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# TOWARDS A DEFENCE OF ENTRAPMENT

By ROBERT K. PATERSON\*

## I. INTRODUCTION

Recently, Canada seems to have become a centre for allegations involving lawlessness by police officers. Civil rights advocates have expressed concern that these revelations have not given rise to the level of public concern and disapprobation that would seem appropriate. Apart from lack of proof in specific instances, the justification for this inertia seems to be a widespread belief in the fundamental honesty of our law enforcement agencies and a sympathy for the difficulty of the policeman's task.

Few reported cases provide illustrations of the problem of police excess in the context of individual trials. In *R. v. Kirzner*,<sup>1</sup> the Chief Justice discussed at some length the approach Canadian courts might adopt toward allegations of entrapment by peace officers. The accused in *Kirzner* had been convicted of two possessory drug offences after a jury trial. Prior to the circumstances that led to his arrest, he had been used as a decoy and informant in connection with R.C.M.P. investigations. His claim was that he had made the purchase giving rise to his arrest as part of a general agreement with the R.C.M.P. to buy drugs on their behalf. The accused's R.C.M.P. contact gave evidence that he had not been told by the accused that the latter was selling drugs. The Supreme Court of Canada agreed that the conduct of the accused was entirely of his own responsibility and had not been concocted or acquiesced in by the police to ensnare him. Laskin C.J.C. considered that the accused was simply trying to use his police contacts as a shield for his own activities. The Supreme Court was unanimous in its view that the evidence did not amount to entrapment by the police. On appeal, the Ontario Court of Appeal had held that it was not possible to raise entrapment as a defence in Canada.<sup>2</sup> The majority of the Supreme Court, in a brief comment, declined to express any opinion on whether entrapment was available as a defence in Canada. The main significance of the decision is the more thorough judgment of Chief Justice Laskin, in which three other justices concurred. The Chief Justice surveyed approaches taken both in Canada and elsewhere regarding police ensnarement. His finding was simply that he would not endorse the view that entrapment was not a defence in Canada—but beyond that he declined to go.

## II. JUDICIAL TOLERANCE OF COVERT POLICE ACTIVITY

Along with recent allegations of illegal break-ins and surveillance meth-

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<sup>1</sup> [1978] 2 S.C.R. 487, 81 D.L.R. (3d) 229, 38 C.C.C. (2d) 131, 1 C.R. (3d) 138.

<sup>2</sup> *R. v. Kirzner* (1976), 14 O.R. (2d) 665, 74 D.L.R. (3d) 351, 32 C.C.C. (2d) 76 (C.A.).

ods, there appears to have been considerable growth in the use of undercover agents by Canadian police forces, particularly in connection with the drug issue. Public confidence in the police seems to prevail as well in the response of our courts to undercover police operations. This is confirmed by the recent remarks of Laskin C.J.C. in *R. v. Kirzner* when he commented:

The use of spies and informers is an inevitable requirement for detection of consensual crimes and of discouraging their commission; otherwise, it would be necessary to await a complaint by a "victim" or to try to apprehend offenders *in flagrante delicto*, an exercise not likely to be crowned with much success. Such practices do not involve such dirty tricks as to be offensive to the integrity of the judicial process. Nor can objection on this ground be taken to the use of decoys who provide the opportunity to others intent upon the commission of a consensual offence.<sup>3</sup>

Since the primary function of the police is to detect criminal behaviour, it is obvious that they will utilize a variety of tactics to do so. Any interference by the courts or Parliament in the use of these methods will have to be based on a distinction between conduct that is tolerable and conduct that is not. The statement of the Chief Justice accurately reflects the law in Canada and the United States—that the mere use of spies and informants *per se* is not illegal. This does not mean that it should continue to be so. One could argue that such behaviour is as immoral as the conduct of the person at whose apprehension it is directed. Further, many consensual crimes involve no identifiable victim, in the ordinary sense; thus, certain conduct is penalized on more vague grounds of morality or societal stability.

Continued tolerance of such modern policing devices as tactical units and stop and search techniques is founded on assumptions about the extent to which such methods actually deter crime and lead to the arrest of offenders. Critics of the new sophistication in police methods emphasize instead its creative aspects.<sup>4</sup> They argue that in their zeal to prevent crime, the police may in fact increase it by furnishing funds to criminals and by otherwise providing a favourable climate for criminal activities. There are more specific risks involved in undercover operations, too, such as the commission of crimes other than those envisaged by the police.

The reasons for the expansion of police undercover work are varied; possibly the most obvious is the growth in the size and sophistication of police forces. The trend towards police bureaucratization and the questioning by criminologists and others of traditional police methodology have led to police experimentation with new practices. Informers are often co-operative police witnesses, anxious to avoid charges against themselves. Since the evidence of informers is admissible and the courts have not seen their use by the police as improper, there have been no significant reasons for the police to stop using them.

Recognition by our courts or by Parliament of a defence in entrapment would, however, constitute a substantial limitation on the currently permissive context in which the police operate. In the discussion that follows, it

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<sup>3</sup> *Supra* note 1, at 493 (S.C.R.), 234 (D.L.R.), 136 (C.C.C.), 144 (C.R.).

<sup>4</sup> See Marx, *Undercover Cops: Creative Policing or Constitutional Threat?* (1977-78), 4(2) Civ. Lib. Rev. 34.

will be assumed that some form of control on instigatory police behaviour in the context of undercover work is justified, and an evaluation will be made of alternative steps that might be taken, bearing in mind experience elsewhere and the particular problems of the Canadian context.

### III. THE PROBLEM OF DEFINING ENTRAPMENT

In *Kirzner*, the Chief Justice's definition of entrapment was modelled on developments in the United States; he drew a distinction between police engaging in acts of solicitation or decoy work and situations in which they actively organize a scheme to ensnare a victim. This distinction was restated recently by the United States Supreme Court in *United States v. Russell*.<sup>5</sup> Commenting on two prior Supreme Court decisions, Mr. Justice Rehnquist, for the majority, said:

*Sorrells* and *Sherman* both recognize "that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution" [citations omitted]. Nor will the mere fact of deceit defeat a prosecution . . . , for there are circumstances when the use of deceit is the only practicable law enforcement technique available. It is only when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play.<sup>6</sup>

This test was adopted *sub silentio* by the majority in *Kirzner*, since they found that the evidence did not show "a police-concocted plan to ensnare [the accused] going beyond mere solicitation."<sup>7</sup> For the purpose of discussing whether a defence of entrapment should be developed in Canada, the need to draw a distinction between conduct that merely facilitates and active techniques of ensnarement will be assumed. The distinction is easier to state than to apply. In a recent decision involving the meaning of the word "solicitation" in section 195.1 of the *Criminal Code*,<sup>8</sup> the Supreme Court of Canada had to deal with the undercover tactics of the Vancouver city police.<sup>9</sup> There, a member of the city police vice squad dressed in casual clothes had driven an unmarked police car around downtown Vancouver and stopped to look at the appellant. She smiled at the officer, who returned her smile. After this the appellant got into the officer's car and a conversation ensued that led to an agreement by the appellant to engage in sexual relations with the policeman for money. The appellate court did not think that solicitation had taken place in these circumstances and no defence of entrapment was raised, but the facts indicate that the officer, in returning the appellant's smile, had invited her to enter his car and at least suggest an invitation by him to her to offer herself for sex.<sup>10</sup> Spence J. in his judgment indicates this when he

<sup>5</sup> *United States v. Russell*, 411 U.S. 423, 93 S. Ct. 4637 (1973).

<sup>6</sup> *Id.* at 435-36 (U.S.), 1644-45 (S. Ct.).

<sup>7</sup> *Supra* note 1, at 503 (S.C.R.), 241 (D.L.R.), 142 (C.C.C.).

<sup>8</sup> R.S.C. 1970, c. C-34.

<sup>9</sup> *Hutt v. The Queen* (1978), 82 D.L.R. (3d) 95, 38 C.C.C. (2d) 418, 1 C.R. (3d) 164 (S.C.C.).

<sup>10</sup> This officer's behaviour is similar to that of the police officer in *Sneddon v. Stevenson*, [1967] 2 All E.R. 1277 (Q.B.). In that case, the appellant argued that the police officer had been an accomplice, and that his evidence should have been corroborated. However, the court held that the officer had not been an accomplice, and that insofar as he had enabled the appellant to commit an offense, his activities, if *bona fide*, had been proper.

says: "[W]hen one reads the statement of facts one wonders whether the appellant solicited any more than the complaining officer."<sup>11</sup> The *Hutt* case seems to be an example of police behaviour that was merely encouraging. For entrapment to occur, more active encouragement by the police is necessary.

In American cases, the additional ingredient required to establish that entrapment occurred has been supplied by a variety of factors. Thus, in *Sorrells v. United States*,<sup>12</sup> the undercover agent repeated his request for illegal whiskey in the context of a sentimental reminiscence between himself and the seller over both men's wartime experience. In *United States v. Russell*,<sup>13</sup> the undercover agent had supplied an essential chemical for the manufacture of the drug that formed the basis of the defendant's conviction. A common thread in cases where entrapment has been established has been repeated pressure on an initially unwilling defendant to commit a crime, eventually leading to his arrest.<sup>14</sup>

In Canada and elsewhere, it is factors such as these that have led to acquittal. Thus, in *Lemieux*,<sup>15</sup> the police activity consisted of soliciting the accused to drive two men to a house which they intended to break and enter. Lemieux argued that, although he was aware that his passengers intended a break-in, he was unaware that one of them was a police informant who was soliciting the commission of the crime. The Supreme Court acquitted Lemieux, albeit not on the ground of entrapment. By doing so, the Court may be seen to evince an even more liberal approach to police conduct that exculpates the accused than is suggested by the Chief Justice in *Kirzner*. In *Lemieux*, the Supreme Court regarded lack of predisposition on the appellant's part to commit the offence as critical. It is the issue of the accused's proclivity, which has caused so much difficulty in the United States, to which I will return later in discussing what form of entrapment defence might best be adopted in this country.

At this juncture, there appear to be at least four alternative approaches Canada could adopt to deal with what is seen as improper instigatory behaviour by the police (hereinafter called entrapment) in connection with the detection of crime. First, the *status quo* could be retained with entrapment not being expressly recognized as a separate defence, but with such behaviour being allowed to have an ameliorative effect on the accused in indirect ways such as reduced sentences or the exclusion of admissible evidence. This is the position in England and New Zealand. Second, legislation might be passed making it an offence for police officers, and others involved in the investigation of crime, to behave in certain repugnant ways and to use unacceptable methods. This would involve making entrapment itself a crime. Third, a

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<sup>11</sup> *Supra* note 9, at 101 (D.L.R.), 424 (C.C.C.), 171 (C.R.).

<sup>12</sup> 287 U.S. 435, 53 S. Ct. 210 (1932).

<sup>13</sup> *Supra* note 5. The defence was actually held to be unavailable to the accused, since he was shown to be predisposed to commit the type of offence charged. See text accompanying note 72, *infra*.

<sup>14</sup> See, e.g., *Kadis v. United States*, 373 F. 2d 370 (1st Cir. 1967).

<sup>15</sup> *Lemieux v. The Queen*, [1967] S.C.R. 492, 63 D.L.R. (2d) 75, [1968] 1 C.C.C. 187, 2 C.R.N.S. 1.

separate entrapment defence might be adopted, as has occurred throughout the United States. This step would involve an assessment of the two principal formulations by United States courts of a substantive defence, and the policy arguments in favour of both. Finally, repeal of those "victimless" or consensual crimes which attract entrapment techniques could be considered. This approach will not be discussed here as it involves wider legal and moral issues outside the scope of this article. As well, the repeal of this kind of offence would not, by itself, dispose of the problem since, as the *Lemieux* case shows, entrapment methods can be used for other than consensual or "victimless" crimes.

#### IV. NON-RECOGNITION OF ENTRAPMENT AS A SEPARATE DEFENCE

Throughout the Commonwealth there has been continued resistance to recognition of entrapment as a separate common law defence. The explanation for this reluctance is twofold. The first reason is *stare decisis*. English and New Zealand courts have been unable to find any precedent for developing a common law defence of entrapment.<sup>16</sup> Courts in these countries have shown no great enthusiasm for such a defence on policy grounds either. These grounds have never been very clearly delineated. The most convincing of them is a preference for the retention of the utmost judicial discretion and flexibility in accepting or rejecting evidence.<sup>17</sup> Less convincing is the view that a defence of entrapment involves open-ended policy questions that cannot be incorporated in a precisely worded rule of law.

In England, there has been unanimous rejection of entrapment as a defence. In a recent decision of the Court of Criminal Appeal, the Lord Chief Justice states: "We, therefore, feel it right to say that this doctrine, given the unlovely name of 'entrapment,' does not find a place in English law. . . ."<sup>18</sup> Instead of recognizing a defence going directly to the accused's culpability, English courts have seen evidence of entrapment as being relevant in two other ways—either as a matter affecting the exclusion of evidence, or as a matter to be taken into account in sentencing. As to the latter, there is the Court of Appeal's decision in *Birtles*,<sup>19</sup> where Lord Parker C.J. reduced the sentence because of the real possibility that a police officer had encouraged the commission of the offences involved. As one commentator has pointed out, however, this limited response is akin to sentence reduction because of inefficient conduct of the case by the prosecutor.<sup>20</sup> It also leaves an accused with a criminal record despite express recognition by the court that improper police conduct led to his arrest.

The most common response of English courts has been to exclude evidence obtained by what the trial judge considers to be improper means. Traditionally in England, apart from confessions, there have been no exclusion-

<sup>16</sup> See *R. v. McEvilly and Lee* (1973), 60 Cr. App. R. 150 at 155-56 (C.A.).

<sup>17</sup> See *R. v. Capner*, [1975] 1 N.Z.L.R. 411 at 414 (C.A.).

<sup>18</sup> *R. v. Mealey and Sheridan* (1974), 60 Cr. App. R. 59 at 63 (C.A.).

<sup>19</sup> *R. v. Birtles*, [1969] 2 All E.R. 1131, 53 Cr. App. R. 469 (C.A.), and see *Sneddon v. Stevenson*, *supra* note 10.

<sup>20</sup> McClean, *Informers and Agents Provocateurs* [1969] Crim. L. Rev. 527 at 537.

ary rules of the kind developed in the United States. Instead, judges exercise discretion to exclude evidence obtained by oppressive means. Often the undercover police officer or his agent have been key witnesses. To exclude their testimony would often be to put the accused's conviction in jeopardy. English courts have not hesitated to express their prejudice against instigatory behaviour by the police, but on the question of excluding evidence they have always insisted that the discretion of the trial judge should be untrammelled. In one case, Roskill L.J. stated:

[T]he mere fact that . . . there was a possibility that the offence as it was ultimately committed might not have taken place but for the intervention of the police is not of itself a ground for the trial judge to exercise his discretion to exclude the evidence.<sup>21</sup>

In that case, a police officer had received information from an informant about a planned theft. He subsequently met with the defendant and volunteered to assist in the disposal of the stolen goods. The trial judge admitted the officer's evidence and his decision was upheld.

The position in New Zealand is similar. New Zealand courts are unanimous in rejecting entrapment as a substantive defence. In recent cases, they have adhered to the distinction referred to earlier between the mere use of traps or deception and active incitement or promotion of crime. In the most authoritative decision, the Court of Appeal said that it felt this distinction was a fair compromise between the competing interests of the police and of defendants.<sup>22</sup> As we saw earlier, this also appears to be the attitude taken by the Supreme Court in *Kirzner*.

Unlike English courts, though, New Zealand courts have rejected the view that evidence of entrapment can be taken into account at sentencing. The position in New Zealand is now clearly that the trial judge has a discretion to exclude the evidence of an undercover police officer if it was obtained by means of entrapment.<sup>23</sup> This choice was re-emphasized in a recent case where the accused was introduced as a party to a drug purchase by an undercover police officer.<sup>24</sup> The true targets of the operation were the vendors of the drugs involved, but the accused was also charged, as he had clearly committed a crime. The evidence of the police officer was excluded because of circumstances clearly indicating incitement and promotion. To facilitate the transactions, the police had provided large sums of money and an aircraft. It was manifest that their aim was to apprehend the suppliers and that the accused was merely a pawn in this manoeuvre. Mahon J. also noted that it was insufficient to establish the disposition of the accused to commit a drug offence. Instead, the question was whether he would have committed the specific offences charged without the police instigation.

In *R. v. Pethig*, Mahon J. rationalized the New Zealand rejection of the English sentencing approach. The judge felt that by taking the existence of en-

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<sup>21</sup> *Supra* note 16, at 155, and see *supra* note 18. Also see Heydon, *The Problems of Entrapment*, [1973] 32 Camb. L.J. 268.

<sup>22</sup> *Supra* note 17, at 413.

<sup>23</sup> *Id.*

<sup>24</sup> *R. v. Pethig*, [1977] 1 N.Z.L.R. 448 (S.C.).

trapment into account only in sentencing, courts failed in their duty to make clear their disapproval of such police behaviour by not allowing such behaviour to affect the guilt of the offender.<sup>25</sup> In his view, the preservation of the discretion of the trial Judge in this regard was a matter of deliberate policy and in accord with a laudable concern for interests of fairness and justice. These factors outweighed the interest of the community in having laws enforced and criminals prosecuted. In New Zealand, as a result of these two recent cases, the sole means for dealing with entrapment is to give the trial judge a discretion to exclude evidence obtained by such means. This position accords with precedent and preserves wide discretion over the effects of entrapment on an individual accused.

In Canada, by contrast, courts have taken diverse paths to find answers to the entrapment problem. Until *Kirzner* there had been no discussion by a higher court in this country of the adoption of a separate defence of entrapment. Instead of approaching allegations of entrapment by formulating a new defence, Canadian courts have shown a preference for trying to deal with entrapment by using existing concepts. In some instances this usage has been entirely novel and sometimes awkward.

There has been no support at an appellate level in Canada for the view that the correct method for dealing with entrapment is to exclude, where appropriate, evidence obtained by these means.

Since the law of evidence in Canada is much the same as that of England and New Zealand, there is no apparent reason why a Canadian court could not deal with allegations of entrapment through the exclusion of evidence. An obstacle to doing this in Canada, however, is the decision of the Supreme Court in *Wray*.<sup>26</sup> Since that case, Canadian courts appear to have even less discretion to exclude evidence than their Commonwealth counterparts. In *Wray*, the Court decided that judicial discretion to exclude evidence arises only when evidence is of little probative weight and when not to exclude it would be unfair to the accused. The Court went on to say that no discretion exists if the sole objection to admission is that it would tend to bring the administration of justice into disrepute. In many cases, the result under either the English or the Canadian approach would be the same. But striking differences could arise, and the New Zealand case of *Pethig*<sup>27</sup> illustrates this dramatically. There, the evidence of the undercover policeman, once excluded, led to the discharge of the accused. A similar result in Canada would be impossible if *Wray* were applied. The evidence of the police officer in *Pethig* was too crucial to give rise to a discretion to exclude under the rule in *Wray*. Thus, while courts in England and New Zealand have a considerable margin of flexibility within which to operate and to achieve a significant degree of control over police malpractice, the same is not true in Canada, where *Wray* appears to establish clearly a rule that gives priority to the conviction of the accused over judicial monitoring of police misconduct.

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<sup>25</sup> *Id.* at 451-52.

<sup>26</sup> *R. v. Wray*, [1971] S.C.R. 272, 11 D.L.R. (3d) 673, [1970] 4 C.C.C. 1, 11 C.R.N.S. 235. Also see Sheppard, *Restricting the Discretion to Exclude Admissible Evidence* (1971-72), 14 Crim. L.Q. 334.

<sup>27</sup> *Supra* note 24.

Earlier, in the absence of a recognized defence of entrapment, one approach taken in Canada was to find that the level of police instigation prevented ascribing responsibility to the accused for all of the requisite elements of the crime charged. This explains the decision of the Supreme Court in *Lemieux v. The Queen*.<sup>28</sup> The appellant was convicted of breaking and entering. The facts revealed that the break-in had been solicited by a police informer who had instigated the commission of the offence. The owner of the premises had also consented to the break-in and had given a key to the police who lay in wait. In England, it had been held that such consent was irrelevant.<sup>29</sup> The Supreme Court in *Lemieux* allowed the appeal, however, on the ground that the level of instigation on the part of the authorities had removed responsibility for the *actus reus* of the crime from the appellant.<sup>30</sup> With respect, this reasoning is confusing. By seeking to ascribe the activities of the police to the accused, a court performs as artificial an exercise as if it had sought to ascribe the intentions of the police to negate the *mens rea* of the accused. The police do not want to commit the crime. They want to ensnare the accused into doing so and in most entrapment cases it is irrefutable that he has done so. The actions and intentions of the two parties are not related.<sup>31</sup> The proper course is simply to ascertain whether the accused has committed the crime. In *Lemieux*, the feigned consent of the owner was clearly irrelevant. The inveigling activities of the police and their agents should have been considered, if at all, as a matter of justification or excuse for the accused.

In *Lemieux*, the Supreme Court added that if the defendant had committed the offence then the fact that he had done so at the solicitation of an *agent provocateur* would have been irrelevant.<sup>32</sup> The comments made as *obiter dicta* have been construed by some as rejection by the Court of a defence of entrapment.<sup>33</sup> If the word "solicitation" was being used in contradistinction to inducement or instigation, then the Court may have merely been saying that it regarded the defence as unproven if solicitation, rather than instigation, had taken place. However, if a test of responsibility is to be used, might not mere solicitation be seen as sufficient to deny the accused's responsibility for the *actus reus* of the alleged offence?

*Lemieux* was distinguished by the Appeal Division of the Supreme Court

<sup>28</sup> *Supra* note 15.

<sup>29</sup> *R. v. Chandler*, [1913] 1 K.B. 125, [1911-13] All E.R. Rep. 428, 8 Cr. App. R. 82 (C.C.A.).

<sup>30</sup> *Cf. Patterson v. The Queen*, [1968] S.C.R. 157, 67 D.L.R. (2d) 82, [1968] 2 C.C.C. 247, 3 C.R.N.S. 23, where an element of the *actus reus* of the crime unrelated to the undercover operations of the police was not established, and the accused was acquitted.

<sup>31</sup> But *cf. Watt, The Defense of Entrapment* (1970-71), 13 Crim. L.Q. 313. Unfortunately, the flawed reasoning of *Lemieux* continues to escape detection. In *R. v. Burke* (1978), 42 A.P.R. 132, 16 Nfld. & P.E.I.R. 132, 44 C.C.C. (2d) 33, the Prince Edward Island Supreme Court relied on the decision for the proposition that once entrapment was established it was open to a court to acquit for absence of *actus reus*.

<sup>32</sup> *Supra* note 15, at 496 (S.C.R.), 79 (D.L.R.), 190 (C.C.C.), 4 (C.R.N.S.).

<sup>33</sup> Cohen, *Due Process of Law: the Canadian System of Criminal Justice* (Toronto: Carswell, 1977) at 392; and Sneiderman, *A Judicial Test for Entrapment: the Glimmerings of a Canadian Policy on Police-Instigated Crime* (1973-74), 16 Crim. L.Q. 81 at 83-4.

of Nova Scotia in *R. v. Bonnar*.<sup>34</sup> There, an employer of the accused hired a private investigator to detect thefts from his warehouse. The investigator made purchases from the accused and saw him put the money in his pocket on each occasion. The Court thought that the consent to the theft simply facilitated it and that there was an absence, on the part of the investigator, of the inveigling behaviour that occurred in *Lemieux*. In other words, this was not a case of entrapment at all and there was no call for consideration of either excluding the investigator's evidence or of whether a defence of entrapment existed.

The most prevalent method of dealing with entrapment in Canadian criminal trials has been by way of a stay of proceedings on grounds of abuse of process. In *R. v. Ormerod*,<sup>35</sup> the Ontario Court of Appeal considered an appeal against conviction on drug charges by a young man who had worked undercover for the R.C.M.P. He claimed that this involvement afforded him a defence. The Court did not think that persistent importuning by the police was suggested on the evidence. Laskin J.A. (as he then was) denied that there was any statutory basis for a defence of entrapment and said that to uphold the defence would be to involve the courts in "a dispensing jurisdiction in respect of the administration of the criminal law."<sup>36</sup> He did go on to suggest that the doctrine of abuse of process might be a way for courts to do justice in such cases, on the basis of the same Court's decision in *R. v. Osborn*.<sup>37</sup> *Osborn* was later reversed on appeal by the Supreme Court of Canada.<sup>38</sup> The recent decision of the same Court in *Rourke*<sup>39</sup> has confused the meaning of abuse of process even more, and further obscured the relationship of the doctrine to entrapment.

The doctrine of abuse of process has not been developed by courts in Commonwealth countries other than Canada. Insofar as a coherent theory has emerged in Canada, the power of the courts to stay proceedings on this ground seems narrower than perhaps was at first thought. The emphasis of the power is the function it serves in preventing criminal proceedings from being improperly instituted—to collect a debt or enforce some civil claim, for example. Thus, to deal with entrapment under this rubric places emphasis on the integrity of the legal system rather than on the rights of the accused. Arguably, this is undesirable since it fails to relate the alleged police abuse to the culpability or predisposition of the accused respecting the crime charged. Accepting entrapment as an abuse of process has the effect of staying proceedings and acquitting the accused.

The judgment of Pigeon J. in *Rourke* leaves open the possibility that,

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<sup>34</sup> (1975), 11 A.P.R. 365, 14 N.S.R. (2d) 365, 30 C.C.C. (2d) 55, 34 C.R.N.S. 182 (C.A.).

<sup>35</sup> [1969] 2 O.R. 230, [1969] 4 C.C.C. 3, 6 C.R.N.S. 37 (C.A.).

<sup>36</sup> *Id.* at 238 (O.R.), 11 (C.C.C.), 45 (C.R.N.S.).

<sup>37</sup> [1969] 1 O.R. 152, 1 D.L.R. (3d) 664, [1969] 4 C.C.C. 185, 5 C.R.N.S. 183 (C.A.).

<sup>38</sup> [1971] S.C.R. 184, 15 D.L.R. (3d) 85, 1 C.C.C. (2d) 482, 12 C.R.N.S. 1.

<sup>39</sup> *Rourke v. The Queen*, [1978] 1 S.C.R. 1021, 76 D.L.R. (3d) 193, 35 C.C.C. (2d) 129, 38 C.R.N.S. 268. See Cohen, *Abuse of Process: The Aftermath of Rourke* (1977), 39 C.R.N.S. 349.

despite the denial of a general power in the courts to stay proceedings for oppressiveness, there may be individual substantive defences that collectively constitute a defence of abuse of process.<sup>40</sup> One of these may be entrapment. An example of this approach is found in *R. v. Shipley*,<sup>41</sup> where a County Court judge stayed proceedings against the defendant on a charge of unlawfully trafficking in a narcotic on the basis of the Ontario Court of Appeal's decision in *R. v. Osborn*.<sup>42</sup> There was evidence of inducements being offered to the defendant by an undercover R.C.M.P. officer which amounted to substantially more than mere solicitation. A similar case to *Shipley* is the decision of the British Columbia Provincial Court in *R. v. McDonald*.<sup>43</sup> In the latter case, the judge entered a stay of proceedings to a charge of trafficking where the accused had shown reluctance to sell drugs and had sold to an undercover police agent only after persistent requests by the latter and a display of histrionics.

Notwithstanding that it may be possible to support the reasoning and result in these two cases even after *Rourke*, abuse of process seems an inappropriate basis on which to deal with entrapment. The doctrine of abuse of process is not suitably applied outside of prosecutorial process to matters involving the investigation of crime. This was the view of McIntyre J.A. in the Court of Appeal in *Rourke*, and was quoted with approval by Pigeon J. in the Supreme Court.<sup>44</sup> Matters clearly preliminary to the proceeding and preceding the indictment were not seen as proper objects for the trial judge's discretion—a discretion which is more related to the misuse of the proceedings themselves. Thus, as a matter of principle, entrapment is not properly dealt with under the inherent power of the court displayed in the doctrine of abuse of process.

Until *Kirzner*, Canadian courts had taken a number of uncoordinated paths in their search for a satisfactory basis on which to deal with allegations of entrapment. These approaches illustrate the difficulty inherent in trying to fit entrapment into pre-existing legal categories. At least the New Zealand approach of dealing with entrapment under the judicial power to exclude evidence makes for legal certainty and yet is sufficiently flexible to allow for sensitive application. This approach ensures adequate protection against police abuses while not hampering the apprehension of offenders committing particular crimes, such as certain drug offences and economic crimes. The New Zealand statutory solution, in the absence of a separate statutory defence, is an acceptable answer to the widely accepted view that there is no common law defence of entrapment. This view is held in Canada; however, the divergent approaches taken by our courts in cases of entrapment are unsatisfactory and favour the introduction of a uniform judicial defence. The problem with the New Zealand example is that a discretionary remedy, by nature, provides little in the way of principles or guidelines for judges. This may be seen as

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<sup>40</sup> *Id.* at 1043-44 (S.C.R.), 209-10 (D.L.R.), 145-46 (C.C.C.), 272-74 (C.R.N.S.).

<sup>41</sup> [1970] 2 O.R. 411, [1970] 3 C.C.C. 398 (Co. Ct.).

<sup>42</sup> *Supra* note 37.

<sup>43</sup> (1971), 15 C.R.N.S. 122 (B.C. Prov. Ct.).

<sup>44</sup> *Supra* note 39, at 1042-43 (S.C.R.), 208 (D.L.R.), 144-45 (C.C.C.), 271-72 (C.R.N.S.).

inappropriate in a jurisdiction as geographically and culturally diverse as Canada. If entrapment is accepted as a matter on which the accused is entitled to introduce evidence, it would be appropriate that courts be provided with some assistance by way of rules regarding how such evidence is relevant to his guilt or innocence.

Before turning to the question of what kind of defence of entrapment might be developed, another way in which evidence of entrapment could be of consequence will be discussed.

## V. THE CRIMINALIZATION OF ENTRAPMENT

One response to the apparent widespread use of police informers and undercover agents might be to make the instigation of offences by such persons itself a crime. To do so would be to dismiss entrapment as a matter of excuse for the offender—irrespective of his predisposition—and discourage it by making it criminal. This approach would meet the demands of those who are concerned about entrapment being a defence for an offender (who, it is conceded, has committed the crime with which he is charged) but are nevertheless eager for curbs to be placed on police excesses. The difficulty with this argument is that many defences are available notwithstanding the presence of all of the elements of the completed crime. Self-defence is an example. In any case, where entrapment is not a defence, criminalization is of no assistance to the victim of police misconduct.

Criminalization seems more capable of support in the United States where courts have held that the defence of entrapment is not available in respect of acts of inducement by private citizens.<sup>45</sup> In *Kirzner*,<sup>46</sup> Laskin C.J.C. did not raise this problem beyond referring to the police or other agents. Presumably, government agents of all kinds would be covered. Since, unlike the United States, private prosecutions can be laid in Canada (for summary conviction offences) there would seem to be less justification for excluding a defence, at least where an information has been laid by an overly zealous citizen. At present, the prerogative of the Attorney General to enter a stay of proceedings should be a sufficient control device in cases of this nature.

On balance, the argument in favour of criminalization does not seem to be a strong one. Given the traditionally close relationship between prosecutors and policemen, it would be unrealistic to expect that charges against police officers would be laid very often. This factor supports the adoption of a substantive defence which doubles as a restraint on police behaviour, rather than merely making such conduct itself a crime.

Additionally, there is no doubt in Canada that the police, and their agents and informers are not exempt from criminal responsibility once their activities exceed efficient policing and become involved with the actual com-

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<sup>45</sup> *Henderson v. United States*, 23 F. 2d 169 (5th Cir. 1956); *Holloway v. United States*, 432 F. 2d 775 at 776 (10th Cir. 1970). See also Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, 1978) at 542. *Quaere* whether, in Canada, this would add anything in light of the rules regarding counselling and procuring.

<sup>46</sup> *Supra* note 1.

mission of crime.<sup>47</sup> No general provision in the *Criminal Code*<sup>48</sup> extends immunity to peace officers, though there are some provincial statutes which give relief in specific circumstances.<sup>49</sup> The distaste of Canadian courts for this kind of immunity is illustrated by *R. v. Ormerod*,<sup>50</sup> a case already mentioned and with facts reminiscent of *Kirzner* itself. In the Ontario Court of Appeal, Laskin J.A. (as he then was), after rejecting an allegation of entrapment on the facts, went on to consider the appellant's claim to derivative immunity as an informer. The Judge did not think that the appellant's activities, though considered to be in *bona fide* furtherance of a police agency, were exempt from being criminal. The case illustrates the invidious position of the informer, who is more likely to be charged than the peace officer, but who is no more immune to conviction than the officers of the Crown. Moreover, it demonstrates what may be a more constitutionally significant judicial reluctance to treat law officers any more kindly than ordinary citizens.<sup>51</sup>

If a peace officer or informant were charged, the nature of the particular offence may affect the likelihood of his conviction. In theft, for example, where the accused's actions must be without colour of right, the defendant may escape conviction on the belief that he was acting with lawful authority. The elements of other offences may not offer such an excuse, despite the fact that the police were seeking to secure prosecution evidence. *R. v. Petheran*<sup>52</sup> is an example of the latter. The unfortunate accused was a policeman who bought liquor contrary to a provincial statute and was the subject of a private information, laid by his victim. The Alberta Court of Appeal was adamant that his contravention of the statute was not justified simply because he was carrying out his duties as a police officer.

The only recent official support for a new offence of entrapment comes from the English Law Commission *Report on Defences of General Application*. The Commission proposes a new offence of entrapment owing to the difficulties of drafting a satisfactory substantive defence. Under the new provision, proceedings would be instituted only with the consent of the Director of Public Prosecutions. At least one commentator has seen this recommendation as simply a second-best approach that fails to deal with the fundamental problem of entrapment.<sup>53</sup>

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<sup>47</sup> It has been suggested in the United States that police defendants might use a defense of necessity in cases where charges arising out of undercover activity were laid against them. See Dix, *Undercover Investigations and Police Rulemaking* (1974-75), 53 Texas L. Rev. 203 at 284. English and Canadian courts retain a healthy scepticism concerning the availability of such a defense in general. See *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, 53 D.L.R. (3d) 161, 20 C.C.C. (2d) 449, 30 C.R.N.S. 209. In any case, the elaborate preliminary planning, characteristic of undercover work, would be inconsistent with the "clear and imminent peril" requirement of a defense of necessity.

<sup>48</sup> R.S.C. 1970, c. C-34.

<sup>49</sup> See, e.g., *The Police Act*, R.S.A. 1955, c. 236, s. 14(1), and *The Vehicles Act*, R.S.S. 1965, c. 377, ss. 119(4), 133(11) and 137(7).

<sup>50</sup> *Supra* note 35.

<sup>51</sup> See Parker, *Comment* (1970), 48 Can. B. Rev. 178.

<sup>52</sup> [1936] 2 D.L.R. 24, [1936] 1 W.W.R. 287, 65 C.C.C. 151 (Alta. C.A.).

<sup>53</sup> See English Law Commission, *Report on Defences of General Application* (Report No. 83, 1977); and Ashworth, *Entrapment* (3), [1978] Crim. L. Rev. 137.

If a defence of entrapment were introduced to excuse the accused only where there was no predisposition to commit the offence, then the argument for criminalization is perhaps stronger. If this were the case, there would be an unsatisfied need for a control device on inveigling police behaviour where the defence was unavailable. It is this central question, of the formulation of a substantive defence, left open by the Chief Justice in *Kirzner*, which is now addressed.

## VI. A COMMON LAW DEFENCE OF ENTRAPMENT?

Though the Chief Justice in *Kirzner* was reluctant to say whether an independent defence of entrapment could be said to exist, the tenor of his remarks indicates that he favours such a defence. He rejected *obiter* statements in the Court below and statements by the Court of Appeal of British Columbia in *Chernecki*<sup>54</sup> that there was no such thing as a defence of entrapment. The Chief Justice explained that section 7(3) of the *Criminal Code* should not be regarded as having frozen the power of the courts to recognise new defences.<sup>55</sup> Thus, the Chief Justice would appear to have abandoned the view he took in *Ormerod* that abuse of process was the appropriate ground on which to allow the defence.<sup>56</sup>

The function of section 7(3) has been primarily preservative.<sup>57</sup> It has given criminal defendants the benefit of defences available at common law that are not expressed in the Code itself. While speaking of a precursor to the present subsection, Russell J. of the Nova Scotia Supreme Court said in 1913:

I seriously doubt whether this provision was intended to affect in any way the construction of the terms used in the definition of the crime. I think it was rather intended to give a defendant the benefit of some common law excuse or defence when all the conditions constituting the crime as defined in the statute were present.<sup>58</sup>

An example is the application of *res judicata* in the context of criminal trials. The incorporation of this defence into Canadian criminal law has not been questioned. Similarly, there is no good reason—apart from sheer novelty—why a defence of entrapment cannot be incorporated in the same manner. The arguments outlined earlier against dealing with entrapment under exist-

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<sup>54</sup> *R. v. Chernecki*, [1971] 5 W.W.R. 469, 4 C.C.C. (2d) 556, 16 C.R.N.S. 230 (B.C.C.A.).

<sup>55</sup> *R. v. Kirzner*, supra note 1, at 495-96 (S.C.R.), 235-36 (D.L.R.), 137-38 (C.C.C.), 146-47 (C.R.). Section 7(3) of the *Criminal Code*, R.S.C. 1970, c. C-34, reads as follows:

Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

<sup>56</sup> *Supra* note 35, at 238 (O.R.), 11 (C.C.C.), 45 (C.R.N.S.).

<sup>57</sup> *Criminal Code*, R.S.C. 1970, c. C-34.

<sup>58</sup> *R. v. Curry* (1913), 12 D.L.R. 13 at 35, E.L.R. 11 at 37, 47 N.S.R. 176 at 210, 21 C.C.C. 273 at 301 (N.S.S.C.), *aff'd* (1913), 48 S.C.R. 532, 15 D.L.R. 347, 13 E.L.R. 550, 22 C.C.C. 191.

ing formulae also support the introduction of an independent defence. The likelihood of this occurring in the near future, however, is slight. There is no persuasive authority outside of the United States to support the existence of a defence at common law.

The only judicial support in Canada for a more generalized approach to entrapment, prior to *Kirzner*, is a decision of the Provincial Court of British Columbia.<sup>59</sup> In this case, involving trafficking in narcotics, Cronin Prov. Ct. J. was satisfied that although the defendant had in fact trafficked in the drug, he had been induced to do so by a police officer. The Judge expressed the view that interests of justice and fairness necessitated trial judges' hearing evidence of entrapment from defence counsel who offered it. In doing so, he relied on an unreported decision of the British Columbia Court of Appeal that held it improper for a trial judge to rule ahead of time that evidence of entrapment, which the defence wished to lead, was irrelevant.<sup>60</sup> He did not think that entrapment had anything to do with abuse of process, but that it was a separate common law defence. Hence, an acquittal was entered for the reason that the accused had been induced to commit the offence.

Even if the judiciary remain unresponsive to these proposals, this does not mean that Parliament could not introduce a defence of entrapment. In 1969, the *Report of the Canadian Committee on Corrections* recommended that Parliament do just that. The Report recommended that the defence provide that an accused be not guilty if, in the absence of a pre-existing intention to commit the offence, he was instigated to do so by a peace officer or his agent in order to obtain prosecution evidence.<sup>61</sup> No action has been taken in the decade since the report was published. Were the Ouimet Report's recommendations adopted, there would still be problems to resolve. The Committee did not explain what it meant by "no pre-existing intention." Does this mean that if an accused were known to have a predisposition towards the commission of an offence of the type with which he was charged, he could not avail himself of the defence? Would this be a desirable result?

These kinds of questions relate to the content of the defence itself. The only common law country with an established entrapment defence is the United States. There, judges and lawyers have had a history of experience with various formulations of a defence of entrapment. Before proposing a version of a defence for this country, a survey of United States law and some of its difficulties is offered.

## VII. THE DEFENCE OF ENTRAPMENT IN THE UNITED STATES — THE CRIMINAL CLASS NEED NOT APPLY.

Though entrapment is a defence in virtually every state and in federal courts, its availability remains problematical. The Supreme Court's repeated

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<sup>59</sup> *R. v. Haukness*, [1976] 5 W.W.R. 420 (B.C. Prov. Ct.).

<sup>60</sup> *Id.* at 433.

<sup>61</sup> *Can. Report of the Canadian Committee on Corrections* (Ouimet Report) (Ottawa: Queen's Printer, 1969) at 75-80.

division on its approach to the defence has prevented the emergence of a unified theoretical basis for the defence in the United States.<sup>62</sup>

The first United States Supreme Court decision was *Sorrells v. United States*<sup>63</sup> where the defendant had been charged with possession and sale of whiskey in violation of the *National Prohibition Act*. At his trial he relied on entrapment as a defence. The court ruled against him and he was convicted. A government agent posing as a tourist had visited the defendant at home. The agent ascertained that the defendant and he had been members of the same Division during World War I. He then asked the defendant twice if he, the defendant, could get him some liquor. The defendant both times replied that he had none. The conversation then turned to the wartime experience of the two men. After this, the agent made a third request. This time the defendant complied and returned with a half gallon of liquor, which he sold to the agent. The facts were thus rather like the undercover "buys" made by police officers in the contemporary Canadian drug scene; the major differences from a plain "buy" being the repetitive nature of the request and the appeal to sentiment. The facts in *Sorrells* can perhaps be compared to a situation where an agent feigns drug-dependency in the hope that a dealer will agree to sell to him.<sup>64</sup>

The majority in *Sorrells* held that the defence should have been submitted to the jury by the trial judge. Their rationale for allowing the defence was that the level of instigation by the government agent was serious enough to permit the conclusion that it would not have been within the intention of the framers of the statutory offence that a defendant be convicted in these circumstances. This threshold question of statutory interpretation goes to the question of whether entrapment can be available as a defence at all. It has been dispensed with in later United States Supreme Court decisions, but it was apparently this concern with the concept of entrapment as a defence to conduct that was clearly criminal that led to the adoption of this artificial rationalization based on interpretation of the statute concerned. In later cases, this theory seems to have been abandoned in favour of a wholesale recognition of the availability of the defence as a matter of public policy. The only remaining significance of this early explanation is that it proves that the defence is not, as an outsider might surmise, founded on constitutional grounds.

In a later Supreme Court decision on entrapment, the Court did allude to a possible constitutional ground for acquitting where entrapment, though

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<sup>62</sup> On the American approach to the problem, and for analysis of recent case law and reform proposals, see: Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons and Agents Provocateurs* (1951), 60 Yale L.J. 1091; Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution* (1959-60), 28 Fordham L. Rev. 399; Park, *The Entrapment Controversy 1975-76*, 60 Minn. L. Rev. 163; Kadish and Paulsen, ed., *Criminal Law and its Processes: Cases and Materials* (3d ed. Boston: Little, Brown, 1975) at 1081-97. This is a small selection from a voluminous body of literature, most of which is noted in the Park article.

<sup>63</sup> *Supra* note 12.

<sup>64</sup> There were similar facts in the second United States Supreme Court decision on entrapment. In *Sherman v. United States*, 356 U.S. 369, 78 S. Ct. 819 (1958), an agent met the accused at a drug treatment centre and after repeated attempts to arouse his sympathy, induced him to procure drugs.

proved, would be unavailable as a defence. In *Russell*,<sup>65</sup> the defendant was convicted on narcotics charges after being supplied by an undercover narcotics agent with an essential ingredient to manufacture a drug. For reasons which will be explored shortly, the defence was not available and the conviction was upheld. In writing the opinion of the Court, Mr. Justice Rehnquist stated that if an agent's activities were contrary to "fundamental fairness [and] shocking to the universal sense of justice,"<sup>66</sup> they might violate the due process clause of the Fifth Amendment to the Constitution. The Court did not elaborate further, but presumably such things as threats of physical violence and the widespread commission of crimes by agents to establish their credibility would be within a due process defence.<sup>67</sup>

There is evidence of a hardening of this attitude in the latest Supreme Court decision on entrapment. In *Hampton v. United States*,<sup>68</sup> the defendant was charged with distributing heroin. The drug had been supplied to him by government agents. All five judges of the majority in *Hampton* rejected the availability of the defence of entrapment on the authority of *Russell*. Three of the five were of the view that *Russell* was also authority for the proposition that due process was not available as an alternative defence. These remarks were only *dicta*, but they represent a retrenchment of the majority position.

In Canada, our *Bill of Rights*<sup>69</sup> might be fashioned to provide a similar due process defence in appropriate cases,<sup>70</sup> though there is no judicial interpretation to support this suggestion. In *Kirzner*, Laskin C.J.C. did not refer to the possibility and, given the reticence of United States courts to found a defence of entrapment on constitutional precepts, it would be an odd reversal of initiative for a Canadian court to do so. In *Hogan v. The Queen*,<sup>71</sup> the Supreme Court of Canada held that contravention or infringement of the Canadian *Bill of Rights* was insufficient to render otherwise admissible evidence inadmissible. In this and other cases, the preponderant view has been that, notwithstanding similarities in language, the Canadian *Bill of Rights* cannot be regarded as comparable to its American counterpart. Thus, while Canadian judicial interpretation of the *Bill of Rights* is still in its infancy, there is nothing to encourage resort to it by victims of entrapment.

While entrapment has been widely accepted as a defence in the United States, no agreement on the nature of the defence has emerged. In *Sorrells*, the majority explained that the elements of the defence involved the need to show both that the act was committed at the insistence of government officials, and that the defendant was not otherwise disposed to commit the crime. This analysis substantially limited the availability of the defence to the accused in

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<sup>65</sup> *Supra* note 5.

<sup>66</sup> *Id.* at 1643.

<sup>67</sup> See, e.g., *R. v. Woods*, [1969] 3 C.C.C. 222 (Ont. C.A.).

<sup>68</sup> 425 U.S. 484, 96 S. Ct. 1646 (1976).

<sup>69</sup> S.C. 1960, c. 44, as am. by S.C. 1970-71-72, c. 38, s. 29.

<sup>70</sup> See Cohen, *supra* note 33, at 385-95.

<sup>71</sup> [1975] 2 S.C.R. 574, 48 D.L.R. (3d) 427, 18 C.C.C. (2d) 65, 26 C.R.N.S. 207. See also *Curr v. The Queen*, [1972] S.C.R. 889, 26 D.L.R. (3d) 603, 7 C.C.C. (2d) 181; and *Miller v. The Queen*, [1976] 5 W.W.R. 711 (S.C.C.).

criminal cases. It meant that if a defendant put in issue his lack of disposition to commit the offence by raising the defence of entrapment, the prosecution could then introduce evidence to the contrary. If the prosecution failed in that attempt, the accused was innocent of the crime, though he may have been responsible for all the substantive elements of the offence. In effect, the state, through its agents, is culpable in respect of the crime, as its instigator. This version of the defence will be referred to as the "culpability defence."

The minority view in *Sorrells* is contained in the opinion of Mr. Justice Roberts. This view ignores the predisposition of the accused and focusses solely on the degree of instigation by the government agents. The minority saw the true foundation of the defence in the public policy of protecting what it termed "the purity of the government and its processes."<sup>72</sup> When threatened, the correct course of action is to disregard the guilt of the accused, stay the proceedings and quash the indictment. Since there is no need to examine the reputation or prior transgressions of the defendant, this will be referred to as the "police conduct defence."

Despite the virtually unanimous adoption of a defence of entrapment in the United States, the split outlined above survives. Under the culpability version of the defence, prosecutors have introduced evidence of past "criminal conduct" by an accused for which he was never prosecuted.<sup>73</sup> Although some courts have rejected character and hearsay evidence relating to prior unconvicted "criminal conduct," others have allowed hearsay evidence to be introduced by agents relating the information about the defendant that they have received from informants.<sup>74</sup> The practical effect of this evidence is seriously to reduce the credibility of the defence of entrapment raised by the defendant,<sup>75</sup> even though the evidence is often unreliable and of dubious probative value.

It is important at this stage to clarify the meaning of the word "predisposition." In the context of the commission of crimes, the word has at least four meanings. It could simply mean a predisposition to commit crimes in general. On the other hand, it could mean a tendency to commit a specific type of offence. Thus, if one were a known drug user with a record of drug and narcotic offence convictions, one could be said to be predisposed to commit offences of that kind. In a more specialized sense, predisposition could refer to a tendency to commit the particular Code offence charged. Finally, it could refer to a predisposition to commit the actual crime charged in the particular manner in which it was executed. Proof of predisposition in all of these senses becomes more difficult as one proceeds from the first to the last. The United States Supreme Court uses the term in the second sense mentioned. To determine its existence, the specific circumstances of the crime charged are ignored and an inquiry is made whether the accused had a general purpose to commit a crime of the type charged, were he given an opportunity. This definition

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<sup>72</sup> *Supra* note 12, at 455 (U.S.), 217 (S. Ct.).

<sup>73</sup> *U.S. v. Brown*, 453 F. 2d 101 (8th Cir. 1971).

<sup>74</sup> See: *Whiting v. United States*, 296 F. 2d 512 (1st Cir. 1961); *U.S. v. Brooks*, 477 F. 2d 453 (5th Cir. 1973). But see *U.S. v. Collier*, 313 F. 2d 157 (7th Cir. 1963).

<sup>75</sup> See Hardy, *The Traps of Entrapment* (1974-76), 3(2) *Am. J. Crim. L.* 165.

raises immediate difficulties.<sup>76</sup> How close need the crime the defendant is predisposed to commit resemble the crime with which he is charged? How certain must it be that he would commit the offence in the absence of police instigation? In the United States, some courts have been sensitive to these problems. In one case, the Court held that predisposition to sell heroin was not proved by the fact that the defendant was a user of the drug and had sold it to support his habit.<sup>77</sup> Advocates of the police conduct defence cite these problems to justify their argument that predisposition be ignored altogether.

Before examining the relevance of predisposition more directly, it is appropriate to consider whether evidence of predisposition, in each of the four senses above, is admissible in Canada. The short answer is that in none of the first three senses is evidence of character or predisposition admissible.<sup>78</sup> In each of these three cases similar fact evidence is inadmissible because its potential for prejudice outweighs its probative value. In the fourth category, evidence of predisposition is admissible if it tends to prove that the defendant is responsible for the specific crime with which he is charged. In this instance, the probative value of the evidence outweighs the risk of prejudice. In the House of Lords, Lord Salmon explained:

My Lords, evidence against an accused which tends only to show that he is a man of bad character with a disposition to commit crimes, even the crime with which he is charged, is inadmissible and deemed to be irrelevant in English law. I do not pause to discuss the philosophic basis for this fundamental rule. It is certainly not founded on logic, but on policy. To admit such evidence would be unjust and would offend our concept of a fair trial to which we hold that everyone is entitled. Nevertheless, if there is some other evidence which may show that an accused is guilty of the crime with which he is charged, such evidence is admissible against him, notwithstanding that it may also reveal his bad character and disposition to commit crime.<sup>79</sup>

Whether evidence is relevant in this last sense, and therefore admissible, is a question of law. One consequence of introducing a defence of entrapment may be to render similar fact evidence admissible as evidence to rebut a defence raised by the accused.<sup>80</sup> If similar evidence is admissible, the trial judge nevertheless has a discretion to exclude the evidence if he feels its prejudice to the accused warrants exclusion. This is not, however, an appropriate place to embark on a discussion of the law of evidence.<sup>81</sup> It suffices to add that in Canada there has so far been no opportunity for our courts to examine this question. Were they to do so, the law on similar fact evidence suggests that a balance would be struck between the probative weight of the evidence and its

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<sup>76</sup> See Dix, *supra* note 47, at 254-58.

<sup>77</sup> *Id.* at 255.

<sup>78</sup> *Criminal Code*, R.S.C. 1970, c. C-34, s. 593. This section states that if an accused puts his character in issue by introducing evidence of good character, the Crown can rebut this evidence by introducing evidence of its own as to his reputation and prior convictions.

<sup>79</sup> *Boardman v. D.P.P.*, [1975] A.C. 421 at 461, [1974] 3 W.L.R. 673 at 706, [1974] 3 All E.R. 887 at 912 (H.L.).

<sup>80</sup> *Makin v. A.-G. N.S.W.*, [1894] A.C. 57 at 65, [1891-94] All E.R. Rep. 24 at 26 (P.C.).

<sup>81</sup> See Sklar, *Similar Fact Evidence — Catchwords and Cartwheels* (1977), 23 McGill L.J. 60.

likely prejudicial effect on the accused. In the case of entrapment, the potential for prejudice is considerable. The probative value, on the other hand, is questionable for basically the same reasons advanced to justify the inadmissibility of similar fact evidence. Evidence of predisposition to commit crimes, a specific type of crime, or even the crime charged, does not offer proof that the defendant has committed the actual crime of which he stands accused.

Probably the strongest argument in favour of the culpability defence is that it focusses the relevance of entrapment upon the primary issue before the court—the guilt or innocence of the accused. Under the culpability defence it is not denied that the defendant has committed the offence with which he is charged, but evidence of instigation or inducement is admissible by way of excuse. The prosecution can rebut this defence evidence by introducing evidence tending to establish the defendant's predisposition to commit the type of crime in question.<sup>82</sup> One advantage of this approach is that it shields the courts from any charge that they are usurping the Crown's prerogative power to pardon. Entrapment is seen as relevant only to the culpability of the accused—the only issue before the court—and if it becomes irrelevant to that issue by proof of predisposition, then it is a matter outside the court's inquiry, perhaps warranting separate penalty.

Despite its appealing logic, the culpability test has drawn criticism for failing to deal with cases where there is clear proof of entrapment. In these cases, once predisposition is established entrapment cannot affect the result. This has been the case in many recent United States decisions involving drug trafficking. One case in which the result was affected is *Greene v. United States*.<sup>83</sup> There, the conviction of the defendants for illegal possession of a distilling apparatus and sale of spirits was reversed. The facts reveal a remarkably elaborate scheme by United States Treasury undercover agents to penetrate an illegal whiskey organization. Entrapment was evidenced by the substantial involvement of the agents over a long period, during which repeated pressure to commit an offence was applied to the defendants. There was evidence also that financial assistance had been offered. Nonetheless, it was held that the defendants were predisposed to commit the type of crime involved and were thus unable to take advantage of the culpability defence. Despite this barrier, the Court reversed, feeling that under its supervisory jurisdiction it could not allow the convictions to stand. If the culpability defence is to remain, however, it is hard to see how it can be qualified by concerns about the level of police misfeasance, short of express adoption of the police conduct defence itself.

The emphasis placed on the character of the accused by the culpability test has also been criticized.<sup>84</sup> In most trials, character is not of major significance. Under the culpability defence, the predisposition of the defendant becomes a crucial factor. Supporters of the defence say that this is appropriate. If, they say, the defendant has committed a crime, he should be convicted, unless it appears that he would not have done so except for police in-

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<sup>82</sup> *Criminal Code*, R.S.C. 1970, c. C-34, ss. 683 and 686.

<sup>83</sup> 454 F. 2d 783 (9th Cir. 1971).

<sup>84</sup> See, e.g., Donnelly, *supra* note 62.

stigation. In deciding whether police instigation should be a defence for the accused, the proponents of the defence argue that predisposition is relevant in determining whether police activity was responsible for the commission of the crime. The confusion in this thinking seems to have been in the mind of Mr. Justice Mahon in the New Zealand case of *Pethig*.<sup>85</sup> The predisposition of the accused to commit a drug offence was said by the Court to be unconnected to the issue of whether he would have committed the offence in the absence of the conduct of the police. Similar logic lies behind the policy of the general rule regarding similar fact evidence restated in *Boardman*.<sup>86</sup> Evidence tending to show that the accused is of bad character or repute is not relevant to the question of whether he is likely to have committed a specific offence at a particular time and place. Such evidence is equally irrelevant as to whether an accused committed a particular offence of his own volition or at the behest of the police or their agents.

Proponents of the culpability defence argue that the police conduct defence is misguided for allowing disapproval of police conduct to affect the outcome of an accused's trial.<sup>87</sup> One retort is that the culpability defence causes discrimination against recidivists because it fails to realize that these persons will need less inducement to commit particular offences than "ordinary law abiding citizens." It is one thing for the courts to tolerate inveigling measures by the police that do not amount to entrapment in the defined sense, but another for entrapment to be unavailable as a defence to anyone with a tendency to commit a particular crime. Undercover methods are used mostly in connection with the so called "victimless" crimes, where the participants will nearly always be predisposed. To exclude an entrapment defence in these cases is tantamount to failing to recognize it altogether. Whether this is a defensible result is discussed below.

#### VIII. A CANADIAN DEFENCE OF ENTRAPMENT

The police conduct defence represents recognition of entrapment *per se* as justification for an acquittal. The basis for the defence was expressed by Frankfurter J. in the first United States Supreme Court case on entrapment:

The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the government to bring about conviction cannot be countenanced.<sup>88</sup>

The learned judge went on to say that the culpability defence, which looked only to the character and predisposition of the defendant, lost sight of the underlying reason for a defence of entrapment—society's intolerance of oppressive law enforcement. To adopt the culpability defence in his view, was to discriminate against recidivists. Despite four Supreme Court majority decisions to the contrary, the police conduct defence has received overwhelming

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<sup>85</sup> *Supra* note 24.

<sup>86</sup> *Supra* note 78.

<sup>87</sup> See Park, *supra* note 62, at 224-39.

<sup>88</sup> *Sherman*, *supra* note 64, at 380 (U.S.), 824 (S. Ct.).

support from American legal scholars<sup>80</sup> and is included in the Model Penal Code.

At the beginning of this paper, there was reference to the increasing volume and sophistication of police techniques, including expansion in the use of undercover agents. This kind of police work has primarily been directed at the consensual or "victimless" crimes. Most reported Canadian cases where entrapment has been in issue have involved offences under the *Food and Drugs Act*<sup>80</sup> and the *Narcotic Control Act*.<sup>81</sup> Despite burgeoning police undercover activity, there has been little effort by Parliament or the courts to develop appropriate legal responses to meet the threats to individual freedom which might arise in the context of covert policing.<sup>82</sup> Parliamentary inaction is probably due to a variety of political factors, including pressure from advocates of "law and order" and the police themselves. Not only has Parliament been inactive, it has actually increased the effectiveness of such law enforcement by enacting amendments to the *Criminal Code* expressly to allow controlled wire-tapping.<sup>83</sup> Courts in Canada have shown a variety of responses to the entrapment problem—most of them adaptations from existing legal rules. In a wider context, the law has shown no desire to increase its protection of the rights of the accused. There is no prohibition on the admission of illegally obtained evidence in Canada<sup>84</sup> and nothing has been done to bring the due process provisions of the *Bill of Rights*<sup>85</sup> to the aid of criminal defendants.<sup>86</sup>

The adoption of the police conduct defence could be criticized for producing the acquittal of offenders who would have committed crimes regardless

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<sup>80</sup> See Park, *supra* note 62, at 167. Professor Park himself, however, supports the culpability defense.

This year the Supreme Court of California has also adopted the police conduct defence. In *People v. Barraza*, 591 P. 2d 947 (1979), five members of a bench of seven judges found that the risks of prejudice to the accused involved in the culpability defence together with the strong deterrent effect of the police conduct defence on what it termed "lawless law enforcement" (at 955), overwhelmingly favoured the latter approach. The court went on to say, at 955:

Finally, while the inquiry must focus primarily on the conduct of the law enforcement agent, that conduct is not to be viewed in a vacuum; it should also be judged by the effect it would have on a normally law-abiding person situated in the circumstances of the case at hand. Among the circumstances that may be relevant for this purpose, for example, are the transactions preceding the offense, the suspect's response to the inducements of the officer, the gravity of the crime, and the difficulty of detecting instances of its commission.

<sup>80</sup> R.S.C. 1970, c. F-27, as am. by S.C. 1976-77, c. 28, s. 16.

<sup>81</sup> R.S.C. 1970, c. N-1, as am. by S.C. 1972, c. 17, s. 2(1), and by S.C. 1974-75-76, c. 48, s. 25(1).

<sup>82</sup> See Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (New York: John Wiley, 1966). According to this empirical study, undercover operations do not necessarily give rise to an increase in instances of entrapment.

<sup>83</sup> See Burns, *Electronic Eavesdropping and the Federal Response: Cloning a Hybrid!* (1975-76), 10 U.B.C. L. Rev. 36.

<sup>84</sup> *R. v. St. Lawrence*, [1949] O.R. 215, 93 C.C.C. 376, 7 C.R. 464 (H.C.). See: Heydon, *Illegally Obtained Evidence (1)* and *Illegally Obtained Evidence (2)*, [1973] Crim. L. Rev. 603 and 690 resp.; Ashworth, *Excluding Evidence and Protecting Rights*, [1977] Crim. L. Rev. 723.

<sup>85</sup> S.C. 1960, c. 44, s. 2.

<sup>86</sup> *Supra* note 70.

of police intervention. The short answer to this criticism is that, in cases of police instigation, the accused is not solely responsible for the commission of the offence with which he has been charged. In Canada, apart from concern with the civil rights of criminal defendants, there may be additional reasons for the adoption of the police conduct defence. Presently in Canada there is uncertainty surrounding the political and legal responsibility of the R.C.M.P. In November, 1977, the Prime Minister stated that he had no intention of interfering with the day-to-day operations of the force, unless ordered to do so by the House of Commons.<sup>97</sup> The control and management of the R.C.M.P. is vested by statute in the Commissioner, who is under the direction of the Solicitor General of Canada.<sup>98</sup> Professionals in the Solicitor General's department number around eighty and lines of responsibility are not sharply drawn. This makes less convincing the argument that the police are properly responsible to their political superiors and thereby rightly exempt from judicial censure. When to this limited constitutional and political responsibility are added the few judicial checks on police misfeasance, the position of the defendant prejudiced by such conduct becomes unenviable.

The conclusion that Canada needs a workable defence of entrapment is not incompatible with an appreciation of the realities of law enforcement. Professor Park, in his extensive article, is critical of the police conduct defence for reasons connected with these realities.<sup>99</sup> He believes that neither the courts will be able to administer nor the police to work with such a defence in practice. This conclusion may have some justification in the United States but there is no reason to accept it in this country. Instances of entrapment will continue to be isolated occurrences in day-to-day policing. Judges will be conscious of this as well as the danger of defendants seeking the defence in inappropriate cases, such as *Kirzner* itself. There is no justification for the view that our courts would not be able to develop and apply a defence of entrapment consistently and sensitively.

## IX. CONCLUSION

At present, there is no recognition of a general defence of entrapment in Canada. The majority in *Kirzner* deliberately avoided expressing any view on whether this recognition should be given. Despite the confusion created by *Rourke*, it would appear that entrapment can still lead to a stay of proceedings for abuse of process. The decision of the Supreme Court in *Wray* seemingly precludes the matter being dealt with by trial judges in exercising their discretion as to the exclusion of evidence. Nonetheless, one could argue that a distinction should be drawn between unfairly obtained evidence in connection with a crime already committed (which is admissible) and evidence of oppressive police behaviour contributing to the commission of an offence. It is

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<sup>97</sup> See: Trueman, "Can't tell Mounties how to conduct their daily operation, Trudeau says," *The Globe and Mail*, Nov. 3, 1978 at 1, cols. 5-7; "Doesn't interfere in day-to-day operations of RCMP, PM says," *The Globe and Mail*, Nov. 3, 1977 at 9, cols. 1-6.

<sup>98</sup> *Royal Canadian Mounted Police Act*, S.C. 1959, c. 54, s. 5.

<sup>99</sup> Park, *supra* note 62, at 226-31.

arguable that in the absence of a defence of entrapment, the latter should be inadmissible. The approach of the New Zealand courts, summarized earlier, accepts this proposition, subject to the discretion of the trial judge.

In *Kirzner*, the Chief Justice thought that if a full-fledged defence of entrapment were now to be recognized it should be placed under section 7(3) of the *Criminal Code*. If this step were taken, or if Parliament were to enact a defence, the crucial issue becomes one of how the defence should be expressed. Assuming that a certain level of instigation and promotion is required by the definition of entrapment, debate will then centre on the relevance of predisposition on the part of the accused. The outcome of this debate will be determined by the importance one attributes to a defence of entrapment as a means of controlling oppressive police behaviour. Those who are less concerned with controlling police excesses in the context of a criminal defence will argue that since the accused has, in fact, committed the crime, he should be convicted. They say that this result is a fair one unless it can be shown that the accused would not have committed the offence but for the police involvement. The main problem with this argument, apart from its sophistry, is that it ignores the fact that, in most offences where entrapment occurs, the existence of predisposition is seldom in doubt. For this reason, there is merit in the view that predisposition be irrelevant and that the availability of the defence turn only on whether the accused can establish the necessary level of inveiglement or instigation by the police or their agents.

In *Kirzner*, the Chief Justice left open the classes of offences to which entrapment could be pleaded. As he points out, in crimes of violence there will generally be no need for the police to resort to instigation. Usually the victims of these crimes will be ready to testify independently. In addition, there are policy arguments that can be advanced to exclude the defence in respect of serious crimes. It is reasonable to expect that if Parliament were to enact a defence of entrapment, it would exclude its availability for certain crimes, as in the definition of the defence of compulsion in section 17 of the Code. In the absence of this direction, the closest attempt of the courts to formulate a test for the availability of a common law defence of entrapment is the statutory interpretation rationale proposed by the United States Supreme Court in *Sorrells*. However, as Roberts J. said in that case, that test would be as illusory as leaving the matter to the individual judge in each case. One approach may be to adopt the reasoning of the common law authorities on compulsion, which excluded that defence for heinous crimes. Since the common law was never clear as to which crimes were heinous, this may not be helpful. A more workable solution may simply be to add to the defence of entrapment the additional factor of the nature of the crime committed. In other words, in determining the availability of the defence, the court should be required to take into account the seriousness of the crime involved.<sup>100</sup> The more serious

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<sup>100</sup> See *United States Model Penal Code: Proposed Official Draft* (Philadelphia: American Law Institute, 1962), s. 2.13(3):

The defense [of entrapment] afforded by this Section is unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening such injury to a person other than the person perpetrating the entrapment.

the crime, the more serious the evidence of police instigation would need to be to uphold the defence.

The *Kirzner* decision is disappointing in that it fails to indicate how our criminal courts should deal with evidence of entrapment. Only the opinion of the Chief Justice seeks to provide guidelines as to how courts might treat this evidence in the future. This article discusses the arguments for and against a substantive defence of entrapment. It is submitted that in Canada there is a pressing need for an independent defence which ignores the defendant's predispositions and focuses on the conduct of the police. One may respectfully agree with the Chief Justice that it be placed under section 7(3) of the Code. Such a defence would free our courts from the vicissitudes of abuse of process and the uncertainties of *Rourke*. In enabling judges to decide whether evidence of police instigation is sufficient to allow the defence, we would permit a new certainty in a cloudy corner of our criminal law. The case for a substantive defence does not imply that we lack honest and efficient law enforcement in Canada. What we do lack are rules to ensure adequate protection against the possibility.