The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference

Volume 57 Article 12

2012

Police Questioning in the Charter Era: Adjudicative versus Regulatory Rule-making and the Problem of False Confessions

Steven Penney

Citation Information

Penney, Steven. "Police Questioning in the Charter Era: Adjudicative versus Regulatory Rule-making and the Problem of False Confessions." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 57. (2012).
DOI: https://doi.org/10.60082/2563-8505.1240
https://digitalcommons.osgoode.yorku.ca/sclr/vol57/iss1/12

Police Questioning in the Charter Era: Adjudicative versus Regulatory Rule-making and the Problem of False Confessions

Steven Penney[*]

I. INTRODUCTION

Perhaps no aspect of Charter[1]-era criminal procedure jurisprudence has come under more vociferous attack than the courts' use of the common law to create new powers for police. Over the past 30 years, the "ancillary powers" doctrine has filled gaps in the legislative armoury of investigative powers, mostly in the areas of detention and arrest (hereinafter "detention") and search and seizure (hereinafter "search").[2] The chief message of the doctrine's critics is that courts should stick to the job that they are institutionally best suited to: protecting individual rights by ensuring that legislation and legislatively sanctioned executive action conforms to the minimum standards set out in the Charter.[3]

There is one area of constitutional criminal procedure, however, that has remained untouched by both the ancillary powers doctrine and (necessarily) its critics: police questioning. The reason for this is that

---

[*] Professor, Faculty of Law, University of Alberta. Thanks to Evan McIntyre and Nicholas Trofimuk for excellent research assistance.

[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[2] See, generally, Steven Penney, Vincenzo Rondinelli & James Stribopoulos, *Criminal Procedure in Canada* (Markham, ON: LexisNexis, 2011), at paras. 1.216-1.227 [hereinafter "Penney, Rondinelli & Stribopoulos"].

[3] See *R. v. Kang-Brown*, [2008] S.C.J. No. 18, [2008] 1 S.C.R. 456, at paras. 2-17 (S.C.C.), LeBel J., dissenting; James Stribopoulos, "In *Search* of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31 Queen's L.J. 1, at 18-30, 55-61 [hereinafter "Stribopoulos, 'In *Search* of Dialogue'"]; James Stribopoulos, "The Limits of Judicially Created Police Powers: Investigative Detention After *Mann*" (2007) 52 Crim. L.Q. 299, at 314-24 [hereinafter "Stribopoulos, 'Limits'"]; Glen Luther, "Police Power and *The Charter of Rights and Freedoms*: Creation or Control" (1986) 51 Sask. L. Rev. 117, at 222-27; Tim Quigley, "Brief Investigatory Detentions: A Critique of *R. v. Simpson*" (2004) 41 Alta. L. Rev. 935, at 949-50.

neither Parliament nor the courts have given police a "power" to question. Instead, they have merely a "freedom" to do so; people approached or detained by police are accordingly entitled to choose whether and how to answer.[4] In this, the law of police questioning differs from that of detention and search, where (subject to limitations) police are empowered to compel cooperation, either through physical force[5] or legal sanction.[6]

This does not mean, of course, that there is no need to regulate police questioning. Using their physical and psychological advantages over criminal suspects, police sometimes question them in undesirable ways, including those that are inherently cruel, compel unfair self-incrimination or induce false confessions.[7] The law therefore limits the ways in which police are permitted to persuade suspects to speak to them.

The same issue raised in the ancillary powers debate — the merits and demerits of legislative versus judicial rule-making — is thus potentially in play for police questioning. As with detention and search, there could be a vigorous conversation on the proper functions of the common law, ordinary legislation, and the Charter in regulating police questioning. However, one of the parties to that conversation — Parliament — has been almost entirely silent. With the exception of the questioning of young persons,[8] Parliament has declined to legislate on the topic, leaving the courts as the sole regulators of police questioning practices.

The purpose of this paper is to examine the implications of this legislative absence. The first question addressed is whether the critics of the ancillary powers doctrine are correct that the optimal regulation of police investigative practices requires robust legislative input. I argue that they are. Second, I ask whether courts could effectively compel Parliament to regulate police questioning. I argue that this is improbable. Lastly, I

---

[4] See, generally, Ed Ratushny, *Self-incrimination in the Canadian Criminal Process* (Toronto: Carswell, 1979), at 185-86 [hereinafter "Ratushny"]; *R. v. Singh*, [2007] S.C.J. No. 48, [2007] 3 S.C.R. 405, at paras. 27-28 (S.C.C.); *R. v. Turcotte*, [2005] S.C.J. No. 51, [2005] 2 S.C.R. 519, at para. 41 (S.C.C.); *R. v. Rothman*, [1981] S.C.J. No. 55, [1981] 1 S.C.R. 640, at 683 (S.C.C.).

[5] See, *e.g.*, *Criminal Code*, R.S.C. 1985, c. C-46, s. 25; *R. v. Asante-Mensah*, [2003] S.C.J. No. 38, [2003] 2 S.C.R. 3 (S.C.C.).

[6] See, *e.g.*, *Criminal Code*, s. 254(5); *Highway Traffic Act*, R.S.O. 1980, c. 198, s. 189(1); *Traffic Safety Act*, R.S.A. 2000, c. T-6, s. 166.

[7] See, generally, Christopher Sherrin, "False Confessions and Admissions in Canadian Law" (2005) 30 Queen's L.J. 601 [hereinafter "Sherrin"]; Steven Penney, "What's Wrong with Self-Incrimination? The Wayward Path of Self-Incrimination Law in the Post-*Charter* Era, Part 2: Self-Incrimination in Police Investigations" (2004) 48 Crim. L.Q. 280 [hereinafter "Penney, 'What's Wrong?'"]; Timothy E. Moore & C. Lindsay Fitzsimmons, "Justice Imperiled: False Confessions and the Reid Technique" (2011) 57 Crim. L.Q. 509 [hereinafter "Moore & Fitzsimmons"].

[8] *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 146(1).

explore whether appellate courts should compensate for legislative silence by adopting a more robustly "regulatory" (as opposed to "adjudicative") approach to decision-making. I argue that they should and provide examples (under the common law confessions rule and section 10(b) of the Charter) of how such an approach could better address the chief policy issue raised by police questioning: false confessions.

II. PARLIAMENT'S ROLE IN REGULATING INVESTIGATIVE METHODS: WHAT HAS IT BEEN?

Before discussing the optimal relationship between Parliament and the courts in regulating investigative powers, it will be helpful to briefly describe the history of that relationship. Before the enactment of the Charter in 1982, neither Parliament nor the courts were active in the field.[9] Section 91(27) of the *Constitution Act, 1867*[10] gives Parliament exclusive authority over matters of "Criminal Procedure", which includes the investigative phase of the criminal process. Parliament has never enacted a comprehensive code of criminal procedure, however, and its footprint on the investigative phase is small.[11]

This was especially true in the pre-Charter era. During that period, Parliament codified common law arrest powers,[12] created several search powers,[13] regulated the questioning of young persons,[14] and enacted a

---

[9] As a law school subject and field of practice, pre-Charter "criminal procedure" consisted largely of the law relating to the post-investigative phases of the criminal process. A glance at the leading contemporary texts reveals there was little law regulating the investigative phase. See, *e.g.*, Roger E. Salhany, *Canadian Criminal Procedure*, 3d ed. (Toronto: Canada Law Book, 1978) (1 chapter of 10); Eugene G. Ewaschuk, *Criminal Pleadings and Practice in Canada* (Toronto: Canada Law Book, 1983) (3 chapters of 25).

[10] 30 & 31 Vict., c. 3 (U.K.).

[11] Provincial legislatures have also given police investigative powers under various provincial heads of power that may be used in criminal inquiries in some circumstances. See, generally, *R. v. Nolet*, [2010] S.C.J. No. 24, [2010] 1 S.C.R. 851 (S.C.C.); *R. v. Orbanski; R. v. Elias*, [2005] S.C.J. No. 37, [2005] 2 S.C.R. 3 (S.C.C.); *Brown v. Durham Regional Police Force*, [1998] O.J. No. 5274, 43 O.R. (3d) 223 (Ont. C.A.). The same is true of investigative powers enacted under federal regulatory legislation (*i.e.*, legislation enacted under federal heads of power other than s. 91(27) of the *Constitution Act, 1867*, *id*. See generally *R. v. Jarvis*, [2002] S.C.J. No. 76, [2002] 3 S.C.R. 757 (S.C.C.).

[12] *Criminal Code, 1892* (U.K.), 55 & 56 Vict., c. 29, s. 552 (see now *Criminal Code*, R.S.C. 1985, c. C-46, s. 495).

[13] See, *e.g.*, *Criminal Code, 1892, id.*, s. 569 (search warrants for "building, receptacle or place") (see now *Criminal Code*, R.S.C. 1985, c. C-46, s. 487); *Opium and Drug Act*, S.C. 1911, c. 17, s. 7 (search powers in relation to drugs) (see now *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 11); *Protection of Privacy Act*, S.C. 1973-74, c. 50 (wiretap authorizations) (see now *Criminal Code*, R.S.C. 1985, c. C-46, Part VI).

Bill of Rights[15] granting individuals certain rights in relation to detention, search and questioning. The effect of these laws in regulating police was limited, however. The reasons for this are well known. First, many of the rules were defined by Parliament[16] or interpreted by the courts[17] to maintain maximal police discretion. Second, people affected by rule violations rarely had access to effective remedies.[18] With few exceptions,[19] there were no statutory powers to exclude illegally obtained evidence, and the Supreme Court of Canada was virtually alone in the common law world in refusing to recognize a common law discretion to exclude illegally obtained evidence.[20] In addition, while the principle of legality held police accountable for misconduct amounting to a tort or crime, lawsuits and criminal prosecutions were rare.[21]

The courts did little to fill the gaps. They had recognized a common law police power to search incident to arrest.[22] And in a case arising shortly before the Charter, the Supreme Court of Canada recognized a new common law power to detain motorists to investigate impaired

---

[14] *Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 56; see now *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 146.

[15] *Canadian Bill of Rights*, S.C. 1960, c. 44, R.S.C. 1985, App. III [hereinafter "*Bill of Rights*"].

[16] See, *e.g.*, *Narcotic Control Act*, R.S.C. 1970, c. N-1, s. 10 (warrantless searches for drugs and searches for drugs under writs of assistance). See also *R. v. Grant*, [1993] S.C.J. No. 98, [1993] 3 S.C.R. 223 (S.C.C.) (warrantless searches under s. 10 of *Narcotic Control Act* violate s. 8 of Charter absent exigent circumstances); *R. v. Sieben*, [1987] S.C.J. No. 11, [1987] 1 S.C.R. 295 (S.C.C.) (assuming that writs of assistance violate s. 8 of the Charter).

[17] See, *e.g.*, *R. v. Chromiak*, [1979] S.C.J. No. 116, [1980] 1 S.C.R. 471 (S.C.C.) (right to counsel triggered by "detention", which consists only of actual physical restraint). See, generally, Walter Surma Tarnopolsky, *The Canadian Bill of Rights*, 2d ed. (Toronto: McClelland & Stewart, 1975).

[18] See *R. v. Hogan*, [1974] S.C.J. No. 116, [1975] 2 S.C.R. 574, at 584 (S.C.C.) (no exclusion of evidence for violations of *Bill of Rights*).

[19] See, *e.g.*, *Criminal Code*, R.S.C. 1970, c. C-34, s. 178.16(1) (exclusion of illegally obtained wiretap evidence).

[20] See *Quebec (Attorney General) v. Begin*, [1955] S.C.J. No. 37, [1955] S.C.R. 593 (S.C.C.); *R. v. Wray*, [1970] S.C.J. No. 80, [1971] S.C.R. 272, at 293 (S.C.C.). See also Steven Penney, "Unreal Distinctions: The Exclusion of Unfairly Obtained Evidence Under Section 24(2) of the Charter" (1994) 32 Alta. L. Rev. 782, at 784-93.

[21] See Paul C. Weiler, "The Control of Police Arrest Practices: Reflections of a Tort Lawyer" in Allen M. Linden, ed., *Studies in Canadian Tort Law* (Toronto: Butterworths, 1968) 416, at 448-49; Andrew Goldsmith, "Necessary But Not Sufficient: The Role of Public Complaints Procedures in Police Accountability" in Philip C. Stenning, ed., *Accountability for Criminal Justice: Selected Essays* (Toronto: University of Toronto Press, 1995) 110, at 124.

[22] Until quite recently, however, the contours of this power were vague. See *Cloutier v. Langlois*, [1990] S.C.J. No. 10, [1990] 1 S.C.R. 158 (S.C.C.). See also *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.); *R. v. Golden*, [2001] S.C.J. No. 81, [2001] 3 S.C.R. 679, 159 C.C.C. (3d) 449 (S.C.C.).

driving offences.[23] Lastly, as in other common law jurisdictions, Canadian courts had for many decades indirectly regulated interrogation practices by excluding involuntary confessions.[24]

Police therefore had a largely free hand to do their jobs as they saw fit. Professional and other non-legal norms were undoubtedly influential in restraining misconduct. Abuses were frequent enough, however, that advocacy groups pressured the federal government to ensure that the Charter included robust checks on police discretion.[25] These efforts helped shape the final versions of sections 8, 9 and 10 of the Charter (which set out the main constitutional rules regulating search, detention and questioning, respectively) as well as section 24 (which gave courts the power to award meaningful remedies for constitutional violations, including the exclusion of evidence).[26] Like most other Charter rights, these provisions were articulated in broad terms.

At the dawn of the Charter era, there were thus three sources of legal rules regulating police investigations: a patchwork of statutory provisions, a handful of common law rules, and the new constitutional rights guarantees and remedial provisions. From this mix emerged a new, constitutionalized criminal procedure that increasingly regulated a greater and greater proportion of the field, much as in the United States after the Warren Court's "due process revolution" in the 1960s.[27] And as in the United States, in Canada the courts were (and remain) the chief architects of this revolution, interpreting the Charter "purposively" to: create rules directly regulating police investigations; strike down or temper statutory police powers; and shape the contours of both established and novel common law police powers.

Parliament's role in the Charter-era has been mostly secondary, reactive and deferential. It did not use the opportunity of the Charter's

---

[23] *R. v. Dedman*, [1985] S.C.J. No. 45, [1985] 2 S.C.R. 2 (S.C.C.).

[24] See *R. v. Boudreau*, [1949] S.C.J. No. 10, [1949] S.C.R. 262 (S.C.C.), *per* Rand J.; *R. v. Fitton*, [1956] S.C.J. No. 70, [1956] S.C.R. 958 (S.C.C.); *R. v. Rothman*, [1981] S.C.J. No. 55, [1981] 1 S.C.R. 640, at 644 (S.C.C.). The rule is most often traced to *R. v. Warickshall* (1783), 1 Leach. 262, 168 E.R. 234 (K.B.). Its definitive, traditional formulation was set out in *Ibrahim v. R.*, [1914] A.C. 599, at 609 (P.C.).

[25] See, *e.g.*, Canada, Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, 1:7 (November 18, 1980), at 11-12, 15-16, 27-29 (Canadian Civil Liberties Association); 1:7, at 89-90, 92 (November 18, 1980) (Canadian Jewish Congress); and 1:15, at 8, 15, 18 (November 28, 1980) (Canadian Bar Association).

[26] See, generally, Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Documentary History*, vol. 2 (Toronto: McGraw-Hill, 1989), at 771.

[27] See Yale Kamisar, "The Warren Court and Criminal Justice: A Quarter-Century Retrospective" (1995) 31 Tulsa L.J. 1, at 2-3.

passage to codify or reform the law regulating criminal investigations. Its chief involvement has been to give police powers to use investigative techniques that courts had invalidated under the Charter.[28] In the main, these powers hewed closely to the constitutional limits dictated by the courts.[29] In short, if the relationship between Parliament and the courts in this field can be characterized as a constitutional "dialogue",[30] it is one dominated by the latter party.

Nor did Parliament take up the opportunity to engage the courts in a non-constitutional dialogue about police powers. As mentioned, the courts had occasionally recognized common law police powers before the Charter. This happened only rarely, however, and in the early years of the Charter the Supreme Court of Canada questioned the legitimacy of the practice.[31] That reluctance began to fade with the widespread recog-

---

[28] See, *e.g.*, *An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act*, S.C. 1993, c. 40, s. 4 (see now *Criminal Code*, ss. 184.1-184.2 (responding to *R. v. Duarte*, [1990] S.C.J. No. 2, [1990] 1 S.C.R. 30 (S.C.C.) and *R. v. Wiggins*, [1990] S.C.J. No. 3, [1990] 1 S.C.R. 62 (S.C.C.)); *An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act*, S.C. 1993, c. 40, s. 15 (see now *Criminal Code*, s. 487.01 (responding to *R. v. Wong*, [1990] S.C.J. No. 118, [1990] 3 S.C.R. 36 (S.C.C.)); *An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act*, S.C. 1993, c. 40, s. 18 (see now *Criminal Code*, s. 492.1 (responding to *R. v. Wise*, [1992] S.C.J. No. 16, [1992] 1 S.C.R. 527 (S.C.C.)); *An Act to Amend the Criminal Code (organized crime and protection of justice system participants)*, S.C. 1997, c. 23, s. 14 (see now *Criminal Code*, s. 487.3 (responding to *R. v. Feeney*, [1997] S.C.J. No. 49, [1997] 2 S.C.R. 13 (S.C.C.)); *An Act to amend the Criminal Code and the Young Offenders Act (forensic DNA analysis)*, S.C. 1995, c. 27, s. 1 (see now *Criminal Code*, ss. 487.04-.05 (responding to *R. v. Borden*, [1994] S.C.J. No. 82, [1994] 3 S.C.R. 145 (S.C.C.)); *DNA Identification Act*, S.C. 1998, c. 37 (see now *Criminal Code*, s. 487.091 (responding to *R. v. Stillman*, *supra*, note 22); *Criminal Law Improvement Act, 1996*, S.C. 1997, c. 18, s. 46 (see now *Criminal Code*, s. 487.11 (responding to *R. v. Grant*, *supra*, note 16 and *R. v. Silveira*, [1992] S.C.J. No. 38, [1995] 2 S.C.R. 297 (S.C.C.)).

Parliament did act independently in creating new search powers in specialized contexts. See, *e.g.*, *An Act to Amend the Criminal Code (capital markets fraud and evidence-gathering)*, S.C. 2004, c. 3, s. 7 (see now *Criminal Code*, ss. 487.011-487.017 (general production orders and production orders for financial information)); *An Act to amend the Criminal Code, the Crown Liability and Proceedings Act and the Radiocommunication Act*, S.C. 1993, c. 40, s. 18 (see now *Criminal Code*, s. 492.2 (number recorder warrants)); *An Act to amend the Criminal Code, the Food and Drugs Act and the Narcotic Control Act*, S.C. 1988, c. 51 (see now s. 462.32 (warrants for proceeds of crime)).

[29] See Stribopoulos, "In *Search* of Dialogue", *supra*, note 3, at 66-73; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001), at 176-79 [hereinafter "Roach, *Supreme Court*"].

[30] See, generally, Peter W. Hogg & Allison A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75; Roach, *Supreme Court*, *id.*; Stribopoulos, "In *Search* of Dialogue", *id.*, at 61-73.

[31] See, *e.g.*, *R. v. Wong*, *supra*, note 28, at 56 ("it does not sit well for the courts, as the protectors of our fundamental rights, to widen the possibility of encroachments on these personal liberties. It falls to Parliament to make incursions on fundamental rights if it is of the view that they are needed for the protection of the public in a properly balanced system of criminal justice".).

nition by provincial courts of appeal of the common law power of investigative detention.[32] That power was finally confirmed by the Supreme Court in 2004,[33] and within a few years the Court had recognized a suite of common law detention and search powers.[34] Without exception, Parliament chose to leave these powers alone.

III. PARLIAMENT'S ROLE IN REGULATING INVESTIGATIVE METHODS: WHAT SHOULD IT BE?

The next question is whether Parliament should be playing a more active role in regulating criminal investigations. There are at least three arguments in favour of greater legislative input. First, compared to courts, legislatures are more directly responsive to people's preferences for alternative policy choices. There are of course downsides to preference aggregation,[35] and public choice theory teaches that the outcomes of the democratic process are often skewed in favour of motivated and powerful coalitions.[36] But these flaws may be offset (to some degree at least) by the courts' counter-majoritarian role in constitutional rights protection.[37]

---

[32] See *R. v. Simpson*, [1993] O.J. No. 308, 79 C.C.C. (3d) 482 (Ont. C.A.); *R. v. Ferris*, [1998] B.C.J. No. 1415, 126 C.C.C. (3d) 298 (B.C.C.A.), leave to appeal refused [1998] S.C.C.A. No. 424 (S.C.C.); *R. v. Dupuis*, [1994] A.J. No. 1011, 162 A.R. 197 (Alta. C.A.); *R. v. Lake*, [1996] S.J. No. 886, 113 C.C.C. (3d) 208 (Sask. C.A.); *R. v. G. (C.M.)*, [1996] M.J. No. 428, 113 Man. R. (2d) 76 (Man. C.A.); *R. c. Pigeon*, [1993] J.Q. no 1683, 59 Q.A.C. 103 (Que. C.A.); *R. v. Carson*, [1998] N.B.J. No. 482, 39 M.V.R. (3d) 55 (N.B.C.A.); *R. v. Chabot*, [1993] N.S.J. No. 465, 86 C.C.C. (3d) 309 (N.S.C.A.); *R. v. Burke*, [1997] N.J. No. 187, 118 C.C.C. (3d) 59 (Nfld. C.A.).

[33] *R. v. Mann*, [2004] S.C.J. No. 49, [2004] 3 S.C.R. 59 (S.C.C.).

[34] See *R. v. Godoy*, [1998] S.C.J. No. 85, [1999] 1 S.C.R. 311 (S.C.C.) (emergency search power); *R. v. Clayton*, [2007] S.C.J. No. 32, [2007] 2 S.C.R. 725 (S.C.C.) (investigative roadblock); *R. v. Kang-Brown*, *supra*, note 3 (canine sniff search); *R. v. M. (A.)*, [2008] S.C.J. No. 19, [2008] 1 S.C.R. 569 (S.C.C.) (same).

[35] It is often suggested, for example, that legislators and their constituents are almost always hostile to the interests of criminal suspects and defendants. See Anthony G. Amsterdam, "Perspectives on the Fourth Amendment" (1974) 58 Minn. L. Rev. 349, at 378-79; Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999); William J. Stuntz, "The Pathological Politics of Criminal Law" (2001) 100 Mich. L. Rev. 505, at 553-56; Donald A. Dripps, "Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?" (1993) 44 Syracuse L. Rev. 1079; Don Stuart, "Time to Recodify Criminal Law and Rise Above Law and Order Expediency: Lessons from the Manitoba Warriors Prosecution" (2000) 28 Man. L.J. 89.

[36] See Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (Chicago: University of Chicago Press, 1991); Maxwell L. Stearns, ed., *Public Choice and Public Law: Readings and Commentary* (Cincinnati: Anderson, 1997); William N. Eskridge, Jr., "Dynamic Statutory Interpretation" (1987) 135 U. Pa. L. Rev. 1479, at 1530.

[37] See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980); Rosalind Dixon, "The Supreme Court of Canada, *Charter* Dialogue,

Second, legislatures are better placed than courts to amass the information necessary for optimal, prospective regulation of complex systems.[38] Courts, by contrast, lack specialized expertise in the subject matter, are limited in their ability to call upon relevant social science and other "social facts",[39] and can only regulate in a piecemeal fashion in response to the cases that come before them.[40]

Third, while legislators and judges undoubtedly suffer from the same cognitive biases afflicting everyone,[41] the retrospective and case-specific nature of adjudication heightens the distorting effects of hindsight bias.[42] Courts encounter only a tiny proportion of the population of innocent people harmed by investigative intrusions. Thankfully, such persons are rarely charged and even more rarely tried. And as mentioned, few seek redress for this harm in civil court. As a consequence, the overwhelming majority of criminal defendants harmed by police are factually guilty. Hindsight bias inclines courts to conclude that these harms were justified in the circumstances.[43] This leads courts to articulate flexible rules

---

and Deference" (2009) 47 Osgoode Hall L.J. 235, at 257-66; Thomas W. Merrill, "Does Public Choice Theory Justify Judicial Activism After All?" (1997) 21 Harv. J.L. & Pub. Pol'y 219; Frank B. Cross, "Institutions and Enforcement of the Bill of Rights" (2000) 85 Cornell L. Rev. 1529; Michael C. Dorf & Michael Isaacharff, "Can Process Theory Constrain Courts?" (2001) 72 U. Colo. L. Rev. 923; Michael J. Klarman, "The Puzzling Resistance to Political Process Theory" (1991) 77 Va. L. Rev. 747, at 763-68.

[38] See Adrian Vermeule, *Law and the Limits of Reason* (Oxford: Oxford University Press, 2008); Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Chicago: University of Chicago Press, 1994); *R. v. Landry*, [1986] S.C.J. No. 10, [1986] 1 S.C.R. 145, at 187-88 (S.C.C.), La Forest J., dissenting; *R. v. Evans*, [1996] S.C.J. No. 1, [1996] 1 S.C.R. 8, at para. 4 (S.C.C.), La Forest J., concurring.

[39] See Stephen Breyer, "Our Democratic Constitution" (2002) 77 N.Y.U. L. Rev. 245, at 261-63; Orin S. Kerr, "The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution" (2004) 102 Mich. L. Rev. 801, at 875-76 [hereinafter "Kerr, 'Fourth Amendment'"]; Cass R. Sunstein & Adrian Vermeule, "Interpretations and Institutions" (2003) 101 Mich. L. Rev. 885, at 903-904, 923 [hereinafter "Sunstein & Vermeule"]; William J. Stuntz, *Accountable Policing* (Harvard Public Law Working Paper No. 130, 2006), available online: <http://ssrn.com/abstract=886170>.

[40] See Stuart Minor Benjamin, "Stepping Into the Same River Twice: Rapidly Changing Facts and the Appellate Process" (1999) 78 Tex. L. Rev. 269.

[41] Like other decision-makers (including judges), the rationality of legislators (and the people who elect them) is limited by many factors, including incomplete and asymmetric information, bounded rationality and systemic psychological distortions. See, generally, Cass R. Sunstein, ed., *Behavioral Law and Economics* (Cambridge: Cambridge University Press, 2000) [hereinafter "Sunstein, *Behavioral Law*"].

[42] See Jeffrey J. Rachlinski, "A Positive Psychological Theory of Judging in Hindsight" in Sunstein, *Behavioral Law*, *id.*, 95.

[43] See Stribopoulos, "In *Search* of Dialogue", *supra*, note 3, at 57-58; Carol S. Steiker, "Second Thoughts About First Principles" (1994) 107 Harv. L. Rev. 820, at 852-53; Brent Snook *et al.*, "Reforming Investigative Interviewing in Canada" (2010) 52 Can. J. Criminology & Crim. Just. 203, at 206 [hereinafter "Snook *et al.*"].

facilitating conviction but providing suboptimal deterrence against police misconduct. As mentioned, legislators often follow public opinion in enacting "tough on crime" legislation. But they can also be sensitive to the effect of intrusive state powers on innocent, "ordinary" citizens. So when they do act to regulate the investigative process, either on their own initiative or in response to court decisions, they often clearly delimit police power and provide meaningful sanctions for overreaching.[44]

Recognizing the benefits of having both institutions participate in shaping the law of detention and search, many jurists have thus called on courts to refuse to recognize common law police powers — thus spurring Parliament to act.[45] This is possible because, *prima facie*, people have constitutional rights to *not* be detained or searched. At a minimum, any intrusion constituting a "search or seizure" under section 8 of the Charter[46] or a "detention" under section 9[47] must be authorized by statute or common law. So, if the courts refuse to recognize common law powers permitting such intrusions, police may not commit them without legislative sanction.

Unfortunately, this strategy is unlikely to work for police questioning. As mentioned, there is no statutory or constitutional right to *not* be questioned by police. In theory, the courts could erect common law or constitutional rules that would demand a legislative response. They could amend the confessions rule, for example, to exclude all admissions to persons in authority regardless of voluntariness, signalling to Parliament that it must regulate interrogation. Or in the absence of statutory rules regarding the invocation or waiver of the right to counsel, they could issue a prophylactic rule under section 10(b) of the Charter requiring a lawyer's presence for questioning.[48] But such innovations would represent dramatic departures from existing law as well as from deeply rooted conventions regarding the respective functions of courts and legislatures. Declining to recognize a common law police power, in contrast, is

---

[44] See Kerr, "Fourth Amendment", *supra*, note 39, at 839-58; Steven Penney, "Reasonable Expectations of Privacy and Novel Search Technologies: An Economic Approach" (2007) J. Crim. L. & Criminology 477, at 503-505; Craig Lerner, "Legislators as the 'American Criminal Class': Why Congress (Sometimes) Protects the Rights of Defendants" (2004) U. Ill. L. Rev. 599, at 613-18; Stribopoulos, "In *Search* of Dialogue, *id.*, at 63-70.

[45] See works cited, *supra*, note 3.

[46] See *Hunter v. Southam (sub nom. Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.)*, [1984] S.C.J. No. 36, [1984] 2 S.C.R. 145, at 159 (S.C.C.); *R. v. Dyment*, [1988] S.C.J. No. 82, [1988] 2 S.C.R. 417, at 426 (S.C.C.).

[47] See *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, at para. 54 (S.C.C.).

[48] See, generally, Michael Plaxton, "In Search of Prophylactic Rules" (2005) 50 McGill L.J. 127 [hereinafter "Plaxton"].

consistent with the courts' accepted role in protecting constitutional liberties, leaving Parliament room to authorize reasonable invasions of those liberties. Nor is it likely that Parliament will choose of its own accord to regulate in the field. It has had well over a century to do so, and apart from the specialized realm of young persons, it has not done so.[49] What is possible, however, is that if courts adopt the more boldly regulatory approach to questioning that I urge below, Parliament might be impelled to regulate in a way that accords better with its own policy preferences. In this way, a productive dialogic relationship between courts and the legislature could yet emerge, maximizing the advantages and minimizing the disadvantages of each institution's rule-making process.[50] But even if this does not occur, the law of police questioning would still benefit from the courts' attempts to compensate for legislative silence.

IV. How Courts Can Compensate for Legislative Silence

To illustrate what a more boldly regulatory approach to police questioning might look like, I will survey some of the key rules deriving from the common law confessions rule and section 10(b) of the Charter. In relation to each of these rules, the Supreme Court of Canada has adopted a largely adjudicative approach; that is, it has set out broad standards enabling trial courts to make fine-grained, fact-based, *ex post* decisions achieving a just result in the cases before them. I argue that the chief goals of police questioning law — maximizing the availability of reliable evidence of guilt and minimizing wrongful convictions based on false confessions — would be better served by adopting a legislatively inspired, regulatory approach; that is, the setting out of bright-line, *ex ante* rules grounded on empirical evidence. My aim is not to propose a comprehensive set of optimal rules, but rather to provide examples of how appellate judges could better approach the rule-making task.

Before examining the jurisprudence, I should address two preliminary objections. The first relates to institutional competency. After highlighting the deficiencies of judicial rule-making, it might seem strange that I am calling for judges to adopt a role that they may not be well suited for. Could an assertive, reformist approach by the courts in

---

[49] For an explanation for why legislatures are often reluctant to legislate in criminal law, see Dan M. Kahan, "Is *Chevron* Relevant to Criminal Law?" (1996) 110 Harv. L. Rev. 469, at 474-75.

[50] See Stribopoulos, "Limits", *supra*, note 3, at 318-23.

this field make the situation worse, rather than better?[51] There are several responses to this charge. The first is to recognize that judicial regulation is a second-best alternative. Since Parliament has been unwilling to act, legal reform can only come from the courts. Second, as mentioned and as described more fully below, Parliament retains a considerable capacity to correct what it sees as judicial errors, should it choose to do so. And third, in the realm of police questioning, there is reason to think that courts are capable of mitigating their rule-making weaknesses. As discussed below, courts can and have drawn from empirical literature on interrogation and false confessions. This scholarship bears the features of mature and reliable science[52] and coheres to a significant extent with long-standing judicial experience.[53] And to the extent that empirical gaps frustrate optimal rule-making, they are no more likely to be filled by legislative inquiry than litigation.[54]

The second objection relates to the style of rule-making in question. There is a long-standing debate in legal theory on whether it is better for courts to articulate bright-line rules or flexible standards.[55] Undoubtedly the law requires both; the optimal mix turns on the context.[56] Rules are typically preferable to standards when judges have access to good information about the context of the decision, the regulated domain requires certainty, and the proposed rules can provide that certainty.[57] As mentioned immediately above, courts have access to good information about false confessions, and there are several features of police questioning law that strongly militate in favour of certainty over flexibility.

The first, which I discuss in greater detail below, is that courts frequently err in assessing the reliability of confession evidence. Flexible, case-by-case determinations of the admissibility or weight of such evidence are likely to too often result in wrongful convictions.

Second, errors prompted by the rigidity of bright-line rules are less likely to do harm in the context of police questioning than in other fields.

---

[51] See, generally, Sunstein & Vermeule, *supra*, note 39.

[52] See Moore & Fitzsimmons, *supra*, note 7, at 521.

[53] See *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3, at para. 47 (S.C.C.).

[54] These gaps include reliable estimates of the frequency of wrongful convictions based on false confessions and the importance of confession evidence to conviction rates. See Sherrin, *supra*, note 7, at 606-17; Saul M. Kassin *et al*., "Police-Induced Confessions: Risk Factors and Recommendations" (2010) 34 Law and Human Behavior 3, at 5 [hereinafter "Kassin *et al.*"].

[55] See Louis Kaplow, "Rules Versus Standards: An Economic Approach" (1992) 42 Duke L.J. 557.

[56] See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass: Harvard University Press, 1999), at 57-60.

[57] *Id*., at 57.

If the application of a rule in a given case turns out to be too protective of a criminal suspect *ex post* (*i.e.*, by denying police use of a method that might have induced a reliable confession), the loss to society's interest in convicting the guilty may not be great. The weight of empirical evidence suggests that prophylactic exclusionary rules rarely cause wrongful acquittals.[58] And as mentioned below, jurisdictions that have forgone problematic interrogation practices have experienced no reduction in confession rates.

Lastly, case-by-case standards may be retained to prevent wrongful conviction in cases where bright-line rules could not prevent the admission of a dubiously reliable confession. There is considerable evidence, for example, that "vulnerable" individuals (including people who are young, intellectually disabled, mentally ill or have especially compliant personalities) may sometimes confess falsely, even in non-coercive circumstances.[59] Courts could develop bright-line rules requiring police to identify and redress these vulnerabilities,[60] but in some cases, the extent of vulnerability might not be apparent *ex ante*. But if vulnerability is established at trial and exposes a significant risk of wrongful conviction, courts sensitive to the phenomenon can still exclude the confession.[61]

V. THE CONFESSIONS RULE

The confessions rule is a common law rule of evidence prohibiting the admission at trial of statements made by suspects to police or other "persons in authority" unless prosecutors prove beyond a reasonable doubt that the statements were made "voluntarily".[62] In theory, developing the rule in a regulatory vein should not be especially controversial. If Parliament disliked the courts' reforms, it could overrule them.

---

[58] See Stephen J. Schulhofer, "Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs" (1996) 90 Nw. U.L. Rev. 500; John J. Donahue III, "Did *Miranda* Diminish Police Effectiveness?" (1998) 50 Stan. L. Rev. 1147. For a contrary view, see Paul G. Cassell & Richard Fowles, "Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement" (1998) 50 Stan. L. Rev. 1055.

[59] See Sherrin, *supra*, note 7, at 629-52; Richard A. Leo, "False Confessions: Causes, Consequences and Implications" (2009) 37 J. Am. Academy Psych. & Law 332, at 335-37; Kassin *et al.*, *supra*, note 54, at 19-22.

[60] See, *e.g.*, Kassin *et al*., *id.* at 30-31.

[61] See *R. v. Oickle*, *supra*, note 53, at para. 42; Sherrin, *supra*, note 7; Dale E. Ives, "Preventing False Confessions: Is *Oickle* Up to the Task?" (2007) 44 San Diego L. Rev. 477, at 480-84 [hereinafter "Ives"].

[62] See *R. v. Oickle*, *supra*, note 53, at para. 24.

It is true that the Supreme Court has recognized a "right to silence" under section 7 of the Charter that overlaps with the confessions rule,[63] but the implications of this holding are quite limited. For statements made to police interrogators, the Court has held, the confessions rule "effectively subsumes the constitutional right to silence".[64] Though informed by the Charter, the framework for deciding voluntariness is consequently still part of the common law.[65] As the Court put it in *R. v. Oickle*, in developing the common law rule, courts can "offer protections beyond those guaranteed by the Charter".[66] While the courts would likely balk at any legislative attempt to either permit the admission of involuntary confessions or dramatically re-conceive the concept of voluntariness (to the accused's detriment), Parliament would therefore have considerable space to regulate interrogation and dictate the conditions for the admission of confessions.[67]

The problem, however, is that the courts have been reluctant to conceive of the confessions rule as serving a regulatory function.[68] As mentioned, it is technically a rule of evidence, not criminal procedure. It does not, therefore, directly regulate the conduct of police in questioning suspects. Any such effect is indirect, signalling to police that if they elicit an involuntary statement, it will be inadmissible at trial.

The confessions rule has thus typically been articulated and applied malleably to achieve justice *ex post*, rather than regulate questioning in the public interest *ex ante*.[69] This has been true even when courts have been most attuned to both the policy issues underlying interrogation and the social science available to inform that policy.

---

[63] See *R. v. Turcotte*, *supra*, note 4, at para. 41; *R. v. Singh*, *supra*, note 4, at paras. 34-40; *R. v. G. (B.)*, [1999] S.C.J. No. 29, [1999] 2 S.C.R. 475, at paras. 22, 44 (S.C.C.); *R. v. Whittle*, [1994] S.C.J. No. 69, [1994] 2 S.C.R. 914, at 931 (S.C.C.). See also Hamish Stewart, "The Confessions Rule and the Charter" (2009) 54 McGill L.J. 517, at 529-34; Plaxton, *supra*, note 48, at para. 33; Lisa Dufraimont, "The Common Law Confessions Rule in the *Charter* Era: Current Law and Future Directions" (2008) 40 S.C.L.R. (2d) 249, at 255-56 [hereinafter "Dufraimont"].

[64] *R. v. Singh*, *id.*, at paras. 37-39. See also *R. v. Oickle*, *supra*, note 53, at paras. 29-31.

[65] See *R. v. Oickle*, *id.*, at para. 31.

[66] *Id.*, at para. 31. See also Hon. Justice Gary T. Trotter, "The Limits of Police Interrogation: The Limits of the Charter" (2008) 40 S.C.L.R. (2d) 293, at 302-306 [hereinafter "Trotter"].

[67] See Plaxton, *supra*, note 48, at 143-44.

[68] See, *e.g.*, Trotter, *supra*, note 66, at 305 (expressing the judicial sentiment that it is "unrealistic to expect bright lines in this area").

[69] See Dufraimont, *supra*, note 63, at 259-60; Don Stuart, "*Oickle*: The Supreme Court's Recipe for Coercive Interrogation" (2000) 36 C.R. (5th) 188, at 188-91.

Oickle illustrates the point. There, the Court took it upon itself to modernize and rationalize the confessions rule.[70] It invoked the prevention of wrongful convictions as the rule's primary justification, referred to the role of false confessions in convicting the innocent, summarized the literature on the social and psychological dynamics of false confessions, and suggested how the various aspects of the rule should account for those dynamics.[71]

There is a strong argument, however, that the Court's adjudicative approach fails to protect adequately against wrongful convictions. There are two steps to this argument. First, without clear, prophylactic rules to follow, interrogators will generate a significant number of false confessions. And second, because police, prosecutors and judges are likely to overestimate their ability to distinguish between true and false confessions, a significant number of false confessions will be admitted into evidence and contribute to wrongful convictions.

To decide whether a statement was made voluntarily, judges must consider many factors, of which few are decisive. The voluntariness inquiry is "contextual",[72] having regard to "the entire circumstances",[73] including the (objective) nature of the tactics used by police and the suspect's (subjective) reaction to those tactics.[74] If police are uncertain as to whether certain methods are permitted, they are less likely to act with restraint.[75] Faced with a recalcitrant suspect and a serious crime, they may push the envelope, hoping that a court will later decide that, considering all the circumstances, the confession is sufficiently reliable.

Consider the category of "threats or promises". We know that the use or threat of physical violence[76] and concrete offers of lenient treat-

---

[70] *R. v. Oickle*, *supra*, note 53, at para. 32. See also Edmund Thomas, "Lowering the Standard: *R. v. Oickle* and the Confessions Rule in Canada" (2005) 10 Can. Crim. L. Rev. 69 [hereinafter "Thomas"].

[71] *R. v. Oickle*, *id.*, at paras. 34-45.

[72] *Id.*, at para. 71.

[73] *Id.*, at para. 68.

[74] See *R. v. Hodgson*, [1998] S.C.J. No. 66, [1998] 2 S.C.R. 449, at para. 15 (S.C.C.); *R. v. Fitton*, [1956] S.C.J. No. 70, [1956] S.C.R. 958, at 962 (S.C.C.); *R. v. Spencer*, [2007] S.C.J. No. 11, [2007] 1 S.C.R. 500, at paras. 13, 21 (S.C.C.); *R. v. Oickle*, *id.*, at para. 42.

[75] See, generally, Jerome H. Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (New York: MacMillan, 1994), at 12.

[76] *R. v. Oickle*, *supra*, note 53, at para. 48 ("obviously imminent threats of torture will render a confession inadmissible"). Not surprisingly, the empirical record confirms that violence and threats of violence are apt to produce false confessions. See Wayne T. Westling, "Something is Rotten in the Interrogation Room: Let's Try Video Oversight" (2001) 34 J. Marshall L. Rev. 537, at 543.

ment[77] will always result in exclusion. Few other techniques, however, are prohibited outright. Courts have admitted confessions despite the use of a variety of manipulative inducements, including offering psychiatric counselling;[78] threatening to investigate, question or charge suspects' loved ones;[79] withholding contact with loved ones;[80] minimizing the moral (as opposed to legal) seriousness of the offence;[81] and suggesting that "it would be better" if the suspect confessed.[82]

In *Oickle*, the Court intimated that *quid pro quo* inducements should usually result in exclusion.[83] It later held in *R. v. Spencer*,[84] however, that "while a *quid pro quo* is an important factor in establishing the existence of a threat or promise, it is the *strength* of the inducement, having regard to the particular individual and his or her circumstances, that is to be considered in the overall contextual analysis".[85] Police clearly offered Spencer a *quid pro quo* (withholding a visit with his girlfriend until he confessed), but considering his savvy and experience in dealing with police, the Court upheld the trial judge's decision that his confession was voluntary.[86]

The category of "oppression" is also fraught with indeterminacy. In *Oickle*, the Court noted that such conditions may be created by depriving suspects of necessities such as food, clothing, water, sleep or medical attention; denying them access to counsel; subjecting them to aggressive, intimidating or prolonged questioning; or confronting them with inadmissible or fabricated evidence.[87] Failing to warn suspects about their

---

[77] See *R. v. Oickle*, *id.*, at para. 49. See also *R. v. T. (S.G.)*, [2008] S.J. No. 572, 2008 SKCA 119 (Sask. C.A.), revd [2010] S.C.J. No. 20, [2010] 1 S.C.R. 688 (S.C.C.) (statement ruled involuntary after police told accused that he might not be charged if he apologized).

[78] *R. v. Oickle*, *id.*, at paras. 50, 78 (suggestions that the suspect needed "professional help" were acceptable because they did not constitute an offer contingent on a confession).

[79] See *R. v. Oickle*, *id.*, at paras. 81-84 (threat to question fiancée); *R. v. Spencer*, *supra*, note 74 (threat to charge girlfriend).

[80] *R. v. Spencer*, *id.*

[81] *R. v. Oickle*, *supra*, note 53, at paras. 73-77.

[82] The Supreme Court has stated that such comments require exclusion "only where the circumstances reveal an implicit threat or promise"; otherwise they will likely be considered only "moral inducements" that do not undermine voluntariness: *R. v. Oickle*, *id.*, at paras. 55, 79-80. See also *R. v. Mujku*, [2011] O.J. No. 284, 2011 ONCA 64, at paras. 33-35 (Ont. C.A.).

[83] *R. v. Oickle*, *id.*, at para. 57 ("The most important consideration in all cases is to look for a *quid pro quo* offer by interrogators, regardless of whether it comes in the form of a threat or a promise.").

[84] *Supra*, note 74.

[85] *Id.*, at para. 15 (emphasis added). See also *R. v. Jackson*, [1977] B.C.J. No. 1117, 34 C.C.C. (2d) 35, at 38 (B.C.C.A.).

[86] *R. v. Spencer*, *id.*, at paras. 13, 20-21.

[87] *Id.*, at paras. 60-61.

right to silence and ignoring invocations of this right may also contribute to an oppressive atmosphere.[88]

However, none of these factors is determinative and the case law reveals little consistency. Courts have found confessions to be voluntary, for example, despite substantial sleep[89] and clothing deprivations;[90] lengthy and repetitive questioning;[91] repeated denials of suspects' desire to remain silent;[92] unlawful or unreasonably lengthy detentions;[93] or confronting suspects with false evidence of their guilt.[94]

Since *Oickle*, empirical evidence has continued to mount that many of these tactics (including many used in the "Reid Technique" used by most Canadian interrogators[95]) are apt to produce false confessions.[96] Detailed and comprehensive accounts of the relationship between common interrogation practices and false confessions may be found

---

[88] *R. v. Singh*, *supra*, note 4, at paras. 32, 53. See also *R. v. Otis*, [2000] J.Q. no 4320, 151 C.C.C. (3d) 416, at para. 56 (Que. C.A.), leave to appeal refused [2000] C.S.C.R. no 640, [2001] 1 S.C.R. xvii (S.C.C.).

[89] See, *e.g.*, *R. v. Ross*, [1997] O.J. No. 2316, 30 O.T.C. 247 (Ont. Gen. Div.) (oppression did not arise from the police's refusal to allow an exhausted accused sleep during questioning).

[90] See, *e.g.*, *R. v. Jackson*, [2005] A.J. No. 1726, 2005 ABCA 430 (Alta. C.A.). But see *R. v. Moore-McFarlane*, [2001] O.J. No. 4646, 56 O.R. (3d) 737, at para. 73 (Ont. C.A.) (lack of clothing one of several factors raising doubt as to voluntariness).

[91] See, *e.g.*, *R. v. Singh*, *supra*, note 4, at para. 47.

[92] See, *e.g.*, *R. v. Singh*, *id.* (repeated questioning in face of 18 assertions of right to silence did not render confession involuntary); *R. v. Edmondson*, [2005] S.J. No. 256, 2005 SKCA 51 (Sask. C.A.), leave to appeal refused [2005] S.C.C.A. No. 273 (S.C.C.).

[93] See, *e.g.*, *R. v. Roy*, [2003] O.J. No. 4252, 15 C.R. (6th) 282, at para. 13 (Ont. C.A.).

[94] See, *e.g.*, *R. v. Sinclair*, [2003] B.C.J. No. 3258, 2003 BCSC 2040, at para. 136 (B.C.S.C.), affd [2010] S.C.J. No. 35, [2010] 2 S.C.R. 310 (S.C.C.) (finding confession voluntary despite substantial "exaggerations" and "misinformation" about forensic and other evidence).

[95] The Reid Technique is a proprietary interviewing method marketed by firm John E. Reid and Associates. See Fred E. Inbau *et al*., *Criminal Interrogation and Confessions*, 4th ed. (Boston: Jones and Bartlett, 2004). On the use of the Reid Technique by Canadian police see: Moore & Fitzsimmons, *supra*, note 7, at 534-36; Snook *et al.*, *supra*, note 43, at 217-19. For judicial commentary, see: *R. v. Cruz*, [2008] A.J. No. 559, 2008 ABPC 155, at para. 106 (Alta. Prov. Ct.); *R. v. Minde*, [2003] A.J. No. 1184, at para. 32, 343 A.R. 371 (Alta. Q.B.); *R. v. Barrett*, [1993] O.J. No. 1317, 13 O.R. (3d) 587, at para. 58 (Ont. C.A.), revd [1995] S.C.J. No. 19, [1995] 1 S.C.R. 752 (S.C.C.); *R. v. Whalen*, [1999] O.J. No. 3488, at paras. 11-15 (Ont. C.J.); *R. v. Barges*, [2005] O.J. No. 5595, [2005] O.T.C. 1116, at paras. 52-53, 80-81 (Ont. S.C.J.); *R. v. S. (M.J.)*, [2000] A.J. No. 391, 32 C.R. (5th) 378, at paras. 18-24, 38-50 (Alta. Prov. Ct.); *R. v. Chapple*, 2012 ABPC 229, at paras. 61-73 (Alta. Prov. Ct.).

[96] See Kassin *et al*., *supra*, note 54; Steve Drizin & Richard A. Leo, "The Problem of False Confessions in the Post-DNA World" (2004) 82 N.C.L. Rev. 891 [hereinafter "Drizin & Leo"]; Saul M. Kassin & Gisli H. Gudjonsson, "The Psychology of Confessions: A Review of the Literature and Issues" (2004) 5 Psychol. Sci. in Pub. Int. 33, at 55 [hereinafter "Kassin & Gudjonsson"]; Richard J. Ofshe & Richard A. Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action" (1997) 74 Den. U.L. Rev. 979, at 1084-88 [hereinafter "Ofshe & Leo"]; Melissa B. Russano *et al.*, "Investigating True and False Confessions within a Novel Experimental Paradigm" (2005) 16 Psychological Science 481, at 484.

elsewhere.[97] It will suffice here to highlight three tactics that have frequently been found to be associated with false confessions.

The first is the presentation of false evidence, a tactic used in a high proportion of documented false confession cases.[98] Decades of psychological research has demonstrated that misinformation can powerfully alter people's perceptions and beliefs, and many experiments have shown that participants presented with false evidence are more likely to falsely confess than those who have not.[99] As the Court noted in *Oickle*, such evidence "is often crucial in convincing the suspect that protestations of innocence, even if true, are futile".[100] Yet the Court declined to prohibit the practice, and in subsequent cases courts have found confessions to be voluntary even where police confronted the suspect with utterly fabricated evidence.[101]

The second tactic is the use of inducements to confess, including suggestions that a confession will confer leniency or another tangible benefit.[102] As mentioned, tangible offers of leniency will likely render a confession involuntary, but more subtle (or in the case of *Spencer*, not-so-subtle) inducements are often permitted. The evidence suggests, however, that statements suggesting leniency by "pragmatic implication" are capable of inducing false confessions.[103]

A third practice commonly associated with false confessions is prolonged and persistent interrogation.[104] Psychological studies indicate that suspects subjected to such questioning may confess falsely in order to end the ordeal,[105] especially when deprived of sleep.[106] In *Oickle*, the Court acknowledged that false confessions can be produced by pro-

---

[97] See, *e.g.*, Kassin & Gudjonsson, *id.*; Drizin & Leo, *id.*; Sherrin, *supra*, note 7; Brandon L. Garrett, "The Substance of False Confessions" (2010) 62 Stan. L. Rev. 1051 [hereinafter "Garrett"].

[98] See Kassin *et al*., *supra*, note 54, at 28; see Garrett, *id.*, at 1097-99.

[99] See Robert Horselenberg, Harald Merckelback & Sarah Josephs, "Individual Differences and False Confessions: A Conceptual Replication of Kassin and Kiechel (1996)" (2003) 9 Psychology, Crime & Law 1; Saul M. Kassin & Katherine L. Kiechel, "The Social Psychology of False Confessions: Compliance, Internalization and Confabulation" (1996) 7 Psychological Science 125; Kassin *et al*., *id.*, at 28-29. Exaggerating the strength of the evidence, especially that derived from supposedly "scientific" methods like polygraphy, may also be problematic. See Thomas, *supra*, note 70.

[100] *R. v. Oickle*, *supra*, note 53, at para. 61. See also paras. 38, 40.

[101] See, *e.g.*, *R. v. Sinclair*, *supra*, note 94, at para. 136.

[102] Kassin *et al*., *supra*, note 54, at 30.

[103] *Id*.

[104] See Drizin & Leo, *supra*, note 96, at 948-49; Garrett, *supra*, note 97, at 1096.

[105] Kassin & Gudjonsson, *supra*, note 96, at 53-54; Drizin & Leo, *id.*, at 948-49; Saul M. Kassin, "On the Psychology of Confessions: Does *Innocence* Put *Innocents* at Risk?" (2005) 60 American Psychologist 215, at 221 [hereinafter "Kassin"]; Ofshe & Leo, *supra*, note 96, at 1061.

[106] See Sherrin, *supra*, note 7, at 640-43.

longed questioning.[107] But it set no *ex ante* limit on the length of an interrogation, stating only that lengthy questioning was one factor capable of producing an atmosphere of oppression leading to an involuntary statement. Indeed, the interrogation approved in that case lasted nearly six hours.

The evidence is strong, then, that despite the possibility of exclusion under the confessions rule, police continue to question suspects in ways apt to produce false confessions. This is in itself a significant concern, since people who confess falsely face a high probability of wrongful arrest, wrongful detention and wrongful prosecution. Even worse, of course, is the prospect of wrongful conviction. To avoid this, courts must have the capacity to discern and disregard false confessions. The option of leaving the weight of dubiously reliable confessions to be decided by the trier of fact is exceptionally dangerous. Courts have long recognized that triers of fact have great difficulty discounting the weight of confessions, even those obtained in circumstances casting obvious doubt on their reliability.[108] The modern empirical record amply supports this belief.[109]

The main safeguard against false confession-based wrongful convictions is therefore evidentiary exclusion, chiefly through the confessions rule. That rule can only be effective in preventing wrongful convictions, however, if there is a reliable record of all the circumstances relevant to the interrogation. Historically, the ability of courts to assess the reliability of confessions was greatly hampered by the evidentiary record. The testimony of defendants and police often diverged, with such "swearing contests" typically being won by police.[110] Highly coercive interrogation practices consequently often went undetected.

Today, many interrogations are electronically recorded, often with both video and audio.[111] As the Court noted in *Oickle*, this is a laudable

---

[107] *R. v. Oickle*, *supra*, note 53, at paras. 45, 60.

[108] See *R. v. Oickle*, *id.*, at paras. 35-36; *R. v. Osmar*, [2007] O.J. No. 244, at para. 69, 2007 ONCA 50 (Ont. C.A.), leave to appeal refused [2007] S.C.C.A. No. 157 (S.C.C.); *Wigmore on Evidence* (J. Chadbourn rev.), vol. 3 (Boston: Little, Brown, 1970), at 303.

[109] See Richard A. Leo, *Police Interrogation and American Justice* (Cambridge: Harvard University Press, 2008), at 195-98, 246-68; Kassin, *supra*, note 105, at 222-23; G. Daniel Lassiter & Andrew L. Geers, "Bias and Accuracy in the Evaluation of Confession Evidence" [hereinafter "Lassiter & Geers"] in G. Daniel Lassiter, ed., *Interrogations, Confessions, and Entrapment* (New York: Kluwer, 2004) 197, at 198-200.

[110] See Ratushny, *supra*, note 4, at 107-108; Fred Kaufman, *Admissibility of Confessions*, 3d ed. (Toronto: Carswell, 1979), at 63-64, 140-42; Yale Kamisar, "Foreword: *Brewer v. Williams* — A Hard Look at a Discomfiting Record" (1977) 66 Geo. L.J. 209.

[111] See *R. v. Oickle*, *supra*, note 53, at para. 46.

development.[112] However, the Court refused to make electronic recording a prerequisite (where feasible) for admissibility.[113] This is unfortunate. As so many commentators have argued, mandatory audio-visual recording (of both interrogators and suspects) is a critical prophylactic against wrongful convictions and carries few (if any) downsides.[114] An increasing number of legislatures[115] and courts[116] have adopted some form of mandatory recording rule. Canadian courts should do the same.[117]

---

[112] *Id*.

[113] *Id*.

[114] See Kassin *et al*., *supra*, note 54, at 25-27; See Richard A. Leo *et al*., "Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century" (2006) Wis. L. Rev. 479, at 523 [hereinafter "Leo *et al*."]; Steven A. Drizin & Beth A. Colgan, "Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions" (2001) 32 Loy. U. Chicago L.J. 337, at 339-41; Ratushny, *supra*, note 4, at 272; Law Reform Commission of Canada, *Questioning Suspects: Working Paper No. 32* (Ottawa: Law Reform Commission of Canada, 1984), at 58; Alan Grant, "Videotaping Police Interviews: A Canadian Experiment" (1987) Crim. L. Rev. 375; Alan Young, "Adversarial Justice and the Charter of Rights: Stunting the Growth of the 'Living Tree'" (1997) 39 Crim. L.Q. 362, at 379-80; Kent Roach, "Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions" (2007) 52 Crim. L.Q. 210, at 231-32; Joyce Miller, *The Audio-Visual Taping of Police Interviews with Suspects and Accused Persons by Halton Regional Police Force: An Evaluation* (Ottawa: Law Reform Commission of Canada, 1988); *Report to the Attorney General by the Police Commission on the Use of Video Equipment by Police Forces in British Columbia* (Victoria: British Columbia Police Commission, 1986); Tim Quigley, "Pre-trial, Trial, and Post-trial Procedure" in Don Stuart, Ronald J. Delisle & Alan Manson, eds., *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Carswell, 1999) 253, at 290; Glanville Williams, "The Authentication of Statements to the Police" (1979) Crim. L.R. 6, at 13-22; Welsh S. White, "False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions" (1997) 32 Harv. C.R.-C.L.L. Rev. 105, at 153; The Hon. Peter deC. Cory, *The Inquiry regarding Thomas Sophonow* (November 4, 2001), at 19, online: <http://www.gov.mb.ca/justice/publications/sophonow/police/recommend.html>; *The Commission on Proceedings Involving Guy Paul Morin* (Toronto: Ministry of the Attorney General, 1998), at 1199-1206; Penney, "What's Wrong?", *supra*, note 7, at 290-93; Penney, Rondinelli & Stribopoulos, *supra*, note 2, at paras. 4.39-4.41.

[115] See *Illinois Code of Criminal Procedure of 1963*, 725 ILCS 5, § 103-2.1; *Texas Code of Criminal Procedure*, art. 38.22 § 3(a)(1) (2002) (Texas); D.C. Code Ann., § 5-116.01 (LexisNexis Supp. 2007) (D.C.); Me. Rev. Stat. Ann. tit. 25, § 2803-B (2007) (Maine); N.M. Stat., § 29-1-16 (Supp. 2006) (New Mexico); N.C. Gen. Stat., § 15A-211 (North Carolina); Md. Code Ann., Crim. Proc., § 2-402 (2009) (Maryland); Wis. Stat. Ann., §§ 968.073, 972.115 (West 2009) (Wisconsin); H.B. 534 Mont. Code Ann., § 46-4 (2009) (Montana); Or. Rev. Stat., § 165.540 (2009) (Oregon); Ind. R. Evid. 617 (Indiana); *Evidence Act 2001* (Tas.), s. 85A; *Crimes Act 1958* (Vict.), s. 464H; *Criminal Code* (W.A.), s. 570D; *Police Administration Act*, ss. 142-143; *Criminal Procedure Act 1986*, s. 281 (N.S.W.); *Summary Offences Act 1953*, s. 74D (S.A.); *Crimes Act 1914* (Cth.), s. 23A(6); *Police Powers and Responsibilities Act 2000* (Qld.), ss. 246, 263-266; *Crimes Act 1914* (Cth.), s. 23V; *Criminal Justice Act, 1984 (Electronic Recording of Interviews) Regulations, 1997*, S.I. No. 74/1997 (Ireland); *Police and Criminal Evidence Act 1984* (U.K.), c. 62, s. 60.

[116] See *Stephan v. State*, 711 P.2d 1156, at 1159-60 (Alaska Sup. Ct. 1985); *State v. Scales*, 518 N.W.2d 587, at 591-93 (Minn. Sup. Ct. 1994).

[117] Some courts, in Canada and the United States, have imposed rules that have stopped short of requiring recording but provided police with strong incentives to do so. See, *e.g.*, *R. v. Moore-McFarlane*, [2001] O.J. No. 4646, 160 C.C.C. (3d) 493, at para. 65 (Ont. C.A.) (failure to record will place a "heavy burden" on the Crown to prove voluntariness); *Commonwealth v. DiGiambattista*,

But having access to an accurate record of the interrogation is no panacea. Psychologists have long known that ordinary people overestimate their capacity to detect deception.[118] More recently, researchers have shown that justice system professionals display similar overconfidence and have great difficulty discerning true from false confessions.[119] There is little reason to think that judges are immune from this deficiency.

Further, a high proportion of documented false confessions have included details that prosecutors have convincingly argued that an innocent person could not have known.[120] Interrogators may (often unintentionally) feed or leak non-public details to suspects, and evidence of such contamination may either not appear or be ignored at trial, especially if the entire course of the interrogation is not recorded.[121] The apparent truthfulness of such confessions may lead judges to admit (and triers of fact to believe) them despite the presence of factors associated with false confessions.[122]

For all of these reasons, any regulatory regime relying primarily on *ex post* review is unlikely to mitigate the risk of wrongful conviction to an acceptable level. How then would a regulatory approach improve this situation? First and foremost, it would provide greater clarity to police on what they are allowed and not allowed to do in questioning suspects. Great strides have been made in recent years in determining the causes of false confessions and identifying the circumstances in which they are apt to lead to wrongful convictions. There is still uncertainty as to the frequency of false confession-based wrongful convictions, and debate over how far the law should go to prevent them.[123] But armed with better

---

813 N.E.2d 516, at 535 (Mass. 2004) (instructing the jury that they may consider a confession less reliable if unrecorded).

[118] See B.M. DePaulo *et al*., "Cues to Deception" (2003) 129 Psychological Bulletin 74; Lassiter & Geers, *supra*, note 109. See also, generally, Aldert Vrij, *Detecting Lies and Deceit: Pitfalls and Opportunities* (Chichester: Wiley, 2008).

[119] See Saul M. Kassin, Christian A. Meissner & Rebecca J. Norwick, "I'd Know a False Confession if I Saw One" (2005) 29 Law and Human Behavior 211; Christian A. Meissner & Saul M. Kassin, "'He's Guilty!': Investigator Bias in Judgments of Truth and Deception" (2002) 26 Law and Human Behavior 469; Kassin *et al*., *supra*, note 54, at 24-25; Kassin, *supra*, note 105, at 222-23. See also, generally, Pär Anders Granhag & Leif A. Strömwall, eds., *The Detection of Deception in Forensic Contexts* (Cambridge: Cambridge University Press, 2004).

[120] See Garrett, *supra*, note 97, at 1066 (36 of 38 cases studied).

[121] *Id*., at 1066-83, 1113-15.

[122] *Id*., at 1094-1102.

[123] See, generally, Michel St-Yves, "Police Interrogation in Canada: From the Quest for Confession to the Search for the Truth" in Tom Williamson, Becky Milne & Stephen P. Savage, eds., *International Developments in Investigative Interviewing* (Cullumpton: Willan, 2009) 92; The

insights as to the psycho-social causes of the phenomenon and the limitations of the confessions rule in addressing it, courts should be able to craft rules that would diminish the risk of wrongful conviction without substantially compromising the state's ability to convict the guilty. The guiding principle should be to prohibit, or at least severely restrict, the use of tactics that experience and science have shown are *apt* to produce false confessions, not merely to exclude only confessions that appear to be unreliable in a given case.[124] This approach avoids the pitfalls of biased *ex post* review referred to above.

The aim of this paper is to encourage courts to develop a regulatory *approach* to interrogation law, not to propose a comprehensive set of reforms to the confessions rule to minimize false confessions.[125] But potential reforms could include (in addition to an audio-visual recording requirement) imposing maximum limits on the duration[126] and minimum standards on the conditions[127] of interrogations; restricting the questioning of vulnerable suspects;[128] banning the use of false evidence;[129] and prohibiting specific types misrepresentations as to the strength of evidence.[130] The Supreme Court of Canada should also consider reversing *Spencer*[131] and forbid all inducements to confess, regardless of the perceived capacity of suspects to resist such inducements.[132] Empirical

---

Right Honourable Antonio Lamer, *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons, Randy Druken* (St. John's: Office of the Queen's Printer, 2006); Working Group on the Prevention of Miscarriages of Justice of the Federal–Provincial–Territorial Heads of Prosecutions Committee, *Report on the Prevention of Miscarriages of Justice* (Ottawa: Department of Justice, 2004), Part 6.

124 See *R. v. Oickle*, *supra*, note 53, at para. 65.

125 For examples of the latter, see Leo *et al*., *supra*, note 114.

126 See Welsh S. White, "False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions" (1997) 32 Harv. C.R.-C.L.L. Rev. 105 at 143-45 (suggesting a five-hour time limit) [hereinafter "White"]; Kassin *et al*., *supra*, note 54, at 28.

127 See Ives, *supra*, note 61, at 498.

128 See, *e.g.*, *Police and Criminal Evidence Act 1984* (U.K.), 1984, c. 60, Code C, Detention, treatment and questioning of persons by police officers (in force January 31, 2008) (detailing special procedures for questioning of mentally disordered and mentally vulnerable); Garrett, *supra*, note 97, at 1116 (providing examples of legal and policy proposals).

129 See Kassin *et al*., *supra*, note 54, at 28-29; *R. v. Mason*, [1987] 3 All E.R. 481, at 484-85.

130 See White, *supra*, note 126, at 146-47; Ives, *supra*, note 61, at 498-99.

131 *R. v. Spencer*, *supra*, note 74.

132 See Lisa Dufraimont, "Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?" (2008) 33 Queen's L.J. 261, at 285-86; Dale E. Ives & Christopher Sherrin, "*R. v. Singh* — A Meaningless Right to Silence with Dangerous Consequences" (2007) 51 C.R. (6th) 250.

research confirms what judges have long intuited: threats and promises are the most frequent cause of false confessions.[133]

The proposals would inevitably generate controversy, especially among police, prosecutors and others who would fear that police would be handicapped in their ability to obtain reliable confessions necessary to prove serious crimes. Experimental evidence[134] and the experience of other jurisdictions suggests,[135] however, that less confrontational and manipulative interrogation tactics are at least as adept at obtaining reliable confessions as the harsher techniques more commonly used in Canada and the United States.

VI. SECTION 10(b) OF THE CHARTER

In the United States, dissatisfaction with the confession rule's effectiveness in curbing coercive interrogation practices led the Supreme Court to adopt the *Miranda* warnings under the aegis of the Fifth Amendment's self-incrimination clause.[136] Canada's version of *Miranda* is section 10(b) of the Charter, which states that "[e]veryone has the right on arrest or detention ... to retain and instruct counsel without delay and to be informed of that right". In interpreting this simple directive, the Supreme Court of Canada has issued an elaborate set of rules that is in some ways a model of the kind of prospective regulatory regime proposed here. As detailed below, however, many of these rules are too imprecise to provide substantial protection against false confessions.

Before elaborating this argument, I should address two potential objections. First, courts have not said that minimizing false confessions is one of section 10(b)'s purposes. Instead, its purpose is to help suspects

---

[133] See Richard Ofshe & Richard A. Leo, "The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions" (1997) 16 Studies in Law, Politics & Society 189; Christopher Sherrin, "False Confessions and Admissions in Canadian Law" (2005) 30 Queen's L.J. 601.

[134] See Moore & Fitzsimmons, *supra*, note 7, at 537-40; Kassin *et al*., *supra*, note 54, at 29.

[135] See S. Soukara *et al*., "A Study of What Really Happens in Police Interviews with Suspects" (2009) 15 Psychology, Crime & Law 493, at 502-503; Snook *et al.*, *supra*, note 43, at 219-23; Ivar A. Fahsing & Asbjørn Rachlew, "Investigative Interviewing in the Nordic Region" in Tom Williamson, Becky Milne & Stephen P. Savage, eds., *International Developments in Investigative Interviewing* (Cullumpton: Willan, 2009); Moore & Fitzsimmons, *id.*, at 540-42; Stephen Moston *et al.*, "The Effects of Case Characteristics on Suspect Behaviour During Questioning" (1992) 32 Brit. J. Criminology 23, at 38-39.

[136] See Steven Penney, "Theories of Confession Admissibility: A Historical View" (1998) 25 Am. J. Crim. L. 309, at 366-72.

make informed, voluntary choices in their interactions with police.[137] The right to counsel, the Supreme Court has held, gives suspects the opportunity to become more aware of their legal situation and mitigates the risk of unwitting self-incrimination.[138] However, in better equipping detainees to resist pressure to confess, section 10(b) does indirectly help to minimize false confessions.[139] As mentioned, questioning techniques apt to produce false confessions are most likely to be used with detainees who do not give police the answers they are looking for. Section 10(b) tells such persons that they have the right to cut off questioning and talk to a lawyer. It also reminds police that there are "moral and constitutional limits" to their efforts to extract confessions.[140] Even if section 10(b) is not directly aimed at reducing false confessions, assessing whether a regulatory approach can better enhance this goal is still a worthy exercise.

The second objection relates to section 10(b)'s constitutional status. In theory, it is much more difficult to amend rules promulgated by the courts under the Charter than the common law. The difference may not be as great in practice, however. As mentioned, the confessions rule has been constitutionalized in the sense that courts would likely strike down any statute diminishing its core protections. But consistent with the Supreme Court's dialogic approach to Charter review,[141] legislation more modestly modifying or augmenting the rule would likely be treated with deference. A similar dynamic would likely emerge should Parliament legislate on the right to counsel during interrogation. In recent years, the Supreme Court of Canada has been willing to approve of substantial

---

[137] See *R. v. Bartle*, [1994] S.C.J. No. 74, [1994] 3 S.C.R. 173, at 193-94 (S.C.C.); *R. v. Sinclair*, [2010] S.C.J. No. 35, [2010] 2 S.C.R. 310, at paras. 24-26 (S.C.C.).

[138] See *R. v. Manninen*, [1987] S.C.J. No. 41, [1987] 1 S.C.R. 1233, at 1242-43 (S.C.C.); *R. v. Brydges*, [1990] S.C.J. No. 8, [1990] 1 S.C.R. 190, at 203, 206, 215 (S.C.C.); *R. v. Bartle*, *id.*, at 191; *R. v. Prosper*, [1994] S.C.J. No. 72, [1994] 3 S.C.R. 236, at 271 (S.C.C.); *R. v. S. (R.J.)*, [1995] S.C.J. No. 10, [1995] 1 S.C.R. 451, at para. 85 (S.C.C.); *R. v. Jones*, [1994] S.C.J. No. 42, [1994] 2 S.C.R. 229, at 254-55 (S.C.C.), *per* Lamer C.J.C., dissenting. See also *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151, at 176 (S.C.C.).

[139] See Christine Boyle, "*R. v. Sinclair*: A Relatively Disappointing Decision on the Right to Counsel" (2010) 77 C.R. (6th) 310.

[140] Richard A. Leo, "The Impact of *Miranda* Revisited" (1996) 86 J. Crim. L. & Criminology 621, at 679.

[141] See Peter W. Hogg, Allison A. Bushell Tornton & Wade K. Wright, "*Charter* Dialogue Revisited — Or 'Much Ado About Metaphors'" (2007) 45 Osgoode Hall L.J. 1; Michael Plaxton, *supra*, note 48.

legislative modifications of rules that it had previously promulgated as constitutional minimum standards.[142]

In much of its early section 10(b) jurisprudence, the Supreme Court did impose several bright-line obligations and prohibitions on police. In concert with the Court's now-abandoned, near-automatic exclusionary rule for self-incriminating evidence,[143] these rules set the framework for a robust regulatory approach to the right to counsel. Recall that the only express obligation on police contained in section 10(b) is to tell detainees that they have a right to talk to a lawyer. But under the Court's "purposive" interpretive approach, police must also inform detainees of any available legal aid or duty counsel services.[144] Further, if duty counsel is available, police must tell detainees how to contact them.[145] And when detainees do assert their right to counsel, police must allow them, as soon as feasibly possible,[146] to telephone a lawyer in private.[147] Police may not elicit any evidence from the detainee before such access is provided.[148]

But many other section 10(b) rules hew more closely to the adjudicative approach. Particularly opaque is the threshold determination of whether a person has been detained and is therefore entitled to the right to counsel. The governing test in most interrogation cases is whether the "reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice", considering the "circumstances giving rise to the encounter as would

---

[142] See, *e.g.*, *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668 (S.C.C.); *R. v. Hall*, [2002] S.C.J. No. 65, [2002] 3 S.C.R. 309 (S.C.C.); *R. v. Darrach*, [2000] S.C.J. 46, [2000] 2 S.C.R. 443 (S.C.C.); *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] S.C.J. 30, [2007] 2 S.C.R. 610 (S.C.C.).

[143] See *R. v. Stillman*, *supra*, note 22 (now overtaken on this point by *R. v. Grant*, *supra*, note 47).

[144] *R. v. Brydges*, *supra*, note 138, at 209-10, 212, 215; *R. v. Bartle*, *supra*, note 137, at 195.

[145] See *R. v. Bartle*, *id.*, at 197. Typically, police give detainees either a single (toll-free) duty counsel telephone number or a list of numbers for lawyers acting as duty counsel. See *R. v. Bartle*, *id.*, at 200-201; *R. v. Cook*, [1998] S.C.J. No. 68, [1998] 2 S.C.R. 597, at para. 59 (S.C.C.); *R. v. Pozniak*, [1994] S.C.J. No. 75, [1994] 3 S.C.R. 310, at para. 11 (S.C.C.); *R. v. Harper*, [1994] S.C.J. No. 71, [1994] 3 S.C.R. 343, at para. 26 (S.C.C.); *R. v. Cobham*, [1994] S.C.J. No. 76, [1994] 3 S.C.R. 360, at para. 12 (S.C.C.).

[146] See *R. v. Manninen*, *supra*, note 138, at 1242 (S.C.C.) ("there may be circumstances in which it is particularly urgent that the police continue with an investigation before it is possible to facilitate a detainee's communication with counsel"). See also *R. v. Burley*, [2004] O.J. No. 319, 181 C.C.C. (3d) 463, at para. 16 (Ont. C.A.); *R. v. Nelson*, [2010] A.J. No. 1329, 490 A.R. 271, at paras. 15-23 (Alta. C.A.).

[147] The courts have typically held that s. 10(b) requires an environment "where the conversation cannot be overheard and there is no reasonable apprehension ... of being overheard". *R. v. Miller*, [1990] N.J. No. 305, 87 Nfld. & P.E.I.R. 55, at 58 (Nfld. C.A.).

[148] *R. v. Lewis*, [2007] N.S.J. No. 18, 2007 NSCA 2, at para. 32 (N.S.C.A.); *R. v. Nelson*, *supra*, note 146.

reasonably be perceived by the individual", "[t]he nature of the police conduct", the "particular characteristics or circumstances of the individual", as well as a non-exhaustive list of considerations falling within these categories.[149]

There are many problems with this test.[150] I focus here on those relating to false confessions. The Court in *Grant* likely intended that potentially coercive, interrogation-style questioning trigger the protection of section 10(b). Several of the *Grant* factors, including whether police have singled out the suspect for "focussed investigation", the "duration of the encounter" and the "language used" by police, seem directed to this end.[151] Yet no factor is decisive, and even intensive interrogation may not always trigger detention if police tell suspects that they are free to leave. The Court in *Grant* stated that in "those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go".[152] Before *Grant*, most courts had found detention when police had identified the accused as the likely perpetrator and conducted questioning with a view to inducing self-incriminating statements, even when suspects were told that they were free to leave or to decline answering questions.[153] But since *Grant*, some have held otherwise.[154]

Given the psychological dynamics of intensive interrogation, even repeated references to the freedom to leave may not be heeded, especially by innocent suspects eager to clear their names.[155] A simpler rule finding detention whenever police try to elicit self-incriminating infor-

---

[149] *R. v. Grant*, *supra*, note 47, at para. 44.

[150] See Steven Penney & James Stribopoulos, "'Detention' under the Charter after *R. v. Grant* and *R. v. Suberu*" (2010) 51 S.C.L.R. (2d) 439 at 451-56 [hereinafter "Penney & Stribopoulos"]; Steven Penney, "Triggering the Right to Counsel: 'Detention' and Section 10 of the Charter" (2008) 40 S.C.L.R. 271, at 281-85 [hereinafter "Penney, 'Triggering the Right'"].

[151] *R. v. Grant*, *supra*, note 47, at para. 44. See also *R. v. Way*, [2011] N.B.J. No. 335, 2011 NBCA 92, at para. 37 (N.B.C.A.).

[152] *R. v. Grant*, *id.*, at para. 32.

[153] See, *e.g.*, *R. v. Johns*, [1998] O.J. No. 445, 14 C.R. (5th) 302, at para. 28 (Ont. C.A.); *R. v. Teske*, [2005] O.J. No. 3759, at para. 55, 32 C.R. (6th) 103 (Ont. C.A.); *R. v. Rajaratnam*, [2006] A.J. No. 1373, 214 C.C.C. (3d) 547, at para. 17 (Alta. C.A.); *R. v. Lee*, [2007] A.J. No. 1183, 417 A.R. 331 (Alta. C.A.).

[154] See, *e.g.*, *R. v. Rodh*, [2010] S.J. No. 647, 2010 SKPC 150, at para. 25 (Sask Prov. Ct.); *R. v. Wheeler*, [2010] Y.J. No. 10, 2010 YKTC 7, at para. 28 (Y.T. Terr. Ct.). See also *R. v. Way*, *supra*, note 151, at paras. 39-40 ("there may be situations where the police advise a person that he or she is under no obligation to answer questions and is free to go, which would still result in a finding of psychological restraint. However, detention will certainly be much more difficult to establish when such information has been genuinely provided").

[155] See Kassin, *supra*, note 54; Moore & Fitzsimmons, *supra*, note 7, at 528.

mation from someone they have identified as a likely perpetrator of the offence would provide clearer guidance to police and better mitigate the risk of false confession.[156]

Another minefield of indeterminacy is the jurisprudence surrounding the duration and circumstances of the "reasonable opportunity" afforded to detainees who have invoked their right to counsel.[157] For the duration of this period, police must refrain from questioning or otherwise attempting to elicit self-incriminating evidence from detainees.[158] Once the "reasonable opportunity" expires, however, police may proceed with such measures, regardless of whether detainees have talked to a lawyer.[159]

Most of the litigation in this area arises when a detainee expresses a desire to talk to a specific lawyer, is not able to contact him or her, and is then questioned. Sometimes detainees will not have spoken to any lawyer; in others they may have consulted with either duty counsel or another lawyer. The Supreme Court has held that detainees have a presumptive right to talk to a lawyer of their choosing, but must be reasonably diligent in doing so.[160] The cases on this issue are notoriously inconsistent.[161] As one would expect of the adjudicative approach, there are few hard and fast rules: in each case, "all of the surrounding circumstances" must be considered in deciding whether police have provided a reasonable opportunity; or conversely, whether detainees have diligently exercised their rights.[162]

---

[156] See Penney, "Triggering the Right", *supra*, note 150, at 284-85. To be clear, these are not the only circumstances where psychological detention (without legal compulsion) should be found to have arisen. In the context of the liberty interest protected by s. 9 of the Charter, the use of mandatory (as opposed to permissive) language by police should also trigger detention. See Penney & Stribopoulos, *supra*, note 150, at 460-62.

[157] See *R. v. Manninen*, *supra*, note 138, at 1241.

[158] See *R. v. Manninen*, *id.*, at 1242; *R. v. Prosper*, *supra*, note 138, at 269 (S.C.C.).

[159] *R. v. Prosper*, *id*.

[160] *R. v. Ross*, [1989] S.C.J. No. 2, [1989] 1 S.C.R. 3, at 11 (S.C.C.); *R. v. Tremblay*, [1987] S.C.J. No. 59, [1987] 2 S.C.R. 435, at 439 (S.C.C.).

[161] See Stephen Coughlan, "When Silence Isn't Golden: Waiver and the Right to Counsel" (1990) 33 Crim. L.Q. 43, at 55; Stanley A. Cohen, "Police Interrogation of the Wavering Suspect" (1989) 71 C.R. (3d) 148; Patrick Healy, "The Value of Silence" (1990) 74 C.R. (3d) 176, at 181-83; Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Toronto: Thomson Carswell, 2005), at 352-53; Tim Quigley, *Procedure in Canadian Criminal Law*, 2d ed. (looseleaf) (Toronto: Thomson Carswell, 2006), at § 7.2(c)(iii)(B).

[162] *R. v. Prosper*, *supra*, note 138, at 269; *R. v. Sheppard*, [2005] N.J. No. 233, 2005 NLCA 45, at para. 18 (N.L.C.A.); *R. v. Basko*, [2007] S.J. No. 564, 2007 SKCA 111, at para. 13 (Sask. C.A.); *R. v. Ngo*, [2003] A.J. No. 610, 2003 ABCA 121, at para. 25 (Alta. C.A.); *R. v. Whitford*, [1997] A.J. No. 309, 115 C.C.C. (3d) 52, at para. 7 (Alta. C.A.), leave to appeal refused [1997] S.C.C.A. No. 246 (S.C.C.); *R. v. Richfield*, [2003] O.J. No. 3230, 178 C.C.C. (3d) 23, at para. 9 (Ont. C.A.).

A related rule requires police to issue an additional caution (often called a "*Prosper* warning") to detainees who, after invoking their right to talk to a lawyer, decide not to do so.[163] In such cases, police must defer questioning until detainees clearly and knowingly waive their right to counsel. This requires police to remind detainees that they are entitled to a reasonable opportunity to contact counsel, during which the police are prohibited from obtaining incriminating evidence.[164] This rule is clear enough, but several courts have found that the warning need not be given to detainees who have not been reasonably diligent in attempting to contact counsel.[165] It thus requires police to again decide, on the totality of circumstances, whether the detainee has been duly diligent.

A regulatory perspective points to a much narrower construal of the right to counsel of choice. In most cases, detainees will be able to speak to duty counsel immediately. Where such consultation is available, detainees who express a desire to talk to a specific lawyer should be given a brief and definite period of time to do so (*e.g.*, one hour). If detainees have not talked to this lawyer within that period, they should be given the chance to speak with duty counsel. If they decline that opportunity, police should be obliged to issue the *Prosper* warning before questioning them. If neither preferred nor duty counsel is available, police will have to hold off until one of them is, unless detainees give a valid *Prosper* waiver.

This approach would be simple for police to administer and would have the happy effects of increasing the availability of reliable confession evidence (leading to just convictions), minimizing the frequency of false confessions (leading to wrongful convictions), and in some cases, shortening the duration of detention.

The goal of obtaining just convictions would be fostered in two ways. First, it would assist the police in conducting timely and efficient investigations. The due diligence rule's purpose is to prevent dilatory

---

[163] *R. v. Prosper*, *supra*, note 138.

[164] *R. v. Prosper*, *id.*, at 274-75. See also *R. v. Ross*, *supra*, note 160, at 11-12; *R. v. Manninen*, *supra*, note 138, at 1244; *R. v. Black*, [1989] S.C.J. No. 81, [1989] 2 S.C.R. 138, at 156-57 (S.C.C.); *R. v. Brydges*, *supra*, note 138, at 204; *R. v. Evans*, [1991] S.C.J. No. 31, [1991] 1 S.C.R. 869, at 893-94 (S.C.C.); *R. v. Smith*, [1991] S.C.J. No. 24, [1991] 1 S.C.R. 714, at 727-28 (S.C.C.); *R. v. Bartle*, *supra*, note 137, at 192-94, 206.

[165] See *R. v. Basko*, *supra*, note 162; *R. v. Jones*, [2005] A.J. No. 1325, 2005 ABCA 289 (Alta. C.A.), leave to appeal refused [2005] S.C.C.A. No. 538 (S.C.C.); *R. v. Luong*, [2000] A.J. No. 1310, 149 C.C.C. (3d) 571 (Alta. C.A.).

detainees from frustrating police efforts to obtain reliable evidence.[166] Where duty counsel is available, shortening the "reasonable opportunity" period to one hour (or another brief period) would further enhance this purpose. In some cases, this would generate reliable evidence that would not have otherwise been obtainable.

Second, under the current rule, the uncertainty of the due diligence standard will often cause inadvertent Charter violations. Courts will find that police should have either given detainees more time to contact their lawyers or given them a *Prosper* warning. In many of these cases, reliable confession evidence will be excluded as a result. This would be an acceptable cost if exclusion were necessary to encourage compliance with a rule protecting against wrongful convictions. But as explained immediately below, the current expansive interpretation of the right to counsel of choice does not advance these interests.

Indeed, the approach I propose is more likely to prevent false confessions than the current one. Under the reasonable opportunity rule, detainees who wish to talk to counsel but are not duly diligent are entitled to neither consultation nor a *Prosper* warning. Having indicated a reluctance to talk to police without legal advice, they are nonetheless subjected to the rigours of interrogation without the benefit of that advice. If talking to a lawyer helps the innocent to resist pressure to confess, that assistance is lost. My proposal, in contrast, would ensure that all detainees who want to talk to a lawyer actually do so, unless they later exercise a voluntary and informed waiver.

In at least some cases, this approach would also lessen the duration of detainees' detentions. Because the "reasonable opportunity" period would be short, police could proceed with interrogation sooner than is the case today. This would spur earlier release if, after the interrogation, police decide to: decline to arrest a detainee; release an arrestee; or promptly present an arrestee to a justice for potential pre-trial release.

It might be argued that an even better approach would be to allow detainees more time to talk to lawyers of their choosing. In my view, this would frustrate the efficiency of interrogation and prolong detention without significantly minimizing the risk of false confession. While the advice given to detainees may vary, there is no evidence that duty

---

[166] See *R. v. Smith*, [1989] S.C.J. No. 89, [1989] 2 S.C.R. 368, at 385 (S.C.C.), *per* Lamer J.; *R. v. Sinclair*, *supra*, note 137, at para. 58; *R. v. Willier*, [2010] S.C.J. No. 37, [2010] 2 S.C.R. 429, at para. 34 (S.C.C.); *R. v. Whitford*, *supra*, note 162, at para. 15.

counsel's advice is less protective than that of other lawyers.[167] Lawyers acting as duty counsel are ethically obliged to provide competent and comprehensive advice, and organizations that deliver duty counsel services bear a responsibility to ensure proper training, supervision and oversight. In any case, since under the current regime most detainees who invoke their rights to talk to duty counsel, preserving a robust right to counsel of choice would add little protection against false confessions. No doubt, some detainees feel more comfortable consulting lawyers whom they know. If they are able to talk to them within a brief and certain period of time, they should be permitted to do so. But in the absence of evidence that trust or confidence in a particular lawyer mitigates the risk of false confessions, we would be better off with a regime that ensures both prompt consultation and prompt interrogation.

There is, however, an alternative that would be even simpler to administer and offer even more protection against false confessions: a rule prohibiting *incommunicado* questioning after the assertion of the right to counsel. In the United States under *Miranda*, once detainees invoke their right to counsel, police must cease questioning until a lawyer is present.[168] This rule applies regardless of whether detainees have talked to a lawyer or attempted (whether diligently or not) to do so.[169]

The advantages of this approach are obvious. Talking to a lawyer does not guarantee that detainees will be able to resist pressure to confess falsely.[170] As the United States Supreme Court has observed, the prohibition on post-invocation questioning is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights".[171] For detainees who invoke their rights (admittedly a minority of all detainees), such a rule would dramatically diminish the risk of false confession. But it would also come with a cost: reducing the availability of reliable confession evidence. Whether the benefits would outweigh the costs entails a difficult policy choice. In my view they would.[172] But the

---

[167] See Simon Verdun-Jones & Adamira Tijerino, *A Review of* Brydges *Duty Counsel Services in Canada* (Ottawa: Department of Justice Canada, 2003), at 63-70.

[168] See *Edwards v. Arizona*, 451 U.S. 477, at 484-85 (1981); *Minnick v. Mississippi*, 498 U.S. 146, at 150 (1990). This rule does not apply, however, if suspects themselves initiate further communication with police. See *Edwards v. Arizona*, *id*.; *Oregon v. Bradshaw*, 462 U.S. 1039 (1983).

[169] *Minnick v. Mississippi*, *id*., at 150.

[170] See *Miranda v. Arizona*, 384 U.S. 436, at 470 (1966), where the Court noted that "even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process". See also *Minnick v. Mississippi*, *id*., at 153.

[171] *Michigan v. Harvey*, 494 U.S. 344, at 350 (1990).

[172] Steven Penney, "What's Wrong?", *supra*, note 7, at 318-20. See also Lee Stuesser, "The Accused's Right to Silence: No Doesn't Mean No" (2002) 29 Man. L.J. 149, at 150.

Supreme Court of Canada's recent decision in *R. v. Sinclair*[173] has foreclosed this option for the foreseeable future. There, the Court confirmed that police could not only question after invocation (assuming consultation, the expiry of the reasonable opportunity or a *Prosper* waiver), but also that they could refuse detainees' requests to either stop the interrogation or (save for limited exceptions) consult again with counsel.[174] The best option for bolstering section 10(b)'s protection against false confessions is thus to encourage prompt consultation with a lawyer, even if that means curtailing the right to counsel of choice.

VII. CONCLUSION

Legislative inaction does not in itself give courts free rein to adopt the kind of regulatory approach proposed here. In many situations, a case-by-case incrementalist approach may still be best. But where a pressing policy concern presents itself, clear and prospective rules are needed to address that concern, and the courts have access to the empirical information required to shape those rules, the case for bright-line prospective regulation becomes strong.

The law of police questioning meets each of these criteria. The prevention of wrongful convictions is one of the most important goals of the criminal justice system.[175] The evidence is mounting that false confessions are not rare and often contribute to wrongful convictions. The kinds of clear rules necessary to substantially mitigate the problem are relatively easy to discern and amply supported by the empirical record. And it is becoming increasingly apparent that the adoption of such rules is not likely to substantially hamper efforts to convict the guilty.

Meaningful reform of police questioning will likely require more than legal innovation. Professional norms will also need to change (there are tentative signs that this may finally be starting to occur[176]). But the law can play an important role in both regulating questioning practices and fostering attitudinal changes among interrogators. In the absence of legislative action, the responsibility falls on appellate judges to take up this regulatory mantle.

---

[173] *R. v. Sinclair*, *supra*, note 137.

[174] *Id*.

[175] See, generally, *R. v. Oickle*, *supra*, note 53, at para. 36; *R. v. Mills*, *supra*, note 142, at para. 71; *R. v. Leipert*, [1997] S.C.J. No. 14, [1997] 1 S.C.R. 281, at para. 4 (S.C.C.).

[176] See Snook *et al.*, *supra*, note 43, at 225.