

ARE NEW YORK POLICE OFFICERS SAFELY PLAYING OR PLAYING IT SAFE? ELIMINATING THE FORTY- EIGHT HOUR RULE

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INTRODUCTION

Shortly after midnight on February 4th, 1999, four police officers patrolled a Bronx avenue on the lookout for an elusive robber and serial rapist.¹ While they had not been assigned to the neighborhood for long, they were aware that fulfilling their duty to “serve and protect” in this area would be particularly difficult. Crime was prevalent and suspects frequently eluded capture: the rapist for whom they searched that night had avoided arrest for five years.² As members of the New York Police Department (“NYPD”) citywide Street Crimes Unit, the officers knew they had an important duty to decrease crime. The job was dangerous, and required instinctual reactions that sometimes resulted in error. Three of the four officers had shot suspects in the past causing them to have “shooting records,” and one of the incidents was still under investigation.³

Among the officers, Edward McMellon, twenty-six years old, Kenneth Boss, twenty-seven, Sean Carroll, thirty-five, and Richard Murphy, twenty-six, none was a veteran cop. Boss, the most experienced officer, had served seven years on the force. Officers Carroll

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1. Laurie P. Cohen, *System Set to Protect Police/Unique Set of Rules for Implicated Cops*, NEWSDAY, Apr. 11, 1999, at A08 (also published as *No Questions Asked: New York Rules Mean It's Tough to Convict Police in Diallo Case*, WALL ST. J., Apr. 7, 1999, at A01); Donna De La Cruz, *NY Cops' 41 Bullets Kill Unarmed Immigrant Victim Shot at Home Had No Crime Record*, STAR LEDGER (Newark, N.J.), Feb. 5, 1999, at O15. Many of the specific facts surrounding this incident remain in dispute. This account of the incident relies primarily on facts reported in newspaper articles and by the officers themselves at trial, which are largely undisputed. As will be discussed, the uncertainty surrounding this incident may, in part, be attributed to the forty-eight hour rule.

2. Cohen, *supra* note 1.

3. De La Cruz, *supra* note 1.

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and McMellon each had five years of experience and Officer Murphy had four years of experience.⁴ With a little under a year of duty with the unit, Officer Carroll was the most experienced of the four in dealing with street crime.⁵ That night an unusual lack of patrol cars forced the four officers to work together as a team for the first time.⁶

As the officers patrolled the Soundview section of the Bronx, they examined each passerby near the avenue. Their eyes fixed on a man who appeared to fit the description of the rapist: a young, black male. As they approached the suspect, he ducked cautiously into a vestibule of an apartment building.⁷ The officers, dressed in plainclothes, identified themselves and approached the building.⁸ They stepped up to the vestibule with their guns drawn. The man, alarmed, reached into his pocket. He began to withdraw a black object. Suddenly, the officers began to fire at the suspect. Forty-one shots rang out; all were fired by the police. Officer Boss fired five bullets and Officer Murphy fired four. Officers McMellon and Carroll each fired their weapons sixteen times.⁹ Nineteen shots met their target.¹⁰

When the firing subsided the suspect lay motionless on the vestibule floor. Nearby, beside him, was a black wallet or a beeper. There was no gun on the vestibule floor. There was no gun in the victim's pocket.¹¹

Police commanders and investigators from the NYPD arrived and began to examine the victim. Upon discovering that the victim was unarmed, they became concerned. They did not, however, question the officers as to why they had shot so many times at the apparently unarmed man. Instead, the investigators ransacked the victim's apartment for information and awoke and questioned his unsuspecting roommates.¹² They discovered only that the victim was a modest twenty-two year old street vendor and an African im-

4. *Id.*

5. JAMES LARDNER & THOMAS REPPETTO, *NYPD: A CITY AND ITS POLICE* 332 (2000).

6. *Id.*

7. *Id.*

8. Cohen, *supra* note 1.

9. De La Cruz, *supra* note 1.

10. LARDNER & REPPETTO, *supra* note 5, at 331.

11. Cohen, *supra* note 1; *see also* LARDNER & REPPETTO, *supra* note 5, at 332.

12. *See* Frank Serpico, *Amadou's Ghost: Diallo Speaks to Serpico*, *VILLAGE VOICE* (New York, N.Y.), March 14, 2000, at 50; Donna De La Cruz, *4 Cops Gun Down Unarmed Bronx Man*, *TIMES UNION* (Albany, N.Y.), Feb. 5, 1999, at B2.

migrant named Amadou Diallo.¹³ There were no witnesses to the shooting. Very few people heard gunfire at all.¹⁴

Not only were the officers not interrogated, but they also were given time to discuss the shooting, alone and uninterrupted. A representative from the Policemen's Benevolent Association ("PBA"), the police union, arrived at the building to protect the officers from questioning.¹⁵ This representative guarded the officers and tended to their needs. Several of the officers had become nauseated and physically ill.¹⁶ They complained of ringing in their ears and the PBA representative escorted them to a nearby hospital.¹⁷ There, the officers sat together, free to converse about the shooting for close to four hours.¹⁸

Not until their trial for the death of Amadou Diallo, fourteen months later, did Officers McMellon, Carroll, Murphy and Boss tell the world what happened that night or why they shot forty-one times at an unarmed man.¹⁹ Public indignation was aroused by this seemingly unprovoked and senseless use of force. The few investigative facts that were discovered and revealed prior to trial were facts about Diallo's age, race, disposition, and character; these only added to the public's negative impression of the officers' conduct. Absent alternative explanations, community leaders, the media and the general public were forced to speculate and come to their own conclusions, which often inferred impropriety. Numerous rallies and protests accused the police officers of police brutality motivated by blatant racial stereotyping.²⁰

Additionally, protesters expressed frustration over the lack of NYPD investigation and resolution of the matter. Newspaper articles and demonstrators charged that the prolonged silence of the officers was the result of special treatment routinely offered to police officers.²¹ Criticism targeted a provision in the NYPD guide-

13. See LARDNER & REPPETTO, *supra* note 5, at 331.

14. See De La Cruz, *supra* note 12.

15. See Cohen, *supra* note 1. The PBA represents most of the police on the NYPD force. See *id.*

16. See *Hannity and Colmes: Police Brutality* (Fox News television broadcast, Mar. 15, 1999).

17. See Cohen, *supra* note 1.

18. See *id.*

19. See *id.*

20. See LARDNER & REPPETTO, *supra* note 5, at 332; De La Cruz, *supra* note 1; Angela C. Allen, *Diallo's Mother Expected at Rally*, N.Y. POST, Mar. 6, 1999, at 11.

21. See De La Cruz, *supra* note 12; Cohen, *supra* note 1.

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book known as the forty-eight hour rule.²² The forty-eight hour rule, section 118-09 of the NYPD Patrol Guide, prohibits any questioning of police officers suspected of serious misconduct, or any police officers who are potential witnesses, for two days following an alleged incident.²³ The media and protesters alleged that this provision unfairly permitted the officers to be silent during the initial investigation.²⁴

Critics also blamed the forty-eight hour rule for the eventual acquittal of the four police officers.²⁵ Prosecutors charged the officers with second degree murder, the most serious criminal offense filed against New York police officers.²⁶ Nevertheless, the officers who shot Amadou Diallo escaped without criminal sanction. Of the verdict, a disappointed Bronx D.A. Robert Johnson remarked that Diallo's suspected killers frustrated prosecutors by invoking the forty-eight hour rule.²⁷

The forty-eight hour rule, in effect during the initial investigation of the Amadou Diallo shooting, is routinely invoked in most investigations of police wrongdoing. Police officers, as defendants, occupy a unique position in the world of criminal investigation. On the one hand, like all defendants, police should be protected by the Fifth Amendment and not be forced to incriminate themselves.²⁸ Unlike the average defendant, however, a police officer's misconduct is generally investigated by a superior or fellow officer. As a result, the environment is deemed to be inherently coercive for police, whereas it might not be for the average defendant.²⁹ On the

22. See Jerome H. Skolnick, *Code Blue: Prosecuting Police Brutality Requires Penetrating the Blue Wall of Silence*, AMERICAN PROSPECT, Mar. 27-Apr. 10, 2000, at 49; De La Cruz, *supra* note 1; Cohen, *supra* note 1.

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23. NEW YORK POLICE DEPARTMENT, NYPD PATROL GUIDE § PG118-09 (J. & B. Gould eds., Gould's DiskLaw NYPD Patrol Guide, Sept. 1999) [hereinafter NYPD PATROL GUIDE].

24. See De La Cruz, *supra* note 12; Allen, *supra* note 20; *Hannity & Colmes: Police Brutality* (Fox News television broadcast, Feb. 18, 1999).

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25. See Skolnick, *supra* note 22; Cohen, *supra* note 1. After a change of venue to Albany, N.Y., a jury of eight whites and four African-Americans acquitted all four officers. See LARDNER & REPPETTO, *supra* note 5, at 333.

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26. See Cohen, *supra* note 1.

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27. See Carl W. Thomas, *Shake the Trees*, VILLAGE VOICE (New York, N.Y.), Mar. 28, 2000, at 43.

28. See, e.g., *Confederation of Police v. Conlisk*, 489 F.2d 891 (2d Cir. 1973) (holding that the Fifth Amendment rights of the officers were violated where the officers were not informed that their answers to an internal affairs probe could later be used against them).

29. For an extreme example of this pressure, see *Luman v. Tanzler*, 411 F.2d 164 (5th Cir. 1969) (holding that the choice faced by an officer between invoking

other hand, permitting the officers to remain silent in the initial phases of investigation is a privilege not offered to other suspects or witnesses. Such a rule or policy may unnecessarily frustrate the overarching goal of law enforcement: to protect the public and investigate crime. Additionally, police officers may have a higher duty to act cautiously and take responsibility for their mistakes while conducting their official duties.

This article discusses the rationale behind permitting the officers to avoid interrogation during the initial investigation of the Diallo shooting, with the main focus on the forty-eight hour rule. The first part provides the history and background of the forty-eight hour rule, including a summary of the relevant case law.³⁰ This section also discusses the shortcomings of the case law, the limited scope of protection under the Supreme Court's interpretation of the Fifth Amendment, and the remedy that the forty-eight hour rule was intended to provide.

The second part suggests that the impact of the forty-eight hour rule extends beyond its necessary function at a disproportionate cost to society. First, the rule prevents thorough investigation of potentially criminal conduct by police officers by limiting questioning of officers who are potential witnesses at the scene of the crime. It appears to frustrate investigations by perpetuating the "blue wall of silence," preventing discovery of the truth about allegations of police misconduct. Second, the rule undermines public confidence in law enforcement. Even innocent police officers are often presumed guilty as a result of being precluded from telling their side of the story. Finally, the department as a whole may suffer because the rule prevents prompt internal investigations and modification of departmental policies and procedures where necessary to avoid similar incidents in the future.

The third section describes criticism of the forty-eight hour rule and the difficulty groups have faced in amending or challenging the rule. This section also proposes an alternative measure for conducting investigations of police misconduct and shootings. One possibility is to abolish the practice of a police force investigating shootings by its own officers. Either federal investigators or an independent bureau instead could conduct such inquiries.

his privilege against self-incrimination and losing his job did not run afoul of the Constitution).

30. *See* *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967) (requiring that all police officers' statements elicited by superiors or internal police department investigators during an investigation of potential police misconduct be immunized from use in criminal proceedings).

This article concludes that the forty-eight hour rule is entirely unnecessary and should be eliminated, because its practical effect extends well beyond that needed to satisfy its original purposes and undermines public confidence in law enforcement. Protecting police officers whose statements regarding suspected incidents of misconduct may be elicited under inherently coercive circumstances, however, is essential. Historically, the rule grew out of the unique dilemma facing police officers suspected of misconduct in the course of their duties and a determination that their right to avoid self-incrimination should be safeguarded. While police officers are deserving of no less protection than average citizens, alternative means should be employed that more properly balance the officers' need for protection in vulnerable situations with the department's and the community's interest in protecting the public. A better rule would allow commanders and investigators to interrogate officers immediately following alleged misconduct in an administrative fashion, while still immunizing all incriminating statements from use in criminal proceedings. Such a process would advance the government's interest in being informed of wrongdoing within its internal operations.

II THE ORIGIN AND PURPOSE OF THE FORTY-EIGHT HOUR RULE

In a typical murder or attempted murder case the foremost objective of the investigators is to determine what occurred. Prior to focusing the investigation on any particular suspect or suspects, police officers may question any witness not in custody without violating her Fifth Amendment right to refuse self-incrimination.³¹ Immediately upon arrival at the scene of a shooting, investigators routinely separate witnesses and anyone present in order to prevent any potential collaboration.³² Then, in accordance with official investigative procedures, the officers interrogate witnesses or bystanders regarding what they saw or heard.³³ Police investigators use this tactic to narrow the focus of the investigation to one particular suspect.

31. See *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (holding that *Miranda* warnings are not required prior to the non-custodial interrogation of a suspect during a non-threatening roadside detention).

32. See Thomas, *supra* note 27; see NYPD PATROL GUIDE, *supra* note 23, § PG116-05.

33. See NYPD PATROL GUIDE, *supra* note 23, § PG116-05.

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Upon placing a suspect under arrest, the ability of police officers to continue questioning is limited by the Fifth Amendment.³⁴ The Supreme Court in *Miranda v. Arizona* held that due to the inherently coercive atmosphere of custodial interrogation, a suspect must be explicitly notified of his or her right to remain silent and to have an attorney present during questioning.³⁵ During trial, a defendant's silence during interrogation cannot be used against him to suggest guilt. This does not mean, however, that the investigators must refrain from questioning the defendant. A suspect might never invoke, or might waive, his right to an attorney.³⁶ Should a defendant choose to speak without invoking or after waiving his right to counsel during interrogation, anything he says will be considered voluntary and can and will be used against him in court.³⁷

Officers McMellon, Carroll, Murphy, and Boss were afforded protection beyond the requirements of the Fifth Amendment and *Miranda*. In addition to avoiding interrogation after being arrested, they were not questioned during the initial investigation. The investigating officers were prohibited from interrogating the officers *prior* to placing them in custody.

The reasons the officers were not questioned are complex. In part, the investigators did not ask them any questions because the forty-eight hour rule prohibits the interrogation of police officers suspected of serious misconduct for two days. Additionally, prosecutors request that investigating officers avoid questioning suspected officers because statements may appear to be compelled, since they are often elicited from fellow officers or superiors con-

34. See *Miranda v. Arizona*, 384 U.S. 436, 458 (1966) (recognizing the "intimate connection between the privilege against self-incrimination and police custodial questioning"); *Dickerson v. United States*, 530 U.S. 428, 433 (2000) (upholding the necessity of *Miranda* warnings during custodial interrogation to ensure voluntariness of statements). Two distinct inquiries are used to determine if a person is in custody for *Miranda* purposes: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to . . . leave." *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). The officers clearly felt free to leave the vestibule where they shot Amadou Diallo; in fact, they went to the hospital. Cohen, *supra* note 1.

35. See *Miranda*, 384 U.S. at 468.

36. See *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) (interpreting *Miranda* as protecting a suspect from questioning absent an attorney once he has invoked his right to an attorney and has not unequivocally and knowingly waived that right).

37. See *Miranda*, 384 U.S. at 468; see also Jerome H. Skolnick, *Deception by Police*, CRIM. JUST. ETHICS, Summer/Fall 1982, at 40 (explaining that once a suspect in custody begins to talk, the police may employ deceptive practices).

ducting the investigation. Compelled statements may not be used in trial and are, therefore, of little use to prosecutors.³⁸

In order to appreciate the implications of and motivations for refraining from questioning, one must consider the confusing history of the forty-eight hour rule. Chronicles vary in placing its inception at anytime between 1971 and 1990. Consequently, it is unclear when or even whether it began as a de facto practice that was eventually codified.³⁹ What is clear is that prior to the late 1960s the NYPD did not have any rules dictating the conduct of internal investigations.⁴⁰ In the 1960s, the increased exposure of police corruption and misconduct on a national scale brought about a wave of new rules both protecting the police and requiring them to admit to wrongdoing.⁴¹ The forty-eight hour rule was created in an effort to protect police from the increasingly routine practice of being questioned by other police regarding internal affairs. It has, however, been perceived as a method for avoiding questioning in the criminal arena as well.

It seems clear that the 1967 Supreme Court holding in *Garrity v. New Jersey* was the catalyst for the adoption of the forty-eight hour rule.⁴² In *Garrity*, internal investigators forced policemen to answer questions, under threat of job termination, regarding the alleged fixing of traffic tickets.⁴³ Holding that “policemen. . .are not relegated to a watered-down version of constitutional rights,” the court held that Fifth Amendment (incorporated through the Fourteenth Amendment) protection extended to police officers.⁴⁴ Incriminating evidence elicited under the penalty of discharge could not be admitted in a subsequent criminal proceeding against the officers without violating their Fifth Amendment rights against compelled self-incrimination.⁴⁵

While *Garrity* forbade the use of compelled testimony in criminal proceedings, it did not completely foreclose interdepartmental

38. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

39. See J. Zamgba Browne, *Wright Steps in to Scrap Forty-Eight Hour Rule*, N.Y. AMSTERDAM NEWS, Jan. 21, 1998, at 6 (placing development of current rule around 1990); Cohen, *supra* note 1 (stating that rule developed in 1978); *Forty-Eight Hour Rule Not a Copout*, N.Y. DAILY NEWS, Jan. 3, 1998, at 12 (chronicling the rule’s onset in 1971).

40. See Cohen, *supra* note 1.

41. *Forty-Eight Hour Rule Not a Copout*, *supra* note 39. For a review of some of the rules in other jurisdictions, see Cohen, *supra* note 1.

42. 385 U.S. 493, 500 (1967); see also Cohen, *supra* note 1.

43. *Garrity*, 385 U.S. at 496-97.

44. *Id.* at 500.

45. See *id.*

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inquiries into police misconduct. In fact, a few years following *Garrity*, the Supreme Court held in *Kastigar v. United States* that *Garrity* did not prevent the State from compelling employees and contractors to testify if neither the testimony nor its fruits—any evidence obtained as a result of the testimony—were to be used against them in criminal proceedings.⁴⁶ This is known as the “use immunity rule.”

The following year the Supreme Court, in *Lefkowitz v. Turley*, reiterated the importance of permitting the state to compel its employees to answer questions in certain situations.⁴⁷ In *Lefkowitz* the Court held that *Garrity* and *Kastigar* reconciled the protection required by the Fifth Amendment with the government’s well-recognized need to obtain information “to assure the effective functioning of government.”⁴⁸ Compelled testimony, albeit incriminating, may be used in civil and administrative hearings.⁴⁹ Additionally, “given adequate immunity the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment.”⁵⁰ In other words, the Court found nothing unconstitutional about forcing a state employee to answer questions relating to the performance of official duties even if such questioning would result in job loss or other administrative sanctions. While these compelled statements were immunized from use in a subsequent criminal prosecution, the use of these statements, whether inculpatory or exculpatory, would be permitted in interdepartmental or administrative investigations and disciplinary proceedings.

The failure of the Supreme Court to require complete immunity for inculpatory statements elicited in police interdepartmental inquiries left open a gap, exposing police to intimidating and coercive questioning by superiors and internal police investigators. While police are not forced to incriminate themselves publicly, they may be compelled to do so privately and lose their employment if uncooperative. Justice Brennan, dissenting in *Lefkowitz*, sharply criticized the Court for failing to extend Fifth Amendment protec-

46. See *Kastigar v. United States*, 406 U.S. 441, 446 (1972).

47. See *Lefkowitz v. Turley*, 414 U.S. 70, 81 (1973).

48. *Id.* (quoting *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 93 (1964)).

49. See *Lefkowitz*, 414 U.S. at 81; cf. *Internal Affairs’ Police Interviews Not Publicly Released in ‘Baez’ Case*, N.Y. L.J., April 2, 1998, at 35 (explaining that until the conclusion of a criminal investigation is final, public release of information from General Order 15 interviews is prohibited).

50. See *Lefkowitz*, 414 U.S. at 84.

tion to all compelled statements.⁵¹ Justice Brennan maintained that the privilege against self-incrimination should include all forced testimony and that such statements should be immunized from use in administrative, as well as criminal, proceedings.

The New York internal investigation procedures developed within the framework set by these Supreme Court decisions. In 1969, New York City Police Commissioner Howard Leary issued General Order 15 (“G.O. 15”) requiring all officers to submit upon order at any time to questioning by internal investigators.⁵² G.O. 15 regulations require officers to testify before a Civilian Complaint Review Board and answer any questions “specifically directed and narrowly related to official duties.”⁵³ In accordance with *Garrity*, *Kastigar*, and *Lefkowitz*, these statements are immunized from use in a subsequent criminal prosecution, but can be used in civil cases and as a basis for internal reprimands, suspension, and termination of employment.⁵⁴

Of course, as Justice Brennan recognized, partial immunity would be insufficient to protect the police from all compelled testimony. All the dangers inherent in compelled testimony, including reduced reliability⁵⁵ and erosion of individual freedoms, are present when police are compelled to answer questions—even if answering will only result in a loss of employment or a civil suit. Shortly after G.O. 15 was issued, the PBA collectively bargained for additional protections against self-incrimination for NYPD officers. Since the PBA could not limit use of these statements on constitutional grounds, they limited the acquisition of such statements. The PBA achieved an agreement requiring NYPD investigators to wait two business days before interviewing police officers regarding

51. *See id.* at 85 (Brennan, J., dissenting) (“I join the Court’s opinion in all respects but one. It is my view that immunity which permits testimony to be compelled ‘if neither it nor its fruits are available for . . . use’ in criminal proceedings does not satisfy the privilege against self-incrimination. ‘I believe that the Fifth Amendment’s privilege against self-incrimination requires that any jurisdiction that compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony.’” (quoting *Piccirillo v. New York*, 400 U.S. 548, 562 (1971) (Brennan, J., dissenting))).

52. *See Forty-Eight Hour Rule Not a Copout*, *supra* note 39.

53. David E. Pitt, *Facing the Wall of Silence: Tompkins Goal Is Making Police Talk*, N.Y. TIMES, Jan. 2, 1989, at 27.

54. *See id.*; *Internal Affairs’ Police Interviews Not Publicly Released in ‘Baez’ Case*, *supra* note 49.

55. *See Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964) (holding that self-deprecatory statements are especially unreliable when obtained as a result of coercion).

any incident of suspected police misconduct.⁵⁶ This rule is commonly known as the forty-eight hour rule. It remains part of the NYPD's Patrol Guide, as section PG118-09, "Interrogation of Members of the Service."⁵⁷

Specifically, PG118-09 states:

Prior to questioning a member of the service (uniformed or civilian) who is the subject or a witness in an official investigation [the Interrogating Officer must]:

- 1) Permit member to obtain counsel if:
 - a) a serious violation is alleged, *OR*
 - b) sufficient justification is presented although the violation is minor;
- 2) Notify member concerned 2 (two) business days prior to date of hearing to permit member to obtain and confer with counsel.⁵⁸

Additionally, a uniformed member of the service in the rank of a police officer who is the subject of an official investigation will be given 2 (two) business days prior to the date of a hearing, if a serious violation is alleged or sufficient justification is presented even though the alleged violation is minor, to obtain and confer with counsel. In addition, a police officer who is a witness in an official investigation is entitled to a period of time, up to 4 (four) hours, to confer with counsel.⁵⁹

The forty-eight hour rule extends protections against compelled statements beyond that required by the Supreme Court's interpretation of the Fifth Amendment in *Garrity*, *Kastigar*, and *Lefkowitz*. The rule completely forbids questioning for a period of two days even in administrative situations, whether or not the statements elicited would be admissible in subsequent criminal prosecutions. This period of silence allows the policemen to obtain counsel just as they would if they had been arrested and were invoking their right to counsel under the Fifth Amendment. In essence, it applies a two-day grace period to administrative hearings which is akin to the general grace period afforded in criminal hearings.⁶⁰

56. See *Forty-Eight Hour Rule Not a Copout*, *supra* note 39.

57. NYPD PATROL GUIDE, *supra* note 23, § PG118-09.

58. *Id.*

59. *Id.* (original emphasis omitted).

60. After invoking his right to counsel, under the Fifth Amendment, the suspect cannot be questioned until he has received an attorney. *Miranda v. Arizona*, 384 U.S. 436, 473 (1966).

III THE PRACTICAL EFFECT OF FORTY-EIGHT HOURS

In theory, the forty-eight hour buffer applies only to departmental questioning and would not affect criminal investigations of serious police misconduct. In practice, however, administrative and criminal investigations overlap for at least three reasons. First, "serious misconduct" is an ambiguous term that, depending on the conduct's nature and severity and the specific circumstances, can include criminal behavior. Second, in incidents of possible police misconduct, like the Diallo shooting, the police commanders and investigators who arrive on the scene come from within the department. They are restricted, therefore, by PG118-09 because, as police commanders, their questioning can be deemed a "departmental investigation," even if the actual conduct is criminal. Finally, if the officers were to question the police suspects, any information would be protected from use in a criminal proceeding because it could be deemed to have been elicited under coercive conditions.

The forty-eight hour rule takes this final factor into consideration, providing:

If a member of the service (uniformed or civilian) is under arrest or is the subject of a criminal investigation or there is a likelihood that criminal charges may result from the investigation, the following warnings shall be given to the member concerned prior to the commencement of the interrogation:

'I wish to advise you that you are being questioned as part of an official investigation by the Police Department. You will be asked questions specifically directed and narrowly related to the performance of your duties. You are entitled to all the rights and privileges guaranteed by the laws of the State of New York, the Constitution of this state and the Constitution of the United States, including the right not to be compelled to incriminate yourself and the right to have legal counsel present at each and every stage of this investigation I further wish to advise you that if you refuse to testify or to answer questions relating to the performance of your official duties, you will be subject to departmental charges which could result in your dismissal from the Police Department. If you do answer, neither your statements nor any information or evidence which is gained by reason of such statements can be used against you in any subsequent criminal proceedings. However these statements may be used against you in relation to subsequent departmental charges.'

'The questions and answers resulting from the interrogation conducted pursuant to this procedure are confidential. They are not to be revealed nor released to any person or agency outside the department without prior written approval of the Deputy Commissioner-Legal Matters. If a subpoena duces tecum is received for any questions and answers, the Legal Bureau should be contacted immediately.'⁶¹

This warning provision blurs the difference between the use of the forty-eight hour rule in criminal and in administrative proceedings. The language of the provision is broad enough to require warnings in *all* situations that potentially involve criminal conduct, even though in some situations, such as civilian shootings, it is difficult to determine at the time of questioning whether the alleged conduct will be criminally prosecuted.

One consequence of the forty-eight hour rule is to limit unnecessarily the investigation of police criminal misconduct more than the investigation of an average person's misconduct. Unlike *Miranda* warnings, the forty-eight hour rule's warning provision cautions the suspect regarding the use of any statements prior to the determination of criminality. If criminal charges are eventually brought against the officers, their rights under *Miranda* will be invoked, thereby preventing any interrogation at that point. Additionally, this provision explains that even if the officers do speak after receiving the above warnings, their statements will be immunized from use in all criminal proceedings. This protection extends beyond *Miranda* to cover statements made freely and voluntarily following a recitation of the full warning.

The forty-eight hour rule effectively prevents any investigation, no matter how preliminary, into potential criminal conduct on the part of the police. Even when suspected police are not yet in custody or not official suspects in a criminal case, "if there is a likelihood that criminal charges may result from the investigation," the officers must be warned regarding the use of their statements.⁶² Additionally, the rule provides that if investigators immediately question police suspected of criminal activity, *any and all* inculpatory responses will be treated either as confidential, as immune from use in criminal proceedings, or both.⁶³ This is true even if the

61. NYPD PATROL GUIDE, *supra* note 23, § PG118-09.

62. *See id.*

63. The standard warning required under the rule assures the police officer being questioned that his or her statements will not be used in a subsequent criminal prosecution and that the answers will be confidential, meaning they will not be

investigating officer recites the warning prior to questioning because the provision restricts the use of all statements in criminal proceedings, even if the officer wishes to make a statement voluntarily. Unlike the warnings mandated by *Miranda*, the warning required by the forty-eight hour rule explains that, “[i]f you [the officer] do answer, neither your statements nor any information or evidence which is gained by reason of such statements can be used against you in any subsequent criminal proceeding.”⁶⁴ The forty-eight hour rule, therefore, extends beyond protections afforded by the familiar *Miranda* warnings, which explicitly tell a suspect that anything the suspect says can and will be used against her in a court of law.

As a result of the Fifth Amendment protections, the immediate questioning of police officers is largely opposed by prosecutors.⁶⁵ Questioning upon arrival at the scene of a crime would, ironically, undermine any subsequent criminal prosecution, leaving prosecutors with little admissible evidence since the officers could claim they were intimidated into answering.⁶⁶ This provision is largely in accordance with *Garrity*, *Kastigar*, and *Lefkowitz*. By incorporating it into the rules of the police, the provision has yielded a practice of requiring approval from the District Attorney’s office before any officers on the scene may be questioned.⁶⁷ Prosecutors routinely deny such requests even for the questioning of potential witnesses for fear that all statements would be inadmissible in a criminal proceeding.⁶⁸ Investigators, therefore, are unable to question officers for the purpose of investigating the potentially criminal incident or to satisfy the need for interdepartmental discipline.

The inability to question those involved at the scene of a potential crime can ultimately frustrate both external and internal department investigations. Many crimes are solved in the early stages of investigation, so a delay of forty-eight hours can significantly un-

given to any “agency outside of the department prior to written permission from the Deputy Commissioner on legal matters.” *Id.* George Grasso, NYPD Deputy Commissioner of Legal Matters, has stated that “investigators taking statements from the accused is the surest way to undermine a prosecution” because the questioned officers “could argue that they were intimidated into answering.” Cohen, *supra* note 1.

64. Cohen, *supra* note 1.

65. *See id.*

66. *See id.* (quoting George Grasso, NYPD Deputy Commissioner for Legal Matters).

67. *See id.*

68. *See id.*

dermine the ability of investigators to obtain critical information.⁶⁹ The inability to question suspects can cause investigations to lose their momentum, intensity and focus.⁷⁰ It may also delay the receipt of contributing information and give suspects the opportunity to get their stories straight (this could include not only producing an accurate representation of the events at issue but also fabricating facts in order to make each officer's story consistent with the others' and to portray the officers involved as non-culpable). Additionally, during the trial stage of the criminal prosecutions for police misconduct, the absence of prior statements limits the prosecutor's ability to impeach an officer's credibility.⁷¹

Preliminary investigation may be especially important in cases involving police misconduct. As in Amadou Diallo's case, many instances of police misconduct involve few if any civilian eyewitnesses. For example, Officer Michael Davitt shot William Whitfield in Brooklyn on Christmas Day in 1997. As a result of invoking the forty-eight hour rule, there was no true investigation until two and one-half weeks later, when Davitt testified before a grand jury that he thought the keys in Whitfield's hand were a gun.⁷² Likewise, there would have been no corroboration of Abner Louima's claim of abuse and sodomy in a Brooklyn station house absent medical reports showing extensive internal damage.⁷³

The problem may be exacerbated because the commanders may not notify the prosecutors for some time.⁷⁴ In the Amadou Diallo case, for example, roughly an hour passed before the police commanders notified prosecutors of the incident.⁷⁵ Whenever they do notify the prosecution, however, they must receive the District Attorney's permission prior to questioning any police officer. The prosecutor, in turn, must ask permission from the PBA before beginning any interrogation of police officers, because the statements can be used in departmental proceedings.⁷⁶ In the Diallo case, the Bronx District Attorney requested permission to question McMellon, Carroll, Murphy, and Boss, but the PBA representative snubbed the request.⁷⁷

69. See Thomas, *supra* note 27.

70. See Browne, *supra* note 39.

71. See Cohen, *supra* note 1.

72. See *Forty-Eight Hour Rule Not a Copout*, *supra* note 39.

73. See *infra* text accompanying notes 125-26.

74. See *id.*

75. See *id.*

76. See *id.*

77. See *id.*

In addition to frustrating the initial investigation of misconduct, a second consequence of the forty-eight hour rule is to create an automatic public perception of police misconduct. Critics of the rule claim that the rule itself is the primary reason New York prosecutors have great difficulty convicting police of criminal misconduct.⁷⁸ Following a police shooting newspapers often report, as in the case of the Diallo shooting, that the rule is impeding investigation⁷⁹ and allowing officers time to get their story straight.⁸⁰ While the police department may deny invoking the rule for the purpose of delaying administrative hearings, the ability of the prosecution to prohibit interviews of the officers can create the appearance of a cover-up or withholding of information.⁸¹

For example, though Officers McMellon, Carroll, Murphy, and Boss were shielded from questioning beyond the requirements of the Fifth Amendment and *Miranda*, this silent period may have had a disadvantageous effect on public opinion of the officers. In the days following Diallo's death, newspapers published numerous articles condemning the shooting.⁸² Some newspapers remarked on the officers' previous shooting records.⁸³ Many of these articles questioned the propriety of the officers' silence and blamed the forty-eight hour rule. Journalists were frustrated by the lack of information and declared that the police officers were receiving special treatment.⁸⁴ What little information could be reported included statements by the victim's uncle remarking that his nephew was a quiet, honest, religious (Muslim) man who never drank or smoked.⁸⁵ Additionally, newspapers reported that the officers had plenty of time to examine the autopsy, forensic evidence, and ballistics reports.⁸⁶ The officers did have an opportunity to tell their story voluntarily to a grand jury prior to trial, but they refused to appear.⁸⁷ Such controversy fueled protesters and activists such as

78. See *id.* (noting that the forty-eight hour rule allows officers to evade investigators while getting his or her story straight); see also Skolnick, *supra* note 22.

79. See De La Cruz, *supra* note 12; Skolnick, *supra* note 22.

80. See *Forty-Eight Hour Rule Not a Copout*, *supra* note 39.

81. See Mike Claffey, *Louima Bid to End Blue Wall Called Disaster*, N.Y. DAILY NEWS, Dec. 6, 2000, at 28.

82. See De La Cruz, *supra* note 12; Allen, *supra* note 20; *Hannity & Colmes*, *supra* note 24.

83. See De La Cruz, *supra* note 1.

84. See LARDNER & REPPETTO, *supra* note 5.

85. See De La Cruz, *supra* note 12; LARDNER & REPPETTO, *supra* note 5.

86. See LARDNER & REPPETTO, *supra* note 5.

87. See Jorge Fitz-Gibbon et al., *Rudy Touts Restraint to Rookies: New Cops Cautioned About Confrontations*, N.Y. DAILY NEWS, Feb. 19, 1999, at 26.

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the Reverend Al Sharpton and supporters of Mr. Diallo's mother who arrived from Africa.⁸⁸ Extensive media coverage sparked rallies all over the New York City area and elsewhere protesting the shooting of the innocent black street vendor.

The forty-eight hour rule also reinforces the perception that police officers receive special treatment under the law. Keith Wright, a member of the Harlem Assembly, has argued to the New York State Legislature that the forty-eight hour rule "does little more than put cops above the law."⁸⁹ A thirty-three member panel of the New York Mayor's Task Force on police-community relations recommended, after extensive study, the "abolition of the forty-eight hour rule," stating the rule "fuels the public's perception that police officers get favored treatment."⁹⁰ Many critics charge that the rule encourages the NYPD "code of silence," which insulates officers from prosecution in brutality cases.⁹¹ After forty-eight hours police department officials are free to dismiss or reprimand officers based on information received in administrative hearings. If by that time, however, there are criminal charges pending, the department cannot take action, since the NYPD Patrol Guide requires that the department refrain from imposing disciplinary measures until after the criminal case concludes.⁹²

A third consequence of the forty-eight hour rule and its delay of investigation is that it can be detrimental to the reputation of innocent officers and the department as a whole. First, the use of a forty-eight hour buffer undermines the credibility of innocent police.⁹³ In his arguments to eliminate the provision, New York Mayor Rudolph Giuliani has remarked that, "more often than not, the forty-eight hour rule prevents the [New York Police] department from getting an innocent explanation."⁹⁴ James Fyfe, a consultant for the NYPD, has explained to journalists that even in situations where an officer can argue self-defense, there are no corroborating statements from other police officers attesting to the officer's credibility.⁹⁵ In Fyfe's opinion, "the rules in New York serve to keep quiet the officers who have acted correctly in order to protect a few

88. See Allen, *supra* note 20.

89. See Browne, *supra* note 39.

90. See Tim Whitmire, *Panel on Police Brutality Urges Higher Pay, No Forty-Eight Hour Rule*, THE RECORD (Bergen County, N.J.), Mar. 25, 1998, at A4.

91. See Graham Rayman, *Code of Silence Challenge; Louima's Lawyers Accuse NYPD*, PBA, NEWSDAY, Aug. 7, 1998, at A31.

92. See Cohen, *supra* note 1; NYPD PATROL GUIDE, *supra* note 23, § PG118-09.

93. See Pitt, *supra* note 53.

94. Fitz-Gibbon et al., *supra* note 87.

95. Cohen, *supra* note 1.

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bad guys.”⁹⁶ Second, silence fuels suspicion that the police are shielded from interrogation long enough to get their story straight. Finally, because the forty-eight hour rule protects all officers, including witnesses, from interrogation, it contributes to lingering suspicions that the “blue wall of silence” remains a prominent aspect of police culture. By encouraging other officers to close ranks around officers suspected of violating the public’s trust and threatening the lives of those they are sworn to protect, the rule perpetuates the “us against them” attitude, further deteriorating relations between the police department and the public.⁹⁷

IV
IS THE RULE REALLY NECESSARY? WHAT CAN
BE DONE?

Every police department in the United States has internal procedures for dealing with charges of misconduct.⁹⁸ All police officers must face scrutiny that may result in an internal affairs investigation, criminal prosecution or civil trials. New York, however, with its forty-eight hour rule, seems to offer police more protection than other major cities.

New York prosecutors face greater “procedural handcuffs” than their counterparts in Boston, Chicago, Los Angeles, Philadelphia, San Francisco or Miami, when attempting to investigate police shootings and misconduct.⁹⁹ The rule seems entirely unnecessary to protect police rights; no police department but the NYPD has a forty-eight hour rule¹⁰⁰ or any similar provisions drastically restricting freedom of investigators. In Chicago, officers suspected of killing someone while on duty must provide an oral statement to a commanding officer without any delay.¹⁰¹ Officers who may have witnessed the shooting are routinely separated and questioned immediately.¹⁰² Similarly, the Los Angeles Police Department

96. *Id.*

97. See Thomas, *supra* note 27 (criticizing the forty-eight hour rule as a tool of the NYPD to “frustrate prosecution”); *Forty-Eight Hour Rule Not a Copout*, *supra* note 39 (explaining that the forty-eight hour rule is not wholly understood and fuels the misperception of impropriety).

98. See *Hannity & Colmes*, *supra* note 24.

99. See Cohen, *supra* note 1.

100. See *Hannity & Colmes*, *supra* note 24 (interviewing William Bratton, former New York City Police Commissioner, who explained that Boston, where he had worked previously, is one of the many cities without any procedure to delay investigation; Bratton had never heard of a two-day delay outside of New York).

101. See Cohen, *supra* note 1.

102. See *id.*

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("LAPD") does not hesitate to gather statements from officers at the scene of a suspected police shooting.¹⁰³ In a recent New Jersey incident, state troopers fired eleven shots at four unarmed teenagers, seriously injuring three.¹⁰⁴ Investigators from the state's Major Crimes Unit arrived only minutes after the shooting and immediately separated and questioned the officers.¹⁰⁵

The extra degree of protection afforded to police officers in New York is unnecessary and unwarranted. When the misconduct alleged is criminal, many police departments find that the protections mandated by the Fifth Amendment, *Garrity* and *Kastigar* are sufficient.¹⁰⁶ Prior to focusing the investigation on a particular suspect or placing a suspect into custody, answering questions is considered voluntary. In New Jersey, for example, the officials investigating the teenagers' shooting shared the officers' statements with prosecutors. There was no allegation that these statements were coerced simply because they were taken by fellow officers. An attorney for one of the officers, Robert Galantucci, publicly stated that he would not challenge the admissibility of these statements and believed that they were made voluntarily.¹⁰⁷ Other police departments, namely the LAPD, do not share statements made at the crime scene with prosecutors, but the district attorney's office is free to conduct its own investigation.¹⁰⁸

The forty-eight hour rule has received its share of criticism, yet it remains intact. Supporters of the forty-eight hour rule argue that officers need the delay and time buffer because of their special role in society. Police officers are responsible for handling dangerous situations and are expected to make spur-of-the-moment decisions to protect the public. The threat of immediate interrogation may jeopardize their ability adequately to enforce the law. Officers may fear having to account for their actions so quickly after the fact, before they are able to recover from the shock of having taken the action, and before having the chance themselves to think clearly through the reasons for their instinctual responses. If officers are frequently second-guessed, it may cause them to focus on how the public will interpret and judge their actions. This could, in turn,

103. *See id.*

104. *See* Thomas Zolper, *N.J. Indicts Two Troopers; Says They Falsified Race in Reports on Traffic Stops*, THE RECORD (Bergen County, N.J.), April 20, 1999, at A01; Cohen, *supra* note 1.

105. *See* Cohen, *supra* note 1; Kifner & Herszenhorn, *Racial 'Profiling' at Crux of Inquiry into Shooting by Troopers*, N.Y. TIMES, May 8, 1998, at B1. R

106. *See* Browne, *supra* note 39.

107. *See* Cohen, *supra* note 1. R

108. *See id.*

undermine their ability to resolve dangerous situations quickly, before they escalate into violent or potentially life-threatening episodes. This atmosphere of suspicion surrounding a police officer's actions is especially present following incidents such as wrongful shootings or abuse, where the public quickly will attempt to assign blame in order to make sense of a tragic death. PBA President James Savage has claimed that "New York police officers seem to be scrutinized more than those of any other police agency If a cop here makes a mistake while on the job, it's often considered criminal."¹⁰⁹

Rich Roberts, a public information officer for the Internal Union of Police Associations, has argued that police need the forty-eight hour rule because police officers, like all citizens, have the right to remain silent.¹¹⁰ Roberts did not consider, however, that the Supreme Court does not recognize the non-custodial questioning of potential witnesses or suspects at the scene of the crime as a violation of the right against self-incrimination. While Roberts confused the rule with the protections afforded by the Fifth Amendment, he may nonetheless be making a valid point. Officers may need extra protection, a "cooling-off" period, following a shooting. Perhaps the intense emotional nature of such an event would impair the officer's ability to provide an accurate account of the incident. Statements obtained immediately following a shooting incident, while the officer involved is still recovering from the trauma of the event, may be distorted. After the stress of the incident has subsided, the officer may be able to provide a more accurate and complete account of the incident. Nonetheless, the officer's previous statements could be used in a subsequent criminal prosecution to impeach the officer's testimony and suggest that the omitted details and other distinctions between the two sets of statements are evidence of a guilty defendant attempting to cover up his wrongdoing and avoid criminal liability.

On the other hand, some critics argue that the special role of the police does not justify the existence of the rule. Indeed, the responsibility of the police may be a reason for abolishing, not maintaining, the rule. Police officers are armed and have the power and authority to harm other individuals if necessary. Additionally, police receive special training, and are therefore reasonably expected to exercise restraint in using deadly force. Graham Weatherspoon, a retired police detective and member of 100 Blacks

109. *Id.*

110. *See Hannity & Colmes, supra* note 16.

in Law Enforcement, noted that police officers should exercise special care and be accountable for their decisions.¹¹¹ Mr. Weather-
spoon's twenty years in the NYPD taught him that "if a police officer
takes an action, he should know why he is taking that action . . . and
should be able to answer . . . [and to] verbalize his reason for doing
what he did [immediately], not two days later."¹¹²

In light of its many defects, public leaders and activists have
challenged the legitimacy of the forty-eight hour rule by targeting
state and national forums. Following the recommendation of the
Mayor's Task Force for the elimination of the forty-eight hour rule,
State Senator David A. Paterson (D-L-Manhattan), Deputy Minority
Leader of the State Senate, proposed a bill to do away with the
rule.¹¹³ Senator Paterson's proposal, Senate Bill No. 6573, would
have permitted the interrogation of police officers to follow the
same guidelines employed in the questioning of any other person
suspected of misconduct.¹¹⁴ Police officers would still have the
right to counsel and all Fifth Amendment protections in "appropri-
ate circumstances."¹¹⁵ The bill would also have allowed the Police
Department to investigate internal, low-level infractions in addition
to criminal prosecutions. Paterson argued that "when officers stand
accused of serious misconduct or illegal activities, departmental
regulations should not inhibit the ability of the department or dis-
trict attorney to swiftly and thoroughly investigate the allega-
tions."¹¹⁶ Additionally, the Black, Puerto Rican and Hispanic
Legislative Caucus introduced four bills regarding police miscon-
duct, one of which called for the abolition of the forty-eight hour
rule.¹¹⁷ Locally, throughout the year of 1999, protesters of Amadou
Diallo's shooting staged public rallies including a demonstration in
March on the steps of New York's City Hall where they argued for
the end of the forty-eight hour rule.¹¹⁸

Public challenges to the rule have not met with much success.
The efforts of community leaders and protesters have influenced
the city's position in collective bargaining with the PBA. However,
while Mayor Giuliani pledged to eliminate the rule in the summer

111. See *Hannity & Colmes*, *supra* note 24.

112. *Id.*

113. *Deputy Minority Leader Lauds Louima Task Force Recommendation*, N.Y. BEA-
CON, April 8, 1998, at 4, available at 1998 WL 11453323.

114. *Id.*

115. *Id.*

116. *Id.*

117. See Tracey Tulley & Alice McQuillan, *Congress Probe of NYPD Brutality
Urged*, N.Y. DAILY NEWS, Mar. 2, 1999, at 24.

118. See *Allen*, *supra* note 20.

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of 2000 when the city renegotiated its contract with the NYPD, he only achieved a modest limitation on the rule with regard to sergeants, lieutenants, and captains.¹¹⁹ The limitation replaces the requirement that investigators give officers “two days” with the requirement that they allow “a reasonable time” prior to the questioning of these higher ranking members of the police force.

Perhaps frustrated by the lack of response from city and state officials, some individuals have turned to the national government for assistance in eliminating the rule. Former police officer and anti-corruption advocate Frank Serpico, disgusted with the acquittal of Diallo’s assailants, reiterated the contents of a letter he wrote President Bill Clinton in 1994.¹²⁰ In this letter, Serpico mentioned the Mollen Commission’s findings that perjury was prevalent among police officers and recommended seven measures, including abolition of the forty-eight hour rule, to promote the search for truth.¹²¹ Arguing to a different forum, Representative John Conyers (D-Mich.) has responded to wide assertions that New York is one of the nation’s worst cities for police brutality cases.¹²² As a member of the House Judiciary Committee, Representative Conyers urged the members to hold hearings regarding the circumstances surrounding the Amadou Diallo shootings, including the allegations of police misconduct and the delays involved early on in the investigation.¹²³

While individual challenges, locally and nationally, increase awareness about the defects of the forty-eight hour rule, they are inadequate to effect change because they only indirectly attack the problem. The provision is part of a contractual agreement between the PBA and the NYPD. The provision can be eliminated only with the help of the PBA. The PBA is not accountable to public opinion,

119. See Claffey, *supra* note 81; NYPD PATROL GUIDE, *supra* note 23, § PG118-09 (revision 99-2, dated Jan. 12, 1999). This provision replaces “two days” with “a reasonable time” (“Interrogations of detectives and sergeants, lieutenants, and captains and above in emerging investigations, where there is a need to gather timely information, should usually be done after all preliminary steps and conferrals have been completed and the member to be questioned has been afforded a reasonable time to obtain and confer with counsel.”).

120. Serpico, *supra* note 12.

121. *Id.* The Mollen Commission was an independent Commission established to investigate NYPD corruption. See *infra* note 137 and accompanying text.

122. See Tulley & McQuillan, *supra* note 117.

123. See *id.*

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however, thus making it difficult to bring public pressure to bear on either the leaders or constituents of the police union.¹²⁴

The PBA's barrier to elimination of the forty-eight hour rule is demonstrated clearly by the tragic story of Abner Louima. On the night of August 6, 1997, Abner Louima was arrested outside a popular club for Haitian immigrants in East Flatbush, Brooklyn. Officers Justin Volpe and Charles Schwarz took Louima to the seventieth precinct station house, where Volpe dragged him into the bathroom and sodomized him with a broken broomstick to the point that he was doubled over in pain, bleeding and seriously injured.¹²⁵ They then threw Louima into a cell at the precinct where inmates recognized the severity of his injuries and demanded that he be taken to a hospital. Eventually, he was taken to a hospital where police officers fabricated an explanation for his injuries, telling a physician that he had been involved in violent gay sex. Abner Louima had suffered severe internal damage and had to remain hospitalized for several months.¹²⁶

The investigation and prosecution in Abner Louima's case was seriously frustrated, in part, by the forty-eight hour rule, which afforded officers who witnessed the attack the right to refuse to come forward voluntarily and confess what they had seen.¹²⁷ Louima, however, survived the attack and was able to testify in court regarding the incident. Louima's attackers, Volpe and Schwarz, were found guilty in the spring of 1999 and sentenced to thirty and fifteen and two-thirds years in prison respectively.¹²⁸ Yet not all victims of police brutality live to tell their stories.¹²⁹ Consequently, Louima filed a civil lawsuit against the city and the NYPD in an attempt to prevent procedural frustration in cases where the victims cannot testify.¹³⁰

124. Because the PBA controls this provision in the NYPD's contract, the PBA was joined as a defendant in a lawsuit that Abner Louima, a victim of police brutality, brought against New York City. See Alan Feuer, *Federal Suit in Louima Case Takes Aim at PBA Policies*, N.Y. TIMES, Dec. 7, 2000, at B4; Claffey, *supra* note 81.

125. See *id.*; LARDNER & REPPETTO, *supra* note 5, at 330.

126. See Joseph P. Fried, *Jury Selection to Begin In Louima Beating Case*, N.Y. TIMES, Mar. 28, 1999, § 1, at 1; Martin Mbugua, *'I Speak for the Silenced'- Louima*, N.Y. DAILY NEWS, Dec. 10, 2000, at 56.

127. Recall that the forty-eight hour rule protects police officer witnesses to misconduct from interrogation. NYPD Patrol Guide, *supra* note 23, § PG118-09.

128. See Mbugua, *supra* note 126; Feuer, *supra* note 124; LARDNER & REPPETTO, *supra* note 5, at 330.

129. See Mbugua, *supra* note 126.

130. See *id.*

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In August of 1998, Louima added the PBA to the list of defendants, observing that “the union is a major player in the problem” of the silence surrounding incidents of police brutality.¹³¹ Louima alleged that the PBA, through the abuse of the forty-eight hour rule, tried to “derail the investigation into [Louima’s] attack by helping the accused officers get their stories straight” prior to speaking to investigators.¹³²

Louima claimed that the police union in New York has never been held responsible when its members are accused of misconduct or excessive force.¹³³ He blamed the forty-eight hour rule for many flawed investigations.¹³⁴ Barry Scheck, one of Louima’s attorneys, charged in a recent interview that the rule was responsible for the failure to obtain a guilty verdict in the Diallo case. He explained that “the fact that [those] cops weren’t separated and pinned down to a story is inexcusable. . . . By the time of the trial there [were] no prior statements that prosecutors [could] use to challenge the cops’ credibility.”¹³⁵

Instances of police unions frustrating a city’s efforts to respond to public and federal pressure to remedy procedures in the city police department are not unique to New York. In Columbus, Ohio, the Fraternal Order of Police prevented the city from entering into a consent decree with the Department of Justice (DOJ). The DOJ had determined that there were over 300 civilian complaints against the city police department alleging improper searches and seizures and police misconduct. In 1999, the city entered into a decree without notifying the union. The union (after tallying a vote by its 1,700 members) rejected the decree and sought to litigate the mat-

131. Feuer, *supra* note 124.

132. *Id.* Negotiations in the Louima case have continued into April, 2001 and are still ongoing. As part of a proposed nine million dollar settlement, Louima’s attorneys are asking the PBA and the NYPD to agree to eliminate the forty-eight hour rule in the collective bargaining agreement between the union and the city. The PBA maintains that the rule is necessary to protect the rights of police officers, despite Louima’s claims that it promotes police silence and delays investigations. The disagreement over the rule has been holding up negotiations in the settlement for several weeks. Most recently, reports indicate that agreement on the proposed settlement was abruptly abandoned because the PBA wanted Louima to drop his demands for reform or elimination of the forty-eight hour rule. The city has pledged to do away with the rule, but the PBA says it will fight to retain the provision. See Mike Claffey, *Settlement in Brutality Case Stalls After Report that Louima “Caved In,”* N.Y. DAILY NEWS ONLINE EDITION, March 28, 2001, http://www.nydailynews.com/2001-03-28/News_and_Views/City_Beat/a-105069.asp.

133. Feuer, *supra* note 124.

134. *See id.*

135. Cohen, *supra* note 1.

ter in federal court, using the members' dues to pay the legal expenses. The city's contractual relationship with the union prevented the city from settling the issue with the DOJ without the approval of the union, so the city was forced to defend its interests in litigation.¹³⁶

Police unions, undoubtedly, serve a very important function. They protect individual officers from infringements of their rights, just as all unions protect their members. In protecting individual police officers, however, police unions face an inherent conflict of interest because they should also serve the greater interest of all their members. The union cannot both actively support efforts to rid the police department of corruption and police brutality, while also representing individual police officers in defending against such allegations. The Mollen Commission, which conducted an independent investigation of corruption in the NYPD, discovered, after speaking with department managers and prosecutors, that the PBA, in protecting its officers, often thwarts investigations and perpetuates the "code of silence" among police.¹³⁷ In representing all officers, the PBA must advise both witnesses and suspects in corruption investigations.¹³⁸ Consequently, the PBA often encourages witnesses to remain silent and criticizes cooperators who testify against their fellow officers.¹³⁹ The Mollen Commission recommended that the PBA amend "Patrol Guide Procedure No. 118-9," the forty-eight hour rule, in order to "allow internal investigators to interrogate police officers under oath and with penalties for perjury."¹⁴⁰ While in negotiating the forty-eight hour rule the PBA reinforced their members' protection against self-incrimination, it may have done great damage to the NYPD officers by delaying investigations, fueling the perception of impropriety, and reinforcing the sense among the public that members of the police department are above the law.

136. Jim Oliphant, *Making a Federal Case of Police Brutality*, LEGAL TIMES, Dec. 11, 2000, at 13.

137. See *Report of the N.Y. City Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department: Mollen Commission Report*, in 6 NEW YORK CITY CORRUPTION INVESTIGATION COMMISSIONS 1894-1994 (Gabriel J. Chin ed., 1997) [*hereinafter* Mollen Commission Report].

138. See *id.* at 67.

139. See *id.*

140. *Id.* at 141.

V
PROPOSED ALTERNATIVE TO THE FORTY-EIGHT
HOUR RULE

The PBA's zealous representation of its members when it negotiated the forty-eight hour rule is quite understandable. The union's response to the gap left open by *Garrity*, *Kastigar* and *Lefkowitz* can hardly be faulted; they granted the immunity that Justice Brennan thought was necessary to maintain the voluntariness and credibility of confessions. The Court and the PBA, however, can afford police an analogous level of protection in ways more just for, and agreeable to, society as a whole.

The Court should have granted complete immunity for any statement elicited by a police commander conducting an investigation of serious misconduct by an officer. If this were the case, there would be no reason for the forty-eight hour rule. Any information elicited would, at the very least, assist police commanders and investigators in determining what happened at a crime scene. While in the Amadou Diallo case little could have been done to remedy the situation, in other cases where the victim survives, or is suffering from a different type of injury (e.g. an asthma attack), any information could be of crucial importance. Additionally, such immunity may encourage suspects and witnesses to reveal and identify their mistakes instead of covering them up and ignoring them.

Imagine if the police officers involved in the Diallo shooting had received complete immunity from statements made to police investigators at the scene. The investigators would have stopped and asked the officers what happened, instead of ignoring the officers and immediately examining the victim. They might have discovered, at that point, information that was not revealed until the officers' trial over a year later. They might have determined that the suspect's behavior, darting in and out of the building and peering at the officers in a peculiar manner, was probably not sufficient probable cause for the officers, in plainclothes, to enter the vestibule with guns drawn. They might have learned that the officers approached the building in pairs and that as they saw the suspect reach into his pocket, one of the first-pair officers fell back off the vestibule steps, making a loud noise and gesture that may have been confused with a gun shot impact.¹⁴¹ They might have heard that the officers fired new department-regulation hollow bullets which caused the victim to jerk back and forth, creating the impression

141. James Fyfe, Address to the New York University School of Law *Police, Law & Society* Class (Oct. 16, 2000).

that he was darting toward them.¹⁴² Additionally, they may have determined that placing four inexperienced officers, who had never before been assigned together, on the same patrol may have been a bad idea.

Obtaining this information immediately could have helped the police department satisfy its obligation to the public by modifying departmental procedures and policies to prevent future accidental shootings. As it was, the NYPD did change some of its policies as a result of the information it had following the Diallo shooting. There was some speculation, immediately following the shooting, that Mr. Diallo may not have heard or understood the officers when they identified themselves and may have thought that they were robbers.¹⁴³ As a result, the NYPD required officers in the Street Crimes Unit to wear uniforms, instead of plainclothes, for a brief period following the Diallo incident.¹⁴⁴ At trial, police consultant James Fyfe testified that hollow bullets, unlike other bullets,¹⁴⁵ might cause the body they strike to jolt forward, giving the appearance that the victim is lunging toward the shooter. Since then, there has been a lot of criticism of the NYPD over its use of hollow bullets. If this problem concerning the bullets were appreciated sooner, under different circumstances, police commanders might have chosen to eliminate use of these bullets. In addition, the department may have recognized the importance of having an older, more experienced officer paired with less experienced officers when on dangerous night patrols.

While offering complete immunity for statements made to police commanders or NYPD investigators at the scene of a police shooting is beneficial to the internal functions of the department, it obviously does not address the difficulty arising from prosecuting police officers for misconduct. To facilitate prosecution, an outside prosecuting agency must be in charge of investigating police shootings. This agency must be sufficiently independent of the NYPD so that there is no danger of the implicit coercion present in situations like those in *Garrity*, involving questioning between superiors and subordinates of the same governmental organization.¹⁴⁶ Investigators and police commanders in the NYPD should be automatically disqualified from pursuing an investigation of an alleged police shooting. The moment that notice of the incident is wired into a

142. *Id.*

143. LARDNER & REPPETTO, *supra* note 5, at 332.

144. *See id.* at 331.

145. Fyfe, *supra* note 141.

146. *See Garrity v. New Jersey*, 385 U.S. 493 (1967).

station or precinct, the NYPD should defer investigation of the case to a separate agency; this agency, not the NYPD, should examine the crime scene and interview suspects and witnesses to determine whether there is any basis for criminal liability.

Establishing an independent agency to investigate police shootings is controversial because of the cost involved and the lack of success independent agencies have had in the past. These challenges, however, can be overcome. First, with regard to cost, the agency could be an offshoot of an existing agency, either a branch of a state or federal organization (the FBI) or, in New York City, the Police Commission.¹⁴⁷ Additionally, the cost may be one that our society is willing to bear given the numerous incidences of unnecessary shootings. Second, the independent agencies that have failed in the past were set up to root out corruption, a problem that the Mollen Commission determined must be resolved from within the department itself by increasing command accountability and using agencies of independent oversight.¹⁴⁸ The Mollen Commission concluded that the former Special State Prosecutor and Inspector General Model failed because they had neither the authority nor responsibility to implement measures which would reduce corruption.¹⁴⁹ Additionally, they stripped the NYPD of the ability to conduct its own internal investigations and make necessary changes.¹⁵⁰

While the Mollen Commission was correct in determining that the roots and solutions to corruption are found within an organization, this is not true for all forms of police misconduct. Criminal activity, such as unauthorized and unconstitutional shootings, can be effectively investigated by outside organizations without compromising the integrity of the police department. Independent investigations can be conducted *simultaneously* with the department's own internal investigations. The department's authority to make necessary changes would remain unlimited so long as it was confined to administrative matters, such as changing the type of bullets, or requiring officers to wear uniforms. The problem faced by the Mollen Commission in implementing reforms, therefore, would be circumvented. Criminal discipline, however, would be adminis-

147. The Police Commission was established through N.Y., N.Y., Exec. Order 18 (Feb. 27, 1995) by Mayor Rudolph Giuliani. The five-person independent commission is designed to combat police corruption. Paul Crotty, *THE CORPORATION COUNSEL'S VIEW OF INDEPENDENT OVERSIGHT OF THE POLICE DEPARTMENT*, 40 N.Y. L. Sch. L. Rev. 23, 26 (1995) (citing N.Y., N.Y., Exec. Order 18 (Feb. 27, 1995)).

148. See MOLLEN COMMISSION REPORT, *supra* note 137, at 149-51.

149. See *id.* at 149-52.

150. See *id.* at 151-52.

tered by an objective organization regulated by the same constitutional standards that govern the criminal prosecution of civilians and other individuals in the United States.

If an independent investigator had arrived at the scene of the Amadou Diallo shooting she would have been able to separate the four officers and interrogate them individually in the same manner as investigators of regular homicide cases. The officers, not yet formal suspects in the case, could have refused to answer, but they might voluntarily respond to the questioning if they felt they needed to explain the situation. Only once she brought the officers into custody would the investigator be required to inform the police officers, using the *Miranda* provisions, of their right against self-incrimination.

As it was, the investigation into the Diallo shooting left many questions unanswered. Indeed, the actual circumstances surrounding the incident are still in dispute. At the very least, an independent investigation might have diminished the public outcry against the impropriety of the police by increasing accountability and reducing the perception that police are "above the law." In other cases, such interrogation by an independent agency would be crucial to the prosecution's clear presentation of events and ultimately a more evenhanded trial.

CONCLUSION

The solution to the problem of investigating police shootings consists of three essential elements. First, the PBA and the NYPD must work with the city to abolish the forty-eight hour rule. Second, in renegotiating with the PBA and its constituents, the city should grant NYPD officers complete immunity from any and all statements made to police commanders and investigators at sites of suspected police misconduct. Third, the city should establish an independent agency that would be responsible for conducting criminal investigations of suspected police misconduct. The PBA and the NYPD should agree to work with the members of this agency to permit the investigations.

The officers of the NYPD serve an important function in our society and we should continually strive, as a community, to improve the relationship of the police with the city and demand the utmost integrity from those charged with the responsibility of protecting the public. Most of the 37,000 members of the NYPD do not deserve public rebuke or suspicion. They are ordinary people trying to do the extraordinary job of policing their peers. Nevertheless, as our society changes as a whole, we must identify the proce-

dures that have failed or become outdated, and adapt by creating new procedures.

Although the forty-eight hour rule may have been motivated by a genuine concern for the rights of police officers subject to increasingly intense scrutiny, it has been abused and used as a tool to undermine investigations into police misconduct even where innocent explanations exist. Instead of protecting officers from pressured and coerced interrogations, the rule actually does more harm than good; the rule inflicts significant damage on the reputation of individual police officers and the department as a whole by creating a public perception of impropriety and by limiting the police department's ability to recognize errors and improve. The forty-eight hour rule is an unnecessary and ineffective means of protecting the police officer's right against self-incrimination. The time has come to devise a more effective means of guaranteeing police officers' civil rights while uncovering and prosecuting serious misconduct.