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THE CRIMINAL SUSPECT'S ILLUSORY RIGHT OF SILENCE IN THE BRITISH COMMONWEALTH

H. J. Glasbeek† and D. D. Prentice‡

As an underpinning for the decision in *Miranda v. Arizona*,¹ the majority of the United States Supreme Court invoked the English practice with respect to in-custody interrogation to substantiate the thesis that "[e]xperience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed."² On the other hand, Mr. Justice Harlan's dissenting opinion rejected the position that English and Commonwealth³ practices justified the limits that the Supreme Court eventually placed on police interrogation.⁴ Determining which opinion was on sounder ground provides intricate but enlightening material for a comparative investigation of criminal law systems.

Any comparison between United States and Commonwealth attitudes, of course, must be viewed in the light of differing legal frameworks and social environments. The Bill of Rights, as an integral part of the United States Constitution, has no counterpart in the countries under survey. Further, the rights of the accused in the Commonwealth are seldom regulated by any comprehensive body of legislation; the topic has been subsumed by the law pertaining to crimes and evidence.⁵

The differences in social environment are also relevant. There is a feeling in the United States that the crime rate is rising.⁶ The courts fear that the police, operating under increased community pressures, will tend to view the rights of the accused as obstructions to the legitimate execution of their duties. Also, the findings of the Wickersham

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¹ 384 U.S. 436 (1966).

² *Id.* at 486.

³ Hereinafter referred to as the Commonwealth countries. Unless otherwise indicated this will include only England, Canada, and Australia.

⁴ 384 U.S. at 522-23 (dissenting opinion).

⁵ In Canada, a Bill of Rights has been enacted. 8 & 9 Eliz. 2, c. 44 (Can. 1960). As will be seen below, however, it is merely declaratory in effect. For the experience in Commonwealth countries other than those under discussion, see de Smith, *Fundamental Rights in the New Commonwealth*, 10 INT'L & COMP. L.Q. 83, 215 (1961).

⁶ See, e.g., Hoover, *Law Enforcement States Its Views*, 12 VILL. L. REV. 457, 458 (1967); *U.S. Crime: A "Renaissance"?*, NEWSWEEK, Feb. 27, 1967, at 31.

Commission⁷ on law enforcement appear to have left an indelible imprint on the collective judicial mind. The majority in *Miranda* willingly accepted as prevailing police interrogation practices advice given in police manuals, which consisted of writings by "professors and some police officers," not one of which was "shown by the record . . . to be the official manual of any police department . . ."⁸ These factors have led American courts to play an activist role in the control of the police.

In the Commonwealth countries there is no equivalent feeling of urgency, and the courts have been correspondingly more passive. This is explicable not so much on the ground that there is a lesser incidence of crime—a statistic very difficult to obtain—but rather on the ground that there is a feeling among lawyers, be it warranted or not, that these are "fundamentally law abiding countr[ies]."⁹ Also, the police in the Commonwealth countries are held in higher esteem by both the judiciary and the public. In 1962 the Royal Commission on the Police stated:

The findings of the survey constitute an overwhelming vote of confidence in the police, and a striking indication of the good sense and discrimination of the bulk of the population in their assessment of the tasks that policemen have to carry out. It is clear that such change as there has been in public opinion in recent years has been mainly in favour of the police. We therefore assert confidently, on the basis of this survey, that relations between the police and the public are on the whole very good, and we have no reason to suppose that they have ever, in recent times, been otherwise.¹⁰

Keeping the above distinctions in mind, the central problem is the same in the United States and the Commonwealth countries: determining the degree to which the accused should be made a witting or unwitting instrument in his own condemnation. Specifically, the issue is to what extent the police may exploit the timidity, ignorance, lack of foresight, and stupidity of the suspect in order to obtain a conviction.

I

THE RIGHT TO REMAIN SILENT

Theoretically, the police in the Commonwealth countries are not legally entitled to compel a suspected person to aid them in their inves-

⁷ NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT OF LAWLESSNESS IN LAW ENFORCEMENT (1931).

⁸ 384 U.S. at 499 (Clark, J., dissenting).

⁹ P. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 134 (1958). The author also cites statistics to show that the incidence of serious crimes is larger in the United States than in England. At least one important American law officer does not view the American populace as "fundamentally law abiding." See Hoover, *supra* note 6, at 466.

¹⁰ ROYAL COMMISSION ON THE POLICE, CMND. NO. 1728, ¶ 338 (1962).

tigation. The fastidiousness of the courts in protecting this right is well illustrated by the recent decision in *Rice v. Connolly*.¹¹ The appellant was thought to be acting suspiciously in an area that had been the scene of a number of breaking-and-enterings that night. Upon request, he refused to identify himself or give his address to a police officer unless he were formally arrested. The police officer obliged by charging him, under a section of the Police Act, with obstructing a police officer in the execution of his duty; the defendant successfully appealed the ensuing conviction. Lord Parker was of the opinion that the sole issue presented by the case was whether the appellant had a lawful excuse for refusing to answer the police constable.

It seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority, and to refuse to accompany those in authority to any particular place; short, of course, of arrest.¹²

Clearly, if suspected persons regularly invoked the right to remain silent, effective law enforcement would be stymied. But there is, in fact, no likelihood that this will happen. For the most part people are ignorant of their right of silence; even if they were not, there is strong pressure on them to cooperate, since it is popularly assumed that only the guilty would decline to do so. Indeed, the Judges' Rules¹³ recognize this social responsibility of citizens "to help a police officer to discover and apprehend offenders."¹⁴ Also, the legal system does not preclude the use of evidence obtained as a result of the suspect's voluntarily foregoing

¹¹ [1966] 3 W.L.R. 17, [1966] 2 All E.R. 649 (Q.B.).

¹² *Id.* at 21, [1966] 2 All E.R. at 652. See also *Greathead v. Village of Newcastle*, [1954] Ont. W.N. 160 (High Ct. J.); *Koechlin v. Waugh*, 11 D.L.R.2d 447 (Ont. C.A. 1958); *Regina v. Hoare*, [1966] 1 W.L.R. 763, [1966] 2 All E.R. 846 (C.C.A.). There are a number of minor statutory exceptions to the above principle. For these, see *Martin, Canada*, at 37, and *Williams, England*, at 41, in *POLICE POWER AND INDIVIDUAL FREEDOM* (C.R. Sowle ed. 1962). Since our main concern is pretrial procedure, this article will not deal with the rules relating to presumptions, comment on failure of accused to testify, burden of proof, or adoptive admissions, although they certainly affect the quality of the accused's right of silence.

¹³ The text of the first revised edition of these rules, effective since 1964, can be found in [1964] 1 All E.R. 237. The Judges' Rules have been recognized as general guiding principles in Canada. *Regina v. Fitton*, 6 D.L.R.2d 529 (Sup. Ct. 1957). Typical of the position in Australia is the province of Victoria, where the general format of the Judges' Rules have been adopted in the Standing Orders of the Victoria Police Department. For a copy of the Orders, see *Dunn, Interrogation of Suspects in Victoria*, 40 L. INST. J. 492, 493 (1966).

¹⁴ Appendix A, ¶ (a), quoted in [1964] 1 All E.R. 237 n.2.

his right to remain silent. The position is succinctly stated by Lord Devlin:

[W]hile the English system undoubtedly does give the accused man the right to be silent, it does nothing to urge him to take advantage of his right or even to make that course invariably the attractive one. The balance on which the English system works is that it combines the suspect's right to silence with the opportunity to speak.¹⁵

Thus, the right to remain silent does not in any meaningful way regulate the relationship between suspected persons and the police.

II

THE SCOPE OF LEGITIMATE QUESTIONING—THE CAUTION

If a suspect decides not to insist on his right to remain silent, are there any limitations on the extent to which the police may exploit his willingness to cooperate? Because of conflicting judicial opinions, the police in 1912 requested the judiciary to articulate a policy for regulating the obtaining of evidence by police questioning. This resulted in the Judges' Rules,¹⁶ which have been amended several times, most recently in 1964. The Rules recognize that questioning is a valuable and legitimate part of the investigatory process. Apparently, however, the scope of the right to question will vary directly with the stage reached in the inquiry. Unfortunately, such variations in the permissible ambit of questioning are closely related to the law of arrest.

Rule 1 concedes that the police should be unhampered during that stage of the investigation in which the object of the inquiry is to ascertain the guilty party.¹⁷ It also seems to permit questioning of a suspect in custody even though he has not been arrested.¹⁸ This appears to be a major departure from the common law principle that a person cannot

¹⁵ P. DEVLIN, *supra* note 9, at 59-60.

¹⁶ See note 13 *supra*. One view asserts that the Judges' Rules are designed not to regulate police conduct, but merely to control the admissibility of evidence obtained as a result of police questioning. See Smith, *Questioning by the Police: Some Further Points—I*, 1960 CRIM. L. REV. (Eng.) 347. For a brief description of the origin of the Rules, see St. Johnston, *The Legal Limitation of the Interrogation of Suspects and Prisoners in England and Wales*, 39 J. CRIM. L.C. & P.S. 89 (1948-49).

¹⁷ 1. When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. *This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.*

[1964] 1 All E.R. 237 (emphasis added).

¹⁸ *Id.*

be restrained unless arrested.¹⁹ But since this principle is clearly recognized in Appendix A of the Judges' Rules themselves,²⁰ it is difficult to imagine that Rule 1 was intended to override it. There are a number of less-than-perfect resolutions of this problem. The first of these is that, since "Rule 1 has contradicted a major principle of the law of arrest," it will be nugatory insofar as the two conflict.²¹ This thesis has been challenged on the ground that there is a "significant difference between having a reasonable suspicion and having sufficient admissible evidence to set the machinery of the courts in motion by preferring a charge."²² In other words, the phrase "taken into custody" as used in Rule 1 is a synonym for arrest, and therefore Rule 1 does not permit detention for questioning without the filing of a formal charge. The difficulty with this latter interpretation is that it berefts Rules 2 and 3²³ of any meaning or function, for they appear to have been inserted specifically to cover the situation of questioning after arrest and prior to a formal charge.

A more reasonable interpretation than either of the above is that

¹⁹ See *Rice v. Connolly*, [1966] 3 W.L.R. 17, [1966] 2 All E.R. 649 (Q.B.).

²⁰ Paragraph (b), quoted in [1964] 1 All E.R. 237 n.2.

²¹ Brownlie, *Police Powers—IV, Questioning: A General View*, 1967 CRIM. L. REV. (Eng.) 75, 81.

²² Thompson, *Questioning: A Comment*, 1967 CRIM. L. REV. (Eng.) 94, 97.

²³ 2. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

3. (a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:

"Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence."

(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.

Before any such questions are put the accused should be cautioned in these terms:

"I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may be given in evidence."

Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interrogating officer.

(c) When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any questioning or statement began and ended and of the persons present.

[1964] 1 All E.R. 237-38.

the second sentence in Rule 1 recognizes, as does the first, that the police must have wide questioning powers during the early stages of a criminal investigation. This means that the phrase "taken into custody" covers the situation in which the suspect comes to the police station without overt pressure being applied by the police and the police do not possess reasonable grounds for suspecting that he has committed an offense. Although this is a somewhat strained reading of the actual phraseology, it has the advantages of giving Rule 1 an independent meaning, of being within the spirit of the Rules, and of not infringing any common law principles. If this interpretation is correct, the Rules apparently classify in-custody questioning, when the suspect has gone to the police station of his own accord, as falling within the investigatory and not the accusatorial stage of the interrogation.²⁴

The accusatorial stage commences when Rule 2 becomes operative—"as soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence"²⁵—and a caution must then be given in the terms laid down in Rule 3. Whether or not the police officer has "reasonable grounds" will be determined objectively.²⁶ This test seems similar to that applied to ascertain whether or not a police officer possesses sufficient evidence to make a lawful arrest without a warrant.²⁷ If this be so, the further requirement for a lawful arrest without warrant—that the arrestee be promptly informed of the suspected offense—gives no additional protection to that afforded by the caution in Rule 2. The major distinction between the two forms of protection is that the police can indefinitely delay an arrest and thus the warning of the suspect, whereas Rule 2 becomes automatically operative when the police officer has "reasonable suspicion."

The Commonwealth countries have placed their faith in a caution as the protective device for the suspected person once the accusatorial process begins. But the protection provided by the caution is inadequate, since it comes too late in the investigation. The point at which the caution is given is determined by the quantum of evidence pos-

²⁴ For this distinction, see *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964). A similar distinction is made by P. DEVLIN, *supra* note 9, at 31.

²⁵ For test of Rule 2, see note 24 *supra*.

²⁶ *McArdle v. Egan*, 150 L.T.R. (n.s.) 412, 413 (C.A. 1933); G. ABRAHAMS, *POLICE QUESTIONING AND THE JUDGES' RULES 44-47* (1964).

²⁷ See Criminal Law Act c. 58, § 2 (1967); *John Lewis & Co. v. Tims*, [1952] 1 A.C. 676, [1952] 1 All E.R. 1203; *Christie v. Leachinsky*, [1947] 1 A.C. 573, [1947] 1 All E.R. 567. For a different interpretation of the meaning of "reasonable grounds," see Brownlie, *supra* note 21, at 83.

sessed by the police, and not by how long questioning may have taken place in "the compelling atmosphere of . . . in-custody interrogation."²⁸ Such questioning will frequently take place when a person, upon request, accompanies a police officer to the police station. It is rather ingenuous to maintain that, provided a suspect is not commanded to come, he is not being detained illegally for questioning, but is willingly cooperating. The public-spiritedness of the average citizen, the desire of both the innocent and the guilty to convince the police of their innocence, and the ignorance of the average citizen "that the police have no compulsive power"²⁹ conspire to cause an individual to place himself in a position where a caution is vital.

A classic example is *Regina v. Joyce*,³⁰ where at 11:30 P.M. the police arrived at the home of the accused, who had already retired for the night. The police invited him to accompany them to the police station, one of the officers stating, "I need to take a statement from you." The accused denied his guilt of any offense, and declared his reluctance to accompany the police. He complied with the request, however, believing himself obligated to do so. At the police station he purportedly confessed. The court held that the officer's misunderstood "invitation" to go to the police station was not such an inducement as to render the confession inadmissible.

The facts in *Joyce* surely must occur regularly.³¹ A Scots judge, unlike his brethren in the Commonwealth countries, has clearly recognized the inherently oppressive nature of in-custody questioning of the "voluntary" variety. In *Chalmers v. H. M. Advocate*,³² Lord Justice General Cooper stated:

But when a person is brought by police officers in a police van to a police station, and while there alone, is faced with police officers of high rank, I cannot think that his need for protection is any less than it would have been if he had been formally apprehended.³³

If the caution is to perform the function of forewarning the suspect of

²⁸ *Miranda v. Arizona*, 384 U.S. 436, 465 (1966).

²⁹ H. STREET, FREEDOM, THE INDIVIDUAL AND THE LAW 19-20 (1963).

³⁰ [1958] 1 W.L.R. 140, [1957] 3 All E.R. 623 (Cent. Crim. Ct.).

³¹ The existence of the practice of detaining for questioning has been documented, although the actual extent of its use is uncertain. Professor Glanville Williams states, "if the reader will be satisfied with unqualified assertions and isolated examples, they can be supplied." Williams, *Questioning by the Police: Some Practical Considerations*, 1960 CRIM. L. REV. (Eng.) 325, 328. See also STREET, *supra* note 29, at 18-20.

³² [1954] Scots L.T.R. 177. Of course, as will be seen below, the oppressiveness of the questioning may activate the voluntariness test. See *Rex v. Cansdale*, 12 Can. Crim. 245 (Alta. Sup. Ct. 1951).

³³ [1954] Scots L.T.R. at 182-83.

his peril, then it should be administered when the questioning commences and not held back until the police have "reasonable grounds" to suspect the person being questioned. Criticism of the Rules, as presently formulated, is not to be taken as a recommendation for the complete elimination of police questioning. Questioning by the police, however, should take place only when the person questioned knows about both his right of silence and the seriousness of the matter. This could be achieved without any major modification in the present procedure merely by adopting the recommendations made in 1929 by the Royal Commission on Police Powers and Procedure.³⁴ The Commission stated:

Our precise recommendation, therefore, is that, at the outset of any formal questioning, whether of a potential witness or of a suspected person, with regard to any crime or any circumstances connected therewith, a constable should first caution that person in the following words:

"I am a police officer. I am making inquiries (into so-and-so), and I want to know anything that you can tell me about it. It is a serious matter, and I must warn you to be careful what you say."

In framing this caution, we have deliberately avoided the use of any technical phrases, and have made use of the simplest possible words which we think will be readily understood by all persons with whom the Police come into contact. This is a point to which we attach great importance.³⁵

Even if Rule 2 has become operative and a caution has been administered, the police are not precluded from further questioning, provided that a record of the circumstances of the questioning is kept by the police.³⁶ Thus, the suspect may still find himself compelled to cooperate with the police, since a caution advising him of his right to remain silent loses much of its authority when immediately followed by persistent questioning. This likely negation of the beneficial effect of the caution was summed up by an Irish judge:

When a constable cautions his prisoner that he is not bound to say anything to criminate himself, but that what he shall say may be used in evidence against him on his trial, then, if the constable says nothing for the purpose of eliciting a disclosure, the prisoner is left to the voluntary agency of his own mind. But if the constable

³⁴ REPORT OF THE ROYAL COMMISSION ON POLICE POWERS AND PROCEDURE, CMD. NO. 3297 (1929).

³⁵ *Id.* ¶ 73.

³⁶ See Rule 2, *supra* note 23. For details of how the record is to be kept, see Appendix B of the Judges' Rules, *quoted in* [1964] 1 All E.R. 239 n.3.

puts a series of searching interrogatories, he virtually, and, I think, actually and in effect, abandons the caution, and announces, by the very course of interrogation which he applies, that it is better for the prisoner to answer than to be silent. The process of questioning impresses, on the greater part of mankind, the belief that silence will be taken as an assent to what the questions imply. The very necessity which that impression suggests, of answering the question in *some* way, deprives the prisoner of his free agency; and impells him to answer, from the fear of the consequences of declining to do so.³⁷

Further, the caution under Rule 2 does not mention that the suspect may, at his own behest, terminate the interview, although this right is implicit in the right to remain silent.

The right of the police to question the suspect after giving a caution under Rule 2 is not, however, completely unlimited. *First*, the police have no authority to demand answers; but as has been pointed out, only an iron-willed person will invoke his right of silence in the intimidating surroundings of a police station. *Second*, the continued questioning after caution may well render any ensuing statements involuntary.³⁸ For example, in *Rex v. Howlett*,³⁹ a statement by the accused was excluded as involuntary, because it had been obtained through persistent questioning for two hours after the caution.⁴⁰ *Third*, the various jurisdictions have legislation requiring prompt arraignment within periods varying from "as soon as practicable"⁴¹ to twenty-four hours.⁴² Unfortunately for the suspect, there is no rule equivalent to the *McNabb-Mallory* rule,⁴³ which precludes the admission of evidence obtained when the suspect is not charged as promptly as possible. Even if the police do comply with the prompt arraignment statutes, the permitted delay between arrest and charge may tend to intimidate the suspect, since he has no way of knowing the limitations placed on the police.

Fourth, all meaningful questioning must come to an end when

³⁷ *The Queen v. Johnston*, 15 Ir. C.L.R. 60, 122 (1864) (Pigot, C.B., dissenting) (emphasis in original).

³⁸ See note 31 *supra*.

³⁹ 96 Can. Crim. Cas. 182 (Ont. C.A. 1950).

⁴⁰ Cf. *Regina v. Nye*, 122 Can. Crim. Cas. 1 (Ont. C.A. 1958) (in which the accused was convicted on the basis of statements elicited after 12 hours of questioning.).

⁴¹ *The Magistrates' Court Act 1952*, 15 & 16 Geo. 5 & 1 Eliz. 2, c. 55, § 38(4); Comment, *Rex v. Morgan*, 1961 CRIM. L. REV. (Eng.) 538; Judges' Rules, Appendix A, ¶ (d), quoted in [1964] 1 All E.R. 237 n.2.

⁴² CRIM. CODE CAN. § 438(2) (SNOW 1955).

⁴³ See generally Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L.J. 1 (1958).

Rule 3 becomes operative.⁴⁴ But this Rule is a weak means of protecting the accused's right to remain silent. Since its operation can be delayed indefinitely by the police, the caution under the Rule amounts to "little more than a part of the formality of making the charge."⁴⁵ This flows from the decision in *Regina v. Brackenbury*,⁴⁶ in which it was held that "charged with the offence" meant "what every police officer would understand it to mean, that is, *formally* charged with the offence."⁴⁷ It has also been held that the phrase "informed that he may be prosecuted" is intended to cover only the situation "where the suspect has not been arrested, and where, in the course of questioning, a time comes when the police contemplate a summons may be issued."⁴⁸ This invites the police to delay formally charging the suspect until so much evidence has been obtained that the safeguard purportedly provided by Rule 3 is rendered meaningless.

These defects are compounded by the fact that the Judges' Rules are not rules of law, but merely

rules of practice drawn up for the guidance of police officers; and if a statement has been made in circumstances not in accordance with the Rules, in law that statement is not made inadmissible if it is a voluntary statement, although in its discretion the court can always refuse to admit it if the court thinks that there has been a breach of the Rules.⁴⁹

Where a violation of the Rules has led to exclusion, it has been based on police conduct that was clearly overbearing and likely to cause a problem relating to voluntariness.⁵⁰ Since 1964, the Court of Criminal Appeal has been empowered to order a new trial,⁵¹ and perhaps the courts will now adopt a more stringent attitude toward violation of the Rules. Until 1965, the only possible alternatives open to an appellate court were to quash or uphold the conviction. Nevertheless, as long as enforcement of the Rules lies within the discretion of the trial judge, the ability of the Court of Appeal to exercise firm powers of control

⁴⁴ See text of Rule 2, quoted in note 23 *supra*.

⁴⁵ Brownlie, *supra* note 21, at 84.

⁴⁶ 49 Crim. App. 189, [1965] 1 All E.R. 960.

⁴⁷ *Id.* at 190, [1965] 1 All E.R. at 961 (emphasis in original).

⁴⁸ *Regina v. Collier*, [1965] 1 W.L.R. 1470, 1473, [1965] 3 All E.R. 136, 138 (C.C.A.).

⁴⁹ *Rex v. May*, 36 Crim. App. 91, 93 (1952).

⁵⁰ See *Rex v. Brown*, 23 Crim. App. 56 (1931); *Rex v. Taylor*, 17 Crim. App. 109 (1922); *Rex v. Grayson*, 16 Crim. App. 7 (1921). *But see Regina v. Smith*, 46 Crim. App. 51 (1962); *Rex v. Wattam*, 36 Crim. App. 72 (1952); *Rex v. Turner*, 19 Crim. App. 171 (1925); *Rex v. Booker*, 18 Crim. App. 47 (1924); *The King v. Voisin*, [1918] 1 K.B. 531 (C.C.A.); *The King v. Best*, [1909] 1 K.B. 692 (C.C.A.); *Rex v. Crowe*, 81 J.P. 288 (1917).

⁵¹ Criminal Appeal Act, c. 43, § 1 (1964).

over criminal procedure is at best tenuous. The appellate courts are reluctant to override discretionary rulings.

The Rules, which were formulated at the request of a police force seeking guidance concerning permissible questioning techniques, apparently have not been used by the courts to regulate the exercise of their own discretion to exclude. Inevitably this creates uncertainty among the police concerning the extent of their powers, tempting them, whenever a suspect's guilt seems likely, to gamble that a violation of the Rules will not harm the chances of a conviction.⁵² In England a countering influence is at work: the special relationship between the police, the prosecution, and the judiciary. Under this system, the police, like private citizens, hire barristers, as opposed to having a permanent prosecuting attorney.⁵³ The barrister in turn is tightly controlled by the judiciary's sentiments, and in the words of Lord Devlin, "[w]hat the judge disapproves of, the Bar is unlikely to do; and if the Bar will not do it, the police must conform."⁵⁴ Thus, the efficient operation of the Rules ultimately depends on the good will of specific law officers. At best this is a precarious safeguard for the suspect.

III

THE RIGHT TO COUNSEL

The central feature of the Rules is that they rely heavily on the caution as a technique for protecting the suspect's right to remain silent. Another available device is the provision of a right to counsel at an early stage in the proceedings. This right is accorded in a qualified form by the Judges' Rules, which provide:

[E]very person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody *provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so . . .*⁵⁵

The Rules also provide that "persons in custody should . . . be informed orally of the rights and facilities available to them."⁵⁶

⁵² Of course, if the suspect pleads guilty after the Rules have been violated, the violation will never come to the notice of the court.

⁵³ In the larger metropolitan areas of Australia and Canada, the Crown is represented by state prosecutors, who are nonelected officers. *See, e.g.*, The Crown Attorneys Act, R.S. Ont. 1960, c. 82.

⁵⁴ P. DEVLIN, *supra* note 9, at 27.

⁵⁵ Judges' Rules, Appendix A, ¶ (c), *quoted in* [1964] 1 All E.R. 237 n.2 (emphasis added). *See also id.*, Appendix B, ¶ 7, [1964] 1 All E.R. at 240.

⁵⁶ *Id.*, Appendix B, ¶ 7(b), [1964] 1 All E.R. at 240.

By permitting consultation between the suspect and his counsel to be delayed by the police until it does not interfere with the "administration of justice," the Rules deviate considerably from the procedure laid down in *Miranda*. This reflects the high priority accorded effective law enforcement in England,⁵⁷ a priority, no doubt, that the critics of *Miranda* would wish to see recognized in the United States. This equivocal drafting of the Rules may explain the complete dearth of right-to-counsel cases. Another possible explanation is the feeling that counsel would be superfluous because there is no general fear that the police will indulge in overbearing tactics. Thus, perhaps neither the judge, the suspect, nor the suspect's counsel would consider it a glaring anomaly if counsel were not present during the questioning period. The result is that the lack of counsel is not a matter of contention. Indeed, the most recent Royal Commission on the Police⁵⁸ did not refer at all to the right to counsel during police interrogation. The basic fact is that English criminal procedure does not rely on the provision of counsel at the investigatory stage of the proceedings. Even at trial the right to counsel is not unqualified. Although most of the Commonwealth countries have extensive provision for legal aid,⁵⁹ denial of counsel to an indigent at trial will not automatically result in reversal of his conviction.⁶⁰

Whereas in Australia the extent of the right to counsel is similar to that in England, the recent enactment of a Bill of Rights⁶¹ in Canada provided the courts with an opportunity to create new jurisprudence in this area. During the debates on this bill in Parliament an opposition spokesman said, "this Bill will not add something to our legal safe-

⁵⁷ See REPORT OF THE ROYAL COMMISSION ON POLICE POWERS AND PROCEDURE, CMD. NO. 3297, ¶ 96 (1929); Williams, *supra* note 31, at 344-45.

⁵⁸ CMND. NO. 1728 (1962).

⁵⁹ For a review of the English and Canadian legal aid provisions, see PROVINCE OF ONTARIO, REPORT OF THE JOINT COMMITTEE ON LEGAL AID (1965). This report resulted in the introduction of a comprehensive scheme for legal aid in both civil and criminal matters. The Legal Aid Act 1966, S. Ont., c. 80 (1966). For Australian practice, see, e.g., Legal Assistance Act, No. 17 (N.S.W. 1943), *as amended*, No. 63 (N.S.W. 1957); Poor Persons Legal Assistance Act, No. 6339 (Vict. 1958).

⁶⁰ *Regina v. Huebschwerlen*, 45 Can. Crim. 393 (Yukon C.A. 1965); *Regina v. Howes*, [1964] 1 W.L.R. 576, [1964] 2 All E.R. 172 (C.C.A.); *Galos Hiram v. The King*, [1944] A.C. 149, [1944] 2 All E.R. 50 (P.C.). Also, if an accused has been represented, then he "must surely assume responsibility for the actions of his own solicitor," and "the mistake of the solicitor must be regarded as the mistake of the client." *Regina v. Behr*, [1967] 1 Ont. 639, 646 (Thunder Bay D. Ct.).

⁶¹ 8 & 9 Eliz. 2, c. 44 (Can. 1960).

guards which does not at present exist."⁶² So far this prediction has proven correct. The Bill of Rights provides:

[N]o law of Canada shall be construed or applied so as to

- (c)
deprive a person who has been arrested or detained
 - (ii)
of the right to retain and instruct counsel without delay
- (d)
authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards⁶³

The interpretation given these provisions has been extremely restrictive. It has been held that they do not require the police⁶⁴ or the judge⁶⁵ to advise arrested persons of their right to retain counsel. In fact, in *Regina v. Piper*,⁶⁶ the court held that the right to counsel as laid down in *Gideon v. Wainwright*⁶⁷ and *Powell v. Alabama*⁶⁸ could not be duplicated without further legislation. The most significant decision to date has been that of the Supreme Court of Canada in *Regina v. O'Connor*.⁶⁹ The accused was stopped by a police officer, who formed the opinion that the accused was drunk and unfit to drive. The officer took the accused to the police station, where a breathalyser test indicated that he was under the influence of drink. The trial judge found that the accused was not told he was to be charged and did not know he was under arrest until after the breathalyser tests were taken. After the tests had been administered, he made a request to contact his lawyer. He was allowed to make one telephone call, but the solicitor was not available. The Ontario High Court excluded the results of the breathalyser tests for two reasons. *First*, and most important, the failure by the police promptly to inform the accused of the nature of

⁶² 104 CAN. H.C. DEB. 5728 (1960). The speaker was Mr. P. Martin, now Minister of External Affairs.

⁶³ 8 & 9 Eliz. 2, c. 44, § 2 (Can. 1960). See CRIM. CODE CAN. §§ 557(3), 590, 709(2) (Snow 1955), for other provisions referring to right to counsel.

⁶⁴ *Regina v. Gray*, 132 Can. Crim. Cas. 337 (B.C. County Ct. 1962). This is contrary to the Judges' Rules.

⁶⁵ *Regina v. Piper*, 51 D.L.R.2d 534 (Man. C.A. 1964).

⁶⁶ *Id.* at 535-36.

⁶⁷ 372 U.S. 335 (1963).

⁶⁸ 287 U.S. 45 (1932).

⁶⁹ 48 D.L.R.2d 110 (Ont. H.C. 1964), *rev'd*, 52 D.L.R.2d 106 (Ont. C.A. 1966), *aff'd*, 57 D.L.R.2d 123 (Sup. Ct. 1966)

the charge against him directly affected his capacity to invoke section 2(c)(ii) of the Bill of Rights. *Second*, if counsel had been provided immediately upon request, he might have detected some mechanical deficiency in the breathalyser equipment or inaccuracy in the actual tests. In reaching this conclusion, the judge recognized the crucial importance of counsel at this stage of the investigation:

It is the early participation of counsel both in fact development and fact presentation which lends some semblance of reality to the concept of the balance existing between the accused and the otherwise irresistible forces of the State. To waylay counsel in this crucial and vital stage of fact development, as the police in this instance would seem to have desired to do, is tantamount to waylaying the cornerstone of our concept of criminal justice so painstakingly assembled through almost countless generations.⁷⁰

The decision was reversed by the Ontario Court of Appeal, which in turn was upheld by the Supreme Court of Canada. The Supreme Court rejected the view that section 2(c)(ii) imposed any positive duty on the police to inform the accused of his right to counsel. It rejected the first of the High Court's reasons on the ground that it was not justified to infer that the accused would have retained counsel if promptly informed of the charge. The second reason was considered "speculative," because there was no indication that "the presence of counsel in the police station after the tests had been completed . . . would have affected the admissibility of this evidence."⁷¹ This suggests that, before the right to counsel provisions of the Bill of Rights are violated, there must be some indication that the presence of counsel would have benefited the accused. Significantly, the Supreme Court also evinced a certain reluctance to put teeth in the right-to-counsel provisions of the Bill of Rights. It reasoned that, even if there had been a violation of section 2(c)(ii), Section 224 of the Criminal Code⁷² left it with no option but to admit the evidence. Although section 2(c)(ii) does not by its terms require exclusion of evidence obtained after its violation, giving section 224(3) its normal scope denies any real efficacy to the Bill of Rights.⁷³ As

⁷⁰ *Id.* at 115.

⁷¹ 57 D.L.R.2d at 129.

⁷² In any proceedings under Section 222 or 223, the result of a chemical analysis of a sample of the blood, urine, breath or other bodily substance of a person may be admitted in evidence on the issue whether that person was intoxicated or under the influence of a narcotic drug or whether his ability to drive was impaired by alcohol or a drug, *notwithstanding that he was not, before he gave the sample, warned that he need not give the sample or that the results of the analysis of the sample might be used in evidence.*

CRIM. CODE CAN. § 224(2)(c)(ii) (Snow 1955) (emphasis added).

⁷³ This is even more paradoxical in view of the introduction to § 2 of the Bill of Rights, which states:

the Ontario High Court observed, Parliament had attached the utmost importance to the Bill of Rights and clearly "intended that its enforcement should not lack for want of a remedy."⁷⁴

A further example of the reluctance of the Canadian courts to use the Bill of Rights to extend the right to counsel is provided by *Regina v. Steeves*.⁷⁵ Section 2(e) of the Bill of Rights provides that no law of Canada is to be construed so as to "deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."⁷⁶ The defendant was deliberately denied counsel prior to trial, but the court held the section was not violated. This conduct could not be considered "fatal to the fair hearing at the trial and it is in the light of the trial itself that the fair hearing provisions of the *Canadian Bill of Rights* must be examined."⁷⁷

IV

EXCLUSIONARY RULES OF EVIDENCE AS A MEANS OF REGULATING POLICE CONDUCT

The deficiencies of the caution under the Judges' Rules and of the right to counsel have not been remedied by development of exclusionary rules of evidence to regulate the conduct of the police. As a condition precedent to the admissibility of an incriminatory statement,⁷⁸ the prosecution must show that the statement is free and voluntary "in the sense that it has not been obtained from him either by fear of prejudice

Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared

⁷⁴ *Regina v. O'Connor*, 48 D.L.R.2d 110, 118 (Ont. H.C. 1964). There are, of course, remedies other than exclusion available when the Bill of Rights has been violated. For example, the conviction could be quashed. But this remedy was precluded by the Supreme Court in *O'Connor*. Alternatively, the aggrieved person might be able to lay an information under the Canadian Criminal Code. This is highly theoretical. See W. TARNAPOLSKY, THE CANADIAN BILL OF RIGHTS 180 *et seq.* (1966). Third, a tort action might be maintained for breach of statutory duty. See *id.*

⁷⁵ 42 D.L.R.2d 335 (N.S. Sup. Ct. 1964).

⁷⁶ 8 & 9 Eliz. 2, c. 44, § 2(e) (Can. 1960).

⁷⁷ 42 D.L.R.2d at 345.

⁷⁸ In England any incriminatory statement is considered a confession for the purposes of the voluntariness test. In *Regina v. Harz*, [1967] 2 W.L.R. 297, 303-04, [1967] 1 All E.R. 177, 182 (H.L.), the House of Lords declined to draw a distinction between "confessions and admissions which fall short of a full confession," and thus impliedly rejected the Wigmore thesis. See 3 J. WIGMORE, EVIDENCE § 821, at 238-39 (3d ed. 1940). For the Canadian position, which is more akin to that of Wigmore, see *Regina v. Black*, [1966] 3 Can. Crim. Cas. (n.s.) 187 (Ont. C.A.).

or hope of advantage exercised or held out by a person in authority."⁷⁹ Inevitably, this language is difficult for the courts to apply, because the circumstances in which the confession was made must be evaluated in terms of their impact on the state of mind of the accused. In addition, of course, every confession can be said to be voluntary, in that it is the "expression of a choice, that it is willed to be made."⁸⁰ On the other hand, no confession is voluntary in the sense that it is a spontaneous act by the confessor, except in the unique situation in which a person walks into the police station and confesses.⁸¹ This latter argument was rejected in *Regina v. Fitton*,⁸² even though it is semantically correct. These difficulties in applying the voluntariness test could be partially overcome if the courts had a definite view of its proper function. Unfortunately, no clear declaration of purpose has been forthcoming. By an examination of statutory modifications of the common law and the cases, some tentative conclusions can be made concerning the ends served by the test.

Section 149 of the Victorian Evidence Act (1958) provides:

No confession which is tendered in evidence shall be rejected on the ground that a promise or threat has been held out to the person confessing, unless the judge or other presiding officer is of opinion that the inducement was really calculated to cause an untrue admission of guilt to be made.

In *Cornelius v. The King*⁸³ this section was construed to apply only when a threat or promise had induced a confession. The High Court of Australia decided that, when other kinds of tactics are used, the voluntariness of the confession must be determined by established common law criteria.⁸⁴ Impliedly, then, there are other criteria of admissibility than the trustworthiness of the obtained confession, although it is unclear what these criteria are. Nevertheless, after holding that the Victorian Evidence Act was inapplicable because no threat or promise was present, the High Court in *McDermott v. The King*⁸⁵ admitted

⁷⁹ *Ibrahim v. Regem*, [1914] A.C. 599, 609 (P.C.).

⁸⁰ *Regina v. Fitton*, 6 D.L.R.2d 529, 533 (Sup. Ct. 1957).

⁸¹ Examples of such strange happenings can be found in *People v. Pike*, 239 Cal. App. 2d 237, 48 Cal. Rptr. 575 (1966) (the police asked a suspect his name and he blurted out a confession), and *People v. Vallarta*, 236 Cal. App. 2d 128, 45 Cal. Rptr. 631 (1965) (the defendant boasted that he was the biggest narcotics pusher in the county).

⁸² 6 D.L.R.2d 529 (Sup. 1957).

⁸³ 55 Commw. L.R. 235 (H.C. Austl. 1936).

⁸⁴ *McDermott v. The King*, 76 Commw. L.R. 501 (H.C. Austl. 1948); *The King v. Lee*, 82 Commw. L.R. 133 (H.C. Austl. 1950). For an exhaustive review of these and other cases, see Z. COWEN & P. CARTER, *ESSAYS ON THE LAW OF EVIDENCE* 41 *et seq.* (1956).

⁸⁵ 76 Commw. L.R. 501 (H.C. Austl. 1948).

evidence obtained as a result of questioning after a charge was made, although there had been no formal caution. Similarly, in *The King v. Lee*,⁸⁶ the confession was made after improper in-custody interrogation of the accused, and the evidence was held to be admissible.

The recent case of *Regina v. Harz*⁸⁷ also indicates that the voluntariness test is designed for more purposes than merely guaranteeing the trustworthiness of confessions. Customs officers exercised their statutory power to compel the defendants to produce their books, and requested them to attend an interview in order to answer questions. At the interview, the defendants were told by the investigators that they could be prosecuted for refusing to give information, a view that was endorsed by defendants' counsel. The customs officers did not in fact have the power to initiate a prosecution if suspects refused to answer questions, but the defendants, in their ignorance, made incriminating statements. The Court of Criminal Appeal reversed the ensuing conviction.⁸⁸ The majority, while conceding that truth as a criterion for the admissibility of incriminating statements would adequately serve the ends of justice, held that the authorities precluded the court from deciding "this case by application of that principle."⁸⁹ It should be noted that no doubt was voiced about the truth of the incriminating evidence. A vigorous dissent contended that the confession was admissible because it was not made in circumstances in which there was a "danger that the accused might have been tempted to make such a statement when it was untrue."⁹⁰ The House of Lords upheld the decision of the Court of Criminal Appeal,⁹¹ and this decision has been interpreted to hold that, "[w]hatever be the nature of the inducement . . . and however trivial it may seem to the average man to have been," it will provide a basis for the exclusion of the incriminating statement.⁹²

This test is clearly aimed at controlling the conduct of the police in their investigatory activities, since the test for exclusion will be differently framed when the inquiry has been undertaken by a person not in authority. In the latter case the question concerns the "effect of the inducements. Did it go so far as to deprive the person to whom it was made of free will and choice as to whether or not he would make a state-

⁸⁶ 82 Commw. L.R. 133 (H.C. Austl. 1950).

⁸⁷ [1967] 2 W.L.R. 297, [1967] 1 All E.R. 177 (H.L.).

⁸⁸ [1966] 3 W.L.R. 1241, [1966] 3 All E.R. 433 (C.C.A.).

⁸⁹ *Id.* at 1271, [1966] 3 All E.R. at 456.

⁹⁰ *Id.* at 1263, [1966] 3 All E.R. at 450.

⁹¹ [1967] 2 W.L.R. 297, [1967] 1 All E.R. 177 (H.L.).

⁹² *Regina v. Richards*, [1967] 1 W.L.R. 653, 655, [1967] 1 All E.R. 829, 830 (C.A.); see *Regina v. Wilson*, [1967] 2 W.L.R. 1094, [1967] 1 All E.R. 797 (C.A.).

ment as he did?"⁹³ By distinguishing between inducements held out by persons in authority and those held out by other persons, the court appears to recognize the inherently more oppressive nature of the former situation. For the purpose of this distinction, the phrase "person in authority" includes, at the minimum, persons who can have a direct effect on the initiation and conduct of a criminal prosecution.⁹⁴ The problem with the voluntariness test, however, is that the factual issue of inducement will usually reduce itself to a swearing contest between the police and the accused. The unsatisfactory result is that the application of rules partly designed to control police investigation practices is dependent to a great extent on police say-so.

Another severe limitation on the voluntariness test as a device to discourage the police from violating the suspect's right of silence is the doctrine of "confirmation by subsequent facts."⁹⁵ Although in England the doctrine is somewhat unsettled, "facts discovered in consequence of inadmissible confessions may certainly be proved in evidence if their relevance can be established without resorting to any part of the confession."⁹⁶ In Canada the law is clearer. In *Rex v. St. Lawrence*,⁹⁷ Chief Justice McRuer stated the law as follows:

Where the discovery of the fact confirms the confession—that is, where the confession must be taken to be true by reason of the discovery of the fact—then that part of the confession that is confirmed by the discovery of the fact is admissible, but further than that no part of the confession is admissible.⁹⁸

The solution in *St. Lawrence* is a compromise between the principle that coerced confessions are excluded because of their unreliability and the principle that they are excluded in order to control the police. Logically, of course, there is no reason why the whole confession should not be considered reliable if some part of it is confirmed by consequently discovered facts.⁹⁹ Clearly, this doctrine tempts the police to indulge in coercive practices.

This ambivalence is also exemplified in the rules regulating the conduct of the *voir dire*. In some of the Commonwealth jurisdictions

⁹³ *Regina v. Richards*, [1967] 1 W.L.R. 653, [1967] 1 All E.R. 829 (C.A.).

⁹⁴ *See, e.g., Regina v. Wilson*, [1967] 2 W.L.R. 1094, [1967] 1 All E.R. 797 (C.A.). In this case the victim of a robbery, who recovered the stolen property by private negotiation with the thieves, was held to be a person in authority.

⁹⁵ 3 J. WIGMORE, *supra* note 78, § 856, at 337.

⁹⁶ A. CROSS, *EVIDENCE* 266 (3d ed. 1967). *See also* Z. COWEN & P. CARTER, *ESSAYS ON THE LAW OF EVIDENCE* (1956).

⁹⁷ [1949] Ont. 215.

⁹⁸ *Id.* at 228.

⁹⁹ *See* 3 J. WIGMORE, *supra* note 78, § 857, at 338.

it is permissible for prosecution counsel to ask the accused during the voir dire whether the confession is true. In the Canadian case of *Regina v. De Clerq*,¹⁰⁰ the dissent opposed this approach on the ground that it created a prejudicial threat to the accused, especially when the trial judge was sitting alone, since he could never completely exclude from his mind an affirmative answer given by the accused.¹⁰¹ The lot of the accused is not greatly enhanced when the trier of fact is a jury, because in most Commonwealth countries the major responsibility for determining voluntariness rests with the judge.¹⁰² This is true even in England where the Massachusetts rule, giving the jury partial responsibility, has precarious tenure.¹⁰³

V

THE PROBLEM OF POLICE DECEPTION

Even if maximum protection is accorded to a suspect's right to remain silent by administering a caution and providing counsel upon request, there may be circumstances in which the police could undermine this right by deceptive practices. Although on several occasions the courts have had to adjudicate the admissibility of evidence obtained by deception, the jurisprudence is still in such a fledgling state that only the most tentative predictions about its likely development can be made. Usually the courts have admitted such evidence, while often voicing their disapproval of police subterfuge.

In a recent Canadian case, *Regina v. McLean*,¹⁰⁴ a confession was excluded as being involuntary when it was made after the accused was falsely informed that his accomplice had made a statement which implicated him.¹⁰⁵ The court distinguished *Regina v. Fitton*,¹⁰⁶ in which the Supreme Court of Canada admitted a confession obtained in similar circumstances with the difference that the police were telling the truth. If the confession was voluntary in the *Fitton* situation, it

¹⁰⁰ [1966] 1 Ont. 674 (C.A. 1965).

¹⁰¹ This doctrine has been upheld in England in *Rex v. Hammond*, 28 Crim. App. 84, [1941] 3 All E.R. 318. Some of the Canadian jurisdictions have rejected it. *Rex v. Weighill*, [1945] 2 D.L.R. 471 (B.C.C.A.); *Regina v. Hnedish*, 26 W.W.R. (n.s.) 685 (Sask. Q.B. 1958).

¹⁰² *Regina v. McAloon*, [1959] Ont. 441 (C.A.); *Basto v. Regina*, 91 Commw. L.R. 628 (H.C. Austl. 1954).

¹⁰³ See Note, *What Happened to the Voir Dire?*, 83 L.Q. REV. 332 (1967); MacKenna, *The Voir Dire Revisited*, 1967 CRIM. L. REV. (Eng.) 336. The tenuous nature of the English position is indicated by the attitude of the Privy Council in *Chan Wei Keung v. Reginam*, [1967] 2 W.L.R. 552, [1967] 1 All E.R. 948.

¹⁰⁴ 126 Can. Crim. Cas. 395 (B.C. Sup. Ct. 1957).

¹⁰⁵ Cf. *The King v. White*, 15 Can. Crim. Cas. 30 (Ont. C.A. 1908).

¹⁰⁶ 6 D.L.R.2d 529 (Sup. Ct. 1957).

must have been voluntary in *Regina v. McLean*, since the stimulus provoking the confessions was identical in both cases. The obvious distinction between the cases is that in *McLean* the court disapproved of the police deception and adopted the elusive concept of voluntariness to discipline the police obliquely; but in so doing, the court overworked the concept.

The inadequacy of the voluntariness test as a means of controlling police deception is graphically illustrated when the deception results in the obtaining of incriminatory real evidence. Since under Commonwealth law admissibility of real evidence is a function of relevancy,¹⁰⁷ the voluntariness test has no role to play, and therefore can never provide a jurisprudential underpinning for the exclusion of real evidence obtained by trick. Nevertheless, faced with real evidence deceptively obtained, the courts on a number of occasions have excluded it even though relevant. For example, in *Regina v. Payne*,¹⁰⁸ the Court of Criminal Appeal concluded that the trial judge should have exercised his discretion to exclude the results of a medical examination that the accused had undergone when assured that it was merely a routine examination and that the results would not be used in evidence. In *Callis v. Gunn*,¹⁰⁹ however, the court admitted fingerprint evidence given by the accused even though he was not informed that he was under no obligation to do so; but unlike *Payne* no assurance was given that the evidence would not be used against him. Lord Chief Justice Parker considered that evidence obtained by trick or false representation should be excluded in the exercise of the trial court's discretion.¹¹⁰ In other words, the trial judge's factual evaluation of the oppressiveness of the trick would determine admissibility.

It is axiomatic that the concept of discretion can never be given precise metes and bounds. Normally some exactness can be provided by repeated decisions, an exactness that is at a premium, because the exclusion is directly aimed at controlling the police. Unfortunately, there has been a paucity of decisions. The present jurisprudence suggests that the judicial discretion to exclude will only be exercised when the deception is egregious. In estimating the offensiveness of the de-

¹⁰⁷ *Kuruma v. Reginam*, [1955] A.C. 197, [1955] 1 All E.R. 236 (P.C.).

¹⁰⁸ [1963] 1 W.L.R. 637; [1963] 1 All E.R. 848 (C.C.A.); see *Rex v. Nowell*, [1948] 1 All E.R. 794 (C.C.A.); *Rex v. Voisin*, [1918] 1 K.B. 531 (C.C.A.); Comment, *Regina v. Court*, 1962 CRIM. L. REV. (Eng.) 697.

¹⁰⁹ [1964] 1 Q.B. 495, [1963] 3 All E.R. 677.

¹¹⁰ "[I]f there was any suggestion of it having been obtained oppressively, by false representation, by a trick, by threats, by bribes, anything of that sort," it should be excluded. *Id.* at 502, [1963] 3 All E.R. at 681.

ception, the courts, so far, have recognized that trickery is a valuable and a necessary tool for efficient law enforcement. Thus, in *Regina v. Maqsud Ali*,¹¹¹ two suspects who voluntarily went to the police station to aid the police in their investigation of a murder were left in a room together in which there was a concealed microphone. They made incriminatory statements that were overheard by the police and were held to be admissible.

The criminal does not act according to Queensberry Rules. The method of the informer and of the eavesdropper is commonly used in the detection of crime. The only difference here was that a mechanical device was the eavesdropper. If, in such circumstances and at such a point in the investigations, the appellants by incautious talk provided evidence against themselves, then in the view of this court it would not be unfair to use it against them. The method of taking the recording cannot affect admissibility as a matter of law although it must remain very much a matter for the discretion of the judge.¹¹²

The use of agents provocateurs, of course, is another deceptive device available to the police to circumvent the accused's rights of silence. In *Brannan v. Peek*,¹¹³ Lord Chief Justice Goddard strongly disapproved the conduct of two officers in plain clothes who entered a public house and prevailed upon the appellant to accept a bet from them.

The court observes with concern and with strong disapproval that the police authority at Derby apparently thought it right in this case to send a police officer into a public house for the purpose of committing an offence in that house. It cannot be too strongly emphasized that unless an Act of Parliament provides that for the purpose of detecting offences police officers or others may be sent into premises to commit offences therein—and I do not think any Act does so provide—it is wholly wrong to allow a practice of that sort to take place.¹¹⁴

This statement was dictum, since the gambling involved did not violate

111 [1965] 3 W.L.R. 229, [1965] 2 All E.R. 464 (C.C.A.).

112 *Id.* at 240, [1965] 2 All E.R. at 469. See also *Regina v. Steinberg*, [1967] 1 Ont. 733 (C.A.), in which the police, while conducting a legal search of the accused's premises, concealed a microphone; the resulting evidence was held to be admissible. For the English position on wiretapping, see REPORT OF THE COMMITTEE OF PRIVY COUNCILLORS APPOINTED TO INQUIRE INTO THE INTERCEPTION OF COMMUNICATIONS, CMND. NO. 283 (1957); for Canada, see Chorney, *Wiretapping and Electronic Eavesdropping*, 7 CRIM. L.Q. 434 (1964-65), and Cornfield, *The Right to Privacy in Canada*, 25 U. TORONTO FACULTY OF L. REV. 103 (1967); for Australia, see Note, 2 FED. L. REV. 132 (1966).

113 [1948] 1 K.B. 68, [1947] 2 All E.R. 572.

114 *Id.* at 72, [1947] 2 All E.R. at 573.

the criminal law. In *Browning v. J.W.H. Watson (Rochester) Ltd.*,¹¹⁵ however, the evidence was also obtained by agents provocateurs and Lord Chief Justice Goddard permitted its introduction while again castigating the use of such tactics. The most extensive discussion of the problem to date is to be found in *Regina v. Murphy*.¹¹⁶ In this case Lord MacDermott distinguished between two categories of agents provocateurs. Some merely offer enticement "to those who are predisposed to commit the offence in question," while others hold out an enticement "which by its nature subjects to some particular temptation or pressure those who may have no such predisposition."¹¹⁷ Irrespective of the category into which the conduct of the agent provocateur falls, however, there is no guarantee that the evidence will be excluded; as a matter of law, admissibility is a function of relevancy,¹¹⁸ and if the evidence is relevant its exclusion depends on the exercise of judicial discretion and is not subject to a rule of automatic exclusion.

CONCLUSION

The majority in *Miranda* was not justified in invoking Commonwealth rules of criminal procedure in support of its holding. Although Commonwealth practice demands "that a cautionary warning be given an accused," the requirement that it does not have to be administered until "a police officer . . . has evidence that affords reasonable grounds for suspicion"¹¹⁹ often results in situations where the accused is subjected to "custodial interrogation"¹²⁰ without the benefit of a caution. Further, while the United States Supreme Court was correct in saying that "the right of the individual to consult with an attorney . . . is expressly recognized"¹²¹ under the Judges' Rules, this right is severely qualified by the requirement that its invocation shall cause "no unreasonable delay or hindrance . . . to the processes of investigation or the

¹¹⁵ [1953] 2 All E.R. 775 (Q.B.).

¹¹⁶ [1965] N.I. 138. There are a number of English cases involving larceny in which an element of entrapment was involved. *See, e.g.,* *Rex v. Turvey*, [1946] 2 All E.R. 60 (C.A.). As has been pointed out by Donnelly, these cases are not strictly applicable to the problem at hand, since they normally involve the question whether the crime has been committed. The question here is what is to be done with the deceptively obtained evidence when all the elements of the crime are present. *See* Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agents Provocateurs*, 60 *YALE L.J.* 1091 (1951).

¹¹⁷ [1965] N.I. at 140.

¹¹⁸ *See* page 492 *supra*. The Lord Chief Justice, of course, qualified this statement with the caveat that "confessions which are not voluntary are outside this proposition and are clearly inadmissible." [1965] N.I. at 140.

¹¹⁹ *Miranda v. Arizona*, 384 U.S. 436, 487 (1966).

¹²⁰ *Id.* at 444.

¹²¹ *Id.* at 488.

administration of justice”¹²² The right to counsel has, in fact, served no meaningful function as a safeguard to the suspect in the Commonwealth countries. Finally, under the American practice, violation of the rules governing investigation, as most recently laid down in *Miranda*, will result in automatic exclusion. In the Commonwealth countries, however, the courts supervise somewhat similar rules by an application of judicial discretion.¹²³ This frequently results in the admission of evidence obtained in violation of the suspect’s basic right to remain silent.

¹²² Appendix A, ¶ (c), *quoted in* [1964] 1 All E.R. 237 n.2.

¹²³ By making the admissibility of evidence dependent on the exercise of judicial discretion and by adopting the thesis that many of the rules of evidence are rules of practice and not strict rules of law (*see, e.g., Regina v. Cleghorn*, [1967] 2 W.L.R. 1421, [1967] 1 All E.R. 996 (C.A.)), the law of evidence in England is potentially fluid and nebulous.