The use of undercover police officers and informers is an accepted technique of law enforcement. One danger in their use, however, is that they may go too far in encouraging or actively participating in improper conduct. How far is 'too far'? Who determines what should be the dividing line between proper and improper conduct? What are the best techniques for ensuring that the police or their agents do not engage in this form of impropriety? These questions are the subject of this paper.

Undercover agents come in many different shapes and guises, but there are two basic categories: undercover police officers, and informers who co-operate with the police for pay or other consideration. In both cases their conduct ranges from being passive observers to being active participants. But, as one sociologist has warned, 'there are pressures inherent in the role that push the informant toward provocation.' Indeed, there is a risk that the agent may go even further. 'The spy,'

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† This article is based on a paper prepared under contract for the Federal Commission of Inquiry Concerning Certain Activities of the RCMP (the McDonald Commission) and submitted to the Commission in March 1980. The opinions expressed are, of course, the author's and do not necessarily represent the views of the Government or the Commission.


1 Marx, Thoughts on a neglected category of social movement participant: The agent provocateur and the informant (1973) 80 Am. J. Sociol. 402, at 404–5.
stated Chafee, 'often passes over an almost imperceptible boundary into the agent provocateur, who instigates the utterances he reports, and then into the fabricator, who invents them.'

Let us first clear aside one type of informer, the co-operative accomplice who turns 'Queen's Evidence' against his confederates. This category of informer raises a number of issues, legal and otherwise: for example, corroboration of the accomplice's testimony; granting immunity from prosecution; plea bargaining for testimony; the extent to which co-operation should be taken into account in sentencing; the timing of the testimony; and the protection by the authorities of those who give evidence. These issues will not be dealt with in this paper because they do not involve questions of entrapment. An arrested person may, however, for various reasons, agree to co-operate with the police by continuing his association with other criminals. In such a case the danger of improper conduct does arise.

There has been no suggestion by the judiciary in Canada or England that it is improper to use undercover operations. (Indeed, the courts have always been careful to protect the informer's identity from disclosure.)

Laskin CJ wrote in 1977 in *Kirzner v The Queen*, which involved narcotics: 'The use of spies and informers is an inevitable requirement for detection of consensual crimes and of discouraging their commission ... Such practices do not involve such dirty tricks as to be offensive to the integrity of the judicial process.' Similarly, the Lord Chief Justice of England stated in 1974 in *Regina v Mealey and Sheridan*: 'So far as the propriety of using methods of this kind is concerned, we think it right to say that in these days of terrorism the police must be entitled to use the effective weapon of infiltration.'

US cases have also permitted the use of infiltration. The Search and Seizure provision of the Fourth Amendment has been held not to be violated by such action, although there are some state cases holding that the First Amendment's guarantee of freedom of speech and association

4 (1977) 38 C.C.C. (2d) 131, at 136
5 (1974) 60 Crim. App. R. 59, at 61. See also *R. v Underhill* (1979) 1 Cr. App. R. (S.) 270, at 272: 'It is a recognized and legitimate means of detecting crime and bringing the guilty people to justice that infiltration shall take place.'
might be. While the Canadian Bill of Rights also recognizes 'freedom of speech' and 'freedom of assembly and association,' it is very unlikely that the Supreme Court of Canada would declare undercover observers illegal on this basis.

**Instigating criminal activity**

Informers and undercover officers and agents are often involved in instigating — to use a relatively neutral term — criminal conduct. Canadian cases, particularly in the drug field, are replete with examples. In many cases this activity is entirely acceptable. Few would suggest, for example, that it is improper for the police to seek to purchase drugs from a known trafficker to get a conviction against him. As the Ouimet Committee stated, 'it is sometimes necessary for law enforcement officers to pose as members of a criminal group or to make purchases of narcotic drugs.' To purchase drugs is a form of entrapment, but entrapment is not necessarily improper.

On the other hand, it would not be considered proper for an undercover policeman, in order to charge the person with trafficking, actively to persuade — through, for example, feigned friendship and great need — a user who has, to the knowledge of the police, not been engaged in trafficking before, to sell him a small quantity of narcotic.

The courts in the United States, through the defence of entrapment, which will be discussed in detail later, have attempted to separate proper from improper conduct. English and Canadian courts have barely touched on the question.

Widgery CJ in *Mealey and Sheridan*, stated that the officer 'must endeavour to tread the somewhat difficult line between showing the necessary enthusiasm to keep his cover and actually becoming an agent provocateur, meaning thereby someone who actually causes offences to be committed which otherwise would not be committed at all.' Laskin CJ

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7 See, eg, *White v Davis* (1975) 533 P. 2d 222 (Cal. s.c.), holding that the use of police undercover agents and informants in classes at U.C.L.A. would in the absence of a 'compelling state interest' violate the First Amendment guarantees of both the state and federal constitutions. See Scalia's paper at 52 et seq. for discussion of these cases, including the U.S.S.C. decision of *Laird v Tatum* (1972) 408 U.S. 1, which held that the 'chilling effect' of the defendant's conduct was not adequate to confer 'standing' on the plaintiff.

8 Stat. Can. 1960, c 44, Appendix III to R.S.C. 1970, ss. 1(d) and (e)

9 See Wilson *The Investigators* (1978), at 22.

10 See the Final Report of the Commission of Inquiry into the Non-medical Use of Drugs (the Le Dain Commission) (1973), at 952, and the cases cited supra note 14, at 966.

11 *Report of the Canadian Committee on Corrections* (1969), at 75

12 See Williams *Criminal Law* (2nd ed 1961), at 785.

expressed the same concern in *Kirzner*: 'The problem which has caused judicial concern is the one which arises from the police-instigated crime, where the police have gone beyond mere solicitation or mere decoy work and have actively organized a scheme of ensnarement, of entrapment, in order to prosecute the person so caught.'

Finding the proper dividing line is not an easy task because it will vary from crime to crime and from fact situation to fact situation. Take the simple question of whether solicitation is proper. The offence of bribery, the subject of recent instigatory tactics by FBI agents against members of Congress, offers some interesting examples. No doubt there will soon be a flurry of Law Review notes in the United States on the subject.

Is it right for a police officer to ask a citizen arrested for, say, careless driving, for a small bribe in exchange for dropping the charge, in order to get evidence to convict the citizen of attempted bribery? No doubt most would say that it is unfair to trap a person in this way. Not only is it 'manufacturing' crime by creating too great a temptation for an accused who had no predisposition to engage in such conduct, but to allow it would give a legitimate cover to police corruption by permitting a corrupt officer to say that he was merely testing the accused in asking for money. What if the same accused had, to the officer's knowledge, a reputation for giving bribes, and had even previously been convicted of bribery? Again, the answer should be that the police conduct is improper because a briber can be dealt with when he does, in fact, offer a bribe.

If asking a citizen for a bribe is improper, is it acceptable for the police to trap a fellow officer suspected of accepting bribes into accepting one? Most would say yes because of the great difficulty of controlling the conduct in any other way. The corrupt officer and the briber are like the narcotics buyer and trafficker. It is a consensual arrangement where there is no immediate victim. Would the same type of instigation be proper against officers who were not suspected of taking bribes? Most would probably agree with the American writer who stated that 'the offence is so grave, the evidence so difficult to obtain, the temptation so constant and recurring that a government is justified in testing its officers by a normal offer.' In any event, even if one considers such indiscriminate testing improper for the purpose of charging the officer who succumbs, it should not be considered for internal disciplinary purposes.

14 *Kirzner v The Queen* (1977) 38 C.C.C. (2d) 131, at 136
15 Seven 'Abscam' convictions, including those of four former or current Congressmen, have been appealed to the Federal District Court in Brooklyn and are expected to end up in the United States Supreme Court: *New York Times* 15 February 1981.
In Canada these questions are rarely the subject of discussion. Nor will they be in the future unless some method of settling the propriety of this conduct is determined.

Before we turn to the questions of techniques of settling and enforcing the boundaries between legal and illegal conduct, we should look at the likely extent of informer and police undercover activity in Canada. The greater the use of undercover activity the greater the danger that if it is uncontrolled, improper instigation will occur.

**Extent of infiltration**

I know of no published empirical study on the role of the undercover policeman or the informer in Canada. An English study\(^\text{18}\) of 150 cases tried at the Old Bailey in the early 1970s turned up only nine instances where it was apparent that an informer had alerted the police. But as the investigator of the study concedes, ‘there may have been a deliberate concealment by the police of the fact that an informer played any role whatever’\(^\text{19}\). Confidentiality – even from the prosecutor – is important in the world of the informer. Neither the Ouimet Committee\(^\text{20}\) nor the Le Dain Commission\(^\text{21}\) published empirical data on the use of the undercover agent or informer, although both dealt with the subject. The Le Dain Commission acknowledged their importance in stating: ‘Because of the difficulty of detecting drug crimes the police rely heavily on undercover agents and informers.’\(^\text{22}\) The Ouimet Committee, as we have seen, simply stated that ‘it is sometimes necessary for law enforcement officers to pose as members of a criminal group or to make purchases of narcotic drugs.’\(^\text{23}\)

Three important American studies, however, one in each of the last three decades, show the pattern in the United States with respect to the role of the informer. There is little reason to believe that the pattern is substantially different in Canada.

William Westley’s investigation\(^\text{24}\) of the municipal police force in a midwestern city done in 1950 (but not, in fact, published until 1970) set

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19 See Oscapella’s LL.M. thesis, from which the *Crim. L.R.* article was drawn, at 14. See also Skolnick *Justice Without Trial: Law Enforcement in Democratic Society* (1966), at 133.
21 *Final Report of the Commission of Inquiry into the Non-medical Use of Drugs* (1973). The commission’s final report lists a research project on entrapment undertaken for the commission (p. 1145 of the report): B. Anthony, J. Moore, R. Solomon, and M. Green, *Entrapment and violence in the enforcement of drug laws*. But this research report, as far as I can tell, was never published.
22 At 951
23 At 75
out the importance of informants. One detective graphically summed up their value to Westley: 'A dick is as good as his pigeons.' Another stated: 'Pigeons account for the solution of between 40% and 50% of the tough cases.'

A similar conclusion was drawn by Jerome Skolnick in his study of a California city in the early 1960s. Police testimony and his own observation led him to the conclusion that 'it almost never happens that an informant is not used somewhere along the line in crimes involving "vice," and also in such other secret crimes as subversion, espionage, and counterfeiting.'

Finally, James Q. Wilson's study in the mid 1970s of FBI and narcotics agents again shows their importance. About half the FBI matters he examined involved the use of an informant. Informants are even more important for the Drug Enforcement Agency: 'Most investigations depend on informants; narcotics investigations depend crucially on them.'

Thus I would be very surprised if informers – and no doubt undercover policemen – do not play a very significant role in the work of police forces in Canada, particularly the RCMP, perhaps more than is normally realized.

Techniques of control

The following sections examine possible techniques of control. These include creating a defence to the criminal charge instigated, excluding evidence, reducing the sentence, creating criminal or civil liability in the person who improperly instigates the offence, and finally setting out rules for disciplinary action. A combination of techniques will be necessary. Disciplinary action, for example, may well have some effect on the police, but not on an informer who is not directly employed by the police.

At the present time the legality of conduct in this area is not at all clear. The situation is reminiscent of that of ten years ago with respect to wiretapping, where the police engaged in the practice but were unsure whether it was legal to do so. Wiretapping and infiltration are similar in that both intrude on the privacy of the individual. Indeed, the informer can often have access to more personal information than the wiretapper.

25 At 41
26 Justice Without Trial (1966)
28 The Investigators: Managing F.B.I. and Narcotics Agents (1978)
29 At 34-5
30 At 58
31 See Friedland National Security: The Legal Dimensions (1980), at 78 et seq.
A number of techniques to control improper wiretapping were introduced in 1973 in the Protection of Privacy Act. Undoubtedly the most important technique is to require judicial approval in advance. Would such a procedure be desirable to control informants and improper instigation? In my opinion it would not. Wiretapping is an extraordinary technique – at least it should be – and so the burden placed on the senior judiciary to hear applications is not a particularly onerous one. Moreover, the authorization generally involves relatively straightforward activity. In contrast, there are so many situations involving undercover agents and various forms of instigation that it would place a very great burden on the judiciary. Drug purchases alone would require a very large number of applications. If the task were given to the judiciary it is likely that it would require only the control of a justice of the peace, as with search warrants, and this is not a particularly effective control mechanism. Further, the police would have difficulty in specifying in advance the precise conduct that they or their agents wished to engage in, so there would necessarily be either very vague authorizations or continuing close interaction between the police and the judiciary, which would not be desirable. Moreover, there will be many cases where there will be no time for an authorization, and the legislation would no doubt allow the police to operate in these cases without authorization in advance. As in the case of arrest without a warrant, this would tend to be used far more than the authorization provision. It is far better to find techniques which attempt to control impropriety by examining the conduct and fashioning a remedy after the event.

The wiretapping legislation does, however, contain other techniques which warrant consideration. Some of these, such as creating criminal and civil liability and excluding illegally obtained evidence, will be discussed in later sections. The requirement that the request for an authorization be made by the solicitor general of Canada or the attorney general of a province or by a person specially and personally designated

33 The point is discussed in Dix, Undercover investigations and police rulemaking (1975) 53 Texas L.R. 203, at 215, and Zimring and Frase The Criminal Justice System: Materials on the Administration and Reform of the Criminal Law (1980), at 249. The Quebec Keable Commission (Rapport de la Commission d'enquête sur des opérations policières en territoire québécois, 1981, at 424) recommends that approval of a request for authorization be required in advance: 'Elle devrait faire l'object d'une approbation accordée soit par le Procureur général du Québec (ou son représentant), soit par un magistrat sur demande du Procureur général (ou son représentant).' See also Toronto Globe and Mail 7 March 1981.
34 See generally, Friedland Detention Before Trial (1965).
35 Ibid, ch 2
36 Canadian Criminal Code s 178.11(1)
37 S 178.12
38 S 178.16
by one of them is another control technique forcing a member of the Cabinet to take political responsibility for the applications. Because of the number of such applications it would be unwise to require approval at such a high level in the case of informers, but it would be sensible to require authorization at a senior level within the police force itself. This is a technique that has been adopted in England, where the latest Home Office Circular requires that 'a decision to use a participating informant should be taken at senior level.'

Another technique used in wiretapping is to require periodic reports on the extent to which wiretapping is used. Although such reports would be instructive and would inhibit the use of informants in the case of infiltration of suspected subversive organizations, I doubt that figures in other cases would tell us enough to warrant the expense and inconvenience of collecting the data.

Finally, there is the technique of requiring notification ninety days after a person's phone has been tapped that he was the subject of wiretapping. This is very effective in discouraging the widespread use of wiretapping. There is no doubt that a similar procedure would discourage the use of undercover agents. But in the case of informants it would also endanger their safety. Moreover, it might discourage the use of informants and undercover agents to a greater extent than is warranted.

Let us now turn to the device that is used in the United States, an entrapment defence. A brief look at the question of the acceptance of the defence in Canada, England, and the United States will precede a theoretical discussion of the defence.

**The defence of entrapment**

**CANADA**
The Supreme Court of Canada has not yet dealt directly with the question whether entrapment can be a defence to a charge. In 1967 in Lemieux v The Queen, Judson J speaking for the Supreme Court stated: 'Had Lemieux in fact committed the offence with which he was charged, the circumstances that he had done the forbidden act at the solicitation of an agent provocateur would have been irrelevant to the question of his guilt or innocence.' The statement was not, however, necessary to the judgment and might well be considered obiter in a future case.

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39 S 178.12
41 S 178.23
42 [1968] 1 C.C.C. 187, at 190
43 See Peda v The Queen [1969] 4 C.C.C. 245 (s.c.c.).
The question of entrapment came up again before the Supreme Court in 1977 in *Kirzner v The Queen*. The Ontario Court of Appeal had held that no defence of entrapment was available, Brooke JA stating for the court: '[W]e are convinced ... that this defence is not available to a criminal charge.' Five members of the Supreme Court held, dismissing the accused's appeal, that it was unnecessary for them to discuss the defence, as the evidence was not open to show a 'police-concocted plan to ensnare him going beyond mere solicitation.' Laskin CJ, with whom three other members of the court concurred, while also holding that the evidence in the case could not amount to entrapment, dealt at length with the defence and preferred 'to leave open the question whether entrapment, if established, should operate as a defence.' The *Kirzner* case was not, in fact, a good case in which to analyse the defence of entrapment because the accused's defence was that he was acting for the police, not that he was entrapped by the police. Protecting an informer or undercover policeman, which will be discussed in a later section, is a different question than providing an entrapment defence.

A number of lower court judgments have dealt with the defence. A provincial court judge in British Columbia in 1976 has provided the only reported case where entrapment was clearly accepted as a defence, resulting in an acquittal of the accused. Other provincial court judges have achieved the same result by staying a prosecution as an abuse of the process of the court, a technique which Laskin CJ specifically leaves open in *Kirzner*.

Some Canadian judgments have dealt with entrapment cases by reducing the accused's sentence. But Canadian courts cannot grant an absolute or conditional discharge in cases where the possible penalty is...
fourteen years or more, thus cutting out its use in the bribery and trafficking examples used earlier in this paper. In my opinion there is no justification for any restrictions on the granting of discharges. Further, there are still some minimum sentences applicable in Canada, including the seven-year minimum penalty for the offence of importing a narcotic into Canada. So, a sentencing reduction could not handle a case in which a person without any previous conduct with respect to trafficking takes a small amount of a narcotic drug across the border at the urgent insistence of a sick friend, who, in fact, turns out to be a police officer.

The Ouimet Committee concluded that 'there should be a clear legislative statement with respect to the unacceptability of official instigation of crime.' In particular, it recommended that legislation be enacted to provide:

1. That a person is not guilty of an offence if his conduct is instigated by a law enforcement officer or agent of a law enforcement officer, for the purpose of obtaining evidence for the prosecution of such person, if such person did not have a pre-existing intention to commit the offence.

2. Conduct amounting to an offence shall be deemed not to have been instigated where the defendant had a pre-existing intention to commit the offence when the opportunity arose and the conduct which is alleged to have induced the defendant to commit the offence did not go beyond affording him an opportunity to commit it.

3. The defence that the offence has been instigated by a law enforcement officer or his agent should not apply to the commission of those offences which involve the infliction of bodily harm or which endanger life.

A legislative solution to the entrapment defence will be discussed more fully in a later section.

ENGLAND

The English Court of Appeal has held in a number of cases that the defence of entrapment does not exist in English law. In Regina v Mealey and Sheridan in 1974 Widgery CJ stated:

55 Canadian Criminal Code s 662.1
56 Bribery of a police officer under s 109 carries a possible 14-year penalty.
57 There is a possible life sentence for trafficking: see the Narcotic Control Act, R.S.C. 1970, c N-1, s 4(9).
58 The Report of the Canadian Committee on Corrections (1969), at 194-6, did not include such a restriction in its recommendation.
59 § 5
60 At 76
61 At 79-80
If one looks at the authorities, it is in our judgment quite clearly established that the so-called defence of entrapment, which finds some place in the law of the United States of America, finds no place in our law here. It is abundantly clear on the authorities, which are uncontradicted on this point, that if a crime is brought about by the activities of someone who can be described as an agent provocateur, although that may be an important matter in regard to sentence, it does not affect the question of guilty or not guilty.

The House of Lords in Regina v Sang in 1979 assumed that the defence did not exist. Although the point was not, in fact, argued before the House of Lords, the judgments used sufficiently conclusive language that it would now require legislation to bring the defence into English law. Lord Diplock, for example, stated that 'the decisions ... that there is no defence of “entrapment” known to English law are clearly right.' Viscount Dilhorne stated: 'It has been held, rightly in my opinion, that entrapment does not constitute a defence to a charge.' And similar statements were made by the other Law Lords. Legislation is not likely in the near future. The Law Commission, in its 1977 report, did not recommend the introduction of the defence, stating: 'We have come to the conclusion, after considering the full range of arguments, that a defence would not be the best solution to present difficulties, whether as a matter of principle or in practice.' The Law Commission's earlier Working Party on the Criminal Law had been 'undecided on the question' and so did not come forward with a positive view on the subject.

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63 (1974) 60 Cr. App. R. 59, at 62. For a discussion of the background to this case and the role of the police informer, see Robertson Reluctant Judas: The Life and Death of the Special Branch Informer, Kenneth Lennon (1976). See also the Report to the Home Secretary from the Commissioner of Police of the Metropolis on the Actions of Police Officers concerned with the Case of Kenneth Joseph Lennon, Ordered by the House of Commons to be printed 31 July, 1974.

64 [1979] 3 W.L.R. 263

65 At 267

66 At 276

67 Lord Salmon at 277: 'It is now well settled that the defence called entrapment does not exist in English law'; Lord Fraser at 280: Court of Appeal 'decisions appear to me to be right in principle'; and Lord Scarman at 285: 'It would be wrong in principle to import into our law a defence of entrapment.'

68 R. v Underhill (1979) 1 Cr. App. R.(S.) 270


70 At 46

The Law Commission favoured instead the introduction of a new criminal penalty to apply to the entrapper.\textsuperscript{72} This will be dealt with in a later section.

The English courts will continue to use evidence of entrapment to affect the sentence,\textsuperscript{73} and will grant an absolute discharge in appropriate cases.\textsuperscript{74} Unlike Canada, England has no restrictions on the use of absolute discharges.\textsuperscript{75}

In addition, there is the possibility of stopping a prosecution as an abuse of the process of the courts. Abuse of process was not argued in \textit{Sang}.\textsuperscript{76} The Court of Appeal, however, stated, obiter, that 'a trial judge may have power to stop a prosecution if it amounts to an abuse of the process of the court and is oppressive and vexatious.'\textsuperscript{77} In the House of Lords only Lord Scarman mentioned the 'abuse of process' concept, stating, 'Save in the very rare situation, which is not this case, of an abuse of the process of the court (against which every court is in duty bound to protect itself), the judge is concerned only with the conduct of the trial.'\textsuperscript{78}

\textbf{UNITED STATES}

A series of four United States Supreme Court cases have established the defence of entrapment in American law. In \textit{Sorrells v United States}, decided in 1932, the defence of entrapment applies, according to the majority opinion, if the result of the governmental activity is to 'implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute.'\textsuperscript{79} The same view was restated by the majority of the Supreme Court in the subsequent cases of \textit{Sherman v United States} in 1958,\textsuperscript{80} \textit{United States v Russell} in 1973,\textsuperscript{81} and \textit{Hampton v United States} in 1976.\textsuperscript{82} The test focuses on the accused's predisposition and is therefore often labelled the 'subjective' test.

The minority view in each of the four cases focuses attention on police

\begin{itemize}
\item \textit{Sorrells v United States} [1932] 287 U.S. 435, at 442
\item \textit{Sherman v United States} (1958) 356 U.S. 369
\item \textit{United States v Russell} (1973) 411 U.S. 423
\item \textit{Hampton v United States} (1976) 425 U.S. 484
\end{itemize}

\textsuperscript{72} At 51-2
\textsuperscript{74} See, eg, \textit{Browning v Watson} (1953) 1 W.L.R. 1172 (Div. Ct.).
\textsuperscript{75} See \textit{Thomas Principles of Sentencing} (2nd ed 1979), at 225 et seq.
\textsuperscript{76} [1979] 3 W.L.R. 263, at 288
\textsuperscript{77} [1979] 2 W.L.R. 439, at 443
\textsuperscript{78} Ibid
\textsuperscript{79} (1932) 287 U.S. 435, at 442
\textsuperscript{80} (1958) 356 U.S. 369
\textsuperscript{81} (1973) 411 U.S. 423
\textsuperscript{82} (1976) 425 U.S. 484
conduct and is known as the 'objective test.' In *Sherman v United States*, for example, Frankfurter J stated that an entrapped accused should not be convicted if 'the methods employed on behalf of the Government to bring about conviction cannot be countenanced.'

No Supreme Court case has established the defence as a constitutional requirement applicable to the federal government or to the states. But this is hardly necessary because of the acceptance of the defence by the Supreme Court and by state courts and legislatures. In 1976, according to one commentator, all states except Tennessee had accepted the defence of entrapment, and Tennessee at the time had legislation pending that would do so.

The Supreme Court split between those favouring the subjective and those favouring the objective approach is also found, not surprisingly, in the state courts. Most follow the subjective approach, but a small number, including, recently, the Supreme Court of California, use the objective test.

In contrast, almost every commentator on the defence and all the major legislative proposals take the objective approach. The California Supreme Court pointed out in 1979 that only two American law review articles endorsed the subjective view. One of these, however, a lengthy, illuminating analysis published in 1976 in the *Minnesota Law Review*, shows some of the advantages of the subjective approach often overlooked in other articles and argues that the objective "hypothetical-person defense creates a greater risk of unjust treatment of individual defendants than does the federal defense, and that the possibility of beneficial effects upon conduct of police agents is not strong enough to justify taking this risk."

Both the American Law Institute's Model Penal Code of 1962 and the proposed US Federal Code prepared by the Brown Commission in 1971...
adopted the objective approach. The Model Penal Code states that entrapment should be a defence if the police or their agents induce or encourage an offence by ‘employing methods of persuasion or inducement which create a substantial risk that such an offence will be committed by persons other than those who are ready to commit it.’

The Brown Commission proposal is that ‘entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense.’ This was the test judicially adopted by the California Supreme Court in the 1979 case mentioned above.93

The two tests are not as clearly separated in practice as they are in theory.94 Indeed, Lafave and Scott's view is probably correct that 'most cases would come out the same way in the end whichever view is taken.'95 Some cases mix up the tests by construing the objective test as subjective.96 And some of the supposed theoretical characteristics of each test can be found in practice in the other test as well. So, for example, although the objective test is usually thought to be a question for the judge, the recent California test has left it as a jury question.97 And although the accused's previous convictions are thought not to be relevant for the objective test, many courts permit their use.98

There is a possibility of using the due process clause of the Fifth and Fourteenth Amendments to bar government activity which 'shocks the conscience'99 of the court, whether or not the accused was predisposed to commit the offence. The door for such a defence was left open by Rehnquist in United States v Russell, when he stated: 'While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction ... the instant case is distinctly not of that breed.'100 But Rehnquist, speaking for two other members of the court, tried to shut the door firmly again in 1976 in Hampton v United States101 by not applying the due process clause

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93 People v Barraza (1979) 591 P. 2d 947
94 See generally, Park, supra note 85.
95 Criminal Law (1972), at 372
96 See Park, supra note 85, 168.
97 People v Barraza (1979) 591 P. 2d 947, at 956
98 Park, supra note 85, 201 et seq
99 Per Frankfurter J. in Rochin v California (1952) 342 U.S. 165, at 172
100 (1973) 411 U.S. 423, at 431–2
to an accused who was predisposed to commit the offence. Two other concurring members of the court, however, (who would, of course, be joined by the dissenters on this issue) considered that it was going too far to hold 'that the concept of fundamental fairness inherent in the guarantee of due process would never prevent the conviction of a predisposed defendant, regardless of the outrageousness of police behaviour in light of the surrounding circumstances.' So the door is still slightly ajar.

The Canadian Bill of Rights also contains a 'due process' clause: 'There have existed and shall continue to exist ... the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law.' This clause has not yet been raised in any reported Canadian entrapment case. If it were, its chance of success would be very slight because of the limited scope the Supreme Court of Canada has so far given to the words 'due process.'

The outcome of applying the various tests will, of course, depend to a great extent on how the tests are interpreted by the courts. Take the Brown Commission proposal 'likely to cause normally law-abiding persons to commit the offense.' Does 'likely' mean possibly or does it mean greater than a 50 per cent chance? If the latter, then the defence is almost a dead letter. Who is the normally law-abiding person? If he is the reasonable man on the Clapham omnibus will he ever be induced to commit an offence? Presumably, because of the deliberate use of the word 'normally,' he is less law-abiding than the reasonable man, who I would think would always, not just normally, be considered law-abiding.

Does the normally law-abiding person have any of the accused's characteristics? For example, if a paedophile is entrapped into attempting an offence, does one measure the police lure by judging how a normally law-abiding paedophile would react? If not, then it would be very difficult ever to establish the defence in such a case. Similarly, if a person is induced to traffic in narcotics, is the lure measured against the reaction of a normally law-abiding possessor (a contradiction in terms?) or by a non-user? If the latter, then again it is unlikely that the defence will be established in many cases. So, as with the Canadian and English law of provocation, one is forced to build some of the accused's characteristics into the 'ordinary' or normally law-abiding person. Once again one sees a merging of the objective and subjective approaches.

102 Powell and Blackmun JJ, at 492
Looking at the subjective test, which denies the defence to a person who is 'predisposed,' what do we mean by 'predisposed'? Predisposed to commit that very offence? To commit an offence violating that very law? To commit offences of that type? To commit offences in general? If it is the last, then the defence will be difficult to apply; if the first (committing that very offence) then the defence will apply in a great many cases.

So the test itself does not determine the result. The content of the test is very important, as is the crucial issue of the burden of proof. I suspect, for example, that many, if not most, district attorneys in the United States would prefer the objective test with the burden of persuasion on the accused rather than the subjective test with the burden on the prosecution to disprove entrapment beyond a reasonable doubt.

Theoretical basis for the defence

What is the theoretical basis for the establishment of the defence? Glanville Williams has rightly pointed out that there is 'no ready-made doctrine to cover the situation.' Evidence in a few special cases, to quote Lord Diplock in the *Sang* case, 'both the physical element (actus reus) and the mental element (mens rea) of the offence with which he is charged are present.'

The special cases in which entrapment affects the actus reus are those in which police involvement affects one of the elements of the charge. So, for example, because of police involvement in the case of possession of stolen goods, the goods might no longer be considered stolen goods; in the case of breaking and entering, the house might not have been broken into without the consent of the owner; and in the case of treason, the enemy may not actually have been assisted. However, in Canada (but not in England) it should be possible in these cases to convict the accused of an attempt.

There are other, but not many, isolated instances where traditional concepts might be able to solve entrapment problems. For example, an assurance by a peace officer that the proposed conduct is not illegal might enable the accused to raise a mistake of law defence, particularly if the

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106 Criminal Law (1961), at 785
107 *R. v Sang* [1979] 3 W.L.R. 269, at 267
110 *R. v Snyder* (1915) 24 C.C.C. 101 (Ont. C.A.)
113 See Friedland, National Security: The Legal Dimensions (1980) at 101 et seq.
peace officer acts openly as a peace officer. The Model Penal Code specifically deals with this in the entrapment section, providing a defence if the police make 'knowingly false representations designed to induce the belief that such conduct is not prohibited.'\textsuperscript{114} And there may be cases where the police tactics are so excessive that they can amount to duress.

Estoppel is not applicable as a basis for the defence because, as Glanville Williams has stated: 'The strict doctrine of estoppel has not been applied in criminal law, except in respect of estoppel by judgment; and in any event the situation is not precisely one of estoppel.'\textsuperscript{115}

The US cases bring in the defence in two ways, depending on whether the subjective or objective approach is taken. Those favouring the subjective approach bring in the defence through the device of statutory interpretation, holding that the legislature could not have intended the statute to cover police-instigated conduct that traps an innocent person. This theory was enunciated by the United States Supreme Court in 1932 in \textit{Sorrells v United States},\textsuperscript{116} where a prohibition agent induced Sorrells, a law-abiding citizen without previous involvement in such sales, to supply liquor through repeated requests in which, in the language of the majority decision, he took 'advantage of the sentiment aroused by reminiscences of their experiences as companions in arms in the World War.'\textsuperscript{117} Chief Justice Hughes for the majority of the court stated: 'We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute.'\textsuperscript{118} The minority view, which also led to an acquittal, looked at the conduct of the government, refusing to rely on what they considered the artificiality of using the technique of statutory construction. It 'requires no statutory construction, ... but frankly recognizes the true foundation of the doctrine in the public policy which protects the purity of government and its processes.'\textsuperscript{119}

The same division is found in the later cases. In \textit{United States v Russell}\textsuperscript{120} Rehnquist J for the court stated that the defence 'is rooted not in any authority of the Judicial Branch to dismiss prosecutions for what it feels to have been "overzealous law enforcement," but instead in the notion that

\begin{itemize}
  \item \textsuperscript{114} S. 213(1)(a)
  \item \textsuperscript{115} Criminal Law (1961), at 785
  \item \textsuperscript{116} (1932) 287 U.S. 435
  \item \textsuperscript{117} At 441
  \item \textsuperscript{118} At 448
  \item \textsuperscript{119} Per Roberts J. at 455
  \item \textsuperscript{120} (1973) 411 U.S. 423
\end{itemize}
Congress could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offense but was induced to commit them by the government. The minority in Russell, dissenting, again looked to the abuse of government power: "[T]he focus of this approach is not on the propensities and predisposition of a specific defendant, but on "whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of government power.""

Would either of these approaches be acceptable to the judiciary in Canada?

Statutory interpretation certainly appears artificial in this situation. We do not usually build the law of defences and excuses in this way, although there are occasions such as the recent Regina v City of Sault Ste. Marie decision on strict responsibility where it was desirable to do so. A more acceptable approach is to use section 7(3) of the Criminal Code, which provides: 'Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.' Although the section, by its very terms, applies only to federal legislation, there is little doubt that if the defence is accepted with respect to federal statutes it would, without too much difficulty or discussion, also be applied by the courts to provincial legislation.

Section 7(3) has been used by the Supreme Court of Canada in the past few years to introduce – or at least to acknowledge the existence of – the defence of necessity in the Morgentaler case, to permit the use of the law of duress in the Paquette case, and to develop the concept of double jeopardy in the Kienapple case.

One hurdle that the court would have to get over is that the section can be interpreted to limit defences to those recognized when the Code was first introduced in 1892 – and entrapment was not then recognized as a defence. But in the above cases the Supreme Court has given a liberal interpretation to the section and, as Laskin cj stated in Kirzner, 'I do not think that s. 7(3) should be regarded as having frozen the power of the

121 At 435
122 Per Stewart J, at 441, quoting in part from the dissenting judgment of Frankfurter J. in Sherman v United States (1958) 356 U.S. 369, at 382
123 (1978) 40 C.C.C. 353 (S.C.C.)
124 Morgentaler v The Queen (1975) 20 C.C.C. (2d) 449
125 R. v Paquette (1976) 30 C.C.C. (2d) 417
126 Kienapple v The Queen (1974) 15 C.C.C. (2d) 524
Courts to enlarge the content of the common law by way of recognizing new defences, as they may think proper according to circumstances that they consider may call for further control of prosecutorial behaviour or of judicial proceedings. The courts should not be criticized for manufacturing a defence to deal with manufactured crime.

An entrapment defence is akin to the defences of duress and necessity, but does not fit comfortably with either. In all cases there is an external force which has an effect on the accused, although in this case, unlike the others, the external force is the police. It is, however, not like necessity, where the accused acts to protect a more important value. The defence is closer to duress. As Fletcher has written, 'In one case the actor is seduced by the wiles of a duplicitous police officer, in the other he is coerced by the threats of an overbearing will.'

The defence also bears some resemblance to the concept of provocation, which provides the accused with a defence to a murder charge if an external event would have made an ordinary person lose his self-control. But provocation only reduces murder to manslaughter and does not result in an outright acquittal. Thus a successful provocation defence affects sentencing, which entrapment can (with some limitations) now do.

No existing defence quite fits. Perhaps all one can say is that if it is to be a defence it is because it is unjust to register a conviction in certain circumstances. We will return to this theme later.

Let us turn to the minority view that the purpose of the defence is to control government power. The potential for this approach in Canada will depend on whether the Supreme Court of Canada accepts that it has a role in controlling prosecutorial power. This issue is still an open question in Canada, although it would seem not to be in England, at least with respect to government harassment through multiple prosecutions by unreasonably splitting a case. In Connelly v D.P.P. (1964) the House of Lords developed the concept that it would be an abuse of the process of the court for the Crown unreasonably to split its case. This particular issue has not yet been settled in Canada. If the Supreme Court holds — and as I have written elsewhere it would be unfortunate if it did so hold — that

127 (1977) 38 C.C.C. (2d) 131, at 138
128 Fletcher Rethinking Criminal Law (1978), at 542
129 Canadian Criminal Code s. 215
131 See The Queen v Osborn (1970) 1 C.C.C. (2d) 482 (S.C.C.); see also Rourke v The Queen (1977) 35 C.C.C. 129 (S.C.C.). Note that in R. v Krannenburg (1980) 51 C.C.C. (2d) 205, at 212 (S.C.C.) Dickson J stated, obiter, for the court: '[T]he laying of another information may amount to nothing less than an abuse of process.'
132 Friedland Double Jeopardy (1969) ch 7
there is no power to bar abusive prosecutorial practices in such cases, then it could not logically stop a prosecution because of abusive police practices. The case for interference with abusive prosecutorial practice is a far stronger one because it relates directly to the procedure before the court.

But even if the courts do step in to bar prosecutorial harassment they may not take the further and more difficult step of attempting to control police misconduct through a general discretionary power to bar prosecutions as an abuse of process. Indeed, if the concept, which is often given the convenient label ‘abuse of process,’ is given the fuller description of ‘abuse of the process of the courts’ then it is not easy to extend it to the pre-trial stage. In *Rourke v The Queen (1977)* the question was whether it was an abuse of process to delay bringing a charge. Pigeon J, for the majority of the court, stated that he could not ‘admit of any general discretionary power in Courts of criminal jurisdiction to stay proceedings regularly instituted because the prosecution is considered oppressive.’ Yet, if the concept of abuse of process can be used to bar a criminal case because it is felt the courts are being used as a collection agency, why should a case not be barred when the Criminal Court is being used to prosecute a state-manufactured crime? Even though there may be no ‘general discretionary power,’ it is still quite possible that the Supreme Court might apply it to specific exceptional situations, such as entrapment.

The concept of abuse of process is therefore one possible solution to the entrapment problem. A better solution would be a legislative one in which the various issues can all be faced directly at the same time: the test to be applied; the burden of proof; whether it is to be dealt with by the judge or jury; and whether the accused’s record should be admissible when entrapment is in issue.

Before we turn to an examination of such a legislative provision let us examine a further device which has been used by some courts, that is, barring evidence based on entrapment.

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133 (1977) 35 C.C.C. (2d) 129
134 At 145
135 See the cases cited by Laskin CJ in *Rourke v The Queen (1977)* 35 C.C.C. (2d) 129, at 137.
136 It will be recalled that only one member of the House of Lords, Lord Scarman, in *R v Sang* [1979] 3 W.L.R. 263, at 288, mentioned abuse of process; see also *R v Sang* [1979] 2 W.L.R. 439, at 443 (C.A.).
Exclusion of evidence

A number of cases in England\textsuperscript{138} and elsewhere\textsuperscript{139} had excluded evidence by the entrapper as a method of controlling entrapment. But this technique was unequivocally rejected in England by the Court of Appeal\textsuperscript{140} and the House of Lords\textsuperscript{141} in Sang. To reject evidence was, in effect, to bring in the defence through the back door. And so the proposal to do so, according to Lord Diplock, 'does not bear examination.'\textsuperscript{142} Lord Salmon stated that such a result would be 'inconceivable,'\textsuperscript{143} Lord Fraser that it would be 'remarkable,'\textsuperscript{144} and Viscount Dilhorne that it would be 'odd.'\textsuperscript{145} And so, as Lord Diplock stated, '[w]hatever be the ambit of the judicial discretion to exclude admissible evidence it does not extend to excluding evidence of a crime because the crime was instigated by an agent provocateur.'\textsuperscript{146}

The House of Lords went on to deal with this broader question of the extent to which a judge has a discretion to exclude illegally obtained evidence. Their Lordships held, although the result is not as clear as one would like,\textsuperscript{147} that there was no discretion to exclude evidence on the ground that it was obtained by improper or unfair means except in the case of confessions and evidence obtained from the accused after commission of the offence. And, of course, they reaffirmed that there is a discretion to exclude evidence if its prejudicial effect outweighs its probative value.

Canadian courts are even less inclined to exclude illegally obtained evidence. In the well-known case of The Queen v Wray\textsuperscript{148} in 1970 the Supreme Court of Canada held that there was not even a discretion to exclude real evidence obtained through the accused as the result of oppressive interrogation tactics. And in Hogan v The Queen\textsuperscript{149} the

\begin{itemize}
  \item \textsuperscript{140} R. v Sang [1979] 2 W.L.R. 439
  \item \textsuperscript{141} R. v Sang [1979] 3 W.L.R. 263
  \item \textsuperscript{142} At 267
  \item \textsuperscript{143} At 277
  \item \textsuperscript{144} At 280
  \item \textsuperscript{145} At 276
  \item \textsuperscript{146} At 268
  \item \textsuperscript{148} [1970] 4 C.C.C. 1. Three members of the court, Cartwright cjc, Hall and Spence jj, dissenting, would have allowed the trial judge to exclude the evidence.
  \item \textsuperscript{149} (1974) 18 C.C.C. (2d) 65
\end{itemize}
Supreme Court held that even a violation of the Bill of Rights did not justify the exclusion of evidence.

Both the Ouimet Committee and the Evidence Code of the Law Reform Commission of Canada recommend that the trial judge have a limited discretion to exclude evidence. The Ouimet Committee recommended that legislation give effect to the principle that '[t]he court may in its discretion reject evidence which has been illegally obtained.' And the Law Reform Commission's draft section provides, in part, that: '15. (1) Evidence shall be excluded if it was obtained under such circumstances that its use in the proceedings would tend to bring the administration of justice into disrepute.' It should also be noted that the Canadian wiretapping legislation includes a provision excluding conversations illegally obtained.

The English Royal Commission on Criminal Procedure considered the exclusion of evidence in its report published in January 1981. 'Running as a common thread through all the evidence on police powers,' the commission had stated in its earlier consultative paper, 'is the question of how the exercise of those powers can be effectively controlled.' The report rejects the automatic exclusionary rule as a general means of securing compliance with its proposed statutory rules respecting police questioning. It would, however, use the technique 'in order to mark the seriousness of any breach of the rule prohibiting violence, threats of violence, torture or inhuman or degrading treatment and society's abhorrence of such conduct.'

In my opinion, even if the courts were to be given some discretion to exclude evidence, it would not be a sound technique for controlling entrapment. Entrapment does not lead to the creation of evidence in the same way as illegal search and interrogation do. What is to be excluded? Presumably it is the evidence of the undercover agent. So an accused who happens to admit the facts to the police will be convicted, but one who does not will not. Similarly, if another witness happens to be present the accused will be convicted; if the entrapper and the accused are alone, he will not. These distinctions are surely unwarranted. The entrapment

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150 Report of the Canadian Committee on Corrections (1969), at 74
151 Evidence Report (1977) s 15(1)
152 S 178.16(1). Subsection (2) gives the judge a discretion to refuse to admit evidence obtained directly or indirectly as a result of information acquired by an illegal interception 'where he is of the opinion that the admission thereof would bring the administration of justice into disrepute.'
should either directly affect the result or it should not. Moreover, it is not possible to say on the basis of the present law what police conduct is legal and what is illegal, and so whether evidence will be excluded will depend to too great an extent on the personal views of the trial judge. It would be far better to develop a limited defence of entrapment to handle the problem.

A legislative solution

There is no single simple solution to entrapment problems. A legislative solution which provides a defence to the accused may not also supply a fair test for deciding whether a police officer should be prosecuted for his conduct. Neither test may be the right one for deciding what the borderline should be between proper and improper conduct and whether a police officer should be disciplined for overstepping the line. Again, none of the tests may be the same as that which should be used to decide whether the police officer or agent is an accomplice and thus requires corroboration. In this section we examine possible legislative provisions which would give a defence to the accused.

Neither the objective nor the subjective model is ideal.

The objective model, which is designed to control police behaviour, is inconsistent with the present Canadian judicial philosophy of not using the trial of an accused to control the police. Even in the area of the law of confessions, where one might have thought that controlling the police was one of the prime considerations, the Supreme Court of Canada has held that evidence obtained as the result of an inadmissible confession - for example, the location of the murder weapon - is admissible, as well as those parts of the confession that are confirmed by the subsequent find.\(^{155}\) So, introducing the objective test would be a far-reaching step in Canadian law. Moreover, somewhat paradoxically, the test suffers from the disadvantage of making the test in certain cases too difficult for the accused. Not only does the test usually place the onus of proof on the accused, but, because the test has to handle cases of those with and without a pre-existing intent, the judges are likely to err on the side of giving the police greater scope for instigation than is desirable.\(^{156}\)

The subjective test, such as that suggested by the Ouimet Committee, previously set out,\(^{157}\) would be preferable.

One of the objections to the subjective test is that it permits the prosecutor to prove previous convictions and other evidence of wrongdo-

\(^{155}\) *The Queen v Wray* [1970] 4 C.C.C. 1 (S.C.C.)

\(^{156}\) See Park, supra note 85.

\(^{157}\) See supra 8–10.
ing in order to show a pre-existing intention. But this objection can be overstated because the actus reus and mens rea will already have been admitted by the very nature of the defence and so the previous convictions cannot prejudice those issues. Moreover, the accused will almost certainly have to go into the witness box to give his version of the transaction, and under Canadian law his previous convictions would then be admitted, although for a different purpose.

The Ouimet test may, however, favour the accused to too great an extent in certain cases. Let us suppose that there have been a series of violent sexual assaults at night in a certain park. The police decide to use a female decoy to trap the culprit. Another person, not the suspected culprit, seeing the female sitting in a provocative pose alone on the park bench decides, without any “pre-existing intention,” to indecently assault her. Should he have a complete defence? The Ouimet test would give him one. But I do not want him to be acquitted. Society expects people like him to exercise restraint. It is, of course, possible to say that the accused had, in fact, a pre-existing intention because he decided to indecently assault her; but if this is the meaning of “pre-existing intention” then the defence will rarely be applicable.

Take another case. If there is widespread corruption in a police force and the police commission decides to test officers with bribes, then the Ouimet test would prevent the conviction of someone who accepted a bribe if he did not have a pre-existing intention to do so. Yet, as previously suggested, most people would feel that a conviction in such a case would be warranted.

Although the Ouimet test, as drafted, is a relatively good one, it may be that a better one would combine elements of both the objective and subjective tests so that the police conduct and the accused’s pre-existing intent would both be factors in determining whether a defence should apply. It is the combination of the two factors that makes it unjust to convict in any particular case. Society should allow the police very little scope for entrapping the person without a pre-existing intent, but substantially more scope in the case of the person who has a pre-existing intent. The test should reflect that the propriety of police conduct will vary from case to case depending on the crime charged and the accused’s prior intent to engage in the activity.

Drafting such a test would not be easy. As with the concepts of causation and the actus reus for an attempt, a simple formulation would be preferable to an elaborate set of provisions which attempts to make too many fine distinctions. I would leave the decision to the trier of fact and,

158 Canada Evidence Act, R.S.C. 1970, c E-10, s 12
159 See Park, supra note 85, at 213.
because of the extraordinary nature of the defence, would place the burden of persuasion on the accused. The issue would not get to the jury if the trial judge did not think there was sufficient evidence to permit the jury to consider the matter. The following is my attempt to provide the jury with a test: 'The jury should acquit the accused if they are satisfied that the police or their agent’s conduct in instigating the crime has gone substantially beyond what is reasonable, having regard to all the circumstances, including, in particular, the accused’s pre-existing intent.'

Another, but less satisfactory, possibility, which follows Judge Bazelon’s suggested test on the equally difficult insanity issue, would leave it to the jury to acquit the accused if they were satisfied that all the circumstances, including, in particular, the police conduct and the accused’s pre-existing intent make it unjust to register a conviction.

**Liability of the entrapper**

Another method of controlling improper entrapment is to impose liability, civil or criminal, on the instigator.

It would be difficult to succeed in a civil action against the instigator if entrapment did not also create a defence to the criminal action. If an action were brought, the courts would probably look to the closest analogy involving an abuse of legal procedure, malicious prosecution, where the criminal action must have ended in the plaintiff’s favour before a civil action can succeed. But even if civil liability were a possibility it would not be particularly effective because the damages would no doubt be very low.

Criminal liability against the instigator offers greater possibilities than civil liability. There are a number of judicial statements indicating that the police officer is not immune from prosecution. For example, in *Kirzner*, Laskin cj stated that '[t]he police, or the agent provocateur or the informer or the decoy used by the police do not have immunity if their conduct in the encouragement of a commission of a crime by another is

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160 Would such a provision violate s 2(f) of the Canadian Bill of Rights ('presumed innocent until proved guilty')? Probably not, just as s 16, the insanity section, which places the onus of proof on the accused, probably does not.

161 *U.S. v Brauner* (1972) 471 F. 2d. 969, at p 1032 (Dist. Col. C.A.): ‘Our instruction to the jury should provide that a defendant is not responsible if at the time of his unlawful conduct his mental or emotional processes or behaviour controls were impaired to such an extent that he cannot justly be held responsible for his act.’

162 See Winfield *The Present Law of Abuse of Legal Procedure* (1921), at 124 et seq.

itself criminal.' But this does not answer the question whether the 'conduct ... is itself criminal.'

The dicta in some of the cases are vague. In the Sang case the Court of Appeal simply stated that '[a] police officer who goes too far may himself be prosecuted for the crime which he has committed or for inciting another to commit a crime.' The judgements in the House of Lords in Sang are unhelpful on this question. Lord Salmon did not try to determine where the line should be drawn, but gave as an example a case crying out for prosecution; he referred to 'the unusual case, in which a dishonest policeman, anxious to improve his detection record, tries very hard with the help of an agent provocateur to induce a young man with no criminal tendencies to commit a serious crime; and ultimately the young man reluctantly succumbs to the inducement ... The policeman and the informer who had acted together in inciting him to commit the crime should ... both be prosecuted and suitably punished.' In Canada the officer in such a case could be charged with 'counselling or procuring' under section 22 of the Code.

It is not likely that the courts would convict a police informer who played a minor role in the execution of a crime in order to frustrate the crime. At the other extreme, they would convict an informer who played a major part in a serious crime, whatever his purpose. But few such cases will ever reach the courts and so the law will necessarily remain uncertain.

One Canadian case did reach the courts, however. An early liquor case in Alberta held that the police-sergeant who purchased liquor in order to trap a suspected liquor violator was guilty of an offence. There was special provincial legislation exempting the police from prosecution, and it may be that the fact that the legislation did not cover the facts of this case was decisive in the view of the Alberta Court of Appeal in reversing the acquittal by the magistrate. The case, in my opinion, goes too far and would not likely be followed today in other cases of purchase, or at least the case would be distinguished as one depending on specific legislation.

164 (1977) 38 C.C.C. (2d) 131, at 134. See also Brannan v Peek [1948] 1 K.B. 68 (Div. Ct.).

165 See also Report No. 83 of the English Law Commission, Report on Defences of General Application (1977), at 50, which starts with the firm statement 'Wherever a person, for the purpose of entrapping another, himself commits a criminal offence he can, of course, be prosecuted for that offence.' On the following page, however, they say, '[I]t is by no means clear that in all cases the trapper would be guilty.'

166 [1979] 2 W.L.R. 439, at 456

167 [1979] 3 W.L.R. 265, at 278. Lord Diplock (at 267) may not have been directing his mind to this question when he stated: 'The fact that the counsellor and procurer is a policeman or a police informer ... cannot affect the guilt of the principal offender'; see also Lord Scarman (at 285) who also probably was not dealing with the point at issue here.

168 R. v Petheran (1936) 65 C.C.C. 151 (Alberta C.A.)
There are no recent cases where a police officer or a police informer has been convicted, although there are Canadian cases where persons who have at some stage acted for the police, but were not doing so at the time of the offence, have been convicted.\footnote{169}

If society considers that it is a legitimate police practice for an undercover officer or agent to attempt to purchase a narcotic, then the courts should not convict the officer of possession.\footnote{170} The officer cannot be expected to arrest the accused before taking possession of the drug: if he did, the evidence of trafficking would be less certain and the officer might in the circumstances be incurring risk to himself. Similarly, if it is legitimate for an undercover officer to infiltrate a drug ring and he plays a minor role in the organization for a brief period, then it would be wrong to convict the officer of aiding and abetting in trafficking. Further, if it is legitimate for an undercover officer to infiltrate an espionage ring, he should not be convicted of committing an offence if he breaches a provincial law by registering in a hotel under a false name. It is not that the police should be exempt from the law, but that the law should not make such conduct criminal.

On what basis should these acts not be offences? The law of necessity, in the light of \textit{Morgentaler},\footnote{171} does not seem to be applicable. And superior orders should not by itself be a valid reason for illegal conduct.\footnote{172} Lack of mens rea is certainly a possible defence in some, if not most, cases, including aiding and abetting which requires 'purpose,'\footnote{173} but will not help in those cases where no mens rea is required. Section 25 of the Criminal Code, which provides that '[e]veryone who is required or authorized by law to do anything in the administration or enforcement of the law ... as a peace officer ... is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do,' has not been given a liberal interpretation by the Supreme Court of Canada.\footnote{174}


\footnote{170} A regulation passed under the Narcotic Control Act, r.s.c. 1970, c. N-1, Regulation 3(1), permits a police officer 'to have a narcotic in his possession where [he] has obtained the narcotic pursuant to these Regulations and ... such possession is for the purpose of, and in connection with' his employment. It seems unlikely that the officer would fit the section because he would not have 'obtained the narcotic pursuant to these Regulations.'

\footnote{171} \textit{Morgentaler v The Queen} (1975) 20 C.C.C. (2d) 449 (s.c.c.).

\footnote{172}See Friedland \textit{National Security: The Legal Dimensions} (1980), at 104 et seq.


\footnote{174} See Friedland, supra note 172, at 100 et seq.; \textit{Eccles v Bourque} (1974) 19 C.C.C. (2d) 129 (s.c.c.).
Once again it is difficult to find a concept which would prevent convictions in these cases. The courts would probably simply use section 7(3) of the Code to prevent a conviction when the officer is using legitimate and relatively harmless law enforcement techniques. In England the Divisional Court held that it was proper for the police to instruct a person blocking an ambulance to go the wrong way on a one-way street. In Canada, in the area of arrest and search the Supreme Court has developed such doctrines. A police officer can search a suspect who has been arrested for carrying dangerous weapons, and similarly police can go onto private property in making an arrest.

Another approach would be to provide by legislation a specific statutory defence similar to section 25 to cover these cases. But it would be difficult to draft such a law. No doubt the police would prefer clarification by legislation, but it would be better to achieve clarification through administrative rules and then to rely on the good sense of the courts, if prosecutions are brought, not to frustrate legitimate police activity. Trying to set the guidelines by establishing criminal liability against the police is likely to establish the line at a level too favourable to the police.

It is for this reason that a new offence against the police, as recommended by the Law Commission, while at first very attractive, is not a desirable approach. It would rarely be used, would be pitched to allow too much instigation, and would not serve to give the required guidance in this area.

In relation to provincial law, however, there is less danger in clarifying the law in advance. Provincial offences are less serious than Criminal Code offences. Moreover, many do not require mens rea and so the lack of mens rea defence is not open in many cases. New Brunswick has handled the problem legislatively by providing: 'A member of the Royal Canadian Mounted Police or a member of a police force shall not be convicted of a violation of any Provincial statute if it is made to appear to the judge before whom the complaint is heard that the person charged with the offence committed the offence for the purpose of obtaining evidence or in carrying out his lawful duties.'

The federal government probably has constitutional power to pass a similar provision applicable to all summary conviction offences, federal and provincial. Would it be desirable to do so? In my opinion a statutory provision protecting police officers involved in undercover operations

176 R. v Brezack (1949) 96 c.c.c. 97 (Ont. C.A.)
177 Eccles v Bourque (1974) 19 c.c.c. (2d) 129 (s.c.c.)
179 New Brunswick Police Act, s.n.b. 1977, c P-9.2, s 3(4)
who 'act reasonably in carrying out their lawful duties' from criminal liability for minor offences (for example, false registration in a hotel room) would assist the police without creating dangers of abuse. One objection might be that providing protection in certain cases would imply a lack of protection in others. However, it should be possible to draft language which would avoid such an inference.

The protection could — and, in my opinion, should — be linked to the existence of published rules or, preferably, regulations relating to the conduct. The use of regulations would require that the rules be scrutinized by a parliamentary committee.

*Rule-making and disciplinary action*

In England and the United States there have been publicly announced guidelines relating to informers and instigation designed to assist the police. There have been no such guidelines in Canada.

The Home Office in England issued general guidelines in 1969, and in 1976 the US attorney general issued detailed rules to guide the FBI. In Canada the solicitor general could issue guidelines to cover federal forces, and provincial attorneys general could do the same for provincial forces.

Breach of the guidelines could, as apparently is now the case with respect to the FBI in the United States, lead to disciplinary action. This is not the place to examine the difficult question of the type of machinery which could best deal with disciplinary problems. There have been a number of commissions and committees in Canada that have looked into the matter. It should, of course, be noted that disciplinary action cannot apply to non-police informers, although guidelines can attempt to give them guidance and can use the threat of prosecution as a sanction.

What would the rules contain? They could, for example, include a simple rule, such as in England, that '[n]o member of a police force, and no police informant, should counsel, incite or procure the commission of a crime.' They could require approval for each operation at a senior level within the force. They could prohibit any acts of 'violence' in the

182 See Wilson *The Investigators* (1978), at 84.
183 See the memo from Edward H. Levi, supra note 181.
185 See the memo from Edward H. Levi, supra note 181.
course of an infiltration. They could require that the officer have reasonable grounds to 'believe' or, at least, to 'suspect' that the person instigated had been engaged in similar conduct in the past. The guidelines cannot, however, be too specific, or else criminals would be able to test confederates to try to ensure that they were not involved with the police. But they could set out what is thought to be necessary for proper and effective policing.

Conclusion

A number of techniques to control improper instigation are needed.

A Some guidelines, as in England and the United States, should be developed in Canada, leading to disciplinary action if they are breached.

B A limited defence should be available to the accused if the guidelines are breached by the police or their agent. The courts could develop the defence under section 7(3) of the Code or, possibly, through the concept of 'abuse of process.' A legislative solution would, however, be able to shape the defence better than a judicial one and so would be preferable. The test could be that proposed by the Quimet Committee, which looks at whether the accused had a pre-existing intention to breach the law. A better approach is to combine the objective and subjective tests.

C Exclusion of evidence to control entrapment is not a desirable way of dealing with the problem.

D Whether or not a defence is permitted, the courts should continue to take entrapment into account in sentencing, including the possibility of granting an absolute discharge. The Canadian Criminal Code should be amended to eliminate the present restriction preventing the granting of a discharge in certain cases where the possible penalty is fourteen years or more.

E The police should be protected by legislation from prosecution for breaching summary conviction offences when they act reasonably in carrying out lawful duties specifically permitted by rules relating to infiltration. Protection for the police for more serious breaches of the law should be left to judicial interpretation.