THE INVESTIGATION OF OFFENCES AND POLICE POWERS*

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I. INTRODUCTION

Investigation is but one of many roles which the police in this country are asked to perform.[1] The police are expected to do, and actually do, far more than their traditional crime-fighting image would suggest. Crime-fighting or law enforcement (of which the investigative function forms one part) must vie for resources with peace-making or order-maintenance responsibilities, as well as with community-service duties.

The investigative role is in many ways the most attractive aspect of police work. From this the police derive both professional pride and a positive public image. There is, however, considerable controversy concerning this aspect of the police role. According to Weinreb, "the police have assiduously cultivated their image as crime fighters as a part of a campaign for professional respectability".[2] This they have done in part through their insistence that, above all, criminal investigation is highly technical work, a "science", which requires skill and training and produces spectacular results. To a considerable extent the police have achieved their goal. Yet many contend that the police have fostered an

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[1] A 1962 British Royal Commission on the police took note of the myriad of tasks which were assigned to the police in modern society and listed these all-encompassing basic duties: 1. The police had a duty to maintain law and order and to protect persons and property. 2. The police had a duty to prevent crime. 3. The police were responsible for the detection of criminals and, in the course of interrogating suspected persons, they had a part to play in the early stages of the judicial process, acting under judicial restraint. 4. The police had the responsibility of deciding whether or not to prosecute persons suspected of criminal offences. 5. The police themselves (in some but not all jurisdictions) conducted many prosecutions for the less serious offences. 6. The police had the duty of controlling road traffic and advising local authorities on traffic questions 7. The police carried out certain duties on behalf of government departments. 8. The police had, by long tradition, a duty to befriend anyone who needed their help, and they might at any time be called upon to cope with minor or major emergencies. *See* FINAL REPORT OF THE ROYAL COMMISSION ON THE POLICE 22 (1962).

[2] L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES 22 (1977).

image which has led the public to expect far more of them than they can possibly deliver.[3]

Although criminal investigation (or crime control) is without a doubt an important part of police activity, it by no means commands the major portion of resource allocation in modern policing. Studies conducted in both Canada and the United States have shown that the two functions of service and peacekeeping (order-maintenance) consume more of the average police officer's time than the function of crime control (law enforcement).[4] Most modern commentary seems to concede that it is appropriate to strike the balance in this manner.[5] Nevertheless, the way in which Canadian police departments are organized to investigate and combat crime has also been subject to criticism.[6]

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[3] C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 269-70 (1980). Silberman claims that "the [American] police simply do not know what to do to reduce crime; some off-beat officials are not even certain there is *anything* they can do to produce a significant and lasting reduction in criminal violence". Further, it is his view that

> the police have been reluctant to acknowledge their impotence in the face of rising crime. . . . Hence police have felt the need to surround themselves with an aura of professional invincibility, to encourage an image of themselves capturing criminals through a combination of hard work, bursts of intuition, and the use of arcane scientific methods — dusting for fingerprints, analyzing samples of blood, hair and fingernail dirt, tracking footprints and tiremarks, and other forms of 'criminalistics', as they are called in police jargon.

Id. at 270-72.

[4] For details of such studies, *see* C. GRIFFITHS, J. KLEIN & S. VERDUN-JONES, CRIMINAL JUSTICE IN CANADA: AN INTRODUCTORY TEXT 55-56 (1981).

[5] *See* Leon & Shearing, *Reconsidering the Police Role: A Challenge to A Challenge of A Popular Conception*, 19 CAN. J. CORR. 331 (1977). Leon and Shearing do not criticize this state of affairs but do take issue with conclusions which are conventionally drawn from it. They say: "The debate has been based exclusively upon an analysis of what police *should* do and what they *actually* do, and has overlooked what the police *can* do and have the *authority* to do." *Id.* at 336.

[6] *See* Grant, *The Criminal Justice System — Where Are We Going?*, 69 CAN. POLICE CHIEF 39 (1980). Grant expresses the view that our law enforcement capability has long been biased in favour of "overt predatory crime". He says that it is "now not so much the police discretion which dictates resource allocation but the political discretions which have so organized police forces as to grossly bias the capability quotient in the direction of overt predatory crime and away from clandestine fraud and corruption". Thus "society ends up with the criminals which it organizes its law enforcement agencies to catch. If we point 90% of those resources at a particular target we cannot be surprised if the resultant criminal statistics indicate that the area chosen would seem to have been the right one. Of course we caught criminals there but it says nothing of the activity occurring elsewhere". Grant does not deny the importance of directing police efforts towards curbing violence, but he recognizes a need to rethink the question of resource allocation. He suggests that fraud and corruption offences impose a tremendous cost upon society as a whole. They deserve to be the focus of greater attention and merit the allocation of a greater measure of police investigatory resources. In this regard *see* the study paper prepared by Grant: LAW REFORM COMMISSION OF CANADA, THE POLICE: A POLICY PAPER (1980).

The purpose of these prefatory remarks is simply to indicate the considerable controversy which surrounds many aspects of the police role, including the investigatory function. There are even claims that the significance of police detective work, the centre-piece of police professionalism, has been greatly exaggerated and inflated.[7] These various controversies possess features of unique interest but they take one far beyond the general confines of the subject of the role of investigator.

It is the intention of this paper to examine the role of the investigator from a more traditional legal, as opposed to criminological, perspective. The role of the investigator is, after all, largely shaped and altered by the legal milieu in which he operates. The examination will be concerned with the role of the investigator as analysed in the context of police powers. This analysis will focus primarily upon the powers of arrest, search and seizure. In addition, there is another major tool or weapon at the investigator's disposal that merits attention, namely the police power to conduct inquiries and to question citizens in order to gather factual information pertaining to allegations of criminal misconduct. The ability of the police to question citizens is inextricably linked to other police investigatory practices, particularly those of search and arrest.

II. Police Investigation and the Ability to Question Citizens

Notwithstanding the undoubted public apprehension that an efficient police force is indispensable to the maintenance of public peace and security, there remains a certain ambivalence, at least in some sectors of the public, toward the function of the police in modern Canadian society.

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[7] *See* L. Weinreb, *supra* note 2, especially chapter 2 on criminal investigation *See also* C. Silberman, *supra* note 3, at 271-72 and 292-94. Referring to an American study of juvenile court statistics, Silberman says:

> When one examines the ways in which the police actually catch "the perpetrator" . . . three factors stand out:
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> (1) the heavily reactive nature of policing — specifically, the degree to which police depend on the people they police for knowledge of who the criminal is and where he can be found, as well as for knowledge that a crime has been committed;
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> (2) the haphazard nature of criminal investigation, and the larger role played by accident and chance, as well as by the offender's own bungling, in the apprehension of criminal suspects;
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> (3) the variety of ways in which traditional police organization and attitudes inhibit effective use of what information is available about criminals and crime.

Id. at 293. *See also* R. Ericson, Making Crime: A Study of Detective Work (1981), especially chapters 1 and 3; and Report of the Royal Commission on Criminal Procedure 17 (Sir Cyril Philips Chairman 1981), where reference is made to Royal Commission on Criminal Procedure, Uncovering Crime: The Police Role, Research Study No. 7 (1980), which concluded that the majority of offenders were detected in circumstances not involving the exercise of detective skills.

This may spring in part from a distrust of the police engendered by recent revelations that the police have for some time been systematically and deliberately breaking many laws in the name of protecting or safeguarding society.

Nevertheless, the police have always sought and expected public cooperation in the investigation of crime. It is common knowledge that the police cannot *effectively* carry out their duties with respect to law enforcement unless they have the support and confidence of the public. Not only is this citizen cooperation necessary for effective law enforcement, but disrespect for the police creates a climate which is conducive to crime.[8] Without the ability to discover the facts of a crime by asking questions of persons from whom it was thought that useful information might be obtained, the police would be paralyzed. However, it was long believed that the citizen's duty to answer questions, save in very limited circumstances, was not a legal duty but a moral one. The accepted wisdom was, until very recent times, that the citizen's moral obligation was only to answer polite questions, and that rudeness and bad language might create a situation in which even the moral obligation might disappear.[9] The practical reality of most citizen-police confrontations is that the citizen is completely unaware of his rights and duties. Consequently the police have always approached such encounters from a position of power.[10] It is one of the curious ironies of Canadian life that citizens have been unaware of the extent of their rights while the police have been unaware of the limits on their powers.

The nature of the rights and obligations of citizens in the context of police investigation of crime has remained somewhat murky in Canada, perhaps because a certain amount of mythology has long pervaded the area. For some time it had been accepted orthodoxy that, as a recent British report contends, the police officer was merely a "citizen in blue who [was] paid to do things that all citizens should do".[11] The corollary of this notion was that the police should possess few powers that were not

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[8] REPORT OF THE CANADIAN COMMITTEE ON CORRECTIONS 41 (Ouimet J. Chairman 1969) [hereafter cited as OUIMET REPORT].

[9] REPORT OF THE ROYAL COMMISSION OF INQUIRY RESPECTING THE ARREST AND DETENTION OF RABBI LEINER BY THE METROPOLITAN TORONTO POLICE 69, 72 (Wells J. Chairman).

[10] The OUIMET REPORT, *supra* note 8, at 49, makes the same point in this fashion:

> In the investigation of the commission or alleged commission of an offence, a police officer is entitled to question any person, whether or not the person is suspected, in an endeavour to obtain information with respect to the offence. While the police officer may question, he has no power to compel answers. There is no doubt, however, that a police officer by reason of his position and his right to arrest in certain circumstances, has a power (factual but not legal) to exert very great psychological pressure to obtain answers.

[11] REPORT OF THE ROYAL COMMISSION ON CRIMINAL PROCEDURE, *supra* note 7, at 21.

enjoyed by the ordinary citizen.[12] These sentiments, if ever completely true, today contain only a small element of truth.[13]

Modern crime, the argument goes, demands a different form of policing from that which prevailed earlier in this century. Without change, policing becomes mired in inefficiency. By favouring efficient policing (which entails some weighting of the social interest in the repression of crime over the social interest in the protection of individual rights) we have by slow degrees moved away from the situation where our police are clothed merely with those powers enjoyed by all citizens. Increasingly, by the same incremental process, we have chosen to enlarge that grant of special powers which our police employ.

This tendency was manifest in a recent decision of the Supreme Court of Canada. At first glance *Moore v. The Queen*[14] appears to be a beguilingly simple case, almost trivial in nature, but its result seems to have altered one of the traditional bases of the citizen-police relationship. *Moore* involved a consideration of both the citizen's duties with respect to assisting the police in their investigation, and whether, when, and in what way an arrest power would be justified in circumstances where the citizen refused to assist the police by wilfully and deliberately ignoring their enquiries.

The facts of the case are unremarkable. Mr. Moore rode his bicycle through a Vancouver street intersection while the traffic light was showing red against him. A police officer observing this infraction asked him to pull over and identify himself in order to make out a highway traffic ticket. Moore ignored the officer's request and rode on. He was then forcibly stopped. An acrimonious exchange took place, and ultimately he was arrested and charged under the Criminal Code with the more serious offence of wilfully obstructing a peace officer in the

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[12] *See* FINAL REPORT OF THE ROYAL COMMISSION ON THE POLICE, *supra* note 1.

[13] *See* REPORT OF THE ROYAL COMMISSION ON CRIMINAL PROCEDURE, *supra* note 7, at 21. In Canada, the expansion in police powers since 1962 is undeniable. Between 1962 and 1981 note the following developments: passage of comprehensive wiretap legislation, pronouncement of a wider rule concerning the admission of illegally-obtained evidence, compulsory breath tests in drunk-driving cases, and enhanced search and seizure capabilities with regard to firearms.

[14] [1979] 1 S.C.R. 195, 5 C.R. (3d) 289 (1978).

execution of his duty.[15] At trial, Moore was acquitted on this charge by a directed verdict, the trial judge holding that the mere refusal to identify oneself could not in law constitute the offence of obstructing a peace officer. The British Columbia Court of Appeal reached the opposite conclusion. Ultimately the Supreme Court of Canada was asked to decide the point.

Before *Moore* there seemed little reason to doubt that the law in both England and Canada was as described by Leigh: "And in general it still remains the rule that a citizen has a right to be as uncooperative as he pleases, provided he does not impede the course of justice by knowingly giving false information to the police."[16] The leading English case on point contains this observation: "In my judgment there is all the difference in the world between deliberately telling a false story — something which on no view a citizen has a right to do — and preserving silence or refusing to answer — something which he has every right to do."[17]

The Supreme Court of Canada, in deciding that Moore was indeed guilty of obstruction, seems to have ignored this vital difference. In doing so the Court has eroded the traditional foundation of citizen-police relations. Due to this judgment social cooperation has been transformed into social coercion. The right to silence, long believed to be an inviolate cornerstone of just criminal procedure, has peripherally suffered an assault.

By way of contrast, it is useful to quote again from the judgment of the Lord Chief Justice in the English decision of *Rice v. Connolly*:

> It seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed *the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority*, and to refuse to

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[15] All members of the Supreme Court agreed that the police had no power of arrest *per se* for the mere breach of the provincial provision. However, by virtue of the interaction of certain procedural provisions in the provincial Summary Convictions Act, R.S.B.C. 1960, c. 373 (*replaced by* the Offence Act, R.S.B.C. 1979, c. 305) with the CRIMINAL CODE, there was felt to be a power to arrest for the offence of proceeding against a red light if it were necessary in order to establish the identity of an accused person. One commentator felt this interpretation was unfounded and too broad. He suggested instead that the answer lay in having the B.C. legislature amend its traffic laws to make clear provision for cyclists who did not identify themselves to police and to support this provision with the specific power of arrest without warrant: Grant, *Moore v. The Queen: A Substantive, Procedural and Administrative Nightmare*, 17 OSGOODE HALL L.J. 459, at 467-68 (1979). For other commentary, *see* Ewaschuk, *What's in a Name? The Right Against Self-Incrimination?*, 5 C.R. (3d) 307 (1979). Ewaschuk is of the view that since certain provisions of the governing provincial statute expressly confer an arrest power, the *expressio unius* canon of statutory interpretation has application and thus the legislature must be deemed to have intended not to grant the arrest power for other offences in the same statute.

[16] L. LEIGH, POLICE POWERS IN ENGLAND AND WALES 195 (1975).

[17] Rice v. Connolly, [1966] 2 Q.B. 414, at 420, [1966] 2 All E.R. 649, at 652 (Lord Parker C.J.).

> accompany those in authority to any particular place; short, of course, of arrest.[18]

Moore stands for the proposition that one may still rely on one's right to silence but, if that is done, one risks being charged with a criminal offence which may be graver than the offence of which one is suspected. Also, note the result of the case: Moore is left with the stigma of a criminal record as a result of his conviction on the charge of obstructing a peace officer, rather than the minor consequences which flow from a relatively insignificant traffic violation.

Due to its lack of qualification the case goes considerably beyond simply addressing the problem of trying to enforce a minor law against a flagrant and unruly offender. (It is difficult to feel good will toward Mr. Moore. Individuals like him may well incline provincial legislatures toward amending their traffic laws, if necessary, to make clear provision for police to arrest, without warrant, cyclists who when breaking laws refuse to identify themselves.) The law pronounced in *Moore* is broader than this.

Whether or not there should be a duty on Moore, or others like him, to identify himself is not truly the significant issue here. The use of the criminal law of obstruction to compel citizen compliance is grossly disproportionate to the objective sought. The legislature alone should be the body to decide in which specific circumstances an obligation to answer questions on pain of arrest will be imposed, and indeed it has done so in certain instances. Glanville Williams explains the rationale underlying this viewpoint:

> [I]t is a fundamental principle of English law that an accused person cannot be interrogated or at least cannot be forced to answer questions under a legal penalty if he refuses; this principle is absolute, and does not admit of exception even for a demand of name and address, unless a statute has expressly created an exception. To say that the police have a duty to gather evidence, and therefore that a criminal's refusal to give name and address is an obstruction, is far too wide, because the same premise would yield the conclusion that a criminal's refusal to confess to the crime is an obstruction.[19]

Mr. Justice Dickson, who dissented strongly in *Moore*, adopted this view:

> The fact that a police officer has a duty to identify a person suspected of, or seen committing, an offence says nothing about whether the person has the duty to identify himself on being asked. Each duty is entirely independent. Only if the police have a lawful claim to demand that a person identify himself, does the person have a corresponding duty to do so. As McFarlane J.A. said in *R. v. Bonnycastle* . . . : "The duty of a peace officer to make inquiries must not be confused with the right of a person to refuse to answer questions in circumstances where the law does not require him to answer."

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[18] *Id.* at 419, [1966] 2 All E.R. at 652 (emphasis added).

[19] Williams, *Demanding Name and Address*, 66 L.Q.R. 465, at 473-74 (1950).

> The Legislature deliberately imposed a duty to identify upon the drivers of motor vehicles — perhaps because of their more lethal nature — but chose not to impose such a duty on the drivers of other vehicles such as bicycles. The Legislature must be taken to have intended to relieve bicycle riders of the duty. To require the riders of bicycles to give their names and addresses would be tantamount to amending the *Motor-vehicle Act*. It would also appear that Parliament, in providing in ss. 450(2) and 452(1)(*f*)(i) of the *Criminal Code* for arrest and detention for the purpose of establishing identity, did not recognize a duty to identify oneself existing apart from statute, breach of which would expose the offender to a charge of "obstructing".[20]

No one denies that our traffic laws, like all laws, must be enforceable to be effective. However, a state which provides a super-abundance of coercive powers to enlist the support of its citizens endangers the consensus which is necessary for its continued life. As the legal order increasingly impinges on the daily actions of the individual, actual freedom diminishes. Citizens could be compelled to identify themselves in a broader fashion than exists at present in the post-*Moore* era. This could be accomplished through a system of universal identification coupled with the creation of a legal duty to identify oneself to the authorities whenever asked to do so. Citizens can conceivably be obliged to do all manner of things, especially where the obligation is reinforced by the criminal sanction. Legal duties could compel citizens to spy on one another in order to aid in the detection of possible wrongdoing. A failure to report suspicious incidents could in itself constitute an offence. Too many such obligations result in the attrition of freedom. It is arguable that we are already moving in this direction by small degrees.

The *Moore* case involved important issues. As seen, it touched in a significant way upon the nature of the obligation of a citizen to respond to the inquiries of a police officer. It also involved a consideration of the breadth and scope of the police power of arrest.[21]

III. Arrest and Detention

Arrest is one of the most powerful of police weapons. It is a "coercive power" in the sense in which those words are used by Britain's Royal Commission on Criminal Procedure; that is, it is a power that involves either an intrusion upon someone's person or his property, or a deprivation of his liberty.[22] Arrest can be, for some, a frightening or

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[20] *Moore*, *supra* note 14, at 212, 5 C.R. (3d) at 305.

[21] The McRuer Commission in Ontario lamented, some years ago, that "powers of arrest without a warrant have been conferred with abandoned liberality, without regard for historic principles, necessity or elementary safeguards of civil rights or human dignity". 2 Royal Commision Inquiry Into Civil Rights, Report No. 1, at 728-29 (1968).

[22] Report of the Royal Commission on Criminal Procedure, *supra* note 7, at 22.

humiliating experience. It can potentially damage reputations and destroy careers, and may do so even where criminal charges ultimately prove unfounded. There are certain limitations and restraints upon an officer's use of the power,[23] but they are not sacrosanct. The effective scope of the arrest power has in fact been significantly enlarged in recent years.

There are indications that the arrest power is not nearly as restrained as it once was. One decision which has profoundly affected the power stole silently onto the scene several years ago and, for the most part, has provoked only muted protests since its pronouncement by the Supreme Court of Canada. *Regina v. Biron*,[24] a case involving an altercation between the police and a patron in a bar, raised an issue no less fundamental than the ability of the citizen to be free from official restraint save to the extent that the law otherwise provides. Its resolution by the Court has left commentators to ponder uneasily the question of whether our law now operates so as to deprive a citizen of his right to resist an unlawful arrest. The facts of the case have been colourfully summarized by one of these commentators:

> On October 24, 1970, Montreal police made an authorized raid on a bar in search of illegal firearms and liquor. M. Biron was at the bar when the raid was made and refused to co-operate or to give his name. In so behaving he does not appear to have broken any law — certainly none of the charges subsequently laid against him concerned this aspect of the evening's events. M. Biron appears to have been unwise enough to have verbally abused the police whereupon he was arrested and led outside the club and handed over to Constables Dorion and Marquis who took him to a police car. Later, Constable Dorion tried to take M. Biron to a police wagon but the latter protested his arrest, a scuffle ensued and M. Biron found himself charged with two offences, first, creating a disturbance in a public place by shouting, contrary to Cr. Code s. 171(1)(*a*)(i) and secondly, resisting Constable Dorion, a peace officer, in the execution of his duty, contrary to Cr. Code s. 118(*a*).
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> This scenario led to a degree of judicial disarray which makes [other police powers] cases look like models of concordant justice. At trial, M. Biron was convicted of both offences but he was acquitted of the charge of creating a disturbance on appeal by trial *de novo*. On further appeal to the Quebec Court of Appeal, the conviction for resisting Constable Dorion was set aside by a majority decision of two to one. The Crown then appealed this decision to the Supreme Court of Canada and succeeded on a majority decision of five to three. In the result, M. Biron was convicted of resisting Constable Dorion in the execution of his duty. Of the 13 judges who had considered the case, eight thought the case proved and five did not. This

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[23] Not every breach of the law will invite the exercise of the arrest power. Some minor offences or infractions are enforceable only by issuance of a written summons to the accused to appear in court. (The police officer has no power of arrest in such cases.) In other, usually more serious, instances, the arrest power is conferred by statute. Depending upon circumstances, such as the nature of the offence, whether the accused is found committing the offence, *etc.*, a police officer may have the power to arrest the suspect. In other circumstances he may only arrest after securing a warrant from a justice of the peace for the arrest of the accused.

[24] [1976] 2 S.C.R. 56, 23 C.C.C. (2d) 513, 59 D.L.R. (3d) 409 (1975).

> might not be too surprising except for the fact that the "duty" being considered here was, on its face, neither vague nor arcane, but the central and essential question of when a peace officer has power to arrest for a criminal offence![25]

Section 450(1)(*b*) of the Criminal Code, which has application to summary conviction offences as well as indictable offences, provides that a peace officer may arrest without warrant a person whom he finds committing a criminal offence.[26] Since it was ultimately determined (on a trial *de novo*) that Biron was not, in law, guilty of the summary conviction offence of causing a disturbance, could it be properly said that he was justified in resisting an "unlawful" arrest? The relevant question can be put several ways. Can a citizen who believes the police have no legal basis for arresting him resist that arrest with impunity? Will the citizen be liable to criminal charges where he resists an arrest which was based on a peace officer's *bona fide*, though mistaken, belief that the citizen was committing an offence?

Martland J., writing for the majority in *Biron*, held that the words "committing a criminal offence" meant "apparently committing a criminal offence".[27] Thus the arrest could be a lawful one even though the person arrested was acquitted of the offence for which the arrest was made. More importantly, it would seem that so long as the officer was acting in good faith in relation to circumstances which were apparent to him at the time the arrest was made, the citizen has no right to resist the unlawful arrest.

The result in *Biron* is at once peculiar and disturbing. Arguably, it elevates the peace officer's good faith actions to a higher status than the *bona fide* reactions of the citizen who believes (correctly) that he is being wrongfully subjected to official harrassment. Naturally, it should not be the policy of the law to leave the police officer vulnerable and unprotected against criminal prosecutions or lawsuits for those actions taken in the execution of his duty. The Criminal Code by sections 25 and 31 offers protection in this regard. However, Laskin C.J.C., dissenting in *Biron*, makes the following point forcefully:

> I would find it astonishing that a provision concerned with a constable's criminal or other responsibility and which immunizes him in specified circumstances in respect of an arrest that he has made, should become the vehicle for providing a basis upon which an accused may himself be convicted of resisting the arrest. To do that is to turn a protective provision, a shield, for the constable into a sword against an accused by treating the

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[25] Grant, *The Supreme Court of Canada and the Police: 1970-76*, 20 CRIM. L.Q. 152, at 157-58 (1978). For other commentary on this case, *see* Ball, *Comment*, 41 SASK. L. REV. 143 (1976-77).

[26] Note that this is a narrower power to arrest than that conferred by s. 450(1)(*a*), which pertains to indictable offences. S. 450(1)(*a*) allows a peace officer to arrest without a warrant a person who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence.

[27] *Supra* note 24, at 75, 23 C.C.C. (2d) at 526, 59 D.L.R. (3d) at 423.

> protection as an expansion of the powers of arrest given by what is now s. 450.[28]

The dissenting judgment is not insensitive to the position of the constable, as the following extract indicates:

> Of course, as Kaufman J.A. points out in his reasons, a constable's lot is a heavy and even unenviable one when he has to make an on-the-spot decision as to an arrest. But he may be overzealous as well as mistaken, and it may be too that when a charge or charges come to be laid the Crown attorney or other advising counsel may mistake the grounds and thus lay a charge which does not support the arrest. We cannot go on a guessing expedition out of regret for an innocent mistake or a wrong headed assessment. Far more important, however, is the social and legal, and indeed political, principle upon which our criminal law is based, namely, the right of an individual to be left alone, to be free of private or public restraint, save as the law provides otherwise. Only to the extent which it so provides can a person be detained or his freedom of movement arrested.[29]

The decision in *Biron*, not unlike that in *Moore*,

> brings closer the day when everyone should be advised to submit to any arrest whatsoever by the police, without question and quite irrespective of the circumstances, since if it 'appears' there is an offence a valid arrest will have occurred and any resistance will be an offence *per se* even if the original charge was improper and unfounded.[30]

The result in *Biron* truly does upset a hitherto fundamental proposition of law. One can only ruefully ponder what of substance is left of these remarks from *Christie v. Leachinsky*:[31]

> Putting first things first I would say that it is the right of every citizen to be free from arrest unless there is in some other citizen, whether a constable or not, the right to arrest him. And I would say next that it is the corollary of the right of every citizen to be thus free from arrest that he should be entitled to resist arrest unless that arrest is lawful.[32]

Despite the awesome dimensions of the modern arrest power the arrest may often take place in a disarmingly casual manner. In theory, an arrest consists of the actual seizure or touching of a person's body with a view to detention, but it may in fact entail far less than this. So long as there is submission to the process the mere pronouncing of words by the arresting officer will suffice.[33] There is, according to the Supreme Court of Canada, no room for subdivision of the concept of "arrest" into "custodial" arrest and "symbolical" or "technical" arrest. An accused is either arrested or he is not.[34]

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[28] *Id.* at 60, 23 C.C.C. (2d) at 515, 59 D.L.R. (3d) at 411.

[29] *Id.* at 64-65, 23 C.C.C. (2d) at 518-19, 59 D.L.R. (3d) at 415.

[30] Grant, *supra* note 25, at 161.

[31] [1947] A.C. 573, [1947] 1 All E.R. 567 (H.L.).

[32] *Id.* at 591, [1947] 1 All E.R. at 574-75 (Lord Simonds).

[33] *See* Regina v. Whitfield, [1970] S.C.R. 46, [1970] 1 C.C.C. 129, 7 D.L.R. (3d) 97 (1969).

[34] *Id.* at 48, [1970] 1 C.C.C. at 130, 7 D.L.R. (3d) at 98 (Judson J.)

> The use of coercive powers cannot be justified unless there is certainty or suspicion based upon reasonable grounds that a crime has been or may have been committed, is being or is about to be committed. Generally, coercive powers cannot and should not be exercised against a person, his property or his liberty unless he himself is known to have committed or is suspected on reasonable grounds of having committed a specific crime.[35]

These principles, which are firmly embedded in Anglo-Canadian common law, "apply to the general powers of stop and search, search of premises and arrest".[36]

In *Regina v. Dedman*,[37] a recent case calling into question the ability of police officers to spot-check motorists in order to uncover "impaired" drivers,[38] Martin J.A. of the Ontario Court of Appeal made several important observations on the rights of citizens and the powers of police investigators. His remarks merit quotation at length:

> It is, of course, a constitutional principle that the citizen has a right not to be subjected to imprisonment, arrest or physical restraint that is not justified by law, and every invasion of the property of the citizen is a trespass unless legally justified. In *Knowlton v. The Queen* . . . Fauteux C.J. was careful to point out that no question of false imprisonment was involved. On the other hand, when a police officer is trying to discover whether, or by whom, an offence has been committed, he is entitled to question any person, whether suspected or not, from whom he thinks useful information may be obtained. Although a police officer is entitled to question any person in order to obtain information with respect to a suspected offence, he has no lawful power to compel the person questioned to answer. Moreover, a police officer has no right to detain a person for questioning or for further investigation. No one is entitled to impose any physical restraint upon the citizen except as authorized by law, and this principle applies as much to police officers as to anyone else. Although a police officer may approach a person on the street and ask him questions, if the person refuses to answer the police officer must allow him to proceed on his way, unless, of course, the officer arrests him on a specific charge or arrests him pursuant to s. 450 of the *Code* where the officer has reasonable and probable grounds to believe that he is about to commit an indictable offence. . . .[39]

In *Dedman* the accused was signalled by police and directed to stop his vehicle. Dedman "complied" with the "request", but subsequently failed to provide a sample of his breath for analysis. At trial he was acquitted of the charge under section 234.1(2) of the Criminal Code on the basis that the officer, when signalling Dedman to stop, had no reason

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[35] REPORT OF THE ROYAL COMMISSION ON CRIMINAL PROCEDURE, *supra* note 7, at 22-23.

[36] *Id.* at 23.

[37] 32 O.R. (2d) 641 (C.A. 1981) *rev'g* 30 O.R. (2d) 555, 55 C.C.C. (2d) 97, 8 M.V.R. 142 (H.C. 1980), *leave to appeal to S.C.C. granted* 19 Oct. 1981.

[38] The procedure called into question was authorized under Ontario's R.I.D.E. program. Officers were instructed to stop vehicles at random in locations where it was believed there had been a high incidence of impaired driving or alcohol-related accidents. Drivers were asked to produce drivers' licences and proof of insurance, and officers were to observe the condition of the vehicle and the driver.

[39] *Dedman*, *supra* note 37, at 652-53.

to believe that he had committed any offence. The police action was held to be unauthorized since it was not founded on any evidence of improper driving or defective condition of the vehicle. Subsequently, Maloney J. dismissed an appeal by way of stated case by the Attorney General of Ontario from the acquittal in the court below. A unanimous Ontario Court of Appeal overturned those results and substituted a conviction. Martin J.A. characterized Dedman's actions in "compliance" as voluntary, thus lifting the incident (in his view) out of the parameters of authorized police powers. As in the case of search of premises with the consent of the occupant, the court viewed the police officer as simply one individual making a request of another. The subsequent rights and powers of the parties were thus defined by private transaction rather than public law.[40] According to Martin J.A.:

> It is important to correctly characterize what occurred here. The respondent was signalled or requested to stop and he complied with the request. A distinction must be made between a legal liberty, that is, something a person may do without breach of the law, and a legal right, which the law will enforce, to do something or not to be prevented from doing something.[41]

Further, the learned justice did not believe "that the signal to stop given by a police officer to a motorist is any greater interference with the liberty of the citizen than tapping a person on the street on the shoulder in order to attract his attention for the purpose of questioning him".[42]

The difficulty with these views is that they do not truly square with the reality of the encounter being described. They hearken back to the old, and largely discredited, notion, previously discussed, that the police officer is very nearly in the same position as all other citizens; "a citizen in blue who is paid to do things that all citizens should do".[43]

How "voluntary" is the citizen's response when he finds himself in a line of cars being halted in front of flashing police barricades, or being waved to the side of the road by a cordon of uniformed police officers? How valid then is the analogy to a situation where a citizen walking along a street is tapped on the shoulder and politely asked to assist the police by answering a few questions?

Mr. Justice Martin presents the orthodox view of police powers when he says that "[i]n carrying out their general duties, the police have limited powers, and they are entitled to interfere with the liberty and property of the citizen only where such interference is authorized by law."[44] This orthodoxy is buttressed by certain corollaries, not the least of which is the one recently restated by the British Royal Commission on Criminal Procedure to the effect that coercive powers ought not to be

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[40] L. Paikin, Standards of Reasonableness in Search and Seizure Law (unpublished paper Aug. 1981).

[41] *Dedman*, *supra* note 37, at 656.

[42] *Id.* at 656-57.

[43] *See* note 11 *supra*.

[44] *Dedman*, *supra* note 37, at 652.

used unless there exists a high degree of certainty that a crime has been, is being or is about to be committed.[45]

In theory, then, the police have no general power which permits them to stop and detain individuals *at random*, whether such action be for the purpose of conducting a search, proceeding with an interrogation, or compelling citizens to identify themselves. The exercise of the power must pertain to a specific investigation and be based upon reasonable grounds, or it must be expressly and specifically authorized by legislation.[46] These constraints are the mechanism whereby the state ensures that official action will not be arbitrary.

Viewed in this fashion, an administrative scheme to validate random discretionary intrusions upon individual liberty such as those "authorized" under Ontario's R.I.D.E. programme cannot be characterized as other than arbitrary. No legislation expressly conferred a power upon police officers to stop motor vehicles at random[47] in order to search out intoxicated motorists. A laudable social purpose is not enough to clothe the exercise with legality.

As mentioned, Martin J.A. chose to sidestep the problem by characterizing the initial encounter between Dedman and the police as voluntary. A similar, though certainly not identical, approach was adopted in perhaps even more provocative circumstances in the recent Supreme Court of Canada case of *Chromiak v. The Queen*.[48]

Chromiak was charged with refusing to provide a sample of his breath suitable for analysis in an approved roadside screening device.[49] He had refused the police officer's demand for a breath sample, saying that he wanted his lawyer present on the street before taking any tests. The issue on appeal was whether Chromiak had been "arrested and detained", circumstances which were prerequisites of his ability to rely upon his right to retain and instruct counsel without delay, which right is found in the Canadian Bill of Rights.[50] If so, then Chromiak might be said to have had a reasonable excuse for refusing the officer's demand.

If Chromiak had been in law arrested or detained then his case would have been on all fours with *Brownridge v. The Queen*.[51] In that case the

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[45] *Supra* note 35.

[46] Presumably the exercise of police powers on a basis other than the commission of crime is highly exceptional and thus the grant of such power must be specific and express.

[47] The exercise is no less random because it requires the procedure to be carried out at specific locations noted for alcohol-related accidents or frequent impaired driving. It is random insofar as it relates to each stopped motorist.

[48] [1980] 1 S.C.R. 471, 12 C.R. (3d) 300, 102 D.L.R. (3d) 368 (1979).

[49] Contrary to s. 234.1(2) of the CRIMINAL CODE.

[50] R.S.C. 1970 (App. III), s. 2(*c*)(ii).

[51] [1972] S.C.R. 926, 7 C.C.C. (2d) 417, 28 D.L.R. (3d) 1. However, Ritchie J. found the facts in *Brownridge* "startlingly different" from those in *Chromiak*, as Brownridge had been arrested and was being held in the police cells when his request to speak with a lawyer was refused. Chromiak, after performing certain sobriety tests (at the roadside), was issued an appearance notice and allowed to leave. *See Chromiak, supra* note 48, at 477, 12 C.R. (3d) at 306, 102 D.L.R. (3d) at 372.

Supreme Court of Canada held, by a six to three majority, that as there was a genuine reason for the motorist to seek legal advice, it would run counter to section 2(*c*)(ii) of the Bill of Rights to hold that the denial of a request to consult a lawyer could not constitute a reasonable excuse for the accused to refuse to provide a breath sample.[52]

A unanimous seven-man Court decided that Chromiak was not a person who while "arrested or detained" had been deprived of the right to "retain and instruct counsel without delay". Therefore Ritchie J., on behalf of the Court, was unable to find any reasonable excuse for Chromiak's failure to comply with the demand made to him by the peace officer.

In the present context the case is important for what it has to say regarding the meaning of the words "arrest" and "detention". It is useful to quote from the judgment of Ritchie J. at some length:

> It appears to me to be obvious that the word "detention" does not *necessarily* include arrest, but the words "detain" and "detention" as they are used in s. 2(*c*) of the *Bill of Rights*, in my opinion, connote some form of compulsory restraint and I think that the language of s. 2(*c*)(iii) which guarantees to a person "the remedy of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful", clearly contemplates that any person "detained" within the meaning of the section is one who has been detained by due process of law. This construction is supported by reference to ss. 28(2)(*b*), 30, 136(*a*), 248 and 250 of the *Criminal Code* where the words "to detain" are consistently used in association with actual physical restraint.[53]

The judgment incorporates and appears to adopt these passages from the dissenting opinion of Pigeon J. in *Brownridge*:

> The legal situation of a person who, on request, accompanies a peace officer for the purpose of having a breath test taken is not different from that of a driver who is required to allow his brakes to be inspected or to proceed to a weighing machine under ss. 39(6) or 78(3) of the *Highway Traffic Act*. Such a person is under a duty to submit to the test. If he goes away, or attempts to go away, to avoid the test, he may be arrested and charged but this does not mean that he is under arrest until this happens. He is merely obeying directions that police officers are entitled to issue. Motorists cannot reasonably expect to be allowed to seek legal advice before complying with such orders. Police officers are fully justified in treating as a definitive refusal a refusal to comply until legal advice is obtained.
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> Does s. 2(*c*)(ii) of the *Bill of Rights* alter the common law situation with respect to motorists requested to submit to a test required by the *Criminal Code* as opposed to tests required by provincial legislation? I do not think so. The provision under consideration applies to 'a person who has been arrested or detained'. Such is not, it appears to me, the legal situation of one who has been required 'to accompany' a peace officer for the purpose of having a breath test taken. The test may well be negative and, in such a case, it would

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[52] Laskin J., as he then was, in a separate majority opinion in *Brownridge* (Hall J. concurring), was of the view that denial of the right to counsel did not constitute a "reasonable excuse"; rather, this right existed independently of those words and its denial vitiated a conviction for the offence.

[53] *Chromiak*, *supra* note 48, at 478, 12 C.R. (3d) at 307, 102 D.L.R. (3d) at 373.

> be quite wrong to say that this person was arrested or detained and then released. Detained means held in custody as is apparent from such provisions as s. 15 of the *Immigration Act*. . . .[54]

How useful or valid are the distinctions which are drawn in *Chromiak*? While what occurred may not actually have involved an arrest in any formal, legal sense, it certainly closely resembles one. To say that what occurred does not involve a "detention" is to strain one's credulity.

It is instructive to juxtapose a number of authoritative legal principles concerning arrest and detention:

1. Arrest consists in the seizure or touching of a person's body with a view to his restraint; words may, however, amount to an arrest if, in the circumstances of the case, they are calculated to bring, and do bring, to a person's notice that he is under compulsion and he thereafter submits to the compulsion.[55]

2. There is no room for a subdivision of arrest into "custodial" arrest and "symbolical" or "technical" arrest. An accused is either arrested or he is not arrested.[56]

3. Detention does not *necessarily* include arrest, but "detention" does connote some form of compulsory restraint.[57]

4. "Detention" as used in section 2(*c*)(ii) of the Bill of Rights contemplates a situation in which a person has been detained by due process of law. Many sections in the Criminal Code use the word "detain" consistently in association with actual physical restraint.[58]

5. "Detained" means held in custody.[59]

One could go further down this road by noting that once one is held in custody there may be in effect an "imprisonment". According to Lord Devlin "[a]rrest and imprisonment are in law the same thing. Any form of physical restraint is an arrest, and imprisonment is only a continuing arrest."[60]

One appears to be confronted at this stage in the development of our jurisprudence with something of a definitional morass. It is important to step back from this deciphering exercise and observe what is actually going on in these citizen-police encounters. An 1845 English decision captures the reality well:

> So, if a person should direct a constable to take another in custody, and that person should be told by the constable to go with him, and the orders are

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[54] *Id.* at 479, 12 C.R. (3d) at 308, 102 D.L.R. (3d) at 374.

[55] 11 Hals. 73 (4th ed. 1976).

[56] *Whitfield*, *supra* note 33.

[57] *Chromiak*, *supra* note 48.

[58] *Id.*

[59] *Brownridge*, *supra* note 51, at 943-44, 7 C.C.C. (2d) at 429-30, 28 D.L.R. (3d) at 13-14.

[60] P. DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 68 (1966). *But see Biron*, *supra* note 24, at 77, 23 C.C.C. (2d) at 528, 59 D.L.R. (3d) at 424, where De Grandpré J., agreeing with Martland J., says: "Once the arrest is made, the concept of arrest ceases to apply, and a new concept, that of custody, becomes applicable."

> obeyed, and they walk together in the direction pointed out by the constable, that is, constructively, an imprisonment, though no actual violence be used. In such cases, however, though little may be said, much is meant and perfectly understood.[61]

The point is simply this: many of the distinctions which have been drawn in the case law — distinctions from which serious consequences have flowed — are artificial.

Arrest, search and seizure, interrogation (as contrasted with preliminary police investigative questioning), and demands to perform breath tests are all exercises of police power.[62] They are all coercive powers involving a deprivation of liberty or an intrusion upon a citizen's person or property. In order to be exercised, most of these powers involve, at a minimum, some form of detention. This detention may be by way of actual physical restraint, but the restraint imposed may be equally effective where it takes the form of simple submission by the citizen-detainee: "Though little may be said, much is meant and perfectly understood."[63]

Submission to a police officer's authority cannot be said to be truly consensual or voluntary. When one submits to being pulled over at a roadblock one is not acting in a voluntary manner. Similarly, although one is not actually under arrest while being confronted with a breathalyzer demand, surely one is nevertheless being "detained" by the police. One is not simply engaged in a voluntary consensual exercise.[64]

Notwithstanding this, there seems to be a somewhat alarming tendency in our courts to characterize citizen compliance with police demands as voluntary behaviour. *Dedman* and *Chromiak* are useful illustrations of this tendency. The point emerges even more strongly if one examines the reasons for judgment of the court of appeal in *Chromiak*:

> In essence what happened here was that when Chromiak was faced with the demand he said, in effect and to speak colloquially, "Thanks, but no thanks." He was not arrested nor detained: he was left free to go, and to go in his car since his companion would be driving. The operation of s. 234.1 does not contemplate or require an arrest or physical detention in order to make the demand. If he stops, he does so voluntarily and if he then refuses the demand, the section does not contemplate or authorize his immediate arrest or detention. He is free to go, but it is said that he is faced with a hard choice: whether to accede to the demand and chance the outcome which might lead to a further demand under s. 235, or to refuse and chance the issue of a summons and the outcome of a trial. It is said in effect that the necessity to

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[61] Bird v. Jones, 7 Q.B. 742, at 748, 115 E.R. 668, at 670 (1845) (Williams J.).

[62] Interrogation may be regarded as an incident of arrest and detention and thus as somewhat diferent from the other exercises.

[63] *Bird*, *supra* note 61.

[64] This is not to say that it is impossible either factually or legally for there to be situations wherein the citizen does actually consent freely or volunteer. However, the circumstances of most investigatory encounters are such that a contrary assumption would naturally be made.

> make such a choice results in some mental or psychological compulsion which equates with detention: whether the choice is voluntary acquiescence which was disposed of in *Hogan* under s. 235, or refusal as in the present case. I am unable to make that equation. Chromiak made the choice voluntarily, without any compulsion of *de facto* or threatened detainment, whether lawful or otherwise. Further, the legislative purpose of s. 234.1, as explained in *Regina v. Murphy*, makes it clear that no detention in a criminal sense is contemplated in its operation.[65]

IV. Modern Controversies Involving the Power to Search Covertly

The foregoing critique has concerned itself in part with the phenomenon of the growth of police investigatory powers through the common law by a process of what may be described as tortured and artificial logic unaccompanied by legislative assent. A related area in which there may yet be a similar expansion, one where legislative direction from government policy-makers is essential, is that of surreptitious entry for investigative purposes by law enforcement officials.

There are two facets of this issue which have in recent months garnered a measure of public notoriety: surreptitious entry to plant electronic surveillance devices and surreptitious entry in order to search for evidence of crime.

Surreptitious entry in order to plant electronic surveillance devices was recently considered by the Manitoba Court of Appeal in the case of *Regina v. Dass*.[66] In that case, Huband J.A. stated:

> The authorization to intercept private communications is not an authority to break the laws of the land. If in effecting an interception a law enforcement officer commits a trespass, assaults a person, causes injury to some person by negligence, or the like, the authorization to intercept gives the law enforcement officer no protection.[67]

The learned justice of appeal asserts that there is "nothing in the Criminal Code which gives a judge the power to authorize or condone illegal entry".[68] According to His Lordship's reasoning, section 178.13(2)(*d*), which allows a judge the power to impose terms and conditions pertaining to the execution of the surveillance order, does not contemplate either expressly or by implication a judicial grant of permission to ignore or breach the laws of the land. Although his remarks were *obiter dicta* they have nevertheless generated a considerable amount

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[65] Regina v. Chromiak, 14 A.R. 222, at 232, 8 Alta. L.R. (2d) 361, at 369, 46 C.C.C. (2d) 310, at 318 (C.A. 1979) (Clement J.A.).

[66] [1979] 4 W.W.R. 97, 8 C.R. (3d) 224 (Man. C.A.).

[67] *Id.* at 115-16, 8 C.R. (3d) at 246.

[68] *Id.* at 117, 8 C.R. (3d) at 247.

of consternation in law enforcement circles and adverse commentary in the literature.[69]

The critics of *Dass* draw strength from a parallel decision of the United States Supreme Court which reached conclusions opposite to those of Huband J.A. That Court, in *Dalia v. United States*,[70] after examining the language, structure and history of the American legislation, concluded that Congress meant to authorize the courts, in certain circumstances, to approve electronic surveillance without limitation upon the means necessary to effect it. The Court also said: "More important, we would promote empty formalism were we to require magistrates to make explicit what unquestionably is implicit in bugging authorizations: that a covert entry, with its attendant interference with Fourth Amendment interests, may be necessary for the installation of the surveillance equipment."[71]

The notion of "implied authorization" recently surfaced in the Supreme Court of Canada in *Colet v. The Queen*,[72] a case dealing with search and seizure rather than electronic surveillance law. Specifically, the Court in *Colet* was asked whether the power to seize firearms under then section 105(1)[73] of the Criminal Code implied a correlative right to enter premises and search for the items to be seized. It was argued that section 26(2) of the Interpretation Act[74] justified the inference of such implied powers, but Ritchie J., writing for a unanimous Court, rejected this doctrine of implied authority.

> It is my respectful opinion that, if Parliament intended to include "to search" in the provisions of s. 105(1), the failure to do so was a clear case of legislative oversight, but that power which has not been expressly conferred cannot be supplied by invoking the provisions of the Interpretation Act.[75]

The decision in *Colet* thus seems to support the reasoning of Huband J.A. in *Dass*.[76]

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[69] *See* Frankel, *Surreptitious Entry, Its "Legality" and Effect on Admissibility*, 22 CRIM. L.Q. 112 (1979-80); Chasse, *Wiretap — Covert and Surreptitious Entry — Taps, Yes; Bugs, No*, 1 B.C. CROWN COUNSEL NEWSLETTER 1 (1979).

[70] 60 L. Ed. 2d 177 (1979).

[71] *Id.* at 193 (Powell J.).

[72] 19 C.R. (3d) 84, 57 C.C.C. (2d) 105 (S.C.C. 1981). *But see* Eccles v. Bourque, [1975] 2 S.C.R. 739, 27 C.R.N.S. 325.

[73] *Repealed and replaced by* S.C. 1976-77, c. 53, s. 3.

[74] R.S.C. 1970, c. I-23, s. 26(2):

> Where power is given to a person, officer or functionary, to do or enforce the doing of any act or thing, all such powers shall be deemed to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing.

[75] *Colet, supra* note 72, at 93, 57 C.C.C. (2d) at 112-13.

[76] *Supra* note 66. *See* 2 SECOND REPORT OF THE COMMISSION OF INQUIRY CONCERNING CERTAIN ACTIVITIES OF THE ROYAL CANADIAN MOUNTED POLICE 1022 (McDonald J. Chairman 1981) [hereafter cited as MCDONALD COMMISSION SECOND REPORT].

The policy question which arises in this context is whether or not judges should have the power to authorize covert entry for the purpose of executing and terminating surveillance orders.

It has been said that bugging has a "vastly more pernicious nature"[77] than tapping. "[O]ne can avoid using the phone in many situations, but how does one avoid bugs in one's home or office?"[78]

Judges are naturally uncomfortable with the prospect of authorizing anyone, even a police officer, to commit unlawful acts. Certainly, even if a power to authorize covert entry were conferred by statute it should not be so construed, or be so widely drawn, as to permit the commission of violent or destructive acts. But the real nub of the question involved here is whether lesser forms of illegal activity ought to be condoned.[79]

Due to the indiscriminate nature of the invasion of privacy accomplished by means of room or house bugs, there is a powerful temptation to abjure their use in any circumstance. However, this kind of prohibition may only secure the result of moving the origin or source of such invasion to an external, rather than internal, physical site. The invasion will, however, remain every bit as complete. Control over the techniques of invasion and the devices used seems more to the point.

There is at present no adequate statutory control mechanism to police either the execution of surveillance orders or the nature of the techniques which are to be used in order to invade privacy. Existing provisions are perhaps sufficiently elastic in theory to allow judges to impose some standards in these areas, but these initiatives are destined to be idiosyncratic and largely ineffective, primarily because uniform judicial standards cannot evolve in a situation where the development of a distinctive jurisprudence is impossible. Since the authorization process is *ex parte*, and since there is no requirement that reasons be given, the guiding virtue of precedent and the cross-pollinating effects of contrast-

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[77] B. SCHWARTZ, PRIVACY IN A FREE SOCIETY 43 (1974).

[78] *Id.*

[79] In examining this question it should be noted that often the covert entry to be effected and the surveillance to be conducted will be at the home of an individual who is totally innocent of any wrongdoing and not suspected by the police of any criminal involvement whatsoever. (The surveillance may be requested to be carried out at such a place because that is one of the locations where the target has often been observed.) A point which is also of interest, although it does not measurably advance the case either for or against bugging, is that the present "state of the art" is such that much surveillance can be carried out with externally positioned, highly sophisticated equipment. No picking of locks or entering of premises is required. More germane is the fact that the actual invasion of privacy thus occasioned may be just as complete and total as that accomplished by means of an internally positioned bug. Indeed there are signs that advances in technology are outstripping the legislative efforts designed to control them. For a chilling and already dated look at the nature of this technology, *see* A. WESTIN, PRIVACY AND FREEDOM 74-77 (1970); limitations on the technology are discussed, *id.*, at 80-84.

ing decisions are absent.[80] The answer must lie elsewhere, in clearer statutory directives.

The central concern of a scheme that legitimizes invasions of privacy under certain controlled circumstances should hardly be the imposition of limitations upon the method whereby such invasions are accomplished. Rather, it is for society, through its legislature, to decide which forms of activity are sufficiently serious as to merit the use of invasive police investigatory powers. Enhanced control over the granting of authorizations and closer restrictions on the scope of the activity to be investigated by means of invasive or intrusive technologies are better guarantors of the public interest.

Room or house bugs should be available in appropriate circumstances.[81] Covert entry in order to install and remove such devices is a necessary concomitant of such a practice. However, it should be the clear import of any statutory provision authorizing such techniques that no protection be available to an officer who commits violent or destructive acts in the course of executing a surveillance order. Nor should the limited power to enter private premises carry with it any authorization to rummage about, or to seize or photograph evidence. These exercises should require the accompanying authority of an ordinary search warrant.

Judges should receive statutory direction to the effect that the primary rule governing the issuance of orders authorizing electronic surveillance is that no greater invasion of privacy be permitted than is necessary for the attainment of the objective sought. Accordingly, the authorizing judge should give preference to those techniques that invade privacy least. Other techniques should be authorized only where it can be demonstrated that less invasive practices will prove ineffective.

It is one thing to support, under a system of strict controls, surreptitious entries by police investigators in order to plant or remove listening devices. It is quite another to propose, as some law enforcement lobbyists recently have, that the broad power covertly to search private premises for evidence of the commission or intended commission of an offence be accorded to the police even if the power were authorized by a judicial warrant.[82] This lobbying effort is simply evidence that wiretap law, despite its known defects, is currently fashionable as a model for new legal regimes which seek to broaden police investigatory powers. The Marin Commission, for example, recently recommended its

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[80] *See* Valeriote, *Judicial Authorization for Wiretap: An Illusory Protection*, 12 OTTAWA L. REV. 215 (1980). *See also* Burns, *A Retrospective View of the Protection of Privacy Act: A Fragile Rede is Recked*, 13 U.B.C.L. REV. 123 (1979).

[81] The McDonald Commission describes electronic surveillance as a "valuable and necessary tool". *See* II MCDONALD COMMISSION SECOND REPORT, *supra* note 76, at 1019.

[82] For R.C.M.P. views in this regard, *see id.* The McDonald Commission declined to make any direct recommendations on surreptitious entries, preferring to have the matter referred to the Law Reform Commission of Canada for more intensive study.

application to a scheme involving expanded mail-opening powers.[83] This development also represents the potential realization of the worst fears of those who expressed concern about the "thin edge of the wedge" when wiretap legislation was first introduced into Canada. There is an insidious quality to the logic of the argument that in the field of law enforcement and crime detection all things are possible so long as a judge will sign a paper "authorizing" the proposed activity.

V. CONCLUSION

In the 1980's the question to be answered is to what extent the demand for more efficient and effective law enforcement will be allowed to diminish the already shrunken domain of individual privacy. The inexorable nature of the logic that impels policy-makers to validate one police investigatory power after another is at odds with the wisdom of the common law, which is, after all, not logic but experience. In the words of one eminent Canadian jurist, our law often "makes its choice between competing values and declares that it is better to close the case without all the available evidence being put on the record. We place a ceiling price on truth. It is glorious to possess, but not at unlimited cost."[84]

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[83] REPORT OF THE COMMISSION OF INQUIRY RELATING TO THE SECURITY AND INVESTIGATION SERVICES BRANCH WITHIN THE POST OFFICE DEPARTMENT 164 (Marin J. Comm'r 1981).

[84] Freedman, *Admissions and Confessions*, in STUDIES IN CANADIAN CRIMINAL EVIDENCE 95, at 99 (R. Salhany & R. Carter eds. 1972).