Florida Journal of International Law

Volume 5 | Issue 1 Article 6

September 1989

Silence Is No Longer Golden: The Criminal Evidence Order (Northern Ireland) 1988

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SILENCE IS NO LONGER GOLDEN: THE CRIMINAL EVIDENCE ORDER (NORTHERN IRELAND) 1988

I. INTRODUCTION

Although twenty years have passed since the British government sent troops into Northern Ireland, a peaceful resolution of the Ulster problem is unlikely to occur in the near future. Recent events, such as the bombing of the Royal Marine Music School at Deal, demonstrate that Irish terrorist groups still plan to resort to violence. This resolve has been met by an equally determined response from the British government. In the last year, British Prime Minister Margaret Thatcher has placed restrictions on television interviews with members of groups linked to terrorism.[1] In addition, Parliament passed the

1. On Oct. 19, 1988, the Home Secretary Douglas Hurd announced that radio and television broadcasts of interviews with members of the Sinn Fein, the political wing of the Irish Republican Army (IRA), would be illegal. The ban does not apply to newspapers and reported speech in general. Washington Post, Oct. 20, 1988, at A35, col. 1. It is interesting to note that the result of this has been the use of television pictures of Sinn Fein leaders with subtitled speech. The bill was supported by several members of Parliament. Mr. Hurd said:

> When you've had a bomb outrage, and there are pictures of bodies in distress and weeping relatives, and the next thing that happens on the screen in people's living rooms is somebody saying, "I support the armed struggle" or "they deserved it," that I think is not only offensive, but it's wrong, and it's perfectly reasonable to remove that.

Wash. Post, Oct. 20, at A35, col. 1.

Northern Ireland Criminal Evidence Order in 1988.[2] That Order allows the court or jury to draw inferences from an accused criminal's silence.

Many of these governmental actions have produced a large amount of criticism and it is for this reason that they warrant being examined in closer detail. This comment will assess the nature and probable impact of the Northern Ireland Criminal Evidence Order. Critics claim that the Order has diminished personal freedom while proponents point to the abuse of the "right to silence" by guilty defendants. Consequently, the Order's impact on civil rights and its effectiveness as a tool against terrorism will be examined.

II. A Brief History of the Underlying Conflict in Northern Ireland

The origin of the present conflict can be traced to the Plantation of Ulster in 1609.[3] At that time, James I carried out a process of colonization through the use of "undertakers" whose job consisted of establishing Scottish and English settlers in Ulster.[4] This colonization resulted in the introduction of foreigners with a completely different heritage and culture.[5] These differences led to conflict between the Irish Catholics and the British Protestant influence.

For the next 200 years, the British sought to pacify the Catholics through the use of discriminatory laws. In 1695, William III commenced the enactment of the penal laws which directly restricted the Catholic way of life and freedom of religion.[6] Toward the end of the 1700's the penal laws were relaxed due to what some have described as a growing religious tolerance.[7]

However, by the beginning of the 1800s, whatever peace had existed began to disappear. In 1835, riots broke out in Belfast resulting

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2. On Oct. 20, 1988, Mr. Thomas King, Secretary of State for Northern Ireland announced the proposed order to avoid "The gross, determined and persistent abuse of that right to silence." The Times (London), Oct. 21, 1988, at 1, col. 4. The Order was signed into law on Nov. 14, 1988.

3. Darby, *The Historical Background*, in Northern Ireland: The Background to the Conflict 14 (J. Darby ed. 1983).

4. J. Beckett, The Making of Modern Ireland 1603-1923, 45-47 (1966).

5. Darby, *supra* note 3, at 15.

6. From 1695 to 1697, the Irish parliament passed bills which disarmed Catholics, prohibited the sending of children abroad to be educated and banished the Catholic clergy. J. Beckett, *supra* note 4, at 151-52. In 1704, the Irish Parliament passed an even more restrictive law which forbade Catholic purchase of an interest in land exceeding a thirty-one year lease and prohibited the devisement of a Catholic's land by will. *Id.* at 157-58.

7. *Id.* at 213. For an opposing view see Darby, *supra* note 3, at 16-17. Darby thinks that while some religious tolerance and harmony existed, there were equal signs of division between the two communities.

in the death of a woman.[8] These events quickly were followed by the Great Potato Famine of 1845-1849. Above all, the famine served to strengthen the hatred of the Irish toward the British and provided a basis for the movement for Home Rule.[9]

The late 1880s and early 1900s saw a revival of the old tensions between Catholic and Protestant. Protestantism became identified with Unionism and the desire to stay with Britain; Catholicism became identified with Home Rule and independence.[10] Both sides began to form defense groups such as the Irish Republican Army and the Orange Order[11] and the tension culminated in the Easter Rising of 1916.[12] After the Easter Rising, various pressures forced the Republicans, the Unionists and the British to reach a compromise.[13] Therefore, in 1920, Britain passed the Government of Ireland Act[14] which divided Ireland into Southern Ireland and the six counties of Ulster. Shortly afterwards in 1921, Britain and Sinn Fein signed the treaty which recognized Southern Ireland as the "Irish Free State."[15]

Thus, the partition of Northern and Southern Ireland (now Eire) came about through the workings of a parliamentary act and a treaty. The initial years after the signing of the treaty were turbulent and full of discrimination against Catholics mixed with Catholic rioting.[16] The 1940s and 1950s saw a period of relative peace which some have attributed to economic growth and benefits received by the onset of the Welfare State.[17] However, the 1960's were to prove to be very different.

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8. Darby, *supra* note 3, at 17.

9. *See* F. LYONS, IRELAND SINCE THE FAMINE 3-5 (1971). The Irish perceived the British as having shown little sympathy. Also, they felt that Britain had worsened things through poor administration. For example, even during the worst period of the famine, the British government refused to prohibit the export of food. J. BECKETT, *supra* note 4, at 349.

10. F. LYONS, *supra* note 9, at 13.

11. Darby, *supra* note 3, at 17, 19. The Orange Order was a Protestant organization which sought to unify Protestants against Catholic interests. The IRA was a paramilitary force created to represent the nationalists.

12. For an in depth analysis of the Easter Rising by the Nationalists *see* F. LYONS, *supra* note 9, at 358-880.

13. For instance, the British Government was under a lot of pressure from the American Government to reach a settlement. J. BECKETT, *supra* note 4, at 442.

14. Government of Ireland Act, 1920, 10 & 11 Geo. 5, ch. 67.

15. The treaty was signed on Dec. 6, 1921. For a description of the months leading up to the treaty, see D. HARKNESS, NORTHERN IRELAND SINCE 1920, 7-9 (1983).

16. For an examination of the social and economic factors involved during this discontented period, see *id.* at 43-80.

17. Darby, *supra* note 3, at 23.

While the 1960's started as a decade of some tolerance, they ended in bloodshed. In the early 1960's, the Northern Ireland Prime Minister, Terence O'Neill, attempted to carry out reforms in Northern Ireland. Although some of these reforms had limited success, several failed.[18] Whatever success that was achieved, disappeared with the outbreak of sectarian violence in 1968. This violence grew to a head in 1969 and resulted in the deployment of British troops to prevent a "massacre" of the Catholic minority by the Protestant majority.

Since 1969, very little in the way of progress toward a peaceful resolution has been accomplished.[19] Violence continues to be a way of life in Northern Ireland and Britain continually has had to counter this with emergency actions,[20] one of which will now be examined.

III. THE CRIMINAL EVIDENCE ORDER (NORTHERN IRELAND) 1988

The Criminal Evidence Order (Northern Ireland)[21] became law on November 14, 1988. Under the Order, several inferences can be made about an accused's silence. First, the court or jury may make any inferences "as appear proper"[22] from an accused's silence during ques-

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18. *See* D. HARKNESS, *supra* note 15, at 139-76; F. LYONS, *supra* note 9, at 746-47; Darby, *supra* note 3, at 24 26.

19. The Anglo-Irish Agreement of 1985 is a possible exception. Under the Treaty, Eire has an increased role in the government of Northern Ireland and both Britain and Eire agree to combine efforts to stop terrorism. *See* Greenspan, *Bridging the Irish Sea: The Anglo-Irish Treaty of 1985*, 12 SYRACUSE J. INT'L L. & COM. 585-99 (1985).

20. *See, e.g.*, Northern Ireland (Emergency Provisions) Act 1973; Northern Ireland (Emergency Provisions) Act 1974; Northern Ireland (Emergency Provisions) Act 1975; Northern Ireland (Emergency Provisions) Act 1976; Northern Ireland (Emergency Provisions) Act 1978; Northern Ireland (Emergency Provisions) Act 1984; Northern Ireland (Emergency Provisions) Act 1987. For an overview of security policies and legislation in Northern Ireland, see generally JUSTICE UNDER FIRE: THE ABUSE OF CIVIL LIBERTIES IN NORTHERN IRELAND (A. Jennings, ed. 1988) (of particular value is the chart of legislation and policies at pages 4-5).

For an analysis of pretrial detention procedures under the Prevention of Terrorism (Temporary Provision) Act 1974, see Lowry, *Draconian Powers: The New British Approach to Pretrial Detention of Suspected Terrorists*, 9 COLUM. HUM. RTS. L. REV. 185 (1977).

21. Criminal Evidence (Northern Ireland) Order (N. Ir. Stat. 1988) [hereinafter Criminal Evidence Order].

22. *Id.* art. 3, ¶ 2, cl. c. The court or jury may: "(i) draw such inferences from the failure as appear proper; (ii) on the basis of such inferences treat the failure as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material." *Id.* However, the reader should also be aware of art. 2, ¶ 4: "A person shall not be committed for trial, have a case to answer or be convicted of an offence *solely* on an inference drawn from such a failure or refusal as is mentioned in Article 3(2), 4(4), 5(2) or 6(2)." *Id.* [emphasis added].

tioning.[23] This section is designed to combat the "ambush" defense which involves the accused remaining silent during questioning but then producing an alibi at trial.[24]

Second, the court or jury may draw inferences from the accused's refusal to be sworn or failure to testify when asked to do so.[25] However, the accused is not compelled to give evidence and therefore cannot be found guilty of contempt of court for failure to do so.[26] In addition, this article does not affect a person's right to privilege[27] and cannot be used if the mental condition of the accused is such that it is unwise to give evidence.[28]

Third, the Order permits the court or jury to draw inferences from an accused's failure to account for objects or marks on or about the accused's person.[29] This article applies to situations where a police

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23. *Id.* art. 3, ¶ 1. The Order applies in the context of questioning when:
(a) at any time before he was charged with the offence, on being questioned by a constable trying to discover whether or by whom the offence has been committed, failed to mention any fact relied on in his defense in these proceedings; or
(b) on being charged with the offense or officially informed that he might be prosecuted for it, failed to mention any such fact,
Being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed . . . .

Id.

24. The Times (London), Oct. 21, 1988, at 24, col. 7.

25. Criminal Evidence Order *supra* note 21, art. 4, ¶ 3. The Order applies in this context:
(3) If the accused —
(a) after being called upon by the court to give evidence in pursuance of this Article, or after he or counsel or a solicitor representing him has informed the court that he will give evidence, refuses to be sworn; or
(b) having been sworn, without good cause refuses to answer any question, paragraph (4) applies.

Id. For the inferences that can be made, see *id.* at ¶ 4.

26. *Id.* art. 4, ¶ 5.

27. *Id.* art. 4, ¶ 6(a).

28. *Id.* art. 4, ¶ 1(b).

29. *Id.* art. 5, ¶ 1. The Order applies in this instance where:
(a) a person is arrested by a constable and there is —
(i) on his person; or
(ii) in or on his clothing or footwear; or
(iii) otherwise in his possession; or
(iv) in any place in which he is at the time of his arrest, any object, substance or mark, or there is any mark or any such object; and
(b) the constable reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offense specified by the constable; and
(c) the constable . . . requests him to account for the presence of the object, substance or mark; and

officer believes that a mark or object on the accused implicates the accused in the commission of a crime.[30] For the order to apply in this instance, the police officer must inform the accused of the consequences of remaining silent.[31]

Finally, a court or jury may draw inferences from an accused's failure to account to a police officer for the accused's presence at a particular place.[32] However, the police officer must have had a reasonable belief that the accused's presence at that place could imply the accused's participation in the crime.[33] Additionally, the officer must have informed the suspect of the effect of remaining silent.[34]

IV. The Effect of the Criminal Evidence Order (Northern Ireland) on Civil Liberties and Countervailing Concerns

As stated, the Order has provoked much controversy and criticism. Most critics are concerned with what they view as the continual erosion of democratic liberties in Northern Ireland.[35] In addition, critics question the effectiveness of the Order as a tool against terrorism.[36] Opponents of the Order have pointed to the "age old" right to remain

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(d) the person fails or refuses to do so.

Id. For inferences to be made, see *id.* at ¶ 2.

30. *Id.* art 5, ¶ (1).

31. *Id.* art. 5, ¶ 4.

32. *Id.* art. 6, ¶¶ 1, 2. The Order applies in this instance where:

(a) a person arrested by a constable was found by him at a place at or about the time the offence for which he was arrested is alleged to have been committed; and

(b) the constable reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the offence; and

(c) the constable . . . requests him to account for that presence; and

(d) the person fails or refuses to do so.

Id. For the inferences to be made, see *id.* at ¶ 2.

33. *Id.* art. 6, ¶ 1(b).

34. *Id.* art. 6, ¶ 3.

35. The response of the Labour Party was particularly vehement. Mr. Kevin McNamara, the Labour Party's spokesman on Northern Ireland affairs, said that the British government was using Northern Ireland as a "laboratory for draconian measures, which are to be introduced in the United Kingdom . . . . Everything that we stand for in our democracy is going up in smoke and the terrorists are winning all the way." Wash. Post, Oct. 21, 1988, at p. A1. Mr. McNamara also explained: "This is a victory for the I.R.A. My god! They have done away with an Englishman's right to remain silent." The Boston Globe, Oct. 23, 1988, at A31.

Mr. Kinnock, leader of the Labour Party, accused Mr. Tom King, Secretary of State for Northern Ireland, of "surrendering to the panic which has gripped Mr. Hurd and the Prime Minister." The Times (London), Oct. 21, 1988, at 2, col. 4.

36. The Times (London), Oct. 21, 1988, at 2, col. 4.

silent as being a symbol of democracy. Therefore, they feel that the Order has begun to break down democratic ideals in Britain.[37]

A. *The History of the Right Against Self-Incrimination*

The right against self-incrimination (*nemo tenetur seipsum prodere*) has been part of the English legal system for centuries. Several commentators have traced it to the sixteenth and seventeenth centuries.[38] The development of the right appears to have arisen from concerns about the prevalent use of torture to induce confessions.[39] Most commentators agree that the right was firmly established after the trial of John Lilburne in 1637.[40]

Not long after the right against self-incrimination was recognized, criminal defendants were banned from giving sworn testimony at their own trial.[41] This prohibition was removed by the Criminal Evidence Act of 1898[42] which permitted the accused to testify but also prohibited the prosecution from making any comment or inference from the accused's silence.[43] Therefore, the prohibition on inference-making was an addition to the right of silence, made in England in 1898. In com-

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37. *See supra* note 35 (Mr. McNamara's statement).

38. For a history of the right against self-incrimination, see generally Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1949); Marks, *"Thinking Up" About the Right of Silence and Unsworn Statements*, 58 LAW INST. J. 360 (1984); Urick, *The Right Against Compulsory Self-Incrimination in Early American Law*, 20 COLUM. HUM. RTS. L. REV. 107 (1988). For an interesting comparison of the American right against self-incrimination and the Talmudic right against self-incrimination, see Rosenberg & Rosenberg, *In the Beginning: The Talmudic Rule Against Self-Incrimination*, 63 N.Y.U. L. REV. 955 (1988).

39. Urick, *supra* note 38, at 110-14. Mr. Urick notes that the Puritans demanded the privilege in America also, due to the use of coercion in interrogations. *Id.* at 115-16.

40. *Id.* at 114-15; Marks, *supra* note 38, at 371.

41. According to one scholar, this prohibition was based on the notion that an interested party in litigation, was likely to perjure himself. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 324 (1968).

42. Criminal Evidence Act (1898), 61-62 Vict. Ch. 36, § 1.

43. *Id.* at § 1(b). It is interesting to note that a *judge* has a right to comment on an accused's silence, when such a comment would be in the interest of justice. R v. Rhodes, 1 Q.B. 77, 83-84 (1899); R v. Sparrow, (1973) 2 All E.R. 129. However, this right is not absolute since a judge's comment should never allow a jury to assume that an accused's silence is equated with guilt. R v. Sparrow, (1973) 2 All E.R. 129, 134-36. This judicial right always must be exercised with the utmost care as Lord Oaksey pointed out in Waugh v. R, (1950) A.C. 203, 211: "It is true that it is a matter for the judge's discretion whether he shall comment on the fact that a prisoner has not given evidence; but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such a comment." *Id.*

parison, the United States Supreme Court applied this prohibition to the States in 1965.[44]

From this brief history, two elements of the right against self-incrimination can be distinguished.[45] First, the criminal defendant has the right not to be compelled to testify, i.e., the right to silence. Second, in the United States and England, the prosecution may not make any comment on, nor may the court draw any inferences from, the defendant's failure to testify. Consequently, the Northern Ireland Criminal Evidence Order apparently has removed the second element but not the first element, since there is no compulsion to testify. However, a court may infer guilt from failure to do so. While this might appear to have weakened civil rights by placing a burden on the criminal defendant, it is in accord with many continental European criminal procedure systems.

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44. Griffin v. California, 380 U.S. 609 (1965). *See* Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 BUFFALO L. REV. 361, 378 (1977). In *Griffin*, the Court prohibited state courts from making inferences about a criminal defendant's silence. Justice Douglas, writing for the majority, stated:

> [C]omment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," Murphy v. Waterfront Comm'n, 378 U.S. 52, 55, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. *Griffin, supra* note 44, at 614.

However, the Court had already applied this prohibition to federal courts in Wilson v. United States, 149 U.S. 60 (1893). The *Wilson* decision was based on a federal statute, 20 Stat. 30, ch. 37, passed in 1878 which stated that in all criminal proceedings in federal courts, "the person so charged shall at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him." *Id.* at 62-63. Justice Field, writing for the Court, supported this prohibition of a presumption by saying:

> The act was framed with a due regard also to those who might prefer to rely upon the presumption of innocence which the law gives to everyone, and not wish to be witnesses. It is not everyone who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive 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 as to increase rather than remove prejudices against him.

Id. at 66. *But see* Justice Stewart's dissent in *Griffin*, 380 U.S. 609, 617 (1965).

45. As shown in Justice Stewart's dissent in *Griffin*:

> We must determine whether the petitioner has been "compelled . . . to be a witness against himself." Compulsion is the focus of the inquiry. Certainly if any compulsion be detected in the California procedure, it is of a dramatically different and less palpable nature than that involved in the procedures which historically gave rise to the fifth amendment guarantee . . . . I think that the Court in this case stretches the concept of compulsion beyond all reasonable bounds and that whatever compulsion may exist derives from the defendant's choice not to testify, not from any comment by court or counsel.

Griffin, 380 U.S. 609, 620 (1965).

B. *The Allowance of Inference in Other Legal Systems*

In several continental legal systems, a right to silence (i.e., prohibition of compulsion to testify) exists, but inferences of guilt can be or are drawn from the silence.[46] For example, in France the accused must be informed of the right not to make a statement at the first hearing.[47] However, the court can consider the defendant's failure to explain, when evaluating the evidence.[48]

Continental legal systems are not the only ones to allow the making of inferences. For instance, under the Criminal Justice (Scotland) Act 1980,[49] a criminal defendant has the right not to make a declaration.[50] However, if the defendant refuses to answer a question during the judicial examination procedure,[51] the defendant runs the risk of having inferences made at the subsequent trial.[52] On the other hand, inferences can only be drawn at the trial if the accused introduces evidence which could have been used to answer a question during the judicial examination.[53] It should be noted that the Scottish Act is aimed primarily at stopping the "ambush" defense and, therefore, is not quite as broad as the Northern Ireland Order. The Northern Ireland Order is directed at several other areas in addition to the ambush defense.[54]

From the above examples, it would appear that the right to silence, i.e., the right not to be compelled to testify, is a universally recognized right among civilized nations. However, many of these nations still allow negative inferences to be drawn from an accused's failure to testify. While this would appear to lend support to the government action in Northern Ireland, it does not explain why many countries allow an inference to be made. The policy behind this will be examined in the next section.

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46. *See generally* Comment, *The Accused's Privilege Against Self-Incrimination in the Civil Law*, 11 AM. J. COMP. L. 585 (1962); Schlesinger, *supra* note 44. For comment on the German Rule, see J. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 72-73 (1977).

47. Code de procédure pénale [C. PR. PEN.] art. 114(1) (Fr.).

48. *See* Comment, *supra* note 46 at 598.

49. Criminal Justice (Scotland) Act 1980, ch. 62, § 6 amends Criminal Procedure (Scotland) Act 1975, ch. 21, § 20. *See also Right to Silence*, 33 J. L. SOC'Y OF SCOTLAND 445-46 (1988); Gow, *Scotland's Right of Silence*, 138 NEW L.J. 781 (1988).

50. Criminal Procedure (Scotland) Act 1975, ch. 21, § 20.

51. For an outline of the judicial examination procedure see Gow, *supra*, note 49.

52. Criminal Justice (Scotland) Act 1980, ch. 62, § 6.

53. *Id.*

54. Gow, *supra* note 49. Consequently, the British Government might consider adopting an order similar to the Scottish Act if opposition becomes too great. *Id.*

C. *The Need for the Drawing of Adverse Inferences from an Accused's Silence: The Northern Ireland Problem*

While critics have viewed the Northern Ireland Order as an erosion of civil liberties,[55] many have felt that the prohibition against inferences of guilt has been one of the most abused legal doctrines ever.[56] Even the former Master of Rolls, Lord Denning, stated that the right to silence should be abolished.[57] Northern Ireland's justice system has been in turmoil since the beginning of the "troubles" in the late 1960's. In the early 1970's, witnesses and jurors were being threatened by terrorist groups. Consequently, the British government introduced the jury-less trials.[58] However, juries have not been the only element of the justice system to be abused. Terrorist groups have viewed the right to silence as a vehicle to gain the acquittal of its members.[59] This "tool" has been extremely effective and has resulted in the release of suspects when substantial evidence exists that they committed a crime.[60]

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55. *See supra* note 35 and accompanying text.

56. *See supra* note 2 (Mr. King's statement); *see also* Marks, *supra* note 38.

57. Lord Denning stated:

> In my view the right to silence ought to be abolished in Northern Ireland and in England and Wales too. It hampers the police in the investigation of crime. A man ought to be free, if he is innocent, to give an explanation. It is only the guilty person who says "I am not going to say anything." The right of silence helps the guilty.

The Daily Telegraph (London), Oct. 21, 1988, at 1.

58. For criticism of this action and an analysis of its history and subsequent effect, see Hadden, Boyle & Campbell, *Emergency Law in Northern Ireland: The Context*, in JUSTICE UNDER FIRE: THE ABUSE OF CIVIL LIBERTIES IN NORTHERN IRELAND, 13-14 (A. Jennings ed. 1988). *See also* Greer & White, *A Return to Trial by Jury*, in JUSTICE UNDER FIRE: THE ABUSE OF CIVIL LIBERTIES IN NORTHERN IRELAND 47 (A. Jennings ed. 1988).

59. According to the Security Forces, the IRA has developed techniques to use the right of silence to their advantage. This has included the publishing of articles entitled "Interrogations — Whatever You Say, Say Nothing" in Sinn Fein's Republican News. The Times (London), Oct. 21, 1988, at 2, col. 3.

Sir John Herman, RUC chief constable has stated: "Terrorists are well schooled in methods to impede investigation into their acts of violent criminality. They are educated to a high degree in the workings of the legal system and use this knowledge to their advantage. Training in interrogation resistance, with lectures and demonstrations, is standard procedure." *Id.* at 2, col. 4.

60. The police pointed out several recent cases including the following:

> In a recent incident a man was beaten to death by four others in a sectarian attack.
>
> Police arrived quickly and found bloodstains on two of the men. A witness confirmed that all four had attacked the man but later withdrew his statements because of threats. The suspects did not speak and so the police could not check

Due to this blatant misuse of the right to silence, the miscarriages of justice that have occurred and the extraordinary situation which exists in Northern Ireland, the Criminal Evidence Order seems to be justified. No one likes to restrict civil liberties, but no right is absolute and any right must always be balanced with the interests of society as a whole.[61] Society's interest in maintaining the integrity of its justice system and apprehending those responsible for atrocities far outweighs the adverse consequences of inferences drawn from a defendant's silence.

V. CONCLUSION

While Catholics have legitimate grievances concerning Protestant prejudice, and Protestants fear the concept of a unified Ireland, terrorism and violence are not the answers to their problems. No easy solution exists to bring about a peaceful settlement in Northern Ireland. However, until the day when Catholics and Protestants can negotiate with each other, the British government must take whatever steps are necessary to combat the terrorist undermining of society. One method of undermining the fabric of society has been the abuse of the right to silence. Therefore, the government has seen fit to draw inferences from such silence through the Criminal Evidence Order (Northern Ireland) 1988.

While any removal of a civil right engenders criticism, most of the criticism of this action is unfounded. Historically, the right to silence meant merely a right to not be compelled to testify.[62] The prohibition

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> their stories for inconsistencies. On withdrawal of the evidence by the witness, the men were released.

The Times (London), Oct. 21, 1988, at 2, col. 5. Under the Order, a court would have drawn inferences from the two bloodstained men's silence under article 5. This does not seem unfair considering the presence of extremely incriminating evidence.

61. A recent editorial in the *Criminal Law Review* cautioned against the infringement of the right to silence. However, the article conceded: "Silence is neither a wondrous gift nor an absolute right: it is proper that it should be considered in light of the balance of the criminal process and the social and psychological contexts of criminal investigation . . . ." *How Silently, How Silently*, 1989 CRIM. L. REV. 1, 3.

62. It is accepted that compulsion of suspects or accused to answer questions is incompatible with a civilized system of justice. But the law may be seen as irrational and socially mischievous where it disallows consideration of potentially inculpating conduct, such as ominous silence . . . .

> It would have been consonant with the law as it evolved after the Restoration for the judges to have advised, and the practice followed, that an accused be warned merely that he could not be compelled to answer questions but that his refusal might be used at trial against him.

Marks, *supra* note 38, at 372-73.

on the drawing of inferences was a later addition to the right to silence concept. Therefore, the government has merely removed a superfluous layer of a fundamental right since no one in Northern Ireland is compelled to give testimony.

In addition, the prohibition against the making of inferences has been ignored by many civilized legal systems in the world. These systems have been concerned more with the conviction of criminals than the fostering of abhorrent behavior through abused civil rights concepts. Northern Ireland is an area which has seen so much violence and misuse of the justice system that the time has come for such violence and misuse to end and for the perpetrators of violence, both Protestant and Catholic, to be brought to justice.

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