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Law Enforcement and the Conflict of Values

Alan W. Mewett*

On June 1st, 1965, the Canadian Committee on Corrections was appointed under the chairmanship of the Hon. Mr. Justice Roger Ouimet and comprised, in addition to the Chairman, a lawyer, G. Arthur Martin, Esq., Q.C., a retired R.C.M.P. officer, Mr. J. R. Lemieux, a social worker, Mrs. S. P. McArton and the Executive Secretary of the Canadian Corrections Committee, Mr. W. T. McGrath. It reported to the Solicitor General four years later in March 1969.[1]

The terms of reference were to "study the broad field of corrections, in its widest sense, from the initial investigation of an offence through to the final discharge of a prisoner from imprisonment or parole... but excluding consideration of specific offences except where such consideration bears directly upon any of the above mentioned matters."[2]

The Report rests upon eight basic principles that are set out, with little elaboration, in Chapter 2. There probably would be little quarrel with any of these basic principles, and since the terms of reference excluded consideration of specific offences, it is understandable that the committee did not enlarge upon them. The fourth principle is expressed as follows:

* Professor of Law, University of Toronto.

[1] *Report of the Canadian Committee on Corrections. Toward Unity: Criminal Justice and Corrections.* (Queen's Printer. Ottawa, 1969). Hereafter referred to as Report.

[2] *Ibid.*, at p. 2.

> No conduct should be defined as criminal unless it represents a serious threat to society, and unless the act cannot be dealt with through other social or legal means.[3]

This represents a fundamental premise of the rest of the Report and one that is frequently overlooked in piece-meal legislation. Indeed, legislators too easily assume that undesirable acts, merely because they are undesirable, are proper subjects for criminal legislation without any adequate consideration being given to the question of whether there are not more desirable methods of minimizing the harm from those acts.

The bulk of the recommendations is contained in Chapters 5 to 25 — some 400 pages, and it is with the substantive recommendations of Chapter 5 that I should like to deal. Chapter 5 relates to the Investigation of Offences and Police Powers and is from many points of view, the most interesting and important. It begins with an analysis of the role of the police and a survey of existing police powers, and that part presents a fair picture of the balancing of the interests of the community and the interests of the individual. It goes on to consider four areas of difficulty which call for further comment. These are (1) the problem of self-incrimination, (2) the rules relating to illegally obtained evidence, (3) the situation where the police instigate the commission of an offence and, (4) electronic eavesdropping and the invasion of privacy.

It is not necessary to expatiate on any Hohfeldian analysis of rights and duties and powers and privileges but a confusion does exist that obfuscates the whole area of community interests and individual rights. When one refers to the "right" of the individual, one necessarily implies that others (in particular, in this context, the police) have "no right" to violate that right. Thus one has the "right" not to be arbitrarily arrested and the police have "no right" to arrest arbitrarily.

On the other hand, in the vast majority of their everyday activities, the question of whether the police have the "right" to act does not arise because no one else's rights are being infringed. It is incorrect to refer to the police "right" to interrogate a suspect because the suspect has no right not to be questioned. He has, it is true, a right not to be compelled to reply but no right not to be asked. In fact, the police have the power to interrogate anyone they please. Thus the question at the root of both this problem and a number of similar problems that will be discussed later is not whether the police have the right to act in a certain manner, but whether the

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[3] *Ibid.*, at p. 12.

person in respect of whom they are acting has the right not to have them act in that way.

An individual's right means a legally protected interest, but the way in which that interest is protected differs in the case of different rights. The interest may be protected by means of a civil action or a criminal prosecution; it may be protected by giving him a defence to a criminal charge that he otherwise would not have had. For example, a person has a "right" not to be arbitrarily arrested. The consequence of a violation of that right is to give rise to a civil action for damages, or, in some cases, a criminal prosecution. A person who has been forced to make a confession by being assaulted, not only has those rights, but, in addition, is given an evidentiary advantage of having that confession excluded. However, if the confession is induced by means of an improper inducement, the only protection is evidentiary in nature. On the other hand, an individual has no legally protected interest in being tricked into making a confession. If he confesses in such a manner, no "right" has been infringed.

Thus two fundamental questions arise. The first is the extent of the individual's right vis-à-vis the police. That is to say, what rights does he have to prevent the police from acting in a certain way? The second question is, given that the right exists, what is the most desirable means of protecting that interest in order best to make it meaningful — a right to sue for damages or to achieve some advantage not otherwise available to him?

One cannot really deny, it is suggested, that a conflict of values has arisen as a result of a number of factors that have come into existence within the last hundred years or so. Technological advances have aided not only the investigation of offences but also their commission and the offender is less likely to be bothered by legal or moral scruples in making full use of them. The telephone and the motor car have facilitated the creation of criminal organizations without necessarily facilitating their apprehension to a corresponding degree. The criminal law itself diverges, in some respects, from current mores, though there is, of course, considerable disagreement as to the extent of this divergence. For these, and doubtless other reasons, the conflict of values is usually stated as some variation of the theme: the rights of the individual as opposed to the rights of the community. It seems to me preferable, for the reasons stated, to put the conflict in terms of asking what rights should the individual have against everyone else (including, of course, the police) and how best should these rights be protected, but "protected" not

necessarily in the sense of enforcing them so as to nullify all consequences of their violation.

The Committee recommends legislation to embody the following principles:

(1) The court may, in its discretion, reject evidence which has been illegally obtained.

(2) The court in exercising its discretion to either reject or admit evidence which has been illegally obtained shall take into consideration the following factors:

(i) whether the violation of rights was wilful or whether it occurred as a result of inadvertance, mistake, ignorance or error in judgment.

(ii) whether there existed a situation of urgency in order to prevent the destruction or loss of evidence or other circumstances which in the particular case justified the action taken.

(iii) whether the admission of the evidence in question would be unfair to the accused.

(3) The legislation should provide that the discretion to reject evidence illegally obtained provided for by such legislation does not affect the discretion which a court now has to disallow evidence if the strict rules of evidence would operate unfairly against an accused.[4]

A number of comments can be made on these proposals and most, if not all, are critical. There is a discernible trend to attempt to simplify the more complex rules of evidence by adopting a broad rule of inclusion or exclusion and subjecting this rule by what is usually referred to as the court's discretion to admit or refuse the evidence, as the case may be, in certain circumstances. This can be seen in the American proposed *Model Code of Evidence* and in the proposed *Uniform Rules*[5] and in Canadian decisions.[6] It is a simple method of tackling evidentiary rules that have become so complicated as to defy all reasonable efforts at definition. However, there are three grave objections to relying to a too great extent on judicial discretion to formulate rules of evidence. In the first place, it must be remembered that most criminal trials in this country are before a magistrate (or provincial judge) sitting without a jury. In some cases, it is unavoidable that he will have to hear evidence, on a *voir dire,* in order to rule on its admissibility. One hopes that magistrates are sufficiently trained to be able to erase such facts from their consideration in the event that the proposed evidence is ruled inadmissible. Certainly, there is no reason to suggest that they do not do their best. Nevertheless, it is generally undesirable to put the trier of fact in this position, and examples should not be allowed

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[4] *Ibid.*, at p. 74.

[5] *E.g.*, rule 64.

[6] *R.* v. *Wray*, unreported judgment of the Ontario Court of Appeal, 1969.

to proliferate, particularly in situations where they are likely to arise with some degree of frequency on extremely important issues.

In the second place, evidence is inextricably tied up with practice and procedure. The law cannot be absolutely certain, but preparation for trial must depend upon being able to make a reasonable assessment of what evidence will go in and what will be kept out. Both defence counsel and crown counsel are put in a difficult position whenever there can not be any reasonable prediction, and the more emphasis there is on judicial discretion the less certainty there can be in advance.

Finally, it is very difficult for any appellate tribunal to interfere with the exercise of judicial discretion. Courts of Appeal, and rightly so, control the basis for the exercise but are most reluctant to interfere in the way it was exercised. Something as important as the admissibility of what in all probability is going to be a crucial piece of evidence should be subject to a complete ruling by an appellate tribunal, not only as to the guidelines for the exercise of discretion, but also as to the ultimate question of actual admissibility.

Even apart from these criticisms, the recommendation implies an interesting approach to the existence of a "right" not to have disclosed illegally obtained evidence. It appears to depend not only on whether the evidence was in fact illegally obtained, but also on the subjective motives of the person illegally obtaining it. The right appears to be less highly regarded if the police officer acted mistakenly or under some emergency, than if he acted deliberately.

One may ask whether this is an example of attempting to use the rules of evidence in order to control police practices rather than in order to protect the individual, for it seems to me that it makes very little difference *to the accused* if the police acted honestly but illegally or if they acted dishonestly and illegally. I have elsewhere[7] elaborated on my views on the mistaken attempts to use the rules of evidence to control police conduct — the supreme example of which is, I suppose, *Miranda* v. *Arizona*.[8] The rules of evidence exist to control the admissibility of facts from which inferences are drawn during the trial process. In the present context, the most important aspect of this is to protect the accused. There are other devices, and many of them, that more effectively control police practices. The Committee, in fact, is hedging. It states:[9]

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[7] A.W. Mewett, *Proof of Guilt in a Changing Society*, (1967-68), 10 Cr. L. Q. 270.

[8] 384 U.S. 436 (1965).

[9] Report, *loc. cit.*, at p. 74.

> The Committee considers that an inflexible rule which requires the rejection of all evidence illegally obtained is neither necessary or (sic) desirable.

It then states what has always been a perfectly clear principle, at least from the time of *Kuruma, Son of Kaniu* v. *R.*,[10] namely that the court has power, in the exercise of its discretion, to reject illegally obtained evidence under certain circumstances.

Of course, there is no question but that an accused has the "right" not to have facts illegally obtained. The use of the word "illegally" must connote a "right". The question is whether the existing method of protecting that right (by action for assault or trespass or whatever is appropriate, *after the event*) is adequate.[11] It is suggested that if it is not appropriate to use the rules of evidence indiscriminately to control police practices, as I have submitted, then the argument against the admission of such evidence cannot be based upon the assertion that it is irrelevant or will lead to abuse by the police. Thus the only case that the Committee can really make out against its admission is that it is unfair.

"Fairness" or "unfairness" are relative concepts and it can equally well be argued that it is unfair to the community to exclude evidence that is directly relevant to the guilt of the accused because, in the process of obtaining it, some legally protected interest of the accused has been infringed. The unfairness to the accused arises not because the system or the community or the law does not give him a right, but because an individual — the police officer — has violated that right. The accused clearly has a right of redress against that individual. This, of course, is an entirely different situation from a forced confession and an entirely different situation from that in which the unfairness to the accused arises because of the abuse of the legal process itself. Given the overriding discretion in *Kuruma*, it seems preferable not to tamper with the existing law on the admissibility of illegally obtained evidence.

Perhaps this problem is intimately connected with what is usefully but imprecisely called the privilege against self-incrimination. Like all legal clichés, this, too, tends to be highly misleading and it is to be regretted that the Commission does not devote more study to it and its ramifications beyond noting, "it appears to the Committee that the privilege against self-incrimination is deeply involved in the feeling of justice or fairness with which contemporary Canadian society reacts to our criminal process."[12]

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[10] [1955], 2 W.L.R. 223.

[11] It cannot be the law of evidence that prevents the police from acting in any way they please if they are not concerned with the admission of evidence.

[12] Report, *loc. cit.*, at p. 54.

Perhaps no phrase is bandied about with more imprecision and with more unawareness of its legal and social significance than the privilege against self-incrimination, unless perhaps it be the phrase that everyone is presumed to be innocent until proven guilty. It is unnecessary to repeat Wigmore's classic examination of the history of the self-incrimination privilege,[13] much of which is inextricably interwoven in the struggle for jurisdiction between the ecclesiastical courts and the royal courts. More germane, for our purposes, was the simple question of under what circumstances should an individual be forced to answer questions that might incriminate him. Should he be compelled only after some proper form of accusation such as a presentment or bill of indictment or was the criminal process going to be allowed to "degenerate into a merely unlawful process of poking about in the speculation of finding something chargeable?"[14]

The Star Chamber with its inquisitorial methods permitted the compulsory examination, both of the defendant and of witnesses, the subject matter of which ranged far beyond the precise offence alleged. The examination was, in fact, the excuse for a wide-ranging interrogation. In 1637,[15] John Lilburn was charged before the Star Chamber, but refused to answer any questions about alleged offences apart from the one for which he was currently on trial. For this contumely, he was whipped and sentenced to the pillory. Ultimately, the House of Lords held that the sentence be "totally vacated... as illegal and most unjust, against the liberty of the subject and law of the land and Magna Charta". Lilburn received £ 3,00 in compensation — no small sum in those days.[16]

However, after *Lilburn's* Case, the emphasis shifted. Lilburn made no claim not to answer incriminating questions — only those not properly presented, of which he was not properly accused. Certainly, there seems little evidence[17] that previously there had ever been any privilege against refusing to testify, or to take oath, or answering questions relating to the offence with which the accused stood charged. Coke's usual facile adoption of a convenient Latin tag (in this case, *nemo seipsum tenetur prodere*) now became responsible for a generalized claim not only to be free from fishing expeditions in an inquisitorial process but to be free from answering incriminating

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[13] *Wigmore on Evidence*, (1961 ed.), Vol. VIII, § 2250, p. 266.
[14] *Ibid.*, at p. 276.
[15] 3 How. St. Tr. 1315.
[16] Wigmore, *op. cit.*, at p. 283.
[17] *Ibid.*, at pp. 284-289.

questions, even when properly indicted. By 1679[18] even a witness could successfully claim what has finally become a privilege. It is worth quoting Wigmore at length at this stage:

> So the interesting question is, how did this result come about? How did a movement which was directed, originally and throughout, against a method of procedure in ecclesiastical courts, produce in its ultimate effect a rule against a certain kind of testimony in common law courts? The process of thought, popular and professional, is to be accounted for. Now, for our history of legal ideas we do not ordinarily expect to go to Bentham. But he was the first to search into this history, and to maintain that this common law privilege did not antedate the Restoration; and, in this instance, his explanation of the process of thought by which the transmutation took place seems fairly to represent the probabilities. That explanation lies in the principle of the association of ideas — an association which began to operate immediately in the reactionary period of the Restoration and the Revolution, when the growth and ascendancy of Whig principles involved all the Stuart practices in one indiscriminate and radical condemnation.[19]

The Committee appears to adopt the popular concept of the privilege — vague and nebulous in scope. It appears to accept with equanimity the abolition of the privilege against answering incriminating questions, while testifying on oath in a court to which the *Evidence Act* applies and the substitution therefore of the limited protection afforded by the provision that only his answers may not be used in subsequent proceedings.[20] The Committee states, in italics, indeed:

> Thus the abolition of the privilege of a wituess to refuse to answer on the ground that his answer may tend to incriminate him places an additional and powerful weapon in the hands of law enforcement.[21]

The Committee does note that the witness must *claim* the privilege and that several statutes, both federal and provincial, provide for the compulsory examination of witnesses. It, therefore, recommends:

> That Section 5, sub-section (2) of the *Canada Evidence Act* be amended to provide that no answer made by a witness required to give evidence before a court, administrative tribunal or other body having the power to compel witnesses to attend and give evidence under oath shall be receivable in evidence in any subsequent criminal proceedings against such witness, other than a prosecution for perjury in the giving of such evidence, unless it is established that prior to the making of such answer such court, administrative tribunal or other body advised the witness of the protection

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[18] *Reading's Trial*, 7 How. St. Tr. 259 at p. 296.

[19] Wigmore, *op. cit.*, at p. 291.

[20] Available, of course, by complimentary federal and provincial legislation, if the question arises in criminal or civil cases.

[21] Report, *loc. cit.*, at p. 68.

> afforded by Section 5, subsection (2) of the *Canada Evidence Act* and the procedure required to be followed to obtain the protection afforded thereby.[22]

Two very distinct questions arise. Should individuals have a privilege against self-incrimination, in some form or other? If so, is the limited method of protection now afforded him adequate and meaningful?

It is interesting to note that now, in the middle of the twentieth century, the problem of this whole question of privilege really rests on the worry that manifested itself in the sixteenth, that someone is going to start "poking about in the speculation of finding something chargeable". This worry manifests itself not only in the area of answering questions under oath or the powers of administrative tribunals, but also into the area of compulsory statements to police officers, the powers of the police to interrogate and wiretapping and eavesdropping. A thirteenth century canonical rule directed towards heresy and witch-craft inquisitions becomes relevant once more.

The conflict of values is apparent. The quotation from Hamlet referred to in Wigmore[23] is appropriate:

> In the corrupted currents of this world Offence's gilded hand may shove by justice; And oft t'is seen the wicked prize itself Buys out the law. But 't is not so above; There is no shuffling; there the action lies In his true nature, and, we ourselves compelled, Even to the teeth and forehead of our faults, To give in evidence.

What is designed to protect the innocent must of its very nature protect the guilty. But I should have thought that one very fundamental question that should be asked is whether the innocent needs the protection. If that question had been asked in the context of thirteenth century conditions of witch-hunts, heresy, hysteria, condemnation by public clamor and, indeed, the rack and the wheel, I suppose no enlightened person would have hesitated to answer in the affirmative. It is not surprising that, in a reaction against Stuart excesses and the Star Chamber, the answer was in the affirmative. It is even not surprising that in the enthusiasm of the American Revolution the privilege became honoured, if misunderstood — to the stultification of many an American criminal prosecution.

Today, the question is not all that simple to answer. Few of us are innocent of all crime or social or moral offence. So complex and wide-ranging is the criminal law that it is difficult not to breach it. An uncontrolled fishing expedition is almost certain to turn up

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[22] *Ibid.*, at p. 70.

[23] Wigmore, *op. cit.*, at p. 281.

something. This is quite apart from something called the "right to privacy" that I shall discuss later.

For the guilty, it will be recalled that, in origin, the objection to self-incrimination was not to answering questions relating to one's guilt but to answering questions that might establish one's guilt before one has been accused of anything, or not related to the subject matter of what one has been accused of doing. *Lilburn's* Case,[24] while a landmark, did not purport to extend it further. What was objectionable was not the *fact* of compulsion, but the *range of inquiry*. No one objected to the *juramentum de veritate dicenda* (the oath to tell the truth) so long as (a) a presentment had been made in due form and (b) the questioning was germane to the presentment. In more modern terminology, if a specific charge had been laid, there was no objection to being compelled to testify and to take an oath to tell the truth about that charge. In short, the objection was not to self-incrimination but to witch-hunting.

McCarthyism is too recent for us to make light of the inherent force of that objection. But I would suggest that the incredible extension of the original protection benefits only the guilty and does not affect the innocent. In fact, the utterly unjustified extension of a perfectly simple and acceptable principle must be one of the greater frauds perpetrated on law enforcement in the common law world. What is essential for adequate, but at the same time fair enforcement of the criminal law is a return to a system that protects the individual against witch-hunts, against compelling him to submit to inquiry in the speculation of finding something chargeable (or, indeed, as I shall discuss later, against permitting anyone, notably the police, "poking about in the speculation of finding something"), but requiring him, upon an allegation being made in due form, to respond to those charges.

I see nothing difficult in adopting this in cases where a charge has been laid in criminal courts and the offender stands formally accused and is on trial. I do not believe that this violates any "privilege against self-incrimination [that] is deeply involved in the feeling of justice or fairness with which contemporary Canadian society reacts to our criminal process".[25] The process of "charging" an accused is fairly well formalized in our system and at the very least someone has sworn that he has reasonable and probable grounds for believing the accused guilty. In fact, throughout the pre-trial procedures for indictable offences, this belief may involve a com-

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[24] *Supra*, n. 15.

[25] Report, *loc. cit.*, at p. 54.

plainant, the police, the crown-attorney, a justice of the peace, a magistrate and, in some provinces, a grand jury, before the accused stands arraigned. There seems to me to be simply no justification why an accused person should not be compellable to answer, when on trial, as to the truth of the accusation. The process will never have reached the stage of trial, until, by a system of sifting and sorting, the accusation stands on reasonable and probable grounds.

More difficult is the situation where an individual is not formally accused of a specific offence. This may occur extrajudicially during police investigation; it may occur, as the Committee rightly points out, before an administrative tribunal [26] (or Royal Commission) where the individual is not accused; it may occur where the individual is testifying at the trial of another accused. What must be avoided is making any of these circumstances opportunities for fishing expeditions that can later be used to the disadvantage of the individual by being used, themselves, *as the very basis for a later formal accusation.* That is to say, if the basis for the accusation arises *aliunde,* the accused should be compelled to answer (nothing, of course, will prevent him lying or refusing to reply, but in our system, the trier of fact should be perfectly entitled to draw inferences from that); but the individual should not be compelled to provide his own basis for the accusation.

Herein, I suggest, lies the real key to the modern rationale of the privilege against self-incrimination. But if this is so, the Committee's recommendations do not go far enough. As it points out, while an individual may refuse to answer police inquiries, in some proceedings (such as administrative tribunals or Royal Commissions) he is compelled to answer and has no protection at all. Furthermore, if he is a witness, it is only the *answers* that may not be used against him in subsequent proceedings. Information found as a result of those answers may, and frequently does form the basis of a subsequent accusation. If there is any merit in the suggested reason for a privilege against self-incrimination, the only rational conclusion that can be drawn is that a person being interrogated by the police, examined before a tribunal or appearing as a witness in trial proceedings must have the right to refuse to answer in all cases where those answers might, directly or indirectly, reasonably form the basis of a subsequent accusation against him.

This, one entirely agrees, would militate against one aspect of law enforcement, but it is not, for that reason, insupportable. In any case, there is one other side to the police function that is not

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[26] *Ibid.,* at p. 67.

adequately dealt with by the Committee. This is the exploration of the question as to how far the operation of the police should extend to uncovering what would otherwise be undetected crime.

Traditionally, the investigation of an offence cannot begin until the existence of that offence has become known to the police. Until comparatively recently, this has presented little difficulty and it is not necessary to expand on the reasons why this is no longer the case. New techniques available to the criminal, organized crime, fear of reprisals, the proliferation of crimes without victims and many other factors, now mean that not only is it more difficult to solve known crimes, but also more difficult to know that crimes exist. If it is true that no one should be compelled to provide the basis for his own accusation, it is suggested that more consideration has to be given to the problem of enabling the basis for the accusation to be found elsewhere.

The Committee deplores, and quite rightly, any practice of the police in instigating the commission of an offence, which would otherwise not have taken place, in order to provide the basis of an accusation. It recommends:

> 1. That a person is not guilty of an offence if his conduct is instigated by 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.
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> 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.
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> 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.[27]

There is, indeed, a difference between entrapment and enticement. There is little doubt that most police officers would agree that the latter is an abuse of their powers and that for them to instigate an offence can hardly legitimately fall under "the prevention of crime". However, the entrapment of an offender, already embarking on criminal conduct is a perfectly proper exercise of the police function.

Now, of course, comes a critical inquiry. Should the concept of witch-hunting be limited to being compelled to answer questions relating to one's own guilt in an inquisitorial system ranging beyond any formal accusation or should it properly be extended (for histori-

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[27] *Ibid.*, at p. 79.

cal reasons, I maintain it is an extension) to a *police* function of digging or exploring "in the speculation of finding something chargeable"? And it is, perhaps regrettably, too late to examine this problem without being involved with what has become or is becoming the so-called "right to privacy". The difficulty arises, surely, because, although a few years ago the individual could be protected against manifest prying into his affairs by the requirements of arrest warrants or search warrants and corresponding rights to sue if these were not obtained, there are now many methods available for getting the same information without committing any of the traditional torts or criminal offences in the process. The traditional limitations on the powers of the police to search premises or an individual were designed precisely to prevent law enforcement officers from going on fishing expeditions "in the speculation of finding something chargeable", unless (and this is a point often overlooked) they could justify their actions *beforehand.* This justification must exist, in the case of arrest and personal search [28] because they, prior to the arrest and search, know, or have reasonable and probable grounds for believing that certain offences have been or are being committed, or, in the case of search of premises (apart from cases where no warrant is required) they have sworn that they have reasonable and probable grounds for believing that certain items will be found. In short, an arrest or search must be justified *before* it takes place.

If, as has already been noted, the arrest or search is not justifiable beforehand, it is illegal, a breach of the individual's "right" has occurred, and that "right" is enforceable, not by nullifying the consequences, but by providing an action for damages or a criminal prosecution. If it is desirable to create a "right" to privacy — and I accept that it is — it is not necessary, in order to protect that right, to nullify the consequences of its breach. The breach may be adequately protected by providing an *ex post facto* action for damages.

Furthermore, the occasions upon which that right is removed may be equated either to those generally involving search warrants — *i.e.* requiring a sworn statement as to reasonable and probable belief which, in itself, amounts to a formal accusation — or to those involving arrests without warrant — *i.e.* permitting an informal accusation by requiring only that the police officer show that he himself thought, on reasonable and probable grounds, that he had cause. In either case, what it is essential to avoid is prying without pre-existing cause, on mere vague suspicion, or public ru-

[28] *R.* v. *Brezack,* (1949), 96 C.C.C. 97.

mour — not really far removed from *per clamosam insinuationem* of the thirteenth century.

The difference between the limitations on the right to search and the right to arrest is easily explicable. Generally speaking, although, of course, there are exceptions,[29] the obtaining of incriminating documents or other real evidence does not present any great degree of urgency that cannot wait for a warrant; the arrest of an offender may or may not permit the delay involved in obtaining a warrant. The law clearly recognizes that occasions will exist where the obtaining of a warrant to arrest is not realistic. Into what category, therefore, should one put the use of eavesdropping devices, whether they be wire-taps or some other device? It seems to me that if we require law enforcement officers to be satisfied *beforehand* of reasonable and probable cause, no urgency is likely to arise to render the obtaining of a warrant unrealistic. Such warrant should be premised upon the sworn statement as to reasonable and probable grounds for believing that an offence has been committed or is being committed or is about to be committed and that evidence will be obtained as a result of using an eavesdropping device. I, personally, see no reason for departing from the usual practice of permitting a justice to issue such warrant.

Thus far, I agree with the Committee, save that it would wish the warrant or order to be issuable only by a supreme court justice[30] — thus, somehow implying that the right to privacy is to be more jealously guarded than the right not to be arrested or not to have one's house searched. But the Committee goes on to recommend that the results of an *illegal* eavesdropping be inadmissible in evidence,[31] without, surprisingly enough, any of the hedging that it employed in the case of illegally obtained real evidence as to judicial discretion, honest mistake and so on. I can only repeat that I do not think it is a function of the law of evidence to attempt to control police activity. It is, of course, necessary to enact legislation embodying the right to privacy, but it would be relatively simple to provide that the use of any eavesdropping device by anyone should be a criminal offence, (and one would hope that the Provinces would pass complimentary legislation providing for a civil action) except by a peace officer acting under a warrant. Equally clearly, I see no difficulty in limiting the warrant as to duration, place, and

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[29] As in the case of writs of assistance, or a number of provincial statutes such as the *Games and Fisheries Act*, R.S.O. 1960, ch. 158, s. 6, or the *Liquor Control Act*, R.S.O. 1960, ch. 217, ss. 79(2), 110(3), 111.

[30] Report, *loc. cit.*, at p. 86.

[31] *Ibid.*, at p. 87.

alleged offender and offences. In short, the police officer should justify the use of the device *beforehand.*

I have never been happy with Section 431 of the *Criminal Code* providing:

> Every person who executes a warrant issued under section 429 may seize, in addition to things mentioned in the warrant, anything that on reasonable grounds he believes has been obtained by or has been used in the commission of an offence, and carry it before the justice who issued the warrant... to be dealt with in accordance with section 432.

It does appear that once a valid search warrant has been issued, Section 431 permits the seizure of items not mentioned in the warrant, that could provide evidence in the prosecution of a totally different offence. I hasten to add that there is no evidence that this section is abused by law enforcement officers.

Nevertheless, the problem is even more acute in the case of warrants to eavesdrop. (It is, I think, a little easier to overhear a conversation providing evidence of offences other than those alleged than it is to find items other than those specified in a search warrant.) It must be admitted that there may be some difficulty in drafting, but it is suggested that it would be desirable to provide that no evidence of any conversation not relevant to the specific offence mentioned in the warrant, nor any evidence found as a result of that conversation shall be admissible in a subsequent prosecution for any offence other than the one specifically mentioned in the warrant.

Such a scheme should surely protect the right to privacy of everyone, guilty or innocent, who has not been "accused" (not in the formal sense) of a crime, by having a police officer swear that he has reasonable and probable cause directed toward a specific offence.

There remains the problem of the effect of totally illegal eavesdropping. As I have suggested, there is little difficulty in making the police officer liable to damages and in imposing criminal liability. In my opinion, however, the results of such illegal eavesdropping should not be made inadmissible in evidence. It may be objected that it is illogical to provide that if evidence is obtained during the course of authorized wiretapping that is not relevant to the offence mentioned in the warrant it should not be admissible whereas if the evidence is obtained in a completely illegal manner it is admissible. The lack of logic is, I suggest, apparent rather than real. There are in fact two fundamentally different issues involved. One is the use of the legal process in order to obtain, under the guise of legality, incriminating evidence. The other is an illegal

disregard for the legal process itself. The victim of illegality has a protection — a right of action against the wrongdoer or the right to initiate criminal proceedings against him. In the other case, as in so many other aspects of the whole legal system, we must be concerned with the victim of an abuse of the process, for he is the one with no rights and no protection unless we create them for him. We cannot give him a cause of action because no one has acted illegally but we can ensure that he will not suffer because a lawful process has been allowed to be twisted to his detriment.

Unfortunately, there is a tendency to examine not only this problem but also the problem of illegally obtained evidence in a vacuum divorced from the realities of life. Or perhaps it is that we assume that American conditions are equally applicable north of the border. It is inconceivable how legislation can be proposed on the assumption that law enforcement officers are going to break the law deliberately, commit criminal offences and leave themselves open to civil actions in order to secure evidence. Do we not have to assume that if it is illegal to obtain real evidence in a certain way or to obtain evidence of conversations without a warrant, then law enforcement officers will not act illegally? Quite apart from the fact that most police officers have more to do than search premises indiscriminately or idly listen in on other people's conversations in the hope of finding something, a relatively simple, swift and straight-forward method of obtaining the necessary authorization reduces the risk of illegal operations. In any case, if the risk of illegal activity is high, the only method of changing this state of affairs is to improve the calibre of the police force not to keep what, *ex hypothesi,* is an inadequate and dangerous group of individuals and attempt to control them by inadequate and dangerous means. I see no point in tackling a fundamental problem at the end rather than the beginning. I personally do not believe that the risk of illegal activity is high; of course it exists, but to attempt to counter it by using an evidentiary technique is, like *Miranda*[32] and the extension of the privilege against self-incrimination, merely another example of throwing the baby out with the bath-water.

Furthermore, it need hardly be added, the discretion to exclude that is clearly recognized in *Kuruma*[33] would equally clearly apply to illegally obtained evidence of conversations and would provide protection in flagrant cases of injustice.

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[32] *Supra,* n. 8.
[33] *Supra,* n. 10.

I suppose the basic themes that run throughout this paper is that, in the Canadian context, it is the abuse of a legal process which should give us more concern than the adoption of illegal tactics, and that, important as the rights of the individual are, there are ways of protecting those rights without at the same time necessarily destroying the interests of the community. It is these that I have called the conflict of values. I do not doubt for one moment the integrity and erudition of the Ouimet Committee. I merely propose that there is another side to the coin.

Apart from the Committee's recommendation as to instigation to commit offences by law enforcement officers acting as a defence, which I accept, I would propose:

1. That illegally obtained evidence be admissible in evidence, subject to the discretion recognized in *Kuruma*;
2. That a person compelled to testify in any proceedings be restored his privilege against answering questions that might incriminate him in subsequent proceedings;
3. That a person properly and formally accused be compelled to testify at his trial and to answer all questions relevant to the specific offence charged;
4. That the use of all eavesdropping devices be made both criminally and civilly illegal, save by a police officer acting under a warrant issued by a justice, limited to time, place, person and alleged offence;
5. That evidence of conversations obtained under a lawful warrant but not related to the person or offence specified be inadmissible, along with evidence obtained as a result of those conversations;
6. That evidence of conversations obtained unlawfully be admissible, subject to the discretion to exclude recognized in *Kuruma*.

Let me add one final point. Legal aid in this country is by no means at an optimum standard and in some areas of Canada it is pitifully inadequate. One must hope there will come a time in the not too distant future when legal aid will mean everything that all of us would wish it to mean. The accused will have meaningful assistance, in cross-examination, in preparation, and in defending himself. In *Kuruma*, Lord Goddard made a statement with which I cannot, at least on a literal interpretation, agree. He said:

> If it [i.e. the evidence] is [relevant], it is admissible and the court is not concerned with how the evidence was obtained.[34]

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[34] *Ibid.*, at p. 227.

The court should be concerned. It should be concerned, not because it will affect the relevance of the evidence (illegally obtained evidence or illegal recordings of conversations) or its admissibility, but because this may be the only opportunity the accused may have to establish the illegality of the conduct of the police in order to obtain subsequent redress. The court, in my opinion, should permit cross-examination into the circumstances of the obtaining of evidence, even though it has ruled such evidence admissible. Such an inquiry may no longer be directly relevant to the fact of admissibility, but it may, quite properly, affect weight or even form the basis of a discretionary exclusion under the *Kuruma* principle. It will also afford the accused some basis for any subsequent proceedings. I do not believe that Canadian courts would take such a narrow view of the proper scope of a legitimate inquiry as Lord Goddard seems to take.

Given an adequate system of legal aid, therefore, and the desire on the part of the courts not to prejudice unfairly an accused that I believe they have, the resolution of the conflict of value lies not in the enforcement of "rights" so much as in the prevention of abuses. There must be rules to safeguard the individual but those rules cannot be formulated with a disregard for the interests of the community. This is what the adversary system used to connote; there is no reason why we cannot return to it.