

CONFESSIONS, ILLEGALLY/IMPROPERLY OBTAINED
EVIDENCE AND ENTRAPMENT UNDER THE
POLICE AND CRIMINAL EVIDENCE ACT 1984:
CHANGING JUDICIAL AND PUBLIC ATTITUDES
TO THE POLICE AND CRIMINAL INVESTIGATIONS

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ABSTRACT

This thesis considers the law on confessions, illegally/improperly obtained evidence and entrapment under the Police and Criminal Evidence Act 1984.

There is a detailed discussion of the case-law and the principles which underlie that case-law as well as a detailed discussion of the principles and policies which underlie the relevant statutory and common law provisions. There is also some discussion of some of the psychological aspects of false confessions and interrogation. There is some historical discussion of how the law has approached confessions, illegally/improperly obtained evidence and entrapment before the enactment of the Police and Criminal Evidence Act 1984.

A major theme of this thesis is to illustrate how changing judicial and public attitudes to the police and criminal investigations from the mid nineteenth century to the present day have influenced the content of the law on the three areas of criminal evidence under discussion, namely confessions, illegally/improperly obtained evidence and entrapment.

In particular this thesis has attempted to illustrate how judicial responses to Sections 76 2(a) and 76 2(b) and S.78 of the Police and Criminal Evidence Act have been influenced by changing public attitudes to the police, the integrity of their evidence to the criminal court and their role in the criminal justice system and society.

In order to illustrate and highlight important points and arguments in the thesis, reference is occasionally made to the law and issues on identification evidence, accomplice evidence, forensic evidence as well as the law and issues on covert police operations to gather evidence not involving entrapment. However, no claim is made for comprehensive treatment of the law on identification evidence, accomplice evidence or forensic evidence, merely reference is made to those areas for the purposes of exposition on the main areas of study:

Confessions, illegally/improperly obtained evidence and entrapment.

The name of the publishers and place of publication for books and monographs quoted in the text is given in the bibliography.

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CHAPTER 1

AN OVERVIEW OF THE NINETEENTH CENTURY TO PRESENT DAY ATTITUDES TO THE POLICE, CONFESSIONS AND ILLEGALLY/IMPROPERLY OBTAINED EVIDENCE

Introduction

The aim of this thesis is to illustrate how the current law on Confessions and Improperly Obtained Evidence including evidence obtained by entrapment has been influenced by shifting judicial and public perceptions of the police and the crime problem in England and Wales. In order properly to appreciate these developments an overview of the history of judicial attitudes to confessions and improperly obtained evidence will be undertaken. This will also involve some consideration of how the police role in relation to the criminal justice system and society has evolved.

The approach to the areas of the law of criminal evidence examined in this thesis is not therefore from a purely evidentiary viewpoint, a viewpoint which focuses purely on the rules and discretions governing the admissibility of particular kinds of evidence into the criminal trial. This is not to say that the evidentiary viewpoint is necessarily always incomplete with regard to evidentiary doctrines. The principles governing for example, the admissibility of similar fact evidence or the purposes of cross examination on the previous convictions of the accused under S.1.f(ii)-(iii) of the Criminal Evidence Act 1898 can be examined solely from the perspective of the judicial function at the criminal trial. Such issues can be viewed as "classic conundrums of the law of criminal evidence" (1) where the focus is purely on the principles at issue and the forensic process at trial. It is no doubt true that these areas of the law of criminal evidence can also be fruitfully explored from a different perspective than the purely evidentiary. An example of this is Dr. Munday's examination of the extent to which the assumptions underpinning the law on the cross examination of the accused on his previous convictions deviates from the research of psychologists on the strength of the link between dishonesty in the commercial sphere and dishonesty in the testimonial sphere. (2) However, this kind of approach is not necessary for a proper understanding of the principles at stake in the area of similar facts or cross examination under the 1898 Act. The principles which inform the law on similar fact evidence namely, the avoidance of undue prejudice to the accused against the desirability of the adduction of evidential material which can be very

useful to the trier of fact in determining the issues at trial, can be readily understood without necessarily having a knowledge of the history of the development of the law on similar fact evidence over the past hundred years. (3) The concerns which frame the law on similar fact evidence in the light of jury trial can be appreciated without regard to the history of that doctrine of the law of criminal evidence.

However, in contrast the rules and principles governing the admissibility of confession evidence and illegally or improperly obtained evidence cannot be satisfactorily understood solely from the purely evidentiary perspective. The rules and principles of the law of criminal evidence on confessions for example do of course govern the admissibility of that type of evidence to the criminal trial and to that extent it is possible to view S.76 2(a) and (b) and S.78 of The Police and Criminal Evidence Act 1984 as purely evidentiary norms but to fully appreciate the significance of these provisions as well as their evolution a broader perspective than the evidentiary is required. As Professor Twining has observed on the defects of a purely evidentiary approach to confessions and illegally obtained evidence which focuses on the doctrines of admissibility,

“... the phenomenon and problems are not primarily evidentiary - it is odd to see the principle of decent and fair treatment of suspects and others being treated mainly as an evidentiary principle.” (4)

It will be a major concern of this thesis to illustrate how changing perceptions of the police in terms of their perceived integrity and the integrity of their evidence to the criminal court, and changing perceptions of their role in relation to the criminal justice system, has influenced the development of the law of confession and the law on illegally and unfairly obtained evidence. These two areas of the law of criminal evidence have historically received (5) very different treatment in the law of criminal evidence and continue to be treated differently under the new regime established by the Police and Criminal Evidence Act. For example, confessions are subject to two exclusionary rules in S.76 2(a) and (b) whereas illegally obtained evidence is subject only to discretionary exclusion under S.78. The concerns regarding the two areas of evidence are very different although there are some similarities as well. The justification for examining them together is that both the law on confessions and the law on illegally obtained evidence have been influenced in a major way by perceptions of the police at a judicial and public level. It will be necessary therefore to trace the history of the police at least in broad outline so as to reveal the shifting ideological underpinnings of the existence of police power, which includes the power

to gather evidence in criminal investigations for use at trial, which have existed since the foundation of Sir Robert Peel's new metropolitan police in 1829.

The Police in the 19th Century

The Origins of the Police

It is clear from the work of historians of the police (Critchley, Reiner, Emsley (6)) that the new police came into existence after 1829 partly as a result of the concern of the ruling elites with the increased threat of public disorder in the early nineteenth century. There were no doubt other impulses behind the establishment of the new police. (7)

The origins and initial purposes of the police lay not in the need for a crime detection and investigation organisation but rather in the need for a trained non military body committed to the maintenance of public order. The modern core role of the police as the state agency charged with special powers and duties to investigate crime and prepare cases for prosecution against offenders was not regarded as a central role of the police until towards the last quarter of the nineteenth century. The 1870s with the creation of the separate Criminal Investigation Department seems to have been the decade when the emphasis of the police role shifted towards detection and investigation of crime and away from the mere preventive patrolling of the streets. (8)

If the police were not perceived to be intimately connected with criminal investigations for the production of evidence for use in criminal trials then it could be plausibly maintained that the police were merely "citizens in uniforms" maintaining the Queen's peace on a full time basis.

Lustgarten comments that (9)

"The single most important feature of the constitutional position of the police is that they have the status of constable. When organised police forces were established in the nineteenth century, they were grafted onto and clothed with the powers of the traditional office."

The constitutional status of the police in the 19th Century

In the nineteenth century the police were not perceived as a core state agency charged with detecting and investigating crime. The theory was, a police officer although holding the office of constable under the Crown, was an independent agent deriving his powers from the common law. (10) The ancient office of Constable was a creation of the common law and therefore the constable derived his powers from the common law. The theory was that the police had no powers greater than those of the ordinary citizen apart from a slightly wider power of arrest: a constable alone could arrest in cases of suspected felony or treason. (11) This view of the limitations of the constable's powers was based on the view, in the words of Lustgarten,

"... because in legal theory he was a sort of delegate of the community, the constable exercised common law powers only." (12)

Therefore it was plausible to maintain, as Sir James Fitzjames Stephen did amongst others (13), that the police officer was merely a citizen in uniform. This meant that the police merely performed as a full time occupation duties and exercised powers which the ordinary citizen had in any case. As Waldron comments,

"It was simply that he did this for a living and was trained at it whereas the ordinary citizen had better things to do." (14)

The concept of the police as "citizens in uniform" was still potent enough to play a central part in the reports of both the 1929 and 1962 Royal Commissions on the Police. The 1929 Royal Commission commented,

"The police of this country have never been recognised either by law or traditions as a force distinct from the general body of citizens. Despite the imposition of many extraneous duties on the police by legislation and administrative action the principle remains that a policeman in the view of the common law is only a person paid to perform as a matter of duty, acts which if he were so minded he might have done voluntarily." (15)

The corollary of the police as "citizens in uniform" was that they had no greater powers than the ordinary citizen derived from the common law. Sir James Fitzjames Stephen commented that the police had no greater powers of questioning or evidence-

gathering than the private individual had. (16)

The Development of the Police Investigative and Prosecutorial Roles in the mid to late Nineteenth Century

Until the early part of the nineteenth century the Justice of the Peace in his role as examining magistrate investigated crime, made arrests and questioned suspects. However, by 1848 when the Indictable Offences Act was passed this instigatory procedure of the magistrates had developed into a preliminary hearing and as Devlin notes,

"The police took over the responsibility for the investigation, the magistrates retained the judicial role."
(17)

However, the situation is rather more complicated than this statement allows. The above distinction and division by Devlin between the police and magistracy is not so clear cut given the continued involvement of the magistracy in the investigation of criminal offences in the form of their supervisory role in the granting of search and arrest warrants and in permitting extensions to the period of custodial detention and interrogation beyond thirty-six hours under PACE. (18)

More to the point is that even if the police took over the responsibility for the investigation of offences later in the nineteenth century this should not be taken to mean that the police were then similar to the criminal investigative agency that the modern police are understood to be. Crucially that central investigative strategy of the modern police (19), namely the interrogation of suspects in police detention, was not accepted as legitimate practice even at the end of the nineteenth century. The modern criminal justice system may revolve around police interrogation, confession and the guilty plea, but in the nineteenth century there was a much less obvious connection between police investigations into crime and the verdict at the criminal trial.

The nineteenth century prohibition on the police engaging in the questioning of arrested suspects, can be contrasted with the power of the modern police to arrest and detain for the purposes of interrogation. (20)

In his preface to Sir Howard Vincent's police code published in 1882, Hawkins J. (later Lord Brampton) addressed the police on their duties and commented,

"Perhaps the best maxim for a constable to bear in mind with respect to an accused person is 'keep your eyes and your ears open and your mouth shut!' By silent watchfulness you will hear all you ought to hear. Never act unfairly to a prisoner by coaxing him by word or conduct to divulge anything. If you do you will assuredly be severely handled at trial and it is likely your evidence will be disbelieved." (21)

A modern commentator has noted of the nineteenth century police practice that,

"... suspects were not interrogated and constables were known to testify that the defendant had sought to make a statement 'but I knew my duty and bade him to be silent'." (22)

The nineteenth century dislike of the idea of police interrogation of suspects was partly linked to memories of the physical abuse of defendants to obtain confessions in the courts of the seventeenth century and earlier. As McConville et al explain,

"... the memories of Star Chamber's practices of compulsion and torture for the purpose of obtaining confessions contested the notion of interrogation as an acceptable investigative strategy; the incongruity between police assertions that the suspect confessed in the privacy of the police station and the suspect's denial of this in the public realm of the courtroom continued to incite judicial suspicion of the private production of evidence." (23)

This judicial distaste about the police engaging in pre-trial questioning of the accused must be understood in an era when the accused could not even be cross-examined in court due to his incompetency as a witness in his own trial. This incompetency only ended in 1898 with the passage of the Criminal Evidence Act of that year. It is not difficult to find examples of judicial disapproval of police questioning of suspects in the law reports. In R v Gavin and others (1885) Smith J. commented (24)

"When a prisoner is in custody the police have no right to ask him questions" ...

and the confession so obtained was ruled inadmissible.

In R v Knight and Thayre (1905) Chanell J. said, (25)

"When he has taken anyone into custody ... he ought not to question the prisoner."

In R v Crowe and Myerscough (1917) Sankey J. said, (26)

"In my view if a police constable has determined to arrest a person or if a person is in fact in custody then he should ask no questions which will in any way tend to prove the guilt of the person in custody from his own mouth."

However, judicial disapproval of the police questioning of suspects reflected a more general concern in the nineteenth century to keep police powers in England to a minimum necessary for the job, a concern which was an important part of the ideological underpinning of police legitimacy at that time. Reiner points out that at the outset of the establishment of the police in London in 1829 they faced considerable public hostility. (27) Many at both ends of the spectrum of social status felt that a professional police force was alien to English traditions of civil liberties and necessarily inimical to individual rights and freedoms won through bitter social, religious and political conflict in the preceding centuries. The police as an institution had for Englishmen in the early nineteenth century connotations of continental despotism, especially French despotism.

An important way of disarming this hostility to the police was to emphasize that police powers were kept to a minimum. Public suspicion of police power continued throughout most of the nineteenth century, witness for example the uproar in the press and in Parliament to the revelation at the trial at the Old Bailey that the police had entrapped the abortionist Titley in 1880. (28) The refusal to grant the police a power of interrogation must be understood against the great fear of the police as a potential weapon of despotism, as indeed some continental police forces were, notably the French and the Russian. Another aspect of this distrust of police power was that the courts were very careful to scrutinize the lawfulness of policies adopted by chief officers. (29)

Sir Travers Humphreys, a High Court judge, commented on the changes he had experienced in his long career in practice as a barrister and judge in a speech at the Inns of Court in 1948, (30)

"Sixty years ago ... confessions to policemen were few and far between and those which were admitted in evidence after objection were rarer still. Today the reverse is the case."

Therefore, even in the late nineteenth century few confessions were obtained by the police, indeed the whole structure of criminal investigation to produce evidence for use in court was not unambiguously a police function. Until around 1870 the majority of criminal prosecutions were undertaken by private individuals or private associations and not the police. (31) These private individuals or associations would gather evidence about an offender and prosecute the case in the criminal courts. It was only after 1870 that the police undertook the majority of criminal prosecutions. Hay and Snyder remark, (32)

" ... that by 1879 the private prosecutor often wore blue."

The explanation for this comment is that when the police did prosecute they did so in theory only as private individuals who happened to have information about lawbreaking by the accused. Indeed, Emsley has commented, (33)

"The English system of criminal prosecution and trials entered the twentieth century shot through with paradoxes ... the prosecution of a criminal offender was still perceived as the right of any individual but increasingly such prosecutions were being dominated by the professional police."

The main point here is that certainly before the 1870s the criminal courts were not dependent on the police to bring offenders before the court. Even if after 1870 the police began to dominate the process of collecting evidence and prosecuting criminals it is submitted that there was no mature view of the criminal courts and the police forming a system or process.

Another point illustrating the difference between the nineteenth century police and the modern police is that it was only in 1869 that full time divisional detectives were established and only from 1877 that the C.I.D. was formed with 250 men. The view of the police as being concerned with the detection and investigation of offences was subordinate to the view of the police role as being concerned with public order maintenance and crime protection through regular foot patrols. Reiner pinpoints the 1870s as a crucial turning point in the police role, (34)

"By the late 1870s, the trend towards increasing specialisation and emphasis on detection was well entrenched, playing down the general role of the general practice uniform constable."

Public and official fear of crime in the last quarter of the nineteenth century even led to the toleration of the creation of a secret police force, the Special Branch, in 1887 to counter increasing political violence and subversion, especially from Irish revolutionaries.

Public Attitudes to the Police in the 19th Century

Reference has already been made to the immense hostility on the part of the public towards the establishment of the new police in 1829. This 'legitimacy' problem was only resolved towards the end of the nineteenth century. By the 1890s the English police began to be seen as part of the English genius and also as a symbol of national pride. This is so even if, as revisionist historians of the police such as Brogden note (35) that 'consent' to the police amongst the poor and marginalised has never been as unproblematic as the "official" histories of the English police such as that of C. Reith suggested. (36)

Emsley in his social and political history of the English police, quotes various sources to illustrate the esteem in which the English police were held by the 1890s. Emsley comments, (37)

"The Bobby was now firmly established as part of the British constitution. According to John Burns, a former Labour activist but by 1900 an Independent Radical M.P., the City of London and The Metropolitan Police were 'the best police force in the world'."

It can be argued that part of the success in achieving widespread public acceptance of the police was due to skilful propaganda on the part of those who favoured the new police. As Reiner and Leigh note, (38)

"Clearly central to the acceptance of the force by the majority of the public was the belief that the police were subordinate to the rule of law and that they lacked either legal powers or the coercive capacity to police other than by the consent of the populace."

Hence a lack of a power to question suspects in custody. In order to secure legitimacy for the police a crucial element in the propaganda campaign was the concept of the caretaker or "citizen in uniform". This concept had a remarkably long shelf-life. It was mentioned with approval as late as 1973 in Sir Robert Mark's highly publicised Dimbleby Lecture. (39)

Judicial Attitudes to Police Evidence in the Nineteenth Century

The judiciary, at least in the early part of the nineteenth century, tended to share public scepticism about the dangers posed by the new police. J. D. Heydon has commented that (40),

"The judges tended to distrust the early police as novelties; indeed they continued to do so throughout the nineteenth century."

The hostile attitude of the nineteenth century judiciary towards the practice of police interrogation of suspects was one manifestation of that distrust. Judicial dislike of interrogation by the police went beyond judicial exhortation to the police not to indulge in the practice so as to actually include the exclusion of confessions by suspects allegedly made to the police. Lord MacDermott noted in his address to the Bentham Club in 1968 with regard to the admissibility of answers put to questions to a suspect in custody, (41)

"The attitude of the judges during the latter part of the nineteenth century seems to have veered towards excluding such answers in the exercise of their discretion."

It is important to make clear that the exclusion of confessions here was independent of the common law voluntariness rule which was established at the end of the eighteenth century: see Chapters 2 and 3 on the voluntariness rule. This judicial attitude to confessions obtained by the police from the questioning of suspects in custody had an effect on police attitudes to interrogation as an investigative strategy which lasted into the twentieth century, beyond the First World War. As the Royal Commission on Criminal Procedure (1981) noted, (42)

"The Royal Commission on Police Power and Procedure in 1929 said that the great majority of police forces followed Lord Brampton's advice as a matter of fundamental principle and concluded that it was desirable to avoid any questioning at all of persons actually in custody."

The sceptical comments of Cave J. about the authenticity of confessions obtained by the police from the private questioning of suspects is a further example of judicial distrust of the police in the nineteenth century. In R v Thompson (1893) (43) Cave J., an experienced judge, commented that he always distrusts confessions allegedly made to the police by suspects: see Chapter 4 of this thesis.

It is submitted that judicial attitudes to the police profoundly affected the development of the common law doctrine that improperly obtained or illegally obtained evidence is freely admissible at trial. In the mid to late nineteenth century the common law rule was laid down in decisions such as R v Leatham (1861) and Jones v Owen (1870) (44). Insulated from the police as an institution, the criminal judiciary in the nineteenth century could take the view that all that mattered with regard to evidence obtained illegally or improperly by the police was whether it was relevant to the facts in issue at the criminal trial. The judges were reluctant to admit confessions obtained by the police because of a fear of manufactured evidence and a judicial dislike about the police engaging in pre-trial cross-examination of the accused. However, the reliability of improperly obtained real evidence, such as stolen goods obtained by an illegal search, is rarely at issue unless the defence claim is that the evidence was 'planted' by police, a relatively common defence to drugs charges in the modern courts.

Distanced from the police as an institution because of a lack of a perceived unity to the criminal process the nineteenth century judiciary could admit illegally or improperly obtained evidence without concern for any potential damage to their own judicial integrity or the legitimacy or fairness of the criminal trial. In the case of Jones v Owen (1870) the judge dismissed completely any suggestion that because the evidence of illegal poaching had been discovered by an illegal search of the suspect by a police officer that this could affect the admissibility of the evidence. In the earlier case of R v Leatham (1861) Crompton J. commented,

"It matters not how you get it, if you steal it even it would be admissible in evidence."

As Professor Dennis points out (45)

"The inspiration for this common law position came largely from civil cases where the court has traditionally conceived its function as that of doing justice between the parties according to the evidence the parties choose to present. From this standpoint it is immaterial how the parties came by this evidence."

The above judicial pronouncement by Crompton J. omits to make a distinction between evidence obtained by the illegality of the private citizen and evidence obtained by the illegality of the police officer. Reference has already been made in this thesis to the relative insulation of the criminal courts from the police in the nineteenth century, however that perhaps also underlies Crompton J.'s omission to distinguish between the police officer and the private citizen in obtaining evidence illegally is how the police were viewed in ideological terms in the nineteenth century. This was as "citizens in uniform" rather than as a core state agency that we understand the modern police to be. The significance of the constable or "citizen in uniform" is that judges in the nineteenth century could maintain that illegal or improper conduct of the police in gathering non confession evidence was irrelevant to the question of the fairness of the criminal trial and that therefore there was no good reason not to admit such evidence into trial. This view could be taken because evidence obtained illegally by the police constable was no different in status from evidence obtained by the illegality of a private citizen. If the police were "citizens in uniform" then for the criminal courts to have treated evidence obtained by the police in a manner differently from evidence obtained by a private citizen would have seemed illogical.

This observation helps to explain the significance of Zuckerman's insight that, (46)

"Criminal judges last century may have been right to divorce admissibility from illegality if they felt that the trial process was so detached from the police investigation as to be insulated from any illegalities that occurred in the police station."

Criminal judges in the nineteenth century obviously felt that they had no responsibility for the way in which non confession evidence presented before them by the police had been obtained. However, as referred to earlier, with regard to confession evidence the judiciary were very much concerned with how that evidence had been obtained. The main rule governing the admissibility of confessions was the common law 'voluntariness' rule.

This was not a rule formulated so as to control the actions of the police in the interrogation of suspects. The police force date from 1829 whereas the exclusionary rule had its origins in the late eighteenth century. Even if in the twentieth century pre PACE, the voluntariness rule could be interpreted so as providing some limits on police interrogation methods, i.e. no threats or inducements ought to be offered to the suspect by the police, the rule left entirely open whole areas regarding the limits of permissible police conduct in interrogation. For example, the idea of outlawing "oppression" in interrogation was not incorporated into the exclusionary rule until Callis v Gunn in October 1963. (47)

The Police in the Twentieth Century up to PACE

Judicial and Official Attitudes to Interrogations and Confessions obtained through Questioning in the early 20th century

Accompanying the increasing legitimacy of the English police in society came a changing judicial attitude toward the admissibility of confessions obtained by the police questioning of suspects, so that by 1914 Lord Sumner could comment that the trend of the judicial discretion was to admit rather than to exclude such confessions (48). Increasing public and judicial respect for the police must have played a part in this change in judicial attitudes towards the admissibility of confessions obtained by pre trial questioning. This trend for admitting confessions into evidence continued as the police entered the "Golden Age" of their legitimacy in the 1940s and 1950s.

However, the interrogation of suspects was still officially frowned upon in the early twentieth century. The 1929 Royal Commission on the Police reported that the questioning of suspects seemed to have been limited to the large city forces such as the Metropolitan Police but this practice was criticized by the 1929 Report, whose Commissioners wished for a blanket ban on police interrogation. (49)

The Growth of Police Power

Apart from the voluntariness rule there was also as a check on police interrogations, the Judges' Rules. These were first issued in 1906 and 1912 by the Kings Bench Division to the police. This perhaps illustrates that even in 1906 the view of the policeman as "citizen in uniform" could not be consistently maintained and that the police were sufficiently differentiated from citizens in their powers and duties so as to require additional guidance on what was and what was not acceptable practice towards suspects. Arguably the 1906 issue of the Judges' Rules was the first judicial recognition that the police were different from ordinary citizens.

However, a close examination of the original Judges' Rules of 1912 reveals that they offer very little in the way of regulation of the detention and questioning of suspects by the police. The Judges' Rules of 1912 are limited to such matters as when the caution should be administered to the suspect and the terms of the caution.

Contemporaneously with the issue of the Judges' Rules came regulations to the police from the Home Office on the conduct of identification parades. These regulations followed the Beck case (1907) (50), a notorious case of miscarriage of justice based on repeatedly unreliable identification evidence. This again suggests that whatever the official rhetoric, the police were regarded as performing special duties requiring special guidance. The holding of identification parades is a classic example of a power and procedure which is a police function separate from what the ordinary citizen is capable of performing.

There was therefore a contradiction in official discourse in both claiming the police as citizens in uniform and issuing guidance to the police on the correct exercise of their special powers.

However, the view of the police as "citizens in uniform" was still potent enough to play a central part in the 1929 and 1962 Royal Commissions on the Police (51). Yet as Reiner and Leigh point out that in fact if not in theory the ideology of the policeman or "citizen in uniform" was vitiated in 1929 let alone in 1962 (52),

" ... by the accretion of power based on bureaucratic organisation, technology and training and it has been undermined since by a steady accretion of formal powers."

As Lustgarten points out, special statutory powers denied to the general public had

begun to be created after organised police forces had gained some degree of public acceptance. This process started with the Metropolitan Police Act in 1839 which granted policemen wider powers of search and arrest in particular circumstances. (53) The process continued throughout the nineteenth century and into the twentieth century with, for example, the passage of The Misuse of Drugs Act 1971 which created special powers for the police to stop and search for illegal substances. Lustgarten comments that, (54)

" ... the logical culmination has been reached in the 1984 Act with its wide powers for constables throughout the country to arrest, search, seize property, and conduct intimate body searches. Legally speaking, the constable is indeed now 'a man apart' from other citizens."

It should be pointed out that it is possible to exaggerate the potency of the constable as "citizen in uniform" in the pre PACE era. The concept of policemen as "citizens in uniform" was attacked as inaccurate by Professor Goodhart in his dissent to the 1962 Royal Commission. Goodhart's point was that the police were given extra powers to fulfil their duties to investigate crime and that to say a constable was a "citizen in uniform" was to obscure this important social fact. (55) However, as will be seen later in this chapter, the myth of the constable as "citizen in uniform" was only finally laid to rest by the R.C.C.P. Report in 1981.

Contrasted with the official maintenance of the "citizen in uniform" concept came an increase in and toleration of use by the police of the interrogation of suspects.

The 1964 change to the Judges' Rules seems to have been the first official authorization of the practice of police questioning of suspects already in their custody but it is clear that the 1964 change merely recognised what was already widespread police practice: see Chapter 2 of this thesis and the comments of J. C. Smith in the 1960 Criminal Law Review reported in Chapter 2.

The reasons for the growth of interrogation in the police armoury against crime are complex. An obvious factor in the growth in the use of interrogation was the removal of official disapproval with interrogation as a practice. This was manifested first of all in increasing judicial willingness to accept confessions into evidence obtained through interrogation, see for example the decision in R v May (1952) (56). Secondly it was manifested in the express authorization given to the questioning of suspects in custody by Rule 1 of the 1964 revised Judges' Rules.

This change in official attitudes towards custodial interrogation may itself have been driven by fears of rising crime and a desire not to hamper police efforts in investigating crime. Certainly by 1968 Lord MacDermott (57) commented that undue attachment by the law to the suspects' privilege against self-incrimination was hampering the police in their fight against rising crime rates. The growth in the use of interrogation post Second World War does match a considerable growth in the crime rates, especially since the mid 1950s. By 1957 over half a million crimes were committed in Britain annually and as one commentator notes, (58)

" ... the shortage of police manpower to cope with this crisis in crime was a serious cause for concern in Whitehall."

However, worse was to come for in the post war period the great increase in the crime rate occurred from the late 1950s. By 1960 the crime figure was over seven hundred thousand crimes annually, which represented a considerable growth from the 1955 figure of over four hundred thousand. Traditionally the English police have been portrayed as "low in numbers", this was an important element in the traditional English police model. In 1938 the ratio of police to population was 1:689 which as Reiner points out, (59)

" ... would have put England and Wales relatively low on the international scale ... thus England and Wales seem to have been comparatively thinly policed before the Second World War."

This was fine in a society of the 1930s that can be characterized as relatively "crime free". However, the great growth in crime referred to from the late 1950s was not matched by a corresponding increase in the number of police officers and although by 1962 the ratio of police to public had improved to 1:581 the figure was still comparatively low in comparison to other industrial countries such as France or Germany.

In the light of a rapidly rising crime rate from the late 1950s and official concern about police effectiveness but no significant resources to increase substantially police manpower, it would not be surprising if the police started to have heavy recourse to the interrogation of suspects as a response to this crisis. One important feature of custodial interrogation of criminal suspects as an investigative method is that it can produce good results in the shape of confessions as evidence and general criminal intelligence efficiently involving only a few hours of a detective's time and involving

as few as one or two detectives.

It may be the case that the heavy reliance on interrogation manifest by the time of the 1981 Royal Commission made good sense from an efficient employment of manpower resources perspective. It can also be pointed out that heavy reliance on interrogation as a crime fighting tool appears to be the case in some other advanced liberal democracies, Japan and the U.S.A. being notable examples of countries where interrogation by police is heavily utilized. (60) However, whether police interrogation is utilized in a particular country is going to be crucially determined by the form of criminal procedure adopted there. It may be that in certain countries interrogation of suspects is primarily a judicial rather than a police function, as in India. By virtue of the Indian Evidence Act 1872 police evidence of anything said during interrogation, by the suspect before the suspect was taken before the magistrate, is inadmissible evidence. (61) Given the high evidential value of confessions in many jurisdictions it is not surprising that police forces worldwide view interrogation as a quick and cheap route to conviction.

In England serious resourcing needs may in addition have driven the trend towards interrogation as the central investigative strategy. Sir Robert Mark has commented that in the post Second World War era, (62)

"Criminal intelligence and targeting criminals were both born from the refusal of successive governments, Conservative and Labour, to allow the police adequate resources to fulfil their primary function of prevention."

The interrogation of suspects as routine may well have followed this post war development in the increased use of intelligence and informers to combat crime. The crucial point here is that informer intelligence used to identify criminals may not be admissible evidence as proof of guilt, i.e. the word of an informer may be inadmissible as hearsay evidence. However, a confession obtained from the targeted criminal through interrogation may well secure a conviction either through a guilty plea or guilty verdict. Sir John May has commented on this phenomenon in his Report on The Guildford Four case (63),

"Where the police feel certain that they have indeed arrested the right people perhaps on the basis of what is regarded as reliable intelligence but have little or no admissible evidence to prove their guilt, there may be a strong temptation to persuade those persons to confess."

The growth of subjectivist doctrines in the criminal law post Second World War may have also stimulated the drive towards reliance on interrogation as a useful means of providing clear evidence of a subjective mental element required in many offences, e.g. offences under The Offences Against the Persons Act 1861 as interpreted in R v Cunningham (1957) (64). Section 8 of the Criminal Justice Act 1967 is also significant in this regard. (65) The adversarial system itself with rules of evidence erecting relatively high evidentiary barriers to conviction may also induce a reliance on confession evidence by the police. Damaska has commented on the adversary system, that, (66)

" ... there is a greater divergence between what the police actually know and what can be introduced as evidence at trial ..."

than in inquisitorial systems of trial. Strict exclusionary rules prohibiting hearsay or the adduction of previous convictions save in "exceptional" circumstances are good examples of how the police may have good grounds to believe in the guilt of an individual but lack the admissible evidence to prove it. Recourse to interrogation to obtain a confession may therefore be the only way to close that gap. Moreover, if

" ... most detective work is not detection but the transformation of an incident into a case and an individual into a defendant by the collection, categorization and presentation of evidence ... "

then " ... interrogation is an especially important site for the legalization of accounts ..." (67)

through e.g. the use of legal closure questions which invite the suspect to provide information but actually force information into a legally significant category in the hope that the suspect adopts it.

At the present the interrogation of suspects is still viewed as the central investigative strategy of the police. Confessions obtained through interrogation are seen as vital to the efficient working of the modern criminal justice system. Zander has commented that, (68)

" ... the criminal justice system would grind to a halt if confessions could not be utilised by the prosecution."

The Chief Inspector of Constabulary, Sir John Woodcock, has less dramatically than

Zander referred to confessions as "a vital tool of justice". (69)

Pre PACE studies estimated that the proportion of suspects interrogated by the police who made admissions was over 60% (Softley and Irving, both studies in 1980) (70). Since PACE was introduced there seems to have been a small decline in the percentage of suspects who make confessions but the figure is still high; Moston and Stephenson's study in 1992 (71) found a rate of 59%. It should be noted that very many of these suspects plead guilty at trial, over 90% according to some studies. McConville and Baldwin in their research for the RCCP in 1981 found that for contested cases confession evidence assumes a vital role in only about 20% of all cases heard in the Crown Court. (72) However, the true significance of confession evidence in the criminal process can only be appreciated when it is realised that the making of a confession is very often a prelude to a guilty plea. It is the inherent dispositive nature of a confession that makes that form of evidence so attractive to the police; this important observation should lead to an awareness of the crucial significance of the police power to detain and interrogate suspects now found in S.37 of PACE. As Dixon has written, (73)

"From a legalistic perspective, the central purpose of police powers to detain for questioning is the collection of evidence for potential use in court. A more socially realistic perspective suggests that the division between investigative and judicial functions is too neat. Criminal justice systems which depend on very high rates of guilty pleas for their effective functioning have transferred the crucial site of determination from the court to the police station. When cases are effectively determined by a confession then a power to detain and question is more in practice if not in law than an investigative power."

McConville and Baldwin in 1981 (74) found that over 90% of defendants who made written confessions to the police in Birmingham and 76% in London plead guilty at trial. In McConville's study for the RCCJ of those who confessed during custodial interrogation where the outcome of the case is known, 93.6% pleaded guilty. (75) Therefore there can be little doubt about the close correspondence between confession evidence and conviction. This fact is unlikely to be lost on police officers, lawyers and defendants.

It should be pointed out that the requirements of the Police and Criminal Evidence Act have made the obtaining of confessions more difficult than under the Judges' Rules. This has led, according to the police service, to a decreased reliance on interrogation in recent years fuelled as well by public concern over the role of

unreliable confession evidence in major miscarriage of justice cases between 1989-1992. (76) As one of the Chief Constables interviewed by Reiner commented, (77)

"PACE ... has made us far more professional in our approach. We have to work harder to get other evidence rather than relying simply on what we can get the defendant to confess to."

However, as noted earlier, some studies show that the confession rate from suspects remains remarkably similar to the pre PACE era.

It is of course, in the best interest of the police to portray themselves as having changed in their approach to investigation and hence to have become more "professional". (78) Yet although the police are now more careful in the conduct of criminal investigations than the crude conviction-by-confession strategy of the pre PACE era, interrogation still occupies a central place in police investigative strategy and the criminal justice system remains dependent on the police power to interrogate so as to precipitate guilty pleas and guilty verdicts through confessions.

Public Attitudes to the Police up to the 1970s and the Reality of Policing

It has already been noted that it is only from 1963 that the voluntariness exclusionary rule incorporated the notion of outlawing oppressive methods of interrogation. This is possibly linked to the unjustified esteem in which the police were held by the courts and the public at least until the 1960s. Even then as Emsley comments, (79)

" ... disquiet about aspects of police behaviour in the 1960s remained muted."

The point is that if the police were to be generally trusted to behave with propriety towards suspects then there would have seemed no pressing need for a rule outlawing oppressive methods of interrogation. That the police did sometimes pre 1960s behave with brutality towards suspects is attested to by no less a figure than Sir Robert Mark, former Metropolitan Police Commissioner, in his autobiography "In the Office of Constable", his account of policing in 1940s Manchester. Mark writes, for example, (80)

"Before and immediately after the War, there was a willingness by the police to use violence against the hardened criminal which I believe now holds rare indeed."

Brogden in his oral history of policing in Liverpool in the inter-war years corroborates the view of a willingness by the police to use violence at that time,

"There is some evidence that the history of policing in England and Wales contains much more resort to the stick and fist than is recognized in the orthodox accounts. The stick in particular backed up by the practical invisibility of the night beat was a useful device to save on unpaid overtime ... The policeman would employ a good deal of violence on his beat to avoid the need for tiresome court appearances ... A degree of violence might also be sufficient to control certain types of behaviour for which conviction was difficult or unlikely."

Brogden makes an authoritative statement on the issue of police violence in his study, (81)

"Rank-and-file police officers in the inter-war years were no angels in the way they exercised authority on behalf of a smug urban middle class over the people relegated to the bottom of the social pile."

Further corroboration of this analysis is provided by another oral history of policing in England and Wales, Weinberger's study of English police in the period 1930s - 1960s. The advantage of Weinberger's study over Brogden's is that it does not seek to limit its inquiry to a particular city but seeks to give a rather more general impression of police behaviour and attitudes over a wider time span than Brogden's study. Weinberger comments,

"The two main ways of getting evidence illegally were violence or fabrication. Both were routinely used and openly admitted to by its respondents ... Strong arm methods were the norm whether for softening up the prisoner, for gaining confessions or for exacting revenge."

Weinberger comments further,

"Once in the station and despite the philosophy of the police service that 'if you hit a prisoner you should do it outside the station' violence could become an integral part of the means to gain confessions."

The police were able to utilize and cover up such behaviour which would likely be exposed today, because as Weinberger notes, (82)

"The period probably brought to a peak the broad coverage and reach of the police authority in this country - an authority that is increasingly coming under challenge today."

With a high level of authority comes respect and deference from those under that authority and also crucially high credibility with the judicial authorities in any dispute between police and citizen or to police behaviour. The police were able to maintain their general public image of unimpeachable integrity because when the police stooped to the use of unreasonable violence it was generally restricted to the most powerless and socially marginal groups in society who tend to lack a public voice, or who until fairly recently have tended to be deferential to those in authority, including the police. Those low status socio-economic groups therefore, often in the pre 1970s era, lacked the ability or the will to bring the issue of police violence or corruption to public notice. The use of excessive force against hardened criminals could likewise be engaged in with a certain amount of impunity given the secrecy of the police station and the lack of personal credibility of those making a complaint.

It is important to point out that although the recent spate of miscarriages of justice, 1989 - 1992, has brought to public attention the problems of police abuse of suspects and the fabrication of evidence, these same concerns also informed public concern about the police especially in the 1970s but also in the 1960s, although not in so dramatic a fashion as the post 1989 era. The fabrication of evidence formed the background of the notorious Detective Challenor affair in the early 1960s and the issue of the mistreatment of suspects was the concern behind the Sheffield "rhinowhip" inquiry which also occurred in the early 1960s. (83) However, these cases were treated by informed opinion as "exceptional" scandals and the general untarnished reputation of the police persisted until the early 1970s. For example, the C.L.R.C. in 1972 commented that the Sheffield and Challenor cases were the result of a small number of "black sheep" in the police force and that such incidents were a rare occurrence. (84)

However, from the early 1970s the problem of police deviance began to be perceived as a much deeper institutional problem. Reiner in a 1989 article commented on this phenomenon, (85)

"During the early 1970s concern and controversy about policing increased over a variety of issues, notably police powers and the treatment of suspects, the handling of disorder as well as the flurry of corruption revelations signalling the "fall of Scotland Yard". All of these issues were of course present even in the 'consensus' period (1950s, 1960s). But now the critical theme among journalists and academics became the systematic sources of police deviance and threats to civil liberties as a function of police organisation and the nature of policing transcending the individualistic "one bad apple" approach."

The Confait case concerning the wrongful imprisonment of three youths for manslaughter based on their false confessions and the Fisher Report of 1977 on the case crystallized civil liberties concerns about the police treatment of suspects: see on this Reiner (86).

It is important to note this public perception of systematic police deviance in the 1970s, for the Police and Criminal Evidence Act 1984 can be viewed from one perspective as a concerted legislative attempt to restore public confidence in the proper exercise of police powers such as stop and search and interrogation. The need for public confidence to be restored in the proper exercise of police powers was dramatically highlighted by the serious disorder which affected several larger English cities in the summer of 1981. These riots have been characterized by Brogden as "anti-police riots" (87) and while social and economic factors were obviously an ingredient in the outbreak of disorder, a crucial spark was the excessive use of stop and search powers, especially in Brixton during the Metropolitan Police operation "Swamp 81". The Scarman Inquiry Report clearly saw policing mistakes as a crucial factor sparking the disorders. (88) The riots highlighted the crucial connection between the maintenance of civil order and the proper exercise of police powers concerning the investigation of crime.

Judicial Attitudes to Police Evidence in the Twentieth Century before PACE

The revised Judges' Rules of 1964 did offer more detailed regulation of the interrogation of suspects than the earlier versions of the Rules, but still far less than that provided for by PACE and the Codes of Practice. Lord Scarman remarked in R v Sang,

"The Judges' Rules are not a judicial control of police interrogation but notice that if certain steps are not taken certain evidence otherwise admissible may be excluded at trial." (89)

There was a judicial discretion recognized at common law, R v Voisin (1918) (90) to exclude a confession obtained in breach of the Judges' Rules but it was rarely exercised. Judges at common law would very often admit a confession obtained by deliberate breach of the Judges' Rules. Judicial suspicions of the police which existed throughout the nineteenth century and which sometimes led to the exclusion of confession evidence merely because the police questioned a suspect in custody, seem to have evaporated by the time of the 1929 Royal Commission on the Police. The only sanction for breach of the Judges' Rules given that exclusion of a confession rarely occurred (see Pattenden's remark "Since 1945 non-observance of the Rules has in most reported cases been condoned" (91)) was a judicial rebuke to the police for violating the Rules. In R v Mills and Lemon (1947) the Lord Chief Justice said,

"The sooner the Bristol police study, learn and abide by the Judges' Rules the better." (92)

This suggests that at least with regard to the terms of the Judges' Rules the judiciary were not entirely unconcerned at trial with how the police conducted investigations. However, as has been noted, this concern rarely translated into discretionary exclusion of confessions obtained in breach of the Judges' Rules.

There remained one more discretionary power to exclude evidence obtained in an improper manner by the police. This was the rarely exercised "fairness to the accused" discretion first recognized in Kuruma v R (1955) (93) by Lord Chief Justice Goddard. However, this discretion was tightly circumscribed so as to only exclude evidence obtained after the commission of the offence from the suspect and by analogy with the privilege against self-incrimination: see R v Sang (1979).

There were only two instances of this common law discretion being exercised at appellate level, R v Payne (1963) (94) and R v Court (1962) (95), although we cannot know of the true figure of first instance uses of this discretion since these cases would not come to appeal and therefore public notice.

Given the habitual non-exercise of the discretion to exclude confessions obtained in breach of the Judges' Rules and the limitations of the "fairness to the accused" discretion, the only effective legal control of police methods in interrogation was the

voluntariness rule. The test in the modern form was enunciated by Lord Sumner in Ibrahim v The King (1914) (96). To be admissible, confessions however convincing, must have been voluntary in the sense that the prosecution must prove beyond reasonable doubt,

"That it has not been obtained from him by fear of
prejudice or hope of advantage exercised or held out
by a person in authority."

The concept of "oppression" was added by a dicta in Callis v Gunn (1963) (97) and only confirmed in 1972 in R v Prager (98).

With regard to the main part of the exclusionary rule, namely 'threats' and 'inducements' the courts became overly concerned with the technicalities of the voluntariness formula. This persisted until the House of Lords' decision in DPP v Ping Lin (1976) (99) which relaxed the technicalities of the rule. The technicalities of the rule meant that in certain cases the exclusion of a confession where its reliability was not in doubt, but it was excluded because a "form of words" had been used by the interrogator prior to the confession being made by the suspect. The rigours of the voluntariness rule at common law led one judge, Winn L.J. in R v Northam to comment,

"The criminal classes are only too well aware of their
position of virtual immunity in the hands of the police."
(100)

Yet given that the Judges' Rules on contemporaneous note taking and access to legal advice were often abrogated by the police and not supported by an exclusionary remedy by use of the discretion of the judge, the suspect was often at a structural disadvantage in claiming that his confession was "involuntary" for the judge often had no independent record of the interrogation nor an independent witness to it in order to decide properly on whether a threat or inducement had been made.

The suspect was often unable to claim the protection of the voluntariness rule precisely because the judiciary were complicit in the usual non observance of the Judges' Rules by the police. In court it was often merely the police account of what transpired at interrogation against the suspect's account of what transpired at interrogation, i.e. on the question of whether any threat or inducement had been made by the police or whether the police had behaved oppressively. Given the esteem and trust in which the police and their evidence was held by judges, magistrates and juries

at least before the 1970s then the suspect stood little chance of successfully contradicting a perjured police account of the interrogation if the police were in a particular case prepared to commit perjury. The CLRC in their Eleventh Report in 1972 recognized that, (101)

“... if the accused alleges that the evidence against him is perjured he is not likely to be believed, moreover the mere making of the allegation by the accused in giving evidence enables the prosecution to elicit damaging facts relating to his previous record.”

(On this point see Chapter 4 of this thesis)

It has to be recognized that up to the 1970s the police were accepted as much more credible witnesses than most defendants, who tended to be drawn from low status socio-economic groups. Box and Russell have drawn attention to the “discredibility” of most of those who allege mistreatment at the hands of the police. (102) The police could allege at court a variety of reasons, e.g. revenge against the police or mental instability as to why the accused ‘made up’ his allegations of police misbehaviour in the interrogation. The court, in the absence of independent evidence would normally accept the police account. The main obstacle to exposing police deviance is the conflict of evidence between police and suspect over what did actually occur. The suspect is at a structural disadvantage because of the legitimacy accorded to the police account of events due to the fact that they are the police, the visible symbols of lawful authority. Reiner points out that police treatment of low status socio-economic groups was “regularly characterised by abuse of powers, excessive force and corruption” but that nonetheless until relatively recently the English police were able to preserve their benign image in the eyes of the established opinion making classes. (103)

From a certain perspective it was perfectly natural for trial judges and magistrates to place great trust in the evidence of policemen in the pre PACE era. In a liberal democratic state it is normally possible to make the reasonable assumption that officers of the state will undertake their duties competently and honestly. The courts should be able to act on the assumption that the police have done their job properly.

However, it is certainly possible to argue that the English police, certainly in the 1970s, often took advantage of the trust placed in them to give perjured evidence. They were able to do this because of the cloak of secrecy surrounding the police station and the interrogation process. Blind faith in the integrity of law enforcement officers in a liberal democratic state is therefore a dangerous substitute for the open

and reliable exercise of police powers. This is especially so when the police force in England have a particular mandate in an adversarial system to construct cases against suspects. This mandate is reinforced by a powerful police culture which views the conviction of people believed to be criminals by the police as the central police task. This contrasts with a view of the police role as investigating directly the truth of the suspect's actual involvement in criminal activity. As Sir Henry Fisher (104) pointed out, the police do not see it as their duty to follow up lines of inquiry which will exonerate the suspect. In the Confait case the police attempted to negative an alibi rather than to analyze the case in the light of countervailing evidence.

The creation of the Crown Prosecution Service in 1985 may have had a tempering effect in this regard on the police since the police no longer bear the responsibility of prosecuting cases in court. McConville and Baldwin commented in 1981,

"It is the responsibility for prosecution that requires the police to present the strongest possible case and to ignore doubts they may entertain." (105)

A. A. S. Zuckerman notes that due to the attitude of the courts with regard to breaches of the Judges' Rules, the result was,

"... that the courts forwent adequate supervision of interrogation and by and large left suspects to the mercy of the police." (106)

The lack of proper regulation of the police-suspect encounter before PACE in terms of a lack of statutory rules and the non-exercise of the discretion to exclude evidence can in part be attributed to the ideological underpinning of police legitimacy and how the criminal courts viewed the police in terms of the integrity of their evidence and the relationship of the police to the court system.

It is now well established that by the 1950s the police enjoyed almost universal public esteem and support. As Reiner points out, (107)

"... by the 1950s the police had become not merely accepted but lionized by the broad spectrum of opinion. In no other country has the police force been so much a symbol of national pride."

If the police were to be trusted to behave fairly towards suspects then there was no need for detailed regulation of the police-suspect encounter in the police station.

Similarly, if police evidence was to be trusted then there was no pressing need to exclude confession evidence which had not been properly documented and authenticated, as required by the Judges' Rules. Police non-observance of the Judges' Rules or access to legal advice for the suspect would similarly not call into question the fairness of the interrogation for the police could be trusted to behave fairly and the confession could consequently be admitted into evidence. This position began to change somewhat in the 1970s, when some trial judges did exclude confession evidence which had been obtained in breach of the provision on a suspect's access to legal advice (see Chapter 5 on these examples) but there is little evidence of this pre the 1970s. Indeed in 1967 in R v Northam Winn L.J. commented that the English police,

" ... are now to be trusted in almost every single case, to behave with complete fairness towards those who come into their hands or from whom they are seeking information."
(108)

The reality seems to have been different. Paul Condon, the current Metropolitan Police Commissioner, described the police service he joined in 1967 as,

" ... fairly brutal, poorly trained and poorly educated despite its rosy image." (109)

The 'rosy image' was one shared by many judges. Indeed at one time the 'rosy image' was shared even by many defence counsel. Sir Derek Hodgson, the High Court judge who tried the P. C. Blakelock murder trial commented,

"When I started at the bar in the 1940s, it simply didn't enter one's head that confessions might be unreliable. As defence counsel we didn't think of going into how they might have been obtained." (110)

This perceived integrity of the police was well entrenched by the 1950s, although in the pre World War Two years the situation was not so clear cut. For example, H. Montgomery Hyde in his biography of Sir Norman Birkett (111) commented,

"In the summer of 1928 there occurred a sensational official enquiry into methods used by the English Metropolitan police in interrogating private individuals. For some time there had been complaints that officers from Scotland Yard were employing 'third degree' tactics and these complaints came to a head in the Savidge Inquiry."

PACE and its aftermath

The Emergence of PACE

As referred to before in this thesis, the myth of the constable as 'citizen in uniform' was only finally laid to rest by the RCCP in 1981. It was not a harmless myth though, for the concept of constable as 'citizen in uniform' must be taken into account in considering the reasons for the lack of detailed and enforced regulation of interrogations before PACE. As Dixon has written,

"The ideology of constables as 'citizens in uniform' has been important both as a legitimating device and as an impediment to proper consideration of the nature of police powers." (112)

The constable as 'citizen in uniform' myth concealed the true nature of the growth of police power, pre PACE, and the consequential problem of regulating that power. One method of regulating the increase of police powers is through the discretionary exclusion of evidence obtained by a misuse of those powers. As Dixon points out, the willingness of the judiciary to exclude evidence from the criminal trial is a crucial way of controlling police power. (113)

"Police powers can be increased by judicial inaction as well as action. If judges consistently refuse to exclude evidence obtained in some unlawful way then that practice has a judicial imprimatur, which is hard to distinguish from authorization. While it is true to say that the practice is not fully legalized in the sense that it may found a civil claim, this possibility is usually not significant."

The RCCP noted,

"... the notion of the police officer as the citizen in blue who is paid to do things that all citizens should do contains an element of truth. But it is far from reality. Society expects, indeed it places a duty upon the police to detect and investigate crimes and if appropriate to bring detected offenders before the courts. Any rules to regulate investigation must be so framed that they enable the police to discharge their duty but ensure that the rights of the suspect are properly protected." (114)

As Reiner and Leigh note, (115)

"The RCCP and PACE constitute a significant watershed consolidating and clarifying the changes in formal powers and concrete practice which had built up since the Second World War, separating the police officer from the ordinary citizen. The new settlement is based on a new ideological rationale."

The Police and Criminal Evidence Act which grew out of the RCCP report is therefore built upon a new ideological rationale for the police. PACE was an attempt to balance the tension between police effectiveness and individual liberty. One crucial feature of PACE was its institutionalization of a system of detention for questioning by the police. This was balanced by the introduction of greater protections for the suspect, especially access to free legal advice put on a statutory footing.

It is now recognized that the police do have powers significantly different from the citizen, and this is rightly so given the special responsibility upon the police to investigate and detect crime. Although the constitutional form of the independent constable remains, the police are in effect the official state agency for the investigation of crime.

Not only did the RCCP recognise that the police were fundamentally different in powers from the citizen but the RCCP report must be viewed against the breakdown in the public concerns about the integrity of the police which occurred from the late 1960s and increased in the 1970s. As Reiner and Leigh note, (116)

"The broad background for understanding the emergence of PACE is the increasingly fraught and controversy-ridden political and social context of policing since the late 1950s but especially since the early 1970s."

Reiner has commented on this situation, (117)

"During the 1970s the elements making for the legitimization of the police in Britain became unravelled and reversed. The series of revelations of police deviance, both in the sense of corruption and other violations of the rule of law undermined the image of the police as professional symbols of legal authority."

To take one example of this change in public attitudes to the police and their integrity, the issue of "verballing" rarely heard of before the late 1960s, became a major issue in many criminal trials in the 1970s, i.e. the police would allege and the defendant would

deny the existence of an oral confession allegedly made by the defendant to the police during the pre trial police interrogation: on this issue see Chapter 4 of this thesis. The "verballing" problem clearly informed the RCCP's report (118) and the subsequent PACE scheme for tape-recording of confessions in the interrogation room and authentication scheme for confessions made to the police elsewhere.

Public Attitudes to the Police post PACE and perceptions of the Unity of the Criminal Process

There has not only been a shift in official perceptions of the police role since the RCCP report of 1981 but the public has a tendency in the present era to view police misconduct in criminal investigations as having a bearing upon the reputation of the criminal justice system as a whole. If judicial attitudes to illegally obtained evidence and improperly obtained confessions must be publicly acceptable, in order to secure public confidence in the criminal justice system, then how judges react to evidence obtained improperly or illegally by the police should take account of changed public attitudes.

Zuckerman pointed out in 1987 that, (119)

"The investigative process is now seen as part of the administration of justice."

It is arguable that Section 78 of PACE is a manifestation of that perceived linkage between the investigation stage and the trial stage with its explicit direction to the trial judge to consider how evidence has been obtained as a factor in deciding whether to exclude improperly obtained evidence in his discretion.

As evidence of popular attitudes linking the police investigation with the legitimacy of the criminal trial system it is possible to point to public anger and criticism of miscarriages of justice cases being directed at the criminal justice system as a whole rather than anger being directed solely at the police. This is so despite the fact that the main reason for many of the miscarriages of justice 1989-1992 has been as a result of police misconduct in the investigations into the offences rather than due to any inherent defect in the trial system itself. The former Lord Chancellor Lord Hailsham has commented on this phenomenon, (120)

"... convictions have been overturned as unsafe or unsatisfactory years after sentence has been pronounced and in some cases served and previous appeals rejected. Much of this has unjustly rubbed off on the judiciary, who can after all only decide cases on the evidence which is put before them."

Hailsham comments further,

"It is impossible to exaggerate the seriousness of the savage blow which this series of cases has dealt to public confidence. Much of this is misplaced and is directed either to the persons or functions of the judiciary who presided over the original trials or were parties to the dismissal of the original appeals. No system of justice is foolproof against fabricated or even unreliable evidence and the jurisdiction of the Court of Appeal in criminal cases is not a rehearing of the original case." (121)

In March 1991 the 'Times' columnist Bernard Levin in a diatribe against some of the judiciary in that newspaper, following the release of the Birmingham Six, called upon Lord Chief Justice Lane and Lord Bridge to resign immediately as they were unfit for judicial office. Lord Bridge had been the original trial judge at Lancaster in 1975 and Lord Lane as Lord Chief Justice had rejected a previous appeal against conviction by the six men in 1988. (122) It is true that the judges were not responsible for the perjury of police officers or the withholding of evidence by prosecutors or the dishonesty of Home Office forensic scientists, nonetheless judicial intransigence at appeal level certainly greatly prolonged the miscarriages of justice which occurred at the original trial. This judicial intransigence was epitomized by the comment of Lord Lane on January 28th 1988 in dismissing the appeals of the Birmingham Six:

"The longer this hearing has gone on, the more convinced this court has become that the verdict of the jury was correct." (123)

Therefore, whether it was fair or not, the judiciary in the public perception are implicated in the serious miscarriage of justice cases which have traumatised the criminal justice system in recent years. In an article, Sir Stephen Sedley referred to the loss of public confidence the judiciary has suffered over the miscarriage of justice cases,

"It is a remarkable fact that a judiciary which has taken a public battering in recent years over miscarriages of criminal justice has in the same period earned large public approbation for its willingness to prevent and correct abuses of governmental power." (124)

The judiciary have therefore good reason to insist on proper procedures for investigation being followed by the police. This is because miscarriages of justice based on errors and misconduct in the investigatory stage have a profound impact on public confidence in the whole criminal justice system, including the judiciary. As Professor Griffiths points out, (125)

"Public criticism of judges has increased over the last two decades, fuelled especially by the discovery of major miscarriages of justice, often inadequately investigated by the courts."

Professor Birch has commented upon the impact of the miscarriage of justice cases upon the judiciary's view of their role in relation to pre-trial police impropriety, in discussing the case of R v Sang (1979). In R v Sang it was stated that the judge is not concerned with how evidence is obtained (save with regard to confessions and an extremely limited discretion for other evidence) only with the use of evidence at trial by the prosecution. Birch comments, (126)

"Changes in the way in which the criminal justice system is viewed, and in how it views itself, means that such an abdication of interest in the background of a case is unacceptable today. Public interest in miscarriages of justice and the high profile awarded to cases in which pre-trial misconduct has led to unjustified and lengthy imprisonment must have played an important part in the courts' changed perception of their role, which now clearly extends to voicing a view on the illegal or improper way in which evidence was obtained and includes the assumption of broad powers to control the pre-trial stage by monitoring, for example disclosure and delay and abuse of power in bringing cases to court. Much of this activity ... would have seemed excessive and improper twenty years ago but it is now regarded as necessary to command public respect for the criminal trial and to avoid the impression that the courts are colluding in impropriety."

Professor Dennis has commented that the outcome of the Guildford Four Appeal in October 1989 (127)

"... traumatised the criminal justice system. It raised major questions concerning police investigative methods, the trustworthiness of police evidence, the role ... of the Court of Appeal."

The whole criminal justice system, not solely the police, were implicated in the scandal. The impact of the scandal was linked in part to the extreme gravity of the

offences for which the Guildford Four were convicted wrongfully and the extremely long time they had spent wrongly in imprisonment, fifteen years each.

A decline in public confidence in either the police or the judiciary is not likely to be in the long term public interest. Therefore the judiciary have another good reason to insist on proper procedures being followed in the investigation of offences.

Reiner and Leigh noted in 1994 that (128)

"The public standing of the police is now at its lowest ebb since they came to be established in their modern form in the first half of the nineteenth century."

This distrust of the police may not only be confined to the general public. P. S. Atiyah has commented that (129)

"The legal professions have grown very distrustful of the police."

This is linked, according to Atiyah to the long string of miscarriages of justice.

However, public lack of confidence in the police may also be linked to a perception of a failure of the police to protect them from crime and criminals.

Judicial Attitudes to Police Evidence in the post PACE era

There is a *quid pro quo* for the enhancement and clarification of police powers to investigate crime that PACE represents and that is that the police should observe the procedures for investigation which have been laid down in the same statute which gives them their clarified and enhanced powers. This is not necessarily to advocate a disciplinary approach to evidence obtained in breach of those procedures (the disciplinary approach has been consistently denied by the criminal courts pre PACE and post PACE: see Chapter 7), rather it is to recognise that admission of evidence obtained in deliberate or significant violation of proper procedures can so upset the fairness or legitimacy of the criminal trial itself so as to justify the exclusion of such evidence in certain circumstances.

Zuckerman has written of "the institutional reliance" (130) that the prosecuting

authorities and the judiciary place on the police. As Zuckerman points out,

"The trial is an examination of the police investigation, it is not itself an investigation of the crime." (131)

Given this institutional reliance on the police by the criminal courts the judiciary can hardly disclaim interest in how the police gather evidence. The criminal trial is sufficiently linked in public perception with the police investigations so as to demand judicial concern as to whether the police followed proper procedures in gathering evidence.

The creation of the Crown Prosecution Service, a separate state agency for the prosecution of offenders in 1985 does not affect the fact that it is the police who construct cases for prosecution, the CPS role being limited mainly to a 'filtering' role against weak cases or cases not in the public interest to prosecute.

The criminal justice system relies on police investigations in another important way apart from the role the police have in assembling evidence for use in contested criminal trials, and that is the overwhelming reliance on the police to produce guilty pleas through obtaining confessions in interrogation; the characteristic feature of the English criminal justice system is not public adjudication of responsibility but public proclamation of guilt. (132)

The reliance of the prosecuting and judicial authorities on the police for the effective and efficient disposition of criminal cases is a major feature of the modern criminal justice system in England and Wales.

The Police and Criminal Evidence Act and Section 78 in particular, is arguably statutory recognition that in the present day criminal investigations involving the collection of evidence and the criminal trial are fundamentally linked so that there is a judicial duty to ensure consistent procedural fairness throughout the process, as an individual moves in status from suspect to defendant.

In the era of PACE a judicial view has indeed developed that police investigations into crime and the criminal court form a continuum of due process so that unfairness in the police investigative stage can have an adverse impact on the fairness of the criminal trial. Court of Appeal cases such as R v Keenan, R v Walsh, R v Canale discussed in Chapter 4 and R v Quinn, R v Nathaniel discussed in Chapter 7 (133) can all be interpreted as disclosing a view of the criminal process where significant

unfairness in the police investigation can impact on the fairness of the criminal trial with consequences for the admissibility of evidence obtained in an 'unfair' manner by the police.

As a consequence of this view confession evidence (R v Keenan, R v Walsh, R v Canale) identification evidence (R v Quinn) and even highly reliable D.N.A. evidence (R v Nathaniel) has been held by the Court of Appeal to have been wrongly admitted by trial judges because they failed to take properly into account procedural unfairness by the police. Section 78 with its statutory language making the concept of the "fairness of the proceedings" as the criteria governing the exercise of the judicial discretion to exclude evidence has been the device used to reflect this judicial change in attitude towards the admissibility of unfairly obtained confession and non confession evidence.

A good example of the change in judicial attitudes post PACE is the response to "significant and substantial" breaches of the verballing provisions of PACE by the police. The senior judiciary in decisions such as R v Keenan and R v Canale has shown clear appreciation that the word of the police as to the existence of a confession made in interrogation is no longer judicially acceptable: on this see Chapter 4.

In R v Elson the Court of Appeal commented, (134)

"The PACE Act 1984 (s.66) Codes of Practice were there to protect the individual against the might of the state. The individual was at a great disadvantage when arrested by the police and that was so whether or not the police behaved with the utmost propriety."

The judiciary have become aware of the need to regulate the police-suspect encounter through, in appropriate circumstances the discretionary exclusion of evidence. This change is to be seen in various judicial decisions and remarks such as those by Hodgson J. in R v Samuel and R v Keenan, Lord Lane in R v Canale and Saville J. in R v Walsh, to the effect that significant breach or deliberate breach of important provisions in PACE has a tendency to upset the "balance of fairness" between suspect and the police established by PACE and that evidence so obtained might have to be excluded from the criminal trial as a result.

There has been a discernible change of judicial attitudes towards exclusion of evidence from the position at common law and under the Judges' Rules so much so

that Lord Chief Justice Bingham commented extra judicially in 1990 whilst a Lord Justice of Appeal (135)

"It may be that the pendulum has swung too far towards exclusion upon breaches being shown, without adequate consideration of the effect on the fairness of the proceedings, which the Act requires."

The cases of R v Samuel, R v Keenan, R v Canale, R v Walsh quoted above are all confession cases but there seems to be an increased willingness to exclude evidence in non confession cases where proper procedures for investigating offences have not been followed: see Matto v DPP, R v Sharpe, R v Nathaniel and R v Smurthwaite for important examples of this trend. (136) It may be argued however, that with regard to Matto v DPP and R v Sharpe, two cases concerning the exclusion of breathalyzer evidence under S.78, the approach of the courts is consistent with a judicial willingness to interpret the Road Traffic Act on the obtaining of samples of drink driving very strictly even in the pre PACE era, e.g. see Morris v Beardmore. (137) However, Matto v DPP and R v Sharpe are also consistent with cases such as R v Nathaniel which view police non-compliance with proper procedures generally as a relevant factor under the section 78 discretion.

In particular there has been a greater willingness to exclude identification evidence where the police have breached Code D of PACE and the defendant is prejudiced as a result. Lord Taylor C.J. commented in R v Quinn, a case involving evidence from an identification parade conducted by the police, (138)

"We wish to emphasise that where a detailed regime is laid down in a statutory code, it is not for the police ... to substitute their own procedure and their own rules for that which is laid down."

In R v Nagah (139) identification evidence was held to have been wrongly admitted because of a deliberate flouting of Code D by the police in order to guarantee a positive identification by the witness of the suspect through the use of "confrontation" as a procedure for identification instead of a properly conducted identification parade, as the defendant was entitled to under Code D. This approach of the courts represents a strengthening of judicial attitudes to police breach of proper procedures for identification parades than in the pre PACE era (140) and a much greater willingness to exclude identification evidence in discretion because of that breach of procedures than was manifest in the pre PACE era. Pre PACE the situation was

summed up by Jackson, who commented, (141)

"Identification evidence has occasionally been excluded on the basis that proper procedures laid down for identity parades and the showing of police photographs have not been complied with."

However, there are a number of judicial dicta and the problematic case of R v Chalkley (142) to suggest that judicial attitudes to the exclusion of non confession evidence under S.78 are not as homogenous as the preceding discussion might have suggested. These dicta and R v Chalkley seek to suggest that S.78 merely re-states the common law position and therefore would deny that Section 78 is based on a new ideological rationale for the exclusion of non confession evidence. In R v Mason Watkins L.J. said that Section 78 did no more than re-state the power which judges had at common law before PACE. (143) In R v Christou Lord Taylor C.J. commented, (144)

"The learned judge held that the discretion under S.78 may be wider than the common law discretion identified in R v Sang, the latter relating solely to evidence obtained from the defendant after the offence is completed, the statutory discretion not being so restricted. However, he held that the criteria of unfairness are the same whether the trial judge is exercising his discretion at common law or under the statute. We agree. What is unfair cannot sensibly be subject to different standards depending on the source of the discretion to use it."

It is important to note that S.82(3) of PACE expressly preserves the common law discretion.

In R v Chalkley the Court of Appeal clearly held that Section 78 did not enlarge the common law. The court said that the inclusion in Section 78 of the words "the circumstances in which the evidence was obtained" did not mean that the court could exclude the evidence as a means of expressing disapproval of the way in which it had been obtained. Auld L.J. then stated the common law discretion as being the test under S.78 (145)

"Save in the case of admissions and confessions and generally as to evidence obtained from the accused after the commission of the offence there is no discretion to exclude evidence unless its quality was or might have been affected by the way in which it was obtained."

However, as Dennis persuasively argues (146) there are good grounds for believing that R v Chalkley is not merely an odd decision but is actually *per incuriam* as it expressly failed to take into account such binding authorities as R v Smurthwaite (1994) which clearly can be seen as interpreting the Section 78 more widely than the common law discretion. In particular the use of entrapment by the police is a relevant factor under the S.78 discretion, although this was expressly denied as being relevant to the common law discretion by the House of Lords in R v Sang (1979): see Chapters 8 and 9.

Despite the small stream of judicial opinion going the other way, increased judicial willingness to exclude evidence when proper procedures for the investigation of offences have not been followed is arguably indicative of a changed perception of the police role and the consequent need to regulate the exercise of police powers. The Police and Criminal Evidence Act recognized that the police must be given considerably greater powers than the citizen in order to perform the important duties society places upon the police, but an important corollary of this is that the police must conform to proper procedures laid down by Parliament for the investigation of offences. Indeed to do so is in the best interests of the police themselves for as Dixon points out (147),

"A central tenet of the police claim to legitimacy is their subordination to law. Police work is presented as being the application of an objective set of laws."

There is perhaps another good reason as to why the judiciary should insist that the police comply with proper procedures for investigating offences. The detection and solution of the vast majority of crime depends on information supplied to the police by the public. The RCCJ commented that, (148)

"In the majority of investigations the police rely heavily on the public and in particular on victims, to notify them of crimes that have been committed and to provide the information necessary to identify the offender. Research indicates that between 80% - 90% of offences are brought to the notice of the police by victims, bystanders or other members of the public."

The consequence of this is that good police-community relations are vital to effective law enforcement. A serious deterioration in police-community relations may have an effect on the quantity and quality of information received from the public by the police about crime. One important way of maintaining public confidence in the police is to ensure that police powers are exercised in a fair and proper manner and

that evidence gathered is as reliable as possible. The judiciary have a vital role here in their ability to exclude improperly obtained confessions and improperly obtained non confession evidence from the criminal trial. Such measures may not only have a salutary effect on police behaviour but are also potentially capable of restoring and maintaining public confidence in the criminal justice system, such public confidence that is vital to the proper function of that system.

The Significance of the European Convention on Human Rights and the Human Rights Act of 1998

It is proposed now to consider the effect of the European Convention on Human Rights and The Human Rights Act of 1998 on the possibility of the exclusion of improperly obtained evidence in criminal proceedings. The Human Rights Act 1998 incorporates directly into English law the E.C.H.R. Until it comes into force, in October 2000, the European Convention will still be relevant.

However, as Dennis points out the Human Rights Act 1998 (149)

" ... will have a profound impact on the creation, interpretation and application of legislation and case law through the whole of English law and the law of evidence is no exception. Indeed, the law of criminal procedure and evidence is expected to be one of the most significant areas of contention as the implications of the Convention and Article 6 in particular are considered."

Article 6 is the "fair trial" provision of the E.C.H.R.

It is likely that judicial decisions under PACE excluding evidence where there has been "significant and substantial" breach of fair procedures for investigations established by PACE will be held to be in accordance with the Convention, especially Article 6; as Dennis comments, of the Convention rights,

"It is impossible to predict their precise impact on the current law, not least because in many cases the courts are likely to say that the relevant English law encapsulates Convention law. This is particularly so in relation to instances where the exclusionary discretion under Section 78 of PACE is used to safeguard the fairness of the proceedings. It will be surprising if previous judicial

implementations of notions of fairness, whether as part of the common law's 'right to a fair trial' or pursuant to the statutory discretion, are held not to coincide in most cases with the requirements of Article 6 of the Convention."

However, areas of the law beyond the scope of this thesis, such as S.34 of The Criminal Justice and Public Order Act 1994 may be much more vulnerable to challenge under the new Human Rights Act.

Once the Human Rights Act comes into force it will be no longer necessary for parties to seek redress in Strasbourg under the E.C.H.R. However, for the time being the E.C.H.R. itself has relevance to English law. For discussion on how the Convention affects the issue of improperly obtained evidence and entrapment see the discussion in Chapter 8 of this thesis, but after the decision in R v Khan House of Lords (151) the Convention has relevance to the exercise of the trial judge's discretion under Section 78 of PACE. At trial in R v Khan the trial judge had accepted that the aural surveillance of a conversation between Khan and three others, in which he had admitted his involvement in the illegal importation of heroin, was at least arguably in breach of his right of privacy under Article 8 of the Convention. However, the trial judge had gone on to say that neither this nor anything else in the case required him to exclude the evidence under S.78 of PACE.

The House of Lords held that the fact of the apparent breach of the Convention was something which might be relevant to the exercise of the judge's discretion under Section 78. Lord Nolan commented, (152)

"If the behaviour of the police in the particular case amounts to an apparent or probable breach of some relevant law or convention, common sense dictates that this is a consideration which may be taken into account for what it is worth. Its significance, however, will normally be determined not so much by its apparent unlawfulness or irregularity as upon its effect, taken as a whole, upon the fairness or unfairness of the proceedings."

Therefore an apparent breach of a Convention right is a factor which a judge might take into account in the exercise of the exclusionary discretion but that there is no duty to take it into account.

In conclusion it can be argued that the incorporation of the E.C.H.R. in The Human Rights Act is a welcome development and is likely to lead to a continuation, even a strengthening of the trend of judicial decisions to exclude evidence which has been

obtained through significant and substantial breaches of important provisions of PACE, Section 78 being the appropriate mechanism for exclusion.

A Note on the Constitutional Position of the Police and Criminal Investigation

Given that there is an institutional reliance by the criminal courts on the police to conduct criminal investigations and to assemble evidence for use at trial, it is therefore important to have an understanding of the constitutional position of the police in regard to their duty to undertake criminal investigations. Although the Crown Prosecution Service was set up in 1985 to take away the responsibility of prosecution from the police, as The Glidewell Report makes clear, the CPS are still dependent on the police to assemble the case file,

"The new service found itself occupying a position between the police and the Courts. The police continued to be responsible for deciding on the charge and preparing the case file. The CPS had a new role, that of reviewing cases passed to it after the police had charged a defendant in order to decide whether the evidence justified the charge."
(153)

The Crown Prosecution Service does not direct the police in their criminal investigations although they can ask for more evidence in a particular case. Given that there is no judicial or CPS direction or oversight of criminal investigations by the police it is important to identify the constraints that do operate on the police in their conduct of criminal investigations. The Police and Criminal Evidence Act and The Codes of Practice represent a strictly controlled legislative scheme for criminal investigations once they have begun, but what is to stop the police from refusing to investigate a crime at all? Exactly what duties do the police have in regard to undertaking criminal investigations? The starting point is Professor Leigh's observation,

"Police discretion, like executive discretion generally, must operate within the constitutional limitations imposed by statute and the courts." (154)

The crucial issue is how much discretion the police have in deciding whether to commence a criminal investigation or not. There exists no statute imposing general

duties of law enforcement upon the police. However, the common law is not silent on the matter. The leading authorities are "The Blackburn Cases", starting with R v Metropolitan Police Commissioner ex parte Blackburn (1968). (155) In this case the Commissioner had decided for the time being not to prosecute gaming clubs for breaches of the Gaming Acts in the absence of special circumstances. The court held that this was a breach of a legal duty owed to the general public and potentially enforceable in an appropriate form of proceedings against the Commissioner. The Court of Appeal held,

"... it was the duty of the Commissioner, as also of Chief Constables to enforce the law, and though chief officers of police had discretions (e.g. whether to prosecute in a particular case, or over administrative matters), yet the Court would interfere in respect of a policy decision amounting to a failure of duty to enforce the law of the land." (156)

Lord Denning M.R. commented that,

"... there are some policy decisions with which I think the courts in a case can, if necessary, interfere. Suppose a Chief Constable were to issue a directive to his men that no person should be prosecuted for stealing any goods less than £100 in value. I should have thought that the court could countermand it. He would be failing in his duty to enforce the law." (157)

As Leigh comments, the decision in the case,

"... clearly assumes, in my submission rightly, that the police cannot properly refuse to enforce a criminal offence at all. It is more defensible to draw a distinction between individual cases than between classes of offences." (158)

Further guidance was given by the Court of Appeal in R v Metropolitan Police Commissioner ex parte Blackburn (No.3) (1973) (159). According to Leigh the case establishes the following relevant principles: (160)

- The courts will not interfere with the Chief Officer of Police unless he in substance abdicates his responsibility over law enforcement.
- The Chief Officer can so abdicate his responsibility by refusing to exercise a

discretion vested in him by, for example, refusing to enforce a law at all or by adopting policies which in substance ensure non-compliance.

Therefore, while the police enjoy considerable discretion with regard to individual criminal investigations: whether to investigate at all, whether to caution or charge or take no further action, and if to charge, the nature of the charge, the courts will interfere if the police decide at the policy level not to enforce a particular law or decide not to investigate particular classes of offender.

G. Robertson is cynical about the reach of the Blackburn doctrine (161),

"The law - or at least the judges who enforce it - will not call upon police chiefs to answer for very much. They will only interfere if satisfied that there has been an abdication of responsibility; in effect a determined refusal to enforce the law."

and

"To say that the police are answerable to the law alone means that they are not answerable to anyone in the way they choose to enforce the law." (162)

Footnotes to Chapter 1

- (1) The purposes of cross examination under S.1 f(ii) is described as a "classic conundrum" of the law of criminal evidence by Zuckerman et al in [1994] All ER Annual Review at p.195.
- (2) R. Munday "Stepping Beyond the Bounds of Credibility: The Application of Section 1 f(ii) of the Criminal Evidence Act 1898". [1986] Criminal Law Review p.511.
- (3) The modern exclusionary rule for similar fact evidence dates back to *Makin v A-G for New South Wales* (1894) A.C.57. However the exclusion of similar fact evidence as a rule has its origins in the early nineteenth century - see *Cross on Evidence* Seventh Edition at p.340 and *R v Cole* (1814).
- (4) W. Twining "Rethinking Evidence" 1990 at pp.363-364.
- (5) Illegally Obtained Evidence has historically been admissible in law in England subject to an exclusionary discretion dating only from 1955 see *Kuruma v R*, [1955] AC 197. In contrast 'involuntary' confessions have since 1783 been subject to an exclusionary rule of law called the 'voluntariness rule', subsequently replaced by two separate rules of law in the form of section 76 2(a) and 76 2(b) of the Police and Criminal Evidence Act. Confessions were from 1918 also subject to discretionary exclusion upon breach of the Judges' Rules, see *R v Voisin* [1918] 1 KB 531. Confessions are subject at the present time to discretionary exclusion under s.78 of PACE (hereinafter adopted as the acronym for the Police and Criminal Evidence Act 1984).
- (6) T. A. Critchley "A History of Police in England and Wales" 2nd edition, 1978.
C. Emsley "The English Police: A Political and Social History", 1st Edition 1991.
R. Reiner "The Politics of the Police" 2nd edition 1992.
- (7) See M. Brogden "The Emergence of the Police: The Colonial Dimension". *The British Journal of Criminology* (1987) Vol.27 at p.4. "Colonial police work and perhaps in turn British police work was pre-eminently missionary work to legitimise external governance".
- (8) See R.Reiner "The Politics of the Police" 1992 at p.70.
- (9) L. Lustgarten "The Governance of Police" 1986 at p.25.
- (10) see L. Lustgarten "The Governance of Police" 1986 at Chapter 2 and I. H. Dennis "The Law of Evidence" 1999 at p.233.
- (11) L. Lustgarten "The Governance of Police" 1986 at p.26.
- (12) L. Lustgarten "The Governance of Police" 1986 at p.28.
- (13) Sir James Fitzjames Stephen, quoted by Lustgarten "The Governance of Police" 1986 at p.26, note 5.
- (14) J. Waldron "The Law" 1990, p.80.
- (15) The Royal Commission on Police Powers 1929, para. 15.
- (16) Sir James Fitzjames Stephen: "History of the Criminal Law" (1883) Vol.1, pp.493-494 quoted by I. H. Dennis, *The Law of Evidence* 1999 at p.233.

- (17) P. Devlin, "The Judge" 1979 at p.70.
- (18) See Section 8(1) of PACE: Power of the Justice of the Peace to authorise entry and search of premises.
Section 43(1): Power of the magistrates court to issue a warrant of further detention authorising the keeping of that person in police detention beyond thirty-six hours already elapsed.
- (19) M. McConville and J. Baldwin "The Role of Interrogation in Crime Discovery and Conviction" (1982) Vol.22 British Journal of Criminology at p.174: "Questioning has come to dominate police work".
- (20) See Section 37(2) of PACE.
- (21) "An Address to Police Constables on their Duties" from Sir Howard Vincent's Police Code 1882. The address contains the injunction "Neither judges, magistrates nor jurymen can interrogate an accused person ... much less then ought a constable to do so."
The Royal Commission on Police Powers 1929 commented on this passage that "This principle is firmly implanted in the minds of most of the police officers who gave evidence before us". Paragraph 60 of the Royal Commission Report 1929.
- (22) S. Uglow, "Policing Liberal Society" 1988 at p.52.
- (23) M. McConville, J. Hodgson, L. Bridges, A. Pavlovic, "Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain" 1994 at p.73.
- (24) R v Gavin and others (1885) 15 Cox C.C. 656.
- (25) R v Knight and Thayre (1905) 20 Cox C.C. 711.
- (26) R v Crowe and Myerscough. Central Criminal Court. The Justice of the Peace, December 8th 1917, p.288.
- (27) R. Reiner, The Politics of the Police 1992, p.57.
- (28) See the discussion in Chapter 8: "Entrapment".
- (29) For example where magistrates laid down rulings which halted particular law enforcement policies against street traders, see J. Davis, "A Poor Man's System of Justice: The London Police Courts in the second half of the nineteenth century" (1984) The Historical Journal 27.2.
- (30) T. Humphreys, "The Bar as a Profession" [1956], Criminal Law Review, p.297 at p.304.
- (31) See L. Lustgarten "The Governance of Police" 1986 at p.28.
- (32) D. Hay and F.Snyder, "Policing and Prosecution in England 1750-1850", 1994 at p.37.
- (33) C. Emsley "Crime and Society in England 1750-1900", 1987 at p.162.
- (34) R. Reiner, "The Politics of the Police " 1992, p.70.

- (35) On this point see generally M. Brogden, "The Police, Autonomy and Consent" 1982.
- (36) C. Reith, "A Short History of the Police" 1948 is a good example of the "official" police history.
- (37) C. Emsley, "The English Police: a political and social history" 1991 at p.89. Note also the comment of the Times Newspaper 13th February 1906: "Our police force is a credit to the men who are responsible for it and a source of pride to every Englishman who is acquainted with police administration in other countries".
- (38) R.Reiner, L. Leigh, "Police Power" p.69 at p.70 in "Individual Rights and the Law in Britain" 1994 edited by C. McCrudden and G. Chambers.
- (39) Sir Robert Mark, The Dimbleby Lecture 1973. Police Federation Papers.
- (40) J. E. Heydon, "Evidence: Cases and Materials" Second edition 1984, p.178.
- (41) Lord MacDermott, "The Interrogation of Suspects" [1968] Vol.21 Current Legal Problems at p.12.
- (42) Royal Commission on Criminal Procedure Report (RCCP) 1981, Chapter 2 paragraph 2.7.
- (43) R v Thompson [1893] 2 QB 12 [1891-4] All ER Rep. 376.
- (44) R v Leatham [1861-73] All ER Rep. 1646.
Jones v Owen (1870) 54 JP 759.
- (45) I. H. Dennis, "The Law of Evidence" 1999 at p.232.
- (46) A. A. S. Zuckerman, "The Principles of Criminal Evidence" 1989 at pp.344-345. However, today the police cannot be seen as independent of the courts. As I. H. Dennis points out: "Although the constitutional form of the independent constable has been retained in substance the police have become official state investigators of crime". I. H. Dennis "The Law of Evidence" 1999 at p.233.
- (47) Callis v Gunn [1964] 1 QB 495 [1963] 3 All ER 677.
- (48) Ibrahim v R [1914-15] All ER. Rep. 874 at p.879.
- (49) The 1929 Royal Commission on Police Powers paragraph 169: "We recommend a rigid instruction to the police that no questioning of a person in custody about any crime or offence with which he is or may be charged should be permitted. This does not exclude questions to resolve elementary and obvious ambiguities in a voluntary statement ..."
- (50) The Beck case is discussed briefly by P. Devlin in The Judge 1979, at p.188. As Devlin comments, "This miscarriage of justice was the goad which finally pricked Parliament into setting up the Court of Criminal Appeal".
- (51) On this point see R. Reiner, L. Leigh "Police Power" at p.70 of C. McCrudden and G. Chambers "Individual Rights and the Law in Britain", 1994.
- (52) *ibid* at p.70.

- (53) L. Lustgarten "The Governance of Police" 1986 at p.28.
- (54) *ibid* at p.29.
- (55) Goodhart - Memorandum of Dissent by Dr. A. L. Goodhart to the Royal Commission on the Police 1962 Report, paragraph 20.
- (56) *R v May* (1952) 36 Cr. App. R. 91 at p.93.
- (57) Lord MacDermott "The Interrogation of Suspects" [1968] Vol.21 Current Legal Problems, p.20.
- (58) Sarah Manwaring-White "The Policing Revolution" 1983 at p.118.
- (59) R. Reiner, "Myths vs Modernity: Reality and Unreality in the English Model of Policing", p.16 at p.18 in "Comparisons in Policing: An International Perspective" edited by Jean-Paul Brodeur, 1995.
- (60) On Japan see William P. Cleary, "Criminal Investigation in Japan" (1989) Vol.26 California Western Law Review p.123 at p.147: "The Japanese place too much reliance on the confession", and see also A. Watson "The Dark Clouds over Japanese Criminal Justice: Abuse of suspects and forced confessions" (1995), Justice of the Peace and Local Government Law 516, 534.
On the U.S.A. see Gordon van Kessel: The Suspect as a source of Testimonial Evidence - a Comparison of the English and American approaches (1986) Volume 38 The Hastings Law Journal, p.1. Kessel comments that in the U.S.A. "Police interrogation efforts vary widely but that at least in 'professional' police departments they probably continue to question the great majority of suspects arrested for serious offences" at p.117.
- (61) The Indian Evidence Act 1872, Section 25 states "No confession made to a police officer shall be proved against a person accused of any offence". Section 26 states "No confession made by any person whilst he is in custody of a police officer unless it be made in the immediate presence of a magistrate shall be proved as against such person".
- (62) Sir Robert Mark "In the Office of Constable" 1978 at p.293.
- (63) A Report of the Inquiry into the Circumstances surrounding the Convictions arising out of the Bomb Attacks in Guildford and Woolwich in 1974. By the Rt. Hon. Sir John May, 30 June 1994 at p.307, paragraph 21.17.
- (64) *R v Cunningham* [1957] 2 QB 396 [1957] 2 All ER 412. Dixon comments: "There is a significant (but as yet inadequately traced) link between the trend in areas of modern substantive criminal law towards requiring proof of subjective intention and police use of interrogation in order to obtain confessions". Law in Policing: Legal Regulation and Police Practices, 1997 at p.273.
- (65) Section 8 states: "A court or jury in determining whether a person has committed an offence:
(a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions, but
(b) shall decide whether he did intend or foresee that result by reference to all the evidence drawing such inferences from the evidence as appear proper in the circumstances."

- (66) Damaska quoted in L. Lustgarten "The Governance of Police" 1986 at p.2.
- (67) D. Dixon, "Law in Policing" 1997 at p.270.
- (68) M. Zander, "A Matter of Justice" 1989, p.196.
- (69) Sir John Woodcock, "Why we need a revolution" (1992) 100 Police Review, p.1932.
- (70) Both studies quoted by M. Zander in "The Police and Criminal Evidence Act 1984 Third Edition", 1995 at p.221.
- (71) Ibid at p.221.
- (72) M. McConville and J. Baldwin: "Courts, Prosecution and Conviction" 1981 at p.138. Yet as they point out at p.141 a guilty plea often follows a confession. This feature of the criminal process saves the police and the court system valuable resources.
- (73) D. Dixon: "Revising police powers: legal theories and policing procedures in historical and contemporary contexts", at p.160 in "Contemporary Issues in Criminology" 1995 edited by L. Noaks, M. Levi and M. Maguire. For some critics the 1984 Police and Criminal Evidence Act represented a dramatic shift in power towards the police because of the Act's institutionalization of a power to interrogate. Nicholas Blake for the Haldane Society commented in 1985: "Despite minor concessions by the Bill's promoters in the course of its parliamentary passage, the prize gained by them in the 1984 Act is the fundamental principle of the right to interrogate and the right to detain for interrogation. Those gains by the government and the police service represent a considerable loss to civil liberties. From henceforth the debate will be about degrees of pressure rather than about the right to exert pressure at all". Nick Blake, "The Right of Silence in English Criminal Law" in The Haldane Journal, Volume 1, 1985, p.7 at p.14. Since the enactment of PACE establishing the acceptable degree of interrogative pressure has indeed become an important issue: see Chapter 5 of this thesis.
- (74) M. McConville, J. Baldwin, "Courts, Prosecution and Conviction", 1981.
- (75) M. McConville, "Corroboration and Confessions: The Impact of a Rule requiring that no Conviction can be sustained on the basis of Confession evidence Alone", Research Study No. 13 for the RCCJ at pp.32-33.
- (76) On the role of confession evidence in the miscarriage of justice cases see I. H. Dennis "Miscarriages of Justice and the Law of Confessions: Evidentiary Issues and Solutions" [1993] Public Law, p.291.
- (77) R. Reiner, "Chief Constables" 1992 at p.150. See also the opinion of The Glidewell Report at p.28: "The Police and Criminal Evidence Act 1984 extended police powers of investigation in some respects but on the other hand imposed considerable new restraints on police officers interviewing suspects, and thus on the obtaining of confessions to alleged offences. As a result, evidence of a confession by the accused which until the passage of the Act was a frequent feature of criminal prosecutions, is now much less common and a prosecution based solely on confession evidence is very rare". The Review of the Crown Prosecution Service: A Report 1998, Sir Iain Glidewell.

- (78) That great changes have indeed occurred in police practice is accepted by the otherwise critical journalist D. Rose in his exposé of the criminal justice system "In the Name of the Law: The Collapse of Criminal Justice" 1996, pp.17-18.
- (79) C. Emsley, "The English Police: a Political and Social History" 1991 at p.169. An example of the complacent attitude of the Establishment to the police in the early 1960s is to be found in the comments of Sir Ludovic Kennedy, who wrote the Introduction to Lord Devlin's memoirs "Taken at the Flood". At page 7 Kennedy writes, "In the early 1960s I made two documentary films on the police for the television programme "This Week" ... I spoke of the police bending the Judges' Rules, especially in relation to confessions. Naturally the old guard were swift to denounce me. "Bending the rules" boomed Manningham-Buller (now elevated to Lord Dilhorne) "seldom occurs". Lord Shawcross Q.C. who had taken part in the programme thundered "There is no foundation whatever for such opinions", while Sir Lionel Heald, a former Attorney-General, claimed that the programmes had been faked. All these strictures were of course articles of faith". P. Devlin: "Taken at the Flood" 1996.
- (80) Sir Robert Mark "In the Office of Constable" 1978, p.52.
- (81) M. Brogden, "On the Mersey Beat" 1991, at p.105.
- (82) B. Weinberger, "The Best Police in the World: An Oral History of English Policing from the 1930s to the 1960s" 1995 at pp.190-191. Of course at the time, the early 1960s, the police were viewed generally as unproblematic. For example, the sociologist M. Banton writing in 1964 in "The Policeman in the Community" commented that lessons could be learnt by the sociologist from analyzing the English police, an institution that was "working well". Preface p.vii "The Policeman in the Community" 1964.
- (83) Both the Challenor case 1964 and the Sheffield case 1963 are discussed at p.75 of R. Reiner "The Politics of the Police" 2nd edition, 1992. A further police scandal of the period was that investigated by the Mars-Jones Inquiry of 1964 into allegations that London Police Officers had planted evidence on three boys charged with possessing offensive weapons in 1959. The Inquiry exonerated the three boys. For details of the case see Sir David Nagley "The Technique of Persuasion", fourth edition 1991, at pp.13-15.
- (84) The Criminal Law Revision Committee. The Eleventh Report, 1972, paragraph 52 at p.31.
- (85) R. Reiner "The Politics of Police Research in Britain" from "Police Research: Some Future Prospects" edited by Mollie Weatheritt 1989 at pp.11-12.
- (86) Sir H. Fisher: The Confait Case: Report, 1977. R. Reiner "The Politics of the Police" 2nd edition, p.82.
- (87) M. Brogden, "The Police: Autonomy and Consent" 1982 at p.237, and see his comments in "The Preface": "The primary characteristic of the riots themselves was not an anarchic reaction to social malaise but virulent hostility to police officers".
- (88) Lord Scarman: The Scarman Report: The Brixton disorders, 1981.
- (89) R v Sang [1979] 2 All ER 1222 at pp.1245-1246.

- (90) R v Voisin [1918] 1 KB 532 [1918-19] All ER 491.
- (91) R. Pattenden "Judicial Discretion and Criminal Litigation" 1990 at p.276. There were however, some exceptions. For example Sir Frederick Lawton has written: "In the early 1960s whilst trying a capital murder case I adjudged an alleged oral confession inadmissible because of what I considered to be gross breaches of the Judges' Rules by a senior CID officer". Sir Frederick Lawton "Tarnished Police Evidence", The Law Society's Gazette 11th May 1991 at p.2. It is important therefore not to make glib assertions about the attitude of all the judiciary towards police breaches of the Judges' Rules.
- (92) R v Mills and Lemon [1947] KB 297 [1946] 2 All ER 776.
- (93) Kuruma v R [1955] A.C. 197 [1955] 1 All ER 236.
- (94) R v Payne [1963] 1 All ER 848 [1963] 1 WLR 627.
- (95) R v Court [1962] Crim. L.R. 697 CCA.
- (96) Ibrahim v R [1914-15] All ER Rep.874 at p.877.
- (97) Callis v Gunn [1964] 1 Q.B.495 [1963] 3 All ER 677.
- (98) R v Prager [1972] 1 All ER 1114.
- (99) DPP v Ping Lin [1976] AC 547 [1975] 2 All ER 917.
- (100) R v Northam (1967) 52 Cr. App. R. 97 at p.102.
- (101) Criminal Law Revision Committee. Eleventh Report, paragraph 52 page 31.
- (102) Box and Russell "The Politics of Discredibility: Disarming Complaints against the Police" (1975) 23 Sociological Review 2, p.315. The point is that no matter how cogent the complaint is by a suspect of police misbehaviour, a determining factor in the resolution of the dispute between the police and the suspect will be the "character" of the suspect.
- (103) R. Reiner "The Dialectics of Dixon: The Changing Image of The T.V. Cop" p.12 in "Police Force, Police Service", 1994, edited by M. Stephens and S. Becker.
- (104) Sir Henry Fisher, "Report of an Inquiry by the then Sir Henry Fisher into the circumstances leading to the trial of three persons on charges arising out of the death of Maxwell Confait and the fire at 27 Doggett Road, London SE6" 1977. Sir Henry Fisher commented at paragraph 230 of his Report: "The evidence which I have heard suggests that the police do not at present see it as their duty to initiate enquiries which might point to the fact that for some other reason the prosecution should fail. And there is nobody outside the police who regards it as his duty to spur the police on to question the case and so follow lines of enquiry which might be inconsistent with it".
- (105) M. McConville and J. Baldwin, "Courts, Prosecution and Conviction" 1981 at p.191.
- (106) A. A. S. Zuckerman, "The Principles of Criminal Evidence" 1989 at p.314.
- (107) R. Reiner, "The Politics of the Police" 2nd edition 1992 p.57. As Reiner points out, the F.B.I. in the U.S.A. and the Mounties in Canada may also have

enjoyed a mythic status in those countries but these are elite organizations. The status attached to the English police was focused on the lowly police constables.

- (108) *R v Northam* (1967) 52 Cr. App. R. 97 at p.102. Another example of official complacency about the integrity of the police is implicit in the comment of Lord Kilmuir, then Sir David Maxwell Fyfe, Attorney-General who remarked in 1948 that "there is no practical possibility" of an innocent man being hanged in this country and that anyone who thinks otherwise is "moving in a realm of fantasy". If the death penalty had been available in 1974 and 1975 most of the Birmingham Six and Guildford Four would have been executed. For the Maxwell-Fyfe reference see "The Acceptability of Executing the Innocent", Andrew J. Stinchcombe, *The Howard Journal of Criminal Justice* (1994) Vol.33, p.304 at p.305.
- (109) Sir Paul Condon quoted by S. Holdaway in "Modernity, rationality and the baguette" p.154 in "Comparisons in Policing: An International Perspective" 1995 edited by Jean-Paul Brodeur.
- (110) Sir Derek Hodgson quoted by D. Rose in "A Climate of Fear: The Murder of P. C. Blakelock and the Case of the Tottenham Three" 1992, at p.95.
- (111) H. Montgomery Hyde, "Norman Birkett" 1984 at p.229.
- (112) D. Dixon, "Revising 'police powers': legal theories and policing practices in historical and contemporary contexts", p.128 at p.131 in "Contemporary Issues in Criminology" 1995, edited by L. Noaks, M. Levi, M. Maguire. There is a positive side to the view of policemen as "citizens in uniform", as Geoffrey Marshall pointed out, "The traditional description of the police officer as a species of private citizen, though in many ways an exaggeration, is at least a signal that he enjoys no special quasi-judicial or state privilege and may be sued, as may anybody else, for wrongful acts committed in the course of his duties, and in particular for wrongful arrest, assaults or false imprisonment". G. Marshall "The Police: Independence and Accountability" p.251 in "The Changing Constitution" edited by J. Jowell and D. Oliver, 1st edition 1985. After the Police Act 1964 section 48 the Chief Constable of a force was made vicariously liable for the torts of his constables.
- (113) D. Dixon, *ibid* at p.154.
- (114) R. C.C.P. Report 1981, paragraph 2.21.
- (115) R. Reiner, L. Leigh, "Police Power", in "Individual Rights and the Law in Britain" 1994, edited by C. McCrudden and G. Chambers at p.71.
- (116) *ibid* at p.87.
- (117) R. Reiner, "The Politics of Police Research in Britain", p.6. in "Police Research: Future Prospects" 1989, edited by M. Weatheritt.
- (118) RCCP Report 1981, Chapter 4, paragraph 4.2.
- (119) A. A.S. Zuckerman, "The Principles of Criminal Evidence" 1989, at p.345.
- (120) Lord Hailsham, "On the Constitution" 1992 at p.68.

- (121) *ibid.* As Robert Stevens commented in "The Independence of the Judiciary" 1993 at p.178, "As some pointed out, the many apparent failings of judges to do justice in major criminal cases were in fact failings of the police with respect to doctored evidence and uncorroborated confessions."
- (122) B. Levin, "Hoist by their arrogance", *The Times* 18th March 1991 at p.10. Levin commented that: "Lords Bridge and Lane must go not because of dishonesty but because they consistently perpetuated injustice ... This pair have got to go. These two most prominently have done terrible and shameful wrong and their culpability is not a whit lessened by their certainty that they were doing right."
The former Master of the Rolls Lord Denning has also been criticized for his judgement in the civil action the Birmingham Six fought in 1980 against the police and prison officers, see C. Mullin, "Error of Judgement", Revised edition 1990.
- (123) Lord Lane, quoted by C. Mullin in "Error of Judgement" 1990 at pp.266-267.
- (124) Sir Stephen Sedley "Rights, wrongs and outcomes", *The London Review of Books* 11 May 1995, p.13. The former Lord Chancellor Lord Mackay seems to strike a defensive note when he writes, "Even if one takes full account of all that has been said about miscarriages of justice, in very few of the cases can legitimate criticism be levelled against the judges". "The Administration of Justice" 1994 at p.6.
- (125) J. Griffiths "The Politics of the Judiciary" 1997 at p.56. Also see the comment of J. Griffiths in "The Politics of the Judiciary" at p.341: "The best that can be said of the judicial performance is that the courts were shown to be worse than useless as protectors of innocent persons charged with highly unpopular offences".
- (126) Professor Birch, "Excluding Evidence from Entrapment: What is a Fair Cop?" [1994] *Current Legal Problems*, p.78.
- (127) Professor I. H. Dennis, "Miscarriages of Justice and The Law of Confessions. Evidentiary Issues and Solutions" [1993] *Public Law*, p.294.
- (128) R. Reiner, L. Leigh "Police Power" in "Individual Rights and the Law in Britain", edited by C. McCrudden and G. Chambers at p.69. C. Emsley in "The English Police: A Social and Political History" 1991, corroborated the view expressed by Reiner and Leigh above when Emsley comments: "At the end of the decade (1980s) in a poll commissioned by the B.B.C. suggested that two-thirds of the population believed that the police bent the rules to gain convictions and newspapers at opposite ends of the political spectrum were concluding that public esteem for the police was at an all time low" at p.17.
- (129) P. S. Atiyah, "Law and Modern Society" Second edition, 1995 at p.72.
- (130) A. A. S. Zuckerman, "A Strategy for Reducing the Incidence of Miscarriage of Justice" (1993), *Northern Ireland Legal Quarterly*, p.3 at p.4.
- (131) *ibid.*
- (132) This is not to say that confessions are vital to the investigation of all types of crime. As M. Levi points out: "In almost all fraud cases, unlike other forms of crime, documentary evidence and its proper interpretation are central and confessions are merely a desirable complement. Issues of supervision of interviews are consequently less major a component of fraud cases since there

is normally some documentary evidence against which to validate confessions." At p.202 of "The Investigation, Prosecution and Trial of Serious Fraud". Research Study Number 14 for the Royal Commission on Criminal Justice.

- (133) R v Keenan [1989] 3 All ER 598.
 R v Walsh (1990) 91 Cr. App. R. 161.
 R v Canale [1990] 2 All ER 187.
 R v Quinn [1990] Crim. L. Rev. 581.
 R v Nathaniel (1995) 159 J.P.419.
- (134) R v Elson, The Times Law Report 30 June 1994.
- (135) The Right Hon. Lord Justice Bingham, "The Discretion of the Judge" [1990], Denning Law Journal p.27 at p.41. Examples of cases where the trial judge too readily excluded evidence merely because of police breach of PACE and the Codes of Practice include:
 R v Fennelley [1989] Crim L.R.142 Acton Crown Court
 R v Fogah [1989] Crim. L.R. 141 Snaresbrook Crown Court.
 R v Williams [1989] Crim. L.R. 66.
- (136) Matto v DPP (1989) RTR 337.
 R v Sharpe (1993) RTR 3 February 1993.
 R v Nathaniel (1995) 159 J.P.419.
 R v Smurthwaite [1994] 1 All ER 898.
- (137) Morris v Beardmore [1981] A.C.446.
- (138) R v Quinn [1995] Crim. L.R. p.56.
- (139) R v Nagah [1990] 92 Cr. App. Rep. 344.
- (140) For an example of pre PACE exclusion of identification evidence see R v Leckie [1983] Crim. L.R. 543.
- (141) J. D. Jackson "The Insufficiency of Evidence based on Personal Impression" [1986] Crim.L.R. 203 at p.210.
- (142) R v Chalkley [1998] 2 Cr. App. R. 79 C.A.
- (142) R v Mason [1987] 3 All E.R. 481 C.A.
- (144) R v Christou [1992] 4 All E.R.559 at p.564.
- (145) R v Chalkley [1998]2 Cr. App. R. 79 at pp.105-106.
- (146) I. H. Dennis, "The Law of Evidence" 1999 at pp.74-77.
- (147) D. Dixon, "Legal Regulation and Policing Practice" (1992) Vol.1. Social and Legal Studies, p.515.
- (148) The Royal Commission on Criminal Justice Report (RCCJ) 1993, Chapter 2, paragraph 5, page 10.
- (149) I. H. Dennis, "The Law of Evidence" 1999, pp.31-32.
- (150) ibid at p.33.

- (151) R v Khan [1996] 3 All ER. 289 H.L.
- (152) [1996] 3 WLR 162 at p.175.
- (153) The Review of the Crown Prosecution Service: A Report, 1998, at p.1.
- (154) L. H. Leigh, "Police Powers in England and Wales" 1985 at p.18.

- (155) R v Metropolitan Police Commissioner ex parte Blackburn [1968] 1 All ER 763.
- (156) ibid at p.763.
- (157) ibid at p.769.
- (158) L. H. Leigh, "Police Powers in England and Wales" 1985 at p.19.
- (159) R v Metropolitan Police Commissioner ex parte Blackburn (No. 3) [1973] 1 All ER 324.
- (160) L. H. Leigh, "Police Powers in England and Wales" 1985, at p.20.
- (161) G. Robertson, "Freedom, the Individual and the Law", 1993 at p.6.
- (162) ibid at p.7.

CHAPTER 2

CONFESSIONS: AN HISTORICAL OVERVIEW OF THE ISSUES

In this chapter it is proposed to examine confession law in England to show how it has developed from being exclusively concerned with the 'creditworthiness' issue to the modern state of the law which is influenced by considerations of the creditworthiness of confessions, the authenticity of confessions and legitimacy in the obtaining of confessions. (1)

The Creditworthiness of Confessions

The traditional concern of the law of confessions was as noted, creditworthiness. More specifically the issue was that a confession obtained from a suspect under certain circumstances was so inherently unreliable that a rule of law was justified to exclude a confession where those particular circumstances existed. The old 'voluntariness' rule singled out 'inducements', 'threats' and much later (2) 'oppression' as circumstances which should trigger the automatic exclusionary rule. Lord Sumner in Ibrahim v R (1914) said that 'logically' the fact of a threat of inducement preceding a confession should go to the weight of the evidence and not its admissibility but that,

"... from the danger of receiving such evidence judges have
thought it better to reject it for the due administration of justice."
(3)

It should be noted however, that although creditworthiness was the rationale of the voluntariness rule an involuntary confession remained inadmissible in law even if palpably true. The rule has been understood from a judicial perspective and by academic commentators (4) in terms of securing the creditworthiness of confessions. This view dates back to the old case of R v Warickshall, where the judges commented,

"A confession forced from the mind by the flattery of hope or the torture of fear comes in so questionable a shape when it is to be considered as evidence of guilt that no credit ought to be given to it, and therefore it is rejected."
(per Nares J and Eyre B) (5)

Lord Reid in the case of Harz (1967) (6) suggested that along with a concern for creditworthiness, the privilege against self incrimination lay behind the rule and Lord Diplock in R v Sang (1980) (7) went further and claimed that the *nemo debet prodere se ipsum* principle was the sole justification for the voluntariness rule. Yet these isolated dicta arose extremely late in the history of a doctrine which had been understood for nearly two hundred years as solely involving considerations of credit. This concern still shapes the law of confessions although no longer in the guise of the 'voluntariness' rule, see section 76 2(b) of the Police and Criminal Evidence Act for modern recognition of the creditworthiness of confessions problem. It is a truism that generally people do not confess to something they did not do in the absence of physical mistreatment or psychological abuse. On the other hand, modern psychological research has established that sometimes certain people confess to things they have not done even in the absence of physical mistreatment or psychological abuse: see Chapter 3. To understand this we have to realize that custodial interrogation is in itself 'inherently coercive' (8) as was recognised as long ago as 1966 by the Supreme Court in America in Miranda v Arizona. If in this context an inducement is offered or a mild threat made then the potential for a false confession to emerge is sufficiently serious to justify an exclusionary rule. As Lord Reid said in Harz on the cases where an inducement has been held to render a confession inadmissible:

"It is true that many of the so called inducements have been so vague that no reasonable man would have been influenced by them, but one must remember that not all accused are reasonable men or women, they may be very ignorant and terrified by the predicament in which they find themselves. So it may have been right to err on the safe side." (9)

The voluntariness rule was heavily criticized in the CLRC 11th Report and the RCCP 1981 Report as being overly concerned with whether a particular form of words, (i.e. a threat/inducement) preceded a confession and that more attention should be paid to whether the words or conduct of the police actually posed a threat to confession reliability. Hence the new test formulated in S.76 2(b). Yet whatever the defects of the voluntariness rule as a prophylactic against confession unreliability it has to be

remembered that this was the only issue which the law of confessions was concerned with seriously prior to the enactment of PACE in 1984. The issue of the reliability of a confession involved an issue of admissibility in another separate way from the 'voluntariness' issue. At common law there exists one other power to exclude a confession, which is part of the general discretion to exclude evidence whose prejudicial effect outweighs its probative value. This discretion was exercised to exclude a confession in R v Stewart (1972) (10) in circumstances described by the trial judge as 'very exceptional'. In this case the suspect had a mental age of a five year old child and a mental condition known as 'echolalia' in addition; patently no trust could be placed at all in his confession although it might have caused great prejudice against the defendant if the jury considered the confession. This discretion is retained by S.82(3) of PACE. Whether a confession is reliable or not has traditionally been treated as a matter for the jury and apart from the limited reliability filter of S.76 2(b) the reliability of a confession is still a jury issue. It is only when a confession is patently unreliable should the judge exercise his discretion to exclude a confession as more prejudicial than probative. To do otherwise would be to usurp the function of the jury as assessors of the credibility of evidence. The other main issue in the modern law of confessions, (apart from 'legitimacy') is the authenticity of a confession.

The Authenticity of Confessions

This is the issue of whether the confession was actually made and if made, what its exact terms were. Mirfield, in his monograph on "Confessions" characterized this issue as the 'confession issue' and commented,

"... it arises whenever the defence denies that a confession attributed to the accused by the prosecution was made by him." (11)

The problem this issue posed the courts in the pre-PACE era is explained by Mirfield,

"When a policeman states that the accused made an incriminating statement, the accused's words being such and such, and the accused denies this, how can we be confident about who is to be believed." (12)

The traditional approach of the law here was that questions as to whether the confession was in fact made went to its 'weight' before the jury and not its admissibility, see Ajodha v The State (1982) (13). As Mirfield points out, only at the extreme margin where no confession could possibly have been made, would the law intervene to rule out an alleged confession on the grounds that it was not actually made - see the case of (14) R v Roberts (1953). Before PACE there was also the requirement in the Judges' Rules that any confession to the police be contemporaneously recorded. In Rule III it was stated,

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

There existed a discretionary power to exclude a confession for breach of the Rules, see R v Voisin (1918), which first recognised this discretion (15)

Yet confession evidence was rarely excluded for breach, even deliberate breach of an important provision such as access to legal advice let alone a less important provision such as contemporaneous recording of an interview with a suspect. In effect then the question of the making of the confession was treated as a matter going to the weight of the confession not to its admissibility.

To fully understand this approach of the law to the authenticity issue we must take into account the high esteem in which the police were held by the judiciary and public at least until the start of the 1970s. The point is this: if the police were to be generally trusted, then questions about the alleged fabrication of confessions by the police (the 'verballing' issue) could be satisfactorily treated as a matter going to the weight of an alleged confession and not its admissibility. The alleged fabrication of confession by the police was not seen (pre 1970's) as such an intractable problem as to require a policy of discretionary exclusion of non recorded confessions. We can usefully contrast the problem of inducements and threats during custodial interrogation, with the authenticity problem.

With regard to threats or inducements made by the police in interrogation, a confession obtained in such circumstances presents such problems in terms of reliability (i.e. what was the operative cause of the confession, the inducement or conscience?) that the law adopted a general rule of exclusion. No such policy was needed with regard to the issue of whether the police fabricated the confession. The

police were to be trusted not to give perjured evidence about an alleged confession even in the absence of a contemporaneous and signed note of the confession as required by the Judges' Rules.

An example of typical judicial attitudes to the police in the pre-PACE era is the comment of Winn L.J. in R v Northam (1967) who said that the police were,

" ... to be trusted in almost every single case to behave with complete fairness towards those who came into their hands ..."

In the light of events which occurred only a few years later, such as the known mistreatment by the police of the Guildford Four and the Birmingham Six (16) this comment of Winn L.J. seems complacent in the extreme. Moreover, what also happened after Winn L.J. made the above comment was that the specific issue of police fabrication of confessions became a highly charged political issue between critics of the police and those who downplayed the extent of police deviance. Cox in "Civil Liberties in Britain" in 1975 commented that,

"The quality of police evidence became increasingly suspect in the 1960s." (17)

Cox drew out the serious implications for civil liberties of this fact,

"The quality of police evidence and its honesty is crucial because most people who are convicted are convicted by it. Much of this evidence relates to how an accused was detained, what was found on or near him and what he said under interrogation. It is the abuse of police power in these circumstances - arrest, search and questioning - that has created the most intractable police/civil liberty problem in recent years." (18)

More specifically on the problem of police fabricating confessions, Cox continued,

"The lack of supervision of police questioning makes it impossible to tell whether the frequent conflict of evidence between what the police officers say took place during interrogation is more accurate than the accused's version. The police have traditionally relied on their superior credibility as honest men and women; but by 1970 this was sufficiently in doubt for a prominent judge - Mr. Justice McKenna to warn of the dangers publicly." (19)

Cox then quotes McKenna J., who said to the Annual Conference of Justice in 1970,

"If (the police) agree to tell an untrue story, they know each will be available to confirm the other's evidence - at the trial, and that the only written record will be their notebooks, each book telling the same story in identical words. They know that they will go into the witness box as men of good characters, likely to be believed."

It has to be pointed out that the law of criminal evidence facilitated somewhat the ability of the police to secure convictions on verbalised confession evidence. For example, in R v Mallinson (20) the prosecution case was dependent largely on alleged oral confessions. The defendant appealed against his conviction of possessing drugs with intent to supply on the grounds that the conviction was unsafe because it had been secured on alleged oral confessions. The Court of Appeal held that there was

"... no principle to be gathered from the authorities of universal or general application that a conviction wholly or mainly resting on evidence of an oral confession could never be safe or satisfactory. It must in every case be a question to be decided on the particular facts."

However, a rule of evidence requiring a confession to be corroborated before it could sustain a conviction or a rule of evidence requiring a confession to the police to be tape recorded before it could be admitted into evidence would in the former case reduce and in the latter case eliminate the possibility of 'verballing' by the police. The authentication scheme for confessions introduced by PACE is a major improvement on the old principles of receiving confession evidence from the police exemplified by R v Mallinson which no doubt encouraged the police to attempt to attribute to the defendant a confession he never made. Fabricated confession evidence appears to have played an important role in at least two of the notorious miscarriages of justice cases of the 1989-1992 period. In the Birmingham Six case four of the six men admitted at trial signing written confessions but alleged that this was only because of the brutality of the police interrogation. However, two of the six, Hill and Hunter, were alleged to have made oral admissions to the police. At trial they denied making the admissions and alleged that the police had fabricated them. In R v McKenny (1991) (21) the Court of Appeal quashed the convictions of all the Birmingham Six. No direct comment was passed by the Court of Appeal on the allegations of police fabrication of confessions by Hill and Hunter. In the Tottenham Three case, reported as R v Silcott, R v Braithwaite, R v Raghup (22), Silcott made no written or signed confession during lengthy interrogations but he was alleged to have made some incriminating oral remarks, remarks which he denied having made.

In December 1991 the Court of Appeal quashed the convictions of all three men. In regard to the specific evidence against Silcott, ESDA tests showed that the Silcott interview notes had been altered. Since Silcott's alleged statements constituted the only prosecution evidence against him the court took the view that his conviction could not stand. Perhaps the single most recurring theme of all the revelations of miscarriages of justice is the presence of the excessively coercive interrogation of vulnerable suspects, however the separate problem of fabrication of confession evidence made an appearance in at least two of the cases.

This issue of alleged 'verballing' became so charged that the RCCP noted in 1981,

"The frequency of challenges to the police record of interview is said to make it essential to have some sort of independently validated record in order, in the eyes of others to prevent the police from fabricating confessions ... or in the eyes of others to prevent those who have in fact made admissions subsequently retracting them." (23)

It is important to state that this was not only a one way issue with concern solely emanating from civil liberties lobbies towards police behaviour but also that the police resented unjustified attacks on their integrity by unfounded allegations at trial of 'verballing'. It is well established that the police are sensitive on this point. In 1961 in the Criminal Law Review, reference was made to a Police Federation memorandum to the 1962 Royal Commission on the Police. The editorial in The Criminal Law Review noted as follows,

"One of the matters to which the Federation drew attention was the frequency with which defending counsel and solicitors make 'false allegations against the police of brutality, perjury and corruption'. Policemen apparently feel strongly about unjustified attacks on their integrity." (24)

R. N. Gooderson in his 1970 article "The Interrogation of Suspects" noted that

"... the police are sensitive about their public image and the damaging effect of allegations of what has taken place when they were interviewing a suspect." (25)

How much more sensitive are the police about such allegations at the present time

given the police corruption scandals and miscarriages of justice due to police deceit and brutality which have come to light since 1970?

One good reason for the police to be sensitive about their public image is their dependence on public co-operation for the notification and solution of crime. As the RCCJ (1993) noted,

"The proportion of crimes solved by the police without help of any kind from members of the public is negligible." (26)

The maintenance of law and order is critically dependent on public goodwill.

The documentation procedure for interrogations and confessions established by PACE and The Codes was a direct result of the increasingly acrimonious public debate between the police and their critics over the verballing problem in the 1970s. With regard to verbal confessions, research quoted in the RCCP Report (1981) pointed to the fact that nearly all challenges to confession evidence were on the accuracy of the alleged confession with only 2% challenged on their alleged voluntariness (with written statements the position was reversed, fewer than 10% being challenged for accuracy, whereas nearly 40% were attacked on their alleged voluntariness). (27)

The concerns in the 1970s over verballing, which fed into the RCCP Report and subsequently into PACE, have obviously influenced judicial attitudes to police breaches of the anti-verballing provisions of PACE. For example, in the case of R v Hunt Steyn L.J. commented with regard to Code C,

"The background to those provisions was of course a public perception and a legislative intention that the evil of police officers falsely attributing incriminating statements to persons in custody should be stamped out." (28)

In Keenan Hodgson J. gave a fuller and more balanced account of the purposes of Code C:

"... these Code provisions are designed to make it difficult for a detained person to make unfounded allegations against the police which might otherwise appear credible. Second, it provides safeguards against the police inaccurately recording or inventing the words used in questioning a detained person ... the provisions are designed to make it very much more difficult for a defendant to make unfounded allegations that he has been 'verballed' which appear credible." (29)

Hodgson J. rightly points out that protection of the police as well as of the suspect is an aim of Code C.

Appeal cases such as R v Delaney, R v Keenan, and R v Canale (30) illustrate that the judiciary are no longer prepared to accept the police version of what transpired at interrogation as there are mechanisms for the independent validation of the interrogation process.

We have here in the authenticity issue, a clear example of how public perception of the police has influenced the law of confessions both in terms of the legislative scheme for recording set up in PACE and judicial attitudes to breach of that scheme through the exclusion of confession evidence or through the quashing of convictions because trial judges failed to properly take into account breach of the recording provisions by the police.

Moreover, police concern for their own public image was also one major impetus for the reforms in recording interrogations established by PACE.

P Mirfield commented in "Confessions" that,

"It is remarkable that English law has for so long left the problem of the accuracy of the record largely alone. It seems almost perverse that the Act introduces an exclusionary rule to ensure that a confession actually made is reliable but eschews use of the same technique to ensure that a confession attributed to the accused was actually made." (31)

Mr. Mirfield could not have predicted in 1985 that the English judiciary would police the verballing provisions of PACE by use of S.78 as a discretionary remedy for breach of those provisions. Indeed in Delaney Lord Lane said that since the court was deprived of a record of interrogation by the police the prosecution could not satisfy the burden of proof under S.76 2(b) to show that the confession was not obtained due to unreliability inducing police methods and therefore the confession should have been excluded as a matter of law. The defence alleged that the police downplayed the seriousness of a serious sexual offence to the suspect person of very low IQ. Lord Lane said he could not properly adjudicate on the S.76 2(b) issue in the absence of an independent record of the interrogation. (32) The question of the record of the interrogation is not only relevant to the discretion to exclude under S.78 but also has

relevance to the issue of law under S.76 2(b). This is a dramatic change from the common law position.

The Legitimacy of Confessions

The third issue that has moulded the modern law of confessions is what can loosely be termed 'due process' concerns. This is a much more characteristically modern concern than either the 'creditworthiness' issue or the 'authenticity' issue. The 'due process' concern can be stated as follows:

"How should the law of confessions respond to the fact that the suspect is interrogated in the detention of the police, and also to the fact that the police are a state agency?"

Herbert Packer in his seminal American work "The Limits of the Criminal Sanction" (1968) refers to due process as a value system which views,

"... efficiency in the suppression of crime as subordinate to the protection of the individual in his confrontation with the State." (33)

That confrontation with the State begins, according to Packer, with the arrest of the suspect by the police and ends with the verdict at trial.

It might be argued that the law of confessions can help to ensure that the 'citizen as suspect' is treated by the police in a manner acceptable to a civilized society through the use of exclusionary rules and discretions to exclude a confession obtained in breach of minimum standards of behaviour set for the police in their treatment of suspects in custody. Both the CLRC (1972) and the RCCP (1981) recognised this basic point as justly impinging on the law of confessions. (34)

This 'due process' strand in confession law is a modern one due to the simple fact that the permissibility of police interrogation of a suspect in custody in England was not fully conceded at an official level for at least 130 years after the founding of the new police in 1829 (see Rule 1 of the revised Judges' Rules of 1964).

This is not to say that the police could not legitimately question suspects before arrest nor does it imply that confessions voluntarily made to the police by a suspect in custody were not admissible.

The official line, at least until the revised Judges' Rules of 1964 was that the interrogation of suspects in custody was not a legitimate police practice. Yet it is only when police interrogation of a suspect in custody is accepted as legitimate can the 'due process' questions of how the suspect is to be treated in interrogation and the law's response to that, be sensibly asked.

If police interrogation of suspects is not accepted as legitimate then establishing the limits of fair interrogative practices is a redundant issue.

The permissibility of police interrogation of a person in custody was an open question at least when Lord Sumner spoke in Ibrahim as his Lordship recognised in that case. The Royal Commission on Police Powers and Procedure in 1929 said that interrogation of persons in custody was limited to the Metropolitan Police and a few other city forces but that,

"The great majority of police forces to judge by the evidence before us follow Lord Brampton's advice at least to the fundamental principle governing their actions." (35)
(on Lord Brampton's advice see the previous chapter)

The 1929 Commission concluded that, "It is desirable to avoid any questioning at all of persons in Custody" (36) - this is justified in the Report by reference to the privilege against self-incrimination of the suspect and the need to protect it. (37) Custodial interrogation is inconsistent with respect for the privilege against self-incrimination of the accused according to the 1929 Commissioners. If however, the privilege against self-incrimination is seen as merely a privilege against compelled self-incriminatory speech then there is not necessarily a conflict between interrogation and the *nemo debet prodere se ipsum* principle, for there is always the option of remaining silent in the face of lawful and legitimate police interrogation.

The uncertainty about the legitimacy of police interrogation of suspects in custody continued into the early 1960s - witness the comments of Professor J. C. Smith that,

"There is one quite fundamental question concerning the Judges' Rules to which there appears to be no clear answer. Do the Rules forbid the Police to question persons in custody or do they merely advise them that

if they do question such persons, the answers may be inadmissible in evidence." (38)

However, by 1972 the CLRC reported the view,

"... that the police should be able to question suspects in custody is now generally thought to be necessary for the due administration of the law." (39)

The position prior to the 1960s seems to have been that though the status of police interrogation of suspects was uncertain in law it was in fact practiced by the police to the point where Professor Smith in 1960 recognised that whatever the official position,

"... it would not be surprising if Dr. Glanville Williams' view that the Rules are habitually disregarded is correct" (40)

and that "... it would seem almost inevitable that the rule prohibiting questioning generally should go by the board." (41)

We know also what the general approach of the courts was to non observance of the Judges' Rules in terms of the exclusion of confession evidence. Rule 1 of the revised Judges' Rules of 1964 established the legitimacy of the interrogation of suspects in custody. Although it was not until the House of Lords' decision in Holgate-Mohammed v Duke (42) closely followed by S.37 of PACE that detention for the purpose of questioning was given the sanction of the law. Section 37(2) of PACE states that,

"... the person arrested shall be released either on bail or without bail, unless the custody officer has reasonable grounds for believing that his detention without being charged is necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him."

With the gradual acceptance of the legitimacy of police interrogation arose the question of "What are the rights and how best to safeguard the rights of a suspect who is being questioned?" Indeed, not only was police interrogation increasingly seen as legitimate but it became to be officially recognised as a necessity - thus the RCCP commented,

"The evidence submitted to us all leads us to the conclusion that there can be no adequate substitute for police questioning in the investigation and ultimately in the prosecution of crime." (43)

If police interrogation was officially viewed as a necessity then the question of how best to safeguard the rights of suspects in custody became a political imperative. Hence the RCCP (1981) notion of a 'fundamental balance' between the interests of the community in the suppression of crimes and the interests of suspects.

Of course the Judges' Rules attempted to provide some regulation of the police-suspect encounter in interrogation but it is important to remember that the 1912 Rules were not clear on whether interrogation was permissible. Also, the Rules were originally requested by the police to clear up ambiguities about the proper course of conduct in relation to persons in custody and the admissibility of statements made by suspects. A. T. Lawrence J. in Voisin (1918) commented,

"In 1912 the Judges at the request of the Home Secretary, drew up some rules as guides for police officers. These rules have not the force of law, they are administrative directions, the observance of which the police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the Judge presiding at the trial."
(44)

As has been noted, this discretion was rarely exercised in the accused's favour. The RCCP (1981) said that the Judges' Rules,

"... represented a first conscious effort within the pre-trial procedure to set out a considered balance between the need to protect the rights of the individual suspect and the need to give the police sufficient powers to carry out their task."
(45)

However, we need to treat this statement with caution. Firstly, the Rules were issued for the guidance of the police rather than explicitly as a safeguard for suspects. Secondly, to say that the Rules were 'a conscious effort to set out the rights of the individual suspect' is an empty claim for the only meaningful way those 'rights' could be protected was through the discretionary exclusion of confessions where there was a breach of those rights, but this rarely happened.

The central due process notion of authoritatively setting out the rights of a suspect in police custody was only finally achieved in the RCCP Report of 1981. Of course the CLRC in 1972 had made a nod towards the notion of decent and fair treatment of suspects in police custody and the role of the law of evidence in that regard. The CLRC said,

"Even the most cogent evidence may be rejected because of the way in which it was obtained ... a suggested reason (besides possible unreliability) why a confession is inadmissible unless proved to have been voluntary is the need to discourage the use of improper means to obtain confessions ... It is admittedly questionable whether the object mentioned should be secured by restricting the admissibility of evidence rather than by disciplining those responsible, but we do not think that we can leave this object out of account and we have had regard to it in our recommendations about the admissibility of evidence in confessions." (46)

The CLRC continued,

"We do not think it would be right or acceptable to public opinion to make any exception to inadmissibility where there has been oppression." (47)

However, the CLRC made no comprehensive attempt to reconcile the social need for the police to interrogate suspects with the social need for the rights of suspects to be stated with certainty and authority.

A similarity the RCCP Report shares with the CLRC 11th Report is on the need for a rule of inadmissibility for confessions obtained by oppressive police methods. Again this is not justified by concerns about reliability but reflects modern due process concerns:

"... in order to mark the seriousness of any breach of the rule prohibiting violence, threats of violence, torture or inhuman or degrading treatment and society's abhorrence of such conduct, non-compliance with this prohibition should lead to the automatic exclusion of evidence so obtained." (48)

The provision which emerged from this concern, namely S.76 2(a), can be best understood as a provision enforcing due process concerns. The section is not justified by reference to reliability for the provision says that where there is oppression,

"... the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid."

Moreover if a concern for reliability is behind the oppression head it is hard to see why a separate reliability test is provided for in S.76 2(b) PACE.

It is important to remember that the concept of 'oppression' was only incorporated as part of the exclusionary rule by Parker C.J. in Callis v Gunn (1964). This was a fairly late development in the long history of the exclusionary rule and it is by no means clear that 'oppression' was understood originally as being directed towards ensuring that the suspect was treated in a civilized manner by his interrogators. In R v Priestley (1965) and R v Prager (1972) (49) the courts seem to suggest that it is a concern with the suspect's privilege against self-incrimination which lies behind the ban on oppression in interrogation. Reference is made in those cases to oppressive questioning overbearing the suspect's will and leading him to speak when otherwise he would have remained silent. Of course the privilege against self-incrimination is part of the concept of 'due process' as commonly understood but the real objections to 'oppressive' methods of interrogation are independent of the privilege against self-incrimination and have to do with basic standards of decency in the treatment of suspects which any civilized society should aspire to. The RCCP stated that the suspect had other rights apart from the right not to be subject to oppression,

"... the right not to be held incommunicado, the right to legal advice, the right to be fairly interviewed and to be properly cared for." (50)

In illustrating the contrast between pre and post PACE approaches of the judiciary to the notion of suspects' rights, perhaps the right to legal advice is the most dramatic example. The Judges' Rules contained a provision for the obtaining of legal advice by suspects: the Preamble to the Judges' Rules stated that the Rules do not affect the principle that,

"... every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor." (51)

However, access was routinely denied and the alleged 'right' was rarely supported by a judicial discretion to exclude, as pointed out by Baldwin and McConville, who

commented in 1979,

"It is clear then that even in principle the 'right' of access to a solicitor during police interrogation is far from absolute: it is qualified by the provisions as to unreasonable delay or hindrance and the courts have shown themselves reluctant to exclude evidence merely because it has been obtained in breach of the Rules." (52)

Yet since the introduction of PACE we have had the judicial pronouncement in the Court of Appeal that the right to legal advice is "one of the most important and fundamental rights of a citizen" per Hodgson J. in R v Samuel (1988). Where there is a causal relationship between wrongful denial of the S.58 right and a confession then exclusion under S.78 is a strong possibility (unless the suspect is already aware of his rights - see R v Alladice and R v Dunford). Lord Lane in Alladice suggested that where the police in bad faith deny access to legal advice exclusion of a confession would be easy even in the absence of a causal connection.

"If the police have acted in bad faith the court will have little difficulty in ruling any confession inadmissible under S.78 if not under S.76." (53)

Under the old law even deliberate breach of access to legal advice was rarely treated as affecting the admissibility of a confession under the discretion to exclude evidence obtained in violation of the Judges' Rules. The denial of legal advice to the suspect under the old law only went usually to the weight of the confession before the jury. However, the right to legal advice is now viewed as an essential part of the procedural protections for the suspect which was the *quid pro quo* for the increased and clarified police powers in PACE. As Professor Leigh has pointed out, the power of prolonged detention for questioning which PACE bestowed upon the police was crucially dependent on promises being made in Parliament during the debates on the PACE Bill to improve the legal aid scheme for free legal advice in the police station. (54).

In conclusion, it can be seen how the English law of confessions has evolved into its present complex state where questions of the authenticity of a confession, its reliability and the legitimacy of its obtaining are all issues which go to the admissibility of confession evidence either in the form of an exclusionary rule S.76 2(a) or S.76 2(b) or in the form of the exclusionary discretion S.78. This complexity has recently received high judicial recognition by Ralph Gibson L.J. who commented

"The rules relating to the questioning of suspects and to the admissibility and fairness of evidence of admissions have reached a degree of much complication which can give rise to difficulties for those entrusted with the direction of criminal trials." (55).

In the following chapters it is proposed to consider in depth each of the framing concerns behind modern English confession law: authenticity, reliability and legitimacy (56) (57).

Footnotes to Chapter 2

Confessions: An Historical Overview of the Issues

- (1) Section 82(1) of the 1984 Act defines the term "confession" to include "any statement wholly or partly adverse to the person who made it ... whether made in words or otherwise". Thus a partial admission to an element in an offence would constitute a "confession". For a discussion of the rationale of the admissibility of confessions see J. C. Smith "Exculpatory Statements and Confessions" [1995] Criminal Law Review, p.280.
- (2) "Oppression" was added to the rule by Lord Parker in *Callis v Gunn* [1963] All ER 677.
- (3) *Ibrahim v R* [1914-15] All ER. p.874 at p.878.
- (4) See Wigmore on Evidence Volume 111 at p.330 and Andrews in [1963] Criminal Law Review, p.15 and p.19.
- (5) *R v Warickshall* (1783) 1 Leach 163.
- (6) *Commissioners of Customs and Excise v Harz and Power* [1967] 1 AC 761 at p.820.
- (7) *R v Sang* [1979] 2 All ER 1222 at p.1230. Lord Diplock commented that "The underlying rationale of this branch of the criminal law, though it may originally have been based on ensuring the reliability of confessions is in my view, now to be found in the maxim *nemo debet prodere se ipsum*, no one can be required to be his own betrayer".
- (8) *Miranda v Arizona* (1966) 348 US 436.
- (9) Lord Reid in *Commissioners of Customs and Excise v Harz and Power* [1967] AC 761.
- (10) *R v Stewart* (1972) 56 Cr. App.R.272. Generally speaking in assessing the probative value of a confession attention will be paid to whether the confession is rich in detail and whether it contains any 'intimate knowledge' which could only be known by the perpetrator of the offence. Inherently improbable matters mentioned in the confession will be a warning as to its unreliability as will be any striking omissions in the confession with the known facts of the offence. Inconsistencies within the confession and with other known facts will also signal that the confession may be unreliable.
- (11) P. Mirfield "Confessions", 1985, p.1. Sweet and Maxwell.
- (12) P. Mirfield "The Future of the Law of Confessions" [1984] Criminal Law Review at p.63.
- (13) *Ajodha v The State* [1981] 2 All ER. 193.
- (14) *R v Roberts* [1953] 2 All ER. 340 quoted at pp.1-2 of "Confessions" Mirfield op. cit. In *R v Roberts* Devlin J. commented, "If I do not think that there is any evidence fit to go to the jury that they are his statements I shall rule them out". Roberts, a deaf mute was alleged to have made an oral confession to the police.

- (15) R v Voisin (1918) 13 Cr. App.R.89.
- (16) The Birmingham Six case is discussed in great detail by C. Mullin "Error of Judgement" 1990.
- (17) B. Cox "Civil Liberties in Britain" 1975, Chapter 4, p.171.
- (18) *ibid*.
- (19) *ibid* at p.175.
- (20) R v Mallinson [1977] Criminal Law Review, p.161. C.A.
- (21) R v McKenny et al (1991) 93 Cr. App. R. 287. Interestingly Gudjonsson has shown that testing of the six men in 1987 for suggestibility and compliance revealed that Hill and Hunter scored very low whereas the other four men scored medium to high on the same scale. For Hill and Hunter then fabrication of confession rather than force to obtain a confession may have been the police tactic in 1974. For results of the test see G. Gudjonsson, "The Psychology of Confessions" at p.271. The test illustrated that suggestibility is a highly stable personality trait over long periods of time.
- (22) R v Silcott, Brathwaite, Raghup. Times Law Report, December 9th 1991. Court of Appeal.
- (23) RCCP, paragraph 4.2.
- (24) [1961] Criminal Law Review 283.
- (25) R. N. Gooderson "The Interrogation of Suspects, (1970) Vol. 48 The Canadian Bar Review 270 at p.294.
- (26) RCCJ 1993 paragraph 23, p.7.
- (27) RCCP 1981, paragraph 4.8.
- (28) R v Hunt [1992] Crim LR 582.
- (29) R v Keenan [1989] 3 All ER 598 at p.604.
- (30) R v Delaney (1988) 88 Cr. App. R.338. R v Canale (1990) 91 Cr. App. R.1.
- (31) P. Mirfield "Confessions" 1985, p.218.
- (32) R v Delaney [1989] 88 Cr. App. R. 338 at p.342.
- (33) H. Packer "The Limits of the Criminal Sanction", p.4.
- (34) CLRC 1972 at paragraph 60.
RCCP 1981 at paragraph 4.112.
- (35) Royal Commission on the Police 1929, paragraph 162.
- (36) *ibid*, paragraph 165.
- (37) *ibid*, paragraph 164.

- (38) J. C. Smith, Questioning by Police: Further Points - 1 [1960] Criminal Law Review, p.347.
- (39) CLRC 1972, paragraph 52.
- (40) J. C. Smith. Questioning by Police - Further Points - 1 [1960] Criminal Law Review at p.349.
- (41) *ibid.*
- (42) *Holgate-Mohammed v Duke* [1984] AC 437.
- (43) RCCP Report, paragraph 4.1.
- (44) *R v Voisin* [1918] 1 KB 531.
- (45) RCCP 1981, paragraph 1.21.
- (46) CLRC 1972, paragraph 17.
- (47) *ibid*, paragraph 60.
- (48) RCCP, paragraph 4.132.
- (49) *R v Prager* [1972] 1 All ER 1114.
R v Priestley (1965) 51 Cr. App.R.1
- (50) RCCP, paragraph 4.77.
- (51) *The Judges' Rules* [1964] All ER p.237.
- (52) Baldwin and McConville, "Police Interrogation and the Right to see a Solicitor" [1979] Criminal Law Review, p.145.
- (53) *R v Alladice* (1988) 81 Cr. App.R. 380 at p.386.
- (54) L. Leigh "History of the Police and Criminal Evidence Act 1984" in "Public Law and Politics" edited by C. Harlow, 1986 p.91 at p.111. Leigh comments, "It seems clear that improvements to the legal aid scheme were of capital importance in procuring acceptance of the institution of detention for questioning".
- (55) Per Ralph Gibson L.J. in *Halawa v Federation against Copyright Theft* (1995) 59 J.P. 1817.
- (56) It should not be presumed that the creditworthiness issue, authenticity issue and legitimacy issue are mutually exclusive in any given case. A particular case may give rise to problems of, for example, both creditworthiness and legitimacy or for example both legitimacy and authenticity. A defendant may allege that he was induced by illegitimate means into making a confession which was in fact untrue or a defendant may allege that a police officer wrote out a confession which he was tricked or forced into signing.
- (57) It is important to distinguish confessions to the police or other parties pre-trial from a plea of guilty at trial, such a plea of guilty being a confession of fact. Confessions to the police or a third party pre-trial are not conclusive of guilt, they can be retracted, explained or denied. However, a plea of guilty in court has a different status from a confession to the police. In *R v Rimmer* [1972] 1

WLR 268, Sachs L.J. commented, "A plea of guilty has two effects: first of all it is a confession of fact; secondly it is such a confession that without further evidence the court is entitled to, and indeed in all proper circumstances will act upon it and result in a conviction". A guilty plea can only be retracted at the discretion of the court, not the defendant and the cases tend to show that the discretion should be sparingly exercised in favour of the accused, e.g. see R v McNally [1954] 1 WLR 933.

CHAPTER 3

THE CREDITWORTHINESS OF CONFESSIONS; THE CONTEXT OF POLICE INTERROGATION

Introduction

This chapter will examine the context of police interrogation as a backdrop to the issue of the creditworthiness of confessions, then there will be a discussion of the reasons why suspects might make false confessions and a typology of false confessions. There will then be a discussion of the meaning and interpretation of Section 76 2(b) of PACE. The next section will look at possible underlying theories of exclusion under Section 76 2(b). The last section will look at the admissibility of psychiatric and psychological evidence under Section 76 2(b).

The context of police interrogation

The Benthamite response to the problem of the creditworthiness of confession evidence would be to view the issue as always going to the weight that the court attached to the evidence rather than as the position in English law has been, to see the issue as going in certain circumstances to the admissibility of the evidence. The Benthamite would see no reason to accord confession evidence any different status from any other piece of relevant evidence. The basic test of relevancy that Bentham constructed as a condition of the admissibility of evidence would seldom be an issue, for a statement by the accused implicating himself in the offence with which he is charged is without doubt relevant to the case against him. Wigmore wrote,

"The policy then should be to receive all well-proved confessions in evidence and to leave them to the jury, subject to all discrediting circumstances, to receive such weight as may seem proper." (1)

Wigmore seems here to make an exception with regard to admissibility for confessions which are not "well proved", i.e. not authentic in the sense of not having been made at all. The issue of "authenticity" is a separate issue to which this thesis will return in Chapter 4.

The issue of the creditworthiness of confession evidence provides a good example of the deficiencies of the Benthamite approach to the law of evidence. The Benthamite theory ignores as a question going to the admissibility of confession evidence, the complex psychological and sociological processes which produce confession evidence from interrogation. However, the law should respond to this problem in terms of the admissibility of confessions to further the goal of safeguarding the innocent against conviction. It is extremely doubtful whether this goal can be adequately realised by an approach which allows for the free admissibility of confessions. Furthermore, the Benthamite perspective ignores the requirements of the political morality of our society which insists that in certain circumstances the state should not rely on apparently reliable and relevant evidence to secure a conviction of guilt. This point will be developed in the chapter on the legitimacy (2) of confessions, but a fairly obvious example would be a confession obtained by torture. No civilized system of justice should allow a conviction on this kind of evidence. For the Benthamite, how evidence is produced or elicited is a matter of weight of the evidence before the trier of fact.

It is the context of police interrogation of suspects in order to procure a confession that is the background to the provision of Section 76 2(b) in the Police and Criminal Evidence Act 1984. As Wolchover and Heaton Armstrong comment in their monograph "Confession Evidence". (3)

"Most confessions are adduced as the product of questioning rather than as spontaneous utterances provoked by the pronouncement of suspicion or arrest. The study of confession evidence as a psychological phenomena is necessarily integral therefore with that of the dynamics of interrogation: it is impossible to study confessions in isolation of the process of obtaining them."

This process of police interrogation and certain dubious police tactics in interrogation presents a potential threat to the reliability of confessions. The Criminal Law Revision Committee in 1972 commented,

"Persons who are subjected to threat, inducements or oppression may confess falsely; juries are particularly apt to attach weight to such a confession even though the evidence of the threat, inducement or oppression is before them; consequently they must be prevented from knowing of the confession." (4)

The reasons why suspects might make false confessions and a typology of false confessions

Research has illustrated (see for example "The Case for the Prosecution" by M. McConville, A. Sanders and R. Leng (5)) that the police view interrogation as being primarily aimed at securing a confession of guilt through questioning rather than being an open ended inquiry into the truth of the suspect's involvement in the alleged crime. As J. Baldwin comments, police interrogation "is concerned with future rather than past events" (6) i.e. that police interrogation is used by the police as a means of obtaining evidence for use in court rather than establishing the actual involvement of the suspect in the alleged crime. Given that this is how the police view interrogation and the vulnerabilities of certain suspects (for an account of the important concept of interrogative suggestibility, see G. Gudjonsson "The Psychology of Interrogations, Confessions and Testimony" (7)) the possibilities of a false confession emerging from the police-suspect interaction in interrogation is not an insignificant one. A potentially dangerous combination of overbearing police officers, overly confident in the suspect's guilt and frightened, confused and perhaps mentally ill-handicapped suspects, explains why the interrogation of suspects can present a major threat to the reliability of confession evidence. Barry Irving (8) has commented that,

"Interrogation ... is a two-way process in which the participants swap information. The interrogator lets the suspect know what he wants to find out when he is dissatisfied with answers, where he requires extra detail, when he wants to understand connections between statements, what he believes or disbelieves and what his attitudes to the information are."

This process can lead the suggestible suspect to adopt the police account of events. Of Armstrong's confession it has been said " ... if Armstrong sang like a canary it was a song the police had taught him" (9). Armstrong, as one of the Guildford Four, served fifteen years in prison on the basis of his false confession.

The importance of the psychological research undertaken by Gudjonsson, Mackeith and others is that the police do not have to engage in violence or threats of violence nor use inducements for a false confession to emerge from interrogation and this is so even if the suspect is not mentally ill nor mentally handicapped or in other ways mentally deficient. Mere psychological manipulation in itself by the police, such as playing on a suspect's low self-esteem can be enough to elicit a false confession to a very serious offence from a normal person in police custody. Gudjonsson and Mackeith (10) in a research article, "A Proven Case of False Confession:

Psychological aspects of the Coerced-Compliant type", draw attention to a recent English case where a 17 year old youth falsely confessed to two murders of old ladies who had also been sexually assaulted. The confessions took place during police interrogation of the youth whilst he was not legally represented. The youth was of average intelligence and he suffered from no mental illness and his personality was not obviously abnormal. (A coerced-compliant confession means one where the suspect does not confess freely and voluntarily but rather confesses for some immediate instrumental gain such as to escape police pressure or police authority.)

This confession was subsequently by chance proved to be false. Another individual confessed to the crime and was convicted for it. The youth had spent 11 months on remand though for the crime. The false confession appears to have resulted from excessive psychological manipulation and verbal pressure of a young man who was at the time distressed and susceptible to interrogative pressure. Gudjonsson and MacKeith comment,

"The youth's self-esteem was clearly manipulated, particularly by the senior detective who played on his alleged failures with girls. The most serious confession (i.e. the murders) followed immediately upon this kind of manipulation." (11)

Excessive psychological manipulation of a normal suspect in the context of police detention and interrogation is therefore capable of eliciting a false confession. Threats of violence or the use of inducements do not present the only threat to confession reliability with the interrogation of normal suspects.

Section 76 2(b) of PACE can be viewed as a direct response to the particular threat to the reliability of confessions posed by certain police tactics in the interrogation room. Of course threats to the reliability of a confession can derive solely from the suspect himself without the need for any police misconduct or manipulation. A false confession may emerge from normal police interrogation where no dubious tactics have been used; the confession may still be false because of a specific vulnerability of the suspect who is particularly suggestible or under the influence of drink or drugs or who is mentally ill. There is also the concept of a "voluntary" false confession, which is now well known to psychologists. Gudjonsson comments (12)

"Voluntary false confessions are offered by individuals without any external pressure from the police. Commonly these individuals go voluntarily to the police station and inform the police that they have committed the crime in question."

The question then arises as to why does S.76 2(b) limit the judicial enquiry into the reliability of the confession to those cases where there is a causal link between the potentially unreliable confession and "anything said or done" by the police which is conducive to unreliability? The reason for the limitations of S.76 2(b) is because of the degree of danger to the reliability of confession evidence obtained by certain police tactics in interrogation. Confessions so obtained suffer from systemic defects in terms of their reliability. In contrast with confessions made spontaneously to the police or confessions given voluntarily or confessions given under normal interview conditions there is no such systemic danger of unreliability, and therefore there is no justification for a rule of exclusion where there is a possibility that such confessions are false.

There is some truth in the old common law assumption that in the absence of threats or inducements no one of sound mind would confess unless they were guilty of the offence, see R v Lambe (1791) (13) and R v Warickshall (1783) for old common law authorities on the great probative worth of confessions based upon the common sense observation that a person is not likely to confess to something they have not done.

Of course that old common law assumption is in need of some corrective analysis in the light of recent psychological research and the history of false confessions in England. A voluntary false confession is always a possibility and there are plenty of examples of the genre, e.g. the many false confessions to the Lindbergh baby kidnapping case in the 1930s in the USA. (14)

In England the Home Office Forensic Scientist Professor Keith Simpson wrote in his autobiography that voluntary false confessions,

"... are a well known phenomenon in well publicized murder cases, the motive doubtless being to provide a little colour in an otherwise dull life. In a case of mine in Hertfordshire in 1956 no fewer than three notoriety seekers had 'confessed' before I had time to reach the police station only thirty miles from London; and I had set out immediately I was called." (15)

These people who make false voluntary confessions may not always be mentally ill or

suffering from a severe personality disorder. For example, a person may make a false voluntary confession to the police in order to protect somebody else, e.g. a close relative, from conviction for the crime. Gudjonsson has commented that with regard to juveniles, confessing to protect someone else from criminal responsibility may be common. (16)

There is also a possibility of a false confession emerging from normal police interrogation and detention, this could be so even where the suspect is not mentally ill nor suffering from a personality disorder. Gudjonsson comments, (17),

"False confessions are not confined to the mentally handicapped or the mentally ill. The view that apparently normal individuals would never seriously incriminate themselves when interrogated by the police is totally wrong and this should be recognised by the judiciary."

Custodial interrogation is in itself inherently coercive and this may be inherently too much pressure for certain vulnerable suspects who confess falsely because of the mere fact of interrogation. The Stevan Kiszko case providing an example of this phenomenon. Kiszko confessed to the murder of a young girl because he was frightened of the police and wished to go home to his mother. There was no suggestion of improper pressure by the police although crucially he was not interviewed in the presence of a legal advisor. He was mentally backward. His conviction was quashed by the Court of Appeal in 1992 after evidence showed he could not be the killer. However, it is argued here that the discretionary powers of the judge are adequate to deal with the problem of unreliable confessions which arise from those defects which lie within the suspect solely, such as psychological vulnerabilities rather than from the use of unethical interrogation techniques by the police.

A full taxonomy of the different kinds of false confession is provided by G. Gudjonsson in "The Psychology of Confessions, Interrogation and Testimony" (18) but the three main types are the aforementioned voluntary and coerced-compliant false confessions and the coerced-internalized false confessions. With the coerced-compliant false confession the suspect confesses for a perceived immediate instrumental gain, such as release from police custody and "the perceived immediate gains outweigh the perceived and uncertain long-term consequences ... suspects naively believe that somehow the truth will come out later, or that their solicitor will be able to rectify their false confession." (19)

The coerced-internalized false confessor comes to believe during police interrogation, even if this belief is later lost, that they have committed the crime in question. Such a confession is linked to a "memory distrust syndrome" where the suspect distrusts his own memory and is also linked to high trust in the police and the honesty of their account of events.

Section 76 2(b) of The Police and Criminal Evidence Act 1984

Section 76 2(b) was enacted in order to replace the old voluntariness rule of the common law and although it is not proposed now to give a history of that rule (on this see Chapter 2 of this thesis) a few points are worth noting at this stage of the discussion. First of all the voluntariness rule recognized that confessions made under certain circumstances are so systemically unreliable that an exclusionary rule was justified to rule out a confession whenever those circumstances existed. Those circumstances were the impact on a suspect of certain methods of questioning which were such as to render his confession "involuntary" and therefore suspect in terms of creditworthiness. Those methods were those which employed threats and inducements, and, at a later stage of the development of the rule, "oppression".

Section 76 2(b) of PACE was a clean break from the common law but S.76 2(b) follows the voluntariness rule to the extent that the demarcation between admissible and inadmissible confessions is defined by focusing on certain undesirable, unreliability inducing methods of interrogation. To this extent both the common law and S.76 2(b) incorporate important psychological insights about the reliability of confessions made under certain conditions and are in that way superior to the Benthamite approach, which would see such circumstances as going to the weight of the confession only.

The second point to make is that the voluntariness rule was arbitrary to the extent that it only took regard of inducements, threats and "oppression" in the context of interrogation as bringing into operation the exclusionary rule. Section 76 2(b) in contrast focuses on,

"... anything said or done which was likely in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof."

This is more satisfactory in that it acknowledges that in the inherently coercive nature of custodial interrogation other police tactics apart from inducements or threats or "oppression" could affect the reliability of confession evidence. For example, an unlawful denial of legal advice to a person of low IQ could well lead to an unreliable confession being made: see the case of R v McGovern (1991) which concerned the unlawful denial of legal advice and the operation of S.76 2(b). (20)

The third point to make about the voluntariness rule is that it had ossified to the extent that even the mildest threat or inducement could lead to the confession being ruled inadmissible. In contrast, S.76 2(b) brings the issue of unreliability inducing police tactics to the fore by asking whether any confession which the accused made was likely to be unreliable.

The focus now is on the potential of the interrogation methods to affect the reliability of confessional evidence, not as before on whether a particular form of words had been used by the police in questioning the suspect. It is therefore not the case that the making of inducements prior to the suspect making a confession, will necessarily lead to a confession being excluded under S.76 2(b). The section requires the trial judge to determine whether the inducement was in the circumstances existing at the time such as was likely to render any confession made unreliable. Therefore, not all inducements will fall foul of S.76 2(b) since not all inducements are likely to have an effect on the reliability of the suspect's confession. As the CLRC in 1972 explained,

"If the threat was to charge the suspect's wife jointly with him, the judge might think that a confession even of a serious offence would be likely to be unreliable. If there was a promise to release the accused on bail to visit a sick member of his family, the judge might think that this would be unlikely to render a confession of a serious offence unreliable but likely to do so in the case of a minor offence." (21)

Section 76 2(b) is modelled on a proposal made by the CLRC in 1972 although the S.76 2(b) test is wider than the CLRC test, in that S.76 2(b) refers to anything said or done, whereas the CLRC limited the test to threats or inducements.

A contrast can then be made between the type of police method in interrogation which brings S.76 2(a) into operation and the type of police tactic which brings S.76 2(b) into operation. S.76 2(a) is directed at absolutely prohibited interrogative techniques such as violence or the threat of violence. These are the core prohibited practices. S.76 2(b) is directed at another range of tactics such as the use of inducements, the

playing down of the seriousness of a serious offence etc. The use of these tactics in interrogation by the police does not necessarily render a confession made following their use inadmissible. However, there is a possibility that in the circumstances of the case their use may lead a trial judge to rule the confession inadmissible under S.76 2(b). Therefore the police must be careful in their use of inducements whereas in contrast the police must never use violence or the threat of it in interrogation. Section 76 2(a) and S.76 2(b) therefore differ in the strength of their injunction to the police about certain interrogative methods. However, the reference in S.76 2(b) to "any confession" prevents S.76 2(b) from being a straightforward test on the effect of interrogation methods on the reliability of the confession at issue. It is proposed to analyse in detail later in this thesis the reasons for this phraseology in S.76 2(b) which focuses attention on a hypothetical confession rather than the actual confession made.

It needs to be emphasized that Section 76 2(b) is not a straightforward test on the reliability of a confession. The section requires a causal relationship between "anything said or done" by the police or others and the confession before the exclusionary rule operates. Thus, for example, a confession made perfectly voluntarily by a mentally ill individual which is in fact false, would not fall within the operation of S.76 2(b). Perhaps the prejudicial effect probative value discretion or the Section 78 discretion could be used to rule such a confession inadmissible but it is not within the language nor the purpose of S.76 2(b) to operate in such circumstances. The case of R v Brine (1992) (22) is an example of where the Court of Appeal said S.78 should have been used to rule an unreliable confession inadmissible. In R v Brine S.76 2(b) was held inapplicable because the predisposition to stress the accused suffered when interrogated was something internal to him and not "anything said or done" to him for the purposes of S.76 2(b). The judgement in R v Mackenzie (23) provides a further safety net for confessions made by mentally handicapped suspects which are unconvincing in their reliability. This is a common law test independent of S.76 2(b) and requires the trial judge to withdraw the case from the jury where a confession forms the substantial part of the prosecution case and that confession is an unconvincing one made by a mentally handicapped person.

Before a detailed consideration of S.76 2(b) is attempted it is proposed to analyse the particular threat to the creditworthiness of confessions by police interrogation methods. At the outset it is important to note the following; the great importance of confession evidence to the English Criminal Justice System determines to a large degree the kind of interrogative approach to suspects that the police will take.

If confessions mattered much less to the Criminal Justice System then it is likely that the various pressures put on suspects to confess by the police would be reduced. However, the police are put under strong pressures by the criminal justice system to secure confessions (for various administrative and proof reasons) and this in turn translates into strong pressures being put on suspects to confess in police interrogation. The context of the "admissibility of evidence" also generates pressure on police to obtain confessions. The point is that not all information about an offence in the hands of the police is admissible in evidence.

The police themselves value confessions as being a 'quick route' to a conviction. This view has been strengthened by a judiciary, who in the past as Michael Mansfield Q.C. points out, "have commonly told juries that they could have no better form of evidence" (24) than a confession. American research on the effect of a confession on juries suggests that they are more influenced by a confession than by an eye witness's identification. Kassin and Wrightsman comment,

"Our research leads to the conclusion that juries are heavily influenced by the presence of a confession as part of the prosecutor's evidence." (25)

This fact is likely to be part of the knowledge of police culture. Moreover, many confessions lead to a guilty plea obviating the need for the police to attend court as witnesses or to gather other evidence for use by the prosecution. Much police time is potentially saved by obtaining a confession. This is likely to increase the desire of the police to obtain an early confession through interrogation, thereby increasing the pressures on the reliability of confession evidence obtained through interrogation as well as raising the possibility of undue pressure being placed on suspects, pressure which might be "oppressive". It is vital in order to understand the significance of S.76 2(a) and S.76 2(b) of PACE to appreciate the role of confession evidence in our criminal justice system.

This is to reflect an important point made by Professor Twining (26) in 1978, who urged for an integrated analysis of confessions, analysing the role of confessions in the criminal process as a whole,

"... because of the concentration on the exclusionary rules, nearly all of the existing literature on confession treats retracted confessions as the norm; yet retracted confessions surely represent only a small minority of confessions. Typically neither the scholarly literature nor public debate

gives a balanced and realistic total view of the role of confessions in the criminal process; for example, the significance of confessions as an important stage en route to a guilty plea. Evidence scholarship has failed to give a systematic account of confessions in criminal process as phenomena. As a result, it provides no clear answers to such questions as who confesses to whom about what under what conditions, in what form and with what results? Yet it is difficult to see how one can hope to make sensible and informed judgements about the issues of policy relating to confessions and interrogation without at least tentative working answers to such questions."

Twining offers this as a useful example of the deficiencies of most Evidence Scholarship at that time, namely that the literature by focusing on the rules of evidence neglected among other issues the systematic study of fact-finding institutions and processes. Confessions cannot be properly understood unless their overall role in the criminal justice system is grasped. It is often and rightly assumed that custodial interrogation is inherently coercive. At a basic level, no one can enjoy the prospect of being questioned against their will in alien surroundings. However, it is important to recognise that the intensity of the psychologically coercive pressures imposed on suspects by custodial interrogation is not a fixed invariable. Whilst all custodial interrogation is "inherently coercive" the intensity of the psychological coercion must be a function in part of the importance of the strategy of interrogation and hence confessions to the police in a particular country. This importance is in part derived from the demands of the criminal justice system itself.

Given that the criminal justice system imposes these pressures on the reliability of confessions it is important that the system provides some mechanism of quality control to filter out those methods of police interrogation which tend to threaten the reliability of confessions in the long run. Section 76 2(b) can be understood in this way: as an attempt to provide a quality control on confessions obtained by police interrogation, a method of obtaining evidence which is required by the system itself.

It is unlikely that forensic science evidence could provide an alternative to reliance on confession evidence as a source of proof, as C. Walker has recently written. (27)

"Given that forensic science evidence is available in only 1:200 cases and that resources do not stretch to its analysis and use in all possible cases, the hope that science may provide an antidote to the police construction of criminality especially through interrogation, seems forlorn.

The requirements of a criminal law dominated by subjectivist *mens rea* proof issues also makes confessions indispensable to the criminal justice system. As the Scottish jurist Dickson recognised as long ago as 1887,

"... the peculiar value of confessional evidence lies in its furnishing the best proof of the intention which constitutes the essence of most crimes." (28)

It may also sometimes be the case that the obtaining of a confession may be the only way of proving an offence. A good historical example of that situation is the conviction in March 1950 of the atomic scientist Klaus Fuchs for treachery. Fuchs received a fourteen year sentence from the Lord Chief Justice Lord Goddard. Goddard's biographer comments of the Fuchs case, (29)

"He had made a full confession. Without it there could have been no prosecution for the security services could not lay hands on a single witness to the crimes committed."

Studies from the United States show that confession evidence is the only evidence available in about 30% of prosecutions for child sexual abuse. It may also be the case that alternative techniques for investigating offences present their own problems for the criminal justice system. Kent Greenawalt criticizes the simplistic notion that "increasing reliance on confessions would replace more reliable less intrusive techniques of criminal investigation". Greenawalt comments, (30)

"In some cases alternative techniques simply cannot suffice. Moreover, some typical kinds of proof such as eye witness identification may often be less reliable than admissions. Also some 'alternative' techniques such as informers and electronic surveillance may be even more intrusive on individual liberty than pressures to answer questions. Still the argument remains that in systems relying heavily on confessions there is a tendency to overbear suspects rather than establish guilt by independent means."

The Interpretation of Section 76 2(b) and possible underlying theories of exclusion under Section 76 2(b)

As the cases of R v Goldenberg (1988) (31) and R v Crampton (1991) make clear, the focus of S.76 2(b) is on police methods of interrogation which are likely to have an adverse effect on the reliability of confession evidence so obtained. The section does not apply where the defect, i.e. the threat to the reliability of the confession lies solely within the suspect. Thus in Goldenberg and Crampton the police engaged in the interrogation of drug addicts in the stages of withdrawal. There were suggestions by the defence that they may have confessed in order to get bail so as to obtain supplies of their drug. The purpose of S.76 2(b) is not to rule inadmissible confessions made whilst the suspect was experiencing the abnormal stress and pressure which is an inevitable part of custodial police interrogation.

In R v Crampton it was held that it was doubtful whether the mere holding of an interview when the appellant was withdrawing from drugs was "something done" within the meaning of Section 76 2(b) of PACE. In R v Goldenberg it was held that the words "said or done" in Section 76 2(b) did not extend so as to include anything said or done by the person making the confession; the reasoning of the court was that by use of the preceding words "in consequence" in the subsection it was clear that a causal link between what was said or done and the subsequent confession had to be shown. Accordingly "anything said or done" applied only to something external to the person making the confession and as was stated by the Court of Appeal "no reliance was placed at the trial on anything said or done by the police", therefore the confession was admissible. Moreover in R v Crampton the Court of Appeal held that there was no reason for the judge to have excluded the confession in the exercise of his discretion under S.78 of PACE. In R v Goldenberg the trial judge had ruled against a submission that the confession's prejudicial effect outweighed its probative value. The Court of Appeal was "also satisfied that the judge was right to rule against the submission that the prejudicial effect of this evidence outweighed its probative value".

The decisions in Goldenberg and Crampton have attracted some adverse academic criticism. Professor Birch comments that the approach of the Court of Appeal in R v Goldenberg

“... produces the odd result that where D. is given a drug by a police doctor prior to confessing, the test for admissibility will be different from where the drug is self-administered.” (32)

In the first case, where the police doctor gives the drug, S.76 2(b) will apply; in the second case where the drug is self-administered S.78 will apply. It is not an “odd result” if one considers the rationale for S.76 2(b). The focus is, to repeat, on unreliability inducing police methods of interrogation and where the police administer a drug to a suspect prior to interrogating him then this is precisely the kind of situation S.76 2(b) is designed to deal with. Where the police merely interview someone in accordance with the Codes of Practice and that person happens to be in the stages of withdrawal from drugs then it is strongly arguable that S.76 2(b) is not applicable in this situation. Holding an interview in accordance with the Codes of Practice cannot be, consistently with the rest of the PACE Act, a practice which is covered by S.76 2(b). The PACE Act legitimates police interrogation so long as it is in accordance with the Codes of Practice; it would be inconsistent, if holding an interrogation in compliance with those Codes was to be rendered nugatory by the exclusion of a confession under the S.76 2(b) rule of law. Of course a judge always has the discretion to rule out a confession if its probative value is outweighed by its prejudicial effect. This is so even if the Codes of Practice have been fully complied with. However, this is an exceptional measure for a judge to take and in the case which is often quoted to support the existence of this discretion for confessions, R v Stewart (1972), the facts of the case were described by Mr. Recorder Hawser as “very exceptional”. There is a considerable difference in scope between saying that a confession from an interview with a drug addict in compliance with the Codes is covered by the S.76 2(b) rule of law and saying that the same confession might be ruled inadmissible by use of the probative value prejudicial effect discretion.

It was expressly denied by the Court of Appeal in R v Crampton that the mere holding of an interview at a time when the appellant is withdrawing from the symptoms of heroin addiction is something which is done within the meaning of Section 76(2). Yet still it might be argued that interrogating people who are withdrawing from drugs is “something done” to the vulnerable suspect. It can be argued that interrogating people who are obviously in a drug withdrawal state is likely in the long term to lead to many unreliable confessions being made from those kinds of suspects and that, therefore the police should be deterred by S.76 2(b) from engaging in such a practice. However, as Stuart-Smith in R v Crampton pointed out,

"The mere fact that someone is withdrawing, and may have a motive for making a confession, does not mean the confession is necessarily unreliable." (33)

A report of a Home Office medical working group has commented,

"Many confessions given in withdrawal states are reliable .."

and commented also that

" ... symptoms and signs of mild opiate withdrawal may be no barrier to interview whereas severe withdrawal may render an addict unfit to be interviewed." (34)

This medical opinion seems to be in accord with judicial doctrine on the subject. In R v Rennie (1982) Lord Lane L.J. commented that a reliable confession is often made for a variety of motives, including remorse and a desire to terminate the interrogation early. Lord Lane C.J. commented in Rennie,

"Very few confessions are inspired solely by remorse. Often the motives are mixed and include a hope that an early admission may lead to an earlier release ... if it were the law that the mere presence of such a motive ... led inexorably to the exclusion of a confession, nearly every confession would be rendered inadmissible." (35)

Interestingly, this dictum seems to find some support in empirical research by Gudjonsson and Bownes into "The Reasons why Suspects Confess during Custodial Interrogation: data from Northern Ireland". (36) They conclude after a survey of offenders who confessed, that most suspects confess due to more than one single facilitative factor,

"The three facilitative factors, External Pressure (such as police persuasion and fear of confinement), Internal Pressure (an internal need to tell the police about their criminal deed) and proof (the perception of proof where the subject believes there is no point in denying the allegation as the police will eventually prove his involvement) were in varying degrees endorsed by all subjects which indicates that suspects confess to the police for a variety of reasons rather than for any one reason. However, for any given suspect one group of factors is likely to predominate."

It is however, the suspect's perception of the proof that the police have against him which is the most potent cause of the making of confessions. It is for this reason that the police may be tempted to lie as in R v Mason about the state of the evidence against the suspect. Indeed, in the notorious case of R v Heron (37) the police lied to Heron about him being seen at the scene of the crime by alleged witnesses. It was this factor amongst others that persuaded the trial judge that the interrogation of Heron had been "oppressive" and that his confession was therefore inadmissible under S.76 2(a). Gudjonsson has recently documented another dramatic effect of the police lying to a suspect about the state of the evidence against him and that is that a vulnerable suspect may actually come to believe he has committed an offence. In an article entitled "How eagerness to please can result in a false confession", Gudjonsson documents (38) an English case where a vulnerable twenty-five year old man who was described as someone "who could easily be made to say anything to get away from the situation he could not handle", confessed during police interviewing to having started a series of fires. The interesting feature of the case is that the confession "had the hallmarks of a coerced-internalized false confession". This is a false confession where the suspect actually comes to believe the police account that the suspect committed the alleged offence. Gudjonsson comments that,

"The case illustrates the process whereby such confessions can in certain circumstances occur quite easily with psychologically vulnerable individuals. The suspect's salient vulnerabilities were: his eagerness to please the investigating officers; firm trust in the police and great respect for them; lack of confidence in his memory of events, and high suggestibility."

A crucial feature of the case was that police officers lied to the suspect about alleged witnesses seeing him at the scene of the crime. This had an impact in persuading the suspect that he must have committed the offences even though he could not clearly remember doing so. Gudjonsson comments,

"Mr. J, the suspect, told the author that when he arrived at the police station he went into the kitchen area and was interviewed there by the police officers; this interview was not tape-recorded. The police wanted him to make a statement and claiming that they had witnesses to say that they had seen him set fire to a caravan. In fact no such witnesses existed. The police officers seemed very sure of Mr. J's guilt and kept telling him that he had done it on drink and that they were there to help him. They said that it was not a very serious offence and once he had owned up to it he could go home. Mr. J. claims that after a while he began to believe the police officers, thinking that he must have committed those offences even though he could not remember having done so."

A dangerous consequence of police lies in police interrogation is hereby illustrated. Lying by the police is particularly insidious because as the visible symbols of lawful authority and as agents of the law, they are presumed to be honest and truth-telling individuals. Vulnerable individuals may well take at face value anything the police tell them; this fact could well lead to the production of false confessions, as the case mentioned above by Gudjonsson illustrates. It can be argued that many suspects who make a confession may have various motives for doing so, yet it is not clear that solely because there may be another explanation for the confession as well as guilt that the jury should not be allowed to assess the confession and decide for themselves what reason or reasons for the confession the suspect had. A too broad interpretation of S.76 2(b) which only requires the police to interview with propriety a vulnerable suspect before the section applies, would take too many confessions away from the deliberations of the jury and would be contrary to the intention of Parliament in passing S.76 2(b) (on this point see the chapter on "Reform of the law of confessions" Chapter 6).

If the desire to secure an early release from police custody was induced by something said by the police then of course S.76 2(b) could well apply to rule out any subsequent confession as a matter of law. However, where the police do not induce the desire to go home early but the desire still exists within the suspect, then S.76 2(b) has no applicability. It should be remembered that the basic doctrine of the law of criminal evidence is that the assessment of the credibility of evidence is normally for the jury. In R v Mackenzie Lord Chief Justice Taylor commented,

"The question whether the circumstances raise doubts as to the reliability of any confession is a question of fact. It would therefore normally be a matter for the jury to decide." (39)

Of course, individual vulnerabilities of the suspect can be taken into account in deciding the S.76 2(b) question but it requires also some behaviour from the police which is beyond the "mere holding of an interview" with a suspect in accordance with the Codes of Practice. In R v McGovern (1990) even though the actual confession to a very serious crime, murder, was admitted by the defence to be true, the Court of Appeal excluded the confession under S.76 2(b), which illustrates very dramatically that the focus of the subsection is not on the truth of the actual confession but on the reliability of a hypothetical confession obtained by certain unreliability inducing police tactics. The facts of R v McGovern reveal a mix of suspect vulnerability and police misconduct. Both these factors were taken into account by the Court of Appeal

in excluding the confession. The suspect was six months pregnant at the time of the interrogation, she was of limited intelligence (IQ of 73) and was very emotionally distressed at the time of the interrogation.

The police had wrongfully denied the suspect legal advice, a right she should have had under S.58 of PACE. Farquharson L.J. in the Court of Appeal held,

"This court is clearly of the view that even if the confession given at the first interview was true, as it was later admitted to be, it was made in consequence of her being denied access to a solicitor and is for that reason in the circumstances likely to be unreliable ... We think that if a solicitor had been present at the time this mentally backward and emotionally upset young woman was being questioned, the interview would have been halted on the very basis that her responses would be unreliable." (40)

Farquharson L.J. made it clear that,

"... the fact that the confession was in substance true is expressly excluded by the Act as being a relevant factor." (41)

A combination of individual vulnerabilities and police misconduct can bring S.76 2(b) into play even where the actual confession is true but individual vulnerabilities of a suspect does not in itself bring S.76 2(b) into play, that is clear from R v Goldenberg and R v Crampton. The focus is not on the objective reliability of the confession, rather it is on the conduct of any police officer or another person to whom the confession was made. This is not to say that the police officers need to be in "bad faith", by what they say or do to the suspect, indeed in R v Delaney the officers were acting in good faith, yet the Court of Appeal said that S.76 2(b) should have been used by the trial judge to exclude a confession where there might have been an inducement offered to a suspect of very low I.Q. However, a 'mere interview' held in full accordance with PACE and the Codes of Practice is not enough to bring S.76 2(b) into play. Indeed if it did it would introduce a contradiction into the PACE scheme, for then perfectly proper police behaviour in interrogation would lead to inadmissibility as a matter of law for certain confessions. The discretionary exclusion of those same confessions is an altogether different matter, since no contradiction is present in arguing that although police behaviour conformed with PACE a confession is as a matter of discretion too unreliable to go before a jury.

However, the use of a case by case exclusionary discretion for confessions obtained by unreliability-inducing interrogation methods would run the risk of allowing into the trial too many false confessions because judges as fallible beings would make mistakes as to the reliability of a particular confession.

This perhaps helps to explain why the focus in S.76 2(b) is on "any confession" and that a confession can be excluded "notwithstanding it may be true". This urges the judge to be ultra cautious before admitting a confession that may have been obtained by unreliability-inducing police methods, hence the judge's focus should be not on this actual confession but 'any' confession the suspect may have made as a result of those dubious police methods, 'any confession' being a much more stringent test than focusing on the actual confession. Perhaps the reason for the hypothetical language is that judges are likely to admit fewer false confessions by mistake by applying the hypothetical test rather than by focusing on the actual confession and its reliability.

The main point though, is that only an exclusionary rule of law is capable of safeguarding the criminal trial from a type of evidence which has deep flaws in terms of its general reliability. Confessions obtained by the use of strong inducements or threats or excessive psychological manipulation are likely to be highly unreliable.

It might be asserted though that the danger to confession reliability posed by certain police methods should in principle be one for the jury to assess. However, this is a misguided argument. Indeed Professor Birch refers to the danger of the jury not being able to properly assess the weight of a confession obtained by dubious police methods,

"Section 76 merits a separate existence because it is declaratory of the effects of a particularly common and dangerous form of unreliability resulting from things said or done in the interrogation process. Common because there is always a risk that defendants under interrogation might make unreliable statements in order to halt the process and dangerous because juries are believed to put too much faith in confessions obtained under interrogation." (42)

(It must be remembered that confessions obtained through interrogation are one of the most recurring forms of evidence that appear before the criminal court: so the risks inherent in this type of evidence are magnified.) Professor Birch comments that S.76 2(b) reflects these observations,

"Thus it is provided that any suspicion of unreliability of this nature must lead to exclusion. The strength of the fear behind the provision can be seen from the fact that the section does not even concern itself with actual unreliability: the question to be put is a hypothetical one concerning the reliability of any confession made in those circumstances." (43)

It can then be argued that the language of S.76 2(b) represents sound policy, that is, a wish to be ultra cautious with this kind of evidence which is systemically unreliable and liable to carry undue weight with the jury if admitted. The problem for this interpretation of S.76 2(b) is that where there is no risk of the actual confession being unreliable the confession may still be excluded.

For example, in R v McGovern (1990) the defence admitted the confession was true yet the Court of Appeal still quashed the conviction because the trial judge had failed to apply Section 76 2(b) properly. It is hard to square this decision with the view that sees S.76 2(b) as being an exercise in caution by focusing attention on a hypothetical rather than the actual confession.

A rival interpretation of the underlying theory of exclusion under Section 76 2(b)

There is, however, a rival interpretation of the purposes of S.76 2(b). A.A.S. Zuckerman puts it as follows,

"It may be said that the legislature was using the hypothetical form in order to create a normative test rather than a factual one. According to this view the aim of the hypothetical phraseology is to encourage the court to concentrate its attention on the propriety of the standards of interrogation rather than on their effect on the particular accused. Thus the judge has to pass an evaluative judgement on whether the methods adopted by the police are likely in the long run of cases to have an adverse effect on the reliability of confession."
(44)

On this view S.76 2(b) has a deterrent rationale: it aims to influence police behaviour in terms of their interrogation tactics by ruling inadmissible any confession,

notwithstanding the actual confession may be true, that may have been made as a result of unreliability inducing police methods. If the police wish to have confessions admitted in evidence then they must on this theory, pay attention to the methods/techniques they use in obtaining confessions.

An example of police tactics which it is desirable to deter is where the police offer strong inducements to suspects to make confessions. In R v Phillips (1987) the Court of Appeal considered that when the police told the appellant that if he confessed other offences would be "taken into consideration" then the trial judge should have excluded the confession under S.76 2(b).

It should be noted however, that if the suspect asks the police what will happen if he confesses then the police can legitimately inform him that for example other offences may be taken into consideration or that for example the police will not oppose bail. (This represents a change from common law, where such information given to the suspect by the police might have been considered an inducement and therefore any confession subsequently made would have been inadmissible - this was so even where the suspect requested the information from the police.) This situation is provided for by Paragraph 11.3 Code C:

"No police officer shall indicate except in answer to a direct question, what action will be taken on the part of the police if the person being interviewed answers questions, makes a statement or refuses to do either, then the officer may inform the person what action the police propose to take in that event provided that action is itself proper and warranted."

If this is the sequence of events rather than the police prompting the suspect to confess by informing him of what will happen if he does not confess, then it is likely that S.76 2(b) has no applicability. The sequence of events is crucial here and it may be that trial judges will insist on a tape recording of the interrogation to resolve any conflict between the police version of the sequence of events and the suspect's version of the sequence of events.

There is however, a more straightforward explanation for the hypothetical phraseology of S.76 2(b). Professor C. Tapper has recently stated (45)

"The legislature realised that simple reference to the likelihood of unreliability was likely to be unsatisfactory, since that would have the contingent disadvantage of forcing

the judge to make a preliminary decision on the very issue that the jury would have to decide at a later stage. In an effort to avoid this consequence the unlikelihood of unreliability was insulated from the confession in issue by reference to a hypothetical confession made by that accused person in those very circumstances, the distinction fortified by reference to the possibility of the real confession being true despite the hypothetical one being false.

It is hard to believe that this artifice has had the slightest effect on the course of trials, and that judges are studiously averting their gaze from the confession before them, and instead concentrating on what might have been said falsely, however much they believe this one to be true."

Tapper's main point is that the decision as to the reliability of the confession has traditionally rested with the jury. It would be inconvenient then if at the admissibility stage the judge had to decide on precisely the same issue, hence the phraseology of S.76 2(b) which is not focused on the actual confession, rather on a hypothetical one. This may or may not explain the phraseology of S.76 2(b) but what cannot be accepted without question is Tapper's remark that the language of S.76 2(b) has not had an effect on the course of trials and that trial judges will focus on the reliability of the actual confession and not the reliability of the hypothetical one. In R v Kenny (1994) (46) the trial judge admitted a confession made by a mentally handicapped individual who had not been interviewed in the presence of any appropriate adult contrary to Code of Practice C. Para. 11.14. The trial judge ruled that despite the breach of the Code he was sure beyond reasonable doubt that the admissions were reliable and admitted them into evidence. The Court of Appeal quashed the conviction on the grounds that the trial judge had not addressed his mind to the right question. He considered whether the confession was or was not reliable. What he should have done was to consider whether in the circumstances the confession, true or not, was obtained in consequence of anything done which was likely to render any confession unreliable, the burden being on the prosecution to prove beyond reasonable doubt that it was not so obtained.

If trial judges are, as Tapper suggests, focusing on the actual confession rather than the hypothetical confession then, as R v Kenny illustrates, they are likely to have their decisions overturned on appeal. R v Cox (1991) provides another illustration of where a trial judge considered the actual reliability of the confession, admitted the confession and then had his decision overturned by the Court of Appeal on the ground that it is not actual but potential unreliability that S.76 2(b) is concerned with.

The deterrence/disciplinary theory of excluding evidence is normally associated with ensuring that the police comply with standards of behaviour set out in a constitution or a code of practice, or to ensure that the police respect private rights (such as the right to be free from unlawful search and seizure) by excluding evidence obtained in violation of such rights. However, there is no reason why the technique of deterring the police through exclusion of evidence should not be attempted to ensure the goal of confession reliability. The theory seeks to improve the long term reliability of confessions by attempting to influence police behaviour through the exclusion of confession evidence.

Yale Kamisar, writing in the 1960s in the U.S.A. drew attention to two reliability standards, one standard focused on the reliability of the actual confession made in the light of police tactics; the second standard focuses on a separate issue, the effect of police tactics on general confession reliability. Kamisar wrote,

"First, taking into account the personal characteristics of the defendant and his particular powers of resistance, did the police methods create too substantial a danger of falsity? Second, without regard to the particular defendant, are the interrogation methods utilized in this case sufficiently likely to cause a significant number of innocent persons to falsely confess, that the police should not be permitted to proceed in this manner." (47)

This second reliability standard asks the question - what is the likelihood objectively considered that the interrogation methods employed in this case create a substantial risk that a person subjected to them will falsely confess - whether or not this particular defendant did? This "deterrent-reliability" interpretation of S.76 2(b) would certainly explain the focus on the hypothetical confession that the suspect may have made rather than the actual confession that he did make in that section of PACE. It can also explain why a confession should be excluded even if, as in R v McGovern, the actual confession is true. This is because it is better that a conviction is sacrificed in order to deter the police from employing such reliability threatening tactics in the future. Of course such a theory raises a host of difficult questions about the technique of using the law of evidence to deter the police. For example, "do the police pay attention or are they even aware of court decisions?" "Is not acquittal of the guilty, as in McGovern too high a price to pay for such a speculative exercise as deterrence?" These questions are difficult ones, to which we will return later in this thesis. However, P. Mirfield has directly questioned the deterrent efficiency of S.76 2(b) of PACE:

"Particular decisions under the rule would seem unlikely to discourage police practices having a tendency to produce unreliable confessions. Such decisions would be specific, fact related and available to the police at best only through the law reports. Scepticism about deterrent effects seems justified here." (48)

However, it may be that Mirfield is overstating the case against the deterrent effect of S.76 2(b). It is true that some cases using S.76 2(b) to rule confessions inadmissible have been very specific and fact related, for example in R v McGovern great stress was laid on the fact that the girl was mentally ill and actually physically ill at the time of her interrogation; she had been vomiting in her cell as well as being six months pregnant. No general lessons for the police about wrongful denial of access to legal advice for the suspect could be learnt from R v McGovern. The case turned on its particular facts as much as the denial of legal advice. It may be possible to be more optimistic about the deterrent effect of exclusionary rules in confession cases where the rules are not "fact related" as in S.76 2(b) but are clear and general as in, for example, the rule on inadmissibility for confessions introduced in the U.S.A. by Miranda v Arizona (1966). In that case Warren C.J. laid down precisely and clearly what measures the police should take before commencing interrogation, including informing the suspect of this privilege against self-incrimination and his right to counsel. However, it may be that S.76 2(b) can also send out effective messages to the police about the need to avoid certain interrogative practices. The fact that McGovern was "specific and fact related" does not mean that all cases will be so. S.76 2(b) is also applicable to more general techniques that the police are often tempted to employ to obtain confessions. There are types of tactics such as offering strong inducements to confess or threats to charge or involve members of the suspect's family, which need to be deterred as being unconducive to the long term reliability of confessions. S.76 2(b) can be used to send strong signals to the police that these types of psychological tactics are likely to result in a confession being excluded. Unlike unlawful searches, interrogation is virtually always engaged in with a view to future court proceedings and hence interrogation, unlike the exercise of search powers, is likely to be more responsive to the deterrent effect of exclusionary rules.

Oaks (49) who, in his research into the deterrent effect of the exclusionary rule on the exercise of illegal search and seizures, commented that his great scepticism about the deterrent effect of the illegal search and seizure rule, Mapp v Ohio, did not necessarily apply to the deterrent efficiency of exclusionary rules in the context of police interrogation and confessions. Police behaviour in interrogation may be open

to more influence because the purpose of interrogation is usually to obtain confession evidence for use in court. This contrasts with the great variety of reasons why the police may conduct a search and seizure operation, reasons which may have nothing to do with securing evidence for use in court but may involve a desire to harass known criminals or to confiscate certain kinds of contraband or other illegal material. However, the deterrent effect of exclusionary rules in the context of the interrogation of suspects may be substantially weakened by the phenomenon of the guilty plea following a confession in the police station. As this is a major feature of the English Criminal Justice System it will inevitably be the case that most interrogations will not be reviewable by the courts and hence some policemen may reason that they can risk flouting the exclusionary rules in order to obtain a confession. Peter Lawrie in his study of Scotland Yard in 1970, commented on this situation,

" ... a guilty plea pulls down the curtain on all past transactions. There can be no complaints about the arresting officer's behaviour and no haggling over the Judges' Rules." (50)

Section 76 2(b) does have an application to the particular unusual case where certain police tactics threaten the reliability of a confession because of specific vulnerabilities in the suspect, but S.76 2(b) also applies to the general case where, for example, the police have offered a powerful incentive to a suspect to confess. If S.76 2(b) is applied correctly by the courts as in R v Phillips (1987) then the police will be likely to receive the general message that the improper use of inducements invites the exclusion of a confession. There is a final interpretation of S.76 2(b) that has to be considered, that put forward by A. Stein in an unpublished Ph.D thesis. (51) Stein defines it thus, that S.76 2(b),

" ... distributes the risks of error surrounding confessions ... the principle of risk-distributive equality requires the courts to enforce the general standards of interrogation with rigorous consistency irrespective of the effect that a particular non-compliance with one of the standards might have had on the reliability of a particular confession, elicited from a particular suspect. If a confession has been obtained improperly, it should be excluded because the non-compliance with the standards would unjustifiably aggravate the risks of error borne by the defendant if this confession is admitted."

On this view, given that certain methods of police interrogation carry great dangers of inducing unreliable confessions it would be unfair to allow a confession to be admitted in a particular case where those "outlawed" methods were used. The risk of

a wrongful conviction by allowing a confession to be admitted, which had been obtained by the disapproved of methods, should not be borne by the defendant.

The risk that his confession is false, even if only slight, is not a risk he should be expected to bear. This is because of his right to equality with the way other suspects and their confessions are treated by the courts.

However, this theory, although it can explain why the focus is not on the actual confession rather than the hypothetical confession, it cannot explain the situation where there is no risk at all of the actual confession being false and yet S.76 2(b) can still rule it inadmissible - see R v McGovern on this important point, where the defence conceded that the confession was true, yet the Court of Appeal still invoked S.76 2(b) to quash the conviction. It is by no means clear why "risk distribution" principles insist that the confession in McGovern should have been excluded - since there was no risk of error. If the point of risk-distribution principles of exclusion is to protect an accused person from the judge making a mistake as to whether to admit the evidence as reliable, then why insist on exclusion where there is no risk of the confession being unreliable, as in R v McGovern?

It would seem then that the most plausible interpretation of S.76 2(b) is the deterrence-reliability principle which seeks to influence police interrogation tactics by excluding confessions where unreliability-inducing tactics have been used to obtain the confession, and this goal is unaffected by whether the actual confession before the judge is true, possibly true, or false.

The Admissibility of Psychological and Psychiatric Evidence on the Section 76 2(b) issue

There have been interesting developments concerning the admissibility of psychological and psychiatric evidence under Section 76 2(b) of PACE which illustrates that the judiciary are well aware of the potential for police interrogation to produce unreliable confessions from vulnerable suspects. Indeed it is important to be aware of the impact of psychological research upon the judiciary's changing perceptions of police interrogation and its potential for producing false confessions. Gudjonsson and Haward comment, (52)

"In recent years a significant contribution has been made by psychological expertise in determining the psychological vulnerabilities and interrogative circumstances which render a confession potentially invalid."

This research has impacted upon the judiciary. As Sigurdsson and Gudjonsson commented in 1996:

"During the past decade there has been increased recognition among the judiciary that wrong convictions may result from false confession and psychological vulnerability. Corre, a solicitor and a stipendiary magistrate, argues that much of the change in recognition among the judiciary is due to important psychological work in this area during the past decade." (53)

In the case of John Roberts jailed in 1983 for the murder of Daniel Sands (The Times, Friday March 20th, 1998) the conviction was overturned after psychometric tests showed Roberts was vulnerable to making false confessions and had been denied proper access to a solicitor during his interviews. In judgement Lord Justice Henry commented,

"Medical science and the law have moved a long way since 1982. We hope that the safeguards now in place will prevent others becoming victims of similar miscarriages of justice." (54)

Lord Justice Henry also said the situation had been changed by the development of psychometric tests which the medical profession and latterly the courts, accepted as capable of providing a measure of suggestibility.

As Gudjonsson and Haward comment, " .. of fundamental significance" (55) with regard to the increased receptive attitude of the courts towards psychological evidence in confession cases was the case of Raghip. This case was reported as R v Silcott and others (56) and concerned the conviction for murder of three males for the brutal murder of P. C. Blakelock during the Tottenham riots of 1985. In Raghip's appeal the psychological evidence consisted of demonstrating Raghip's borderline I.Q. (full scale I.Q. of 74) and his abnormal personality traits (high suggestibility and compliance) which were considered to undermine the reliability of his confession to the police.

The judges fully accepted the psychological findings and Raghip's conviction was quashed. In Raghip the Court of Appeal held that the circumstances to be considered by a trial judge when hearing submissions under Section 76 2(b) of PACE as to the admissibility of a confession include the mental condition of the defendant at the time the confession was made and that the decision is to be taken on medical evidence rather than the trial judge's assessment of the defendant in interview. The accused's mental state during the relevant interview is "one of the circumstances existing at the time" which Section 76 2(b) of PACE requires to be taken into account in deciding on the reliability of any confession that the accused might have made in consequence of anything said or done.

The rule in R v Turner (57) stated by Lawton L.J. has been an impediment to the reception of psychological and psychiatric evidence:

"An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary."

However, with regard to confessions the courts seem to be moving away from the straitjacket imposed by R v Turner. Yet caution is needed here, as Mirfield points out (58)

"... it is clear from R v Heaton (59) that where the accused's general I.Q. is in the dull/normal range, even though the expert will say that the accused is very suggestible, it will be extremely difficult to persuade a court that either the judge or the jury will find the expert's evidence helpful enough for it to be ruled admissible."

However, just because a defendant's I.Q. is not below an arbitrary cut off point as defined in R v Masih (60), then R v Raghip established that psychological evidence will be admissible if the accused's I.Q. is in the borderline mental defective range. R v Ward (61) follows R v Raghip in enlarging the scope for the admissibility of psychiatric or psychological evidence in relation to the truthfulness of a confession:

"... the expert evidence of a psychiatrist or psychologist may properly be admitted if it is to the effect that a defendant is suffering from a condition not properly described as mental illness, but from a personality disorder so severe as to properly be categorised as mental disorder."

Another *caveat* should be made here. Although the mental state of the defendant at the time when the confession was made is clearly an important factor in establishing a risk that any confession may be unreliable under Section 76 2(b) that mental condition can only vitiate a confession if something has been said or done by the police to bring that condition into play. Cases such as R v Goldenberg and R v Crampton make it clear that mere vulnerability in the suspect and complete propriety by the police in interviewing will not bring Section 76 2(b) into play. The "thing done" which will usually bring Section 76 2(b) into play in the context of psychological or psychiatric vulnerabilities of the suspect will be the failure to secure the attendance of an appropriate adult as required by Code C 11.4: e.g. see R v Everett (62) Wrongful denial of legal advice as in R v McGovern may also bring Section 76 2(b) into play.

However, where Section 76 2(b) does come into play the criminal courts have shown an increased understanding of the importance of psychological and psychiatric expertise in allowing the judge to come to a proper understanding of the dangers in confessions from certain vulnerable suspects.

Footnotes to Chapter 3

The Creditworthiness of Confessions

- (1) Wigmore on Evidence, Volume III, p.306. Chadbourn Revision 1970.
For an account of Bentham's views on evidence see W. Twining, "Theories of Evidence: Bentham and Wigmore" 1985 at pp.19-108.
- (2) See Chapter 5 of this thesis.
- (3) D. Wolchover and A. Heaton Armstrong "Confession Evidence" 1996, p.65.
- (4) Criminal Law Revision Committee. 11th Report. 1972, p.35 at paragraph 55.
- (5) M. McConville, A. Sanders, R. Leng, "The Case for the Prosecution" 1991, Chapter 4 pp.56-79, see especially at p.76: "Whereas suspects are generally keen to proclaim their innocence and endeavour to furnish evidence in support of their claim, these attempts are routinely rebuffed by the police. For the interviewing officer the suspect is presumptively guilty and the purpose of the interview is to produce a confession. Lines of defence raised by the suspect are irrelevant red-herrings to be ignored or argued away. To show interest in the story which the suspect wishes to present is to demonstrate weakness of resolve in the battle of wills with the suspect. To permit material which contradicts guilt into the interview is to build weakness into the case and is the antithesis of constructing a case for the prosecution."
- (6) J. Baldwin, "Police Interview Techniques: Establishing Truth or Proof?" (1993) Vol.33. The British Journal of Criminology, p.325 at pp.350-351: "Interrogations are conducted with an eye to the possibility of any subsequent trial. In that sense their importance is concerned as much with what might be claimed later in court as with the circumstances of what happened in the original incident."
- (7) G. Gudjonsson "The Psychology of Interrogations, Confessions and Testimony" 1992, Chapters 6 and 7, pp.101-163. The basic idea of the concept of interrogative suggestibility is that certain people have a psychological make-up conducive to the uncritical acceptance of suggestions made to them by the police. Gudjonsson defines interrogative suggestibility as, " ... the extent to which, within a closed social interaction, people come to accept messages communicated during formal questioning, as the result of which their subsequent behavioural response is affected", at p.115 of "The Psychology of Interrogations, Confessions and Testimony", 1992.
Other pertinent psychological vulnerabilities to the emergence of a false confession apart from suggestibility are:
 - (1) learning disabilities
 - (2) compliance
 - (3) confabulation
 - (4) acquiescence
 - (5) anxiety states
 - (6) major mental illnesses such as schizophrenia and severe depression
 - (7) drug and alcohol intoxication and withdrawal states.
- (8) Barry Irving, quoted in Ronan Bennett "Double Jeopardy: The Retrial of the Guildford Four" 1993, at p.45.

- (9) Alastair Logan on Armstrong quoted in Ronan Bennett, "Double Jeopardy: The Retrial of the Guildford Four" 1993 at p.45.
- (10) G. Gudjonsson, J. MacKeith, "A Proven case of False Confession: Psychological Aspects of the Coerced-Compliant Type", (1990) Vol.30 Journal of Science, Medicine and the Law , p.329.
- (11) *ibid* at p.334.
- (12) G. Gudjonsson, "The Psychology of Interrogations, Confessions and Testimony" 1992, at p.226 and also see pp.226-227 for an account of the various reasons why an individual might make such a confession. Gudjonsson comments, "It is now known how often voluntary false confessions occur or how easily they are recognized by police officers".
- (13) *R v Lambe* (1791) 2 Leach C.C.552 (per Grose J.)
- (14) See on the Lindbergh baby case S. M. Kassin and L.S. Wrightsman "Confession Evidence" in "The Psychology of Evidence and Trial Procedure" edited by S. M. Kassin and L. S. Wrightsman 1985, p.67 at p.76.
- (15) Professor Keith Simpson "Forty Years of Murder: An Autobiography" 1980, at p.208.
- (16) G. Gudjonsson, "The Psychology of Interrogations, Confessions and Testimony" 1992 at p.227. For further case studies of false confessions although drawn from the Dutch legal system see "Anchored Narratives: The Psychology of Criminal Evidence" 1993, by W. Wagenaar, P. J. Van Koppen and H. Crombaag at pp.99-110.
- (17) G. Gudjonsson "The Psychology of Interrogations, Confessions and Testimony" 1992 at p.227 and p.259.
- (18) G. Gudjonsson "The Psychology of Interrogations, Confessions and Testimony" 1992 at pp.226-228.
- (19) *ibid* at p.228.
- (20) *R v McGovern* (1991) 92 Cr. App. R. 228.
- (21) Criminal Law Revision Committee Eleventh Report 1972, at paragraph 65 at pp.43-44.
- (22) *R v Brine* [1992] Crim. L.R. 122.
- (23) *R v Mackenzie* (1993) 96 Cr. App. R. 98.
- (24) Michael Mansfield Q.C. "Presumed Guilty" 1993 at p.94.
- (25) S. Kassin and L. Wrightsman "Confessions in the Courtroom" 1993 at p.140. The authors comment at p.3: "Mock jurors are more influenced by testimony about a confession than by an eye-witness's identification".
- (26) W. Twining "Rethinking Evidence: Exploratory Essays" 1990 at p.3.
- (27) C. Walker, "Forensic Evidence and Terrorist Cases" [1995] Cambridge Law Journal, p.69.

- (28) Dickson, quoted in David Griffiths "Confessions", Scottish Criminal Law and Practice Series 1994, p.128.
- (29) Fenton Bresler, "Lord Goddard" 1977 at p.202.
- (30) Kent Greenawalt, "Perspectives on the Right to Silence", p.235 at p.264 in "Crime, Criminology and Public Policy" edited by Roger Hood, 1974.
- (31) R v Goldenberg (1989) 88 Cr. App. R. 285.
R v Crampton (1991) 92 Cr. App.R. 369.
- (32) D. Birch, "The PACE Hots Up, Confessions and Confusions under the 1984 Act" [1989] Criminal Law Review 95 at p.113.
- (33) R v Crampton (1991) 92 Cr. App. R. 369 at p.374.
- (34) Report of a Medical Working Group, "Substance Misuse, Detainees in Police Custody: Guidelines for Clinical Management", Department of Health 1994, H.M.S.O. pp.12-13.
- (35) R v Rennie [1982] 1 All ER 385. In this case a possible motive for the confession was to protect members of his family from police inquiry but as Lord Lane commented, "Even if it were the fact that the appellant had decided to admit his guilt because he hoped that if he did so the police would cease their enquiries into the part played by his mother, it does not follow that the confession should have been excluded".
If the police had expressly held out the promise that they would not investigate the suspect's mother if he confessed then the confession would likely to be excluded under the old common law and also under Section 76.2(b) of PACE. However, as Lord Lane commented, "In some cases the hope may be self-generated. If so it is irrelevant even if it provides the dominant motive for making the confession. In such a case the confession will not have been obtained by anything said or done by a person in authority ... There are few prisoners who are being firmly but fairly questioned in a police station to whom it does not occur that they might be able to bring both their interrogation and their detention to an earlier end by confession".
- (36) G. Gudjonsson, I. Bownes, "The Reasons why suspects confess during custodial interrogation: data from Northern Ireland", 1992, Vol. 32, Medicine, Science and the Law, p.204.
See also: "Police Interviewing and Psychological Vulnerabilities: Predicting the Likelihood of a Confession", Gudjonsson, Pearce, Clare and Rutter. Journal of Community and Applied Social Psychology, Vol.8 pp.1-21, 1998:
"The paper is concerned with examining the differences between people who confess and those who deny offences during a police interview. Suspects were more likely to confess if they reported having consumed an illicit (non-prescribed) drug in the previous 24 hour period and less likely to confess when interviewed in the presence of a legal advisor or if they had experience of prison or custodial remand. In this study younger suspects were also more likely to confess. Further examination reveals that nearly 60% of those that confessed were aged 25 years or under compared with more than 50% of the deniers who were aged over 25 years. The results suggest that the odds of a suspect making a confession are more than three times greater if the suspect has reported using an illicit drug within the 24 hour period prior to arrest compared with a suspect who claimed he or she had not taken such a substance. According to this model the odds of a suspect not making a confession are four times greater for a suspect who has a legal adviser present compared with a suspect who does not have a legal adviser in the interview.

The model also predicts that a suspect with experience of prison or custodial remand has twice the odds of not making a confession compared with the suspect who has no such experience. The model suggests that what needs to be considered is experience of custody on remand or following conviction rather than convictions per se. It may be that the application of "custodial experience" to other studies would resolve the conflicting reports of the effects of conviction on confession. In the majority of cases, personal experience of a period of incarceration will serve to reinforce the long term consequences of making a confession especially in serious cases".

- (37) R v Heron, 22nd November 1993, The Times.
- (38) G. Gudjonsson. "I'll help you boys as much as I can: how eagerness to please can result in a false confession" (1993) The Journal of Forensic Psychiatry, Vol.6, No..2. p.333.
- (39) R v Mackenzie (1993) 96 Cr. App. R. p.98 at p.108.
- (40) R v McGovern (1991) 92 Cr. App. R. p.228 at p.233.
- (41) *ibid.*
- (42) D. Birch "The PACE Hots Up ..." [1989] Criminal Law Review, p.95 at p.111.
- (43) *ibid.*, at p.111.
- (44) A. A. S. Zuckerman "The Principles of Criminal Evidence" 1989 at p.p.336-337.
- (45) C. Tapper, "Trends and Techniques in the Law of Evidence", in "Criminal Justice and Human Rights" edited by Peter Birks, Oxford 1995, p.13 at p.33.
- (46) R v Kenny [1994] Crim. L.R. 284.
R v Cox [1991] Crim. L.R. 276.
- (47) Yale Kamisar, "What is an Involuntary Confession", (1963) Vol. 17, Rutgers Law Review, p.728 at p.755.
- (48) P. Mirfield, "The Future of the Law of Confessions" [1984] Criminal Law Review, pp.70-71.
- (49) D. Oaks, "Studying the exclusionary rule in search and seizure" (1970) 37, The University of Chicago Law Review, 665.
The reference for Mapp v Ohio is 367 US 643 (1961).
- (50) P. Lawrie, "Scotland Yard: A Study of the Metropolitan Police" 1970, p.219.
- (51) A. Stein, "The Law of Evidence and the Problem of Risk-Distribution", Ph.D. University of London 1990.
- (52) G. Gudjonsson and L. Haward "Forensic Psychology: A Guide to Practice" 1998 at p.176.
- (53) J. Sigurdsson and G. Gudjonsson "The Psychological Characteristics of False Confessors': A Study among Icelandic Prison Inmates and Juvenile Offenders" (1996) Vol.20 Personality and Individual Differences, p.321 at p.321.

- (54) The Times, Friday March 20th 1998.
- (55) G. Gudjonsson and L. Haward "Forensic Psychology: A Guide to Practice" 1998 at p.170.
- (56) R v Silcott and others (1991), The Independent, 6 December 1992.
- (57) R v Turner [1975] Q.B. 834 at 841 C.A.
- (58) P. Mirfield "Silence, Confessions and Improperly Obtained Evidence" 1997 at p.302.
- (59) R v Heaton [1993] Crim. L.R. 593.
- (60) R v Masih [1986] Crim. L.R. 395. The accused had a borderline I.Q. of 72 and was therefore a borderline mental defective. Had his I.Q. score been four points lower he would have been classed as mentally defective and expert evidence would have been admissible.
- (61) R v Ward [1993] 1 WLR 619 at 690.
- (62) R v Everett [1988] Crim. LR.826.

CHAPTER 4

THE AUTHENTICITY OF CONFESSIONS

Introduction

This chapter will look at the authenticity of confessions issue. There will be a brief outline of what the issue involves, followed by a history of the issue up to PACE. Then there will be a discussion of the PACE recording regime itself and the response of the courts to police breach of that scheme. This will be followed by a discussion of how the authenticity issue has impacted on the prosecution duty to prove beyond reasonable doubt that a confession has not been obtained in a way proscribed by Section 76 2(b) of PACE. Then there will be a discussion of the consequences of the tape recording requirement. This will lead on to a discussion of the lacunae in the current regime, namely off the record interactions between suspect and the police and informal confessions.

It is ironical that for so long the law of criminal evidence attended to the creditworthiness of confessions in the shape of the voluntariness rule (although the voluntariness rule was far from being a complete test on the creditworthiness question, focusing as it did merely on certain methods of obtaining confessions) but largely ignored the question of the authenticity of the confession as raising an admissibility issue. The irony is as follows, authenticity is the most fundamental of all the issues surrounding confession evidence. It is fundamental because questions of the creditworthiness or the legitimacy of confessions do not become pertinent unless it is assumed that the confession was in fact made. As David Griffiths has put it in a study of the law of confessions in Scotland (1)

"Unless the issue of 'verballing', actual or perceived, is tackled there is probably little point in worrying about issues such as fairness or corroboration."

English law has approached this problem in the past by the judge assuming that the confession was made and then determining the question of the confession's voluntariness as an issue of admissibility. It was for the jury to determine the issue of whether in fact the confession was made or not, an issue of fact like any other fact the jury was entrusted to determine. Only at the extreme margin would the issue of whether the confession was made become a question of the admissibility of the

confession as Mirfield makes clear by reference to the unusual case of R v Roberts (1953) (2) where because the defendant was shown to be mute he could not have made his alleged oral confession. The orthodox view is, as Mirfield points out, that the

"... prosecution need not do more than adduce *prima facie* evidence of the making of the confession ..." (3)

for it to be admitted to trial on that issue. Lord Bridge in the Privy Council case of Ajodha v The State (1982) (4) referred to the situation where the defence is an absolute denial of the prosecution evidence of a confession,

"In this situation no issue as to voluntariness can arise and hence no question of admissibility falls for the judge's decision. The issue of fact whether or not the statement was made by the accused is purely for the jury."

The aim here will be for defence counsel to convince the jury or justices that the prosecution witnesses, usually the police, have made up the story of the confession.

The History of the Authenticity Issue up to PACE

It must not be assumed from the above that the issue of the authenticity of confession evidence has not been a serious source of concern to commentators and jurists at different periods of English legal history. Reference has been made earlier to the politically charged accusations and denials of "verballing" by the police in the 1970s, a debate which informed much of the RCCP's determination to provide a system of documentation of the suspect's period in police custody. Yet concern with the issue of authenticity of confessions can be found at much earlier periods of history than the 1970s. There was concern over this issue at the very time that the exclusionary rule was being formulated and promulgated in the late eighteenth century. Wigmore in "Wigmore on Evidence" sets himself to explain why jurists have exhibited such widely differing opinions on the evidential value of confessions. He resolves the puzzle by pointing to the distinction between the issue of the authenticity of a confession and the issue of the confession as evidence in itself. This explains why,

"On the one hand we find writers and judges of wide experience affirming the slender value of confessions and urging the greatest caution in their use ... on the other hand, we find persons of equal authority offering, in equally positive and unqualified language, that confessions are the highest kind of evidence." (5)

As Wigmore points out, this conflict over the value of confessional evidence even manifested itself in the opinions of the same jurist, for example Sir William Scott in Williams v Williams (1798) said,

"The court must remember that confession is a species of evidence which though not inadmissible, is regarded with great distrust."

Sir William said in contrast, in the case of Mortimer v Mortimer (1820)

"I need not observe that confession generally ranks high, or I should say highest, in the scale of evidence."

According to Wigmore the writers who doubted the evidential value of confessions

"... were thinking not of the confession as evidence of the act, but of the testimony to the alleged confession." (6)

As Erle J. stated in R v Baldry (1852),

"I am of opinion that when a confession is well proved it is the best evidence that can be produced."

This concern with the authenticity of confession was linked to the kind of witness relied upon to testify to a confession in the late eighteenth and early nineteenth centuries, as Wigmore pointed out, these witnesses to alleged confessions often were,

"Paid informers, treacherous associates, angry victims and over-zealous officers of the law - these are the persons through whom an alleged confession is oftenest presented." (7)

Wigmore himself must have been sufficiently impressed by the problem of the authenticity of the confession to make lack of authenticity a bar on the free admissibility of confession evidence.

"The policy then should be to receive all well-proved confessions in evidence and to leave them to the jury, subject to all discrediting circumstances, to receive such weight as may seem proper."

The Scottish jurist Dickson was also alert to the great dangers of inauthentic confessions when he wrote in 1887 that,

"Evidence of oral admissions is also easily fabricated, and the chance of detecting its untruth is small; for when all a witness speaks to is an independent statement his falsehood is almost beyond the reach of cross-examination and is seldom contradictory to the proved circumstances attending the crime." (8)

For the modern context the point can also be made that when it is a policeman who attests to the making of an alleged confession the problem of assessing his evidence is particularly acute since the mantle of legitimacy his office gives him makes the reliability of his testimony of the confession difficult for the jury to assess correctly. Police testimony is normally assumed to be truthful in a liberal democratic state, given the general assumption that officers of the state will perform their duties competently and honestly. This is what makes police perjury particularly dangerous and difficult to detect. In the Canadian context, Mr. Justice Morand in his Report on Metropolitan Toronto Police Practices, has remarked on the phenomenon of general trust in the reliability of police testimony and the reasons for that trust,

"To a very large extent in criminal cases ... the proof of the facts depends upon evidence given by the police. There is a natural tendency among judges as among the public generally, to accept the sworn testimony of a police officer particularly when it contradicts the words of a person whose credibility is suspect by the very reason of his involvement with the law." (9)

However, it is not clear that a concern with the authenticity of confessions actually influenced the development and application of the exclusionary "voluntariness" rule in the late eighteenth and early nineteenth centuries, although Wigmore ambiguously remarks,

"The moral is that the proper course lies, not in distorting the legitimate principles of confession law but in exacting more in the way of quantity and quality of the testimony by which alleged confessions are presented." (10)

However, a plausible case can be made out for arguing that in the latter part of the nineteenth century a confession was excluded in a reported case partly because of a distrust of police evidence of the alleged confession of the accused. In Ibrahim v R, Lord Sumner entered into a discussion of the conflicting authorities on the admissibility of confessions obtained by questioning of suspects in police custody. Lord Sumner remarked,

"Cave J. in R v Male (1893) rejected a statement made by a prisoner in custody to a constable who had cross-examined him, saying merely that the police have no right to manufacture evidence ..." (11)

This interpretation of R v Male suggests that distrust of police evidence of the confession may have played a part in the decision. In R v Male Cave J. excluded a confession obtained by questioning a person in custody on the ground of the impermissibility of this course of conduct *per se*, for as Cave J. said of the policeman who has a prisoner in custody,

"Under these circumstances, a policeman should keep his mouth shut and his ears open." (12)

This reflected a general judicial and official dislike of the practice of police questioning of those in their custody at the time. It must be remembered that it was not until 1898 that a defendant was made competent to give evidence on his own behalf. Therefore, some nineteenth century judges may have taken the view that since no questioning of the accused was allowed at trial then this prohibition should extend to pre trial police questioning of a suspect in custody. Certainly the remarks of Cave J. in R v Male imply this connection between the prohibition on cross examination of the accused at trial and disallowing any cross examination of the suspect before trial by the police. Cave J. commented,

"The law does not allow the judge or the jury to put questions in open court to prisoners; and it would be monstrous if the law permitted a police officer to go

without anyone being present to see how the matter was conducted and put a prisoner through an examination and then produce the effects of that examination against him."

However, it is possible that Lord Sumner was right and that a fear of police manufactured evidence of a confession might have played a part in Cave J.'s approach. This analysis is supported by the remarks of Cave J. in the 1893 case of R v Thompson (13). Cave J. said *obiter*

"I would add that for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but when it is not clear and satisfactory the prisoner is not infrequently alleged to have been seized with the desire born of penitence and remorse to supplement it with a confession, a desire which vanishes as soon as he appears in a court of justice."

That case was actually decided on the basis that it was not proved satisfactorily that the confession was voluntary but this remark of Cave J. is some evidence of a judicial unease with police evidence of the making of confessions, the same unease which was to reappear nearly a hundred years later in the post PACE cases R v Keenan (1989), R v Canale (1991) and similar cases. There is not much evidence of judicial distrust of police evidence of the making of a confession in the period between the end of the nineteenth century and the modern judicial scepticism about police evidence of confessions in the post PACE cases quoted above. One reason for this is that questions as to the authenticity of a confession were treated as questions going to the weight of the alleged confession before the jury. The authenticity of a confession was not considered to be a judicial issue at all.

There is however, a decision of the Court of Appeal quashing a conviction in December 1973 which manifests a distrust of the police evidence of the making of a confession, R v Pattinson. (14) The judgement was given by Lawton L.J. The accused was charged with robbery. The case for the prosecution substantially rested on an alleged oral confession by P. Two police officers who were supervising him whilst he was shaving gave evidence of a disjointed statement containing admissions and lasting about twenty minutes. They had made no note at the time but made a note

purporting to record the statement about one and a half hours later. As Lawton L.J. commented,

"It was a remarkable feat of memory on the part of these two police officers to have got down that disjointed statement." (15)

Moreover there was very little other evidence against the accused.

"In these very unusual circumstances luck seems to have been on the side of the prosecution because they were suddenly presented with evidence, which if true and reliable, accounted to a confession of guilt." (16)

Lawton L.J. then commented,

"This is not the first time in the history of the administration of justice in this country that police officers have arrested a man and then shortly before he was due to appear in court he has of his own volition supplied the evidence which was singularly lacking against him until that moment."

The judgement then quotes the remarks of Cave J. in R v Thompson about the possibility of police fabricating an oral confession in order to provide the prosecution with some evidence to prosecute the case, having referred to the comment of Cave J., Lawton L.J. in R v Pattinson , remarks "that is this case". The conviction is quashed with Lawton L.J. remarking

" ... this court is gravely concerned about the state of the evidence in this case ... we do not like this kind of evidence."

R v Pattinson is significant in cautioning against any glib assertions that post war and pre PACE the senior judiciary would not countenance the possibility of deliberate police manufacture of evidence and perjury. R v Pattinson shows a Court of Appeal pre PACE alert to the possibility of manufactured police evidence. Lawton L.J. it will be remembered, was a member of the CLRC who in 1972 recommended the taping of police interrogations as an experimental measure to combat police manufacturing of confession evidence.

There are also the significant remarks of Lawton L.J. in the 1975 case of R v Turner (17) where reference is made in the judgement to the practice of defence counsel challenging the credibility of the police witnesses giving evidence about oral confessions. Lawton L.J. comments that this,

" ... almost always happens in this class of case at the Central Criminal Court but not so commonly on circuit."

Lawton L.J. then comments that this evidence by the police of alleged oral admissions is "usually" true but

" ... if the evidence of such oral admissions is untrue as regrettably it sometimes is, defendants are unjustly and unfairly put at risk. In our judgement something should be done and as quickly as possible to make evidence about oral statements difficult either to challenge or to concoct."

This comment clearly has a resonance in the light of Hodgson J.'s comments in R v Keenan that the recording provisions of PACE are there to protect the suspect from having oral confessions falsely attributed to him and also protects the police from unjustified allegations of manufacturing confession evidence and that therefore the recording provisions of PACE need to be supported by the likely exclusion of a confession where the police have significantly breached the recording provisions.

The above analysis does not suggest that unease about the authenticity of extra judicial confessions actually influenced the "voluntariness" exclusionary rule or generated a policy of exclusion in itself, rather it is argued that this unease may have played a part in forming that strand of judicial decisions in the late nineteenth century which tended to exclude confessions obtained by the police from the questioning of persons in custody. This judicial strand was, as is known from Lord Sumner's judgement in Ibrahim, opposed by another line of decisions which admitted confessions obtained by police questioning of those in their custody - as Lord Sumner said,

"The English Law is still unsettled, strange as it may seem, since the point is one that constantly occurs in criminal trials. Many judges, in their discretion, exclude such evidence, for they fear that nothing less than the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it. (18)

It may also be that a fear of police manufacturing of confession evidence bolstered this prejudice against the admissibility of confessions obtained by police questioning of those in their custody.

However, the orthodox view, as stated by Lord Bridge in Ajodha v State (1982) was that the question of the authenticity of a confession went to the weight of the evidence with the jury. The jury was assumed to be competent to assess accurately the weight to be given to the confession in the light of doubts about its authenticity. A contrast can be made with the problem of assessing a confession which may have been obtained by a threat or inducement. In this situation the jury were not trusted to carry out the "weighting" exercise correctly. As the Criminal Law Revision Committee (1972) pointed out,

"... that although in most cases the jury would be able to assess the weight to be given to an induced confession, there is still the danger that, in a case where the strength of the evidence on either side is about evenly balanced, the immediate effect on the jury of evidence of a confession, might be too great to be undone, even with the help of the summing up, by the evidence of the way in which the confession was obtained." (19)

For much of the twentieth century the weighting process for the jury of the issue of the authenticity of the confession was fairly unproblematic. The police were generally trusted not to fabricate evidence and if a police witness testified that an accused had made a confession then that was strong if not conclusive evidence that a confession had been made, the main issue for the jury being the question of the creditworthiness of the confession. Whether jury trust in police evidence was sometimes misplaced is a separate question. Some corroboration for this view of jury trust in the veracity of police witnesses is provided by Lord Denning in the debates in 1984 in the House of Lords on the PACE Bill. Lord Denning commented in the debate,

"When I was a young man and I cross-examined a policeman and suggested that he was wrong I would lose my case. The jury had confidence in the police as we all had, and trusted them. How different it is now! Counsel taunt the police all the time; they suggest they are framing up the case against them. They appeal to the jury making allegations, particularly against the police, all the time, destroying the confidence of our people in the police." (20)

Whether or not Lord Denning's comments are exaggerated about the contrast between the days of his youth and the present day, his Lordship does attest to a considerable change in public attitudes to the integrity of the police and hence jury approaches to police evidence. Further evidence of this shift, although again of an anecdotal nature, is to be found in the remarks of the experienced commentator and practitioner James Morton. Morton comments,

"It should be remembered that until the 1970s evidence given by the police to magistrates and juries was almost invariably accepted without question. The concept of the fabrication of evidence by investigating officers was simply not accepted by the courts." (21)

This is perhaps something of an exaggeration, for in 1963 Glanville Williams in "The Proof of Guilt" commented,

"Whereas magistrates tend to believe the police officers who appear before them regularly and who are generally found to speak the truth and perhaps never caught out in a lie, though regularly alleged to be lying by defendants who are pleading guilty, a jury is readily influenced against the police and is slow to convict on police evidence alone." (22)

Moreover, Morton's claim that pre 1970's "the concept of the fabrication of evidence by investigating officers was simply not accepted by the courts" has to be set against official recognition of the practice of police verballing in both the 1929 and 1962 Royal Commissions on the police. The 1962 Royal Commission commented at paragraph 369,

"There was a body of evidence, too substantial to disregard, which in effect accused the police of stooping to the use of undesirable means of obtaining statements and of occasionally giving perjured evidence in a court of law ... The National Council for Civil Liberties gave a few examples of cases in which the courts had refused to convict, apparently because the police evidence was disbelieved or because it was based on confessions which were held not to have been voluntary." (23)

The 1962 Commission concluded,

"Practices of this kind, if they exist (and evidence about them is difficult to obtain and substantiate) must be unhesitatingly condemned." (24)

The CLRC in 1972 referred to paragraph 369 of the 1962 Report quoted above and commented,

"...there is a widespread impression not only among criminals that in tough areas a police officer who is certain that he has got the right man will invent some oral admission to clinch the case." (25)

However, despite the occasional siren voices of concern, the general view pre the 1970s was that the vast majority of police officers did not give perjured evidence.

Sir Frederick Lawton (26) has written on the subject of fabrication of evidence by the police pre 1960s:

"In a letter to the Times 24 March 1991, Montague Martin, a retired solicitor who had practiced before the metropolitan stipendiary magistrates seemed to be suggesting that police brutality and the fabrication of evidence had been common in the London area and that the magistrates there had been indifferent to it. When I practiced before those magistrates as a barrister between 1935 and 1961 I was often instructed that the police had "put on the verbals" and even that my client had been assaulted after arrest. My experience was usually the same as that of Mr. Martin - rejection of my client's evidence."

These comments from an extremely experienced former senior judge are most revealing.

Sir Frederick Lawton has also written in a letter to the Times that,

" ... when I started in practice in 1935 ... police evidence then and for some years afterwards, was seldom challenged and when it was juries usually accepted it." (27)

The consequence of this was that questions about the authenticity of confessions could, it was assumed, be satisfactorily treated as a matter going to the weight of an alleged confession and not its admissibility. The jury could assess the weight of the alleged confession evidence in the light of the general belief that police officers were to be believed. Juries were similarly trusted to assess the weight of the testimony of other witnesses such as accomplices, co-defendants etc., subject to the help of the judge in terms of corroboration warnings and judicial cautions.

However, when the veracity of police evidence of alleged confessions became a politically charged issue then the "weighting" process became much more problematic for it could no longer be assumed that police witnesses were telling the truth. From the early 1970s onward the issue of police fabrication of evidence, specifically confessions, entered public consciousness as part of the general problem of police corruption at that time.

As the research evidence to the RCCP (1981) made clear, many criminal trials in the 1970s became centred upon the "authenticity of the confession" issue with unfortunate consequences for the use of court time, the public image of the police and the potential for the wrongful conviction of the innocent on 'verballed' confessions. There was also some scope for the guilty to escape conviction by persuading a jury that they were 'verballed' by the police when in fact they had made a confession:

"The frequency of challenges to the police record of interview is said to make it essential to have some sort of independently validated record in order in the eyes of some to prevent the police from fabricating confessions or damaging statements or in the eyes of others, to prevent those who have in fact made admission subsequently retracting them."

As the RCCP noted,

"Nearly all challenges to verbal statements were on their accuracy, only 2% of them being challenged on their alleged voluntariness. With written statements the position was reversed, fewer than 10% being challenged for accuracy whereas 40% were attacked on their alleged voluntariness." (28)

Later in this chapter reference will be made to the revolution that the introduction of tape recording for formal interview concerning all indictable offences have made to the way in which confession evidence is challenged in court, but stated as succinctly as possible, the situation is, as Zander and Henderson (29) state in their recent Crown

Court study for the 1993 Royal Commission.

"... when the interview was tape recorded, challenges were very rare."

The PACE cases on breach of the "verballing" provisions of PACE

There is a residual problem with non-tape recorded confessions which do still tend to attract challenges in a number of cases where that kind of evidence is adduced, but given that taped confessional evidence is now the norm it is fair to say that tape recording has revolutionized the issue of the "authenticity of the confession", from being a central issue in many trials to being an issue in only a small minority of cases. It was however, changing public perceptions of the veracity of police evidence in this area which stimulated this change. Judges, in their enforcement of the 'verballing' provisions of the Codes of Practice, are very much aware of this historical background to the new recording rules in PACE and the Codes of Practice and therefore take breach of these rules extremely seriously by often excluding under S.76 2(b) or S.78 confession evidence which has not been properly "authenticated" by a tape or contemporaneous note. In R v Hunt (1992) Steyn L.J. (now Lord Steyn) commented with regard to Code C,

"The background to those provisions was of course a public perception and a legislative intention that the evil of police officers falsely attributing incriminating statements to persons in custody should be stamped out."

The legislative intention has, as we shall see, been undermined by the continuing admissibility of informal confessions, although as Roger Leng, a critic of the present law, admits,

"A consequence of PACE is that it would now be virtually impossible to fabricate a confession in formal interview and have it admitted as evidence." (30)

This is because the judges have taken a very strict approach to breaches of the

recording provisions in PACE and the Codes. An early signal of judicial intentions was sent to the police by Hodgson J. in R v Keenan in the spring of 1989. Hodgson J. commented,

" ... in cases where there has been "significant and substantial" breaches of the verballing provisions of the code, the evidence so obtained will frequently be excluded..." (31)

and in emphasis of this important point Hodgson J. continued on the admissibility of admissions,

" ... if the breaches are significant and substantial we think it makes good sense to exclude them."

The 'verballing' provisions now include the requirement to tape record any interview at a police station

"... with a person who has been cautioned ... in respect of an indictable offence." (Code E para 3.1 (a) Revised Edition 10/04/95)

There is also a requirement with regard to interviews at a police station or not, to make

"... an accurate record of each interview with a person suspected of an offence" (11.5 (a) Code C and in 11.10.)

"Unless it is impracticable the person interviewed shall be given the opportunity to read the interview record and to sign it as correct or to indicate the respects in which he considers it inaccurate."

With regard to unsolicited comments by the suspect,

"A written record shall also be made of any comments made by a suspected person, including unsolicited comments which are outside the context of an interview but which might be relevant to the offence ... Where practicable the person shall be given the opportunity to read that record and to sign it as correct or to indicate the respects in which he considers it incorrect." (para.11.13)

The change in attitude to these provisions by the judiciary in contrast to their attitude to the old requirement in the Judges' Rules to make a contemporaneous record of the interview, predates, as Professor Dennis points out, the revelations of the recent miscarriage of justice cases. (32) The leading case of R v Keenan, in this area, was decided in the spring of 1989 whereas the Guildford Four were not released until October 1989. The Guildford Four was the first case in the series of revelations of miscarriages of justice; which marked the Criminal Justice System between 1989 and 1992.

However, those revelations must have strengthened the trend towards exclusion in later cases on the authenticity issue such as R v Scott (33) (August 1990) C.A. which was decided in the middle of the miscarriage of justice revelations of the 1989-1992 period. Professor Dennis claims the origins of the change in judicial attitudes is "obscure" (33b), but at least with regard to the verballing provisions of PACE the explanation for changed judicial attitudes is fairly straightforward. The explanation is the fraught background of the RCCP Report in 1981 on the question of 'police verballing' which informed the 'authentication' scheme set up by PACE in the Codes of Practice some years later. In R v Keenan Hodgson J. directly invoked the history of concern with the verballing issue to justify his decision to exclude the confession which was not properly "authenticated" in that case.

"These Code provisions are designed to make it difficult for a detained person to make unfounded allegations against the police which might otherwise appear credible. Second, it provides safeguards against the police inaccurately recording or inventing the words used in questioning a detained person ... the provisions are designed to make it very much more difficult for a defendant to make unfounded allegations that he has been "verballed" which appear credible." (34)

More directly, Hodgson J. commented later in the case,

"In cases when the rest of the evidence is weak or non existent, that is just the situation where the temptation to do what the provisions are aimed to prevent is greatest, and the protection of the rules most needed." (35)

This comment has a strong echo of the remarks of Lawton L.J. in R v Pattinson (1972) and Cave J. in R v Thompson (1893), on the temptations and pressures on police officers in certain cases to fabricate confessions.

Hodgson J. makes it clear that it is not satisfactory for a trial judge to reason that a defendant can contest the police version of events by going into the witness box at trial and that therefore it is not necessary to exclude the alleged confession which had been obtained in breach of the "verballing" provisions.

If the recording provisions are not complied with and the defendant is forced to contest the authenticity issue at trial then he is placed in the pre PACE era when a defendant, especially one with a criminal record, was at a serious disadvantage in successfully contesting the police version of events. This was because a successful denial of the confession could be mounted only if the accused went into the witness box, thereby forfeiting his right to silence in court. Judges deprecate attempts to discredit police witnesses' version of events by defence counsel when the accused does not go into the witness box - see R v Callaghan (1979) (36) and in any case the jury will be suspicious of such a course of conduct by the defence and are likely to disbelieve the defence if the accused does not testify himself. Section 35 of the Criminal Justice and Public Order Act 1994 formalises and legitimates the adverse inference drawing process of the jury in this type of situation.

If the accused had a criminal record then the consequences of resolving the authenticity issue at trial were and are much more dramatic - by virtue of S.1f(ii) of the Criminal Evidence Act 1898 and by virtue of the interpretation given to that section by R v Britzman (1983) (37). If an accused with a criminal record suggests on oath that the police made up the confession then it is highly likely that his previous convictions will be read out to the jury by prosecution counsel. The fact may inhibit the defendant from contesting the confession himself in the witness box. It was decided in R v Britzman that if the accused denied having confessed to the police, the implication necessarily being that the police officers lied on oath, the prosecution may thereupon cross-examine the accused on his previous convictions. Indeed in Britzman the appellant and his counsel were very careful in what they said - they merely denied that the conversation had taken place with the police, they did not go on to allege that the police offices had fabricated the evidence against them. Nevertheless as Lawton L.J. held,

"A defence to a criminal charge which suggests that prosecution witnesses have deliberately made up false evidence in order to secure a conviction must involve imputations on the characters of those witnesses."

with the dramatic consequence that

"... juries are entitled to know about the characters of those making (the imputations)." (38)

Lawton L.J. did refer to a discretion to disallow such cross-examination even when imputations on prosecution witnesses have been made but such discretion was only to be exercised if there is nothing more than a denial of what was said in a short interview but that the

"... position would be different however, if there was a denial of evidence of a long period or detailed observation extending over hours and ... where there were denials of long conversations."

The type of convictions which can be revealed to the jury can bear a strong resemblance to the offence with which the defendant is charged. The convictions need not be for dishonesty offences for them to be revealed to the jury.

It may be thought that only dishonesty convictions were relevant to the issue of the credibility of the accused as a witness. However, as was made clear in R v Powell (1986) (39) the fact that the previous convictions are not for offences involving dishonesty does not preclude them from being revealed under S.1f(ii). If the offences are similar to the charge the defendant faces then it is hard to see how the jury can prevent themselves from using those convictions to the issue of the guilt of the accused directly. This feature of the law on cross examination must act as a powerful disincentive on the accused to challenge police evidence in the witness box. The Royal Commission in 1993 stated that whereas 83% of defendants with no previous convictions gave evidence in Crown Court trials, only 71% of defendants with previous convictions gave evidence: (40) this evidence gathered from its own Crown Court study.

One dramatic and prejudicial result for the accused of the police not complying with the verballing provisions was that the "confession issue" would have to be resolved at the trial by testimony of the police and by testimony of the accused, who by denying that the confession was made in opposition to the police claim that the confession was made, would thereby be putting his character in issue under the "Britzman" interpretation of S.1f(ii) of the Criminal Evidence Act 1898. If the police had complied with the recording provisions then the danger of the accused's character being put in issue at the trial would not have arisen: the accused only puts his

character in issue and therefore his previous convictions in issue at trial if he chooses to do so by conducting his defence in a particular way, e.g. by attacking the veracity of prosecution witnesses. However, the police would force him to conduct his defence in a particular way if they failed to comply with the recording provisions of PACE.

Hodgson J. outlined a third way in which the accused could be seriously disadvantaged by police non-compliance with the anti-verballing provisions:

"If the defence was to be that the interview was inaccurately recorded then it was plainly unfair to admit it because it placed the appellant at a substantial disadvantage in that he had been given no contemporaneous opportunity to correct any inaccuracies nor would he have his own contemporaneous note of what he had said."

Hodgson J. made it clear that criminal trials should not, as they tended to in the past, become "battles of character" between police witnesses and the accused over the authenticity of an alleged confession. The unfortunate consequences of such a battle were made clear throughout Hodgson J.'s judgement in *Keenan*.

These unfortunate consequences were: unfounded attacks on the integrity of police witnesses, the accused being forced to put his character in issue, or to give testimony and be cross-examined when he would prefer not to and also the ever present possibility that the jury would wrongly convict the accused on police "verballed" confession evidence.

All these problems can be averted by simply insisting that the police record all interviews in the police station at least for indictable offences and enforcing this stricture by excluding any confession obtained in serious breach of the recording requirements.

Hodgson J.'s strictures in *Keenan* have been followed in later cases such as *R v Walsh (1990)*, where Saville J. commented that if there had been significant and substantial breaches of the provisions of the Codes relating to the recording of interviews,

"Then *prima facie* at least the standards of fairness set by Parliament have not been met." (41)

The judiciary are no longer prepared to rely upon the integrity of the police version of what happened during interrogation but demand that the scheme which was set up by PACE and the Codes of Practice to record interviews be respected by the police. That scheme represents a publicly agreed upon procedure to resolve the troublesome "authenticity" issue.

If juries become unduly suspicious of police evidence because of bad publicity about the integrity of police evidence then there is a real danger that they will disbelieve police evidence when in fact that evidence is reliable as proof of guilt. This is hardly conducive to the due administration of the criminal law. To the extent that the public have grown sceptical about police evidence this represents a serious deterioration in the quality of the administration of justice for after all police officers are officers of the law.

There is some encouraging evidence that it is not only formal interviews which are being vigorously policed by the judiciary. Informal interviews are also liable to attract the exclusionary approach if the recording provisions are breached. In R v Weerdesteyn (1994) (42) customs officers had failed to make a note of their informal questioning of the suspect and so inevitably there was no opportunity for the accused to have approved of the record of the interview or expressed his disagreement in accordance with the Code. Hobhouse L.J. excluded the incriminating remarks, noting as he did, that

"... the vice that arises from this disregard of the Code has been commented upon by this court on many occasions. The purpose is to obtain good and reliable evidence of anything that has been said and in fairness to the appellant to enable him to comment upon it and/or correct it close to time when the matter is fresh in his mind. What happened in the present case was that at the very earliest he did not know that he had said anything significant during this conversation until at least two-and-a-half months later. When it came to the trial all that he could say was that he had no recollection of the conversation at all; that is not surprising, so that was the result which was produced by this failure to observe the provisions of the Code."

R v Weerdesteyn follows R v Cox (1992) and the opinion of Bingham L.J. in R v Absolam (43) that the Codes of Practice may apply even in a case in which it was plain that there was not in any sense a formal conventional interview. For the Code to apply it sufficed that "there was a series of questions directed by the police to the suspect with a view to obtaining admissions on which proceedings could be founded".

Indeed in R v Weerdesteyn there was only one question from the Customs officer which produced the incriminating replies from the suspect. The Court of Appeal nevertheless held that the situation was such that it was "designed to produce unguarded admissions" so that it was one which the Code was intended to prevent. Therefore the suspect should have been cautioned before the Customs officer asked the single question about the alleged offence and also that a proper record should have been made of the short exchange between suspect and Customs officer. In the 1995 version of Code C in 11.1.A it states, "An interview is the questioning of a person regarding his involvement or suspected involvement in a criminal offence".

In R v Chung (1990) (44) the Court of Appeal said a confession should have been excluded under S.76 2(b) or in the alternative S.78, one of the grounds for the decision being the failure to record the alleged admissions immediately and the failure when the note of the interview had been made to show it to the appellant.

To quote R. Leng,

"Recent cases indicate that the courts will exclude alleged informal admissions where no adequate opportunity to verify or deny has been given." (45)

Given this acknowledgement there is an element of overreaction by Leng when he claims in criticism of the RCCJ report that,

"... perhaps the most outstanding feature of their reasoning is that it fails to distinguish between recorded and unrecorded confessions and therefore fails to address the real risk of fabrication, where the only evidence of a confession is a police officer's word." (46)

With regard to informal confessions, the Code states that a contemporaneous note must be made and signed by the suspect and it is likely that a confession will be excluded in the court's discretion under S.78 or even by law under S.76 2(b) if no good explanation is forthcoming as to why the recording provisions have not been complied with. It is therefore somewhat misleading to write of the existence of cases, as Leng does

"... where the only evidence of a confession is a police officer's word." (47)

However, exclusion of a confession under S.78 is a discretionary matter and it is possible that some courts will admit confessions even where the recording provisions have been breached. Whether this situation is satisfactory will be examined later in this chapter.

The Authenticity of a Confession and the Section 76 2(b) issue

The authenticity of the confession has not only become an exclusionary question in itself under the S.78 discretion, it also has become part of the exclusionary issue under the S.76 2(b) rule of law. It is important here to point out that a confession is more than just a single moment of contrition by a suspect, it is also often a product of a process, namely the interaction between police and the suspect. As was made clear in the extremely important research study, "The Case for the Prosecution" (1991) by McConville, Sanders and Leng,

"Analysis of police interrogation records confirms that the relationship between interrogator and suspect is dynamic so that any confession is a product of the process of interaction." (48)

However, it is an 'unfair' dynamic given the great power imbalance between the police and the suspect; interrogation is designed to "confirm and legitimate a police narrative" of events through the obtaining of a confession which replicates how the police viewed the suspect's involvement or alleged involvement in the crime.

Once this is realised it can be seen that any attempt to record the moment of acceptance of guilt by the suspect will also tend to record at least some of that police-suspect interaction.

Thus, the issue of whether the confession was made as a result of inducements or threats of violence can be resolved sometimes by looking at the record of the interview process. A Criminal Justice System which places a high premium on securing the authenticity of confessions will also secure some clear evidence of the circumstances in which the confession was made and the judiciary has made it plain that they require that independent record in order to satisfactorily adjudicate the S.76 2(b) question of law. The judiciary are thus not only not prepared to rely, as they

used to, upon the word of the police as to the evidence of a confession but also the testimony of the police will not suffice on the crucial question of the surrounding circumstances of the confession, e.g. was an inducement made by the police preceding the confession? There is however, an important point to be made about current practice concerning the use of tapes of interrogation in court. Baldwin (49) has shown through research that written tape summaries prepared by police officers are often used in court rather than the playing of the tape itself. The tapes are rarely checked by defence lawyers. If the police officers make an inaccurate written summary of the taped interrogation, and Baldwin suggests such summaries can be inaccurate, then the benefits of the regime of the tape recording requirement, i.e. to provide the court with an accurate and unassailable record of the interrogation may be diminished or lost.

In R v Delaney the lack of a contemporaneous record of the interrogation went to the admissibility question of S.76 2(b) of PACE. Lord Chief Justice Lane giving the judgement of the Court of Appeal held that while the particular breach, i.e. breach of the recording requirements, did not directly affect the confessions which the accused made it had the following effect,

"By failing to make a contemporaneous note, or indeed any note as soon as practicable, the officers deprived the court of what was, in all likelihood, the most cogent evidence as to what did induce the appellant to confess." (50)

In Delaney there was an issue that the police had deliberately sought to play down, the seriousness of the offence to the suspect who had an I.Q. of 80 and who, according to the evidence of a psychologist, had a personality which

"... was such that when being interviewed as a suspect he would be subject to quick emotional arousal which might lead him to wish to rid himself of the interview by bringing it to an end as rapidly as possible."

The offence was in fact a serious one, that of indecent assault on a very young girl. The Detective Constable admitted at trial that he had deliberately sought to play down the seriousness of the assault because he did not want to frighten Delaney from confessing his guilt. The conduct of the police towards this particular suspect was such that, in the words of Lord Lane, the police might "be encouraging a false confession". (51) The appellant may have felt it was easier to get away from the unpleasant experience of interrogation by making a confession, particularly in the

light of the suggestion that what was required was treatment rather than prison. Therefore, as Lord Lane argued, the breach of the recording provisions

" ... deprived the court of the knowledge which should have been available to it, namely of precisely what was said by these officers in the vital interview."

Given this, the conviction was quashed as the confession should have been excluded under S.76 2(b) of PACE.

Under S.76 2(b) it is the prosecution which bears the burden of proof, proof beyond reasonable doubt, that the confession was not obtained by "anything said or done" which, "was likely in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof". The significance of the reasoning in Delaney is that the testimony of the police is not sufficient to discharge this burden and if the burden is not discharged, then, as a matter of law the confession must be excluded under S.76 2(b). R v Delaney has been followed in R v Barry (1992) (52). In that case the Court of Appeal held that since "there was a clear conflict of evidence between the appellant and the police as to what was said during the unrecorded interviews" this was a factor which the trial judge should have given more weight to in considering whether to exclude the confession under S.76 2(b). As the Court of Appeal reasoned,

" ... if those interviews had been recorded as they should have been, the court would have been in a much better position to assess the relevant evidence."

In this respect there has been a dramatic change from the common law situation where the prosecution bore the burden of showing that the confession was "voluntary". The change from the common law situation is as follows:

Given that the Judges' Rules on contemporaneous note taking and access to legal advice were often disregarded by the police and that the judges were extremely reluctant to exclude alleged confessions in their discretion for breaches of the Judges' Rules, then the suspect was often at a structural disadvantage in claiming that his confession was "involuntary". The judiciary at common law often had no independent record of the interrogation nor an independent witness to attest to it in order to decide authoritatively on the voluntariness issue. It was often merely the

police account of what happened at interrogation against the suspect's account of alleged threats or inducements before he made a confession.

Given the high esteem in which police evidence was held by judges in the pre PACE era then the suspect would have a difficult task in arguing that there was a threat or inducement if the police were determined to deny that evidence and commit perjury in the process.

There is a strong parallel here with the question of the existence of a confession: given the absence of an independent account of the confession a defendant would have a difficult task in persuading a jury that he rather than the police should be believed. Now, both the issue of the authenticity of the confession (which has become an exclusionary issue) and the question of its surrounding circumstances cannot be resolved simply by police testimony at trial against that of the defendant. A statutory scheme for the recording of interrogations exists and the judges have made it clear that the word of the police is not a substitute for that record of an interrogation.

P. Mirfield in his first monograph on "Confessions" attested to the advantages of an accurate record of interrogation,

"An accurate record of transactions between police and accused might in some circumstances assist in the correct resolution by the trier of law of any exclusion issue which arises ... an accused might allege that his confession is inadmissible because obtained by threats of violence."

"In such a case it is very likely that the sole issue will be whether the threats were actually made. If so, the admissibility of the confession will turn entirely on whether reliance can be placed upon the police record." (53)

In R v Canale (1991) (54) the Lord Chief Justice again stressed that if an allegation of an improper inducement or threat is made, then the judge will need the recording requirements of PACE to be observed in order to give him evidence on which he can properly adjudicate the S.76 2(a) or S.76 2(b) questions of law. In Canale there had been in the words of Lord Lane "flagrant and cynical" breaches of the requirements for the contemporaneous recording of interviews by the police. The accused had allegedly confessed in two interviews which had not been recorded.

However, in two subsequent interviews which were recorded, he repeated his admissions. The appellant argued at the trial that he had been induced by certain

promises on behalf of the police to make the unrecorded admissions which started off the whole series of admissions. Up to the first admission at the interview which was not contemporaneously recorded he had, in the words of the Court of Appeal,

"... stoutly denied that he had anything to do with these conspiracies or robberies at all." (55)

As the Court of Appeal concluded,

"... somehow that *volte-face*, because *volte-face* it was, had to be explained." (56)

Yet when the trial judge came to rule on the question of inadmissibility under S.76(2)(b) or S.78 of PACE the judge was

"... deprived of the very evidence which would have enabled him to come to a more certain conclusion as to what he should do with regard to the submissions, because he was deprived of that contemporaneous note which should have been made."

Thus in deciding whether the first admission was properly obtained or not (i.e. whether as the result of certain promises by the police) the existence of the contemporaneous note was vital to the answering of the S.76(2)(b) question.

It was no answer for the police to point to the later admissions which were recorded, for their admissibility depended on the admissibility of the first unrecorded admission, i.e. the defendant argued that those later recorded admissions would not have happened without the making of the first unrecorded admission. The Court of Appeal in R v Canale quashed the defendant's convictions holding that all the admissions should have been ruled inadmissible under Section 78.

The reasoning in Canale seems to be along the following lines: if the police by their failure to comply with the verballing provisions deny the court the ability to decide the admissibility question under S.76(2)(b) properly, by depriving the court of an accurate record of what was said or done to the suspect by the police, then S.78, which is concerned with the "fairness of the proceedings" might be used to rule inadmissible any disputed confession. On the issue of admissibility under S.76(2)(b) the courts are not prepared to rely on the word of the police as to what induced the suspect to confess when statutory provision is made in PACE and the Codes of

Practice for the creation of contemporaneous documentation of an interrogation which the suspect should have had the opportunity to correct, at the time of the interrogation. This reasoning also applies to the present requirement to make a tape recording of all interviews at police stations concerning indictable offences. To conclude, although S.76 2(b) is not directed at the question of whether a confession has been in fact made, the failure of the police to record an interview at which a confession is alleged to have been made can be a relevant factor under S.76 2(b). As Birch comments,

" ... while such a breach to record properly cannot by itself justify exclusion under S.76 2(b) it may be a relevant factor to take into account when the court is trying to decide whether something has been "said or done" prior to the confession which is conducive to untruth. Thus if D says he was offered a bribe to confess to the offence, and the interviewing officer says that this is a lie, the fact that the officer has failed to make a proper record of the interview which might have helped the court to decide whom to believe is obviously relevant to the S.76 2(b) question. Given that the burden of proof is on the prosecution under S.76 2(b) it may well be the case that a failure to record an interview properly is fatal to a prosecution attempt to discharge this burden and hence any confession will be excluded from the trial."

The Consequences of the Tape-recording Requirement

John Baldwin (57) has described the introduction of recorded interviews with suspects as

" ... maybe the single most important reform of the criminal justice system in recent years."

It is not difficult to understand the reasons for this claim. A taped record of an interrogation with a suspect helps to resolve the problems posed by confession evidence at many levels: it provides clear evidence of the making of a confession; it provides some evidence of the circumstances in which the confession was made (always bearing in mind the possibility of off the tape inducements or threats which are not disclosed by the tape recording - on this see McConville, (58)). The existence of a tape recording of the interrogation may not only make it much easier for a judge to determine whether threats of violence or inducements were made by the police but

it also may help to prevent miscarriages of justice based on false confessions caused in another way. This is the situation where the confession of the accused purportedly reveals details of the crime which only the police and the actual offender could know. However, as The Confait case (59) reveals, such "special knowledge" may have been unwittingly communicated to the suspect during interrogation by the police. Sir Henry Fisher in his report (60) on the Confait case was misled by the apparent incriminating "knowledge" in the confessions of the boys to the murder of Maxwell Confait. This knowledge was in fact communicated to the boys by the police. A tape recording of the interrogation makes it easier to evaluate what is said during interrogation by the police and may disclose that a seemingly reliable confession which discloses "special knowledge" of the crime may not be reliable because that "knowledge" may have been unwittingly transmitted to the suspect during the interrogation, who then has merely incorporated that information into his false confession. Indeed, in R v Mackenzie, Lord Taylor suggested that the "special knowledge" Mackenzie displayed in his confession about the murders may have been communicated unwittingly by police to him by a non taped interview in the police car on the way to the police station. (61) A tape may disclose whether information about the offence may have been transmitted in this way from the police to the suspect. A tape recording of the interrogation may also confirm whether the suspect was cautioned before the questioning and whether he was offered his right to see a solicitor. It may be that setting down clear due process protections for the suspect in police interrogation may be undermined by a failure to also set down a requirement that the interrogation process be properly recorded. Procedural protections for suspects can be more easily evaded when there is no independent record of the interrogation.

Tape recording also prevents valuable court time being taken up with allegations and denials of the practice of "verballing" or the use of violence at interrogation, although accusations can still be made about the period before the interrogation.

Some measure of tape recordings' success in achieving fairness between police and suspects is that after years of hostility to the idea the police welcome tape recording as a means of preventing unjustified attacks on them. The law reform body JUSTICE, in its research of over 3,000 cases where convictions were challenged, found that,

"Before PACE the main complaints had been physical or verbal intimidation and the fabrication of admissions. Those problems had virtually been removed in formal interviews by the requirement for tape recording." (62)

The police themselves view the tape recording requirements of PACE positively, for as one of the Chief Constables interviewed by Reiner in his book on Chief Constables, commented,

"Tape recording has helped us work quite effectively - produced straight pleas of guilty, cut out all the nonsense of allegations of verbals." (63)

The tape recording of interrogations has also significantly aided the work of forensic psychiatrists such as Gudjonsson, who are able to make an informed judgement about the reliability of a confession and the vulnerabilities of suspects from listening to the tape. This aids the defence at the trial in contesting the confession if it is unreliable and also helps to secure successful appeals once conviction on a false confession has emerged.

However, what clouds this picture of properly documented interrogations are two major problems which continue to trouble commentators.

Off the record interactions and informal confessions

1. Off the record interactions which affect the formal interview record and which could include unrecorded inducements or threats or violence. Dixon in his study found that officers routinely prepare suspects before recorded interviewing: 71% of police officers reported that they sometimes, often or always did this. (64)
2. 'Informal' confessions which do not have to be tape recorded but require only a contemporaneous note to be made and "unless it is impracticable the person interviewed shall be given the opportunity to read the interview record and to sign it as correct or to indicate the respects in which he considers it inaccurate ... if the person concerned ... refuses to read the record or sign it, the senior police officer present shall read it to him and ask him whether he would like to sign it as correct ... the police officer shall then certify on the interview record itself what has occurred." (11.10) Given this, the scope for abuse in terms of "verballing" is still a possibility for informal confessions even though that particular problem has been eradicated for formal interviews.

The first problem to consider is the continuing possibility of off the record inducements or threats which could influence the content of the formal interview. This is seen as a particularly insidious threat, for as McConville, Sanders and Leng comment in relation to the official record of interrogation,

" ... the integrity of the record is compromised by the fact that it ignores the police/suspect questioning that often precedes it." (65)

They argue that custody officers who control access to the suspect are often complicitous in this process by allowing the investigating officers informal access to the suspect without that being recorded on the custody sheet. The possibility of off the record inducements and threats are described in the following way by McConville, Bridges, Hodgson and Pavlovic,

"The importance of these low visibility exchanges between police and suspect cannot be overestimated. The more successful in manipulating the decision making of the suspect, the less apparent will be the influence of the police when the official interrogation takes place. It is at this covert level that the police are able to utilize those strategies which if discovered, would or might incur the disapproval of the courts and endanger the admissibility of any confession arising therefrom." (66)

In the light of this, a cynic may offer an account of why the police have welcomed the tape recording of interrogations. A cynic may argue that tape recording offers the illusion of a complete record of interrogation whilst allowing the police to manipulate the suspect off the tape. As Roger Leng has commented,

" ... far from restricting the activities of investigators, the PACE rule about recording interviews serves the police interest in controlling the investigation. By legitimating the formal interview the rule elevates that part of the total interaction which the police have chosen to emphasize whilst obscuring and denying that which is less convenient to the police case. Viewed in this light constabulary enthusiasm for recording becomes quite understandable." (67)

Given this it is important that the recording procedures operate only as a shield for the accused by demonstrating for example, that an inducement was offered, the recording procedures should not operate as a sword for the prosecution since the tape recording or note cannot conclusively prove that a threat or inducement alleged by the suspect

had never been made by the police. Unfortunately some judicial opinion has taken the evidence of a tape or a contemporaneous note as being the last word on whether an inducement or threat was offered to the suspect by the police. In R v Canale Lord Lane made the following remark:

"The importance of the rules relating to contemporaneous noting of interviews can scarcely be over emphasized ... it is a protection for the police, to ensure as far as possible that it cannot be suggested that they induced the suspect to confess by improper approaches or improper promises ..." (68)

It is respectfully submitted that Lord Lane could have been more cautious here, for whilst one can accept that if a confession is made on tape then that is conclusive of its existence, one should not accept that the tape, and much less a written note, is conclusive of the question as to whether threats or inducements were made prior to the confession. Lord Lane should have been aware that it is a potentially dangerous message to send to the police that the record is presumptively the final word on the S.76 2(b) question. Judges should be cautious about accepting at face value the claims of the police that since the record discloses no threat or inducement that therefore no threat or inducement was made.

The approach advocated here would be consistent with modern judicial scepticism towards the police account of interrogations manifest in such cases as Keenan, Canale and Delaney. The judiciary should be equally sceptical of a suspect's claims. The judiciary should not be overly ready to accept the allegations of suspects that the police made "off the tape" inducements or threats. Suspects often have good reason to falsely allege police misbehaviour. It should be remembered that the prosecution still have to prove beyond reasonable doubt that a confession was not obtained by "oppression" or "anything said or done" which threatens the reliability of a confession. The tape or signed note should not be regarded as the final word on that subject. It therefore should not be possible for the prosecution to point to the tape and argue that since for example, it does not disclose an inducement then they have automatically satisfied the burden of proof on the S.76 2(b) question.

Informal Confessions

Informal confessions remain a source of concern to commentators since their admission tends to undercut the regime of protection against the practice of

'verballing' established by PACE. The existence of informal confessions allows police deviance, (in this case "verballing") to be "shifted" rather than eliminated. Whereas the possibility of 'verballing' in formal interviews has been eliminated by the compulsory tape recording of all interrogations for indictable offences, 'verballing' remains a possibility with regard to informal confessions. This is because tape recording is not required, only a contemporaneous note is required which the suspect should be given the opportunity to sign, but since provision is made in the Code for the situation where the suspect refuses to sign (a note must be made of this) the possibility of the concoction of a confession in informal interviews by the police remains a possibility. In R v Scott (1990) the Court of Appeal quashed a conviction based on an informal confession which had been obtained in breach of the Code. In that case the suspect had made incriminating remarks after a tape recorded interview had finished.

The police officers made a note of the comment but failed to show it to the suspect or ask him to sign it. At trial the defence was that the incriminating comment had not been made - the old 'verballing' situation. The Court of Appeal said the trial judge had erred in his discretion under S.78 of PACE in admitting the evidence because of "The fact that the incriminating remark came between two interviews denying the offence". (69)

However, S.78 is a discretionary power to exclude evidence and it should not be assumed that every time there has been a breach of the Codes then a confession will be excluded. In R v Scott emphasis was laid on the fact that the alleged incriminating remark came between two taped denials of the offence. It still remains a possibility that confession evidence will be admitted where the only evidence of such a confession is a police officer's testimony although in the light of cases such as Keenan and Scott such evidence is "likely" to be excluded under the S.78 discretion. It is submitted here that this is unsatisfactory in that a discretionary exclusionary approach to non authenticated confessions does not go far enough in tackling the continuing problem of 'verballed' police evidence of a confession. Moreover, in allowing the admissibility of a confession where a contemporaneous note has been made and an opportunity offered to the suspect to sign it, the law is allowing scope for abuse. At present a police officer can fabricate an alleged informal confession and say that the suspect was offered a chance to sign and correct the note of the confession but refused to do so: see Code C, paragraph 11.10. It would be then the police officer's word against that of the defendant in court that this chain of events in fact occurred.

Whereas informal interviews can probably never be eliminated given the 'low visibility' of exchanges between police and suspect (e.g. at the scene of the crime or in the police car on the way to the station) the products of informal interviews, i.e. informal confessions can be eliminated from the criminal trial by the simple expedient of an exclusionary rule to the effect that no confession shall be admissible unless made on tape and/or made in the presence of an independent third party.

Such an approach has had the recent support of Lord Templeman in A. T. and T. Istel v Tully (1992), where his Lordship said,

"Ill treatment of prisoners and fabrication of confessions can only be prevented by better organisation, selection, training, supervision and remuneration of the police force coupled with stringent rules for access to independent legal advice and a bar on confessions obtained in the absence of that representation. If fewer convictions result, this is a price which must be paid and a price which the police force as at present trained are unable to accept." (70)

The Royal Commission on Criminal Justice were also not prepared to "pay the price" of a bar on non taped confessions or confessions not made in the presence of an independent third party. The RCCJ feared that the consequences of such a rule would be that too many guilty people would go free since for example "spontaneous confessions on arrest are often the most truthful". (71) There is some support for this view of the RCCJ about the reliability of confessions made upon arrest in the remarks of Lawton L.J. in R v Turner,

"It is a matter of human experience which has long been recognized, that wrongdoers who are about to be revealed for what they are, often find relief from their inner tensions by talking about what they have done. In our judgement and experience this is a common explanation for oral admissions made at or about the time of arrest and later retracted." (72)

However, as Roger Leng points out the RCCJ has missed the main issue, which is not whether informal confessions are truthful but whether they have in fact been made, i.e. the 'authenticity' issue rather than the 'creditworthiness' issue. If the suspect does not in fact confess upon or shortly after arrest then he is unjustly and unfairly put at risk by a rule which allows the possibility of an alleged oral confession to be given in evidence. There is also an important public policy dimension to the debate on non taped confessions. Professor Dennis had written,

"Police evidence of oral admissions is highly damaging to the accused and hence prejudicial but experience shows that its probative value is doubtful in the absence of corroboration." (73)

Recognition that police perjury and fabrication of confessions has played a major role in recent miscarriages of justice cases, and that these miscarriage of justice cases have produced a public crisis of confidence in the criminal justice system, would justify not merely a corroboration requirement for informal confessions but a full exclusionary rule.

The revelation of any miscarriage of justice is likely to have some effect on public confidence in the criminal justice system. This is so whether the miscarriage is due to unreliable identification evidence or the perjured testimony of an alleged victim for example. However, where the cause of the miscarriage is due to police perjury the damage to the criminal justice system is of a qualitatively different nature from other causes of miscarriage of justice. The damage done by police perjury is likely to be great because the police are an integral part of the criminal justice system. The investigation of offences by the police tends to be publicly viewed as part of the administration of justice. As Lord Birkett observed many years ago, "a blow struck at the integrity of the police is a blow struck at the whole fabric of the State". (74)

Some convictions of the guilty would be lost by an exclusionary rule for non taped confessions but the cost in terms of loss of public confidence in the criminal justice system of this particular kind of wrongful conviction (i.e. wrongful conviction on 'verbalised' confession evidence) is so great that an exclusionary rule is justified. The recommendation of the RCCJ does not go far enough here. The RCCJ commented (75)

"We recommend that admissions allegedly made to the police outside the police station, whether tape recorded or not should be put to the suspect during the beginning of the first tape recorded interview at the station. Failure to do this may render the alleged confession inadmissible."

This recommendation has found its way into the new Code C which requires the police to give the defendant an opportunity to verify an alleged oral confession on tape: in P.11 2A Code C. A failure to comply with this requirement might well constitute a significant and substantial breach and therefore probably lead to the exclusion of the non taped confession under S.78. The new provision does not however, cover an alleged confession made after a formal interview.

The RCCJ leave the door open for a conviction on a "verballed" confession when they argue,

"...if however, the suspect on having the confession put to him or her does not confirm the confession on tape, it should not automatically be inadmissible. The circumstances may still be such as to justify the evidence being put before a jury to weigh up." (76)

This is unsatisfactory, for only a rule requiring all confessions to be taped will eradicate the problem of "verballed" confessions.

The argument here is not solely based on the avoidance of individual wrongful convictions by such a rule on non taped confessions, but is also based on the legitimacy of the criminal justice system itself. A major step in restoring public confidence in the legitimacy of the system would be a public pronouncement in the shape of a statutory provision that no confession is to be admitted in evidence unless tape-recorded or made in the presence of an independent third party. The public would see that the grave problem of police fabrication of evidence was being tackled in a direct, dramatic fashion. Professor Dennis has written,

"One of the ways in which the law of evidence promotes legitimate verdicts in criminal cases is by excluding apparently relevant evidence if it carries systemic risks of unreliability which renders its probative value uncertain." (77)

Of course, there are important exceptions to the principle that evidence which carries systemic risks of unreliability is excluded from trial. For example, identification evidence though notoriously unreliable and the cause of many wrongful convictions, is not subject to a general exclusionary rule. The great importance of such evidence in the proof of guilt in certain cases (such as street offences) mentioned by Lord Widgery in R v Turnbull (78) is no doubt the justification for the general admissibility of identification evidence. The Crown Court study for the Royal Commission illustrated that identification evidence is of some importance in about one-quarter of contested cases. Lord Devlin (79) wrote that,

"The problem peculiar to evidence of visual identification is that this evidence, because of its type and not because of its quality, has a latent defect that may not be detected by the usual tests."

However, only poor quality identification unsupported by other evidence is withdrawn from the jury. Identification evidence is generally admissible subject to a Turnbull warning from the judge to the jury on the dangers inherent in identification evidence.

A rule of inadmissibility for non taped confessions would be declaratory of an official position that a potent source of miscarriages of justice in the past, "verbalised confessions" by the police is no longer even a possibility. This would have important effects in restoring the legitimacy of the system, for as Pattenden has written,

"The manufacture of evidence by the police, which is not confined to the West Midlands Serious Crimes Squad, is a matter of grave public concern." (80)

On August 14th 1989 the Chief Constable of the West Midlands, Geoffrey Dear disbanded his entire Serious Crime Squad. In the preceding year twenty individuals charged with serious offences had either been acquitted or had charges dropped against them after they alleged that confessions allegedly made in police custody had been fabricated by the police. It should be remembered that it was the West Midlands C.I.D. who conducted the investigation into the Birmingham pub bombings which led to the wrongful conviction of six men. Two of the six alleged that the police fabricated oral admissions which were used to convict them. Indeed, the saga of the West Midlands Serious Crime Squad continues to reverberate in the criminal courts. In 1994 the Court of Appeal quashed the convictions of two men Williams and Smith who allegedly confessed to conspiracy to rob to officers of the West Midlands Crime Squad in 1985. The Court of Appeal commented that,

"... this court deeply regrets that these two appellants were convicted on account of the evidence of police officers whose conduct has only been discredited in the later cases to which we have referred." (81)

In considering the authenticity of confessions issue and possible reforms in this area it is important to keep in mind the public policy considerations borne out of the revelations of miscarriages of justice cases in recent years (82).

Footnotes to Chapter 4

The Authenticity of Confessions

- (1) David Griffiths. "Confessions" 1994, Scottish Criminal Law and Practice Series at p.3.
- (2) R v Roberts [1953] 2 All ER. 340.
- (3) Mirfield, "Confessions" at p.2.
- (4) Ajodha v State [1982] AC.204 at p.222.
See also: Thongjai v The Queen. The Judicial Committee of the Privy Council [1997] 3 WLR 667 held that while the statements considered in Ajodha v State were written statements the principle stated therein applied also to oral admissions. Lord Hutton said that where the prosecution alleged that the defendant made an oral admission and the case was raised on behalf of the defendant that he did not make the oral admission and that he was ill treated by the police before or at the time of the alleged admission, two issues were raised which were not mutually exclusive. The first, which was for the judge to decide, was whether on the assumption that the alleged oral admission was made it was inadmissible as being involuntary. The second, which was for the jury to decide if the judge ruled that the alleged admission was admissible in evidence was whether the admission was in fact made.
- (5) Wigmore on Evidence, Volume III at p.303, Chadbourn Revision.
- (6) *ibid*, at p.303.
- (7) *ibid*.
- (8) Dickson, W. G. "The Law of Evidence in Scotland" (2nd edition by P. J. H. Grierson 1887) quoted in David Griffiths, "Confessions" , p.128, 1994.
- (9) Mr. Justice Morand, The Royal Commission into Metropolitan Toronto Police Practices (Morand J. Commissioner 1976), quoted in Ed. Ratushny "Self-Incrimination in the Canadian Criminal Process" 1979 at p.30.
- (10) Wigmore on Evidence, Volume III, p.304.
- (11) Ibrahim v R [1914-15] All ER. 874 at p.879.
- (12) R v Male and Cooper (1893) 17 Cox C.C. 689.
- (13) R v Thompson [1893] 2 QB.12.
- (14) R v Pattinson (1973) Cr. App.R. 417 at p.423.
- (15) *ibid* at p.424.
- (16) *ibid* at p.426.
- (17) R v Turner (1975) Cr.App. Rep. 67 at p.77.
- (18) R v Ibrahim [1914-15] All ER Rep at p.880.

- (19) CLRC Eleventh Report (1972) paragraph 64.
- (20) 4 June 1984 Debates House of Lords, Vol.452.
- (21) J. Morton, "Guide to the 1994 Criminal Justice and Public Order Act " 1994, at p.18.
- (22) G. Williams, *The Proof of Guilt* 1963, at p.324.
- (23) 1962 Royal Commission on the Police, paragraph 369.
- (24) *ibid*, paragraph 370.
- (25) CLRC Eleventh Report 1972, paragraph 52.
- (26) Sir Frederick Lawton "Tainted Police Evidence", *The Law Society's Gazette*, 8 May 1991 at p.2. Vol.88.
- (27) *The Times*, Wednesday June 13 1990, at p.17.
- (28) RCCP (1981) paragraph 4.8.
- (29) M. Zander and P. Henderson, "Crown Court Study", Research Study No.19, *The Royal Commission on Criminal Justice* at p.99.
- (30) Roger Leng, "A Recipe for Miscarriage: The Royal Commission and Informal Interviews" in "Criminal Justice in Crisis" 1994, at p.173.
- (31) *R v Keenan* [1989] 2 All ER. 598 at p.609.
- (32) Professor I. H. Dennis, "Miscarriages of Justice and the Law of Confessions: Evidentiary issues and Solutions" [1993] *Public Law* 291 at p.310.
- (33) *R v Scott* [1991] Crim LR 56. The miscarriage of justice cases based on manufactured police evidence also seem to have had an effect on judicial attitudes towards the value of the hearsay rule in criminal proceedings. In *R v Kearley* (1992) Lord Ackner commented that the old justification for the hearsay rule that it protected the court from manufactured evidence was vindicated by the recent revelations of police manufacture of evidence in such cases as the Birmingham Six: Lord Ackner commented: "Professor Cross in his book *Evidence*, stated that a further reason justifying the hearsay rule was the danger that hearsay evidence might be concocted. He dismissed this as 'simply one aspect of the great pathological dread of manufactured evidence which beset English lawyers of the late eighteenth and early nineteenth centuries'. Some recent appeals well known to your Lordships regrettably demonstrate that currently that anxiety rather than being unnecessarily morbid is fully justified" [1992] 2 All ER 345 at p.366.
- (33b) Professor I. H. Dennis "Miscarriages of Justice and the Law of Confessions" [1993] *Public Law*, at p.310.
- (34) *R v Keenan* [1989] 2 All ER at p.604.
- (35) *ibid* at p.609.
- (36) *R v Callaghan* (1979) 69 Cr.App. Rep. 88 C.A.
- (37) *R v Britzman, R v Hall* [1983] 2 All ER 369.

- (38) *ibid* at p.372.
- (39) *R v Powell* [1986] 2 All ER 193.
- (40) The Royal Commission on Criminal Justice Report (1993) p.126 footnote 15.
- (41) *R v Walsh* (1990) 91 Cr. App.R. 161 at p.163.
- (42) *R v Weerdesteyn* [1995] Crim. L.R. 239.
- (43) *R v Absolam* (1989) 88 Cr. App.R.332.
- (44) *R v Chung* (1991) 92 Cr. App.R. 314
- (45) R. Leng, "A Recipe for Miscarriage: The Royal Commission and Informal Interviews" in "Criminal Justice in Crisis" 1994, p.173 at p.175.
- (46) *ibid* at p.179.
- (47) *ibid* at p.179.
- (48) Mike McConville, Andrew Sanders and Roger Leng, "The Case for the Prosecution: Police Suspects and the Construction of Criminality" 1991 at p.78.
- (49) J. Baldwin, "Preparing the Record of Taped Interviews", Research Study Number 2, The Royal Commission on Criminal Justice.
- (50) *R v Delaney* (1989) 88 Cr.App.R. 338 at p.340.
- (51) *ibid* at p.342.
- (52) *R v Barry* (1992) 95 Cr.App.R. 348 C.A.
- (53) P. Mirfield "Confessions" 1985, pp.3-4.
- (54) *R v Canale* [1990] 2 All ER 187.
- (55) *ibid* at p.191.
- (56) *ibid*.
- (57) John Baldwin, New Law Journal May 11th, 1990, p.662, Volume 140.
- (58) M. McConville, "Videotaping Interrogations: Police Behaviour on and off Camera" [1992] Criminal Law Review at p.602.
- (59) The Confait case reported as *R v Lattimore* (1975) 62 Cr.App. Rep.53 CA.
- (60) Sir Henry Fisher, The Fisher Report *op. cit*.
- (61) *R v Mackenzie* (1993) 96 Cr.App.R. 98 at p.110.
- (62) JUSTICE "Report on Miscarriages of Justice" 1989.
- (63) R. Reiner "Chief Constables" 1992 at p.148.
- (64) D. Dixon, "Law in Policing" 1997 at p.152.

- (65) McConville, Sanders, Leng, "The Case for the Prosecution" 1991 at p.58.
- (66) *ibid* at p.60.
- (67) R. Leng, "Pessimism or Professionalism? Legal Regulation of Investigations after PACE" in "Contemporary issues in Criminology", editors L. Noaks, M. Levi, M. Maguire 1995 at p.214.
- (68) R v Canale [1990] 2 All ER 187 at p.190.
- (69) R v Scott [1991] Crim LR 56 CA.
- (70) A.T. and T. Istel Ltd. v Tully [1992] 2 All ER 523.
- (71) RCCJ (1993) paragraph 50 at p.61.
- (72) R v Turner (1975) 61 Cr.App.Rep.67 at pp.76-77.
- (73) I. H. Dennis, "Miscarriages of Justice and the Law of Confessions" [1993] Public Law, p.308.
- (74) Quoted in "Norman Birkett" by H. Montgomery Hyde 1964, at p.245.
- (75) RCCJ (1993) paragraph 50 at p.61.
- (76) *ibid*.
- (77) I. H. Dennis, "The Criminal Justice and Public Order Act 1994: The Evidence Provisions" [1995] Criminal Law Review at p.13.
- (78) R v Turnbull [1977] Q.B.224.
- (79) P. Devlin, "The Judge", 1979 at p.192.
- (80) Rosemary Pattenden, "Evidence of Previous Malpractice by Police Witnesses and R v Edwards" [1992] Criminal Law Review 549 at p.557.
- (81) R v Williams and Smith [1995] 1 Cr.App.R. 74 at p.81.
- (82) Beyond the scope of this thesis is the problem of the authenticity of alleged confessions made not to the police but to other parties, such as fellow prisoners. For a brief discussion of the problem of so-called "cell confessions" see Morton's book on Supergrasses and Informers 1995 at p.261. It would appear that most English judges treat such confessions with great caution. For example, in the trial of Terry Marsh for attempted murder, Marsh was alleged to have made a verbal confession about the attempted murder to another prisoner on remand in prison. Mr. Justice Fennell stated with regard to this evidence, "As a matter of strict law, his evidence does not require corroboration. But in my judgment and my direction to you, it would be very wise indeed to look for independent support before you proceeded to act on the basis of his evidence". Quoted in G. Gudjonsson, "The Psychology of Interrogations, Confessions and Testimony" at p.221.

CHAPTER 5

THE LEGITIMACY OF CONFESSIONS

Introduction

This chapter aims to analyze the legitimacy of confessions issue. The chapter will start by examining what is meant by the legitimacy of confessions issue. Then the chapter will look at three responses to the legitimacy problem. The chapter will then look at the case of R v Mason (1) as a leading case on the legitimacy of confessions issue. The next section will look at Section 58 of PACE; the right to legal advice and how the section has been interpreted by the courts. At the beginning of this section there will be a discussion of the pre PACE situation with regard to access to legal advice and the courts' attitude to police breach of the Judges' Rules. The section following will look closely at Section 76 2(a) of PACE and its interpretation by the courts. The chapter will close by looking at undercover methods by the police and the legitimacy of confessions so obtained.

The legitimacy of confessions issue

The problem of the legitimacy of confession evidence is not fundamentally a proof problem. The issue of the legitimacy of confession involves extra-probative considerations which may result in reliable confession evidence being excluded from the criminal trial. Galligan makes the following useful distinction with regard to the purposes of the law of evidence:

"There are two distinct issues: (i) one concerns rules about the probative value of evidence, (ii) the other concerns rules about the exclusion of evidence for reasons other than reasons of evidentiary value. The question in (i) is how to deal with evidence the probative value of which contains a degree of risk that it will be used improperly. Evidence gained from an involuntary confession from hearsay or from an accomplice may vary in its reliability and it is difficult to know in any event how much weight it should be given ... The guiding objective in these cases is rectitude of outcome, the question is, given some such uncertainty or defect, how best is rectitude achieved; what is the rational procedure for obtaining an accurate outcome. These are issues internal to proof. In (ii) the issue is whether certain kinds of evidence,

which are likely to be of probative value and therefore relevant in achieving rectitude should be excluded in order to advance other values or policies, such as confidentiality, national security or the protection of an accused against the police. These are issues external of proof; they are based on values which compete with rectitude of decision making. The exclusion of evidence in order to uphold those values may mean the loss of probative evidence and thus a lower level of accuracy." (2)

Therefore the issue of the legitimacy of confessions may result in the exclusion from the trial of confession evidence which is authentic and otherwise reliable. This is justified on certain extra-probative grounds. Identifying these extra-probative considerations and the correct evidential response to a case where the police have violated principles which are justified on extra-probative grounds is a controversial and politically charged process. The possibility of guilty offenders going free because of the exclusion of their reliable confessions from trial on legitimacy grounds brings into focus the sensitive issues involved in this area of confession law. The case of R v Mason (1987) C.A. is a good example of a reliable confession which was excluded on 'legitimacy' grounds by the Court of Appeal. In that case the defence conceded the truthfulness of the confession made but because of the crucial fact that the police had lied to the suspect's solicitor about the state of the evidence against him, the confession should have been excluded under S.78 held the Court of Appeal.

The issue of the legitimacy of confessions is therefore a more open and controversial topic than either the creditworthiness or authenticity issues, where disagreement tends to focus purely on the issue as to whether the law does too much or too little to ensure that confessions are authentic and reliable. Thus some commentators have argued for a strict exclusionary rule for non taped confessions as a response to the authenticity issue. (3) The RCCJ (1993) rejected this proposal as too draconian. (4) The fear was too many reliable confessions would be lost by any such rule. On the creditworthiness issue some commentators have argued that S.76 2(b) should be reformed so as to require a judge to exclude a confession where he was not satisfied as to its reliability. At the moment S.76 2(b) is limited to unreliable confessions caused by "anything said or done", therefore not all unreliable confessions are covered by this test. The RCCJ however commented that,

"In our view the safeguards under PACE against false confessions are comprehensive and while not foolproof are substantially sound. (5)

The RCCJ also endorsed the principle that it was desirable that if a confession had been made it was for the jury to assess its reliability. (6) Disputes over the legitimacy of confessions tend to be of a more political nature involving questions as to what extra probative considerations should be recognised so as to allow for the exclusion of confession evidence which is authentic and creditworthy.

This is not to say, however, that there is not some consensus of opinion on the legitimacy issue. Despite a few historical exceptions (most notably Bentham, Wigmore and the minority opinion of three members of the CLRC 11th Report) (7) it is generally agreed that no confession should be received which has been obtained by violence, threats of violence or the use of inhuman, degrading treatment or torture. Those few commentators who have disagreed in the past assert that the matter of the fact of violence in the obtaining of the confession should be treated as a matter going to the weight of the confession before the jury and that the police officers involved in the use of violence against suspects should be disciplined by way of the criminal law and other punitive mechanisms. Packer provides a useful summary of this 'crime control' approach to the admissibility of coerced confessions: (8)

"The evil of a coerced confession is that it may result in the conviction of an innocent man. It is a factual question in each case whether the accused's confession is unreliable. A defendant against whom a confession is introduced into evidence should have to convince the jury that the circumstances under which it was elicited were so coercive that more probably than not the confession was untrue. In reaching a determination on that issue the trier of fact should of course be entitled to consider the other evidence in the case and if it points toward guilt and tends to corroborate the confession, should be entitled to take that into account in determining whether more likely than not the confession was untrue. To say this is not to say that the unlawful use of force by the police against an accused is ever to be condoned. The point is simply that the use of force is not in itself determinative of the reliability of a confession and should therefore not be conclusively against the admissibility of a confession."

Bentham it seems, would even appear to advocate (9) the use of torture of suspects in certain circumstances. Bentham thought that to use torture to obtain confessions was self defeating given the great possibility that such confessions would be unreliable. Bentham said of confessions obtained by torture: "A confession so obtained is no proof at all". (10)

It is not often asserted by those arguing for the exclusion of a confession obtained by violence or torture that the great risk or unreliability is the main justification of the prohibition. The focus is rather on the unacceptability of such interrogative methods in a civilised democratic society, irrespective of the probative worth of confession evidence so obtained. Even if such confessions could be proved true by independent evidence, the argument is that exclusion is fully justified on extra probative grounds. Indeed S.76 2(a) of PACE asserts that the issue of whether the confession is true is an irrelevant factor in assessing the admissibility of the confession which is challenged because of oppression in its obtaining. Moreover S.76 (5) of PACE also asserts,

"Evidence that a fact to which this subsection applies was discovered as a result of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf."

Therefore if the confession obtained by oppression leads to the discovery of other incriminating evidence, such as the murder weapon, then no mention can be made by the prosecution that these facts were discovered as a result of the accused's confession. The reliability of the confession is thus totally negated as having any evidential value where there was oppression in its obtaining.

The only qualification on this proposition is the existence of S.76 4(b), a minor qualification which allows the prosecution, where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, to use "so much of the confession as is necessary to show that he does so". However, perhaps the use of violence to obtain any evidence should lead to its exclusion as a matter of law. Indeed there is an even more radical position which is to the effect that the use of serious violence in the course of the police investigation should lead to the abandonment of the prosecution: on this see Zander's note of dissent to the Royal Commission on Criminal Justice.

The true disagreement in the area of the legitimacy of confessions is away from the issue of the use of violence or inhuman treatment in obtaining confessions. It rather concerns other due process values which might demand the exclusion of confession evidence because of police violation of those due process norms. Examples of these other due process values include the privilege against self-incrimination, the right to legal advice and the right not to be held incommunicado. The first of these values is the creation of common law, the other two find expression in statutory form in the shape of S.56 and S.58 of the Police and Criminal Evidence Act.

The question of the extent to which the criminal trial should be prepared to forego the admission of reliable confessions because of breach of one of these procedural rights is at the heart of the debate surrounding the legitimacy of confession evidence issue.

It is proposed now to outline a few differing responses to this issue of the recognition of due process values, other than the prohibition of violence or the threat of violence in the obtaining of confessions. All three responses outlined can be located in the modern English debate on this subject. It is not intended to provide an exhaustive account of all possible responses to the issue, rather it is intended to outline the major positions.

Three responses to the 'legitimacy' problem

One view holds that, save with regard to the use of violence or torture etc. the law should not attempt to vindicate procedural rights through the mechanisms of evidence from the criminal trial. If procedural rights have been violated by the police then this is a matter for controlling mechanisms independent of the law of criminal evidence. This view might be based on the premise that,

" ... since the object of a criminal trial should be to find out if the accused is guilty, it follows that ideally all evidence should be admissible which is relevant in the sense that it tends to render probable the existence or non-existence of any fact on which the question of guilt or innocence depends."
(CLRC 11th Report) (11)

This view argues that some relevant evidence may be needed to be excluded because of its potential for substantial unreliability or undue prejudice to the accused. This tends to undermine Bentham's claim that to maximize rectitude of decision making all relevant evidence should be admitted for assessment by the trier of fact, hence Bentham said, "Evidence is the basis of justice: exclude evidence you exclude justice".

It may well be that rectitude of decision making is sometimes best served in the long run by rules excluding classes of evidence whose probative weight is very difficult to assess by the jury and which may be potentially very unreliable. Hence the existence

of S.76 2(b) of PACE and the hearsay rule at common law for example. The modified Benthamite view of the CLRC 11th Report also argues that with regard to confession obtained by violence, regard is needed to the standards of a civilised society and that an exclusionary rule on confessions obtained by oppressive methods is therefore justifiable as a qualification on the basic principle of the admissibility of relevant evidence. However, on this view to vindicate other procedural rights through the exclusion of confession evidence is an inappropriate response. By "vindication" is meant the possible response of the law to a situation where the police have infringed the pre-trial "rights" of the suspect, such as the right to legal advice. The exclusion of evidence obtained by police violation of such a right is one method of "vindicating" a right that the legal system recognizes as a "right". The modified Benthamite approach of the CLRC 11th Report rejected a role for criminal evidence in vindicating the procedural rights of the suspect through the exclusion of evidence. (12)

This is especially so given the possibility of vindicating those procedural rights through other mechanisms such as civil actions against the police, police internal disciplinary action or official complaints procedures. Any breach of the provisions regarding the treatment of suspects independent of the prohibition of violence on obtaining confessions should, where relevant, be treated as a matter going to the weight of the confession but not its admissibility. If the suspect was wrongfully denied access to a solicitor then this is a factor solely going to the weight the jury should place on the confession in deciding whether to convict the accused. Such was the approach also of the RCCP in 1981, whose report asserted that,

" ... in general ... we consider that the exclusion of evidence is not a satisfactory way of enforcing compliance with rules." (13)

The RCCP adopted a much more Benthamite attitude to the admissibility of confessions than the PACE scheme eventually adopted. For the RCCP, all confessions were to be admitted to the jury except for those confessions obtained by violence or torture. (14)

If there have been breaches of the provisions other than the prohibition on violence then this, according to the RCCP, should go to the weight rather than the admissibility of the confession,

" ... since reliability is the primary purpose of the Code of Practice for interviewing suspects." (15)

Consequently,

" ... the reliability of confessions obtained in its breach must be open to question; and it would not therefore be right for statement evidence obtained in breach of the Code to be accepted uncritically and without comment by the criminal courts. The advocate for any accused who contests the truth of a confession alleged to have been made by him will have considerable scope for discrediting the evidence of that confession if it has been obtained when the provisions of the Code have not been observed." (16)

However, there is a challengeable assumption at the heart of the position of the RCCP here. It assumes that the main justification of a due process value such as the right to legal advice is to render confession evidence more reliable.

However, the right to legal advice can be justified on grounds which are independent of a concern to improve the reliability of confession evidence. The main justification for the right to legal advice is the importance of the value of informed participation of suspects in the process to which they are subjected to. The recognition of this may lead us to conclude that treating wrongful denial of the right to legal advice as going solely to the weight of a confession is an inadequate response to its violation. It may be that in an appropriate case the exclusion of a confession is warranted because of police breach of the right to legal advice. An appropriate case might be where the police in bad faith deny the suspect access to legal advice. Lord Lane made clear in R v Alladice (1988) that a court would have "little difficulty" (17) in excluding a confession in those circumstances under Section 78, if not under Section 76.

A second major position takes procedural rights and their violation by the police as central to the question of the exclusion of confession evidence from the trial. This view proceeds on the assumption that since the criminal justice system sees fit to bestow certain rights on suspects in the pre-trial investigative process then the most appropriate mechanism to vindicate those rights when they have been violated is to exclude the evidence which has been obtained by violation of one or more of those rights. An example might be a confession obtained by wrongfully denying the suspect his right to legal advice, a statutory right under Section 58 of PACE. If the right to legal advice is to be taken seriously then it is arguable that there must be some real consequence for its violation by the police. A right which had no remedy or consequence for its violation does not, on this theory, deserve the title of "a right". A "right" with no remedy would then be merely aspirational or 'a good idea' - this in essence what the principle of access to legal advice in the police station meant under The Judges' Rules under the pre PACE regime. Breach of the principle was treated

solely in many cases, as a matter going to the weight of the confession before the jury. However, S.58 of PACE is on a statutory footing and has been described by Hodgson J. in the leading case on the section as "one of the most important and fundamental rights of citizens". (18) There is no tort (19) of "denying access to legal advice wrongfully" so the question remains as to what should be the consequence of a finding of a wrongful denial of legal advice?

The evidential exclusion at trial of a confession obtained by wrongful denial of the S.58 right is one way in which the right to legal advice can be given real meaning - it confirms that the right has weight in our legal system and is not just a rhetorical claim. It might be argued that this method of vindicating the right has a great social cost, namely the exclusion of relevant and potentially reliable evidence of guilt, the confession of the accused. However, recognition of a right by society has been understood by the leading jurisprudential scholar of the past twenty years, R. M. Dworkin as precisely involving a social cost. Professor Dworkin comments,

"There would be no point in the boast that we respect individual rights unless that involved some sacrifice and the sacrifice in question must be that we give up whatever marginal benefits our country would receive from over-riding those rights when they proved inconvenient." (20)

The loss of some convictions in cases where the police have deliberately breached the right to legal advice prior to the making of a confession may be more than a marginal loss to society, but if the right is to be given real meaning it may be that the price is worth paying.

Professor Ashworth is the leading proponent of the kind of analysis presented above. He has set out the terms of the theory as follows:

"If a legal system declares certain standards for the conduct of criminal investigations ... then it can be argued that citizens have corresponding rights to be accorded certain facilities and not to be treated in certain ways. If the legal system is to respect those rights then it is arguable that a suspect whose rights have been infringed should not thereby be placed at any disadvantage ... And the appropriate way of ensuring that the suspect does not suffer this disadvantage is for the court at trial to have the power to exclude evidence obtained by improper means." (21)

This theory has a more general application than purely the exclusion of confession evidence obtained in breach of procedural rights. It is capable of extension to the exclusion of illegally and improperly obtained real evidence such as that obtained from an illegal search and also applies to evidence obtained by entrapment or trickery: see especially the discussion on the protective principle in Chapter 7.

This approach to the problem of the legitimacy of confessions and the legitimacy of illegally obtained real evidence or evidence obtained by entrapment involves extremely difficult choices as to what interests are to be protected as "rights" for the purposes of the exclusion of evidence. This is likely to be a controversial process because the cost of identifying an interest as a right on this theory is the potential exclusion of evidence which results in a patently guilty offender escaping conviction.

These are all serious questions which any advocate of what is called "the protective principle" must face.

The exclusion of relevant and reliable evidence on this basis has a great social cost - the non conviction of offenders, some of them dangerous, on the ground that the police violated a "right". Obviously when the right in question is the right not to be subject to torture or violence then the protective principle is largely uncontroversial.

Ashworth however, makes clear that the protective principle has much greater scope than the exclusion of confession evidence obtained by violence on the part of the investigators. (22)

The English cases on breach of important provisions of PACE and the Codes of Practice in cases of the obtaining of confession evidence can arguably be interpreted as disclosing a weak version of the protective principle. In the leading case of R v Walsh (23) Saville J. commented that if there had been significant and substantial breaches of S.58 the right to legal advice or the provisions of Code C relating to the recording of interviews,

" ... then *prima facie* at least the standards of fairness set by Parliament have not been met..."

and therefore a confession so obtained is likely, though not inevitably, to be excluded from trial under S.78 of PACE. Ashworth comments that a strong version of the

protective principle would exclude any such qualification that breaches of PACE or the Codes need to be "significant or substantial" before a confession is likely to be excluded. Ashworth in principle endorses a stronger version of the protective principle than is found in cases such as R v Walsh "if rights are to be respected fully". (24)

However, as Ashworth points out,

"In terms of practical politics there may be some pressure to qualify the principle so as to avoid losing 'good' convictions for a procedural departure that really had little effect on the defendant's enjoyment of rights." (25)

However Ashworth can be criticized here. It may be the case that the "significant and substantial" test propounded in R v Walsh and in R v Keenan is not a response to "practical politics" but is in fact a qualification based on principle. This is to note that "fairness" under S.78 has been interpreted by the Court of Appeal as meaning fairness to the Crown as well as fairness to the defendant: see R v Smurthwaite (1994). (26) It may be the case that when the judiciary refer to the need for breaches of PACE and the Codes to be "significant and substantial", due weight is being given to the interests of the Crown. If evidence was excluded from trial merely because of an inconsequential breach of PACE and the Codes, as happened in R v Fennelley (27) then the interests of the Crown would not be given sufficient weight by the judiciary and exclusion here would upset the "fairness of the proceedings". Therefore the test formulated in R v Walsh represents a principled judicial response to PACE and the Codes which was a negotiated settlement between the interests of suspects and police/prosecuting agencies. Ashworth misrepresents the situation when he implies that the "significant and substantial" test is a result of the pressures of "practical politics", rather the judicial test is a principled response to the negotiated settlement of PACE. It may be that the PACE Act was the result of practical politics - but this criticism should not be levelled at the judiciary in their interpretation of Section 78.

A third major view on the question of the vindication of due process values through the exclusion of evidence argues that the discourse of "rights" and their vindication by the law of criminal evidence is inappropriate. On this view it is not one of the purposes of the law of criminal evidence to vindicate the pre-trial rights of the suspect

through the exclusion of evidence at the trial. I. H. Dennis argues,

" ... that the law of evidence is not overtly concerned to enforce individual rights ... The law of evidence is an unsatisfactory mechanism for protecting rights. What are needed are compensation or punitive remedies which are effective and available in all cases." (28)

Hence where a defendant pleads guilty at trial there is no opportunity for the court to vindicate his pre-trial rights which may have been violated by the police, through the exclusion of evidence from the criminal trial.

The main argument for this claim is that the protective principle (the "rights vindication model") sets up an incoherent model. This model of the criminal process argues that truth-finding is subject to the need to recognise certain external values which operate as side constraints as the pursuit of truth-finding. These values are the "rights" of the suspect in the pre-trial investigatory phase. Dennis comments,

" Individual rights and the public interest in truth-finding do not seem to be commensurable values which can be meaningfully 'balanced'. The effort to do so simply produces an unsatisfactory theory." (29)

The protective principle has to address in what circumstances violation of a right will lead to the exclusion of relevant evidence from the trial. It also has to identify first of all what "rights" there actually are. On the theory put forward by Professor Dennis, the important question is not whether a right has been violated by the police in obtaining evidence, the issue is rather whether breach of statutory rules governing the investigatory process by the police is so grave that the integrity or legitimacy of the trial process itself would tend to be undermined by the admission of evidence obtained by that breach of the rules.

Such a view could still acknowledge the concept of "a right not to be subject to violence during interrogation" or a "right to legal advice" but the justification for the law of criminal evidence to rule inadmissible evidence obtained in breach of those norms is not because a right *per se* had been breached but that a concern for the integrity of the trial process dictates the exclusion of the evidence. This is not to

downplay the importance of the "right not to be subject to violence". Indeed, a police officer who violated that right would be subjected rightly to the full force of the criminal law as well as other punitive/disciplinary mechanisms as well as possible civil actions in tort law. However, on the theory put forward by Professor Dennis, exclusion of such "tainted" evidence is necessary for reasons which are internal to the purposes of the criminal trial and verdict. To argue as Ashworth does that the confession should be excluded because of the violation of a "right" is to suggest that the law of criminal evidence is responding to a concern or consideration external to the normal purposes of the law of evidence, i.e. that to vindicate a "right" there must be a "side constraint" on the usual purposes of the law of criminal evidence. Those usual purposes are securing the accuracy of the fact finding process by regulating the admissibility of unreliable or prejudicial evidence. Dennis comments,

"Apparently reliable evidence may need to be excluded if it carries significant risks of impairing the moral authority of the verdict. This is because it is not in the public interest that verdicts should be returned which lack moral authority. They are not satisfactory either for justifying individual punishment or for affirming the values of the criminal law. If relevant evidence is excluded here it will be because we are giving effect to values which are internal, not external to the process of proof." (30)

Therefore, although there is a consensus amongst commentators as to the need for confessions obtained by violence or inhuman treatment to be automatically excluded from trial the account or justification given for such a rule differs among the commentators. For Ashworth it is excluded because of violation of an important right. For Dennis the confession should be excluded because if it was obtained by violence then this will seriously impair the moral authority of any verdict based on such evidence.

With regard to other procedural values it is not immediately clear why there should be problems of legitimacy at all: why should a confession be excluded because of breach of a procedural right other than the right not to be subject to violence? It is therefore important to try to identify what is at stake when an individual is detained for interrogation by the police. The following is offered as an attempt to identify the central issues:

Custodial interrogation concerns the detention of the citizen by a core agency of the state for the primary purpose of questioning the citizen in order to produce evidence such as a confession for use in later criminal proceedings against the citizen.

Given this statement, it is important therefore that there are clear rules regulating how the citizen should be treated by the police in custody, for the position of the citizen as a suspect in custody is part of a wider relationship between the citizen and the state. Those writers who advocate due process norm in the criminal justice system recognise the crucial feature of the exercise of state coercion when a suspect is forcibly detained for interrogation. As Herbert Packer put it, due process is a value system which views

" ... efficiency in the suppression of crime ... (as)
subordinate to the protection of the individual in
his confrontation with the state." (31)

Packer makes clear that although the model of due process encounters its rival of the crime control model, on that model's own ground in respect to the reliability of fact finding processes this is not the heart of the difference between the two models. The due process model not only argues that its precepts will lead to more accurate fact finding than following the precepts of the crime control model, due process is also informed by a set of values which are independent of reliability concerns. As Packer comments,

"... in point of historical development the doctrinal
pressures emanating from the demands of the due process
model have tended to evolve from an original matrix of
concern for the maximization of reliability into values
quite different and more far reaching. These values can
be expressed in, although not adequately described by,
the concept of the primacy of the individual and the
complementary concept of limitation on official power."
(32)

Of course, some due process values such as a right to legal advice can be justified both on "reliability" grounds and also on grounds independent of a wish to increase the reliability of confession evidence. On the reliability issue advice from a solicitor is likely to reduce the coercive pressures of custodial interrogation on a suspect, as the RCCP recognised, the presence of a lawyer will,

" ... provide protection and support to the suspect during
interview." (33)

If the coercive pressures on a suspect are reduced then it is likely that the risk of a false confession being produced will also lessen.

Furthermore, a lawyer present provides independent witness to the interrogation process and to the subsequent terms of the confession which is likely to inhibit undue pressure being placed on the suspect and also provides the court with independent evidence of what was said and done at interrogation. Tape recording of interrogations is not a complete panacea, for comments can be made before the tape is switched on by the police or during breaks between interrogations. A lawyer may well notice what the tape misses.

Independent of these benefits to the accuracy of the fact finding process of the court when assessing confession evidence, which a solicitor who was present at the interrogation can provide, a right to legal advice serves interests which are independent of the fact finding process at trial. Legal advice on the strength of the police case against the suspect and his possible options to co-operate, remain silent or offer an innocent explanation for his conduct, serves the important value of informed participation of the suspect in the process to which he is subject. The ability of persons to participate in an informed way in the process to which they are subject to may have important pay-offs in terms of the legitimacy of that process, both to the individual suspect and to the community as a whole. (34)

The decision in R v Mason

The first Court of Appeal decision to establish that S.78 of PACE applied to confession evidence was R v Mason.

In that case a reliable confession to fire-bombing a car was held wrongly admitted by the Court of Appeal on the grounds that the trial judge had not taken into account the deceit practised on the accused and his solicitor. The Court of Appeal laid emphasis on the vital consideration (35) namely the "deceit practised on the appellant's solicitor" and deprecated the police deceit ,

" ... particularly ... on a solicitor whose duty it is to advise (the client) unfettered by false information from the police." (36)

It is unclear what the position would have been if the deceit had been practised solely on the suspect. The crucial feature in R v Mason was the deceit practised on the solicitor which went to the heart of any objectivity the solicitor could give in advising his client. If the deceit was practised solely on a suspect then another principle apart from the need to preserve the value of unfettered legal advice will have to be advanced to have the admission ruled inadmissible under Section 78 of PACE. Professor Birch identified the issue in R v Mason as "the right not to be lied to". This principle is capable of extension to the situation where the police practice a deceit solely on a suspect. However, it should not be thought that the Court of Appeal in R v Mason decreed that all confessions obtained after lies to a suspect's lawyer should henceforth be inadmissible. No such general proposition can be located within the judgement.

Moreover, it is not clear that "the right not to be lied to" can be located in English pre-trial criminal investigations. The use of "information bluffs" by the police (i.e. pretending to have more evidence against the accused than in fact exists without specifying the nature of the evidence) is a familiar police tactic. What made the police conduct in R v Mason so objectionable was that the police interfered with the suspect-solicitor relationship by lying about the state of the evidence. The suspect is entitled, as a consequence of S.58 of PACE to unfettered legal advice on what he should say (if anything) to the police. As a consequence of the lie to the solicitor, the solicitor advised his client to explain any involvement the suspect had with the offence. Where a lie is told to a suspect only by the police then that might be a situation where S.76 2(b) could operate because of the potential unreliability of a confession so obtained. It is too strong to propose as Professor Birch does, "a right not to be lied to", for not only is there a question as to whether this right actually exists (i.e. can it be located within the legal materials and discourse of the English criminal legal system?) but how would contravention of this alleged right by the police "so adversely affect the fairness of the proceedings" that any confession made should therefore be excluded under S.78 of PACE. A "right not to be lied to" seems too strong as an unqualified principle as it might extend to ruling inadmissible the confession obtained by the sort of tactics used in R v Bailey and Smith (1994) (37), tactics which the Court of Appeal held unobjectionable. In R v Bailey the police created a 'false' impression so as to lull the suspects into a false sense of security so that they made incriminating remarks which were recorded in their police cell. If the police had not lied to the suspects in R v Bailey then they would not have confessed. However, there was not an express misrepresentation in R v Bailey as there was in R v Mason.

Perhaps a relevant consideration in the context of the decision by the Court of Appeal in R v Mason was the nature of the offence and the type of evidence produced. If in a murder case the police lied to a suspect and his solicitor about the state of the evidence against the suspect and then the suspect on legal advice, produces the murder weapon then perhaps the court would take a different view on the admissibility of real evidence than the confession evidence in R v Mason.

English law has always drawn a sharp division in its treatment of improperly obtained confessions and its treatment of improperly obtained real evidence. The latter has rarely been excluded. It is significant in this context that just because a confession has been ruled inadmissible under S.76 this does not affect the admissibility in law of any fact discovered as a result of that confession - see S.76(4). For example, the murder weapon with the accused's fingerprints on it would be admissible even if found as a result of the accused's inadmissible confession. As a matter of strict principle it should not matter for the purposes of S.78 whether the deceit of the solicitor results in a confession or real evidence being produced. In both cases the suspect is entitled to have unfettered legal advice on whether to co-operate with the police or not. However, it is also true that as a matter of practice, confessions and real evidence have traditionally received different treatment from the English courts. As Birch comments on the Stagg (38) case,

"Real difficulty would have arisen had S. produced convincing evidence of involvement in the crime: the murder weapon perhaps. The unacceptability of the strategy would then have had to be weighed against the reliability of the outcome, taking into account the difficulty of detecting the crime and the fact that more conventional enquiries had failed to produce a result. Quite possibly the evidence would have been admitted." (39)

This is so despite the fact that any confession would likely have been excluded under S.76 2(b) or as in the R v Hall case under S.78. The point is that the Court of Appeal might tolerate a deceit on a solicitor which produced from the client real evidence as opposed to a confession.

Perhaps as a factor influencing judicial decisions to exclude evidence "seriousness of offence" is a factor too. In Mason although the offence was arson there was no immediate threat to life in the circumstances of the case. If the defendant in Mason had attempted to burn the house down with the occupants in it and he had confessed

following the same deceit practised by the police on him and his solicitor, then it is interesting to speculate what the attitude of the Court of Appeal would have been. For then not only an offender but a very dangerous offender would have gone free following the inadmissibility of the confession.

Significantly R v Khan (1994), a non-confession case on S.78 establishes that seriousness of offence (40) is a relevant factor on the exercise of the S.78 discretion. The more serious the offence the less likely it is that the evidence will be excluded under S.78. This is in accord with the exercise of the discretion to exclude the evidence of an accomplice mentioned by Lawton L.J. in R v Turner. (41) Lawton L.J. commented that the more serious the offence then the greater demands of justice to convict the defendant on the evidence of an accomplice and therefore the discretion to exclude should less likely be exercised.

However, Watkins L.J. did comment emphatically at the end of his judgement in R v Mason that

“ ... we think we ought to say that we hope never again to hear of deceit such as this being practised on an accused person and more particularly possibly on a solicitor whose duty it is to advise him unfettered by false information upon the police.”

This comment suggests that whatever the nature of the offence the kind of police deceit practised in R v Mason will not be tolerated by the Court of Appeal and so will lead to the exclusion of a confession so obtained. Perhaps a differently constituted Court of Appeal might take a different view in the case of a very serious crime such as murder.

If a right such as the right to legal advice can be justified on grounds independent of a concern to enhance the reliability of confessions then to argue that breach of the right to legal advice by the police should merely go to the weight a confession has before a jury (the RCCP proposal) (42) may well be an inadequate response to police violation of that right. It is arguable that a deliberate breach of that right should affect the admissibility of a subsequent confession. This is the only effective way that the non-reliability based values which a right to legal advice represent can be properly vindicated. If reliability of confessions was the only justification for the right to legal advice then breach of that right might be properly treated as a matter going to the weight of the confession before the jury. Yet this approach cannot give effect to say, the value of informed participation by a suspect in the legal process he is subject to,

this being a value which the right to legal advice represents. The only effective way of giving effect and support to this value is to exclude a confession where it was made consequent as a deliberate wrongful denial of legal advice.

Section 58 of PACE and its interpretation by the courts

One of the most significant changes in judicial attitudes is in relation to the right to legal advice. It is not even clear that this was considered to be "a right" of the suspect in the pre PACE era. The situation regarding judicial attitudes to breaches of the Judges' Rules reached a low point with the decision in R v Prager (1972) where the discretion to exclude a confession obtained in breach of the Judges' Rules was doubted by Edmund-Davies J., who said,

"Their non-observance will not necessarily lead to a confession being excluded from evidence unless it is shown that the confession was not made voluntarily." (43)

However, there are cases after Prager in which breach of the Rules did lead to exclusion of a confession under the discretion confirmed in R v Voisin (1918). The principle in the Rules relating to access to legal advice seems to have been the basis of a number of decisions in the defendant's favour where access had been wrongfully denied by the police.

R v Allen (1977) (44) a decision of Norwich Crown Court, R v Trickett (1981) (45) and R v Marsh (1985) (46), two decisions of the Central Criminal Court, all excluded confessions on this basis. R v Elliott and R v Lemsatef (47) both reported in the same year as R v Allen, were more indicative of the judicial trend. This trend was to admit confessions to the trial even though they had been obtained in breach of the requirement that the suspect should be allowed access to a solicitor if he wished. In R v Elliott Kilner Brown J., refused to exclude a confession where the police had wrongly denied access to a solicitor; the judge said,

"If the impression should be gained that the judges ought to punish police officers for breaches of the Judges' Rules, that clearly and plainly begs the proper question and is not the proper test."

The proper test being, according to Kilner Brown J.,

"... did breach of the Rules render the confession unreliable?"

This comment of Kilner Brown J. is in line with the comment of Lord Diplock in R v Sang (1979) that it was not part of the functions of the judge to discipline the police over the way in which they have obtained evidence. (48)

In R v Stephen King (1980) the Court of Appeal held that there was no obligation on the police (49) to inform a suspect of his right to speak to a solicitor since the Administrative Directions which supplemented the Judges' Rules said only that the suspect should be allowed to speak to a solicitor, which presupposed a request from him. The Codes of Practice of course, impose a duty now on the police to inform a suspect of his right to legal advice - Code C paragraph 3.1 - a duty which first arises when a suspect is under arrest at a police station. A further example of judicial attitudes to the principle of access to legal advice pre PACE is provided for by the case of R v Fell (1984) where the defendant was convicted of murder. The police ignored his requests for a solicitor and his subsequent confession was the only evidence against him. The trial judge acknowledged a breach of the Judges' Rules but refused to exclude his confessions. The comments of the trial judge were upheld in 1985 by the Court of Appeal,

It was the pursuit of truth, it was what the police officer sought, the interests of justice which authorised and required him to deny and deprive Peter Fell of the assistance of a solicitor ... You will remember that by the time of the confession interview ... the defendant had been in custody for more than two days and he had been questioned by detectives two at a time for a total of some eight and a half hours." (50)

It is interesting in the light of developments under PACE that there is little in the pre PACE law reports to indicate that the judiciary believed that there is a right to legal advice whose denial would very probably lead to exclusion. Exclusion of confession evidence under the Judges' Rules remained an idiosyncratic matter depending on the attitudes of particular judges.

After the decision in R v Samuel (1988) there can be no serious doubt about the importance the judiciary now attach to the right to legal advice. As Professor Zander said of this Court of Appeal decision, (51)

"The decision which was given in December 1987 was a considerable shock to the police. It showed that the courts were prepared to enforce the provisions of S.58 with an unexpected degree of vigour."

Reiner and Leigh corroborate the dramatic impact of R v Samuel,

"Samuel sent shock waves through the police as it came to be realized painfully that PACE would be interpreted much more stringently than the Judges' Rules." (52)

The significance of Samuel is that the right to legal advice was described by Hodgson J. as,

"... a fundamental right of the citizen..."

whose wrongful denial by the police will very likely lead to the exclusion of a resultant confession as a matter of discretion under Section 78. In the subsequent first-instance decision of R v Williams the trial judge excluded the confession because at the time of her arrest in her flat on suspicion of involvement in drug importation there was an interview with customs officers in which she was not told of her right to legal advice. The suspect then allegedly admitted involvement in drug importation. The trial judge took the view that it would be "totally unfair" to include into trial the evidence of the interview, applying R v Samuel (53).

Access to legal advice is not now understood as something that the police should as fair minded individuals grant to a suspect where that is convenient to "the administration of justice", rather it is understood as a basic right of the citizen which is not in the hands of the police to grant or deny.

It is important to note that access to legal advice can be delayed for up to 36 hours but only after strict criteria have been met: S.58(8) of PACE on the grounds for delay. Research studies on PACE indicate that over two-thirds of suspects detained in police stations do not exercise their right to see a solicitor. However, this represents a doubling of the proportion who do see a solicitor compared to pre PACE experience. (54)

The police can no longer reason as they could in the era of the Judges' Rules that a

request for legal advice by the suspect can be denied without proper justification and that any confession obtained will still be admitted into evidence. The obvious reason why the police would wish to prevent a suspect from seeing a solicitor is that the solicitor might caution silence in the face of police questioning. The Codes of Practice specify in Annex B to Code of Practice C that,

" Access to a solicitor may not be delayed on the grounds that he might advise the person not to answer any questions."

However, for Sharpe (55) in his treatise on *Habeas Corpus*, this ability of the police to delay access to legal advice in the case of a serious arrestable offence under Section 58(8) is totally unacceptable in that it may prevent a suspect from applying for the writ when his arrest and detention might be unlawful. In Canada in contrast, the principle of immediate access to legal advice has constitutional force in the Charter of Rights and Freedoms, S.10(b).

The later cases of R v Alladice (1988) and R v Dunford (1990) can be interpreted as providing some "comfort for the police". In these cases it was held that a confession obtained after wrongful denial of access to legal advice was not necessarily inadmissible under S.78. If the defendant knew of his rights independently of a legal advisor then a resultant confession could still be admitted even if legal advice had been wrongfully denied. In R v Dunford (56) the Court of Appeal followed R v Alladice in holding that,

" ... the solicitor's advice would not have added anything to this particular appellant's knowledge of his rights."

The Court of Appeal in Dunford pointed out that even where there was a clear breach of S.58 the court must still balance all the circumstances and decide whether or not there exists such an adverse effect upon the fairness of the proceedings that justice requires the evidence to be excluded. To say that a suspect has a right to legal advice and that therefore any wrongful denial should lead to exclusion under S.78 is no argument - what has to be shown is that denial would have such an adverse effect on the fairness of the proceedings that S.78 should be invoked.

However, both R v Alladice and R v Dunford can be criticized in the following terms; that a suspect may know of his rights in the abstract is not the issue, for this is no compensation for legal advice on how to exercise those rights in the context of the

actual case the suspect faces.

Moreover, one of the purposes of a legal advisor is to explain the legal meaning of such concepts as dishonesty, intent or recklessness and knowledge of this may well affect what the suspect says or does not say to the police. Indeed, under the terms of S.34 of the 1994 Criminal Justice and Public Order Act the suspect faces a further difficult choice of giving information to the police about the offence or staying silent and risking adverse inferences being drawn at trial from that silence. Legal advice in the particular circumstances of the case is therefore made more crucial to the suspect by the introduction of S.34 of the 1994 Act. Indeed by S.58 (2) of the Youth Justice and Criminal Evidence Act 1999 an adverse inference under Section 34 cannot be drawn unless the suspect had been allowed an opportunity to consult a solicitor prior to being questioned at an authorised place of detention.

Although access to legal advice was described in the following terms in S.58 of PACE,

" A person ... held in custody in a police station ... shall be entitled if he so requests to consult a solicitor privately at any time ..."

it was by no means inevitable that the judiciary should have taken so strict a line on the consequences of breach of that provision. Indeed, the PACE Act is silent on what the consequences of a breach of S.58 should be. It is argued here that recognition by the judges that PACE represents a new settlement between police and suspect must surely have played a part in their attitude to deliberate breaches of S.58 by the police.

In this sense there is a parallel with judicial attitudes to breach of the recording provisions for interviews at the police station. Where those breaches are substantial exclusion almost as a matter of course will follow. The case R v Walsh (57) is significant in this context, in that there had been in that case breaches of both the recording provisions and S.58. In that case Saville J. commented that if there had been significant and substantial breaches of S.58 or the provisions of the Code relating to the recording of interviews,

" ... then *prima facie* at least the standards of fairness set by Parliament have not been met."

In R v Walsh the following important statement of principle was made,

"Although bad faith may make substantial or significant that which might not otherwise be so, the contrary does not follow. Breaches which are in themselves significant and substantial are not rendered otherwise by the good faith of the officers concerned."

This is a significant comment given that under the old Judges' Rules the presence or otherwise of good or bad faith seems to have been an irrelevant consideration.

What the comment of Saville J. reveals is that the judiciary fully appreciate that PACE and the Codes represent a new settlement between police and suspect, and deliberate police breach of that settlement is likely to upset the "fairness of the proceedings" for the purposes of S.78. Inadvertent breach of that settlement is only likely to bring S.78 into operation if the breach is "significant and substantial". Breaches of the Codes of Practice which are made in good faith and which are not "significant and substantial" should not involve the exercise of the judge's discretion under S.78 to exclude relevant evidence from the trial. The "new settlement" is not so fragile as to require the exclusion of evidence solely because the police have breached the Codes of Practice.

As has been pointed out in various cases such as R v O'Loughlin (1987) (58) R v Smurthwaite (1994) "fairness" under S.78 means "fairness" to the interests of the prosecution as well as of the defence. Exclusion of evidence solely because there was a breach of the Codes would not be to give sufficient weight to the interests of the prosecution. Moreover, under S.78 the test is whether admission of the evidence "would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it", not merely an effect on the fairness of the proceedings. This suggests something of a threshold before a breach of the Codes would dictate exclusion of evidence.

Section 76 2(a) of PACE and its interpretation by the courts

It has to be accepted that some psychological pressure on some suspects is necessary to persuade them to confess when in fact they are guilty. This point is fully accepted by Gudjonsson, the forensic psychologist who aided the defence in The Guildford Four and Birmingham Six appeals, (59)

"I think it is important to realise that unless there is some kind of perceived pressure or that people believe that the police have something on them in the majority of cases people would not confess ... I do believe that a certain amount of pressure is essential in police work."

It may also be the case that some interrogative pressure is necessary even for those suspects who feel remorse for their offence and wish to confess to relieve their inner tension. Gudjonsson and Bownes in a research study into prisoners in Northern Ireland being held for sex or property offences, comment (60)

"... the more remorseful criminals are about their offences the more likely they are to experience an urge to confess. However, the same blame attribution factors were associated with strong inhibitions about confessing. That is blaming the offence on internal mental factors (rather than on society) still leaves offenders feeling ashamed about having committed the offence and in order to overcome the resistance caused by the shame, more interrogative pressure is required. These findings have important implications for police interrogation techniques. They indicate that suspects who feel great remorse about their offence and those who blame the offence on internal mental factors like loss of temporary control, are going to be reluctant to confess to their offence, even though they have a great need to do so. The reason for this is probably related to the shame they experience in connection with the offence. In other words, remorseful suspects also feel most ashamed about what they have done and this inhibits them from confessing. These findings are consistent with views of some experienced interrogators."

Interestingly, the playing down of the seriousness of the offence is a very effective technique in inducing remorseful suspects to confess by offering them "face-saving" devices to confess. It will be remembered that in R v Delaney (1988) the police were alleged to have down-played the seriousness of the offence which Delaney was suspected of, indecent assault. The Court of Appeal did not approve of this technique because of Delaney's mental age, which was that of a young child and ruled his confession inadmissible under S.76 2(b) of PACE. If Delaney had been a suspect of normal intelligence then it is unlikely that his confession would have fallen foul of S.76 2(b). "Down-playing" the seriousness of the offence is a useful interrogative strategy to induce remorseful suspects to overcome their shame and confess truthfully. Delaney in contrast, was a very vulnerable suspect who may have been induced into a false confession by the police manipulation.

However, as Gudjonsson and others have shown through research, the more psychological pressure that is applied to suspects, especially vulnerable suspects to induce them to confess the more likely it is that false confession will be produced. This means that there are cogent reliability based concerns for the police not to employ oppressive interrogative questioning for example. Yet there is a legitimacy issue independent of this concern for the reliability of confessions.

At what point does the pressure applied to suspects to obtain a confession become "oppressive" so that the trial process should forego any confession obtained by those methods?

Given that a finding of oppression under S.76 2(a) of PACE leads to the automatic exclusion of a confession without any consideration or argument as to its unreliability or its potential unreliability it is important to identify what police conduct does fall within the operation of this exclusionary rule. If the threshold of 'oppression' is set too low then there is a danger that too many guilty offenders will go free. To emphasize the point a finding of oppression leads to the automatic exclusion of a confession without any argument as to the effect of the oppressive conduct on the reliability or potential reliability of the confession. The Court of Appeal has an important role to play in identifying these core prohibited practices for S.76 (8) of PACE is only a partial definition of what police conduct counts as "oppression" (see R v Fulling (1987) (61)). Obviously there are limits to the precision of this identifying exercise by the Court of Appeal. Therefore Robert Reiner's plea for a clear statement on,

" ... how much verbal abuse, how loud a voice, how many repeated questions constitute oppression for the purposes of S.76 2(a)." (62)

is a completely unrealistic demand on the Court of Appeal. Mr. Justice Mitchell said in R v Heron,

" ... where the line is to be drawn between proper and robust persistence and oppressive interrogation can only be identified in general terms." (63)

Whilst some interrogative practices such as the use of threat of violence are always unacceptable in a civilized society, the use of other practices such as intensive interrogative questioning may or may not be oppressive depending on the degree of

intensity of questioning involved and the personality of the suspect. The degree of intensity is likely to depend on a number of factors, the length of questioning, the amount of verbal abuse, the tone of voice, the number of accusatory questions and the personality and age of the suspect.

The decisions in R v Emmerson (1991) (64) and R v Miller (1993), the first decision holding that a "rude and discourteous" interrogation was not oppressive and the other holding that a very intensive interrogation was oppressive, illustrates that with regard to questioning it is all a matter of degree on whether the questioning is oppressive or not. The Court of Appeal in R v Heaton (1993) (65) distinguished R v Miller on the ground that although police officers had raised their voices slightly in the interview there was no shouting and the interview had only lasted 75 minutes. This is perfectly correct for it would tend to seriously frustrate the important aim of convicting the guilty through confession evidence if a forceful accusatory attitude by the police in interrogating a suspect was held to be in itself "oppressive".

In parallel with the above point, the term violence in S.76 (8) must as Tapper notes "indicate more than a mere battery" since

"... the requirement of so small a degree of force would be prone to cause disputes in far too many perfectly reasonable and acceptable situations." (66)

Again the threshold of oppression must not be set too low for then too many acceptable confessions would be ruled out as inadmissible because for example, a police officer had put his hand on a suspect's shoulder during questioning.

The next issue to be considered is to examine exactly why certain police practices are considered so objectionable that their use invites an automatic exclusionary rule to operate on any confession so produced.

It is interesting that official reports which have considered the issue of police interrogation, for example the CLRC Eleventh Report and the RCCP Report, have tended to denounce the use of 'oppressive' methods in very general terms without offering a detailed account of why such methods are unacceptable. The CLRC in its Eleventh Report limited itself to the following comments,

"We do not think it would be right or acceptable to public opinion to make any exception to admissibility where there had been oppression." (67)

The RCCP was slightly more expansive in its explanation of the prohibition on violence and torture as interrogative methods,

"In order to mark the seriousness of any breach of the rule prohibiting violence, threat of violence, torture or inhuman or degrading treatment and society's abhorrence of such conduct, non-compliance with this prohibition should lead to the automatic exclusion of evidence so obtained." (68)

These condemnations of 'oppressive' methods in securing confessions are cast in very general terms and do not make any explicit connection between the values that the trial process exists to uphold and denial of those values which occurs when the police use violence or torture to obtain evidence for use in the criminal trial.

Recognition of this point would bring out clearly the important issue that the use of violence or torture by the police in obtaining evidence is not only publicly unacceptable but is not consonant with the values which the criminal trial process seeks to uphold.

Therefore, even if public opinion were to change with regard to the acceptability of police violence against certain suspects (e.g. terrorist suspects involved in a determined and widespread campaign of violence against society, public opinion may well sanction the use of violence by the police here) the important point of principle would retain its force to rule out such methods. A conviction based on confession evidence obtained through violence or torture by the police would still be unacceptable as being a contradiction of the purposes of the trial process and verdict in a liberal democratic society. As Professor I. H. Dennis has written,

"At one level the verdict represents a conclusion that the factual demonstration has or has not been made out. But this is not the only message that the verdict carries. A verdict of guilty also conveys moral condemnation of the defendant. It is an expression of moral blame. At a deeper level the verdict is additionally an expression of the norms of the criminal law and of the consequences of breach of such norms." (69)

To understand the legitimacy of the verdict theory it is important to grasp the fact that the criminal trial and verdict communicates more than merely the fact that a particular defendant is guilty or innocent.

Criminal trials perform valuable symbolic and educational functions which communicate messages about the importance of the rule of law and the deterrence of criminality which are independent of truth finding.

This perhaps slightly overstates the point since without a perceived general accuracy of verdict the criminal trial could not command the moral authority to communicate those "valuable symbolic and educational functions" but the main point is a valid one that the criminal trial has a significance beyond the conclusion that the defendant is guilty or innocent. Police impropriety in the investigative stage can diminish the moral integrity of the criminal trial which passes judgement on a defendant on the basis of evidence gathered by the police. A good example is the case of torture to obtain a confession. The use of torture to obtain a confession, according to Professor Dennis,

"... amounts to a gross violation of the fundamental principle of according all citizens respect and dignity." (70)

Consequently,

"A verdict derived from such a violation is self-contradictory. It cannot fulfil its integral functions of making a morally justified statement of the defendant's blameworthiness and fitness for punishment and of conveying an expressive message that the criminal law incorporates values which it is necessary to uphold by punishment." (71)

This argument of principle must be clearly distinguished from a separate consequentialist argument used to bolster the prohibition on confessions obtained by torture or violence. As Dennis has written,

"Furthermore, to uphold a conviction in this case would carry great risks of a loss of public confidence in the integrity of the criminal process and of the criminal law itself. The state should not therefore be able to rely upon evidence obtained by such methods." (72)

Appeals to the acceptability of certain methods of police interrogation with public opinion must surely only be a subsidiary argument in favour of a ban on confessions obtained by torture or violence.

The main argument against the use of violence or torture should be based on strong moral considerations, namely that, as the Home Office memorandum to the Royal

Commission on Criminal Justice in December 1992 stated,

"Oppressive behaviour is offensive to the very values of Criminal Justice." (73)

Interestingly from 1973 the law in Northern Ireland rendered a confession to a scheduled terrorist offence inadmissible if obtained by subjecting the suspect

"... to torture or to inhuman or degrading treatment in order to induce him to make it."

(Northern Ireland (Emergency Provisions) Act 1978, s.8(21))

This provision was introduced as a response to the excesses of some members of these security services and police in interrogating suspects in the fraught atmosphere of early 1970s in Northern Ireland. However, it was also designed to make more confessions admissible than under the common law voluntariness test which it replaced. With the abandonment of internment the obtaining of convictions upon confession evidence became vital in the fight against terrorism. The brutal interrogation of suspects in Northern Ireland in the 1970s attracted international concern, see the Amnesty International Report in 1978 as an example. Certain interrogation techniques of the security services led to major embarrassment for the British Government when the case of Ireland v UK (1978) (74) was decided against Britain in the European Court of Human Rights. The Court held that Article 3 of the European Convention on Human Rights was breached due to the use by the security forces in Northern Ireland of five specific techniques of interrogation. These five techniques were, forcing suspects to stand right up to a wall for hours, being hooded for hours, subjection to persistent noise, deprivation of sleep and deprivation of food. The deprivation of sleep is especially likely to produce a highly suggestible state in even the most hardened of suspects. It has been commented by Peter Suedfeld in "Psychology and Torture" (75) that,

"... of the methods enumerated, the sustained disruption of sleep patterns - either by complete sleep deprivation or by violently altering the accustomed diurnal cycle - has been singled out as leading not only to dread and dis-orientation, but eventually to an internalized belief in false confessions. It has been called probably the most potent of all the debilitating elements of softening up prisoners."

The techniques of the UK security services were held by the European Court of Human Rights to amount to treatment that was inhuman and degrading but not to torture.

The provision quoted above in Northern Ireland law was drawn from Article 3 of the European Convention of Human Rights. It was later incorporated into the Police and Criminal Evidence Act in England and Wales by S.76 (8) of PACE, as a partial definition of "oppression". Interrogation practices in England, although not generally of the brutality experienced by suspects in Northern Ireland in the 1970s, seem to have left a lot to be desired. A study into English practice by Walkley (76) in 1983 showed that over half the detectives he interviewed were prepared to use force or the threat of force when questioning suspects. 32% of those questioned were prepared to use force. A further 34% of detectives were prepared to countenance the use or threat of force. The Walkley study is quoted without objection in a recent paper by Tom Williamson, who is a Detective Chief Superintendent in the Metropolitan Police Service. Although Williamson (77) does stress that there has been a discernible move towards non oppressive interrogation techniques in the post PACE era, "the transition from coercive questioning practice is only just beginning". There is some evidence to suggest that a heavy handed approach to the interrogation of suspects may have been somewhat encouraged by a C.I.D. culture which accorded status to those detectives who could secure a confession from a suspect quickly.

In his autobiography, Jack Slipper, a Detective Chief Superintendent in the Flying Squad in the 1970s recounts an interrogation of a woman who was "so nervous she was literally vomiting in the wastebasket in the C.I.D. office". Detective Chief Superintendent Slipper's account of his approach is interesting for the light it casts on C.I.D. culture at the time. (78)

"When a woman does that (vomiting) it's natural to be tempted to ease off but in those circumstances a good policeman cannot afford to say, Well never mind love, we will talk about it again in the morning ... It is still your duty to carry on. That's what the ratepayers pay you for and, I have to admit, pride comes in to it also. If you ease off a suspect and a colleague comes in half an hour later and gets a full confession, your own good name can come unstuck in one evening. You may get all kinds of sympathy and your excuses may be accepted, but in the bar in the Yard where all the police gossip circulates the word soon goes out that 'Jack is losing his grip'..."

This illustrates that legal changes to the recording of interrogations and the provision of legal advice, whilst important, must be accompanied by a change in C.I.D. culture which has often accorded social and professional status to the detective who can 'obtain' confessions from suspects without a corresponding concern for the reliability of those confessions. The police now claim that there is much greater pre-interrogation preparation so as to make sure that the interrogation proceeds on the basis of reliable information. John Smith (79) the Deputy Commissioner of the Metropolitan Police, comments that the quashing of the convictions of the Tottenham Three caused the police "a hell of a lot of anguish". As a result he claims the emphasis is now on investigations before anyone was arrested with "a minimal reliance on confession evidence". Interestingly research studies do bear out this change in police attitudes to interrogation. David Dixon (80) from his own research published in 1990 has commented recently,

"... crucially there has been a shift in evaluations of investigative methods: the tradition of arresting on hunches, interrogating and giving weak cases "a run" has been challenged by according status to officers who investigate more carefully before arrest and who find ways of working within the rules."

Given the importance of custodial interrogation of suspects to the aims of criminal justice and the danger that the police in seeking to fulfil those aims will overstep the mark of propriety, it is vital that the Criminal Justice System has an unambiguous statement on what police methods in obtaining confession it will not even begin to countenance. This is the function of S.76 2(a), a declaration of the core prohibited interrogative practices that will not be tolerated by the system, irrespective of the reliability issue.

Any inquiry by the judge under S.76 2(b) begins by asking whether the police methods used tended to affect the reliability "of any confession which the suspect may have made in consequence thereof". With regard to "oppressive" tactics by the police, the consequences of this inquiry by the judge will virtually always be that the confession is ruled inadmissible if S.76 2(b) is applied correctly.

However, with regard to tactics such as violence or threats of violence, it would be inappropriate and inconsistent with the values of criminal justice to treat the admissibility of a confession obtained by such methods as going to the reliability question under S.76 2(b). As Professor Birch has written, the intention of S.76 2(a) is

to announce that,

" ... some basic minimum standards are not negotiable and courts cannot entertain arguments based on the reliability of evidence obtained in an oppressive way without descending to the level of the oppressor." (81)

Thus S.76 (8) has a list of absolutely prohibited police practices which if used will bring in the operation of S.76 2(a) automatically. The question then becomes, since S.76 (8) is only a partial definition of "oppression" what other practices can constitute "oppression" for the purposes of S.76 2(a)? R v Miller (1992) decided that aggressive interrogation questioning can constitute "oppression". The question then becomes whether "oppression" in this case is a variable concept depending on the personality of the suspect and his vulnerabilities. It may be argued that a lower level of intensity of questioning may become "oppressive" for a juvenile or an old lady but not for an experienced hardened criminal.

It could be argued that S.76 2(b) is available to cover those cases which require a determination of the individual vulnerabilities of suspects before a confession is ruled inadmissible.

Intensive questioning of certain vulnerable suspects could be viewed as "something said or done" which was likely to affect the reliability of any confession made. In R v Fulling (82) Lord Lane said that S.76 2(b) is,

"... wide enough to cover some of the circumstances which under the earlier rule were embraced by what seems to us to be the artificially wide definition of oppression approved in R v Prager (1972)."

The common law concept of oppressive questioning was defined in R v Prager approving Lord MacDermott's address to the Bentham Club, as

"... questioning which by its nature, duration or other attendant circumstances ... so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would have remained silent."

As Dennis has recently observed,

" ... taken literally, this principle made questioning of suspects in police custody virtually impossible." (83)

It might be argued that S.76 2(a) only covers those cases of intensive interrogative questioning which are clearly "oppressive" for all suspects. For confessions produced from less intensive questioning, but still intensive questioning, S.76 2(b) is available to deal with any problem, if it is felt given the vulnerabilities of a certain suspect that intensive questioning (as opposed to mere questioning) is likely to lead to an unreliable confession. However, it is proposed not to agree with this viewpoint.

If the police engage in an intensive interrogation of a 12 year old boy or a mentally handicapped person, for example, it might well be the case that the interrogation is rightly stigmatized as "oppressive" whereas it would not necessarily be oppressive if the same interrogation was of an experienced career criminal. This was recognised by the common law concept of oppression, see R v Hudson (1980) (84). If one of the main reasons for the existence of S.76 2(a) is to declare certain police interrogation methods publicly unacceptable regardless of their actual impact on the reliability of confessions (contrast S.76 2(b) here) then S.76 2(a) is properly invoked where the police subject extremely vulnerable members of society to the kind of interrogative questioning which should be reserved only for the most hardened of criminals. This is of course, not to advocate intensive interrogation for any suspect. Indeed all suspects are vulnerable to a lesser or greater degree in police custody. It is merely to recognise that certain suspects will not talk to the police unless some verbal pressure is placed upon them. However, where police interrogative questioning reaches a certain level of intensity it becomes "oppressive" for all suspects, and any confession made as a result should be ruled inadmissible under S.76 2(a).

R v Miller provides a good example of when interrogative questioning becomes "oppressive" regardless of the vulnerabilities of a particular suspect. However, in R v Miller the Court of Appeal did make reference to the fact that Stephen Miller had a mental age of eleven so it would appear that under S.76 2(a) the vulnerabilities of a particular suspect is one factor in deciding whether police tactics used were "oppressive".

The first major case on S.76 2(a) was R v Fulling (1987). It was at the time PACE was passed an open question whether the common law definition of "oppression" survived given that S.76 (8) represented only a partial definition of "oppression". The common law concept of "oppression" was a relative and flexible concept. It could

take account of the suspect's personality and the effect of the interrogation on him. The test which the common law arrived at was first stated in R v Priestley (1965) by Sachs J. Oppressive questioning was held to be,

"... that which tends to sap and has sapped that free will which must exist before a confession is voluntary."

In R v Fulling the Court of Appeal rejected the "artificially wide definition" of oppression approved of in such cases as Prager and Hudson. The court said that PACE was a codifying act and that therefore the court should not reassert the old law on oppression. The Lord Chief Justice defined oppression by its "ordinary dictionary meaning". This was the,

"... exercise of authority or power in a burdensome, harsh or wrongful manner: unjust or cruel treatment of subjects, inferiors etc., the imposition of unreasonable or unjust burdens."

Lord Lane continued, quoting from the Oxford English Dictionary,

"There is not a word in our language which expresses more detestable wickedness than oppression."

The emotional cruelty practiced by the police in this case, telling the suspect that in the police cell next to her was her boyfriend's lover, is probably insufficient to classify as "oppressive" conduct. The suspect claimed that she confessed in order to escape what was to her an intolerable situation of being in a cell next to her rival. The police officer's statement in R v Fulling seems to have been a truthful one and whilst it was callous and tactless it was in the opinion of the court, below the threshold of "oppressive" conduct although others may reasonably disagree with this finding. This illustrates a crucial feature about the concept of "oppression", namely that it is an essentially contestable concept. This means that although oppression has a core of settled meaning about which everyone can agree, e.g. the use of serious violence is clearly "oppressive", in penumbral cases such as R v Fulling there can be reasonable disagreement about whether conduct is oppressive or not.

A. A. S. Zuckerman criticized the judgement in R v Fulling as follows,

"A perfunctory reference to a dictionary entry can hardly provide the police with guidelines for the conduct of interrogation." (85)

The reference to "wickedness" does however import a strong notion of 'bad faith' and it would have to be fairly extreme police behaviour which could properly be described as "detestable wickedness". An example of police conduct not involving the use of violence or the threat of it nor the use of overly prolonged questioning which nevertheless would be stigmatized as "oppressive" is that mentioned in the 1986 case of R v Miller (86), a case decided under the old common law concept of "oppression". The Court of Appeal commented that police questions deliberately asked with the intention of producing a disordered state of mind in a mentally ill suspect would amount to oppression by the police. Watkins L.J. commented that "questions skilfully and deliberately asked so as to produce a disordered mind" was "such obviously wicked conduct". This phrase echoes Lord Lane's definition of oppression as "detestable wickedness". Since Fulling, further clarification has been forthcoming from the Court of Appeal on what interrogation practices can be classified as "oppressive". In R v Miller (1992) interrogative questioning of a very intensive nature was held to be "oppressive".

In R v Miller, also known as "The Cardiff Three" case (87) upon hearing the tapes of the interrogation of one of the suspects in that murder case the Lord Chief Justice had no doubt that the police had behaved "oppressively" by forceful repeated accusations by the police that the suspect was guilty in the face of the suspect's repeated denials of guilt. However, the intensity of the questioning disclosed by the tapes of that case was extreme: the suspect had denied involvement in the offence over 300 times before he confessed to murder. It should not be assumed that forceful accusatory questioning *per se* is to be regarded as "oppressive" under S.76 2(a). It was various factors such as the duration of the questioning, the number of the same accusatory questions as well as the force and menace of the delivery which influenced the judgement of the Court of Appeal to quash the conviction.

It is perfectly right that this level of intensity in questioning is classified as "oppressive". A person under arrest in police detention cannot simply walk away from the abuse and this is why, as Zuckerman points out, the use of verbal abuse in police interrogation,

"... is offensive to our sense of justice." (88)

This is a strong reason for refusing to treat all cases of intensive interrogative questioning as going solely to the S.76 2(b) question although S.76 2(b) would no doubt operate to exclude confessions obtained by the more extreme forms of

interrogative questioning as unreliable or potentially unreliable; the more extreme forms of interrogative questioning are also offensive to our sense of decency and hence S.76 2(a) is the appropriate provision to be properly invoked so as to exclude any confession so obtained.

It is to be hoped that the courts will pay even closer attention to the possibility of questioning becoming "oppressive" in the light of the change to the law affected by S.34 of the Criminal Justice and Public Order Act 1994.

Under the old law a suspect in the face of verbal insults or unduly repetitive questioning by the police had always the "risk free" option to remain silent, and maintain his dignity. However, under the provisions of the new Act the suspect will be told at the outset of questioning that if he does not reveal certain facts then this could be used to ground inferences at trial. Given that silence is no longer a "risk free" option for the suspect it is likely that he will be more vulnerable to the distressing psychological effects of verbal abuse in the context of police interrogation. A suspect can, of course, still remain silent without fear of direct sanction but the possible indirect sanction of adverse inferences at trial makes silence less of a refuge for the suspect than it was previously. Any confession which results from this scenario should be scrutinized carefully for signs that it may have been obtained by undue psychological pressure. It is the submission of this thesis that due to S.34, police questioning has the potential to become "oppressive" at a lower level of intensity than under the old law where silence was always a risk free option for the suspect. P. Mirfield has commented on S.34 (89),

"These provisions do seem to change the climate - as they were certainly intended to - such that in law the suspect is recruited as an active part of the investigation process."

No longer can a passive silent attitude to police questioning be a 'risk free' option for the suspect. Not having this option at his disposal the suspect is likely to experience the disagreeable effects of custodial interrogation even more intensely than before the introduction of S.34. The possibility of interrogative questioning becoming "oppressive" is something the courts should be even more aware of than before the introduction of the new provision. There has been an argument canvassed that by allowing the court to draw inferences from a suspect's silence in the police station that this will decrease police reliance on improper tactics in interrogation. An American academic Professor Mark Berger, in a recent article on developments in England and

"It is arguable that permitting adverse inferences from silence would remove the pressure police now feel to secure incriminating admissions because they would also gain evidentiary benefit from a suspect's refusal to answer ... Existing rules place police under great pressure to secure statements from a criminal suspect. If they fail to do so not only are they deprived of potentially valuable evidence but also they may not make use of the fact that the suspect remained silent. The legislation would change this balance. Under the new law a suspect's answers to official questions can be used as evidence against but so can his refusal to respond. Arguably this will lessen the likelihood that police will engage in improper tactics because they can secure some evidentiary benefit even if a suspect remains mute when questioned."

However, in criticism of this viewpoint it may be the case that the police will not decrease their use of improper tactics to obtain confessions since a confession if admissible in evidence has much greater weight than inferences which may be drawn from silence in the face of police questioning. The criminal court under S.34 is not obliged to draw inferences but may do so. The incentive to obtain confessions has not in the author's opinion been substantially lessened by the introduction of S.34 of the 1994 Act. Moreover, S.34 increases the risk of a false confession by placing more pressure on suspects to speak. The vulnerable suspect may well make a false admission under the increased coercive atmosphere of the new regime. Also there is the danger that at trial the jury may well draw a mistaken inference of guilt from silence in the police station, increasing the risk of a miscarriage of justice. In conclusion S.34 increases the dangers to innocent suspects rather than decreasing them.

In R v Heron (1993) at Leeds Crown Court Mr. Justice Mitchell ruled inadmissible a confession to the horrific murder of a small girl. Listening to the tapes of the interrogation the judge held that (91)

"I have no hesitation in concluding that there comes a time in that interview when the police began to act oppressively."

The police had conducted,

"... an exercise in breaking the defendant's resolve to make no admissions."

Various factors seemed to have influenced the judge in finding that the interrogation became "oppressive". The repetitive nature of allegations by the police that Mr. Heron had committed the murder in the face of his repeated denials recalled the police tactics in R v Miller.

"It was wrong in the teeth of his constant denials to pound him with consistent allegations of him being the killer and pound him with sexual allegations."

Mr. Heron denied the killing more than 120 times.

The judge also criticized the police for misrepresenting evidence to Mr. Heron by falsely claiming they had two witnesses who had identified him at the place where the victim was last seen alive. Lies to a suspect and his solicitor in R v Mason about police possession of incriminating evidence led to a confession being excluded under S.78.

It might be thought from the Miller and Heron cases that the courts will not tolerate the traditional loud-mouthed heavy questioning approach of the pre PACE era. However, this is probably overstating the point. Police questioning in both the Miller and Heron cases was extreme in its intensity and because the line separating "oppressive" questioning from "non oppressive" questioning was clearly crossed in those cases it does not follow that shouting at suspects or making accusations to suspects will necessarily bring S.76 2(a) into play. Indeed in R v Emmerson (1991) (92) the C.A. held that where a police officer swore and spoke in a raised voice at times during an interrogation of a suspect who later confessed, this conduct although described as "impatient and rude" was not oppressive. According to Lloyd L.J. the police officer,

"... was saying in effect that it was plain that the appellant had committed the offence and why was he wasting their time. The impression given is one of impatience and irritation. The judge found it rude and discourteous."

However, the judge also said on the *voire dire*

"... that to exclude this evidence would be to give oppression a 'completely false meaning'."

The Court of Appeal said,

“... we agree with the judge. In our view the evidence was rightly admitted.”

Not all bullying interrogations deserve to be stigmatized as “oppressive” and if there is a problem with those interrogations not classed as “oppressive” then S.76 2(b) provides a further test for admissibility in an appropriate case.

However, there is a line to hold against “oppressive” interrogation and the judges have a vital role here in using S.76 2(a) in emotive cases such as Heron where there must be a strong temptation on the police to use methods which begin to border on the “oppressive”.

Indeed, attempts were made by some, including a senior police officer, after the Heron case to justify the tactics used in that case. This prompted the Lord Chief Justice to comment extra judicially in November 1993 (93),

“That when judges exclude confessions obtained in breach of the 1984 Act by oppressive interviewing, attempts are made in some quarters - not all - to justify the conduct of the interviews and to criticise the judges.”

Some police officers seem to view S.76 2(a) as a fetter on their legitimate action; after the Heron case a Northumbria detective Chief Superintendent is reported to have said that the local community had been “let down by the Criminal Justice System”. On the point of oppressive questioning he said,

“It would be entirely wrong to be pussyfooting about - we have a responsibility to search for the truth. If we are talking about oppressive behaviour it occurs every day in the courts, not just in the police station.” (94)

The elementary criticism on this comment is the difference between a cross-examination in open court and a police interrogation in private for the purpose of obtaining a confession. The two contexts are significantly different, and therefore oppressive questioning has a totally different import in the police station from questioning in open court, where the trial judge has the power to stop intimidatory questioning of the witnesses by counsel. The judge is master of proceedings in his own court.

After the release of the Cardiff Three the Chief Constable of South Wales police called for,

" ... a full debate on what constitutes oppressive questioning."
(95)

One interesting feature of the Heron and Miller cases was the existence of a taped record of the interrogation process. The Court of Appeal in the Miller case was shocked by the menace of the delivery as well as the number of repetitive questions asked. It may be that the existence of taped evidence of interrogations rather than reliance on police accounts of interrogation as in the pre PACE era has made the issue of "oppressive" questioning a live one in criminal trials. The old common law concept of oppression was deficient as a protection for suspects because of a lack of an independent account of the conduct of the interrogation leading up to a confession.

The courts tended to rely on police versions of events with all their potential for bias and doctoring of the record of the interrogation. The police could, pre PACE, simply deny the 'oppressive' behaviour alleged, and the police would often have been believed by judges, juries and magistrates.

Also it may be that the experience of listening to tapes of interrogation has made the judiciary more vigilant to the possibility of oppression in questioning. The Lord Chief Justice, Lord Taylor was clearly 'horrified' by listening to the interrogations of Stephen Miller.

The much increased visibility of the interrogation process in England, post PACE, may result in the important due process value of the protection of suspects from "oppressive questioning" being realised in many cases. The police know that in formal interviews at least, bullying tactics are likely to be detected by the courts, through the tape recording requirements of the Codes of Practice; a similar point is made by McConville et al in "Standing Accused". They comment that in the pre PACE era,

"Records of interrogation as unilateral police products, depicted the police asking polite questions of suspects whilst suspects tried to secure favours from the police as by offering an admission in return for bail. Of their nature therefore they anticipated possible objections to questionable practices and were constructed in such a way that the reported interrogations conformed to any demands that could be legitimately made of the police."

However, in the post PACE era, the police are required to tape record interrogations,

"This significant change in the rules of accounting is beginning to draw the judiciary into examining the nature of "interviews" and the propriety of certain lines of questioning." (96)

It is not possible to ascertain with any certainty how frequently violence or the threat of it was employed in the pre PACE era to obtain confessions. The facts of Treadaway v Chief Constable of West Midlands (1994) (97) disclose police behaviour towards a suspect in interrogation in 1982 which in the words of Mr. Justice McKinnon "amounted to nothing less than torture". Substantial damages were awarded against West Midland police. The plaintiff alleged that he signed the confession only after he had been handcuffed behind his back, and a succession of plastic bags had been placed over his head with the ends bunched up behind his neck causing him to struggle and pass out at one point. After the fourth plastic bag was held over his head he signed the confession.

There is an important caveat to the proposition that oppressive interrogation methods are more likely to be detected by the courts than in the pre PACE era because of the tape recording requirements. This caveat is that since most suspects who following interrogation make confessions plead guilty, then the nature of those interrogations will not be scrutinized by the criminal courts. It may be that some police officers will be tempted still to use oppressive methods in the hope that those methods will never be examined by the courts because of a guilty plea made by the defendant following his confession.

Section 76 2(a) as a rule of admissibility can only operate to protect defendants from coerced confessions where there is a contested trial. It has serious limitations as a protection for all defendants from coerced confessions because of the great number of guilty pleas.

A case has thankfully yet to be reported in England since the introduction of the PACE regime where the police have actually used or threatened violence to obtain a confession but a recent Privy Council case Burut v Public Prosecutor (1995) (98) from Brunei illustrates that in some common law jurisdictions the use of violence or inhuman treatment to obtain confessions is a continuing problem of some magnitude. In Burut the accused were suspected by the police of being involved with firearms offences and as such were subject to "a special procedure" carried out in Brunei in

cases involving suspected firearms offences. The procedure involved interrogating suspects whilst they were manacled and hooded. Lord Steyn giving the opinion of the Privy Council held that this conduct was "oppressive" under Brunei law which had adopted the common law concept of "voluntariness" as a bar on the admissibility of confessions. The interest of the case is in the interpretation given the phrase "confession obtained by oppression". The trial judge and the Court of Appeal of Brunei held the confessions of the accused admissible despite the use of the "special procedure" prior to the making of the confessions. The reasoning was that the confessions were made at interviews with the police when the special procedure had not been used, the special procedure had been used at earlier interviews with the suspects a few days earlier.

Lord Steyn criticized this reasoning of the Brunei courts,

"... although the appellants' written statements had not been obtained during interviews in which they were subjected to such treatment, nothing had occurred between their interrogation in accordance with the special procedure and the making of the statements to dispel the implied threat of further interrogation at which such procedure would be applied to them."

Consequently the confessions were obtained by oppression and were hence inadmissible. The convictions were quashed.

There is another issue with regard to confessions obtained by oppression. This is where the police use oppression to obtain a confession and then at subsequent interviews behave in complete accord with PACE and the Codes of Practice and obtain further confessions. It has been asserted by the courts that the fact that an earlier confession has been ruled inadmissible does not necessarily mean that subsequent confessions are inadmissible. This is likely to be an important issue for, as Heydon notes (99)

"There can be no doubt that an accused who makes one confession is likely to make others."

Once one confession is made the psychological and practical disadvantages of having confessed have already been incurred, and so this makes subsequent confessions easier to make.

At common law the inadmissibility of an earlier confession as involuntary did not preclude the possibility of the admissibility of a later confession if it could be shown that any inducement had dissipated in its effect on the defendant when he made his subsequent confession and that therefore it can be said that the later confession is voluntary: see R v Smith (1959) (100) which is the leading common law case on successive confessions and their admissibility.

As stated in R v Glaves (101) and R v Wood there is no general rule that the inadmissibility of the original confession "must inevitably be a continuing blight upon any subsequent confessions". The Crown might be able, for example, to persuade the court that the inducement had not continued with regard to the subsequent confessions although the original confession was ruled inadmissible because made as a result of an inducement. This is in line with the approach taken at common law where confessions subsequent to an involuntary one could be admitted if the improper inducement had become ineffective due to some interviewing cause such as lapse of time. However, where the original confession is ruled inadmissible because of oppression in its obtaining, then the courts should be careful about allowing the admissibility of subsequent confessions which were obtained by the use of further oppression. It may be that as in Burut v Public Prosecutor the use of oppression at the outset taints the whole series of later interviews where the police behave with complete propriety. The suspect may greatly fear a return of the violence or threats. It is submitted that once oppression is used to obtain a confession then unless circumstances are very unusual, all subsequent confessions should be ruled inadmissible under S.76 2(a) even if those subsequent confessions were made at interviews where the police complied perfectly with the Codes of Practice.

Undercover methods and the legitimacy of confessions so obtained

It is proposed to complete this analysis of the question of the legitimacy of confession evidence by focusing on a new problem which has arisen since the enactment of PACE: what should the response of the courts be to attempts by the police to secure a confession from a suspect by the use of "undercover methods" which are not controlled by that legislative regime?

It may be tempting for the police to use such methods especially after an attempt to secure a confession in formal interview under the Codes has failed as it had failed in

the Hall case. The suspect would be "off guard" in such a situation, not aware he is dealing with the police and also he will not have the benefit of legal advice on the possibly incriminating nature of his replies. There is some evidence to suggest that the rigours of PACE on the detention and interrogation of suspects and the control of access to a suspect by the "custody officer" has led to an increase of autonomous C.I.D. activity away from the police station (on this see D. Hobbs in his book "Doing the Business") (102). This activity may involve questioning of suspects without the constraints of the Codes of Practice.

It is therefore important that the courts attempt to fill in the gaps left by PACE and the Code on undercover methods to obtain confessions. The protections for suspects provided by the 1984 Act could easily be circumvented by the expedient of engaging in such operations. It would be unsatisfactory that measures to strengthen due process protections for suspects in the police station resulted in an increase of undercover attempts to secure confessions from suspects outside the police station. There must be a temptation for some police officers to avoid the rigours of PACE and the Codes in formal interviews by attempting to question suspects unhampered by the rigours of the statutory regime.

Such undercover methods to secure confessions must be clearly distinguished from other undercover methods which have come to the fore in recent years. Thus attempts to entrap suspects to commit further offences or tactics designed to provide incriminating evidence about the commission of an offence which do not involve questioning about an offence must be distinguished from the situation under consideration, which concerns attempts to question suspects about their involvement in offences uninhibited by the requirements of the Codes of Practice.

In Christou and Wright (C.A.) a police trap designed to secure evidence of the commission of crimes in the form of a 'shady' jewellery shop under the control of the police which 'accepted' stolen goods was held to be a legitimate operation and evidence of the transactions was said to have been rightly admitted at the trial. In giving judgement (103) Lord Taylor emphasized that the police were not involved in the questioning of suspects about their involvement in criminal offences.

"The appellants were not being questioned by police officers acting as such, conversation was on equal terms. There would be no question of pressure or intimidation by the police officers as persons actually in authority or believed to be so. We agreed with the learned judge that the Code simply was not intended to apply in such a context."

However, Lord Taylor administered the following caution to the police, a caution which played a significant part in the decisions of the judges in the later cases of R v Bryce and R v Hall. Lord Taylor commented in Christou,

"It would be wrong for police officers to adopt or use an undercover pose or disguise to enable themselves to ask questions about an offence uninhibited by the requirements of the Code and with the effect of circumventing it. Were they to do so, it would be open to the judges to exclude the questions and answers under S.78 of the 1984 Act." (104)

The questions asked by the police in Christou,

"... were for the most part simply those necessary to conduct the bartering and maintain their cover. They were not questions about the offence."

Such a situation cautioned against by Lord Taylor arose in the case of R v Bryce (105). In that case an undercover police officer had contacted the appellant by telephone and agreed to buy a car which had been stolen shortly before. They arranged to meet and at the meeting at a market the police officer had a conversation with the appellant by the officer including a query as to whether the car was stolen.

The appellant said it was and he was arrested. The Court of Appeal held that the questioning was,

"... blatantly an interrogation with the effect if not the design of using an undercover pose to circumvent the Code."

As such, under the Codes of Practice, a caution should have been given and the suspect should have been notified of his right to legal advice. The confession should have been excluded under the S.78 discretion. This principle was confirmed by the Court of Appeal in R v Lin. Hung and Tsu (1995) (106) where it was emphasized that,

"... in a case where a judge concluded that the use of undercover officers was purely in order to get round the requirements of the Code that would be a strong reason for holding the evidence inadmissible."

In R v Pall Lord Justice Glidewell commented,

"In our view the absence of a caution in most circumstances is bound to be significant for the purposes of the exercise of S.78." (107)

In R v Hall an admission by the defendant to murdering his wife was ruled inadmissible on the *voir dire* under S.78 and in the alternative S.76 2(b) of PACE. The suspect had been interrogated formally on a number of occasions but had remained silent in all of those interrogations. The police established an elaborate charade by which an undercover policewoman pretended to become emotionally involved with the suspect. The purpose behind the charade was to try to use the suspect's emotional involvement with the undercover policewoman as a lever by which the suspect could be persuaded to talk about his possible involvement in the disappearance of his wife. Arguably this police tactic was likely to render unreliable any confession made, as Hall might have said anything including a confession to murder to keep the relationship with the undercover policewoman going. Moreover, he was denied the protection of PACE and the Codes of Practice by not being cautioned nor offered the right to see a solicitor in what was in effect a series of police questions designed to elicit self incriminating answers from Hall about his role in the disappearance of his wife. The operation used in R v Hall was similar to that used in R v Stagg (108) where another undercover policewoman offered sexual and emotional involvement with the suspect in exchange for information concerning the suspect's possible involvement in the murder of a young woman. Ognall J. denounced the police operation in Stagg as,

"... a blatant attempt to incriminate a suspect by positive and deceptive conduct of the grossest kind."

This is in line with dicta in R v Sang that attempt to unfairly induce a suspect to incriminate himself is a basis for excluding evidence in the discretion of the trial judge. Lord Diplock commented in R v Sang that a discretion existed to exclude,

" ... evidence tantamount to a self-incriminatory admission which was obtained from the defendant after the offence had been committed by means which would justify a judge in excluding an actual confession which had the like self-incriminating effect."

The comments of Ognall J. in R v Stagg clearly illustrate that this important principle

for the discretionary exclusion of unfairly obtained evidence has survived the passage of S.78 of PACE and indeed is a basis for excluding evidence under that provision. Ognall J. commented,

"It seems to me that there can be no difference in principle between on the one hand evidence of fantasies expressed by a suspect said to go to the issue of identity or on the other hand evidence, for example of fingerprints or a blood sample. It is not the nature of the material obtained that matters, it is the purpose for which the prosecution seek to use it. Thus when Lord Scarman spoke of an accused being tricked into providing evidence that would plainly in my judgement include evidence of this character ... I am quite satisfied that the evidence obtained in this undercover operation falls directly within the class of material of which disapproval was expressed albeit *obiter* in R v Sang ..."

Ognall J. concluded,

"Although the court's powers at common law are preserved by sub-section 82(3) of the Police and Criminal Evidence Act in the context of the facts of this particular case it does not matter whether the conclusion I have arrived at is seen in the light of the principles relating to self-incrimination at common law or under the statutory discretion invested in me by section 78 of the Act: on either basis I am satisfied that the conduct of a fair trial demands the exclusion of the evidence obtained in this fashion."

However, R v Hall is the stronger case because a confession was made in that case whereas in R v Stagg the prosecution evidence solely consisted of inadmissible evidence of disposition to commit the offence without any admission by Stagg to involvement in the offence.

Mr. Justice Waterhouse held that,

"It is clear that throughout those later relevant conversations the undercover officer has engaged in continuous questioning of the defendant whenever the conversation could be steered approximately in that direction about the circumstances of the death or disappearance of his wife. That was a questioning of a person who was still suspected of having committed the offence of murder."

Denial of the requirements of the Codes of Practice led the judge to hold the

confession inadmissible under S.78. S.76 2(b) was obviously applicable as well given that the undercover policewoman promised the suspect emotional commitment if he revealed that he had killed his wife. A more manipulative inducement is hard to imagine, threatening the reliability of any confession made as a result of it.

What is permissible as a tactic to obtain a confession from a suspect who has remained silent in formal interview is to 'bug' the suspect's conversations with others. Whether this extends to the bugging of a suspect's conversations with his solicitor is obviously a different matter. Legal advice is unlikely to be "unfettered" (see R v Mason) if solicitor or client suspect the police are bugging their confidential conversations. However, in R v Bailey and Smith (109) a confession was held rightly admitted after a bug was placed in the suspect's police cell and his conversations with an associate were listened to. The Court of Appeal held that the police were under no duty to protect suspects from having the opportunity to speak incriminatingly to each other if they chose to do so. There was nothing to prohibit the police from bugging a cell where self-incriminating speech might be made even after an accused person had been charged and had exercised his right to silence in interview with the police.

The distinction with Bryce is that no questioning by the police took place. If suspects are so careless to talk to each other in an incriminating way in a police station then the police cannot be censured for taking advantage of that.

Counsel for the defence in Bailey sought to argue that deceitful conduct of the kind practised by the police in Bailey,

"... drives a coach and horses through the Code to the point where the police will in future not bother even to interview suspects."

The Court of Appeal rightly rejected this argument. The stratagem employed in Bailey could manifestly not be used with any frequency,

"... nothing would be more obviously self-defeating: it should be used only in grave cases." (110)

However, what would tend to subvert the protections of the Codes of Practice was the kind of undercover activity manifested in cases such as Bryce and Hall. If the police thought that they could avoid the rigours of the Codes by interviewing suspects in undercover guise and then produce incriminating remarks at trial then the potential for

undercutting PACE and the Codes would be substantial. The decisions in Bryce and Hall are to be welcomed. They are another sign of the seriousness of the courts in attempting to ensure that the "new settlement" on the thorny problem of achieving fairness in the interrogation of suspects established by PACE is respected by the police. (111) These are also indicative of a new judicial scepticism towards police accounts of contested investigative events and a greater willingness to exclude police evidence than in the pre PACE era: see Chapter 1.

Footnotes to Chapter 5

The Legitimacy of Confessions

- (1) R v Mason [1987] 3 All ER 481.
- (2) D. Galligan "More Scepticism about Scepticism" (1988) 8 Oxford Journal of Legal Studies, p.249 at p.256.
- (3) See for example I. H. Dennis "Miscarriages of Justice and the Law of Confessions: Evidentiary Issues and Solutions" [1993] Public Law at p.297.
- (4) RCCJ Report (1993) paragraph 50, p.61.
- (5) ibid, paragraph 33, p.57.
- (6) ibid, paragraph 31.
- (7) CLRC 11th Report (1972), paragraph 63, page 42.
- (8) H. Packer, "The Limits of the Criminal Sanction" 1968. p.189.
- (9) see W. L. Twining and P. E. Twining, "Bentham on Torture" (1973) Vol.24, Northern Ireland Legal Quarterly, p.305.
- (10) ibid at p.326.
- (11) CLRC Eleventh Report (1972) paragraph 14.
- (12) CLRC Eleventh Report (1972) General Principles, paragraphs 14-17.
- (13) RCCP (1981) Chapter 4, Paragraph 4.132.
- (14) ibid, paragraph 4.132.
- (15) ibid, paragraph 4.133.
- (16) ibid.
- (17) R v Alladice (1988) 87 Cr. App.R. 380 at p.386.
- (18) R v Samuel (1988) 2 All ER 135 at p.147. R v Samuel was followed by the trial judge in the trial of Paul Guest for murder at Leeds Crown Court four weeks after the judgement in R v Samuel. The trial judge held that Guest's confession to his part in the murder of a policeman was inadmissible because the police had wrongfully denied him legal advice at his interrogation. This was so even though the police interrogation of Guest occurred almost a year before the appeal of Samuel was heard. Guest was acquitted because the prosecution had no other evidence. For further discussion of this case see M. Hunter "Judicial discretion: Section 78 in Practice" [1994] Criminal Law Review, p.558 at p.564.
As Dixon remarks for operational officers "the significant influence was not Samuel but its application in Guest , an unreported case in which a confession to the murder of a police officer was excluded, leading to the defendant's acquittal", pp.170-171 of "Law in Policing" 1997.

- (19) For an argument that there should be a statutory tort of wrongful denial of legal advice see A. Sanders "Rights, Remedies and PACE" [1988] Criminal Law Review, 802.
- (20) R. M. Dworkin "Taking Rights Seriously" 1977 at p.193.
- (21) A. Ashworth, "Excluding Evidence as Protecting Rights" [1977] Criminal Law Review 723 at p.725.
- (22) *ibid.*
- (23) R v Walsh (1990) 91 Cr. App. R.161 at p.163.
- (24) A Ashworth "The Criminal Process" 1995 at pp.302-303.
- (25) *ibid.*
- (26) R v Smurthwaite [1994] 1 All ER 898 at p.903.
- (27) R v Fennelley [1989] Criminal Law Review, p.142.
- (28) I. H. Dennis "Reconstructing the Law of Criminal Evidence" [1989] Vol. 42 Current Legal Problems, p.21 at p.39.
- (29) *ibid* at p.37.
- (30) *ibid* at p.38.
- (31) H. Packer "The Limits of the Criminal Sanction" at p.4.
- (32) *ibid* at p.165.
- (33) RCCP (1982) at para. 481.
- (34) On the value that persons attach to informed participation in the legal system, see T. Tyler "Why People Obey the Law" 1990.
- (35) R v Mason [1987] 3 All ER 481 at p.484.
- (36) *ibid* at p.485.
- (37) R v Bailey and Smith [1995] 3 All ER 513. On the issue of deception by the police see A. Ashworth's article "Should the Police be allowed to use Deceptive Practices" (1998) Vol.114. Law Quarterly Review at p.108.
- (38) R v Stagg. 14th September 1994. Unreported. Central Criminal Court (Ognall J.).
- (39) D. Birch "Excluding Evidence from Entrapment: What is a Fair Cop?" [1994] Vol.47, Current Legal Problems, p.96 note 74.
- (40) R v Khan [1994] 4 All ER 426.
- (41) R v Turner (1975) 61 Cr. App. R.67.
- (42) RCCP (1981) at paragraphs 4.92 and 4.133.

- (43) R v Prager [1971] 1 All ER 1114 at p.1118.
- (44) R v Allen (1977) Crim L.R. 163. Norwich Crown Court.
- (45) R v Trickett (1981) Crim. L.R. 331. Central Criminal Court.
- (46) R v Marsh (1985) Crim. L.R. 47. Central Criminal Court.
In R v Allen MacKenna J. commented, "... if the police are allowed to use in court evidence which they have obtained from suspects to whom they have wrongly denied the right of legal advice they will be encouraged to continue this illegal practice ... complaints against the police of their refusing prisoners' access to a solicitor are numerous. If there is substance in them as I believe there often is, the exercise of the court's discretion in the manner I am exercising it may do something to put an end to an undesirable practice".
- (47) R v Elliott [1977] Crim. L.R. 551.
R v Lemsatef [1977] 2 All ER 835 C.A.
- (48) R v Sang [1979] 2 All ER 1222 at p.1236.
- (49) R v Stephen King [1980] Crim. L.R. 551.
- (50) The case of Peter Fell quoted at p.7 of the "JUSTICE" Report "Unreliable Evidence? Confessions and the safety of Convictions".
- (51) M. Zander "The Police and Criminal Evidence Act 1984" 2nd edition at p.115.
- (52) R. Reiner, L. Leigh "Police Power" in "Individual Rights and the Law in Britain" 1994, edited by McCrudden and Chambers at p.100.
- (53) R v Williams [1989] Crim.L.R. 66.
- (54) For the research figures see R. Reiner, L. Leigh "Police Power" in "Individual Rights and the Law in Britain" edited by McCrudden and Chambers at pp.104-105. However, it should be remembered that it may sometimes be in the interests of the police to allow suspects to have access to legal advice for as Dixon comments " ... for the police a significant benefit of suspects' receiving legal advice is that often they are advised to confess or are presented with a set of options of which confession is clearly the most attractive. In a criminal police process whose single most important feature is its fundamental dependence on the guilty plea the best advice is often to make an early confession and to cooperate in other ways such as implicating co-offenders for which courts give credit in sentencing". D. Dixon, "Law in Policing" 1997 at p.242.
- (55) R. J. Sharpe "The Law of Habeas Corpus" 1989, Second Edition at p.133: "The Police and Criminal Evidence Act 1984 does accord an arrested person the right to contact and be advised personally by a solicitor, but there is an enormous, and it is submitted unacceptable, exception which permits the police to deny this right for up to thirty-six hours in the case of a serious arrestable offence."
- (56) R v Dunford (1990) 91 Cr. App. R. 150.
- (57) R v Walsh (1990) 91 Cr App. R. 161 at p.163.
- (58) R v O'Loughlin [1987] Crim. L.R. 672 C.A.

- (59) G. Gudjonsson, "The Psychology of False Confessions" (1989) Vol.57-58 Medico-Legal Journal 93, at p.98.
- (60) G. Gudjonsson and I. Bownes "The Reasons why Suspects Confess during Custodial Interrogation: data from Northern Ireland" (1992) Vol. 32, Medicine, Science and the Law, p.204.
- (61) R v Fulling [1987] 1 All ER 65.
- (62) R. Reiner "Investigative Powers and Safeguards from Suspects" [1993] Criminal Law Review, p.808 at p.812.
- (63) R v Heron. Unreported Leeds Crown Court. 18th October 1993. (Mitchell J.)
- (64) R v Emmerson (1991) 92 Cr. App. R. 284.
- (65) R v Heaton [1993] Crim. L.R. 593. C.A.
- (66) Cross on Evidence. Seventh Edition 1990. p.615.
- (67) CLRC Eleventh Report, paragraph 60.
- (68) RCCP (1981) Paragraph 4.132.
- (69) I. H. Dennis "Reconstructing the Law of Criminal Evidence" [1989] Vol. 42 Current Legal Problems, p.21 at p.36.
- (70) *ibid* at p.37.
- (71) *ibid*.
- (72) I. H. Dennis "Instrumental Protection, Human Right or Functional Necessity? Reassessing the Privilege against Self-incrimination" [1995] Cambridge Law Journal, p.342 at p.353.
- (73) Home Office Memoranda to the Royal Commission on Criminal Justice. December 1992, paragraph 3.119.
- (74) Ireland v United Kingdom [1978] 2 EHRR 25.
- (75) P. Suedfeld "Psychology and Torture" 1990 at p.10.
- (76) J. Walkley "Police Interrogation: A Study of the Psychology, Theory and Practice of Police Interrogation and the Implications for Police Training" quoted in "Reflections on Current Police Practice" by Tom Williamson in "Suspicion and Silence: The Right to Silence in Criminal Investigations" edited by D. Morgan and G. Stephenson, p.107 at pp.109-110.
- (77) *ibid* at p.109.
- (78) J. Slipper "Slipper of the Yard" 1981 at p.94.
- (79) John Smith, Deputy Commissioner of the Metropolitan Police, quoted in David Rose "A Climate of Fear: The Murder of P.C. Blakelock and the case of the Tottenham Three".

- (80) D. Dixon "New Left Pessimism", in "Contemporary Issues in Criminology" edited by Noakes, Levi, Maguire, 1995 at p.219.
- (81) D. Birch "The PACE Hots Up ..." [1989] Criminal Law Review, p.91 at pp.100-101.
- (82) R v Fulling [1987] 2 All ER 65.
- (83) I. H. Dennis [1996] The Sydney Law Review, 33 at p.39.
- (84) R v Hudson (1981) 72 Cr. App. R. 163 at p.169.
- (85) A. A. S. Zuckerman "The Principles of Criminal Evidence" 1989 at p.333.
- (86) R v Miller [1986] 3 All ER 119 at p.127.
- (87) R v Paris, Abdullahi and Miller (1993) 97 Cr. App. R. 99.
- (88) A. A. S. Zuckerman "The Principles of Criminal Evidence" 1989 at p.303.
- (89) P. Mirfield "Two Side-Effects of ss.34-37 of the Criminal Justice and Public Order Act 1994" [1995] Criminal Law Review, p.616 at p.617.
- (90) M. Berger "Of Policy, Politics and Parliament. The Legislative Rewriting of the British Right to Silence" (1994-5) The American Journal of Criminal Law, Vol.22, p.391 at p.425.
- (91) R v Heron. The Times 22nd November 1993.
- (92) R v Emmerson (1991) 97 Cr. App. R. 284 at p.287.
- (93) Lord Taylor C.J. Commenting on the Heron case in The Times 27th November 1993 at p.2: "Lord Taylor insists oppressive interrogation must cease".
- (94) The Daily Telegraph 27 November 1993 and quoted by Sanders and Young "Criminal Justice" 1994 at p.169.
- (95) Quoted in The Guardian 17 December 1993 and quoted by Sanders and Young "Criminal Justice" at p.169.
- (96) McConville et al "Standing Accused" 1994 at p.115.
- (97) Treadaway v Chief Constable of West Midlands. The Times Law Reports 1994 at p.523.
- (98) Burut v Public Prosecutor [1995] 2 A.C. 579. There is a case for arguing that if a suspect is denied an important due process protection before a confession is made then not only that confession but all subsequent confessions should be ruled inadmissible even if those subsequent confessions were obtained in interviews conducted with perfect procedural propriety. The point is that the police might not have obtained the subsequent confessions if the original confession had not been made, the suspect reasoning that he has little to lose by repeating his confession. If the criminal courts in England are concerned post PACE with ensuring a continuum of fairness from the pre-trial investigative phase to the criminal trial then it is arguable that where a confession is obtained by violation of important provisions of PACE such as Section 58 then all subsequent confessions should be excluded under section

78 of PACE to ensure the "fairness of the proceedings". This line of reasoning may help to explain why the second confession in R v McGovern was held by the Court of Appeal to have been inadmissible despite the presence at the interview of the suspect's solicitor. The Court of Appeal noted that once she had made her first confession (when legal advice was wrongly denied her) then it was likely that she would make a second confession.

Farquharson L.J. commented, "We are of the view that the earlier breaches of the Act and Codes renders the contents of the second interview inadmissible also. If the first interview was in breach of Section 58 it seems to us that the subsequent interview must be similarly tainted".

- (99) J. D. Heydon. "Evidence: Cases and Materials" Second Edition 1984, pp.181-182. For an important discussion of the issue of successive confessions see P. Mirfield "Successive Confessions and the Poisoned Tree" [1996] Criminal Law Review, p.554.
- (100) R v Smith [1959] 2 All ER 193.
- (101) R v Graves (1993) Crim. L.R. 685 C.A.
 R v Wood (1994) Crim. L.R. 222 C.A.
 See further on this point R v Gillard and Barrett (1991) 92 Cr.App.R.61 where Taylor L.J. commented, "... there can be no universal rule that whenever the Code has been breached in one or more interviews, all subsequent interviews must be tainted and should therefore be excluded by the trial judge. Such a rule would fetter the judge's discretion under Section 78."
 Also see the comments of Otton L.J. in R v Nelson and Rose [1998] 2 Cr.App.R. 398 at p.409.
- (102) D. Hobbs "Doing the Business: Entrepreneurship, Detectives and the Working class in the East End of London", Clarendon 1988 at p.226.
- (103) Lord Taylor C. J. in R v Christou [1992] 4 All ER 559 at p.566.
- (104) ibid at p.566.
- (105) R v Bryce [1992] 4 All ER 567 at 572, C.A.
- (106) R v Lin, Hung and Tsu [1995] Criminal Law Review 817 at p.818.
- (107) R v Pall (1992) 156 J.P. 424.
- (108) R v Stagg 14th September 1994. Central Criminal Court (Ognall J.) Transcript of the ruling of the trial judge in the possession of the author of this thesis.
 Also the unreported ruling of Waterhouse J. in R v Hall 1994 in the possession of the author of this thesis.
- (109) R v Bailey [1993] 2 All ER 513. See also R v Ali, The Times February 19th 1991, where a self incriminatory conversation between the suspect and his family was held admissible despite the fact that it had been obtained by the police planting a secret microphone in the room in the police station where the conversation was held without the knowledge of the family nor suspect that the room was bugged. The Court of Appeal upheld the decision of the trial judge to admit the evidence.
- (110) R v Bailey [1993] 2 All ER 513 at p.523.

- (111) For further examples of police traps to secure incriminating conversations from suspects see *R v Jelen and Katz* (1989) 90 Cr.App.R. 456 and *R v H* [1987] Criminal Law Review 47 (Winchester Crown Court).

In *R v H*, a first instance decision, the defendant had been arrested and interviewed for the offence of rape. He claimed that the alleged victim had consented and he was then released from police authority. The police then set a trap by organising a taped telephone conversation between him and the complainant during which she lied that the conversation was not being recorded. The trial judge held the conversation to be inadmissible as an unfair trap under Section 78 of PACE. In *R v Jelen and Katz*, the police had arranged a tape-recorded conversation between the appellant and a co-accused during which the appellant made various self-incriminatory statements after the co-accused had lied that he had said nothing to the police. It was held in dismissing the appeal that although there was undoubtedly a trap involved in the police tactics the appellant was still anxious to meet and to speak to the co-accused. The Court of Appeal distinguished *R v H* by emphasizing that in *R v Jelen and Katz* the police were at an early stage of their enquiries and the appellant had not been cautioned nor interviewed, in contrast to the situation of the defendant in *R v H*. The fact that the trap was employed at an early stage of the police inquiry before the stage at which the Codes of Practice would have been relevant was a decisive factor in the Court of Appeal decision in *R v Jelen and Katz*. In response to an argument that the police had used the co-accused in order to avoid the requirements of Code C of the Codes of Practice, the court said: " ... the provisions of the Code governing the detention, treatment and questioning of persons by police officers are there for the protection of those who are vulnerable because they are in the custody of the police. They are not intended to confine police investigation of a crime to conduct which might be regarded as sporting to those under investigation." (1989) 90 Cr. App.R. 456 at p.464.

CHAPTER 6

REFORM OF THE LAW OF CONFESSIONS

The Issue

False confessions have been a primary cause of many of the miscarriages of justice cases which have traumatized the criminal justice system in England since 1989. It is therefore not surprising that the law of confessions should have attracted attention from those who wish to avoid similar miscarriages of justice cases in the future. Sir John May in his Report of the Inquiry into the convictions arising out of the Guildford and Woolwich bomb attacks commented, (1)

"I think that the next important lessons which can be drawn from the case of the Guildford Four derive from the fact they were convicted solely on the evidence of their own confessions. There was no other evidence against them. Further, these confessions were mutually inconsistent in many important respects and each of the Four retracted their admissions before or at trial. They contended that the confessions were in no way voluntary and that each had been induced by oppression. This they said comprised assaults, threats of violence against members of their families. Whilst being questioned at excessive length they had been deprived of sleep, food and drink."

May commented that "at this length of time I am in no position to make findings on these questions". At the very least the Guildford Four case propelled the issue of convictions based on false confession evidence to the centre of public attention.

However, it is important that genuine well informed concern is distinguished from overreaction. Unfortunately comment in some academic writings on the subject of false confessions tend towards overreaction. Greer has written, (2)

"Enough is now known about the nature of police interviews, the psychology of those in custody and the role of confession evidence in contested cases for it to be presumed inherently unreliable unless its credibility is rehabilitated by strict tests."

One of those tests according to Greer is the proposal that,

"No confession ought to be admitted in evidence unless there is independent evidence capable of supporting its contents."

The problem with this analysis is that by overstressing the dangers of false confessions it proposes reforms which may frustrate one of the fundamental aims of the criminal justice system, namely the conviction of offenders. Of course, advocates of serious reform to the law of confessions would assert that the protection of the innocent from conviction may require measures which would inhibit the conviction of some guilty defendants. However, given that there is a great social cost for further legal hurdles against the admissibility of confessions it is vital that the law strikes an acceptable balance between the protection of the innocent and the conviction of the guilty. A balanced perspective of the risks of false confessions and the current legislative and common law regime against them is needed before an assessment of various reform proposals to the law of confessions can be made.

Moreover, it has to be acknowledged that the old assumption that a suspect, in the absence of police impropriety, would not falsely confess cannot be sustained in the light of modern psychological research. As the RCCJ Report acknowledged, (3)

"The legal system has always allowed in evidence statements that are made against the interests of the maker in the belief that individuals will not make false statements against themselves. This belief can no longer be sustained. Research has conclusively demonstrated that under certain circumstances individuals may confess to crimes they have not committed and that it is more likely that they will do in interviews conducted in police custody even when proper safeguards apply."

An example of the common law attitude to the value of confession evidence is the old case of R v Lambe (1791) (4) where it was stated in the opinion of twelve judges that confessions,

"... are at common law admissible in evidence as the highest and most satisfactory proof of guilt, because it is fairly presumed that no man would make such a confession against himself if the facts confessed were not true."

Yet the RCCP also endorsed the principle that, (5)

"Where a suspect has made a confession ... it must normally constitute a persuasive indication of guilt and it must in principle be desirable that if a not guilty plea is entered in spite of it, the jury are given the opportunity of assessing its probative value for themselves."

It must generally be the case that in the absence of undue police pressure a person of normal intelligence and maturity would not confess to a crime he did not commit. That there are and have been exceptions to this general statement does not justify wholesale scepticism about the probative worth of confessions. As the Court of Appeal recently commented in R v Ward, (6)

"In our experience cases in which it is accepted that a confession was made and was made voluntarily but nevertheless it is asserted that the confession was wholly untrue, are rare in the extreme. This of course is such a case."

There are particular risks of unreliability associated with juveniles, the mentally ill and the mentally handicapped but not only are there special statutory and common law duties on a judge in dealing with such cases it also cannot be assumed that a confession made by such a person is inherently unreliable. S. Uglow's comment in "Criminal Justice" (1995) (7) " ... that in practice reliance on confessions is very dangerous" is a misleading overreaction to the miscarriage of justice cases. In the context of retracted confession Gudjonsson (8) has written,

"It is true that a number of people retract their confessions and possibly the majority of these are doing it because they do not want to be convicted for an offence that they did commit."

Even with regard to retracted confessions then it cannot be assumed that this type of evidence is systematically unreliable, although certain categories of retracted confessions such as those challenged under Section 76 2(b) of PACE may be systematically unreliable. Legitimate concern about the role of confessions in wrongful convictions should not lead to an overestimation of the danger of the unreliability of confessions as a class of evidence, especially if the confession has been obtained in compliance with the terms of the Police and Criminal Evidence Act 1984 and The Codes of Practice. This is a legislative structure designed to reduce the risks of an unreliable confession whilst not unduly hampering the police in obtaining

a confession from the suspect.

Moreover, an unduly cautious approach to confessions and their general probative worth by commentators which influences the media may have the undesirable effect of influencing juries to reject reliable confessions and allow guilty offenders to be acquitted. As has been noted before, overreaction to the dangers of confession evidence may lead to reform proposals which are too stringent and which will run the risk of allowing too many guilty offenders to escape conviction. As has been recognised by commentators, confessions as evidence are vital to various proof issues in many serious cases. Evidence of 'intention' or 'recklessness' may in certain cases only be provided by a confession. As Devlin notes of the Bodkin Adams trial,

"... there was no hope of a conviction unless the police could obtain admissions." (9a)

Confessions may be the only realistic source of proof in certain serious cases; proof of child sexual abuse may be in some cases dependent on a perpetrator confession given the difficulties associated with the testimony of very young children. A recent case where the Court of Appeal commented that only a confession could have led to conviction was the serious case of R v Payne (1994) (9b). The appellant, a care worker at a home for physically handicapped adults, admitted buggery of a patient in the home, who was severely handicapped and who had great difficulty in communicating. The trial judge Rougier J. had commented at trial,

"I very much doubt whether the matter could have been proved against you if you had chosen to continue to lie innocence."

In the Court of Appeal, McCowan L.J. commented on the confession,

"The case could not have been brought without his admissions and co-operation."

It is therefore odd to find G. Robertson Q.C. commenting in "Freedom, The Individual and The Law", that,

"... a strict rule against conviction on the strength of an uncorroborated confession would require police to find the independent evidence which will always exist if a confession is true." (9c)

Independent evidence might not always exist as R v Payne shows.

The Reform Proposals

The starting point of the discussion on PACE is that it is generally recognised that it has decreased the possibility of miscarriages of justice based on false confessions. Thus, rules on recording of confessions, access to legal advice and their stringent enforcement by the judiciary have had the result that the interrogation process has been opened up to public scrutiny. The old problem of 'verballing' is now one which has been eliminated in formal interviews by the requirement of tape-recording although it remains a problem with regard to informal confessions. One of the major aims of PACE was to reduce the likelihood of false confessions emerging from the interrogation process and S.76 and S.78 have been vigorously employed by the judges to work to that end. Reference should also be made to S.77 of PACE which places a duty on the trial judge to tell the jury of the 'special need for caution' (see R v Campbell (1994) (10) on the importance of this duty) where the prosecution case rests wholly or substantially on a confession made by a mentally handicapped person and where that confession was not made in the presence of an independent person.

In R v Bailey (1994) (11) the Court of Appeal quashed a conviction for manslaughter and arson and ordered a retrial where the trial judge had failed to give the warning required by S.77 since the appellant suffered from a significant mental handicap; the confession was made to the police not in the presence of an independent adult and the prosecution case depended substantially on the confession. However, there is no good reason why S.77 should be limited to the mentally handicapped only.

It also has to be accepted that miscarriages of justice cases based on false confessions have occurred since the introduction of PACE.

However, in one of the most notorious cases R v Miller (1992) (12) the Lord Chief Justice was careful to stress that the miscarriage of justice was due to a combination of human errors and not due to any inherent defects of the PACE regime itself.

"Before parting with this case we should comment on the apparent failure of the provisions in the Police and Criminal Evidence Act 1984 to prevent evidence obtained by oppression and impropriety from being admitted. In our judgement, the circumstances of this case do not indicate flaws in those provisions. They do indicate a combination of human error."

These human errors included the oppressive behaviour of the police, the passivity of the solicitor present and the fact that the worst example of the police excesses was not played to the trial judge.

However, the PACE structure has been criticized by some commentators for failing to do enough against the admission of false confessions. Although S.76 2(a) and its interpretation by the courts has been criticized by some commentators for not being specific enough on what police conduct counts as "oppression", it is S.76 2(b) and its interpretation in cases such as R v Goldenberg and R v Crampton which has come under a greater amount of criticism. Professor Jackson has critically commented on S.76 2(b) and the Royal Commission on Criminal Justice Report,

"A thorough review of the admissibility test, however, might have prompted the Commission to consider whether the trial judge should himself be satisfied that the confession is reliable before admitting it." (13)

It is important to stress that the section was never intended to cover all possible cases of unreliability in confessions. Instead S.76 2(b) isolates a particular recurrent threat to the reliability of confessions, namely "anything said or done" by the interrogator which affects the reliability of confessions.

As Parliamentary debates reported in Hansard make clear, S.76 2(b) was never intended to cover cases such as R v Stewart (1972) where the threat to confession reliability lay in a defect within the suspect and not in any undue police pressure or impropriety. Lord Elystan Morgan and Lord Denning in the House of Lords both made this important point about the scope of section 76 2(b). (14)

The Lord Chancellor, Lord Hailsham made clear in the debates in the House of Lords on the PACE Bill, that S.76 2(b) must be understood against the background of the traditional approach of the law of evidence to issues of fact and law,

" (the clause) ... is an attempt to modify two principles of law which, in one form or another have been part of the criminal law of England for centuries - that is to say in the ordinary course of events questions of fact are for the jury and questions of law for the judge. But when we are dealing with confessions there is one important exception. There is a class of confession - a class containing two sub-clauses - where the judge becomes a judge of fact. He has to decide on what is called the *voir dire* - whether the prosecution have proved beyond reasonable doubt that the confession was not obtained by in effect either unlawful pressures or unlawful inducements ... But it is an extremely exceptional case because it is not desirable to take away from juries the right to decide the facts. Nor is it desirable to give judges the right to decide the facts. It is normally the function of the jury - and ought to be so - to find the facts and to say in relation to evidence which is logically probative first whether they believe it at all and secondly how far they regard it as reliable, relevant or carrying weight. That is part of the duty of a tribunal of fact. Clause 77 of the Bill seeks to codify and slightly remodel what has always been the law of England in this field of evidence." (15)

The question then becomes whether English law should be altered so as to impose upon the judge a duty to assess the reliability of a confession and be satisfied that it is reliable before admitting it to the trial. This is in essence what Jackson has proposed. (As has Professor Choo (16)) although Choo admits the proposal would upset "traditionalists" i.e. those who view the jury as the proper assessors of the reliability of evidence.) Such a step would be a major one in English criminal evidence, making the admissibility issue a question of fact for the first time - is the confession true or not? Rather than the question posed by S.76 2(b) or the old voluntariness test. The question must then be faced - are confessions so inherently unreliable as a class of evidence compared to, for example, identification evidence, that the judge should preempt the deliberation of the jury and rule out a confession on the ground that the judge is not satisfied as to its reliability?

The ability of the jury to assess the probative worth of evidence accurately has been recently reaffirmed by the House of Lords in the "similar fact" case of R v H (1995) (17). As Lord Griffiths said,

"The basic reason why criminal cases are heard by juries rather than by a judge alone is that our society prefers to trust the collective judgement of twelve men and women drawn from different backgrounds to decide the facts of

a case rather than accept the view of a single professional judge. Deciding the facts requires the jury in all cases to decide whose evidence they find credible and what inferences they are prepared to draw from the facts as they find. I would therefore resist any attempt to remove this essential role from the jury for to do so seems to be to strike root and branch at the very reason we have jury trials." (18)

A rule requiring the judge to be satisfied as to the reliability of a confession before admitting it would be a radical departure for the law and contrary to the general principle that assessment of the credibility of evidence is for the jury and not the judge. Other forms of evidence such as identification evidence, the evidence of accomplices and informers may also be potentially unreliable yet that is not considered to justify a rule by which the judge should be satisfied of the reliability of the evidence before admitting it to the trial.

Where there is a possibility of reasonable disagreement about the reliability of a confession it would seem unduly protective towards the accused and an impediment to important aims of the criminal justice system to require the judge to be satisfied himself as to the reliability of a confession before admitting it. A reference was made earlier to accomplice evidence as a form of evidence which is inherently unreliable although some accomplices may be capable of giving reliable testimony. Accomplice evidence is not subject to any exclusionary rule. Accomplice evidence normally goes before the jury subject to no mandatory corroboration requirement and indeed after S.32 of The Criminal Justice and Public Order Act 1994 subject to no corroboration warning either. It would be anomalous if, having abolished the corroboration warning for accomplice evidence, Parliament introduced a corroboration rule for confession evidence. The trend of the law has been to leave the treatment of different types of unreliable evidence to the discretion of the judge, a corroboration rule for confessions would be against this trend. (19)

Of course, where a confession is on its face very unconvincing the judges should have and do have a discretion to exclude the evidence as being more prejudicial than probative. This discretion to exclude was recognised in R v Stewart (1972) although the facts of the case were described as "very exceptional" by the trial judge. In R v Isequilla (1974) (20) the Lord Chief Justice said,

"If one of the reasons for excluding confessions is the danger that they may be untrustworthy, it would be in accordance with principle to exclude a confession made by someone whose mental state was such as to render his utterances completely unreliable. It is however difficult to formulate a governing principle and it is possible that, in England the matter will be treated as one of judicial discretion."

The Lord Chief Justice went on to say that the mental state of the appellant at the time of the confession which amounted to no more than the fact that he was sobbing and frightened, did not come anywhere near the class for the exercise of the discretion. Yet,

"Of course in an extreme case where a man is a mental defective it would be no doubt absolutely right to rule out evidence of his confession as being wholly unreliable."

The trial judge in R v Kilner (1976) (21) excluded a confession made by a mentally ill suspect on the authority of R v Isequilla. In R v Davies (1979) a confession was excluded in the trial judge's discretion on the grounds that the confession was probably unreliable given that the suspect made the confession while heavily under the influence of a drug. (22) In R v Powell (1979) (23) also a first instance decision, a confession was excluded under the probative value/prejudicial effect discretion because of the poor mental state of the suspect when he made his confession. However in R v Miller (1986) (24) the Court of Appeal approved the decision of the trial judge to admit a confession made by a defendant whilst in an irrational state of mind during police interrogation, i.e. when the suspect was beset with delusions and hallucinations because the judge held that the jury were capable of distinguishing between apparently rational and irrational parts of the defendant's so called confession and selecting which part or parts of the confession they could safely rely and act on to convict the defendant. This case illustrates that the prejudicial effect/probative value discretion to exclude a confession will only be used in an extreme case of potential unreliability of the confession, as for example where multiple confessions by a mentally unstable defendant show mutual inconsistencies to a large degree. In R v Effik and Mitchell (25) the Court of Appeal did not differ from the opinion of the trial judge that if it had been found that the defendant made his confessions whilst suffering from severe withdrawal symptoms then the trial judge would have used his discretion to exclude the confession from evidence. The trial judge had commented,

"If I were to find that he was suffering from those acute withdrawal symptoms at the time of the interview then I make it quite plain that I would have exercised my discretion to exclude evidence of the interviews."

It has been suggested by commentators that the confession in the R v Ward case was an example of where the judicial discretion to exclude should have been exercised. As Professor Dennis has written,

"Had the full story of Ward's numerous statements to the police with their inconsistencies and inaccuracies, been revealed at trial, one wonders whether any judge worth his salt would have let the confessions go to the jury. They might well have been excluded on the *voir dire* on the grounds that no probative value could safely be attached to them and that they were capable of causing great prejudice particularly given the horrific nature of the offences charged." (26)

It is implicit in the above comment of Dennis that he accepts that where there is the possibility of reasonable disagreement about the reliability of a confession it should be admitted to the jury for consideration assuming that the confession is not inadmissible under S.76 2(a) or S.76 2(b) of PACE and that the confession's admission "does not have such an adverse effect on the fairness of the proceedings that it ought to be excluded" under S.78 of PACE.

However, the mentally ill and juveniles also ought to receive special treatment with regard to their confessions and therefore S.77 of PACE should be amended accordingly. (27) The RCCJ (1993) supported this reform, see paragraph 40 of that Report. It is important to point out that where the police are interviewing a mentally handicapped or mentally ill person or a juvenile then they should only do so when there is an "appropriate adult" present. Paragraph 11.14 Code C states,

"A juvenile or a person who is mentally disordered or mentally handicapped, whether suspected or not, must not be interviewed or asked to provide or sign a written statement in the absence of the appropriate adult unless paragraph 11.1 applies."

If the police fail to comply with this provision then a confession runs the risk of being excluded under S.76 2(b) of PACE. The "appropriate adult" requirement is there to ensure that the especially vulnerable suspect is not manipulated into giving unreliable information and also that he can be given guidance on what the police are saying to

him. Cases where S.76 2(b) has been used to exclude a confession because of breach of the "appropriate adult" requirement include R v Everett (1988) (28), R v Moss (1990), R v Cox (1991), R v Glaves (1993): in this last case the confession was excluded even though a solicitor though not the "appropriate adult" was present; under the Code C a solicitor cannot perform as 'an appropriate adult'. Failure of the police to comply with the "appropriate adult" requirement is likely to lead to the exclusion of a confession under S.76 2(b). However, this is not inevitable and so S.77 provides a further level of protection at trial in the case of the mentally handicapped confessor.

In addition to the common law discretion to exclude a confession whose prejudicial effect outweighs its probative worth there is also the duty imposed by R v Mackenzie (1992) (29) on trial judges to withdraw a case from the jury where:

- (a) the prosecution case depended wholly on confessions,
- (b) the defendant suffered from a significant degree of mental handicap, and
- (c) the confessions were unconvincing to the point where a jury properly directed would not properly convict upon them.

Then the trial judge should in the interests of justice take the initiative and withdraw the case from the jury. S.76 and S.78 of PACE do not cover all possible cases of false confessions. The PACE regime for confessions in section 76 does not cover the situation where the unreliability of the confession is due to a factor inherent in the suspect. However, section 78 and the common law discretion and the common law duty imposed by Mackenzie would seem to be sufficient for those cases where there is a danger of miscarriage of justice due to a false confession by a mentally disordered or mentally handicapped individual.

Those commentators who advocate stricter controls on the admissibility of confession evidence in the form of a corroboration requirement or a requirement that a confession has to be made in the presence of a legal advisor can also be criticized for hampering unduly the conviction of the guilty on confession evidence. Public concerns about the criminal justice system failing to convict the guilty has been almost as intense in recent years as the concern expressed at the beginning of the 1990s about wrongful convictions on false confessions, as Reiner has noted (30) a rule requiring confessions to be corroborated is likely to increase public anxiety about the ability of the criminal justice system to protect them from criminals.

The crucial and obvious difference between measures such as judicial warnings on confession evidence and more rules regulating the admissibility of confession evidence is that the latter will have the effect of removing some confessions from the consideration of the jury.

Pattenden concluded in her study of the corroboration issue, as follows,

"A solution is needed which will reduce public concern about wrongful convictions without simultaneously allowing the patently guilty to go free ..." (31)

Pattenden favours a judicial warning to juries on the dangers of confession evidence. Various reforms which are aimed at improving the ability of juries to correctly assess confession evidence should on the whole be welcomed. The relaxation of the rules on expert evidence with regard to the reliability of confession evidence from those with a severe personality disorder manifest in the decision of the Court of Appeal in R v Ward (32) is one such measure. Moreover, if more expert evidence on the vulnerabilities of particular suspects in interrogation is allowed into trial then trial judges will be more able to identify those potentially very unreliable confessions which should be excluded in the trial judge's discretion to exclude evidence which is more prejudicial than probative. The increased ability of the defence to cross examine a police officer on previous cases where his evidence of an alleged confession has led to an acquittal, established in R v Edwards (33) is likewise to be welcomed. Consideration should also be given to reform of S.1 f(ii) of the Criminal Evidence Act 1898 which tends to inhibit those defendants with previous convictions from challenging confession evidence where that challenge involves imputations on the character of police officers. For a challenge to the integrity of the police by the defendant in the witness box will most probably lead to the disclosure of his convictions before the court. Geoffrey Robertson Q.C. has written that the S.1 f(ii) rule is one of the most frequent causes of the wrongful conviction of defendants with previous convictions. (34)

John Sprack (35) in the context of confessions, succinctly sums up the problems of the operation of S.1 f(ii),

"... one difficulty in rooting out false confessions is that there is a powerful disincentive to prevent the accused from alleging that the officers have fabricated the confession or behaved in any seriously improper way. This disincentive is known as the 'tit for tat' rule ... Hence where they have a

suspect with previous convictions the police can attribute a false confession knowing that they are in a strong position."

It would appear that Winston Silcott was deterred in the Blakelock murder trial from challenging police evidence by going into the witness box because of the operation of the S.1 f(ii) rule. Silcott had a previous conviction for murder and his Q.C. Barbara Mills believed that there would be a great risk that the jury would learn that he was already a murderer if Silcott challenged the authenticity of his alleged confession to the police in the witness box. (36)

This danger has been reduced since the introduction of a tape recording requirement for an indictable offence. It would be virtually impossible now to fabricate a confession in formal interviews and have it admitted in evidence. However, for informal interviews there is no tape recording equipment. The potential for 'verballing' remains and hence so does the inhibitory effect of Section 1 f(ii) on the accused in successfully mounting a defence that the confession allegedly made 'informally' or 'spontaneously' was in fact never made at all. Section 1 f(ii) will also operate if the defendant alleges police brutality, for example, before he made a confession. It may well be as Sprack concludes, that if the criminal justice system really wants to expose police malpractice then the 'tit for tat' rule should be abolished where in order to mount an effective defence an accused wishes to challenge police confession evidence. The Royal Commission on Criminal Justice (37) proposed a partial reform of this rule in line with the reform proposal of the CLRC,

" ... this rule should not apply where the judge is satisfied that imputations made by the defendant against the prosecution evidence are central to the defence."

However, all these measures are concerned with improving the ability of the trier of fact to correctly assess the weight of confession evidence. A clear distinction should be made between these reforms and those reforms to the law of confessions which would erect further hurdles to the admissibility of confession evidence. One possible exception to this is a rule requiring all confession evidence to be taped before it is admitted to trial. It is anomalous and unsatisfactory that alongside the authentication procedures for confessions in formal interviews there should exist a parallel system for the admissibility of non recorded confession in informal interviews. This reform can be defended on the ground that it more fully realises the purposes behind the PACE reforms, one of which was to eliminate the 'verballing' issue once and for all.

However, a corroboration requirement or a rule requiring all confessions to be made in front of a legal advisor can be criticized for reopening the settlement between police and suspect that PACE represents. The PACE Act was debated long and hard in Parliament and the entire context of police powers and interrogation was considered not solely the corroboration of confessions issue. It would be wrong to legislate on the corroboration issue without considering the wider picture of police powers and interrogation. The rules relating to the admissibility of confessions, S.76 and the discretion to exclude S.78 were part of that political settlement between the rights of suspects and the interests of the police and the community. It was therefore accepted at the time PACE was passed that a confession, if it satisfied the PACE tests, was in itself admissible evidence of guilt. This reflects the old common law position that English law allows a conviction to be based on nothing more than an unequivocal confession - see R v Wheeling (1789) (38) and R v Sullivan (1887) (39). (Indeed, a confession is potentially enough to ensure conviction even in the absence of *corpus delicti* of the crime - see Porter v Court (1962) (40) where there was no evidence apart from the confession that a crime had been committed. The Divisional Court upheld the conviction.) The suspect was given enhanced protection by the statutory scheme for interrogations in PACE and the courts have taken the lead in enforcing this aspect of PACE. However, one of the assumptions around which PACE was built was that a confession obtained in the absence of legal advice (as opposed to the right to legal advice being offered by the police) was in itself admissible evidence of guilt, even in the absence of corroboration. This position reflects the community interest in facilitating the conviction of guilty offenders on the evidence of their unequivocal confessions to crime. It is important to note that PACE not only seeks to protect the trial process from unreliable confessions, it also seeks to protect the admissibility of a reliable non oppressively obtained confession as evidence of guilt. (41) PACE legitimated detention for questioning for up to thirty-six hours on police authorization and up to ninety-six hours on the authorization of a magistrate. Assuming the police comply fully with PACE, any confession obtained during that period of detention is likely to be admissible. It will not usually be possible for an argument to be made that prolonged detention beyond a few hours in a police station is inherently 'oppressive' and that therefore any confession made in that period is inadmissible under S.76 2(a). For PACE to be internally consistent S.76 2(a) cannot be invoked against confessions obtained from a suspect who has been held in police custody for thirty-six or even ninety-six hours so long as the police have complied with PACE and not engaged in unfair or oppressive questioning. In this way PACE safeguards the general admissibility of confessions obtained through police interrogation. Arguments of the R v Hudson (1980) (42) type that prolonged

detention and questioning is inherently oppressive are therefore disarmed. The principles which govern the admissibility of confessions reflect the Janus faced position of protecting defendants from wrongful conviction on unreliable confessions but also serve the community interest in the general admissibility of confessions obtained through police interrogation as proof of guilt. In considering admissibility standards for confessions then it is wise to consider not only what types of confessions are inadmissible under the regime but also what types of confessions are admissible under that regime. Confession law is often influenced not only by a desire to protect the trial from certain kinds of confessions but also to guarantee the admissibility of other confessions. The voluntariness rule at common law was abandoned partly because too many reliable confessions were being excluded because of inducements made prior to their making, which mild inducements often had no real effect on the reliability of the confession made (on this point - see the Criminal Law Revision Committee Eleventh Report at page 37, paragraph 57). The attitude the observer has to interrogation, confessions and their value to the criminal process will therefore have normative consequences in terms of the confession evidence standards adopted. A hostile attitude to pre-trial interrogation may lead to stricter criteria of admissibility than a positive view of the value of police interrogation would.

One of the debated topics in Parliament during the PACE Bill was the corroboration issue for confessions but this was rejected as a measure even for especially vulnerable suspects such as the mentally handicapped. Of course S.34 of the Criminal Justice and Public Order Act can be criticized in these terms as well. It upsets the balance between suspect and police established by PACE by giving the police even more pressure to exert upon a suspect to confess. The right to silence in the police station was part of the package proposed by the RCCP (1981) and was accepted as a part of the political settlement between police and suspects that was achieved in the PACE Act after long consultation and political debate.

The response to S.34 should not be to advocate any stricter controls on the admissibility of confession evidence, rather the balance between police and suspects should be re-established by the repeal of S.34. Of course if this is not politically feasible then alternative strategies to restore the balance between police and suspect should be considered and perhaps a rule requiring the presence of a legal advisor before a confession is admitted into evidence would be an appropriate response to the increased pressures placed on suspects by S.34. (43) The significance of the 1998 Human Rights Act should not be overlooked in this context; as Dennis notes (44),

"... the provisions permitting adverse inferences from silence, particularly pre-trial silence in the face of police questioning, are likely to be tested at an early stage under Article 6 of the Convention."

The corroboration requirement in Scotland

The Royal Commission on Criminal Justice considered in its Report whether there should be introduced into English law a corroboration requirement for confessions similar to that found in Scottish law. It is not proposed to rehearse all the arguments for and against the various corroboration requirements proposed as these arguments can be found in the RCCJ Report itself at pp.62-68 and in "Confession Evidence" by D. Wolchover and A. Heaton Armstrong at pp. 23-33. (45) However, some observations will be made on the corroboration requirement as it presently stands in Scotland.

The corroboration requirement for confessional evidence in Scotland flows from the general rule of evidence there that the guilt of the accused cannot be established by the evidence of only one witness. There must be evidence from two sources to justify a conviction. It follows that in theory an accused who has made a confession to the police cannot be convicted on evidence of the confession alone; however as will be seen, Scottish law does allow for the conviction of a person on his confession alone. In Gilmour v H.M.A. (1982) (46) the High Court in Scotland stated that where the confession is freely made and unequivocal in its terms then very little corroboration is required. Indeed, the confession itself may provide sufficient corroboration if it contains "special knowledge" - see Wilson and Murray v H. M. Advocate (1987). (47). The "special knowledge" confession is one where the confession contains references to facts which the maker could not reasonably have known about had he not been involved in the crime. However, Scottish law has not limited this requirement to "knowledge" that is not publicly known - see Wilson above. The current efficacy of the corroboration requirement in Scotland as a protection against miscarriage of justice must be doubted. Even a rule which stated that the "special knowledge" evinced in the confession was only known to the police would be a potentially dangerous one for as the Royal Commission on Criminal Justice commented, special knowledge can be passed to suspects, whether wittingly or unwittingly, by the officers conducting the interview. (48) If a corroboration requirement for confessions was to be imported into English law from Scotland then it is imperative that statute makes it clear that a confession can only provide

corroboration from itself when it contains "special knowledge" of the crime that is not in the public domain and also is not known to the police at the time the confession was made. (49)

Moreover, given that in Scottish law where the confession is itself unequivocal little is required by way of corroboration, then this cannot be considered to be a situation providing a panacea for dealing with false confessions. As Mirfield points out,

" ... the confession may be entirely unequivocal, may have been obtained without any unfair treatment of the accused and yet be wholly unreliable, whether because a coerced-compliant or a coerced-internalized one or whatever. Logically it would seem, the corroboration requirement should be addressing concerns not foreclosed by unequivocality and admissibility." (50)

The current Scottish law on the corroboration of confessions cannot be considered a satisfactory candidate for transplant to cure the problems of unreliable confessions.

Footnotes to Chapter 6

Reform of the Law of Confessions

- (1) Sir John May, "A Report of the Inquiry into the circumstances surrounding the convictions arising out of the Bomb Attacks in Guildford and Woolwich in 1974", 30 June 1994 at p.305.
- (2) Steven Greer, "The Right to Silence, Defence Disclosure and Confession Evidence", p.102 at p.114 in "Justice and Efficiency? The Royal Commission on Criminal Justice". Edited by Stewart Field and Philip A. Thomas 1994. See also J. Griffiths in "The Politics of the Judiciary" 1997, at p.212: "Confessions are notoriously unreliable partly because they may be extracted by duress and partly because some people are highly suggestible."
- (3) The Royal Commission on Criminal Justice Report, July 1993, p.64, paragraph 66.
- (4) R v Lambe (1791) 2 Leach C.C. 552.
- (5) RCCJ (1993) Report page 57, paragraph 31.
- (6) R v Ward (1993) 96 Cr. App. R. 1 at p.58.
- (7) S. Uglow, "Criminal Justice" 1995 at p.83.
- (8) G. Gudjonsson, "The Psychology of False Confessions" (1989) The Medico Legal Journal, p.94.
- (9) a) P. Devlin "Easing the Passing" 1985 at p.213.
As Devlin notes "The detective needed proof of the motive which only the doctor could supply" at p.20.
b) R v Payne (1994) 15 Cr. App. R. 395.
c) Robertson, "Freedom, the Individual and the Law" at p.39.
- (10) R v Campbell (1995) 2 Cr. App.R. 262.
- (11) R v Bailey (1995) 2 Cr. App.R. 262.
- (12) Reported as Anthony Paris and others (1993) 97 Cr. App. R. 99 at p.109.
- (13) J. D. Jackson, "The Evidence Recommendations" [1993] Criminal Law Review at pp.827-828.
- (14) House of Lords debates, 31 July 1984, Hansard pp.692-693.
- (15) Lord Hailsham in The House of Lords Debates 19th October 1984, Hansard p.1202.
- (16) A. Choo, "Confessions and Corroboration: a comparative perspective" [1991] Criminal Law Review 867 at 876. Choo comments: "What is required is that the trial judge be accorded an expanded role. Where the reliability of confessional evidence is disputed, the trial judge should have a duty to make a determination him or herself as to the reliability of the evidence".
- (17) R v H [1995] 2 All ER 865. Lord Griffiths at p.878.

- (18) *ibid* at p.884.
- (19) see 1988 Criminal Justice Act s.34
1994 Criminal Justice Act s.32.
- (20) *R v Isequilla* [1975] 1 W.L.R. 716.
- (21) *R v Kilner* [1976] Criminal Law Review 740.
- (22) *R v Davies* [1979] Criminal Law Review 167.
- (23) *R v Powell* [1980] Criminal Law Review 39.
- (24) *R v Miller* [1986] 2 All ER 119.
- (25) *R v Effik and Mitchell* (1992) 95 Cr. App. R. 427 at p.433.
- (26) I. H. Dennis, "Miscarriages of Justice and the Law of Confessions: Evidentiary Issues and Solutions" [1993] Public Law, p.291.
- (27) On the origins of s.77 Professor Leigh has written: "Opposition arguments that confessions by mentally handicapped persons ought not to be admitted unless corroborated were met in part by a later amendment providing for a special warning to the jury in such cases". See L. Leigh, "Some Observations on the Parliamentary History of the Police and Criminal Evidence Act 1984" in "Public Law and Politics", edited by Carol Harlow, 1986 at p.112.
S.77 states that "Without prejudice to the general duty of the court at a trial or indictment to direct the jury on any matter on which it appears to the court appropriate to do so, where at such a trial: (a) the case against the accused depends wholly or substantially on a confession by him; and (b) the court is satisfied - (i) that he is mentally handicapped; and (ii) that the confession was not made in the presence of an independent person, the court shall warn the jury that there is special need for caution before convicting the accused in reliance on the confession, and shall explain that the need arises because of the circumstances mentioned in paragraph (a) and (b) above."
- (28) *R v Everett* [1988] Crim. L.R. 826 C.A.
R v Moss (1990) 91 Cr. App. R. 37.
R v Cox [1991] Crim L.R. 276 C.A.
R v Graves [1993] Crim L.R. 685 C.A.
- (29) *R. v Mackenzie* (1993) 96 Cr. App. R.98.
As A. Choo has pointed out it would be better if the Mackenzie power should be exercisable whenever the prosecution case depends wholly on confessions which are so unconvincing that no properly directed jury could properly convict on them, regardless of whether the unreliability of the confession is attributable to mental handicap or to some other factor. A. Choo, "Evidence, Text and Materials" 1998, p.407.
- (30) R. Reiner, "Investigative Powers and Safeguards for Suspects" [1993] Criminal Law Review, p.808. "By the time the Report of the Royal Commission was published in July 1993 there had been a distinct shift in the public debate about law and order even though anxiety on the issue had intensified rather than abated ... Although lack of confidence in the integrity of criminal justice remained evident, the popular and the political mood seemed to have shifted to an even greater concern with the system's effectiveness in tackling crime."

- (31) R. Pattenden, "Should Confessions be Corroborated?" [1991] 107 LQR 317. In Australia judicial warnings in relation to the making of disputed and uncorroborated confessions are required, *McKinney and Judge v.R.* (1991), 171 CLR 468. The Royal Commission on Criminal Justice, 1993, also came down in favour of a judicial warning to juries about the dangers of false confessions: see RCCJ Report Chapter 4, paragraph 4.77. As Dennis comments: "There remains a good case for the introduction of such a warning requirement, but to date no legislation has implemented this recommendation and the courts have shown no inclination to give effect to it", at p.486 "The Law of Evidence" 1999 by I. H. Dennis.
- (32) *R v Ward* (1993) 98 Cr. App. Rep.337 held that expert evidence was admissible to show the likely unreliability of her confession as she was suffering at the time of her interrogation a personality disorder, which whilst not a mental illness was of the nature of a mental disorder: see also *R v Raghip* (1991) for another case where expert evidence was allowed on the question of the reliability of a confession by a defendant with a personality disorder. However for a normal defendant it will not be possible to adduce psychological evidence that he is unduly suggestible and therefore likely to make an unreliable confession under police interrogation. The decision in *R v Turner* [1975] 1 All ER 70, stands as a bar to the admissibility of expert evidence here. Lawton L.J. commented that: "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary." More particularly Lawton L.J. went on to comment that the jurors do not need a psychiatrist to tell them how ordinary people who are not suffering from mental illness are likely to react to the stresses and strains of life. Perhaps the time has now come to partially abandon the position stated in *R v Turner* and recognize that concepts such as interrogative suggestibility and compliance may well be beyond the knowledge of the average juror who may not therefore appreciate how an otherwise normal person could make a false confession under normal interrogation by the police. Expert evidence of a person's suggestibility under interrogation should be more readily admitted than at present. For a more sceptical view of the value of expert evidence about the concept of interrogative suggestibility in the normal criminal case see Dennis: "The Law of Confessions and Miscarriages of Justice: Evidentiary Issues and Solutions" (1993) Public Law at p.112.
- (33) *R v Edwards* (1991) 93 Cr. App.R. 48.
- (34) G. Robertson Q.C. "Freedom, the Individual and the Law" 1993, at p.378.
- (35) John Sprack, "The Trial Process" p.83 in "Criminal Justice under Stress" 1992, edited by Stockdale and Casale.
- (36) Quoted in David Rose "A Climate of Fear: The Case of the Tottenham Three" 1992, p.156.
- (37) The Royal Commission on Criminal Justice (1993) paragraph 33, p.127. See also, Law Commission Consultation Paper No. 141, "Evidence in Criminal Proceedings: Previous Misconduct of a Defendant" at p.234, where the Law Commission proposed "that imputations should result in the loss of the shield only if they do not relate to the witness's conduct in the incident or investigation in question".
- (38) *R v Wheeling* [1789] 1 Leach C.C. 311n.

- (39) R v Sullivan [1887] 16 Cox C.C. 347. See also R v Kersey (1908) 1 Cr. App.R. 260 for Court of Appeal authority for the proposition that a confession alone can sustain a conviction.
- (40) Porter v Court [1963] Criminal Law Review 39. And see on this issue "Convicting on Confessional Evidence in the Complete Absence of a Corpus Delicti", Roderick Munday (1993) 157 Justice of the Peace and Local Government Law at p.275.
- (41) In "Interrogation and Confession: A Study of Progress, Process and Practice" by Ian Bryan 1997 he comments at p.307: "In protecting the confession as an admissible and *prima facie* reliable specie of evidence the law has had recourse to a variety of legitimating forms ... The PACE legislation may be seen as making the revival of statutory control and the restoration of regulation consistent with the rule of law."
- (42) R v Hudson (1980) 72 Cr. App. R. 163.
- (43) Section 34 states that: "Where, in any proceedings against a person for an offence evidence is given that the accused: (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings, or (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed ..." then the court or jury "may draw such inferences from the failure as appear proper".
- (44) I. H. Dennis, "The Law of Evidence" 1999 at p.33.
- (45) The Royal Commission on Criminal Justice (1993) "Confession Evidence" by D. Wolchover and A. Heaton Armstrong. Criminal Law Library 1996.
- (46) Gilmour v H. M. Advocate (1982) SCCR 590.
- (47) Wilson and Murray v H. M. Advocate (1987) SCCR 217.
- (48) The Royal Commission on Criminal Justice (1993) at p.63 paragraph 60. In the Inquiry into the circumstances surrounding the convictions arising out of the Bomb Attacks in Guildford and Woolwich in 1974 one of the wrongly convicted people, Carole Richardson, is quoted as saying that, "much of the information in her confessions came from overhearing informal conversations between police officers". At p.59 of "A Report of the Inquiry into the circumstances surrounding the convictions arising out of the Bomb Attacks in Guildford and Woolwich in 1974" by Sir John May, 30 June 1994.
- (49) Lord Bingham when Master of the Rolls gave a useful summary of some reform proposals to counteract the dangers of false confessions, when he wrote: "A growing body of evidence shows that certain people will for psychological and other reasons in the absence of any improper pressure, threats, inducements, fraud or violence, confess to crimes they have not committed. The most constructive proposals for remedying this problem are that interrogations should be video-taped so that the manner in which a confession made may be assessed; that defendants should have an early opportunity of disavowing a confession before a judicial officer; that the

truthfulness of a confession should require to be corroborated by independent evidence; and perhaps that a defendant's suggestibility should be accepted as a proper subject for expert evidence." from "The English Criminal Trial: The Credits and Debits" in The Clifford Chance Lectures I, edited by B. Markesinis 1996, p.91 at p.102.

Although beyond the scope of this thesis the problem of the current inadmissibility of "third party" confessions needs to be addressed by law reformers. The rule in R v Turner (1975) 61 Cr. App. R.67 which prevents an accused from introducing into trial, evidence that another person not on trial had allegedly confessed to the crime is a potential cause of miscarriages of justice. Whilst confessions to crime by accused persons are admissible in evidence by way of exception to the hearsay rule, the hearsay rule applies in full to confessions not made by an accused at trial. For an argument that third party confessions should become admissible in law under certain strict conditions: see Andrew L.T. Choo "Hearsay and Confrontation in Criminal Trials", Clarendon Press 1996 at pp.61-65.

- (50) P. Mirfield, "Silence, Confessions and Improperly Obtained Evidence", 1997 at p.350.

CHAPTER 7

ILLEGALLY/IMPROPERLY OBTAINED EVIDENCE

Introduction

This chapter proposes to examine the English law and theory behind the issue of the exclusion of illegally or improperly obtained evidence. The first section will involve an historical overview of the issue as it has been dealt with by English courts. Then there will be a discussion of the changes Section 78 of The Police and Criminal Evidence Act has brought to this topic. Then there will be an in depth discussion of the theoretical justifications for excluding illegally or improperly obtained evidence. The next section will focus on improperly obtained evidence and covert police operations. The final section will deal with the cases under Section 78 of PACE.

An Historical Overview of the Issue

The governing principle in this area of criminal evidence in England, is that stated by Lord Goddard in Kuruma v R in 1955. (1)

"The test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained."

As a matter of law illegally or improperly obtained evidence is admissible. This principle which has never been doubted in the cases has been recently reaffirmed by the Court of Appeal in R v Khan (1994) (2). As was stated in that recent case, evidence obtained by illegal means is *prima facie* admissible if it is relevant to the issue of the accused's guilt. In this way English law still differs from the law in Scotland and the law in the U.S.A. In Scottish law illegally obtained evidence is *prima facie* inadmissible unless the illegality can be excused in some way (see Lawrie v Muir (1950)) (3). In the U.S.A. evidence obtained from an illegal search and seizure in violation of the fourth amendment to the U.S. Constitution has been subject to a strict exclusionary rule since the ruling in Mapp v Ohio (1961) (4). Only comparatively recently have exceptions been made by the courts to the strict

operation of the rule (e.g. see U.S. v Leon (1984)) (5). The inclusionary principle which governs English law on illegally obtained evidence was first formulated in the middle of the nineteenth century in cases such as R v Leatham (1861) (6) and Jones v Owen (1870) (7). However, it is possible to point to the much earlier case of R v Warickshall (1783) (8) as some authority for the proposition that improperly obtained evidence is admissible as a matter of law. In Warickshall a confession was ruled inadmissible on the basis that it was involuntary. However, incriminating facts that were discovered as a result of the inadmissible confession were held to be admissible in evidence,

"... although confessions improperly obtained cannot be received in evidence yet that any acts done afterwards might be given in evidence notwithstanding that they were done in consequence of such confession."

This old principle has been embodied in S.76 (4) of PACE.

"The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence, (a) of any facts discovered as a result of the confession ..."

This does not mean to say that those facts should always be admitted to trial. S.76 (4) merely allows those facts to be admitted, it does not say they should be admitted. In an appropriate case S.78 might be used to rule those facts inadmissible under the discretion. Robertson comments that,

"If a policeman points a revolver at a suspected terrorist and threatens to shoot him unless he confesses the whereabouts of an unexploded time bomb, the court should on principle exclude not only the ensuing confession and the fact that the bomb was found as a result of it but also (under section 78) any forensic evidence connecting the bomb with the defendant." (9)

Any conviction based on evidence which was secured by such police methods is unlikely to command moral authority and hence S.78 should be invoked to exclude the forensic science evidence. Robertson's position here is similar to the position advocated by Zander in his note of dissent to the RCCJ that any serious violence in the course of a criminal investigation against the suspect should lead to a collapse of the prosecution case by the exclusion of all evidence.

The real development in the English law on illegally obtained evidence has been, it will be argued, in the scope and rationale of the discretion to exclude illegally or improperly obtained evidence from the criminal trial. This discretion was only first recognised in 1955 in Lord Goddard's dictum in Kuruma, and was limited in its scope applying, according to R v Sang only to evidence obtained from the accused after the commission of the offence and by analogy to the privilege against self-incrimination which the accused enjoyed pre-trial. The passage of S.78 of the Police and Criminal Evidence Act 1984 represents a noticeable shift in the scope (see R v Cooke (1995) (10) Court of Appeal for confirmation of the fact that S.78 is a substantially wider discretion than the common law discretion) and rationale of the discretion to exclude illegally obtained evidence. But see R v Chalkley (1998) (11) discussed in Chapter 1 for a judicial opinion rejecting a wide application of Section 78.

It is proposed now to examine the common law rule of admissibility in law for illegally obtained evidence and to suggest that the conditions in which it was adopted have changed to the extent that departure from the rule in terms of the exercise of the discretion to exclude illegally obtained evidence is much more warranted in the late twentieth century than in the mid nineteenth century. The common law as developed in R v Leatham and Jones v Owen reflected a fundamental principle of English evidence law: all relevant evidence is admissible unless it is subject to an exclusionary rule or discretion. In deciding whether there should be an exclusionary rule or discretion the judges at common law in the nineteenth century would obviously have considered whether there was a sound reason for excluding such evidence. With regard to the problem of the creditworthiness of confessions there was obviously good sense in formulating a rule which excluded a confession obtained by a threat or an inducement on the ground that such confessions are likely to be unreliable (see R v Warickshall (1783)), however with regard to evidence obtained illegally it is arguable that there was no such sound reason for exclusion. Indeed all the considerations pointed towards inclusion of the evidence, as Mellor J. commented in Jones v Owen (1870),

"I think it would be a dangerous obstacle to the administration of justice if we were to hold that, because evidence was obtained by illegal means it would not be used against a party charged with an offence."

A. Ashworth (12) has criticized this comment of Mellor J. for its use of the concept of justice in a 'questionable way', by which Ashworth means that the 'administration of justice' sometimes requires the exclusion of illegally obtained evidence. However,

against Ashworth, is the point that Mellor J.'s comment was not "questionable" in the context of the 1870s. The production of illegally obtained evidence by the police for the use in court, although it formed the background of the facts in Jones v Owen (an illegal search by a constable which produced salmon caught by poaching) did not have the modern implications of the "misuse of state power in the collection of evidence for the purposes of criminal trial". (13) This phrase was used by Lord Scarman in the House of Lords debates on the PACE Bill to identify the modern issues with regard to the problem of illegally obtained evidence.

For most of the nineteenth century there was not the perceived modern institutional reliance on the police by the criminal court system. The idea of a powerful state apparatus for the detection and investigation of offenders and the collection of evidence against them for use in court was not fully developed in the nineteenth century: on this point see Chapter 1 of this thesis.

However, by the late nineteenth century and early twentieth century the police were the main agency for the gathering of evidence and the prosecution of offenders. The Judges' Rules of 1912 which attempted to regulate part of the investigatory side of police work, namely the questioning of suspects, was some evidence of this core role of the police and its official recognition. The criminal courts became dependent on the police for the construction of cases and the production of evidence for use in court against offenders. However, this fact did not mean that in this period judicial attitudes to evidence obtained improperly or illegally by the police changed. A discretion to exclude a confession obtained in violation of the Judges' Rules was recognised in R v Voisin (1918) but no such discretion was recognised for the exclusion of improperly obtained non confession evidence until 1955. The orthodox view as repeated by Lord Diplock as late as 1979 in R v Sang was that, (14)

"The function of judge at a criminal trial as respects the admission of evidence is to ensure that the accused has a fair trial according to law. It is no part of the judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them ... what the judge at a trial is concerned with is not how the evidence adduced by the prosecution has been obtained but with how it is used by the prosecution at the trial."

An extremely limited discretion to exclude non confession evidence obtained in an

improper way by the police was recognised in Kuruma as late as 1955 but most cases of illegally or unfairly obtained evidence fell outside the operation of this discretion and were therefore subject to Lord Diplock's statement of the unyielding inclusionary principle. Evidence from an illegal search and evidence from entrapment are two examples mentioned by Lord Diplock as falling outside the Kuruma discretion.

Lord Diplock commented that the discretion was limited to

"evidence tantamount to a self-incriminatory admission which was obtained from the defendant after the offence had been committed."

As Lord Taylor pointed out in R v Christou,

"... in view of the terms of those dicta, the paucity of cases in which the discretion has been exercised so as to exclude legally admissible evidence is not surprising." (15)

Despite the increasing reliance by the criminal courts on police evidence by the beginning of the twentieth century there was still perceived to be a clear distinction between the investigatory process conducted by the police and the fact finding process at trial, hence Diplock's comment as late as 1979 that the judge is solely concerned with the use of evidence at trial not with how it was obtained by the police or anybody else.

If particular police behaviour in the obtaining of evidence was considered to be offensive and in need of checking then the judges had the mechanism of a judicial rebuke in open court to make their feelings known to the police. Indeed this device of the judicial rebuke whilst admitting the improperly obtained evidence became the normal judicial response to police breaches of the Judges' Rules on obtaining confessions as well as being the usual judicial response to other instances of police impropriety. A discretion to exclude a confession may have been recognised in R v Voisin (1918) but breach of the rules rarely led to exclusion. Judicial rebuke seems to have been the most the police could have feared from their breach of the rules in obtaining a confession, e.g. R v Mills and Lemon (1947) per Lord Goddard and R v Mackintosh (1982) per Lawton L.J. (16)

If in a more cynical age, the notion of a few sharp words from the bench to the police seems an inadequate response to police impropriety in the obtaining of evidence it is appropriate to remember that thirty years ago a judicial rebuke would have carried a

lot more weight with police and public than at the present time when the public reputation of the judiciary has declined so much. In support of this claim on declining confidence in the judiciary, see the following remark by Lord Taylor of Gosforth. (17)

In 1936 the Lord Chief Justice Lord Hewart said "Her Majesty's judges are satisfied with the almost universal admiration in which they are held". In 1992 his successor, Lord Taylor of Gosforth, acknowledged that no judge today would express such sentiments: "If he did he would be lambasted by the press, and rightly so!". Even as late as 1975 Devlin (18) could write "The English judiciary is popularly treated as a national institution, like the navy and tends to be admired to excess". A judicial rebuke at one time was likely to carry some weight in police culture because of the very high status of the English judiciary.

As Cross pointed out using the 1947 case of R v Mills and Lemon (19) as an illustration,

"Is it to be supposed that when the Lord Chief Justice said 'The sooner the Bristol Police study, learn and abide by the Judges' Rules the better' the conduct of the police of Bristol was unaffected because his Lordship admitted a confession obtained in consequence of a breach of those rules?"

Therefore judicial rebuke was viewed as a way of checking police impropriety without the social cost of the exclusion of relevant evidence.

Roskill L.J. in R v Sang (20) commented that,

"Experience shows that expressions of judicial disapproval when justified are not without their effect as a deterrent to reprehensible or arbitrary police behaviour."

The Law Commission in 1977 had a similar faith in the notion of the judicial rebuke when they commented that the criminal courts could exert "substantial influence" over police conduct by an occasional "strong expression of judicial disapproval". (21) G. Robertson (1994) comments that this view of the Law Commission "is sanguine in the extreme". (22) However, in the context of English society at least pre-1970s, a judicial rebuke was likely to have had some influence on the police even in the absence of action to exclude improperly obtained evidence because of the great status of English judges at that time.

The same approach was taken to evidence obtained by the use of entrapment by the police, a judicial rebuke if necessary, followed by the admission of the evidence. An example of this approach is the entrapment case of R v Birtles (1969) (23), where the Lord Chief Justice Lord Parker rebuked the police for acting as *agent provocateurs* but held that the evidence of the police officer was rightly admitted. The only legal consequence of the fact of entrapment by the police was that the sentence imposed on the appellant was reduced by Lord Parker.

However, once a discretion to exclude improperly obtained evidence was recognised in Kuruma v R then the way was open for progressively minded judges who thought that the judges should be more willing to exclude illegally or improperly obtained evidence tendered by the police. In the 1970s trial judges in the cases of R v Foulder (1973) (24), R v Burnett (1973) and R v Ameer (1977) excluded evidence obtained by the entrapment of the defendant into committing a criminal offence by the police. R v Sang (1979) H.L. can be understood as an attempt to halt this tendency of some trial judges to exclude evidence because of dislike at the way it was obtained, hence Lord Diplock's comment,

"However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced, if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason." (25)

R v Sang re-established the old principle that all relevant evidence is admissible irrespective of how it was obtained and that any discretion to exclude is very narrow in scope and certainly does not encompass evidence obtained from entrapment.

Only five years later S.78 of PACE was legislated which was based on a view that the judiciary should be concerned with how evidence is obtained. Lord Diplock had famously said in Sang,

"It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at trial is obtained by them ..."

However, during the debates on the PACE Bill Leon Brittan, the Home Secretary, commented,

"In our view it can indeed be a proper part of the judge's function to have regard to the way in which evidence has been obtained and to refuse to admit it if those circumstances bear upon the fairness of the proceedings. That is a principle which we are prepared to see enacted for the first time in statute." (26)

Lord Scarman whose own amendment was rejected in favour of the amendment drafted by the Lord Chancellor, made the important point that his amendment extending the power of a judge to exclude evidence obtained unlawfully should be viewed in the context of the Police and Criminal Evidence Bill as a whole. In explaining the difference between the common law discretion known to Lord Goddard, Lord Parker and Lord Widgery and his own amendment for a discretion to exclude illegally obtained evidence, Lord Scarman said,

"One small significant answer tells the whole story. It is because there was no Police and Criminal Evidence Act in their day and we are discussing this amendment in the light of a codification known for the moment as the Police and Criminal Evidence Bill." (27)

This comment is significant for understanding the rationale of exclusion under S.78 of PACE. The PACE Act represented a negotiated political settlement between the interests of the police and the suspect. It was recognised that the police have the duty to investigate crime on behalf of the community and for this socially important purpose enhanced powers were given to the police to gather evidence for use in the prosecution of offenders.

However, as Lord Scarman commented, the PACE Bill also recognised the principle of,

"Safeguarding citizens against the misuse of police power in the collection of evidence for purposes of criminal proceedings."

Although Parliament rejected Lord Scarman's 'reversed onus' rule on illegally obtained evidence (*prima facie* inadmissible unless the illegality could be excused) and adopted S.78 (drafted by Lord Hailsham, the Lord Chancellor) instead, Lord Scarman's comment quoted above is a useful insight into how Parliament understood the ideological rationale of the creation of a statutory discretion to exclude illegally or

improperly obtained evidence. The focus of the old common law discretion (still retained by S.82 (3)) was on 'fairness to the accused', i.e. the discretion was seen as protecting one vital interest of the accused pre-trial, namely his privilege against self-incrimination. Given that the defendant enjoyed a privilege against self-incrimination at trial then it might have seemed sensible to extend protection to the pre-trial privilege against self-incrimination through use of an exclusionary discretion. The point is that if a suspect was unfairly induced to incriminate himself in the police station then the damage would already have been done when the trial begins and his privilege against self-incrimination at trial would have lost its bite if the defendant had been tricked or unfairly induced to incriminate himself in the police station. This analysis perhaps explains why the House of Lords in R v Sang stated that the exclusionary discretion only extended to protecting the privilege against self-incrimination of the suspect pre-trial. It would have been hypocritical to assert that the defendant enjoyed a right not to testify at trial whilst allowing the police pre-trial to unfairly induce the suspect to incriminate himself.

The impact of Section 78 of the Police and Criminal Evidence Act on this topic

The focus of the new discretion in S.78 is, it is submitted, on the lack of state probity in the gathering of evidence which if it reaches a certain level of impropriety or involved the breach of important rules for the conduct of investigations could so adversely affect the fairness of the proceedings that the evidence ought to be excluded.

That the S.78 discretion is wider than the common law discretion has been recognised by the Court of Appeal in R v Cooke, July 22nd 1994 - the Court of Appeal commented obiter,

"The discretion of the court not to admit evidence which was improperly obtained was previously strictly circumscribed, R v Sang (1980) A.C. 402. Despite some expressions of opinion to the contrary it is clear that Section 78 has given the courts a substantially wider discretion."

Reference by the Court of Appeal in R v Cooke to "some expressions of opinion to

the contrary" can be taken as a comment on R v Mason (1987) where Watkins L.J. said that S.78 merely re-states the common law discretion.

In R v Christou and Wright (1992) Lord Taylor commented that the "criteria of fairness" (28) are the same under the common law as under S.78. R v Cooke makes it clear that S.78 is a different discretion from the common law discretion. In line with the approach taken earlier in this thesis it is to be argued that this change in the law of evidence which is now recognised by the Court of Appeal is due to a changed view of the role of the police in relation to the community and the criminal justice system. A recognition that reliance on evidence obtained illegally or improperly by the police can weaken the moral and expressive authority of the verdict, so that illegally or improperly obtained evidence is sometimes rightly excluded by the use of S.78.

PACE represents a politically negotiated attempt to balance the community interest in granting the police extra powers to detect and investigate crime and the community interest in controlling misuse of those powers. The "fairness of the proceedings" could be upset by breach, particularly deliberate breach of proper procedures statutorily laid down for the investigation of crime. A useful and interesting summary of the uses of the S.78 discretion was provided by Lord Lane in R v Quinn (1990). Lord Lane said,

"The function of the judge is therefore to protect the fairness of the proceedings and normally proceedings are fair if a jury hears all relevant evidence which either side wishes to place before it, but proceedings may become unfair if for example, one side is allowed to produce relevant evidence which for one reason or another the other side cannot properly challenge or meet or where there has been an abuse of process, e.g. because evidence has been obtained by deliberate breach of procedures laid down in an official Code of Practice." (29)

The reference in Lord Lane's judgement to the unfairness caused by one side adducing evidence that the other side cannot properly challenge or meet is relevant to cases such as R v Keenan and R v Weerdesteyn where the police have not complied with the recording provisions for interviews and as a result the defendant is put at a substantial disadvantage in challenging police evidence of an alleged confession in court: see Chapter 4 of this thesis. This is so whether or not the police acted in bad faith. S.78 is relevant to exclude a confession in that context. However, the reference to an 'abuse of process' and the relevance of S.78 is interesting for the potential exclusion of illegally obtained evidence. As Professor Birch has commented,

"There is the quite distinct unfairness generated by letting one side get away with breaking the rules of the game, which Lord Lane C.J. terms an abuse of the process of the court and which is about as close as we have come to acknowledging the need to preserve the respect for and legitimacy of the verdict." (30)

The comment of Lord Lane in Quinn is consistent with viewing the S.78 discretion in the context of illegally or improperly obtained evidence as being concerned with the misuse of state power and bad faith non compliance with the procedures statutorily laid down for investigation. Lord Lane in R v Quinn also commented of S.78 that "the section gave the courts power to express disapproval of objectionable police methods by excluding the fruit of such misconduct". Judicial comment which is very different from the sentiments expressed in R v Sang by the House of Lords.

The common law basis for the discretion to exclude illegally or improperly obtained evidence, namely to protect the suspect's 'privilege against self-incrimination' is therefore no longer at the heart of the rationale for the exercise of the discretion.

It is generally unwise to extrapolate firm conclusions from a comparison of a few cases only but an indication of the change in judicial attitudes to illegally obtained evidence can be gathered from a comparison of the treatment of the issue in the pre-PACE case of R v Apicella (1985) (31) C.A. with the post-PACE case of R v Nathaniel (1995) (32) C.A. Both cases concerned the admission of scientific evidence of high probative worth in a serious criminal case. In R v Apicella the accused was charged with raping three girls. The strongest evidence against him consisted in the fact that each of the girls as a result of the sexual attack had contracted an unusual strain of gonorrhea. The accused was found to have the same strain of gonorrhea. The sample in issue was initially obtained by the prison doctor for therapeutic purposes. The accused submitted to giving the body fluids sample because he had been told, wrongly, by a prison officer, that as a prisoner he had no choice but to give it. The sample was used by the prosecution to prove he was the rapist. Lawton L.J. on appeal held that the evidence was rightly admitted. R v Payne (1963) (33) was distinguished but it was not clear on what grounds it was distinguished. R v Payne represents (with R v Court (1962) on very similar facts) the only time an appeal court said evidence should have been excluded under the Kuruma discretion. In R v Payne the appellant was asked when he went to the police station whether he was willing to be examined by a doctor, and it was made clear to him that the purpose of that was that the doctor should see whether the appellant was suffering

from any illness or disability. The appellant was told that it was no part of the doctor's duty to examine him in order to give an opinion as to his unfitness to drive. In fact the doctor was called as a witness for the prosecution and gave strong evidence in regard to the extent to which the appellant was under the influence of drink.

The appellant was convicted of the drink driving charge. The Court of Criminal Appeal quashed the conviction. It was stated that the magistrate,

"In the exercise of his discretion ought to have refused to allow that evidence to be given on the basis that if the accused realised that the doctor would give evidence on that matter he might refuse to subject himself to examination."
(Per Lord Parker C.J.)

In the light of Lord Parker's comment it is hard to see how R v Apicella can be distinguished, for the defendant in that case might have refused to consent to supply the sample if he thought that the evidence would have been used against him. It should be remembered that in Callis v Gunn (34) which was a case of unfairly obtained real evidence, Lord Parker C.J. said,

"There is no suggestion here that they conveyed to him that he had to accede to the request. If that had been done there might be a clear case for excluding the evidence."

In Apicella the impression conveyed to the defendant was that he had to accede to the request. It may be, as R. Pattenden observed, that given the nature of the offence in R v Apicella,

"Would the law not have looked an ass if this highly relevant evidence had been excluded?" (35)

In R v Payne the improperly obtained evidence in issue was only in a case concerning the relatively minor offence of driving under the influence of drink.

Writing in 1990, M. Gelowitz (36) argued that S.78 does not fundamentally alter the common law position on illegally obtained evidence. He commented,

"The striking fact is that the Court of Appeal has not yet been called upon to exclude probative real evidence in the exercise of discretion under Section 78."

Indeed, Gelowitz believes that S.78 should not be used to exclude illegally obtained real evidence since it is "pure proof" and therefore its admission cannot upset the fairness of the proceedings: real evidence Gelowitz claims is 'neutral' as between prosecution and defence; what Gelowitz means by this is that how real evidence is obtained does not affect its probative worth in any way. In contrast, denial of access to legal advice can affect the chances of the police obtaining a confession; so in consequence where that denial of legal advice has been wrongful the confession might justifiably be excluded under Section 78. However, Gelowitz should consider the point that if the police had followed proper procedures for obtaining real evidence then they might not have obtained that evidence at all and that it is only due to police non-observance of proper procedure (as in R v Nathaniel and the duty to destroy samples under S.64) that the real evidence is obtained at all. Therefore in an important way the real evidence comes before the court affected by the manner of its obtaining and that therefore in an appropriate case S.78 should be used to exclude the evidence in order to safeguard the 'fairness of the proceedings' - the proceedings including pre-trial events in the criminal investigation.

However, in the case of R v Nathaniel (1995) the Court of Appeal quashed a conviction on the ground that real evidence of high probative value in a case of great seriousness involving charges of rape and robbery had been wrongly admitted. In Nathaniel the prosecution relied on DNA evidence which had been obtained from the accused in connection with another charge of rape from which he had been acquitted.

In breach of S.64 of PACE the police did not destroy that sample but it was kept on the Metropolitan Police computer index. Section 64 states,

- "If (a) fingerprints or samples are taken from a person in connection with the investigation of an offence; and
- (b) he is cleared of that offence, they must be destroyed as soon as practicable after the conclusion of proceedings."

When the appellant was investigated for the rape and robbery for which he was convicted it was discovered that his DNA profile was found to match that of the victims' assailant. This evidence, which the trial judge found to be of "a high probative value" was admitted in evidence and he was convicted.

The Court of Appeal quashed his conviction with the Lord Chief Justice Lord Taylor

giving judgement. Lord Taylor placed emphasis on the police breach of the statutory duty under S.64 to destroy the DNA sample when the appellant was acquitted on the other rapes. Bad faith was not alleged by the defence but the police still had breached the statutory duty and the appellant in the words of Lord Taylor

"... had in effect been misled in consenting to give the blood sample by statements and promises which were not honoured."

The appellant had been told before he consented to giving the original sample that it would be destroyed if he was prosecuted in relation to the offence and acquitted.

Before this decision in R v Nathaniel, Professor Birch had commented on the case of R v Cooke that, (37)

"It would seem that whatever the theoretical potential of S.78 the courts are as reluctant as they were at common law to exclude scientific evidence which clearly shows that an accused person has committed a serious offence such as rape."

R v Nathaniel is significant in this respect. Consistent with other decisions concerning important provisions of PACE such as S.58 (see R v Samuel) or the recording provisions (see R v Keenan, R v Canale) the Court of Appeal is insisting that the scheme for fair investigation of offences established by PACE should be respected by the police. S.64 of PACE required samples to be destroyed if an acquittal follows their use in criminal proceedings. This provision has an obvious civil liberties dimension, the state should not be allowed to build a sample database on citizens who have been acquitted at trial of crime. S.64 is part of the scheme of fairness between police and suspects. The police are given powers to obtain samples from suspects to investigate and detect crime effectively but the *quid pro quo* of this is that such samples must be destroyed if an acquittal results following a prosecution involving samples taken from the accused. The absence of bad faith as a requirement for exclusion in Nathaniel is also noteworthy. In Matto v DPP (1987) (38) the crucial factor which led to highly probative real evidence (a breathalyzer test) being excluded under S.78 was the finding of bad faith on the part of the police in the exercise of their powers. Nathaniel suggests that highly probative real evidence can be excluded under S.78 even in the absence of bad faith.

The comparison between Apicella and Nathaniel is a striking illustration of the effect of the passage of S.78 of PACE and its underlying rationale on judicial attitudes to

evidence obtained by the police in a way which violates fair standards in the conduct of criminal investigations.

Real evidence obtained by an unlawful search

A further illustration of how Section 78 has affected the law with regard to illegally or improperly obtained evidence is provided by the case of R v Khan (1997) (38b). Lord Diplock in R v Sang famously said that there was no discretion to exclude evidence obtained by an illegal search. However in R v Khan the Court of Appeal commented that if the second search of the accused had been illegal then the judge would have had a discretion, not an obligation, to exclude it. The Court of Appeal refused to interfere with a judge's decision to admit the evidence of drug-smuggling by a diplomat. However, as Dennis points out, (38c)

"It may well be that exclusion of the fruit of unlawful searches will be rare, but this does not detract from the significance of recognising that Section 78 confers a discretion to exclude such evidence. This case would not be covered by Lord Diplock's statement in Sang of the discretion."

The theoretical justifications for excluding illegally or improperly obtained evidence

It is proposed now to examine the different rationales which have been propounded for the exclusion of illegally obtained evidence from the criminal trial and to examine the extent to which they have been recognised in English criminal evidence.

The debate over illegally obtained evidence is primarily a political one rather than a purely evidential one. At a basic level the question of the admissibility of relevant and reliable evidence of guilt unfairly or illegally obtained pits crime control concerns against civil liberties concerns. The political nature of the debate will become clear in the discussion of the various rationales for the exclusion of illegally obtained evidence.

However, before consideration is given to the various rationales that have been propounded for the exclusion of such evidence, it is proposed to consider a view of the problem which in effect denies that there is an issue at all with regard to the admissibility of improperly obtained evidence. Ashworth terms the view "the reliability principle". This principle is justified on the basis of a controversial view of the proper purposes of the criminal trial and the rules of evidence which control the admission of evidence to it. Wigmore is a leading example of a proponent of this view. Polyviou gives a useful summary of the position, (39)

"To begin with, rules of evidence are or should be only designed to enable courts to place correct determinations of specifically defined disputed issues; illegally obtained evidence is as reliable and as probative as evidence lawfully obtained; and since the courts need all reliable evidence material to the only issue before it which is the guilt or innocence of the particular accused, the way in which probative evidence currently before the court was obtained is immaterial to this issue and such evidence should therefore be considered."

It is important to note that when commentators talk of illegally obtained evidence they usually mean illegally obtained real evidence, such as the murder weapon, illicit drugs, stolen goods etc. The point is that the reliability of real evidence is unaffected by how it was acquired - the evidence speaks for itself. An exception to this principle is where the accused alleges the real evidence was 'planted' upon him. In this way police illegality in planting the evidence affects the probative value of the real evidence.

As Ashworth (40) comments, the 'reliability principle' is based on,

"... a clear separation of functions between the criminal court whose purpose is to determine the truth of the charges against the accused, and other agencies such as police disciplinary tribunals which deal with improprieties by law enforcement officers."

The 'reliability principle' can also be bolstered by the observation that what is fair and what is not in police investigations for the purposes of the exercise of an exclusionary discretion will lead to uncertainty in practice. As Roskill L.J. commented in R v Sang,

"Subjective judicial views of what is morally permissible or reprehensible are an unsafe guide to the administration of the criminal law and to the proper exercise of judicial discretion."

Roskill went on to say that a trial judge should not undertake

"... passing a necessarily subjective judgement on the ethics of the police ... a judgement from which the prosecution has no right of appeal." (41)

The reliability principle could of course accommodate exclusionary rules or discretions against certain types of unreliable evidence, for example, hearsay evidence, but the theory would deny any cogent reason for evidence law to exclude as a matter of law or discretion evidence which is both relevant and reliable. Apart from confessions obtained by violence, the issues surrounding illegally obtained evidence rarely involves concerns about the probative worth of evidence.

The issues behind the exclusion of illegally or improperly obtained evidence are not probative concerns, rather they are of a 'political' nature involving such considerations as checking the abuse of police power, safeguarding the integrity of the criminal court or vindicating the 'rights' of the accused through the exclusion of evidence.

Some of the dicta of the House of Lords in R v Sang approach the Wigmore view of the purposes of the rules of evidence (see especially Lord Diplock). The extremely limited discretion to exclude evidence on the basis of the '*nemo debet*' principle is one point of distinction between the Diplock approach in Sang and the Wigmorean approach to illegal or unfairly obtained evidence. Both views are based on a clear distinction between the investigatory stage and the trial stage. As was said in Sang a trial judge should only be concerned with the fairness of the trial and not with how evidence is obtained by the police. As Lord Diplock commented,

"However much the judge may dislike the way in which a particular piece of evidence was obtained before proceedings were commenced if it is admissible evidence probative of the accused's guilt it is no part of his judicial function to exclude it for this reason."

The Deterrence Principle

The idea behind this theory is that the exclusion of evidence from the criminal court is a way of disciplining the police for the impropriety in the obtaining of that evidence. If the police do not wish to risk 'losing' the conviction of a guilty offender through the exclusion of evidence they should not engage in impropriety in the obtaining of evidence. The courts can 'discipline' the police by excluding evidence from the criminal trial and although an acquittal is not always inevitable, the exclusion of evidence, especially confession evidence, can sometimes undermine the prosecution case to a degree where a conviction is not sustainable.

However, there is a great cost for achieving this aim by excluding evidence: the non conviction of guilty offenders because of the exclusion of reliable relevant evidence on deterrence grounds. Wigmore brought out what he considered to be the essential absurdity of the disciplinary principle. Wigmore commented, (42)

" ... our way of upholding the constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else."

This is the point that it is the public not the police who are punished by the exclusion of illegally or improperly obtained evidence, for an offender may go free.

However, the police have a professional interest in the conviction of offenders, an important point which Wigmore overlooked. Therefore the police may be punished by the exclusion of evidence from the criminal trial. The point remains however, that the public are also punished by the non conviction of a guilty offender.

Further arguments against the law of evidence performing a deterrence function might focus on the lack of efficiency of such an approach at a great social cost - the acquittal of the guilty. Research conducted by Oaks twenty-five years ago in the USA cast doubt on the efficiency of the exclusionary rule for the products of illegal search and seizure in terms of the deterrence of police misconducts. One reason suggested by Oaks for the weak effect of deterrence was that in many search and seizure cases the searches were not carried out with a prosecution in mind but merely to confiscate illegal material or harass known criminals, therefore the police knew that their actions were not likely to be reviewed by the criminal courts. Interestingly, Oaks insisted that it would be a mistake to extrapolate from his conclusions on the weak deterrent effect of an exclusionary rule in search and seizure cases to the deterrent effect of an

exclusionary rule in confession cases: (43)

"The variety of reasons for an improper search and seizure is in marked contrast to the limited number of reasons why police could engage in the type of illegal conduct that causes the exclusion of a coerced confession ... the predominant incentive for interrogation is to obtain evidence for use in court. Consequently police conduct in this area is likely to be responsive to judicial rules governing the admissibility of that evidence."

This is interesting in the light of the purposes of S.76 2(b) of PACE which can be interpreted as seeking to deter unreliability inducing methods of police interrogation through the exclusion of confession evidence: on this see Chapter 3 of this thesis.

It may be argued that given the lack of clear evidence that exclusionary rules actually significantly deter the police then it follows that highly probative evidence of guilt should not be excluded for the sake of deterring police misconduct. This is especially so where other controlling and disciplinary mechanisms exist and could be developed to control police misconduct in the obtaining of evidence.

For example, civil actions against the police have increased significantly in recent years. They have become a useful way of publicising and exposing police misconduct as well as being a route to the vindication of the particular plaintiff's rights. One of the beneficial consequences of the Police Act 1964 (see s.48) was to make Chief Constables liable for torts committed by constables in their forces. Civil actions against the Metropolitan Police for example, have cost that force over a million pounds a year in recent years. The embarrassing nature of such actions for the police is attested to by Geoffrey Robertson Q.C., who comments (44)

"Cases of this kind present such an unedifying picture of police conduct that considerable effort is expended in keeping them out of court and out of the public eye through a negotiated settlement."

A main reason why deterrence of police behaviour through the exclusion of evidence is unlikely to be very successful is the competing norms of police behaviour and public pressure on the police to secure evidence of guilt.

Moreover, the trial would probably not be uppermost in the policeman's mind when

he committed the illegality in obtaining the evidence as it would be some months into the future. However, caution is needed with regard to the argument from the power of peer pressure as a factor militating against the success of the deterrence principle. The deterrence hypothesis might be defended by pointing out that mechanisms such as the exclusion of evidence are needed precisely because of the strength of police culture pushing police officers towards illegality where that is necessary to secure evidence of guilt. The deterrence hypothesis could be supported by claiming that every available means to deter police misconduct should be utilised given the strength of police culture pushing the other way.

Militating against the deterrence approach to illegally obtained evidence is the fact the approach of the English judiciary has been to disclaim any deterrent function for the judge. Lord Diplock in R v Sang commented,

"It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them."

Similar sentiments were expressed after the introduction of PACE by Watkins L.J. in R v Mason, Hodgson J. in R v Keenan and by Lord Lane in R v Delaney (45) who held,

"It is no part of the duty of the court to rule a statement inadmissible simply in order to punish the police for failure to observe the Codes of Practice."

However, remarks of Lord Lane in the later case of R v Canale (1991) do have a disciplinary edge to them, when holding that a non-recorded confession should have been excluded, he comments in the following terms, that the police officers had,

"... demonstrated a lamentable attitude towards the 1984 Act and the Rules"

and " ... a cynical disregard for the rules". (46)

Lord Lane also commented that it was "high time" that police officers understood the importance of the rules relating to the recording of interviews. These comments in the context of the exclusion of confessions from the criminal trial do contain a hint of judicial discipline towards police misconduct.

If a justification is to be found for the exclusion of illegally or improperly obtained evidence under the PACE regime (S.78) then deterrence is unlikely to be a satisfactory explanation on both normative and descriptive grounds.

It provides an unattractive theory for exclusion given that it is very uncertain that the theory significantly deters the police and it can be strongly argued that highly probative evidence should not be excluded on such a speculative basis. On the descriptive side of the theory it is positively contradicted by many statements of the English judiciary disclaiming a "deterrent function" over the police.

The Protective Principle

A. Ashworth, a leading proponent of this theory for exclusion, sets out its terms thus:
(47)

"If a legal system declared certain standards for the conduct of the criminal investigations ... then it can be argued that citizens have corresponding rights to be accorded certain facilities and not to be treated in certain ways."

If the legal system is to respect these rights then it is arguable that a suspect whose rights have been infringed should not thereby be placed at any disadvantage, and the appropriate way of ensuring that the suspect does not suffer this disadvantage is for the court of trial to have the power to exclude evidence obtained by improper means.

However, there are certain practical and theoretical difficulties with this approach. The first difficulty for the protective principle is - what exactly count as "Rights"? PACE and the Codes of Practice contain numerous provisions governing many aspects of investigation and interrogation. Are all these provisions to be taken to generate "rights" and if not, on what criteria is it decided which provisions generate rights and which do not? Do other principles for ethical investigation of crime generate rights? Ashworth, for example, puts forward "a right not to be entrapped" as a right which the criminal justice system should recognise (by means of a substantive defence according to Ashworth rather than by means of evidential exclusion). However, this alleged right is likely to be controversial in England at

least where entrapment is viewed by the criminal courts as being in certain circumstances a legitimate police investigative tool - see Smurthwaite (1994) where it was asserted by Lord Taylor,

" ... the fact that the evidence has been obtained by entrapment or by agent provocateur or by a trick does not of itself require the judge to exclude it." (48)

An implicit recognition perhaps of the legitimacy of entrapment as an investigative and detection tool in certain circumstances. Also see the opinion of the Divisional Court in DPP v Marshall (1988) per Woolf L.J. for judicial acceptance of the legitimacy of entrapment in certain situations, notably where the police employ entrapment to obtain evidence of ongoing criminal activity. The refusal of Roskill L.J. to mitigate the sentence of the entrapped drug dealer Underhill is also a reflection of this judicial acceptance of the use of entrapment against those engaged in a course of continuing illegal activity. (49) Ashworth himself recognises the difficulties inherent in the protective principle,

"What should be the test of the existence and extent of particular rights? There can be no prior assertion of what rights should or should not be recognised." (50)

Another objection to the protective principle would argue that it is not the purpose of the law of criminal evidence to vindicate the rights of the suspect, that this is a matter which is extraneous to the proper purpose of the law of evidence. The law of criminal evidence seeks to promote the purposes of the trial and verdict in criminal cases. The vindication of the pre-trial rights of the suspect solely because they are the rights of the suspect is not therefore a value which the law of criminal evidence should be necessarily concerned with. Of course, violation of certain rights of the suspect pre-trial could affect the fairness of the trial itself - a confession obtained by torture in violation of the "right not to be tortured" should for various reasons be excluded from the criminal trial. However, to argue that the law of criminal evidence should vindicate a suspect's rights through the exclusion of evidence is to introduce an extremely wide and probably unmanageable principle. A further important question for the protective principle is - does the deliberateness of police violation of a right add to the gravity of the breach and hence make exclusion of evidence more likely?

Ashworth comments that the deliberateness of police violation of a right is

"irrelevant". What matters according to Ashworth, is whether prejudice followed any actual infringement of a right.

If prejudice such as a confession or the obtaining of real evidence follows breach of the right then it is arguable that to vindicate the right the evidence should be excluded irrespective of the presence of bad faith on the part of the police.

However, it is arguable that deliberateness of police violation of a suspect's rights is a significant feature of the moral context, i.e. it makes the right's violation worse and therefore the decision to exclude easier.

There are other questions for the protective principle which fail to be answered: should the protective principle be protected by a rule or a discretion? Do the interests of crime control sometimes override rights? How is this line to be drawn? Professor Ashworth argues that the law,

"... may occasionally be justified in not protecting a declared right, in limited circumstances the law might accord to the value of crime control priority over the value of a particular right."

Ashworth gives the example of an item of real evidence which would almost certainly be destroyed if it were not immediately seized and the court might then hold that the urgency justified the violation of the right against unlawful searches. However, as Ashworth himself notes,

"If the concept of urgency were readily applied to excuse unlawful action then the declared rights would stand for less and less." (51)

It can be argued that once we concede that rights can be traded against social goals such as the preservation of reliable evidence then we lose the notion of a right in its proper sense. The idea of a "right" carries with it the idea that it should be respected even when this is inconvenient in terms of wider social goals such as crime control. If crime control can override the protection of rights in some cases, as Ashworth suggests, can the line be held against the abrogation of rights whenever it is necessary to do so in the interests of crime control?

Public opinion and political interests will often be pushing for that line to be crossed

and therefore the "political feasibility" of the adoption of a full blown "protective principle" in the law of criminal evidence must be seriously questioned.

The Judicial Integrity Principle

This principle was argued for in the context of the exclusionary rule in the U.S.A. (see Mapp v Ohio (1961)) to protect the Fourth Amendment. The principle suggests that if improperly obtained evidence is adduced at trial then this admission could bring the trial process into disrepute. The investigative process and trial process are linked not only in fact but also in the public perception, so the theory goes, and to command the respect of the public the court must be seen to distance itself in appropriate circumstances from pre-trial improprieties which are serious enough to threaten the integrity of the court.

To achieve this distancing from police impropriety in the obtaining of evidence the court should consider excluding the evidence. The judicial integrity principle found a clear exposition in the words of Traynor J. in the U.S. case of People v Cahan (1955) California Supreme Court, (52)

"When ... the very purpose of an illegal search and seizure is to get evidence to introduce at a trial, the success of the lawless venture depends entirely on the courts lending its aid by allowing the evidence to be introduced. It is no answer to say that a distinction should be drawn between the government acting as law enforcer and the gatherer of evidence and the government acting as a judge ... Out of regard for its own dignity as an agency of justice and custodian of liberty the court should not have a hand in such 'dirty business' ... it is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law."

Yet this principle behind the exclusion of illegally obtained evidence has not gone unchallenged in the U.S.A. A recent example of criticism of the judicial integrity principle is provided by W. Stuntz, who commented,

"As an independent basis for the rule the judicial integrity argument deserves (and has recently received) little attention. Our law has long permitted the admission of evidence obtained through fraud or even force by private parties without any discernible effect on the integrity of the court system. There is no obvious reason why evidence obtained illegally by the police should have any greater impact on courts' integrity. Judges can without hypocrisy or inconsistency both admit the evidence and condemn (and punish) the police officer for his misconduct in obtaining it".
(53)

The above view of W. Stuntz, that there is no discernible difference between evidence obtained illegally by the police and evidence obtained by the illegality of private parties is not shared by the author of this thesis. It is possible to quote Zuckerman's point to repudiate Stuntz' view. Zuckerman comments, (54),

"Generally speaking it is practical to dissociate the admissibility of evidence from its legality where incidents of illegality ... emanate from individuals whose actions do not reflect on the judicial institution as a whole. It is thus possible to justify the admissibility of illegally obtained evidence in civil litigation where the transgressors are private citizens. However, today the investigative process is seen as part of the administration of justice which is why the debate regarding illegally obtained evidence has assumed such importance."

Stuntz is at least right when he asserts that illegality by a private citizen in obtaining evidence is no bar to its free admissibility in civil proceedings: see Calcraft v Guest (1898) per Lindley M.R. (55)

"Suppose the instrument were even stolen and a correct copy taken would it not be reasonable to admit it?"

However, when the situation is the illegality of a police officer in the obtaining of evidence for use in criminal proceedings the situation is very different from the Calcraft v Guest scenario. The criminal courts are reliant on the police to obtain evidence for use in prosecution of offenders. The police perform a vital public function achieving that. The civil courts merely provide a forum by which private parties can settle their disputes. There is no dependence by the civil courts on private parties nor an urgent public interest that their disputes are taken to court rather than settled out of court. It has been argued earlier that criminal verdicts are justificatory and expressive (56) and hence are sensitive to the way in which evidence has been

obtained. Civil judgements merely settle disputes between private parties and hence are not as sensitive to how evidence used at trial is obtained. For all these complex reasons it is absurd to argue that since evidence obtained by the illegality of citizens is not thought to impugn the integrity of the civil courts then illegality by police officers in obtaining evidence cannot impugn the integrity of the criminal courts.

However, Stuntz does reflect a trend in American jurisdictions to give the judicial integrity principle less weight than in the past. Arval A. Morris (57) comments that the judicial integrity principle has fallen out of favour with the American Courts since Mapp v Ohio and that deterrence of police misconduct is now the primary justification for the exclusionary rule. Morris quotes Justice Powell in United States v Calandra (1974) who ruled that,

"... in sum the rule is a judicially created remedy designed to safeguard fourth amendment rights generally through its deterrent effect."

Morris regrets the decline of the judicial integrity rationale which he regards as the "most important" rationale for the exclusionary rule. He in fact, sees the decline of the judicial integrity rationale in a conspiratorial light, for

"... once the exclusionary rule's opponents have given it an exclusively empirical foundation they can attack it. They erroneously claim the exclusionary rule extracts an unusually 'high price' from society - 'the release of countless guilty criminals'. Then ignoring the constitutional dimension (the integrity principle) they seek to shift the burden by demanding that in light of such a 'high price' the rule's proponents must produce some clear demonstration of the benefits and effectiveness of the exclusionary rule. Finally the rule's opponents rise up and triumphantly declare that there is no empirical evidence to support the claim that the rule actually deters illegal conduct of law enforcement officials." (58)

Therefore, according to Morris, ignoring the judicial integrity principle is part of a strategy by the exclusionary rule's opponents to have the rule removed as a bar to the admission of evidence obtained by illegal search and seizure by the police. The 'judicial integrity' principle is not even secure where it was first propounded, namely in the U.S. jurisdiction.

In response to claims that the admission of unfairly or illegally obtained evidence

would tend to undermine the integrity of the criminal court and hence the fairness or acceptability of a guilty verdict and that therefore to preserve its integrity the criminal court should consider excluding the evidence, Wigmore argued that,

" ... the illegality is by no means condoned. It is merely ignored in this litigation." (59)

The Wigmorean argument here proceeds on the assumption that there is no sufficient connection between the trial process and the investigatory stage of the criminal justice system to warrant the view that the actions of the police could impugn on the integrity of the court itself. The trial process, on this view, is concerned with the guilt or innocence of the accused not with how evidence has been obtained.

Moreover, the 'judicial integrity' concept, although it has gained some support in the American jurisdiction, has found very little echo in English reported judgements until very recently. Pattenden has remarked,

" ... there is no suggestion in the cases that the English judiciary think that receiving improperly obtained evidence will harm their prestige." (60)

I. H. Dennis claims to find some support for the "legitimacy of the verdict" theory of exclusion in judicial remarks in the recent cases of Williams v DPP, R v Bailey and Smith, where judgements used the word "legitimate" in connection with certain police covert procedures for the obtaining of evidence. Dennis comments,

" ... this tends to support the theory advanced ... as to the basis of the discretion to exclude under Section 78 of PACE."
(61)

However, the word 'legitimate' could merely be a reference to those covert police methods the judiciary can stomach as opposed to those methods which border on the 'oppressive' or 'unfair'. It is too strained an interpretation of both Williams v DPP and Bailey and Smith to see those cases as providing some support for either the judicial integrity or the similar theory 'the legitimacy of the verdict' as a justification for the exclusion of illegally or improperly obtained evidence. There is also the case of R v Horseferry Road Magistrates Court ex parte Bennett [1993], House of Lords per Lord

Lowry whose judgement contains ideas very similar to those of the 'legitimacy theory'. Lord Lowry comments,

"The court in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of the law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and if tolerated will mean that the court's process has been abused." (62)

However, Lord Lowry emphasized that this concern to stay proceedings arose from

"... wrongful conduct by the executive in an international context ... the court must jealously protect its own process from misuse by the executive."

The Bennett case involved the deliberate abuse of extradition procedures to bring a suspected offender into the English jurisdiction. It is therefore not a case on police impropriety in the obtaining of evidence for use in criminal proceedings. A stronger case to support the 'legitimacy theory' is the recent House of Lords case of R v Latif and Shahzad (1996). The case involved the possible use of entrapment by an English customs officer in aiding the defendants to import heroin into England where they were arrested. Lord Steyn in dismissing the appeals commented that entrapment,

"... posed the perennial dilemma. If the courts always refused to stay such proceedings the perception would be that the court condoned criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the courts were always to stay such proceedings, it would incur the reproach that it was failing to protect the public from serious crime. The weaknesses of both extreme positions left only one principled solution. The court had a discretion."

Lord Steyn went on to comment, (63)

"In this case the issue was whether despite the fact that a fair trial was possible the judge ought to have stayed the criminal proceedings on the broader considerations of integrity of the criminal justice system. Proceedings might be stayed not only where a fair trial was impossible but also where it would be contrary to the

public interest in the integrity of the criminal justice system that a trial should take place. In a case such as the present, the judge must weigh in the balance the public interest in ensuring that those charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court would adopt the approach that the end justified the means. In the present case the judge did not err in refusing to stay the proceedings."

There are strong echoes of the legitimacy theory for the exclusion of evidence illegally or improperly obtained in this judgement.

Pattenden is right to assert that traditionally a concern that receiving illegally or improperly obtained evidence would taint judicial integrity or the integrity of the process has not been a feature of judicial pronouncements in England.

Although it has been argued that S.78 is a wider discretion than the common law discretion this should not carry the implication that the criminal courts have since 1986 adopted the judicial integrity or legitimacy theories as rationales for exclusion. There is certainly no evidence pre PACE that this is so and very little since to convince that the judges have implicitly adopted the judicial integrity or the legitimacy theories as the basis of their decisions to exclude evidence.

However, the Wigmorean view that in admitting illegally or improperly obtained evidence the court is not condoning the police malpractice did not go unchallenged even in England in the pre PACE era. The leading evidence scholar of the post war years, Sir Rupert Cross made the following observation in 1979, (the year of R v Sang),

"I am unable to agree with those who maintain that by accepting illegally or improperly obtained evidence the court is not condoning the illegality or impropriety. I think that this is just what it is doing but even if I am wrong I have no doubt that such sophisticated arguments as there are in the contrary would be lost on the public. Up to a point the condemnation can be justified. Sometimes the impropriety is considerable but the act of condoning or appearing to condone it is outweighed by that of allowing a serious crime to go unpunished, but surely the crunch must come at some point? I suggest that it is reached when the judge is forced to the conclusion that in all the circumstances the method of obtaining the evidence cannot be condoned. These are occasions on which the public interest in the conviction of criminals is outweighed by the public interest in the due observance of the law by the police. (64)

There has been no explicit indication in the cases that the judicial integrity principle has ever been active in the minds of English judges when they have excluded illegally or unfairly obtained evidence either at Common Law or under S.78 of PACE. Certainly pre PACE English judges have tended to adopt the view that improperly obtained evidence could be admitted without compromising the integrity of the judicial institution or the criminal court. Hence Mirfield's comment that (65)

"Another reason why nothing has been heard of the (judicial integrity) principle in England may well be that English judges are likely to assume that they can satisfactorily avoid condoning unlawful police behaviour without invoking their power to exclude evidence. A firm rebuke to the errant policeman may be thought sufficient to dissociate the court from the unlawful conduct especially where the rule breached does not clearly have the status of a legal rule, as was the case with the Judges' Rules and administrative directions. A rule of a written constitution is of an altogether different order."

What might be argued since the passage of S.78 is that admitting the evidence which has been obtained by illegal means and delivering merely a rebuke to the police will not always be satisfactory to safeguard "the fairness of the proceedings" as required under S.78 of PACE. It may be that changing perceptions of the police role in the criminal justice system since the introduction of PACE mean that a judicial rebuke to the police will not always be enough to secure public confidence in the administration of justice. The view may be taken that if the judicial rebuke is not accompanied by action to exclude illegally obtained evidence in some circumstances then the rebuke is unlikely to carry much weight with the public nor in police culture. This is especially so given that S.78 gives the judiciary a power to express moral objection to improperly obtained evidence through the exclusion of evidence - see Lord Lane's comment in R v Quinn on this point. (66)

An important factor which militates against the attraction of the "judicial integrity" principle is the consideration that public respect for the trial process (which the principle tries to maintain) can be seriously undermined by the sight of patently guilty men escaping conviction because of the exclusion of reliable, relevant though illegally obtained evidence. 'Judicial integrity' is arguably adversely affected when the law over-regularly excludes probative evidence of guilt (because illegally obtained) and fails to protect the public from criminals.

A theory similar in certain respects to the judicial integrity principle has been

developed in England, particularly by Professor I. H. Dennis, a theory which would lead to the discretionary exclusion of illegally obtained evidence in certain circumstances. It differs from the judicial integrity principle in at least two important ways. First of all the judicial integrity principle seems to be linked to the context of illegally obtained real evidence. More particularly the judicial integrity principle is limited to evidence obtained in violation of the Fourth Amendment to the U.S. Constitution. The theory developed by I. H. Dennis, the 'legitimacy of the verdict' theory, is not so limited and has a much wider potential application extending to confessions, hearsay evidence and other doctrines of the law of criminal evidence. Secondly, it is not clear that the judicial integrity principle does take into account the public interest in the conviction of guilty offenders. This is a factor which militates strongly in favour of the admissibility of illegally obtained evidence which is often reliable and cogent to the proof of guilt. The judicial integrity principle is a principle for the exclusion of evidence, it primarily tends to provide a justification for why otherwise probative evidence should be excluded from the criminal trial. It is not clear therefore that it can successfully accommodate the important inclusionary consideration of securing the conviction of guilty and perhaps dangerous offenders. Therefore criticism of the judicial integrity principle to the effect that 'judicial integrity' is also affected by the overready exclusion of illegally obtained evidence is an effective critique of the judicial integrity principle.

However, the theory propounded by I. H. Dennis is not as prone to such a criticism. Dennis has argued that "the theory of the legitimacy of the verdict" can take into account the public interest in the conviction of guilty offenders. This leads to a more subtle theory of exclusion than the judicial integrity principle. A failure to notice this crucial difference between "the legitimacy theory" and the "judicial integrity" principle could lead to unjustified criticism of the legitimacy theory. A. Ashworth seems to make this mistake in his recent work "The Criminal Process". Ashworth asks of Dennis' theory, (67)

"There remains questions as to whether every departure from the rules at the investigative stage can be said to compromise the integrity of the courts ..."

and Ashworth also asks,

"... one question ... is whether the concept of integrity incorporates the social value placed on the conviction of the guilty?"

Yet Dennis has made it clear that,

"Recognising that the verdict serves a number of important public functions, the law is constructed so as to ensure that the verdict will be able to discharge those functions. This means that it will be concerned both with trial accuracy and hence with reliability of evidence and with the integrity of the judgement. These concerns mean that in principle all relevant evidence should be admitted because this will promote factually accurate judgements ..." (68)

Of course, derogations from this basic principle of admissibility are needed for various reasons, e.g. if relevant evidence carries significant risks of unreliability it may not be safe to give the fact finder a free hand in its evaluation. A confession obtained by unreliability inducing methods of police interrogation is a class of evidence correctly subject to an exclusionary rule. With regard to illegally obtained real evidence there is no risk of systematic unreliability with that class of evidence. The public interest in the conviction of the guilty which the legitimacy theory recognises would therefore lead to a position where illegally obtained evidence is *prima facie* admissible. This in fact coincides with the actual English law in this area. However, on the legitimacy theory there may be circumstances where the exclusion of illegally obtained evidence is necessary to secure the legitimacy of the verdict. As Dennis has written,

"In a case where the illegality was flagrant and deliberate the judge may well decide that such evidence should be excluded. A guilty verdict might be seriously undermined by the lack of state probity and respect for process norms in the way the evidence was obtained." (69)

However, it is not certain that any English judge has reasoned on these lines in any reported cases. Evidence has been excluded in circumstances very similar to those described by Professor Dennis, where the illegality was flagrant and deliberate, e.g. see Matto v DPP (1987). However, this does not mean necessarily that the judge excluded the evidence because of the reasons advocated by Professor Dennis.

The protective principle may equally have been present in the minds of judges when they excluded illegally obtained evidence. An interesting research survey was done of the reasons why Crown Court judges exclude evidence under S.78 of PACE. The conclusion reached after an admittedly very small sample of judges at Leeds Crown Court was that, (70)

"The judges were unanimous in rejecting the idea of considering the principles when deciding whether to exclude disputed evidence in the exercise of their discretion." (The 'principles' were the disciplinary, protective and reliability principles.)

This research finding is a cautionary note for any theorist who seeks to find his own preferred theory of exclusion as the explanation for decisions under S.78. As a starting point it would be unwise to discuss the case law in England since 1986 without close reference to the terms and purposes of the Police and Criminal Evidence Act 1984. That Act provides the important historical and ideological context for the exercise of the S.78 discretion. This Act represented a major watershed in the history of English policing, changing the ideological rationale on which policing is accepted in England. This, it is submitted, has substantially affected the willingness of the English judiciary to exclude illegally or improperly obtained evidence under S.78, as well as substantially affecting the willingness of the judiciary to exclude confession evidence under the same provision. This must be considered before any abstract theorising about the rationale for the exclusion of illegally obtained evidence in England can begin.

Improperly obtained evidence and covert police operations

In S.78 the criminal courts have a wide ranging provision for the exclusion of evidence which has been obtained by illegal, improper or unfair means. The challenge to the criminal courts of dealing with the issue of illegally or unfairly obtained evidence has rarely been greater at present as the traditional problems, evidence from an illegal search (see Kuruma v R) evidence from entrapment, (see R v Birtles, R v Ameer), evidence obtained by trickery in the police station (see R v Court, R v Payne) have been added to in recent years by an increase in the use of covert investigatory methods which may involve illegality or impropriety or result in unfairness if evidence gathered by those covert methods is admitted into evidence. (71)

The desirability of a statutory code governing undercover police operations such as surveillance was adverted to as long ago as 1981 in the RCCP Report. (72) The political settlement between police powers and the rights of suspects that PACE represents is incomplete to the extent that covert police operations were left outside

the ambit of the statutory scheme established in PACE for the conduct of police operations. In 1981 the focus of public concern was mainly the interrogation process and the use of "traditional" police powers such as arrest, stop and search and the entry of premises. The growth in the use of covert operations by the police in the years subsequent to 1981 have shown the need for Parliament to urgently consider the limits of permissible police conduct in covert operations in order that the fair settlement between police and public should be as complete and comprehensive as possible. Indeed the House of Lords in R v Khan repeatedly called upon Parliament to introduce statutory control over the use of surveillance devices by the police. Lord Nolan in R v Khan commented, (73)

"The sole cause of the case coming to the House of Lords was the lack of a statutory system regulating the use of surveillance devices by the police. The absence of such a system seemed astonishing, the more so in view of the statutory framework which had governed the use of such devices by the security service since 1989 and the interception of communications by the police as well as by other agencies since 1985. Counsel for the Crown had indicated on instructions that the government planned to introduce legislation covering the matter in the next session of Parliament."

A statutory system for authorisation of the use of surveillance devices by the police was introduced by The Police Act 1997, sections 91-108, although the system of authorization is undercut by S.97(3): "This Section does not apply to an authorisation where the person who gives it believes that the case is one of urgency." Yet this statute only covers a small part of police conduct outside the police station designed to gather evidence; there is still need for a statutory code for covert investigatory practices generally.

However, even if there was a statutory code for covert investigative practices the judiciary would still have the problem of deciding what the consequences of a breach of the Code by the police would be. If the offence investigated was of a less serious nature then it would be relatively easy to rule the evidence inadmissible if there was a "significant and substantial" breach of the Code by the police. If however the offence was of a very grave nature then it is likely that some judges would be tempted to admit the evidence if it was reliable despite the breach of the Code. Moreover a Code for covert investigative practices is unlikely to be comprehensive for innovations in undercover techniques are always a possibility.

However, a statutory code would prevent the law in this area from being "police led", that is the judiciary merely legitimating through the admission of evidence innovative covert investigative practices by the police. A statutory code would stake out in advance what is and what is not acceptable police conduct in covert investigations, at least as a matter of principle if not precise detail.

It is not proposed to offer a comprehensive account of why there has been an increase in the use of covert methods of investigation recently, methods which may involve illegality (trespass and damage to property as in R v Khan) or impropriety (as in R v Hall, R v Stagg) but some observations will be made in an attempt to put the use of S.78 in its context. The first point to make is that PACE and the Codes of Practice have made the obtaining of confessions through interrogation a more difficult process than under the old regime governed by the Judges' Rules. Not only has the obtaining of a confession become harder (e.g. because the percentage of suspects who see a solicitor has risen dramatically from the situation under the Judges' Rules - from a mere fraction of suspects to about 25% of suspects under the PACE regime) and there is a strong link between receiving legal advice and not making a confession (74) but the courts are more willing to exclude a confession where there is impropriety in the obtaining of a confession. Moreover, the chances of impropriety being detected have improved because of the recording provisions and the presence of legal advisors.

It may be that covert investigative techniques are being used because formal interrogation has failed to produce evidence or because it is anticipated that formal interrogation is likely to be unsuccessful in producing incriminating evidence. In R v Khan formal interrogation under PACE had failed to elicit a confession from a suspect suspected of importing heroin into the UK. It was at that stage that a listening device was fitted to a private house which the suspect frequented. The suspect's damaging admissions in the house were recorded by the device and the Court of Appeal and the House of Lords held the evidence rightly admitted. In R v Hall (as also in R v Stagg) formal interrogation had failed to produce a confession to murder so the police set up a covert operation to obtain an incriminating statement, the operation was stigmatized as "unfair" by the trial judge.

Empirical support for the claim that PACE has made obtaining a confession harder for the police than under the Judges' Rules regime is provided by a Home Office Research Study by David Brown in 1991, Chapter 7 "Detectives' views of PACE" (75)

"The view was generally held that interrogation was not as important a part of criminal investigation as before PACE and that fewer confessions were obtained owing to increased constraints."

However, according to Brown,

"The data clearly show that interrogation still occupies an important place in the detectives' armoury."

However, the police have come in for widespread informed criticism because of an over reliance on interrogation in the past. As the RCCJ recognised, (76)

"It is now generally accepted that confessions have hitherto taken too central a role in police investigations."

The move towards covert techniques may be due in part to a reaction by the police towards such criticism of an overdependence on confession evidence.

The second point explaining the increase in the use of covert operations is that such methods can make sense from an efficiency "crime control" point of view. The Audit Commission ("Helping with Enquiries") in 1993 recommended in a highly influential report that the police target 'prolific' offenders in the community and seek to collect evidence and apprehend them there rather than relying on "old style 1970s" detective work to receive a tip off about a suspect, arrest him and then take the suspect to the police station for interrogation. There might not be enough evidence to charge the suspect even after interrogation and in any case the police may not actually arrest the most prolific offenders. If the small number of prolific offenders (who with regard to certain crimes such as burglary or street robbery commit most of the recorded offences) can be 'targeted' in the community then this may make a significant difference to the detection and prevention of certain crimes. The operation which resulted in the case of Williams v DPP (77) can be viewed as an attempt to trap prolific offenders "in the community" rather than relying on interrogation of a suspect as a way to obtain evidence about the commission of offences. In Williams a van was left unlocked with dummy cartons of cigarettes in the back in an area of a town with a reputation for a high prevalence of theft from vehicles. 'Targeting' includes identifying areas of high crime rates for particular offences. Two individuals who succumbed to temptation were prosecuted. The Court of Appeal held that the police

tactic was "legitimate" and the evidence was held to be rightly admitted. If the two individuals caught had been 'prolific' thieves no doubt the police tactics would not have received the level of criticism from commentators that the case attracted (for example of such criticism see G. Robertson (78)). The use of proactive methods may be a response to press criticism in recent years about the prevalence of low clear-up rates.

The third point to make explaining the increase in the use of covert investigatory methods is the influence of successful American covert investigatory techniques. The methods employed in R v Christou (1992) (a "shady" jewellers shop which received stolen goods - actually a police trap) and Williams v DPP were copied from similar operations used by the police in the U.S.A. It is also the case as Lustgarten (79) points out, that certain proactive police techniques may be a direct product of the content of the substantive criminal law: "Certain offences require measures of enforcement that are inherently and unavoidably oppressive". The central example Lustgarten uses is the prohibition on the possession of drugs (80)

"... criminalisation of drugs use has certain inevitable enforcement corollaries; a society which chose to decriminalise drugs would have a very different sort of police force."

Whilst this may be overstated, Lustgarten has a valuable point. The crucial proof issue with regard to drugs offences is showing possession of or distribution of the prohibited drugs. However, the usual method of crime detection, information received from the victim of crime, is lacking in drugs cases because drugs offences tend to be in a sense "victimless". Therefore, the police have to obtain evidence that the defendant was either caught in possession of the drugs or secretly observed taking possession of them. Lustgarten points out that the only effective means of establishing this is by use of one or more of the following methods:

- wiretapping or other forms of surveillance
- participation of undercover agents in illegal transactions which can readily shade into entrapment
- use of informers whose own criminality if kept in bounds may be tacitly condoned
- search of persons or property which involves serious invasion of privacy.

Lustgarten concludes that police methods "oppressive of civil liberties ... is the inevitable price society pays for the creation of such offences; they cannot be enforced otherwise". If drug abuse has increased in society in recent years so might police use of proactive methods to counter that increased level of criminality.

The increase and variety of these operations are giving the criminal courts a new challenge in the field of illegally or improperly obtained evidence beyond the usual types of case involving illegal searches, entrapment and police tricks in the police station. Police trickery outside the police station which was formerly limited mainly to entrapment has expanded into various "manna from heaven" and "sting" operations. J. Morton (81) comments on one aspect of this,

"Nowadays police surveillance and infiltration has become an industry in itself with high technology gadgetry employed for electronic eavesdropping."

There is an irony here for if the police are using these techniques as a partial replacement for dependence on interrogation in response to public concerns about an over reliance on confession evidence then some of these proactive techniques, especially surveillance and bugging devices, are potentially more intrusive to individual liberty than interrogation in the police station. It is the case that evidence obtained by surveillance and the use of electronic bugs does not present a danger of unreliability and is in this sense a superior source of evidence than confessions. However, proactive police investigatory techniques can raise acute civil liberties problems concerning privacy especially when as in R v Khan listening devices are fixed to private residences.

The cases post PACE

An early indication that S.78 is wider than the common law discretion was provided by the Divisional Court judgement in Matto v DPP (1987) (82). In this case a conviction for driving with excess alcohol was quashed where the relevant breath test was administered by the police when acting in excess of their powers in bad faith.

The defendant, who drove his car from a road on to private property was followed by police officers in a police vehicle. They informed him that because of the manner in which he had been driving on the road and because he had exceeded the speed limit

he was required to take a breath test and if he failed the test or refused to take it he might be arrested. The defendant then said that the property was private and that the police could not act. By that time the police officers knew that their implied licence to enter the property had been terminated.

Therefore they acted in bad faith, and stated that they knew what they were doing and if the suspect was wrongfully arrested he could sue the police. The appellant went to the police car where he underwent a breath test which proved positive. He underwent a further breath test at the police station which also proved positive. Woolf L.J. held that,

"The language of S.78 (1) directs the court to have regard to the circumstances in which the evidence was obtained. Therefore it is certainly implicit in the subsection that there can be circumstances in which the evidence was obtained which makes it have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

Woolf L.J. continued,

"I am satisfied that in this case exceptionally there could be circumstances where if the Crown Court had properly directed themselves they could or might have exercised a discretion to refuse to admit the breath-alcohol analysis in evidence. I emphasize that I come to that conclusion because of the finding which they came to of *mala fides*."

It is not clear that the evidence in Matto v DPP could have been excluded under the common law discretion as interpreted by the House of Lords in R v Sang. In R v Payne (1963) one of the few instances of appellate court use of the Kuruma discretion, real evidence of a high probative value as in Matto v DPP was held to have been wrongly admitted. In R v Payne in the police station the accused had been tricked into providing a sample by a misrepresentation by the police.

Bad faith on the part of the police was not alleged but the Court of Appeal held that 'fairness' required the exclusion of the evidence. Payne was explained in R v Sang as a case involving an unfair infringement of the suspect's privilege against self-incrimination (the *nemo debet prodere se ipsum* principle). In Matto no reference was made to the suspect's privilege against self-incrimination, rather the emphasis of Woolf L.J.'s judgement was on the bad faith exercise of police power. This suggests a shift of emphasis in the justification for the discretion to exclude improperly obtained

evidence from a concern focused on the suspect's privilege against self-incrimination to a concern focused on the abuse, particularly deliberate abuse of police power in the gathering of evidence (Lord Lane's dictum in R v Quinn (1990) should be remembered here - see below). The abuse of police power in the gathering of evidence was not suggested at common law as a reason to exclude evidence obtained improperly.

The emphasis given to deliberate misuse of police power in Matto perhaps reflects judicial acknowledgement that in the post PACE era the criminal courts cannot remain indifferent to the deliberate abuse of state power in the gathering of evidence for use in court. Lord Lane commented in R v Quinn (1990) that proceedings may become unfair, if amongst other factors,

" ... there has been an abuse of process, e.g. because evidence has been obtained in deliberate breach of procedures laid down in an official Code of Practice."

This reference to deliberate breach of procedures which can lead to proceedings becoming unfair if the evidence so obtained is admitted suggests that the focus of the exclusionary discretion is not, as at common law on whether the suspect had been unfairly tricked out of his privilege against self-incrimination to produce evidence against himself, but rather the focus is on the abuse of police power and particularly on bad faith violation of procedures for the fair conduct of criminal investigations. It will be remembered that in R v Alladice Lord Lane commented that if the police breached S.58 of PACE in bad faith then it would be 'easy' to exclude a confession so obtained under S.78. Again this suggests that the rationale and purpose of S.78 is different to that of the common law discretion to exclude a confession under the Judges' Rules. It is the submission of this thesis that one important reason for this change, recognised by the judiciary in their use of S.78, is the ideological shift in official attitudes to the police role in the criminal justice system which PACE represents.

Matto v DPP has been followed in Sharpe v DPP (1992) (83) which similarly concerned a positive breath test and in that case possible bad faith use of police power. However, Buckley J. in that case denied that because of a finding of bad faith on the part of the police in obtaining evidence that the discretion of S.78 could only be exercised one way, i.e. to exclude the evidence. This is perfectly in line with principle. S.78 confers a discretion on the judge and whilst bad faith may be a potent

factor in favour of excluding evidence and a factor which the trial judge or magistrates must consider (see Matto) bad faith does not dictate exclusion of evidence.

It has been often asserted by the courts that 'fairness of the proceedings' in S.78 includes 'fairness to the Crown'. Crown interest in the prosecution of offenders on reliable probative evidence is a consideration which must also be considered under S.78. If it was accepted that a finding of bad faith on the part of the police always led to exclusion of evidence then it is arguable that this leaves no place for the interests of the Crown in those cases involving bad faith by the police. If the police breached a relatively insignificant provision of PACE in bad faith and obtained reliable evidence of guilt in a serious offence then perhaps a trial judge would be correct if he decided to admit the evidence rather than exclude it.

However, it should not be thought that the existence of bad faith is required before a judge can exclude evidence under S.78. R v Samuel (1988) and DPP v McGladrigan (1991) (84) establish that a finding of *mala fides* is not required before evidence can be excluded under S.78.

In McGladrigan it was stated by the Divisional Court that with regard to evidence of a positive breath test that,

" ... albeit there was no finding of *mala fides* on behalf of the police the case would not on that ground alone be remitted with a direction to convict."

However, a direction to convict was ordered on other grounds.

The cases discussed above, Matto v DPP, Sharpe v DPP, McGladrigan v DPP are all cases involving road traffic offences and hence relatively less serious offences. R. Pattenden's remark on the exercise of the common law discretion is worth noting here,

"It is surely no accident that the reported instances of the discretionary exclusion of non confession evidence have involved road traffic offences. Where the accused was charged with rape the evidence was admitted" (a reference to R v Apicella (1985)) (85)

As a matter of record non confessional evidence was excluded in the

drugs/entrapment cases of R v Ameer and R v Burnett and in the counterfeit currency/entrapment case of R v Foulder. (86) However, these were first instance decisions only. As a matter of appellate exclusion of illegally or improperly obtained evidence at common law the "Road Traffic Offence" cases were the only ones where the Divisional Court said evidence should have been excluded. In this context the decision of the Court of Appeal in R v Nathaniel (1995) is of great significance.

If as a matter of unstated policy, seriousness of the offence was taken into account in deciding whether to exclude evidence obtained improperly, at common law then this factor has received explicit recognition since the passage of S.78.

In R v Latif and Shahzad (1994) (87), Court of Appeal, Lord Justice Staughton giving the judgement of the court, made the following remark on the S.78 issue,

"The Parliament that enacted S.78 of the Police and Criminal Evidence Act 1984 for the purpose of protecting the innocent might have been surprised to hear it invoked on behalf of an importer of heroin worth £3.2 million into this country in order to exclude the evidence against him on the ground that he was encouraged by an agent of the British government."

The Court of Appeal went on to consider the S.78 question but in the light of this opening comment on the issue it is not surprising that the evidence was held to have been rightly admitted. Professor J. C. Smith comments that the above comment of Lord Justice Staughton,

"... is difficult to reconcile with many of the decisions on Section 78 which treat it as protecting everyone guilty or innocent from conviction upon an "unfair" trial. The alleged unfairness may cast no doubt whatever upon the guilt of the accused but require the exclusion of the evidence or the quashing of a conviction if it has been admitted. Importers of heroin are very wicked but so are many murders, rapists and robbers." (88)

It is unfortunate that the Court of Appeal in Latif refers to the purpose of S.78 as "protecting the innocent". It is true that S.78 does have that purpose and has been used to exclude police evidence which is not up to the standard of reliability required by the courts, e.g. see R v Nagah (1991) where identification evidence was excluded by the Court of Appeal because the police had substituted their own procedure for an identification parade over the requirements of Code of Practice D on identification

evidence. Also see the cases requiring confession evidence to be properly authenticated, e.g. R v Keenan, R v Canale. Section 78 has been used by the courts in that context to protect the court and defendant from fabricated police evidence of a confession.

However, S.78 has a role independent of protecting the innocent. S.78 has been used to exclude very reliable evidence of guilt as in Matto v DPP or R v Nathaniel if the admission of the evidence threatens the "fairness of the proceedings" because of abuse of police power in the obtaining of the evidence.

However, the Court of Appeal in Latif is right to make reference to the gravity of the offence - importation of a class A drug. 'Fairness of the proceedings' under S.78 refers to fairness to the Crown as well as the accused.

Given that S.78 takes into account the interest of the Crown as well as the defence it is arguable that the more serious the offence the heavier is the weight of Crown interests in favour of inclusion of the evidence.

There is a greater public interest in the conviction of persons guilty of serious crimes than the public interest in the conviction of those guilty of less serious crimes. However, merely because the offence is a very serious one this does not mean that evidence will automatically be admitted, as the Court of Appeal commented in Latif,

" ... the question remains in terms of S.78 whether having regard to all the circumstances including the circumstances in which the evidence was obtained the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

The case of R v Stagg (89) (a case concerning an horrific and much publicized murder) is significant in this respect for it suggests that whatever the nature of the offence there are certain police methods which remain unacceptable to the judiciary and invite the use of the exclusionary discretion under S.78. The prosecution argued that the undercover operation was the only route available in order to test the accused's capacity to fantasize in a way that was consistent with a psychological profile that had been compiled on the murderer. Nevertheless the trial judge Ognall J. held that if that route led the police into the area of impropriety the evidence was inadmissible.

The seriousness of the offence as a factor to be taken into account in deciding whether to admit unfairly or illegally obtained evidence under S.78 received even more implicit recognition in R v Khan where it was held by the Lord Chief Justice Lord Taylor (90),

" ... on the facts the invasion of privacy with the attendant trespass and damage was outweighed by other considerations such as the fact that the police had acted in accordance with the relevant Home Office guidelines and that the criminal conduct under investigation was of a serious nature."

From the judgement of the Court of Appeal in Khan emphasis was again laid on the fact that,

" ... what was under investigation was a type of criminal conduct of great gravity, "

and that this is a factor favouring the admission of illegally or unlawfully obtained evidence. The House of Lords has upheld the decision of the Court of Appeal in R v Khan. Lord Nolan commented,

"It would be a strange reflection on our law if a man who had admitted his participation in the illegal importation of a large quantity of heroin should have his conviction set aside on the ground that his privacy had been invaded." (91)

Again a recognition that the gravity of the offence was a relevant factor under the S.78 discretion.

It could be suggested that the more serious the offence the less likely should the courts be to overlook any police impropriety in obtaining evidence of it and therefore exclusion should be more likely than the same police impropriety to gather evidence about a less serious offence.

The argument is that the conviction and punishment of persons accused of serious crimes requires greater justification than the conviction of persons of less serious crimes. Therefore the criminal trial should be less willing to accept 'tainted' evidence to prove serious offences than to prove less serious offences. However, this view has

not been adopted in Australia, see Bunning v Cross (1978) (92) nor now in England. It is surely common sense that there is a greater public interest in the conviction of offenders in serious crimes than in less serious crimes and that public faith in the criminal justice system is likely to be shaken if highly probative real evidence was readily excluded in, for example a murder case or a rape case.

However, there are circumstances where even highly probative real evidence in a serious case is held to be rightly excluded because of police breach of procedures in obtaining that evidence: see R v Nathaniel.

A lack of probity by the police in the collection of evidence for use at trial can so upset the fairness of the proceedings that the evidence should be excluded from trial even where that evidence is highly probative of the guilt of the defendant with regard to a serious offence.

Footnotes to Chapter 7

Illegally Obtained Evidence

- (1) Kuruma v R [1955] AC 197 [1955] All ER 236.
Perhaps there is an important distinction between police illegality and evidence unfairly obtained by the police. Where the police actually break the law to obtain evidence the case for excluding that evidence in discretion is a stronger one than mere unfairness in obtaining the evidence. The legitimacy of the system is called more into question by police breaches of the law they are meant to uphold than by mere unfairness in the obtaining of evidence.
- (2) R v Khan [1994] 4 All ER 426.
- (3) Lawrie v Muir (1950) SLT 37.
- (4) Mapp v Ohio (1961) 367 US 656.
- (5) U.S. v Leon (1984) 468 US 897.
- (6) R v Leatham (1861) 8 Cox CC 498.
- (7) Jones v Owen (1870) 34 JP 759.
- (8) R v Warickshall (1783) 1 Leach 263.
- (9) G. Robertson Q.C. "Freedom, the individual and the Law" at p.38.
- (10) R v Cooke [1995] 1 Cr. App. R. 318. See also the opinion of the court in DPP v McGladrigan that Section 78 discretion was a "new discretion" and not merely a restatement of the common law.
- (11) R v Chalkley [1998] 2 Cr. App. R. 79 C.A.
- (12) A. Ashworth, "Excluding Evidence as Protecting Rights", Criminal Law Review [1977] p.729 note 27.
- (13) Lord Scarman, House of Lords, 11 July 1984, Hansard p.932.
- (14) R v Sang [1979] 2 All ER 1272 at p.1230.
- (15) R v Christou and Wright [1992] 4 All ER 559 at p.564.
- (16) R v Mackintosh (1983) 76 Cr. App. Rep. 177 CA.
- (17) Lord Taylor quoted in Joshua Rozenberg, "The Search for Justice" 1994 at p.5.
- (18) P. Devlin, "The Judge" 1979 at p.25.
- (19) R v Mills and Lemon [1947] KB 297 [1946] 2 All ER 776 quoted in Cross 7th Edition 1990 at p.487.
- (20) R v Sang [1979] 2 All ER 46 at p.62 CA.

- (21) Law Commission Report No.83 "Defences of General Application" 1977, Chapter 5.
- (22) G. Robertson Q.C. Entrapment evidence: Manna from Heaven or Fruit of the Poisoned Tree?" [1994] Criminal Law Review 805 at p.816.
- (23) R v Birtles (1969) 1 Cr. App. R. 1047.
- (24) R v Foulder [1973] Crim. LR 45.
R v Burnett [1973] Crim. LR 748
R v Ameer [1977] Crim. LR 104.
- (25) Lord Diplock in R v Sang [1979] 2 All ER 1222 at p.1230.
- (26) Leon Brittan, 29 October 1984 House of Commons Debates, Hansard p.1012.
- (27) House of Lords Debates 31st July 1984 (Lord Scarman). Lord Scarman's own reverse onus exclusionary rule excluded confessions from its ambit. S.78 which was substituted at a very late stage for it is of course a discretionary power to exclude and does apply to confessions, see R v Mason [1987] 3 All ER 481.
- (28) R v Christou and Wright [1992] 4 All ER 559 at p.564.
- (29) R v Quinn (1990) quoted in D. Birch "Excluding Evidence from Entrapment" [1994], Vol.47, Current Legal Problems at p.92.
- (30) D. Birch "Excluding Evidence from Entrapment: What is a fair cop?" [1994], Vol. 47, Current Legal Problems, at p.92.
- (31) R v Apicella (1985) 82 Cr. App. Rep. 295.
- (32) R v Nathaniel [1995] 2 Cr. App. R. 565. For further discussions of R v Nathaniel see R. Munday "Section 78 of PACE and improperly Obtained Evidence" (1995) 159 Justice of the Peace and Local Government Law, at p.663 and note Munday's comment that. "one senses with Nathaniel, S.78 has truly come of age. In resounding fashion the case disposes of any lingering misgivings that the section does not expand the old common law discretion. It is a powerful precedent epitomizing the view that evidence of any variety which comes by in a manner which the court adjudges unfair runs the real risk of exclusion", at p.668.
- (33) R v Payne (1963) 47 Cr. App. R. 122.
- (34) Callis v Gunn [1963] 3 All ER 677.
- (35) R. Pattenden, "Judicial Discretion and Criminal Litigation" 1990, p.269.
- (36) M. Gelowitz, "Section 78 of the Police and Criminal Evidence Act 1984: Middle Ground or No Man's Land?" [1990] 106 Law Quarterly Review 327.
- (37) D. Birch [1995] Criminal Law Review Commentary on R v Cooke, p.49.
- (38) Matto v DPP (1987) RTR 337.
- (38b) R v Khan [1997] Crim. L.R. 508.

- (38c) I. H. Dennis "The Law of Evidence" 1999, pp.72-73.
- (39) P. G. Polyviou, "Illegally Obtained Evidence and R v Sang" in "Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross" 1981, edited by C. Tapper at p.226.
- (40) A. Ashworth, "Excluding Evidence as Protecting Rights" [1977] Criminal Law Review 723 at p.724.
- (41) R v Sang [1979] 2 All ER 46 at p.62.
- (42) J. H. Wigmore, "Using Evidence Obtained by Illegal Search and Seizure" (1922) Vol. 8, American Bar Association Journal, p.479 at p.484.
- (43) D. Oaks, "Studying the exclusionary rule in search and seizure" (1970) 37 University of Chicago Law Review 665 at p.722.
- (44) G. Robertson, "Freedom, The Individual and the Law" 1993, p.46. Clayton and Tomlinson in their recent work "Police Actions" 1997, comment "10 years ago such actions were relatively rare ... the position has changed beyond recognition since the late 1980s. Civil actions against the police have become an important area of general litigation practice." at p.(vii). This is in contrast to the pre PACE era, as Dixon notes: "In the 1950s and 1960s, courts were unsympathetic to civil actions against police, the policy being not to discourage police from attempting to do their duty", at p.146 of "Law in Policing: Legal Regulation and Police Practices" 1997.
- (45) R v Delaney (1989) 88 Cr. App. R. 338 at p.341.
- (46) R v Canale [1990] 2 All ER 187 at p.190 and p.192.
- (47) A. Ashworth, "Excluding Evidence as Protecting Rights [1977] Criminal Law Review 723 at p.725.
- (48) R v Smurthwaite [1994] 1 All ER 898 at p.902.
- (49) DPP v Marshall [1988] 3 All ER 685, R v Underhill (1979) 1 Cr. App. R. (s) 270.
- (50) A. Ashworth, "Concepts of Criminal Justice" [1979] Criminal Law Review 412 at p.423.
- (51) A. Ashworth, "Excluding Evidence as Protecting Rights" [1977] Criminal Law Review 723 at p.732.
- (52) People v Cahan (1955) 282 P.2d. 905.
- (53) W. Stuntz, "The American Exclusionary Rule and Defendants' Changing Rights" [1989] Criminal Law Review, p.117 at p.118-119.
- (54) A. A. S. Zuckerman, "Illegally Obtained Evidence: discretion as a guardian of legitimacy" (1987) 40 Current Legal Problems, 55 at p.56.
- (55) Calcraft v Guest [1898] 1 QB 759.
- (56) I. H.Dennis, "Reconstructing the Law of Criminal Evidence" [1989] Vol. 42, Current Legal Problems, p.21 at pp.36-38.

- (57) Arval A. Morris, "The Exclusionary Rule ..." (1982) 57 Washington Law Review, p.647.
- (58) *ibid* at pp.650-651.
- (59) J. H. Wigmore, "Using Evidence Obtained by Illegal Search and Seizure" (1922) Vol. 8, American Bar Association Journal at p.479.
- (60) R. Pattenden, "Judicial Discretion and Criminal Litigation" 1990 at p.270.
- (61) I. H. Dennis, "Instrumental Protection, Human Right or Functional necessity? Reassessing the Privilege against self-incrimination" [1995] Cambridge Law Journal 342 at p.365.
- (62) R v Horseferry Road Magistrates Court *ex parte* Bennett [1993] 2 WLR 90.
- (63) R v Latif and Shahzad [1996] 1 All ER 353.
- (64) Sir Rupert Cross, "The Forensic Crunch" (1979) Northern Ireland Legal Quarterly, Vol.30 No.4 at p.298.
- (65) P. Mirfield, "Confessions" 1985, pp.77-78.
- (66) R v Quinn [1990] Crim. LR 581.
- (67) A. Ashworth, "The Criminal Process" 1994, p.32 and at p.302.
- (68) I. H. Dennis, "Reconstructing the Law of Criminal Evidence" [1989] Vol. 42, Current Legal Problems, 21 at p.37.
- (69) I. H. Dennis, "Instrumental Protection, Human Rights or Functional Necessity? Reassessing the Privilege against self-incrimination" [1995] Cambridge Law Journal 342 at p.360.
- (70) Mary Hunter, "Judicial Discretion: Section 78 in Practice" [1994] Criminal Law Review, p.588.
- (71) see "Under Surveillance: Covert Policing and human rights standards" 1998. A Report by "Justice", at p.7, "Modern policing no longer relies solely or mainly on detection, confession and the hope that witnesses will come forward. Increasingly, police, customs and other law enforcement agencies in the UK and other countries are turning to proactive, intelligence-led policing methods."
- (72) RCCP (1981) at p.39 paragraph 3.57.
- (73) R v Khan [1996] 3 All ER 289 H.L.
- (74) J. Pearse and G. Gudjonsson, "Police Interviewing and Legal Representation: A field study". The Journal of Forensic Psychiatry, May 1997, Vol. 8, pp.200-208. "Highly significant relationships were found between the presence of a legal advisor and a suspect's decision not to confess", at p.200.
- (75) David Brown, "Investigating Burglary: the effect of PACE" (1991) Home Office Research Study No. 123, at Chapter 7, p.73.
- (76) RCCJ Report 1993, p.64 paragraph 67.

- (77) *Williams v DPP* [1993] 2 All ER 365. The Audit Commission published their report in 1993. Two major intelligence led operations targeting suspected criminals soon followed in London "Operation Eagle Eye" against street robbers and "Operation Bumble Bee" against suspected burglars. Obviously there are important limits on the permissibility of targeting by the police of people in a high crime area. Stober has recently provided a useful hypothetical scenario to illustrate the limits of permissible police targeting; imagine an area in a city known to have high levels of illegal narcotics activity which is targeted by police in an undercover operation: "To think that the innocent shopper, diner, pedestrian, civil servant or businessman may not only be accosted by the odd drug dealer but also by police agents of the state offering them or anyone else within that area without distinction and at any time of day or night the opportunity to commit an offence, appears to be clearly offensive to the community's sense of decency." Quoted in A L-T Choo "Abuse of Process and Judicial Stays of Criminal Proceedings 1993, at p.164.
- (78) See G. Robertson, "Freedom, the Individual and the Law" 1993 at p.63.
- (79) Lawrence Lustgarten, "The Police and the Substantive Criminal Law" (1987) *British Journal of Criminology* Vol.27 No.1, p.23 at p.30.
- (80) *ibid* at p.24 and p.38.
- (81) J. Morton "Supergrasses and Informers: An Informal History of Undercover Police work" 1995, at p.xiii. For further recent discussion of undercover policing see C. Fijnaut and G. Marx "Undercover: Police Surveillance in Comparative Perspective" 1995, and essays in that volume by D. Hobbs on undercover operations against Football hooligans in the UK and M. Levi on undercover operations and white collar crime in the UK. Also note G. Marx's comment that the undercover policeman has become a "cultural hero" in Western societies. Michael Levi: "Covert Policing and the Investigation of organised fraud: The English Experience in International Context", p.195 in Fijnaut and G. Marx. G. Armstrong and D. Hobbs "High Tackles and Professional Fouls: The Policing of Soccer Hooliganism" p.175 in Fijnaut and Marx.
- (82) *Matto v DPP* [1987] R.T.R., 337 at p.346 D.C.
- (83) *Sharpe v DPP* [1993] R.T.R. 392 at p.399.
- (84) *DPP v McGladrigan* [1991] R.T.R. 297 D.C.
- (85) R. Pattenden "Judicial Discretion and Criminal Litigation" 1990, at p.269.
- (86) *R v Ameer* [1977] *Crim. L.R.* 104.
R v Burnett [1973] *Crim. L.R.* 748.
R. v Foulder [1973] *Crim. L.R.* 45.
- (87) *R v Latif and Shahzad* [1994] *Crim. L.R.* at p.750.
- (88) [1994] *Criminal Law Review* at p.752.
- (89) *R v Stagg*, Central Criminal Court 14th September 1994, unreported (Ognall J.). Transcript of the ruling of the trial judge in the possession of the author.
- (90) *R v Khan* [1994] 4 All ER 426 at p.433.

- (91) R v Khan [1996] 3 All ER 289 H.L.
- (92) Bunning v Cross [1978] 141 CLR 54 [1978] 19 ALR 641.

CHAPTER 8

ENTRAPMENT

Definition

Before an analysis is conducted of the topic, a brief summary will be given defining entrapment and seeking to distinguish that concept from the concept of a trap. Entrapment in the strict sense of the word describes circumstances where a person has been induced to commit an offence which he would not have committed but for the inducement. The 1929 Report of the Royal Commission on Police Powers describes an *agent provocateur* as,

" ... a person who entices another to commit an express breach of the law which he would not otherwise have committed and then proceeds to inform against him in respect of such an offence." (1)

However, the term 'entrapment' can, as Dennis points out (2) be used with varying shades of meaning.

The distinction between entrapment and trap is well illustrated by the following quotation from the judgment of the Court of Appeal for East Africa in Wanjiko v Reginam (3). Entrapment induces the commission of an offence that would not otherwise have been committed; a trap seeks to obtain evidence of an offence that has already been "laid on" or even been committed. The Court of Appeal of East Africa said,

"It is clear that to act as an *agent provocateur* is never justifiable: but this situation arises in its true form only if the accused would never have committed or attempted to commit the crime in question but for the encouragement of the agent. Apart from mere detection of crime already committed there may be two other types of case; first where the police have information that a crime is likely to be committed and conceal themselves with a view to obtaining evidence of its commission, and secondly where it appears that the offence would in any event be committed when opportunity arose and the police provided an arranged opportunity. These are both, as it seems to us, cases in which the use of a trap may be legitimate."

However, in the following discussion 'entrapment' will be used in a wider sense to include not only the situation where a police officer or his agent induces the commission of an offence that would not otherwise have been committed, but also includes the situation where the police or their agents induce a suspect to commit a fresh offence in a situation where the suspect is engaged in continuing or ongoing criminal activities.

Introduction

The issues surrounding the law on entrapment merit a separate discussion from the law on illegally or improperly obtained evidence for the basic reason that whereas other forms of impropriety by the police in the pre-trial phase can be viewed as merely methods of collecting evidence about an offence that has already been committed, entrapment in contrast causes the commission of the crime by the accused. The relationship between the police impropriety, namely entrapment and any conviction of the accused is therefore a more direct and dramatic one than in the case of other forms of police impropriety such as an unlawful search or undue pressure on the suspect to obtain a confession. The crucial point about entrapment in its narrowest sense is that the accused would not face the possibility of criminal proceedings against him if the police had not encouraged the commission of an offence which he would not otherwise have committed. Other forms of police impropriety such as unlawful search or oppressive interrogation leave untouched the fact that the accused has committed a criminal offence of his own volition.

Indeed this crucial distinction between entrapment and other forms of police impropriety has led to some commentators, notably Professor Choo, to argue that the response of the law should be different with regard to proof of entrapment from proof of other forms of police impropriety in gathering evidence. Choo argues (4) that to exclude the evidence of *agents provocateurs* is an inadequate judicial response to the problems of entrapment since such exclusion is not directed at the central consideration for in a case of entrapment the actual commission of the crime and not merely an item of evidence can be regarded as having been a fruit of the police impropriety.

As a consequence Choo argues (5),

" ... what is required is that proof of entrapment must lead automatically to a stay of the proceedings as an abuse of the process of the court."

This as an unqualified statement, is too strong since as we shall observe, entrapment can sometimes be justified as a legitimate investigatory tool and indeed has been recognised as such by the English courts. Significantly Choo has more recently written that (6)

"... it is strongly arguable that improper entrapment should lead automatically to a stay of the proceedings."

This is a clear recognition that entrapment is sometimes legitimate as a police method of investigation.

The Historical Background

The use of entrapment to obtain convictions is not solely a modern phenomenon although the use of entrapment as a law enforcement technique has come to the fore recently in England given the increased use of covert investigative techniques generally by the police in recent years. In the eighteenth and early nineteenth century the fact that most prosecutions were private prosecutions made the criminal courts open to private uses and abuses. One group of private individuals who benefited from the system of private prosecution was the class of men known as thief-takers; these thief-takers were private individuals who made a profession out of seeking and securing convictions of thieves. By the mid to late nineteenth century this task of convicting thieves would have been undertaken by the professional police but in an earlier age "thief-takers" prospered. However, as Hay and Snyder comment, (7)

" ... thief-takers also enticed beginners into crime in order to betray them or secured convictions of innocent men and women through wholly perjured testimony."

The rewards offered by private individuals or Associations for the Prosecution of Felons made the creation of criminals through entrapment an attractive possibility for thief-takers. This vice has a modern counterpart in the form of police informers who might encourage others to commit crime so that they can be informed upon to the police by the informer who wishes to obtain financial reward or credit from the police

and prosecuting authorities. In discussing the acceptability of entrapment as a police technique it is important to remember that its use allows scope for the unscrupulous informer or police officer to advance their own personal interests. It may then be wise to be cautious about too strong an endorsement of the use of entrapment by the police. In contrast it is unlikely that interrogation under the PACE regime allows much scope for the advantage of unscrupulous personal interests on the part of the interrogators, especially given the increased visibility of the process. Covert operations are by definition of low visibility and are therefore prone to encourage corruption by police officers.

In the nineteenth century in England the fear of police use of entrapment amongst other factors inhibited the development of a properly established detective branch of the police until 1877. As T. Critchley in his history of the police in England observes, (8)

"The extreme sensitivity of public opinion towards anything that savoured of 'continental' methods in using police for espionage purposes or to trap people no doubt discouraged the formation of a detective department at Scotland Yard."

Indeed, only a few years after the formation of the CID the police engaged in entrapment as a means of detecting and securing evidence against a suspected offender, much to the distaste and anger of The Times newspaper, which can be viewed at that time as a barometer of respectable opinion in England (see the reference at note 16 of this chapter).

This hostile reaction to the police method in the Titley case is testimony to an English distaste at entrapment as a detection and investigatory tool of the police. This hostility to entrapment which manifested itself at official as well as popular level continued well into the twentieth century, e.g. see the remarks of Lord Goddard C.J. in Brannan v Peek (1947) (9). Only fairly recently, perhaps since the 1970s, does the propriety of entrapment as a useful investigatory technique in certain circumstances seem to have been unequivocally accepted; see for example the comments of Roskill L.J. in R v Underhill (1979) (10) and Woolf L.J. in DPP v Marshall (1988) (11).

However, it is important to note that official hostility towards police use of entrapment did not have implications for the admissibility of evidence from that entrapment. From the case of R v Titley (1880) to R v Sang (1979) it was generally accepted by the judges that the fact of entrapment by the police was irrelevant to the

question of the admissibility of the evidence of an *agent provocateur*. There were a few cases of first instance exclusion of entrapment evidence in the 1970s but these decisions were criticised by both the Court of Appeal and House of Lords as wrong headed decisions.

In R v Titley (1880) the police suspected the accused of being concerned with the illegal procuring of abortions. However, hard evidence was difficult for the police to secure since as the trial judge commented, (12)

"... persons who committed crime were persons who concealed crime."

The police therefore decided to lay a trap for Mr. Titley who was a chemist. The police arranged for a policeman and his wife to pose as parties interested in the illegal services of the accused. They made contact with the accused at the chemist's shop. The accused fell into the trap and not only wrote highly incriminating correspondence with the policeman whom he thought was an ordinary civilian, but he also supplied the undercover policeman with the necessary chemicals for the offence when the policeman called at his shop. At that point Titley was arrested. The evidence so gathered was admitted at the trial and not surprisingly Titley was convicted of unlawfully supplying with intent to procure the miscarriage of a woman. The interest of Titley's case resides partly in the reaction to the case after Titley had been convicted. In the House of Commons on January 11th 1881, a few weeks after the trial, Sir Herbert Maxwell asked the Home Secretary whether (13),

"... it is the intention of the Crown to prosecute Inspector O'Callaghan and Sergeant Stroud for conspiring to incite Titley to commit an indictable offence?"

In reply Sir William Harcourt, the Home Secretary, commented,

"I regret that the police should have decided upon the course to which they resorted without advising the Home Office on the subject. I only became acquainted with it on the eve of the trial. Like other people I was startled when I was informed of it and I asked for a report on the matter."

This suggests that such police methods were considered *prima facie* objectionable even where Harcourt noted,

" ... the evidence left no doubt in the minds of the police that Titley had been in the habit of practicing these crimes on an extensive scale for a long time past."

In the present day when the police suspect ongoing illegal activity and therefore set a trap to secure evidence of that activity by procuring the commission of an example of that continuing criminal conduct as in DPP v Marshall (1988) then such police methods are considered unobjectionable. However, in late nineteenth century England the fear of the police "spy" was still strong being almost a cultural aversion to such techniques of policing. The influence of this cultural aversion lasted well into the twentieth century, for example in R v Mealey (1974) (14), Lord Chief Justice Widgery referring to Brannan v Peek (1947), commented,

"No one who read Lord Goddard C.J.'s words about the dislike for such agents in this country should think that the attitude of the courts toward *agents provocateurs* is different in principle from what it was then."

In that case, Brannan v Peek, a constable placed bets with the reluctant defendant in an attempt to secure evidence for a prosecution under the street betting legislation then in force. Lord Goddard Lord Chief Justice commented,

"The court observes with concern and disapproval the fact that the police authority at Derby thought it right to send police officers into a public house to commit an offence. It cannot be too strongly emphasized that unless an Act of Parliament does so provide - it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected."

In the same vein Lord Goddard continued,

"I hope the day is far distant when it will become a common practice in this country for police officers to be told to commit an offence themselves for the purpose of getting evidence against someone."

This is no doubt a reflection of the old view that the English police are somehow unique and distinct from police forces in the rest of the world and that the English police should be above such trickery as entrapment. In Browning v J. W. M. Watson (1953) (15) Lord Goddard made a blanket condemnation of entrapment as a method of the police,

"No court in England has ever liked action by what are generally called *agents provocateurs* resulting in imposing criminal liability."

Criminal liability was often imposed, though, because entrapment evidence was not excluded from trial until a few first instance decisions in the 1970s.

It is important then to distinguish between cultural objections to entrapment which characterized much official discourse in England until fairly recently and the objections of straightforward principle to improper forms of entrapment. The cultural objections to entrapment in England sought to distinguish the English police whose power was based on public consent (e.g. the constable as "citizen in uniform") from the continental police agent who would employ tricks and traps against the citizenry in the interests of a ruling political elite. An example of an objection of principle to entrapment is the argument that it is not a proper state function to test the virtue of a citizen not reasonably suspected of involvement in ongoing criminal activity. However, in late nineteenth century England arguments against entrapment tended to be based on cultural terms, i.e. that it was somehow 'un-English' for the police to avail themselves of entrapment. In the House of Commons in January 1881 Sir William Harcourt had laid down the principle that,

"As a rule the police ought not to set traps for people."

However, Harcourt accepted the difficulties of obtaining evidence in certain cases when he commented,

"If there is to be a departure from this rule under extraordinary circumstances the matter is one of such difficulty that the discretion ought not to rest with the police authorities. I have accordingly directed that no such methods shall be resorted to for the future without direct communication or authority from the Home Office."

Harcourt had, in his House of Commons reply to Maxwell, set out the difficulties with entrapment as a means of detection,

"In the first place there is a danger that while the police may be in possession of information that crimes most mischievous to society are being committed, these crimes may be difficult if not impossible of detection by ordinary means."

However, outweighing this argument in favour of entrapment is the following important consideration noted by Harcourt,

"... there is the other danger that the confidence of the public may be shaken in the good faith of the police; and of all the evils that could occur that would be the greatest."

Given this risk Harcourt commented,

"The cases in which it is necessary or justifiable for the police to resort to the artifice of the description practiced in this case must be rare indeed."

Public confidence in the good faith of the police does seem to have been upset if the editorial in "The Times" can be taken as a reflection of the opinion of the property-owning classes. The Times was convinced that the police had behaved badly in the Titley case (16),

"Whether the phantom charge against Thomas Titley can be sustained or not is a matter which concerns himself. The charge against the police is of much more general consequence ... In Thomas Titley's case the whole crime from one end to the other is the mere concoction of the police. He is found engaged in his lawful occupation as a chemist and he is urged to an unlawful course outside his regular business. There is more here than the detection of crime. The initiative is with the police and not with the offender; each subsequent step is the result of a distinct suggestion on the part of the police ... If the police have really done what the Recorder's charge implies the proceedings is described none too strongly as very greatly to be reprobated in itself and for the abuses to which it obviously lends itself."

This editorial, apart from being a useful critique of the practice of entrapment, illustrates that such methods were unacceptable to respectable public opinion in late nineteenth century England. The possibility that use of entrapment by the police has a tendency to upset public confidence in the good faith of the police is noted by the modern commentator J. D. Heydon, who comments, (17)

"Public fears of entrapment create suspicion and insecurity.
Trappers are undemocratic in being a secret police force."

An indiscriminate use of entrapment by the police is likely to have consequences for public faith in the fairness of the whole criminal justice process: on this see Chapter 9.

Cultural objections to entrapment as a legitimate police method of investigation in England continued into the twentieth century, for example, the Royal Commission on Police Powers and Procedure 1929 commented on the term "*agent provocateur*", (18)

"... the use of a foreign phrase for which there is no exact English equivalent indicates that the practice is regarded as alien to our habits and traditions."

However, the 1929 Royal Commission, like Harcourt in 1880 were prepared to tolerate entrapment as an exceptional measure. The 1929 Commission started its discussions however, with a clear denunciation of police tactics designed to entrap citizens into crime. Indeed, the Royal Commission commented that in those circumstances, (19)

"We do not believe that a prosecution would ever be instituted on evidence obtained in such circumstances or that a prosecution thus instituted would result in a conviction."

This comment that no prosecution would ever be instituted where the police had initiated offences "with a view to enticing or entrapping members of the public into committing breaches of the law" is interesting in the light of Choo's (20) proposal that proof of entrapment should lead to a stay of the proceedings as an abuse of the process of the court, that the pre-trial police impropriety is so grave that mere exclusion of evidence is an inadequate remedy.

The Royal Commission of 1929 obviously regarded criminal proceedings based on evidence obtained by entrapment as so fundamentally flawed that the proceedings should not be instituted against the entrapped citizen. However, the argument of the 1929 Commission was more subtle than merely arguing that entrapment is always objectionable. The Commission started with the basic proposition that since, (21)

" ... it is the primary duty of the constable to prevent the commission of crimes and offences any conduct on his part leading to the commission of offences would be highly reprehensible."

However, the Commission recognises that it is also the duty of the police to enforce the law and to secure evidence in pursuit of this aim. Yet for certain types of offences the obtaining of evidence in the usual ways is difficult if not impossible. (22)

"The offences in regard to which such difficulties most frequently arise are drinking in licensed premises or clubs during prohibited hours, betting in unlicensed premises, street betting, offences against The Shop Hours Act and cases of clairvoyants or fortune tellers."

However, these situations throw up another problem: should the police merely observe in the hope of gathering evidence that way or can they legitimately take part in criminal activity in order to entrap the suspected offender into an example of his ongoing criminal conduct so that evidence can therefore be gathered to prosecute him for that ongoing criminal activity? The 1929 Commission recommended that, (23)

" ... as a general rule the police should observe only without participating in the offence."

This echoes Sir William Harcourt's comment that,

"As a rule the police ought not to set traps for people."

However, the 1929 Commission like Harcourt, were prepared to make exceptions to the general rule, for the 1929 Commission this was where,

"Observation without participation is from the nature of the case impossible."

The Commission was also prepared to tolerate as an exceptional measure police traps

"if protection is to be afforded to the public". (24)

Entrapment in every circumstance has never been officially disapproved of although the technique has only been tolerated as an extreme measure to be used very sparingly. As was stated by Nolan J. in R v Governor of Pentonville Prison ex parte Chinoy (1990) (25)

"Our law has always acknowledged the fact, unpalatable as it may be, that the detection and proof of certain types of criminal activity may necessitate the employment of underhand and even unlawful means."

Even when police entrapment activity went beyond the narrow limits of legitimacy set out by the 1929 Royal Commission (e.g. in R v Birtles (26) the police encouraged a known criminal to rob a post office and even provided him with a car to stake out the premises and gave him an imitation gun to perform the robbery after which he was arrested, this is clearly beyond what the 1929 Commission established as legitimate use of entrapment) the law implicitly sanctioned the entrapment by admitting the evidence of the *agent provocateur* into trial. The only legal consequence of proof of entrapment was a sentence reduction because of the element of entrapment. Before the 1970s the sentence reduction and a judicial rebuke to the police were the only responses of the criminal court to even the more offensive forms of entrapment. Indeed there were some very strong statements of judicial disapproval of the practice of entrapment, e.g. Lord Goddard in Brannan v Peek, and Lord Parker in R v Birtles, but prosecutions were still brought against the entrapped citizen despite the claims of the 1929 Royal Commission that prosecutions would not be brought where the police had initiated offences, "with a view to enticing or entrapping members of the public into committing breaches of the law". Not only were prosecutions brought, but the courts would not until the 1970s countenance the possibility that evidence obtained by entrapment should be excluded from the trial. It is doubtful whether the terms of the discretion conferred in Kuruma v R (1955) allowed trial judges to properly exclude entrapment evidence even if they wanted to, see R v Sang per Lord Diplock on the limits of the Kuruma discretion. The admissibility of entrapment evidence in law and the unwillingness of the judiciary to exclude it as a matter of discretion is in line with the pre PACE judicial approach to other forms of police impropriety such as illegal searches of persons and property which result in the obtaining of evidence: there is no reported case where evidence obtained from an illegal search was excluded in the

trial judge's discretion.

The sentence reduction continued as the only significant judicial response to the fact of police entrapment into the 1980s and early 1990s, see R v Underhill (1979), R v Mackey and Shaw (1992) (27). However, the picture is slightly more complicated than the above statement implies. In the 1970s before the case of R v Sang (1979) and after R v Birtles (1969) and R v McCann (1971) (28) which are all high authority for the proposition that there is no judicial discretion to exclude entrapment evidence there were some interesting developments at first instance level. G. Robertson Q.C. points out, (29)

"The debate over whether and if so upon what occasions the courts should exclude evidence obtained by tricks and traps was the liveliest of issues throughout the seventies, as trial judges and academic commentators wrestled with the extent to which the judicial discretion at common law could be exercised against receiving evidence of police provocation of unwilling and at first unwitting offenders."

In R v Foulder, Foulkes and Johns (1973) (30) the accused were charged with unlawfully possessing controlled drugs. An undercover police officer had approached Foulkes and persistently requested the drugs. As a result the three accused later met the policeman, produced the drugs and were then arrested by the policeman. The evidence of the policeman was rejected by the court after defence arguments that the discretion to exclude should be exercised since the police had encouraged the accused to commit the offence. The three accused were acquitted.

In R v Burnett and Lee (1973) (31) Lee was introduced to a police informer who told him that she was the agent of a foreign government and was interested in finding the source of forged currency and travellers cheques and obtaining them in large quantities. She also told Lee that in view of her diplomatic status "he would have nothing to worry about". The informer persistently phoned Lee's home asking whether he had discovered the source. After the two accused delivered forged US dollar bills to the informer they were arrested by the police. The trial judge held the evidence inadmissible since there was a strong suspicion that the conduct of the informer tempted and encouraged the accused to commit crime.

However, the Court of Appeal in R v McEvilly (1973) (32) commented that the evidence of the entrapment in both R v Foulder and R v Burnett had been wrongly excluded and should have been admitted in both trials.

In R v Ameer (1977) (33) another first instance judge, Judge Gillis Q.C. did not heed the Court of Appeal's strictures in R v McEvilly and excluded the evidence of an *agent provocateur*. The correctness of the decision in Ameer was strongly doubted by the House of Lords in Sang (1979). It is an interesting observation that before the enactment of S.78 of PACE no Court of Appeal or House of Lords decision ever sanctioned the use of judicial discretion to exclude evidence of an *agent provocateur*. It is therefore slightly misleading for G. Robertson Q.C. to comment,

"What the House of Lords took away in Sang in 1979 - effectively this very power at Common Law to exclude unfairly obtained evidence - Parliament gave back albeit in confusing terms in 1984 through Section 78 of PACE." (34)

The common law discretion, the Kuruma discretion was never approved of by the Court of Appeal so as to act on the evidence of an *agent provocateur*. The recent case of R v Smurthwaite (1994) C.A. is therefore a major landmark in English criminal evidence since the case gives Court of Appeal approval for the first time to trial judges to exclude in their discretion the evidence of an *agent provocateur* where appropriate to safeguard "the fairness of the proceeding" under S.78 of PACE. This suggests that the Section 78 discretion, far from returning us to the "pre Sang" position as Robertson implies, is actually a wider discretion than the common law discretion (see R v Cooke (1994) C.A.) and is based on a different ideological rationale, that police misuse of power in the collection of evidence or non observance of proper procedures can affect the fairness of the proceedings.

The Home Office Circular to the Police on Informants who take part in crime (35)

There exist certain Home Office instructions to the police on the use of informers and entrapment. As Leigh points out they faithfully reflect the law (36) in stating categorically that no member of a police force and no public informant should counsel, incite or procure the commission of a crime. This is in accord with judicial pronouncements in such cases as Brannan v Peek and R v Birtles (37). As Leigh

points out, the Circular to the police on the use of informers and entrapment,

"Scrupulously accords with the legal rules evolved by the courts. It reflects a denial of any special position of sanctity to the police who may not, with impunity break the law in order to enforce the law." (38)

The Circular goes on to state that, (39)

" ... where an informant gives the police information about the intention of others to commit a crime in which they intend that they shall play a part, his participation should be allowed to continue only where:

- (i) he does not actively engage in planning and committing the crime,
- (ii) he is intended to play only a minor role; and
- (iii) his participation is essential to enable the police to frustrate the principal criminals and to arrest them before injury is done to any person or serious damage to property.

The informant should always be instructed that he must on no account act as *agent provocateur*, whether by suggesting to others that they should commit offences or encouraging them to do so, and that if he is found to have done so he will himself be liable to prosecution."

Infiltration of a criminal conspiracy is allowed by the Circular but the informant must never allow himself to cross the boundary into becoming an *agent provocateur*. Neither the police nor their agents should counsel, incite or procure the commission of a crime.

R v Sang and Entrapment Evidence

In R v Sang the House of Lords held that since there was no substantive defence of entrapment in English law that therefore there should be no discretion to exclude evidence of entrapment. As Lord Diplock commented, (40)

"If (the judge) exercised the discretion in favour of the accused he would then have to direct the jury to acquit. How does this differ from recognising entrapment as a defence but a defence for which the necessary factual foundation is to be found not by the jury but by the judge and even where the factual foundation is so found the defence is available only in the judge's discretion."

J. D. Heydon (41) has pointed out that Lord Diplock is not strictly correct in his Lordship's analysis of the situation,

"Those who advocate the discretion to exclude evidence obtained by entrapment do not advocate that if entrapment exists the court should have a discretion to exclude all otherwise admissible evidence. The discretion advocated is simply to exclude evidence which proceeds directly from the entrapment."

Therefore, on this analysis evidence of an independent witness to the crime caused by the police entrapment or a confession made by the entrapped suspect would be admissible and hence go to prove guilt independent of the evidence of an *agent provocateur*. Recognition of this is inconsistent with the argument that the existence of a discretion to exclude evidence of an *agent provocateur* is tantamount to recognising a defence of entrapment. However, in argument against Heydon's analysis are the following observations. First of all, in R v Ameer all evidence from the commission of the crime was excluded by Judge Gillis Q.C. It would remain theoretically possible for a trial judge not only to exclude the evidence of an *agent provocateur* but also any confession or other evidence which exists to prove the offence under S.78 of PACE. If trial judges excluded other evidence as well as the evidence of the *agent provocateur* in a case of entrapment in order to safeguard "the fairness of the proceedings" under S.78 then the situation would look very similar to a 'defence' of entrapment. However there is still a crucial distinction. Section 78 is a discretion which may or may not be used to exclude the evidence of an *agent provocateur* or indeed other evidence of the crime such as a confession, however if a defence of entrapment is made out it is not dependent on the exercise of a judicial discretion. Moreover in R v Smurthwaite the leading case on S.78 and entrapment, Lord Taylor only sanctions the discretionary exclusion of the evidence of the *agent provocateur* in the judge's discretion under S.78. Lord Taylor is silent on the effect of the S.78 discretion on other evidence of a crime committed because of entrapment. Can a confession of an entrapped citizen be excluded under S.78? If only the evidence of an *agent provocateur* can be excluded under S.78 and not the confession of the entrapped citizen then this would not be similar to the operation of a defence of entrapment and Heydon would be right in his analysis. There is no good reason however why a confession following an improper entrapment operation cannot be excluded under S.78. It is clear from the authorities that S.78 can be used to exclude a confession otherwise admissible under S.76: see Chapter 5 of this thesis.

However, Heydon can be criticized from a standpoint of principle. Heydon commented that those who advocate the discretion to exclude evidence obtained by entrapment mean a discretion simply to exclude evidence which proceeds directly from the entrapment: see note 41 of this chapter.

However, this would lead to inconsistent results and hence injustice by not treating similar cases alike. If the prosecution evidence consists solely of the testimony of the *agent provocateur* then an acquittal would follow exclusion of that evidence but if the police had obtained a confession from the entrapped citizen then a conviction may still result even if the evidence of the *agent provocateur* was excluded by the trial judge. The arbitrary nature of the remedy of discretionary exclusion where entrapment exists is an argument in favour of a more drastic remedy of a stay of proceedings where there has been improper entrapment (allowing the fact that entrapment is sometimes not improper if it is used on those involved in ongoing criminal activity). A stay of proceedings would achieve consistency between similar cases of improper entrapment by precluding the possibility of any conviction at all of the improperly entrapped citizen.

However, whatever the merits of the argument in favour of a stay of the proceedings over discretionary exclusion, R v Sang had the unquestionable effect of precluding the possibility of trial judges from even considering the fact of entrapment as a relevant factor in the exercise of their judicial discretion to exclude evidence. R v Smurthwaite in its interpretation of S.78 makes R v Sang redundant as an authority that entrapment is irrelevant to the exercise of any judicial discretion to exclude evidence. Even before R v Smurthwaite, dicta suggested S.78 applied to the evidence of an *agent provocateur*. In R v Gill (1989) (42) reservations were made about dicta in R v Harwood (1989) which suggested that S.78 should be interpreted so as to give effect to R v Sang on the entrapment point and the discretion to exclude. In Governor of Pentonville Prison ex parte Chinoy (1992) (43) it was stated by Nolan J. that the fact of entrapment may be taken into account under S.78.

The Modern Judicial View of Entrapment and Discretionary Exclusion

The judicial trend to see entrapment as a relevant factor to the exercise of the S.78 discretion was confirmed authoritatively by Lord Taylor, Lord Chief Justice in R v Smurthwaite (1994). However, the judgement in R v Smurthwaite, like the

judgement of Nolan J. in Chinoy recognised that sometimes entrapment can be a legitimate police practice. In R v Smurthwaite Lord Taylor commented,

"... the fact that the evidence has been obtained by entrapment or by an *agent provocateur* or by a trick does not of itself require the judge to exclude it." (44)

If discretionary exclusion under S.78 is to mark the limits of acceptable and unacceptable police conduct (e.g. see R v Mason for a police tactic that was 'unacceptable') then by stating that the fact of entrapment does not of itself require the judge to exclude evidence seems to be implying that entrapment may be a legitimate police tactic in certain circumstances and evidence should not be excluded from trial in those circumstances. This reflects a decisive shift in the acceptability of entrapment to official opinion from the position maintained by Lord Goddard in Brannan v Peek (1947).

It is interesting to compare Lord Goddard's denunciation of entrapment in Brannan v Peek with the cautious approval given by Woolf L.J. to entrapment tactics used by the police, in DPP v Marshall. The official distaste with entrapment activity manifest in the opinions of Lord Goddard was a cultural legacy from the nineteenth century and the fears of that time of 'continental' police methods such as entrapment. The nineteenth century legacy had a continued hold in 1947 but by 1988 the fact that entrapment can be a useful investigatory tool seems fully accepted by the Divisional Court in DPP v Marshall. The English police are not to be distinguished from their Canadian, American or continental counterparts, all of whom employ entrapment as a law enforcement tool to the lesser or greater degree. The only limits of principle on entrapment activity by the English police are the same arguments of principle which apply to police forces in other liberal democratic societies. The old arguments that the use of entrapment by the police is un-English, or in the words of the 1929 Royal Commission "alien to our traditions and habits" can no longer be plausibly used to criticize police use of entrapment. The police in England and Wales are now understood after the enactment of PACE as a core state agency given special powers and duties to investigate crime who are similar in status and role to police forces in other liberal democratic societies. The argument manifest in Lord Goddard's judgements that entrapment is inconsistent with the traditions and role of the English police cannot be maintained in the light of the changed ideological understandings of the police role in England manifest in particular in the RCCP Report of 1981 and the PACE Act 1984, the entire structure of which treats the uniformed officer as having

powers and duties peculiar to the office of policeman in a liberal democratic state. Judicial attitudes to the use of entrapment by the English police should be consistent with the view of the police embodied in PACE as a state agency charged with detecting and investigating criminal offences and given special powers to that effect. There should be, and indeed there is, a more relaxed judicial attitude to the use of entrapment by the police.

In DPP v Marshall (1988) police officers in plain clothes purchased four cans of lager and a bottle of wine from a shop which was licensed to sell liquor by the case but not to sell individual cans or bottles of liquor. The respondents were charged with having sold the lager and the wine without having the requisite justices' licence contrary to S.160 of The Licensing Act 1964. The respondents argued that the police officers' evidence should have been excluded under S.78 (1) of PACE since the evidence had been unfairly obtained because the officers had not at the time of the purchase revealed the fact that they were police officers. The magistrates accepted that claim.

On appeal by the Director of Public Prosecutions Woolf L.J. held that the evidence of the police officers had been wrongly excluded by the magistrates. The case was remitted to the magistrates with a direction to proceed with the hearing of the information.

Woolf L.J. made the following important observations, (45)

"If the justices are entitled to exclude evidence on the basis which the justices in this case decided to exclude the evidence, that could have wide-reaching implications on the methods adopted of obtaining evidence in a large range of criminal offences of this sort. In regard to the particular offences which are alleged in this information one can conceive that by keeping the premises under observation the police could have obtained the evidence without adopting the stratagem which was adopted in this case. Clearly while that could have been done it would have been much more time-consuming and difficult than adopting the simple procedure which was adopted in this case of trying to make a purchase which would contravene the law in the way alleged in the information."

There are still important problems of principle with entrapment as a law enforcement technique, hence Lord Taylor's decision in R v Smurthwaite that the fact the evidence was obtained by an *agent provocateur* is relevant to the exercise of the judge's discretion to exclude evidence under S.78. The important argument of principle is that it is not generally an appropriate state function to encourage citizens into crime

for the purposes of securing convictions against those citizens. If S.78 is concerned partly with safeguarding the moral integrity of criminal proceedings then proceedings which are instituted against a citizen where the citizen was encouraged to commit the crime by agents of the state are morally undermined. However, entrapment is a legitimate technique where there is ongoing criminal activity for which it is difficult to obtain evidence in the normal way. Entrapment in this situation becomes a legitimate investigatory tool alongside 'manna from heaven' operations (as in Dawes v DPP (1994) (46), where a car door is deliberately left open to catch a habitual car thief; the door locks automatically from the outside when the thief is on the inside of the car) or 'trickery' operations (as in R v Christou and Wright (1992) (47) a shady jewellers, in fact a police trap, recorded criminals offering stolen goods for sale) to detect and secure evidence against suspected offenders. Where entrapment is used against suspected offenders then it is no more objectionable than the use of 'manna from heaven' operations or 'trickery' to obtain evidence against other suspected offenders. Entrapment can be viewed as an evidence gathering technique to secure the conviction of people already (pre the entrapment) suspected of involvement in criminal activity. However, the type of 'trickery' used in R v Christou and Wright would seem to be only a danger to the guilty offender because if the offence had not been committed then any trick to secure evidence of it will by definition not work. Tricks can only be effective against those engaging in criminal activity: for example, in R v Ramen (1988) the appellant worked for the Post Office; his duties included dealing with remittances received by a Head Post Office from branch offices. As a result of suspicions investigating officers sent him a bundle of letters, one of which contained £100 in cash which was not listed as part of its contents. The appellant was found in possession of the £100 and duly convicted. The Court of Appeal on his appeal against sentence commented that,

"This case is a world away from the *agent provocateur* type of case. This is a case in which as a result of suspicion unproven a test of the appellant's honesty was put into effect, as indeed in the experience of this court it must regularly be in these Post Office cases where suspicion falls upon an employee in a position of trust. There was no question here of applying such a principle as might have applied if the court thought right in the *agent provocateur* cases or in the true entrapment cases. This is not such a case. This is a case where a man in a position of trust is caught out and thoroughly deserved the sentence which was passed on him." (48)

To restate an important point, tricks such as employed against Ramen are only effective against the criminal, an innocent man would not have fallen for the bait.

However, entrapment is a different matter. The commission of the crime can be actively encouraged and indeed suggested by undercover police and the innocent citizen is vulnerable to such tactics as is the professional criminal. Even the virtuous citizen is suggestible to the incitement of others to a certain degree. There is an important distinction between verbal persuasion to criminality by police officers and merely offering the opportunity to criminality as in R v Ramen. It is because of the danger of 'innocent' citizens becoming corrupted that entrapment raises such important issues of principle. However, those with previous criminal records need to be protected from undue police pressure to commit crime also. It should not be thought that merely because someone has a criminal record that he is 'fair game' for the use of entrapment. Entrapment should only be used on those suspected of ongoing criminal activity and of course not all previous offenders fall into that category. "Manna from heaven operations" share a disturbing feature with entrapment in that they may not only tempt the habitual criminal but also may tempt 'innocent' citizens into crime. The police tactics disclosed by Williams v DPP (1994) have drawn much adverse academic criticism (49) because of the danger that innocent citizens could be tempted into crime and that there was no specific individual target of the operation. However, verbal persuasion to criminality is a much more insidious corrupter of personality than merely offering the temptation to criminality by, for example, leaving an unlocked van door with valuable goods inside. This is why entrapment raises such acute problems of principle. It should also be remembered that police officers may be particularly skilful in the verbal manipulation of others, a factor which adds to the acuteness of the entrapment problem. An interesting development in R v Smurthwaite is in Lord Taylor's list of factors favouring the inclusion or exclusion of the evidence of an *agent provocateur*. One of these factors was whether a 'reliable record' of the event exists: a record as to what was actually said by the undercover police and what was actually said by the accused during the undercover entrapment operation. (50)

There is an interesting and significant parallel here with the judicial decisions on the consequence of police breach of the recording provisions of PACE for interviews of suspects: see R v Keenan, R v Scott where significant breach of the recording provisions was held to result in the 'likely' exclusion of confession evidence. There is no Code of Practice or statutory scheme for covert investigatory techniques such as entrapment but Lord Taylor in R v Smurthwaite and in the earlier 'covert' cases of R v Christou and R v Bryce applies to undercover operations similar principles on the importance of recording the encounter between police and suspect in the covert operations that apply to the obtaining of confessions under Code C of the Codes of

Practice under PACE. The importance of an independent record of the covert operation (preferably a tape recording) of what was said by the police and what was said by the suspect is similar to the confessions cases, the tape recording is needed to help the judge to adjudicate on what was said by the suspect and the exact role of the police in the operation. The role of the police in the operation can have important consequences for the admissibility of any evidence so obtained; if the police role was too active then the trial judge may decide to exclude the evidence under section 78 of PACE.

Under the old common law the word of the police, their oral testimony at trial was taken by the judge and often the jury as proof of the making of the confession. There were exceptions, e.g. see R v Pattinson (1973) C.A. (51) per Lawton L.J. but in the vast majority of cases the testimony of the police satisfied the court as to the making of a confession. The word of the police was similarly accepted as strong evidence that the entrapped or tricked citizen had actually committed the criminal offence alleged. If the entrapment or trick produced real evidence as in R v Payne or as in R v Sang then the testimony of the police was less crucial to prove guilt. However, in some cases of entrapment or trickery as in Brannan v Peek, the only evidence that a crime had been committed as a result of the entrapment or trick was the testimony of police officers.

The testimony of the police that the words and conduct of the accused were as alleged seems to have been accepted without question by the courts in the case. The same operation today, following Lord Taylor's comments in R v Christou (1992) and in R v Smurthwaite (1994) may be required to be tape recorded covertly before the evidence of the alleged crime can be admitted into evidence. However, in Williams v DPP (1994) the testimony of the police officers as to the appellants' behaviour in taking out cartons of cigarettes from the back of the van (actually a 'police trap') was accepted in the absence of any recording of the incident. However, in Williams the two appellants had made full admissions to the offences so the evidence of what the police observed was not the only evidence in the case. In any case it should not be thought that the absence of a record of the trick or entrapment is necessarily fatal to the admissibility of the evidence. It is merely a factor, though an important factor for the judge in deciding to exclude evidence in his discretion under S.78 (1). However pre PACE, generally speaking the word of the police as to the success of their undercover operations was accepted as the authoritative word on the issue by the courts in the face of any denial of the evidence by the defendant. However, as noted earlier in this thesis, police evidence, especially evidence that the accused made oral confessions to

the police, became increasingly suspect in the 1970s after decades of uncritical acceptance. This distrust of course led to the recording regime for interrogations. Lord Taylor in R v Smurthwaite likewise insists upon a taped record for undercover operations. As was stated by Lord Taylor, applying his own principles to the facts of R v Smurthwaite (52),

"The two tapes were an accurate and unchallenged record. They record not admissions about some previous offence but the actual offence being committed of soliciting Webster (the undercover police officer) to murder. The appellant was making the running throughout. In these circumstances we can find no ground for criticizing the exercise of the learned judge of his discretion under S.78."

Lord Taylor makes clear that a recording may be vital not only to establish that in fact the accused succumbed to the trick or entrapment but also to establish the precise role of the undercover policeman, i.e. was he an *agent provocateur* or not? In Smurthwaite the tapes disclosed that it was the accused who made the running throughout therefore it was a case similar to whether the police merely provided an opportunity for the commission of offences which would otherwise have been committed. In the absence of a tape it may be in the interests of the police to down-play their role in the entrapment or trick and seek to minimize the pressure they applied to the suspect to commit the alleged offence. Given that the precise role of the undercover police is a crucial factor in deciding whether to exclude their evidence under S.78 (e.g. was he an *agent provocateur* or did he do no more than merely "play along" with the suggestion of the accused, or did he ask questions about previous offences which should have been governed by Code C of PACE as in R v Bryce (1992)), then a tape recording of the event is of vital importance. There is an interesting comparison with the operation of S.76 2(b) of PACE here. One of the crucial questions under S.76 2(b) is what did the police really say or do to the suspect in interrogation before the confession? In R v Delaney (53) the Court of Appeal asserted that a failure to properly record the interrogations where there is a doubt as to what the police did say or do to the suspect could be fatal to the admissibility of a confession under S.76 2(b). The Court of Appeal in R v Smurthwaite implies that a failure to record a covert police operation involving an element of entrapment may be fatal to the admissibility of the evidence if there is a conflict at trial about whether the police acted as *agent provocateurs* or not. The word of the police is not an adequate substitute for an independent record of either interrogations or entrapment operations. A tape is required not only to adequately prove that a confession was made but also to help the trial judge determine

whether an inducement or threat was made prior to the confession. Similarly a tape recording is a crucial factor not only in establishing that the accused did implicate himself in criminal activity but also to establish the precise role of the police in the operation, i.e. how proactive were they? Also if there is a prohibition on the asking of questions about an offence in an undercover pose by the police then a tape may be required to persuade the court that any incriminating replies made by a suspect were not induced by a prohibited question from the undercover police officer about the suspect's involvement in criminal activity. The existence of an independent record of what really was said or done under undercover operation is a crucial point of distinction between R v Christou (1992) and R v Bryce (1992). (54) In the latter case the lack of a tape of the undercover interview with the suspect on his alleged involvement in car theft was held by the Court of Appeal to be a powerful reason to exclude evidence under S.78 of his alleged self-incriminating remarks. In R v Lawrence and Nash (1994) (55) a case decided by the Court of Appeal three months after R v Smurthwaite the Court quashed convictions for conspiracy to supply cannabis to an undercover police officer posing as a customer for the drug. The court found that,

"...the officer's role could hardly have been more active since he not merely offered to buy cannabis resin but persistently and vigorously pressed the appellants to supply it."

The court stressed that this fact in itself would not necessarily have led to the exclusion of the evidence. However, the police had not tape recorded the agent's telephone calls and meetings, a failure the court found "inexplicable and scarcely credible". There is an implicit judicial recognition that if the police set up an undercover operation which can involve a considerable investment of valuable police resources in time and finance then there may be a strong temptation on the police to distort or embellish the evidence as to their role in the operation, i.e. that they were not *agent provocateurs* and also to lie about the result of the undercover operation. There is a parallel here with interrogation. A prolonged interrogation may fail to elicit incriminating replies from the suspect and the police may then be tempted to fabricate an "oral confession" if they are convinced of the guilt of the suspect and there is little other evidence: such a scenario was recognised by Hodgson J. in R v Keenan. Similar pressures on the police to engage in concoction or distortion of evidence may arise during or after covert operations as well. Judicial strictures on the need for the police to tape record undercover operations is perhaps an implicit recognition of this possibility. It can also be pointed out that judicial insistence on

tape recording of undercover operations is a protection for the police and prosecution since police evidence from undercover operations has been successfully challenged in the past where there is a hint of entrapment: see R v Ameer. A tape of the covert operations prevents unfounded allegations of "entrapment" being made by defendants who in reality did all the running with the police merely playing a passive role, as in R v Smurthwaite, where the defence tried to allege that the defendant had been entrapped into the offence by the police officer but the tape recording disclosed that the appellant did all the prompting, the undercover officer being largely passive.

It is important that Lord Chief Justice Taylor has provided in recent decisions some guidance to the police on the fair conduct of covert police operations. It would be anomalous if alongside the detailed legislative scheme for interrogations, stop and search powers, the obtaining of samples etc. there was little in the way of guidance to the police on the proper conduct of covert operations to gather evidence. (The Police Act 1997 provides guidance for the use of surveillance devices on private premises.) Moreover, such guidance from the Court of Appeal is especially important in the light of the increase in the number of such covert operations launched by the police. J. Morton in a recent work on the history of undercover police work refers to a recent successful undercover operation, (56)

"Operation Motion hailed as the way ahead in British policing and launched in October 1994 by West London Drugs Squad, involved three women police officers going undercover and posing as prostitutes in a brothel in Queensway."

The result of the police operation was that thirty-five dealers in hard drugs who called at the flat offering drugs were filmed on video secretly, pleaded guilty and received sentences of between four and six years. The success of such operations will no doubt encourage their spread in police forces throughout the country.

The European Convention on Human Rights and Entrapment

The significance of the European Convention on Human Rights and the issue of methods of evidence gathering for use in criminal prosecutions has assumed a new dimension of importance in recent years with the incorporation of the Convention into U.K. law under the Human Rights Act 1998. It is expected at the time of writing that the Act will come into force as a whole in October 2000. As JUSTICE point out in

their report 'Under Surveillance: Covert policing and Human Rights Standards' (57)

"The issue of exclusion of evidence is an area likely to be highlighted once the European Convention is incorporated into U.K. law under the Human Rights Act 1998. This will be particularly at issue in relation to proactive policing methods."

It is important then to look at how the European Convention on Human Rights has been interpreted in the area of illegally obtained evidence and entrapment for these cases may well have a bearing on how the Human Rights Act 1998 is interpreted by English judges.

With regard to evidence obtained by illegal or improper means, case law under Article 6 of the E.C.H.R., the fair trial provision, shows a similar interpretation to English law. The leading case of Schenk v Switzerland (58) holds that Article 6 does not require the automatic exclusion of evidence obtained as a result of unlawful conduct by law enforcement agencies. In this case the prosecution had relied on evidence of telephone conversations, which as the Swiss government conceded had been obtained unlawfully. The decision in the case confirms that there is no automatic rule of exclusion to be derived from Article 6.1. Also the Convention has been interpreted so as to allow into evidence material obtained by a trick: see Smith v United Kingdom (59), where a security service agent disguising his identity, taped an incriminating telephone conversation with the applicant. The Commission declaring the complaint inadmissible, stated that the evidence had not been obtained unlawfully. The operation had to be regarded as a "ruse in the public interest".

However, in the area of entrapment the European Court has adopted a more interventionist approach, but also an approach that is not inconsistent with decisions decided in English domestic law. In the case of Lüdi v Switzerland (60) the Court held that there had been no violation of Article 8, the right to privacy, because by dealing in drugs the applicant "must have known that he was engaging in a criminal activity" and therefore that he might encounter an undercover officer. In this case undercover police officers had made a sample purchase of drugs from the applicant who had then supplied a quantity of drugs.

However in the recent decision of Teixeira de Castro v Portugal (61) the Court did find a breach of Article 6 of the Convention. In this case an undercover police officer

had approached the applicant and had asked whether he could obtain some drugs. The applicant, who had no previous record of drug dealing, did supply some drugs and was then charged and convicted. The Court held that this "buy and bust" operation amounted to a breach of the right to a fair trial, recognising that this case was not one in which the applicant had been "predisposed" to this type of offence and therefore distinguishing its previous decision in Lüdi v Switzerland. The Court declared that the use of the evidence "in the impugned criminal proceedings means that, right from the outset, the applicant was definitely deprived of a fair trial". The Court found that the police officers had instigated the offence and went on to stress two matters in particular. First, controls and safeguards must be in place for authorising and supervising such operations if they are to be fair: this obviously has implications for the proper supervision of undercover operations in the U.K. Secondly, the Court stressed that the public interest cannot justify the use of evidence obtained as a result of police incitement. If Lüdi v Switzerland and Teixeira de Castro v Portugal were decided under present English law using the R v Smurthwaite guidelines it is likely that the evidence would have been admitted in Lüdi but ruled inadmissible in Teixeira de Castro. However, A. Ashworth at least believes that the strength of the Teixeira de Castro judgement suggests that English law ought to provide for even a defence of entrapment in this type of case rather than mere discretionary exclusion of evidence, (62)

"This strong pronouncement suggests that the admissibility of evidence where there has been entrapment of a person not 'pre-disposed' to this kind of offence will not be left to regulation by national law. The court will exclude it because it undermines the fairness of trials. This suggests that English law ought to provide for automatic exclusion of evidence, or even a defence of entrapment, in this type of case."

Footnotes to Chapter 8

Entrapment

- (1) The 1929 Report of the Royal Commission on Police Powers.
- (2) I. H. Dennis, "The Law of Evidence" 1999 at p.257.
- (3) R v Wanjiko (1954) 21 E. African C.A. 186.
- (4) Andrew L-T Choo, "Abuse of Process and Judicial Stays of Criminal Proceedings" 1993, Chapter 6 pp.164-167 and Chapter 7 p.186.
- (5) ibid at p.186. The ability of a trial judge to stay a criminal prosecution was confirmed in the House of Lords case of Connelly v D.P.P. [1964] AC 1254. Choo provides a useful account of the nature of a stay of proceedings: "A stay typically takes the form of an order that an indictment remain on file with the instruction that it is not to be proceeded with. A stay is not technically an acquittal, although for all practical purposes it may have the same effect. The revival of a stayed prosecution, without the leave of the court, is likely itself to be considered an abuse of process and to be stayed accordingly". A. L-T Choo, "Abuse of Process and Judicial Stays of Criminal Proceedings" at p.7.
- (6) A. Choo "Halting Criminal Prosecutions: The Abuse of Process Doctrine Revisited" [1995] Criminal Law Review, 864 at p.871.
- (7) D. Hay, F.Snyder, "Policing and Prosecution in Britain 1750-1850" 1994, p.47.
- (8) T. A. Critchley, "A History of Police" 1967, p.160.
- (9) Brannan v Peek [1947] 2 All ER 572.
- (10) R v Underhill (1979) 1 Cr. App. R. (s) 270.
- (11) DPP v Marshall [1988] 2 All ER 683.
- (12) Trial judge quoted by Sir William Harcourt in the House of Commons, January 11th 1881.
- (13) Harcourt speaking in the House of Commons, January 11th 1881.
- (14) R v Mealey (1974) 60 Cr. App. R. 59.
- (15) Browning v J. W. M. Watson [1953] 2 All ER 775.
- (16) The Times newspaper quoted in James Morton's "Supergrasses and Informers - An Informal History of undercover police work" 1995, at p.203.
- (17) J. D. Heydon, "The Problems of Entrapment" [1973] Cambridge Law Journal, p.268 at p.272.
- (18) The Royal Commission on Police Powers and Procedure (1929) at paragraph 104 at p.18.

- (19) *ibid* at paragraph 107, p.42.
- (20) Choo, "Abuse of Process and Judicial Stays of Criminal Proceedings" Chapter 6, 1993. See footnote 3.
- (21) The Royal Commission on Police Powers (1929) at paragraph 104, p.41.
- (22) *ibid* at p.41.
- (23) *ibid* at p.42, paragraph 108.
- (24) *ibid* at p.42, paragraph 109.
- (25) *R v Governor of Pentonville Prison ex parte Chinoy* [1992] 1 All ER p.317 at p.333.
- (26) *R v Birtles* [1969] 1 WLR 1047.
- (27) *R v Mackey and Shaw* [1992] Crim. L.R. 602.
- (28) *R v McCann* (1971) Cr. App. R. 359 C.A.
- (29) G. Robertson Q.C. "Entrapment Evidence: Manna from heaven or Fruit of the Poisoned Tree" [1994] Criminal Law Review, p.805.
- (30) *R v Foulder, Foulkes and Johns* [1973] Crim. L.R.45.
- (31) *R v Burnett and Lee* [1973] Crim. LR 748.
- (32) *R v McEvilly* (1973) 60 Cr. App. R. 150 C.A.
- (33) *R v Ameer* [1973] Crim. LR 104.
- (34) Robertson *op. cit.* at p.805.
- (35) Home Office Circular No. 97/1969. Informants who take part in Crime.
- (36) L. H. Leigh, "Police Powers in England and Wales" 1985 at p.6.
- (37) *Brannan v Peak* [1947] 2 All ER 572, *R v Birtles* [1969] 1 WLR 1047.
- (38) L. H. Leigh "Police Powers in England and Wales" at p.6.
- (39) Home Office Circular No. 97/1969 paragraph 3.
- (40) *R v Sang* [1979] 2 All ER 1222 at p.1227.
- (41) J. D. Heydon "Entrapment and Unfairly Obtained Evidence in the House of Lords" [1980] Criminal Law Review, 129 at pp.131-132.
- (42) *R v Gill* [1989] Crim LR 358.
- (43) *R v Governor of Pentonville Prison - ex parte Chinoy* [1992] 1 All ER at p.332.
- (44) *R v Smurthwaite* [1994] 1 All ER p.898 at p.902.
- (45) *DPP v Marshall* [1988] 2 All ER 683 at p.684.

- (46) **Dawes v Director of Public Prosecutions.** The Times Law Reports March 2nd 1996: An offender was arrested when he was detained by automatic activation of the door locks inside a motor vehicle specially adapted by the police as a trap.
- (47) **R v Christou and Wright** [1992] 4 All ER 559.
- (48) **R v Ramen** (1988-89) 10 Cr. App. R.(S) at p.334.
- (49) An example of such adverse criticism to the decision of the Divisional Court in **Williams v DPP** is provided by G. Robertson Q.C. in [1994] Criminal Law Review p.805.
- (50) **R v Smurthwaite** [1994] 1 All ER 898 at 903.
- (51) **R v Pattinson, R v Laws** (1973) Cr. App. R. 417.
- (52) **R v Smurthwaite** [1994] 1 All ER 898 at p.905.
- (53) **R v Delaney** (1989) 88 Cr. App. R. 338 at p.342.
- (54) **R v Bryce** [1992] 4 All ER 567 CA.
- (55) **R v Lawrence and Nash** (1994) unreported. Quoted by G. Robertson Q.C. in [1994] Criminal Law Review at p.811.
- (56) J. Morton "Supergrasses and Informers; An Informal History of Undercover Police Work" 1995, at p.232.
- (57) "Under Surveillance: Covert policing and Human Rights Standards" A Report by JUSTICE 1998, at p.73.
- (58) **Schenk v Switzerland** (1988) 13 E.H.R.R. 242.
- (59) **Smith v United Kingdom** (1997) E.H.R. LR. 277.
- (60) **Lüdi v Switzerland** (1993) 15 E.H.R.R. 173.
- (61) **Teixeira de Castro v Portugal** [1998] Crim. L.R. 751.
- (62) A Ashworth "Article 6 and the Fairness of Trials" [1999] Crim. L.R. 261 at p.271.

CHAPTER 9

ENTRAPMENT - THE THEORETICAL OBJECTIONS

Introduction

The main theoretical problem over the use of entrapment is that unlike for example, the use of violence to obtain confessions or the use of force to take intimate body samples, as a police method it is not *per se* objectionable but can be extremely objectionable depending on the circumstances in which the method is used. (1) Identifying those circumstances which made entrapment acceptable and those circumstances which make entrapment an oppressive tool of law enforcement is the central concern to be explored in this chapter.

An important initial point is to distinguish between a criminal act that is encouraged by an ordinary citizen and one that is encouraged by the police or by an agent acting on the instructions of the police. The law rightly expects control from citizens in resisting the encouragement to criminal activity from their fellow citizens. Lord Diplock in R v Sang commented that,

" ... many crimes are committed by one person at the instigation of others." (2)

There is not and never has been an issue with regard to the admissibility of evidence in the case where a defendant alleges that he would not have committed the offence but for the pressure of another citizen not acting on behalf of the police or other authorities. At the sentencing stage due regard may be had to the malign influence of another stronger or older personality on the defendant. However, where the police or their agents have encouraged the crime a crucial dimension is added which may call for judicial action to exclude evidence or even to stay the proceedings as an abuse of the process of the courts and prevent the prosecution on the entrapment evidence from continuing. As McHugh J. commented in the Australian case Ridgeway v R (3)

"The courts of justice cannot countenance the use of their processes to prosecute offences that in substance have been artificially created by the misconduct of those whose duty it is to uphold the law."

There are important points of principle to explore here but there are also important consequential considerations as well. In a Canadian monograph on entrapment Stober has written, (4)

"The police are on the 'front-line' and are usually the initial point of contact between an individual and the criminal law. Police conduct and accomplishments are therefore highly consequential as they greatly affect public attitudes towards the law and the criminal justice system as a whole."

The manner in which the police carry out their duties creates as Stober notes, "an impression which has profound effects". The excessive use of another proactive technique, stop and search of suspects on the street provoked the most serious civil disorder in England for a century in Brixton in London in 1981. Moreover, it is widely accepted that the police cannot carry out their duties to enforce the law and investigate offences without the co-operation of the public and that this co-operation depends on public faith and trust in the police. Reiner and Spencer have commented, (5)

"The primary determinant of police effectiveness in dealing with crime is not management efficiency or technical powers but flow of information. The lifeblood of policing is public support. If sections of society are alienated from the police this is not only regrettable in itself but a serious barrier to the investigation of crime."

It has been recognised that indiscriminate or misplaced police use of entrapment can cause a loss of public confidence in the police as both Sir William Harcourt in the last century and J. Heydon (6), who wrote the modern classic article on entrapment, pointed out.

However, apart from these important consequential considerations which should caution against indiscriminate use by the police of the technique of entrapment there remain vital issues of principle to consider.

The basic point of objection to entrapment is well put by Robertson, who comments, (7)

"It is a contradiction in terms for officials charged with maintaining the law to arrange for it to be broken."

The focus here is on the misuse of state power - that it is inappropriate for law enforcement officers to engage their resources in the creation of crime rather than its detection or prevention. The misuse of state power is qualitatively different from a failure to observe proper procedures in the investigation of crime such as a wrongful denial of legal advice or even the use of violence to obtain a confession. The point is that police entrapment creates the commission of a crime that would not otherwise have been committed.

It is this creation of a criminal offence by agents of the state which would not otherwise have been committed by the citizen which leads commentators such as Professor Ashworth (8) to argue that entrapment creates a potential contradiction in criminal justice. It is conceptually incoherent for the citizen to be invited to do that which the law forbids him to do by those charged with upholding the law.

The police are given special powers and resources to investigate and detect crime and it is arguably a serious misuse of the conditions on which the police are granted those powers (i.e. the legitimacy on which exercise of those powers rest) when police or their agents encourage the commission of criminal offences in order to trap innocent citizens. Those police powers and resources are arguably not being employed for the purposes for which they were granted by Parliament. S. Uglow in a critique of the growth of proactive policing, "Policing Liberal Society", has commented that, (9)

"Proactive policing raises the problem of the boundaries of legitimate police action. From the standpoint of liberal analysis only the commission of an offence (or its immediate threat) should justify active intervention ... fairness suggests that policing should be reactive, that is that intervention should occur only in response to the committing of a criminal offence or breach of the peace or the immediate apprehension of one of these. It is a yardstick which reduces the possibility of arbitrary and discriminatory policing and emphasizes two salient characteristics - that policing should be minimal and that it is a public service."

The indiscriminate and excessive use of entrapment as a particular proactive technique may endanger the legitimacy on which police power and powers rest. Despite the approving views of the Divisional Court the relatively mild proactive technique used in Williams v DPP did incur a large measure of academic criticism: see Chapter 7 of this thesis. Given that entrapment (involving verbal persuasion) is a much more potent proactive technique than the Williams v DPP 'manna from heaven' operation, then public concern can be expected to increase proportionately when the

entrapment technique is not cautiously used. The creation of crime by the police is potentially an obvious contradiction of the social terms on which police legitimacy rests. However, there is a serious complication at this point in the discussion on the acceptability of entrapment for the police are charged with the duty of securing evidence of serious criminality.

It may be the case that successful detection and the procuring of evidence for use in court to convict the guilty may be dependent on some form of police participation in the activities of criminal gangs and associations. This activity may involve encouraging the commission of offences with a view to securing evidence of the gang's criminal activities. The use of entrapment in this context, far from undermining the mandate on which police power and powers rests, may actually be required by that mandate. Roskill L.J. commented in R v Underhill (1979) (10)

"There can be no doubt that in these days of serious criminal offences, whether of a terrorist character or of widespread trading in drugs whether hard or soft, the task of the forces of law enforcement are difficult indeed ... we have had cases in this court where gangs dealing in hard and soft drugs have had to be infiltrated. It is a recognized and legitimate means of detecting crime and bringing the guilty people to justice that infiltration shall take place. That has long been recognized by the courts and it would be wrong for anything to be done or said by this court which hampered proper means being used for infiltration and detection of serious crime. That cannot be too strongly emphasized."

At times of grave public concern about the activities of organised criminality in the area of drug trading and smuggling, terrorism or forms of criminal fraud, police reliance on entrapment may be driven as much by public demands as by, as Uglow (11) suggests, specialist police squads defining their own objectives. Indeed far from introducing a contradiction into criminal justice, as Ashworth suggests, entrapment may, when used appropriately, serve the aims of criminal justice. Lustgarten in an article entitled "The Police and The Substantive Criminal Law" (12) comments that use of certain oppressive proactive police methods including entrapment to combat the illegal drugs trade,

"... is the inevitable price society pays for the creation of such offences; they cannot be enforced otherwise. The police are simply adopting rational techniques given the job the legislative have imposed upon them."

Lustgarten's point is that in obtaining evidence, for example, about illegal drug supply the police cannot rely on the usual sources of information for there is usually no victim to complain of the crime nor to identify the offender. Proof of drug supply normally demands that the suspect be identified in possession of substantial amounts of drugs. Proof of this requires active surveillance and/or use of entrapment to establish the elements of the offence under the Misuse of Drugs Act 1971 Section 4; the criminal prohibition on the supply of controlled drugs. Lustgarten comments that if society does not wish the police to rely on proactive methods of enforcement such as entrapment and which are "inherently and unavoidably oppressive", then society should not criminalise drug abuse and therefore remove the incentive on the police to resort to proactive methods of detection. However, this is a contentious conclusion. First of all it is by no means clear that the illicit drugs trade does not have genuine victims whom society may wish to protect. Indeed, the extremely severe sentences applicable to drug importers established by the guideline Court of Appeal judgements in Aramah (1982) (13) and Bilinski (1988) (14) are only explicable on the basis that drug supply is a victimising crime. As Ashworth comments,

"The only way of placing heroin importation high on the scale of relative gravity is to adopt a strong paternalism and to regard it at least indirectly as a victimising crime." (15)

These victims may not be willing to report their suppliers to the police but they can be viewed as victims nonetheless. Secondly, even if drug use was decriminalised there would remain other forms of criminality which would require police surveillance and infiltration including the use of entrapment to successfully detect. The ongoing terrorist threat from various sources, domestic and foreign, is an obvious example of a form of criminality which may require police measures which are "inherently and unavoidably oppressive". Organised criminal fraud may be another form of criminality which requires proactive policing as a successful response to its threat. Organized football hooliganism has been combated by police use of surveillance and infiltration. Therefore Lustgarten is probably overstating his case when he comments, (16)

" ... a society which chose to decriminalise drugs would have a very different sort of police force."

The point can also be made that the use of proactive methods may be actually demanded by the concern of citizens in certain areas or urban centres. In these urban areas where specific crimes such as burglary or street robbery or sexual assault in a

public place has reached certain alarming levels then the police in response to public demand for action may have to adopt tactics such as surveillance and entrapment of the prolific offender or offenders. Indeed, the selective and targeted use of surveillance and trickery/entrapment as a means of combating street robbery and drug dealing may be adopted as an alternative to heavy reliance on stop and search powers given the disastrous consequences of Operation Swamp '81 in Brixton.

However, police entrapment of the unwary innocent or even police entrapment of the former offender or those suspected of having certain 'criminal' tendencies crosses the line into what is improper and oppressive police behaviour. This not only does an injustice to an individual but is a serious misuse of police power; as Robertson comments, it is (17)

" ... unjust to expose an individual to the ordeal of trial and punishment for actions the like of which he or she would not have undertaken without calculated and persistent temptation and persuasion by Government agents."

This reflects the heart of the entrapment definition formulated by the 1929 Royal Commission on the Police. The focus is on whether the individual would have committed the offence in question without the pressure or encouragement of the police or their agents. A crucial factor in determining whether entrapment is acceptable or not acceptable is whether the entrapment is aimed at ongoing criminality or intended criminal activity or merely at those suspected of having certain 'inclinations' or indeed not so suspected at all. It is submitted that efforts in the US Courts (18) to distinguish for the purposes of their entrapment defence between those without predisposition to commit the offence and those who can be determined to have had the predisposition to commit the offence is to miss the main point and is an irrelevant distinction. The point is that having a predisposition to commit a particular offence is not in itself criminal nor in itself socially dangerous. The criminal law is aimed at criminal acts or intentions which have manifested themselves in certain preparatory acts to criminal acts, the law is not concerned with thoughts or dispositions. Therefore to limit an entrapment doctrine to those without a predisposition to commit the offence is for the police to become testers of virtue rather than an agency concerned with the detection and prevention of crime. The subjective defence of entrapment offers virtually no protection to anyone with a criminal record. The situation is arrived at that a person least able to resist temptation is lawfully subjected to the greatest temptation. On this view only those not predisposed to commit the offence will be excused.

As Gerald Dworkin has commented critically on the U.S. position:

"... because the dominant opinion in the Supreme Court has favoured the subjective test of entrapment and most defendants have a criminal record which makes it difficult to demonstrate lack of predisposition, the entrapment defence remains limited in scope and rarely used and even less rarely successful." (19)

The correct distinction it is submitted is between entrapment aimed at those already engaged in or intending to engage in activity of a similar criminal nature to the entrapment, and those who there is no reasonable suspicion to believe are engaging in or are about to engage in criminal activity. The first situation here is permissible entrapment, the latter situation involves the use of oppressive and therefore illegitimate entrapment. Evidence of predisposition to commit the offence is only relevant then to reasonable suspicions of ongoing criminal activity.

The English Cases

This crucial distinction is one which in fact English law has already recognised in the sentencing stage where the question has arisen whether a defendant who has been convicted as a result of some form of police entrapment is entitled to a reduction of his sentence. After R v Smurthwaite (1994) this issue now goes to the admissibility of evidence. Lord Taylor commented that a factor in the exercise of the S.78 discretion is,

"... was the officer acting as an *agent provocateur* in the sense that he was enticing the defendant to commit an offence he would not otherwise have committed?"

Another fact mentioned by Lord Taylor is "how active or passive was the officer's role in obtaining the evidence?" This might involve consideration of whether the entrapment was aimed at encouraging an unwilling citizen to commit crime or whether the entrapment was aimed at ongoing criminal activity, e.g. a police request for drugs undercover involving no other pressure than the request itself. A good example of entirely legitimate entrapment was the police behaviour in R v Underhill (1979). The accused was suspected of heavy involvement in cocaine importation and

supply. He was approached by an undercover police officer and asked to supply drugs. The accused supplied a quantity of drugs in return for a large payment of money by the undercover officer. He was then arrested. Roskill L.J. in the Court of Appeal refused to mitigate his sentence because of the alleged entrapment. Roskill L.J. commented, (20)

"We have a picture taking the evidence as a whole including these statements of a man who was deeply involved in trafficking in hard drugs ... he was ready to sell drugs to anybody who would pay large sums of money."

This clearly was not a case where the accused would not have committed the offence had the undercover officer not acted as he did. The police method was more a method of obtaining evidence of continuing criminality and was therefore entirely permissible, indeed desirable.

Roskill L.J. commented though that the dividing line between police behaviour which is proper and improper was "a line which unhappily in practice is sometimes not very easy to draw". An example of this kind of difficulty can be illustrated by reference to the case of R v Perrin (21) Court of Appeal 1991. Perrin the accused and his brother had approached an undercover police officer in a bar and asked the police officer to supply a lorry in order to import cannabis in large quantities into the United Kingdom. The police officer and a colleague met the accused in Spain and supplied a lorry into which the accused deposited the cannabis. The lorry was driven by the police into the UK where at a meeting point on the motorway the accused arrived and unloaded the cannabis into his car. At this point the police sprang their trap and the accused was arrested. The Court of Appeal mitigated his sentence for being concerned in evading the prohibition on the importation of cannabis resin from six years to four years. This was because of the element of entrapment which the Court of Appeal "was satisfied occurred in the present case". Hence,

"... the court should recognise that fact by reducing to some extent the sentence which would otherwise be appropriate."

In so doing the Court of Appeal was following earlier decisions of that court in R v Birtles (1969) and R v McCann (1972) in reducing sentences where defendants had been encouraged to commit offences that they might not have committed. In R v Perrin it is a possibility that had not the undercover police officer agreed to supply a

lorry in Spain and turned up with the lorry to smuggle the drugs into the UK from there therein the offence might not have been committed. However, Perrin seems to have had ready access to a supply of cannabis in Spain and might have been able to smuggle the drugs into the UK of his own accord. A clearer example of permissible police behaviour is the case of R v Smurthwaite. It was clear that the undercover officer was merely a passive listener to a plan conceived by the appellant to kill his wife. There was no real encouragement at all by the police, they only provided the opportunity for the suspect to incriminate himself. The suspect had made inquiries about arranging the death of his wife, it was at that point that the police intervened with the undercover operation. For the charge of soliciting to murder Smurthwaite had gone beyond mere disposition to commit the offence to actually seeking someone to carry out the plan before the police intervened. There was no element of entrapment in the sense of the police officer encouraging the appellant to commit an offence he would not otherwise have committed. At one extreme of the spectrum there are cases such as Underhill and Smurthwaite, in which ongoing criminal activity or intended criminal activity is detected by police trickery which might be classed inaccurately as "entrapment" for the offence would probably still have been committed without the involvement of a police officer. At the other end of the spectrum there are clear cases of totally unacceptable use of entrapment such as was outlined by Lord Salmon in R v Sang, where (22)

"... a dishonest policeman anxious to improve his detection record tries very hard with the help of an *agent provocateur* to induce a young man with no criminal tendencies to commit a serious crime and ultimately the young man reluctantly succumbs to the inducement."

Although at the time there was no discretion to exclude evidence in this case Lord Salmon suggested such a case may be disposed of with "an absolute or conditional discharge". Of course following R v Smurthwaite such a case may well involve an exercise of the judge's discretion to exclude evidence under S.78. Indeed following the recent House of Lords decision, R v Latif such a case as outlined by Lord Salmon may well be a suitable case for a stay of the proceedings as an abuse of process. Lord Steyn commented that in deciding whether to stay the proceedings because of an unfair use of entrapment, (23)

"... the judge must weigh in the balance the public interest in ensuring that those charged with grave crime should be tried and the competing public interest in not conveying the impression that the court would adopt the approach that the end justified the means."

What is also objectionable is the situation where the police do target someone known to have certain criminal tendencies, but not actually involved in criminal activity of any sort. A good example from the US jurisdiction is the targeting of Jacobson (24), the suspected paedophile. The law enforcement agencies encouraged him in an undercover operation to order unlawful paedophile magazines invoking his constitutional rights to encourage him. This is a more debatable case than the example outlined by Lord Salmon but it is submitted that the police should not be "testers of virtue" and should only target those suspected of involvement in criminal activity or at least those who are preparing to commit crime. Lord Parker commented in R v Birtles that it was permissible law enforcement.

" ... for the police to make use of information concerning an offence that is already laid on. In such a case the police are clearly entitled, indeed it is their duty to mitigate the consequences of the proposed offence, for example to protect the proposed victim and to that end it may be perfectly proper for them to encourage the informer to take part in the offence or indeed for the police officer himself to do so." (25)

However, there is a large grey area where entrapment may or may not be acceptable and where there can be reasonable disagreement about this question. An important issue here is where the police learn of a plan by an accused perhaps with a criminal record, to carry out an offence, e.g. a robbery or drug smuggling. The accused may have made only very preparatory measures to effect the plan when the police in an undercover operation offer to facilitate the offence by providing logistical support. In R v Birtles the police learnt that Birtles while still in prison became minded on his release to carry out some raid on a post office. The police approached Birtles after his release in an undercover operation. A police officer was introduced to Birtles as "a top criminal from London". This undercover officer supplied his car for the robbery and either he or an informer working on his behalf supplied Birtles with an imitation firearm. The accused was arrested whilst he attempted to rob a post office. The Court of Appeal felt that there

" ... was a real possibility that the appellant was encouraged by the informer and indeed by the police officer concerned to carry out his raid on the post office. Whether or not he would have done it without that again no one can say, but there is, as it seems to this court, a real likelihood that he was encouraged to commit an offence which otherwise he would not have committed." (26)

The problem with the police intervening once they become aware of a plan is that by providing the means to carry out the plan the police may in fact be encouraging an offence which might not have been committed. The point is that there is a gap between a plan and the actual commission of that plan. The degree of facilitation and encouragement is a vital issue then.

Another difficult and related issue here is where the police target a known user of illicit drugs and tempt him by means of entrapment to become a supplier of illicit drugs; there is a large disparity in offence seriousness between illegal drug use and illegal drug supply.

It may be the case that it is illegitimate for the police to try to convert a relatively minor offender into a dangerous criminal and that in an appropriate case S.78 should be used to exclude evidence from the entrapment here. In R v Chapman (1989) (27) the defendant who was known to the police as a user of amphetamines, was in prison in connection with some other matter. A detective from the drug squad was introduced into his cell as a fellow prisoner. The detective posed as a drug dealer from another part of the country. In the course of the conversation, as the detective had hoped, the defendant spoke of the availability of large quantities of amphetamine sulphate in his home area. Eventually Chapman set up a drug deal and was arrested for conspiracy to supply amphetamine sulphate. The Court of Appeal commented that,

“... there was no evidence at all that he was a dealer in as opposed to a consumer of amphetamines except upon this particular occasion. Entrapment plainly carries considerable weight in the assessment of sentence on that basis.”

The sentence was reduced on appeal. Similarly in R v Shaw (1992) (28) the police targeted Shaw, a known heroin user. An undercover police officer posing as a possible heroin purchaser met Shaw in a public house. The two of them agreed that Shaw would make enquiries about obtaining a supply of heroin and then contact the undercover officer. Shaw was charged after the trap was sprung with supplying heroin. The Court of Appeal commented,

“... on behalf of Shaw it was urged upon us that Shaw indeed is highly unlikely to have committed the offence had he not been persuaded not to do so by us, it we interpose to say,

by any threat of violence or indeed threat of any sort, but by straight persuasion by way of a request for assistance. If that had not taken place it said, it is highly unlikely that this offence would ever have been committed particularly in the light of the fact that Shaw who had been and still was to some extent a heroin addict had taken steps to wean himself off drugs and indeed had taken amongst other things the form of getting very useful and well paid employment."

The court reduced his sentence from six to five years because of the fact of entrapment. It is submitted that it is improper for the police to test the virtue of users of illicit drugs where there is no reasonable suspicion that they are involved also in the supply of illicit drugs.

However, in cases such as Underhill and Sang the police merely offer money to obtain drugs or counterfeit currency. As Lord Salmon observed of Sang that there was "little doubt that he would have tried to sell forged notes to anyone else whom he considered safe". (29) The police trap here is little more than an evidence-gathering device in the process of detection of criminality. Even where the police can legitimately become involved in an undercover operation to prevent the commission of an offence they should be careful not to allow the criminal scheme to run longer than necessary to secure evidence of the offence. In the case of R v Adamthwaite (30) the police learnt of a husband's plot to have his unfaithful wife killed by a contract killer. The potential assassin chosen was in fact an undercover police officer who recorded the conversations with the appellant which ensued. There were in fact three separate meetings between the appellant and the undercover officer before he was arrested. The Court of Appeal whilst upholding the conviction of soliciting to murder, commented critically on the police operation, per Hirst L.J.,

"... while we understand the problem that the police faced we should add that it does seem to us that perhaps the matter could have been nipped in the bud rather earlier by them once they became involved, which might have resulted in the scheme going less to the extremes than it eventually did."

Even for those suspects set on a criminal course of conduct, constraints of ethical police investigation must prevent the police from encouraging the scheme beyond that which is necessary to secure evidence of the crime. The police should not unnecessarily encourage a person to deepen their involvement in criminal activity

even if that person is already set on that path. There are degrees of corruption of personality by virtue of involvement in serious criminality depending on the degree of involvement in criminal activity; therefore as a matter of ethical practice the police should not encourage a person to become more deeply involved in criminal activity if that is not required to secure vital evidence of the crime.

Footnotes to Chapter 9

Entrapment - The Theoretical Objections

- (1) English law does not allow for the taking of intimate samples without the consent of the suspect - see S.62 of PACE; however, under S.62 (10) an adverse inference may be drawn at trial from a refusal without good cause to supply a sample. Note also the power under S.55 of PACE to conduct an intimate search without consent in certain circumstances.
- (2) *R v Sang* [1979] 2 All ER 1222 at p.1226. However, as Choo points out "Official incitement of an offence stands in a completely different position from incitement of an offence by a person unassociated with the executive. The executive has a duty to uphold the law and to prevent crime. Accordingly it is contrary to the very purpose of the law for the executive to take a hand in crime and to seek to bring to conviction an otherwise innocent individual". Andrew L-T Choo, "Abuse of Process and Judicial Stays of Criminal Proceedings" 1993 at pp.152-153.
- (3) *Ridgeway v R* (1995) 129 ALR 41.
- (4) Michael I. Stober, "Entrapment in Canadian Criminal Law" 1985, p.1.
- (5) Reiner and Spencer, "Conclusions and Recommendations" in "Accountable Policing Effectiveness, Empowerment and Equity" edited by R. Reiner, S. Spencer 1993, at p.176.
- (6) J. D. Heydon, "The Problems of Entrapment" [1973] Cambridge Law Journal at p.268. For Sir William Harcourt's views see Chapter 8.
- (7) G. Robertson QC, "Freedom, the individual and the law" 1993 at p.64. This does not mean to say that it is wrong for a police officer to fail to warn a potential offender that he is about to commit a potential offence. In DPP v Wilson. "The Times" 12th February 1991, the Divisional Court held that there was no duty on a police officer to warn a potential offender of a potential offence even when the officer had ample opportunity to do so. In the case it was established that as a consequence of an anonymous telephone call a police officer went to a place where he expected a car to be on the move at any minute and he would catch a driver who had been drinking. In fact the police officer waited for over an hour before the car was driven away and the offender stopped and breathalyzed. It had been submitted on behalf of the defendant that it was oppressive behaviour by the police officer to act on private information and lie around a corner to wait for an offence to be committed. The Divisional Court rejected an argument that Section 78 of the Police and Criminal Evidence Act was appropriately used by the justices to exclude all the evidence following the arrest. The Queen's Bench Divisional Court allowed the prosecutor's appeal against the decision of Spalding Justices on December 19th 1989 to exercise their discretion under Section 78 and exclude evidence of the blood/alcohol analysis. This decision seems correct in principle for while it may be oppressive for a police office to encourage a person to commit an offence they would not have otherwise committed, the police cannot reasonably be expected to warn others of their own folly or their potentially criminal conduct.

- (8) A. Ashworth, "The Criminal Process" 1994, pp.93-96.
- (9) S. Uglow, "Policing Liberal Society" 1988, pp.13-14 and at p.145.
- (10) R v Underhill (1979) Cr. App.R. (S) 270 at p.272.
- (11) S. Uglow comments at p.13 of "Policing Liberal Society", "The increasing development of squads to investigate specific areas show a new direction, a movement towards initiating investigation targeting their own areas of concern. With management techniques such as these the police define their objectives in different terms to those suggested by the lower profile of the community policeman."
- (12) L. Lustgarten, "The Police and the Substantive Criminal Law" [1987] Vol.27 British Journal of Criminology, page 23 at p.24. In Weir v Jessop (No.2) the Scottish High Court considered the admissibility of evidence obtained when an undercover police officer called at a house and asked for cannabis saying he had been sent by the brother of the occupier of the house. The High Court held that evidence of unlawful drug supply obtained through this deception was rightly admissible. Lord Justice Clark commented, "This was a very important case because police officers investigating possible contraventions of the provisions of the Misuse of Drugs Act 1971 frequently used the method employed by D. C. Dinnen in this case". Weir v Jessop (No.2) (1991) SCCR 636 at p.641.
- (13) R v Aramah (1982) 42 Cr. App. Rep. (S) 407. Since 1993 trafficking in large quantities of narcotics has been made the subject of a potential death penalty in U.S. Federal Law: see R. Hood "The Death Penalty" 1996, p.61.
- (14) R v Bilinski (1987) 9 Cr. App. Rep. (S) 360.
- (15) A Ashworth, "Sentencing and Criminal Justice", Second Edition 1995, at p.106.
- (16) L. Lustgarten, "The Police and the Substantive Criminal Law" op. cit.
- (17) G. Robertson Q.C. "Entrapment Evidence: Manna from Heaven or Fruit of the Poisoned Tree?" [1994] Criminal Law Review 805 at p.807.
- (18) See the U.S. decision Sherman v U.S. (1958) 356 U.S. 369.
- (19) Gerald Dworkin, "The Serpent Beguiled me and I Did Eat: Entrapment and the Creation of Crime" (1985) Law and Philosophy 4, p.17 at p.23.
- (20) R v Underhill (1979) Cr. App. R. (S) 270 at p.274.
- (21) R v Perrin (1991) 13 Cr. App. R. (S) 518.
- (22) R v Sang [1979] 2 All ER 1222 at p.1236.
- (23) R v Latif, R v Shahzad, Reported at [1996] 1 All ER 353.
- (24) For a discussion of the Jacobson case (Jacobson v U.S. 1992) see G. Robertson "Entrapment Evidence: Manna from Heaven, or Fruit of the Poisoned Tree?" [1994] Criminal Law Review, 805 at p.814.
- (25) R v Birtles [1969] 1 WLR 1047 at 1049.

- (26) *ibid* at p.1049.
- (27) *R v Chapman* (1989) 2 Cr. App. R. (S) 222 at p.225.
- (28) *R v Mackey and Shaw* [1992] Crim L. R. 602.
- (29) Lord Salmon in *R v Sang* [1979] 2 All ER 1222 at p.1236.
- (30) *R v Adamthwaite* (1994) 15 Cr. App. R. (S) 241. Another clear example of perfectly justifiable police trickery to obtain evidence of ongoing criminality is the operation reported in the case of *R v Angela Edwards* (1992) 13 Cr. App. R. (S) 662. The appellant pleaded guilty to six counts of having obscene publications for gain. She ran a rental business for the hiring out or the sale of pornographic videos from her council flat. She had placed an advertisement in a magazine which read "Adult VHS video tapes, Swedish, German and American £10.00 each, view before purchase facility. Strictly adult callers only". A police officer acting undercover went to this address and bought three pornographic video tapes for a total of £30.00. Later officers with a search warrant seized a large number of video tapes. See also the case of *R v Philip James McGuigan* (1996) 2 Cr. App. R.(S) 253, for another example of an undercover police trick to obtain evidence against a person involved in child pornography.

CHAPTER 10

CONCLUSION

Police Interrogation under PACE Defended

This thesis has adopted a position of the cautious endorsement of the practice of detaining for questioning of suspects under the PACE scheme, on the assumption that the scheme is given full force by the introduction of a mandatory tape recording requirement for confessions to the police and other investigative agencies, and continued judicial willingness to exclude confession evidence where breach of important provisions of PACE has been significant and substantial. Interrogation under PACE is a method of obtaining generally reliable evidence which tends to have a high evidential value and the method is also reasonably efficient from a police resources perspective, and is also efficient from a process perspective given that a confession made to the police is often followed by a guilty plea. Of course it is possible to start from the premise as some commentators do, that custodial interrogation is inconsistent with the presumption of innocence and is therefore illegitimate. It could be asked why should the citizen be forced to undergo an inherently coercive experience which may be of quite lengthy duration when there is not even a *prima facie* case that he has committed a criminal offence? Section 37 (2) of PACE only requires that the custody officer have "reasonable grounds" for believing that the detention of an arrested person is

"necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him."

For Sanders and Young this principle in PACE is fundamentally wrong, (1)

"From the due process perspective it is the power to interrogate which should be questioned. Subjection to involuntary interrogation during involuntary, lengthy and partially indeterminate detention is inconsistent with the presumption of innocence, in the real sense that the innocent can be made to appear to be guilty."

However, the presumption of innocence may be understood as Sir Rupert Cross understood it purely as a statement about where the burden of proof lies in a criminal case. (2)

William Twining (3) has disagreed with this limiting of the presumption of innocence

to the criminal trial process since it is an important general principle of our political morality. However, even if the presumption of innocence is somewhat compromised by the institution of detention for questioning, that compromise is accepted in this thesis. Our society accepts that citizens may have to bear certain unpleasant experiences in order to further important societal goals such as detecting crime. The important point is whether those practices that may impinge on citizens are operated in a fair and non-discriminatory manner by officials. The Police and Criminal Evidence Act allows for the detention of a citizen for questioning subject to important safeguards of "reasonable suspicion", the custody officer concept as a buffer against the automatic detention of those under arrest and the plethora of protections once detention for interrogation is authorised. It is also possible to point to the practice of the remand system as a far more serious interference with liberty than custodial interrogation that society seems to accept as a burden that the innocent citizen may have to bear.

Although custodial interrogation is 'inherently coercive' its coercive effect can be substantially mitigated by effective protection for the suspect in the police station such as time limited and reviewable detention, ready access to properly qualified legal advisers, the overseeing of a 'custody officer', properly recorded interrogations and the right to inform relatives of the fact of detention and the place of detention. The problem with the old pre PACE regime was not that it allowed for lengthy custodial interrogation but that there was very little in the way of effective checks on the misuse of police power. The suspect was by and large often at the mercy of the police. This system may have produced results that would be unobtainable under the much stricter PACE regime; as Rose comments (4),

"Despite its pitfalls the rigorous interrogation which characterized criminal investigation under the old regime was capable of producing valuable results; safe convictions in cases which aroused great public concern."

As Rose comments, quoting Judge Laughland, some of those convictions would be lost today since the tactics would be considered "oppressive" (5) and hence any confession obtained by such methods would be excluded under Section 76 (2) (a).

However, not only is oppressive interrogation in itself offensive whatever the seriousness of the offence investigated but the consequences of a regime of unregulated interrogation can be horrific not only in terms of individual wrongful convictions on coerced or fabricated confessions but also in terms of the repute of the

criminal justice system itself when those miscarriages of justice are exposed. There may then be sound reasons for the criminal process to protect its own reputé and hence its proper functioning to insist upon a closely regulated and enforced scheme for criminal investigations including interrogations. If the quality of police evidence in the investigative stage can be enhanced, even if it cannot be guaranteed, by strict procedures which are enforced through the exclusion of evidence then it may not be necessary to impose strict quality control at trial for police evidence in the form of a corroboration rule for confessions or a corroboration rule for identification evidence. If the system can help to control the conditions in which police evidence is gathered so as to produce an acceptable level of reliability in the long run of cases, then the system may be able to resist law reform calls for corroboration rules or other strict admissibility tests such as a straightforward 'reliability' test for confessions.

Those who oppose the principle of police custodial interrogation or at least argue for a much reduced role for it have to answer how is this to be achieved without serious consequences for the detection and proof of criminality? Given the centrality of custodial interrogation to the criminal process, alternatives suggested to fill the gap if interrogation is to decline in use can appear rather strained and even unacceptable. Sanders has written that one way of significantly reducing recourse to custodial interrogation is his proposal that,

"Consideration should be given to putting the onus in relation to intent on the defendant. Thus the police would only need to interrogate to secure evidence of intent to commit the crime in question if the circumstances created significant doubt about the presence of intent. Although this might place pressure on suspects to talk to the police in police stations it would change the emphasis from the police trying to construct their case as now to the suspect constructing theirs, returning some control to suspects." (6)

This proposal to reverse the onus of proof in relation to the element of intent of criminal offences, so as to decrease police reliance on interrogation to secure evidence of intent through a confession, would of course be contrary to the fundamental principle of the adversarial system as stated by Viscount Sankey in Woolmington v DPP. (7)

"Where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental. Throughout the web of the English Criminal law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt..."

There is no valid reason why a confession obtained with full compliance with PACE should not legitimately function so as to discharge the prosecution's burden in relation to the intent element in criminal offences. There is evidence to suggest that custodial police interrogation is peculiarly suited to the eliciting of confessional statements given that the making of a confession under police interrogation can provide immediate psychological benefits to a suspect. Gudjonsson comments on this point, (7b)

"... people who are faced with police officers interviewing them about a crime and uncertain about what is going on, once they confess the situation is a little clearer for them. They know that the police are going to stop asking questions."

It is plausible to argue that confessions reduce anxiety because they create an acceptable level of certainty about the future.

This is not to say that confessions are a universal panacea to the problem of the proof of criminality. The obvious point is that some suspects who are in fact guilty do not confess under interrogation especially if that interrogation is closely regulated and controlled as is interrogation under the PACE regime. Moreover, this group of guilty suspects who do not confess under interrogation include some very dangerous criminals such as terrorist leaders or professional criminals who are hardened to interrogative questioning, and in the case of terrorists often trained in counter interrogation methods. The degree of threat these groups represent to society might entail a response in the criminal justice system in terms of developing an alternative systematic way of successful prosecution of these kinds of offenders given that the usual systematic approach to suspects, namely interrogation does not usually produce confessions. The approach adopted in various jurisdictions has been to rely on (indeed an overreliance in some jurisdictions) the testimony of accomplices more popularly known as 'supergrasses'. A reliance on this kind of evidence to obtain convictions of organised criminals or terrorists is not surprising. The evidence of accomplices is the next best source of information about a defendant's involvement in an offence apart from a confession. The accomplice is often an observer or indeed a participant in the same or similar offences that the defendant is charged with. The leaders of organised crime often do not participate directly in criminal offences so there is often no eyewitness identification evidence nor forensic evidence that the prosecution can rely upon. Accomplice evidence may be the only viable source of proof here if interrogation fails to elicit a confession. The method of the supergrass has been used in the USA to deal with organised crime leaders, in Northern Ireland

between 1982-1986 to obtain the conviction of hardened terrorist suspects and in England principally in London, to deal with gangs of organised professional criminals who specialised in armed robbery in the 1970s and early 1980s. In all three contexts the need for supergrass evidence stemmed from a failure of interrogation to produce confessional evidence against certain suspects. Of the English context Greer has written, (8)

"The evidence suggests that the appearance of the English Supergrass process was connected with a rise in the incidence of serious organised crime, principally in the London area and on official perception that existing methods of dealing with it were ineffective. Reflecting this mood the Criminal Law Revision Committee stated in its eleventh report in 1972, 'There is now a large and increasing class of sophisticated professional criminals who are not only skilful in organising their crimes and in the steps they take to avoid detection but are well aware of their legal rights and use every possible means to avoid conviction if caught'."

One of the methods used by professional criminals to escape conviction if caught was a persistence in refusing to answer police questions. Hence the CLRC argued for appropriate adverse inferences to be allowed to be drawn at trial from a refusal to answer police questions. It took twenty-two years before this proposal was legislated by S.34 of the Criminal Justice and Public Order Act 1994. This is not the place to discuss the merits or otherwise of this deeply controversial change to the old common law position stated in Hall v R (1971) per Lord Diplock. (9)

However, an overreliance on accomplice testimony can bring as much if not more disrepute on a legal system than overreliance on confession evidence. This is what happened in Northern Ireland after the experience of supergrasses in the Diplock court system; as Jackson and Doran have commented, (10)

"The supergrass phenomenon attracted particular odium to the Diplock system as the sheer number of defendants involved in the process seemed to convert ordinary trial procedures into extraordinary spectacles."

In England the repute of the criminal justice system itself may not have been affected by the use of supergrass testimony but heavy reliance on that form of evidence prevalent in the 1970s to secure the conviction of professional criminals declined as juries became more suspicious of supergrass testimony and judges took the view that

such evidence poisoned the well of justice. Criminal trials in England based mainly on the testimony of supergrasses are now rare events.

If a confession cannot be obtained from a suspect and accomplice testimony against the suspect in particular types of criminal cases becomes discredited in the courts as a reliable source of evidence there may be recourse to covert operations to infiltrate drug gangs and terrorist organisations to provide evidence. Rose (11) in his recent book "In the name of the Law", has commented on this phenomenon of covert operations arising out of a distrust with accomplice evidence,

"A tip-off from an informant may be by far the most common way of making the first detection of a professional organised crime but the reluctance displayed by the courts in accepting the evidence of supergrasses means hard evidence has to be provided by other means. The solution which has been widely adopted by the Regional Crime Squads lies with the growing use of undercover police officers. Acting on informants' intelligence the undercover teams pose as criminals trying to arrange a "buy" for the drugs or counterfeit notes. The undercover agent secretly tapes whatever transpires and arrests swiftly follow."

J. Morton corroborates this point that there is an increasing number of undercover operations involving police officers because of the difficulties with informers. He quotes an undercover officer, (12)

"Courts seem to be much more comfortable with undercover officers than with informers."

Potentially this covert taped evidence by a police officer is the best evidence of all; a taped conversation with a criminal in which the criminal discloses details of his criminal activity or criminal conspiracy (e.g. see the tape in R v Smurthwaite (1994)) is not tainted by claims of unreliability as the evidence of an accomplice often is; indeed, confessions as well are often refuted by the defence as unreliable. Moreover, a taped covert conversation is potentially more secure from legal challenge than a confession which has to surmount the S.76 as well as S.78 hurdles before it is admitted into evidence. The taped conversations made during a covert operation are only likely to be excluded under S.78 if (i) the police officer working undercover attempted to ask questions about the suspect's involvement in a criminal activity unencumbered by Code C on the questioning of suspects; or (ii) entrapped the suspect in a significant way. R v Bryce, R v Christou are the authorities on point (i)

and R v Smurthwaite is the authority on point (ii).

However, apart from these points of potential inadmissibility covert operations cannot be considered to be a serious replacement for interrogation as an investigative strategy of the police. Covert operations tend to be very costly and time consuming potentially involving months of surveillance and covert contact with the suspect. Obviously these are major constraints on the number of operations which each regional squad can mount. Far more importantly, covert operations are potentially dangerous to individual police officers involved in them especially if the police have infiltrated dangerous criminal gangs or terrorists when the consequences of discovery may be fatal to the officer concerned. Of course in contrast, police interrogation of suspects in the police station presents a negligible risk to police officers and is also cost efficient in terms of achieving results; covert operations in contrast do not have the same guarantee of success in the majority of cases. Therefore covert operations as a way of gathering evidence whatever their usefulness in particular cases (which can include some very serious cases) cannot operate as an antidote to the criminal justice system's reliance on confession evidence. Moreover, many forms of criminality are not susceptible to the use of undercover operations which require mainly to be directed at criminal conspiracies or ongoing forms of criminality to achieve success.

Despite all the controversy about the role of confessional statements in miscarriages of justice a confession obtained under the full protections of PACE from a normal suspect is one of the least problematic of all sources of evidence. The reliability defects of identification evidence and accomplice evidence hardly need further elaboration. Moreover, the morality of reliance on accomplice testimony has attracted concern from commentators. Sean Doran has pointed out that the old mandatory corroboration warning for accomplice evidence (abolished by S.32 of the Criminal Justice Act 1994) reflects arguably a moral concern about accomplice evidence, (13)

"... the warning is more than just a safeguard against potentially unreliable evidence, it is also an expression of moral concern about accomplices' evidence. This moral element is perhaps stronger where the accomplice has bought immunity or struck some kind of deal but even in other circumstances we do not feel particularly 'easy' about convicting somebody on this basis."

Jackson and Doran (14) in their study of the Diplock courts comment,

"The moral concerns derive from justifying the conviction of some by the grant of immunity to others who may have committed crimes which are just as heinous."

There is no comparable moral concern about convicting a person on their own non-coerced confession of guilt. Confession evidence is also a more important source of evidence to the criminal process than forensic evidence which is only available in a small number of cases, whereas as noted before, confession evidence is a systematic source of proof of guilt. However, although overall forensic evidence is only available in about 2% of cases it may have a dramatic impact in certain classes of cases; the role of DNA as a relatively new forensic tool should not be overlooked here; as Walker and Cram comment, (15)

"In qualitative terms DNA profiling has already generated a considerable impact upon the investigation of particular offences especially murder and serious sexual assaults. This usage is likely to increase as it has been estimated that DNA material is recoverable from the victim in 60 per cent of these cases. Thus while the technique is not about to boost crime detection rates across the board, it may help to obtain convictions in the relatively rare but nonetheless serious category of offences against the person."

The strict rules of the law of criminal evidence render virtually worthless as items of proof certain kinds of information which the police and prosecuting authorities may take into account in investigating offences and deciding whether to prosecute or not. This material may not however, be usable as evidence in a criminal trial because of the strict exclusionary rules. Confession evidence obtained through interrogation may be the only way to close the gulf between what is known about an offender and what is admissible as proof of guilt. The relevant exclusionary rules here are primarily the hearsay rule which would prohibit the courts' assessment of much information from informers, upon which much of the detection of crime is based, but which is inadmissible as proof of guilt unless the informer himself testifies in court; a relatively unlikely scenario. The other exclusionary rule relevant here is the similar fact evidence rule; the police may feel sure that they have arrested the right individual for a crime because of similarities in the commission of the offence with the previous convictions of that individual, yet those previous convictions are subject to a high evidential hurdle in the form of the probative value/prejudicial effect test and therefore their admission will only be 'exceptional' (DPP v Boardman 1974) (16). The decision of the House of Lords in R v P (17) has improved the chances of previous convictions being admitted into evidence. Decisions after R v P have indeed shown that the decision has produced a more liberal admissibility test for previous convictions and other similar facts. (18)

However, even the admissibility of previous convictions which do bear a similarity with the charge the defendant is facing is by no means certain or even likely. Again a confession obtained through interrogation may close the gap between what the police know and what is admissible in evidence. Obtaining confessions can also alleviate demands that previous convictions be readily admitted into guilt, which opens the great risk of prejudice and hence wrongful conviction of considerable numbers of defendants. If it is thought that it is interrogation by the police which is the more objectionable feature then radical reform could be made to the hearsay rule or the rule against adduction of previous convictions. However, this would entail serious dangers; the evidence of informers not in court to testify would pose obvious dangers of unreliability which may not be satisfactorily met as a question of weight of the evidence before the jury; a rule of inadmissibility save in exceptional circumstances may well be justified here. It would also produce problems under Article 6 of the E.C.H.R. because of the lack of opportunity to cross-examine the witnesses against the accused. The great risks of prejudice to defendants caused by any further relaxation of the similar fact rule has already been referred to. It is proposed therefore to disagree respectfully with the opinions of Sir Frederick Lawton who has argued for the greater use of previous convictions in court to counter the problem of police fabrication of evidence; the former Lord Justice of Appeal comments,

"There would be much less temptation for police officers to fabricate evidence if more use could be made of previous convictions during a trial." (19)

This it is respectfully submitted is a wrongheaded argument. It is no doubt the case that the police are frustrated when they are certain a suspect is guilty but have little admissible evidence against him because of the operation of the hearsay rule or similar fact evidence rule. However, the key to stamping out police fabrication of evidence is a strict regime on the taping of all confessional statements and for the other fabrication problems, fighting it with both training of the police and close supervision of criminal investigations by senior officers at least in serious criminal cases.

The Importance of Judicial Decisions upholding the PACE regime

This thesis has illustrated how official attitudes to police interrogation have moved from outright hostility in the nineteenth century to official tolerance in the twentieth century pre 1964 and connivance by the judiciary in admitting often the fruit of interrogation, to a situation of legal authorization of interrogation from 1964 with Rule 1 of the revised Judges' Rules, to positive encouragement to the police to utilize interrogation in the 1984 Act with the establishment of an institutionalised system of detention for questioning. One major impetus to this change in official attitudes has possibly been the great increase in the amount of crime since the late 1950s but especially since the early 1970s and the still growing phenomenon of organised and professional criminals. Custodial interrogation in tandem with relatively new techniques of the targeting of prolific offenders through covert operations is a relatively efficient way of obtaining evidence in the face of this tidal wave of crime.

It is important then that the legitimacy of detention for custodial interrogation is maintained and that the main fruit of that process, namely confessional statements continue to be admissible as proof of guilt in themselves without the encumbrance of a corroboration requirement. The Court of Appeal has an important role to play in this regard in upholding PACE and the Codes of Practice through decisions which emphasize that breaches of important provisions of PACE particularly deliberate breach are likely to lead to the exclusion of evidence from the criminal trial. Decisions such as R v Keenan, R v Samuel, R v Canale can be viewed solely from a "due process" perspective ensuring procedural fairness for defendants but it is submitted that these decisions have also useful long term "crime control" benefits. These decisions excluding evidence because of important breaches of PACE by the police help to maintain the legitimacy of custodial interrogation from attack by critics who would seek to remove the interrogation role completely from the police or substantially limit the ability of the police to detain for interrogation. For example, the Haldane Society of Socialist Lawyers proposed in 1982 (20) that the police must bring a charge or release the suspect after a maximum of 12 hours from the time of arrest. The Haldane Society made it clear that this period was not to be considered a period of detention for questioning but merely time to allow the police to obtain confirmation of the suspect's identity and the collection of evidence. This proposal would have seriously limited current police powers which include the power to detain suspects for questioning for up to four days.

A system of detention for interrogation which is open to outside scrutiny and which allows the suspect various due process protections is much less vulnerable to criticism than a closed secret system of interrogation. The Haldane Society proposals were made in 1982 at a time when the old regime of interrogation governed by the Judges' Rules had been thoroughly discredited as completely open to police abuse.

The second major benefit to crime control concerns that Court of Appeal decisions upholding PACE through the exclusion of evidence confers is to safeguard the admissibility of confessions in themselves and stave off calls for a corroboration requirement or stricter criteria of admissibility than S.76 2(b) requires. A parallel of a kind may be drawn with the issue of identification evidence and its treatment by the law of evidence which was a major source of concern in the 1970s as wrongful identification led to notorious cases of miscarriages of justice. The Devlin Committee (21) which looked at the issue in 1976 proposed quite a radical reform of the law of evidence on identification evidence, recommending that identification evidence would only exceptionally in itself be able to found a conviction. The Lord Chief Justice and four other judges of the Court of Appeal in R v Turnbull (22) a case shortly after the Devlin Report forestalled the Devlin Committee proposals and any statutory limitation on identification evidence by laying down guidelines for trial judges on how to treat identification evidence and how they should warn juries how to weigh this inherently unreliable evidence. The Court of Appeal made it clear that non observance by trial judges of the Turnbull guidelines would lead probably to the quashing of convictions. However, what the decision in Turnbull also achieved was to guarantee the continued admissibility of such identification evidence as proof of guilt in itself. Even poor quality identification could be put before the jury if there was other supporting evidence. Crucially this supporting evidence could fall far short of 'corroboration' in the strict sense; 'odd coincidences' could, according to the Court of Appeal, provide the necessary 'supporting' evidence. R v Turnbull is a good example of how strict judicial adherence to limited principles for the treatment of certain kinds of evidence can disarm calls for more radical reform. There are those commentators, e.g. Robertson (23) in "Freedom, the Individual and The Law", who call for a strict corroboration requirement for the admissibility of all identification evidence but this does not appear at the present time a likely nor acceptable possibility; one reason why such reform calls can be legitimately ignored is continued Court of Appeal insistence on judicial adherence to the Turnbull guidelines. The Court of Appeal in R v Turnbull said that any law that said no person could be convicted on visual evidence alone would lead to affronts to justice and to serious consequences for the maintenance of law and order. (24) It is arguable that just as a

corroborative requirement for identification evidence would lead to affronts to justice so would a corroboration requirement for confessions, indeed more so, since confessions are a much more regular source of evidence to the proof of guilt than identification evidence, although identification evidence has an important role to play in the proof of 'street offences' such as robbery, pickpocketing, disorderly conduct, assaults etc. Another important way of shoring up public confidence in the reliability of identification evidence is judicial insistence that the way that evidence is gathered follows the statutory procedures established in Code D of PACE. There has been something of a judicial sea-change here from the pre PACE era when police breach of the Home Office circulars on identification parades would only occasionally lead to the discretionary exclusion of identification evidence. Nowadays significant police breach of Code D is likely to lead to the exclusion of the evidence under S.78 of PACE; as the Court of Appeal recently commented in R v Hickin and others,

"Identification evidence could give rise to problems with which everyone was now familiar. It has a unique potential for injustice and identification procedures, formal or informal, must be conducted in the knowledge that should an identification be challenged the court would wish to scrutinize the procedure with very considerable care and caution." (25)

If the Court of Appeal can make it clear that the current regime of interrogation is being upheld then a potentially large contribution is made to uphold the legitimacy of the current system an important element of which is the possibility of conviction purely on confessional evidence. Indeed to allow for conviction on confessions alone has been a concern for the courts since 1789 with Lord Kenyon's judgement in R v Wheeling. (26) In contrast, the Judges' Rules were habitually ignored by the police and this led very rarely to the exclusion of confessional evidence. The consequence of this poor police practice was the miscarriages of justice in the Confait case (1974) (27) which led to contemporary calls for a corroboration requirement for confessions. The Fisher Report (1977) recommended a corroboration requirement for certain categories of vulnerable suspects such as juveniles. Poor police practice in the investigation of offences led to the series of serious miscarriages of justice revealed after the freeing of the Guildford Four. Many of these miscarriages, such as The Guildford Four, Birmingham Six, Stefan Kiszko, Judith Ward, Maguire cases, dated from the early to mid 1970s when the police generally were much less professional in the investigation of criminal offences than they are now. The police are paying now in terms of public repute for the fall-out from the 1970s era which was an exceptionally bad period in terms of police behaviour and integrity in the conduct of

criminal investigations. The revelation of these miscarriages from 1989 led to calls from many quarters for a corroboration requirement for confessions. Roger Leng has commented, (28)

"Following the exposure of wrongful conviction based on confession evidence alone a substantial body of opinion has favoured the introduction of a rule barring conviction on confession evidence unless corroborated."

It would therefore be extremely naïve to argue that since confession evidence is so important to the conviction of the guilty that therefore more confessions should be admitted to trial than at present by reversing the judicial trend towards the exclusion of confessions upon proof of police breaches of PACE which are 'significant and substantial'. In the long term this would be a dangerous route for the courts to take because of the dangers of increasing the risk of wrongful convictions on unreliable police evidence. However, there is a hint in the Court of Appeal decision in R v McGovern that perhaps the requirements of PACE are too stringent in their effects on the admissibility of confessions. Lord Justice Farquharson, after quashing the conviction commented,

"Whether it is a satisfactory consequence that a confession which was admitted to be a true account of the appellant's participation in this wicked and terrible killing should be excluded because of the breaches of the Act and perhaps the Code of Conduct is no doubt a matter for debate, but we are satisfied that is the effect in law." (29)

Moreover judicial willingness to exclude confession evidence has the beneficial effect of securing jury trust in confessions that are admitted into evidence and therefore facilitating the conviction of the guilty. This might also have a beneficial effect on jury trust in the veracity of other police evidence such as police eyewitness testimony. The point is that public doubt and suspicion about the interrogation process and confessions so obtained is likely to have an effect on jury trust in other police evidence such as police evidence that they found illegal drugs on the accused or in his home. In the 1970s the problem of 'verballing' was a problem which had reached public notice. It would not be surprising if jury disbelief in alleged oral admissions lent credence to other defence claims that the police had for example, "planted drugs" or made up their eyewitness testimony implicating the defendant. If the police were planting drugs and fabricating evidence then increased jury scepticism about police evidence in the 1970s and early 1980s may have served a useful function in protecting

the innocent. However, if police professionalism has greatly improved in the post PACE era and therefore police fabrication of evidence is now a marginal problem, then jury suspicion of police evidence could lead to unjustified acquittals of the guilty. Judicial willingness to exclude non authenticated confession evidence could have an important effect in shoring up jury confidence in other police evidence. Reiner in his work on Chief Constables, reports the remarks of one of his sample of Chief Constables that because of PACE,

"Policing by plan had to replace policing by hunch. A related benefit was that police evidence would be more trusted as it had been gathered within the constraints of a rational set of procedures." (30)

Deliberate breach of procedures by police which constitutes 'oppression' as in Matto v DPP has a tendency to undermine public respect for the police and also the criminal justice system. Although a reliable conviction was lost in Matto v DPP, arguably crime control was in the long run served for the legitimacy of the system was upheld and public co-operation thereby not alienated - a crucial fact given the dependence by the police in detecting crime on public co-operation. A discretionary approach using S.78 is best suited to this purpose of maintaining legitimacy and therefore public support in the criminal process. Automatic exclusionary rules here are not only inimical to legitimate crime control concerns but threatens public confidence in another way - too many guilty individuals being acquitted because of police breach of a rule whatever the seriousness of the offence. Unfortunately, the decision of the Court of Appeal in R v Nathaniel although decided using the discretionary power of S.78, comes close to illustrating how over ready exclusion of highly probative though improperly obtained evidence can produce results which might be offensive to the public. In Nathaniel a very dangerous criminal was acquitted because of police breach (not even in bad faith) of a provision of PACE which cannot be described as central to that scheme. Discretionary exclusion of improperly obtained evidence should be reserved for those cases of flagrant police breach of important due process norms. The concern here is to uphold public faith in the legitimacy of the criminal process; over ready exclusion of reliable evidence threatens public confidence, at a time of great public concern about crime, in the legitimacy of the system. Public faith in the legitimacy of the process is partly dependent on the ability of the process to protect them from criminals especially dangerous criminals. R v Nathaniel (31) is an odd decision in this regard, but whatever the merits of the decision it is a noteworthy symbol of how judicial attitudes to police evidence overall have changed since the introduction of PACE.

In the face of increasing and increasingly organised crime the police have negotiated for themselves a considerable array of powers. What were even until fairly recently considered to be unacceptable invasions of personal liberty have now become routine and virtually unarguable police practices. The obvious examples here are the power to detain for questioning, the permitted length of that detention which can amount to days rather than hours and the permissibility of entrapment as a detection device and evidence gathering method in certain circumstances. Even in 1929 at the time of the Royal Commission on Police Powers neither police use of traps nor interrogation nor police detention for lengthy periods before charge, was beyond fierce debate and widespread opposition.

Summary

In the era of PACE detention for questioning and non oppressive entrapment are considered widely to be vital police tools in the fight against crime. The great increase in crime from the late 1950s but especially from the 1970s must have contributed to an atmosphere in which interrogation and entrapment became more acceptable. However, both custodial interrogation and covert operations are now subject to constraining principles which the police must pay attention to so as not to jeopardise the admissibility of any evidence so gathered. Custodial interrogation is subject to a legislative scheme for interrogations and the judicial guidelines for covert operations as to the importance of an accurate record of the police investigative method is symptomatic of a loss of near automatic confidence in the integrity of police evidence. This loss of confidence began in the early 1970s and gathered momentum in subsequent years. In the light of declined public confidence in the integrity of the police the transparency of police investigations becomes desirable. If the police are more professional now than they ever have been and it would therefore be reasonably safe to rely in most cases on police evidence even in the absence of independent records, then the police are paying for their past vices in having to comply with constraining principles for the conduct of criminal investigations. It has recently been pointed out that "The police are now in a healthier state than before but look worse" (32) than in the pre PACE era. The Police and Criminal Evidence Act in fostering a more professional attitude in the police may have prevented even further erosion of public confidence in the police in recent years. An Act which was seen by the police service in its early years as a constraint on effective criminal investigations may actually have furthered police interests by shoring up public confidence in the police at a time of great crisis in the criminal justice system. The Police and Criminal

Evidence Act, although a jolt to the police when introduced, has had an important pay-off in aiding rising levels of public confidence in the police after the dark years of 1989-1992 when public confidence in the police fell dramatically as the police paid the price for poor ethical criminal investigations in the 1970s.

Footnotes to Chapter 10

Conclusion

- (1a) A. Sanders and R. Young, "Criminal Justice " 1994 at p.203.
- (1b) In "Policing As Social Discipline" 1998 by Satnam Choongh there is also a call for an end to police interrogation at p.237: "I suggest that it is important to abolish the right of the police to question suspects ... such powers serve as an enabling device through which the police discipline particular segments of the population", and at p.139, "The importance which the police attach to their power of interrogation is at least partly explicable by the police desire to control obnoxious individuals and communities." A call for an end to reliance on confession evidence has been made by The Honourable J. Bruce Robertson, Judge of the High Court of New Zealand. Judge Robertson proposes a ban on the reception of confession evidence made out of court and a reliance on a new duty to testify in court on the accused: "Any survey of injustices alleged to have occurred both here and overseas indicates that a person's alleged out of court statements have been of pivotal importance in the obtaining of convictions which are subsequently found to be unjustified. General exclusion would lessen the possibility of injustice arising. Such material is essential under the present system but that would be averted if explanation was required in court with the potential for distortion removed. When persons actually face their judges of fact to explain themselves the chance of inappropriately avoiding responsibility would be lessened." Honourable J. Bruce Robertson, "Rights and Responsibilities in the Criminal Justice System", F. W. Guest Memorial Lecture, 1992, Vol. 17 Otago Law Review, p.501 at p.516.
- (2) Sir Rupert Cross quoted at p.207 of W. Twining "Rethinking Evidence" 1990.
- (3) *ibid* at p.208.
- (4) D. Rose, "In the Name of the Law: The Collapse of Criminal Justice" 1996 at p.20.
- (5) *ibid*.
- (6) A.Sanders, "Controlling the Discretion of the Individual Officer" in R. Reiner and S. Spencer, editors, "Accountable Policing: Effectiveness, Empowerment and Equity" 1993 at p.106.
As Dixon comments, "If interrogation were to be severely restricted or abandoned the implications for change in substantial criminal law and in the development of other possibly more reliable but much more intrusive investigative methods need to be squarely faced." "Law in Policing: Legal Regulation and Police Practices" 1997 at p.176.
- (7) *Woolmington v D.P.P.* (1935) AC 462.
- (7b) G. Gudjonsson "The Psychology of False Confessions" (1989) Vol. 57-58 *Medico-Legal Journal*, p.93 at p.98.
- (8) S. Greer, "Supergrasses" 1994 at p.214.
- (9) *Hall v R* [1971] 1 All ER 322 at p.324.

- (10) J. Jackson, S. Doran "Diplock Courts: Trial Without Jury" 1995 at p.54.
- (11) D. Rose, "In the Name of the Law: The Collapse of Criminal Justice" 1996 at p.174.
- (12) J. Morton, "Supergrasses and Informers" 1995 at p.322.
- (13) S.Doran, "The Symbolic Function of the Summing up in the Criminal Trial" Vol. 42,(Winter 1991) Northern Ireland Legal Quarterly, p.365 at p.371.
- (14) J. Jackson, S.Doran, "Diplock Courts: Trial Without Jury" 1995 at p.45.
- (15) C. Walker, I. Cram, "D.N.A. Profiling and Police Powers" [1990] Crim. L. R. p.479 at p.480.
- (16) DPP v Boardman [1974] 2 W.L.R. 673.
- (17) R v P [1991] 2 All ER 859.
- (18) e.g. R v Channing [1994] Crim. L.R. 924 C.A.
- (19) Sir Frederick Lawton "Tarnished Police Evidence", the Law Society's Gazette, Vol.88, Wednesday 8 May 1991 at p.2. Another distinguished ex judge, Lord Devlin makes a similar recommendation to Sir Frederick Lawton when Devlin writes in "Easing the Passing": " ... for my part I should like to see reliance upon police interrogation reduced almost to vanishing point. I should be prepared to pay for that by admitting into trial much that is excluded from it as supposedly unfair to the accused. Let the court of trial and not the police station be the place at which guilt is determined but let the court be less inhibited about what it listens to." p.213. Easing the Passing: The Trial of Dr. Bodkin Adams, 1985.
- (20) See "The Police, the Law and the People", A Haldane Society Publication, 2nd Edition, 1982, by Nick Blake.
- (21) Lord Devlin, "Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases" 1976 (The Devlin Report). There is now a considerable body of literature on the psychology of mistaken identifications. Two accessible accounts of the main issues are J. Jackson, "The Insufficiency of Identification Evidence Based on Personal Impression" [1986] Crim. L.R. p.203 and G. Davies: "Mistaken Identification: Where Law meets Psychology head on" (1996) The Howard Journal, Vol.35, p.232.
- (22) R v Turnbull [1977] Q.B. 224 [1976] 2 All ER 549.
- (23) G. Robertson, "Freedom, The Individual and the Law", 1993, p.376.
- (24) R v Turnbull [1976] 2 All ER 549 at p.552.
- (25) R v Hickin and others [1996] Criminal Law Review 584 at p.585. Jackson had gloomily predicted back in the 1986 Criminal Law Review that "there is no guarantee that judges and justices acting within their discretion will be any more inclined to exclude identification evidence where the procedures have not been complied with than they have been in the past" at p.211. As in other areas such as confessions and improperly obtained evidence the judicial sea change on the discretionary exclusion of improperly collected identification evidence has proved commentators wrong.

- (26) R v Wheeling (1789) 1 Leach C.C.
- (27) The Confait Case is reported as R v Lattimore (1975) 62 Cr. App.Rep.53.
- (28) R Leng "A Recipe for Miscarriage: The Royal Commission and Informal Interviews" in "Criminal Justice in Crisis" 1994, edited by M. McConville and L. Bridges, at p.181.
- (29) R v McGovern (1991) Cr. App.R. 228 at p.235.
- (30) R. Reiner, "Chief Constables" 1992 at p.149.
- (31) For an argument that R v Nathaniel was wrongly decided by the Court of Appeal see I. H. Dennis "The Law of Evidence" at pp.246-247: "It is suggested that, in the absence of any finding that the police had deliberately set out to manipulate the defendant and abuse their powers under PACE, the trial judge was right to admit the evidence and the Court of Appeal wrong to allow the appeal ... where the police have not acted in bad faith, evidence should be excluded only if the defendant has been significantly disadvantaged by the breach and the breach violated a fundamental norm of the criminal justice process. Only some breaches will have this quality".
- (32) D. Downes and R. Morgan "The Politics of Law and Order in Post-war Britain" in "The Oxford Book of Criminology" 1994, edited by M. Maguire, R. Morgan and R. Reiner, at p.220.

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