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# COMMENT ON INGRAHAM'S "MORAL DUTY" TO TALK AND THE RIGHT TO SILENCE

GREGORY W. O'REILLY

## I. INTRODUCTION

Professor Barton L. Ingraham opened an illuminating debate about fundamental legal principles usually assumed to be at the bedrock of American democracy in his reply<sup>1</sup> to my article in this journal. My article described how England's new limits to the right to silence allow judges and juries to consider as evidence of guilt both a suspect's failure to answer police questions during interrogation and a defendant's refusal to testify during trial.<sup>2</sup> Proponents of this new law argued that it would "dissuade offenders from thwarting prosecution simply by saying nothing," force suspects to confess, increase convictions, and thereby reduce crime.<sup>3</sup> Opponents countered that even the innocent may "have valid reasons for remaining silent, and that the proposal would not reduce crime, but rather would increase the likelihood of coerced or false confessions and erroneous convic-

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<sup>1</sup> Barton L. Ingraham, *The Right of Silence, The Presumption of Innocence, The Burden of Proof, and a Modest Proposal: A Reply to O'Reilly*, 86 J. CRIM. L. & CRIMINOLOGY 559 (1996).

<sup>2</sup> Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402 (1994). The new law, the Royal Assent dated Nov. 3, 1994, effective March 1, 1995, contains four parts:

(1) judges and jurors may draw adverse inferences when suspects do not tell the police during interrogation a fact relied upon by the defense at trial if, under the circumstances, the suspect could have been expected to mention the fact; (2) if the accused does not testify, judges and prosecutors may invite the jury to make any inference which to them appears proper-including the "common sense" inference that there is no explanation for the evidence produced against the accused and that the accused is guilty; (3) judges and jurors may draw an adverse inference when suspects fail to respond to police questions about any suspicious objects, substances, or marks which are found on their persons or clothing or in the place where they were arrested; and (4) judges and jurors may draw adverse inferences if suspects do not explain to the police why they were present at a place at or about the time of the offense for which they were arrested.

*Id.* at 403-04 (internal citations omitted).

<sup>3</sup> *Id.* at 403 (citing Editorial, *Howard's Beginning*, THE TIMES (London), Oct. 7, 1993, at 17).

tions."<sup>4</sup> Opponents also argued that the new limits to the right would "undermine the presumption of innocence and erode England's accusatorial system of justice."<sup>5</sup>

Along with others, I argued that limiting the right to silence would have significant effects on the accusatorial system of justice because the right exists to stall the engine which drives the inquisitorial system—the power to encourage, require, or force individuals to answer to government questioning. By adopting the use of adverse inferences from the refusal to speak, England has curtailed the right to silence and replaced it with a *duty to talk*. In doing so, England has stepped back toward an inquisitorial system, a retreat which will affect not only the criminal justice system but also the character of the relationship between the citizen and the state.

Professor Ingraham disagreed, and took issue with the key elements of the accusatory system of justice—the presumption of innocence, the right to silence, and the burden and standard of proof. For Professor Ingraham, it is "no longer clear" that the hazard of criminal sanction is still sufficiently severe to require the protections of the accusatorial system.<sup>6</sup> He seeks to ensure that suspects and defendants honor a proposed moral *duty to talk*.<sup>7</sup> Professor Ingraham's reply echoes themes from his previous writings. He has argued that the accusatorial criminal justice system is a "circus of illusions and deception"<sup>8</sup> and a "perfect tool for keeping facts out of sight."<sup>9</sup> He has also argued

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<sup>4</sup> *Id.* at 403 (citing Editorial, *The Right to Silence*, THE ECONOMIST, Jan. 29, 1994, at 17; See THE ROYAL COMM'N ON CRIMINAL JUSTICE, REPORT, 1993, Cmnd. 2263 [hereinafter 1993 REPORT]; see also ROGER LENG, THE ROYAL COMM'N ON CRIMINAL JUSTICE, RESEARCH STUDY No. 10 (1993). Reasons for silence include "the protection of family or friends, a sense of bewilderment, embarrassment or outrage, or a reasoned decision to wait until the allegation against them has been set out in detail and they have had the benefit of considered legal advice." 1993 REPORT, at 52.

<sup>5</sup> O'Reilly, *supra* note 2, at 403 (citing Michael Zander, Editorial, *Abandoning an Ancient Right to Please the Police*, THE INDEPENDENT (London), Oct. 6, 1993, at 25 (the right to silence is "based on the presumption of innocence, and reflects the burden thrown on the prosecution to prove the defendant guilty, without any assistance from the defendant if he so chooses"); John Jackson, *Inferences from Silence: From Common Law to Common Sense*, 44 N. IRELAND LEGAL Q. 103, 108 (1993); O'Reilly, *supra* note 2, at 403, n.8 ("The use of adverse inferences after the prosecution has established only a prima facie case shifts a burden to the accused to testify or have his silence aid the prosecution in carrying its burden of proof. This violates the accusatorial principle that it is the prosecution's duty to prove the accused's guilt."); Editorial, *The Right to Silence*, THE ECONOMIST, Jan. 29, 1994, at 17 ("taking issue with the move to curtail the right to silence, arguing that it is an assault on the presumption of innocence and the burden of proof").

<sup>6</sup> Ingraham, *supra* note 1, at 575.

<sup>7</sup> *Id.* at 566.

<sup>8</sup> Barton L. Ingraham, *The Ethics of Testimony: Conflicting Views on the Role of the Criminologist as Expert Witness*, in EXPERT WITNESSES, CRIMINOLOGISTS IN THE COURTROOM 179 (Patrick R. Anderson and L. Thomas Winfree, Jr., eds., 1987).

<sup>9</sup> Ingraham, *supra* note 1, at 594.

that "American lawyers" perpetuate "myths" about the system, namely that judicial independence protects the citizen against overreaching government, that the adversary system utilizes neutral magistrates in a contest from which the truth emerges,<sup>10</sup> and that official power must be checked to assure liberty.<sup>11</sup> He has referred to the American distrust of leaving "too much to the discretion of officials" as "American parochialism,"<sup>12</sup> and dismissed distinctions between legal systems—including those of totalitarian regimes—regarding the value they place on the protection of the innocent from conviction.<sup>13</sup> The stark contrast between Professor Ingraham's views and my own may help to clarify why American lawyers believe and practice as we do, and why we have not only a tradition supporting the right to silence, but a commitment to it as a primary value in our jurisprudence.

While English proponents of limiting the right to silence offered in trade the dubious promise of reduced crime, Professor Ingraham offered only a moral justification. He made light of any competing concerns, such as the risk that more innocent people will be convicted of crimes, or that the change may increase state power at the expense of individual liberty. In advocating a duty to talk, Professor Ingraham minimized its significance, contending that I offered "patently untrue" or "unverified statements" about the significance of the new law.<sup>14</sup> While he questioned the value of the accusatorial system and suggested that it should be diminished, he asserted the new law does not move the English justice system from the accusatorial towards the inquisitorial model, and argued that I perpetuated "myths" about the accusatorial and inquisitorial systems.<sup>15</sup>

In addition to defending England's new law, Professor Ingraham offered his own proposal for, among other things, imposing a duty to talk and reducing the standard and burden of proof.<sup>16</sup> He conceded that his proposal would "require the revision of the American presumption of innocence doctrine and the overruling of a whole series of Supreme Court cases, and therefore, it may strike the reader as a purely academic exercise."<sup>17</sup> It so strikes this reader. My response deals with Ingraham's defense of the new English law, his critique of my article, his dismissal of the need for the protections of the American accusatorial system of justice and his unconvincing justification

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<sup>10</sup> BARTON L. INGRAHAM, *THE STRUCTURE OF CRIMINAL PROCEDURE* 8-9 (1987).

<sup>11</sup> *Id.* at 33-34.

<sup>12</sup> *Id.* at 33.

<sup>13</sup> *Id.*

<sup>14</sup> Ingraham, *supra* note 1, at 590.

<sup>15</sup> *Id.* at 559-60.

<sup>16</sup> *Id.* at 580-87.

<sup>17</sup> *Id.* at 580.

for a duty to talk. Professor Ingraham's attempt to make a duty to talk seem benign by diminishing its significance and blurring the distinctions between accusatorial and inquisitorial systems requires this reply, for as Justice Bradley warned "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."<sup>18</sup>

## II. DO WE STILL NEED AN ACCUSATORY CRIMINAL JUSTICE SYSTEM?

Professor Ingraham argued "for treating criminal and civil cases more alike procedurally than they traditionally have been"<sup>19</sup> because "rationalizations"<sup>20</sup> for the procedural differences cited by the United States Supreme Court, such as "the stigmatizing effect of a criminal conviction," and the "nature and severity" of the criminal sanction,<sup>21</sup> "may have been true in the past, but they are far less true today." He compared the past, when death was the only penalty for a felony, with the present, where fines and probation are the most common penalties imposed by the criminal courts.<sup>22</sup> Relying on figures from 1985, Professor Ingraham noted that 1,870,132 persons were placed on probation and 757,409 were serving time in state and federal jails and prisons, thus "about 70% of all offenders" are placed on probation.<sup>23</sup> Professor Ingraham found it "very unlikely" that "this situation . . . has changed much in the decade following publication of these statistics."<sup>24</sup> He is wrong to believe that, because parole is more common than prison, the severity of American criminal sanction is somehow diminished. Imprisonment was not "rare" in 1985, and it has escalated dramatically in the last decade. The available current data reveals that, at the end of 1994, 1.5 million people were behind bars in America. Of these, most—958,704—were in state prisons, 95,034 were in federal prisons, and 483,717 were in local jails.<sup>25</sup> One year later nearly 1.6 million people were behind bars, with 1,078,357 in state and federal prisons, an increase of 8.7 percent; and 507,044 in

<sup>18</sup> *Boyd v. United States*, 116 U.S. 616, 635 (1885); James Madison, *Speech in the Virginia Convention, Richmond Va., June 6, 1788*, in *THE PAPERS OF JAMES MADISON* 79 (Robert A. Rutland and Charles F. Hobson eds., 1979).

<sup>19</sup> Ingraham, *supra* note 1, at 576.

<sup>20</sup> *Id.* at 574.

<sup>21</sup> *Id.* at 572 (citing *In re Winship*, 397 U.S. 358, 363-64 (1970)).

<sup>22</sup> *Id.* at 574.

<sup>23</sup> *Id.* at 574 n.37.

<sup>24</sup> *Id.* (citing *Probation and Parole* 1985, BJS BULLETIN (Jan. 1987), and BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 102 (2d ed. 1988)).

<sup>25</sup> See U.S. Dep't of Justice, *Nation's Correctional Population Tops 5 Million*, Aug. 27, 1995 (press release); Fox Butterfield, *More in U.S. Are in Prisons, Report Says*, N.Y. TIMES, Aug. 10, 1995, at A14 (an additional 3.5 million persons on parole or probation).

local jails, an increase of 4.2 percent.<sup>26</sup> By 1995, America had the world's highest incarceration rate, far exceeding the rates of any other industrialized nation, and five to ten times higher than the incarceration rates of Western European nations.<sup>27</sup> Serious offenders are typically not sentenced to probation, but to prison. The Department of Justice reported that in 1992, sixty percent of persons convicted of violent offenses were sentenced to prison, and another twenty-one percent were sentenced to time in local jails, often reflecting long pre-trial stays.<sup>28</sup> Over eighty percent of persons convicted of violent offenses spend time behind bars.<sup>29</sup>

Relying on 1983 figures, Professor Ingraham found that the average sentence for serious felonies was between about three and six years, while the actual time prisoners served "was, on the average, much less than these figures would indicate."<sup>30</sup> He concluded that "[l]ong-term imprisonment is also rare, although it has become more frequent in the last few years."<sup>31</sup> Professor Ingraham is wrong: long-term imprisonment is far from rare. The Department of Justice reported that from 1992 through 1994 the average person convicted of a violent offense was sentenced to ten years in prison and would serve slightly less than five years in prison.<sup>32</sup> In 1991, thirty-four percent of American inmates were serving sentences of at least ten years, and another six percent were serving either life or death sentences. In England and Wales, by contrast, only four percent were serving sentences of ten or more years, and an additional eight percent were serving life sentences.<sup>33</sup> Differences in early release practices did not

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<sup>26</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES, 1995, at 2 (1996); *Prison Population Doubles in Decade*, CHI. TRIB., Aug. 19, 1996, at 3. By midyear 1996, an estimated 1,630,940 persons were in America's jails in prisons. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON AND JAIL INMATES, 1996, at 1 (1997).

<sup>27</sup> According to the Sentencing Project, based on Justice Department figures for the twelve months ending June 30, 1995, America's rate of 565 per 100,000 surpasses Russia's 1993 rate of 558 per 100,000. Linnet Myers, *Prison Population is Soaring in U.S.*, CHI. TRIB., Dec. 4, 1995, at 3. By comparison, European incarceration rates per 100,000 ranged from 49 in the Netherlands, to 80 in Italy, to 93 in England and Wales. Linnet Myers, *Cultural Divide over Crime and Punishment*, CHI. TRIB., Oct. 13, 1995, at 1; *Prison Population Doubles in Decade*, CHI. TRIB., Aug. 19, 1996, at 3 (one out of every 167 Americans is in prison or jail).

<sup>28</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 1992, at 2 tbl.2 (1995).

<sup>29</sup> *Id.*

<sup>30</sup> Ingraham, *supra* note 1, at 574-75, n.38 (citing *Prison Admissions and Releases*, BJS SPECIAL REPORT (1986) and BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 100 (2d ed. 1988)).

<sup>31</sup> *Id.* at 574.

<sup>32</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENT OFFENDERS IN STATE PRISON: SENTENCES AND TIME SERVED 2 (1995).

<sup>33</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PROFILE OF INMATES IN THE UNITED STATES AND IN ENGLAND AND WALES, 1991, at 7 (1994).

eliminate the differences in time served,<sup>34</sup> and these statistics are from before the "truth-in-sentencing" laws went into effect and dramatically increased the time actually served in American prisons.<sup>35</sup> Having represented persons facing both the death penalty and long prison terms, and having visited the jails and prisons where they languish, I find it hard to take seriously Professor Ingraham's musings that "[i]t is no longer clear" as to "[w]hich is more severe, a fine, probation, short-term incarceration or a civil damage award, the amount of which may be sufficiently high to destroy a business or strip one of one's earnings and savings, not only in the present but in the future as well."<sup>36</sup>

While Professor Ingraham asserted the death penalty "is imposed and carried out so seldomly [*sic*] as to hardly count as a punishment,"<sup>37</sup> it has been imposed on 3,122 persons who are awaiting execution on America's death rows in 1996,<sup>38</sup> and by early 1996, it had been carried out on more than 330 people since executions resumed in 1977.<sup>39</sup> In 1993, thirty-eight persons were executed in America. In 1994, thirty-one persons were executed. Fifty-six people were executed in 1995, and by September 18, 1996, thirty-two persons had been executed.<sup>40</sup> Experts expect the pace of executions to increase dramatically under the *habeas corpus* reforms passed by Congress in 1996.<sup>41</sup> Can Professor Ingraham seriously compare an execution with a money judgment?

Professor Ingraham minimized the severity of the stigmatizing effects of conviction today, comparing it to old England, where felons were often branded. Without citation, he asserted that: "Today, in the United States, loss of reputation and social standing counts for little among the vast majority of lower-class offenders, especially juveniles, and in the higher ranks of society, wealth, celebrity, and mobility often remove the stigma of a criminal conviction."<sup>42</sup> These as-

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<sup>34</sup> *Id.* at 8 (notes that authors viewed early release reduction of sentence in England as one-half of sentence versus one-third in the U.S.). Between 1992 and 1994, however, violent offenders' percentage of time to served rose from 44% to 48%. BUREAU OF JUSTICE STATISTICS, *supra* note 26, at 2.

<sup>35</sup> For the example of Illinois, see Gregory W. O'Reilly, *Truth-in-Sentencing, Illinois Adds Yet Another Layer of "Reform" to its Complicated Code of Corrections*, 27 LOY. U. CHI. L.J. 985 (1996).

<sup>36</sup> Ingraham, *supra* note 1, at 574-75.

<sup>37</sup> *Id.* at 574.

<sup>38</sup> See NAACP LEGAL DEFENSE FUND, DEATH ROW U.S.A. (Spring 1996).

<sup>39</sup> See *id.* Capital punishment was reinstated in 1976.

<sup>40</sup> Telephone interview, National Coalition for the Abolition of the Death Penalty.

<sup>41</sup> See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 101-08, 110 Stat. 1214, 1217-26; Telephone Interview with National Coalition to Abolish the Death Penalty, *supra* note 40 (predicting an increase in the number of executions due to habeas corpus reforms).

<sup>42</sup> Ingraham, *supra* note 1, at 575.

sertions will be difficult to measure, unless Professor Ingraham specifies the dividing line between "lower class" and the "higher ranks." Moreover, it is plain that the average lay person would not find it easy to seek a job as a felon, or enjoy the "celebrity" of being known as the felon next-door in the average American neighborhood. One could experience the more extreme forms of stigma by registering under one of the nation's many new sex offender registration and community notification laws.<sup>43</sup>

### III. INGRAHAM'S POLL-DERIVED MORAL "DUTY TO TALK"

In seeking to eliminate crucial elements of the accusatorial system, Professor Ingraham would replace the legal right to silence with a moral duty to talk. Professor Ingraham believes that a dichotomy exists between the morality of the American lawyer and the common man, arguing that the school-taught lawyers' "moral stance" is "alien" to the average lay person.<sup>44</sup> According to the lay person's "commonsensical" view, the best way to reach "fully informed decisions" is "by hearing from the defendant."<sup>45</sup> From this lay person's view, Professor Ingraham suggested a moral duty to talk:

If a person is morally or legally accountable for his conduct, he owes a moral duty to answer questions relevant to that conduct to persons in authority . . . whenever a sufficient basis exists for conducting such an inquiry . . . Every citizen or resident guest of a community has a duty to give frank answers to relevant questions concerning a crime to police

. . . .<sup>46</sup>

While Professor Ingraham did not distinguish between a moral and a legal duty, English precedent has held that even if there were what some consider a moral duty to talk, there is no such legal duty, and that "the whole basis of the common law is that right of the individual to refuse to answer questions put to him by persons in authority . . . ."<sup>47</sup> For Professor Ingraham, however, the moral duty should entail the legal duty. This follows from the position which Professor Ingraham took in his book, *The Structure of Criminal Procedure*, where he contended that criminal procedure follows natural law, a "fundamental order of society and of nature which commands all human laws to conform to its norms."<sup>48</sup> For Professor Ingraham, this natural law is

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<sup>43</sup> Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 631-32 (1996).

<sup>44</sup> Ingraham, *supra* note 1, at 560.

<sup>45</sup> *Id.* at 565.

<sup>46</sup> *Id.* at 566.

<sup>47</sup> 1993 REPORT, *supra* note 4, at 49 (quoting *Rice v. Connolly*, 2 Q.B. 414 (1966)).

<sup>48</sup> Ingraham, *supra* note 10, at 123 ("That such an order exists is the basic assumption of all social scientists, although few would be so bold as to claim all human laws must



equally apparent to the layman and the lawyer, because "rules of justice and of good, are plain alike to simple and to wise."<sup>49</sup> To make the duty effective, there must be a sanction applied for its violation. Professor Ingraham agrees with the use of adverse inferences as the sanction so that the trier-of-fact may infer whatever is reasonable from "obdurate silence," including the inference that the suspect is "conscious of his guilt . . . because he has something to conceal . . . probably his involvement in the . . . crime."<sup>50</sup>

Professor Ingraham measured his lay person's morality (and perhaps natural law) by the unreliable yardstick of a 1993 Gallup Poll<sup>51</sup> which found, according to Professor Ingraham, that sixty-four percent of those polled strongly or somewhat agreed that a defendant should be required to prove his or her innocence, that fifty-six percent strongly or somewhat strongly disagreed that it is better to let some guilty people go free than to risk convicting an innocent person, and that seventy percent agreed that the criminal justice system makes it too hard for the police and prosecutors to convict people accused of crimes.<sup>52</sup> A 1991 Roper poll, however, found that fifty-nine percent of that sample thought—or opined—that the right to remain silent when charged with a crime should be guaranteed by the Constitution, while an additional twenty-five percent opined that it should be guaranteed by regular law but not by the Constitution. Only eleven percent opined that it should not be guaranteed at all.<sup>53</sup> That comes to eighty-four percent in favor of the right to remain silent. So much for a poll-derived moral consensus against the accusatory system of justice.

More important, polls are a dubious means of testing either morality or good sense, and are even of questionable value in gauging public opinion. While a poll may reveal the passions of the moment, public opinion changes. In 1991, polls indicated that George Bush's personal approval rating exceeded ninety percent.<sup>54</sup> The next year, he lost the election. The time a poll is taken may influence its results.

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conform to it").

<sup>49</sup> *Id.* at 123, 171 n.7 (quoting HUGO GROTIUS, *THE LAWS OF WAR AND PEACE* 23 (Francis W. Kelsey trans., 1962)).

<sup>50</sup> Ingraham, *supra* note 1, at 567.

<sup>51</sup> GEORGE GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION 1993*, at 231-32 (1994).

<sup>52</sup> Ingraham, *supra* note 1, at 560 ("I cite these results to show that a majority of Americans probably do not share with lawyers the basic beliefs and principles underlying the operation of our criminal justice system.")

<sup>53</sup> Bob Baker, *The Times Poll: Nation Divided on What Law Should Allow*, *L.A. TIMES*, Dec. 14, 1991, at 28. The L.A. Times poll asked questions of 1,709 randomly selected adults between November 21, 1991 and November 24, 1991.

<sup>54</sup> Edwin Yoder, Editorial, *Learning from Polls: Garbage In, Garbage Out*, *ST. LOUIS POST-DISPATCH*, July 12, 1996, at 7B.

Indeed some polls are taken for the purpose of revealing the opinion of a particular moment, rather than a more general public opinion. This is the case in the poll cited by Professor Ingraham which was taken at the time the jury was selected in the federal trial of the police officers accused of beating Rodney King, and replicated questions used during jury selection.<sup>55</sup> The trial attracted great public attention and outrage, in part because the officers had previously been acquitted by a state court jury in Simi Valley.<sup>56</sup> The poll illuminated the passions of the moment feared by defense attorneys, who worried that at that particular time the public, and potential jurors, would be inclined to believe the criminal justice system had made it too difficult to convict the officers in the first case, require the officers to prove their innocence, and err on the side of conviction.<sup>57</sup> It is ironic that Professor Ingraham used questions aimed at eliminating the passions of the moment from the officers' trial to justify tailoring the entire criminal justice system to fit those passions.

Polls can also be inadvertently or intentionally manipulated by pollsters, or by those who cite them.<sup>58</sup> Professor Ingraham, for instance, cited the Gallup poll to demonstrate that a majority of sixty-four percent strongly or somewhat agreed that a defendant should be required to prove his or her innocence. It is a dubious practice, however, to reach a majority by adding those who only somewhat agreed with the proposition to those who strongly supported it. Given only a choice to support or oppose the proposition, a majority might have opposed it. Such a choice was not given in the poll cited. The actual poll reported that forty-five percent—a minority—strongly agreed with the proposition, while nineteen percent somewhat agreed.<sup>59</sup> While Professor Ingraham contended that a majority of fifty-six percent strongly or somewhat strongly disagreed that it is better to let some guilty people go free than to risk convicting an innocent person, the actual poll reported that only about one-third of those polled, thirty-four percent, strongly disagreed, while twenty-two percent somewhat agreed.<sup>60</sup>

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<sup>55</sup> Roper Center at University of Connecticut, Public Opinion Online (1994) (Nos. 0224292, 0224293, 0224296).

<sup>56</sup> Laurie L. Levenson, *What if the King Jury Again is Mostly White?*, L.A. TIMES, Feb. 9, 1993, at 7.

<sup>57</sup> GALLUP, *supra* note 51, at 231.

<sup>58</sup> Bob Garfield, *I Hear America Yawking: Seven Good Reasons Why Public Opinion Polling Should Be Banned*, WASH. POST, Nov. 5, 1995, (Magazine), at W10 ("Sometimes the result is what Gary Orren of Harvard's Kennedy School of Government has called 'very vague notions masquerading as opinion.'") [hereinafter *I Hear America Yawking*].

<sup>59</sup> GALLUP, *supra* note 51, at 231.

<sup>60</sup> *Id.* at 232.

Moreover, there is no gauge of the extent to which opinions reflected in a poll might be trivial and uninformed.<sup>61</sup> Most polls measure uninformed or unformed opinions. Studies aimed at gauging deliberate, informed opinions indicate that people subjected to intense education on an issue often change their opinions. In Britain, for example, after being informed about the issue, the percentage of persons believing that suspects should have the right to remain silent under police questioning rose from thirty-six to fifty percent.<sup>62</sup>

Professor Ingraham bolstered his hypothetical lay person's case against the accusatory model by arguing that "[t]o the average lay person the allocation of proof in a civil tort or criminal trial makes no sense at all," a remark which he based upon his "more than twenty years . . . attempting to teach American criminal law to college students . . ." <sup>63</sup> It seems a stretch, however, to judge as nonsense what fails to make sense to the average college student, no matter how superb their teacher.

#### IV. POLLS, MAJORITIES, AND CONSTITUTIONS

In his enthusiasm for majorities, Professor Ingraham dismissed—and missed—the point of a constitutional right, and the value of the experience of history, rebutting straw-man arguments which I never made in favor of the elements of the accusatory system of justice.<sup>64</sup> Dismissing these arguments, Professor Ingraham's idealized lay person concluded that "many of these doctrines make no moral or practical sense," and that the Gallup poll's lay person majority "is right and American lawyers are wrong."<sup>65</sup> Justice Brennan warned of this moral populism, quoting legal philosopher H.L.A. Hart, "It seems fatally easy to believe that loyalty to democratic principles entails acceptance of what may be termed moral populism: the view that the majority have a moral right to dictate how all should live.' This, he said, is 'a misunderstanding of democracy which still menaces individual

<sup>61</sup> *I Hear America Yaking*, *supra* note 58.

<sup>62</sup> *Polling, Box Populi*, *ECONOMIST*, July 27, 1996, at 73, 74. Ingraham contends that "It takes a considerable amount of sophisticated exegesis and constant repetition to convince the ordinary lay person of the rationality and morality of these viewpoints." Ingraham, *supra* note 1, at 560. Maybe a little education and deliberation would be enough.

<sup>63</sup> *Id.* at 565 n.14.

<sup>64</sup> Ingraham does not rebut serious justifications. Instead he characterizes arguments about tradition as "this is the way we have always done things in this country"; and "this way is hallowed in tradition, was instituted by our Founding Fathers in our Constitution." He characterizes arguments about authority as: "this way has been decreed by the Supreme Court of the United States"; or "bogus appeals to our xenophobia": "Our way stands in stark contrast to foreign methods of procedure and we all know what despots they are." *Id.* at 561.

<sup>65</sup> *Id.*

liberty.”<sup>66</sup>

Constitutional rights protect individual liberty, often against the transitory whims of a majority. As Justice Brennan has noted, “the point of having a bill of rights supported by judicial review . . . is to . . . remove certain rights from the daily joust of politics, to protect minorities . . . from the passions or fears of political majorities.”<sup>67</sup> The effectiveness of constitutional rights hinges on the fact that they may be “amended only by supermajoritarian procedures . . . and may not be brushed aside whenever a legislative majority deems them dispensable.”<sup>68</sup> While to Professor Ingraham the courts have imposed straightjackets, Justice Brennan viewed the courts as a “calmer, cooler party to a dialogue from which the community benefits over time.”<sup>69</sup> These views were echoed by Professor Donald Dripps, a Fifth Amendment skeptic, when he noted:

The conventional sources of constitutional law all point to a higher regard for the privilege than contemporary analysis can substantiate. The very point of a constitution is to prevent contemporary analysis from undermining those principles that are vulnerable to the recurrent pressures of the day, but nonetheless that have proved valuable by long experience.<sup>70</sup>

This “American” attitude has gained widespread adherents in Britain, in a campaign for a “Bill of Rights for Britain.”<sup>71</sup>

## V. MINIMIZING THE SIGNIFICANCE OF A DUTY TO TALK

I believe that the new English law took a step back toward an inquisitorial system by imposing a duty to talk for a right to silence, and sanctioning failures to adhere to the duty with an inference of guilt. Professor Ingraham advocated the duty to talk, yet unconvincingly minimized its significance with arguments which include inaccurate characterizations of my position.

### A. A “MINOR CHANGE”

Professor Ingraham minimized the significance of the new English duty to talk, coyly characterizing it as only “minor procedural changes,”<sup>72</sup> which “may prove to be inconsequential in practice,”<sup>73</sup>

<sup>66</sup> William J. Brennan, Jr., *Why Have a Bill of Rights?*, 9 OXFORD J. LEGAL STUDIES 425, 434 (1989) (quoting H.L.A. HART, *LAW, LIBERTY, AND MORALITY* 79 (1963)).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 427.

<sup>69</sup> *Id.* at 433.

<sup>70</sup> Donald A. Dripps, *Self-Incrimination and Self-Preservation: A Skeptical View*, 1991 U. ILL. L. REV. 329, 351.

<sup>71</sup> *Why Britain Needs a Bill of Rights*, *ECONOMIST*, Oct. 21, 1995, at 64.

<sup>72</sup> Ingraham, *supra* note 1, at 592.

and "hardly one that *forces* the defendant to abandon his silence."<sup>74</sup> In this he followed the lead of English proponents of adverse inferences (the accused's silence "will simply become an item of evidence . . . scarcely a major infringement of a defendant's liberty . . .").<sup>75</sup> Yet Professor Ingraham conceded the significance of the change, noting that I was "undoubtedly correct" from the American perspective in my contention that imposing a duty to talk and sanctioning silence violates the presumption of innocence.<sup>76</sup> He also conceded that his own plan to impose a duty to talk "may fly in the face of existing constitutional law"<sup>77</sup> and "require the revision of the American presumption of innocence doctrine and the overruling of a whole series of Supreme Court cases . . .".<sup>78</sup> Despite Professor Ingraham's attempt to down-play its significance, the whole purpose of adverse inferences is to discourage the use of the right to silence and to foster a duty to talk. As Paul Kauper noted, an adverse inference from silence "brings a psychic pressure to bear on [the suspect] impelling him to speak . . . ; in fact *this pressure is the very object of this provision.*"<sup>79</sup>

Professor Ingraham also contended that, because the new law will not meet its "crime control" goals of increasing the number of confessions or reducing crime, it cannot "produce a major change" in due process—"the burden of proof, presumption of innocence, and the accusatorial system of justice."<sup>80</sup> Yet, as the 1981 Royal Commission report and English commentators have pointed out, the new law will curtail the right to silence, reduce the burden of proof and erode the presumption of innocence.<sup>81</sup>

Perhaps Professor Ingraham's views are in part the result of a misconception about what the new law does. He contended without citation that, "at most," the new law:

gives the defendant the burden of going forward with evidence of his

<sup>73</sup> *Id.* at 593.

<sup>74</sup> *Id.* at 568.

<sup>75</sup> Editorial, *Howard's Beginning*, TIMES (London), Oct. 7, 1993, at 17.

<sup>76</sup> Ingraham, *supra* note 1, at 562.

<sup>77</sup> *Id.* at 561.

<sup>78</sup> *Id.* at 580.

<sup>79</sup> Yale Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15, 17 (1974), reprinted in YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS 79 (1980) (quoting Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1251 (1932)) (emphasis added; ellipses in original).

<sup>80</sup> Ingraham, *supra* note 1, at 568, 591-92.

<sup>81</sup> THE ROYAL COMM'N ON CRIMINAL PROCEDURE, REPORT Cmnd. 8092, at 80-81, 86-87 [hereinafter 1981 REPORT]; David Dixon, *Politics, Research and Symbolism in Criminal Justice: The Right of Silence and the Police and Criminal Evidence Act*, 20 ANGLO-AM. L. REV. 27, 34-36 (1991); Steven Greer, *The Right to Silence: A Review of the Current Debate*, 53 MOD. L. REV. 709, 710, 725 (1990); see also O'Reilly, *supra* note 2, at 403, 405.

innocence *when he has no other extrinsic evidence* (other witnesses, physical, demonstrative, expert and scientific) to offer in opposition to the state's case and when that case is strong enough to convict.<sup>82</sup>

In fact, the new law does not permit the suspect or the accused to avoid adverse inferences from his or her silence by offering the testimony of another witness. It requires the suspect or the accused to talk or face adverse inferences from silence.<sup>83</sup> Moreover, the adverse inference may be drawn, not only when the state's case is "strong enough to convict," but when the state has established a *prima facie* case.

#### B. THE BURDEN OF PROOF AND THE PRESUMPTION OF INNOCENCE

In seeking to bolster his argument that the new law creates "no major change" in the burden of proof or presumption of innocence, Professor Ingraham rebutted exaggerated claims I never made, arguing, for instance, that the new law does not *totally* remove the presumption of innocence or convert the justice system from accusatorial to inquisitorial.<sup>84</sup> In the following three instances, he incompletely quoted my assertion, overlooked support for it, and erroneously termed it "patently untrue" or "unverified":

(1) The new English law shifts the burden of proof to the accused by making them talk to the police during interrogation *and then go forward with evidence through their own testimony . . . [or] the court will penalize them with an inference of guilt.*<sup>85</sup> As the 1981 Royal Commission report noted, adverse inferences from silence "reverse the onus of proof at

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<sup>82</sup> Ingraham, *supra* note 1, at 591-92 (emphasis added).

<sup>83</sup> Under the new law "if he chooses not to give evidence, or . . . refuses to answer any question" he faces adverse inference. O'Reilly, *supra* note 2, at 427-30, n.152 and accompanying text (citing The Criminal Justice and Public Order Act, 1994, Part III, § 35 (Eng.)).

<sup>84</sup> Ingraham, *supra* note 1, at 593. Ingraham asserts that it "cannot be said that it [the new law] *totally* removes a presumption of innocence or converts the justice system from accusatorial to inquisitorial." *Id.* (emphasis added). Ingraham fails to page reference my article, because no such contention was made. I asserted that curtailing the right to silence and replacing it with a duty to talk would "undermine" the presumption of innocence and that with such a change, England "moved towards" an inquisitorial system. O'Reilly, *supra* note 2, at 445, 449. Again setting up a straw man, Ingraham says that the new law "does not shift the burden of proving *all* the essential elements of the crime from the prosecution to the defendant." Ingraham, *supra* note 1, at 590 (emphasis added). I made no such contention.

<sup>85</sup> Ingraham, *supra* note 1, at 590 (citing O'Reilly, *supra* note 2, at 445; italics for omitted portions of assertion). I discussed support for this assertion, which includes the new law itself: "if he chooses not to give evidence . . . or refuses to answer any question . . . [he faces adverse inferences]," O'Reilly, *supra* note 2, at 428 n.152 and accompanying text, 427-30; the views of English commentators; and the *Murray* case construing the similar law in effect in Northern Ireland, where the House of Lords ruled that it was acceptable for the inference to be "that the accused is guilty." *Murray v. Director of Public Prosecutions*, 1 W.L.R. 1 H.L. (N.I.) (1994); Dixon, *supra* note 81, at 32-34; Greer, *supra* note 81, at 724; O'Reilly, *supra* note 2, at 427-29 nn.161-62 and accompanying text.

trial" contrary to the "golden thread" which runs through the English criminal justice system, that is, the requirement that "the prosecution prove the prisoner's guilt."<sup>86</sup>

(2) Under the new law, if the prosecution establishes a *prima facie* case—even if it falls short of proof beyond a reasonable doubt—the accused will have to testify *or the prosecutor's case will be bolstered by an inference of the accused's guilt.*<sup>87</sup>

(3) Adverse inferences undermine the presumption of innocence by forcing suspects to explain away their alleged involvement in a crime *or face the inference that there is no explanation and that they are guilty.*<sup>88</sup>

Professor Ingraham quarreled with my analogy between adverse inferences and the confession *pro confesso*,<sup>89</sup> and asserted that suspects and the accused should not "have their silence treated legally as if it were tantamount to a confession of guilt."<sup>90</sup> Yet that is just what he advocated. If defendants, by remaining silent, fail to carry their new burden to present an explanation, the court may penalize them with an inference of guilt. This is a sanction which resembles the confession *pro confesso*, by which silent suspects were treated as if they had confessed.<sup>91</sup>

## VI. THE RIGHT TO SILENCE AND THE ACCUSATORIAL SYSTEM

Professor Ingraham argued that in my article I perpetuated "myths" exaggerating the differences between the accusatorial and inquisitorial system, especially concerning the importance of the right to silence in the accusatory system, and the benefits that flow from

<sup>86</sup> 1981 REPORT, *supra* note 81, at 80 (quoting *Woolmington v. DDP* AC 462 (1935) and Lord Sankey).

<sup>87</sup> Ingraham, *supra* note 1, at 590; O'Reilly, *supra* note 2, at 446 (italics for omitted portions of assertion). I discussed support for this assertion, which includes the new law, O'Reilly, *supra* note 2, at 427-30; the *Murray* case, the remarks of an English commentator, and the Report of the Royal Commission on Criminal Justice. *Id.* at 446 n.270 and accompanying text.

<sup>88</sup> Ingraham, *supra* note 1, at 590; O'Reilly, *supra* note 2, at 445 (italics for omitted portions of assertion). He omits mention of my discussion of support for this assertion, which includes the new law itself and *Murray*. O'Reilly, *supra* note 2, at 427-30, 429 nn.161-62. Ingraham himself concedes that:

[I]t violates the "presumption of innocence" to require a suspect to respond to police questions in certain circumstances or to insist that a defendant respond to accusations by testifying at his trial . . . and in the absence of a defendant's testimony to permit the jury to draw adverse inferences of guilt from the defendant's failure to testify . . . . [F]rom the perspective of the American doctrine, O'Reilly is undoubtedly correct.

Ingraham, *supra* note 1, at 562 (citing *In re Winship*, 397 U.S. 358 (1970); *Griffin v. California*, 380 U.S. 609 (1965)).

<sup>89</sup> *Id.* at 592.

<sup>90</sup> *Id.* at 566.

<sup>91</sup> O'Reilly, *supra* note 2, at 445 (citing LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 13, 23-24 (2d ed. 1986)).

that system.<sup>92</sup> I pointed out, as did the 1981 Royal Commission and English commentators, that curtailing the right to silence moves the justice system from the accusatorial towards the inquisitorial system.<sup>93</sup> While denying this, Professor Ingraham himself noted that the distinction between systems regarding the right to silence is perhaps their "greatest difference."<sup>94</sup> He conceded that ours is a predominately "accusatorial" system,<sup>95</sup> and conceded that such systems "go very far in protecting and fostering this right."<sup>96</sup> He contrasted this accusatorial approach with "inquisitorial" systems, which "are more open to the idea that persons accused of crimes should be encouraged to offer evidence of their innocence to the police and cooperate with them."<sup>97</sup> Inquisitorial systems, he noted, allow adverse inferences from silence.<sup>98</sup> Professor Ingraham also discussed this distinction between these systems regarding the right to silence in his book *The Structure of Criminal Procedure*, in which he contrasted the "American" system with "inquisitorial" systems.<sup>99</sup>

#### VII. THE RIGHT TO SILENCE, THE ACCUSATORIAL SYSTEM, AND LIMITED GOVERNMENT

While Professor Ingraham denied that a connection exists between limited, democratic government, accusatorial procedure, and the right to silence,<sup>100</sup> a significant body of scholarship takes a contrary view. Professor Mirjan Damaska, among other comparative law

<sup>92</sup> Ingraham, *supra* note 1, at 560. Ingraham also asserts that "the way it contrasts two procedural systems as they actually exist today is both inaccurate and one-sided." *Id.* at 590.

<sup>93</sup> 1981 REPORT, *supra* note 81, at 80-81, 86, 87; Dixon, *supra* note 81, at 32-34; Greer, *supra* note 81, at 710, 725.

<sup>94</sup> Ingraham, *supra* note 1, at 564.

<sup>95</sup> *Id.* at 564 n.12. Professor Ingraham asserts that in my article "no account is given to those inquisitorial elements always in Anglo-American criminal procedure." *Id.* at 589. However, I noted views regarding the American system's inquisitorial techniques. O'Reilly, *supra* note 2, at 420 n.103 (referring to Abraham S. Goldstein, *Reflections on the Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1016 (1974) and WAYNE L'FAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 1.6, at 37 (1984)).

<sup>96</sup> Ingraham, *supra* note 1, at 564.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> According to Professor Ingraham:

in inquisitorial systems the defendant is expected to be more cooperative and forthcoming than in adversarial systems; although not required to do so, he is expected to furnish information to investigators and answer questions at his trial. In adversarial systems, on the other hand, the defendant is expected to maintain his silence until the state has produced sufficient proof of his guilt at his trial to shift the burden of persuasion to him; even then he continues to have this right if he chooses to exercise it.

INGRAHAM, *supra* note 10, at 121 (emphasis added) (comparing the American system to China, France and the Soviet Union).

<sup>100</sup> Ingraham, *supra* note 1, at 589.



experts,<sup>101</sup> links the activist state to the inquisitorial system, and the reactive state to the accusatorial process.<sup>102</sup> The activist state seeks to manage society and fully penetrate social life, and justice serves state policy. The citizen is an object of state action and a source of evidence, whose testimony is "eagerly sought" and includes the use of adverse inferences.<sup>103</sup> The reactive state, by contrast, is a *laissez-faire*, limited government, which takes a modest role in managing society, relying instead on the capitalist system and voluntary associations. Both England and the United States fit this model.<sup>104</sup> In the reactive state, government stays at arm's length, providing a neutral forum for solving conflicts between parties,<sup>105</sup> who control the process.<sup>106</sup>

For Damaska, when a party must testify he is made the source of evidence and an object of the process. He, thus, can no longer control the process, or manage his tactical interests.<sup>107</sup> Thus, in adversarial proceedings, such as criminal proceedings in common-law countries,<sup>108</sup> "[i]t is the sovereign prerogative of the defendant alone to decide whether and when to testify in presenting his own case."<sup>109</sup> Damaska thus finds support for the right to silence both in the privilege and the logic of the contest structure.<sup>110</sup> He warns against undermining the requirement that a party, such as the state, must carry its own evidentiary burden: "It is a curious burden indeed that can be sustained by one side's forcing the opponent to carry the load. As Roman-canon scholars liked to say, a party to a contest should not be compelled to become *telum adversarii sui*, that is, an offensive weapon of his adversary."<sup>111</sup>

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<sup>101</sup> Mirjan R. Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 571 (1973). Professor Karl Llewellyn, for instance, contrasted "parental" and "arms length" systems. He characterized the former as having simple procedures, no distrust of officials, and a goal of reintegrating the offender into society through openness and confession. In the "parental" system, punishment is viewed as an educational tool. By contrast, in the "arms length" system officials take hold of a person and attribute a crime to him. There is a distrust of officials, and the goal is not the offender's reintegration into society, but his punishment. Moreover, redemption is also seen as too much an invasion of personality. *Id.*

<sup>102</sup> According to Damaska, "the legal process of the reactive state resembles what is called 'the adversarial process' in common-law cultures and the 'party-governed,' 'contradictory,' or 'accusatorial process' in Continental legal culture." MIRJAN R. DAMASKA, *THE FACES OF JUSTICE AND STATE AUTHORITY* 80 (1986).

<sup>103</sup> *Id.* at 90-91 n.34, 127-30, 164-65.

<sup>104</sup> O'Reilly, *supra* note 2, at 406 n.19; DAMASKA, *supra* note 102, at 71-80, 90-91.

<sup>105</sup> *Id.* at 71-80.

<sup>106</sup> *Id.* at 126.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 126-27.

<sup>109</sup> *Id.* at 127.

<sup>110</sup> *Id.* at 127.

<sup>111</sup> *Id.* at 126.

## VIII. PROTECTING THE INNOCENT FROM CONVICTION

In his desire to shift towards inquisitorial methods by curtailing the right to silence, reducing both the burden and standard of proof, and by making it easier for prosecutors to obtain convictions, Professor Ingraham ignored concerns that such moves increase the risks of convicting the innocent.<sup>112</sup> For instance, regarding his own scheme for curtailing the right to silence, he admitted that "it may be true that there will be some risk (of convicting the innocent). However, we do not know this for certain, as the hypothesis has never been tested."<sup>113</sup> Professor Ingraham's willingness to risk increasing the conviction of the innocent is not surprising given his view that conviction is no more serious, or even less serious, than a civil judgment,<sup>114</sup> and his view that there is no connection between a system's structure and its tendency to protect the innocent.<sup>115</sup> This view contrasts with that of Damaska, who noted that, while the tension between efficiency and the protection of individual rights was present in any system, the "pure adversary model tends to resolve the conflict in a synthesis coming closer to the Due Process ideology than does the non-adversary model."<sup>116</sup>

Professor Ingraham articulated his view in his 1987 book *The Structure of Criminal Procedure*, in which he denied the willingness or tendency of a totalitarian system—including China—to convict the innocent.<sup>117</sup> He dismissed concerns about justice in such societies:<sup>118</sup>

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<sup>112</sup> Ingraham, *supra* note 1, at 567-68, 587.

<sup>113</sup> *Id.* at 587.

<sup>114</sup> *Id.* at 574-76.

<sup>115</sup> *Id.* at 589; see also INGRAHAM, *supra* note 10, at 33-34.

<sup>116</sup> Damaska, *supra* note 101, at 577. For Damaska, "[t]he prospect of convicting an innocent is viewed with so much horror in the Due Process ideology that it is even prepared to sacrifice factfinding precision in the totality of cases." *Id.* at 576.

<sup>117</sup> According to Professor Ingraham:

in non-political cases it is no more in the interest of totalitarian governments than of any others to have innocent people convicted of crimes they did not commit or guilty offenders escape justice . . . [For] [n]o government could long endure which did not at least give the appearance of attempting to do justice.

INGRAHAM, *supra* note 10, at 33.

<sup>118</sup> For instance, Professor Ingraham characterized the American distrust of leaving "too much to the discretion of officials" as "American parochialism" which, he contended, had created an "illusion" about totalitarian societies. INGRAHAM, *supra* note 10, at 33-34 ("[l]aws which invest officials with authority . . . necessarily restrict that authority; . . . possession of great power over a subject people does not necessarily mean that legal procedures for the processing of criminal cases will be neglected or left to the unregulated discretion of government agents and officials"). Professor Ingraham similarly argued that officials must be trusted at times to "hedge on the strict application of liberal principles," because legal repression has generally protected the State from the violence of its enemies. BARTON L. INGRAHAM, *POLITICAL CRIME IN EUROPE* xiii (1979). He also contended that such trust will not endanger liberty, because "the limited use of legal repression for defensive purposes

"All fictional accounts of governments so tyrannical that the issue of guilt or innocence becomes subordinate to the higher goals of demonstrating the regime's absolute power and of eliciting abject submission to that power (for example, Orwell's *1984*) are just that, fictions."<sup>119</sup> One such "fiction" was recently played out in China. Between April and August, 1996, 162,000 people were arrested, and 1,000 were executed in operation "Strike Hard,"<sup>120</sup> an operation recalling a comparable 1983 crime crackdown in China in which 10,000 people were executed within a few months.<sup>121</sup> According to *The Economist*, "[r]obbers and other undesirables were rounded up, given a brief trial, found guilty and usually executed the same day."<sup>122</sup> Amnesty International warned that coerced confessions and torture might be in use during the operation,<sup>123</sup> and the *New York Times* noted that "[a]n arrest closes off virtually any possibility of a determination of innocence—a trial is a mere formality."<sup>124</sup> One Beijing lawyer remarked, "I would be disbarred if I tried to defend any criminals charged under Strike Hard. That is just the way it works here."<sup>125</sup>

Professor Ingraham also misapprehended my arguments about why the use of adverse inferences risks increasing the conviction of the innocent. While he conceded that "[o]f course, there are other reasons, consistent with innocence, why people sometimes maintain silence in the face of an accusation, as O'Reilly points out in his article,"<sup>126</sup> he inaccurately characterized the reasons I presented for this conclusion. Professor Ingraham pointed to the concern for the innocent who remain silent during interrogation, not because they are guilty, but because they are informed of their right to silence and fear no adverse inference from silence in reliance on *Miranda* and *Griffin*.<sup>127</sup> Professor Ingraham argued that, if these cases were overturned, suspects would no longer remain silent in reliance upon them, and thus erroneous adverse inferences from silence "would be

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has not led to the growth of a 'police state.' More often it has been the failure to employ limited measures of repression during a period of weakness and division which has led to the polarization of factions within society, the defeat of democracy, and the introduction of a dictatorial regime." *Id.*

<sup>119</sup> INGRAHAM, *supra* note 10, at 33.

<sup>120</sup> *China's Politics of Crime*, ECONOMIST, Aug. 10, 1996, at 25.

<sup>121</sup> Patrick E. Tyler, *Crime (and Punishment) Rages Anew in China*, N.Y. TIMES, July 11, 1996, at A1.

<sup>122</sup> *China's Politics of Crime*, *supra* note 120, at 25.

<sup>123</sup> Tyler, *supra* note 121, at A1.

<sup>124</sup> Seth Faison, *A Case Study: A Man Kills in April, Is Executed in May*, N.Y. TIMES, July 11, 1996, at A8.

<sup>125</sup> *China's Politics of Crime*, *supra* note 120, at 25.

<sup>126</sup> Ingraham, *supra* note 1, at 568.

<sup>127</sup> *Id.* at 567 n.19.

sufficiently rare and exceptional as not to render the inference of guilt an unreasonable one; they would be possibilities, not probabilities."<sup>128</sup> He ignored more significant reasons which I discussed explaining why adverse inferences drawn from silence might be incorrect:

Some innocent people might remain silent during interrogation because they are confused, or because they are unable or unprepared to produce a cogent explanation in the tense environment of a police interrogation. Some . . . might not be capable of offering persuasive testimony from the witness stand, and in fact may further incriminate themselves due to excessive nervousness or timidity. Moreover, not all suspects who remain silent do so because of their guilt. Some remain silent to protect others. In the Royal Commission's Study, for instance, in twelve percent of the cases where suspects remained silent, they did so to protect others. In each of these instances, an inference of guilt from silence could have resulted in the conviction of an innocent person.<sup>129</sup>

Although Professor Ingraham promised no practical benefits from the new law, he is willing to increase the possibility of convicting the innocent based upon erroneous adverse inferences. He also failed to consider the additional risk of increasing the conviction of the innocent of which the Royal Commission warned, when it noted that adverse inferences give the police an additional method of producing confessions, which could cause weak suspects to confess to crimes which they did not commit.<sup>130</sup>

And the innocent are convicted. In 1987, Radelet and Bedau maintained that they had documented 350 cases in which innocent people had been convicted of homicide or rape in America in this century, that 139 were sentenced to death; twenty-three were executed.<sup>131</sup> Even today, with the protections in place that Professor Ingraham views as the "straightjacket of the sixties," the innocent are still sentenced to death. Within the last ten years in Illinois, for instance, seven men have been exonerated and freed after having been sent to death row.<sup>132</sup> In the wake of new *habeas corpus* reforms, evidence of innocence will likely come too late. This is hardly a time to increase the risks of convicting the innocent. The procedural safeguards of the accusatory system are demonstrably necessary.

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<sup>128</sup> *Id.* at 568.

<sup>129</sup> O'Reilly, *supra* note 2, at 450-51.

<sup>130</sup> *Id.* at 450.

<sup>131</sup> Hugo A. Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987); see also Richard C. Donnelly, *Unconvicting the Innocent*, 6 VAND. L. REV. 20 (1952) (regarding projections of the percentage of innocent convicted).

<sup>132</sup> Ken Armstrong, *Bars to Justice: In a System Ravenous for Convictions Sometimes the Innocent Don't Walk*, CHI. TRIB., June 23, 1996, at C1.

## IX. THE HAZARDS OF ABUSE

Professor Ingraham ignored the hazards of abuse in systems that focus on confessions rather than on extrinsic evidence. England's new law courts such abuses by turning the justice system's focus away from extrinsic evidence—such as independent witnesses, fingerprints, or DNA profiling—and, through the use of adverse inferences, towards obtaining confessions and dubious conclusions about guilt from silence. As Justice Goldberg noted, this will drive down the system's reliability and drive up the risk of convicting the innocent.<sup>133</sup> This risk is highlighted by the 1996 Department of Justice survey of cases where innocent persons were convicted, only to be later exonerated by DNA profiling.<sup>134</sup>

Yet Professor Ingraham sought to frame the issue as a question of whether the use of adverse inferences would "lead to vicious police brutality . . . (which) . . . allegedly goes on."<sup>135</sup> He gave no page reference to my article in this instance, because I did not make this straw man contention. Rather, I suggested that England's shift towards inquisitorial methods "undermines the accusatorial system's protection of individuals from humiliation and abuse at the hands of government investigators. The inquisitorial system tempts law enforcement officers to use inhumane and unreliable methods to obtain confessions—a temptation which has been the source of miscarriages of justice."<sup>136</sup>

As I pointed out, the Royal Commission and English commentators had expressed concern over the new law's increased focus on interrogation in the wake of interrogation abuses that had resulted in a number of miscarriages of justice in England.<sup>137</sup> While Professor Ingraham made light of such concerns,<sup>138</sup> there is ample literature in England and America documenting them.<sup>139</sup> I also pointed out that

<sup>133</sup> *Escobedo v. Illinois*, 378 U.S. 478, 489 (1964).

<sup>134</sup> See generally, Edward Connors et al., U.S. DEP'T. OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996).

<sup>135</sup> Ingraham, *supra* note 1, at 592-93.

<sup>136</sup> O'Reilly, *supra* note 2, at 450. See also *id.* at 421.

<sup>137</sup> *Id.* at 421, 426, 450. Such cases keep recurring as a series of 1997 cases makes clear. See, e.g., Youssef M. Ibrahim, *Once Again, Britain Frees People Jailed by Mistake*, N.Y. TIMES, Feb. 22, 1997, at A4 (In one case, "police tricked" Patrick Malloy, who died in prison, into making a false confession.).

<sup>138</sup> Ingraham, *supra* note 1, at 592.

<sup>139</sup> See, e.g., GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY (1992); Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 692 n.288 (1996) (reviewing examples of interrogation abuses and false confessions); Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987); Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 12-16

the recent Italian experience illustrates how the focus on interrogation can lead to abuse. In 1988, concerns about inquisitorial methods prompted the Italian Parliament to limit inquisitorial tendencies by adopting elements of an accusatorial system.<sup>140</sup> After the reforms, the detention of suspects for investigation and interrogation has continued to raise questions about abuses. For instance, the state has allegedly used detention to coerce suspects to confess and to testify against co-conspirators. These allegations came to light after a number of prominent suspects in a corruption investigation committed suicide while in detention.<sup>141</sup> In 1995, Italy moved to curb similar abuses by requiring the videotaping of interrogations.<sup>142</sup> Similar programs are already in operation in the United States.<sup>143</sup> In 1992, Argentina also moved away from its inquisitorial tradition and adopted accusatorial elements into its criminal justice system, including measures to counter abusive interrogation tactics.<sup>144</sup> Under the law, police officers must advise prisoners of their right to counsel, and to remain silent until the lawyer or a judge arrives.<sup>145</sup> Police must also notify a judge of an arrest within six hours.<sup>146</sup>

Belittling the hazards of abuse, Professor Ingraham suggested curtailing the right to silence without substituting new protections to counter abuses. Even in England, this draconian approach was rejected. Instead, years before restricting the right to silence, England adopted measures aimed at preventing abuse during interrogation in the Police and Criminal Evidence Act of 1984 (PACE).<sup>147</sup> Some scholars have referred to this approach as "exchange abolition:" in exchange for abolishing the right, the police allow attorneys to advise suspects during interrogation and audio or videotape interroga-

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(1986); Serge Schmemmann, *Israel Renews Its Permission for the Use of Force in Interrogations*, N.Y. TIMES, Aug. 17, 1995, at A5.

The temptations to coerce are not limited by national boundaries. See Tim Wiener, *C.I.A. Taught Coercion to 5 Latin American Forces*, N.Y. TIMES, Feb. 22, 1997, at A6; Gary Cohn & Ginger Thompson, *CIA Linked to Rights Abuses*, CHICAGO SUN-TIMES, Jan. 28, 1997, at 12 (CIA taught physical coercion methods).

<sup>140</sup> O'Reilly, *supra* note 2, at 447.

<sup>141</sup> *Id.*

<sup>142</sup> Law of Aug. 8, 1995, modifying Italian Code of Criminal Procedure (C.P.P.), in GAZZ. UFF., Aug. 8, 1995; see also *Video—Interrogatori*, IL SOLE, Aug. 5, 1995, at 24.

<sup>143</sup> Interrogations are videotaped in Alaska and Minnesota. See WILLIAM A. GELLER, U.S. DEP'T. OF JUSTICE, *VIDEOTAPING INTERROGATIONS AND CONFESSIONS* (1993); see also Leo, *supra* note 139, at 621 (suggesting videotaping of interrogations).

<sup>144</sup> Ed McCullough, *Argentines Now Have the Open Trials Common Elsewhere*, AP INT'L NEWS, Nov. 9, 1992; see also Gregory W. O'Reilly, *Opening up Argentina's Courts*, 80 JUDICATURE 1 (March-Apr. 1997).

<sup>145</sup> McCullough, *supra* note 144.

<sup>146</sup> *Id.*

<sup>147</sup> Police and Criminal Evidence Act, 1984, ch. 60 (Eng.).

tions.<sup>148</sup> The idea is not new. In America during the 1930's, Kauper proposed discouraging abuse during interrogation by recording judicial examinations of the accused in place of police interrogation.<sup>149</sup>

Contrary to the English proponents of limiting the right to silence, and even contrary to the experience of some inquisitorial systems, Professor Ingraham failed to recognize what John Henry Wigmore—no cheerleader for the right to silence—noted: “[t]he exercise of the power to extract answers begets a forgetfulness of the just limitations of that power. The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture.”<sup>150</sup> Ignoring this, Professor Ingraham, stands far away even from a scholar like Professor David Dolinko, who is critical of any principled foundation for the privilege against self-incrimination, yet does not counsel its abolition. Dolinko recognizes its “important functions in the legal system as a whole, so that its repeal would do violence to the entire system.”<sup>151</sup>

#### X. CONCLUSION

In general, an inquisitorial system and an accusatorial system, such as ours, differ as to whether there is a duty to talk or a right to silence. In the former, a duty to talk may logically entail a sanction for its breach, while in the latter, there can logically be no sanction for silence, since no duty exists or is breached; a right is claimed. Contrary to Professor Ingraham's assertions, a number of writers besides myself have put forth reasonable arguments supporting the view that there are distinct tendencies in the nature of governments, which track the distinctions between the accusatory and inquisitorial justice systems. A number of writers besides myself have also put forth reasonable arguments that England's new duty to talk and sanction for silence curtails the right to silence, undermines the burden of proof, erodes the presumption of innocence, and pushes the justice system from the accusatorial towards the inquisitorial model. On the other hand, if, as Professor Ingraham believes, there are *no* practical effects from curtailing the right to silence, *no* increase in confessions or con-

<sup>148</sup> Greer, *supra* note 81, at 718.

<sup>149</sup> Kamisar, *supra* note 79, at 85-86 (quoting Kauper).

<sup>150</sup> JOHN H. WIGMORE, 8 EVIDENCE § 2251 (3d ed. 1940), *quoted in* Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 451 (1987). “Wigmore later defended the privilege, narrowly understood, because of its contribution to preventing official cruelty in obtaining evidence.” Donald A. Dripps, *Self-Incrimination and Self-Preservation: A Skeptical View*, 1991 U. ILL. L. REV. 329 n.1 (citing JOHN H. WIGMORE, 8 EVIDENCE § 2250 (1st ed. 1904)).

<sup>151</sup> David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1063 (1986).

victions, and *no* reduction in crime, it seems unreasonable for society to risk the costs of such a change, such as increasing the conviction of the innocent and abuse by officials, and the accretion of government power at the expense of individuals' privacy and autonomy.