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**Invasion of Privacy: Police and Electronic Surveillance
in Canada**

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XI. Privacy

A. *Privacy: Problems of Definition*

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I. The Police Function

Broadly speaking, there seems to be little mystery as to the role and function of the police in modern society: the police enforce the law, keep the peace, investigate crime, apprehend offenders and generally serve the public. Their basic functions are thus threefold: law enforcement,¹ order-maintenance,² and community service.

Crime fighting is in many ways the most attractive aspect of police work and it is from this work that the police have derived their most positive public (and self) image. Crime fighting is in colloquial terms the "cops and robbers" aspect of police work. It involves the investigation of crime — the pursuit and apprehension of criminals. In broader terms it is said, not without controversy, to involve the prevention and suppression of crime. It is the view of most modern policemen that "catching criminals, especially the violent and the organized,... constitutes the real core of the job".³

It was not always so. Criminal investigation was not identified originally as a separate or special responsibility of urban police departments. In the nineteenth century the local constabulary retained many of the characteristics of the town watchman whose duty it was "in some small way to keep the peace and public order"; only rarely, for instance in response to some unsolved spectacular crime, did they become involved in investigative work.⁴ Weinreb believes that "the police have assiduously cultivated their image as crime fighters as part of a campaign for professional respectability".⁵ They have done this in part through their insistence that above all criminal investigation was highly technical work, a "science" which required skill and training, and produced spectacular results. To a considerable extent the police have achieved

¹In this analysis, "crime fighting" will be used interchangeably with the term "law enforcement".

²"Peace keeping" will be used interchangeably with "order-maintenance".

³L. Radzinowicz & J. King, *The Growth of Crime* (1977), 164.

⁴L. Weinreb, *Denial of Justice* (1977), 21.

⁵*Ibid.*, 22.

their goal. Indeed, many have contended that the police have fostered an image which has led the public to expect far more of the police than they can possibly deliver.

Silberman, in his wide ranging study of *Criminal Violence, Criminal Justice* in the United States, claims that "the police simply do not know what to do to reduce crime; some off-beat officials are not even certain there is *anything* they can do to produce a significant and lasting reduction in criminal violence".⁶ Furthermore, it is his view that the police have been reluctant to acknowledge their impotence in the face of rising crime:

Hence police have felt the need to surround themselves with an aura of professional invincibility, to encourage an image of themselves capturing criminals through a combination of hard work, bursts of intuition, and the use of arcane scientific methods — dusting for fingerprints, analysing samples of blood, hair, and fingernail dirt, tracking footprints and tire marks, and other forms of "criminalistics", as they are called in police jargon.⁷

Despite the fact that police work involves much more than sophisticated crime detection, modern policing is increasingly being drawn into the thrall of modern technology:

The elite in the eyes of both police and public are the detective branches, the wide ranging regional crime squads. The most advanced modern technology must be engaged to centralize, sift and transmit information, to overtake the mobile modern criminal. There must be specialist units to match the specialisms of crime: the drug squad, the vice squad, the fraud squad, the experts on thefts of art and antiques, not to mention the special branch. There must be advanced forensic facilities. There must be centralization of control, inter-regional and international co-operation. The police are to be seen as professional soldiers in a war against crime, to be organized and equipped as such. The role of the public is to notify anything suspicious, co-operate in inquiries if required and keep out of the line of fire.⁸

Although criminal investigation is without a doubt an important part of police activity, it by no means commands the major portion of time allocation in modern policing. Studies conducted in Canada and the United States have shown that the two functions of service and peace-keeping consume more of the average police officer's time than the

⁶C. Silberman, *Criminal Violence, Criminal Justice* (1978), 200. See also, in this regard, the controversial study commissioned by the Rand Corporation: P. Greenwood, *et al.*, *The Criminal Investigation Process* (1975), 3 vols.

⁷*Ibid.*, 202. R. Ericson, in his study of detective work in a Canadian setting, *Making Crime: A Study of Detective Work* (1981), concludes that detectives have little control over crime, and that their effectiveness derives from mundane (*e.g.*, citizens and uniformed officers) rather than scientific sources.

⁸Radzinowicz & King, *supra*, note 3, 164.

function of crime control.⁹ Most modern commentary concedes that it is appropriate to strike the balance in this manner.¹⁰

Historically, the primary task of the police has been the preservation of public peace and tranquillity. All other tasks and services were thought to be subordinate to this one. The peace-keeping role of the police entails such activity as the dispersal of crowds which are unruly, obstruct traffic, or otherwise endanger the peace; the intervention into family rows with violent undertones, or street quarrels and disputes which carry the threat of violence. James Q. Wilson described the peace-keeping function of the police as focussing on behaviour that "disturbs or threatens to disturb the public peace or that involves face to face conflict among two or more persons".¹¹ This police duty then is both straightforward and general — the maintenance of public order and the restoration of peace to the community once it is disturbed.

The community service role of the police is well expressed in the following extracts:

The police are called upon to provide a wide variety of social services as well. They rush accident victims to the hospital; bring alcoholics indoors on a winter's night; break into a locked house or apartment to see whether an elderly occupant is alive or well; persuade a mentally ill person who has barricaded himself in his apartment to return to the hospital; administer emergency first-aid to a heart attack victim, or someone who has taken a drug overdose, while waiting for the ambulance to come. Police also get cats down from trees, chauffeur dignitaries around town, rescue the drowning, talk suicidal people out of killing themselves, direct traffic, and provide advice and help to the sick and elderly, as well as to otherwise healthy people who simply cannot cope with some pressing problem.¹²

For most people they are also a residual social service. They are liable to be called in any emergency not within the duties of more precisely defined social agencies like the fire and sanitation departments: injuries and deaths, burst sewer pipes, cats in trees, children in locked bathrooms, family quarrels, barroom brawls. The occasions when the police are called vary among different economic and social neighbourhoods; but

⁹See the useful summary of the results of such studies detailed in C. Griffiths, J. Klein & S. Verdun-Jones, *Criminal Justice in Canada* (1980), 55 *et seq.* See also Chappell, Gordon & Moore, *Criminal Investigation: A Selective Literature Review and Bibliography* (1982) 6 Can. Police Coll. J. 13.

¹⁰Leon & Shearing, *Reconsidering the Police Role: A Challenge to a Challenge of a Popular Conception* (1977) 19 Can. J. Crim. & Corr. 331, 336 do not criticize this state of affairs but do take issue with conclusions which are conventionally drawn from it. They say the debate has been based exclusively upon an analysis of what police *should* do and what they *actually* do, and has overlooked what the police *can* do and have the *authority* to do. In the result "[t]he common sense view of the police as law enforcers and crime fighters... has recently been obscured" (p. 343).

¹¹J.Q. Wilson, *Varieties of Police Behaviour* [:] *The Management of Law and Order in Eight Communities* (1968), 16.

¹²Silberman, *supra*, note 6, 203.

the general principle is that the police are an undifferentiated source of help. When they are called, unless they can recommend a more appropriate agency, they are expected to respond. The police do not say, "Sorry, that's not our job."¹³

It seems correct to state that almost since the appearance of the modern police force the purposes and tasks of the police have been mixed. This mixture naturally varies according to the political and social environment in which they operate. Some police tasks are difficult to categorize or accurately place within one of the three functional classifications which have been alluded to. The "duty to prevent crime", for example, may be regarded as an aspect of law enforcement, or peace-keeping, or both.

The Ouimet Committee, in its examination of corrections in Canada, noted that the control of highway traffic has become an important police function in modern times.¹⁴ At first this task might be thought to be simply an aspect of order-maintenance but Radzinowicz and King indicate that the police tend to value this activity primarily because of its usefulness in crime fighting: "The police claim that their powers to direct and stop traffic, to check on licenses and insurance, are essential if they are to catch the motorized criminal: and most criminals nowadays, like most other people travel by car. Organized crime in particular depends heavily on a succession of stolen vehicles."¹⁵

Two additional aspects of modern policing have been detailed in the literature. The Task Force on Policing in Ontario specified the additional functions of public education and referral.¹⁶ These two functions may arguably comprise part of the general service function of the police. Alternatively, due to their emerging importance, they may be said to be separate police functions since they require special resource allocation and personnel skills.

In Canada the police operate under a variety of statutes which contain significantly different provisions respecting their status and

¹³Weinreb, *supra*, note 4, 15. With respect to the social service role of the police in Canada and more particularly in the City of Vancouver, see B. Levens, *The Social Service Role of Police [:] Domestic Crisis Intervention* (1978).

¹⁴Canada: Solicitor General, *Report of the Canadian Committee on Corrections — Toward Unity: Criminal Justice and Corrections* (1969), 39 [hereinafter the *Ouimet Report*].

¹⁵*Supra*, note 3, 166.

¹⁶"Public Education" includes the development of programs which provide citizens with information on how to protect themselves, their homes and their property from crime. One program of this kind is "Operation Identification". "Referral" involves removing individuals from the criminal justice system and sending them to other agencies in the community. This is often called diversion. See Ontario: Solicitor General, *Task Force on Policing in Ontario* (1974), 17.

accountability.¹⁷ Stenning, in an exhaustive study of the police in Canada, indicates that the police constable's jurisdiction, duties and powers — the important indicia of his status — are usually not spelled out in detail in the legislation under which he is appointed.¹⁸ Accordingly, it is difficult to define with clarity the legal status of the police. Most governing statutes preserve for the policeman the status of "peace officer", which has for centuries been recognized as the central component of the office of constable, and has its origins in the common law status of "conservator of the peace".¹⁹

In 1962, the English Royal Commission on the Police noted the many tasks which are assigned to the police and listed eight basic duties, most of which can be comfortably accommodated under one or more of the three major functional classifications noted previously:

- (1) The police have a duty to maintain law and order and to protect persons and property.
- (2) The police have a duty to prevent crime.
- (3) The police are responsible for the detection of criminals and in the course of interrogating suspected persons, they have a part to play in the early stages of the judicial process, acting under judicial restraint.
- (4) The police have the responsibility of deciding whether or not to prosecute persons suspected of criminal offences.
- (5) The police themselves (in some but not all jurisdictions) conduct many prosecutions for the less serious offences.
- (6) The police have the duty of controlling road traffic and advising local authorities on traffic questions.
- (7) The police carry out certain duties on behalf of government departments.
- (8) The police have by long tradition a duty to befriend anyone who needs their help, and they may at any time be called upon to cope with minor or major emergencies.²⁰

The most problematical of these duties is the "duty to prevent crime". As the previous discussion indicates, the duty to prevent crime may be regarded either as an aspect of law enforcement, or as a facet of

¹⁷P. Stenning, *The Legal Status of the Police in Canada* [:] *A Study Paper prepared for the Law Reform Commission of Canada* (1981), unpublished.

¹⁸*Ibid.*, 141-50.

¹⁹*Ibid.*, 157-65. See, e.g., the *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9, and the *Police Act*, R.S.O. 1970, c. 351, s. 55.

²⁰See Great Britain: Royal Commission on the Police, *Final Report*, Cmnd 1728 (1962), 22; Griffiths, Klein & Verdun-Jones, *supra*, note 9, 52.

the peace-keeping mandate of the police, or both. Stenning indicates that the origins of this duty are ancient indeed.²¹ Why the duty to prevent crime is considered problematical is the focus of the ensuing discussion.

II. Crime Prevention and the Police Function

Since the police are actively engaged in the detection and apprehension of criminals and since the effectiveness of modern police departments is evaluated, at least in part, on the basis of the success of the strategies which the police utilize in their attempts to combat crime, it may be stated that the "prevention of crime" is an important part of modern policing. It is more difficult to ascertain the legitimate scope of such police crime prevention activities. To what extent should society, in the name of the suppression of crime, permit the use and growth of extraordinary police powers?

"Crime prevention" in its present usage is a colloquial term of imprecise breadth. It is used to refer to a variety of police actions ranging from patrolling the streets to surreptitious surveillance and undercover activity.²² The claim that one of the prime functions of the police is the "prevention of crime" is largely uncontroverted due to the looseness which attends the use and meaning of the phrase. It has almost achieved the status of a homily or a charm.

Nevertheless, despite the imprecision in the use of language, the right and the duty of the police to make inquiries²³ and to take preventive action against crime exists not only at common law but is preserved in statute law as well.²⁴ It is beyond dispute that there is a recognized core of legitimate police activity which may serve preventive peace-keeping or order-maintenance functions. Within this core may be located such activities as:

- (1) maintaining a visible presence in the community through the use of marked cars and uniformed officers (preventive patrolling);
- (2) dispersing boisterous or menacing crowds which interrupt traffic or endanger the peace;
- (3) peace-making interventions into family disputes which threaten violence;

²¹See, generally, Stenning, *supra*, note 17, 13-87.

²²Useful discussion and commentary on this concept are provided in D. Wasson, *Community-Based Preventive Policing: A Review* (1977).

²³See *Dedman v. The Queen* (1981) 32 O.R. (2d) 641 (C.A.), *rev'g* (1980) 30 O.R. (2d) 555 (H.C.). Leave to appeal to S.C.C. granted 19 May 1981.

²⁴*Kennedy v. Tomlinson* (1960) 20 D.L.R. (2d) 273, 295 (Ont. C.A.) *per* Schroeder J.A.

- (4) breaking up street quarrels or public altercations which signal potential violence;
- (5) educating the public as to how best to protect themselves or their possessions;
- (6) cultivating good community relations and reliable information networks;
- (7) ensuring prompt response to complaints as a means of choking off incipient crime.

While it is evident that much, if not all, of this activity may be characterized as falling within one or more of the three major police functions of law enforcement, order-maintenance and community service, it is also true, that these police functions serve the general aim of crime prevention.²⁵ If they do not deter the actual commission of a particular crime they may accomplish the result of preventing the aggravation of a particular offence or the escalation of a minor incident to the status of a major crime.

The growth of crime and the arrival of new technologies has brought with it the parallel phenomenon of the expansion and specialization of urban police forces. New methods for the deployment of available resources have been utilized. Although the police have always claimed "the prevention of crime" (in the broad sense of that term) to be part of their mandate, that claim now involves resort to a highly enhanced intelligence function extending well beyond such accepted crime detection devices as the tailing of suspects, or the use of stake-outs and plainclothes police officers. In order to augment this crime prevention intelligence function a need for the following powers has been asserted: expanded, liberally construed (from the police perspective) wiretap and electronic surveillance legislation; legal authorization to open mail; the creation of obligations on citizens to identify themselves when requested by a police officer; compulsory universal identification schemes; approbation of the police practice of using undercover agents and *agents provocateurs*; and expanded search and seizure powers.

²⁵This is also the view of Wilson, *supra*, note 11, 31: "To the patrolman, the law is one resource among many that he may use to deal with disorder, but it is not the only one or even the most important; beyond that, the law is a constraint that tells him what he must not do but that is peculiarly unhelpful in telling him what he should do. Thus, he approaches incidents that threaten order not in terms of enforcing the law but in terms of 'handling the situation'. The officer is expected, by colleagues as well as superiors, to 'handle his beat'. This means keeping things under control so that there are no complaints that he is doing nothing or that he is doing too much. To handle his beat, the law provides one resource, the possibility of arrest, and a set of constraints, *but it does not supply to the patrolman a set of legal rules to be applied.*" [Emphasis added.]

There exist both broad and narrow views of the police function as it relates to crime prevention. The broad view proceeds from the belief that crime is out of control and that the social order is threatened. Its adherents argue that present police powers and resources are inadequate to the task of controlling crime. By this argument "effective law enforcement requires that the police be given adequate powers and be supplied with the necessary resources to efficiently perform the functions society has delegated to them".²⁶ The broad view is consistent with what Packer describes as the "crime control model" of the process.²⁷

In its most extreme form the broad view accomplishes a rhetorical shift from "crime prevention" or "crime control" to "war on crime" which implies or signifies a "transition from a routine concern to a state of emergency". This shift has been derided on the basis that it is needlessly and misguidedly alarmist:

We no longer face losses of one kind or another from the depredations of criminals; we are in imminent danger of losing everything! The perception of such risks does not abide patient study; as long as the envisioned doom is held up as a realistic possibility there is no need to show its impending certainty nor to estimate its likelihood with precision. It matters little that the [war] metaphor, like many metaphors, contains a contradiction in terms. For in truth a community can no more wage war on its internal ills than an organism can "wage war" against its own constitutional weaknesses. Though it may seem paradoxical on first glance, the existence of crime in society is like the existence of organic malfunction, a normal aspect of human life. Both are properly subject to vigilant control. But the conceit that they can be ultimately vanquished, which is the implicit objective of war, involves a particularly trivial kind of utopian dreaming.²⁸

The danger implicit in the broad view of the police function is that in our zeal to detect and apprehend wrong-doers we may become impatient with and insensitive to the restraints upon the exercise of police powers. These have evolved over centuries. It is in the public interest that the police be strong and effective in preserving law and order and (in a certain sense) in preventing crime, but as Skolnick points out, "it is equally to the public good that police power should be controlled and confined so as not to interfere with personal freedom".²⁹ The Ouimet Committee was also at pains to point out that "it is equally important that police powers and practices not undermine the societal values which they are established to protect, which include civil liberties as well as security of the person and property."³⁰

²⁶*Ouimet Report, supra*, note 14, 40.

²⁷See H. Packer, *The Limits of the Criminal Sanction* (1968).

²⁸E. Bittner, *The Functions of the Police in Modern Society* (1970), 48.

²⁹J. Skolnick, *Justice Without Trial* (1966), 10.

³⁰*Supra*, note 14, 40.

The traditional, narrow view of the police holds that they should possess few extraordinary powers:

Indeed a policeman possesses few powers not enjoyed by the ordinary citizen, and public opinion, expressed in Parliament and elsewhere has shown great jealousy of any attempts to give increased authority to the police. This attitude is due, we believe, not to any distrust of the police as a body but to an instinctive feeling that, as a matter of principle, they should have as few powers as possible which are not possessed by the ordinary citizen, and that their authority should rest on the broad basis of the consent and active co-operation of all law-abiding people. At the same time it must be realised that there are certain duties of a special nature which if they are to be entrusted to the police and adequately performed by them, require the grant of special powers.³¹

As a restraining principle of the growth of police powers this may be a laudable sentiment, but as a description of the powers presently possessed by the police relative to those of the ordinary citizen it is far from accurate.³² Police powers to use force; search and seize; arrest and detain; watch, beset and otherwise conduct surveillance; and bear arms, far exceed any citizen powers in these areas. By a continuous incremental process the legislature and the courts have chosen to enlarge the grant of special powers which the police enjoy in Canada.³³ The most recent Canadian examples have occurred through legislative amendments in the areas of gun control and wiretap law.³⁴

The broad conception of the role of the police in the prevention of crime contemplates the expansion of police powers and resources, supports the utilization of new technologies to combat crime, and advocates a greater concentration upon crime in its incipient, inchoate stages. Rather than viewing the police role as largely reactive it is asserted that pro-active police involvement in society is necessary, and therefore this conception is predicated upon an expanded police intelligence function.

The narrow, restrictive view of crime prevention is suspicious of any expansion of police powers and is fearful of encroachment upon and diminishment of fundamental civil liberties. It is skeptical about the

³¹*Ibid.*, 10-1.

³²See Great Britain: Royal Commission on Criminal Procedure, *The Investigation and Prosecution of Criminal Offences in England and Wales: The Law and Procedure*, Cmnd 8092-1 (1981), 21, para. 58 [hereinafter *Royal Commission Report on Criminal Procedure*].

³³The same holds true in Britain. See, e.g., two recent criminal law decisions which profoundly affect police powers and have contributed to their growth: *R. v. Sang* [1980] A.C. 402 (H.L.), which deals with the rule respecting the admission of illegally obtained evidence, and *Malone v. Metropolitan Police Commissioner* [1979] Ch. 344, a case examining the common law position on wiretaps in England.

³⁴See the *Criminal Law Amendment Act, 1977*, S.C. 1976-7, c. 53, for recent legislative changes in these areas.

potential effectiveness of new technologies in the detection or prevention of crime. The narrow view seeks to strike a balance between those powers of the police which are needed for effective law enforcement and the right of the citizen to be protected from unnecessary intrusions by state agents and abuse of power. It attempts to delimit the ambit of authorized police involvement and interventions to the limits of substantive criminal law. In general, it sees the police as a reactive rather than pro-active force in society and thus views valid police concerns as being event-specific. If the police have a maintainable intelligence function to perform it argues that this function should be rigorously confined within narrowly drawn legal limits.

III. A Digression Concerning the History and Philosophy of Preventive Policing

The crime prevention role of the police is hardly a new topic of debate. The notion of "preventive policing" permeates much of the eighteenth and nineteenth century writing on the police in England.³⁵ Notable early proponents of the concept were the utilitarians Bentham and Chadwick. Their views had great currency during the days when Sir Robert Peel's Select Committee on the Police of the Metropolis was receiving presentations concerning the possible shape of, and role to be played by a police force in England. Their ideas stood in strong contrast to those of the eighteenth century philosophers Blackstone, Adam Smith, and Paley which were hostile to the institution of the police. According to Radzinowicz, the attitude of the eighteenth century writers "sprang from their concept of the proper province and powers of the state in relation to what they conceived to be the natural and inalienable rights of the individual, the political freedom which all should enjoy and the rule of law by which society should be governed".³⁶ To them these considerations far outweighed any greater security which an efficient police might

³⁵That notion is linked to modern perceptions of police officers as part of organized, bureaucratically structured police forces. The solitary authority of the constable to take preventive action as part of his historic role as the conservator of the King's peace is more venerable yet. Authoritative accounts written in the sixteenth century by Lambard and Fitzherbert demonstrate the existence of an authority from at least the thirteenth century onward, thought to inhere in the constable's office itself, to prevent breaches of the peace. The degeneration of the constable's office in terms of its efficiency and prestige which occurred in the seventeenth and eighteenth centuries spurred the later reformers of the eighteenth and nineteenth centuries to devise the new police forces. These matters are comprehensively taken up by Stenning, *supra*, note 17, 48-59. In this general area I rely heavily on the monumental contribution of L. Radzinowicz, *A History of English Criminal Law and its Administration from 1750* (1956), vol. 3, *Cross-currents in the Movement for the Reform of the Police*.

³⁶*Ibid.*, vol. 3, 425.

provide. Radzinowicz quotes J.S. Mill in this regard: "In England there has always been more liberty, but worse organization, while in other countries there is better organization, but less liberty."³⁷

For Bentham, one of the earliest authoritative spokesmen in this area, prevention of crime could be achieved by two means. The first was premised on a belief in the deterrent effect of "certain punishment" for the commission of crime. Clearly, this thesis has to do with the administration of justice *after* the detection, apprehension and conviction of the offender. However, the second means whereby crime might be prevented reveals something of the policy behind preventive policing: "The greater number of offences would not be committed, if the delinquents did not hope to remain unknown. Everything which increases the facility of recognizing and finding individuals adds to the general security."³⁸ As a result of this belief Bentham argued for a change in public and judicial attitudes toward common informers and spies claiming that the advantages of such an attitude would be great. He also believed that common informers would respond by demonstrating high moral qualities. Possibly, these propositions appeared as implausible to the society of his day as they do in the twentieth century.³⁹

The debate over the proper scope and ambit of the police function was no mere philosophic abstraction. Peel was wrestling with the realities of the dispute and there was no dearth of examples to be followed. Continental police forces, especially those of France, provided a ready model from which to fashion a police force with a pronounced crime prevention mandate. A climate of fear was abroad, especially in London, which was to be the territorial focus of Peel's first reforms. Daniel Defoe had written earlier of London that "violence and plunder is no longer confined to the highways... . The streets of the city are now the places of danger; men are knocked down and robb'd, nay sometimes murther'd at their own doors, and in passing and repassing from house to house or from shop to shop. Stage coaches are robb'd in High Holbourn, White Chapel, Pall Mall, Soho and almost all the avenues of the city... . 'Tis hard that in a well govern'd city... it should be said that the inhabitants

³⁷See J.S. Mill, "Representative Government" in *Utilitarianism, Liberty and Representative Government* (1936), 347.

³⁸J. Bentham, *Collected Works* (1838-43), vol. 1, *An Introduction to the Principles of Morals and Legislation*, 367, 533, quoted in Radzinowicz, *supra*, note 35, vol. 3, 433.

³⁹Bentham, *ibid.*, 559, quoted in Radzinowicz, *supra*, note 35, vol. 3, 436: "The informers who would require to be paid need have only a small salary; and a hundred gratuitous informers would present themselves for one who required to be paid... . Informers, animated by public spirit, rejecting all pecuniary recompense, would be listened to with the respect and confidence which is their due."

are not now safe."⁴⁰ This environment remained largely unchanged in the time of Peel.

Louis XIV of France had been the first to establish a permanent "Lieutenancy of Police" in 1667. In time almost all of Europe followed his lead, and by the eighteenth century French pre-eminence in the field was undisputed. "At the time [the mid-18th century] European despots were dazzled by the level of control and surveillance achieved by Louis XV's police. Sartine, Louis' Lieutenant General of Police, had not exaggerated when he had boasted, 'Sire, when three people chat in the street, one of them is my man'."⁴¹

For William Paley the institution of the police was indissolubly linked with a despotic form of government. In *Principles of Moral and Political Philosophy*⁴² he offers this stunning exposition of what a continental police represented to him:

The liberties of a free people, and still more the jealousy with which these liberties are watched, and by which they are preserved, permit not those precautions and restraints, that inspection, scrutiny, and control, which are exercised with success in arbitrary governments. For example, neither the spirit of the laws, nor of the people, will suffer the detention or confinement of suspected persons, without proofs of their guilt, which it is often impossible to obtain; nor will they allow that masters of families be obliged to record and render up a description of the strangers or inmates whom they entertain; nor that an account be demanded, at the pleasure of the magistrate, of each man's time, employment, and means of subsistence; nor securities to be required when these accounts appear unsatisfactory or dubious; nor men to be apprehended upon the mere suggestion of idleness or vagrancy; nor to be confined to certain districts; nor the inhabitants of each district to be made responsible for one another's behaviour; nor passports to be exacted from all persons entering or leaving the kingdom: least of all will they tolerate the appearance of an armed force, or of military law, or suffer the streets and public roads to be guarded and patrolled by soldiers; or, lastly, entrust the police with such discretionary powers, as may make sure of the guilty, however they involve the innocent. These expedients, although arbitrary and rigorous, are many of them effectual: and in proportion as they render the commission or concealment of crimes more difficult, they subtract from the necessity of severe punishment.⁴³

As Radzinowicz notes, "although there were very few who stated so forcibly [as Paley] the danger to liberty inherent in any police organization based on a system of 'precautions, inspection, scrutiny and control' there were many who, in a more or less articulate way, entertained an equally strong apprehension of this danger".⁴⁴

⁴⁰Daniel Defoe, quoted in Buckley, *The Present Epidemic of Crime* [1903] 11 *The Century Magazine* 150, reproduced in T. Bowden, *Beyond the Limits of the Law* [:] *A Comparative Study of the Police in Crisis Politics* (1978), 20.

⁴¹Bowden, *ibid.*, 53.

⁴²17th ed. (1809), vol. 2, 306.

⁴³*Ibid.*, 295-7, reproduced in Radzinowicz, *supra*, note 35, vol. 3, 424-5.

⁴⁴*Supra*, note 35, vol. 3, 425. This apprehension was confined to England. Continental scholars in the closing decades of the eighteenth century began to fashion their own

At bottom the reluctance to enhance and extend police powers was a reluctance "to improve the effectiveness of the police for fear of creating an instrument capable of serving the ends of tyranny".⁴⁵ From the time of the Gordon Riots in 1780, "London was in the hands of the mob, and even the military were powerless to intervene". Nevertheless, there was no rush to embrace the totalitarian impulse implicit in police state methods.

Peel's natural caution and his belief in reform by slow degrees led to the creation not of an all-powerful national police force but rather a smaller, more restricted municipal force designed to service London proper. Ultimately, it was to be the model for the modern police force not only within England, but throughout much of the common law world as well. The modest beginning signalled by the creation of the Metropolitan Police in 1829 was in essence an attempt to create an instrument of state control that would be at once manifestly impartial and immune from outside influence, while still being amenable to some effective form of external control. The potential incompatibility of these objectives was only reconcilable through compromise. Thus the prospects for success or unanimity as to the propriety of chosen methods were impaired from the outset.

The debate over the broad and narrow views of the police function continues to the present day. Referring in 1962 to the recurring nature of the dilemma, the English Royal Commission on the Police quoted these remarks from Johnson made some two centuries earlier: "The danger of unbounded liberty and the danger of bounding it have produced a problem in the science of government which human understanding seems hitherto unable to solve."⁴⁶

A recognition that the problems implicit in a consideration of the police role in crime prevention are perplexing and paradoxical can hardly serve as an end point for discussion. The balance between liberty and security is continuously being struck. The lessons afforded by history and comparative models should not be ignored. There is, to use our previous example, obviously much to be learned from the English struggle to come to grips with the role of the police in their society. The early caution and restraint exercised in a time of rampant disorder provides a not inappropriate guide to action at a time when the growth of crime and lawlessness is the focus of much public attention.

complementary school of political thought which later became known as the liberal doctrine of state and criminal jurisprudence: see Radzinowicz, *supra*, note 35, vol. 3, 425-31.

⁴⁵Royal Commission on the Police, *supra*, note 20, 13.

⁴⁶The exact source of Dr Johnson's remarks is not cited by the Commission. See *ibid.*, 14.

In striking this note of caution and restraint it is also appropriate to recognize that this is not a subject fit for *ad hoc* situational or circumstantial adjustment. That approach may achieve some short term objectives. However, the disfunctional results which in the long run flow from ill-conceived policies far outweigh any gain. A broader canvass and a more rational long-term perspective is necessary. The danger is not that our few, prized liberties will expire in some loud, anguished and bloody battle, but rather that by slow degrees, by slight turnings of the screw, by steady, constant erosion, they will silently disappear.

IV. Crime Prevention and the Rule of Law

Underlying this discussion of the scope of police powers lies a desire to discover and enunciate clear guiding principles of general application. These principles obviously must relate to the questions of when and what kinds of coercive interventions or other intrusions into the lives of citizens by police will be permitted. This can only be achieved by first appreciating the relationship between the role of the police and the Rule of Law.

In a society avowedly devoted to the maintenance of free men within free institutions the Rule of Law is conceived in a manner intended to promote conditions conducive to liberty. The Rule of Law need not be so allied to the concept of liberty or individual freedom. Indeed, in many countries it is not; taken alone, it is largely a neutral concept. At the very minimum the Rule of Law means that people shall be ruled by the law and subject to it.⁴⁷ All men, governors as well as governed, are subject to the dominion of the Rule of Law — hence the meaning of the phrase “government by law and not by men”. The Rule of Law primarily serves the basic intuition that the law must be capable of guiding the behaviour of its subjects. Human behaviour cannot be guided by law unless it is discoverable, open, clear and relatively stable. Furthermore, since it is impossible for anyone to be guided by a retroactive law, the law should only have application to future acts; that is, it should only be prospective in its operation.

It is evident, that this conception of the Rule of Law says nothing about the substantive content of law or how law is made. Thus, it is possible for the Rule of Law to serve the needs of tyranny as well as democracy.⁴⁸

⁴⁷Raz, *The Rule of Law and Its Virtue* (1977) 93 L.Q.R. 195, 196. Much of the ensuing discussion as it pertains to the Rule of Law has been influenced by this article.

⁴⁸There is, of course, an historically long and highly charged debate over the question of whether what passes for law under a tyrannical regime is in fact law. See, e.g., H.L.A. Hart, *The Concept of Law* (1961); Hart, *Positivism and the Separation of Law and Morals* (1958) 71 Harv. L. Rev. 593; L. Fuller, *The Morality of Law*, rev. ed. (1969); Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart* (1958) 71 Harv. L.

Conformity to the Rule of Law is clearly only one virtue of many which a legal system should possess. To take one obvious example, the Rule of Law is often closely identified in democratic systems with the protection of individual freedom. Indeed, in the Canadian parliamentary system the preservation of liberty is the complement of the Rule of Law, and implicit in the Canadian conception of the Rule of Law is a recognition of the importance of the notion of individual freedom. In terms of the criminal justice system, the Rule of Law assumes that the basic purposes of the criminal law should be carried out with no more interference with the freedom of individuals than is necessary.⁴⁹

In terms of the police function the Rule of Law at least in part means control of official behaviour.⁵⁰ The Rule of Law is only effective if the legal machinery for the enforcement of law is itself regulated in ways which are in themselves capable of guiding official action. It is the enforcement machinery which also provides effective remedies for cases of official deviation from the Rule of Law.

While it is desirable that the law be relatively certain and precise, since vagueness and imprecision diminish the law's ability to guide behaviour, it is also necessary that it possess a sufficient degree of flexibility. This flexibility is required in order that appropriate responses to unforeseen exigencies and varieties of circumstance are not foreclosed. The instrument for insuring flexibility within the confines of legal order is discretion. Unbounded, unstructured discretion, however, is ultimately destructive of the notion of the Rule of Law, since it introduces uncertainty, and with it the potential for arbitrariness, into the law. Therefore, under a system devoted to the Rule of Law it is a matter of principle interest that the discretion of crime-preventing agencies not be allowed to pervert the law.⁵¹ This is not to imply that the police are the primary target of the Rule of Law. The police are in the same position as all men and women in society in that they are subject to the governance of the Rule of Law.

The police are arguably the agency to which we have granted the greatest power and widest discretion to interfere in our lives.⁵² The integrity of our processes is manifest only when such power is exercised

Rev. 630; Harvey, *The Rule of Law in Historical Perspective* (1961) 59 Mich. L. Rev. 487; J. Finnis, *Natural Law and Natural Rights* (1980).

⁴⁹This is one of the basic propositions upon which the Ouinnet Committee proceeded, *supra*, note 14, 11.

⁵⁰*Ibid.*

⁵¹Raz, *supra*, note 47, 201.

⁵²K. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969), 81, asserts and subsequently justifies a claim that "the police are among the most important policy-making agencies, despite the widespread assumption that they are not".

according to law. The Rule of Law demands that this grant of power not be unstructured and unregulated. The police should not be or be seen to be a law unto themselves. This is the challenge implicit in the notion of preventing policing.

The more police are preoccupied with the necessity of bringing to book those they regard as dangerous villains, the more impatient they become of legal restraints on their powers and discretion, the more convinced that the end justifies the means.⁵³

The police in democratic society are required to maintain order and to do so under the Rule of Law. As functionaries charged with maintaining order, they are part of the bureaucracy. The ideology of democratic bureaucracy emphasizes initiative rather than disciplined adherence to rules and regulations. By contrast, the Rule of Law emphasizes the rights of individual citizens and constraints upon the initiative of legal officials. This tension between the operational consequences of ideas of order, efficiency, and initiative, on the one hand, and legality, on the other, constitutes the principle problem of police as a democratic legal organization.⁵⁴

Skolnick notes that if the police could maintain order their short-run difficulties would be considerably diminished. In a properly structured system, however, they must concern themselves with legality not only because of their use of the law as an instrument of social order but also because in some measure the law purports to regulate their conduct as it relates to those who are suspected, accused or found guilty of crime.⁵⁵ Taken to its extreme, the maintenance of order without the practice of legality or the Rule of Law yields totalitarianism. As noted "such a system of social control is efficient, but does not conform to generally held notions about the 'Rule of Law'."⁵⁶

V. Basic Principles Governing the Police Role in a Democratic Society

No one disputes that the police should be strong and effective in preserving law and order and preventing crime. This serves the public good. However, "it is equally to the public good that police power should be controlled and confined so as not to interfere arbitrarily with personal freedom".⁵⁷ Fitzgerald puts the issue well in the following extract:

The aim of crime prevention in a free society is part of the larger aim of producing a society in which the citizen can fulfil himself in the pursuit of his individual happiness, free from want, disease, and external interference. The pursuit of this aim naturally entails some measure of state interference with individual liberty. But

⁵³Radzinowicz & King, *supra*, note 3, 165.

⁵⁴Skolnick, *supra*, note 29, 6.

⁵⁵*Ibid.*, 7.

⁵⁶*Ibid.*, 8.

⁵⁷*Ibid.*, 10.

unless a society is careful to keep a check on the measure of interference, it may end by losing more in the way of liberty than it gains in freedom from want, disease, and crime.⁵⁸

Obviously, we must be — indeed we are — greatly concerned about crime. We do not wish to live in fear, to be afraid to go about in our neighbourhoods, or to be reluctant to speak with our fellows lest one should turn out to be the “violent stranger”. We do not lightly excuse even non-violent criminal intrusions into our lives: the disquiet, upset and sense of violation which is felt when a break-in is discovered and items are missing, property is damaged, or a lock is picked, is very real. All true crime is disruptive of social tranquillity. As the incidence of crime accelerates the peaceful community may come to feel itself under seige.

At the same time we value our privacy not only as against the criminal but also as against the unnecessary visitations of the state. We do not wish to live our lives under constant scrutiny. Few of us would be prepared, or at least pleased, to be required to identify ourselves on demand, to detail our whereabouts or proposed travel plans, to have our personal correspondence scrutinised or our intimate conversations overheard. These things are also disruptive of social tranquillity. The growth of state surveillance is productive of suspicion and distress. It is a seige of another kind.

An expansion in police powers of surveillance will not necessarily alleviate or preclude the occurrence of those crimes which create the greatest amount of social disquiet. No amount of surveillance will prevent a rape from taking place on a deserted street, or a mugging in an empty park, or indeed, even a bank robbery carried out by hooded thieves in broad daylight. Additional police powers cannot be justified on the ground that they prevent these kinds of crime in these kinds of circumstances. Even if it could be demonstrated that police intrusions on a massive scale could deter some portion of serious crime it is to be doubted that Canadians would tolerate living under scrutiny that intense or that local governments could afford to provide it.⁵⁹

Thus two of the basic principles governing the role of the police in a democratic society are these:

The police in carrying out the basic purposes of the criminal law should be subject to the Rule of Law.

The basic purposes of the criminal law should be carried out with no more interference with the freedom of individuals than is necessary.

⁵⁸P. Fitzgerald, *Criminal Law and Punishment* (1962), 146.

⁵⁹This sentiment was also expressed with reference to the United States. See United States: President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967), 95.

Implicit in these principles is the operative notion of *restraint*. The emphasis is on a minimum of interference. The state may only intervene in the lives of its citizens where that intervention is authorized by law, and may intervene only to the extent authorized by law. This said, the question which then occurs is "when is it appropriate for the state to intervene?" In other words, when should the official use of coercive force⁶⁰ by legitimated?

It is appropriate for the state to intervene with coercive force when freedom or security is threatened.

This proposition is self-evident. What does not show on its surface is the *proper point of intervention*. Since the Rule of Law, in order to be effective, demands certainty in the sense of discoverable, open, clear and stable laws, it follows that the state should refrain from coercive interventions by its agents unless there is a high degree of certainty that the citizen has acted, is acting, or is about to act contrary to law.⁶¹ In the parlance of the modern criminal law this is the requirement of "reasonable and probable grounds" as a condition precedent to most police actions. The necessity for reasonable and probable cause is the mechanism whereby the state insures that official action will not be arbitrary.

The police are entitled to know with some precision when they can and should act. Similarly, a citizen is entitled to a measure of reasonable certainty concerning what he may do without prompting an intervention by the state. In a society which prizes liberty it is not surprising that a basic legal maxim should state that everything is permitted save that which is expressly forbidden. The conundrum is that the maxim has application not only to the citizen but to the police as well. Thus the importance of the following proposition which has the effect of ordering society's priorities:

As a general rule there should be no coercive intervention without a high measure of certainty that there has been, is being, or will be a crime committed.

From this it may be seen that in general police intervention should be tied to proscriptions upon conduct rather than to status or capacity. Our system of criminal justice is act-oriented. Only in rare instances do we

⁶⁰"Coercive force" does not simply imply the physical application of force or the justified resort to violent actions by state agents. In essence it involves any assertion of authority by officials which is backed by the possibility of a resort to physical compulsion in order to ensure and obtain compliance.

⁶¹*Royal Commission Report on Criminal Procedure, supra*, note 32, 22, para. 22. The power to use coercive force where an offence is about to be committed is problematical. Arguably, no coercive intervention is justifiable until those elements constituting an inchoate crime are present.

punish or incarcerate on the basis of status, and when we have done so the reaction more often than not is one of distaste and disapproval.⁶² A man is to be punished for what he has done, not for what he is, or on the basis of what his character is perceived to be like. To do otherwise is to invite vendettas and persecution. Without the certainty which is the basic attribute of an act-oriented system, everyone would potentially be subject to arbitrary coercion at the instance of the state. Arbitrary searches, seizures, arrests and detentions are in this light seen to be those predicated upon considerations which are not event-specific. Crime, not status or some other criterion, should be the activating circumstance. This proposition should not necessarily be restricted to the notion of a fully completed crime. The substantive law of inchoate offences — attempts and conspiracies — places the *inception of crime* at a much earlier point. Thus the time for possible official intervention may also be moved to an earlier point on the continuum which stretches between suspicion and charge.

The concerns of the state with the problems of crime and criminality should be met with event-specific investigation rather than panoptic supervision.

The force of this proposition resides in the assumption that in a society in which liberty or individual freedom is the pre-eminent concern, the police role is of necessity largely reactive rather than pro-active in nature. The requirement that the existence of a crime serve as the activating phenomenon for official action leads invariably to this conclusion.

Since the state's concerns should in general be met with event-specific investigation rather than all-pervasive surveillance and supervision it follows that discreet, invisible police activities which nevertheless involve basic intrusions into the lives of citizens should be dealt with on the same footing as overt coercive interventions. The mere fact that the intrusion involved goes undetected does not mean that the violation of the citizen's privacy or fundamental rights is less reprehensible or less complete. A break-in unaccompanied by broken doors or windows, or the removal of items in order to have them copied, photographed or reproduced, or other signs of disturbance, is just as much a violation⁶³ as one which bears the marks of entry, disturbance and theft.

This discussion should not be taken to imply that there is no room in a modern criminal justice system for any police activity prior to the commission of crime. As our previous consideration of the police role and

⁶²This has been the history of preventive detention/dangerous offender legislation in Canada. See Law Reform Commission of Canada, *Studies on Imprisonment* (1976), in particular, Price & Gold, "Legal Controls for Dangerous Offenders", 153.

⁶³Some may query whether the two events are qualitatively equivalent.

function reveals, there are numerous tasks and duties for the police to perform which by nature occur at a point in time that is quite separate from the time frame delineated by the phrase "the commission of crime". The essence of the control which is introduced in this discussion is that police involvement should be event-specific, *i.e.*, tied in to the commission of a specific crime. In other words, intrusive police activity should not be diffuse and unfocussed, or even generally (panoptically) focussed. The principal assertion is that the police should not be permitted to roam at large, with power to conduct a wholesale inquisition in society. The police should investigate specific, real crimes, not speculative, hypothetical crimes.

Even Bentham, who was well known for his belief in a "preventive police force", seemed to acknowledge the force of this basic limiting stricture. According to him the task of the police was to intervene as soon as an offence "may announce itself in various manners",⁶⁴ either while it was in the process of being committed or immediately afterwards. However, Bentham's belief in a society replete with public-spirited informers indicates his ultimate preference for intrusive, pervasive, panoptically focussed police crime prevention activity.

The general rule that there should be no coercive intervention or other intrusive police activity without a high measure of certainty as to the existence of a specific criminal act is not a fanciful notion arising *in vacuo*. It is a logical corollary of accepted Anglo-Canadian conceptions of the Rule of Law. In his *Introduction to the Study of the Law of the Constitution* Dicey says as much in this forceful statement:

We mean, ..., that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.⁶⁵

Thus one is able to assert as a fundamental rule in the area of law enforcement that:

The interventions or intrusions of the state should only be authorized or carried out in a manner that is consistent with the Rule of Law.

⁶⁴Bentham, *supra*, note 38, 367-8, quoted in Radzinowicz, *supra*, note 35, vol. 3, 435.

⁶⁵A. Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed. (1967), 188. Dicey's conception of the Rule of Law has come under heavy attack, particularly from administrative law scholars attempting to free themselves and their field from the burden of Dicey's views on discretion. See the important article by Arthurs, *Rethinking Administrative Law: A Slightly Dicey Business* (1979) 17 Osgoode Hall L.J. 1, 4, fn. 13, where a list of notable critiques of Dicey's views is provided.

This rule essentially particularizes the more general assertion put forward in the first of the basic principles considered in this discussion, namely, that the police in carrying out the basic purposes of the criminal law are subject to the Rule of Law.

VI. Pro-Active versus Reactive Policing

Lest it be thought that too great a fidelity to the Rule of Law would leave society vulnerable and unprotected, and would diminish the effectiveness of the police in controlling crime, it should be remembered that there are many forms of police activity which serve a preventive function but do no violence to the notion of the Rule of Law. The maintenance of a visible police presence in high crime areas, team policing, prompt response to complaints, public education, the cultivation and maintenance of good community relations and the resultant reliable information networks, are all arguably devices which aid in the prevention of crime. There are many others which one could identify.⁶⁶ Since these are forms of police activity which operate in advance of the commission of crime they may be characterized as "pro-active policing". But they remain forms of action which are consistent with the Rule of Law.

This is not a panacea. It must be conceded that the effectiveness of some of these measures has been seriously questioned. Citing American studies⁶⁷ Silberman contends that "[s]hort of creating a police state, there is no reason to believe that putting more cops on the street would affect the amount of street crime".⁶⁸ He also notes that "[n]ew technology does not help either... . [C]utting a police department's response time does little good when, as researchers recently discovered, crime victims wait twenty to sixty minutes before they call the police."⁶⁹ In terms of a cost-benefit analysis of these measures the conclusions to be drawn are far from cut and dried. The jury is still out. Silberman casts his lot with other proactive, non-intrusive forms of policing such as the cultivation of improved police-community relations⁷⁰ through such vehicles as team policing and a return to the concept of a "regular beat" and foot patrols.

Silberman is concerned with the ability of the present law enforcement system to deal with what he perceived as the most pressing and

⁶⁶A useful survey of preventive policing strategies is to be found in Wasson, *supra*, note 22.

⁶⁷See especially, G. Kelling, T. Pate, D. Dieckman & C. Brown, *The Kansas City Preventive Patrol Experiment: A Summary Report* (1974). See also Greenwood, *et al.*, *supra*, note 6; discussion of the Greenwood study and of the reaction to it is to be found in Chappell, *et al.*, *supra*, note 9, 18-32.

⁶⁸Silberman, *supra*, note 6, 200.

⁶⁹*Ibid.*, 200-1.

⁷⁰See, generally, J. Alderson, *Policing Freedom [:] A Commentary on the Dilemmas of Policing in Western Democracies* (1979).

worrisome aspect of crime — the rising tide of criminal violence. His concerns lead him to consider the adequacy of present law enforcement efforts to reduce violent crime. His basic conclusion is not up-lifting: despite a massively expensive program of law enforcement American police are largely impotent in the face of rising crime.

Others such as Grant note that both our public and private law enforcement capability have long been biased in favour of “overt predatory crime”. He offers the insight that it is “now not so much the police discretion which dictates resource allocation but the political discretions which have so organized police forces as to grossly bias the capability quotient in the direction of overt-predatory crime and away from clandestine fraud and corruption”.⁷¹ Thus

Society ends up with the criminals which it organizes its law enforcement agencies to catch. If we point 90% of those resources at a particular target we cannot be surprised if the resultant criminal statistics indicate that the area chosen would seem to have been the right one. Of course we caught criminals there but it says nothing of the activity occurring elsewhere.⁷²

Grant does not deny the importance of directing police efforts toward curbing violence. Both he and Silberman see a need to rethink the question of resource allocation, although they probably would not be in complete agreement on where best to concentrate the particular allocation of resources. Grant provides us with the insight that it is essential to focus attention on the political discretions which are exercised within the administration of criminal justice if the question of resource allocation is to be meaningfully addressed.

The face of crime which Grant would have us direct more attention towards is important indeed. Fraud and corruption impose a tremendous cost upon society whether practised by affluent professionals and government officials or by the underworld. As Radzinowicz and King note, “corruption is essentially a persistent offence of the prosperous and the powerful extorting money from the poor”.⁷³ Fraud and corruption uniquely possess, in contrast to other crimes, the potential to be committed in ways which do not involve specific, individual human victims. Grant offers the example of fraud on a government department.⁷⁴ No individual feels this violation or loss directly. Instead, the loss is compensated for in a diffuse manner — usually through the vehicle of taxes which must be adjusted in order to accommodate additional government expenditures. In Grant’s opinion, traditional reactive

⁷¹Grant, *The Criminal Justice System — Where Are We Going?* (1980) 69 Can. Police Chief 39.

⁷²*Ibid.*, 40.

⁷³*Supra*, note 3, 42.

⁷⁴Law Reform Commission of Canada, *The Police — A Policy Paper* (1980), 69.

policing is inadequate to control or monitor such crime. Without precisely explaining which techniques he envisions being utilised in advance of the commission of crime⁷⁵ he contends that "this is the area, *par excellence*, for pro-active detective work",⁷⁶ by which one assumes he means *intrusive*, pro-active detective work.

In reality there are no short, simple answers to problems involving effective law enforcement on the one hand and citizen privacy on the other. Before embracing "pro-active policing" one must first define what such a concept legitimately entails. And prior to that inquiry, one must be satisfied that reactive police detective work is truly and clearly inappropriate to the task of policing the forms of crime which have captured Grant's attention. Modern business and government are subjected to various forms of scrutiny (annual audits, tax returns, reports to shareholders) as well as to non-criminal investigations (security commissions, professional disciplinary proceedings). Informants in the victimized organization can and do present themselves to the police on occasion. Some crime obviously does come to light. With the promotion of new, more appropriate resource allocation within the police departments themselves (such as the creation of well-funded, sophisticated "fraud squads") and a greater concentration upon white collar, managerial crime an improvement in the general level of effectiveness is, in some small measure at least, bound to occur.

The low visibility of a particular crime can hardly be the sole or the over-riding justification for an increase in police powers.⁷⁷ The justification for new intrusive police powers which cannot be justified in terms of other police functions and duties is captured in a single phrase: crime control.

Crime control (a term if not coined by Packer,⁷⁸ at least popularized by him) assumes that crime is on the increase and that we need every reasonable technique at our command to combat it. The argument continues: "[S]ince modern technology has made the law breaker more successful and harder to catch, modern technology must be brought in to check and to bring him to justice."⁷⁹

At first it may not seem to be much of a jump from the suggestion that we employ older "traditional" techniques of eavesdropping and

⁷⁵*Ibid.*, 70, for a reference to the cultivation of informant networks.

⁷⁶*Ibid.*

⁷⁷In fairness to Grant, *supra*, note 71, his argument is not so much based upon an increase in powers but upon an increase in the allocation of resources. However, it is doubtful whether solutions such as the wide-scale use of spies and informants within government and the business community implies a growth in the sum of valid, approbated police powers.

⁷⁸*Supra*, note 27.

⁷⁹Radzinowicz & King, *supra*, note 3, 126 *et seq.*

undercover surveillance to a discussion of modern technology as applied to crime control. In fact, "old-fashioned methods of shadowing, eavesdropping and interception of letters can now be supplemented by the microscopic bugging device and the tapped telephone".⁸⁰ A movement from the recognized, but disapproved, use of entrapment techniques,⁸¹ to a new regime wherein the use of *agents provocateurs* is approved and encouraged, and cameras in the work place supplement these efforts, represents changes in law enforcement methods that are not only quantitatively, but more importantly qualitatively different and distinct. There is in all of this a distinction worth preserving, namely, the distinction between surveillance as part of crime-specific investigation, and surveillance as spying.

It is not that the old methods are morally different from the new, but rather that they are far more pervasive and harder to control.⁸² On the other hand it is illogical to dismiss new technologies *simpliciter*. For example, no one would suggest that we should give up the benefits of computer technology and return to such time-consuming techniques as laborious manual searches through criminal records and checks with various agencies. The crucial question to be addressed is — when and in what circumstances will we allow the police to resort to intrusive powers? The answer to this question has already been given in general terms: the intrusions of the police must be structured, confined and checked within a regime which is compatible with the demands of the Rule of Law. Intrusions which fall outside of a sequence of crime and investigation should not be legitimated. In other words, the machinery of law enforcement should be controlled, and its activation should not be generalized (and hence arbitrary) but should be event-specific. This may result in a system that is somewhat less efficient than would otherwise be the case:

In a time when crime has become a major public issue, we are prone to grant the police the powers they claim they need to protect us. But it is at just such a time that we should be most careful to scrutinize the validity of such claims. For there are many powers we deny to the police that, if granted, would undoubtedly increase their efficiency. Yet we withhold the grant, not because we wish to hamper law enforcement, but because there are values we place above efficient police work.⁸³

VII. Crime Control and the Challenge of Organized Crime

The arguments in favour of the enlargement of police powers in pursuit of the god of enhanced crime control finds its greatest strength not

⁸⁰*Ibid.*

⁸¹See *Amato v. The Queen* (unreported) 9 August 1982 (S.C.C.) and *Kirzner v. The Queen* [1978] 2 S.C.R. 487.

⁸²See generally Beck, *Electronic Surveillance and the Administration of Criminal Justice* (1968) 46 Can. Bar Rev. 643.

⁸³*Ibid.*, 687.

in the murky shoals of white collar crime, but rather in the dark and mysterious realms of organized crime. Less than twenty years ago it was believed that organized crime was largely non-existent in Ontario and quite possibly in the rest of Canada as well.⁸⁴ As recently as 1968 respected commentators continued to voice the opinion that although "there is no doubt that organized crime exists in the United States... there is little if any evidence that it exists in Canada".⁸⁵ By 1976 the official view, in some quarters at least, had changed drastically. The Québec Commission of Inquiry on Organized Crime was particularly alarmist on the subject, contending that "[o]rganized crime is one of the greatest problems our society must face today".⁸⁶ Actually, an off-hand remark in the same Commission report comes nearer the mark: "Our knowledge of it is largely superficial".⁸⁷

⁸⁴See *Report of the Inquiry into Organized Crime in Ontario* (1961).

⁸⁵Beck, *supra*, note 82, 683. However, the assessments have been far from uniform. For example, in 1963 it was acknowledged that organized crime was active in Ontario at least in the area of organized illegal gambling. See *Report of Mr Justice W.D. Roach on the Inquiry into Certain Aspects of Gambling in Ontario* (1963). American investigations into organized crime in the United States revealed Canadian "connections". See, generally, W. Kelly & N. Kelly, *Policing in Canada* (1976), 437-530.

⁸⁶Québec Police Commission: Inquiry on Organized Crime, *Organized Crime and the World of Business* (1977), 2 [hereinafter *Crime and the Business World*]. Defining exactly what is meant by the term "organized crime" is not an easy task. The Québec Police Commission relies on this formulation: "A group of individuals continuously and secretly conspiring together on a permanent basis with a view to profiting from several types of crime, and from loopholes in the law." Other even looser definitions such as "a conspiracy or concerted action between two or more persons to effect any illegal object or purpose" have surfaced but in the final analysis have proved less than useful in differentiating organized crime activity from other forms of criminal action. Beck, *supra*, note 82, 682, says that "[o]rganized crime is simply the application of corporate principles to the business of crime". He elaborates by contending that it is "sound economics and politics to aggregate human and physical resources into large organizations that provide central management and control, a division of labour and prudent allocation of profits". More explicit is this comment which is found in *The Challenge of Crime in a Free Society*, *supra*, note 59, 187: "Organized crime is a society that seeks to operate outside the control of the American people and their governments. It involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments. Its actions are not impulsive but rather the result of intricate conspiracies, carried on over many years and aimed at gaining control over whole fields of activity in order to amass huge profits.

"The core of organized crime activity is the supplying of illegal goods and services — gambling, loan sharking, narcotics, and other forms of vice — to countless numbers of citizen customers. But organized crime is also extensively and deeply involved in legitimate business and in labour unions. Here it employs illegitimate methods — monopolization, terrorism, extortion, tax evasion — to drive out or control lawful ownership and leadership and to exact illegal profits from the public. And to carry on its many activities secure from government interference, organized crime corrupts public officials."

⁸⁷*Ibid.*

The Québec Crime Commission, although not particularly scientific or even legally rigorous in its methods, did perform the useful service of identifying the presence of underworld criminal organizations within the province of Québec.⁸⁸ Through its concentration on "family" and individual profiles it revealed organized systematic activity, interconnections between seemingly disparate criminal elements, and the sanctioned resort to violence in the pursuit of illegal objectives.⁸⁹

Of interest to this inquiry is the ultimate thrust of the Crime Commission's recommendations and the extent to which these law enforcement officials would advocate the use of modern intrusive investigative methods in order to obtain an incremental gain in crime control. The Québec Crime Commission has advocated the use of the Commission of Inquiry on a permanent basis as an indispensable weapon in the fight against organized crime.⁹⁰ It also has proposed the creation of standing "anti-gang squads" capable of carrying on "persistent and effective action against the gangs and of ensuring effective protection to their victims".⁹¹ In addition, the Commission has indicated that the capability of the Québec Research Bureau on Organized Crime to collect, process and analyze police information on organized crime should be enhanced.⁹² An examination of the concept of a permanent commission of inquiry is beyond the scope of this study. It suffices to say that the creation of such an entity is quite without precedent in this country. Bound up in such a notion are such fundamental issues as the introduction of inquisitorial processes into the Canadian criminal justice system and the potential destruction of hitherto sacrosanct, fundamental rights.

About all that is known with any precision about organized crime in Canada is that to the extent that these monopolistic crime corporations operate in Canada, their activities, as in the United States, consist primarily in "supplying gambling, narcotics, women, money and liquor to willing customers" as well as "plowing its huge profits into legitimate businesses".⁹³ An argument, perhaps over-stated, has been put forward that this state of affairs is more than a little ironic:

All these crimes are... crimes without victims, and for that reason are almost impossible to combat. All these crimes involve imposing someone's idea of morality on somebody who has a different idea. It is "coercion to virtue" through the law. If the criminal sanction is of little utility in these areas is it not time we stopped to ask

⁸⁸E.g., the Québec Police Commission nowhere identifies the standard of proof which it was applying in reaching conclusions as to criminal culpability.

⁸⁹See Québec Commission of Inquiry on Organized Crime, *The Fight Against Organized Crime in Québec* (1976) [hereinafter *The Fight Against Organized Crime*].

⁹⁰*Ibid.*, Part Four.

⁹¹*Ibid.*, 238 *et seq.*

⁹²*Ibid.*, 240-2.

⁹³Beck, *supra*, note 82, 682.

exactly what functions the criminal sanction can perform, and which ones we really want it to perform? Is it not particularly urgent that we ask this question if in the attempt to legislate morality we have spawned an infinitely worse evil — organized crime?⁹⁴

The situation depicted in this extract, even if over-drawn, raises valid question: is the cure potentially more destructive than the malady? This is the recurring question which must be addressed when responding to the various pleas for ever-greater, extraordinary police powers to control or combat crime. The debate in this area does not come down to the simple choice that proponents of crime control values often express: protection against crime or no protection. Our police are already equipped with a vast array of crime fighting weapons, including broad powers of surveillance — especially wiretapping and the use of other electronic eavesdropping technologies.

Nevertheless, if one focusses on rates of apprehension and conviction of offenders, it appears that the system does not operate successfully. There are a myriad of reasons for this, many of which would be unaffected by an expansion in police powers. Many crimes go unreported. Others are insoluble because the circumstances under which they were committed yield no evidence as to the identity of the offender. Witnesses die, leave the jurisdiction of the court, or are unreliable. Available police resources are such that full enforcement of all criminal laws is an impossibility.⁹⁵ Clearly, there is room for improvement. However, improvement must come within the civilizing restraints of the Rule of Law and not through the adoption of police state or McCarthyist methods. Our rush to increase police effectiveness or efficiency should not exact such an unconscionable price as to result in the sacrifice of traditional rights and safeguards. In a more particular vein, at this juncture in Canada there appears to be no discernible reason or justification to react to so-called “organized” crime with police methods or powers that differ significantly from those which are employed in order to respond to “ordinary” crime.⁹⁶

⁹⁴*Ibid.*, 682-3.

⁹⁵For further elucidation see Radzinowicz & King, *supra*, note 3, 31-57. This analysis does not deny the existence of other factors such as the use of extortion, bribery and even murder to disrupt the criminal process. See Kelly & Kelly, *supra*, note 85, 453-6, for a discussion of the Volpe case in this regard.

⁹⁶See Ryan, “The Invasion of Privacy by Electronic Listening Devices in Canada” in *Proceedings of the Eighth International Symposium on Comparative Law* (1970), 87, 112-3. Ryan’s remarks are still germane more than a decade later: “The Ontario Law Reform Commission *Study and Report* [O.L.R.C., *Report on Protection of Privacy in Ontario* [:] *Preliminary Study* (1968)] contains some observations that look as if they were written to describe the presentation that would be made six months later by the police to the Justice Committee [examining electronic eavesdropping]: “[There is] a continuing process of public education by conscientious and highly placed police officials designed to convince the public that the threat of, e.g., ‘Mafia-like syndicated crime controlled by

VIII. Police Powers of Surveillance

Surveillance may be defined as an activity involving the observation of individuals, the gathering or collection of information about or possessed by such individuals, or the interception of communications passing between or among them. It may be accomplished through the use of the unaided senses or by resort to technologies which improve upon human capabilities. Surveillance is usually, though not necessarily, a clandestine activity. It is always, to some degree, a systematic, continuous activity. In an earlier, less complicated era, surveillance was of only minor concern to the Canadian state. The same cannot comfortably be said in the 1980s.

While casual observation or overhearing of others is a normal feature of every day life, the intentional surveillance of an individual's activities or conversation can have a corrosive effect on his sense of privacy and is generally regarded as a serious affront to the integrity of the individual subjected to the practice. In the past, when the spy or voyeur was limited to the use of his senses, the ordinary person could take effective measures in self-defence to prevent or restrict unwanted invasions of his privacy. However, technological developments have given rise to sophisticated devices which today render it virtually impossible for the ordinary person to take effective measures against the use of technological devices. There has accordingly been a growing demand for adequate legal protection. Traditionally the law has given only limited protection against surveillance. The ancient statutory offence of peeping and the common law crime of eavesdropping sought to restrain deliberate surveillance. But each of these was created long before the modern development of sense-enhancing technical devices. As the law currently stands there is insufficient legal protection against the use of these devices. They have proliferated. The law has not kept pace.⁹⁷

Individuals may conduct surveillance upon one another for a variety of reasons. A husband may spy upon his wife in an attempt to uncover evidence of suspected adultery; employers may surreptitiously keep watch over employees in order to monitor productivity or uncover thefts;

American Gangsters' requires police methods that impinge upon the commonly held view of the domain of individual privacy... . [*Preliminary Study*, 8.] The Ontario *Study and Report* also called for the obtaining of the sort of information that was not to be forthcoming from the police witnesses: '[T]he reality of an assault by modern crime that is not capable of being controlled by traditional police methods, rather than the public image of the spectre of gangsterism, must be the *sine qua non* of any state sanctioned institutional surveillance of the private affairs of individuals. [*Preliminary Study*, 9.]' The presentation by the Chiefs of Police [before the subsequent Parliamentary Committee] contained a great deal of discussion concerning syndicated crime, almost all of it written about the situation as it exists in the United States. The brief was an interesting and at times fascinating polemic, but a factual analysis of the present situation in Canada, either on a crime-by-crime basis as suggested by Westin, or of the syndicated crime picture in this country as suggested by the Ontario Law Reform Commission, it was not."

⁹⁷Australia: Law Reform Commission, *Privacy and Intrusions* [Discussion Paper No. 13] (1980), 44. While the sentiment expressed is applicable in Canada, the legislative situation differs markedly from Australia. See the discussion of Canadian wiretap law, *infra*.

commercial rivals may attempt to uncover production secrets; media reporters may resort to surveillance techniques in order to track down a story. All of these forms of activity arguably raise valid issues concerning privacy. However, for the most part these intrusions, as interesting as the problems which they raise may be, lie beyond the scope of this exercise. Our concern is with the narrower, more directly threatening issue of police or state surveillance.⁹⁸

When exercised as a police power, surveillance by nature occurs towards the front end of the continuum stretching between suspicion and charge. Since the Rule of Law sets the parameters for legitimate police activity, and since, more particularly, it limits police intrusions to a point after a distinct breach of the law has "announced itself" in some manner, legitimate police surveillance must be positioned on this continuum at a place after and beyond the point of suspicion. The question which remains is, *how far* beyond?

Clearly, without the restraining influence of the Rule of Law, it is logical to assume that the police power to carry out surveillance would be employed well in advance of the commission of an offence. In other words, investigation would not be event specific. To the extent even that it was a particularized, individual investigation, such inquiry would consist of investigation based on vague suspicions or rumours. More likely the investigation would be in the form of a generalized search for wrongdoing. A concern for the Rule of Law, however, results in the requirement that prior to an authorized intrusion by the police there should be in existence known, demonstrable, reasonable and probable grounds for believing that a particular offence has been, is being, or will be committed. In the case of surveillance this means that the police, *before* conducting such activity, should be satisfied as to the existence of reasonable and probable cause in order to justify their resort to the use of the power.⁹⁹

In terms of traditional modes of police behaviour and organization these activating criteria cause no upset. With rising crime rates, the more visible presence of organized crime, and the advent of new technologies which enhance police abilities to maintain surveillance, event-specific

⁹⁸For an illustration of the extent of the private use of electronic surveillance see British Columbia, *Report of the Commission of Inquiry into Invasion of Privacy* (1967), 11-24, [hereinafter the *Sargent Report*].

⁹⁹This is only a general rule. Arguably, exceptions to it should exist. However, the validation of any extraordinary power should occur only after those seeking the use of benefit of the power have displaced a heavy onus. The relevant question to be addressed is: "Is the power indispensable in the sense that its use is necessary for the protection or preservation of an over-riding social interest?" Cf. *Royal Commission Report on Criminal Procedure*, *supra*, note 32, 23.

probable cause criteria no longer go unchallenged by the police establishment. Like so many "new" controversies in the law this one in reality harkens back to a much older one, as this extract from Professor Mewett's consideration of law enforcement and the conflict of values reveals:

It is interesting to note that now, in the middle of the twentieth century the problem of this whole question of privilege [against self-incrimination] really rests on the worry that manifested itself in the sixteenth, that someone is going to start "poking about in the speculation of finding something chargeable". This worry manifests itself not only in the area of answering questions under oath or the powers of administrative tribunals, but also in the area of compulsory statements to police officers the powers of the police to interrogate and wiretapping and eavesdropping. A thirteenth century canonical rule directed towards heresy and witchcraft inquisitions becomes relevant once more.¹⁰⁰

Surveillance activity can take on many forms. The advance of technology only adds to the variety of the manifestations. Police activities which involve the use of informants and undercover agents, or which entail surreptitious entry into buildings or premises in order to obtain information, may be characterized as covert, information-gathering, surveillance actions. The employment of wiretaps or other electronic surveillance devices, or the scrutiny of posted communications for the most part involve the clandestine interception of communications, although some techniques such as the use of hidden cameras merely involve the appropriation of information or the mere recording of phenomena. The use of "stake outs" or the "tailing" of suspects are simple direct forms of surveillance. Research into police activity reveals other overt, generalized forms of surveillance. Numbered among these actions are systematic spot checks and prophylactic arrests and searches. Direct police confrontation of suspected criminals may be categorized as forms of surveillance inasmuch as these techniques may involve the gathering of information and the observation of targeted individuals or groups.

Many of the forms of activity which may be characterized as surveillance activities are of dubious or questionable legality. For example, undercover agents may be used as *agents provocateurs* in order to "entrap" a suspect in the commission of an offence. As imprecise as the law of entrapment may be in this country,¹⁰¹ there still seems to be a

¹⁰⁰Mewett, *Law Enforcement and the Conflict of Values* (1970) 12 Crim. L.Q. 179, 188-9.

¹⁰¹See Kirzner and Amato, *supra*, note 81. The law of entrapment is discussed by the McDonald Commission: see Canada, *Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police — Second Report* (1981), vol. 2, 1036-53 [hereinafter *McDonald Commission Second Report*]. Like the Ouimet Committee before it, *supra*, note 14, 77-80, this Commission endorsed the creation of an entrapment defence, vol. 2, 1053.

recognized, significant distinction in the law of entrapment such that there is little doubt that "the entrapment of an offender already embarking on criminal conduct is a perfectly proper exercise of the police function".¹⁰² The same may not yet be said of ensnarement. Another example is that of surreptitious break-ins by police to plant wiretaps or bugs. These surveillance exercises are ostensibly supported by judicial authorizations or by common law authority.¹⁰³

The dilemma which presents itself in this area is vexing and cannot be ignored. On the one hand law enforcement agencies press for authority to utilize the latest technology in the investigation of crime. On the other, as the intrusions by government into the lives of citizens becomes increasingly pervasive — such is the undeniable effect of the technology — the threat to individual freedom is increasingly perceived to be a grave one. If one is curious as to the "state of the art" or is ambivalent as to the Orwellian prospects, this already dated description in the United States Supreme Court case of *Berger v. New York* provides a chilling and intriguing glimpse:

Sophisticated electronic devices have now been developed (commonly known as "bugs") which are capable of eavesdropping on anyone in most any given situation. They are to be distinguished from "wiretaps" which is confined to the interception of telegraphic and telephonic communications. Miniature in size ($\frac{3}{8}$ " x $\frac{3}{8}$ " x $\frac{1}{8}$ " — no larger than a postage stamp — these gadgets pick up whispers within a room and broadcast them half a block away to a receiver. It is said that certain types of electronic rays beamed at walls or glass windows are capable of catching voice vibrations as they are bounced off the latter. Since 1940, eavesdropping has become a big business. Manufacturing concerns offer complete detection systems which automatically record voices under most any conditions by remote control. A microphone concealed in a book, a lamp, or other unsuspected place in a room, or made into a fountain pen, tie clasp, lapel button, or cuff link increases the range of these powerful wireless transmitters to a half mile. Receivers pick up the transmission with interference-free reception on a special wave frequency. And, of late, a combination mirror transmitter has been developed which permits not only sight but voice transmission up to 300 feet. Likewise, parabolic microphones, which can overhear conversations without being placed within the premises monitored, have been developed.¹⁰⁴

¹⁰²Mewett, *supra*, note 100, 193. See also Friedland, *Controlling Entrapment* (1982) 32 U.T.L.J. 1.

¹⁰³This issue in the area of wiretap law is presently unresolved. A recent decision of the Manitoba Court of Appeal has caused a great deal of consternation within law enforcement ranks by stating, in *obiter*, that surreptitious entry to plant an authorized listening device is illegal. See *R. v. Dass* (1979) 47 C.C.C. (2d) 194, 212-4 (Man. C.A.) *per* Huband J.A. See also *Colet v. The Queen* (1981) 19 C.R. (3d) 84 (S.C.C.) which supports the position expressed in *Dass* inasmuch as the Supreme Court rejects the use of s. 26 of the *Interpretation Act*, R.S.C. 1970, c. I-23 to provide implied authorization for police officers to commit otherwise unlawful acts. The conclusion of the Manitoba Court of Appeal is approved of by the *McDonald Commission Second Report, supra*, note 101, vol. 1, 164-73. *Cf. Dalia v. United States* 441 U.S. 238 (1977).

¹⁰⁴388 U.S. 41, 46-7 (1967) *per* Clark J.

IX. Police Discretion and Surveillance

The advance of science and technology is inexorable. This study does not argue that the fruits of technological development ought to be denied to our law enforcement agencies. What is argued for here is the responsible, controlled use of technology, not its outright prohibition. The key questions are: "when?", "in what circumstances?", and "subject to what controls?" These questions must be answered by looking first to the ordering confines of the Rule of Law while at the same time directing an eye toward the protection of individual freedom.

This paper recognizes the dangers implicit in attempting to subordinate all exercises of power in society to the dominion of the courts.¹⁰⁵ What must be protected against is *excessive* discretionary power.¹⁰⁶ In many instances society must allow non-judicial agencies to exercise final, essentially discretionary power over personal and property rights without statutory rules. Where discretion exists the two principal needs are "the elimination of unnecessary discretionary power and better control of necessary discretionary power".¹⁰⁷ As Davis explains, the principal ways of controlling discretionary power are "confining", "structuring" and "checking".¹⁰⁸

Some aspects of police surveillance are amenable to statutory and judicial controls while others, such as the use of informants, are more properly subject to the kind of administrative structures which Davis advocates.¹⁰⁹ It is therefore useful to explore the use of informants as a surveillance technique in the context of this consideration of the use and

¹⁰⁵The view which seeks to eliminate discretion in this way falls within a school of thought which Davis identifies as the "extravagant version of the Rule of Law". This school of thought interprets the Rule of Law to mean that discretionary power has no place in any system of law or government. What it "especially opposes is discretionary power exercised outside courts and not fully subject to judicial control." See Davis, *supra*, note 52, 30.

¹⁰⁶*Ibid.*, 4. Davis offers this useful definition of discretion: "A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction."

¹⁰⁷*Ibid.*, 55.

¹⁰⁸*Ibid.* These are terms which Davis uses in a precise way: "Structuring includes plans, policy statements, and rules, as well as open findings, open rules, and open precedents... . Checking includes both administrative and judicial supervision and review. Our present concern is with eliminating and limiting discretionary power, that is, confining discretion. By confining is meant fixing the boundaries, and keeping discretion within them. The ideal, of course, is to put all necessary discretionary power within the boundaries, to put all unnecessary such power outside the boundaries, and to draw clean lines. The ideal is seldom realized, and many of the failures are rather miserable ones, for they frequently result in avoidable injustice."

¹⁰⁹For Davis' views on the more particular subject of police discretion see K. Davis,

appropriateness of administrative rules as a device controlling police investigative activity.

Administrative controls are appropriate to the regulation of the use of informants because of the nature of the policy questions which arise in the formulation of an effective police enforcement policy, *i.e.*, one which countenances the practice of utilising informants. Some of the policy questions which must be addressed in this context are these:

Should any offender be given a chance to earn immunity from punishment by giving information to the police? Should the police buy information about law violators by paying money? Should they buy such information with non-arrest, with non-prosecution, or with non-punishment? Is it a denial of equal protection to give a chance to one violator to become an informer but not to give a similar chance to another? Should all violators have such a chance, and if not, on what basis should selections be made? Should one who is caught selling narcotics be given immunity from prosecution for burglary if he gives the police valuable information about big narcotics distributors? On what grounds may a valuable informer status be terminated? Is the informer entitled to fair procedure when termination of his informer status is under consideration? If the police renege on promises they have made to an informer, should the informer have a legal remedy? Is the entire structure of police informer practices illegal in fact of statutory authorization; if so, who, if anyone, can get the question before a court?¹¹⁰

This extract does not address the nature of the applicable principle regulating the grant of authority under which the informant operates. When is it appropriate to seek the help of informants? Is the use of informants not simply another technique of surveillance? If unregulated, does not the informant do what we prohibit the police from doing, namely, "poke around in the hope of finding something chargeable?"¹¹¹ If the police are not allowed to conduct a generalized search for wrong-doing (sometimes referred to as domestic spying) then clearly they cannot have resort to techniques or technologies which serve the same end.

Once again, it is necessary to reiterate that what is implied here is not the prohibition of the activity (the use of informers) *per se*, but rather the regulation and control of the timing of the resort to its use. At the front end of the system this means simply that the police cannot "set loose the dogs" without evidence of the commission of a crime. In this area judicial controls such as the use of an authorizing warrant are inappropriate. For reasons which are developed in the ensuing discussion control must reside within the upper echelons of the police bureaucracy itself.

Police Discretion (1975). H. Goldstein, *Policing a Free Society* (1977), 94-5, criticizes Davis for what he sees as his over-concentration on selective enforcement. In his view, this ignores other areas of discretion that do not directly involve a decision of whether or not to enforce a law.

¹¹⁰Davis, *ibid.*, 28-9.

¹¹¹The expression is that of Wigmore and was made by him in reference to the subject of the privilege against self-incrimination. See J. McNaughton, *Wigmore On Evidence*, rev. ed. (1961) vol. 8, 314, § 2251.

The questions which then arise are: how practical are these constraints? How logical are they? How can the police detect the crime if the sources of their information as to its commission are choked off? The answer to such questions are problematical and far from self-evident. Thus, what follows is hardly free of controversy.

A crime announces itself in many ways. In carrying out their manifold duties, the police will often uncover evidence or circumstances pointing to the commission of crime. Citizens often report wrong-doing or suspicious events spontaneously. The informant, unlike the ordinary citizen, usually seeks advantage or gain. His services are valuable, indeed one might say essential, to the investigation of many crimes. But bargains with informants, if they are to be struck at all, should be after the fact, *ad hoc*, situational responses. The position of the informant should not be institutionalized. The gain or advantage which he is accorded should be with reference to, or in return for specific investigations. He should not be on permanent retainer to the constabulary. In other words, informant use, while it ought not to be proscribed, equally ought not to be zealously pursued or encouraged through organizational arrangements within police departments, such as the creation of informer squads or units whose sole or primary responsibility is the gathering and collection of domestic intelligence.

Like any citizen the informant can and should report criminal activity to the authorities. Indeed, in many circumstances, the informant will simply be a public-spirited, "ordinary" citizen. Often, however, the informer will "volunteer" information at a point when he or she is about to be arrested for specific crimes which he has committed, and indeed the police on occasion will trade non-arrest for information.¹¹² If prosecuted, the informer may trade information for a promise of a reduced charge or a lower penalty. These actions presently are largely unregulated and insufficiently controlled, for example, by a system of open statements of police and prosecutorial enforcement policy such as that propounded by Davis.

These remarks are made so as to emphasize the aspect of restraint in relation to a practice which is regarded by some as unsavoury. Informant rewards are not discussed, in the context of the control of event-specific investigation, to signify approval of a practice which at best can be described, like plea bargaining, as a pragmatic compromise rather than as a virtuous course of conduct. Rather, they are discussed for the purpose of expounding upon the ways and means whereby resort to the use of the practice may be inhibited.

¹¹²Davis says that this practice is usually though not always limited to misdemeanours, *supra*, note 109, 29.

This kind of informant use differs, if not quantitatively, then qualitatively, from a "carte blanche" system wherein a wide-scale network of spies report regularly to police in return for monetary rewards or blanket promises of immunity. In the latter case the police conduct massive, though clandestine, general intrusions into the lives of (potentially) all citizens, while in the former circumstance the scale is reduced and the police do not formally initiate the activity. The major exception to this is where evidence of the commission of a crime has come to the attention of police and the police then authorize the informant to gather intelligence in order to confirm the initial information.¹¹³

Obviously this approach will not be free from possible abuse. The police presently harrass (through threat of arrest or prosecution) certain target groups, notably prostitutes and bikers, in order to obtain information. At present, due to the absence of unarticulated enforcement norms, some police officers may be unable to distinguish between what is approved behaviour (in the sense of being authorized) and what is not.

With open, articulated policy direction from the top ranks of the police establishment much ambiguity will disappear. Since enforcement policy will be open it is more likely to be fair. Davis makes this point forcefully:

Every policy, unless confidentiality is necessary, should have to run the gauntlet of public criticism. If it does not survive, then it should not survive.¹¹⁴

Of course, I do not say that enforcement strategies or allocations of police manpower must be disclosed. If extra men are assigned to a high crime area, disclosure might defeat the purpose. But when the policy is that an officer will not arrest for a crime committed in his presence, that reality of the law should be disclosed, for non-enforcement is the practical equivalent of repeal or partial repeal of the criminal legislation.¹¹⁵

Davis' concerns are consistent with the application of the Rule of Law. The Rule of Law does not require the full enforcement of all laws. Other reasons aside, this is simply a practical impossibility. Rather, the Rule of Law requires that those affected by law should have a chance to know what the law is.¹¹⁶ Just as the promulgation of law must be known or discoverable, so too must the repeal (or effective repeal) of the law be knowable. Open, "selective enforcement"¹¹⁷ is not vulnerable to the same

¹¹³The use of undercover police is a different issue from informant use. Writing on the extent of either activity is minimal. See Friedland, *supra*, note 102, 5-6. The *McDonald Commission Second Report*, *supra*, note 101, vol. 2, 1032, endorses open guidelines to regulate the use of undercover agents.

¹¹⁴*Supra*, note 109, 77.

¹¹⁵*Ibid.*, 74.

¹¹⁶The sheer volume of the criminal law qualifies this principle. See Law Reform Commission of Canada, *Our Criminal Law* (1976), 12.

¹¹⁷"Selective enforcement" is used in contradistinction to the concept of "full enforcement". Kadish, *Legal Norm and Discretion in the Police and Sentencing Process*

charges of arbitrariness and capriciousness as secret selective enforcement based on unarticulated premises.

As mentioned, upper-level administrative rule-making is one means whereby some control over some forms of police surveillance activity may be imposed. The police use of informants provides a ready example of an area where substantial improvement might be accomplished through the use of this device. The rationale behind advocating administrative rather than legislative controls over the police use of informants is based on the fact that much police-informer activity is of a spontaneous character. The approach of the police in relation to it is uncoordinated, and is dictated largely by present circumstances. The use of informants in such instances is essentially a spin-off of other, often routine police activities. A formal statutory structure purporting to regulate resort to the use of informants, such as one requiring judicial scrutiny and authorization, would create a cumbersome and unwieldy instrument; in essence it would create an impediment in a process which in this area operates best through informality.

At present, informant use is a form of completely unregulated police discretionary activity. Properly structured rules are an appropriate mechanism for confining this activity since they are easily implemented, and control introduced in this way is capable of being every bit as complete as under legislated standards. Legislative guidelines, if anything, are less comprehensive than properly conceived administrative rules. Statutes, because they are less flexible, rarely have the specificity that rules possess. Rules have an additional advantage over legislation in that the power to make rules accompanies the grant of discretion and need not be separately conferred.¹¹⁸ The police already do much policy-making through rule-making procedures,¹¹⁹ although present police rule-making procedures do not measure up to the standards suggested by theoreticians such as Davis and Goldstein. Through the open articulation of rules, policies become known and accountability is injected into the process.

There is another side to the question of the police use of informants. An informant may, in one sense, be any person who provides information of illegal activity to the police in any context. Thus the pedestrian who

(1962) 75 Harv. L. Rev. 904, 906, describes full enforcement as "the official assumption... that... the police are supposed to enforce all laws against all offenders in all circumstances." Davis, *supra*, note 109, 79-97, suggests that selective enforcement involves the use of discretion to determine whether and when to enforce particular laws. The purpose of his study is to find or invent ways to better control this kind of police discretion.

¹¹⁸Davis, *supra*, note 109, 98-120.

¹¹⁹*Ibid.* For example, police manuals give directions on such matters as conducting line-ups. Directives are also known to exist on matters such as high speed chases and the use of firearms.

sees a fleeing thief turn down an alleyway and conveys this information to the pursuing officer is an informant. One of the reasons why the citizen will assist the police in this way is because the police have taken the time to cultivate good community relations. The particular officer may even be a familiar figure known to the citizen due to his regular presence on foot patrol in that community. In this way police organization, and the order-maintenance or community service activities of the police serve the goal of crime prevention. Citizen cooperation, if it may be labelled as "informant activity", is certainly the benign face of that phenomenon.¹²⁰

It will be recalled that this discussion of the police use of informants was conducted in order to more fully explore the appropriateness of the use of administrative rules as a device to control some police investigatory activities. As mentioned, while some aspects of police surveillance are amenable to statutory and judicial controls, others are more properly subject to administrative controls. Whatever the context, be it statutory provisions, judicial oversight, or administrative rules, our

¹²⁰As important as citizen cooperation is to the process, it should be remembered that rank and file police cooperation is equally important. Even the best organized system can be frustrated by an unaccepting or ignorant police force. Hence the importance of adequate levels of police education and training: see *The Police — A Policy Paper*, *supra*, note 74, 25-7, 49-53; Grant, *Some Reflections on Police Education and Training in Canada* (1976) 18 *Crim. L.Q.* 218; Goldstein, *supra*, note 109, 257-307. However, education alone does not provide a complete answer. Skolnick, *supra*, note 29, 238-9, says the prevailing conception of police professionalism insufficiently addresses the values of a democratic legal order and the Rule of Law. It is also clear that he feels that this situation is not likely to be significantly altered without a transformation in the police understanding of why it is important to uphold the Rule of Law even though this has the effect of making their task more difficult: "The police are increasingly articulating a conception of professionalism based on a narrow view of managerial efficiency and organizational interest. A sociologist is not surprised at such a development. Under the rule of law it is not up to the agency of enforcement to generate the limitations governing its actions, and bureaucrats typically and understandably try to conceal the knowledge of their operations so are forced to make disclosures. But the police in a democracy are not merely bureaucrats. They are also, or can be conceived of as, legal officials, that is, men belonging to an institution charged with strengthening the rule of law in society. If professionalism is ever to resolve some of the strains between order and legality, it must be a professionalism based upon a deeper set of values than currently prevails in police literature and the 'professional' police department studies, whose operations are ordered on this literature.

"The needed philosophy of professionalism must rest on a set of values conveying the idea that the police are as much an institution dedicated to the achievement of legality in society as they are an official social organization designed to control misconduct through the invocation of punitive sanctions. The problem of police in a democratic society is not merely a matter of obtaining newer police cars, a higher order technical equipment or of recruiting men who have to their credit more years of education. What must occur is a significant alteration in the ideology of police, so that police 'professionalization' rests on the values of a democratic legal order, rather than on technological proficiency."

primary concern remains the effective control of discretion.¹²¹ Goldstein elaborates on the relation between police surveillance (an investigative method) and discretion:

An important segment of police activity, requiring many discretionary decisions, involves efforts to acquire evidence of certain kinds of criminal behavior while it is going on and, in some cases, before a victim recognizes that he or she has been victimized. The police in most large cities follow the activities of known professional burglars; lie in wait for street robbers and muggers; trace the sale and distribution of narcotics; check out individuals encountered under suspicious circumstances; keep tabs on suspected subversives; and acquire information on the activities of persons thought to be involved in organized crime.

Most of the methods commonly employed in these self-generated activities involve some degree of intrusion — albeit legal — into the affairs of private individuals. The decisions to utilize these methods, therefore, constitute one of the most important choices. They can decide to frisk; stop and question; search persons and property; use informants; conduct surveillances; eavesdrop or wiretap; take photographs and motion pictures; go undercover; infiltrate an organization; employ decoys; or in other ways place themselves in a situation that invites a person intent on committing a crime to attempt it.¹²²

While it is undeniably true that the police are involved in making enormously important discretionary decisions in these areas, nevertheless one may still question Goldstein's casual assertion that these self-generated activities which involve some degree of intrusion into the affairs of private individuals are legal. Many times they will be, but in other instances there is reason to question the legality of a particular investigative method. This is particularly the case where the technique employed occurs in advance of the commission of a crime.¹²³ One suspects that Davis comes closer to the mark when he concludes that "a good deal of discretion is illegal or of questionable legality".¹²⁴ By this one assumes that Davis means that a good deal of discretionary activity in which the police are involved is unlawful. In other words, the police,

¹²¹The problems posed in the area of police surveillance certainly require the exercise of discretion but the decisions involved are often quite different from those which arise in connection with other areas of discretionary activity. Goldstein, *supra*, note 109, 94-101, identifies six forms of discretion routinely exercised in police departments: (1) choosing objectives, (2) choosing from among methods for intervening, (3) choosing from among alternative forms of disposition, (4) choosing investigative methods, (5) determining field procedures and matters of internal administration, and (6) issuing licences and permits. For example, police administrators exercise a different kind of discretion when they decide how much of a department's resources should be directed toward dealing with serious crime as compared with such other functions as providing protection to persons who feel threatened, and coping with public inebriates.

¹²²Goldstein, *supra*, note 109, 98-9.

¹²³It should be noted that some instances of illegality will not be subject to effective sanction since the intrusion will go undetected or official discretion (*e.g.*, to prosecute) will be employed in such a way as to preclude the effective pursuit of a remedy.

¹²⁴Davis, *supra*, note 52, 4.

when choosing among possible choices of action or inaction (*i.e.*, exercising discretion), occasionally act illegally.

In the United States and Canada it has become increasingly apparent that the police establishment has for a period of some considerable time been quietly appropriating a great latitude in the gathering of intelligence.¹²⁵ Gross illegalities — burglaries, unauthorized wiretapping, “dirty tricks” and incitements to violence — have been uncovered in both countries.¹²⁶ Consequently, the public concern now extends beyond the legality of specific individual acts to a consideration of the over-all programs in which the police have become involved. In *Policing a Free Society* Goldstein notes the dimensions of this discretionary mandate which the police have appropriated for themselves and touches on the difficult questions which it gives rise to:

It is generally recognized that police need to gather certain types of intelligence. They are expected to seek information regarding criminal activity to prevent crimes from occurring and to solve those that occur. But what types of activities are likely to lead to commission of a criminal act? What organizations and individuals are to be kept under surveillance? And what criteria are to be employed in deciding on the methods to be used in gathering intelligence data? The police exercise a tremendous amount of discretion in making these judgments.¹²⁷

Perhaps because Goldstein encompasses within these remarks intelligence activities which pertain to threats to the national security he is able to state that the police are “*expected* to seek information regarding criminal activity to prevent crimes from occurring”. If one subtracts national security considerations (or the political intelligence function) from the equation, then arguably it would be preferable to state that the police are expected to heed information concerning incipient criminal activity in order to prevent such crimes from being carried forward to fruition.

X. The Relationship between Administrative Rule-Making and Police Discretion

The implication of the foregoing analysis is that it is neither necessary nor desirable — nor possible in practice — that all police activity be regulated by a statutory legal régime. Many acts and duties performed by the police do not require any form of legal regulation, and other more important tasks are more amenable to administrative controls than they are to statutory guidance. There has been a reluctance to acknowledge that the police are an administrative agency wielding a vast

¹²⁵This observation need not be restricted to intelligence as it also relates to political or national security matters. It has equal validity in terms of purely domestic or simple criminal surveillance activities.

¹²⁶See, generally, *McDonald Commission Second Report, supra*, note 101.

¹²⁷Goldstein, *supra*, note 109, 103.

amount of discretionary power. Davis, clearly the most influential and authoritative spokesman on this subject, details this reluctance and contends that the police are among the most important policy-makers in our entire society. They make far more discretionary determinations in individual cases than any other class of administrator. There is no close second.¹²⁸

Davis does not argue for the elimination of discretion. What he proposes is that discretion be properly structured and confined. The mechanism for structuring discretion is the promulgation of rules — not in an effort to “replace discretion with rules but to locate the proper balance between rule and discretion”.¹²⁹ There are a number of tangible benefits which flow from the equitable structuring of discretion:

- (1) A police administrator's capacity to exercise effective control over the infinite number of decisions being made by his personnel at the operating level will be improved.
- (2) Higher level decision-making should ensure that the decisions made will be based upon a more defensible weighing of competing considerations.
- (3) Operating personnel would have greater guidance and could be held to pre-announced standards.
- (4) Supervision would be made easier.
- (5) Problem identification would be assisted.
- (6) Opportunities for corruption would be lessened.
- (7) Training could be more realistic.
- (8) Levels of service and enforcement could be related much more directly to legislative appropriations.
- (9) Expertise that the police have developed could be more systematically utilized in deciding upon operating policies.
- (10) The police would be provided with a more realistic and healthier atmosphere in which to function.¹³⁰

Statutory regulations and administrative rules which systematize and order police activities are most important to the police function. At various points throughout the process they may be complementary regulators. Moreover, they may be intimately related. For example, when properly interpreted, the *Criminal Code* provisions advise a police officer as to the outer limits within which he may resort to the use of a gun. Administrative rules may offer him guidance in more specific terms, *e.g.*,

¹²⁸Davis, *supra*, note 52, 222.

¹²⁹*Ibid.*, 44.

¹³⁰This list has been culled from Goldstein, *supra*, note 109, 110-1.

they may enjoin him from shooting at a suspect in an area that is crowded with other persons. To take another example, they may tell him when to desist from a high speed automobile chase. In this parallel example the applicable statutory provisions again set the outer limits governing conduct.

In the area of police powers of surveillance the "usual need" — that of reduced discretion and more elaborate rules — prevails. While it is true that we cannot in many sectors eliminate all discretion (nor should we even if we could) there is a strong case to be made for the position that wherever police activity is by nature intrusive it should be highly regulated — either by statute or by sophisticated open rules which adequately "convey the objectives, priorities and operating philosophy of the [police] agency".¹³¹ As noted, intrusive actions may be either overt or covert. The suspect may be aware of the surveillance and suffer a sense of invasion, or he may remain totally unaware of the clandestine probe. It should be immaterial whether the action is overt or surreptitious as the values embodied in the rules promulgated to regulate the activity remain the same.

The structuring of discretion through the creation of rules is not a suggestion which has been greeted with much enthusiasm by the police community. In the area of selective enforcement senior police bureaucrats have strongly disagreed with the notion that the police be recognized as having broad discretion. They argue that this kind of public image "would detract from [the police] image of objectivity,... would open them up to charges of partiality,... would increase the potential for corrupt practices, and that it would subject to public debate aspects of the police function that might be better left in their current state".¹³² Davis and Goldstein, among others, convincingly make the case. In reply that the failure to acknowledge the discretionary nature of police functioning accounts, at least in part, for some of the most common short-comings in police operations.

The fear has been voiced that a too extensive structuring of discretion, by the application of administrative rules, would reduce the police officer to the level of an automaton.¹³³ This, of course, is an unrealistic fear, as the following extract indicates:

The picture of the constable which emerges from all of this is something of a paradox. On the one hand he is captive on the bottom rung of a ladder of authority. On the other hand he is a unique individual set loose with a tremendous arsenal of weaponry, and the decisions involving the use or non-use of that store of power are by and large his, and his alone.

¹³¹*Ibid.*, 112.

¹³²*Ibid.*, 107.

¹³³*Ibid.*, 111.

Although there are many who would eschew any analogy between the policeman on the beat and the soldier in the field the two phenomena nevertheless provide suitable features of comparison.

The panorama of events which conceivably would compel the intervention of the constable is immense. In the real world which he confronts the constable formulates policy, mediates disputes, and makes decisions. He does so notwithstanding the pervasive web of authority which surrounds him. Directives, guidelines regulations and statutory restrictions may or may not be relevant to the exigencies of the particular situation which confronts the constable. The issues are complex and do not afford simple solutions.¹³⁴

The structuring of discretion does not mean that the police officer will forfeit all freedom or lose the ability to choose among competing courses of action. Ideally, rules will assist in removing caprice and arbitrariness from the process.

The formulation of rules would undoubtedly benefit the process of regulation and rationalization of the power to conduct surveillance. Some of the policy questions which could be answered through the open formulation and articulation of rules are:

- (1) When and in what circumstances is surveillance to be conducted?
- (2) In what ways and with what resources should it be carried out?
- (3) For how long should it be maintained?
- (4) Against which targets should it be directed?
- (5) Whether and/or when to pay informants or refrain from charging them?
- (6) Whether to share information with other forces or government departments?

In conclusion, the reform and improvement of police discretionary practices through administrative rule-making is far from being regarded as a heretical notion. It has won the support and advocacy of many spokesmen¹³⁵ both within and outside of the police establishment.

¹³⁴S. Cohen, *Due Process of Law* (1977), 49-50.

¹³⁵See *The Challenge of Crime in a Free Society*, *supra*, note 59, 103; United States: President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (1967), 21-5; United States: National Advisory Commission on Criminal Justice Standards and Goals, *Police* (1973), 53-5; American Bar Association, *The Urban Police Function* (1973), 121-33. All of these sources are cited in Goldstein, *supra*, note 109, 116, who also notes the advocacy of this approach by the International Association of Chiefs of Police (I.A.C.P.). B. Grosman, *Police Command [:] Decisions & Discretion* (1975), 93, 145, also acknowledges the need for rules to structure discretionary action. The *Task Force on Policing in Ontario*, *supra*, note 16, 20-3, while not explicitly referring to administrative rulemaking *per se*, advocates a movement away from the military tradition in Ontario police work combined with a new emphasis on professional management for policing. This approach is certainly compatible with management structures which are heavily reliant upon administrative rule-making.

XI. Privacy

The police in modern society are not simply a loose collection of public servants performing *ad hoc* tasks in response to specific situational demands involving public order. Modern police organization is complex; police tasks and functions are diverse, and the mechanism for directing and ordering the discharge of a multiplicity of duties and assignments involves a sophisticated bureaucratic structure.¹³⁶

The police bureaucracy, like other complex bureaucracies in society, has a highly developed record-keeping, information-gathering aspect. This aspect of police business is in large measure the natural by-product of the performance of the various duties entrusted to the police as a public agency. With the growth and increasing sophistication of the police record-keeping function have come new and vexing problems. These problems revolve around the potentially conflicting demands of individual privacy and effective law enforcement. The gathering and handling of personal information by law enforcement agencies raises difficult issues of privacy protection.

A. Privacy: Problems of Definition

Most modern considerations of privacy in a legal context begin with the definition of privacy provided by Alan F. Westin in his seminal work on *Privacy and Freedom*: "Privacy is the claim of individuals, groups or institutions to determine for themselves when, how, and to what extent information about them is to be communicated to others."¹³⁷

Whether privacy is a right, an interest or a value has been much debated over the years, and even today, after much attention has been focussed on this topic, we are far from achieving a consensus as to its nature. Neither is there unanimity as to the usefulness of the other aspects of Westin's definition of privacy, or of any other definition for that matter.¹³⁸

Raymond Wacks, a British commentator, contends that "the currency of privacy has been so devalued that it no longer warrants, if it ever did, serious consideration as a legal term of art."¹³⁹

Any attempt to restore [privacy] to what it quintessentially is — an interest of the personality — seems doomed to fail for it comes too late. 'Privacy' has become as

¹³⁶See *The Police — A Policy Paper*, *supra*, note 74, for a development and analysis of the organizational attributes of the modern Canadian police bureaucracy.

¹³⁷A. Westin, *Privacy and Freedom* (1967), 7.

¹³⁸A good discussion of competing theories and definitions is to be found in Burns, *The Law and Privacy: The Canadian Experience* (1976) 54 Can. Bar Rev. 1, 2-12. This article is heavily relied upon in both this section and in the next section which deals with the "right" to privacy.

¹³⁹R. Wacks, *The Protection of Privacy* (1980), 10.

nebulous a concept as 'happiness' or 'security'. Except as a general abstraction of an underlying value, it should not be used as a means to describe legal right or cause of action.¹⁴⁰

On the other hand, Rule, McAdam *et al.* alter Westin's basic definition only slightly when they propose as a "single-global definition for privacy" the "restriction of another's access to information about oneself".¹⁴¹ This designation encompasses restrictions for both what they identify as "aesthetic" and "strategic" reasons.¹⁴² Other definitions are pithier but to the same effect. Cooley described privacy in now classic terms as simply "the right to be let alone".¹⁴³

Critics of Westin's definition object to the characterization of privacy as a "right" or "claim"¹⁴⁴ and note that the definition fails to encompass situations "wherein communications are made *to* a person such as unsolicited telephone calls"¹⁴⁵ — a particularly important example in the context of wiretapping and other forms of electronic surveillance.

Parker proposed a physically-oriented definition of privacy posited on our ability to control those who can "sense" us: "Privacy is control over when and by whom the various parts of us can be sensed by others."¹⁴⁶ "Sense" in this context means observation through any of the senses — vision, hearing, touch, smell or taste.

Prosser, dissatisfied by the shortcomings of attempts to articulate so general a right as privacy, concentrated instead upon particular instances wherein rights of privacy have received recognition.¹⁴⁷ This "functional" approach, based on decided American cases and statutes, has some descriptive uses but is of decidedly limited usefulness in analysing the law in a Canadian context.¹⁴⁸

¹⁴⁰*Ibid.*, 21.

¹⁴¹J. Rule, D. McAdam, L. Stearns & D. Uglow, *The Politics of Privacy* (1980), 23.

¹⁴²By "aesthetic privacy" Rule, *et al.*, *ibid.*, 22, mean "the restriction of personal information as an end in itself. These are cases where disclosure is inherently embarrassing or distressing." Strategic privacy by contrast is "the restriction of personal information as a means to some other end." In these cases privacy facilitates the pursuit of some other interest as where a general is concerned to conceal troop movements from the enemy, or where one conceals future employment plans from one's current employer while seeking a new position elsewhere.

¹⁴³T. Cooley, *Treatise on the Law of Torts*, 2d ed. (1888), 29.

¹⁴⁴Burns, *supra*, note 138, 7, summarizing Lusky, *Invasion of Privacy: A Clarification of Concepts* (1972) 72 Colum. L. Rev. 693.

¹⁴⁵Parker, *A Definition of Privacy* (1974) 27 Rutgers L. Rev. 275; see Burns' criticism of this treatment, *supra*, note 138, 7-10.

¹⁴⁶*Ibid.*

¹⁴⁷Prosser, *Privacy* (1960) 48 Calif. L. Rev. 383; see also the rejoinder by Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser* (1964) 39 N.Y.U. L. Rev. 963.

¹⁴⁸Burns, *supra*, note 138, 11, suggests that Prosser's "interest analysis" if combined with a conception of privacy (the right to be let alone) which regards it not as a rule but as

Evidently it is difficult to develop a single comprehensive definition for privacy, a term which as we have seen is employed to describe a variety of related affairs or conditions.¹⁴⁹

a principle providing guidance and revealing directions would yield a sound basis upon which a coherent and workable law of privacy could develop. Referring to three provincial privacy enactments he notes that none have attempted to define privacy as such but rather they provide guidance in the form of certain factors to which regard is to be had by the tribunal of fact in determining whether or not an invasion of privacy has occurred. Burns says: "This 'open-textured' legislative approach, which is not very different from the judicial development of the law of negligence, seems most appropriate. The tribunal will exercise its own sense of what is proper in the circumstances in deciding whether there has or has not been a breach of privacy subject to the legislative directions and strictures. It may not be entirely satisfactory from a theoretician's perspective but from the viewpoint of efficiency and simplicity it is arguably best. In any event, until such time as a definition of privacy is constructed that incorporates the distinct and discrete legally protected interests we understand to fall under that term, the present 'functional' direction appears to be the only way to stumble."

¹⁴⁹Two recent government inquiries into the subject — Canada: Department of Justice and Department of Communications, *Privacy and Computers* (1972), 13-4, and Ontario: Commission on Freedom of Information and Individual Privacy, *Public Government for Private People* (1980), vol. 3, *Protection of Privacy*, 499-500 — have found it helpful to isolate the different contexts in which the claims of invasion of privacy arise. These bodies both identified and defined "territorial privacy", "privacy of the person", and "privacy in the information context" in the following terms: "(a) *Territorial Privacy*: Claims to privacy advanced in a territorial or spatial sense are related historically, legally and conceptually to property. There is a physical domain within which a claim to be left in solitude and tranquility is advanced and is recognized. A man's home is his castle. At home he may not be disturbed by trespassers, noxious odours, loud noises, or peeping toms. No one may enter without his permission, except by lawful warrant. (b) *Privacy of the Person*: In the second sense, a claim to the privacy of one's person is protected by laws guaranteeing freedom of movement and expression, prohibiting physical assault, and restricting unwarranted search or seizure of the person. This notion, like the territorial one, is spatial in the sense that the physical person is deemed to be surrounded by a bubble or aura protecting him from physical harassment. But, unlike physical property, this 'personal space' is not bounded by real walls and fences, but by legal norms and social values. Furthermore, this sense of privacy transcends the physical and is aimed essentially at protecting the dignity of the human person. Our persons were protected not so much against the physical search (the law gives physical protection in other ways) as against the indignity of the search, its invasion of the person in a moral sense. (c) *Privacy in the Information Context*: The third category of claims to privacy was of primary relevance to the Task Force. It is based essentially on a notion of the dignity and integrity of the individual, and on their relationship to information about him. This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit. And this is so whether or not the information is subsequently communicated accurately, and whether or not it is potentially damaging to his reputation, his pocket-book, or his prospects; the context is of course the controlling factor in determining whether or not particular information will be damaging. Competing social values may require that an individual disclose certain information to particular authorities under certain circumstances (e.g., census information). He may decide to make it available in order to obtain certain benefits (c.g., credit information or information imparted to his lawyer to win a lawsuit or to his confessor to win salvation). He may also share it quite willingly with his intimates. Nevertheless, he

B. The "Right" to Privacy

The "right to privacy" has been described as "the most comprehensive of rights and the right most valued by civilized man".¹⁵⁰ In the United States its origins have been traced to the Constitution, though not without controversy.¹⁵¹ In Canada its legal basis is murky and open to some doubt. However, s. 1 (a) of the *Canadian Bill of Rights*¹⁵² guarantees "the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law". A similar provision is to be found in s. 7 of Canada's newly proclaimed *Charter of Rights and Freedoms*. Conceptually it is difficult — some would say impossible — to conceive of privacy as severable from the notion of individual liberty and autonomy. Life, liberty, security of the person and enjoyment of property are only meaningfully guaranteed if privacy is an implicit condition in the grant of such rights. Moreover, privacy is explicitly guaranteed in the *International Declaration of Human Rights*,¹⁵³ an instrument whose passage Canada supported and one for which it still espouses support. Article 12 of the Declaration states: "No one shall be subjected to arbitrary interference with his privacy, family, home, or correspondence, nor to attacks upon his honour or reputation. Everyone has the right to the protection of the law against such attacks."

Privacy cannot be insisted upon as an absolute. Since rights often conflict with one another they must possess a degree of pliancy. In certain circumstances an individual's right to privacy may be expected to yield in deference to the competing demands of other rights such as the rights of a free press, the right to free speech, or the public's right to know. Although some would argue that privacy possesses a fundamental nature or character, as a protected interest it has spawned remarkably little litigation in this country.¹⁵⁴

has a basic and continuing interest in what happens to this information, and in controlling access to it."

¹⁵⁰*Olmstead v. United States* 277 U.S. 438, 478 (1928) per Brandeis J.

¹⁵¹*Griswold v. Connecticut* 381 U.S. 479 (1965).

¹⁵²R.S.C. 1970, App. III. See also *Canada Act, 1982*, Schedule B, *The Constitution Act, 1982*, Part I, *The Canadian Charter of Rights and Freedoms*.

¹⁵³G.A. Res. 217 A, U.N. Doc. A/810 71 (1948).

¹⁵⁴This is particularly the case where the cause of action is said to be founded on an "invasion of privacy" *per se*. One such attempt was *Krouse v. Chrysler Canada Ltd* [1970] 3 O.R. 135 (H.C.). The plaintiff, a professional football player, sued for damages alleging invasion of privacy by the defendant's use of his photograph in promoting its product. The case proceeded to trial where a decision was rendered without the necessity of relying on the privacy cause of action: [1972] 2 O.R. 133 (H.C.). That decision in turn was appealed to the Court of Appeal which reversed the decision below. The privacy issue was not argued at this stage: (1974) 1 O.R. (2d) 225 (C.A.).

Burns, *supra*, note 138, 24-8, makes the point that although invasion of privacy has

In the field of civil law the chief developments have been the enactment of provincial privacy legislation in three provinces,¹⁵⁵ the passage of the *Canadian Human Rights Act*,¹⁵⁶ as well as the recent passage of Bill C-43 which amends the *Human Rights Act* and contains both the new *Access to Information Act* and the *Privacy Act*.^{156a} There are also a variety of criminal and quasi-criminal provisions that are designed to protect privacy interests or do so incidentally.¹⁵⁷ Burns offers the examples of the criminal offence of publishing a defamatory libel,¹⁵⁸ disturbance¹⁵⁹ and loitering offences (particularly prowling at night on another's property near a dwelling house),¹⁶⁰ and spreading false news.¹⁶¹ The *Criminal Code* is of course much wider than this and contains prohibitions concerning a whole host of non-consensual intrusions of strangers upon the physical and territorial privacy of the individual.

The enactment of the *Protection of Privacy Act*¹⁶² greatly expanded the *Criminal Code's* ability to police invasions of privacy. Indeed, the

not gained much prominence as a cause of action in this country there are nevertheless numerous causes of action recognized at common law and equity that do protect privacy interests. He establishes that "in the main these are available where privacy and property or reputation of interests intersect and these have been granted a measure of legal protection". Burns also documents how various discrete statutory provisions, both provincial and federal have granted a measure of reinforcement to the right to privacy.

¹⁵⁵See Manitoba, *The Privacy Act*, R.S.M. 1970, c. P-125; Saskatchewan, *The Privacy Act*, R.S.S. 1978, c. P-24; British Columbia, *The Privacy Act*, R.S.B.C. 1979, c. 336. Burns, *supra*, note 138, 32-9, notes that by recognizing privacy as an interest worthy of legal protection in its own right, the provincial privacy laws represent an advance over the previous position of privacy under Anglo-Canadian common law, which did not recognize a right to privacy. Under certain circumstances these Acts allow for redress where there has been a wrongful invasion of privacy. None of the three Acts require a plaintiff to demonstrate actual financial loss in order to succeed. The invasion or violation of privacy is itself deemed to be sufficient injury to merit compensation.

¹⁵⁶*Canadian Human Rights Act*, S.C. 1976-7, c. 33, ss. 49-62, ensures the protection of personal privacy in the context of government data handling practices. The purpose of Part IV of the *Act* is to guarantee to individuals rights of access and correction with respect to personal information about them held by federal government departments and institutions, and to control the use and dissemination of this information. Part IV of the *Act* is to be repealed and replaced by more comprehensive legislation. See *infra*, note 156a. This is discussed in some detail in *Public Government for Private People*, *supra*, note 149, vol. 3, 627-36.

^{156a}Enhanced access to personal information held by or under the control of government will be possible under Bill C-43, the *Access to Information Act* (Schedule I) and the *Privacy Act* (Schedule II), 32d Parl., 1st Sess., passed by the House of Commons on 28 June 1982.

¹⁵⁷See Burns, *supra*, note 138, 25.

¹⁵⁸*Criminal Code*, R.S.C. 1970, c. C-34, s. 264, as am.

¹⁵⁹*Criminal Code*, s. 171.

¹⁶⁰*Criminal Code*, s. 173.

¹⁶¹*Criminal Code*, s. 177.

¹⁶²S.C. 1973-4, c. 50. This legislation was subsequently amended by the *Criminal Law Amendment Act*, 1977, S.C. 1976-7, c. 53.

express purpose of these *Criminal Code* amendments was to create criminal offences where none had previously existed for the interception of private communications and the disclosure of the contents of such communications. The *Act* also prohibited the possession of electronic surveillance devices which were designed for the surreptitious interception of private communications. The *Protection of Privacy Act* also effected changes in the *Official Secrets Act*,¹⁶³ not from the point of view of protecting privacy, but rather to accomplish the legitimization of officially sanctioned electronic surveillance which had as its purpose the gathering of intelligence where the national interest or security was at stake. Amendments to the *Criminal Code* also had the effect of legitimizing officially sanctioned electronic surveillance. However, Parliament expressly withheld validation of an intelligence gathering function for the police where ordinary crime was involved.

It appears that a legal interest is developing in this country which it is perhaps now appropriate to describe as a "right" to privacy.¹⁶⁴ Canada does not possess a comprehensive, integrated set of legal rules respecting all aspects of the interest in privacy. Certain aspects of the interest in privacy are well protected by the civil and criminal law. What is problematic is the ability of the individual to be free from unjustified official spying and intelligence gathering — whether such surveillance be in the form of the surreptitious interception of private communications or the acquisition and use of information about the individual. Bound up in the resolution of this problem is the creation of a mechanism for conferring meaningful, legally enforceable rights upon the individual affected. This is no easy task, particularly in the area of law enforcement.

C. *Privacy, Intelligence Gathering and Law Enforcement*¹⁶⁵

Government studies have repeatedly stressed the importance of a police intelligence function. The Ouimet Committee in its 1969 report stated:

One of the most important aspects of police work in the field of crime prevention and the detection and apprehension of offenders involves the gathering of information with respect to intended crimes and the organization of criminal groups. Police intelligence may be related to the task of obtaining evidence to sustain a specific prosecution, or it may have longer term objectives related to acquiring knowledge of the existence of criminal organizations; the scope of their operations and their plans and methods of operation in order to be able to effectively combat them.¹⁶⁶

¹⁶³R.S.C. 1970, c. 0-3.

¹⁶⁴See *Privacy and Intrusions*, *supra*, note 97, 12: "for the purpose of the law, it is only appropriate to speak of a 'right' to privacy where the legal system affords an enforceable remedy for interference with the interest in privacy".

¹⁶⁵This analysis specifically excludes consideration of surveillance and intelligence activity relating to political subversion and national security.

¹⁶⁶*Ouimet Report*, *supra*, note 14, 75.

In the United States the President's Commission on Law Enforcement and the Administration of Justice identified two different forms of intelligence:

Intelligence deals with all of the things that should be known before initiating a course of action. In the context of organized crime there are two basic types of intelligence information: *tactical* and *strategic*. Tactical intelligence is the information obtained for specific organized crime prosecutions. Strategic intelligence is the information regarding the capabilities, intentions, and vulnerabilities of organized crime groups. For example, the body of knowledge built up by the FBI concerning the structure, membership, activities, and purposes of La Cosa Nostra represents significant strategic intelligence... .

A body of strategic intelligence information would enable agencies to predict what directions organized crime might take, which industries it might try to penetrate, and how it might infiltrate. Law enforcement and regulatory agencies could then develop plans to destroy the organizational framework and coherence of the criminal cartels.¹⁶⁷

In a similar vein, the Ontario Commission on Freedom of Information and Individual Privacy¹⁶⁸ recently noted the usefulness in distinguishing between two major types of law enforcement information-gathering activity:¹⁶⁹ the investigation of specific occurrences and the gathering of "intelligence".¹⁷⁰ "Occurrence investigation" refers to a specific incident, while intelligence gathering is concerned with a pattern of occurrences, or with the prevention of occurrences".¹⁷¹

Irrespective of whether information-gathering is event-specific or generalized and prophylactic, it may be intrusive or invade individual privacy. Therefore, the important policy question to be addressed is "when is intrusive law enforcement activity valid or legitimate?"¹⁷² As the earlier discussion of the Rule of Law has indicated, there can be no quarrel with event-specific investigatory techniques which are congruent

¹⁶⁷*The Challenge of Crime in a Free Society*, *supra*, note 59, 199.

¹⁶⁸*Public Government for Private People*, *supra*, note 149, vol. 3, 554.

¹⁶⁹*Ibid.*

¹⁷⁰"Intelligence" in this context is further defined, *ibid.*, as "concerning crime, where on-going efforts are devoted to the detection and prosecution of crime, and security operations which are designed to identify and prevent the realization of threats to the government and political stability of the province."

¹⁷¹*Ibid.*

¹⁷²The word "intrusion" has not been defined thus far. For purposes of this discussion, behaviour is intrusive when it "involves invasion or penetration of the individual's private world in some way": *Privacy and Intrusions*, *supra*, note 97, 15. Certain police powers by nature violate individual privacy. The clearest example of this is the search power. The Rule of Law does not declare that there is to be no power to search because the resort to the use of the power will restrict liberty and compromise freedom. Rather, the Rule of Law ensures that the intrusions into the lives of citizens, *e.g.*, under the search power, will not be arbitrary or random but will be dependent upon the commission of a crime. Thus there is no right to a generalized search and no intrusion without specific justification, *i.e.*, "reasonable/probable cause".

with the requisites of the Rule of Law. In addition, there should be no dispute as to the right or ability of law enforcement agencies to gather information in a manner that is non-intrusive and does *not* invade the realm of individual privacy. Thus, provided that the final compilation of information together with such opinion and conclusions as are drawn are held in confidence by the investigating agency, there seems little reason to doubt the right of law enforcement agencies to collect and report upon information about individuals that is already in the public domain. Similarly, there can be little doubt as to the right of the police to collect, collate, store or assemble information arising out of day to day police operations.¹⁷³ As regards this latter type of information, however, it is submitted that access to such information should be administratively controlled and restricted. Guidelines should detail to whom, when, and in what circumstances access to a requesting agency or officer should be authorized. Presumably, one triggering criterion, at least insofar as ordinary crime is concerned, would be that the information is required in the course of the investigation of a specific occurrence.

The foregoing remarks are subject to certain important caveats. Such information gathering practices are assumed to be employed only in relation to event-specific investigations. They should not be taken to signal approval of any organizational arrangement within a police department or agency whereby the collection, collation and storage of information is systematically and routinely assembled so as to assist in domestic intelligence gathering or spying activities.

The police in carrying out their various functions and duties will incidentally collect or become privy to a great deal of useful information which may ultimately assist in the detection or investigation of crime. For example, one of the obvious benefits of the cultivation of good police community relations is the fact that citizens will be more likely to volunteer information as to the commission of crime to the police than would be the case if the police were viewed as an alien force in the community. Such information gathering may be seen to fall within the legitimate sphere of police intelligence activity.

Intelligence may legitimately be gathered in other ways as well. Informants, or criminals "bargaining" for more lenient disposition or treatment on a particular charge while under investigation, may "volunteer" information as to other illegal activities.

These examples provide a bare tracing of the legitimate shape of police intelligence activities. The gathering of information from

¹⁷³Included in such information would be individual criminal record synopses; information about wanted or missing persons; persons prohibited from driving motor vehicles or possessing firearms; information as to stolen property or firearms, *etc.*

government agencies which have a duty to hold their records in confidence clearly falls outside this jurisdiction. An exception in favour of law enforcement agencies cannot be presumed. It must be explicit and express.¹⁷⁴

The gathering and handling of personal information by law enforcement agencies raises particularly difficult issues of privacy protection. It is inherent in the nature of law enforcement activity that highly sensitive personal information will be gathered for the purpose of making law enforcement decisions relating to the data subject. Data will be gathered without the knowledge or consent of the data subject by methods which would, by any reasonable standard, be considered to be invasive of personal privacy. Public tolerance of these invasive practices is premised, of course, on the need for effective law enforcement as a means of preserving public order. On the other hand, it is widely accepted that there are limits to the extent to which the public interest in privacy protection should be sacrificed to the public interest in effective law enforcement.¹⁷⁵

In Canada two sophisticated computerized systems for the collection, storing and dissemination of law enforcement information are now in place: the Canadian Police Information Centre and the Automated Criminal Intelligence System.¹⁷⁶ These systems assist in the coordination of law enforcement information. However, the use of computer technology does create certain unique hazards. For example, "the need to convert detailed information (sometimes based on opinion rather than fact) to coded computer language may reduce its accuracy".¹⁷⁷ The importance of this shortcoming is expanded upon in the following extract:

With respect to the scope of intelligence record keeping in general, it is important to remember that the subjects of such surveillance may be individuals who have never been convicted, or indeed accused, of any criminal act. Moreover, the names of persons who have merely had innocent contact with the subject of surveillance may appear in intelligence files and in the computerized name file. The broad range of potential sources of such information and the unverifiable nature of some of the information which may find its way into the system gives rise to classic informational privacy problems and suggests that the scope of such surveillance should be carefully limited to cases where a clear need for it can be demonstrated.¹⁷⁸

At present, no clear statutory standard regulates the scope of police record-keeping in Canada and, as the Ontario Freedom of Information Commission attests, neither has a power of inspection and comment been

¹⁷⁴The *McDonald Commission Second Report*, *supra*, note 101, vol. 2, 1029, recommends that law enforcement access to government agency files be regulated under the same terms and conditions as obtain under s. 178.1 of the *Criminal Code* with regard to electronic surveillance. Unfortunately, as presently designed, this is a seriously flawed control mechanism.

¹⁷⁵*Public Government for Private People*, *supra*, note 149, vol. 3, 553-4.

¹⁷⁶These systems, their purposes, and the methods of access to them are described, *ibid.*, 555-6.

¹⁷⁷*Ibid.*, 557.

¹⁷⁸*Ibid.*, 557-8.

bestowed on any independent body or official.¹⁷⁹ In Canada there is a demonstrable need for some entity to be entrusted with broad powers to examine and comment upon law enforcement intelligence files. Of course, *subject* access to files containing personal information, rather than third party access, is regarded as the primary device for "ensuring that fair information practices are adopted by agencies which gather and use such information."¹⁸⁰ However, law enforcement information systems are problematic inasmuch as they contain information as to the identity of informants, law enforcement techniques and other sensitive material mandating secrecy. The Ontario Commission's survey of other jurisdictions' approaches to this problem¹⁸¹ reveals various attempts in freedom of information and privacy legislation to "draft exemptions from the general principle of subject access which would protect the need for secrecy... while assuring citizens that any personal information falling outside this range of protected interests is accessible".¹⁸² In Canada the law at present appears to be that law enforcement agencies are under no legal obligation to give data subjects access to files which contain information about them.¹⁸³

One other important area where the privacy interest and law enforcement concerns intersect occurs where preferential, and perhaps, illegal access to government data banks is given to law enforcement authorities. The McDonald Commission has recently confirmed allegations that the R.C.M.P. has had relatively routine access to information pertaining to, among other things, unemployment insurance, social insurance and taxation.¹⁸⁴ The Krever Commission in Ontario has examined official access to information concerning medical health (including psychiatric assessments).¹⁸⁵ The Ontario Freedom of Information Commission in its report examined and found a greater level of

¹⁷⁹*Ibid.*, 558. The report goes on to detail the fact that the state of New South Wales, Australia and Sweden and France all confer broad powers on public officials to examine and report on law enforcement intelligence files.

¹⁸⁰*Ibid.*, 560.

¹⁸¹*Ibid.*; see, in particular, chaps 6 and 29.

¹⁸²*Ibid.*, 560.

¹⁸³Note the specific exemptions in Part IV of the *Canadian Human Rights Act*, S.C. 1976-7, c. 33, s. 53, which allow the Minister to refrain from disclosure where the information was obtained or prepared by any government institution that is an investigative body in the course of investigations pertaining to the course or suppression of crime generally, or in the course of investigations pertaining to particular offences against any Act of Parliament. This situation is largely unchanged in Bill C-43.

¹⁸⁴See *McDonald Commission Second Report*, *supra*, note 101, vol. 1, 583-92; vol. 2, 1026-9.

¹⁸⁵See Ontario, *Report of the Commission of Inquiry into the Confidentiality of Health Information* (1980), vol. 2, 14-9, 38-48 [hereinafter *Krever Commission Report*].

access by law enforcement agencies to driver and vehicle registry data¹⁸⁶ than that enjoyed by the public at large.

The specific findings of these bodies confirm what had heretofore only been suspected, namely, that there exists a serious potential for abuse. At present, many government bureaucracies lack a policy concerning information-sharing with law enforcement agencies; and in other areas such as taxation, where the law guarantees confidentiality, a loose attitude prevails.^{186a} The inevitable centralizing of data in computer information banks, which presents the possibility of compiling all-encompassing personal information dossiers on individuals, can only serve to heighten or magnify this potential for abuse.

Recent proposals to amend federal laws in order to allow police investigators access to personal information possessed by federal government institutions have been overly generous. The most recent privacy bill to make its way before Parliament, Bill C-43, which contains the new *Privacy Act*, advocates release of information to a designated investigative body carrying out a lawful investigation provided that the request for information was in writing and described the information to be disclosed.¹⁸⁷ This initiative has been criticized for failing to provide a sufficiently clear test of necessity to justify access to the information.¹⁸⁸

Parliament and the provincial legislatures have all created plans and bureaucratic schemes to administer various programmes which, when operating, by their very nature result in the accumulation of sensitive personal information. These plans — which include income tax, old age security, family allowance and the Canada Pension Plan — were carefully conceived and over the years they have been cautiously refined and amended in various ways. They all share a noteworthy characteristic in that they bar disclosure of such accumulated personal information without exception. The omission with respect to the information needs of law enforcement agencies thus can hardly be characterized as an oversight. Undoubtedly, much that is contained within the data banks and files of these government bureaucracies would be of use in ordinary criminal investigations.¹⁸⁹ However, mere usefulness cannot be a

^{186a}See Toope & Young, *The Confidentiality of Tax Returns under Canadian Law* (1982) 27 McGill L.J. 479.

¹⁸⁷This legislation, in draft form, is discussed in the *McDonald Commission Second Report*, *supra*, note 101, vol. 2, 1026-8. See also the recent Canadian Bar Association study by M. Rankin, *Freedom of Information and the McMurtry Letter: A Response to Provincial Concerns* (1982), 53 *et seq.*

¹⁸⁸*Ibid.*, 1028. The Commission also criticized the legislation for "not going far enough" due to its failure to provide access to income tax, family allowance, old age security and Canada Pension Plan information all of which are protected by Acts of Parliament which bar disclosure of information even with permission of the Minister.

¹⁸⁹The various uses to which personal information from government data banks and

sufficient justification where the integrity and effectiveness of a particular programme depends upon promised confidentiality in its information gathering, and information storing, processes. Nevertheless, it is doubtful that confidentiality is compromised in any significant way by the release of simple biographical information such as an individual's name, address, phone number, date and place of birth, occupation and physical description. Absolute barriers to the release of such information to law enforcement agencies for the purpose of conducting a criminal investigation should be removed.¹⁹⁰

The justification for this increment to the lawful information gathering capability of the police is quite simple. The grant of this power involves no serious incursion into the realm of individual privacy or liberty, but it does measurably advance the crime control capacity of the police. This is *not* a situation involving the curtailment of a basic right. Even if one concedes the possibility that this proposal involves some curtailment, it will be minimal in extent and is outweighed by the magnitude and social importance of the benefits conferred by such an initiative.¹⁹¹

The McDonald Commission recommends that all information held by the federal government, with the exception of census information held by Statistics Canada, should be accessible to the police through a system of judicially granted authorizations subject to the same terms and conditions as are now found in s. 178.1 of the *Criminal Code* with regard to electronic surveillance.¹⁹² The Krever Commission adopted a different approach when considering the problem of police access to medical information. With regard to O.H.I.P. health information Mr Justice Krever recommends

that no employee of OHIP be permitted to release health information to any police force without a search warrant. The district manager of OHIP or a person designated by him or her in writing at a district or satellite office should, however, be permitted to answer, yes or no, to the question of any police officer whether OHIP has specific health information about a named person.¹⁹³

The McDonald Commission offers an explanation as to why a search warrant regime, in contrast to a wiretap judicial authorization model,

dossiers might be put are discussed in the *McDonald Commission Second Report, ibid.*, vol. 2, 1026-7.

¹⁹⁰The *McDonald Commission Second Report, ibid.*, vol. 3, 1029, recommends release of such information upon the written request of the investigating agency. This is arguably an insufficient check. Some administrative mechanism in order to ensure that circumstances of demonstrable necessity exist should be devised.

¹⁹¹As to rights and their possible curtailment, see Ashworth, *Concepts of Criminal Justice* [1979] Crim. L. R. 412, 422-5.

¹⁹²*McDonald Commission Second Report, supra*, note 101, 1029.

¹⁹³*Krever Commission Report, supra*, note 185, vol. 2, 69.

would be inappropriate to the needs of a national security investigation but fails to explain its insufficiency in relation to ordinary criminal investigations.¹⁹⁴ However, present wiretap controls — the device the McDonald Commission urges us to employ — are seriously flawed. Consequently, any movement to legislate by analogy to this scheme should be undertaken only with the gravest of reservations, and certainly only after major improvements to that scheme have been made. Furthermore, it should be noted that although the Krever Commission recognizes the public interest in allowing the police in general the right to more information than they are now entitled to obtain,¹⁹⁵ the Commission is cautious in its approach and it certainly does not advocate throwing open all the doors for the purposes of law enforcement investigation.

The case for allowing the police greater access to personal, as opposed to biographical, information may, and this point is not conceded, on close examination ultimately prove well-founded in some instances. The careful inquiry of the Krever Commission into just one aspect of the problem arguably demonstrates the need in that context for *some* additional, highly controlled access. The McDonald Commission made more general recommendations for enhanced access. At the same time, it should be noted, it also insisted that any additional grant of access be highly controlled and restricted. That Commission, however, failed to conclusively demonstrate the need for greater access to personal information on a case by case basis. It is difficult to understand why its reasoning, which seeks to justify the one area where it would preserve complete inviolability — census information — does not apply with equal vigour to personal information collected for other federal purposes, such as taxation.¹⁹⁶

This area requires further study. Canada's concern over freedom of information and protection of privacy has been late in arriving. Nevertheless, it is now manifest in the form of government inquiries, in the enactment of freedom of information and privacy legislation,¹⁹⁷ and in the

¹⁹⁴*McDonald Commission Second Report, supra*, note 101, vol. 2, 1059.

¹⁹⁵*Supra*, note 185, vol. 2, 45.

¹⁹⁶*McDonald Commission Second Report, supra*, note 101, vol. 1, 587, states in this regard: "One category of federal government information which it would be reasonable to exempt from the scope of legislation giving access to otherwise protected bodies of information is the census information compiled by Statistics Canada. While such information may not be more personal than that found in some other federal data banks, the tradition in this country has been very strongly in favour of complete confidentiality of census returns. The unqualified guarantee of confidentiality helps to overcome the reluctance of Canadians to respond to inquiries about personal matters for purposes which may be suspect, or at least not clearly understood, by many".

¹⁹⁷The most recent federal initiative is Bill C-43, *Access to Information Act* (Schedule I) and the *Privacy Act* (Schedule II), 32d Parl., 1st Sess., passed by the House of Com-

creation of access to information rights under human rights legislation. It is to be hoped that this process is not yet complete and that future studies will assess the utility of these proposals:

- (1) the registration of all government information banks containing personal information; (this applies to both the federal and provincial levels of government and most especially to law enforcement information banks);
- (2) the publication of annual indexes or inventories of such facilities;
- (3) controlled rights of subject access and correction;
- (4) the development of adequate guidelines and directives to ensure privacy protection and restrain unwarranted official intelligence gathering activities;
- (5) the creation of an effective impartial oversight mechanism to police adherence to this process.¹⁹⁸

The police have no general mandate to conduct surveillance on society as a whole. They would be acting far beyond their powers, express or implied, were they to compile intelligence files on the entire adult population or even a large proportion of it.¹⁹⁹ The general rule remains that there should be no coercive intervention or intrusion by the police without a high measure of certainty that there has been, is being, or will be a crime committed; and that the concerns of the state with the problems of crime and criminality should be met with event-specific investigation rather than panoptic supervision. Thus, while intelligence gathering has some facets which may be regarded as legitimate, we are still a long way, as indeed we should be, from recognizing in Canada the validity of a wholesale expansion of the police surveillance/intelligence function.²⁰⁰

mons on 28 June 1982. In the area of other enacted legislation see, e.g., *Right to Information Act*, S.N.B. 1978, c. R-10.3, and *Freedom of Information Act*, S.N.S. 1977, c. 10.

¹⁹⁸More particular guidance for the collection, maintenance, storage and dissemination of law enforcement information is furnished by Draper, *Privacy and Police Intelligence Data Banks: A Proposal to Create a State Organized Crime Intelligence System and to Regulate the Use of Criminal Intelligence Information* (1976) 14 Harv. J. on Legis. 1. See, in particular, the author's model statute, entitled *General Standards for Criminal Intelligence Information*, 98-106. Naturally, the study of public sector controls should not divert attention from the equally pressing demands of private sector controls.

¹⁹⁹Hence public consternation over the recent revelation that the R.C.M.P. Security Service maintained files on over 600,000 individuals. Information from these files, some containing hearsay information, was until fairly recently routinely exchanged with foreign intelligence agencies: *Globe and Mail*, 5 August 1981, 1, col. 1.

²⁰⁰Needless to say, intelligence activities founded upon illegal police activities (such as unauthorized wiretapping, break-ins to secure information, etc.) are incompatible with the Rule of Law and cannot be countenanced. The same holds true where the police might be tempted to instigate the commission of unlawful acts by others in order to obtain information.