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RETHINKING SELF-INCRIMINATION IN GREAT BRITAIN

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The privilege against self-incrimination is an important feature of both the English and American legal systems.¹ Its roots are traceable to events in English legal history which continue to play a role in defining the scope of the doctrine in each country.² Because the privilege reflects a restriction upon the power of the state to employ coercive authority in the highly visible sphere of criminal law enforcement, both countries have found it to be a source of controversy and intense public scrutiny.³ Fundamental challenges to the principles behind the privilege, as well as serious calls for its restructuring appear regularly in both English and American legal debates.⁴

What is referred to in the United States as the privilege against self-incrimination is more frequently labeled the right to silence in Great Britain.⁵ Both designations encompass a set of rules which, in general, permit

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1. The self-incrimination privilege in the United States derives from the fifth amendment's requirement that "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. In England the doctrine stems from a combination of statutory and case law sources. *E.g.*, Criminal Evidence Act, 1898, 61 & 62 Vict., ch. 36, § 1(a) (defendant may not be called as a witness except upon his own application); *R. v. Boyes*, 1 B. & S. 311, 121 Eng. Rep. 730 (Q.B. 1861) (reasonable ground to apprehend self-incrimination justifies the court upholding a claim of privilege).

2. See *infra* notes 7-17 and accompanying text.

3. As an example in England, such a furor was raised about questioning practices in a particular murder investigation that a special inquiry was made for the House of Commons. Report of an Inquiry by the Hon. Sir Henry Fisher into the Circumstances Leading to the Trial of Three Persons on Charges Arising Out of the Death of Maxwell Confait and the Fire at 27 Doggett-Road, London SE6 (HC90 1977) [hereinafter cited as *Confait Inquiry*].

4. Fundamental self-incrimination reforms have been recommended by both the Royal Commission on Criminal Procedure and the Criminal Law Revision Committee. Royal Commission on Criminal Procedure, Report, Cmnd. 8092 (1981) [hereinafter cited as *Royal Commission Report*]; Criminal Law Revision Committee, Eleventh Report, *Evidence (General)*, Cmnd. 4991 (1972) [hereinafter cited as *CLRC Report*]. In the United States there have been calls for reform from important commentators, L. MAYERS, SHALL WE AMEND THE FIFTH AMENDMENT? (1959); Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968), and even the enactment of a statute designed to reverse the Supreme Court's *Miranda* warning requirements. Omnibus Crime Control and Safe Streets Act of 1968, Title II, Pub. L. No. 90-351, 82 Stat. 210 (1969) (codified at 18 U.S.C. § 3501 (1982)).

5. The self-incrimination privilege in Great Britain usually refers to the right of witnesses to refuse to answer self-incriminatory questions. See ARCHBOLD, CRIMINAL PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES ¶ 1304 (40th ed. 1979) [hereinafter cited as ARCHBOLD]; C. HAMPTON, CRIMINAL PROCEDURE 32-33 (1977); R. CROSS, EVIDENCE 275-82 (5th ed. 1979); G. WILLIAMS, THE PROOF OF GUILT 38 (3d ed. 1963). See generally Greenawalt, *Perspectives on the Right to Silence*, in CRIME, CRIMINOLOGY AND PUBLIC POLICY (R. Hood ed. 1974). The terms are used interchangeably hereafter to denote the set of related rules described in the text rather than only the right of a witness to refuse to answer self-incriminatory inquiries.

witnesses to refuse to answer self-incriminatory questions, allow a criminal defendant to refuse to take the stand at his own trial, and provide special protections for the suspect in police custody. The English and American legal systems provide a core of protection in each of these areas.

Despite the common roots, similar general content, and equivalent importance, there are important differences between British and American views of the self-incrimination privilege which are particularly instructive. Because the American privilege is constitutionalized in the fifth amendment, reform tends to focus upon expanding or contracting the scope of the controlling decisions of the United States Supreme Court. The British privilege, in contrast, is a common law principle and therefore, in theory at least, more readily subject to change. It has evolved in a distinctly British form and, due to its common law foundations, is subject to re-evaluation even with respect to its fundamental premises. Indeed, recent suggestions for self-incrimination reform in Great Britain demonstrate that even drastic changes are seriously considered.⁶

This article will discuss the intellectual and legal basis of recent proposals concerning self-incrimination in British law. Against the backdrop of the history and controversial development of the British common law self-incrimination privilege, these new proposals shed a great deal of light on the basic assumptions behind the privilege: this is true not only for the British jurist but applies as well for any study or assessment of the American constitutional privilege.

I. THE HISTORICAL FRAMEWORK

A substantial history of religious and political turmoil lies behind the interrelated protections which comprise the self-incrimination privilege. In seeking to deal with religious and political dissidents, both the Church and Crown in post-twelfth century England sought to make use of the inquisitorial process to conduct their investigations. They employed proceedings characterized by compelled submission to the oath *ex officio* which obligated individuals to answer truthfully all questions asked of them. Moreover, administration of the oath *ex officio* was not burdened by requirements of a formal accusation or sufficient evidence against a suspect. Instead, it was a tool to ensnare the unwary and even force them to identify other potential victims. Although its early use was confined to English ecclesiastical courts, the system of compulsory interrogation found its way into civil courts and achieved prominence in Star Chamber and High Commission proceedings.⁷

Opposition to the use of the oath *ex officio* combined elements of principle and practicality. Some believed compulsory interrogation was simply unfair.⁸ Others, however, objected solely because the technique was successful. This may have been the case for English Catholics who, after King

6. See *supra* note 4.

7. See generally M. BERGER, TAKING THE FIFTH 1-23 (1980); L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968); 8 J. WIGMORE, EVIDENCE ¶¶ 2250-2251 (1961); WILLIAMS, *supra* note 5, at 38-45; Wigmore, *Nemo Tenetur Seipsum Prodere*, 5 HARV. L. REV. 71 (1892).

8. Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesias-*

Henry VIII broke with the Catholic Church in Rome, found themselves victimized by compulsory interrogation procedures similar to those they had eagerly used against Protestants.⁹ Similarly, after the defeat of the Spanish Armada, and with it the threat of a Catholic restoration, Protestant heretics increasingly became the subjects of Star Chamber and High Commission inquisitorial investigations. Whether Catholic or Protestant, however, the suspect in such a proceeding faced the dilemma of potential penalties for either perjury or refusing to take the oath, or punishment for any criminal offense revealed by virtue of responding truthfully to the questions asked.

Opponents of the oath *ex officio* found an important ally in the common law courts which sought to restrain the utilization of the oath by issuing writs of prohibition.¹⁰ The reassertion of royal prerogative effectively ended this tactic, but could not stifle all dissent. Victims of High Commission and Star Chamber proceedings, such as John Udall¹¹ and John Lilburne,¹² invoked the common law right of silence in refusing to answer questions or even take the oath, their legal complaint being that compulsory interrogation procedures were employed without formal accusation or presentment. Ultimately, Parliament took the broader step of abolishing both the oath procedure and the High Commission and Star Chamber courts which had so effectively used it.¹³

While these developments may have formally ended compelled questioning under oath by trial courts, the evolutionary process did not terminate there. British law more generally moved toward the disqualification of the defendant from being a witness at his own trial. Since he was prevented from testifying it was naturally considered unfair to infer guilt from his silence. Defendants, however, found they were able to hide behind compelled silence and claim that they were prevented by law from establishing their innocence. A balance was reached in the Criminal Evidence Act of 1898 which barred the defendant from being forced to testify at his own trial, but allowed him to elect to take the witness stand in his own behalf.¹⁴

The right of silence evolved somewhat more slowly outside of the trial context. Even after compelled interrogations had ceased at trial, they re-

tical Courts in England, in *ESSAYS IN HISTORY AND POLITICAL THEORY IN HONOR OF CHARLES HOWARD MCILWAIN* (1936).

9. During the reign of Henry VIII's daughter, Queen Mary, the oath *ex officio* was extensively used in an effort to restore the supremacy of Catholicism in England. LEVY, *supra* note 7, at 73-82. The roles were reversed after Queen Elizabeth I ascended to the throne. *Id.* at 98; Kemp, *The Background of the Fifth Amendment in English Law: A Study of its Historical Implications*, 1 WM. & MARY L. REV. 247, 255-68 (1958).

10. BERGER *supra* note 7, at 13-14. Sir Edward Coke himself obtained one such injunction, *Collier v. Collier*, 4 Leonard 194, 74 Eng. Rep. 816 (1589), and wrote against the oath. *Coke, Of Oaths Before an Ecclesiastical Judge Ex Officio*, 12 Coke 26, 77 Eng. Rep. 1308 (1607).

11. 1 Howell St. Tr. 1271 (1407); LEVY, *supra* note 7, at 150-51, 164-70.

12. 4 Howell St. Tr. 1269 (1649); 3 Howell St. Tr. 1315 (1637); BERGER, *supra* note 7, at 14-20.

13. In 1641, Parliament acted to abolish the High Commission and Star Chamber courts and bar administration of the oath in ecclesiastical proceedings. 16 Car. ch. 10, 11 (1641). After the Stuart restoration the oath was banned entirely. 13 Car. 2, ch. 12 (1662). Soon thereafter the courts began to extend the privilege of not answering incriminating questions to witnesses. 8 J. WIGMORE, EVIDENCE § 2250, at 290 (1961).

14. 61 & 62 Vict. ch. 36 (1898). *See generally* BERGER, *supra* note 5, at 45-48.

mained a feature of the preliminary examination performed by the Justice of the Peace.¹⁵ This created the anomaly, before passage of the Criminal Evidence Act, that the jury might be presented with the defendant's preliminary hearing confession, but the defendant would not be able to directly testify as to his own version of the events. The problems were compounded by the development of the modern police force which created further opportunities for obtaining incriminatory pretrial statements. Justices of the Peace gradually assumed a more judicial role and the preliminary hearing was turned into an examination of the evidence against the accused, rather than an examination of him.¹⁶ To insure control of the extra-judicial interrogation process, there evolved a requirement that confessions be voluntary and fairly obtained.¹⁷

At the beginning of the twentieth century the essential components of the English right to silence were well established. They were refined in subsequent years, but not fundamentally changed. Calls for basic restructuring have emerged, however, and been backed by prestigious sources. The succeeding controversy has been as much a political as a legal debate.

II. CONFESSIONS

A. *Voluntariness*

Before the advent of the right to silence, compelling the suspect to incriminate himself was standard procedure. Physical coercion in the form of torture, and legal coercion represented by the oath *ex officio*, were official instruments of state policy.¹⁸ With the success of efforts to eliminate the oath procedure, however, judicial coercion gradually ceased to exist. Trial questioning was finally ended by the rule disqualifying the accused from testifying at his own trial. Later, the judicialization of the functions of the Justice of the Peace led to the abandonment of the interrogation of the accused at the preliminary hearing.

Although these developments did not directly affect the police, the restrictions upon judicial questioning did serve to create a sense of resistance to police interrogation. Judge Cave observed:

The law does not allow the judge or the jury to put questions in open court to prisoners; and it would be monstrous if the law permitted a police officer to go, without anyone being present to see how the matter was conducted, and put a prisoner through an examination, and then produce the effects of that examination

15. Two 16th century statutes required that the justice of the peace examine accused felons brought before him. 1 & 2 Phil. & M. ch. 13 (1554); 2 & 3 Phil. & M. ch. 10 (1555).

16. BERGER, *supra* note 5, at 45; Home Office, Evidence to the Royal Commission on Criminal Procedure, Memorandum No. 9, The Law of Evidence in Criminal Proceedings, ¶¶ 7-9 (1978) (all evidence to the Royal Commission Memoranda hereafter cited on file at the Institute for Advanced Legal Studies of the University of London) [hereinafter cited as Home Office Evidence Memorandum].

17. *See infra* notes 26-59 and accompanying text.

18. BERGER, *supra* note 5, at 12-13, 38-45. Initially, defendants were subjected to *peine forte et dure* to force them to plead to the charge. Failure to plead barred a trial and thus any chance of forfeiture of property upon conviction. Later it was employed for the additional task of securing a confession.

against him . . . It is no business of a policeman to put questions.¹⁹

Other courts sought to grant police slightly more leeway by permitting questioning once there was clear evidence that a crime had, in fact, been committed.²⁰ Confusion remained, however, as to whether questioning could proceed if the accused had been taken into custody,²¹ and as to when permissible questioning became prohibited cross-examination of the defendant.²² Mr. Justice Hawkins, later Lord Brampton, offered cogent advice in his Preface to the 1882 edition of Vincent's Police Code when he wrote that "[p]erhaps the best maxim for a constable to bear in mind with respect to an accused person is, 'keep your eyes and your ears open, and your mouth shut.'"²³

Despite resistance to the practice of interrogation, English courts generally admitted any resulting confession if it was found to be voluntary. Two eighteenth century cases, *R. v. Rudd*²⁴ and *R. v. Warwickshall*,²⁵ had established that confessions resulting from threats or promises were entitled to no weight. This principle evolved into the requirement that courts must exclude involuntary confessions and was, in turn, applied to those police interrogations which the courts ruled were permissible.

The English standard as to what constituted a voluntary confession evolved in as confusing a manner as its American counterpart.²⁶ One of the earliest expressions of the rule, in *Warwickshall*, was based upon the objective of protecting the reliability of the evidence against the accused.²⁷ The more recent description, offered by Lord Sumner in *R. v. Ibrahim*, omits reference to reliability as an issue, but is nevertheless similar in seeking to explain voluntariness by vaguely defining the contours of an involuntary confession:

19. *R. v. Male and Cooper*, (1893) 17 Cox C.C. 689, 690.

20. *R. v. Crowe and Myerscough*, (1917) 81 J.P. 288; *R. v. Berriman*, (1854) 6 Cox C.C. 388.

21. Compare *R. v. Gavin*, (1885) 15 Cox C.C. 656 with *R. v. Miller*, (1895) 18 Cox C.C. 54, and *R. v. Brackenbury*, (1893) 17 Cox C.C. 628.

22. *Gardner and Hancox*, (1915) 11 Crim. App. 265.

23. Quoted in Home Office, Evidence to the Royal Commission on Criminal Procedure, Memorandum No. 5, The Law and Procedures Relating to the Questioning of Persons in the Investigation of Crime 2 (1978) [hereinafter cited as Home Office Questioning Memorandum]. See also *R. v. Knight and Thayre*, (1905) 20 Cox C.C. 711.

24. (1775) 1 Leach 115, 168 Eng. Rep. 160.

25. (1793) 1 Leach 263, 168 Eng. Rep. 234.

26. Voluntariness is a prerequisite to the admissibility of confessions in the United States, *Mincey v. Arizona*, 437 U.S. 385 (1978), but it is a standard whose meaning is unclear and whose development has been inconsistent. BERGER, *supra* note 7, at 104-12; 150-60. English commentaries on the voluntariness standard can be found in ARCHBOLD, *supra* note 5, at ¶¶ 1377(A)(a)-(f), 1382-85; CROSS, *supra* note 5, at 541-45; Home Office Evidence Memorandum, *supra* note 16, ¶¶ 28-37. See also D. FELLMAN, THE DEFENDANT'S RIGHTS UNDER ENGLISH LAW 45-52 (1966); Kaci, *Confessions: A Comparison of Exclusion Under Miranda in the United States and Under the Judges' Rules in England*, 10 AM. J. CRIM. L. 87 (1982).

27. Confessions are received in evidence, or rejected as inadmissible, under a consideration whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.

R. v. Warwickshall, (1783) 1 Leach 263, 263-64, 168 Eng. Rep. 234, 234-35.

It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.²⁸

In 1963 the requirement was added that confessions obtained by oppression must be excluded.²⁹

The early administration of the voluntariness rule was guided by the conditions of the day. Almost every serious crime was punishable by death or deportation at that time, and the police did not constitute an organized group, could not be effectively watched, and were prone to abuse suspects to gain admissions,³⁰ the judiciary was compelled to create artificial rules to protect suspects from such abuse, especially considering the old rule prohibiting suspects from testifying on their own behalf.³¹ The attitude was one of caution with respect to confessions obtained by the authorities, and in extreme cases courts would view simple admonitions to tell the truth as sufficient to render the confession inadmissible.³² In contrast, the case law was very inconsistent in its treatment of confessions to public officials,³³ and the voluntariness rule was deemed inapplicable to confessions made to individuals who were not in positions of authority.³⁴

Contemporary English confession law retains the 'person in authority' requirement in assessing voluntariness,³⁵ and has resolved a number of related procedural issues.³⁶ Nevertheless, the substance of the voluntariness

28. 1914 A.C. 599, 609. Lord Sumner's views were reaffirmed in *Director of Pub. Prosecutions v. Ping Lin*, [1975] 3 All E.R. 175, and *Commissioners of Customs and Excise v. Harz and Power*, [1967] 1 A.C. 761. Lord Sumner's definition is also incorporated in section (e) of the preamble to the Judges' Rules. Home Office Circular No. 89/1978, Judges' Rules and Administrative Directions to the Police, Preamble § (e) [hereinafter cited as Judges' Rules] reprinted in Royal Commission Procedure Study, *infra* note 44, appendix 12.

29. *Callis v. Gunn*, [1963] 3 All. E.R. 677; [1964] 1 Q.B. 495. Oppression is also barred by the Judges' Rules, *supra* note 28, § (e) (preamble to Rules).

30. *Director of Pub. Prosecutions v. Ping Lin*, [1975] 3 All E.R. 175, 182 (Speech of Lord Hailsham).

31. *Id.* Wariness of confessions was expressed by Judge Cave much earlier when he observed that "for my part I always suspect these confessions, which are supposed to be the offspring of penitence and remorse, and which nevertheless are repudiated by the prisoner at the trial." *R. v. Thompson*, [1893] 2 Q.B. 12, 18.

32. *R. v. Kingston*, (1830) 172 Eng. Rep. 752 ("You are under suspicion of this, and had better tell all you know."). See also *R. v. Partridge*, (1836) 173 Eng. Rep. 243 ("I should be obliged to you if you would tell us what you know about it; if you will not, we of course can do nothing; I shall be glad if you will.").

33. *Ibrahim v. R.*, 1914 A.C. 599 (Confession admissible after suspect was asked "Why have you done such a senseless act?"); *R. v. Baldry*, (1852) 169 Eng. Rep. 568 (confession admissible after suspect warned of his right not to incriminate himself). Confessions following spiritual admonitions were also admissible. *R. v. Gilham*, (1828) 1 Mood. 186, 168 Eng. Rep. 1235. Inconsistencies are inevitable in light of the fact that the rule has "not been tightly defined in law." *The Fisher Report on the Confait Case: Four Issues*, 41 MOD. L. REV. 455, 460 (1978).

34. *R. v. Moore*, (1852) 2 Den. 522, 169 Eng. Rep. 1278; *R. v. Upchurch*, (1836) 1 Mood. 465, 168 Eng. Rep. 1346. Similarly, a confession induced by a hope of pardon, which authorities had not created, would be admitted. *Godinho* [1911] 7 Crim. App. 12 (C.C.A.). See generally *Mirfield, Confessions—the "Person in Authority" Requirement*, 1981 CRIM. L. REV. 92.

35. *R. v. Isequilla*, [1975] 1 All. E.R. 77; *Deokinanan v. R.*, [1968] 2 All. E.R. 346.

36. The prosecution must establish the voluntariness of the confession beyond a reasonable doubt, *R. v. Sartori, Gavin and Phillips*, 1961 CRIM. L. REV. 397, in contrast to the American

standard remains ill-defined, and has produced some results which have generated criticism.³⁷ Threats and promises sufficient to render a confession involuntary are largely a matter of perspective, dependent upon one's view of the role of the voluntariness rule. If reliability alone is the objective, confessions obtained by force and substantial threats would be excluded,³⁸ but lesser pressures that do not necessarily produce unreliable confessions would remain.³⁹ Similarly, inducements which currently lead to the exclusion of confessions⁴⁰ may encourage a suspect to confess without substantial risk of unreliability. English confession law, like its American counterpart,⁴¹ has moved beyond the reliability principle in a more general effort to control the interrogation process. The Criminal Law Revision Committee labelled this additional objective the disciplinary principle.⁴²

The voluntariness principal incorporates the disciplinary principle in three major ways. First, it has taken an expansive view of the threats and

preponderance of the evidence standard, *Lego v. Twomey*, 404 U.S. 477 (1972). The challenge is heard out of the presence of the jury in what the English call a trial within a trial. A decision to exclude will mean that the jury will not hear evidence of the confession. If the confession is ruled admissible, the jury may hear evidence relating to voluntariness in order to assess its probative weight, *Prasad v. The Queen*, [1981] 1 All E.R. 319; *McCarthy*, [1980] 70 Crim. App. 270, with an instruction that the prosecution has the burden of proof. *R. v. Cave*, [1963] Crim. L. R. 371 (C.C.A.); *Francis* [1959] 43 Crim. App. 174 (C.C.A.). All testimony at the trial within a trial is inadmissible as substantive evidence against the accused, as is the case in the United States. *Wong Kam-ming v. The Queen*, [1979] 1 All E.R. 939; *Simmons v. United States*, 390 U.S. 377 (1968). Both countries bar any use of involuntary confessions for cross-examination purposes; *Wong Kam-ming v. The Queen*, [1979] 1 All E.R. 939; *Mincey v. Arizona*, 437 U.S. 385 (1978), but the British exclusionary rule for involuntary confessions does not extend to derivative evidence. *King v. R.*, [1969] 1 A.C. 304; *The King v. Warwickshall*, (1783) 1 Leach 263, 168 Eng. Rep. 234. However, the prosecution must avoid introducing the evidence by stating it was discovered as a result of what the defendant said, *R. v. Berriman*, (1854) 6 Cox C.C. 388, although it has been observed that there is some conflict in the case law. CLRC Report, *supra* note 4, at ¶ 69(i).

37. See Speech of Lord Hailsham, Director of Pub. Prosecution v. Ping Lin, [1975] 3 All E.R. 175, 183; Royal Commission Report, *supra* note 4, at ¶ 4.73.

38. *R. v. Fennell*, (1881) 7 Q.B.D. 147; *R. v. Parrott*, (1831) 172 Eng. Rep. 1275. See also *Commissioners of Customs and Excise v. Harz and Power*, 1967 A.C. 761 (confession made following threat of prosecution involuntary). Lord Widgery, C.J., observed that if a confession "is induced by pressures or other influences [it] may be and often is thoroughly unreliable." *R. v. Isequilla*, [1975] 1 All E.R. 77, 80.

39. In *R. v. Smith*, [1959] 2 All E.R. 193, a Court Martial Appeal Court ruled that the defendant's confession, made shortly after the sergeant-major had informed the company that they would remain on parade until he found out who had been involved in a fighting incident, was inadmissible. Documents produced by a defendant after being informed of the Inland Revenue's practice of accepting monetary settlement in lieu of criminal prosecution where there has been voluntary disclosure were ruled inadmissible in *R. v. Barker*, [1941] 3 All E.R. 33.

40. *Northam*, [1967] 52 Crim. App. 97 (suggestion of a break on other charges an improper inducement); *Zaveckas*, [1969] 54 Crim. App. 202 (improper inducement in police affirmative response to question of whether bail would be granted following statement). *But see Houghton*, [1978] 68 Crim. App. 197 (no inducements found in context of statement made by defendant for reward, but after being cautioned). More recently the Court of Appeal said that the practice of discussing charge concessions with the defendant should be stopped but found no error in the admission of the confession. *R. v. Challinor and Cross*, *Times of London*, October 12, 1982, at 8, col. 4.

41. The "aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Lisenba v. California*, 314 U.S. 219, 236 (1941). See generally *BERGER*, *supra* note 7, at 108-10.

42. CLRC Report, *supra* note 4, at ¶ 55. The phrase has also been used by the Royal Commission on Criminal Procedure, Royal Commission Report, *supra* note 4, at ¶ 4.123, and appeared in Lord Diplock's speech in *R. v. Sang*, [1979] 2 All E.R. 1222, 1230.

inducements which will render a confession inadmissible.⁴³ Second, the rule independently bars the admission of confessions obtained by oppression.⁴⁴ Finally, the threat and inducements must come from a person in authority.⁴⁵ Each of these developments cannot be explained solely on the basis of the reliability objective. British courts have been regulating police behavior through the use of the exclusionary rule despite the fact that this is not a favored practice.⁴⁶

Although British courts may feel that in light of the well-established character of the voluntariness rule, judicial revision would be inappropriate,⁴⁷ there are not written constitutional restraints barring legislative change. Both the recent 1981 Royal Commission on Criminal Procedure Report⁴⁸ and the 1972 Evidence Report of the Criminal Law Revision Committee⁴⁹ were thus left free to offer recommendations to recast the voluntariness rule, and each sought changes which would have the effect of greatly reducing opportunities for judicial exclusion of a defendant's statements to police.

43. *R. v. Isequilla*, [1975] 1 All E.R. 77, 81-82. Judges have commented that the upgrading of the police has made the voluntariness rule "yet one more clog upon the efficient performance by the police of their duties." *Northam*, [1967] 52 Crim. App. 97, 104 (Winn, L.J.); and that it was "designed to protect [the suspect] against dangers now avoided by other and more rational means." *Director of Pub. Prosecutions v. Ping Lin*, [1975] 3 All E.R. 175, 182 (Lord Hailsham).

44. *See supra* note 29. In *R. v. Priestley*, Judge Sachs stated that oppression "in the context of the principles under consideration imports something which tends to sap, and has sapped, that free will which must exist before a confession is voluntary." [1966] 50 Crim. App. 183, 51 Crim. App. 1 (note to case). In an address to the Bentham Club in 1968 Lord MacDermott described oppressive questioning as that "which by its nature, duration, or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent." Quoted in *Royal Commission on Criminal Procedure, The Investigation and Prosecution of Criminal Offenses in England and Wales: The Law and Procedure*, Cmnd. 8092-1, at 28 [hereinafter cited as *Royal Commission Procedure Study*]. *See also R. v. Prager*, [1972] 1 W.L.R. 260; *Hudson*, [1981] 72 Crim. App. 163. Lord Hailsham observed that "any civilized system of criminal jurisprudence must accord to the judiciary some means of excluding confessions or admissions obtained by improper methods." *Wong Kam-Ming v. R.*, [1979] 2 W.L.R. 81, 90 (dissenting opinion).

45. The most recent reaffirmation appears in *R. v. Rennie*, *Times of London*, November 7, 1981, at 4, col. 1. Presumably, since inducements from other sources can have the same impact as those from persons in authority, the requirement, therefore, suggests an objective of controlling the conduct of official interrogators. An inducement made in the presence of a 'person in authority', however, will suffice. *Cleary*, [1963] 48 Crim. App. 116.

46. This position was forcefully put by Lord Diplock in *R. v. Sang*, [1979] 2 All E.R. 1222, 1230:

It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it was obtained illegally there will be a remedy in civil law, if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with.

47. The speeches of Lord Morris ("I do not think that a reconsideration or modification of the rule lies within the province of judicial decision") and Lord Hailsham ("the rule has survived into the twentieth century, not only unmodified but developed, and only Parliament can modify it now from the form in which it was given classical expression by Lord Sumner") in *Ping Lin* reflect judicial unwillingness to tamper with the voluntariness standard. *Director of Pub. Prosecutions v. Ping Lin*, [1975] 3 All E.R. 175, 179, 182.

48. The Commission was created by the Prime Minister. *Royal Commission Report*, *supra* note 4, at ¶ 1.1.

49. CLRC Report, *supra* note 4.

The Royal Commission's position relied heavily upon empirical research it had itself commissioned. Of particular importance was a psychologist's six-month observational study of interrogations conducted by the Brighton Police Criminal Investigation Department.⁵⁰ The study's conclusion was simply that the legal concept of voluntariness could not be utilized meaningfully by a trained observer attempting to use psychological principles to categorize confessions obtained by police following interrogation.⁵¹ Given the Royal Commission's conclusion that the legal definition of voluntariness was imprecise and offered little guidance to police,⁵² the added evidence of the variance of psychological and legal voluntariness⁵³ was sufficient to warrant a new approach to confession admissibility.

The core of the Royal Commission's proposal was abandonment of the voluntariness rule and the development, in its place, of a code of practice to regulate the manner in which police interrogations could be conducted. The object of the code would be to produce "conditions of interview that minimize the risk of unreliable statements."⁵⁴ It would focus on the circumstances and environments in which suspects could be questioned but, apart from prohibiting threats of violence, torture, and inhuman or degrading treatment, no attempt would be made to regulate interrogation tactics.⁵⁵ The drafting of the code was seen primarily as a Home Office responsibility,⁵⁶ although this would inevitably entail input from the police.⁵⁷ Violation of code provisions involving violence, threats of violence, torture, or inhuman or degrading treatment would lead to the automatic exclusion of any confessions so obtained.⁵⁸ This was the only exception to the Royal Commission's reluctance to use the law of evidence as a tool to deter police misconduct, whether in the form of an automatic or reverse-onus exclusionary rule.⁵⁹ In cases involving other breaches of the code of practices, it rec-

50. Irving, *Police Interrogation: A Case Study of Current Practice*, Royal Commission on Criminal Procedure Research Study No. 2, (1980) [hereinafter cited as Case Study]; Interview with Walter Merricks, Commission Member (October 19, 1981); Interview with Dr. Michael McConville, University of Birmingham (November 16, 1981). Observational data was also assembled in a Home Office research study. Softley, *Police Interrogation: An Observational Study in Four Police Stations*, Royal Commission on Criminal Procedure Research Study No. 4 (1980).

51. Case Study, *supra* note 50, at 136, 152; Interview with Barrie Irving (October 15, 1981).

52. Royal Commission Report, *supra* note 4, at ¶¶ 4.70-4.72.

53. *Id.* at ¶ 4.73.

54. *Id.* at ¶ 4.110.

55. *Id.* at ¶¶ 4.111-4.114. The Royal Commission suggested that appropriate subjects for the code would include limits on night questioning; provision for refreshments; a ban on interviewing persons substantially under the influence of drugs or alcohol, or who have been held incommunicado beyond a specified period; and conditions of lighting, ventilation, and seating for the interrogation. It believed that any attempt to regulate interrogation tactics would fail in both the effort to define the impermissible tactics and in dealing with tactics that are implicit in the suspect's situation even if not made explicit, such as a belief that a confession will lead to bail.

56. Royal Commission Report, *supra* note 4, at ¶ 4.116.

57. Interviews with William Bohan, Criminal Policy Division, Home Office (October 16, 1981); Michael Wilmot, Solicitor's Branch, Metropolitan Police (October 20, 1981).

58. Royal Commission Report, *supra* note 4, at ¶ 4.132. Automatic exclusion was viewed as necessary in light of the seriousness of the breach of such rules and society's abhorrence of violent and degrading conduct.

59. The Royal Commission questioned the effectiveness of an automatic exclusionary rule, citing Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970), but

commended a remedy tied to the reliability goal underlying the code. Where there has been such a breach

[t]he judge should point out to the jury or the magistrates be advised of the dangers involved in acting upon a statement whose reliability can be affected by breach of the code. They should be informed that under pressure a person may make an incriminating statement that is not true, that the code has been introduced to control police behavior and minimize the risk of an untrue statement being made and that if they are satisfied that a breach of the code has occurred it can be dangerous to act upon any statement made; accordingly, they should look for independent support for it, before relying upon it.⁶⁰

More direct enforcement of the code would derive from police internal supervision and the complaint procedure.⁶¹

Reliability had also been the linchpin of the 1972 Criminal Law Revision Committee recommendations. In its Evidence Report, the Committee called for the retention of the exclusionary rule with respect to statements obtained as a result of oppressive treatment of the accused, but sought to alter the rule of automatic exclusion for statements obtained as a result of threats or inducements. In its place the Committee recommended that only those statements obtained as a result of threats or inducements likely to produce an unreliable confession should be excluded.⁶²

The Criminal Law Revision Committee's proposals were based upon the utilitarian view that the object of the criminal process is to achieve the "right result," but its entire report was abandoned largely as a result of the furor generated by its call for the restructuring of the right to silence.⁶³ Well aware of the fate of the Committee's efforts,⁶⁴ the Royal Commission chose instead to rely upon the concept of the need for a proper balance between the liberties of the individual and the interests of the whole community.⁶⁵

was itself criticized for confusing the deterrent value of the exclusionary rule in the quite different contexts of interrogations and searches. Inman, *The Admissibility of Confessions*, 1981 CRIM. L. REV. 469, 475. It also raised questions as to the appropriateness of spending more court time on matters not related to the guilt or innocence of the accused. Royal Commission Report, *supra* note 4, at ¶ 4.128. A reverse-onus exclusionary rule, which would place the burden on the prosecution to justify the non-exclusion of illegally obtained confessions, was seen to reflect the same problems as well as lacking the certainty needed to adequately guide police. *Id.* at ¶¶ 4.129-4.131.

60. *Id.* at ¶ 4.133.

61. *Id.* at ¶ 4.118.

62. CLRC Report, *supra* note 4, at ¶ 65. In line with its reliability focus, the Committee would allow the fruit of inadmissible confessions to be introduced. *Id.* at ¶ 68. The fact that the truth of an inadmissible confession is confirmed by evidence subsequently discovered, however, would not justify its admission, although the jury could be informed that derivative evidence was discovered as a result of a statement made by the accused. *Id.* at ¶ 69.

63. CLRC Report, *supra* note 4, at ¶ 27; Gerstein, *The Self-Incrimination Debate in Great Britain*, 27 AM. J. COMP. L. 81 (1979); JUSTICE, Report of Conference on the Report of the Royal Commission on Criminal Procedure, April 11, 1981, at 10 (Comments of Professor Michael Zander); Interview with Charles Morrison, Q.C., Dean of the Inns of Court School of Law (September 24, 1981).

64. Royal Commission Report, *supra* note 4, at ¶¶ 1.24-1.31.

65. *Id.* at ¶¶ 1.11-1.12; Inner Temple, Conference on Questioning and the Rights of the Suspect, September 26, 1981 [hereinafter cited as Inner Temple Conference] (Remarks of Walter Merricks, Member of the Royal Commission on Criminal Procedure).

Each, however, felt that the contemporary voluntariness rule was an inappropriate standard and developed a formula which would have the unmistakable effect of increasing the number of confessions reaching the jury. The Royal Commission would allow all confessions to reach the jury, excluding only those obtained under the most extreme conditions, and with only a judicial warning in the event of a breach of the code of practice. The Criminal Law Revision Committee's proposal was to exclude only confessions obtained as a result of oppressive questioning or tactics likely to result in an unreliable statement. The goals of insuring the accuracy of the trial's outcome and balancing individual and societal interests were seen to call for looser evidentiary controls on the interrogation process.

Suggestions that reliable confessions be admitted against the accused as long as the methods used to obtain them are not extreme, are very much in keeping with the British preference for avoiding the use of evidentiary rules to discipline police.⁶⁶ The exception for extreme tactics, where both the Royal Commission and Criminal Law Revision Committee recommended automatic exclusion, is largely consistent with the reliability objective since any resulting confessions would have a high risk of unreliability. Despite the fact that both proposals received support from some quarters,⁶⁷ most of the reaction has been either cautious⁶⁸ or openly hostile.⁶⁹ Much of the opposition was based on the view that the proposals were vague in failing to specify either the circumstances likely to produce unreliable confessions under the Criminal Law Revision Committee model or the content of the code of interrogation practices proposed by the Royal Commission. Others concluded that even without such details the elimination of the voluntariness test would

66. See *supra* note 45. Interview with Sir David Napley, former President, Law Society (December 3, 1981).

67. Not surprisingly, police groups supported relaxed confession admissibility rules in evidence presented to the Royal Commission. Association of Chief Police Officers of England, Wales, and Northern Ireland, Evidence to the Royal Commission on Criminal Procedure ¶ 7.76 (1978); Police Superintendents' Association of England and Wales, Written Evidence to the Royal Commission on Criminal Procedure ¶ 5.20 (1978). Others also reacted favorably to the Royal Commission's suggestions. Interview with Judge John Buzzard, Central Criminal Court (November 18, 1981). Supporters of the Criminal Law Revision Committee's recommendations included Professor Rupert Cross and Sir David Napley. Cross, *The Evidence Report: Sense or Nonsense*, 1973 CRIM. L. REV. 329, 354; Interview with Sir David Napley (December 3, 1981).

68. In the case of the Royal Commission recommendations, the lack of the details of the proposed code of practices led some to reserve judgment on the acceptability of eliminating the voluntariness rule. JUSTICE, Comments on the Home Office Consultative Memorandum, at 8 (1981) (The Home Office Consultative Memorandum sought comments on issues raised by the Royal Commission Report); Interview with Michael Wilmot, Solicitor's Branch, Metropolitan Police (September 20, 1981).

69. Law Society, *Memorandum of the Council of the Law Society on the Royal Commission's Report* 2, 29 (1981); Law Society and Bar Council, *Memorandum by the Law Society and Bar Council on Certain of the Recommendations of the Royal Commission on Criminal Procedure* 5 (1981); 5 RIGHTS (Journal of the National Council for Civil Liberties) 4 (1981); Interviews with Neil Denison, Q.C., Secretary, Criminal Bar Association (September 22, 1981), Richard DuCann, Q.C., former Chairman of the Bar of England and Wales (November 11, 1981), Peter Archer, M.P. (November 17, 1981). The Labour Party position appeared to be that a reverse-onus exclusionary rule should apply to improperly obtained statements. House of Commons Debate, November 19, 1981, at 538 (Comments of Roy Hattersley, M.P.). It has been suggested that lawyers may simply prefer the vagueness of the voluntariness standard. Interview with Barrie Irving (October 15, 1981).

simply reduce already existing protections for the accused.⁷⁰

One reason for the differing positions on proposals to replace the voluntariness rule is the fundamental question of how much rules of evidence should be used for deterrent purposes. The same issue permeates debates on the American exclusionary rule.⁷¹ Closely related are the differing perceptions as to the frequency of police malpractice, the utility of alternative remedies for police misconduct, and the likely success of utilizing the exclusionary rule for this purpose.⁷² There is also no consensus as to which interrogation tactics, short of the extreme, are either improper or likely to produce unreliable statements. Police may be able to overcome resistance and secure a confession through persuasion and pressure, but is this necessarily bad or likely to produce unreliable evidence? The opponents of the voluntariness rule proposals appear to have a different view of how the British criminal justice system operates in practice and differ in their vision of how it should function. Whether the proposals to alter the voluntariness rule will be adopted by Parliament, and in what form cannot be predicted. It does appear, however, that such an effort will be undertaken by the current government.⁷³

B. *The Caution and Silence*

One of the central premises of the common law of confessions is that a suspect has no obligation to give a statement to the police. Lord Parker's description of this principle in *Rice v. Connolly*⁷⁴ reflects the generally accepted view that:

though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority.⁷⁵

The voluntariness rule is consistent with this because the lack of an obliga-

70. Inner Temple Conference, *supra* note 65 (Remarks of Harriet Harmon, Legal Officer, National Council for Civil Liberties).

71. See *The Exclusionary Rule Bills: Hearings on S. 101 and S. 751 Before the Senate Subcomm. on Criminal Law of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 343 (1981).

72. Judges may tend to view themselves as presently doing an adequate job of protecting the rights of the accused. Interviews with Lord Justice Eveleigh, Member of the Royal Commission on Criminal Procedure (November 19, 1982), Lord Justice Lawton (October 13, 1981); Judge John Buzzard, Central Criminal Court (November 18, 1981). Some barristers also feel that court supervision of the voluntariness standard has been improving. Interviews with Neil Denison, Q.C., Secretary, Criminal Bar Association (September 22, 1981); Richard DuCann, Q.C., former Chairman of the Bar of England and Wales (November 11, 1981). A sign that there were major problems in the interrogation process, however, was the recognition by the police themselves that their testimony as to oral confessions, the so-called police verbals, was not being believed. Interview with Michael Wilmot, Solicitors Branch, Metropolitan Police (October 20, 1981). One commentator observed that the Royal Commission lacked "a sense of street-wisdom, and a practical application of how copybook safeguards get blotted in police cells and in courtrooms." *The Guardian*, November 20, 1981, p. 15, col. 1.

73. See *infra* text accompanying notes 253-87.

74. [1966] 2 Q.B. 414.

75. *Id.* at 419. Suspects in the United States have the same right. *Miranda v. Arizona*, 384 U.S. 436 (1966).

tion to answer police questions does not mean that an individual should be prevented from voluntarily deciding to provide information.

Because it is the English prosecutor's duty to establish the voluntariness of the accused's confession beyond a reasonable doubt,⁷⁶ he is confronted with the problem of assembling the necessary evidence to meet the burden of proof requirement. The practice of cautioning suspects of their right to remain silent prior to interrogation grew as a procedure enabling the prosecution to meet this evidentiary burden.⁷⁷ Due to uncertainty as to whether a caution was required, however, the Chief Constable of Birmingham wrote to the Lord Chief Justice in 1906 asking for clarification. In response, he was informed that a caution should precede questioning if the officer had determined that the suspect should be charged. Later the judges of the Kings' Bench were asked to draw up guides for police interrogation, and the result was the first set of Judges' Rules in 1912.⁷⁸ Changes were made at various points, and the current Judges' Rules, with accompanying Home Office Administrative Directions, were issued in 1978.⁷⁹

The Judges' Rules incorporate the voluntariness principle,⁸⁰ but provide regulation of the interrogation process well beyond the principles minimal dictates. The Rules are not viewed as having the status of law,⁸¹ and a violation of one of the rules or accompanying administrative directions does not lead to the automatic exclusion of any statement thereafter obtained.⁸² As one court observed, "their non-observance may, and at times does, lead to the exclusion of an alleged confession; but ultimately all turns on the judge's decision as to whether, breach or no breach, it has been shown to have been made voluntarily."⁸³ How frequently the discretion to exclude confessions is exercised is subject to some disagreement.⁸⁴

The cautioning of suspects plays a central role in the structure of the Judges' Rules, but the obligation to administer the caution does not arise immediately. Pursuant to Rule II:

As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating

76. *R. v. Cave*, 1963 CRIM. L. REV. 371; *R. v. Sartori*, 1961 CRIM. L. REV. 397.

77. P. DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 32 (1960).

78. The 1912 Judges' Rules are reproduced in *R. v. Voisin*, [1918] 1 K.B. 531, 539 n.3. The historical evolution of the Judges' Rules appears in Royal Commission Procedure Study, *supra* note 43, app. 13, at 162-65.

79. Judges' Rules, *supra* note 28.

80. Judges' Rules, *supra* note 28, Preamble § (e).

81. Archbold, *supra* note 5, at ¶ 1388 E.; Home Office Questioning Memorandum, *supra* note 23, at ¶ 22.

82. *Conway v. Hotten*, [1976] 2 All E.R. 213; *R. v. Collier*, [1965] 3 All E.R. 136; *Commen*, *R. v. Roberts*, 1970 CRIM. L. REV. 464 (C.A.); *Voisin*, [1918] 13 Crim. App. 89.

83. Prager, [1971] 56 A. App. R. 151, 160.

84. Courts have not been inclined to exercise their discretion to exclude evidence as a means of disciplining the police. Royal Commission Report, *supra* note 4, at ¶ 4.124. One Commission member believed that the discretion to exclude was so infrequently exercised that it could be safely removed. Interview with Walter Merricks (October 19, 1981). Others, however, believe that the courts provide adequate protection. Interview with Lord Justice Lawton (October 13, 1981).

to that offence.⁸⁵

The evidentiary standard triggering the duty to caution in form and practice parallels the standard required for an arrest.⁸⁶ Under Rule I, questioning before this point may proceed without a caution, but, when "reasonable grounds to suspect" arise, the individual must be informed: "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence." If the investigation proceeds to the point where an individual is charged with or informed that he may be prosecuted for an offense, Rule III(a) requires that he be cautioned in the same form as Rule II, prefaced by the question "Do you wish to say anything?" However, Rule III(b) generally precludes any further interrogation:

It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimizing harm or loss to some other person or the public or for clearing up an ambiguity in a previous answer or statement.⁸⁷

Furthermore, a caution must precede any such questioning.⁸⁸

To an American observer, the differences between the *Miranda* warning requirements and the obligation to caution imposed by the Judges' Rules are readily apparent. In particular, the English warning is far less detailed and exclusion of evidence obtained without a caution is discretionary. More significant is the fact that *Miranda's* rather demanding waiver requirements are not part of the British system, and thus police in Great Britain feel free to attempt to persuade suspects to answer questions and do not necessarily take no for an answer.⁸⁹ There are similarities as well. There is an investigatory period in both systems in which questioning may proceed without a warning or caution, and the obligation to inform the suspect of his rights arises coincident with the assertion of custodial authority. Similarly, the standards increase when the process becomes more adversarial and the prosecution phase commences.⁹⁰

The most controversial of the recent recommendations for changing the British right to silence sought a fundamental restructuring of the restraints upon police interrogation and the very right of suspects not to respond to police questions. The Criminal Law Revision Committee proposed that, while silence in the face of police questioning should not constitute an of-

85. Judges' Rules, *supra* note 28, at p. 154.

86. Criminal Evidence Act, 1967 s.2. The current standard reflects a change from the pre-1964 rules which focused upon the point where a police officer "has made up his mind to charge a person with a crime." P. DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 28 (1960).

87. Judges' Rules, *supra* note 28, at 154.

88. Given the lack of support for post-charging interrogation, one might expect police to delay the charging decision. Although this has been held a violation of the Judges' Rules, resulting statements are not excluded. The only incentive for police to comply is the fear that the defendant may claim the violation rendered the statement involuntary, and the risk the jury will believe the claim. *R. v. MacIntosh*, *Times of London*, October 8, 1982, at 9, col. 5.

89. Interview with Barrie Irving (October 15, 1981).

90. P. DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 27 (1960); Zander, *The Right of Silence in the Police Station and the Caution* in *RESHAPING THE CRIMINAL LAW* (Glazebrook, ed. 1978).

fense, it should be subject to a wider array of adverse consequences. Moreover, substantial changes in the police caution were proposed to insure that suspects would be made aware of the consequences of exercising their right to silence. This plan became the central focus of the debate over the Criminal Law Revision Committee's Evidence Report and led to its downfall.⁹¹

The Committee's proposals came against the background of a number of confusing decisions delineating the limits of judicial comment on the accused's pretrial silence. A number of rulings had barred the suggestion of adverse inferences of guilt in cases involving post-caution silence.⁹² Other cases, however, distinguished an inference of guilt from notifying the jury that a defense was advanced for the first time at trial and inviting them to consider that fact in assessing its weight.⁹³ A Privy Council ruling had rejected the distinction between pre and post-caution silence⁹⁴ and the Criminal Law Revision Committee assumed that the prohibition against drawing an adverse inference from silence existed independently of the caution.⁹⁵ A more recent court ruling suggests that the current law bars even a comment that a defense was first raised at trial. In *R. v. Gilbert*, the court observed that the current law is that the judge "must not comment adversely on the accused's failure to make a statement."⁹⁶ Additionally, in a 1976 decision, doubt was cast on the Privy Council's view that pre and post-caution silence should be treated the same,⁹⁷ and the Criminal Law Revision Committee believed that the law would permit consideration of precaution silence in assessing the accused's evidence.⁹⁸

The specific form that the Committee's recommendation took was the proposal that:

If the accused has failed, when being interrogated by anyone charged with the duty of investigating offenses or charging offenders, to mention a fact which he afterwards relies on at the committal proceedings or the trial, the court or jury may draw such inferences as appear proper in determining the question before them. The fact would have to be one which the accused could reasonably have been expected to mention at the time.⁹⁹

91. Home Office Questioning Memorandum, *supra* note 23, at ¶¶ 41, 129; Zander, *supra* note 90, at 344.

92. Davis, [1959] 43 Crim. App. 215; Leckay, [1943] 2 All. E.R. 665; Naylor, [1933] 1 K.B. 685.

93. Ryan, [1964] 50 Crim. App. 144; Littleboy, [1934] 2 K.B. 408. Great Britain now requires advance notice of an alibi defense.

94. Hall v. R., [1971] 1 All E.R. 322.

95. CLRC Report, *supra* note 4, at ¶ 29.

96. [1977] 66 Crim. App. 237, 245.

97. *R. v. Chandler*, [1976] 3 All E.R. 105.

98. CLRC Report, *supra* note 4, at ¶ 80. Exactly when permissible comments on the weight of the evidence become prohibited suggestions of an adverse inference of guilt is difficult to discern from the case law. Compare *R. v. Gerard*, [1948] 1 All E.R. 205 and *Tune*, [1944] 29 Crim. App. 162 (permissible comments) with *Sullivan*, [1966] 51 Crim. App. 102 [and] *Hoare*, [1966] 50 Crim. App. 166 (prohibited comments). Where the accused and accuser are on an equal footing, i.e., the accuser is not a member of the police, silence in the face of an accusation may constitute evidence of guilt. *Parkes v. R.*, [1976] 3 All E.R. 380; *R. v. Christie*, 1914 A.C. 545.

99. CLRC Report, *supra* note 4, at ¶ 32.

The totality of the circumstances would determine whether an adverse inference would be warranted in light of the nature of the defense and the suspect's explanation for failure to mention it. The adverse inference could be drawn even in a committal proceeding which has as its purpose determining whether to commit the accused for trial.¹⁰⁰ Similarly, at trial, the adverse inference could be used not only in the determination of the accused's guilt, but also in assessing whether a submissible case had been made.¹⁰¹

The Committee recognized that its proposals were inconsistent with the warnings required by the Judges' Rules. Rules 1 and 2, in particular, create a sense in the mind of the suspect that he is not obligated to answer police questions. The possibility of adverse inferences being drawn from his failure to mention any relevant fact is a consideration that logically should be weighed by the individual in deciding whether or not to exercise his right to silence. A defendant could claim that the caution led him to believe there would be no comment on his silence and thus no adverse inference should be drawn. To remedy this, the Committee recommended a new caution:

You have been charged with [informed that you may be prosecuted for]—. If there is any fact on which you intend to rely in your defense in court, you are advised to mention it now. If you hold back until you go to court, your evidence may be less likely to be believed and this may have a bad effect on your case in general. If you wish to mention any fact now, and you would like it written down, this will be done.¹⁰²

Significantly, the caution would be administered only after an accused was charged or officially informed that he would be prosecuted. No such advice would have to be given at earlier stages of the investigation.¹⁰³ A minority of the Committee, however, urged that the application of the entire proposal be delayed until a regular process of tape recording of confessions had been instituted by the police.¹⁰⁴

The reactions to the Criminal Law Revision Committee's proposal were overwhelmingly negative.¹⁰⁵ The Royal Commission on Criminal Procedure, despite some sympathies for the Criminal Law Revision Committee's proposals, chose to recommend no change in the existing law on the right to silence in police questioning.¹⁰⁶ The Royal Commission took this position despite support for the Criminal Law Revision Committee's proposals from police and prosecutor groups,¹⁰⁷ and criticisms expressed by the Law Society

100. *Id.* at ¶ 36.

101. *Id.* at ¶ 39. If corroboration is required, the Committee also proposed to allow the adverse inference to be used to meet this evidentiary obligation. *Id.* at ¶ 40.

102. *Id.* at ¶ 44.

103. *Id.* As previously indicated, after charging the Judges' Rules permit asking the accused if he has anything further to say, but discourage further detailed interrogation. See *supra* note 86 and accompanying text. The Committee chose not to directly address the caution required in the limited circumstances of post-charging interrogation under Rule (b). CLRC Report, *supra* note 4, at ¶ 43 n.1.

104. *Id.* at ¶ 52.

105. Zander, *The CLRC Evidence Report—A Survey of Reactions*, 1974 LAW SOC. GAZETTE 954.

106. Royal Commission Report, *supra* note 4, at ¶ 4.53.

107. Association of Chief Police Officers of England, Wales and Northern Ireland, Evidence to the Royal Commission on Criminal Procedure ¶¶ 7.38-7.45 (1978) [hereinafter cited as Chief

and Criminal Bar Association calling for less extreme modifications of the right to silence in police questioning.¹⁰⁸

The Commission recognized that cases calling for adverse inferences under the Criminal Law Revision Committee's proposals would be few in number. These cases would involve only those in which the accused did not plead guilty, did not make a damaging admission nor confession to the police, and attempted for the first time to offer a defense at trial. The Commission was concerned that in spite of this, cautions would have to be given to every suspect.¹⁰⁹ This policy, in turn, might affect the way the police would conduct all their interviews,¹¹⁰ and could only serve to add to the pressure on the suspect to answer police questions. The result would be a risk that even innocent individuals would make damaging admissions in the face of a warning that silence would be to their detriment. There was also concern that the effect of a system of adverse inferences would constitute a subtle shifting of the burden of proof, a particularly inappropriate result where the questioning might be based on unsubstantiated and vague allegations or on mere suspicion.¹¹¹ Finally, concern was expressed that the system of adverse inferences from silence might lead to frequent factual disputes as to whether the individual remained silent. The resulting administrative burden could well be unmanageable.¹¹²

The Royal Commission did not exhaustively consider the viability of alternatives suggested to it. The Criminal Bar Association, for example, recommended that at the committal stage of the proceedings the defendant should be invited to make any disclosure of facts relating to his defense and that his failure to do so could be considered in assessing credibility, but not as evidence of guilt or as corroboration of the prosecution evidence where such is required. Comments to this effect could be made to the jury by both the judge and the prosecuting counsel.¹¹³ The defendant's duty to produce relevant facts would arise only after the prosecution had revealed at the committal proceedings the facts supporting the charge.¹¹⁴ Thus, the Criminal Bar Association's proposals were responsive to both concerns voiced by the Royal Commission on Criminal Procedure. The Criminal Bar Associa-

Police Officers Evidence]; Commissioner of Police of the Metropolis, Part I of the Written Evidence to the Royal Commission on Criminal Procedure ¶ 4.13 (1978); Prosecuting Solicitors' Society of England and Wales, Evidence to the Royal Commission on Criminal Procedure 27-29 (1978).

108. Criminal Bar Association, Written Submission No. 1 to the Royal Commission on Criminal Procedure ¶¶ 52-67 (1978); Law Society, Police Powers and Rights of Suspects ¶¶ 58-62 (1978) [hereinafter cited as Law Society Evidence].

109. Royal Commission Report, *supra* note 4, at ¶ 4.49.

110. *Id.* at ¶ 4.50. The Commission added that it would affect pre as well as post-caution interrogations.

111. *Id.* at ¶¶ 4.51-4.52.

112. *Id.* at ¶ 4.52.

113. Criminal Bar Association, Written Submission No. 1 to the Royal Commission on Criminal Procedure pt. 2, ¶¶ 52-68 (1978) [hereinafter cited as Bar Evidence]. This was a reaffirmation of the position taken by the Bar in 1973. Strong sentiment for a revised procedure after the completion of initial police investigation was also noted by the Senate of the Inns of Court and the Bar in its Submission to the Royal Commission on Criminal Procedure at 5 (1979).

114. Bar Evidence, *supra* note 113, at pt. 2, ¶ 59.

tion avoided risking a subtle shift in the burden of proof by rejecting the use of adverse inferences from failure to provide the relevant facts of a defense as evidence of guilt, and limiting its use to credibility questions. In short, the prosecution could not make its case by relying on the silence of the accused. Under the Criminal Bar Association proposals the stage at which the information would have to be provided arose after the conclusion of the initial police interrogation practices. The police could not use the immediate shock of arrest coupled with the caution proposed by the Criminal Law Revision Committee to obtain an early incriminating admission from the accused.

The Law Society offered somewhat more specific suggestions on the right to silence during pretrial investigation. They viewed the existing right to silence as contrary to common sense and unfairly favoring those who are criminally experienced and likely to be guilty.¹¹⁵ It proposed that:

[I]f a defendant exercises his right not to answer questions or if he fails to give an explanation consistent with his innocence which one might reasonably expect him to have volunteered the trial judge and the prosecution (by cross-examination or in its final address) should be entitled to comment thereon to the extent that such matters go to the credibility of the defendant.¹¹⁶

As was the case for the Criminal Bar Associations proposals, the Law Society recommendations did not go so far as to authorize adverse use of the defendants silence during interrogation for purposes of proving his guilt or as corroboration. The Law Society proposal also rejected implementation unless there existed effective sanctions against abuse by the police.¹¹⁷ In this way the Law Society felt that it had satisfactorily resolved the two major obstacles to adverse use of silence; specifically the concern that it would shift the burden of proof and encourage police abuse during the interrogation process. The Law Society also drafted a revised caution to reflect its recommended changes¹¹⁸ and observed that it would be in police interest to administer the caution at an early stage since its position was that adverse comment upon silence prior to the administration of the caution, would not be permitted.¹¹⁹ The Law Society called for further cautioning either immediately before or immediately after charging.¹²⁰ Believing that the Royal

115. Law Society Evidence, *supra* note 108, at ¶¶ 54-55.

116. *Id.* at ¶ 58(b).

117. *Id.* at ¶¶ 58-59.

118. *Id.* at ¶ 64.

I suspect that you may be involved in an offence of [burglary]. I am going to ask you some questions. If you are later prosecuted, your answers to my questions will be given in evidence and your answers should be truthful and accurate.

You are not compelled to answer the questions but I must warn you that, if you fail to do so, a court may be less likely to accept as true any evidence you give at the trial.

You should also tell me of anything which you think is in your favour because, if you do not, the court may be unwilling to accept as true any evidence you give at the trial concerning matters you have not told me about now.

Do you wish to consult a solicitor? If so, I will try to arrange for you to see one before I question you.

Id.

119. *Id.* at ¶ 65.

120. After informing the suspect that he has been or will be charged with an offense, the officer should state:

Commission on Criminal Procedure had failed to provide for sufficient safeguards, particularly with respect to the accuracy of the interrogation, the Law Society recommended against modifications of the right to silence in its review of the Royal Commission's Report.¹²¹

With so much support for modifications of the right to silence during police investigation¹²² it is perhaps surprising that the Royal Commission on Criminal Procedure entirely avoided venturing into this area. Even though the proposals of the Criminal Law Revision Committee had been soundly rejected, compromises were nevertheless available. As both the Bar Council and Law Society recommended, adverse inferences could have been limited to credibility questions, thus avoiding the objection that silence should not be used to shift the burden of proof to the defendant which the Criminal Law Revision Committee arguably did in recommending the use of silence as proof of guilt and corroboration. Moreover, the triggering point for such inferences could be deferred past the initial police investigatory phase, thus ensuring that only those against whom there was reasonable suspicion would be subjected to it. The wording of the caution could be modified from the format suggested by the Criminal Law Revision Committee to minimize its arguably threatening character. Additionally, a strong argument can be made that it is morally appropriate to draw inferences from silence in appropriately controlled situations.¹²³ Absent a recommendation from an entity with the prestige of the Royal Commission, however, it is unlikely that changes in this aspect of right to silence in England will be forthcoming. The previous recommendations of the Criminal Law Revision Committee,

I told you at an earlier stage that it was important that you should tell me of anything you believed to be in your favour. If there is anything you have not told me already, you should tell me now. If you wish, you can make a written statement and, although I can write it for you, it would be better if you yourself write it out.

Id. at ¶ 68.

121. Law Society, Memorandum by the Council of the Law Society on the Royal Commission's Report ¶ 5.13 (1981) [hereinafter cited as Law Society Memorandum]. Following the issuance of the Royal Commission Report, the Bar Council also changed its position and supported the recommendation that there be no change in the right to silence. Law Society and Bar Council, Memorandum by the Law Society and Bar Council on Certain of the Recommendations of the Royal Commission on Criminal Procedure at 4 (1981) [hereinafter cited as Law Society and Bar Council Memorandum].

122. Of course, this was not a unanimous position. One group urged retention of the existing right to silence, fearing added pressure on suspects to answer questions whose meaning was equivocal. A further concern was raised as to whether suspects would appreciate the full significance of the questions. The point was also made that the suspect's silence might be due to reasons unrelated to the subject under investigation. London Criminal Courts Solicitors' Association, Evidence to the Royal Commission on Criminal Procedure 5 (1979) [hereinafter cited as Solicitors' Assoc.].

123. Professor Greenawalt has persuasively developed this argument and concluded that "although adverse inferences are proper when a person refuses to respond to questions based on substantial evidence of his wrongdoing, those who bear responsibility for determining guilt should not be allowed to draw such inferences from silence that has occurred before substantial evidence of wrongdoing exists." Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 43 (1981). Yet, questions remain as to the evidentiary connection between silence and either guilt or the suspect's credibility. See Solicitors' Assoc., *supra* note 122. If it is a weak one, silence may simply not be probative. Even if the connection exists, the nature of the custodial environment arguably should not lead to adverse inferences from silence. Greenawalt, *supra* note 123, at 65. Further consideration of the implications of adverse inferences of guilt as opposed to credibility are also called for.

even though rejected in England, nevertheless have influenced the law in members of the British Commonwealth.¹²⁴

C. *Interrogation Before a Magistrate and Other Accuracy Controls*

In addition to proposals for reform of existing self-incrimination principles, the English have also considered the merits of more fundamental change in the system of justice. This has included evaluation of continental criminal procedure systems and the inquisitorial procedures they utilize as an alternative model for governing the acquisition of information from an accused. In France, for example, a *juge d'instruction* conducts an official inquiry to determine the suspect's guilt. Questioning of the accused is an essential component of this procedure. Instead of relying upon the accusatorial contest between the prosecution and the defense, the inquisitorial process offers a model of active judicial control over the investigation process. Although there is some question as to the effectiveness of judicial controls over investigative activities, the inquisitorial model nevertheless prefers a different format for, and emphasis on, the interrogation of the accused.¹²⁵

Because of the radical change that adoption of inquisitorial procedures would entail, British self-incrimination reform proposals have instead been premised upon retention of the existing adversarial process.¹²⁶ Nevertheless,

124. The Privy Council considered an appeal from Singapore which had enacted some of the Criminal Law Revision Committee recommendations. *Haw Tua Tau v. Public Prosecutor*, [1981] 3 W.L.R. 395 (Singapore). See Meng Heong Yeo, *Diminishing the Right to Silence: The Singapore Experience*, 1983 CRIM. L. REV. 89.

125. The advantages of contemporary inquisitorial procedures are explored in L. WEINREB, DENIAL OF JUSTICE 117-46 (1977). In Professor Weinreb's view, police responsibilities should primarily be those relating to peacekeeping and general emergency services, and that these are inconsistent with other demands placed upon them to act "judiciously, with discretion, and mindful of conflicting interest" in performing their investigative duties. *Id.* at 120. His solution is the creation of an office of an investigating magistracy. However, the effectiveness of such a system in supervising the investigation process is itself subject to dispute. Compare, Goldstein and Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany*, 87 YALE L.J. 240 (1977) and Goldstein and Marcus, *Comment on Continental Criminal Procedure*, 87 YALE L.J. 1570 (1978) with Langbein and Weinreb, *Continental Criminal Procedure: 'Myth' and Reality*, 87 YALE L.J. 1549 (1978). The distinctions between inquisitorial and accusatorial procedures are explored in Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973).

126. The Criminal Law Revision Committee took as an underlying assumption that the English adversary system would not be replaced by inquisitorial process where "there is a full judicial investigation of the whole case, including that for the defense, before the trial and at the trial the judge questions the accused from the report of the investigation." CLRC Report, *supra* note 4, at ¶ 13. In the Committee's judgment such a change could not be made piecemeal and in the absence of a complete consideration of the entire system. *Id.* Similarly, the Royal Commission on Criminal Procedure recognized that any change to an inquisitorial system would be "impossible, on political and practical grounds." Royal Commission Report, *supra* note 4, at ¶ 1.8. Even the JUSTICE recommendations for the interrogation of suspects before a magistrate specifically disclaimed that the judicial official would act as an examining magistrate. JUSTICE, *The Interrogation of Suspects* ¶ 14 (1967). In evidence submitted to the Royal Commission on Criminal Procedure, JUSTICE reaffirmed its position that a magisterial inquisition along the lines of the French *juge d'instruction* was "not intended." JUSTICE, *Pre-Trial Criminal Procedure* ¶ 31 (1979). Nevertheless, others have concluded that an effort should be made to at least incorporate aspects of the inquisitorial system. Interview with Judge John Buzzard, Central Criminal Court (November 18, 1981).

JUSTICE, the British Section of the International Commission of Jurists, has consistently recommended that the magisterial inquiry of the inquisitorial process be at least adapted to British criminal procedure. Under the JUSTICE proposal, the police would still be in charge of the investigation of the offense and the interrogation of the suspect, but a magistrate would be available to validate any statement obtained from the accused or the fact that the accused refused to make any statement. Although the proposal would mean greater judicial involvement in the investigation process, the recommendation did not contemplate the development of a magistrate's inquiry along the lines of the continental model.¹²⁷

Under the JUSTICE proposals police would have retained the right to question a suspect for an adequate length of time.¹²⁸ Any statements made to the police that were not subsequently confirmed before a magistrate, however, would not be admissible.¹²⁹ The suspect would be informed of the nature of police suspicions against him and that police questions would be confined to the matter under suspicion. The individual would then be given an opportunity to make a statement before questioning began and again after it had concluded. He also would receive a caution which reflected the fact that failure to answer legitimate questions could result in adverse inferences or comment.¹³⁰ The function of the judicial officer in the proceeding would thus be "to ensure that the questioning by the police is done fairly, that the suspect is given every opportunity of giving his explanations or ver-

127. JUSTICE, *The Interrogation of Suspects* ¶ 14 (1967); JUSTICE, *Pre-Trial Criminal Procedure* ¶ 31 (1979).

128. JUSTICE, *The Interrogation of Suspects* § 1 (1967); JUSTICE, *Pre-Trial Criminal Procedure* § 25(1) (1979).

129. JUSTICE, *The Interrogation of Suspects* §§ 2, 3 (1967); JUSTICE, *Pre-Trial Criminal Procedure* § 25(3) (1979). The proposals of JUSTICE would also retain the admissibility of statements made by individuals before becoming a suspect or being taken into custody, as well as statements volunteered by a suspect on his first encounter with the police, such as the classic exclamation, "it's a fair cop." JUSTICE, *The Interrogation of Suspects* § 18 (1967); JUSTICE, *Pre-Trial Criminal Procedure* §§ 27, 28 (1979). In light of its concern for excessive reliance on volunteered statements, as well as the risk of distortion and misinterpretation, JUSTICE urged greater availability of tape recorders to limit such problems. JUSTICE, *Pre-Trial Criminal Procedure* § 28 (1979).

130. The magistrate would be required to tell the suspect

You have just heard from the police officer (or representative) why you have been brought here, and in a few moments he is going to ask you some questions. Is there anything you would like to say before he does so? There is no need to say anything at the present stage unless you wish to do so because when the questioning is over you will have another opportunity of saying anything you choose. Anything you do say will of course be recorded and may be used as evidence later on if you are tried for the offense which has (or, for any of the offenses which have) been mentioned.

After the suspect has either made or declined to make a statement the magistrate informs him:

You are going to be asked questions and it is your duty to answer them unless I say that you need not do so. If you are brought to trial it may tell heavily against you if you have refused to answer questions at this stage. On the other hand, the answers which you give today may clear you of suspicion so that you will not be brought to trial at all; and even if you are, it may then count in your favour if you do answer here and now. I must also assure you that in answering these questions you have nothing to fear from any threat which may have been made against you, and nothing to gain from any promise which may have been made to you. Do you understand?

Finally, at the conclusion of the interrogation the magistrate informs the suspect:

Is there anything else that you would like to have on the record? You may say anything more that you wish in explanation of the matters you have been asked about.

JUSTICE, *The Interrogation of Suspects* § 11 (1967).

sion of the events, and that the proceedings are duly recorded and certified."¹³¹

In JUSTICE's view, the existence of a procedure for compulsory interrogation before a magistrate would make it less important to provide immediate access to a solicitor.¹³² Nevertheless, their proposal provided for a right of access to a solicitor for the general purpose of advice and consultation. In the context of the interrogation before a magistrate, however, the solicitor's role would be sharply curtailed. He could object to the interrogation in general as unjustified or raise objections to particular questions on grounds of unfairness, irrelevance, or breach of privilege. He would also have the right to pose his own questions to the suspect. Because the proposal entailed the withdrawal of the right to refuse to answer questions based on self-incrimination, and instead provided for sanctions of adverse inference and comment should the suspect refuse to answer, JUSTICE concluded that "it will become contrary to public policy and to professional etiquette for a solicitor to encourage his client not to answer proper questions."¹³³

JUSTICE viewed its system of compulsory examination before a magistrate as providing protection against unfair police interrogation while at the same time ensuring the admissibility of any statements made by the accused before the magistrate, and permitting appropriate adverse inferences and comment in the event that the accused refused to respond. Nevertheless, support for the JUSTICE proposals has not been forthcoming. The Criminal Law Revision Committee viewed the proposal to make any statement given to the police prior to interrogation before a magistrate inadmissible as contrary to its general philosophy favoring the admissibility of all relevant evidence.¹³⁴ Another concern was that the magisterial interrogation would be too formal, leading suspects to refuse to answer and thus defeating the purpose of the procedure.¹³⁵ This was a position reiterated by the Home Office in its evidence to the Royal Commission on Criminal Procedure.¹³⁶ A member of the Royal Commission added the concern that the suspect's awareness of the inadmissibility of prior statements made to the police, and of the necessity of reaffirmation of his admission before the magistrate, could alert him to weaknesses in the state's evidence. As a result, police might well apply additional pressure to secure reaffirmation of the suspect's state-

131. JUSTICE, *Pre-Trial Criminal Procedure* § 31 (1979).

132. JUSTICE, *Pre-Trial Criminal Procedure* § 46 (1979). Nevertheless, JUSTICE viewed the right of access as "helpful and desirable" to permit the giving of advice concerning the appearance before the referee, as well as providing an opportunity to answer questions concerning such procedures as bail and pre-trial identifications. *Id.*

133. JUSTICE, *The Interrogation of Suspects*, § 15 (1967).

134. CLRC Report, *supra* note 4, at § 47. In explaining its general philosophy of relevance, the Criminal Law Revision Committee observed that "[s]ince the object of a criminal trial should be to find out if the accused is guilty, it follows that ideally all evidence should be admissible which is relevant in the sense that it tends to render probable the existence or non-existence of any fact on which the question of guilt or innocence depends." *Id.* at § 14.

135. The Committee thought that suspects might even be deterred from answering police questions before commencement of the magistrate's questioning. See CLRC Report, *supra* note 4, at §§ 146-47.

136. Home Office Questioning Memorandum, *supra* note 23, ¶¶ 146-47.

ment.¹³⁷ Resource limitations were regularly cited by all opponents as a major limitation.¹³⁸ The Royal Commission on Criminal Procedure's fundamental objection was one of principle. In its view any system of interrogation before a magistrate reflected a break with the very nature of the accusatorial system and risked shifting the burden of proof against the accused.¹³⁹

The JUSTICE proposals for interrogation before a magistrate only partly reflected an effort to alter the scope of the privilege against self-incrimination by providing for adverse inferences and comment in the event the accused refused to respond. The same result could be achieved by simply permitting the same consequences to follow from silence in the face of police questioning. Beyond that objective, however, JUSTICE viewed its proposals as a means of assuring fairness and accuracy in the interrogation process. Although the JUSTICE scheme for achieving this end did not receive widespread support, its concern for fairness and accuracy has been reflected in a variety of different recommendations. Indeed, there has been widespread agreement in the need for a system that would provide an accurate record of the entire interrogation process, including any admissions made by the suspect.

The emphasis upon the need for a system to ensure the accuracy of the methods and output of the police interrogation process is a direct result of British police reliance upon testimony as to oral admissions made by the suspect. The issue has arisen so frequently and has become so controversial that commentators have developed a special name for it—the so-called verbals. The rules of evidence permit police to testify concerning a suspect's verbal admission.¹⁴⁰ When such testimony is presented, however, there are two distinct risks. First, the ease of offering evidence of an oral statement may provide an inducement to fabricate the admission, or falsely claim that the admission was never made. Second, since the admission may be made in the course of a conversation or as the result of a question and answer session, the circumstances may not permit the police to make a contemporaneous record of exactly what was said. Instead, the police may, several hours later, attempt to write down their recollections of the admissions and in so doing erroneously record the suspect's statements.

The risk of fabrication of verbals, as well as allegations that they have been concocted, has been recognized for some time. The very nature of the evidence is such that fabricating either the admission or an allegation that the admission was never made is a simple undertaking. Lord Justice Lawton commented that "something should be done and as quickly as possible, to

137. JUSTICE Conference on the Report of the Royal Commission on Criminal Procedure, April 11, 1981 at 4 (remarks of Walter Merricks).

138. See *supra* notes 128-30. See also Royal Commission Report, *supra* note 4, at ¶ 4.59; Law Society Evidence, *supra* note 102, at ¶ 16; Police Superintendent's Association of England and Wales, Written Evidence to the Royal Commission on Criminal Procedure ¶ 5.22 (1978) [hereinafter cited as Police Superintendent's Evidence].

139. Royal Commission Report, *supra* note 4, at ¶ 4.59.

140. The Judges' Rules state that voluntariness covers the admissibility of "any oral answer given by that person to a question put by a police officer and of any statement made by that person." Judges' Rules, *supra* note 28, Preamble § e.

make evidence about oral statements difficult either to challenge or to concoct."¹⁴¹ Reliance upon such evidence has been subjected to increasing scrutiny by juries, to the point where some have felt that guilty defendants have been able to secure acquittals solely on the basis of their challenges to police veracity. At the same time, police cannot deny that instances of fabricated verbals do exist.¹⁴²

English juries are also skeptical when police testify concerning verbal admissions based upon notes they have made hours after the event, a skepticism that is heightened when they deny collaborating with each other. One judge observed that "police officers nearly always deny that they have collaborated in the making of notes, and we cannot help wondering why they are the only class of society who do not collaborate in such a manner. . . . Collaboration would appear to be a better explanation of almost identical notes than the possession of a superhuman memory."¹⁴³ There is a risk that the more dogmatic an officer becomes about the accuracy of his recollection, the greater the chance that the jury will disbelieve him entirely.¹⁴⁴ The unfairness of the system is only heightened by the fact that police generally do not show their notes to the suspect, even though they may refer to them to refresh their recollection at trial.¹⁴⁵

Most frequently urged as a solution to the problem of providing an accurate record of interrogation sessions has been the proposal for requiring that such sessions be tape recorded. The Criminal Law Revision Committee recommended that the feasibility of such a requirement be studied, with a minority of the Committee calling for the suspension of its proposals to permit adverse inferences to be drawn from a suspect's silence until such a system had been implemented.¹⁴⁶ The years since the Committee's recommendation have produced no consensus on the wisdom and feasibility of tape recording police interrogations. Police groups have been against the proposal, arguing that it would be far too costly, would lessen the evidentiary value of other unrecorded statements, would generate a new kind of dispute as to the conditions preceding the point at which the tape recorder was turned on, and have a further concern that the very presence of the tape recorder would inhibit suspects from answering police inquiries.¹⁴⁷ Ques-

141. Turner, [1975] 61 Crim. App. 67, 77.

142. See Royal Commission Report, *supra* note 4, § 4.2; Senate of the Inns of Court and the Bar, Submission to the Royal Commission on Criminal Procedure 6 (1979); Williams, *The Authentication of Statements to the Police*, 1979 CRIM. L. REV. 6, 14.

143. R. v. Bass, [1953] 37 Crim. App. 51, 59. Lord Devlin saw this as a reaction to the dilemma that if police evidence as to oral statements of the accused differed, counsel for the defense could seize upon the inconsistencies, but that he would also take advantage of collaboration to suggest to the jury that the statement was the product of the officers' agreed version. P. DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND*, 41 (1960). The state of the law has changed, however, and it has been held that there was no error in admitting police oral testimony where the officers had admitted collaborating in reconstructing the suspect's statements. R. v. Quinlan and Turner, 1963 CRIM. L. REV. 349.

144. Senate of the Inns of Court and the Bar, Submission to the Royal Commission on Criminal Procedure 6 (1979).

145. Williams, *The Authentication of Statements to the Police*, 1979 CRIM. L. REV. 6, 11.

146. CLRC Report, *supra* note 4, at ¶¶ 51-52.

147. Association of Chief Police Officers of England, Wales and Northern Ireland, Evidence to the Royal Commission on Criminal Procedure ¶ 7.113(10) (1978); Commissioner of Police of

tions have also been raised as to whether police simply fear criticism of their interrogation techniques.¹⁴⁸ In contrast, others have supported the concept of mandatory tape recording of police interrogations, arguing in favor of both their feasibility and effectiveness.¹⁴⁹ Still other participants appear unable to come to a conclusion.¹⁵⁰ No definitive steps towards the permanent institution of such a plan have been taken.¹⁵¹ The issue remains important since written statements are given in only a minority of cases.¹⁵²

The Royal Commission itself concluded that the tape recording of interviews at the police station is feasible and would not be excessively costly.¹⁵³ It did not, however, view the tape recording of entire interviews as either practicable or desirable.¹⁵⁴ Instead, the Royal Commission recommended that police conclude interviews by tape recording an oral summary of the main points of the interrogation as well as preparing a written summary, including any statements made outside of the police station. The suspect should have his own opportunity to offer comments on both the interview and summary.¹⁵⁵ In the Commission's view:

[this] will enable the gist of an interview or the taking of the written statement to be got into the record without the need for transcription. The officers written summary and the written statement itself will, in effect, be the transcription of the major part of what is on the tape.¹⁵⁶

the Metropolis, Part One of the Written Evidence to the Royal Commission on Criminal Procedure §§ 5.7(1)-(4) (1978); Police Superintendant's Association of England and Wales, Written Evidence to the Royal Commission on Criminal Procedure ¶ 5.29 (1978).

148. Williams, *The Authentication of Statements to the Police*, 1979 CRIM. L. REV. 6, 22.

149. Criminal Bar Association, Written Submission No. 1 to the Royal Commission on Criminal Procedure, § 16 (1978); JUSTICE, Pre-Trial Criminal Procedure, § 35-38 (1979); Law Society, Memorandum on the Royal Commission's Report, § 5.14, at 24-26 (1981).

150. Prosecuting Solicitors' Society of England and Wales, Written Evidence to the Royal Commission on Criminal Procedure 22 (1979) (supporting mechanical recording if cost effect and reliable) [hereinafter cited as Prosecuting Solicitors' Evidence]. In considering the potential benefits and costs of a system for monitoring police interrogations the Magistrate's Association found itself "unable to propose any specific solution to this problem, which we are convinced would work satisfactorily in practice within the framework of the accusatorial system." Magistrate's Association Memorandum to the Royal Commission on Criminal Procedure 11 (1979) [hereinafter cited as Magistrate's Evidence].

151. Glanville Williams reported that successive Home Secretaries have accepted police arguments against extensive tape recording, resulting in a "bi-partisan policy of defensive inactivity." Williams, *The Authentication of Statements to the Police*, 1979 CRIM. L. REV. 6. Nevertheless, experiments to determine the feasibility of a system of recording police interrogations continues, with no insuperable technical problems arising, but with the participants desiring clarification of the evidentiary implications of the taping system. *The Times of London*, March 17, 1982, p. 4, col. 4.

152. In research conducted for the Royal Commission on Criminal Procedure Baldwin and McConville found that only one in three suspects in a sample of cases prosecuted in Crown Court in London had made a written statement, the figure being one in two for a comparable sample in Birmingham. Baldwin and McConville, *Confessions in Crown Court Trials*, Royal Commission on Criminal Procedure Research Study No. 5, at 13-14 (1980). An observational study of police interrogation practices by Paul Softley of the Home Office Research Unit disclosed that only 28% of the sample made written statements during their period of detention by the police. Softley, *Police Interrogation: An Observational Study in Four Police Stations*, Royal Commission on Criminal Procedure Research Study No. 4, at 81 (1980).

153. Royal Commission Report, *supra* note 4, ¶ 4.25.

154. *Id.* at ¶ 4.26.

155. *Id.* at ¶ 4.27.

156. *Id.* at ¶ 4.29.

The tape would be available for the defense lawyer in order to validate the officer's written summary or written statement if there is a dispute as to accuracy, and could conceivably be used at trial for the same purpose. The Royal Commission rejected suggestions that evidence as to summaries or written statements which have not been taped should be automatically excluded.¹⁵⁷

In light of the available evidence, there is certainly a need for greater accuracy in the process of recording a suspect's statements. One sample of contested trials in Magistrates' Courts demonstrated that statements were introduced in approximately one-third of the cases, with about one-half of them being challenged. Nearly all the challenges to verbal statements were based on their accuracy, while only a fraction of the written statements were similarly challenged.¹⁵⁸

The Royal Commission also recognized the need to improve the accuracy of testimony about oral statements. Police practice has been to write out the suspect's statement after the questioning ends, but not necessarily on the basis of contemporaneously taken notes. The practical problems are that interviews are sometimes conducted by one officer, thereby preventing undisturbed note taking, and some suspects are inhibited if notes are taken while they are talking. Among the Royal Commission recommendations to improve note taking were use of printed questionnaires wherever practicable.¹⁵⁹ Where this is not possible, the Royal Commission recommended that the record presented to the court "should be presented . . . as what it is: a minute of the salient relevant points made at the interview."¹⁶⁰ If there has not been a contemporaneous record of the statement or the suspect does not elect to make a written statement under caution

it should become the practice for the interviewing officer at the end of the interview and in the suspect's presence to note down in writing the main relevant points made during the interview. These should be in summary form and should contain not only admissions or damaging statements but also denials. The summary might also include any remarks made to the police officer outside the police station or before the caution. The summary should be read over to the suspect, who should be invited to offer corrections and additions to it if he wishes and also to sign it.¹⁶¹

157. *Id.* at ¶¶ 4.28, 4.30.

158. Vennard, *Contested Trials in Magistrate's Courts: the Case for the Prosecution*, Royal Commission on Criminal Procedure Research Study No. 6, at ch. 4 (1980). The problem is hardly new. Lord Devlin referred to it in his published version of the Sherrill Lecture he delivered in 1956 at the Yale Law School. P. DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 48 (1960). He observed, however, that "the general reputation of the police is good enough for their version of oral statements to carry great weight, so long as the jury is given no reasons to suspect any unfairness or lack of impartiality in the particular circumstances." *Id.* However, it is no longer clear that juries can be depended upon to accept police versions of oral statements, and there are definite signs of growing distrust between police and various segments of British society, as evidenced by the disorders during 1981 and the conclusions of the Government inquiry into the disturbances undertaken by Lord Scarman. See generally *Times of London*, November 26, 1981, p. 1, col. 2; p. 4, col. 1; p. 5 col. 4.

159. Royal Commission Report, *supra* note 4, at ¶ 4.12.

160. *Id.* at ¶ 4.13.

161. *Id.* In a related development, the Metropolitan Police have adopted a policy of where

Others present might also be invited to sign. Even though the Royal Commission recognized that a suspect who did not wish to sign a written statement might not sign the summary, it nevertheless believed its recommendations were an improvement over existing practice. The recommendations would eliminate the problem that the suspect neither signed the officer's record made after the interview nor knew until much later what was in it, while later being faced with a claim that it represented a verbatim account of what the suspect said.

The police themselves are well aware of the fact that the existing system of testifying as to oral statements made by suspects has had an adverse effect on prosecutions. There is concern that juries are reluctant to credit police officer testimony as to verbals.¹⁶² Although the Metropolitan Police responded with a system of using, where feasible, two officers during questioning, with one writing down the questions and answers, and with the suspect being asked to initial it at the completion, it was felt that even this could inhibit securing necessary admissions.¹⁶³ This practice is similar to recommendations of the Criminal Bar Association and JUSTICE¹⁶⁴ calling for a procedure in which the suspect is provided with immediate indications of the record being made of his responses and is given an opportunity to verify them.

There was less agreement as to the merit of the Royal Commission's recommendation that police tape record summaries of the interview with the suspect. One commentator noted:

There is a distinct danger that if used at trial the prejudicial effect of such tape-recordings might greatly exceed their evidential value. The fact that a confession or the accused's assent to a summary is recorded on tape does not necessarily constitute supporting evidence of reliability, although an indiscriminating jury might all too readily regard it as having that effect. Moreover, factual disputes concerning events preceding confession would not be resolved by recordings of this nature.¹⁶⁵

The Law Society expressed grave reservations as to the acceptability of a summary of the suspect's statement as a substitute for a full tape record-

feasible using two officers to conduct an interrogation, one writing down the questions and answers, and then at the conclusion offering the suspect an opportunity to initial the result. Morton, *The Royal Commission on Criminal Procedure: A Solicitor's View*, 131 *NEW L.J.*, 276, 277 (1981). It is not clear, however, how frequently it is feasible to commit two officers to the interrogation process. Interview with Michael Wilmot, Solicitor's Branch Metropolitan Police (October 20, 1982).

162. Interview with Michael Wilmot, Solicitor's Branch Metropolitan Police (October 20, 1982); interview with Richard DuCann, Q.C. (November 11, 1981).

163. Morton, *supra* note 161, at 277-78; Interview with Michael Wilmot, Solicitor's Branch, Metropolitan Police (October 20, 1981).

164. Criminal Bar Association, Written Submission No. 1 to the Royal Commission on Criminal Procedure, part 2, § 14 (1978) (suspect should be invited to sign entries of his oral statements and be given a copy, both being handled by an officer not involved in the investigation); JUSTICE, Comment on the Home Office Consultative Memorandum 6 (1981) (contemporaneous notation of suspect statements to be countersigned by suspect in presence of station officers, with copies immediately supplied to suspect or his solicitor). See also Prosecuting Solicitors' Evidence, *supra* note 143, at 24 (1979) (admissibility conditioned on prompt written notation of statement with opportunity given to the suspect to sign it).

165. Inman, *The Admissibility of Confessions*, 1981 *CRIM. L. REV.* 469, 480.

ing.¹⁶⁶ It suggested that three specific difficulties would arise from the system of tape recording summaries.

First, it gives the interviewing officer an opportunity of selecting from the interview the points, which he, whether consciously or sub-consciously, wishes to emphasize, and therefore becomes an even less accurate record of the interview than the notes made by the interviewing officer. Secondly, it provides no safeguard to the suspect or police against the use of or allegation of antecedent oppression. Thirdly, there is the danger that a jury may give greater credence to such a summary than it does to other evidence.¹⁶⁷

At most, the Law Society was willing to accept a tape recording of a summary of the interview, "with suitable safeguards," as a temporary measure pending the introduction of the regular tape recording. It was felt, however, that this should encompass allowing the suspect to comment on each of the main points of the summary as they were made.¹⁶⁸ Overall, the amount of the attention given to the accuracy problem demonstrates that it remains a persistent and serious concern within the English criminal justice system.

D. *Access to a Solicitor*

The right to have access to and consult with an attorney has become an especially important device in controlling the police interrogation process in the United States. Not only do the *Miranda* warnings include notification of the right to counsel,¹⁶⁹ but also failure to respect the assertion of that right will render any subsequent confession automatically inadmissible.¹⁷⁰ Arguably, once an attorney undertakes to represent an accused, counsel is in a position to protect him from an unwise decision to provide the authorities with incriminating evidence.¹⁷¹ The scope of the right to counsel in the regulation of police interrogations clearly suggests an effort to develop a broad protective shield against abuse. Counsel is present as an advisor to and protector of the accused, not merely as a witness to the event.

In Great Britain, both the Judges' Rules and the accompanying Administrative Directions make provisions for the right of access to a solicitor. Pursuant to the Preamble to the Rules,

every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody, provided that in such a case no unreasonable hindrance is caused to the processes of investigation or the adminis-

166. Law Society, Observations on the Consultative Memorandum from the Home Office 6-7 (1981).

167. Law Society, Memorandum on the Royal Commission's Report 25 (1981).

168. *Id.* at 26.

169. *Miranda v. Arizona*, 384 U.S. 436, 469-75 (1966).

170. *Edwards v. Arizona*, 451 U.S. 477 (1981).

171. *E.g.*, the New York courts require that police refrain from questioning a suspect who is represented by counsel unless they obtain an affirmative waiver in the attorney's presence. *People v. Hobson*, 39 N.Y.2d 479, 384 N.Y.S.2d 419, 348 N.E.2d 894 (1976). This is comparable to the position of the National Council for Civil Liberties prohibiting a waiver of the right of access to a solicitor by a suspect before he has had the benefit of representation. *See infra* note 183.

tration of justice by his doing so.¹⁷²

This is supplemented by Administrative Direction 7(a)(i) which permits him to speak on the telephone with his solicitor "provided that no hinderance is reasonably likely to be caused to the processes of investigation or the administration of justice."¹⁷³

Despite these affirmative rights, the required caution to the suspect makes no mention of the fact that he may consult with his solicitor. Even though Administrative Direction 7(b) calls for the suspect being orally informed of the rights and facilities available to him, supplemented by conspicuously placed notices,¹⁷⁴ this has proven ineffective. The Court of Appeal held in *R. v. King*¹⁷⁵ that there is no error in the failure of the police to inform the suspect of his right to a solicitor. In the court's view the paragraph of the Administrative Direction containing the right of access includes no warning requirement, while the paragraph calling for notification of rights made no mention that the notice had to be given at any particular time, thus allowing the suspect to be informed of his right of access to counsel following the conclusion of questioning. Suspects who have, however, been arrested and are being held in custody do have the statutory protection of the Criminal Law Act of 1977 which provides custodial arrestees with the right

to have intimation of his arrest and of the place where he is being held sent to one person reasonably named by him, without delay or, where some delay is necessary in the interest of the investigation or prevention of crime or the apprehension of offenders, with no more delay than is so necessary.¹⁷⁶

Yet, even though intimation of the arrest and custody may be given to a solicitor,¹⁷⁷ this falls far short of a right to consultation.

There is a strong prevailing feeling that what appears to be a "right" to have access to a solicitor is, in fact, ignored in practice. The available research in England indicates that very few defendants ask for the assistance of a solicitor, and such requests as are made are frequently denied.¹⁷⁸ Moreover, the evidence submitted to the Royal Commission on Criminal Procedure voiced virtually unanimous agreement that police repeatedly deny suspect requests for access to a solicitor, as well as independent efforts by solicitors to consult with individuals they have been retained to represent.¹⁷⁹

172. Judges' Rules, *supra* note 28, preamble § (c).

173. *Id.*, Administrative Direction 7(a)(i).

174. *Id.*, Administrative Direction 7(b).

175. *R. v. King*, 1980 CRIM. L. REV. 40.

176. Criminal Law Act 1977, c. 45, s. 62.

177. See Home Office Circular No. 74/1978 to Chief Officers of Police Concerning Section 62 of the Criminal Law Act 1977, 28 April 1978 at § 5, *reprinted in* Royal Commission Procedure Study, *supra* note 44, at app. 14.

178. Softley reported that only 11% of his sample of 168 adult suspects requested to confer with a solicitor, and of those nearly 1/3 were denied. Softley, *Police Interrogation: An Observational Study in Four Police Stations*, Royal Commission on Criminal Procedure Research Study No. 4, at 68 (1980). Comparable conclusions were reached in Baldwin and McConville, *Police Interrogation and the Right to See a Solicitor* 1979 CRIM. L. REV. 145 and Zander, *Access to a Solicitor in the Police Station* 1972 CRIM. L. REV. 342.

179. *E.g.*, Criminal Bar Association, Written Submission No. 1 to the Royal Commission on Criminal Procedure, part 2, § 18 (1978); Law Society Evidence, *supra* note 108, at ¶ 17; London

This situation prompted one Court of Appeal decision to remind police that "it is not a good reason for refusing to allow a suspect, under arrest or detention, to see his solicitor, that he has not yet made any oral or written admission."¹⁸⁰ Additionally, in a more dramatic step, a confession obtained by police after denying access to a solicitor was excluded by a Crown Court judge out of concern that officers would otherwise ignore the right of access to a solicitor.¹⁸¹ This lead has not been followed, and elsewhere confessions obtained under similar circumstances have been admitted.¹⁸²

Despite the apparent consensus that the right of access to a solicitor is frequently denied on pretextual grounds, the Metropolitan Police evidence to the Royal Commission was nevertheless content to make no changes in existing practice.¹⁸³ Yet, the view that the right of access to counsel cannot be unqualified was shared by other groups presenting evidence to the Royal Commission on Criminal Procedure. Often their comments simply reflected the position that police should retain the authority to deny access to a solicitor because of the potential risks to people and property if critical information was leaked.¹⁸⁴ Those supporting qualifications on the right of access to a solicitor, however, were unable to articulate a precise definition of appropriate situations where access could be denied. The Criminal Bar Association failed to even address this issue, concentrating instead on procedural requirements that if access is to be denied, the suspect must be so informed in the presence of an officer independent of the investigation, and with due record made.¹⁸⁵ The proposal of the Prosecuting Solicitors' Society, that private consultation with a solicitor be permitted "unless there are reasonable grounds for believing that the process of justice would be impeded,"¹⁸⁶ hardly constitutes a detailed criterium. Although it is appropriate to call for greater judicial vigilance in the supervision of police interrogations, as was recommended by the Criminal Bar Association,¹⁸⁷ enforcement will of necessity be inconsistent absent reasonably specific criteria.

Along with suggestions that the existing system be retained have come recommendations for greater protection of the right of access to a solicitor. At one extreme, the right of access could be made a mandated procedure, with all statements obtained in violation of the right being excluded.¹⁸⁸

Criminal Courts Solicitor's Association, Evidence to the Royal Commission on Criminal Procedure § g, at 6 (1979); Police Superintendent's Association of England and Wales, Written Evidence to the Royal Commission on Criminal Procedure, § 7.17 (1978).

180. R. v. Lemsatef [1977] All E.R. 835, 840.

181. R. v. Allen, 1977 CRIM. L. REV. 163.

182. R. v. Elliot, 1977 CRIM. L. REV. 551; R. v. Dodd, Justice of the Peace, October 31, 1981, vol. 145, at 649.

183. Commissioner of Police of the Metropolis, Written Evidence to the Royal Commission on Criminal Procedure, part 1 at ¶ 4.26 (1978).

184. Police Superintendent's Evidence, *supra* note 137, at § 7.5. This position was implicit in the Magistrate's Association view that the existing Judges' Rules and Administrative Directions are satisfactory. Magistrate's Evidence, *supra* note 150, at 12.

185. Criminal Bar Evidence, *supra* note 113, at § 18.

186. Prosecuting Solicitor's Evidence, *supra* note 150, ¶ 7(6), at 32-33.

187. Criminal Bar Evidence, *supra* note 113, at ¶ 19.

188. Legal Action Group, Legality in the Criminal Process: Evidence to the Royal Commission on Criminal Procedure ¶ 3.23(2), (3) (1979). The Prosecuting Solicitors' Society recommended that admissions made other than in the presence of a solicitor would be admissible only

Even greater protection could be provided if the right of access was made non-waivable as recommended by the National Council for Civil Liberties.¹⁸⁹ Other calls for improved protection of the right of access to counsel, however, were premised upon recommendations for drastic reform of the right of silence. Those who called for the use of adverse inferences against suspects who remain silent in police interrogation, and changes in the caution to inform the suspect of that fact, were willing to allow the suspect to consult with his solicitor free of intrusion. Most took the position, however, that the solicitor could not advise his client to remain silent and that any such advice would not constitute a reasonable explanation for the suspect's silence so as to mitigate the effect of the adverse inference.¹⁹⁰ Under these conditions, there would hardly be any reason to discourage access to a solicitor since such consultation would be likely to increase the chances of the suspect responding to the interrogation.

Ultimately, the Royal Commission on Criminal Procedure rejected suggestions that it fundamentally restructure the right to silence. Thus, any call for improved protections for the right of access to a solicitor could not be coupled with restrictions upon the scope of advice the solicitor could offer. Similarly, the Commission rejected use of a solicitor as a witness to the events of the interrogation, just as it rejected the call for questioning before a magistrate.¹⁹¹ The Royal Commission did view the right of access to a solicitor as protecting important interests of the accused, and thus constituting a right in need of protection. As a result, it recommended that the accused be informed of his right to a solicitor but also be permitted to waive that right.¹⁹² In contrast, the solicitor would have no independent right to consult with his client, because the Royal Commission viewed the right of access as a right vested in the accused.¹⁹³ If the right is invoked, the solicitor should be allowed to be present during the police interview, but his function would only be to offer the suspect advice if it is requested.¹⁹⁴ Although the Royal Commission recognized the importance of access to a solicitor and the strong arguments in favor of making it mandatory, it was persuaded that it should permit discretion to withhold access "where exercise of it would cause unreasonable delay or hinderance to the processes of investigation or the administration of justice."¹⁹⁵ This exception was not meant to include withholding access because the solicitor might advise his client not to speak, nor where

if it was impossible to secure the attendance of the solicitor, the statement was volunteered before the defendant was advised of his rights or before the solicitor could attend, or the defendant refused a solicitor. Prosecuting Solicitors' Evidence, *supra* note 150, § 7(4), at 30-31.

189. Inner Temple Conference, *supra* note 62 (remarks of Harriet Harmon, Counsel, National Council for Civil Liberties).

190. *E.g.*, Chief Police Officers Evidence, *supra* note 107, at ¶ 7.46; Prosecuting Solicitors' Evidence, *supra* note 150, at ¶ 7(6), at 32; Interview with Judge John Buzzard, Central Criminal Court, London, (November 18, 1981).

191. Royal Commission Report, *supra* note 4, at ¶¶ 4.60, 4.99. In the Commission's view the use of magistrates or solicitors to validate an interview would create serious resource problems and would involve both in performing functions inconsistent with their traditional role.

192. *Id.* at ¶ 4.87. The waiver would not have to be in the presence of a solicitor.

193. *Id.* at ¶ 4.88.

194. *Id.* at ¶¶ 4.87-4.88.

195. *Id.* at ¶ 4.89.

secrecy is desirable but not imperative.¹⁹⁶

To insure proper control the Royal Commission recommended that refusal of access to a solicitor should be limited to grave offenses.¹⁹⁷ Additionally, there should be:

reasonable grounds to believe that the time taken to arrange for legal advice to be available will involve a risk of harm to persons or serious damage to property; or that giving access to a legal advisor may lead to one or more of the following:

- a) evidence of the offense or offenses under investigation will be interfered with;
- b) witnesses to those offenses will be harmed or threatened;
- c) other persons suspected of committing those offenses will be alerted; or
- d) the recovery of the proceeds of those offenses will be impeded.¹⁹⁸

The decision to deny access would have to be made by a ranking officer, appropriately recorded, and subject to later review.¹⁹⁹ Yet despite the detail of the recommendations, the Royal Commission was unwilling to recommend exclusion of evidence obtained in violation of its proposals. Its view was that despite the lack of legal advice, resulting statements might well be sufficiently reliable to justify their admission.²⁰⁰

The Law Society and Bar Council initially expressed agreement with the Royal Commission recommendations, noting that the resource problem of providing solicitors could be met and cautioning that the exceptions to the right of access would have to be narrowly drawn.²⁰¹ In a more extended analysis, the Law Society questioned the exclusion of grave offenses from the automatic right of access, labelling it illogical.²⁰² In response to the Home Office Consultative Memorandum seeking clarification of views on the impact of the Royal Commission recommendation,²⁰³ the Law Society indicated that it "reluctantly supported" the Royal Commission's proposals.²⁰⁴ It recognized no other acceptable solution to balancing the need for legal advice, which is not qualified in cases of grave offenses, with the risk to prop-

196. *Id.* at ¶ 4.90.

197. *Id.* at ¶ 4.91. The term grave offenses is defined in ¶ 3.7 of the Commission's Report to include serious offenses against the person, property, dishonesty, and other drug and administration of justice crimes.

198. *Id.* at ¶ 4.91.

199. *Id.*

200. *Id.* at ¶ 4.92.

201. Law Society and Bar Counsel Memorandum, *supra* note 121, ¶ 11, at p. 4. The memorandum did, however, admit that resources were inadequate to provide solicitors if there was a mandatory requirement of their presence at all interviews.

202. Law Society Memorandum, *supra* note 121, § 5.15, at p. 27. Additionally, the Law Society observed that in order to fulfill the Commission's proposal to provide mandatory access to counsel in lesser offenses, it would be necessary to eliminate the restrictions on access to counsel for such offenses contained in section 7(a) of the Administrative Directions accompanying the Judges' Rules and in section 62 of the Criminal Law Act 1977 providing for the suspect to give intimation of his arrest to another person.

203. Home Office, A Consultative Memorandum on the Report of the Royal Commission on Criminal Procedure ¶ 12 (1981).

204. Law Society, Observations on the Consultative Memorandum from the Home Office, ¶ 12 at 7 (1981).

erty, persons, and the processes of justice that prompt access might generate. The Royal Commission proposals were seen as a clear improvement over the practice of allowing junior officers to regularly deny counsel in all classes of cases simply because of fear that access would reduce the likelihood that suspects would respond. Additionally, the Law Society saw it as appropriate to warn the jury of reliability considerations in the event that the prosecution seeks to use a statement obtained in violation of the suspect's right of access to counsel.²⁰⁵ In response to the Home Office inquiry as to whether there were any steps that could be taken to guard against the risk of disclosure so that the right of access could be made absolute, the Law Society concluded that no practicable means exist to prevent solicitors from causing mischief. They added, however, "it is acknowledged that the police view of impropriety may differ from the profession's view and consideration may have to be given, by the profession, to giving further appropriate guidance to its members."²⁰⁶

The English take a different view of the right to counsel in criminal matters, particularly during investigative procedures. This is amply demonstrated by the general acceptance by many influential groups of conditions justifying denial of access to counsel. Even efforts at tightening the criteria that would justify denial of counsel to the accused still left ample discretion for police to use their own judgment. There was frequent objection to the propriety of denying access because of fear that counsel would advise silence, but there was also significant support for reforming the right to silence so as to render such advice improper. This would leave counsel with a very limited role in interrogations and obviate the risk that his presence would impede the interrogations.

III. THE RIGHT TO SILENCE IN THE COURTROOM

Under the Criminal Evidence Act of 1898, a defendant in an English criminal trial has the right not to give evidence or appear as a witness.²⁰⁷ In a sense, the right not to give evidence is broader than the scope of the general right to silence. In any other context, the right to silence would authorize the individual to refuse to answer self-incriminatory questions.²⁰⁸ Yet, British law, as is true in the United States,²⁰⁹ permits the accused to refuse to give evidence at all. In the United States this has been partly explained by concern that forcing the accused to give evidence would expose his character to the jury which in turn might be more damaging than anything the accused might say. The U.S. Supreme Court expressed this view when it observed that "[e]xcessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree

205. *Id.* at 8.

206. *Id.* at 9.

207. Criminal Evidence Act, 1898, 61 & 62 Vict., ch. 36, § 1(a).

208. *R. v. Boyes*, 1 B. & S. 311, 1861-1873 All E.R. 172 (1861); *R. v. Coote*, [1873] L.R. 4 P.C. 599; *Rio Tinto Zinc v. Westinghouse*, [1978] 1 All E.R. 434.

209. BERGER, *supra* note 7, at 73-80.

as to increase rather than remove prejudices against him."²¹⁰ These facets of the accused's personality would also be exposed in English trials if he was forced to give evidence, but the total impact would be lessened as a result of more restrictive rules governing the cross-examination of the defendant as to prior crimes.²¹¹

As part of the series of compromises leading to the Criminal Evidence Act of 1898, the accused was made a competent witness in his own behalf, thus reversing the rule by which he had up until then been disqualified from testifying in his own trial, but he could not be compelled to give evidence over his objection.²¹² Additionally, the prosecution was explicitly prohibited from commenting upon the accused's failure to give evidence.²¹³ Moreover, where the accused chose to give evidence, cross-examination as to his character and prior convictions was expressly limited to situations enumerated in the statute.²¹⁴ It was later held that by necessary implication, where an accused chooses to give evidence he may no longer claim the privilege against self-incrimination with respect to questions whose answers might result in the defendant incriminating himself.²¹⁵

The absence of any specific prohibition against judicial comment on the accused's failure to give evidence, particularly in light of the specific prohibition barring prosecutorial comment, has been held sufficient authority to permit the trial judge to refer to the accused's silence during trial when summing up for the jury.²¹⁶ However, this has not prevented confusion from arising as to the permissible scope of such judicial comment. Where the trial judge lets himself get carried away in his comments to the jury on the accused's silence, appellate courts have been willing to reverse. Thus, in a 1950 decision, the Privy Council held improper a judge's comment that the defendant "has not seen fit to go there in the witness box. . . . You have not been able to ask him one question; the one person who is alive today to tell

210. *Wilson v. United States*, 149 U.S. 60, 66 (1893).

211. *See infra* note 232.

212. As a result of the Evidence Act of 1851 parties in civil cases had become competent witnesses. Evidence Act 1851, § 2, 14 & 15 Victoria, ch. 99. In piecemeal fashion, as Parliament created new offenses, it added provisos allowing the accused in any charge under the new act to be a competent witness, but at the same time it avoided any general reform allowing all defendants to testify. BERGER, *supra* note 5, at 46. It was estimated that by 1898 some 20% to 25% of all accused persons were competent to testify by virtue of such enactments. Home Office Evidence Memorandum, *supra* note 16, ¶ 57. Nevertheless, concern remained that making witnesses competent to testify would unfairly compel them to give evidence to their own disadvantage which in turn might potentially lead to the conviction of innocent individuals. As a compromise measure, the Criminal Evidence Act of 1898 provided that although the accused was competent to be a witness in his own behalf, he could not be compelled to give evidence. One observer has expressed doubt whether there was much support for making the defendant a compellable witness, and thus it is unclear whether the act was a compromise measure or simply reflected the prevailing beliefs of the time. Compare Home Office Evidence Memorandum, *supra* note 16, at ¶ 58 with Cross, *supra* note 5, at 411.

213. Criminal Evidence Act, 1898, 61 & 62 Vict. ch. 36, § 1(b). The act contains no ban on comment by the judge, and subsequent case law has held such to be permissible within limits. *R. v. Rhodes* [1899] 1 Q.B. 77.

214. Criminal Evidence Act, 1898, 61 & 62 Vict. ch. 36, § 1(f).

215. "A defendant who gives evidence is, unlike any other witness, bound to answer questions even though the answers may incriminate himself." Minihane, [1921] 16 Crim. App. 38.

216. *R. v. Rhodes*, [1899] 1 Q.B. 77. Judicial comment on the silence of the accused was deemed to be a matter of trial court discretion.

us what happened."²¹⁷ In a more recent 1973 decision by the Court of Appeal the trial judge was held to have committed error in saying to the jury

but you may think members of the jury, that in a case of this kind it was really almost essential, if there was a real explanation as to his part, . . . is it not essential that he should go into the witness box himself and tell you that himself and be subject to cross-examination about it. Well, he did not do so and there it is.²¹⁸

Yet, a judge's observation to the jury that it "might have found it more satisfactory and of a greater assistance to you if she had gone into the witness box"²¹⁹ was held not to be in error. Sir Rupert Cross' conclusion from the existing case law is that

[a]ll that can be said on the authority is that the question whether the judge should make any comment, and how far he should go in commenting, depend on the particular facts, and that it is essential for the judge to make two things plain to the jury, first, that the accused has the right not to testify, second, that they must not assume that he is guilty because he does not do so.²²⁰

More generally, the area appears to be one in which British commentators are reluctant to commit themselves to a statement of what the law purportedly is. The uncertainty may lead judges either to make no comment whatsoever, or to remark solely upon the right of the accused not to give evidence without suggesting any adverse inferences from such silence, however limited.²²¹

In tracing the history of the Criminal Evidence Act, the Criminal Law Revision Committee noted that the suggestion had been made during the consideration of the bill for a prohibition against comment by both the prosecutor and judge. This was initially resisted by the then Solicitor-General, but he eventually agreed to a compromise in which only comment by the prosecution would be barred. He thought the judge should retain the discretion to comment in appropriate cases such as where the defense attacked the character of the prosecutor.²²² In the Committee's view, the trial judge under current law has more power to suggest adverse inferences than is normally exercised as long as he does not comment that the jury should draw an

217. *Waugh v. The King*, 1950 A.C. 203, 210-211.

218. *R. v. Sparrow*, [1973] 1 W.L.R. 488, 492. Improper comments were also found to have been made in *R. v. Mutch*, [1973] 1 All E.R. 178, 179 ("the jury are entitled to draw inferences unfavorable to the prisoner where he is not called to establish an innocent explanation of facts proved by the prosecution which, without such an explanation, tell for his guilt").

219. *Story*, [1968] 52 Crim. App. 334.

220. Cross, *supra* note 5, at 414. Another commentator has suggested that the judge's comment may not suggest that silence constitutes corroboration or proof of guilt. C. HAMPTON, *CRIMINAL PROCEDURE* 197 (1977). Additionally, there is a suggestion in *R. v. Bathurst*, [1968] 2 Q.B. 99, that there may be a wider scope for judicial comment on the accused's failure to give evidence with respect to affirmative defenses.

221. Thus, it was reported in a recent newspaper account on the trial of three prison officers accused of murder that the judge made the following comment on the failure of the defendants to give evidence. "It is their right not to give evidence; it is their entitlement and right to make an unsworn statement from the dock. It would be quite wrong to draw any adverse inference towards any of the accused from their failure to give evidence on oath." *Times of London*, March 18, 1982, p. 3, col. 6.

222. CLRC Report, *supra* note 4, at ¶ 108.

inference of *guilt* from the accused's failure to give evidence.²²³ The Committee's conclusion, however, was that "the present law and practice are much too favourable to the defence."²²⁴

As an alternative, the Committee recommended that once a *prima facie* case against the accused was established, "it should be regarded as incumbent on him to give evidence in all ordinary cases."²²⁵ Failure to do so, in the Committee's view, would call for adverse comment by both the judge and prosecutor.²²⁶ In support of its position the Committee argued that if adverse comment is warranted, there is no basis for barring the prosecution from making it given the fact that limiting adverse comment to the judge might make the latter seem like an extra prosecutor. Additionally, since the defense addresses the jury after the prosecution, it will have the ability to reply to any comment the prosecutor might make.²²⁷

The Committee was also willing to authorize broader comments than current law permits the judge to make. It recommended that any adverse inference dictated by common sense should be permitted, a standard similar to the one the Committee proposed for an accused's failure to mention during pre-trial interrogation any fact on which he intended to rely at trial.²²⁸ The Committee added its recommendation that such inferences should be considered as corroboration where required by law.²²⁹

The Committee recognized that its recommendations would greatly increase the pressure on the accused to testify, but its proposals did not end there. It added a recommendation that following the presentation of an adequate *prima facie* case

the court should tell the accused that he will be called on at the appropriate time to give evidence in his own defence and should tell him what the effect will be if he refuses to do so; and we propose that, when this time comes, the court should formally call on the accused to give evidence.²³⁰

The purpose of calling on the accused to give evidence, in the Committee's view, was to demonstrate to the jury or magistrate "that the accused had the right, an obligation, to give evidence but declined to do so."²³¹

Under American criminal procedure a proposal comparable to that of the Criminal Law Revision Committee would have a devastating impact. It would force the accused to either suffer the consequences of substantial adverse inferences being called to the jury's attention or subjecting the defendant's entire criminal record to the jury's consideration as a result of cross-examination to impeach the defendant's credibility.²³² English law is far more protective of the accused who gives evidence. Under the Criminal Evi-

223. *Id.* at ¶ 109.

224. *Id.* at ¶ 110.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* See *supra* note 101.

229. CLRC Report, *supra* note 4, at ¶ 111.

230. *Id.* at ¶ 112.

231. *Id.*

232. See, e.g., FED. R. EVID. 609. The judge, however, may disallow the impeachment by

dence Act, when the accused is called as a witness he may not be questioned about any prior convictions unless they are either relevant to show that he committed the current offense; the witness has given evidence against a co-defendant; the accused has given evidence or asked questions of the prosecution to establish his own good character; or, finally, his defense has been such as to "involve imputations on the character of the prosecutor or the witnesses for the prosecution."²³³

The Criminal Evidence Act does permit the prosecutor to prove the defendant's prior offenses where they are relevant to establishing his guilt for the offense with which he is charged. Indeed, if such evidence is admissible, it could be produced on the prosecutor's presentation of his case-in-chief without having to rely on cross-examination.²³⁴ The more substantial protections are those which control the use of cross-examination as to prior convictions for purposes of impeaching the credibility of the accused. Under American law such cross-examination is uniformly authorized, thus forcing a difficult choice upon the defendant. If he has a significant criminal record he can only testify at the risk of revealing the record to the jury, and with the hope that it will not be misused by the jury to infer guilt nor unduly affect his credibility. The British defendant, in contrast, may testify and avoid revealing his prior criminal record by not placing his character in issue, not making any imputation on the character of the prosecutor or his witnesses, and refraining from giving evidence against a co-defendant.

There is some uncertainty as to the scope of the cross-examination shield created by the Criminal Evidence Act. Lord Devlin took the position that the defendant puts his character in issue, and subjects himself to cross-examination by prior convictions, when he produces testimony as to a good reputation.²³⁵ Professor Cross argued that the existing case law, as well as statutory construction, demonstrate that character is put in issue when the defendant produces testimony as to his disposition, as distinct from the reputation others have of him.²³⁶

More substantial difficulties appear to have arisen from the exception which permits cross-examination of the defendant where he has cast imputations on the character of the prosecutor or his witnesses. Cases in which the defendant claims that the police have fabricated a confession²³⁷ or has described police testimony as "wishful thinking"²³⁸ have been held sufficient to justify cross-examination as to the defendant's prior convictions. There is, however, a risk that a literal construction of the statute would permit cross-examination of the accused even where he did no more than merely deny his

proof of a prior conviction if its probative value is outweighed by the prejudicial impact. *See also* McCORMICK, EVIDENCE 84-90 (2d ed. 1972).

233. Criminal Evidence Act, 1898 61 & 62 Vict., ch. 36 § 1(f)(ii). However, impeachment by prior convictions is discretionary. *See* R. PATTENDEN, THE JUDGE, DISCRETION AND THE CRIMINAL TRIAL 79 (1982).

234. *See* Cross, *supra* note 5, at 423-24.

235. *Jones v. Director of Pub. Prosecutions*, [1962] 1 All E.R. 569.

236. Cross, *supra* note 5, at 426-27.

237. *Levy*, [1966] 50 Crim. App. 238.

238. *Tanner*, [1977] 66 Crim. App. 56.

guilt.²³⁹ The mere assertion of innocence might be viewed as a suggestion that the prosecutor's witnesses were lying. The solution to this dilemma has been the interpretation of the Criminal Evidence Act to permit cross-examination where the defendant cast imputations on the character of the witnesses for the prosecution to show their unreliability as witnesses independently of the evidence given by them, or when the casting of the imputations is necessary to enable the accused to establish his defense.²⁴⁰ Such cross-examination is barred when the defendant simply denied making a confession without alleging that the police fabricated it.²⁴¹ Simply denying the charge, even if emphatically, will not cause the defendant to lose his shield.²⁴² Even where testimony as to prior offenses may be given, this may not include going beyond the fact of conviction to show a pattern of offenses.²⁴³

In situations where the defendant seeks to cast imputations on the character of the prosecutor or his witnesses, he can avoid revealing his past convictions by making an unsworn statement from the dock.²⁴⁴ The procedure of allowing the defendant to make an unsworn statement from the dock, free of the risk of cross-examination, grew out of the history leading to the passage of the 1898 Criminal Evidence Act. Prior to that time the accused was not permitted to give evidence and was not entitled to full representation by counsel. The unsworn statement was a means to allow him to present his case. The practice survived the Criminal Evidence Act as a way of allowing the defendant to avoid cross-examination. The evidentiary status of such statements remains unclear. One court of appeal decision suggested that

[w]hat is said in such a statement is not to be altogether brushed aside but its potential affect is persuasive rather than evidential. It cannot prove facts not otherwise proved by the evidence before the jury, but it may make the jury see the proven facts and inferences to be drawn from them in a different light.²⁴⁵

Even though a jury may not be directed to disregard the statement, "it can be properly pointed out to them that it can not have the same value as sworn evidence which has been tested by cross-examination."²⁴⁶

There has been a great deal of opposition to the procedure of allowing the accused to make an unsworn statement from the dock, including calls for its abolition by the Criminal Law Revision Committee²⁴⁷ and the Royal

239. See Cohen, *Challenging Police Evidence of Interviews and the Second Limb of § 1(f)(ii)—Another View*, 1981 CRIM. L. REV. 523; Cross, *supra* note 5, at 429-30.

240. Selvey v. Director of Pub. Prosecutions [1970] A.C. 304.

241. Nelson, [1979] 68 Crim. App. 12.

242. R. v. Rouse, [1904] 1 K.B. 184. This principle has been extended to cases in which the defendant alleges that the victim of a claimed rape in fact consented to intercourse. Rather than viewing such a defense as an imputation on the prosecution witness, it is taken instead as a simple denial of guilt. See Cross, *supra* note 5, at 432.

243. R. v. France and France, 1979 CRIM. L. REV. 48.

244. See R. v. Butterwasser, [1948] 1 K.B. 4; Cohen, *The Unsworn Statement From the Dock*, 1981 CRIM. L. REV. 224.

245. R. v. Coughlan, [1976] 64 Crim. App. 11, 17.

246. Campbell, [1978] 69 Crim. App. 221 (C.A.).

247. CLRC Report, *supra* note 4, at ¶ 104.

Commission on Criminal Procedure.²⁴⁸ Support for removing the shield protecting the accused against cross-examination on his prior convictions, however, has not materialized. Only a minority of the members of the Criminal Law Revision Committee thought that the accused should receive less cross-examination protection than under current law by being treated no differently than an ordinary witness. Under the committee majority's recommendation, cross-examination on prior misconduct of the accused would be limited to situations where the main purpose of the defense in attacking prosecution witnesses was to raise an issue as to the witness, credibility. Cross-examination of the accused on his past misconduct would not be permitted unless it was relevant to his own credibility as a witness.²⁴⁹ If an attack against the prosecution would be necessary in order to put forward a defense, the accused would not automatically be subject to such extensive cross-examination. Even this cross-examination can be avoided if the imputations are raised by the defendant without himself giving evidence.²⁵⁰

Reactions to the proposal to permit adverse inferences to be drawn from trial silence have been mixed. The Senate of the Inns of Court and the Bar objected to any change in the accused's right to silence at trial because of concern that it would undercut the prosecution's duty to prove guilt beyond a reasonable doubt.²⁵¹ Whether or not adverse inferences are permitted, perhaps there is something wrong in calling the accused to the witness box in order to highlight his failure to give testimony.²⁵² The position of JUSTICE also avoided making any proposals to alter the right of silence at trial. In their view "only the trial judge should be entitled to comment adversely in reasonable terms, provided he also invites the jury to take into account any special circumstances which might have led the accused to maintain silence."²⁵³

While changes in the right to silence at trial as well as during pre-trial questioning can be treated similarly, there are sufficient distinctions between the two to warrant differing treatment. Pre-trial questioning occurs while the suspect is in police custody and before the state has made out a prima facie case. Eliminating the right to silence at so early a stage could well encourage fishing expeditions against individuals who are only vaguely suspected of involvement in a criminal offense. Absent reforms to improve the accuracy and reliability of the record of pre-trial questioning, there is a risk that too much weight may be placed upon police testimony as to what the suspect did or did not say. Problems relating to the accuracy and reliability of the record have no bearing upon the right to silence at trial. By adding

248. Royal Commission Report, *supra* note 4, at ¶ 4.67. Both the Criminal Law Revision Committee and the Royal Commission on Criminal Procedure recognized that some provision would have to be made for an unrepresented accused to address the court on any matter which his representative could have done had he had one. *Id.*; CLRC Report, *supra* note 4, at ¶ 105.

249. CLRC Report, *supra* note 4, at ¶¶ 126, 127.

250. *R. v. Butterwasser*, [1948] 1 K.B. 4.

251. Senate of the Inns of Court and the Bar, Submission to the Royal Commission on Criminal Procedure 11 (1979). See also MacKenna, *Criminal Law Revision Committees' Eleventh Report: Some Comments*, 1972 CRIM. L. REV. 605, 619-20.

252. Radziñowicz, *Them and Us*, 1972 CAMBRIDGE L.J. 260, 275.

253. JUSTICE, *Pre-Trial Criminal Procedure*, ¶ 48, at 23 (1979).

qualifications requiring that the state establish its case against the accused based upon independent evidence, with adverse inferences from silence serving only as supplementary evidence, it is possible to minimize the objection that reform of the right to silence would serve to alter the burden of proof. Elimination of the right to silence at trial occurs only after the accused has had the opportunity to consult with counsel.

Despite grounds for distinguishing the right to silence at trial, the Royal Commission on Criminal Procedure rejected any change in the existing rules governing judicial comment on the accused's failure to give evidence. In its view, "any modification to the present law of evidence which aimed at requiring the accused to answer a *prima facie* case established by the prosecution would be likely to weaken the initial burden of proof that the accusatorial system of trial places upon the prosecution."²⁵⁴ The Royal Commission, however, recommended abolition of the right to make an unsworn statement from the dock.²⁵⁵ Nevertheless, some support still exists for authorizing comment on the defendant's failure to take the stand²⁵⁶ and the Privy Council has indicated in its review of a Singapore conviction that such comment is not inconsistent with English legal principles.²⁵⁷ Given the frequency with which defendants take the stand to give testimony²⁵⁸ the case for expanding judicial comment and authorizing prosecutorial comment on silence is perhaps not of great practical significance. More important would be the elimination of the right to make an unsworn statement from the dock if in fact the incidence of such unsworn statements is on the rise.²⁵⁹ Such a change would permit the accused's story to be tested by cross-examination, but with the protections against the revelation of prior convictions provided by the Criminal Evidence Act.

IV. THE POLICE AND CRIMINAL EVIDENCE BILL

The process of rethinking self-incrimination principles in Great Britain has been much more than an academic exercise. The Criminal Law Revision Committee's Evidence Report was the subject of an extended parliamentary debate and became a heated issue among interested groups.²⁶⁰ Despite the fact that several of its recommendations proved so controversial that the Government decided to abandon the Report in its entirety,²⁶¹ some of the Committee's self-incrimination proposals have been adopted else-

254. Royal Commission Report, *supra* note 4, at ¶ 4.66.

255. *Id.* at ¶ 4.67. See also Law Society, Memorandum on the Royal Commissions' Report, ¶ 5.13, at 23 (1981).

256. *E.g.*, Interview with Sir David Napley, former president Law Society (December 3, 1981). Sir David supported comments on the defendant's failure to take the stand as long as this would not constitute evidence of guilt, and despite the fact that he objected to adverse inferences arising out of the accused's failure to answer police questions.

257. *Haw Tua Tau v. Public Prosecutor*, [1981] 3 W.L.R. 395 (Singapore).

258. Michael Zander, Written Evidence Submitted to the Royal Commission on Criminal Procedure 84 (1978).

259. Interview with Lord Justice Eveleigh (November 19, 1981).

260. See generally Gerstein, *The Self-Incrimination Debate in Great Britain*, 27 AM. J. COMP. L. 81 (1979).

261. Royal Commission Report, *supra* note 4, at ¶ 1.31.

where with Privy Council approval.²⁶²

The Government has become even more involved in self-incrimination reform in the aftermath of the Royal Commission on Criminal Procedure. It submitted a Police and Criminal Evidence Bill²⁶³ to Parliament which incorporated many of the Commission recommendations. Final action was prevented by the dissolution of Parliament and the subsequent general election, however, the retention of a Conservative majority in Parliament makes it likely that comparable legislation will be resubmitted.

The Criminal Law Revision Committee's recommended changes in the right to silence were not incorporated in the Government's Police and Criminal Evidence Bill. Most of the opposition to the Committee's entire report centered on the proposals to permit adverse inferences to be drawn from an accused's silence in police questioning and failure to testify at trial. Given the absence of support from the Royal Commission on Criminal Procedure for the reconsideration of the Committee's proposals, the Government understandably left them out of its legislative recommendations.

The Police and Criminal Evidence Bill did incorporate the Royal Commission recommendation calling for the abolition of the voluntariness test as the standard governing the admissibility of confessions.²⁶⁴ Pursuant to clause 60 of the Bill, confessions would be excludable if they were obtained

- (a) by oppression of the accused; or
- (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by the accused in consequence thereof.²⁶⁵

The Secretary of State was authorized to issue a code of practice governing police interrogations.²⁶⁶ No provision made a violation of the code the basis for excluding evidence, but it could be taken into account if "relevant to any question arising in the proceedings."²⁶⁷ Presumably this was intended to reflect the Royal Commission proposal that the jury be informed that a code violation might render a confession unreliable.²⁶⁸ The Government proposal further provided that a court could also consider evidence as to the truth or falsity of a confession in determining its admissibility.²⁶⁹ Exclusion of a statement would not affect the admissibility of derivative evidence, nor of testimony that such derivative evidence was discovered as a result of a statement made by the accused.²⁷⁰

262. *Haw Tua Tau v. Public Prosecutor*, [1981] 3 W.L.R. 395 (Singapore); Meng Heong Yeo, *Diminishing the Right to Silence: The Singapore Experience*, 1983 CRIM. L. REV. 89.

263. Police and Criminal Evidence Bill (H.C. Bill No. 16, 1982) [hereinafter cited as Evidence Bill]. See Times of London, December 1, 1982, at p. 4, col. 1.

264. See *supra*, pp. 9-12.

265. Evidence Bill, *supra* note 263, at clause 60. The prosecution must establish admissibility beyond a reasonable doubt if such a challenge is made. *Id.*

266. *Id.* at clause 52(1). Other subjects covered were the treatment, identification and detention practices of the police.

267. *Id.* at clause 52(8).

268. Royal Commission Report, *supra* note 4, at § 4.133.

269. Evidence Bill, *supra* note 263, at clause 60(4).

270. *Id.* at clause 60(6).

The Government's proposals appear to leave confession admissibility standards unclear. Oppression is defined to include torture, inhuman or degrading treatment, and the use or threat of violence,²⁷¹ but these are hardly precise phrases and are only illustrations of the conduct prohibited. The alternative standard requiring exclusion of confessions given in circumstances likely to render them unreliable represents an entirely new legal principle lacking any consensus as to its content. It will be interesting to see, if adopted, what tactics are viewed as offensive to the likely-reliability test, particularly in light of the fact that evidence as to the truth or falsity of the confession is admissible in judging whether the confession should be excluded.

The Government proposal, as was true for the Royal Commission recommendation on which it was based, reflects a policy which is likely to make the exclusion of confessions more difficult. The objective of confession reliability reflected in the Police and Criminal Evidence Bill may well create a risk that police will feel that they have even greater authority than at present to secure a confession. They may see the signal of the proposal as permission to secure involuntary confessions as long as they are not obtained through oppression, and as long as they are reliable. The result may well be even greater reliance by police on custodial interrogation despite criticism of the process.²⁷²

Elsewhere in the legislation specific additional authority is given to police. Under the Bill as originally proposed, a maximum of twenty-four hours of police detention was allowed before a charge had to be made.²⁷³ A magistrate upon ex parte motion could permit an additional twenty-four hours of detention if the accused was involved in a serious arrestable offense and further detention was "necessary to enable the police to preserve evidence of or relating to that offense or to obtain such evidence by questioning that person."²⁷⁴ The imprecision of the standard is compounded by the definition of a serious arrestable offense as an arrestable offense "which the person contemplating the exercise of the power considers to be sufficiently serious to justify his exercising of."²⁷⁵ A warrant of further detention, based upon the same standards, would have permitted the confinement to extend an additional forty-eight hours.²⁷⁶ Even though the Government proposed as an alternative that initial detention be limited to twenty-four hours, extended for a further twelve hours on the authority of a police superintendent, and a further sixty hours by a magistrates' court, the Law Society remained opposed.²⁷⁷ It viewed twenty-four hours as the upper limit for police detention, with the total maximum after magistrate court review as seventy-two

271. *Id.* at clause 60(7).

272. *Times of London*, March 8, 1983, at 14, col. 2 (remarks of Peter Thornton, Chairman, National Council for Civil Liberties).

273. Evidence Bill, *supra* note 263, at clause 32.

274. *Id.* at clause 33.

275. *Id.* at clause 74.

276. *Id.* at clause 34.

277. Law Society, *The Law Society and the Police and Criminal Evidence Bill*, § 5 (1983); Law Society, *Briefing Memo on the Police and Criminal Evidence Bill*, § 4, at 3 (1983).

hours.²⁷⁸

Extended detention is an obvious aid to police in their efforts to interrogate a suspect. The impact of detention can be mitigated by requirements that police notify an individual selected by the accused that he has been arrested²⁷⁹ and that he be allowed access to a solicitor.²⁸⁰ Where the statutory prerequisites are met, however, even the rights of notification of arrest and access to a solicitor can be limited. The Government's proposals permit delay in providing notification of arrest if there are reasonable grounds to believe that other suspects might be alerted; individuals might be harmed; or there might be interference with evidence connected with a serious arrestable offense.²⁸¹ The same factors along with reasonable grounds to believe that there will be a hindrance to the recovery of property, justify delaying an accused access to his solicitor.²⁸²

Even though no formal proposals are before Parliament to eliminate the right to silence or to draw adverse inferences from its exercise, it is clear that an effort is being made to create a police interrogation environment conducive to obtaining confessions and a standard of admissibility directed toward the exclusion of only unreliable statements. If an accused can withstand the impact of extended detention without access to an outsider, he will be protected by the right to silence. The reliability standard may have only a minor impact in controlling the interrogation tactics police employ. Perhaps the real premise is that an accused should not be entitled to withhold information from the authorities, but the techniques of furthering that objective by authorizing the jury to draw an adverse inference from his silence or by removing all restraints from the police interrogation process offend other important values. The only limits necessary, therefore, are those which restrict oppressive tactics and create a likelihood of false confessions. Not surprisingly, questions have been raised as to whether the limits have been properly set.²⁸³

The tenor of the draft interrogation code²⁸⁴ is fully consistent with the approach of the Police and Criminal Evidence Bill. Its provisions essentially repeat the terms of the proposed statute in the areas of notifying someone of the accused's arrest and providing or withholding access to a solicitor.²⁸⁵ Even where access to a solicitor is provided, the accused may be denied the right to the presence of his solicitor during the interview if an officer of appropriate rank has reasonable grounds to believe this would interfere with the conduct of the interrogation.²⁸⁶ The police need not await the arrival of

278. Law Society, *The Law Society and the Police and Criminal Evidence Bill*, § 5 (1983).

279. Evidence Bill, *supra* note 263, at clause 44.

280. *Id.* at clause 46.

281. *Id.* at clause 44(4).

282. *Id.* at clause 46(7).

283. Opposition has been voiced by such groups as the Law Society, Legal Action Group, National Council for Civil Liberties, Magistrates' Association and Justices' Clerks' Society. *Times of London*, February 21, 1983, at 4, col. 1; March 8, 1983, at 3, col. 1.

284. Home Office, *Draft Rules Governing the Treatment and Questioning of Persons in Police Custody* (1982).

285. *Id.* at ¶¶ 4.2, 5.2.

286. *Id.* at ¶ 5.5.

the solicitor before beginning the interview if there are reasonable grounds to believe that delay would risk harm to persons or property, or simply unreasonably delay the processes of investigation.²⁸⁷

In place of the Judges' Rules, the code calls for administering the following caution when the police have reasonable grounds for suspecting that the accused has committed an offense: "I am going to ask you some questions. You do not have to reply unless you wish to do so, but whatever you say will be written down and may be given in evidence."²⁸⁸ The code reflects very little effort to control the interrogation process itself. There is a restriction barring questioning between midnight and 8:00 a.m. absent justification,²⁸⁹ a ban against the questioning of individuals intoxicated by liquor or drugs to the point of being unable to appreciate the nature of the proceedings,²⁹⁰ a prohibition against requiring the individual to stand during the questioning,²⁹¹ a requirement that interview rooms not cause discomfort,²⁹² and a duty to provide reasonable refreshments and breaks.²⁹³ The techniques of interrogation, touching such problems as what kinds of promises or threats are permissible, how much deception is authorized, and whether the suspect may terminate the interview, were left untreated. The issue of tape recording police interrogations was also avoided in the code and appears to remain in an experimental status.²⁹⁴

V. CONCLUSION

Much of the current of self-incrimination reform in Great Britain, seen in the efforts of the Criminal Law Revision Committee, Royal Commission on Criminal Procedure, and recent Government proposals, reflects opposition to the broad scope of the privilege as it presently exists. Many of the proposals have taken issue with the very core self-incrimination concept of the right to refuse to provide information to the state free of having silence brought to the attention of the jury. Others have sought to formalize the practice of incommunicado questioning over an extended period, subject only to the satisfaction of relatively flexible criteria. A major challenge has been made to the long-standing voluntariness test for confession admissibility, with a minimal code of police conduct and the exclusion of unreliable statements offered as an alternative.

287. *Id.* at ¶ 5.4.

288. *Id.* at ¶ 10.1.

289. *Id.* at ¶ 11.2.

290. *Id.* at ¶ 11.3.

291. *Id.* at ¶ 11.5.

292. *Id.* at ¶ 11.4.

293. *Id.* at ¶ 11.7.

294. The Home Office announced plans to conduct a two year experiment involving tape recording interrogations in six police divisions. *Times of London*, November 16, 1982, at p. 2, col. 5. This follows the conclusion of a Scottish experiment in tape recording police interrogations which revealed such problems as police circumventing the tape recording procedures and questions as to the impact of the recording system on the ability of police to secure admissions from suspects. See McConville and Morrell, *Recording the Interrogation: Have the Police Got it Taped?* 1983 CRIM. L. REV. 158; *Times of London*, November 29, 1982, at p. 1, col. 7. For a general discussion of the draft code formulation see Mirfield, *The Draft Code on Police Questioning—A Comment*, 1982 CRIM. L. REV. 659.

All of the proposals accept the need to prohibit uncivilized conduct in the questioning of an accused and keep unreliable evidence out of the decision-making process. Both objectives overlap since improper interrogation techniques damage the reliability of statements they may produce. Beyond these concerns, however, the self-incrimination principle is an obstacle to the acquisition of evidence. The self-incrimination reform movement in Great Britain has largely been aimed at removing that obstacle to the extent politically feasible. Evidence reliability remains an important concern in Britain, and thus there are concessions to the need for restraints to protect against false confessions. The movement, however, appears not to believe that the risk of false confessions is a serious concern, and sees little further value in the enforcement of the accused's right of silence. The expectations are undoubtedly that admissions will be more readily obtained and more clearly admissible as evidence. Whether Parliament will enact the proposed legislation and what its actual effect will be remain to be seen.²⁹⁵

295. Action on the 1982 Police and Criminal Evidence Bill was suspended due to the dissolution of Parliament and general election in 1983. New legislation, however, has been presented in the form of a resubmitted Police and Criminal Evidence Bill. *See* Times of London, October 27, 1983, at 4, col. 1. The Home Secretary, Mr. Leon Brittan, stated in Parliament that the Government's position was that the Bill would provide police with the powers required to investigate crime, but with no more powers than were really needed. *Times of London*, November 8, 1983, at 4, col. 1. Nevertheless, opposition has developed out of concern that police powers created by the Bill could be misused. *See* Times of London, November 9, 1983, at 2, col. 1; October 27, 1983, at 1, col. 8. Parliamentary action will no doubt be influenced by the Metropolitan Police study demonstrating a crisis of confidence in the London Police. *Times of London*, November 19, 1983, at 1, col. 2. Indeed, the Home Secretary made reference to this study in his statement in support of the Bill. *Times of London*, November 8, 1983, at 4, col. 1.

