officer and his benefit from the crime.

This broadening of the scope of the crime is welcome for the prosecution of low-level police misconduct because this low-level form of police violence is often done for no other reason than the officer wanting to use his power against another to show who is boss.⁹² Requiring that the officer did the illegal act for a more selfish reason would not serve this purpose.⁹³ The Model Penal Code's broadening of the crime is also consistent with the developments in policing that have occurred since the time of the common law. With the well-established, larger, and more intrusive police force of today, citizens face a greater chance of having their rights violated by an officer of the peace than they did centuries ago when there was no formal police force.⁹⁴ This changed role of the police force alone justifies this expanded definition of official oppression.

B. Similar State Provisions

Many states have enacted a form of the crime of official oppression, but no state directly addresses the problem of low-level brutality in the course of police work. In addition, the states that have adopted such statutes have not done so uniformly. Some state statutes contain a particular motive requirement that the official be acting with corrupt intent.⁹⁵ However, this formulation was rejected by the drafters of the Model Penal Code formulation because "the fact that the officer considered his action to be helpful to law enforcement should not be a defense. A requirement of 'malicious' or 'corrupt' conduct does not

92. See, for example, the description of the attitude test, *supra* note 23.

93. One could argue that an officer who illegally searches a kid in a crime-prone neighborhood is acting for the officer's own benefit in that he is hoping that by searching this kid the people in the area will be less likely to commit a crime. However, the argument is a tenuous one because the benefit of reduced crime is one that accrues to the entire neighborhood and not just to the officer patrolling the neighborhood. At common law, the benefit to the officer with which the crime of official oppression was concerned was a material benefit (money, privileges, etc.), a benefit that accrued to the officer himself and no one else. Finberg, *supra* note 90, at 1008.

94. See Steiker, *supra* note 30, at 830-38 (detailing the changed circumstances of policing since the time of the framing of the constitution).

95. See, e.g., Fla. Stat. Ann. § 839.25 (West 1994) (defining "corrupt" as "done with knowledge that act is wrongful and with improper motives"); Utah Code Ann. § 76-8-201 (1995) (requiring "an intent to benefit [the officer] or another or to harm another").

clearly exclude such a defense."⁹⁶ Other laws criminalize an officer's failure to perform a duty that he is required to perform.⁹⁷ Another variation makes it a crime when an officer violates a law or statute pertaining to his office.⁹⁸ Some states have graded this offense as a felony, albeit a low-grade felony.⁹⁹

Only two states, Pennsylvania and Colorado, have enacted code provisions very similar to the Model Penal Code's provision.¹⁰⁰ Because Colorado has no case law surrounding its provision, Pennsylvania's provision will be used to illustrate some of the issues surrounding the code's use. There have been two challenges to Pennsylvania's statute alleging it is void for vagueness. Both challenges were unsuccessful because the Pennsylvania Superior Court found that the term "[m]istreatment" is clearly an ascertainable standard; it is in common usage, is equated with abuse, and has a commonly understood meaning."¹⁰¹ In keeping with the Model Penal Code's drafters' broad conception of the crime, the court construed the code to apply to all misconduct by uniformed officers, regardless of whether they are acting in official capacity. The court recognized that the uniform is the sign of authority to the person coming in contact with the officer.¹⁰² Regarding the mens rea for the crime, the Pennsylvania Superior Court found that the "word 'knowing' means that the accused must have been acting in 'bad faith' when he subjected the other to the proscribed activities."¹⁰³

96. Model Penal Code § 243.1 (1985).

97. See, e.g., N.Y. Penal Law § 195.00 (McKinney 1988) ("knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office"); N.J. Stat. Ann. § 2C:30-2 (West 1982) (same).

98. Tex. Penal Code Ann. § 39.02 (West 1994) ("violates a law relating to the public servant's office or employment"); Or. Rev. Stat. § 162.405 (1995) ("knowingly violates any statute relating to the office of the person").

99. Tenn. Code Ann. § 39-16-403 (1991); Ill. Rev. Stat. Ch. 720, art. 33 (1993); Wis. Stat. § 946.12(2) (1994).

100. Colo. Rev. Stat. Ann. § 18-8-403 (West 1990); 18 Pa. Cons. Stat. Ann. § 5301 (West 1983).

101. *Commonwealth v. Manlin*, 411 A.2d 532, 533-34 (Pa. Super. Ct. 1979) (deputy prison warden mistreating inmates by striking and kicking them in disciplinary hearings); accord *Commonwealth v. Checca*, 491 A.2d 1358, 1367 (Pa. Super. Ct. 1985) (judge soliciting a woman appearing before him on driving under the influence charges).

102. *Commonwealth v. Stumpo*, 452 A.2d 809, 814 (Pa. Super. Ct. 1982) (finding that the code covers an officer's conduct even when he is not performing an official act but is wearing his uniform).

103. *Commonwealth v. Eisemann*, 453 A.2d 1045, 1048 (Pa. Super. Ct. 1982) (city officials not guilty of official oppression when they cut short debate at public meeting).

This is consistent with the Model Penal Code's drafters' conception of the mens rea.¹⁰⁴

The full extent to which police officers are charged with the crime of official oppression is uncertain,¹⁰⁵ but a thorough scanning of newspaper articles in states that have the provision suggests that it is being used, although not very frequently. Some of the instances of its use are in the context of deaths in custody.¹⁰⁶ However, this is an extreme form of violence for which constitutional and other criminal protections should be sufficient; using the misdemeanor crime of official oppression in this context seems inappropriate.

The more appropriate use of this provision to cover lower-level abuse by police officers is evident to a small extent in the press. There are a number of reports of using this provision to cover lower-level sex crimes committed by an on-duty officer.¹⁰⁷ There are also reports of using this offense to reach low-level police misconduct. The officers in one of these instances were indicted for unnecessarily "detaining and handcuffing two teen-agers."¹⁰⁸ It is precisely this type of conduct that the provision would be best suited to target.

104. Model Penal Code § 243.1, at 300 (1985) (stating that "the actor's good-faith belief in the legality of his conduct" should be a defense to the crime).

105. In fact, calls I made to the Houston District Attorney's Office (an office that, based on newspaper reports, seems to prosecute official oppression more than others) were consistently transferred to people who did not know much about the crime. When I was finally put in touch with the person who did prosecute the crime, she did not know how often it arose and did not know of any way of finding out that information. She said no statistics were kept, and it was not something that happened often enough for her to know.

106. See, e.g., *Officers Charged in Motorist's Death*, Pa. L. Weekly, Dec. 4, 1995, at 2.

107. See, e.g., *Constable is Charged*, Houston Chron., July 16, 1996, at 17 (charged with official oppression for "allegedly touching a woman's breast while he was serving her with an eviction notice"); Lauri Rice-Maue, *Former Officer Sentenced; Gets Six- to 23-Month Prison Term for Sex Assault on Teen*, Allentown Morning Call, Dec. 6, 1995, at B1.

108. Steve Olafson, *Iowa Colony Law Officers Are Indicted; Oppression Counts Stem From Handling of Teens*, Houston Chron., Dec. 15, 1995, at 37; see also Lawrence Buser, *Fisher, Sullivan Cases Set*, Memphis Comm. Appeal, Aug. 25, 1995, at 2B (a person who called the police to complain about a neighbor's music was handcuffed, pepper sprayed, and hogtied).

III. EVALUATING ARTICLE 243 AS A TOOL AGAINST POLICE ABUSE

In the current state of the criminal justice system, the crime of official oppression as detailed above has only limited use. There are problems with the provision itself, the methods of enforcement the criminal justice system provides, and the concept of using the criminal justice system to deal with police misconduct at all. While each of these issues is certainly problematic, I will attempt to sketch a workable form of the crime of official oppression and its enforcement as well as justifying the use of the criminal justice system below.

A. The Mens Rea

The problem with the provision as written in the Model Penal Code is that the mens rea in the provision is high enough that most of the acts addressed by this Article would be considered outside the scope of the provision. The "bad faith" requirement could reach some of this low-level misconduct, but many times the officer could be acting in good faith" and still abuse her authority.¹⁰⁹ Most importantly, if good or bad faith is the decisive factor in determining whether a crime has occurred, the officer's state of mind becomes the focus of the inquiry rather than the victim's injury. This focus trivializes the violation that occurred and ignores the psychological or physical damage to the victim resulting from the officer's actions. This shifting focus is unfortunately reminiscent of constitutional anti-discrimination law that looks more to the perpetrator than the victim to define the unlawful action.¹¹⁰

A suggested reform in this vein would be to lower the mens rea to "reckless," a mens rea that would come closer to capturing police

109. For example, the officer who arrests a person just to instill a sense of order and respect in him may be acting out of a good faith belief that the arrest is the right and legal thing to do. However, this arrest is an abuse of authority that should be covered by any serious attempt to deal with police misuse of force and authority. Also, an officer who uses excessive force in searching someone before or after an arrest may believe in good faith that the search was properly done. This abusive search, though, should also be covered by this crime of official oppression because it is just as intrusive as a search done in bad faith.

110. For example, under the Equal Protection Clause, the victim's experiencing discrimination is not determinative; rather, the perpetrator's discriminatory intent triggers constitutional protection. *See Washington v. Davis*, 426 U.S. 229 (1976).

conduct that is everyday low-level abuse.¹¹¹ The Model Penal Code defines “reckless” as “consciously disregard[ing] a substantial and unjustifiable risk.”¹¹² This standard would not (as a “negligence” standard would) handcuff an officer when she has an objectively reasonable belief that she must act. Unlike Article 243, though, the “reckless” standard would make some “good faith” defenses untenable.

Some officers could be acting in good faith but still be disregarding a substantial risk due to overzealousness. For example, an overzealous officer wants to rid a neighborhood of drug dealers but illegally searches innocent kids in the process. In this situation, the officer is acting in good faith but should be punished nonetheless. Under the “knowingly” standard of Article 243, she would not be covered because it would be difficult to prove the officer knew her conduct was illegal; under the proposed “reckless” standard, she would be covered because all the prosecutor would have to prove was that the officer

111. The initial paragraph of this proposed revised provision would thus read:

A person acting or purporting to act in an official capacity or taking advantage of such actual or purported capacity commits a misdemeanor if he illegally

Compare with Model Penal Code § 243.1 (1985) (“commits a misdemeanor if, knowing that his conduct is illegal, he . . .”). Combining this provision with the default mens rea provision of the Model Penal Code would result in a culpability requirement of at least recklessness with respect to the element of the illegality of the action. *See* Model Penal Code § 2.02(3) (1985) (providing that “[w]hen the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or *recklessly* with respect thereto” (emphasis added)).

112. Model Penal Code § 2.02(2)(c) (1985). The full text of the definition of “reckless” is:

Recklessly. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.

Id. This definition of recklessness comports with the “subjective” definition of recklessness rather than the “objective” definition that would allow for culpability if the actor *should have known* about the risk. *See* Farmer v. Brennan, 114 S. Ct. 1970, 1977–79 (1994).

disregarded a substantial and unjustifiable risk that her conduct was illegal. This "reckless" standard thus eliminates the bad faith requirement because an officer can be acting recklessly but still in good faith.

Thus, the mens rea of "reckless" would more closely fit with the history of police violence suffered by poor communities and communities of color¹¹³ in that it would recognize the harm without allowing the officers to excuse themselves based on their own unreasonable beliefs about the community.¹¹⁴

B. Enforcing the Crime of Official Oppression

In any system in which the police are chiefly responsible for enforcing crime and prosecutors must rely heavily on the police when prosecuting criminals, it is difficult to bring charges against police officers.¹¹⁵ The officer has to be charged before even getting to court to confront culpability. Furthermore, the police are resistant to investigating or testifying against one another due to the infamous "blue code of silence."¹¹⁶

One possible step toward a solution to the problem of prosecutorial timidity would be to create a quasi-external commission charged with overseeing police use of force or to expand the duties of one that already exists. Such a commission, and not the police department, would have the authority to investigate complaints lodged against the police. The quasi-external nature of this commission would

113. See Williams & Murphy, *supra* note 69.

114. See Strecher, *supra* note 25, at 207-23.

115. See, e.g., Skolnick & Fyfe, *supra* note 1, at xi (discussing this prosecutorial timidity in the context of the Rodney King trials).

116. See John Van Maanen, *Kinsmen in Repose: Occupational Perspectives of Patrolmen*, in *The Police and Society*, *supra* note 21, at 236-37. Van Maanen writes of an incident he observed:

Officer Barns filled out the many reports involved in the incident and passed them to his sergeant for approval. The sergeant carefully read each report and then returned the "paper" to Barns saying that he better claim he was kicked in the face *before* he entered the patrol wagon or Barns would get a heavy brutality complaint for sure. . . . Finally, after some discussion and two re-writes, Barns finished a report which the sergeant said "covered their asses."

Id. at 237.

be necessary because, despite their possible allegiance to the police department, only police officers would have the know-how and familiarity with the police department and its procedures essential to a thorough investigation. Also, those officers in the commission would have the formal investigative training that civilians lack.

Such a commission should have the power to bring charges against the officers so that the local district attorneys are not solely responsible for bringing charges and indictments against police officers.¹¹⁷ Putting this power into the hands of civilians would reinvest power in the hands of those directly affected by police use of force.¹¹⁸ The communities that are often targeted by the police would feel that they have some control over what happens in their neighborhoods, instead of having to sit idly by observing the endless cycle of police abuse and arrests of members of their community.

Initially, the thorough enforcement of this criminal provision as laid out above could lead to many arrests of officers, or at least many more than have occurred in the past. However, proof of guilt beyond a reasonable doubt within a court of law is difficult. Most interactions between police officers and people on the street are either unobserved by others¹¹⁹ or ignored by those in a position to observe.¹²⁰ Furthermore, there is no central control or monitoring of police behavior and interaction with people. The inherent nature of the job of the police officers on the beat is that the officers have immense discretion in how they do their job.¹²¹ This unobserved interaction coupled with the

117. See Peter L. Davis, *Rodney King and the Decriminalization of Police Brutality in America: Direct and Judicial Access to the Grand Jury as Remedies for Victims of Police Brutality When the Prosecutor Declines to Prosecute*, 53 Md. L. Rev. 271 (1994).

118. See Yale Kamisar et al., *Modern Criminal Procedure* 689-91 (8th ed. 1994) (noting that the grand jury's historical roots are in the spirit of checking the power of government).

119. See Skolnick & Fyfe, *supra* note 1, at 21 (stating that "the evidence in most citizens' complaints against officers consists only of the contradictory statements of the parties involved, so that the complaints cannot be resolved").

120. That people ignore dangerous interactions on the street is a commonly lamented fact. People are often told by police to disperse when they are observing something happening, or they just choose to look the other way when something questionable occurs. See generally Thomas C. Galligan, Jr., *Aiding and Altruism: A Mythopsycholegal Analysis*, 27 U. Mich. J.L. Ref. 439 (1994).

121. Albert J. Reiss, Jr. notes the problem this discretion creates:

Although the foundation of policing is the legal order and its rules, police officers, nevertheless, have enormous discretionary powers to

immense discretion of the officer creates a situation in which abuse of authority could come down to the words of the officer against the words of the complainant.

Adding another officer to the scene of the crime is not likely to help the situation. Because of the "blue code of silence"¹²² and the general "it's us against them" feeling, police bond together and rarely speak out against one another.¹²³ William Westley has noted that the consequence of this silence is that officers "apply no sanction against a colleague who took the more extreme view of the right to use violence"¹²⁴ Thus, without any extra witnesses to an interaction between the police and someone on the street or in her own residence, a claim of police abuse of authority would be likely to fail.¹²⁵

The best possible solution to this problem would be an increased role of the citizenry in policing the police. The Chicago Police Department's Office of Professional Standards studied accusations of abuse of authority by the police in 1985 and concluded that "the presence of an independent witness (one not connected with either the complainant or the police) was the most significant factor in determining the outcome of [the complaint]."¹²⁶ This factor was the difference that transformed the Rodney King incident from just another

apply the law. Consequently, there is considerable variability among police officers. . . . What is more important, discretionary decisions can be reviewed only when they are directly supervised or a matter of record. Because the police bureaucracy does not require that many discretionary decisions be made a matter of record, those choices cannot be subject to internal review. Correspondingly, only decisions of record are ordinarily subject to external review.

Reiss, *supra* note 47, at 73-74. Furthermore, unlike other bureaucracies, the police have not eliminated discretion in low-visibility conditions. *Id.*

122. See *supra* note 116.

123. This "blue code of silence" is a well-noted characteristic of police. See generally Victor E. Kappeler et. al., *Breeding Deviant Conformity: Police Ideology and Culture*, in *Police & Society*, *supra* note 21, at 243-62; Selwyn Raab, *The Unwritten Code That Stops Police From Speaking*, N.Y. Times, June 16, 1985, at 4(6) (quoting a former New York officer as saying that "the police code of silence is stronger than the mafia's code of omerta").

124. William A. Westley, *Violence and the Police*, 59 Am. J. Soc. 34, 37 (1953), quoted in Kappeler et al., *supra* note 123, at 250.

125. The difficulty of getting convictions for the crime is a counter-argument to the claim that the extensive use of this provision could handcuff the actions of officers on the street.

126. Kerstetter, *supra* note 7, at 223-24.

occurrence of police brutality to a national media event.¹²⁷ In some communities, this kind of independent observation provided by a camera is available. For example, in Montgomery, Alabama, a former police photographer monitors the police radio so that he can be present at the scene of an arrest and photograph any police use of force.¹²⁸ Obviously, though, not everyone has an independent person filming her encounter with the police.

A combination of increased education of the citizenry about their rights in police encounters and the creation of citizen patrols of the police could fill this void. Increased education could be instituted by informing people of the law that governs their rights in a police encounter: for example, what constitutes probable cause, what is allowed during a stop, when a search is illegal, and when you can walk away.¹²⁹ If people knew this information, they could make reasoned judgments about how to interact with the police and how to evaluate an interaction that they observe.

More importantly, communities can take a more active role in policing the police. The Black Panthers were focused on this idea in the late 1960's when they patrolled communities to ensure that police who

127. The Christopher Commission wrote of the importance of an independent witness:

Our Commission owes its existence to the George Holliday videotape of the Rodney King incident. Whether there even would have been a Los Angeles Police Department investigation without the video is doubtful, since the efforts of King's brother, Paul, to file a complaint were frustrated, and the report of the involved officers was falsified. Even if there had been an investigation, our case-by-case review of the handling of 700 complaints indicates that without the Holliday videotape the complaint might have been adjudged to be "not sustained," because the officers' version conflicted with the account by King and his two passengers, who typically would have been viewed as not "independent."

Christopher Commission Report, *supra* note 11, at ii.

128. Interview with Clifford Hunter in Montgomery, Alabama (Aug. 5, 1996). Mr. Hunter's photographs have been used by plaintiffs in lawsuits to prove their case against the Montgomery Police. None of these cases has gone to trial, but his pictures have helped in settlements. *Id.*

129. The National Lawyers Guild has been conducting such informational sessions for a while now in the form of its Street Law Project, a program designed to inform people of their rights when they encounter the police. National Lawyer's Guild, Street Law Manual (1995) (on file with author).

stopped African Americans were not being abusive.¹³⁰ Also, community groups such as the Guardian Angels could perform this function because they are an independent private form of policing that has an interest in protecting the community regardless of the source of the oppression.¹³¹ This more active role of the community in policing police encounters with its citizens would fill the void that currently exists with respect to citizen observation of the police. With this more active role, the police would be held more accountable for the discretionary authority that they exercise in everyday situations. Accountability would have two effects: it would curb the occurrence of police misuse of force in the first place, and it would supply witnesses for the crime when it does occur.

C. Justifying Using Criminal Law

A major argument against using this provision is that using the criminal law to fight the problem of low-level police abuse is not appropriate. This argument can be made on two fronts, each of which will be addressed below.

1. The Professional Status of the Police

The first argument is that the criminal law should not be used to address the misconduct of police because they are professionals.¹³² This argument has three prongs. First, doctors are not subject to the criminal law every time they do something wrong; they are subject only to civil liability and only in certain cases. Some commentators say that police misconduct should be handled in the same fashion.¹³³ Second, commentators argue that the police's fear of criminal prosecution will

130. Hugh Pearson, *The Shadow of the Panther: Huey Newton and the Price of Black Power in America* 3, 113 (1994); Bobby Seale, *Seize the Time: The Story of the Black Panther Party and Huey P. Newton* 85 (1970).

131. The Guardian Angels are seen as both friendly with the police, *see* Peter Davis, *The Sex Offender Next Door*, N.Y. Times Magazine, July 28, 1996, at 23 (describing the Guardian Angels' efforts in concert with Megan's Law), and opposed to the police, *see* Moore & Kelling, *supra* note 38, at 59 (noting that "opponents (often including the police) see the Angels as vigilantes threatening the rights of citizens with undisciplined enforcement").

132. *See* Skolnick & Fyfe, *supra* note 1, at 196-98 (discussing peer adjudication of allegations of professional misconduct in the medical and legal professions).

133. *See id.*

produce soft policing on the part of the beat officer.¹³⁴ This soft policing will result in increasing disorder and crime, which will benefit no one.¹³⁵ Finally, punishing the individual officer through the criminal justice system is unfair to the officer who is just acting out the role that the department in general wants from him.

Each of these reasons has some merit; however, each also has its own pitfall. The difference between police and other professionals who are not subject to criminal prosecution for misdeeds lies in the peculiar place that police occupy in society. Being protectors of the public order, being paid by the public, and being forced upon people often without their having called for them, the police should be held to a higher standard of accountability than other professionals who misbehave. The police are symbols of the government who are often the only representatives of the country, state, or municipality with which some people have contact.

That the enforcement of this crime would handcuff the police is a major concern expressed by opponents of excessive scrutiny of the police, but it is one with which I have no sympathy. The police cannot be allowed to instill fear in the hearts and minds of the citizens they patrol, particularly when they are scaring a certain class of citizens (the poor, the people of color) in the name of protecting a more powerful class of citizens (the rich, the white). To allow this would be almost to sanction a state under martial law rather than a free society. Moreover, all people have the basic human right to be free from government oppression and unnecessary interference in whatever form it takes.¹³⁶ These rights cannot be compromised for certain disenfranchised and marginalized groups in order to increase the liberty and security of

134. After the L.A. riots in 1992, Police Chief Darryl Gates said that the criticism of the officers' handling of King "had turned a 'once-proud' organization into one that ha[d] adopted a softer approach." He warned, "[F]or those who have their careers to think about, they're looking at what has been said we ought to do, and that's the soft approach to policing." Richard A. Serrano & Ted Rohrlich, *Criticism Over Use of Force Inhibited Police, Gates Says*, L.A. Times, May 7, 1992, at A1.

135. "[E]xcessive or unfair scrutiny and mistrust of officers (by their superiors, other government officials, or the public) can undermine important efforts to strengthen the best of police values." Geller & Scott, *supra* note 15, at 470.

136. Universal Declaration of Human Rights, G.A. Res. 217A, U.N.GAOR, 3d Sess., at art. 5, U.N. Doc. A/810 (1948) (torture and degrading treatment); International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, at art. 7 (1966), *reprinted in* 6 I.L.M. 368 (1966) (torture and degrading treatment); *id.* art. 9 (no arbitrary arrest or detention).

another, more powerful group.¹³⁷ The police must be policed and not given free rein over the citizenry.

Finally, prosecuting the individual officer rather than blaming the entire department is a concern. However, the individual officer has to bear the responsibility for her actions just as other actors within the criminal law do.¹³⁸ Also, the ramifications of these individual prosecutions would most likely be widespread enough at first so that the individual officer in the future would benefit. Faced with a series of officers being prosecuted for criminal offenses that have previously been thought of as everyday offenses, the police administration is bound to take notice. Leadership would have to begin to address the problem directly through training, re-training, and internal discipline. Also, the police administration would have to take a firm stance against the misuse of force and not merely a politically-opportune one.¹³⁹ Eventually, with a very effective internal program, the incidents of abuse would fall to a point at which individual prosecutions for the crime would not overwhelm the department and, more importantly, the community would feel more comfortable with the police and begin to see them as allies in living a safe and secure life.

2. The Criminal Justice System's Hostility to Disempowered Groups

The other argument against the use of the criminal law to curb this problem comes from a completely different angle than the one

137. The concept of "security" in and of itself is one that a state based on power and class distinctions will always attempt to ensure. Cf. Karl Marx, *On the Jewish Question*, in *The Marx-Engels Reader* 26, 43 (Robert C. Tucker ed., 2d ed. 1978).

138. I am expressing no opinion in this Article on this aspect of our criminal law. However, to the extent that the American criminal law focuses on individual notions of responsibility and not on collective forces or socialization, both police officers and the public should be held to this standard.

139. Goldstein observed that the factor most clearly differentiating police forces that succeeded in rooting out corruption and those that did not were forces with a strong and sincere administrative stance against it. This stance included not only pronouncements on the topic but also "communications on the subject of corruption within the agency, investigation of allegations, disciplining of corrupt officers, and promotions made." Herman Goldstein, *Policing a Free Society* 208 (1977). This conclusion could uncontroversially be extended from corruption to misuse of force. See Skolnick & Fyfe, *supra* note 1, at 19 ("The chief who is interested in reducing use of force to a minimum must therefore make it absolutely clear that excessive use of force is not acceptable. Beating a prisoner should be a firing offense, and the best police chiefs make sure it is.").

addressed above. This objection stresses that the criminal justice system has historically hurt minorities and the poor and that this harm is too ingrained in the system for the system to be turned around to help.

Plenty of evidence supports this argument. A December 1995 Justice Department report found that the number of African-American inmates surpassed the number of whites in state or federal prisons and local jails for the first time in 1994. In addition, nearly seven percent of all African-American male adults nationwide were in jail in 1994 as opposed to less than one percent of white male adults.¹⁴⁰ A similar October 1995 study found that one in three African-American men in their twenties is under the supervision of the criminal justice system on any given day—in prison, on probation, or on parole. The same figure was one in four only five years ago.¹⁴¹ Prosecutorial discretion is often exercised against people of color such that “[p]rosecutors are more likely to pursue full prosecution, file more severe charges, and seek more stringent penalties in cases involving defendants of color, particularly where the victim is white.”¹⁴² Racism in sentencing is also evident in the difference between the time whites and African Americans spend in prison for the same offenses.¹⁴³

The class bias of the criminal justice system is evident from the simple observation that a paid criminal defense lawyer is more likely to have the time, resources, and energy to provide the rigorous defense an

140. *Nearly 7% of Adult Black Men Were Inmates in '94*, N.Y. Times, Dec. 4, 1995, at A15.

141. Fox Butterfield, *More Blacks in Their 20's Have Trouble with the Law*, N.Y. Times, Oct. 5, 1995, at A18; accord Fox Butterfield, *Study Examines Race and Justice in California*, N.Y. Times, Feb. 13, 1996, at A12 (discussing a new study showing the corresponding California figure to be 40%). Certain evidence points to the fact that this figure is not based on the fact that African Americans commit more crime. “Blacks make up 12 percent of the United States’ population and constitute 13 percent of all monthly drug users, the report said, but represent 35 percent of those arrested for drug possession, 55 percent of those convicted for drug possession and 74 percent of those sentenced to prison for drug possession.” Butterfield, *More Blacks in Their 20's*, *supra*.

142. Bell, *supra* note 75, at 340 (citing *Developments: Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1525–32 (1988), and Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 Law & Soc’y Rev. 587, 615–19 (1985)).

143. See Sourcebook of Criminal Justice Statistics 1994, at 556 (1994) (citing U.S. Department of Justice statistics of time served in state prison by first release based on race). The statistics show that African Americans receive an average sentence 17 months longer than whites for homicide, 15 months longer for kidnapping, and 14 months longer for rape. *Id.*

accused needs than a public defender will.¹⁴⁴ And, as already mentioned, the focus of the system through its enforcers, the police, is almost always on the activities of the poor.¹⁴⁵ Thus, the argument goes, the criminal justice system does not have it in itself to protect those at the bottom of the heap in this country.

The system does not have to remain this way. Poor people and people of color have just as much right to benefit from the criminal justice system as do other citizens, and the abysmal history of the system is no justification for its continuing in this fashion. The system can be a powerful tool to protect the citizenry from the abuses of the state as well as the abuses of other citizens. Corruption scandals leading to prosecutions have been commonplace throughout the history of the police and other government officials.¹⁴⁶ These prosecutions are evidence of the viability of the criminal justice system as a check on the police and as a protector of the people. In fact, one of the most basic principles in American jurisprudence—that of checks and balances—argues for the increased use of this criminal provision to combat the excesses of the police. The judiciary and the legislature (with the help of the fourth branch of government, the people) should check the executive power as exercised through the police. Of course, it will take a concerted effort to broaden the criminal justice system's focus in this country, because it is now, more than ever before, seen as a system that protects the powerful from the crimes of the non-powerful. The focus of the system must shift from harassing people of color and the poor toward protecting them. This transformation can and should begin with the implementation of a systematic enforcement of the version of the crime of official oppression sketched above.

144. This is not to say that the public defender does not do a good job. But, it does not take a leap of logic to understand that a public defender with a large caseload and limited funds will not be able to provide the same defense an expensive for-hire defense lawyer would be able to provide. The O.J. Simpson criminal case is an obvious example of this problem: the number of young African-American men without the resources Simpson had who were convicted in a one- or two-day trial during the nine months the Simpson trial lasted is a number we will never know.

145. See Klockars, *supra* note 66, at 350; see also *supra* text accompanying notes 62-68.

146. For example, New York has had a 20-year cycle of corruption scandals that lead to prosecutions. See, e.g., Mollen Commission Report, *supra* note 9; Whitman Knapp et al., Report of the Commission to Investigate Alleged Police Corruption (1972).

CONCLUSION

Ultimately, this reform may be ineffective for reasons much larger than any criminal or civil attempt to reform the police. The marriage between police and violence against the marginalized may be cemented indefinitely when situated within the history of this capitalist nation as a whole, let alone simply within the history of the police as sketched above. "They apply violence, and as the definition of violence changes, they can be counted upon to apply it to classes marginal to the dominant order."¹⁴⁷ This is the very nature of the police, and it has been demonstrated again and again since their origin; it may not be reformable. Moreover, the police are inherently called upon to preserve the *status quo*.¹⁴⁸ When that *status quo* is fraught with class bias and racial oppression, the police will function to protect only upper- and middle-class white interests at the expense of all others.

However, despite these institutional limitations, there can be some hope within the context of the police as they exist in America today. With the changes and enforcement model sketched above, Model Penal Code Article 243 can be transformed into a more powerful tool toward fighting the police misconduct that causes great divides between communities of color and poor communities and the people who police them. Whether this can actually happen remains to be seen, but that it is possible with tools that were crafted long ago is an important insight into ending this blight visited upon minority and poor communities.

147. Peter K. Manning, *Violence and Symbolic Violence, in Police & Society*, *supra* note 21, at 362.

148. Klockars, *supra* note 66, at 352 (associating the police with both conservatism and traditionalism).

