CONFESSIONS AND SILENCE*

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The English Criminal Law Revision Committee has contrasted a system in which all relevant evidence would be admitted with that in which much evidence is excluded for some supposedly good reason of policy.[1] In America a common contrast is between a "crime control" and a "due process" model of criminal justice.[2] The former requires a heavy reliance on informal police interrogation carried out in private, on the admissibility of evidence however improperly it was obtained, and on fairly extensive police powers. The latter requires greater weight to be placed on the protection of the rights of individuals, particularly the accused. The former stresses justice to the accused by convicting him if guilty and acquitting him if innocent; and justice to society at large, by protecting it through the conviction of criminals.

The latter stresses justice to individuals, principally innocent ones but also criminals; it asserts there are some methods of protecting society which involve too high a price. It wants to protect all individuals from what often is or may seem to be the awesome power of the State, from indignity, oppression, hardship, or even a slight risk of a wrong conviction. It is important to notice that these desires do not always conflict. They cannot conflict when reliable evidence not obtained from the accused or his premises is admitted. As normally practised today cross-examination is not inhumane or brutal; but though it is unpleasant it is, skilfully conducted, "the greatest legal engine ever invented for the discovery of truth".[3] A medical examination or blood test or a co-ordination test for motorists undertaken with the accused's consent is reliable and not improper. The same may be true of a peculiar quirk of spelling proved after a consensual test, as in the case of the Lindbergh kidnapper, Bruno Richard Hauptmann, who always spelt words like "ought" as "ouhgt" and "$50" as "50$", or Voisin, who, on being asked by the police to write "Bloody Belgian", wrote "Bladie Belgiam", an expression also written on a label attached to the remains of a murdered woman.[4] But often there is thought to be a conflict, and there are certainly conflicting rules of law.

The conflict can be seen most sharply if we ask two questions, usually considered apart, but in fact intimately related. The first is: to what extent

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[1] 11th Report on *Evidence (General)*, 1972, Cmnd. 4991, paras. 14-20.

[2] Herbert L. Packer: "Two Models of the Criminal Process" 113 *U. of Pa. L.R.* 1 (1964).

[3] Wigmore: *Evidence* (3 ed., 1940), para. 1367.

[4] J. Walker, *Kidnap* (London, 1961), 237; *R.* v. *Voisin* (1918) 1 K.B. 531.

should the confessions of the accused be excluded? On this there is a well-known body of tolerably clear law; the dispute is about the sense of that body of law. The second question is: to what extent should any commonsense inferences capable of being drawn from the accused's silence in fact be drawn? "Silence" refers mainly to three kinds of behaviour, to which different considerations may very well apply: that is, the accused's failure to deny charges put to him by state officials out of court, his failure to answer lawful questioning out of court by state officials, and his failure to testify on oath or affirmation at his trial. The rules governing the use that may be made of silence are obscure and not the subject of any agreed dogmatic formulation. They have recently become controversial because in America the Supreme Court has stated that suspects should receive an elaborate group of warnings of their right not to speak; while in England the Criminal Law Revision Committee has recommended an extension of the evidentiary use of silence and the abolition of the present warnings.[5]

Before we consider the present law and the alternatives to it we should review the background against which our law developed and which explains some of its oddities.

In the early nineteenth century, when this part of the law of evidence began to develop, trial was by a member of the senior judiciary and a jury selected on a narrow property qualification, subject to class bias, and none too well educated. The accused had normally been imprisoned until trial without bail. He could be legally represented, but in felony cases until the Trial for Felony Act 1836 defence counsel could only argue points of law and advise the accused what questions to ask witnesses; he could not address the jury or exercise the difficult art of cross-examining the prosecution witnesses and the more difficult one of examining the defence witnesses in chief. Thereafter matters were different, but in practice most accused were not represented: legal aid in any widespread form is a relatively recent development.

There was no general right in England for the accused or his spouse to testify on oath until 1898 (though limited statutory exceptions existed earlier). This made it impossible for the accused to explain away the evidence against him, even that which came from his own mouth in out-of-court admissions. During the century a practice grew of allowing the accused to make an unsworn statement; it was of doubtful probative value since it was not on oath nor subject to cross-examination. Before 1907 there was no right of appeal other than on points of law; and that was to the Court for Crown Cases Reserved, a gathering of a large number of the judges which, though authoritative, was rare, expensive and cumbersome. In particular, for practical purposes a perverse jury verdict was uncontrollable. Trials were often conducted with deplorable speed, and without jury retirements; and though much of the judiciary was of immense quality, the absence of appeal meant that the scandalous conduct of some trials went unchecked.

The police were novelties in the nineteenth century, lacking the efficiency, the public control, the settled norms, and the enjoyment of relatively high public and judicial confidence of police today.

One fundamental difficulty was that prisoners generally came from the poorer classes. They were nearly always illiterate and incapable of helping themselves by a proper preparation and presentation of their case. Indeed,

[5] See generally *The Right to Silence* (Proceedings of the Institute of Criminology, Sydney University Law School, 1974).

because of the mobility of labour demanded and fostered by the Industrial Revolution, operating against a background of highly parochial and heterogeneous forms of traditional society, they were often as dislocated and *deracinés* in the new cities of their own country as any modern migrant is on entering a foreign one.

Yet what we now remember as the worst feature of the whole system—the savagery and adventitious incidence of its punishments—may have helped overcome some of the other vices in it. We shall probably never know how far jury mercy disrupted the operation of these unjust laws by finding, for example, that the value of a £5 note was less than 40 shillings. We do know that judicial manipulation of the rules of evidence operated in favour of the accused. Thus the law was that confessions of guilt could not be admitted unless the prosecution proved them to have been made "voluntarily"—without any inducement, i.e. any fear of any prejudice or hope of advantage held out by a person in authority. Throughout the first half of the century a mass of case law showed an increasing hostility to the admission of confessions; the test of "inducement" became broader and broader, ceasing to be limited to threats of violence or loss of liberty and extending to such vague injunctions as: "You may as well tell me all about it", or "You had better tell the truth". When faced with a borderline case a judge trying the case could do one of three things. He could admit the confession; the prisoner would then almost certainly be convicted on the strength of it. He could decide against admission; the prisoner might still be convicted on the other evidence; and if the prosecution had obtained enough evidence for this without the confession, the conviction would doubtless be a just one. Thirdly, the judge could adjourn the case for consideration by himself and his colleagues of the Court for Crown Cases Reserved. The cumbrousness and delay of the adjournment procedure caused it usually to be rejected, and in Parke, B's words: "Every judge decided by himself upon the admissibility of the confession, and he did not like to press against the prisoner and took the merciful view of it".[6] So a mass of trial rulings excluding confessions on trivial grounds grew up. In the leading case which stopped but could not reverse this trend of "liberalism run wild",[7] Parke, B. said: "I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame when I consider what objections have prevailed to prevent the reception of confessions in evidence. . . . [T]he rule has been extended quite too far, and . . . justice and common sense have, too frequently, been sacrificed at the shrine of mercy".[8] But however much such palliatives reflected a more sensitive conscience, they made the system too irrational to increase its efficiency: "justice and common sense have been sacrificed, not at the shrine of mercy, but at the shrine of guilt".[9] The judges also ameliorated the accused's position in that though he had no right to give sworn evidence, he came to be generally permitted to make an unsworn statement as to what he knew which the jury could take into account.

Confessions

At present interrogation is controlled in three ways. Involuntary or oppressively obtained confessions may be excluded. A breach of the mandates

[6] *R.* v. *Baldry* (1852), 2 Den. C.C. 430, at 445.
[7] Baker, *The Hearsay Rule* (London, 1950), 54.
[8] *R.* v. *Baldry* (1852) 2 Den. C.C. 430, at 445.
[9] *Ibid.*, at 446 per Erle, J.

of the Judges Rules as to cautions about the suspect's right to silence may (but rarely does) lead to the exclusion of subsequent confessions. The judge has a residual discretion, infrequently acted on, to exclude confessions which would operate unfairly against the accused.

The modern rule for exclusion of confessions, which depends on proof that a threat or inducement from a person in authority has been held out to the accused, has the following bases. First, there is a risk that confessions so produced will be false: "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".[10] Secondly, it is "dangerous to leave such evidence to the jury";[11] confessions should be carefully scrutinized because they have so powerful an effect that they may lead the jury to ignore the other evidence in the case. It is felt that juries may wrongly attach weight to a confession even though the evidence which makes it unreliable is before them. Thirdly, there is popular repugnance (partly but not wholly based on Bentham's sporting theory of justice[12]) to the conviction of a man solely on the basis of his own confession; the State has the duty of collecting evidence against criminals and of *proving* guilt before a judge and jury in open court, and should not be able to rely entirely on tired suspects condemning themselves secretly in police stations. To put the point in a more extreme and graphic way, in the much-quoted answer to Stephen's question as to why Indian policemen used torture, "it is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence".[13] Fourthly, the exclusion of confessions tends to discourage undesirable police practices. The result is that the test for an inducement which will render a confession involuntary has become technical and objective; threats and promises of great triviality have been held to suffice even though *R.* v. *Baldry* stopped a still more liberal trend.[14]

Some regard this branch of the law as pre-eminently one which aids the guilty, which derogates from "the ideal that all available and relevant evidence should be before the court",[15] which hampers an understaffed police force attempting to satisfy the high standard of proof in criminal cases without full access to one major category of evidence, and which panders in particular to "a large and increasing class of sophisticated professional criminals who are not only highly skilful in organizing their crimes and in the steps they take to avoid detection but are well aware of their legal rights and use every possible means to avoid conviction if caught [including] refusal to answer questions".[16] One line of judges since Parke, B's time has held this view;[17] so did Wigmore;[18] and the majority of the English Criminal Law Revision Committee substantially accepted it. They thought the confession rule in practice did not correspond with any rationale on which it might properly be based.

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[10] *R.* v. *Warickshall* (1783) 1 Leach 263.
[11] *R. v. Baldry* (1852) 2 Den. 430, at 442 per Pollock, C.B.
[12] Bentham: *A Rationale of Judicial Evidence* IX. 4. iii.
[13] *A General View of the Criminal Law of England* (2 ed., 1890) 188 n. 2.
[14] Above, 377.
[15] 11th Report, para. 20.
[16] 11th Report, para. 21.
[17] *R.* v. *Baldry* (1852) 2 Den. 430; *R.* v. *Smith* (1959) 2 Q.B. 35; *R.* v. *Northam* (1967) 52 Cr. App. Rep. 97.
[18] *Evidence* (Chadbourn revision, 1970) para. 820a.

The Committee therefore recommended that a confession should be excluded only if the prosecution proved beyond reasonable doubt that it "was not obtained by oppressive treatment of the accused; and was not made in consequence of any threat or inducement *of a sort likely*, in the circumstances . . . , to render unreliable any confession which might be made by the accused in consequence thereof." The Committee recommended one change in favour of the accused: abolition of the present rule that inducements must proceed from a person in authority, because untrue confessions might be produced by other persons. This proposal, by depriving trivial inducements of their present effect, is an attempt to ensure exclusion only of confessions which are unreliable, while simultaneously deterring the police from misconduct. "Oppression" covers cases where the accused's will has been sapped by prolonged questioning though no actual inducement can be found. The notion is a relatively recent development in the common law, and confessions are rarely excluded for oppression, but it is capable of much expansion. It is an important one, because if our first aim is to remove the grossest forms of misconduct and the most serious sources of unreliability, physical violence and torture is well covered by the traditional rules, but newer devices are not. In former times confessions of witchcraft or treason were often false because torture was used;[19] this is now neither common, necessary or permissible. Well-developed techniques of relentless questioning are the modern equivalent, ranging from the barbarous to the desirable.[20] At their most extreme such methods produced the plainly false confessions made by the victims of Stalin's purges, which were not often retracted except in minor parts. The makers of those confessions were not weak men bemused by an unexpected predicament, but experienced veterans of prison, exile, revolution, civil war, terror and the administration of a huge state. Not all Stalin's enemies made confessions, but those confessions that were made were apparently produced mainly as a result of protracted questioning by relays of trained interrogators which gradually demoralized the victims and deprived them of self-respect and self-control, not (or not very often or principally), as other explanations have it, because of actual violence, or promises of release for the victim or his family which were unlikely to be honoured, or the confessional propensities of the "Russian soul", or the use of disguised actors, or drugs, or hypnotism, or the victims' perverse Party loyalty and reluctance to destroy the Soviet achievements to which their whole lives had been devoted.[21] In America there are several handbooks recommending more respectable methods, which produce confessions much more quickly, soon revoked though they often are.[22] Such interrogation manuals, usually written in a style of hilarious solemnity, advocate an extraordinary mixture of commonsense and oppressive methods. They are widely used by American police forces, and the U.S. Supreme Court's reading of them was one factor in their adoption of the extreme *Escobedo-Miranda* doctrine in an attempt to diminish such practices.[23]

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[19] H. R. Trevor-Roper: *The European Witch Craze of the Sixteenth and Seventeenth Centuries* (Penguin 1969) 44-5.

[20] See *Cornelius* v. *R.* (1936) 55 C.L.R. 235; *R.* v. *Jeffries* (1946) 47 S.R. (N.S.W.) 284; *R.* v. *Prager* (1972) 1 All E.R. 114.

[21] See Adam B. Ulam: *Stalin* (London, 1973) 410-11; Robert Conquest: *The Great Terror* (London, 1971) ch. 5; Arthur Koestler: *Darkness at Noon.*

[22] See Inbau and Reid, *Criminal Interrogation and Confessions* (Baltimore, 2 ed., 1967).

[23] Below, 383-84.

Those who belong to the Committee's general school sometimes advocate still narrower grounds for exclusion. One would be to exclude a confession only if the inducement *actually* made it unreliable. The most extreme view, supported by three members of the Committee, is that all confessions should be admissible however obtained: the present rule complicates the law and the procedure of the trial, since the jury must withdraw while the admissibility of the confession is determined; worse, it raises the risk that a dangerous criminal who has made a true confession will go free because of a policeman's blunder. Further, any exclusionary rule is pointless now that the accused can testify and a more sophisticated jury can assess reliability for itself, and the natural sanctions against police impropriety are stronger than any exclusionary rule.[24]

The majority view of the Committee is likely to be accepted by most Anglo-Australian lawyers; indeed something very similar already exists by statute in Victoria, where inducements must be "really calculated to cause an untrue admission of guilt to be made".[25] But the extremer views are unlikely to be popular. The confession rule may at present operate either more widely or more narrowly than its rationale requires, but its essential merits have been judicially accepted for nearly two centuries and were supported by Lord Reid's speech in the House of Lords decision *Commissioners for Customs and Excise* v. *Harz and Power*:[26] "many of the so-called inducements have been so vague that no reasonable man would have been influenced by them, but one must remember that not all accused are reasonable men and women: they may be very ignorant and terrified by the predicament in which they find themselves. So it may have been right to err on the safe side". The Committee have been attacked for not proposing alteration of the common law rule so that it favoured the accused even more. One basis for the rule is to discipline the police; the only effective discipline is that which is applied with certainty; hence, it is said, *all* confessions produced by what is defined as police misbehaviour should be excluded, however reliable they are. The pre-*Baldry* cases had this tendency in practice, and some judges since have shown sympathy to it. Cave, J. once said: "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. It is remarkable that it is of very rare occurrence for evidence of a confession to be given when the proof of the prisoner's guilt is otherwise clear and satisfactory; but, when it is not clear and satisfactory, the prisoner is not infrequently alleged to have been seized with the desire borne of penitence and remorse to supplement it with a confession—a desire which vanishes as soon as he appears in a court of justice."[27] Scotland adopts the prophylactic position of substantially refusing to admit any confessions obtained after suspicion has fallen on the accused, unless they are completely spontaneous.[28] The effect of an entirely disciplinary rule would be that confessions obtained during an illegal arrest,

[24] *Inter arma silent leges;* in Northern Ireland legislation has adopted almost this position in respect of some offences. The Northern Ireland (Emergency Provisions) Act 1973, s. 6, provides that all confessions are admissible except where the prosecution fail to prove that the accused was not "subjected to torture or to inhuman and degrading treatment".

[25] Evidence Act 1958 (Vic.) s. 149; see also Evidence Act 1908 (N.Z.) s. 20, and s. 68(2) of the A.C.T. Evidence Ordinance 1971, which is the result of the activities of a very strong committee.

[26] (1967) 1 A.C. 760, at 820; and see *D.P.P.* v. *Ping Lin* (1975) 3 All E.R. 175.

[27] *R.* v. *Thompson* (1893) 2 Q.B. 12, at 18.

[28] *Chalmers* v. *H.M. Advocate* 1954 J.C. 66; *Manuel* v. *H.M. Advocate* 1958 J.C. 41.

or when no warning of the right to silence had been given, would be excluded; such a rule has been approached in America in federal courts under the *McNabb-Mallory* rules[29] (which exclude voluntary confessions made during periods of illegal arrest) and in non-federal courts under the *Escobedo-Miranda* doctrine (which excludes confessions obtained if no warning has been given of the accused's right to silence and to have counsel present during interrogation at public expense).[30] Congress abolished the doctrine in respect of federal prosecutions by the Omnibus Crime Control and Safe Streets Act 1968, s. 701; a differently constituted Supreme Court has also shown signs of attempting to limit it.[31]

The requirement of the Fourteenth Amendment that no state shall "deprive any person of life, liberty or property without due process of law" is infringed by the use of physical torture to extort confessions,[32] by the use of truth or other drugs,[33] and by any conditions which can be regarded as coercive so far as the particular suspect is concerned. Questioning which would not infringe the common law rules as to voluntary confessions may thus fall foul of this extension of due process, particularly in the case of very young, ignorant, frightened, ill or otherwise disadvantaged prisoners.[34] But even there the disciplinary principle has not been fully accepted. Misbehaviour which in our terms is "oppressive", in theirs "coercive", towards the particular suspect leads to the exclusion of confessions, but much behaviour which is criticized by the courts as improper does not result in exclusion. Certainly full acceptance of the disciplinary principle would cause much reliable evidence to be excluded in a way which is alien to the rather untidy, pragmatic, fuzzy way the Anglo-Australian compromise has developed. There is also a serious question as to whether the fear that evidence will be excluded has any effect on police behaviour. Policemen contemplating misconduct will be deterred not by a fear of exclusion of confessions; for they will usually expect that their word as to the occurrence of misconduct will be accepted rather than the accused's. Even if it is not, they do not fear exclusion of evidence; they fear the harsh judicial comment of which notice may be taken by those responsible for the prosecution of crime if they have committed a crime, and of which notice may be taken by their superiors if they have not.[35] Retribution by exclusion should be visited on serious police misconduct; but it is doubtful whether exclusion deters.[36]

One problem to which the Committee directed its attention was the unreliability of confessions caused not by the way they were produced, but by the way which they were recorded. As Wigmore wrote: "Paid informers, treacherous associates, angry victims, and over-zealous officers of the law—these are the persons through whom an alleged confession is oftenest presented; and it is at this stage that our suspicions are aroused and our caution stimulated."[37] The majority of the Committee recommended that experiments with the tape recording of confessions be carried out. They opposed immediate

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[29] *McNabb* v. *U.S.* 318 U.S. 332 (1943); *Mallory* v. *U.S.* 354 U.S. 449 (1957).
[30] *Gideon* v. *Wainwright* 372 U.S. 335 (1963); *Escobedo* v. *Illinois* 378 U.S. 478 (1964); *Miranda* v. *Arizona* 384 U.S. 436 (1966).
[31] *Harris* v. *New York* 401 U.S. 222 (1971).
[32] *Brown* v. *Mississippi* 297 U.S. 278 (1936).
[33] *Dugan* v. *Commonwealth* 333 S.W. 2d 755 (1960).
[34] See generally *Stein* v. *New York* 346 U.S. 156, at 184-5 (1953).
[35] Cross: *An Attempt to Update the Law of Evidence* (Jerusalem, 1974) 17.
[36] A similar problem exists with illegally obtained evidence.
[37] Wigmore, para. 820b.

general introduction of the practice on several grounds. The police feared it would cause more criminals to refuse to talk. Tapes would contain much irrelevant, prejudicial or inadmissible matter (e.g. the accused's record, or his bad associates); it would be easier to avoid such matter being included in a written confession, or at any rate easier to keep such parts from a jury than to cut parts of the tape. Not all confessions can be tape recorded, and those that were not, such as those made suddenly on arrest, might wrongly be regarded as inferior. The quality of tape recordings is often bad, and they can easily be tampered with. The expense might be very great, particularly if proceedings were filmed as well. The risk of publicising those parts of the interrogations which relate to suspects as yet not arrested is a price that might be thought too high.[38] A minority of three, however, recommended that use of tape recorders should be made compulsory in police stations in larger population centres. First, the presence of a tape recorder would tend to deter police from impropriety—violence, oppressive questioning, or the false attribution of spontaneous admissions to the accused. Secondly, the taking of statements in writing, often presenting as brief coherent narrative prose what was the result of hours of repeated questions and disjointed equivocal answers, may misrepresent meaning; there is scope for much mutual misunderstanding between interrogator and suspect and for leading questions; the inflection of a man's voice may be all-important; the later making of the note has obvious extra dangers. The recording would help guarantee genuineness and would help rebut accusations of fabrication. Normally a transcript could be admitted, with only important parts of the recording actually being played. As for the objections made by the majority, policemen who tamper with recordings will fabricate oral and written confessions; recordings are at present *admissible* and are only excluded if in the particular case they seem too unreliable; suspects will soon ignore the recorder and talk as freely as they do traditionally in the presence of policemen taking notes. In principle the minority reasoning seems sound.

There are safeguards other than the existence of a taperecording which increase the likelihood of reliability by avoiding misrecording and the use of coercion. Such safeguards ought therefore to be encouraged, perhaps by providing that the burden of proof of involuntariness should rest on the accused if the prosecution can prove a taperecording; or the presence during the making of the confession of an independent third party; or the reading of the confession, and the accused's acknowledgement of its truth, in the presence of an independent third party; or corroboration of the truth of the confession (so that the police are more likely to search for non-confessional evidence); or the accused's failure to support his allegations against the police in the box on oath or affirmation. The latter proposal in particular is controversial.

The problems of police misbehaviour and police misunderstanding are met in some jurisdictions by the Indian Evidence Act system devised by Sir James Fitzjames Stephen and which is now in force in many parts of the Commonwealth. Under it confessions are only admissible if made before a magistrate. The Criminal Law Revision Committee opposed this; they also opposed a related proposal to force the accused to listen to questions put to

[38] Cross: *An Attempt to Update the Law of Evidence* 19.

him in the presence of a magistrate.[39] Both conflict with the Committee's preference for informal interrogation. In their view they would be unlikely to increase the chance of the accused telling the truth; the formality of the procedure would be likely to cause silence; magistrates would oppose the system; it might be impossible to arrange for magistrates to be present twenty-four hours a day to enable police to begin asking questions when they thought the case against the suspect was strong enough. If the defence at a later trial questioned what was said, the magistrate might have to be called as a witness, which would be inconvenient and embarrassing for him. The public reputation for impartiality of the judiciary might suffer if they were brought into the investigatory process. Finally, the system does not necessarily restrict coercion, which can occur before the accused is brought to the magistrate.

The right to silence out of court

The Judges Rules are a guide to the police in their conduct of interrogations.

In essence they require cautions as to the suspect's right to silence to be given at important stages of interrogation. Thus in England a caution must be given when the police officer has reasonable grounds for suspecting that the accused has committed an offence; another when the charge is made; another when all subsequent questioning begins. The Australian schemes are usually less elaborate. The accused at all stages (except for some specific statutory exceptions) may remain silent. One defect in the caution is that though it says that if the suspect speaks his answers may be used in evidence, it does not say that his silence, though not direct evidence of guilt, may strengthen the inferences to be drawn from the prosecution case. Doubtless one reason for not expanding the caution is that this point is too subtle to be easily understood by a suspect. The effect of breach of the Judges Rules is not (as with the confession rule) automatic exclusion of the evidence; instead the court has a discretion, usually exercised in favour of admission except where there is some gross misconduct or unreliability is likely.

Our present position is very much a middle one. On the one hand, American law attempts to vindicate the right to silence more seriously; on the other hand, the English Criminal Law Revision Committee made recommendations which would make it more disadvantageous to stay silent.

In America failure to warn of the right to silence and of the right to a lawyer, supplied by the state if necessary, results in automatic exclusion of later confessions.[40] There is a right to have counsel present at meetings arranged by the police between a suspect and an eye-witness[41] but only after proceedings have been formally instituted by charge,[42] and there is no equivalent right where the witness makes identifications based on photographs.[43] These rights may be waived; but a long interrogation can then be used as evidence that they were not even though the police testify otherwise. Though Congress has abolished the doctrine so far as federal courts are concerned,[44] it con-

[39] In France interrogation by policemen only occurs at the delegation of a magistrate (*juge d'instruction*). In Italy interrogation of arrested persons occurs mainly in the presence of a magistrate: M. Scaparone, "Police Interrogation in Italy" (1974) *Crim. L.R.* 581.

[40] *Escobedo* v. *Illinois* 378 U.S. 478 (1964); *Gideon* v. *Wainwright* 372 U.S. 335 (1963); *Miranda* v. *Arizona* 384 U.S. 436 (1966). Similar rules have recently been introduced in Italy: M. Scaparone, "Police Interrogation in Italy" (1974) *Crim. L.R.* 581.

[41] *U.S.* v. *Wade* 388 U.S. 218 (1967).

[42] *Kirby* v. *Illinois* 406 U.S. 682 (1972).

[43] *U.S.* v. *Ash* 413 U.S. 300 (1973).

[44] Omnibus Crime Control and Safe Streets Act, 1968, s. 701.

tinues in state courts in the face of some attempts at limitation by a Supreme Court differently constituted now from the mid-sixties: thus it has recently been held that confessions can be used to challenge the accused's credibility if he contradicts them while testifying at the trial;[45] and counsel are not required at line-ups before indictment.[46]

The arguments for this position are that the law guarantees the right to silence and to a lawyer; if warnings need not be given the intelligent are favoured over the ignorant, the rich over the poor, the habitual offender, who has learnt his rights from experience, over the possibly innocent man experiencing his first brush with the police. There are about four thousand *nisi prius* jury trial judges in America, few appointed for life; police must be controlled by rigid rules, not by any judicial discretion. Many of their techniques may produce an untrue confession in that they entail asking for the accused's assent to a relatively innocuous version of what he has done, which is then presented in court, deliberately or because of a misunderstanding, as a confession to a much more serious crime. The opposing point of view might be summarized in the words of one of the dissenting American judges: "Society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law."[47] Confessions are said to be vital to proof of guilt, because only rarely will the police be able to find witnesses or some material piece of evidence which leads them to the offender; and most confessions are not made spontaneously but require appropriate conditions—privacy, ample time to extract and check a story, and sometimes "unfair" interrogation tactics.[48] The presence of a lawyer interferes with detection, because "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances".[49] The application of the *Miranda-Escobedo* doctrine to admissions speedily extracted from the accused by a few questions the moment the police meet him produces particular formalism and difficulty for the police.[50]

Experience does not always support the factual basis of some of these assertions. In the 3576 jury cases studied by Kalven and Zeisel, the prosecution offered a confession in only 19% of cases, but most often in serious cases: 43% of homicides, 30% burglaries, 27% rapes, 16% assaults, 3% drugs offences, 1% drunken driving.[51] (Often, no doubt, confessions are used to provide leads to material evidence or witnesses, or cause the accused to plead guilty.) A study concluded that in New Haven, Connecticut there had been more admissible confessions since *Miranda* rather than fewer. Though one-quarter of suspects were given no warning at all, and the majority were not given the full warnings, more of those who were warned confessed than those who were not. It may be that the police always warned those they thought were on the point of making a confession to ensure its admissibility. The full warnings were given where the police had enough evidence to go to trial, but not enough for conviction. If there were a lot of other evidence against the accused they did not bother. An unintended effect of the warnings was that "on several occasions . . . a suspect seemed to be thrown off guard. . . . He apparently thought that if the police could give these warnings they must

[45] *Harris* v. *New York* 401 U.S. 222 (1971).
[46] *Kirby* v. *Illinois* 406 U.S. 682 (1972).
[47] *Miranda* v. *Arizona* 384 U.S. 436, at 517 (1966) per Harlan, J.
[48] Inbau and Reid, *Criminal Interrogation and Confessions* (2 ed., 1967), 4-142.
[49] *Watts* v. *Indiana* 338 U.S. 49, at 59 (1949) per Jackson, J.
[50] E.g. *Orozco* v. *Texas* 394 U.S. 324 (1969).
[51] *The American Jury* (1966) 142.

have him."[52] Suspects often failed to understand the point of the warnings, perhaps because of the bored police manner of giving them. In most cases where interrogation was used the police had enough evidence to convict the suspect without it; the purpose of interrogation was simply to confirm the case or discover accomplices.[53]

The English Criminal Law Revision Committee go to an opposite extreme. They recommend that if the accused fails to mention before or at the time of charge any fact on which he subsequently relies in his defence and which could reasonably have been expected to be mentioned during questioning, the court may draw whatever inferences of fact may be appropriate. Delay in advancing a story commonly suggests it is false, unless there is some other reason for delay. At present the law is that no inferences can be drawn from silence *in the presence of a policeman*.[54] In other circumstances silence may as a matter of commonsense amount to an implied admission, either because it evidences consent to what is put to the accused, or because it shows a consciousness of guilt, but under the present law all that the jury may be told is that they may think the weight of the accused's story is reduced by his failure to tell the story to the police as early as possible so that they could have the opportunity of investigating it. The jury may not be told that guilt can be inferred from silence. This is a difficult distinction for judge and jury to draw.[55] The Committee did not think it "unfair" indirectly to compel the accused to speak by the risk of adverse inferences being drawn from silence. The same regime will apply to failure to speak to persons who are professional investigators, whether state employees, or such persons as shop detectives. The inference of guilt is not automatic: it must be reasonable. "Obviously there may be reasons for silence consistent with innocence. For example, the accused may be shocked by the accusation and unable at first to remember some fact which would clear him. Again, to mention an exculpatory fact might reveal something embarrassing to the accused, such as that he was with a prostitute. Or he may wish to protect a member of his family."[56] The jury must decide, after appropriate judicial direction, whether in the light of such circumstances an adverse inference should be drawn. (Other matters they will doubtless consider will be the extent of the witness's confusion, fear, and lack of memory at the time of questioning; the extent to which he speaks and understands English, or is articulate. These are precisely the matters a jury is well-equipped to understand and evaluate.) The Committee proposes that the Judges Rules cautions should no longer be required: they conflict with the proposals made, they tend to deter an innocent person from saying something which might clear him, they encourage the guilty to keep back false stories until a time when it is difficult to prove them false. A new warning is proposed by which the possible unfortunate consequences of silence will be explained by a written

[52] (1967) 76 *Yale L.J.* 1519, at 1573.

[53] See also an article by Clark, J. (who dissented in *Escobedo* and *Miranda*), "Gideon Revisited" (1973) 15 *Arizona L.R.* 343, at 351 n. 47: "district attorneys tell me that the percentage of confessions is about the same. What the case has done is to teach the constabulary that confessions are suspect and that they must investigate all leads. Now when a confession is not admitted in evidence, the prosecution has other admissible testimony on hand with which to proceed."

[54] *Hall* v. *R.* (1970) 55 Cr. App. Rep. 108.

[55] Cross considers the distinction to be more formalistic still: *An Attempt to Update the Law of Evidence* (1974) 15. See also Zuckerman, 36 *M.L.R.* 509 (1973). Among the relevant cases are *R.* v. *Ryan* (1966) 50 Cr. App. Rep. 144; *R.* v. *Hoare* (1966) 50 Cr. App. Rep. 166; *R.* v. *Sullivan* (1967) 51 Cr. App. Rep. 102. See Heydon (1974) 1 *Monash L.R.* 53.

[56] Para. 35.

notice at the time of charge. The remaining aspects of the Judges Rules (to do with the recording of interrogations and provision for refreshment and rest) should be covered in administrative directions given by the authority responsible for the police, not the judges.

Is there a right to a lawyer during interrogation in our system? It is asserted principally in the preamble to the English Judges Rules. Assertions in the Judges Rules are not binding on the police or even the courts; but any formal statement of the views of judges must have great weight in a legal system of which they are the high priests. Police refusal of a lawyer must be very frequent.[57] But the consequences of this remain obscure. It may be evidence that the confession is involuntary because of oppression: if at 10 p.m. the accused wanted a lawyer and would not confess, what can have caused him to change his mind by 6 a.m.? The Committee's view on these matters is unstated, though a member has since denied any intention to restrict access to lawyers.[58]

The Committee's recommendations caused a storm in England and elsewhere, and it seems likely that their presence in the Report will prevent its other less controversial proposals from being adopted for some time. To consider some of the points more fully made since the Report, it is certainly arguable that American law took a wrong turning when it reasoned that since the first eight Amendments to the Constitution protect such fundamental rights as freedom of religion of the press and of speech, and since the Fifth Amendment protects the right to silence (the privilege against self-incrimination), the right to silence must equally be fundamental to the proper operation of a liberal democracy. It has acquired "a borrowed radiance from its close connection with these other rights which are genuine essentials of ordered liberty. It has gained a sort of sanctity by association."[59] Another very forceful point is that the Committee's proposals would if nothing else rationalize the law and make it clearer—"would spare the judge from talking gibberish to the jury, the conscientious magistrate from directing himself in imbecile terms and the writer on the law of evidence from drawing distinctions absurd enough to bring a blush to the most hardened academic face."[60]

Thirdly, at present the lies of a person under questioning may be admitted as showing a consciousness of guilt, and "the confused or frightened suspect is much more likely to tell untruths than to rest stolidly upon a 'right of silence', which takes a lot of doing when questions are persistently put to you."[61] It is odd that a jury is permitted to draw the commonsense inference of a consciousness of guilt from a lie, but cannot employ identical reasoning in the case of silence.

It might also be noted that quite serious inroads have been made into the right to silence in England and in some Australian states (e.g. New South Wales) without anything remotely resembling the hostile reception given to the Criminal Law Revision Committee. By the Criminal Justice Act 1967 (U.K.) s. 11 and the Crimes Act 1900 (N.S.W.) s. 405A, an accused is precluded from even raising an alibi defence unless he gives advance notice of his intention and certain particulars of how he will prove it. The point is that the later the

[57] Zander, "Access to a Solicitor in the Police Station" (1972) *Crim. L.R.* 342.
[58] Cross: "A Very Wicked Animal Defends the 11th Report of the Criminal Law Revision Committee" (1973) *Crim. L.R.* 329, at 331.
[59] McCormick: *A Handbook of Evidence* (1 ed., 1954), 290.
[60] Cross, (1973) *Crim. L.R.* 329, at 333.
[61] Williams, (1975) 13 *J.S.P.T.L.* 183, at 190.

police learn of possible defences, the harder it is to verify or falsify them. Why should not what is sauce for the goose of the improbable and uncheckable alibi defence also be sauce for the gander of any other improbable and uncheckable defence?

The case against the Committee may be put the following way. First, though in the last century and a half many changes have occurred increasing the efficiency of the criminal trial and favouring the accused, some changes have injured his position. An organized police force has grown up with much more power than the accused. In some sense a criminal trial must be a game rather than an inquiry into truth: an innocent suspect lacks the means to track down and question witnesses, and hence most criminal defences must depend on a technicality or an appeal to the heaviness of the burden of proof resting on the prosecution because the accused has no more straightforward way of having his innocence declared. Though doubtless professional criminals in their turn are stronger than the police, it is not clear that the problems of dealing with a small minority of suspects would be used as a ground for seriously disadvantaging the vast bulk of suspects of whom some are innocent. Another change is that proportionately many more accused are now tried without jury, so that their chances of acquittal are much less than with a jury. Further, substantial inroads have been made by statute into the placing of a heavy burden of proof on the prosecution, and offences of strict liability have become much more common. Though lawyers are more frequently available for serious charges and in superior courts, this is much less true of minor charges and inferior courts, and still less true of out-of-court interrogations.

Secondly, the Committee's reliance on the fact that about half those tried on indictment are acquitted may be misleading. The vast bulk of criminals are tried without jury and convicted. Further, one may accept the correctness in an ideal world of the aphorism that "every acquittal . . . may . . . be regarded as an injustice, for either a guilty man has been freed or an innocent man has been wrongly put on trial".[62] But there are good reasons for acquittal compatible both with efficiency and civil rights.[63] The acquittals include those directed by the judge for want of evidence, cases withdrawn from the jury by the prosecution, and cases where a technical procedural error of the prosecution's making has occurred. So serious a lack of evidence could not be fully met by inferences from silence. And many reasons for acquittal operate independently of the right to silence. There is the odd perverse verdict, inevitable under any system; there are cases where prosecution witnesses perform unexpectedly poorly. There are cases not strongly advanced by the police but brought to satisfy a particular claimant or local pressure, or to deter future crimes by the fear of the trial itself. There are cases where the police believe strongly and no doubt with reason in the accused's guilt (because of his record or other inadmissible evidence), and hope that though success is unlikely the accused may share their own belief in guilt, particularly if the accused's defence is mishandled. And high acquittal rates may be more due to shortages of men and equipment, and public apathy, than to rules of evidence.

Thirdly, though no doubt the jury can decide whether the suspect had an intelligible reason for silence, to draw inferences from silence will force

[62] Coutts (ed.): *The Accused* (1966) 4.
[63] McCabe and Purves: *The Jury at Work* (1972).

suspects to speak; and the jury may not comprehend the ways in which the innocent may, with the unwitting aid of the police, help to convict themselves. Most suspects are not strong, intelligent and articulate. They are in a frightening situation; they may misunderstand the true significance of questions. They may have forgotten the correct answer during interrogation but remember at the trial, suspicious though this often is. People are commonly unable to sort out and state the factual aspects of their problems clearly even after time for studied reflection and discussions with friendly legal advisers. In a more hostile atmosphere they are prone to ramble, to tell foolish lies in an attempt to terminate questioning instead of saying truthfully "I don't remember", to contradict themselves, and to provide all kinds of evidence which to a later observer may constitute evidence of guilt.

Fourthly, it is odd that the accused should have to disclose the basis of his defence in advance when no similar duty rests on the prosecution other than in the charge and in committal proceedings.

Fifthly, there is some risk of fishing expeditions—of a suspect being asked many questions without the police telling him what charge they have in mind.

Sixthly, whatever the case for there being a duty to answer the police, there can be little for a duty to answer private persons like shop detectives who are not controllable by or accountable to the public.

Finally, a duty to answer out-of-court questions raises serious risks of misunderstanding and misreporting by the police.

On balance the propoal to allow the jury to draw inferences from silence is undesirable, at least without the safeguard of either taperecording (as the minority of the Committee wanted) or a lawyer. This leaves the present law in a somewhat unsatisfactory position, for there is no practice of warning the jury of the limited present value of silence. If we believe in the right to silence without hypocrisy, we must support a much more careful warning on the status of silence than is usually given; but to stress silence in this way may attract the jury's attention to it and suggest to them the presently forbidden question: "Would an innocent man stay silent?" Indeed, a true right to silence would entail no reference at the trial to the accused's pre-trial silence, which is not the present law and which no defender of the right seems to have advocated.

The English Criminal Law Revision Committee and the United States Supreme Court are usually represented as being at opposite poles on this point. If we look at the right to silence in isolation, this is so. But they would be at one if the Committee had supported the right to a lawyer and if the Court permitted inferences to be drawn from silence. If there were a seriously enforced right to a lawyer, much of the danger of out-of-court interrogation would vanish. It would then be proper to draw such inferences from silence as seemed reasonable; a lawyer who advised silence would be backing his opinion of reasonableness against the jury's, and a lawyer who advised against it could hear exactly what his client said and prevent ill-treatment and police misunderstanding. Such a position accords with the spirit of the Committee's Report, which favours admission on grounds of reliability so far as expedient. It takes no account of any fundamental right to silence, which is often asserted and defended, particularly in America, in fervent and almost dogmatic terms without reference to any utilitarian purpose recognition of such a right might serve. It might be said also that it would be unwise for the right to a lawyer

to become as universal in our law as it is there.[64] The suspect should be allowed to speak spontaneously and to submit to brief interrogation without a lawyer in circumstances of urgency; his lawyer's proper role arises just before longer, more leisurely interrogations.

Silence in Court

In England the law is that the accused may make an unsworn statement at his trial on which he cannot be cross-examined; and since 1898 the accused has had a right to testify on oath in his own defence. If he fails to exercise it, the judge, counsel for the accused, and counsel for any co-accused, but not prosecution counsel, may comment on his silence.[65] In normal cases, "the accepted form of comment is to inform the jury that, of course, [the accused] is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that while the jury have been deprived of the opportunity of hearing his story tested in cross-examination the one thing they must not do is to assume that he is guilty because he has not gone into the witness box."[66] In essence, then, silence must not be taken as an admission; its effect is simply to leave the prosecution story stronger for being uncontradicted by the accused, who in many cases will be the man best able to contradict it.[67] However, no comment should be made where there is some reason for silence, such as the accused's insanity or diminished responsibility at the time of the events in question which may prevent his remembering them; or there is some evidence that he may be wishing to protect others; or he is justifiably fearful of being cross-examined on his record.

Often jurymen, by their statements in court or as reported by their fellow jurors in later recollections, reveal a knowledge of the accused's right to testify (and indeed its possible connection with a criminal record). There is hence a risk that the jury will themselves draw the forbidden inference of an admission of guilt from silence unless told not to. But there is no requirement that in every case the judge must comment on the possible correct and incorrect inferences from silence, except where the silence may possibly be admissible as corroboration. The argument against a universal warning is this: it would stress the accused's silence to the jury in cases where the judge thinks that the silence is explicable on proper grounds and that the jury would be least likely to draw any improper inferences if allowed to forget about it. The fear is that even after a warning as to the right and wrong inferences the jury will choose the wrong. If these doubts are well-founded, perhaps the jury should go. If they are not, we should have a *nearly* universal warning.

The above position is again a middle one. In some Australian states[68] and in America there is no judicial or prosecution right to comment.[69] On the other hand, the English Criminal Law Revision Committee have gone to the

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[64] Cf. *Orozco* v. *Texas* 394 U.S. 324 (1968).

[65] Criminal Evidence Act 1898 s. 1(b); *Waugh* v. *R.* (1950) A.C. 203; *R.* v. *Sparrow* (1973) 2 All E.R. 129.

[66] *R.* v. *Bathurst* (1968) 2 Q.B. 99, at 107-8.

[67] This seems the only conclusion to be drawn from the case law. Cross takes a different view, by which inferences of guilt may be drawn from silence, though judicial comment should not be explicit about those inferences. If Cross is correct, this makes the present law even more ludicrous than otherwise, and the distinction drawn by the judges, which is difficult to discern in any case, becomes almost entirely a formal one. See *An Attempt to Update the Law of Evidence* 10-11.

[68] New South Wales and Victoria.

[69] *Griffin* v. *California* 380 U.S. 609 (1965). Indeed the jury should only be told to disregard the accused's silence if defence counsel have requested such an instruction, since it tends to draw the jury's attention to the accused's silence: *U.S.* v. *Woodmansee* 354 F. 2d 235 (1965).

other extreme. First, and one would have thought not very controversially, they recommended the abolition of the accused's right to make an unsworn statement at the trial. It was granted in the nineteenth century to help overcome the accused's incapacity to testify; it is not needed now that he can testify. The fact that the accused, if unrepresented, has to be told of the right to make an unsworn statement, can only confuse him needlessly. Perhaps the only legitimate purpose of the unsworn statement is that it gives the accused with a record a means of raising a defence which involves imputations on the prosecution. This purpose no longer applies where more tender rules as to the cross-examination of the accused on his record apply; it is therefore strange that in New South Wales in 1974 the Legislative Council, while consenting to a statute making cross-examination as to the accused's record much more difficult, would not consent to the abolition of the unsworn statement. In spite of this, the Committee's recommendation has been attacked.[70] The fact that unrepresented defendants can necessarily make speeches in their defence is said to lead to the result that the abolition of the unsworn statement makes represented defendants worse off than unrepresented ones: the latter will be able to make factual assertions in their speeches. It is to be hoped that this technical difficulty will disappear as legal representation becomes more common. Giving sworn evidence is little more lengthy than giving unsworn. It is said that an accused may have many possible good reasons for not testifying; but since any reason a man has for not testifying in public is presumably also a reason for not giving unsworn evidence in public, we will consider the point in reviewing the right to silence generally. It is therefore thought the unsworn statement's days are numbered, and that it should die unlamented.

The second major recommendation of the Committee is more radical. It is that once the judge decides there is a case for the defence to answer, the judge should tell the accused he will be called on to testify as the first defence witness; and that if he fails to do so, the jury may draw such inferences as to his guilt as suggest themselves on the facts. The only exception to this is where the physical or mental condition of the accused makes it undesirable for him to testify. In this way the jury will be permitted to draw inferences from silence at the trial similar to those recommended respecting silence during police interrogation. Since there will already be a *prima facie* case against the accused the inference that silence may not merely (as at present) strengthen the prosecution case by leaving it uncontradicted, but may amount to an admission or other evidence of guilt will usually be stronger for in-court than out-of-court silence. Prosecution comment on silence is to be permitted; the judge may direct the jury as to the wider inferences possible. Similar inferences may be drawn from refusal to answer any particular question, except where the judge considers the question improper, or it is prohibited (e.g. because it improperly raises the accused's character), or the accused can invoke some privilege (e.g. legal professional privilege or the privilege against self-incrimination).

This group of proposals is much less open to attack than those made for out-of-court silence. Many of the *bona fide* reasons for silence are taken account of, such as insanity, or a privilege. It is wrong to say, as the English Criminal Bar Association does, that the proposal would "force persons into the witness

[70] Bar Council *Memorandum on the 11th Report of the Criminal Law Revision Committee*, para. 82.

box on the flimsiest and most unsatisfactory allegation of crime".[71] But are there legitimate reasons for silence not taken account of?

First, it is said that the uneducated or inarticulate need the protection of a right to silence, as do foolish persons who harm their cause by lying on immaterial points. Whatever the position as to out-of-court silence, such persons need a right to silence much less in court. The chance of being misunderstood or misreported is much less; there is less likelihood of panic and confusion; the accused will often be legally represented; counsel and judge will protect him from oppressive questioning; he will have had a chance, with legal advice, to work out his story carefully and in detail. The entire atmosphere is one which favours the accused against the prosecution; it is quite unlike that of the police station.

Secondly, the right to silence is said to prevent the accused from being forced to disclose conduct on his or another's part which though non-criminal is highly embarrassing. The English Criminal Bar Association say: "in practice, for instance in sexual cases, an accused may invite complete ruin in his private life by subjecting himself to cross-examination on his association with the complainant, even when the actual allegation is entirely untrue".[72] To this there are several answers. Clause 5(5)b) of the Committee's draft Bill recognises a general discretion in the court to excuse a sworn accused from answering particular questions. Further, if the accused in the example put remains silent, he will run the risk of being convicted, particularly since the jury in practice are likely to use his silence as the basis of an inference against him. Such an accused's problem would be caused not by the cross-examination he would suffer, but by the false charges of his accuser, which are going to be repeated by the accuser on oath whether or not the accused is cross-examined about them.

Thirdly, the right to silence enables the accused to protect others. Bentham styled this "an act of martyrdom perfectly heroical, and the more heroical, the fitter a subject for a play or a romance. But the more heroical, the more rare; and therefore less fit a subject to constitute a ground for the steps of the legislator".[73]

Fourthly, it is said to be wrong to remove an accused's freedom to refuse to testify if "his legal advisers tell him there is no case in law against him or . . . the evidence against him comes from a demonstrably unreliable source".[74] But the Committee's proposals only come into play when there is held to be a case to answer. If that case depends on an unreliable source, then a failure to answer may not give rise to any inference at all; the accused will be balancing the advice of his lawyer against the likely reaction of the twelve triers of fact in the jury-box.

Fifthly, the right to silence enables an accused with a record to escape cross-examination on it. The record can only be revealed in cross-examination if the accused gives evidence of his own good character or attacks either the prosecutor, the prosecution witnesses, or a co-accused.[75] The precise circumstances in which these events may be held to have occurred are undoubtedly unpredictable. It is said to be safer for an accused to avoid the problem by

[71] Bar Council *Memorandum* para. 29.
[72] Bar Council *Memorandum*, para. 82.
[73] *Works* VII. 5. i. 1.
[74] Bar Council *Memorandum*, para. 82.
[75] See the Criminal Evidence Act 1898 (U.K.) s. 1(f) and its Australian descendants, discussed in J. D. Heydon (1974) 7 *Syd. L.R.* 166.

silence. Kalven and Zeisel's figures show that this is likely to be the real reason for silence in America, where the record of an accused who testifies is more likely to be admitted than in England or Australia. 18% of the accused in their cases were silent. Of those with a record, 26% did not testify. Of those with a record where the case was strongly in their favour, 47% did not testify.[76] But this argument cannot have weight in jurisdictions such as New South Wales, which have made cross-examination on the record less likely.[77]

Finally, even though the accused unsuccessfully submits to the judge that the prosecution have made out no case for him to answer, so that the conditions in which the Committee proposes that inferences may be drawn from silence exist, it is still possible for the accused to be acquitted by the jury. The jury will usually be more defence-minded than the judge, and in any event there is a considerable difference in the quantum of evidence needed for a *prima facie* case and that needed to prove a case beyond reasonable doubt. The accused's counsel can sometimes estimate this difference accurately; he can confidently and properly advise his client that he will be acquitted without having to testify. It is said to be wrong to destroy this possibility by permitting inferences from the accused's silence to make up the difference between a *prima facie* case and proof beyond a reasonable doubt. On the other hand, a man against whom the state has proved a *prima facie* case might be said to have some duty to explain himself, or at least may properly be made to run the risk that a jury will draw inferences from his silence and will differ from the opinion of the accused's counsel on the strength of the case against him.

In general innocent men are eager to tell their story, at least after long reflection before the trial and in the relatively friendly and secure atmosphere of a court. The cases when they are not eager are special ones; the cases when the reasons for this want of eagerness are legitimate are rare. A sane man will rarely do himself an injustice in the box, so the risk of him being wrongly convicted for a bad performance as a witness can be discounted: the jury will distinguish between a liar and a nervous man. The accused will normally only expose himself to cross-examination on his record if the court or his advisers make a serious blunder. A rule which would operate satisfactorily in standard cases and badly only in a few should be adopted.

In America this aspect of the right to silence is often defended because it prevents the accused being subjected to the "cruel trilemma of self-accusation, perjury or contempt".[78] The trilemma under the proposal being considered is between self-accusation, perjury, and the risk of conviction partly based on inferences from silence. But the trilemma is only cruel if a guilty man is being considered; and the cruelty of his situation proceeds from his own actions, not from a harsh legal system. An innocent man will only be the victim of the trilemma where he is seeking to protect others, and cases where this is not obvious to judge and jury will be rare. There are arguments for a general right to silence—of the public, even of suspects outside the court. There are arguments for witnesses other than the accused having a privilege against incriminating themselves, for this encourages them to come forward and tell the truth. But once the State has shown a *prima facie* case,

[76] Kalven and Zeisel, *The American Jury*, 143-8.
[77] By amendments made in 1974 to the Crimes Act: see ss. 413A and 413B.
[78] *Murphy* v. *Waterfront Commission of New York Harbour* 378 U.S. 52, at 55 (1964) per Goldberg, J.

it cannot be regarded as inquisitorial or inhumane to ask the accused to explain it *in court*; nor can it be regarded as violating privacy or making things too easy for the State. On balance the Committee's proposals seem preferable to either the present law or the American alternative.

What are our conclusions? We favoured more confessions being admitted; we had doubts about permitting inferences to be drawn from silence during interrogation, at least unless interrogation was recorded and the right to a lawyer became more real; we favoured inferences being drawn from silence at the trial. Throughout there has been apparent conflict between putting as much evidence before the jury as possible, and using the law to serve other values—the protection of privacy, the discipline of the police, the avoidance of prejudice. The conflict appears to be based on conflicting moral demands—between the punishment of the guilty on the one hand and the protection of various individual rights on the other. But is there really a conflict? These matters are more agitated in our age than formerly because there is more concern about acquitting only the innocent and convicting only the guilty, *and* because there is more concern about individual rights for a wider section of the population. These aims do not necessarily conflict. On the other hand, we have noticed internal conflicts within each set of aims. Sometimes the aim of increasing the relevant evidence before the jury is internally conflicting: the easier it is for evidence to be admitted, the less likely it is that the accused will confess at all. Sometimes the other aims are internally conflicting: the more the police are disciplined by rules of evidence, the worse they may behave; the more evidence is "prejudicial" to the accused, in one sense of that word, the more rationally open is the conclusion of his guilt; the more suspects are warned to be silent, the less likely are innocent ones to give explanations which will cause their speedy release. To consider a more elaborate example, the demand for greater access to lawyers may reduce the accused's protection; for the sort of lawyer who is always available may fall into one of two classes. Either he will be paid by the state at levels which only the young, inexperienced but intensely "sympathetic" will accept, so that the accused will always be advised to stay silent and thus harm himself; or there will arise a class of lawyer always ready to answer police calls, incapable of equally profitable work in other ways, and, when it may be important to oppose police wishes, unwilling to do so through fear of removal from the police list.

The dichotomy between reliability and other aims of the system which runs through so much discussion both in the Anglo-Australian system and in America may be to a large degree false; and where it is not false it may be fairly easy to strike a compromise. But that will not be possible until it is realised how great a strain on commonsense is caused by parts of the present law—the commonsense of judges, jurors, policemen and observers of our system.