

The Law in Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe

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Abstract This article explores from a comparative perspective some of the legal, evidential and procedural issues raised by undercover policing. It focuses on two of the more common, yet legally problematic, techniques of covert investigation: namely, entrapment and covert interviewing. The comparison draws on legal developments in Australia, Canada and Europe.

I. Introduction: The Rise and Rise of Undercover Policing

The 20th century witnessed significant increases in covert surveillance and proactive investigation.¹ This expansion was encouraged in most jurisdictions by legislation authorizing the use of listening devices and telecommunications interception.² Some Commonwealth jurisdictions, like Australia and Canada, have gone further, recently enacting

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1 G. Marx, *Undercover—Police Surveillance in America* (University of California Press: Berkeley, 1988); and C. Fijnaut and G. Marx (eds.), *Undercover—Police Surveillance in Comparative Perspective* (Kluwer: The Hague, 1995).

2 S. Bronitt, 'Electronic Surveillance, Human Rights and Criminal Justice' (1997) 3(2) *Australian Journal of Human Rights* 183; S. Sharpe, 'Covert Policing: A Comparative View' (1996) 25(2) *Anglo-American Law Review* 163.

legislation to provide prospective immunities and exemptions for police and informers who may commit illegal acts during such operations.

This increasing emphasis on covert policing is part of a wider movement from 'coercion' to 'deception' in criminal investigation.³ There are a number of reasons behind this shift. In terms of priorities, intelligence-led strategies have been given increased attention within law enforcement agencies, particularly in relation to the investigation of serious drug offences and organized crime. As a consequence, activities traditionally spurned by police as inconsistent with their preventive mandate, such as using an agent provocateur, are now considered fair game.

Another reason for the shift towards undercover policing relates to the increasingly regulated and restrictive custodial investigative environment. Successive miscarriages of justice have exposed widespread abuses of suspects in police custody, including the fabrication of confessions ('verballing') by police and prison informers. To minimize the risk of these abuses, police powers and suspects' rights have been codified by legislation in Australia, Canada and the United Kingdom.⁴ By contrast with custodial investigation, covert investigation is subject to minimal legal restrictions, and therefore imposes fewer constraints on police. The principal legislative restrictions relate to the use of surveillance devices. However, these legislative frameworks are patchy, applying warrant requirements to a narrow range of surveillance technologies.⁵ While warrants minimize the risk of arbitrary intrusions into the lives of suspects, privacy is not exhaustive of the range of fundamental legal values under threat. Covert investigation may also pose significant threats to the principles of legality and fairness, as well as the public interest in upholding public confidence in the administration of justice.

In the absence of comprehensive legislative regulation, the courts in Canada and Australia have assumed a critical role in imposing constraints on covert police methods, creatively fashioning new remedies from existing evidential and procedural rules. This process of judicial law reform also has a transnational dimension: recently, the European Court of Human Rights, drawing on these Commonwealth

3 See A. Ashworth, 'Should the Police Be Allowed to Use Deceptive Practices?' (1998) 114 *Law Quarterly Review* 108 at 108.

4 Even within these regulated custodial domains, a culture of 'policing by consent' can nevertheless encourage suspects, through ignorance of rights or subtle psychological pressure, to waive fundamental procedural rights such as the right to silence or access to lawyers: see D. Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon Press: New York, 1997) ch. 3.

5 See S. Uglow, 'Covert Surveillance and the European Convention on Human Rights' [1999] *Criminal Law Review* 287; S. Bronitt and D. Kinley, 'Undercover Policing: Detection or Deception?' in H. Selby (ed.), *Tomorrow's Law* (The Federation Press: Annandale, 1995) ch. 1.

authorities, extended its own fair trial jurisprudence to deal with police entrapment and covert interviewing. Notwithstanding the optimism generated by the emergence of this global common law of human rights, judicial efforts to control covert policing through existing evidential and procedural rules have met with only limited success. Rather than promoting judicial remedies for censuring improper covert methods, the article concludes that comprehensive legislation—based on sound legal policy and respect for human rights—is the best mechanism for determining the proper limits of undercover policing.

This article is divided into two parts:

- Section II examines the legal response to offence-facilitation during undercover operations focusing on the problem of entrapment.
- Section III examines the admissibility of confessions improperly elicited by undercover police or informers during covert questioning.

II. Legal Responses to Offence-Facilitation—The Problem of Entrapment

Offence-facilitation by undercover police comes in a range of forms. Controlled operations (also known as controlled deliveries or ‘reverse-stings’) have typically engaged police or their informers in the purchase, importation and supply of illegal drugs to persons suspected of dealing. These operations have been extended beyond drug law enforcement to other offences such as handling or receiving stolen goods.⁶ Such forms of proactive policing are not limited to operations targeting particular individuals or groups suspected of committing crime—for example, random virtue-testing operations have also been used by police to tackle areas viewed as crime ‘hot-spots’.⁷

The legal difficulty with these various forms of offence-facilitation is that police and informers themselves are not immune from the criminal law. Absent statutory immunity or exemption, intentional acts of offence-facilitation ordinarily expose police and their informers to liability as perpetrators, accessories, inciters or conspirators. Although it is unlikely that police or informers who facilitate crime

6 The threats to legality are apparent in a Queensland case, *R v D’Arrigo* (1991) 58 A Crim R 71. In this case, the informer under police direction infiltrated an organized crime group suspected of receiving stolen vehicles. In order to gather evidence against the group the informer participated in the theft of 68 motor vehicles from innocent citizens. The Supreme Court held that this evidence should have been excluded on public policy grounds.

7 Typically these ‘manna from heaven’ operations involve police leaving unguarded valuables in public view in order to tempt passers-by; see e.g. *Williams v DPP* (1994) 98 Cr App R 209.

during officially sanctioned operations would be prosecuted,⁸ the defence may seek exclusion of the evidence on the grounds of illegality or impropriety, or apply for a judicial stay of the proceedings as an abuse of process.⁹

Offence-facilitation for law enforcement purposes may be viewed as part of the broader issue of how the legal system (encompassing the judiciary and legislature) should respond to investigative impropriety.¹⁰ The discussion here is confined to the more problematic forms of state-created crime or offence-facilitation known as ‘entrapment’. Entrapment is not a legal term of art. It has been variously defined as ‘the use of deception to produce the performance of a criminal act under circumstances in which it can be observed by law enforcement officials’, or ‘the use of deceptive techniques to test whether a person is willing to commit an offence’.¹¹ Amongst theorists and legal scholars, there appears little consensus over its meaning or scope.¹² It is no wonder that different legal definitions, as well as remedies, have been developed and applied in various jurisdictions.

Much existing entrapment literature focuses on the substantive defence, and particular definitions, developed in the United States.¹³ This model views entrapment as an exculpatory matter or defence to be determined by the jury. Under this approach, the availability of the defence depends on the fact-finder’s assessment of the subjective impact of police tactics on the particular suspect—crucially, the defence is not made out if the suspect was otherwise predisposed to commit the offence. By contrast, as we shall explore below, the courts in Australia, Canada and England have adopted an objective approach which focuses on the propriety of law enforcement methods rather

8 Some legal assurance for the police can be obtained by seeking a grant of immunity from the Executive. These undertakings are offered *after* the commission of the offence, but do not affect the underlying criminal character of that conduct. Grants of prospective immunity by the Executive have been criticized as unconstitutional, in conflict with the Bill of Rights 1689 (UK) which states that ‘power of suspending of laws or execution of laws by regal authority without the consent of Parliament is illegal’: see generally D. Kell, ‘Immunity From Prosecution for Prospective Illegal Conduct’ (1997) 71 *Australian Law Journal* 553.

9 These various remedies are explored in D. Osborn, ‘Suppressing the Truth: Judicial Exclusion of Illegally Obtained Evidence in the US, Canada, England and Australia’ (2000) 7(4) *E Law—Murdoch University Electronic Journal of Law*; S. Sharpe, above n. 2.

10 For survey of the US authorities, see *ibid.* Osborn, and Sharpe. For an examination of the normative issues involved see Ashworth, above n. 3; S. Bronitt and D. Roche, ‘Between Rhetoric and Reality: Sociological and Republican Perspectives on Entrapment’ (2000) 4 *International Journal of Evidence and Proof* 77.

11 G. Dworkin, ‘The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime’ [1985] 4 *Law and Philosophy* 17 at 17 and A. Ashworth, ‘Re-drawing the Boundaries of Entrapment’, [2002] *Criminal Law Review* 161 at 161, respectively.

12 See J. Braithwaite, B. Fisse and G. Geis, ‘Covert Facilitation and Crime: Restoring Balance to the Entrapment Debate’ (1987) 43(3) *Journal of Social Issues* 5; plus eight commentaries in this special issue on entrapment.

13 *Ibid.* The various tests of entrapment are discussed in Sharpe, above n. 9.

than the suspect's subjective predisposition or past criminal record. The remedy favoured in the Commonwealth jurisdictions studied below is not a substantive defence excusing guilt, but rather the judicial exclusion of evidence and/or grant of a stay of proceedings as an abuse of process. The rationale for this model relates to the threat posed by these practices to fundamental values expressed variously in terms of legality, fairness and public policy.¹⁴

In the 1990s, both the High Court of Australia and the Supreme Court of Canada reviewed the legality of actions of police and informers during undercover operations in *Ridgeway v The Queen*¹⁵ and *R v Campbell*,¹⁶ respectively. While recognizing that covert policing is now an indispensable tool in the fight against crime, both decisions affirmed the fundamental value of the Rule of Law, particularly its tenet that those engaged in law enforcement should themselves be bound by the law. At one level, the decisions in Australia and Canada look like a triumph of due process over crime control.¹⁷ However, closer critical scrutiny reveals that these decisions do not significantly impede covert investigation. Not only are existing remedies for entrapment hedged with significant qualifications, but they are also based upon a judicial discretion that requires the balancing of competing interests, a calculus which empirically seems to favour crime control over due process.¹⁸ The trend to prioritize crime control is apparent in recent statutory reforms in Australia and Canada, which have further expanded the proactive police mandate by conferring immunities and exemptions on a wide range of illegality during covert operations. Police and informers in both jurisdictions can now obtain prospective immunities authorizing what would otherwise constitute serious criminal offences.

Within the Commonwealth there are significant differences in the approach to entrapment. The courts in England and Canada now clearly recognize that entrapment may constitute an abuse of process warranting a stay of proceedings. The Supreme Court of Canada was the first Commonwealth court to apply the abuse of process doctrine to entrapment.¹⁹ This approach departed from the position then applying in English law, where the House of Lords in *R v Sang*²⁰ flatly

14 A. Ashworth, 'Re-Drawing the Boundaries of Entrapment' [2002] *Criminal Law Review* 161.

15 (1995) 184 CLR 19.

16 [1988] 2 SCR 903.

17 The distinction is most famously associated with the models of criminal justice outlined in H. Packer, *The Limits of the Criminal Sanction* (Stanford University Press: Stanford, 1968) ch. 8.

18 Some critical scholars have claimed that the Packer dichotomy, *ibid.*, between crime control and due process is false, and that once judicial rhetoric is subject to empirical scrutiny, the conclusion must be that 'due process is for crime control': D. McBarnet, *Conviction—Law, the State and the Construction of Justice* (Macmillan: London, 1981) at 156.

19 *R v Mack* [1988] 2 SCR 903.

20 [1979] 2 All ER 1222.

refused to recognize any judicial remedies for entrapment beyond mitigation of sentence. This position weakened over time, and in *R v Looseley*,²¹ the House of Lords has affirmed that the appropriate remedy in extreme cases of entrapment was a stay of proceedings on the grounds of abuse of process.²² In Australia, the High Court in *Ridge-way v The Queen*²³ took a slightly different path. The court rejected the general proposition that proceedings based on evidence obtained by entrapment constituted an abuse of process, content instead to extend the public policy discretion to exclude evidence on the grounds of illegality or impropriety.

The evolution of these judicial responses to entrapment and unlawful police methods has occurred gradually, developing by analogy with existing common law doctrines. Although posing a potential obstacle to proactive forms of law enforcement, the values underlying these decisions are unexceptional from a legal standpoint—the higher courts in Australia and Canada have simply reaffirmed the fundamental importance of the Rule of Law, and the idea that law enforcement officials, like any other citizen, are bound by the ordinary law of the land. The decisions also promoted, to a stronger or lesser degree, the importance of maintaining public confidence in the courts and the administration of justice—in this context by avoiding the appearance that judges were condoning serious illegality by state officials or their agents.

From a law enforcement perspective, however, these ‘novel’ judicial developments were controversial, throwing the legal viability of many on-going investigations into doubt. In both Australia and Canada, the controversy surrounding these decisions prompted swift legislative response: Crimes Amendment (Controlled Operations) Act 1996 (Cth); Measures to Combat Serious and Organised Crime Act 2001 (Cth); Bill C-24 (Canada).²⁴ This legislation sought to clarify the powers of police and informers in undercover operations, and to provide a secure legal basis for their otherwise unlawful or improper conduct. However, the remedial focus of the reforms meant that insufficient attention was given to safeguarding the rights and interests of suspects. The legislation addressed the illegality of police operations from a technical legal, rather than wider normative or public policy perspective. Fundamentally these reforms failed to consider whether the underlying tactics adequately respected the suspect’s right to a fair trial.²⁵

21 [2001] UKHL 53.

22 Ashworth, above n. 14; S. Bronitt, ‘Sang is Dead, Loosely Speaking’ [2002] *Singapore Journal of Legal Studies* 374.

23 (1995) 184 CLR 19.

24 At the time of writing, there have been no moves in the UK to grant statutory immunities to police or informers; an inhibition that may relate to uncertainties over whether such laws would be compliant with the European Convention on Human Rights, a human rights treaty which was domestically incorporated by the Human Rights Act 1998 (UK).

25 Bronitt and Roche, above n. 10.

i. Australian Approaches to Entrapment: Avoidance and Neutralization

The leading Australian case examining the legality of offence-facilitation for law enforcement purposes is *Ridgeway v The Queen*.²⁶ In this case, the High Court considered the legality of a controlled delivery of narcotics into Australia from overseas. The accused was charged with possession of an illegal import, the narcotic (heroin) having been illegally imported by members of the Australian Federal Police (AFP) and their informer.²⁷

Although viewed as a case dealing with entrapment, *Ridgeway* focused narrowly on the illegality of police conduct (namely the illegal importation of a prohibited drug into Australia) and whether that ostensibly criminal activity justified either the exclusion of evidence or a stay of proceedings as an abuse of process.

The majority (Mason CJ, Deane and Dawson JJ) held that the appropriate remedy in this case was evidential, rather than procedural. In this case, the existing common law discretion to exclude evidence obtained by unlawful or improper means on public policy grounds could be extended by analogy to exclude evidence of a person's guilt, or an element of an offence, where the actual commission was procured by unlawful conduct on the part of law enforcement officials. The majority question for the trial judge facing these facts was framed in terms of public policy:

The critical question was whether, in all the circumstances of the case, the considerations of public policy favouring exclusion of the evidence of the appellant's offence, namely, the public interest in maintaining the integrity of the courts and of ensuring the observance of the law and minimum standards of propriety by those entrusted with powers of law enforcement, outweighed the obvious public interest in the conviction and punishment of the appellant of and for the crime against s. 233B(1)(c) of the Act [Customs Act 1901] of which he was guilty.²⁸

In determining whether to exclude evidence, the High Court acknowledged that the relative weight of the public interest in convicting the guilty and maintaining confidence in the administration of criminal justice varies according to factors such as:

. . . the nature, the seriousness and the effect of the illegal or improper conduct engaged in by the law enforcement officers and whether such conduct is encouraged or tolerated by those in higher authority in the police force or, in the case of illegal conduct, by those responsible for the institution of criminal proceedings. When assessing the effect of the

26 (1995) 184 CLR 19.

27 The controlled delivery had in fact occurred under a Ministerial Agreement between federal police and customs, though as the High Court pointed out this did not change the illegal nature of the police conduct—indeed the fact that such serious lawlessness was condoned by Executive officers provided further justification for the exclusion of the evidence.

28 (1995) 184 CLR 19 at 41–2.

illegal or improper conduct, the relevance and importance of any unfairness either to a particular accused or to suspected or accused persons generally will likewise depend upon the particular circumstances. *Ordinarily, however, any unfairness to the particular accused will be of no more than peripheral importance.*²⁹

The majority held that the abuse of process doctrine did not extend to entrapment, concluding that granting a stay of proceedings in such cases would be tantamount to recognizing a defence unknown to the common law.³⁰ The majority did conclude, however, on the particular facts, that a stay should have been granted on other grounds—had the trial judge exercised this discretion properly, evidence of the illegal importation by the federal police would have been excluded. Since it would have been impossible for the trial to continue without evidence of that illegal importation, the majority took the view that the trial court was bound to stay proceedings, as continuance of them would have been oppressive and vexatious.

The legal hurdles facing law enforcement could be overcome by legislative regulation of controlled operations, as Brennan J observed:

This result [exclusion of evidence] is manifestly unsatisfactory from the viewpoint of law enforcement. As a technique of law enforcement, the so-called ‘controlled’ importation of prohibited imports may be an acceptable technique for the detection and breaking up of drug rings but, if that be so, the law enforcement agencies must address their concerns to the Parliament. . . . If law enforcement agencies apply for an amendment of the laws to permit the employment of detection methods such as those used in this case, it will be for the Parliament to consider whether controls should be legislatively prescribed. The Parliament might impose conditions upon the employment of those methods. *The Parliament might place responsibility for authorizing the importation of prohibited imports for detection purposes upon specified officers who will be liable if they fail to exercise supervision over the operations of the law enforcement agencies.*³¹

Brennan J’s legislative invitation was swiftly accepted by the Commonwealth and the majority of other state parliaments.³² The basic

29 *Ibid.* at 38, *per* Mason CJ, Deane and Dawson JJ (emphasis added). There is overlap between the list of factors recognized at common law and those contained in statute: see Evidence Act 1995, s. 138 adopted by the Commonwealth, NSW and the ACT. Section 138(3)(f) identifies a list of factors which the court *must* consider in exercising the discretion including, *inter alia*, whether the ‘impropriety or contravention was contrary to or inconsistent with a right of a person recognized by the International Covenant on Civil and Political Rights’.

30 *Ibid.* at 55.

31 *Ibid.* at 53–4 (emphasis added).

32 Unlike Canada, Federal Parliament in Australia has limited constitutional power to enact criminal laws, which remain the primary responsibility of the states and territories. Drug laws, for example, are a combination of federal offences and local offences. See for example: Crimes Amendment (Controlled Operations) Act 1996 (Cth); Measures to Combat Serious and Organised Crime Act 2001 (Cth);

legislative model is a prior authorization scheme under which police may seek a certificate that relieves officers from future criminal liability. Although the original Bill was claimed by the federal government to be a response to *Ridgeway*, it is apparent that work on the legislation commenced sometime before the High Court's decision. Indeed, the opportunism of the government is apparent when the terms of the legislation are reviewed. *Ridgeway* itself only required a narrowly framed law enforcement exemption, along the lines of the regulations enacted in Canada to facilitate reverse-stings (which are examined below). This type of exemption would more than adequately have addressed the 'technical' illegality of police conduct in controlled operations. Instead of adopting this approach, a wide-ranging authorization scheme for granting *prospective* immunity was created.

The Commonwealth Act was originally conceived as an exceptional measure, limited to immunities for police whose covert operations required participation in otherwise illegal importations. Following the New South Wales model, the Federal scheme has recently been expanded beyond operations targeting drug offences to other serious Commonwealth crimes. The Measures to Combat Serious and Organised Crime Act 2001 (Cth) is further evidence of 'function-creep' within Australian law enforcement.³³ The character and scope of the immunity granted has also changed. The new reforms exempt from criminal liability *and* indemnify from civil liability persons participating in controlled operations. The immunities extend beyond law enforcement officers (which include officers from the AFP and

Law Enforcement (Controlled Operations) Act 1997 (NSW); Criminal Law (Undercover Operations) Act 1995 (Sth Australia); Police Powers and Responsibilities Act 2000 (Qld), or Drugs Misuse Amendment Bill 2000 (Qld); Misuse of Drugs Act 1981 (WA), s. 31 (limited exemption for 'reverse-stings'). There is a push for national laws governing covert powers, with a recent report recommending the adoption of uniform legislation relating to controlled operations in Australia: Standing Committee of Attorneys-General and Australasian Police Ministers Council Joint Working Group on National Investigative Powers, *Cross Border Investigative Powers For Law Enforcement—Report* (2003).

- 33 The Act defines 'serious Commonwealth offence' as any offence that involves theft, fraud, tax evasion, currency violations, illegal drug dealings, illegal gambling, obtaining financial benefit by vice engaged in by others, extortion, money laundering, perverting the course of justice, bribery or corruption of, or by, an officer of the Commonwealth, an officer of a state or an officer of a territory, bankruptcy and company violations, harbouring of criminals, forgery including forging of passports, armament dealings, illegal importation or exportation of fauna into or out of Australia, espionage, sabotage or threats to national security, misuse of a computer or electronic communications, people smuggling, slavery, piracy, the organization, financing or perpetration of sexual servitude or child sex tourism, dealings in child pornography or material depicting child abuse, importation of prohibited imports or exportation of prohibited exports, or that involves matters of the same general nature as one or more of the foregoing or that is of any other prescribed kind; and is punishable by three years or more imprisonment: Crimes Act 1914 (Cth), s. 15HB.

Australian Crime Commission) to nominated civilians (i.e. police informers). Rather than limiting immunity to the illegality of police action arising from their offence-facilitation, the Act potentially authorizes the commission of any unlawful conduct deemed necessary for the success of the operations. The only limitation is that the Commonwealth Act, like Bill C-24, can neither authorize nor confer immunity on conduct which seriously endangers the health or safety of any person; causes death or serious injury; involves the commission of a sexual offence; or results in loss or serious property damage: s. 15M. From recent media reports, it appears that controlled operations are being used in the investigation of copyright piracy and disruption of people-smuggling activities.³⁴

Like the Canadian scheme, the authorizing officer under the Commonwealth Act is a senior police officer, customs official or nominated member of the Administrative Appeals Tribunal (AAT) rather than a judge or magistrate. This administrative model of accountability carries the danger of authorizing officers simply ‘rubber-stamping’ applications. It is doubtful whether senior police working within the same service as the operational officers can assume the role of an ‘independent person’, judiciously and critically evaluating the grounds for the proposed operation and maintaining a fair balance between the interests of the state and the citizen. The new role assigned to members of the AAT in regulating covert policing—which now extends to authorizing telecommunications interception and controlled operations—is yet to be evaluated. It should not, however, be assumed that appointing federal judges to this role would result in more effective supervision. The official data on telecommunications interception reveal that interception warrants are rarely refused.³⁵ This low rate of refusal probably reflects the administrative as opposed to judicial character of warrant application proceedings.³⁶ The application proceedings are conducted in secret. They are also heard *ex parte*, the

34 The AFP and Indonesian Police recently admitted to participation in covert operations designed to disrupt and deter people-smuggling activities. The media have exposed an AFP informant posing as a people-smuggler in Indonesia who may have contributed to the deaths of the 353 asylum seekers who drowned when their boat sank in 2002. The AFP eventually admitted to using an informant, but denied involvement of endangering the lives of the asylum seekers: ‘AFP Investigation into Alleged People Smuggler Completed’ *AFP Media Release* (24 August 2002); <http://www.afp.gov.au/page.asp?ref=/Media/2002/0824Ennis.xml> at 15 April 2002. During subsequent Parliamentary hearings on the matter, the Police Commissioner refused, invoking public interest immunity, to disclose material which could reveal operational matters or techniques used. Since 2002, AFP and informants can now seek immunity for offences committed in the course of these operations: see above, under the Serious and Organised Crime Act 2001 (Cth), assented to 1 October 2001.

35 See *Telecommunications (Interception) Act 1979—Report for the year ending 30 June 2001* (Commonwealth of Australia: Canberra, 2001).

36 S. Bronitt, ‘Electronic Surveillance, Human Rights and Criminal Justice’ (1997) 3(2) *Australian Journal of Human Rights* 183 at 195.

decision-maker hearing only from law enforcement officials: the interests of the person being targeted and the wider community are not represented.³⁷

In NSW, the controlled operations legislation goes further in allowing authorization to be granted retrospectively in life-threatening cases where there is no time to make an application; in these cases, external supervisory control is lost since law enforcement officials are in a position to ‘tailor’ their subsequent application to fit the facts revealed in the course of their operation.³⁸ There is no equivalent provision in Canada: arguably, this type of provision would not withstand a Charter challenge and would probably constitute an unreasonable search or seizure under s. 8. Other legislative models have favoured a ‘halfway house’ in circumstances of urgency by allowing fast-track applications using phone, fax or other means of communication: Crimes Act 1914 (Cth), s. 15L. In Australia, unlike Canada, there is no Bill of Rights either at federal or state level which could be invoked against these legislative schemes. Without entrenched rights to privacy and due process, Australian constitutional law offers no checks against this expansion of police power. Indeed, the constitutionality of the federal controlled operations legislation granting retrospective and prospective immunity has been upheld in *Nicholas v The Queen*.³⁹

Under the Commonwealth Act, the authorization certificate can only be granted, and will only confer immunity, if certain conditions are met. A key safeguard, highlighted when the government introduced the Bill, was that the certificates did *not* authorize entrapment. This claim was based on the inclusion of sections providing that immunity can be conferred *only* where the person who was induced by police otherwise had the intention to commit the crime: ss. 15IB and 15M. The introduction of this limitation into Australian law is problematic. The section incorporates the test of subjective predisposition developed in the defence of entrapment in the United States, which as noted above has been rejected by courts in Canada, Australia and England. By adopting this definition and limitation, the Commonwealth Act directs offence-facilitation against persons who have a proven predisposition to commit the crime under investigation. However extreme the enticement used against such suspects, police will

37 Due to the separation of powers doctrine in the Australian Constitution, courts cannot exercise administrative powers. This potential obstacle to judicial involvement in granting warrants is overcome by resort to the ‘delegated person’ principle, which permits judges to exercise these powers in their non-judicial capacity: *Grollo v Palmer* (1995) 184 CLR 348; *Hilton v Wells* (1985) 157 CLR 57. See generally F. Wheeler, ‘Original Intent and the Doctrine of the Separation of Powers in Australia’ (1996) 7(2) *Public Law Review* 96.

38 Law Enforcement (Controlled Operations) Act 1997 (NSW), s. 14.

39 (1998) 193 CLR 173.

retain their immunity from criminal prosecution. Of course, it is possible that a court could exclude evidence on the broader public interest grounds related to impropriety rather than illegality—indeed, the Federal Act provided that the provisions were not intended to limit a discretion that a court has (a) to admit or exclude evidence in criminal proceedings; or (b) to stay criminal proceedings in the interests of justice: s. 15G(2).

In terms of access to judicial review, the rights of persons targeted by controlled operations are fairly limited. The principal limitation is that existing remedies can only be invoked by those persons who fall into the police trap: those who were targeted but not prosecuted necessarily remain ignorant of the police operation and cannot therefore challenge its legality. This has been described as a ‘serious flaw in the existing regulatory regime’.⁴⁰ In the absence of judicial review, the Ombudsman’s monitoring role under the Act and the Annual Reports tabled in Parliament are the only other mechanisms for identifying cases where the operations were unwarranted or unsuccessful.⁴¹ To date, these reports suggest that controlled operation applications are rarely (if ever) refused!

Individuals who are prosecuted following a controlled operation do have legal recourse through the courts, though the effectiveness of these remedies is also limited. Pre-trial disclosure of controlled operations to the defence is critical to their ability to invoke effective remedies against investigative impropriety. However, the law of disclosure in this area is relatively undeveloped. Australian jurisdictions have not imposed a statutory duty of disclosure: the extent of disclosure required under the common law is determined simply by considerations of fairness.⁴² In the context of electronic surveillance, a leading criminal practice manual doubts whether there is any legal duty pre-trial to disclose material obtained by covert operations: ‘In Australia, the prosecution does not have a duty to disclose, prior to criminal proceedings, that material derived from electronic surveillance will be used in prosecution.’⁴³ A recent report by the New South Wales Law Reform Commission (NSWLRC) examining the right to silence recommended that the pre-trial disclosure of evidence should be formalized

40 Bronitt and Roche, above n. 10 at 101.

41 Under the legislation, an Annual Report detailing the certificates granted or refused must be tabled in the Parliament: e.g. *Third Annual Report under section 15T 1998–1999* (Cth, 1999). In some jurisdictions, the Ombudsman plays additional monitoring and inspection roles: *Law Enforcement (Controlled Operations) Act Annual Report 2000–2001* (NSW Ombudsman, October 2001); *Report Under Part 1AB, Division 2A of the Crimes Act 1914* (Cth Ombudsman, December 2002).

42 The High Court considered prosecutorial disclosure in *Lawless v The Queen* (1979) 142 CLR 659; see also *R v Ward* [1993] 2 All ER 577.

43 B. Schurr, *Criminal Procedure (NSW)* (LBC Information Services: Sydney, 1996) ch.8, para. 8. 1430.

in legislation, though recommended against imposing specific disclosure requirements relating to surveillance material.⁴⁴ This compares unfavourably with the Canadian position, where the Criminal Code 1985, s. 189(5), mandates pre-trial disclosure of surveillance evidence, including the transcript, to the defence.

Even in cases where the covertly obtained material is relevant to the defence case, disclosure of the existence or details of undercover operations may be resisted by the prosecution on the grounds of public interest immunity.⁴⁵ Police will vigilantly protect the identity of undercover police and informers, as well as the methods used in covert operations. Within the balancing framework underlying the doctrine of public interest immunity, the fair trial interests of the accused are weighed against the public interest in promoting effective covert law enforcement. A recent study of relevant trial decisions reveals that this balancing almost universally favours the suppression of evidence that would otherwise disclose details of undercover operations, including material that was essential to ensuring a fair trial.⁴⁶

In this context, the law governing disclosure in Australia compares unfavourably with the position in other jurisdictions. In Canada, although there is no express constitutional requirement of disclosure, the Supreme Court has held that the prosecution is under a duty of disclosure to the extent necessary to ensure the accused may make 'full answer and defence'.⁴⁷ In cases where entrapment is raised, the police and prosecutors are obliged to reveal material relating to undercover operations. In *R v Campbell*,⁴⁸ for example, the defence applied for a stay on the ground of entrapment. In the course of this application, they sought, but were denied, access to legal advice received by the Royal Canadian Mounted Police (RCMP) from the Department of Justice lawyers on the legality of the reverse-sting used against the defendants. The Supreme Court had to determine whether solicitor-client privilege attached to this communication, noting that disclosure of otherwise privileged material would be needed to allow

44 NSWLRC, *Report 95: The Right to Silence* (2000), Recommendation 5(f); and NSWLRC, *Report 98: Surveillance: An Interim Report* (2001), para. 9.60: concluded that 'there is no need for provisions in the proposed surveillance legislation to deal with pre-trial disclosure of surveillance material'. Cf. Bronitt, above n. 2 at 203–5.

45 In England and Australia, public interest immunity evolved from Crown privilege, and attaches to material whose disclosure would prejudice public policy. In Canada, the courts have continued to use the terminology of privilege, distinguishing between claims by 'class' or 'case-by-case'. Confusingly, Canadian courts use the term public interest immunity to describe claims that the Crown and its agents are immune from legislation: see, for example, *R v Campbell* [1999] 1 SCR 565 at paras. 26–41.

46 H. Mares, 'Balancing Public Interest and a Fair Trial in Police Informer Privilege: A Critical Australian Perspective' (2002) 6(2) *International Journal of Evidence and Proof* 94.

47 *Stinchcombe* (1991) 3 SCR 326 at 340.

48 [1999] 1 SCR 565.

the accused to make full answer and defence. On the facts, however, the Supreme Court found that the RCMP had waived this privilege because they had relied on the existence of this legal advice to support their claim of good faith (if accepted, this would have defeated the claim of entrapment).

Even assuming there is adequate disclosure that the police had employed a controlled operation against the defendant, the Federal Act in Australia further limits the defence right to challenge the validity of any authorization certification during the trial. A privative or conclusive proof clause in s. 15U(1) provides that in a prosecution, the certificate is 'conclusive evidence that the authorizing officer who gave the certificate was satisfied as to the facts stated in the document'. This presumption of regularity in the issuance of the certificate applies only during the trial itself, which presumably leaves it open for the defence to challenge its legality by judicial review in collateral proceedings.⁴⁹

In the rare case where a court rules that an authorization certificate had no legal effect (for example, where the operation occurred outside the duration specified in the certificate), what are the implications? If there is a trial underway, the defence could seek exclusion of the evidence obtained on the grounds of illegality. Judicial exclusion is discretionary and, as already noted, in this balancing of interests crime control invariably trumps individual rights and the broader constitutional values related to the Rule of Law. Even if the material is excluded, there may be other admissible evidence, such as a confession, that could still sustain a conviction.

Although there are regulatory weaknesses in the federal statutory regime, it is clear that legislative control of controlled operations is desirable from both a liberal and public policy perspective. A statutory framework has the effect of reversing the traditional common law approach to policing, which is that investigators are free to do anything unless expressly prohibited by law.⁵⁰ Under an authorization scheme, before police engage in such operations they must first justify, to a superior officer not involved in the operation, the grounds for covert action by reference to a set of statutory criteria. Not only does

49 Judicial review of action taken by federal law enforcement officers may be instituted under the Administrative Decisions (Judicial Review) Act 1977 (Cth). However, decisions relating to telecommunications interception have been expressly excluded under sch. 1 to this Act. Collateral proceedings seeking judicial review of the legality of police action, such as those relating to arrest and search warrants, are rare in Australia. Legal aid for defendants is necessarily directed to providing legal representation during the trial rather than instituting collateral proceedings to test the legality of police action. By contrast, collateral proceedings have been used extensively to contest the legality of decisions taken by other investigative agencies and tribunals, though in these cases the petitioners are well-resourced businessmen or corporations: M. Allars, 'Reputation, Power and Fairness: A Review of the Impact of Judicial Review upon Investigative Tribunals' (1996) 24(2) *Federal Law Review* 235.

50 *Malone v Metropolitan Police Commissioner* [1979] Ch 344 at 367 per Megarry VC.

this scheme impose restrictions on the scope and duration of covert policing operations, it also provides a record of the grounds believed to warrant such action. This procedure furnishes material that can be subsequently used by the defence at trial to challenge the legality of investigative methods. The imposition of statutory time limits also rectifies the serious threat to privacy in the existing framework, whereby suspects may be targeted for highly intrusive, potentially unlimited, covert investigation.

ii. Canadian Approaches to Entrapment: Clear Lines and Wide Exemptions

Before the Charter, Canadian courts were reluctant to recognize any remedies for entrapment. This position, reflecting the stance adopted in England discussed above, meant that entrapment afforded no defence. In *R v Amato*,⁵¹ the majority of the Supreme Court of Canada affirmed a conviction for trafficking in narcotics even though an undercover police officer had persistently solicited the accused to sell him cocaine and had made implied threats of violence. Dissenting from the majority, Justice Estey argued that entrapment should be recognized as a defence at common law, and on this ground would have stayed proceedings in order to prevent the administration of justice being brought into disrepute.

Six years later, the Supreme Court of Canada returned to entrapment, reversing the approach adopted in *Amato*. In *R v Mack*⁵² the Supreme Court fashioned a remedy for entrapment based on the abuse of process doctrine. Although not expressed in terms of the Charter rights or jurisprudence, it was clear that the Supreme Court was now prepared to take decisive action, including nullifying indictments, in order to strengthen the protection of individual rights in the administration of justice. The court stressed that entrapment warranted a permanent stay of proceedings as an abuse of process, rather than an acquittal. The rationale for the remedy related to the importance of maintaining public confidence in the judicial process rather than as a means of disciplining police or prosecutors.⁵³

As entrapment was a matter independent of guilt or innocence, *Mack* held that it had to be established by the accused on a balance of probabilities *after* the accused's guilt has been established by the jury. Under this model, it is the judge, rather than the jury, who decides whether entrapment has occurred. This is because the judge is the best person to determine whether the state's activities would bring the administration of justice into disrepute. It should be noted that this approach diverges from the procedure recommended by the

51 (1982) 69 CCC (2d) 31.

52 [1988] 2 SCR 903.

53 *Ibid.* at 941-5.

House of Lords in *R v Looseley*,⁵⁴ where it was suggested that entrapment should be raised by the defence and determined by the trial judge *before* the proceedings commence.

The definition of entrapment developed in *Mack* has a number of elements: police are only entitled to provide an opportunity to commit crime where they possess reasonable suspicion that the person was already engaged in criminal activity, or in the course of a *bona fide* inquiry into crime in a high crime area. Even if there is a reasonable suspicion or a *bona fide* inquiry, police should never go beyond providing the suspect with an opportunity to commit a crime and actually induce the commission of a crime. A reasonable suspicion is more than a hunch but less than reasonable and probable grounds to believe that a person has committed a specific crime. On the facts in *Mack*, the Supreme Court determined that the police acted with reasonable suspicion in conducting a six-month drug sting because the accused was a former drug user with several drug convictions, despite the fact that the accused told the police informer he was only interested in real estate. On the other hand, the police officer in *R v Barnes*, who had a (correct) hunch that a scruffily dressed male who looked around a lot was selling marijuana, did not have a reasonable suspicion because her impressions of the suspect were too general and subjective.⁵⁵

Even where reasonable grounds for suspicion are absent, acting in good faith can still provide a refuge for police. In *Barnes*, although police did not have a reasonable suspicion, in effect engaging in a form of random virtue-testing of citizens, the Supreme Court held there was no entrapment because the police were acting pursuant to a *bona fide* inquiry into criminal activity: in this case, by offering a person an opportunity to commit the crime because he was present in a place (the Granville Street Mall in Vancouver) associated with the particular criminal activity. McLachlin J dissented on the basis that the high crime area was described by the police very broadly and that in her opinion:

Determination that the police were operating in the course of a bona fide inquiry . . . requires the court to consider not only the motive of the police and whether there is crime in the general area, but also other factors relevant to the balancing process, such as the likelihood of crime at the particular location targeted, the seriousness of the crime in question, the number of legitimate activities and persons who might be affected, and the availability of other less intrusive investigative techniques.⁵⁶

While the entrapment doctrine in Canada appears to place limits on proactive policing, in practice there remains considerable scope for

54 [2001] 4 All ER 897 at 903 *per* Lord Nicholls, 909 *per* Lord Hoffmann and 926 *per* Lord Hutton.

55 *R v Barnes* (1991) 63 CCC (3d) 1.

56 *Ibid.* at 25.

police to engage in random virtue-testing provided that intelligence supports the belief that the areas are associated with the crimes being investigated, typically drugs or prostitution. In other words, the police can offer someone an opportunity to sell drugs or solicit prostitution simply because that person is in an area deemed to be a crime 'hot-spot' even if they do not have a reasonable suspicion that the person is engaged in the particular crime.

Even if they have reasonable suspicion or are acting on a *bona fide* inquiry, *Mack* imposes one further safeguard, namely that police should never go beyond providing the suspect with an opportunity to commit a crime and actually induce the commission of a crime. The police will cross this line if their conduct is so objectionable that it brings the administration of justice into disrepute and would have induced an average person to commit the crime. Several telephone calls to an old friend to set up a drug buy would not cross the line, but persistent solicitation accompanied with veiled threats would.⁵⁷

Lamer J in *Mack* emphasized that in determining whether police employed means which go further than providing an opportunity, the courts may consider a range of factors including:

- the type of crime being investigated and the availability of other techniques for the police detection of its commission;
- whether an average person, with both strengths and weaknesses, in the position of the accused would be induced into the commission of a crime;
- the persistence and number of attempts made by the police before the accused agreed to commit the offence;
- the type of inducement used by the police including deceit, fraud, trickery or reward;
- the timing of the police conduct, in particular whether the police have instigated the offence or become involved in on-going criminal activity;
- whether the police conduct involves an exploitation of human characteristics such as the emotions of compassion, sympathy and friendship;
- whether the police appear to have exploited a particular vulnerability of a person such as a mental handicap or a substance addiction;
- the proportionality between the police involvement, as compared with the accused, including an assessment of the degree of harm caused or risked by the police, as compared with the accused, and the commission of any illegal acts by the police themselves;
- the existence of any threats, implied or express, made to the accused by the police or their agents;

⁵⁷ *R v Showman* (1988) 45 CCC (3d) 289 (SCC).

- whether the police conduct is directed at undermining other constitutional values.⁵⁸

Mack requires police to structure and justify their covert activities within a new legal framework: it does not, however, constitute a bar on the use of proactive policing methods. By clarifying the boundaries of entrapment, the decision indeed legitimated the dubious practice of random virtue-testing. Paradoxically, in this sense, the decision may have encouraged rather than constrained the expansion of covert policing in Canada.

The legal issue that remained unresolved for law enforcement agencies that engaged in offence-facilitation was the propriety of ‘reverse-stings’. Reverse-sting operations typically involved the controlled delivery of narcotics to suspected dealers. The legal hazards facing the RCMP and their agents involved in these operations were exposed in *R v Campbell*.⁵⁹ In this case, the Supreme Court examined the legal and procedural issues arising from a police operation undertaken in the early 1990s.⁶⁰ Before the appeal was heard by the Supreme Court, Federal Parliament had moved to create a firmer legal foundation for these operations, passing a new Controlled Drugs and Substances Act in 1996 which conferred immunity on police who were supplying drugs in similar operations. Before this Act police had no legal authority to engage in drug dealing: existing regulations merely provided for a narrow law enforcement exemption for drug possession. In the absence of an effective immunity, police engaging in reverse-stings risked severe judicial condemnation by way of exclusion of evidence or stay of proceedings if the matter went to trial.

Like *Ridgeway* in Australia, the decision in *Campbell* exposed the lack of legal authority for the controlled delivery of narcotics. A key question on appeal was whether a reverse-sting involving police supply of illegal drugs to drug organization executives constituted an abuse of process and therefore warranted a stay of proceedings. A collateral procedural question was whether the police were obliged to disclose legal advice they had obtained from the Department of Justice concerning the legality of posing as sellers and offering drugs for sale. The court allowed the appeal in part, directing that the trial court should examine the material to determine whether the police acted in a good faith belief in the legality of reverse-sting operations. The fact that the RCMP acted unlawfully in supplying drugs was a matter that

58 *R v Mack* [1988] 2 SCR 903 at 966.

59 [1999] 1 SCR 565.

60 In 1991, the police initiated a reverse-sting operation using undercover police to pose as cannabis sellers. Using Salavatore Shirose, the police contacted two potential purchasers. John Campbell eventually participated as a financier for one of the two purchasers. In 1992 Campbell and Shirose agreed to pay \$270,000 for 50 kilos of cannabis resin. The defendants were subsequently arrested and charged with conspiracy to traffick and conspiracy to possess cannabis for the purpose of trafficking.

the trial court had to consider, along with other factors, in determining whether there was an abuse of process. In this context, since there was little evidence of entrapment, abuse of process could only be established on the more general ground of a serious violation of the community's sense of fair play and decency disproportionate to the societal interest in the effective prosecution of criminal cases.⁶¹ Noting that Parliament had moved to create statutory exemptions for such operations in 1996, the court acknowledged the limits of judicial law-making in this area:

If some form of public interest immunity is to be extended to the police to assist in the 'war on drugs', it should be left to Parliament to delineate the nature and scope of the immunity and the circumstances in which it is available . . . In this country it is accepted that it is for Parliament to determine when in the context of law enforcement the end justifies the means that would otherwise be unlawful.⁶²

The introduction of immunities for law enforcement purposes in Bill C-24 was not *solely* a reaction to *Campbell*. Indeed, as noted above, the problems facing narcotics police engaged in reverse-stings had been addressed by legislation in 1996. The emergence of Bill C-24 was related more generally to the rising tide of organized crime in Canada, particularly in Quebec. The deaths in that province of a young boy when a bomb exploded outside a biker gang hang-out and an investigative journalist who was murdered for exposing organized crime gangs led to a federal government inquiry. The Department of Justice background material on Bill C-24 refers to *Campbell*, but only to emphasize the judicial view that it is for Parliament, not the courts, to determine the scope of covert police powers. Clearly the insertion of expanded immunity provisions was opportunistic. As well as containing new offences and police powers, Bill C-24 (which took effect in January 2002) established a framework for granting immunity from criminal prosecution for conduct committed in the course of criminal investigations. This power resides in the Executive, namely the Federal Solicitor-General or Provincial Attorney-General and their delegates.

In terms of safeguards, Bill C-24 creates limited rather than blanket immunity. The designation granted is conditional in the sense that it may limit the duration, nature of conduct in the investigation, and the acts or omissions that would otherwise be criminal: s. 25(7). The justification is further limited by a requirement that the officer must have a reasonable belief that the criminal activity, as compared with the nature of the offence under investigation, is 'reasonable and proportional in the circumstances, having regard to such matters as the nature of the act or omission, the nature of the investigation and the

61 *R v Campbell* [1999] 1 SCR 565 at 566 para. 22, citing *R v Conway* [1989] 1 SCR 217.

62 *R v Campbell* [1999] 1 SCR 565 at 594-5 paras. 39 and 41.

reasonable availability of other means for carrying out the public officer's law enforcement duties': s. 25(8)(c). Conduct that involves serious loss or damage to property requires further conditions to be met and the designation cannot relieve liability for intentional or negligent causing of death or bodily harm; wilful attempts to obstruct, pervert or defeat justice; or violating the sexual integrity of another: s. 25(11). Although limited, the range of offences which may be included in the designation extends to any offences contained in the Criminal Code or other Act.

Section 25(2) of the amended Criminal Code identifies the principle behind the amendments as follows:

It is in the public interest to ensure that public officers may effectively carry out their law enforcement duties in accordance with the rule of law and to that end, to expressly recognise in law a justification for public officers and other persons acting at their direction to commit acts or omissions that would otherwise constitute offences.

The principle behind the Act purports to promote compliance with the Rule of Law, yet conferring prospective immunities on police constitutes a direct threat to important aspects of that cherished ideal. The Rule of Law not only requires a lawful basis for the action of public officials, it also encompasses the ideal of equality before the law.⁶³ As the Supreme Court of Canada noted in *Attorney General of Canada v Lavell*:

It means again equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary courts; the rule of law in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of ordinary courts.⁶⁴

In the *Patriation Reference* case, the Supreme Court also noted the multifaceted quality of the phrase:

The 'rule of law' is a highly textured expression . . . conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority.⁶⁵

The drafters of this Bill seem to have missed the significance of this fundamental principle of constitutional theory.

Bill C-24 further legitimates law enforcement criminality through its terminology. Significantly, the language used to describe police immunity has shifted from one of 'exemption' to 'justification'. This is

63 See A. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn (Macmillan: London, 1959) at 202-3.

64 [1974] SCR 1349 at 1366. Cited with approval in *R v Campbell* [1999] 1 SCR 565 at 583, para. 18. See also *Roncarelli v Duplessis* [1959] SCR 121 at 142, where Rand J held that 'the rule of law [is] a fundamental postulate of our constitutional structure'. The preamble of the Charter reflects this commitment to the Rule of Law: 'Whereas Canada is founded upon principles that recognise the supremacy of God and the rule of law.'

65 *Re: Resolution to Amend the Constitution* [1981] 1 SCR 753 at 805-6.

not merely a semantic change. In legal terms, the law enforcement conduct is no longer merely excusable, but rather is now lawful. Courts and commentators alike have had difficulties drawing conceptual distinctions between criminal defences as either excuses or justifications, with the effect that many scholars dispute the utility of such binary classification.⁶⁶ In this context, however, the explicit legislative designation of law enforcement conduct as ‘justified’ serves to bolster the legitimacy of otherwise criminal conduct, making it more difficult for courts to conclude that the evidence was improperly obtained or the proceedings constitute an abuse of process. Will these legislative efforts be successful? It is at least arguable that the jurisdiction of the courts to prevent an abuse of process, because of its inherent nature, cannot be ousted by legislative action. It remains to be seen whether the judiciary is capable of resisting the countervailing claims of Parliamentary supremacy, and invoking its power to prevent an abuse of process in cases where the investigative illegality purports to be justified by Bill C-24.

Another concern related to the Rule of Law is the absence of a judicial officer or independent person exercising a review function in relation to the grants of immunity to police officers. Under Bill C-24, the designation conferring the immunity is made by a member of the Executive, the Federal Solicitor-General or Provincial Attorney-General or relevant Minister, acting on the advice of a senior official responsible for law enforcement: s. 25(4). In situations of emergency, such powers may be exercised by that senior official alone, though the designation must not exceed 48 hours. The Charter contains an explicit protection in s. 8 against unreasonable search or seizure. The Supreme Court jurisprudence has sought to draw the boundaries of ‘reasonableness’ in relation to privacy intrusions for law enforcement purposes, laying particular emphasis on the importance of prior authorization and the importance of balancing competing interests by a person capable of acting judicially (not necessarily being a judge).⁶⁷ The concern about independence supports the use of judicial officers, such as magistrates, or indeed retired judges or senior members of the legal profession as persons displaying independence of mind and judiciousness of character. While the Act meets the first standard, it may be questioned whether the chief law officer of the Executive is sufficiently independent to meet this standard. This internal process of authorization may be compared with senior police officers being given the power to issue their own search warrants—a situation which still prevails in some Australian jurisdictions. Clearly, s. 8 of the Charter could form the basis of constitutional challenge to Bill C-24. The advantage of challenging the designations granted under Bill C-

66 S. Bronitt and B. McSherry, *Principles of Criminal Law* (LBC Information Services: Pymont, 2001) 291–2.

67 *Hunter v Southam* [1984] 2 SCR 145; *R v Noble* (1984) 16 CCC (3d) 146.

24 under the Charter is that where there has been a violation of Charter rights, s. 24 provides that any evidence thereby obtained may be excluded if the admission of it would bring the administration of justice into disrepute.

iii. Sociolegal Perspectives on the Judicial Regulation of Entrapment

The reception by police of a judicial decision depends, not surprisingly, on its origin, content, and context, and the interaction between these variables. So, for example, decisions of superior courts may attract publicity and attention; but equally they may be unknown to operational officers if they are not communicated or may be ignored when custom and practice are strong in a particular procedure.⁶⁸

The decision in *Mack*⁶⁹ addressed the problem of entrapment head-on. By adapting and extending the abuse of process doctrine, the Supreme Court of Canada devised a threshold for unlawful offence-facilitation which could be easily understood and translated into policing practice. It also provided some margin of tolerance for proactive policing: for example, it allowed the targeting of 'hot-spots' for random virtue-testing, rather than limiting inducement to persons reasonably suspected of crime. As Table 1 reveals, the decision is regularly applied by the lower courts.

Table 1 Summary of Judicial Consideration of *R v Mack* [1988] 2 SCR 903 by other Canadian courts

Distinguished	2
Applied	–
Followed	79
Approved	–
Considered	111
Explained	–
Referred to	20
Total	212

Source: WestlawCARSWELL; <http://ecarswell.westlaw.com/using the Quickcite function>, accessed 23 September 2003.

Ridgeway,⁷⁰ by contrast, avoided confronting the problem of entrapment, instead focusing narrowly on the illegality of police actions in controlled operations. By so doing, the majority of the High Court offered little general guidance to undercover police engaged in offence-facilitation operations. Although providing a remedy to the

⁶⁸ D. Dixon, *Law in Policing: Legal Regulation and Police Practices* (Clarendon Press: New York, 1997) 205.

⁶⁹ [1988] 2 SCR 903.

⁷⁰ (1995) 184 CLR 19.

Table 2 Summary of Judicial Consideration of *Ridgeway v R* (1995) 184 CLR 19 by other Australian courts

Distinguished	11
Applied	7
Followed	1
Approved	1
Considered	18
Explained	2
Referred to	10
Total	50

Source: WestlawCARSWELL; [http://ecarswell.westlaw.com/using the Quickcite function](http://ecarswell.westlaw.com/using-the-Quickcite-function), accessed 23 September 2003.

defendant in this specific instance, Australian law has remained permissive in its attitude to undercover impropriety. Indeed, the majority in *Ridgeway* went to some lengths to explain that there was nothing wrong with deception or trickery and that most forms of police entrapment would not warrant exclusion of evidence.⁷¹ As Table 2 suggests, the High Court decision hardly constituted an impediment to covert policing, being distinguished more commonly than it is applied.

The impact of *Ridgeway* on trial practice has been negligible for a number of reasons. First, the scope of the judicial remedy developed by the High Court was restricted to the somewhat 'exceptional' facts in *Ridgeway*. The joint judgment of Mason CJ, Deane and Dawson JJ held that evidence was only likely to be excluded where the illegal conduct of the police creates an *essential ingredient* of the charged offence, or is itself the principal offence to which the defendant's offence is ancillary.⁷² Deane J himself had acknowledged in the application for leave to appeal that this was a very unusual category:

But this case does fall into a very unusual category, does it not, in that here the police have illegally imported heroin for the purpose of procuring an offence whose basis is the illegal importation of heroin.⁷³

In cases where the police involvement does not go as far as to constitute an essential ingredient of the offence or give rise to ancillary liability, but nevertheless induces an accused to commit the offence, the High Court held that the public interest in the conviction and punishment of those guilty of crime is likely to prevail over other considerations, and the evidence should generally be admitted.⁷⁴

That *Ridgeway* was confined to its 'exceptional facts' is apparent from a study of reported and unreported cases in which the decision

⁷¹ Bronitt and Roche, above n. 10.

⁷² *Ridgeway v The Queen* (1995) 184 CLR 19 at 39.

⁷³ *Ridgeway* application for special leave to appeal to the High Court, no. A17 of 1993 at 5.

⁷⁴ *Ridgeway*, above n. 71 at 39.

was raised by the defence: in the three-year period following the ruling, only in one out of 11 cases in which *Ridgeway* was raised was the decision applied rather than distinguished.⁷⁵ This trend is also confirmed by the data presented in Table 2. By contrast, *Mack* has had relatively greater instrumental effect, being followed more often than distinguished by lower courts: see Table 1.

Why does the judicial remedy in *Ridgeway* consistently favour the interests of crime control? The answer is probably related to the balancing exercise at the heart of the discretion. The trial judge is required to balance the desirability of bringing offenders to justice against countervailing public policy considerations, namely, the importance of maintaining the integrity of the courts and ensuring proper observance of the law and minimum standards of propriety by those entrusted with law enforcement. Crime control values, particularly where the cogency of the evidence and seriousness of the offence is high, invariably trump due process values.⁷⁶ At the macro-level, 'balancing' metaphors have been described as the scourge of criminal justice debates.⁷⁷ At the micro-level, the resort to balancing interests in judicial discretion in a range of areas has been subject to extensive critique from both sociolegal and liberal perspectives.⁷⁸ Not only does this approach to judicial discretion tend to sacrifice the fundamental rights of suspects to the exigencies and efficacy of criminal investigation, but it also condones and promotes strategic rule-breaking and the law enforcement mentality that 'the ends justify the means'!

The point made here is not that the law as developed and applied in the higher courts is being routinely subverted by police and trial practice, but rather that the law itself legitimates, or at least condones, many forms of investigative impropriety. Within the balancing framework of the exclusionary discretion, consistent with the findings of Doreen McBarnet,⁷⁹ fundamental values of due process are vaunted in judicial rhetoric, yet when subjected to empirical scrutiny are typically subordinated to the interests of crime control.

Adverse evidential rulings are an inadequate means of regulating investigative misconduct for further reasons. Even in those rare cases where tainted evidence is excluded, there is still the possibility that guilt can be proved by other means, for example, by evidence of

75 Bronitt and Roche, above n. 10 at 88–9.

76 Sharpe, above n. 2 at 170–1.

77 A. Ashworth, 'Crime, Community and Creeping Consequentialism' [1996] *Criminal Law Review* 220 at 229.

78 Bronitt and Roche, above n. 10; Mares, above n. 45.

79 D. McBarnet, *Conviction—Law, the State and the Construction of Justice* (Macmillan: London, 1981) at 155–6. For a recent empirical study, confirming similar trends, in the use of the discretion to exclude evidence on the grounds of public policy, see B. Presser, 'Research Note: Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence' (2001) 25 *Melbourne University Law Review* 757.

confession, identification, possession of incriminating articles or testimony of an accomplice. For this reason the House of Lords recently held in *Looseley* that granting a stay of proceedings is the only way to avoid damage to judicial integrity that is caused by allowing such a conviction.⁸⁰

The Canadian approach to entrapment, since it does not require this weighing of competing public policies, seems less susceptible to judicial subversion. The Supreme Court in *Mack* established boundaries between acceptable and unacceptable law enforcement conduct rather than delegating this task to the trial judge to balance and weigh the competing societal interests in each individual case. This is not to suggest that discretion is absent in the Canadian test. Clearly different courts may reach different conclusions about the existence or significance of particular facts, for example, whether the reasonable suspicion threshold has been reached or whether the police operation was *bona fide*.

It is important not to overstate the differences between the law in Canada and Australia. Within both legal systems due process can be subordinated to crime control. Indeed, the weak link in the Canadian approach to entrapment is the toleration of random virtue-testing. Targeting places rather than persons suspected of crime is not unproblematic.⁸¹ The intrusion into the lives of randomly selected citizens is unjustifiable. There is a danger that dispensing with individualized reasonable suspicion and replacing it with communal suspicion simply promotes over-policing, albeit in covert form, of minorities. Random virtue-testing tends to compound existing problems of selective law enforcement and over-policing of minority communities. It has been argued that proactive investigation should be redirected away from the crimes of the powerless toward the crimes of the powerful.⁸² A preferable alternative to random virtue-testing, suggested by some commentators, is for the police to mount surveillance of crime 'hot-spots' in order to identify persons against whom a case of reasonable suspicion could then be constructed; this approach would not only be effective, but would ensure that the methods used were neither arbitrary nor disproportionate.⁸³

80 Another difficulty with the approach in *Ridgeway* is arbitrariness. In some cases, as in *Ridgeway*, a stay may be granted because the police misconduct related to a central element of the offence. In other cases, similar misconduct may be evident, but as it does not constitute an element of the offence charged, the proper remedy is exclusion but not a stay. While logically coherent, the inconsistent availability of a stay is likely to communicate confused messages from the bench to law enforcement officials about permissible and impermissible evidence-gathering techniques.

81 Ashworth, above n. 14 at 168.

82 Braithwaite, Fisse and Geis, above n. 12; Bronitt and Roche, above n. 10.

83 D. Omerod and A. Roberts, 'The Trouble with Teixeira: Developing a Principled Approach to Entrapment' (2002) 6(1) *International Journal of Evidence and Proof* 38.

Rather than placing limits on undercover policing and offence-facilitation as predicted by some, *Ridgeway* has had the reverse effect. Most significantly, the decision has closed off to defence lawyers access to entrapment remedies being fashioned in Canada and England. In the decade before *Ridgeway*, state courts in Australia had begun to address the problem of entrapment by developing a range of remedies drawing on the law in Canada, England and the United States.⁸⁴ *Ridgeway* effectively consigned these early developments to the dustbin.

iv. Beyond Mack and Ridgeway: The European Standard for Entrapment

The distinction fashioned by Canadian courts between active incitement and passive opportunity-creation of crime has emerged as a significant aspect of the entrapment jurisprudence developed by the European Court of Human Rights. In *Teixeira de Castro v Portugal*,⁸⁵ undercover police in Portugal approached a drug user pressuring him to introduce his supplier to them. Unable to locate the person who supplied cannabis to him, the drug user introduced the accused as a potential supplier of heroin. The informer arranged a meeting with the accused during which the undercover police indicated that they wished to buy 20 grams of heroin. The accused procured the heroin and was arrested and subsequently convicted of a drug offence. Having exhausted domestic remedies, the accused appealed to the European Court of Human Rights, alleging that he had been deprived of a fair trial guaranteed by Article 6 of the European Convention on Human Rights (ECHR).

The court held that Article 6 is breached where law enforcement officials do not confine themselves to investigating criminal activity in an essentially passive manner, but actively incite the commission of an offence. The investigative techniques used in this case caused unfairness in the administration of justice because the police officers had acted on their own initiative without judicial supervision or good reasons to suspect that the accused was a drug trafficker. Furthermore, there was no evidence to support the argument that the accused was predisposed to commit the offence—indeed, the accused had had to locate the drug from a third party and was found in possession of no more drugs than were being solicited by the police. The court concluded that:

... the two police officers' actions went beyond those of undercover agents because they instigated the offence and there is nothing to suggest that without their intervention it would have been committed. That intervention and its use in the impugned criminal proceedings meant

⁸⁴ W. Harris, 'Entrapment' (1994) 18(4) *Criminal Law Journal* 197 at 206–14.

⁸⁵ [1998] 28 EHRR 101.

that, right from the outset, the applicant was definitively deprived of a fair trial.⁸⁶

Entrapment was viewed not merely as a threat to judicial integrity or legality, but also to the underlying fairness of criminal proceedings.

With the incorporation of the ECHR into English law by the Human Rights Act 1998, the courts are obliged to construe domestic law in accordance with these principles or, in cases of conflict, make a declaration of incompatibility. The domestic incorporation of human rights is likely to have 'flow on' effects in related common law jurisdictions, such as Canada and Australia. The prospect that the common law development must be cognizant of fundamental rights means that English decisions are better placed to influence Charter jurisprudence in Canada. Even in Australia, where there is no entrenched Bill of Rights, the High Court has recognized that international human rights law and relevant jurisprudence may be a legitimate influence on the future development of the common law.⁸⁷

The House of Lords in *Looseley* considered whether the active/passive distinction developed in the ECHR entrapment jurisprudence was consistent with domestic English law. Their lordships concluded that there was no incompatibility, but cautioned against applying the active/passive distinction in a mechanical or formalistic fashion. The distinction was important but not necessarily decisive. Indeed, several members of the court admitted that there may be situations where active instigation and persistence might be legitimate to overcome the wariness of street criminals who were acquainted with undercover police tactics.⁸⁸

The proper approach to entrapment involved consideration of a 'cluster of factors' including: the reason for the operation; whether police action was based on reasonable suspicion and subject to proper supervision; the nature of the offence; and the extent of police participation in the crime (*per* Lords Hoffmann and Nicholls). Lord Hutton went further, advocating the adoption of the dissenting opinion of McHugh J in *Ridgeway*. In cases where the crime was artificially created by misconduct the proceedings should be stayed, a question which McHugh J held required consideration of four matters:

- (1) Whether conduct of law enforcement officials induced the offence.
- (2) Whether, in proffering the inducement, the authorities had reasonable grounds for suspecting that the accused was likely to commit the particular offence or one that was similar to that

86 *Omerod and Roberts*, above n. 82; *Teixeira de Castro v Portugal* [1998] 23 EHRR 101 at para. 39.

87 *Mabo and others v Queensland (No. 2)* (1992) 175 CLR 1 at 42 *per* Brennan J.

88 *R v Looseley* [2001] 4 All ER 897 at 915 *per* Lord Hoffmann, at 925 *per* Lord Hutton. For an analysis of this case, see Bronitt, above n. 22.

offence or were acting in the course of a *bona fide* investigation of offences of a kind similar to that with which the accused has been charged.

- (3) Whether, prior to the inducement, the accused had the intention of committing the offence or a similar offence if an opportunity arose.
- (4) Whether the offence was induced as a result of persistent importunity, threats, deceit, offers of rewards or other inducements that would not ordinarily be associated with the commission of the offence or a similar offence.⁸⁹

The role of the criminal predisposition in (3) requires some clarification. Predisposition has been a prominent aspect of debate about entrapment since the United States Supreme Court sought to limit the remedy to otherwise innocent persons (that is, citizens who lacked subjective predisposition to commit the crime).⁹⁰ A focus on the intention of the suspect ostensibly limits proactive policing: in practice, however, the qualification simply legitimates entrapment techniques against persons ‘known’ to the police. Indeed, the House of Lords in *Looseley* expressed concern that denying the remedy to persons with proven criminal propensities would have the effect of forever rendering convicted persons ‘fair game’ for entrapment. As Lord Nicholls concluded: ‘Predisposition does not negate the misuse of state power.’⁹¹

Another important clarification in *Looseley* was the disregard of offence-seriousness as a relevant consideration: Lord Hoffmann stressed that judicial regard to the nature of the offence did not extend to ‘offence-seriousness’ because this would condone a position where the ends might justify the means.⁹²

The House of Lords in *Looseley* seemed mindful of the practicalities of law enforcement. Their lordships sought to draw a line between acceptable and unacceptable offence-facilitation. *Looseley* may be viewed, like *Mack*, as a guideline judgment on entrapment—a decision which addresses law enforcement officials, not just trial judges and lawyers. This may be contrasted with the earlier decision of the House of Lords in *Latif*,⁹³ where the court expressly rejected the usefulness of general guidelines in this area. The test for an abuse of process was simply whether the police conduct was so unworthy or shameful that it would be an affront to public conscience: in Lord Steyn’s view, this test involved balancing countervailing considerations of ‘policy and

89 *Ridgeway v The Queen* (1995) 184 CLR 19 at 92.

90 *Sorrells v United States* (1932) 287 US 435; *United States v Russell* (1973) 411 US 423; *Jacobson v United States* (1992) 503 US 540. The case law is reviewed in Sharpe, above n. 2 at 170–1.

91 *Looseley*, above n. 88 at 904.

92 *R v Looseley* [2001] 4 All ER 897 at 930.

93 (1996) 1 All ER 353.

justice'.⁹⁴ In *Looseley*, this approach in *Latif* was criticized as inviting highly subjective answers and a wide margin for *ex post facto* vetoes of practices that did not meet with judicial approval.⁹⁵

The judicial promise of clarity in this area still remains illusory. Although *Looseley* identified a 'cluster of relevant factors', the House of Lords acknowledged, as did *Mack* and *Ridgeway*, that the weight and importance attached to these vary according to the facts in each case. This approach to entrapment has been criticized by Ashworth, a prominent critic of balancing approaches generally:

This seems to project the test of entrapment into the shadowy and metaphorical world of balancing, where issues of principle may be presented as 'facts' and the relative weight of countervailing factors (and the reasons for assigning that weight) are rarely spelt out.⁹⁶

Is *Looseley* likely to revolutionize proactive policing practices in England? Certainly the decision seeks to regulate what the police can, as well as what they cannot, do. In this respect, *Looseley* compares favourably with *Ridgeway*, which only addresses what the police cannot do, thereby limiting the utility and educative value of the decision from a law enforcement perspective.

The nature and scope of the legal remedies for entrapment differ in Australia and Canada, though the rationale is similarly based on considerations of public policy: namely, that judicial toleration of investigative impropriety would undermine public confidence in the administration of justice. The European Court of Human Rights in *Teixeira* went further than public policy, constructing entrapment as a wider threat to fairness in the administration of justice: this European conception of fairness is not confined to the trial itself, but extends to the pre-trial phase and to the particular methods used to gather evidence. This may be contrasted with the common law, where there is no general duty on the courts to ensure investigative fairness. As we shall explore in Section III below, an exception has emerged in relation to the unfair methods used to obtain confessions. A juridical shift from public policy to unfairness is not merely semantic. If imported into Australia and Canadian law, the expanded right to fairness may provide a wider warrant for judicial control over methods of investigation, not limited to the methods used to obtain confessions.

Basing entrapment remedies on the right to a fair trial rather than public policy has a number of benefits. Fairness is a fundamental value and, unlike the balancing process at the heart of the public policy discretion, is less amenable to trumping by countervailing considerations, such as the importance of bringing offenders charged with serious offences to justice and ensuring that reliable evidence is placed before the courts. Another advantage of the right to fair trial is

⁹⁴ *Ibid.* at 361.

⁹⁵ *Looseley*, above n. 90 at 910 *per* Lord Hoffmann.

⁹⁶ Ashworth, above n. 14 at 170.

that its resilience increases in cases where the charges are serious.⁹⁷ It is precisely in the investigation of serious crime, where the pressures to obtain convictions are strongest, that protection of suspects' rights and remedies against police impropriety are most needed.⁹⁸ As noted above, a balancing process based on weighing competing public interests tends to sacrifice individual rights in the interest of crime control.

III. Legal Responses to Covert Interviewing—The Problem of Elicited Confessions

Subterfuge, ruses and tricks may be lawfully employed by police, acting in the public interest. There is nothing improper in these tactics where they are lawfully deployed in the endeavour to investigate crime so as to bring the guilty to justice. Nor is there anything wrong in the use of technology, such as telephonic interception and listening devices although this will commonly require statutory authority. Such facilities must be employed by any modern police service. The critical question is . . . whether the trick may be thought to involve such unfairness to the accused or otherwise to be so contrary to public policy that a court should exercise its discretion to exclude the evidence notwithstanding its high probative value.⁹⁹

The common law historically displayed little interest in regulating the propriety of evidence-gathering methods used by the police. Confessions, however, constituted a significant exception. The common law voluntariness rule required proof that the confession was obtained voluntarily in the exercise of the suspects' free choice to speak or be silent.¹⁰⁰ Thus confessions obtained by violence, threats or inducements could not be admitted. The English courts also developed a discretion to exclude confessions obtained by trickery and deception: the House of Lords held that the true purpose of such discretion was to uphold the privilege against self-incrimination rather than to discipline the police.¹⁰¹

The approaches in Australia and Canada were variations on this theme. In the 1970s, the Australian courts developed a public policy discretion to exclude improperly or unlawfully obtained evidence,

97 In Australia, the right not to be subject to an unfair trial recognized at common law in *Dietrich v R* (1992) 177 CLR 292 meant that trial of an indigent person facing a serious charge without the benefit of legal representation had to be stayed as an abuse of process.

98 'If the crimes are serious ones, crimes that give rise to great public concern, then it is no less serious for the suspect to be subjected to investigative methods that violate rights or other standards. Seriousness, in other words, is a two-way street': A. Ashworth, 'What is Wrong with Entrapment?' [1999] *Singapore Journal of Legal Studies* 293 at 310.

99 *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159 at 220–1 per Kirby J.

100 *Ibrahim v R* [1914] AC 599.

101 *Sang v R* [1979] 2 All ER 1222 at 1230 per Lord Diplock.

whether real or confessional evidence.¹⁰² At this time, the Canadian courts, before the advent of the Charter, followed the traditional common law approach of refusing to exclude evidence simply because it was obtained by improper or unlawful methods. The Charter profoundly changed judicial attitudes to exclusionary rules in Canada.¹⁰³ With the inclusion of s. 28(2) in the Charter mandating exclusion of evidence obtained in breach of protected rights, the Supreme Court adopted a range of new discretions and remedies. The modern rationale for the exclusion of otherwise reliable confessions in both Australia and Canada can be said to rest on two grounds: unfairness and public policy.

Before considering these in turn, it is desirable to examine the particular evidential concerns related to confessions obtained (whether or not electronically recorded) during covert operations—a practice variously described as ‘covert interviewing’ or ‘surreptitious interrogation’. There are no distinct laws, or even guidelines similar to those regulating custodial interrogation, governing covert interviewing. Rather, the admissibility of such evidence rests on the ordinary rules of evidence, in particular the judicial discretion to exclude evidence on the grounds of unfairness or public policy.¹⁰⁴

An important point, neglected in present judicial analysis, is the overlap between the law governing entrapment and covert interviewing. Although conceptually distinct, in many situations the key elements of the offence and an admission of guilt amount to the same thing. For example, in relation to charges of inchoate offences, a statement made by a suspect to an informer or undercover police officer, ‘Yeah, let’s do the job. . . [i.e. a robbery, drug deal, murder etc.]’ is both a key element of the offence (conspiracy, incitement or attempt) and an incriminating admission.¹⁰⁵ The difficulty, as revealed below, is that different standards have been developed to determine whether police or informers have ‘crossed the line’ in procuring the elements of the offence (entrapment) or eliciting the confession (covert interviewing). A further anomaly arising here is that the privilege against self-incrimination appears only to attach to testimonial rather than physical evidence, a distinction which has been criticized as philosophically and practically flawed.¹⁰⁶

102 *Bunning v Cross* (1978) 141 CLR 54.

103 These changes are reviewed in S. Penney, ‘Unreal Distinctions: The Exclusion of Unfairly Obtained Evidence Under s. 24(2) of the Charter’ (1994) 4 *Alberta Law Review* 782.

104 A. Palmer, ‘Police Deception, The Right to Silence and the Discretionary Exclusion of Confessions’ (1998) 22(6) *Criminal Law Journal* 325.

105 Such inchoate offences generally rest on proof of an agreement, active persuasion or preparatory conduct combined with an intention that the offence will be committed: S. Bronitt and B. McSherry, *Principles of Criminal Law* (LBC Information Services: Pyrmont, 2001) ch. 9.

106 Penney, above n. 101.

A single standard of unfairness, drawing together the threads of voluntariness and public policy, could be developed to regulate the admission of evidence obtained by covert means generally. As Kirby J acknowledged in *Swaffield and Pavic*, cited above, the common law has the potential to develop a holistic approach.

i. Canadian Law ‘Down-Under’: R v Swaffield and Pavic

Prior to the High Court’s decision in *R v Swaffield, Pavic v The Queen*,¹⁰⁷ Australian courts were generally permissive in their attitude to the use of undercover police officers or informers to obtain confession evidence. Undercover officers or informers could use listening devices to record discussions with suspects with few restrictions—indeed, this form of ‘participant monitoring’ fell outside the statutory requirement to obtain a warrant in many jurisdictions. Consequently, suspects could be targeted for indefinite questioning without the protection of the ‘due process’ safeguards otherwise available during custodial interviews, such as the right to silence and legal representation.¹⁰⁸ Also, within the custodial framework, the scope for investigation was limited by statutory time limits in most jurisdictions, which required the suspect to be charged or released within a prescribed period.

In relation to confessions obtained by covert interviewing, courts in Australia were generally prepared to admit this material on the grounds of cogency and relevance, paying little (if any) attention to the threats to the rights to silence or privacy. For example, in *O’Neill v R*¹⁰⁹ the majority of the Queensland Court of Criminal Appeal took the view that the right to silence had no relevance prior to arrest and detention: the right to silence was relevant only to persons in custody facing official police questioning, and therefore a confession obtained by an informer working under the direction of the police was properly admitted. Indeed, in this case, the use of listening devices, rather than raising privacy concerns, was considered a desirable prophylactic against the risk of fabricated confessions by untrustworthy informers.¹¹⁰

By contrast, the adoption of the Charter in Canada significantly altered attitudes to covert interviewing. The Supreme Court first addressed the privacy concerns, ruling that the use of listening devices

107 (1998) 192 CLR 159.

108 For an early article raising this concern see S. Bronitt, ‘Contemporary Comment—Electronic Surveillance and Informers: Infringing the Rights to Silence and Privacy’ (1996) 20(2) *Criminal Law Journal* 15.

109 (1995) 81 A Crim R 458.

110 The High Court decision in *McKinney v R* (1991) 171 CLR 468 was a significant impetus to mandatory taping of confessions. Recognizing the dangers of ‘verballing’ by police, the High Court held that trial judges must warn juries that it is dangerous to convict on the basis of a disputed confession, unless the making of it can be corroborated (for example, by tape recording).

without warrant under the ‘participant surveillance’ exception violated the right to be free from arbitrary search and seizure in s. 8 of the Charter.¹¹¹ By the mid-1990s, the Supreme Court began to re-fashion its evidential rules relating to confessions obtained by deceptive practices.¹¹²

Concerns about the unfairness of covert interviews were addressed in a series of cases litigated before the Supreme Court. These decisions established that a confession unfairly elicited by a state agent (undercover officer or informer respectively) in violation of the suspect’s right to speak or remain silent should be excluded.¹¹³ The court has stressed that the purpose of the right to silence is to prevent the use of state power to subvert the right of an accused to choose whether or not to speak to authorities. The common law right to silence was now subsumed within the wider principle of ‘fundamental justice’ guaranteed by s. 7 of the Charter. The purpose of the right to silence was to impose limits on the power of the state over the suspect and to maintain a balance between their respective interests.¹¹⁴ In *Hebert*, the court advanced the view that:

... our courts must adopt an approach to pre-trial interrogation which emphasizes the right of the detained person to make a meaningful choice and permits the rejection of statements which have been obtained unfairly in circumstances that violate that right of choice.¹¹⁵

The Supreme Court in *Hebert* described that test as ‘essentially objective’ based on an evaluation of the conduct of the police rather than the particular suspect.¹¹⁶ On the facts, the confession in that case had been obtained by an undercover police officer placed in an adjacent cell to the suspect who had initially declined to answer questions. The court held that this trick negated the accused’s decision, previously expressed, to remain silent in the face of police questioning. The accused’s refusal to cooperate with the police in a formal interview, and the police’s deliberate and wilful breach of his rights, were decisive factors to weigh in favour of exclusion under s. 24(2).¹¹⁷

The following year, the Supreme Court decision in *Broyles*¹¹⁸ expanded the elicitation test to confessions procured by informers operating within non-custodial contexts. The decision also established that the question should be addressed in two stages: first, whether the

111 *Duarte* (1990) 53 CCC (3d) 1 at 18.

112 Pre-Charter, Canadian law on confessions was directed solely to concerns about unreliability: confession evidence could not be excluded on the ground of impropriety, even where that impropriety involved the use of an unfair trick: *Rothman* [1981] 59 CCC (2d) 30.

113 *Hebert* [1990] 2 SCR 151; *Broyles* [1991] 3 SCR 595; *Brown* (1993) 105 DLR (4th) 199.

114 *Hebert*, above n. 111 at 153–4.

115 *Ibid.* at 181 *per* McLachlan J.

116 *Ibid.* at 153.

117 *Ibid.* at 154.

118 *Broyles* [1991] 3 SCR 595.

evidence was obtained by an agent of the state,¹¹⁹ and secondly, whether the confession was ‘elicited’. The court emphasized the importance of establishing the causal basis of elicitation—whether there is a link between the conduct of the state agent and the accused’s making of the statement. This involves examining two sets of factors. First, did the agent conduct the conversation in a manner that was expected, or was the conversation the functional equivalent of an interrogation? Secondly, did the agent exploit any special characteristic of the relationship or relationship of trust with the suspect to extract an incriminating statement?

In *Hebert* and *Broyles* the rationale for exclusion was expressed in terms of unfairness, namely, that the admission of the elicited statements would render the trial unfair.¹²⁰ Although couched in terms of the prejudice to the accused’s right to a fair trial, the exclusion of elicited confessions nevertheless incorporates public policy considerations. A wider rationale for exclusion is supported by the court’s view that the elicitation test was ‘essentially objective’ (see above). While not further explained, an objective orientation suggests that courts must consider the propriety of law enforcement tactics, as well as the voluntariness of the particular statements made by the suspect.

The significance of public policy considerations emerges explicitly in the High Court decision of *R v Swaffield; Pavic v The Queen*. The High Court endorsed the Canadian test of elicitation described above. The decision involved a conjoined appeal. In *Swaffield*, an undercover police officer had obtained a confession from a person suspected of theft and criminal damage who had previously refused to answer questions during a formal interview. In *Pavic*, the accused was suspected of the murder of his ex-girlfriend. He refused to answer questions during a formal interview. A friend of the accused, believing he was under suspicion himself, cooperated with police to secure the accused’s confession. The High Court decision not only addressed the admissibility of elicited confessions, it also attempted to rationalize the confused state of authorities dealing with admissibility (the voluntariness test) and exclusion (based on reliability, unfairness and public policy).¹²¹

119 This is determined by asking whether the conversation would have taken place, in the form and manner it did, without the intervention of the state or its agent: *ibid.* at 608.

120 *Hebert*, above n. 111 at 188; *Broyles*, above n. 116 at 617.

121 For a review of the new boundaries of these rules and discretions see: A. Palmer, ‘Police Deception, The Right to Silence and the Discretionary Exclusion of Confessions’ (1998) 22(6) *Criminal Law Journal* 325 at 329–34; E. Stone, ‘Casenote: The Law of Confession in Theory and Practice: *Swaffield* and *Pavic*’ (1999) 3(1) *International Journal of Evidence and Proof* 57.

The High Court decision significantly diverged from the approach taken in earlier decisions such as *O'Neill*.¹²² After reviewing that decision and others, the majority concluded that:

In the light of recent decisions of this Court, it is no great step to recognise, as the Canadian Supreme Court has done, an approach which looks to the accused's freedom to choose to speak to the police and the extent to which that freedom has been impugned. Where the freedom has been impugned the court has a discretion to reject the evidence. In deciding whether to exercise that discretion, which is a discretion to exclude not to admit, the court will look at all the circumstances. Those circumstances may point to unfairness to the accused if the confession is admitted. There may be no unfairness involved but the court may consider that, having regard to the means by which the confession was elicited, the evidence has been obtained at a price which is unacceptable having regard to prevailing community standards. This invests a broad discretion in the court but it does not prevent the development of rules to meet particular situations.¹²³

Unlike the Canadian test, the Australian rationale for exclusion is not limited to unfairness, but extends to public policy. These two distinct rationales are considered in turn.

(a) Unfairness Rationale: The Limits of the Right to a Fair Trial

The judge's control of the criminal process begins and ends with the trial, though his influence may extend beyond its beginning and conclusion.¹²⁴

As Lord Scarman intimates in this quotation, judicial influence over law enforcement conduct is indirect, felt through the exercise of the rules of evidence and procedure. At common law, unfairness in the context of the discretion to exclude confession evidence has a narrow ambit. It focuses on whether it would be unfair to admit such evidence *at trial*. It does not constitute a generalized standard of fair play or decency governing methods of evidence-gathering.¹²⁵ This approach to unfairness, evident both in Canadian Charter jurisprudence and Anglo-Australian common law, has been criticized as unduly restrictive by legal scholars.¹²⁶ However, it reflects a long-standing reluctance of the courts to exercise *direct* discipline or control over police methods of investigation.¹²⁷

The unfairness discretion in relation to confessions has been invoked largely to deal with the problem of unreliability. In the context

122 *O'Neill v R* (1995) 81 A Crim R 458.

123 (1998) 192 CLR 159 at 202. The discretion to exclude confessions on the grounds of unfairness has been codified in some jurisdictions; see Evidence Act 1995 (NSW/Cth), s. 90.

124 *Sang* [1979] 2 All ER 1222 at 1246 *per* Lord Scarman.

125 See Ashworth, above n. 96.

126 Penney, above n. 101; Bronitt and Roche, above n. 10.

127 *Sang* [1979] 2 All ER 1222.

of covert interviewing, as Kirby J observed in *Swaffield*, there were obviously risks of suspects fabricating or embellishing their stories:

In the case of covertly recorded conversations, particular risks of unreliability may present themselves quite apart from the question of voluntariness. Within a criminal subculture, false boasts of criminal behaviour, bravado and false accusations against others may be common and perhaps even considered necessary in certain circumstances.¹²⁸

Apart from unreliability, how else would the admission of a confession obtained during a covert interview undermine the right to a fair trial?

The Canadian and Australian authorities discussed above involved instances where the accused had *previously* exercised the right to silence during a formal interview. Although the elicitation standard in the above cases was not couched with this limitation, the suspect's previous assertion of rights, combined with a deliberate ploy by police to circumvent that choice to be silent, is often cited as a material factor in finding unfairness.

Is the prior assertion of the right to silence by the suspect fundamental to the exercise of the discretion? Limiting the discretion to cases where suspects had previously asserted a right to silence may simply encourage police to target less wary and sophisticated suspects. It may lead to the selective deployment of covert interviewing: in this way, suspects who are ignorant of their rights, or the fact that they have fallen under police suspicion, can be forever 'fair game' for elicitation. Under this model, police are only prevented from elicitation at the point in the conversation where the target, perhaps through mounting suspicion, refuses to divulge further information. This is an example of how judicial efforts to regulate police practices may be neutralized, or worse still become counterproductive, through creative adaptation on the part of law enforcement agencies.¹²⁹

An objective approach to elicitation that focuses on the attitude of the police, rather than the accused, to the right to silence avoids these problems. Indeed the Supreme Court of Canada in *Liew*¹³⁰ clarified that the assertion of the right to silence on the part of the accused is not a condition precedent to the application of the *Hebert* doctrine. In rejecting this limitation, the majority simply pointed out that '[i]t would be absurd to impose on the accused an obligation to speak in order to activate the right to silence'.¹³¹

As noted above, the unfairness discretion is tied to the right to a fair trial. Although the above decisions have focused on the forensic disadvantage that would be caused during the trial, in reality the

128 (1998) 192 CLR 159 at 202.

129 See generally P. Grabosky, 'Counterproductive Regulation' (1995) 23 *International Journal of the Sociology of Law* 347.

130 [1999] 3 SCR 227.

131 *Ibid.* at para. 44.

courts are setting new standards of propriety for pre-trial investigation. Indeed, Palmer has doubted whether it is appropriate to label a trial, which admits an otherwise reliable confession, as ‘unfair’:

It is difficult, however, to see what forensic disadvantage the circumvention of the right to silence could give rise to, other than the admission into evidence of an incriminating statement which would not otherwise have been made. On the assumption that this is not what their Honours [in *Swaffield and Pavic*] meant by ‘forensic disadvantage’ it is submitted that in most cases, the admissibility of admissions obtained in derogation of the accused’s right to silence should be determined by an exercise of the public policy discretion, rather than the fairness discretion.¹³²

Palmer’s advocacy of a public policy instead of unfairness discretion is not beyond criticism. Rather than abandon unfairness in favour of public policy, the common law alternatively could reconceptualize fairness as a broader value of criminal justice underlying both pre-trial and trial process. In the context of pre-trial investigation, whether a suspect is being held in custody or under covert investigation, the right to silence protects individuals from oppressive tactics and preserves a fair balance between the all-powerful state and the potentially vulnerable suspect.

This debate is not just about how conceptual labels should be applied or boundaries drawn between different types of judicial discretion. At its heart lies a deeper normative disagreement over the extent of judicial responsibility for ensuring fairness and propriety in the criminal process. Fairness is not a static concept. Consistent with recent developments in the European Court of Human Rights (discussed below) the law in Canada and Australia could recognize fairness as a fundamental value that underlies the *whole* criminal process, including the methods of gathering evidence. As noted above, there are advantages in locating judicial remedies under an unfairness as opposed to public policy discretion: fairness is an absolute legal value which, unlike public policy, cannot be traded against important countervailing interests.

(b) Public Policy Rationale: Promoting Integrity and Police Discipline

To circumvent the free choice to speak or be silent, which the suspect had exercised in favour of silence, by use of an undercover police officer or a police agent, was not only productive of the risk of an unfair trial to the accused. It was also, in my view, contrary to the public policy which protects the fundamental rights of suspects and holds police, their agents and other investigating officials in check when they are engaged in the questioning of suspects. A conviction of each accused based on such evidence would have been purchased at too high a price.¹³³

¹³² Palmer, above n. 119 at 336.

¹³³ *R v Swaffield; Pavic v The Queen* (1998) 192 CLR 159 at 225 per Kirby J.

The public policy discretion has long been a feature of the Australian law. It has been used to provide remedies where evidence, including confessions, has been obtained improperly and illegally. Unlike the approach adopted in England, this discretion is not tied to situations where the admission of the evidence would create unfairness at trial. As noted in Section II, the public policy discretion has been expanded to cases where police or informers have procured evidence of guilt or elements of the offence.

In defining the limits of the public policy discretion, the courts have identified a number of fundamental values at stake, including upholding the Rule of Law, preventing arbitrary interferences with privacy and maintaining public confidence in the administration of justice.¹³⁴ Further public policy objectives, such as deterrence and disciplinary functions, have also been identified as rationales for exclusion.¹³⁵ However, these are subsidiary to the primary object of the discretion which is to maintain public confidence in the administration of justice—in this sense, the rationale for the public policy discretion resonates with that applied to the abuse of process doctrine discussed in Section II.

In *Swaffield*, Toohey, Gaudron and Gummow JJ (and Kirby J separately) affirmed that the judge has a discretion to exclude elicited confessions either on the grounds of unfairness or public policy. Because of his decision to limit the unfairness discretion to unreliability, Brennan CJ took a narrower approach, arguing that elicited confessions should be addressed under the public policy discretion.

This distinction between the two heads of discretion was most clearly drawn out by Kirby J in the following passage:

The critical question is not whether the accused has been tricked and secretly recorded. It is not even whether the trick has resulted in self-incrimination, electronically preserved to do great damage to the accused at the trial. It is whether the trick may be thought to involve such unfairness to the accused or otherwise to be so contrary to public policy that a court should exercise its discretion to exclude the evidence notwithstanding its high probative value. In the case of covertly obtained confessions, the line of forbidden conduct will be crossed if the confession may be said to have been elicited by police (or by a person acting as an agent of the police) in unfair derogation of the suspect's right to exercise a free choice to speak or to be silent. Or it will be crossed where

134 'It is not fair play that is called in question in such cases but rather society's right to insist that those who enforce the law themselves respect it, so that a citizen's precious right to immunity from arbitrary and unlawful intrusion into the daily affairs of private life may remain unimpaired': *Bunning v Cross* [1978] 141 CLR 54 at 75 *per* Stephen and Aickin JJ.

135 The rationales for exclusion of evidence commonly include the public interests in disciplining police illegality or impropriety; deterring future illegality; protecting individual rights; ensuring fairness at trial; and encouraging other methods of police investigation: Australian Law Reform Commission, *Evidence*, Report No. 26 (Interim) Vol. 1 (AGPS: Canberra, 1985) at 529–32. See also A. Zuckerman, *Principles of Criminal Evidence* (Clarendon Press: Oxford, 1989) at 346–58.

police have exploited any special characteristics of the relationship between the suspect and their agent so as to extract a statement which would not otherwise have been made.¹³⁶

In Swaffield's case, the High Court unanimously held that the confession obtained by the undercover police officer should have been excluded: the court emphasized that the officer had deliberately set out to circumvent the right to silence, an entitlement that the accused had earlier asserted during formal interviews with police. In Pavic's case, the High Court found that the accused's friend was acting as an agent of the police: however, the court divided over whether the confession had been elicited.¹³⁷ The majority found on the facts that there had been no elicitation; in their view, the incriminating statements had been made in the ordinary course of a conversation between friends.¹³⁸ Kirby J dissented on this point. In his view, although perhaps not constituting a functional interrogation, the police had deprived Pavic of his right to silence, which he had previously asserted, by enlisting the help of a friend. In his view, this enlivened the second limb in *Broyles*, namely, that the police exploited the special characteristics of the relationship between the friends. A review of the transcripts of the recorded conversations between Pavic and his friend Clancy reveal that he was repeatedly asked questions about his involvement in the murder. In an effort to reassure Clancy, who repeatedly claimed he was under police suspicion, Pavic eventually (albeit reluctantly) provided details of the murder.

The specific public policy concerns raised by covert interviewing remain unclear. This is partly because of the way the appeals in *Swaffield* and *Pavic* were argued. The public policy discretion was only raised late in the appeal at the invitation of the Chief Justice. From our earlier discussion, public policy discretion rests on weighing competing interests. There are factors favouring admission of evidence, such as cogency and seriousness of the crime. Against this weigh the rights of the suspect. In exercising the discretion, courts would examine the likely impact of judicial toleration of such practices. As Kirby J points out:

Securing the conviction of Mr Pavic of murder was important. But if such tactics become the common rule, the police caution and the right to speak or to be silent would be undermined and police would be encouraged to use family and close friends to circumvent the current law where that law proved an obstacle. It has been a common feature of totalitarian societies that police and security forces enlist the aid of

136 (1998) 192 CLR 159 at 220–1.

137 *Ibid.* at 203–4.

138 *Ibid.* at 204. Toohey, Gaudron and Gummow JJ jointly held: 'In all the circumstances there is no sufficient reason to interfere with the trial judge's refusal to exclude the evidence of the conversation.'

family and friends to inform on suspects, overriding the legal rights of the accused. It has not until now been a feature of our society.¹³⁹

As this discretion rests on balancing interests, the trial judge must consider a range of mitigating factors, such as the seriousness of the offence and whether the breach of a suspect's rights was deliberate or not. As noted in Section II, discretions that rest on the court balancing competing interests have tended to prioritize crime control over due process.

It is important not to overstate the limits that the common law now places on covert interviewing in Canada and Australia. There is plenty of scope for trial judges to disagree over whether a particular confession had been elicited. As with entrapment, cases may always be distinguished on the facts. For example, in *Liew v The Queen*,¹⁴⁰ the majority of the Supreme Court of Canada ruled that an admission made to an undercover officer, posing as a drug dealer, was not elicited and was therefore admissible. In this case, the accused was arrested in connection with a drug deal. The police also pretended to arrest the undercover officer who subsequently participated in a cell block interview. The majority concluded that the admission had not been elicited: the incriminating statements were made naturally in the course of a conversation that had been initiated by the accused; and furthermore, there had been no abuse of a prior relationship with the accused. The slipperiness of the elicitation standard is apparent in the dissent of Lamer CJ who disagreed, not with the majority's statement of law, but rather with their application of the law to the agreed facts. In his view, the incriminating statement made by the accused to the officer, which was used to establish possession of the drugs at trial, did not 'flow' with the tide of conversation as it unfolded in the cell block.

Bearing in mind the centrality of confessions in procuring guilty pleas it is unlikely that threat of judicial exclusion in cases of elicitation will constitute a significant brake on these covert police practices. The capacity of judicial decisions to challenge police culture or behaviour depends critically on their visibility to operational officers and upon the perceived costs of compliance. From a police perspective, as noted above in relation to entrapment, judicial decisions have less normative force than legislation or administrative guidelines. While there is explicit legislative and administrative regulation of custodial interviewing, there are no equivalent controls over covert interviewing. Judging by the experience in the United Kingdom under the Police and Criminal Evidence Act 1984 (PACE), administrative Codes of Practice work best when supported by comprehensive detailed legislation regulating police practice. Legislation regulating covert interviewing could place the burden on the police and prosecution—as a

139 *Ibid.* at 224.

140 [1999] 3 SCR 227.

condition of admissibility—to establish that the confession obtained during covert questioning was neither unfair nor improper. This approach is preferable to codifying the existing discretion, where factors favouring admission and exclusion would be simply listed for judicial consideration. Indeed, Kirby J in *Swaffield* took the view that legislation was clearly desirable in this area:

Legislation might permit police conduct of the kind disclosed in each of these appeals. None has been enacted. If it were, it would presumably introduce pre-conditions of prior independent authorisation. It would lay down checks and limits to defend the kinds of values which have long been protected by the common law. If it derogated from those values it would do so by the authority of Parliament.¹⁴¹

Kirby J's expressed hope that Parliament would 'presumably' defend established common law values might be optimistic in light of recent legislative action to authorize, immunize and expand covert policing operations in Australia.¹⁴²

ii. Lessons from the Commonwealth: The European Standard for Covert Interviewing

The recent judicial efforts in Canada and Australia to impose limits on covert interviewing have not been replicated in England. Section 78 of the Police and Criminal Evidence Act 1984 (UK), at least in theory, offers a framework for developing similar exclusionary discretions. Yet, as numerous commentators have observed, s. 78 has never lived up to its potential as a disciplinary tool or as a means of protecting the integrity of the administration of justice.¹⁴³ The courts have largely confined its operation to cases where the unlawful or improper investigative methods have adversely affected the *reliability* of evidence.¹⁴⁴ The closest the English courts have come to imposing limits on covert interviewing was in *R v Smurthwaite and Gill*,¹⁴⁵ where the Court of Appeal held that a further consideration relevant to admission of evidence of an undercover officer under s. 78 is whether the undercover officer 'abused his role to ask questions which ought properly to have been asked as a police officer and in accordance with the [PACE] codes'.¹⁴⁶ The impact of this ruling is fairly limited: the principle has no application where the covert interviewing is conducted by an informer, who obviously will not be bound by the PACE

141 (1998) 192 CLR 159 at 225.

142 See S. Bronitt, 'Editorial—Taking Privacy Rights Seriously: Engaging With Undercover Law Reform' [2003] 27 *Criminal Law Journal* 113.

143 Sharpe, above n. 9 at 166–72; A. L.-T. Choo and S. Nash, 'What's the Matter with Section 78?' [1999] *Criminal Law Review* 929.

144 A. L.-T. Choo and S. Nash, 'Evidence Law in England and Wales: The Impact of the Human Rights Act 1998' (2003) 7 *International Journal of Evidence and Proof* 31 at 43.

145 [1994] 1 All ER 898. See discussion in B. Emmerson and A. Ashworth, *Human Rights and Criminal Justice* (Sweet and Maxwell: London, 2001) at paras. 15.49–15.52.

146 [1994] 1 All ER 898 at 903 per Lord Taylor CJ.

codes. Unlike Canada or Australia, it seems that English law has not yet developed a separate discretion to exclude confessions elicited (by police or their informers) in unfair or improper derogation of the right to silence.

The failure of English law to protect the right to silence from covert attack has been recently exposed by proceedings before the European Court of Human Rights. In *Allan v United Kingdom*¹⁴⁷ the applicant, a suspect held on remand in a murder case, was subjected to repeated covert questioning by an informer (H). H had been placed by the police in the applicant's cell, and told to 'push him for what you can'. The covert questioning by H, conducted over a three-week period, was supplemented by formal interviews. The defence claimed these formal interviews were intended to 'rattle' him into confiding in H. Throughout these formal interviews, acting on the advice of his solicitor, the defendant remained silent. The trial judge found that there was no unfairness caused by these practices, and refused to exclude the admissions made to H. This decision was upheld by the Court of Appeal. The applicant then instituted proceedings before the European Court of Human Rights.

The European Court of Human Rights in *Allan* began its analysis of the right to a fair trial by emphasizing the central importance of the privilege against self-incrimination. While recognizing that the rules of admissibility of evidence were matters for the national courts, the court affirmed the view, expressed in *Teixeira*, that the right to a fair hearing under Article 6 of the ECHR required judicial analysis of 'whether the proceedings as a whole, including the way in which the evidence was obtained, were fair'.¹⁴⁸ Citing earlier ECHR case law, the court reiterated that the privilege against self-incrimination, which lies at the heart of a fair procedure, primarily was:

. . . concerned with respecting the will of an accused person to remain silent and presupposes that the prosecution in a criminal case seeks to prove the case against the accused without resort to evidence of coercion or oppression in defiance of the will of the accused.¹⁴⁹

In relation to covert interviewing, the court observed that these practices posed a serious threat to the right to silence:

The freedom of a suspected person to choose whether to speak or to remain silent under police questioning . . . is effectively undermined in a case which, the suspect having elected to remain silent during questioning, the authorities use subterfuge to elicit from the suspect confessions or other statements of an incriminatory nature which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial.¹⁵⁰

147 [2003] 36 EHRR 12. See S. Nash, 'Surreptitious Interrogation and Notions of Fairness: *Allan v UK*' (2001) 7 *International Journal of Evidence and Proof* 137.

148 [2003] 36 EHRR 12 at para. 43.

149 *Ibid.* at para. 44.

150 *Ibid.* at para. 51.

Unusually, the court discussed the Canadian and Australian authorities at length. Not only did the Commonwealth authorities provide comparative background, but the court explicitly adopted *Broyles* as the appropriate method for determining whether covert investigative practices had violated Article 6.¹⁵¹ In this case, the court placed weight on the fact that the applicant had relied on the right to silence on legal advice and that H, the informer, had been coached by the police for the specific purpose of eliciting the confession. The European Court concluded that the statements by the applicant had been obtained in defiance of his will and that their use at trial impinged on the right to silence and privilege against self-incrimination.¹⁵²

This adoption of Canadian and Australian law by the European Court may be viewed as part of a wider trend towards what McCrudden has termed a 'comparative human rights jurisprudence'.¹⁵³ Such transnational borrowing has long been a feature of Commonwealth courts which, through their shared legal culture and allegiance to the Privy Council, have been accustomed to following 'foreign' judgments, even if they may be persuasive rather than strictly binding. Until the decision in *Allan*, the European Court, while transcending the legal cultures of common law and civil law systems, has tended to limit its transnational forays to the comparative experience of European countries.¹⁵⁴ *Allan* may be viewed as yet another jurisprudential step towards a *global* common law of human rights.

The task for the English courts in the light of *Allan* is now clear: to recognize within the common law, or within the framework of s. 78, the power to exclude confessions on the ground that they were elicited in unfair derogation of the suspect's right to silence.

The English courts, in giving effect to the European Court's ruling, may claim as they did with *Looseley* that the ECHR simply articulates fairness values that are latent within the English common law. This approach suppresses not only the present extent of non-compliance, but also the direct and positive influence of Canadian and Australian law in this area. Although the extent of 'borrowing' may not be fully disclosed, as demonstrated here, the influence of Commonwealth law in development of a 'common law of human rights' in Europe and elsewhere is significant.

151 *Ibid.* at paras. 29–32 and para. 51.

152 Although there was no coercion or abuse of a special relation of trust, the court considered that the psychological pressures on the applicant impinged on the voluntariness of those statements: *ibid.* at para. 52.

153 C. McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights' in K. O'Donovan and G. Rubin (eds.), *Human Rights and Legal History—Essays in Honour of Brian Simpson* (Oxford University Press: Oxford, 2000) at 36ff.

154 *Ibid.* at 54.

IV. Conclusion

Legal systems around the Commonwealth have been tackling similar problems arising from police use of offence-facilitation and covert interviewing. From their original permissive attitude towards investigative impropriety, the courts in Canada and Australia are now prepared to intervene and provide remedies in cases where fundamental legal values, such as the Rule of Law and the right to a fair trial, are threatened. Although the rationales for intervention are similar—namely considerations relating to legality, fairness and public policy—there remain significant differences between the nature and scope of the remedies applied.

In relation to entrapment, the Canadian courts have gone farthest in defining the limits of proactive policing. The Supreme Court in *Mack* distinguished between acceptable techniques of opportunity-creation and unacceptable forms of entrapment. Although Canadian law has incorporated safeguards, such as reasonable suspicion, to limit unjustified targeting of citizens, the decision also legitimated the dubious practice of random virtue-testing. In cases where entrapment has occurred, the trial judge in Canada is obliged to stay the proceedings as an abuse of process; this decision is made after the issue of guilt has been determined. By contrast, the Australian courts have rejected a procedural remedy based on abuse of process in favour of a discretion to exclude evidence on public policy grounds. The public policy discretion, however, applies only in rare cases where the illegal conduct of the police, which had procured the offence, constituted a central ingredient of the crime charged. The discretionary basis of the remedy also means that trial judges must balance the competing interests of crime control and due process, a process that tends to favour the admission rather than exclusion of evidence. For this reason, Canadian law offers a more effective and workable approach to the problems of entrapment than Australian law.

Another parallel between Australia and Canada is the legislative response to controlled operations or reverse-stings. The illegality of police conduct during such operations, once exposed by the courts, led the legislatures in both jurisdictions to confer legal protection by way of prospective immunities on police and informers. Rather than tailoring these immunities to specific liabilities arising from offence-facilitation, law enforcement officials have been granted wide-ranging immunities—potentially a *carte blanche* for the commission of crimes deemed necessary in the course of covert operations. While police can be reassured that their otherwise unlawful actions now have a lawful basis, the ideal of ‘equality before the law’ has been seriously undermined. A fundamental aspect of constitutionalism—the Rule of Law—is sacrificed for a short-term law enforcement gain. This legislative balance—like the one drawn by the courts in applying remedies for entrapment—eulogizes the ideals of legality and due process while

simultaneously limiting or negating their impact in the interests of crime control. The absence of either an independent authority issuing the immunities or effective judicial review of its decisions renders illusory the safeguards against abuse of state power.

In relation to covert interviewing, the story of legal development is again similar. Canadian law led the way, with the High Court of Australia and the European Court of Human Rights adopting the elicitation test developed by the Supreme Court. An emerging difference is that the Australian rationale for exclusion of confessions extends beyond unfairness to broader public policy considerations. As a vehicle for excluding elicited confessions, the public policy discretion suffers the same weaknesses identified in relation to the remedies for entrapment. In determining whether the impropriety warrants the exclusion of evidence, the rights and protections afforded to suspects can be traded against other crime control values such as reliability and the seriousness of the offence under investigation. A discretion based on unfairness seems less amenable to such trade-offs.

What this discussion reveals, consistent with the jurisprudence of the European Court of Human Rights, is that a wider conception of the right to fair trial is needed. A holistic concept of fairness would extend from the trial itself into the evidence-gathering phase, placing limits on the use of entrapment and other improper investigative techniques. It would ensure that fundamental values, such as the right to silence, were neither circumvented nor neutralized by investigative practices such as covert interviewing.

A practical issue emerging in all of the jurisdictions examined here is whether judicial rulings, especially those made by higher courts, significantly influence police practice. Bearing in mind the key role that confessions play in inducing guilty pleas, police and prosecutors may simply be content to run the risk of exclusion as an acceptable cost of engaging in covert investigation. Even in the unlikely event that some material is excluded at trial, there may exist other evidence sufficient to secure a conviction. In these cases, judicial exclusion constitutes a hollow rebuke to prosecutors, faintly heard by the investigators, with limited impact on actual trial outcomes.

The judicial control of policing methods through the rules of evidence and procedure has many weaknesses, leading some commentators to explore the possibility of using other legal and non-legal remedies.¹⁵⁵ Regulating covert policing comprehensively through legislation is clearly preferable. This raises the question of the proper relationship between the existing common law and statutory reform. To date, legislation has tended to be piecemeal and remedial in focus. Rather than reacting defensively to legal problems identified by the

155 See D. Osborn, above n. 9; <http://www.murdoch.edu.au/elaw/issues/v7n4/osborn74.txt> accessed 15 April 2003; D. Omerod, 'ECHR and the Exclusion of Evidence: Trial Remedies for Article 8 Breaches?' [2003] *Criminal Law Review* 61.

courts, the legislature should provide a comprehensive framework defining the powers and responsibilities relating to undercover policing. Privacy, fairness and legality concerns, which underscore many of the judgments reviewed in this article, should be addressed in a more comprehensive fashion. The task of drawing the permissible boundaries of covert investigation is difficult. This work is clearly suited to an independent law reform commission, rather than government officials tasked to provide a 'quick fix' in the face of the public clamour for more police powers to fight crime. Statutory regulation may not reverse the trend towards undercover policing. It may, however, redirect the focus and enhance the legal accountability of undercover policing: the current state of under-regulation simply encourages its use as a means of evading or neutralizing the due process protections ordinarily available to suspects during custodial investigation.

This study has revealed that courts in Australia, Canada and Europe are now engaged in a transnational conversation about covert policing and human rights. Engaging in this type of comparative research does more than identify the 'best' legal approach. It also allows for critical reflection upon the process of legal change and the respective roles of the Judiciary, Legislature and Executive in determining what is 'fair' in the administration of justice. Legal control over covert policing is currently diffused across both judicial and legislative domains, exercised through an amalgam of statutes and common law. The law in undercover policing, particularly the contours of unfairness and impropriety, is in a state of flux. This process of expansion for covert policing has not been solely the product of legislation: as this article concludes, the courts, though often venerating the constitutional importance of legality and fairness in judicial rhetoric, have also played a key role in promoting and legitimating the expansion of covert investigation.