

ENGLAND LIMITS THE RIGHT TO SILENCE AND MOVES TOWARDS AN INQUISITORIAL SYSTEM OF JUSTICE

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I. INTRODUCTION

Britain's Parliament has adopted Prime Minister John Major's proposal to significantly curtail the right to silence.¹ The new law will allow judges and juries to consider as evidence of guilt both a suspect's failure to answer police questions during interrogation and a defendant's refusal to testify during trial.² Supporters of the new law had argued that change was greatly needed because the right to silence was "a charade which [has been] ruthlessly exploited by ter-

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¹ Royal Assent, Nov. 3, 1994, effective March 1, 1995. In England, until Major's amendment, the right to silence provided that: "The failure of an accused person when questioned to mention some fact which he afterwards relies on in his defense cannot found an inference that the explanation subsequently advanced is untrue, for the accused has a right to remain silent. . . . The failure of the accused to testify on his own behalf may not be made the subject of any comment by the prosecution. . . . The judge may, in an appropriate case, make a comment. . . . but he should make it clear to the jury that failure to testify is not evidence of guilt and that the accused is entitled to remain silent and see if the prosecution can prove its case." 11(2) Halsbury's Laws OF ENGLAND 937-38 (1990) (citations omitted). The right to silence is protected by the Fifth Amendment to the Constitution of the United States: "No person shall . . . be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V. It has also been adopted in the International Covenant on Civil and Political Rights (hereinafter "Covenant"), which provides that "everyone shall be entitled . . . not to be compelled to testify against himself or to confess guilt." Art. 14 (3)(g), 61 I.L.M. 368, 372 (1967). Both the United States and the United Kingdom have, by treaty, adopted the Covenant. UNITED STATES DEPT. OF STATE, TREATIES IN FORCE 343 (June 1993). The treaty entered into force for the United States on Sept. 8, 1992. 51 I.L.M. 645 (1992).

² The Criminal Justice and Public Order Act, 1994 Part III, §§ 37-31 (Eng.) [hereinafter Public Order Act]; Heather Mills, *Tougher Policies Aimed at Helping Victims of Crime*, THE INDEPENDENT (London), Nov. 19, 1993, at 6; Michael Zander, *Abandoning on Ancient Right to Please the Police*, THE INDEPENDENT (London), Oct. 6, 1993, at 25 (editorial); *Hammond's Beginning*, THE TIMES (London), Oct. 7, 1993, at 17 (editorial); *British Rights Groups Criticize New Crime Bill*, CHI. TRIB., Nov. 19, 1993, § 1, at 18.

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ronists."³ Proponents had also diminished the significance of the proposed changes, contending that the accused's silence will simply become "an item of evidence . . . scarcely a major infringement of a defendant's liberty . . . [and that the change] . . . should dissuade offenders from thwarting prosecution simply by saying nothing."⁴

These views, however, contradicted the conclusions of two publications released by the Royal Commission on Criminal Justice in 1993⁵ and spurred the vocal opposition of a number of groups. Those who opposed Major's proposal noted that even the innocent have valid reasons for remaining silent, and that the proposal would not reduce crime,⁶ but would increase the likelihood of false confessions and erroneous convictions.⁷ Those opposed to Major's proposal also argued that it would undermine the presumption of innocence and erode England's accusatorial system of justice.⁸

Major's new law will curtail the right to silence by allowing judges and jurors to draw adverse inferences when a suspect remains silent. It is the latest in a series of similar proposals by English police and politicians,⁹ and it adopts restrictions on the right to silence which Parliament imposed on Northern Ireland in 1988.¹⁰ The new law contains four parts: (1) judges and jurors may draw adverse inferences

³ Mills, *supra* note 2, at 6.

⁴ *Hammond's Beginning*, *supra* note 2, at 17.

⁵ THE ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT, 2263 (hereinafter REPORT); ROGER LING, THE ROYAL COMMISSION ON CRIMINAL JUSTICE, RESEARCH STUDY NO. 10, 1993 (hereinafter LING).

⁶ *The Right to Silence*, THE ECONOMIST, Jan. 29, 1994, at 17 (editorial).

⁷ Reasons for silence include "the protection of family or friends, a sense of bewilderment, embarrassment or outrage, or a reasoned decision to wait until the allegation against them has been set out in detail and they have had the benefit of considered legal advice." REPORT, *supra* note 5, at 52.

⁸ Zander, *supra* note 2, at 25 (The right to silence is "based on the presumption of innocence, and reflects the burden thrown on the prosecution to prove the defendant guilty, without any assistance from the defendant if he so chooses"; John Jackson, *Inferences from Silence: From Common Law to Common Sense*, 44 N. IRELAND LEGAL Q. 103, 108 (1993) (The use of adverse inferences after the prosecution has established only a prima facie case shifts a burden to the accused to testify or have his silence add the prosecution in carrying its burden of proof. This violates the accusatorial principle that it is the prosecutor's duty to prove the accused's guilt.); *The Right to Silence*, *supra* note 6, at 17 (editorial) taking issue with the move to curtail the right to silence, arguing that it is an assault on the presumption of innocence and the burden of proof).

⁹ CRIMINAL LAW REVIEW COM. ELEVENTH REPORT ON EVIDENCE (GENERAL), CMD. 4991, ¶¶ 28-45 (1972) (describing similar proposals); see also THE ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT, 1981, CMD. 8092, ¶ 4.51 (Jan. 1981) (rejecting a similar proposal as contrary to a central element of the accusatorial system—that the prosecution bears the burden of proof).

¹⁰ The Criminal Evidence (NI) Order (hereinafter Order), enacted Nov. 14, 1988, eff. Dec. 15, 1988, cited in J.D. JACKSON, *Curbing the Right to Silence: Lessons from Northern Ireland*, 1991 CANN. L. REV. 404, 405.

when suspects do not tell the police during interrogation a fact relied upon by the defense at trial if, under the circumstances, the suspect could have been expected to mention the fact; (2) if the accused does not testify, judges and prosecutors may invite the jury to make any inference which to them appears proper—including the "common sense" inference that there is no explanation for the evidence produced against the accused and that the accused is guilty;¹¹ (3) judges and jurors may draw an adverse inference when suspects fail to respond to police questions about any suspicious objects, substances, or marks which are found on their persons or clothing or in the place where they were arrested; and (4) judges and jurors may draw adverse inferences if suspects do not explain to the police why they were present at a place at or about the time of the offense for which they were arrested.¹²

The new law purports to control crime by curtailing the right to silence, forcing suspects to confess, and thereby increasing convictions. While similar proposals have surfaced with great fanfare in the past, and have been adopted in Northern Ireland and Singapore, there is little or no evidence that they reduce crime.¹³ Police failure to obtain confessions has not led to the release of significant numbers of criminals. In fact, only a small percentage of suspects fail to answer police questions, and evidence reviewed by the Royal Commission suggests that they are convicted at a slightly higher rate than suspects who answer police questions.¹⁴ Moreover, even if Major's new law increases confessions and convictions, it will not reduce crime, because if the criminal justice system has a failing, it is not found in the low percentage of cases lost in courts, but in the high percentage of cases where the criminal is never caught. For example, while only twelve percent of reported crimes end up in court, over ninety percent of those cases end in conviction.¹⁵ Even if Major's new law does not follow the pattern of similar proposals, and succeeds in incre-

¹¹ See *infra* notes 154 to 155.

¹² Public Order Act, *supra* note 2, §§ 34-37. Compare Order, *supra* note 10.

¹³ See *infra* notes 118 to 136 and accompanying text; David Dixon, *Politics, Research, and Symbolism in Criminal Justice: The Right to Silence and the Police and Criminal Evidence Act, 20 Anglo-Am. L. Rev.* 27 (1991); Jackson, *supra* note 10; Meng Heong Yeo, *Diminishing the Right to Silence: The Singapore Experience*, 1983 *Can. L. Rev.* 89, 94-95 (no evidence that adverse inferences increased confessions).

¹⁴ A study by the Royal Commission found that suspects remained silent in 4.5% of cases in which interviews took place. LANG, *supra* note 5, at 17. According to a study cited in another report of the Royal Commission, 41% of those who had been silent were acquitted compared to 49% of those who had answered police questions. REPORT, *supra* note 5, at 53 (citing T. Williamson & S. Moston, *The Extent of Silence in Police Interviews*, in *THE RIGHT TO SILENCE* DEANITZ (Steven Greer & R. Morgan eds., 1990)).

¹⁵ *The Right to Silence*, *supra* note 6, at 18.

mentally raising the number of confessions and the conviction rate, it will do nothing about the vastly greater number of cases where no suspect is caught. Indeed, the Royal Commission concluded that adverse inferences would increase neither confessions nor convictions.¹⁶ The lack of evidence supporting the use of adverse inferences as a means of controlling crime has not deterred supporters of such measures in England, or even in the United States.¹⁷ Given that the ability of Major's new law to control crime is questionable, perhaps its appeal is purely symbolic.¹⁸

Forcing or strongly inducing suspects to talk, however, has practical consequences. The new law could prompt false confessions by weak suspects and erroneous convictions of those who, although innocent, failed to offer cogent explanations for their behavior or who became confused. More significantly, curtailing the right to remain silent will shift the criminal justice system from its *accusatorial* focus on proof by witnesses and extrinsic evidence, to an *inquisitorial* focus on the interrogation of suspects to gain evidence of their guilt. This change will undermine the accusatorial system of justice, jeopardizing many of its benefits. Among these benefits is the foundation of an open and democratic society—a strictly limited government, restrained in its ability to compromise individual dignity, privacy, and autonomy. Such a move is inconsistent with the inherent distrust of authority which helped shape limited and democratic government.¹⁹

¹⁶ LANG, *supra* note 5, at 79-80.

¹⁷ Major's plan was released just months after the Royal Commission issued two reports which indicated that adverse inferences would not produce the benefits suggested by proponents and discussed the problem which could result if the use of adverse inferences was adopted. REPORT, *supra* note 5; LANG, *supra* note 5. See also United States Dept. of Justice, Office of Legal Policy, *Adverser Inferences from Silence*, 22 U. Mich. J.L. Rev. 1005, 1120-21 (1989) (part of the Department's "Truth in Justice" series, this paper suggests adopting adverse inferences from silence in the United States to remove a "shelter" for the guilty and provide an incentive to the accused to testify); David Heitbroner, *The Law Goes on a Treasure Hunt*, N.Y. Times Magazine, Dec. 11, 1994, at 70, 73 (Justice Department drafts a proposal to allow adverse inferences to be used against persons whose property is subject to forfeiture in drug cases).

¹⁸ Dixon, *supra* note 13, at 32-34 (discussing proposals to curtail the right to silence in the context of the symbolism of legal reforms). See also Steven Greer, *The Right to Silence: A Review of the Current Debate*, 53 Mod. L. Rev. 709, 724 (1990) (discussing the symbolic importance of the right to silence and of the moves to curtail the right).

¹⁹ I WAYNE LAFAVE & JEROLD ISRAEL, *CANAL PROCEDURE* § 1.6 (1984). MARGAN R. DAMASKA, *THE FACIES OF JUSTICE AND STATE AUTHORITY* 90-91, 164-65 (1986). Professor Damaska has noted that both England and the United States have traditionally limited the state to a modest role in managing society, relying instead on the capitalist system and voluntary associations. In such a system, justice primarily serves to mediate conflicts between citizens or associations. But by contrast, in activist states, justice serves state policy, and neither privacy nor autonomy justifies a citizen's failure to cooperate during interrogation or trial. The citizen is not a sovereign subject, but an object of state action and a source of evidence.

England's new limits to the right to silence could influence policy in the United States. One cannot escape the significance of the fact that, as Ronald Dworkin noted, "the ancient right [to silence] is about to be extinguished in the nation which invented it."²⁰ Moreover, unlike Singapore, which has adopted similar limits, Britain is a democracy; it has not become a police state, and citizens may still criticize the government.²¹ This democratic context makes the new limits on the right to silence appear more credible and less extreme.

Like their counterparts in England, some American law enforcement officials have advocated limiting the right to silence. For instance, in 1989, the United States Department of Justice advocated adopting a litigation strategy to urge the Supreme Court to allow adverse inferences from silence to remove a "shelter" for the guilty and provide an incentive for the accused to testify.²² Others have denied the right to silence as a "relic of the Star Chamber" which is no longer relevant in today's criminal justice system and have advocated limiting the right, and adopting the inquisitorial system of justice in the United States.²³ Advocates of this view could find a responsive audience in the United States, as the press, the public, and politicians focus on crime and an extraordinary array of proposals aimed at its control.²⁴ Thus, England's attempt to control crime by limiting the right to silence merits close study, especially in light of the potentially fundamental impact of such a change on the American system of

²⁰ RONALD DWORCIN, *A BILL OF RIGHTS FOR BRITAIN* 9 (1990) (emphasis added).

²¹ *Id.* at 1; Merrill Coozner, *Behind its Crisp Exterior, Singapore Flies on Fear*, *CHI. TRIB.*, Apr. 25, 1994, § 1, at 1 (detailing limits on political dissent and expression in Singapore).

²² United States Dept. of Justice, Office of Legal Policy, *supra* note 17, at 1120-21. Because the right to silence is protected by the Fifth Amendment, the paper urged adopting a strategy to persuade the Supreme Court to allow adverse inferences. In England, by contrast, there is no Bill of Rights, and Parliamentary action is supreme. An act of Parliament limiting the right to silence is therefore not appealable to any court. Anupam Chander, *Sovereignty, Referenda, and the Enfranchisement of a United Kingdom Bill of Rights*, 101 *YALE L.J.* 457 (1991); Dworkin, *supra* note 20, at 9.

²³ Charles Maechling, Jr., *Truth in Prosecuting: Borrowing From Europe's Civil Law Tradition*, A.B.A. J. 59, 60 (Jan. 1991).

²⁴ Tom Brazaitis, *Americans Brutalized by Crime Statistics*, *CLAY. PLAN DEALER*, Aug. 22, 1993, at C2; David Broder, *Congress Passes Off Political Rhetoric as Crime-Fighting*, *CHI. TRIB.*, Jan. 26, 1994, § 4, at 17; Marco R. della Cava, *Brutal Reality Hits Home in Denver*, *USA TODAY*, Oct. 28, 1993, at 1D; Francis X. Clines, *As Gunfire Gets Closer, Fear Comes Home*, *N.Y. TIMES*, Dec. 12, 1993, § 4, at 1; Ted Gest et al., *Violence in America*, *U.S. NEWS & WORLD REP.*, Jan. 17, 1994, at 22; *GOP: Stiffer Prison Terms Needed*, *CHI. TRIB.*, Jan. 27, 1994, § 1, at 12; Charles M. Madigan, *Law-and-Order Responses Failing to Root Out Causes*, *CHI. TRIB.*, Nov. 28, 1993, § 4, at 1; Sam V. Meddis, "Brutalized" Public Lives with Growing Fear, *USA TODAY*, Oct. 28, 1993, at 6A; Sam V. Meddis & Robert Davis, *Police Get Tougher on Crime*, *USA TODAY*, Oct. 28, 1993, at 1A; Elaine Povich, *It's a Federal Offense*, *CHI. TRIB.*, Nov. 14, 1993, § 4, at 1; Katharine Seelye, *House Takes Up Measures to Provide Billions More to Fight Crime and Build Prisons*, *N.Y. TIMES*, Mar. 14, 1994, § B, at 6.

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II. THE DEVELOPMENT OF THE RIGHT TO SILENCE AND THE ACCUSATORIAL SYSTEM

The development of the right to silence in England spanned hundreds of years²⁵ and was intimately tied to the great struggle between rival systems of criminal procedure—the accusatorial common law courts and the inquisitorial ecclesiastical courts.²⁶ These systems were fundamentally divided on a key method of investigation and adjudication: reliance on the accused to furnish testimonial evidence and come to guilt. The common law courts disfavored this method and came to rely primarily upon independent evidence. By contrast, confession was the essential component of the inquisitorial system employed by the ecclesiastical courts. In the battle between these systems, the common law system has maintained the upper hand in England and has helped shape that nation's—and later the United States'—system of limited, democratic government²⁷ and accusatorial criminal procedure.²⁸

²⁵ Professor John Henry Wigmore and Professor Leonard Levy trace this struggle back to the early 1200s. LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 13-24 (2d ed. 1986); 8 JOHN H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* 269-70 (John T. McNaughton Rev. 1961).

²⁶ Wigmore divides this process into two phases. During the first phase, from about the 1300s into the 1600s, individuals used the right to silence as a defense when forced by ecclesiastical courts to take the oath *ex officio* and accuse themselves of offenses. During the second phase, beginning in the early 1600s, accused persons began to assert the right to remain silent when asked incriminating questions in common law courts. WIGMORE, *supra* note 25, at 269-70; see also LEVY, *supra* note 25, at 13-24; 1 MCCORMACK ON EVIDENCE 421 (John W. Strong ed., Practitioner Treatise Series, 4th ed. 1992). See *infra* notes 63-86 and accompanying text for discussion of the fight against the oath not only in the common law courts, but in the Crown's prerogative courts of the Star Chamber and the High Commission.

²⁷ For example, during the sixteenth and seventeenth centuries, the Crown's prerogative courts, the High Commission, and the court of the Star Chamber ignored common law and Parliament's laws and forced testimony through the oath *ex officio*. Many of those subjected to this procedure challenged the authority of the prerogative courts to assert such power by appealing to the common law courts. Some succeeded by obtaining writs of prohibition from common law judges, including Lord Coke. In Coke's time, however, King James' assertion of the supremacy of the Crown over the law, capsulized by his ad *Elizmere* as *rex est lex loquens* (the King is the law speaking) won out, and Coke was forced to retire from the bench. LEVY, *supra* note 25, at 229-55.

²⁸ According to Wigmore, this struggle was "composed in part of the inventions of the early canonists, of the momentous contest between the courts of the common law and of the church, and of the political and religious issues of that convulsive period in English history, the days of the dictatorial Stuarts." WIGMORE, *supra* note 25, at 269; see generally LEVY, *supra* note 25.

A. RIVAL SYSTEMS OF CRIMINAL PROCEDURE

Until early in the thirteenth century, both systems relied upon trial by compurgational oath and trial by ordeal, including ordeal by battle, as methods of adjudication.²⁹ By early in the thirteenth century, trial by compurgational oath or "cononical purgation," had fallen into disuse as it had become little more than a corrupt swearing contest. Under this method, the accused, often with the support of others, would take an oath of denial. Although in earlier times reporters had to have personal knowledge of the event at issue, this requirement fell by the wayside; instead, arcane and complex forms of oath came into use. If the swearer erred, the oath was considered "burst," and the swearer's falseness was revealed.³⁰ Until early in the thirteenth century, trial by ordeal was the primary method of adjudication. Its verdicts were considered just because the result of the ordeal was viewed as a divine judgment.³¹ In 1215, however, the Fourth Lateran Council removed this divine rationale and barred the clergy from administering ordeals.³² This helped prompt both systems to find new methods of adjudication.³³

The division between the two systems became pronounced early in the thirteenth century, a period when both common law and ecclesiastical courts maintained spheres of jurisdiction in England.³⁴ While most offenses were tried in common law courts, ecclesiastical courts had wide jurisdiction and were not limited to what people today might consider religious affairs. For instance, they tried cases involving "sins of the flesh" such as fornication and adultery, and miscellaneous offenses such as usury, disorderly conduct, and drunkenness.³⁵ Early in the fourteenth century, attempts were made to limit the ecclesiastical courts' jurisdiction over laymen to matrimonial and testamentary matters. These limits did not, however, remain fixed and were not rigidly enforced.³⁶ Consequently, the ecclesiastical courts continued to touch the lives of many ordinary citizens.

²⁹ LEVY, *supra* note 25, at 9-14.

³⁰ *Id.* at 5-6, 9.

³¹ *Id.* at 9-14.

³² *Id.* at 14.

³³ WICKMORE, *supra* note 25, at 273 (the ecclesiastical courts also employed compurgational oaths. As in the common law courts, these came to be little more than a farce).

³⁴ *Id.* at 270-71 (the history of the development of the right to silence begins in the early 1300s, a period when the ecclesiastical courts still maintained a large jurisdiction and influence).

³⁵ LEVY, *supra* note 25, at 43-44.

³⁶ See WICKMORE, *supra* note 25, at 271 (citing "De Articulis Cleri," 1 Statutes 209, 2 Inst. 600 (Lord Coke)) (the limits on ecclesiastical jurisdiction did not remain fixed and was a contentious issue for hundreds of years).

In common law courts, trial by ordeal waned early in the thirteenth century and was replaced by early forms of trial by jury. In the first phase of these early trials, the jury of "presentment" decided whether there was sufficient evidence to put a person on trial.³⁷ This guaranteed the right, established in Magna Carta, not to be put on trial without first being charged by credible witnesses.³⁸ Until the sixteenth century, the presenting jury was comprised of local persons who often had personal knowledge of the charge.³⁹

In making what amounted to a charging decision, the jury of presentment could not interrogate accused persons or call them to take an oath. This rule was summarized in a famous maxim: "No one is bound to inform against himself . . . but, when exposed by public repute (*fama*), he is held (*tenetur*) and permitted (*licet*) to show, if he can, his innocence and purge himself [by taking a purgation oath]."⁴⁰ Some commentators, including Wigmore, have argued that during the early development of the jury trial, the right to silence only applied to this initial phase of the criminal process, and not to adjudication.⁴¹

A presenting jury originally decided only if there was a common belief in the accused's guilt. If so, a formal charge would be made and the accused would stand trial. It did not decide guilt or innocence.⁴² Since abolition of ordeals in the thirteenth century eliminated the primary method of adjudication, judges began to fill the gap by asking presenting juries to adjudicate guilt and enter verdicts, often after adding other members of the community to the jury.⁴³ Allowing the same jury which had already decided to make an accusation also to decide guilt or innocence was deemed unfair.

³⁷ LEVY, *supra* note 25, at 15-17.

³⁸ Chapter 28 of Magna Carta provided that: "No Bailiff from henceforth shall put any man to his open Law, nor to an Oath, upon his own bare saying, without faithful witnesses brought in for the fame." 1 THE STATUTES AT LARGE, FROM MAGNA CARTA TO THE END OF THE ELEVENTH PARLIAMENT OF GREAT BRITAIN, ANNO 1761, 19 (1762). For a general discussion, see LEVY, *supra* note 25, at 14.

³⁹ LEVY, *supra* note 25, at 15, 35.

⁴⁰ LEVY, *supra* note 25, at 5-6, 9; WICKMORE, *supra* note 25, at 258-69 n.1(2). The requirement that public repute first be established was honored in the breach: "(I)n England, ex officio procedure as practiced recognized little necessity of presentment by common report, or violent suspicion." Mary Hume Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England*, in ESSAYS IN HISTORY AND POLITICAL THEORY 199, 203 (1936).

⁴¹ In the view of some commentators, such as Wigmore, during the thirteenth century, common law did not differ from the inquisitorial system in its use of the oath; the two systems differed merely about who should have the right to put someone under oath and how it should be done. WICKMORE, *supra* note 25, at 271.

⁴² LEVY, *supra* note 25, at 15.

⁴³ *Id.* at 16.

Consequently, two separate juries developed—a presenting jury and a trial jury—and the accused were given the right to challenge trial jurors as personal enemies or false accusers.⁴⁴ By 1352, the accused also had the right to challenge jurors to assure that they were not generally predisposed to convict and that they would render a fair decision. Within another century, the jury evolved from a collection of well-informed witnesses to an independent and disinterested decision-maker which based its judgement on evidence presented in court, rather than on personal knowledge.⁴⁵

The ecclesiastical courts' new method of investigation and adjudication was the inquisitorial oath, with which they attempted to elicit a confession from the suspect and use it as the primary form of evidence. According to Professor Levy, this method grew out of the ecclesiastical inquest. Such an inquest was based on interrogating persons under oath. For example, a traveling bishop charged with rooting out heresy would put parishioners under oath and closely question them to obtain denunciations of heretics. Initially, the investigating bishop could not adjudicate the guilt or innocence of the accused.⁴⁶ This changed in approximately 1200 when Pope Innocent III extended the bishops' role to adjudication.⁴⁷

The move toward the use of inquisitorial methods in the ecclesiastical courts accelerated when the Fourth Lateran Council eliminated the ordeal as a form of adjudication and filled the gap with three new methods of investigation and adjudication, each of which relied on the inquisitorial oath.⁴⁸ The first method, the *accusatio*, was the old method of adjudication where private persons voluntarily accused others, took on the burden of proving their accusation, and also accepted the risk of being punished if they failed. The second method, the *denunciatio*, also used a private accuser, but eliminated the burdens and risks by allowing that person to act essentially as an informer who secretly denounced the accused to a judge, who then acted as a prosecutor. In the third method, the *inquisitio*, the judge acted as accuser, prosecutor, judge, and jury.⁴⁹

Inquisitorial procedures set almost no limit on who a judge could imprison and put to an inquisition. A judge required only that "*in fama*"—infamy or a bad reputation—attached to the suspect. This

⁴⁴ *Id.* at 16-18.

⁴⁵ *Id.* at 18-19.

⁴⁶ *Id.* at 22.

⁴⁷ *Id.*

⁴⁸ The Fourth Lateran Council also ratified the bishops' role in adjudication. *Id.* at 22; Wignore, *supra* note 25, at 275 n.28.

⁴⁹ Levy, *supra* note 25, at 23; Wickmore, *supra* note 25, at 275 (the *inquisitio* "became a favorite one for heresy trials").

could be established by common report (*fama*), notorious suspicion (*clamosa insinuatio*), or even by the judge's own suspicions.⁵⁰ In practice, judges usually ignored even these weak limits on putting a person through an inquisition.⁵¹ The absence of evidence at this stage was no impediment since the system relied on the next stage, the inquisitorial process, to extract the evidence from the mouth of the accused.

At the start of inquisitorial proceedings the accused was forced to take an oath *de veritate dicenda*, to answer all questions honestly. This oath was designed to induce self-incrimination, because confession was the engine of the inquisitorial process. The chance that anything the accused said could be construed or twisted to mean something incriminating was greatly improved because the accused was kept ignorant of the charges, the accusers, and the evidence. If the content of the accused's statement could not, itself, convict the accused of a crime, it still might subject him to punishment for perjury. While the hazards of taking the oath seem overwhelming, the suspects had no choice. If they did not take the oath, they could be considered guilty *pro confesso*, as if they had confessed,⁵² or they could be imprisoned for contempt. In some cases, suspects faced the threat of imprisonment for life if they remained silent.⁵³ In England, the oath *de veritate dicenda* became known as the oath *ex officio*—because in the proceedings a judge served *ex officio* as accuser, indictor, and convictor.⁵⁴

While objections to the oath and inquisitorial methods quickly developed, England did not enforce the accusatorial system for hundreds of years. In 1246, the zealous Bishop of Lincoln administered the oath to investigate and prosecute sexual misconduct. This effort provoked protest strong enough to move Henry III to order local Sheriffs to bar the use of the oath in all but matrimonial and testamentary cases.⁵⁵ Early in the next century, Parliament adopted this prohibition. Despite such formal prohibitions, the church continued to use the oath to root out heretics and enforce religious orthodoxy, first by the Catholic church, and later by the Anglican establishment and the Crown.⁵⁶

By the sixteenth century, significant opposition to the oath and

⁵⁰ Levy, *supra* note 25, at 24.

⁵¹ See *supra* note 35 and accompanying text. "[I]n England, *ex officio* procedure as practiced recognized little necessity of presentment by 'common report' or 'violent suspicion.'" Maguire, *supra* note 40, at 203.

⁵² Levy, *supra* note 25, at 23-24. The accused of that age also took seriously the threat of damnation for lying under oath. *Id.*

⁵³ *Id.* at 152, 152-53, 150, 156, 173.

⁵⁴ *Id.* at 24.

⁵⁵ *Id.* at 47.

⁵⁶ *Id.* at 47-48, 63-69.

inquisitorial methods began to develop. In 1525, William Tyndale published the first New Testament in English, in which he highlighted with commentary a section from Matthew condemning oaths, and urged opposition to them. In 1528, he expanded on his views in a tract condemning the oath as a violation of a person's conscience.⁵⁷ In 1532, John Lambert, in fighting a heresy prosecution, was possibly the first person to deny the oath as illegal. He argued that no one could be forced to take the oath without first being charged by credible witnesses through a jury of presentment.⁵⁸ That year, the respected lawyer and scholar Christopher St. Germain also published a tract attacking the ecclesiastical courts in general, and the oath in particular. He argued for the supremacy of the common law over canon law, and alleged that the oath unfairly forced the accused to testify without proper accusation and put the innocent at risk more than the guilty.⁵⁹ Finally, that year, Parliament petitioned the King for redress from the oath, objecting to its imposition before fair and open accusation, and to its use before the accused was shown clear charges.⁶⁰

In the mid-sixteenth century, the struggle between officials who sought to use the oath and individuals who asserted a right to silence shifted its main battleground from the religious arena to the center of the political stage, as religious revolutions swept England. Ecclesiastical matters became matters of state when Henry VIII formed the Anglican church, installed himself at its head, and denied the authority of Rome. After Henry, Mary's reign brought a violent reaction, as she swung England back to Catholicism. Just as violent were Elizabeth's efforts to bring the church back under the Crown's authority.⁶¹

⁵⁷ Tyndale translated Matthew as follows: "it was said to them of old tyme, thou shalt not forswere thyselfe, but shalt performe thine othe to god. But I saye unto you, sweare not at all . . ." *Id.* at 62-63. McCormick cites St. Paul's Epistle to the Hebrews as a possible biblical source of the right to silence: "I don't tell you to display that [your sin] before the public like a decoration, nor to accuse yourself in front of others." McCormick ON EV-DENCE, *supra* note 26, at 421 n.2 (alteration in original).

⁵⁸ Levy, *supra* note 25, at 62. See *supra* notes 37 to 41 and accompanying text for discussion about the jury of presentment and the *Magna Carta*.

⁵⁹ Levy, *supra* note 25, at 64-65.

⁶⁰ *Id.* at 66-67.

⁶¹ Henry VIII employed the oath and the inquisition in his efforts to solidify Anglican supremacy. *Id.* at 69-76. The Catholic Queen Mary used a strong High Commission and Star Chamber to solidify Catholic supremacy at the expense of protestants, prosecuting them as heretics. *Id.* at 76-77. These courts' use of inquisitorial methods provoked opposition and helped foster arguments supporting the right to silence. *Id.* at 77. When Elizabeth took power, she simply reversed the roles of protestants and Catholics. *Id.* at 83-91. Under Elizabeth, the punishment for treason was "a peculiarly gory one, deliberately intended to be a spectacle of horror." *Id.* By 1585, approximately 176 Catholic priests and laymen met this fate. *Id.* at 87. Through Parliament's Act of Supremacy, the Crown took

Parliament recognized this authority in the Act of Supremacy, which gave the Crown power over all ecclesiastical matters, and allowed the delegation of this power to commissioners.⁶²

In the last half of the sixteenth century, ecclesiastical matters became matters of state, and religious violations became treasonable. Not surprisingly, the Crown adopted ecclesiastical methods—the inquisition—to enforce religious and political orthodoxy. Consequently, the tools which the Crown used in this effort, the Court of High Commission and the Court of the Star Chamber, became the central battleground in the development of the right to silence.⁶³ While both institutions could impose the oath and force testimony, the High Commission did not allow the accused to know the charges, or to be represented or assisted by counsel.⁶⁴

By early in the fourteenth century, the Court of the Star Chamber had developed from its birth as part of the King's Council into a judicial body. In its early years as a judicial body, its proceedings were secret and its methods were largely within its own discretion. These methods included inquisitorial techniques, the use of secret informers, and even torture.⁶⁵ By 1580, however, the Star Chamber had become less fearsome. Its proceedings were open, and its jurisdiction was generally limited to enforcing royal orders. Although it could still administer torture, branding, and imprisonment, it did not exact the most severe penalties, such as dismemberment or death.⁶⁶ This relatively moderate trend ended late in the sixteenth century as the Crown began to use the Star Chamber along with the High Commission as inquisitorial enforcers of religious and political orthodoxy.

⁶² Ecclesiastical powers, including those of the courts. *Id.* at 95. As Protestantism was re-established, Catholics became both heretics and traitors. *Id.* at 66-76, 83-92, 95.

⁶³ *Id.* at 83-85, 100-01, 106, 184-86. As authorized by the Act of Supremacy, the Crown delegated its power over religious matters to the High Commission which, by 1576, began to resemble a tribunal. Its procedures were, if anything, more repressive than those of the Star Chamber. *Id.* at 123.

⁶⁴ In attacking the High Commission's procedures, James Morice noted that, by contrast, the common law courts and even the Star Chamber in most cases, assured that the accused "hath a knowe accusor, and perfect understandyng of the cause or crime objected, and therewithall is permitted to have a copie of the bill of complaint or information . . . and tyme convenient, and counsel learned well to consider and advise of his oathe and answer." *Id.* at 182-83 (quoting James Morice, A BRIEF TREATISE OF OATHES EXACTED BY ORDNANCES AND ECCLESIASTICAL JUDGES, TO ANSWERS GENERALLIE TO ALL SUCH ARTICLES OR INTERROGATORIES, AS PLEASETH THEM TO PRODUCE. AND OF THEIR FORCED AND CONSTRAINED OATHES EX OFFICIO, WHEREIN IS SHOWED THAT THE SAME ARE UNLAWFULL 38-39 (1600 ed.)).

⁶⁵ The court's name came from early references to its meeting room, a chamber with stars painted on the ceiling. *Id.* at 49, 51-53.

⁶⁶ *Id.* at 100-01, 106.

B. THE CLASH OF RIVAL SYSTEMS

The inquisitorial methods of the Crown soon came into conflict with the common law courts. As early as 1568, Lord Chief Justice Dyer of the Court of Common Pleas granted a writ of habeas corpus freeing a prisoner who was being forced to take the oath. In granting the writ, Dyer was the first to justify objecting to the oath in what became a famous maxim: "*nemo tenetur seipsum prodere*," or, no man shall be forced to produce evidence against himself.⁶⁷ While Dyer viewed this maxim as having derived from the canon law, its historical origins and justification remain vague. This ambiguity about the source of the maxim was common during the late sixteenth century, as a variety of reasons were articulated to justify silence when the oath was imposed. For instance, when Puritan Thomas Cartwright was accused of religious offenses, he argued that the oath invaded an individual's privacy, violated that person's conscience, and was against religious principles.⁶⁸

Soon, common law and the Magna Carta became the primary justifications for opposition to the oath. Respected lawyer and member of Parliament James Morice argued that the oath violated common law by presuming the accused guilty and forcing them to prove that presumption true.⁶⁹ To Morice, this violated chapter twenty-nine of the Magna Carta, which assured that criminal proceedings would be governed by the law of the land as established by Parliament, and not by the Crown and its special courts.⁷⁰ According to opponents of the oath like Morice, Parliament had barred the use of the oath in 1534, when it repealed a law dating from 1401 which had given bishops the power to use inquisitorial techniques.⁷¹ In addition, they believed that the methods of the Crown's inquisitorial courts violated chapter twenty-eight of the Magna Carta, which required proper presentment before the oath.⁷² Some opponents even asserted that chapter twenty-

⁶⁷ According to Justice Dyer in Leigh's case, in cases involving life or limb "the lawe compelled not the partie to sweare, and avouched this place, *nemo tenetur seipsum prodere*." *Id.* at 96, 105.

⁶⁸ *Id.* at 177.

⁶⁹ *Id.* at 194-96. Morice also viewed the procedure as a violation of privacy. *Id.* at 196. In addition, he decried it as unfair, because the methods allowed questioners to confuse suspects, and then convict them from the confused words taken from the suspect's own mouths. *Id.* at 66.

⁷⁰ *Id.* at 194-95.

⁷¹ *Id.* at 180-81, 195. The Act of 1401, *De Haereticis Comburendis*, (concerning the heretic who must be burned) had authorized bishops to use inquisitorial techniques to root out and burn heretics. *Id.* at 57-62. In 1534, when Henry VIII himself fought the church, Parliament succeeded in repealing the law, an enactment which did not stop Henry from carrying on his own inquisitions which resulted in the deaths of 51 heretics. *Id.* at 68-69.

⁷² *Id.* at 171, 235-36.

eight barred the oath outright regardless of proper presentment.⁷³

These arguments against the Crown's use of inquisitorial procedures rested upon the assumption that both the Magna Carta and the common law limited the Crown's sovereignty and that Parliament, as a source of the common law, limited the Crown's sovereignty. Not surprisingly, the Crown did not agree with these assumptions and it continued to impose the oath. By the seventeenth century, the struggle over the oath and the right to silence became a struggle of Parliament and the common law courts against the Crown.⁷⁴ For example, early in the seventeenth century Parliament made four attempts to reaffirm chapter twenty-nine of the Magna Carta, hoping to force the Crown to adhere to the procedures of the common law courts.⁷⁵

The common law courts were also active during this struggle. Perhaps the ablest champion of their position was Lord Coke. As Chief Justice of the Court of Common Pleas, Lord Coke asserted the preeminence of the common law courts and set clear limits on the Crown's ecclesiastical courts. His opportunity came in Fuller's case, when the judges of the King's Bench sought his advice on how to resolve the King's demand to punish Nicholas Fuller, an attorney and member of the House of Commons. Fuller had aggressively attacked the High Commission when he sought writs of habeas corpus from the King's Bench to free his clients from a High Commission prosecution. In his report on Fuller's case, Coke wrote that the judges had resolved that, while the ecclesiastical courts were competent in their own sphere, they enjoyed their jurisdiction only through Parliament's authority, and common law courts could rule on the limits of that jurisdiction. Applying these principles, the court authorized the High Commission to punish Fuller only for ecclesiastical offenses such as heresy, and not for any common law offenses.⁷⁶ Coke confirmed these principles by issuing a series of writs of prohibition, halting proceedings as contrary to the Magna Carta and the common law. These rulings asserted Parliament's power to make law, confirmed the individual's right to the benefits of common law, and evinced a hostility to the oath and inquisitorial procedures.⁷⁷

⁷³ *Id.* at 171.

⁷⁴ *Id.* at 217-28, 241-46.

⁷⁵ *Id.* at 227-28.

⁷⁶ *Id.* at 235, 238-40.

⁷⁷ These cases included writs of prohibition issued by Coke to bar prerogative courts from interrogating suspects. The writs were based on the justification that these courts were operating beyond their jurisdiction, that the subjects were entitled to the benefits of common law, and that Parliament, and not the King makes law. *Id.* at 244-47, 249. Coke's opinions, in combination, evince a general hostility to inquisitorial procedures. The case of Thomas Edwards stands as an example, and was chosen by Coke to appear in his Re-

Coke's rulings threatened to undermine the Crown's inquisitorial procedures and ultimately the supreme authority of King James. In response, King James dismissed Coke from the bench in 1616.⁷⁸ Despite this, the law began to limit the application of the oath and inquisitorial interrogation, and the right to silence began to develop. The Court of Star Chamber could force suspects to take the oath and subject them to interrogation only in cases of misdemeanors—where loss of life or limb was not possible—and then, only after they had been shown the charges against them.⁷⁹ Also, the High Commission barred the oath in criminal cases. While the oath could still be used against the clergy, ordinary citizens faced the oath only in testamentary and matrimonial cases.⁸⁰

These rules were gradually extended through the arguments of those objecting to the use of inquisitorial procedures.⁸¹ In addition, objections to the oath were no longer based primarily on the inquisitor's failure to provide proper presentment. Opponents of the oath argued more expansively, that it was wrong to coerce people to testify against themselves because such procedures violated human dignity and were contrary to the human instinct of self preservation.⁸²

As opponents of the oath began to articulate this more expansive

ports. *Id.* at 245-46; *Edwards' case*, 13 Coke's Rep. 9, at 10 (1609). The use of such writs had a long history, dating back to the thirteenth century when on the King's behalf writs were issued to halt ecclesiastical courts from using inquisitorial methods in cases beyond their jurisdiction. Levy, *supra* note 25, at 216-18.

⁷⁸ The King viewed his power as supreme, including his power to make law. Levy, *supra* note 25, at 242-43. Coke's view, that law stood over the word of the King, was naturally seen as a challenge to the Crown's supremacy. *Id.* at 253. After he was dismissed from his judicial role, Coke continued his fight against the oath as a member of Parliament. *Id.* at 261.

⁷⁹ *Id.* at 257.

⁸⁰ *Id.* at 256-57.

⁸¹ For instance, during an investigation into fraud and corruption by the House of Lords in 1620, witnesses and suspects were told that they would not be forced to incriminate themselves. In 1628 common law judges agreed that a suspect in a murder case could not be coerced into confessing. In a seditious conspiracy case a year later, suspects were only obliged to answer questions which did not concern themselves. In a 1631 rape prosecution, the suspect argued that he should not be examined "of those wherof he must accuse himself." *Id.* at 263-64.

⁸² *Id.* at 263. These views gained strength through Parliament's Petition of Right, for which Coke was a notable proponent. The Petition included objections to an oath and forced interrogation which was imposed by a special commission of the King seeking to compel individuals to contribute to a loan for the Crown. *Id.* at 262-63. It was in the debates on the Petition that Coke urged the supremacy of the law and the Parliament over the Crown: "I know that prerogative is a part of the law, but 'sovereign power' is no parliamentary word. . . . Magna Charta is such a fellow, that he will have no sovereign. I wonder this sovereign was not in Magna Charta, or in the confirmations of it. If we grant this by implication, we give a sovereign power above all laws." 2 CUTTSBERT W. JOHNSON, *THE LIFE OF SIR EDWARD COKE* 257 (2d ed. 1845); see also Levy, *supra* note 25, at 261.

view, England suffered a severely reactionary inquisition under King Charles and Archbishop Laud. Under Laud's power, the High Commission came to dominate the Star Chamber, and it reached into local districts where its influence had never before been felt.⁸³ Charles subjugated the courts and Parliament. Their petitions and writs objecting to the inquisition almost ceased.⁸⁴ The inquisition increased its practice of extracting incriminating statements through the vigorous use of the confession *pro confessa*. Under this practice, those who refused to furnish the evidence of their own guilt were treated as if they had confessed. This rule also applied when those who did answer had failed, in the opinion of the inquisitor, to do so fully, plainly, and directly. Supporters argued that these procedures were justified because the innocent had nothing to hide, and the truth could not hurt them. Only the guilty would therefore refuse to answer.⁸⁵

The prosecutions of John Lilburne proved to be a turning point in the conflict between the Crown and the supporters of the common law. The result was a victory for the right to silence and a devastating defeat for inquisitorial procedures in England.⁸⁶ The Star Chamber charged Lilburne with importing seditious books into England. Lilburne denied importing the books, demanded that he be charged and confronted by his accusers, and refused to take the oath or to answer any of the inquisitor's "impudent questions, for fear that with my answer I may do myself hurt."⁸⁷

In 1639 the Star Chamber found Lilburne guilty of contempt for his refusal to take the oath, jailed him until he agreed to do so, and sentenced him to corporal punishment. At his flogging, Lilburne preached to a large and sympathetic crowd about the injustice of the inquisition.⁸⁸ The political tide was turning against the Crown, however, as the first shudders of political revolution were felt in England.

⁸³ Levy, *supra* note 25, at 266-67, 270-71.

⁸⁴ *Id.* at 268.

⁸⁵ *Id.* at 269, 270-71.

⁸⁶ Lilburne actually suffered four prosecutions, and although he won his cases in court, he was eventually forced into exile and then imprisoned at Dover Castle. In 1637, at age 43, while at home on a parole, he died. *Id.* at 269, 273-300, 312; PAULINE GREENG, *FREEDOM JOHN, A BIOGRAPHY OF JOHN LILBURNE* 346 (1961).

⁸⁷ Lilburne and another prisoner were "remanded to the prison of the fleet, there to remain until they conform themselves in obedience to take their oaths, and to be examined. . . ." 3 THOMAS B. HOWELL, *A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CAPITAL AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783* 1323 (London, Paternoster Row Press 1824); Levy, *supra* note 25, at 273. Lilburne also invoked the Petition of Right, arguing that it barred the imposition of the oath. *Id.* at 277. See MCCORMACK ON EVIDENCE, *supra* note 26, at 423, for a brief discussion of Lilburne's trial.

⁸⁸ Levy, *supra* note 25, at 277; see also MCCORMACK ON EVIDENCE, *supra* note 26, at 423.

Soon Parliament and the Puritans gained power, and within two years of his flogging, Libburne's arguments against the oath began to gain the upper hand. In 1641, Parliament ruled Libburne's sentence illegal, abolished the Star Chamber and the High Commission, and barred the use of the oath in penal cases.⁸⁸ One year later, the right to silence was invoked and recognized in an impeachment trial of twelve Anglican bishops prosecuted before the Puritan-controlled Long Parliament for petitioning the King to protest their exclusion from the House of Lords.⁸⁹ The right to silence was firmly in place by 1688, when King James II prosecuted seven bishops for defying his edict abolishing all laws against nonconformists. In refusing to admit to signing a petition protesting the edict, Archbishop Sanctroft invoked his "lawful right to decline saying anything which may criminate me."⁹¹

With the elimination of the Crown's inquisitorial mechanisms, common law courts came to dominate the English criminal justice system.⁹² Building on common law traditions, the system moved towards an accusatorial model. This evolution was slow, and notable exceptions continued for hundreds of years. For example, the law did not guarantee that accused persons would be given a copy of the indictment and the opportunity to use counsel in their defense until 1696, and accused persons did not have the right to compulsory process in felony cases so they could call witnesses and have them testify under oath until 1701.⁹³ Indeed, until the late nineteenth century, the accused did not have the right to testify in their own defense in either England or the United States.⁹⁴ In England, until 1848, justices of the peace were permitted to closely question the accused at a preliminary examination.⁹⁵ Until 1965 in the United States, some states allowed

⁸⁸ LEVY, *supra* note 25, at 280-82.
⁸⁹ *Id.* at 284-85.

⁹¹ 2 THE WORKS OF LORD MACAULAY (Lady Trevelyan ed., 1865), *excerpted in* LAW AND JURISPRUDENCE IN AMERICAN HISTORY 15 (Stephen B. Presser & Jamil S. Zainabidin eds., 1989). At a preliminary proceeding, the bishops were asked to admit to signing a petition against the King's edict. In response, the bishops invoked their right to remain silent until personally ordered by the King to answer. He did and they replied affirmatively, but only based on the understanding that their answers would not be used against them—an implied immunity from prosecution. The jury's "not guilty" verdict in the case was deemed an affirmation of Parliament's power to make law.

⁹² LEVY, *supra* note 25, at 280-320.
⁹³ *Id.* at 321-23.

⁹⁴ Congress passed the law allowing the accused the right to testify in federal trials in 1878. *Wilson v. United States*, 149 U.S. 60, 65 (1893) (quoting the Act of Congress of March 16, 1878, ch. 37, 30 Stat. 30). In Britain, the accused was disqualified from interest from giving testimony under oath until 1899. LEVY, *supra* note 25, at 324.

⁹⁵ In England, pretrial examination of the accused by justices of the peace had been permitted since 1554 and continued until 1848. LEVY, *supra* note 25, at 325, 375; *see also*

prosecutors and judges to urge jurors to draw adverse inferences from an accused's silence—even though Congress had barred the practice in the federal courts in 1878. Until the 1994 revisions, judges in England could still do this to a very limited extent.⁹⁶ Over time, however, these exceptions continued to dwindle, and the accusatorial model took hold in both England and the United States.

III. THE ACCUSATORIAL SYSTEM.

The criminal justice system that has developed in England and the United States is an accusatorial system which imposes on the government the burden of proving a case through witnesses and extrinsic evidence, and which cloaks the accused in a presumption of innocence. The accusatorial system produces a wide range of benefits: it assures limited government, limits the abuse of suspects, and protects individual privacy, dignity, and free choice. It also renders accurate verdicts. In large measure, the vitality of this system and the benefits which it produces rest on its protection of suspects' right to remain silent.

The accusatorial system uses contested trials to resolve disputes between parties. Counsel represents each side and is responsible for framing the legal issues and presenting witnesses and evidence.⁹⁷ Then a neutral decision-maker resolves the case based upon the evidence presented by the parties.⁹⁸ The government's burden is two-

McCORMICK ON EVIDENCE, *supra* note 26, at 424 ("The practice of pre-trial examination (and the use of the results at trial) remained unmodified until 1848.").

⁹⁶ When Congress passed the law allowing the accused the right to testify in federal trials, it also provided that the accused's failure to testify "shall not create any presumption against him." *Wilson*, 149 U.S. at 65 (quoting the Act of Congress of March 16, 1878, ch. 37, 30 Stat. 30). In *Griffin v. California*, 360 U.S. 609 (1965), the Supreme Court ruled that the Fifth Amendment applies to the states through the Fourteenth Amendment and "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.* at 615. While English judges have to a limited extent been permitted to offer comment on the accused's failure to testify, the proper extent of this practice has been unclear. Jackson, *supra* note 8, at 106-07. Some commentary indicates that such judicial comment has been "made much more sparingly" or "almost apologetically." Greer, *supra* note 18, at 715 (quoting CAMMELL, LAW REVISION COMM., *supra* note 9).
⁹⁷ Abraham S. Goldstein, *Reflections on the Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1016 (1974); LAFAYE & ISHART, *supra* note 19, § 1.6, at 37.

⁹⁸ In an accusatorial system, the trier of fact relies upon the evidence presented by the parties in court. In an inquisitorial system, judges, as triers of fact, rely on the dossier, a written compilation of the evidence prepared before trial, often by the judges themselves. Note, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, 29 CALIF. J. TRANSNAT'L L. 245, 267-69 (1991) (discussing the dossier in the Italian system); *see also* Goldstein, *supra* note 97, at 1018-19 (discussing the French system). The adversary system relies on the parties, driven by their own self-interest, to gather and

fold: first, it bears the burden of going forward, which includes bringing the charge and presenting the case; second, it carries the burden of persuasion, which entails convincing the neutral decision-maker of the accused's guilt.⁹⁹ The government is able to bear the burden of proof better than a suspect. It has a superior ability to collect and preserve evidence and to assure that the trier of fact is aware of all relevant evidence. Imposing the burden of proof on the government also balances the government's superior resources over the individual.¹⁰⁰

Because the accused are presumed innocent and carry no burden, they may remain silent. If the prosecution fails to carry its burden and establish a prima facie case against the accused, the accused may be acquitted without producing evidence.¹⁰¹ The suspect's right to silence assures that government alone carries its burden¹⁰² "by evidence independently and freely secured," without compelling the accused to assist in this prosecution responsibility.¹⁰³ It prevents the

present more information and to critique the other side better than an investigating magistrate. By assuring the neutrality of the decision-maker, the adversary system also avoids the natural tendency present in the inquisitorial system of having the judge, who has compiled the evidence against the accused, favor the side of the prosecution. *LaFare & Israel, supra* note 19, § 1.6, at 40; JOHN H. MERRIMAN, *The Cmn. Law Tradition* 128-32 (2d ed. 1985) (outlining a view favorably disposed towards the methods of the modern inquisitorial systems).

⁹⁹ *LaFare & Israel, supra* note 19, § 1.6, at 43-44; *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) ("Governments are thus constitutionally compelled to establish guilt by evidence independently and freely secured").

¹⁰⁰ *LaFare & Israel, supra* note 19, § 1.6, at 43.

¹⁰¹ *Id.* § 1.6, at 42; *Wickmore, supra* note 25, § 2251, at 317. *See generally* *Murphy v. Waterfront Comm.*, 378 U.S. 52 (1964) (reviewing the history and policies behind the Fifth Amendment).

¹⁰² Some argue that an adversary but non-accusatorial system could operate without the right to remain silent, because while suspects could be forced to help the government carry the burden by being forced to answer questions, they would still be represented by counsel and pitted against their opponent, the state, in a contested trial. *See generally* *Cohlstien, supra* note 97, at 1016-17. However, without the right to silence, the accusatorial system could not function because it is based upon the requirement that the state furnish the evidence of the accused's guilt, a principle inconsistent with the requirement that suspects have the duty to furnish the evidence of their guilt. *LaFare & Israel, supra* note 19, § 1.6, at 42. In a prosecution the government must "shoulder the entire load alone." *Malloy*, 378 U.S. at 55 (quoting 8 *Wickmore*, ON EVIDENCE § 2251, at 317 (McNaughton Rev. 1961)).

¹⁰³ *LaFare & Israel, supra* note 19, at 43 (quoting *Teahan v. United States ex rel Schott*, 382 U.S. 406 (1966)). While this represents a statement of the accusatorial principle of American justice, it is not absolute. In theory, the American system might grant the accused opportunities to establish their guilt or encourage them to do so, but it does not compel them to assist in establishing their guilt. *Telex*, 382 U.S. at 414-16 (holding that the accused cannot be compelled to assist in establishing his guilt but can be encouraged to do so). Some argue that in practice the American system does in fact do the same thing by employing inquisitorial techniques. *See* *Goldstein, supra* note 97.

government from shifting the burden to the suspect by requiring suspects to speak and, in effect, to testify against themselves.

An accusatorial system and the right to silence limit government's power over the individual. Such limits are consistent with an essential component of the American constitutional structure: government has only limited, enumerated powers granted by the sovereign people.¹⁰⁴ According to Professor LaFare, the right to silence evinces Americans' inherent distrust of authority.¹⁰⁵ Because the accusatorial system favors proof by extrinsic evidence and witnesses, rather than reliance on proof by interrogation and confession, it helps to protect people's dignity by assuring that they remain free from humiliation and abuse at the hands of government investigators.¹⁰⁶ In contrast, an inquisitorial system creates an inherent hazard of abuse because of its reliance on interrogation and confessions. Governments too often have used inhumane and unreliable methods to obtain confessions. For example, at one time English common law permitted torture to obtain a confession.¹⁰⁷ In fact, the use of torture to obtain confessions persisted in treason cases even after it had been banned in general criminal cases.¹⁰⁸ Today, in both England and America, abusing suspects to obtain confessions has resulted in scandal and miscarriage of justice.¹⁰⁹

¹⁰⁴ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405-09 (1819) (holding that, although the federal government only possesses limited, enumerated powers, it also possesses the means to execute its limited powers); Federalist constitutional theory held that the people possessed sovereignty, and delegated limited, enumerated powers to the federal government. *ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 113 (6th ed. 1985).

¹⁰⁵ *LaFare & Israel, supra* note 19, § 1.6, at 43.

¹⁰⁶ *Id.* at 49.

¹⁰⁷ OTIS H. STRYKER, *SUPREME COURT AND CONFESSIONS OF GUILT* 18-19 (1973) (After the twelfth century, with the growing influence of the Roman Law, the use of torture to obtain confessions gained widespread acceptance. This practice continued until the seventeenth century in England's common law courts, although in England the practice was never as widespread as in France or Spain.) E. M. MORGAN, *The Privilege Against Self Incrimination*, 34 *MINN. L. REV.* 1, 15 (1949) (noting that one indication of the acceptance of the use of torture is that in 1597, Lord Coke, considered a champion of the right to silence, "personally conducted an examination by torture").

¹⁰⁸ During the mid 1700s, English courts began to set limits on the state's methods of gaining confessions. *Levy, supra* note 25, at 328-29. *See also* STRYKER, *supra* note 107, at 18-21 (briefly reviewing the move towards eliminating torture in England during the seventeenth century).

¹⁰⁹ *Kercock, supra* note 5, at 1 (the report was in part a response to miscarriages of English justice in which police abuses lead to unreliable confessions); *Steven Green, Miscarriages of Justice Reconsidered*, 57 *MOB. L. REV.* 58, 68-71 (1994); *STRYKER, supra* note 107, at 37-38, 43, 49 (discussing the use of torture to obtain convictions, including cases in the southern United States during the 1920s). *See also* *People v. Wilson*, 506 N.E.2d 571 (1987) (torture used to obtain a confession in a case involving the murder of two Chicago police officers).

An accusatorial system protects people's privacy by limiting the government's power to pry into their thoughts and conscience; it offers "respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life . . .'"¹¹⁰ The accusatorial system also affords people free choice over their fate because when suspected of a crime, they may choose whether or not to provide the government with evidence to aid in securing their own convictions.¹¹¹

The accusatorial system is also favored because of its effectiveness in producing accurate verdicts through its reliance on the adversary process and extrinsic evidence. In an adversary process, each side marshals arguments and evidence in its favor, while rebutting the other side's arguments and critiquing the other side's evidence. By relying on extrinsic evidence, the accusatorial system takes advantage of the testimony of independent witnesses, professional investigators, and expert witnesses capable of producing scientific evidence, such as fingerprint comparisons, DNA tests, blood and fiber analysis, and other forensic techniques.¹¹² By contrast, the inquisitorial system's reliance on interrogation can yield false confessions, and consequently, inaccurate verdicts. This is because under interrogation, weak suspects may falsely confess to crimes they never committed. Even strong suspects may falsely confess under interrogation. As early as the nineteenth century, courts recognized that extreme interrogation techniques—such as promises of freedom or benefit, torture, and threats—could render a confession unreliable.¹¹³ Justice Goldberg summed up the hazards of a suspect relying on confessions in *Escobedo v. Illinois* when he stated that a system "which comes to depend on the

¹¹⁰ *Tehan v. United States ex rel. Scharf*, 382 U.S. 406, 416 (1965) (quoting *United States v. Grunewald*, 233 F.2d 556, 581-82 (1956) (Frank, J. dissenting), *rev'd*, 353 U.S. 391 (1957)).

¹¹¹ *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

¹¹² See *supra* note 108 and accompanying text; see generally LAFAVE & ISRAEL, *supra* note 19, § 1.6 at 40.

¹¹³ *Regina v. Gurner*, 169 Eng. Rep. 267-68 (Q.B. 1848) (suppressing the confession of a thirteen-year-old girl charged with attempting to murder her mistress by poison as the product of an inducement because the was told it would be better for her to speak the truth). Even earlier, the common law began to recognize that some confessions could be unreliable, which could cause the conviction of innocent persons. In 1783 the English case *King v. Warickshall* established the rule that an unreliable confession could be excluded from evidence. 168 Eng. Rep. 234 (K.B. 1783) (distinguishing between reliable confessions, the court stated: "A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.") (citations omitted).

'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."¹¹⁴

The "essential mainstay" of this accusatorial system is the right to silence.¹¹⁵ Without it, the government could shift the burden of proof to the accused by requiring the accused to present evidence in response to questioning during interrogation and by requiring the accused to present a case in court by testifying during trial. If a government succeeds in curtailing this right and allows adverse inferences to be drawn, the presumption of innocence would also be imperiled. In effect, a mere accusation would create a presumption of guilt. If suspects failed to rebut this during interrogation and trial, a judge or jury could infer that they are guilty. Such a system would not rely on the government to prove guilt by extrinsic means, but on the accused to furnish the evidence of their own guilt, a shift that would encourage the reliance on confessions that Justice Goldberg decried.

IV. LIMITING THE RIGHT TO REMAIN SILENT

A. THE CONTEXT

Home Secretary Michael Howard announced the British government's decision¹¹⁶ to limit the right to silence at the Conservative Party conference in October 1993, as part of a package of criminal justice reforms aimed at "getting tough" on crime.¹¹⁷ By making this proposal, the Government revived a debate about curtailing the right to silence that dates to the early 1970s.¹¹⁸ The seminal report fueling this debate was a 1972 report by the Criminal Law Revision Committee (CLRC), which suggested that adverse inferences should be drawn against accused persons who failed to mention during interrogation a fact later relied upon in their defense.¹¹⁹ The report also recommended that adverse inferences should be drawn if the accused failed to testify at trial.¹²⁰

¹¹⁴ *Escobedo v. Illinois*, 378 U.S. 478, 489 (1964) (footnotes omitted).

¹¹⁵ *Tehan v. United States ex rel. Scharf*, 382 U.S. 406, 414 (1966) (quoting *Malloy v. Hogan*, 378 U.S. 1, 7 (1964)).

¹¹⁶ Public Order Act, *supra* note 2, §§ 94-97.

¹¹⁷ Mills, *supra* note 2, at 6; *Howard's Beginning*, *supra* note 2, at 17.

¹¹⁸ Greer, *supra* note 8, at 715-18 (discussing the chronology of the controversy during the seventies and eighties).

¹¹⁹ Criminal Law Revision Comm., *supra* note 9, ¶ 32 and Appendix, cl. 1 of the Draft Criminal Evidence Bill, cited in Lewie, *supra* note 5, at 2, n.5. In general, adverse inferences are discussed in the Criminal Law Revision Comm., *supra* note 9, ¶¶ 28-45.

¹²⁰ The report also recommended that adverse inferences should be drawn if, after a *prima facie* case had been established, the accused person failed to testify at trial. Criminal Law Revision Comm., *supra* note 9, ¶¶ 108-13 and Appendix, cl. 5 of the Draft Criminal

In 1976, the Republic of Singapore became the first government to adopt the recommendations of the CLRC.¹²¹ Singapore curtailed the right to silence, hoping to induce suspects to cooperate with the police in solving crimes, and to reduce the number of cases in which the police believed criminals went free because they kept silent.¹²² Until 1976, persons charged and tried for criminal offenses in Singapore enjoyed a right to silence resembling that found in England.¹²³ The new rules were embodied in an amendment to the Singapore Criminal Procedure Code (amendment).¹²⁴ Under the amendment, if suspects do not reveal to the police during questioning a fact which they could "reasonably have been expected to mention," the court may draw "such inferences from the failure as appear proper."¹²⁵ Also under the amendment, the accused face adverse inferences if they refuse to testify. Courts inform the accused, after the prosecution has rested its case, that if they should, "without good cause, refuse to answer any question, the court in determining whether [they are] guilty . . . may draw such inferences from the refusal as appear proper."¹²⁶

The CLRC's suggestions met with more resistance in England. In 1981, a Royal Commission on Criminal Procedure rejected the CLRC's proposals. The commission concluded that adverse inferences would shift the burden of proof to the accused and pressure innocent persons into false confessions.¹²⁷ In 1987, however, Home Secretary Douglas Hurd revived the debate when he argued in his Po-

Evidence Bill, in *LAWC*, *supra* note 5, at 2 n.8.

121 Criminal Law and Procedure Code (Amendment) Act, No. 10 (effective Jan. 1, 1977) (1976) (Sing.); Criminal Law Revision Comm., *supra* note 9; Yeo, *supra* note 13.

122 Yeo, *supra* note 13, at 90 ("The rationale for this amendment was that the law should afford greater assistance to the police and the prosecution in their fight against crime").

123 *Id.* at 89. Before the amendments, the Singapore police cautioned arrestees that they were not obliged to make a statement or answer questions. After the amendments, suspects were told that the court could draw an adverse inference from their silence, if they had failed to mention a fact which they would have been expected to mention when interrogated. Before Singapore curtailed the right to silence, its judges could, as in England, draw some adverse inferences from silence. *Haw Tua Tau v. P.P.*, 3 All E.R. 14, 20 (1981); Yeo, *supra* note 13, at 99 n.44. As in England, the extent of this power, and the circumstances under which its use was appropriate, were unclear. Yeo, *supra* note 13, at 99 n.42-43; Greer, *supra* note 18, at 712.

124 Criminal Law and Procedure Code (Amendment) Act, *supra* note 131. The amendment also eliminated an unusual option which had been afforded the accused in Singapore trials. Formerly, they could offer unsworn testimony and avoid cross-examination. Yeo, *supra* note 13, at 97-98.

125 The new caution provides: "If there is any fact on which you intend to rely in your defense . . . mention it now. If you hold back . . . your evidence may be less likely to be believed. . . ." Section 121(6) of the Criminal Procedure Code, *id.* in Yeo, *supra* note 13, at 91.

126 *Haw Tua Tau*, 3 All E.R. at 18-19, *id.* in Yeo, *supra* note 13, at 97-98.

127 REPORT OF THE ROYAL COMMISSION ON CRIMINAL PROCEDURE, Cmnd. 8092, at 85-87 (Jan. 1981).

lice Foundation lecture that the right to silence did not protect the innocent, whose interests were best served by answering police questions.¹²⁸ According to many commentators, Hurd's proposals were in response to police pressures to make interrogation easier.¹²⁹ In large measure, these pressures grew in reaction to the Police and Criminal Evidence Act of 1984 (PACE), which constrained the police during interrogations and implicitly criticized police investigatory techniques.¹³⁰ PACE reformed investigatory procedures by mandating, among other things, that the police tape record interrogations and allow duty solicitors to advise suspects during interrogation.¹³¹

In 1988, nearly two years after Hurd's remarks, the British government responded to a series of terrorist attacks by limiting the right to silence of suspects arrested in Northern Ireland.¹³² According to the Government, this move was necessary because the right to silence was seriously hindering their ability to convict terrorists.¹³³ The change, however, applied not only to terrorist suspects, but to suspects arrested for all offenses in Northern Ireland.¹³⁴ The new limits on the right to silence were part of the Criminal Evidence Order (Order). The Order adopted the suggestions of the CLRC and added two situations in which adverse inferences could be drawn from the accused's silence: if suspects failed to account for the presence of suspicious objects on their person or clothing or in the place where the suspect was found; and if suspects failed to account for their presence near the scene of a crime.¹³⁵ As in Singapore, the order required judges to admonish the accused, in the jury's presence, that adverse inferences could be drawn if they refused to testify.¹³⁶

128 Greer, *supra* note 18, at 716; Zander, *supra* note 2, at 25.

129 Dixon, *supra* note 13, at 29 n.8 and accompanying text ("It was claimed to be necessary because of the effects on police interrogation of PACE . . ."); Greer, *supra* note 18, at 720.

130 Dixon, *supra* note 13, at 29; Greer, *supra* note 18, at 720.

131 The Police and Criminal Evidence Act, Vol. 11(1) HANSBURY'S LAWS ON ENGLAND (4th ed. 1990) "Interview records" at 553-54; "Interviews in the police station, records and written statements" at 555-56; "Interviews to be tape recorded" at 550-51; "Right to legal advice" at 542-45.

132 The timing of the move also helps explain its speedy passage. It was submitted during the widely publicized trial of three persons accused of conspiring to kill the Prime Minister, all of whom invoked their right to silence. See Dixon, *supra* note 13, at 31 n.19 and accompanying text. The Government made this move by Order in Council, a legislative device which allowed the measures to pass with great speed and little debate. *Id.*; Jackson, *supra* note 10, at 404-05.

133 Jackson, *supra* note 8; see also Jackson, *supra* note 10, at 404 (which cites the comments of Mr. King during the debate in the House of Commons. 140 H.C. Debs, cols. 185-87, Nov. 8, 1988).

134 Jackson, *supra* note 10, at 405.

135 Order, *supra* note 10.

136 Jackson, *supra* note 10, at 405.

Also in 1988, Mr. Hurd indicated his intention to apply these limits on the right to silence in England and Wales. To achieve this goal, he assigned the task of crafting the plan to a Home Office Working Group. The Group's report, released in July of 1989, strongly supported the use of adverse inferences.¹³⁷ Soon after the report's release, the momentum for limiting the right to silence in England was halted by revelations of police misconduct during interrogations and investigations, and resulting miscarriages of justice.¹³⁸ These cases included the wrongful convictions of the Guildford Four, the subject of a popular 1994 film, *In the Name of the Father*,¹³⁹ and the Birmingham Six, who were convicted in a 1974 bombing and spent over sixteen years in prison before the Court of Appeals quashed their convictions. Such cases prompted the government, in 1991, to form a Royal Commission on Criminal Justice to ensure that the guilty were convicted and the innocent set free.¹⁴⁰

In 1993, just months before Home Secretary Michael Howard announced the Government's plan to abolish the right to silence, the Royal Commission on Criminal Justice released two publications suggesting that the right should be retained. *The Right to Silence in Public Interrogation: A Study of Some of the Issues Underlying the Debate* (Study) surveyed the use of the right and concluded that adverse inferences would not increase confessions or convictions.¹⁴¹ In the Study, the Commission concluded that eliminating the right to silence would reduce the prosecution's burden of proof, raise the risk that innocent persons would be convicted, and encourage the police to rely more on interrogation, a sometimes unreliable method as shown by the recent miscarriages of justice.¹⁴² Coming on the heels of the Commission's reports, Howard's announcement of Prime Minister Major's intention to limit the right to silence¹⁴³ drew the vocal reaction of critics, who charged that Major's proposal was an attempt to sacrifice

¹³⁷ Greer, *supra* note 18, at 717 n.54.

¹³⁸ *Id.* at 718. The miscarriage of justice also raised questions about whether suspects' rights would be protected if the right to silence was limited. Renown, *supra* note 5; see also Dixon, *supra* note 13, at 31 n.18 and accompanying text.

¹³⁹ Janet Maslin, *In the Name of the Father: The Sins of a Son are Visited on his Father*, N.Y. Times, Dec. 29, 1993, at C11. (A film starring Daniel Day Lewis and Emma Thompson, directed by Jim Sheridan).

¹⁴⁰ REPORT, *supra* note 5, at 1.

¹⁴¹ LENO, *supra* note 5, at 79-80.

¹⁴² Renown, *supra* note 5, at 1 (the report was in part a response to miscarriages of English justice in which police abuses lead to unreliable confessions); see also Greer, *supra* note 109, at 68-71.

¹⁴³ Anthony Scribner, *Tough Justice on the Clock*, THE INDEPENDENT, October 7, 1993, at 27.

ancient principles in order to pauper to public fears about crime,¹⁴⁴ save money,¹⁴⁵ and pacify the nation's police.¹⁴⁶ This last charge was made because, at the time of Howard's announcement, the police were strongly objecting to the Home Office's proposed personnel and fiscal reforms.¹⁴⁷ In addition, the police had continued to press for the abolition of the right in reaction to the PACE reforms of the 1980s.¹⁴⁸

B. THE LAW

Major's new law adopts the limits placed on the right to silence in Northern Ireland.¹⁴⁹ It contains four sections describing situations which trigger the use of adverse inferences from silence. The first section follows a CLRC recommendation that was adopted in Singapore and in Northern Ireland. It allows such adverse inferences "as appear proper" to be drawn when the accused does not tell the police, during interrogation after being cautioned or informed of the law, any fact relied upon in their defense at trial if, under the circumstances, they would have been "reasonably expected" to mention that fact.¹⁵⁰ This section, which corresponds to Article 3 of the Northern Ireland Order, was, according to the Government, designed to end terrorists' use of the "ambush defense," in which terrorist suspects would remain silent during interrogation, not reveal any details of their defense until trial, and thus prevent the police and prosecution from preparing a rebuttal to the defense claims.¹⁵¹

The second section adopts the CLRC recommendation allowing

¹⁴⁴ *Id.*; Zander, *supra* note 2, at 25; *The Right to Silence*, *supra* note 6, at 17; *Nature*, Oct. 14, 1993, at 591, 592 ("After a string of convictions acknowledged to be unjust and based on false confessions submitted as evidence by the police, can the innocent be sure that what they say will not harm them? Worse, the Runciman Commission [The Royal Commission] concluded that the present law is necessary if public respect for criminal justice is to be preserved.");

¹⁴⁵ Scribner, *supra* note 143, at 27.

¹⁴⁶ Zander, *supra* note 2, at 25.

¹⁴⁷ Proposals for reform unpopular with the police have included cutting the ranks of middle management. This proposal could result in the loss of 5000 police jobs over five years, thus, ending what is essentially a tenured position, replacing it with ten-year contracts and instituting performance evaluations so that promotions would be based on merit and not seniority. *The Police, Paving the Way*, THE ECONOMIST, July 23, 1993, at 53. The Conservative Government's trouble with rapidly increased spending on police has caused them to give closer scrutiny to costs. *Clarke Letters with Home*, THE ECONOMIST, January 25, 1993, at 57.

¹⁴⁸ Zander, *supra* note 2, at 25; Greer, *supra* note 18, at 716.

¹⁴⁹ Public Order Act, *supra* note 2, §§ 34-37; *Complete Order*, *supra* note 10.

¹⁵⁰ Public Order Act, *supra* note 2, § 34; see *supra* notes 117 and 125 to 126.

¹⁵¹ Jackson, *supra* note 10, at 405; THE ROYAL COMMISSION ON CRIMINAL JUSTICE, THE RIGHT TO SILENCE IN POLICE INTERROGATION: A STUDY OF SOME OF THE ISSUES UNDERLYING THE DEBATE 45 (1993).

such adverse inferences "as appear proper" to be drawn from the accused's failure to testify at trial.¹⁵³ Proponents argue that silence at trial often allows a guilty party to avoid conviction, and that allowing adverse inferences will remedy this problem by inducing testimony by the accused, thus allowing their stories to be tested by cross examination.¹⁵³ This section is virtually identical to the rule adopted in Singapore and Northern Ireland, except that an amendment in the House of Commons eliminated the requirement that the judge admonish the accused in the jury's presence that adverse inferences might be drawn if they refuse to testify. This was dropped because of opposition from judges.¹⁵⁴

The second section also alters a long-established rule of English law. Since the end of the nineteenth century, English common law has guaranteed the accused the right to remain silent at trial. Before that time the accused could not be coerced to testify because they were not permitted to testify at all. The accused's testimony was considered unreliable because it came from an interested party. When Parliament granted the accused the right to testify in 1898, it decided that the accused should not be pressured to do so, and thus prohibited the prosecution from commenting on the accused's failure to testify.¹⁵⁵ In limited circumstances, English judges—unlike their American counterparts—have been permitted to offer limited com-

¹⁵² Public Order Act, *supra* note 2, § 35.

Where this subsection applies, the court shall, at the conclusion of the evidence for the prosecution, satisfy itself (in the case of proceedings on indictment, in the presence of the jury) that the accused is aware that the stage has been reached at which evidence can be given for the defence and that he can, if he wishes, give evidence and that, if he chooses not to give evidence, or having been sworn, without good cause refuses to answer any question, it will be permissible for the court or jury to draw such inferences as appear proper from his failure to give evidence or his refusal, without good cause, to answer any question.

¹⁵³ The CLRC report recommended that adverse inferences should be drawn if, after a *prima facie* case had been established, the accused person failed to testify at trial. CANADIAN LAW REVISION COM., *supra* note 9, ¶ 108-113 and Appendix, cl. 5 of the Draft Criminal Evidence Bill.

¹⁵⁴ LEVY, *supra* note 5, at 4-5, 38. Proponents have argued that silence at trial deprives juries of the opportunity to hear the accused's story tested by cross examination.

¹⁵⁵ After the amendment, this section reads: "the court shall . . . satisfy itself" that the accused understand that they may testify, and the consequences of refusing to do so. Public Order Act, *supra* note 2; *Howard's Head, The Sunday Times*, Apr. 17, 1994, § 4, at 5 (editorial expressing disfavor with the Home Secretary for allowing this amendment). For a discussion of this rule in Singapore, see *Haw Tua Tau v. P.P.*, 3 All E.R. 14, 18-19 (1981), cited in *Yeo*, *supra* note 13, at 97-98. In Northern Ireland this rule is codified in section 1(b) of the Criminal Evidence Act (1998) (N.I.).

¹⁵⁶ Until 1898, the accused were disqualified for interest and incompetent to testify on their own behalf in English courts. It was thought that the accused's personal stake in the trial's outcome was too great a temptation to perjury, and that the accused's testimony would therefore be unreliable. LEVY, *supra* note 25, at 824.

ment on the accused's failure to testify after the prosecution has established a *prima facie* case. The extent to which courts may comment or draw inferences has been unclear,¹⁵⁶ and excessive or unjustified comment has been the subject of appeals.¹⁵⁷ Some commentary indicates that such judicial comment has been "made much more sparingly" or "almost apologetically."¹⁵⁸

While the extent of permissible judicial comment has been vague and unclear at common law, judges have not been permitted to invite the jury to conclude that refusal is itself an indication of guilt.¹⁵⁹ At common law, judges have been permitted to instruct the jury that, where the accused does not testify, "it means that there is no evidence from the defendant to undermine, contradict, or explain the evidence put before you by the prosecution. [However, you still have to decide whether, on the prosecution's evidence, you are sure of the defendant's guilt]."¹⁶⁰ Under the new rule, the evidence may, in the words of a recent opinion from the House of Lords, "call for an explanation."¹⁶¹ If the accused fails to provide an explanation by testifying, then judges and prosecutors may invite the jury to make any inference which to them appears proper—including the "common sense" inference that there is no explanation for the evidence produced against the accused and that the accused is guilty.¹⁶²

¹⁵⁶ Jackson, *supra* note 8, at 106-07 (After the N.I. Order, "the courts could no longer maintain the ambiguous common law position which was unclear about what inferences were proper and what were not"); Greer, *supra* note 18, at 712.

¹⁵⁷ Greer, *supra* note 18, at 714.

¹⁵⁸ Greer, *supra* note 18, at 715 (quoting 1972 CLRC ¶ 109). Jackson reviewed the changes made by use of adverse inferences, and commented on the Court of Appeal opinion in *Murray v. Director of Public Prosecutions*, 1 W.L.R. 1 H.L. (N.I.) (1994), which noted that "before the enactment of the Order judges in Northern Ireland considered that the law prevented them from drawing adverse inferences against the accused because he had failed to give evidence in his own defence." Jackson, *supra* note 8, at 106.

¹⁵⁹ Greer, *supra* note 18, at 714; Jackson, *supra* note 8, at 106.

¹⁶⁰ The Royal Commission's Report suggested that the following instruction be given by judges in cases where the accused does not testify:

The defendant does not have to give evidence. He is entitled to sit in the dock and require the prosecution to prove its case. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing, one way or the other. It does nothing to establish his guilt. On the other hand, it means that there is no evidence from the defendant to undermine, contradict, or explain the evidence put before you by the prosecution. [However, you still have to decide whether, on the prosecution's evidence, you are sure of the defendant's guilt.]

¹⁶¹ Greer, *supra* note 5, at 58.

¹⁶² In *Murray*, 1 W.L.R. at 1, the House of Lords ruled that the Northern Ireland Order altered the common law rule: "[I]f aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty." *Murray*, 1 W.L.R. at 11, discussed in Jackson, *supra* note 8, at 107, 162-24.

The third section allows such adverse inferences "as appear proper" to be drawn from the accused's failure to respond to police questions when arrested. This section applies when the accused is arrested in possession of any suspicious objects or substances, or when suspicious marks are found on the accused's person or clothing or in the place where the accused was arrested. Under this section, the accused must respond to questions if the police reasonably believe the presence of the object was attributable to the accused's participation in the offense.¹⁶⁵

The fourth section resembles the third. It allows such adverse inferences "as appear proper" to be drawn from suspects' failure to explain to the police why they were present at a place at or about the time of the offense for which they were arrested. As with the third section, suspects must respond if the police reasonably believe that the suspect's presence was attributable to their participation in an offense.¹⁶⁴

V. EVALUATING THE CLAIMS OF THE PROPONENTS

In 1981, the Royal Commission on Criminal Procedure recommended that the assumptions behind proposals to limit the right to silence be carefully examined.¹⁶⁵ Both before and after that recommendation, a number of studies examined these assumptions,¹⁶⁶ including most recently, the Royal Commission's Study, released in 1993.¹⁶⁷ In addition, M.H. Yeo studied Singapore's experience five years after that nation had limited the right to remain silent.¹⁶⁸ These studies have examined, among other things, whether suspects frequently use the right to avoid interrogation; whether adverse inferences cut down the use of the right; whether use of the right causes the police to drop cases, or increases acquittals or the use of the ambush defense; and whether the right is frequently used in court, with the result that criminals go free.¹⁶⁹ These studies indicate that al-

¹⁶⁵ Public Order Act, *supra* note 2, § 36. This section corresponds to Article 5 of the Northern Ireland Order. Jackson, *supra* note 10, at 405.

¹⁶⁶ Public Order Act, *supra* note 2, § 37. This section corresponds to Article 6 of the Order. Jackson, *supra* note 10, at 405.

¹⁶⁷ The Royal Comm'n on Criminal Procedure, Report of the Royal Commission on Criminal Procedure, Cmnd. 8092, ¶ 1.35, at 11-12 (Jan. 1981); Dixon, *supra* note 13, at 88. ¹⁶⁸ Barry Mitchell, *Confessions and Police Interrogation of Suspects*, 1983 Crim. L. Rev. 596. These surveys are summarized in the Royal Commission on Criminal Justice's publication, *The Right to Silence in Police Interrogations: A Study of Some of the Issues Underlying the Debate* (Leng, *supra* note 5, at 10-14).

¹⁶⁹ Leng, *supra* note 5.

¹⁶⁶ Yeo, *supra* note 13, at 91-92.

¹⁶⁷ Zander, *supra* note 2, at 25; Greer, *supra* note 18, at 716; Yeo, *supra* note 13, at 89; Report, *supra* note 5; Leng, *supra* note 5; Mitchell, *supra* note 166, at 596-600.

lowing adverse inferences does not induce more confessions by suspects or more testimony by the accused, and does not increase the number of convictions or reduce crime.¹⁷⁰

A. DO SUSPECTS FREQUENTLY USE THE RIGHT TO AVOID RESPONDING TO INTERROGATION?

Proponents of limiting the right to remain silent assert that its use hinders police investigations. Curtailing the right, they reason, would "dissuade offenders from thwarting prosecution simply by saying nothing."¹⁷¹ In support of this assertion, proponents have cited internal police research undertaken for the Home Office. For instance, a 1987 study reviewed the records of 1558 interviews by the London Metropolitan Police. The means of selecting this sample were not stated, and the study included multiple interviews of the same suspects. In 6% of the interviews, suspects refused to answer any questions; while in another 6%, suspects refused to answer any questions relevant to the offense. In an additional 11% of the interviews, suspects refused to answer some questions. The authors of the study concluded that 23% of interviewees used their right in some manner.¹⁷²

A similar study, undertaken for the Home Office in 1988, reviewed the records of 3095 interviews conducted by the West Yorkshire Police. The report, like the 1987 study, did not indicate how the sample was chosen. This study reported that in 2.3% of the interviews, suspects refused to answer any questions; in 2.8% of the interviews, suspects refused to answer any questions relevant to the offense; and in 7.9% of the interviews, suspects failed to answer some questions considered relevant to the offense. The authors concluded that 12.3% of the interviewees invoked their right to remain silent in some manner.¹⁷³

While proponents of limiting the right to remain silent argued that the results of these reports bolstered their position, the studies were gravely flawed and contrary to the results of independent academic research. The flaws in the Home Office studies were fundamental. As the Royal Commission's Study pointed out, the Home Office studies examined individual interviews rather than all interviews of a particular individual under questioning. Thus, the same person's repeated refusals to answer questions during numerous inter-

¹⁷⁰ LENG, *supra* note 5, at 79-80.

¹⁷¹ Howard's *Beginning*, *supra* note 2.

¹⁷² LENG, *supra* note 5, at 12 (citing Home Office, Report of the Working Group on the Right to Silence (1989)).

¹⁷³ *Id.* (figures are likely rounded to tenths, as the sum of cited numbers is 12.4, not 12.3).

views counted as numerous instances of the use of the right to remain silent.¹⁷⁴ In fact, the officer in charge of the Metropolitan Police survey, Detective Superintendent Tom Williamson, later acknowledged that this flaw led to an overestimation of the use of the right. According to Williamson, "if a fairly reticent suspect was interviewed five times, each time withholding some element of a story, then this would have been recorded as five instances of silence."¹⁷⁵ The Royal Commission's Study pointed out that the Home Office's research should have assessed how many suspects remained silent throughout the process, not how many were silent at some time during the process, but who may have talked later. The Study also noted that the police collected data for the Home Office's studies at a time when they were campaigning to abolish the right to remain silent based on the argument that it was overused.¹⁷⁶

Some of the same problems were present in a subsequent study in which Williamson participated. In 1992, Moston, Stephenson, and Williamson reviewed 1067 cases, and found that 174 suspects, or 16%, used silence in some manner. One-half of these suspects refused to answer any questions; the other one-half refused to answer some questions. The study, however, did not include any figures on how many suspects remained silent throughout the interrogation. Also, it used a very broad definition of the use of silence, including any refusal to answer questions, and any evasions by the suspect.¹⁷⁷ In fact, in 33 of the 174 instances where police characterized suspects as having used silence, the suspects had actually made some admissions or a confession, and 50 of the 174 denied allegations. By counting evasions as the use of silence, the study injected a highly subjective element into the data. It allowed interviewers to characterize as silence any answers which they did not believe. This was especially troubling because, as in the Home Office studies, data were collected by interested parties—police officers.¹⁷⁸

The weight of the evidence suggests that few suspects use the right to silence to avoid answering questions, that most suspects coop-

¹⁷⁴ LENC, *supra* note 5, at 13.

¹⁷⁵ S. Moston et al., *The Incidence, Antecedents and Consequences of the Use of the Right to Silence During Police Questioning in Criminal Behaviour and Mental Health* (forthcoming) discussed in Dixon, *supra* note 13, at 40-41 (the author acknowledged the study's flawed methodology and pointed to poorly designed questionnaires as the main source of the flaws).

¹⁷⁶ LENC, *supra* note 5, at 13. Further, the studies did not describe how their samples were selected. *Id.* at 12.

¹⁷⁷ *Id.* at 10, 13-14, discussing S. Moston, et al., *supra* note 175; see also Dixon, *supra* note 13, at 40-41.

¹⁷⁸ LENC, *supra* note 5, at 10, 13-14.

erate with the police during questioning, and that the majority of suspects actually confess.¹⁷⁹ This was demonstrated in the Study, which both surveyed other studies and presented its own findings.¹⁸⁰ Among the studies surveyed was Barry Mitchell's, which examined a random sample of 400 cases from Worcester Crown Court in 1978. Mitchell found that only 4.3% of the suspects who were formally questioned exercised their right to silence at any stage of the proceedings.¹⁸¹ In Michael Zander's study of 282 cases at the Old Bailey in 1979, only twelve suspects, or roughly 4%, relied on the right to remain silent; of those, nine were convicted.¹⁸² In 1980, Baldwin and McConville studied 1000 cases from Birmingham Crown Court and 476 cases from Crown Courts in London, and found that only 3.8% of the Birmingham sample and 6.5% of the London sample made no statement.¹⁸³ In McKenzie and Irving's 1988 study, the authors observed interviews of sixty-eight suspects in the same police station in each of two successive years. Eleven percent of their 1986 sample, and 15% their 1987 sample remained silent in response to some or all questions. The authors also reviewed the files of 100 completed cases, and found that 16% of suspects remained silent in response to some or all questions.¹⁸⁴ In Sanders' 1989 study of 500 cases, 2.8% of suspects were silent, while 5.3% denied involvement in the offense without explanation. Thirty-eight percent made denials with some explanation, while 54% made admissions.¹⁸⁵

Two recent studies likely overestimate the extent to which suspects remain silent. McConville and Hodgson's 1992 study examined the effects of the presence of counsel on suspects' use of silence, and also provided data on the general use of the right to silence. The authors attended 159 interviews, and found that 2.5% of the suspects did not answer any questions, while 27% were selectively silent. This number includes, however, suspects who only temporarily used silence, suspects who were silent in response to irrelevant questions, and suspects who refused to answer questions about others' involve-

¹⁷⁹ LENC, *supra* note 5, at 10-14; Mitchell, *supra* note 166, at 597-600.

¹⁸⁰ LENC, *supra* note 5, at 10-14; Mitchell, *supra* note 166, at 597-600.

¹⁸¹ Mitchell, *supra* note 166, at 597, 600 ("Of the 394 defendants who were formally questioned, only 17 (4.3%) exercised their right of silence at any stage").

¹⁸² LENC, *supra* note 5, at 10 (discussing Michael Zander, *The Investigation of Crime: A Study of the Cases Tried at the Old Bailey*, C.I.R. 203, 211-12 (1979)).

¹⁸³ *Id.* (discussing Baldwin and McConville, *Confessions in Crown Court Trials*, Royal Commission on Criminal Procedure Study No. 5, 1980).

¹⁸⁴ *Id.* at 13 (discussing McKenzie and Irving, *Police Interrogation: The Effects of the Police and Criminal Evidence Act 1984*, Police Foundation (1989)).

¹⁸⁵ *Id.* at 11-12 (discussing A. Sanders, et al., *Advice and assistance at police stations and the 24 hour duty solicitor scheme*, Lord Chancellor's Department (1989)).

ment in a crime.¹⁸⁶ Baldwin's 1992 study reviewed 400 videotaped and 200 tape recorded interrogations, and found that 1.7% of suspects did not answer any questions, while another 18% were selectively silent. As in McConville and Hodgson's study, this number included suspects who only temporarily used silence, those who were silent in response to irrelevant questions, and those who refused to answer questions about the involvement of others. In addition, the author of this study did not claim to have used a representative sample, as it was up to the police to elect which cases to record.¹⁸⁷

The Study avoided many of the flaws of the earlier studies. It also broadened the scope of its examination to consider issues raised by the system of adverse inferences adopted in Northern Ireland under the Order, and later included in Major's plan.¹⁸⁸ The Study divided the use of silence into four categories. The first consisted of suspects who remained totally silent and offered no response to any substantial questions. The second consisted of suspects who answered some questions, but refused to answer some substantive questions about their own or someone else's involvement in a crime. The third category covered the ambush defense, which had been addressed by the Order. It applied to suspects who denied the offense, failed to offer or disclose to the police a defense when given an opportunity to do so, and then raised a defense during pre-trial negotiations or at trial. The fourth category covered unexplained facts and other situations addressed in the Northern Ireland Order. It applied to suspects who denied the offense, but failed to explain something incriminating when given the opportunity to do so.¹⁸⁹ The Study avoided overestimating the use of the right to remain silent by not including the following situations as examples of the use of the right to silence: cases where suspects at first refused to answer some questions, but answered all substantial questions by the end of the interview; cases where suspects refused to answer some questions substantially the same as questions already answered; and cases where suspects answered all questions about themselves, but refused to answer questions about others' involvement.¹⁹⁰

The Study examined 848 cases in which interviews took place, and found that suspects remained silent in a small percentage of

¹⁸⁶ *Id.* at 14 (discussing McConville and Hodgson, *Custodial Legal Advice and the Right to Silence*, 1992 (a report prepared for the Royal Commission on Criminal Justice)).

¹⁸⁷ *Id.* at 15 (discussing Baldwin, *The Role of Legal Representatives at Police Stations*, 1992 (a report prepared for the Royal Commission on Criminal Justice)).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 15.

¹⁹⁰ *Id.* at 16.

cases. In thirty-eight of these cases, or 4.5%, suspects remained completely silent. In another eleven cases, or 1.3%, suspects at first refused to answer, but eventually answered all substantial questions.¹⁹¹ These results correspond with Yeo's Singapore study, which examined suspects' use of silence both before and after Singapore adopted adverse inferences, and found that almost all suspects studied before the amendment—93.4%—had responded to police questioning.¹⁹²

The great majority of suspects answer police questions, and a sizable number actually confess. For instance, in Mitchell's study, over 70% confessed, and another 14%, while not making a full confession, made incriminating statements.¹⁹³ In Zander's study, 76% confessed, as did over one-half of the suspects studied by Baldwin and McConnell.¹⁹⁴ These results clearly refute the contention that the right is being "[w]idely exploited by professional criminals and their lawyers to impede the search for truth."¹⁹⁵

B. WILL ADVERSE INFERENCES REDUCE SILENCE DURING INTERROGATION?

Proponents of using adverse inferences assert that such measures will induce suspects to talk to police, to confess, and to reveal their defenses during interrogation, allowing the police to use interrogation techniques to break down their stories.¹⁹⁶ The limited evidence available, however, contradicts these claims. The Study examined whether the police frequently gain a significant advantage when suspects reveal their defenses, and the Study found that this advantage occurs in only a small percentage of cases. Of the 848 suspects interviewed, 314 (37%) raised a defense.¹⁹⁷ In 296 (94% of cases in which suspects raised a defense), the police waived themselves of the suspect's advanced disclosure, and tried to "break down" or rebut the

¹⁹¹ *Id.* at 17.

¹⁹² Yeo found that 57 of his sample of 61 suspects talked to the police, and that the other four were members of a secret society who had been charged in the same offense. Yeo, *supra* note 13, at 93. This result is not surprising in view of the fact that studies in England have produced similar results. Yeo cited two English studies which had come to similar conclusions. *Id.* at 93. More recently, studies have found that suspects' use of the right to silence had little or no impact on charges, prosecutions, or conviction. For a discussion of recent studies, see Green, *supra* note 18, at 711 nn.12,13 and accompanying text.

¹⁹³ Mitchell, *supra* note 166, at 598-99.

¹⁹⁴ *Id.* at 599.

¹⁹⁵ Charles Pollard, *Stop Protecting the Guilty and Absolving the Innocent*, *The Sunday Times*, April 24, 1994, § 4, at 7 (guest editorial by the Chief Constable); REPORT, *supra* note 5, at 51. Indeed, not only is the right rarely used, but "[t]here is no evidence which shows conclusively that silence is used disproportionately by professional criminals." *Id.* at 54.

¹⁹⁶ REPORT, *supra* note 5, at 50-51; LEWIS, *supra* note 5, at 58-60.

¹⁹⁷ See generally LEWIS, *supra* note 5, at 59-60.

suspect's defense.¹⁹⁸ They succeeded in twelve instances, and had partial success in four others. If combined, this comes to only 5.4% of the cases in which the suspect raised a defense.¹⁹⁹

Moreover, Yeo's study of the use of adverse inferences in Singapore indicates that allowing adverse inferences does not cut down on the use of the right, induce a significant number of suspects to talk to the police, or increase confessions. Yeo's findings indicate that by allowing adverse inferences, Singapore did not significantly alter suspects' responsiveness to police questioning. All fifty-eight suspects in Yeo's post-amendment sample answered police questions,²⁰⁰ as stated, but 93.4% had done so before the amendment.²⁰¹ Yeo also found no increases in either full or qualified confessions, but did find an increase in denials.²⁰² This contradicts the theory that the amendment would cause suspects to confess more frequently.²⁰³ Yeo concluded that at the five year mark, the amendment's aim had not been met. The number of confessions had not increased, largely because suspects rarely invoked their right to silence before the amendment.²⁰⁴

C. DOES SILENCE CAUSE POLICE TO DROP CHARGES?

Proponents of limiting the right to remain silent argue that its use forces the police to drop a large number of cases.²⁰⁵ The Study examined this argument by reviewing the 268 cases, out of the total sample of 848 cases, in which the police formally decided to take no further action (NEA).²⁰⁶ In the majority of NEA cases, about 62%, the police were satisfied with the outcome.²⁰⁷ In most of these cases, the reason why the police were satisfied was because they believed the suspect was not guilty. This occurred in 114 (43%) of the cases.²⁰⁸ Twenty-four (9%) of these cases were dismissed for "policy" reasons, where proof was not a problem. These cases included cases dismissed to reward informers or to avoid exposing mistakes or improper con-

¹⁹⁸ *Id.* at 61-62.

¹⁹⁹ *Id.* at 62.

²⁰⁰ Yeo, *supra* note 13, at 93.

²⁰¹ *Id.*, see *supra* note 197 and accompanying text. For a discussion of recent studies, see Greer, *supra* note 96, at 711 nn.12-13 and accompanying text.

²⁰² Yeo found that before the amendment, of his sample of 57 cases, full confessions were had in 26, qualified confessions in 15, and denials in 16. Of his sample of 58 post-amendment cases, full confessions were had in 20 cases, qualified confessions in 11, and denials in 27. Yeo, *supra* note 13, at 94.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ LENC, *supra* note 5, at 23.

²⁰⁶ *Id.* at 23-24.

²⁰⁷ *Id.* at 24-25, 34.

²⁰⁸ *Id.* at 24-25.

duct by the police.²⁰⁹ In twenty-five cases, or about 9%, victims dismissed complaints.²¹⁰

Of the 268 NEA cases the police were not pleased to dismiss, ninety-four (35%) involved suspects who did not remain silent, but who denied the accusation.²¹¹ Suspects remained silent in only nine (4%) of the NEA cases. In four of these, the dismissal was for reasons other than a lack of evidence.²¹² That leaves five cases, or about 2% of NEA cases, where dismissal could be attributed to silence.²¹³ These figures indicate that the right of silence is not causing the police to dismiss a significant number of cases.

D. DOES SILENCE CAUSE PROSECUTORS TO DISMISS CASES OR COURTS TO ACQUIT SUSPECTS?

Proponents of eliminating the right to remain silent have contended that a substantial number of accused persons are acquitted because they remain silent. To test this contention, the Study examined the 490 suspects who were charged with an offense out of the 848 originally interviewed.²¹⁴ Few suspects went free because the prosecution dropped their cases or because a judge or jury acquitted them. Only seventy-nine (16%) of the suspects who were charged had their cases dropped by prosecutors, or were acquitted after contested trials.²¹⁵ Fifty-four (11%) of these suspects had their cases dropped by the prosecution; twenty-five (5%) suspects were acquitted by a jury after a contested trial.²¹⁶

Still fewer suspects had their charges dropped or were acquitted because they remained silent. For instance, of the fifty-four cases dropped by the prosecution, twelve were dropped for policy reasons. This included cases where the prosecutor dropped trivial charges, cases where the suspect was already facing a long term of imprisonment for other charges, and cases where the prosecution sought to use the suspect as a witness. In eight cases, the prosecutor dropped charges for technical reasons. This included cases where a mistake by

²⁰⁹ *Id.* at 24-26.

²¹⁰ *Id.* at 24-25.

²¹¹ *Id.* at 24, 26-28, 30-31, 34.

²¹² *Id.* at 24, 27-29.

²¹³ *Id.* at 27, 34. These cases included one where the victim would not appear for trial, one where the police declined to proceed because the suspect had already been sentenced for other offenses, one where the suspect was a teenager who was already being punished by school authorities, and one where the police were satisfied that someone else was guilty.

²¹⁴ *Id.* at 27. One percent of dismissed cases were not classified. *Id.* at 34.

²¹⁵ *Id.* at 37-38.

²¹⁶ *Id.* at 38.

²¹⁷ *Id.*

police or prosecutors made it impossible to proceed.²¹⁷ The prosecution dropped thirty-three cases for insufficient evidence. The suspect, however, remained silent in only five of the thirty-three cases. Even if the prosecutor's decision to drop these five cases—out of the 490 where charges were brought—was attributable to the accused's silence, the use of adverse inferences would likely make little difference. This is true because, in most of the cases that the prosecutor dropped, other evidence was "thin or non-existent."²¹⁸ Suspects could thus deny their involvement without contradiction by independent evidence, and avoid an adverse inference.²¹⁹

Few of the suspects which a jury acquitted relied on silence. Of the twenty-five suspects acquitted by a jury, seventeen (68%) raised their defense during the police interview.²²⁰ Three suspects raised their defense for the first time in court.²²¹ In three cases, suspects were acquitted after exercising their right to silence at a police interview. Because of the absence of other evidence, however, the prosecution's ability to invite adverse inferences would have made little difference. Suspects could have denied their involvement without contradiction by independent evidence, and thus could have avoided any adverse inference.²²²

E. DOES SILENCE INCREASE THE USE OF THE AMBUSH DEFENSE?

Advocates of the use of adverse inferences have argued that it would remedy the allegedly significant problem caused by the "ambush" defense, in which suspects remain silent during interrogation, and do not reveal any details of their defense until trial. They believe that the ambush defense prevents the police and the prosecution from investigating the defense and preparing a rebuttal.²²³ To remedy this perceived problem, Major's new law will allow such adverse inferences "as appear proper" to be drawn when the accused does not

²¹⁷ *Id.*

²¹⁸ *Id.* at 39. In two additional cases, the suspect initially refused to answer questions, but later answered all substantial questions. Their initial refusal to talk was not linked to the prosecution's decision to drop charges. *Id.* at 38-39.

²¹⁹ *Id.* at 43.

²²⁰ *Id.* at 40 (In two instances, suspects' cases were dismissed because of prosecution delay).

²²¹ *Id.* at 45-58.

²²² *Id.* at 41-43. Earlier studies indicated that "Silence was not an effective bar to conviction." Dixon, *supra* note 13, at 37. In Zander's study, only a quarter of the number of silent suspects were acquitted. *Id.* at 37 (discussing Michael Zander, *The Investigation of Crime*, 1979 *Crim. L. Rev.* 203, 211-12).

²²³ LENO, *supra* note 5, at 45; Jackson, *supra* note 10, at 405. (Noting that, previously, the court could invite an inference under these circumstances if the parties could be said to be on equal footing during the interrogation or interview).

reveal during interrogation any fact relied upon in their defense at trial.²²⁴

The Study, however, found that claims about the extent of the problem are exaggerated, in part because of very broad definitions of the ambush defense, which include cases where the prosecution is not unfairly surprised.²²⁵ Many defenses not raised until trial are not examples of the ambush defense. Examples of this include claims that the suspect's alleged conduct does not amount to the charged offense; procedural defenses, such as double jeopardy and challenges to the admissibility of evidence; and simple denials of an element or elements of the prosecution's case, which are made without the introduction of evidence.²²⁶

To avoid including such cases as examples of the ambush defense, the Study defined the ambush defense as follows: the defense is first raised at trial; it takes the prosecution by surprise; the defendant could have disclosed the evidence or explanation to the police during the interrogation; the prosecution suffers as a result of the surprise; the accused may have an unfair advantage because they have had additional time to prepare their story or those of witnesses; the risk of the suspect being wrongfully acquitted is greater than it would have been had the suspect disclosed the defense at the interrogation; and finally, the defense is false.²²⁷ The Study also did not consider cases to involve an ambush defense if the police did not give the suspects enough information about their suspicions to indicate which facts about their defense might be relevant to reveal; if the police did not give the suspects a chance to reveal the facts relied upon in their defense; or if the suspects were unaware during interrogation of the potential for raising a defense.²²⁸

To determine how often suspects used the ambush defense, the Study examined the cases in its sample in which a suspect was charged, but did not plead guilty. It compared the trial records with the prosecutor's file, and other information collected from the prosecutors and police officers involved in the case, to determine if the

²²⁴ The inference is permissible if, under the circumstances, one could have been "reasonably expected" to mention the fact. Public Order Act, *supra* note 2, § 34. See also LENO, *supra* note 5, at 46. This section was also adopted in Clause 3 of the Northern Ireland Order. See *supra* note 143.

²²⁵ LENO, *supra* note 5, at 50.

²²⁶ *Id.* at 46-49. An affirmative defense, such as self-defense, requires the accused to introduce some evidence and could therefore constitute an ambush. Such a defense is characterized in the Study as a "defense proper." *Id.* at 49.

²²⁷ *Id.* at 47. According to the Study, these characteristics have been used by a number of commentators. *Id.* (citing S. EASTON, *THE RIGHT TO SILENCE* (1991)).

²²⁸ LENO, *supra* note 5, at 50.

defense raised at trial had been disclosed during interrogation. This comparison revealed that juries acquitted twenty-five of the fifty-nine suspects whose cases went to trial. Seventeen (69%) of the acquitted suspects raised their defenses during interrogation. The high percentage of those acquitted who had disclosed their defense undermines the theory that suspects have a significant incentive to withhold evidence in order to ambush the prosecution at trial and gain acquittal.²²⁹

In the other eight jury acquittals, suspects raised a defense in court that they did not mention to the police during interrogation. None of these cases, however, met the criteria for an ambush defense.²³⁰ The Study also found that defendants did not use the ambush defense in any of the fifty-four cases that were dropped²³¹ and that of thirty-four suspects found guilty, only one clearly used the ambush defense, although obviously to little effect.²³² The Study's results—no suspects using the ambush defense were acquitted or had their cases dropped, and a jury convicted the one suspect who raised the ambush defense—contradicts the theory that suspects frequently use the ambush defense to gain acquittal.²³³ This confirms similar findings by McConnell and Baldwin, whose study indicated that ambush defenses were rarely responsible for acquittals.²³⁴

F. WILL ADVERSE INFERENCES LIMIT SILENCE AT TRIAL AND "FREQUENT" ACQUITTALS?

Proponents of limiting the right to silence have contended that the accused's refusal to testify at trial causes the same problem supposedly caused by silence during interrogation—the guilty frequently avoid conviction.²³⁵ To remedy this supposed problem, the second section of Major's new law essentially adopts the CLRC recommendation to allow such adverse inferences "as appear proper" to be drawn

²²⁹ *Id.* at 51.

²³⁰ *Id.* at 51-53.

²³¹ *Id.* at 54. In only one of the dropped cases was a defense raised at trial which apparently had not been raised during interrogation. This was not, however, an ambush defense. *Id.*

²³² *Id.* at 50-51, 55, 58. In two other cases where the suspect was found guilty, the prosecution claimed that the defense used the ambush defense, but the defense denied it. In this sample, the defense was used in, at most, 5% of contested trials. *Id.* at 58.

²³³ *Id.* at 55-57. Many unanticipated defenses are the consequence of police interrogation techniques which are designed to exclude exculpatory statements by the suspect. *Id.*

²³⁴ Dixon, *supra* note 13, at 37 (discussing John Baldwin and Michael McConnell, *Confessions in the Crown Courts Trials*, The Royal Comm'n on Criminal Procedure, Research Study No. 5, 112, 117-25, London HMO 30 (1980)).

²³⁵ LENO, *supra* note 5, at 4-5, 37.

from the accused's failure to testify at trial.²³⁶ Some proponents of using adverse inferences have argued that this will foster testimony by the accused and allow their stories to be tested by cross examination.²³⁷ While the Study's sample provided no cases which allowed an evaluation of the use of silence at trial, the proponents' arguments seem no more convincing in the context of limiting the right at trial than they were in the context of limiting the right during interrogation.

There is no indication that the right to silence is frequently used at trial or that it allows many suspects to go free. In Singapore, Yeo found that few accused persons refused to testify at trial before Singapore's judicial system permitted adverse inferences.²³⁸ His study revealed that suspects refused to testify in only twelve out of 185 pre-amendment cases. Seventeen suspects made unsworn statements under a pre-amendment rule which allowed the accused to offer unsworn testimony at trial and avoid cross-examination; and 156, or 84.3%, testified.²³⁹ The findings indicate that the assertion that silence is frequently used at trial to gain acquittal is exaggerated, because the accused rarely remain silent at trial.

Similarly, using adverse inferences would not foster testimony by the accused. Yeo examined 115 post-amendment cases, tried after the courts began to inform the accused of the adverse inferences that could be drawn if they refused to testify.²⁴⁰ Of this group, 89.1% testified. This increase of less than five percentage points from the percentage of those who testified prior to adverse inferences hardly seems significant, especially since Yeo did not include those who offered unsworn testimony in the calculations. Had he included them, the results would indicate that a higher percentage of accused persons testified at their trials before the amendment.²⁴¹ According to Yeo, after five years in operation, the amendments had "not materially assisted" the police and prosecutors.²⁴² They did not induce accused

²³⁶ Public Order Act, *supra* note 2, § 35. The CLRC report recommended that adverse inferences should be drawn if, after a *prima facie* case had been established, the accused person failed to testify at trial. Public Order Act, *supra* note 9, ¶ 108-113 and Appendix, cl. 5 of the Draft Criminal Evidence Bill, cited in LENO, *supra* note 5, at 2; *Haw Tua Tau v. P.P.*, 3 All E.R. 14, 18-19 (1981), cited in Yeo, *supra* note 13, at 97-98; section 1(b) of the Criminal Evidence Act (N.L.).

²³⁷ LENO, *supra* note 5, at 78-79. Proponents have argued that the accused's silence at trial deprives the jury of the opportunity to hear their story tested by cross examination. *Id.*

²³⁸ Yeo, *supra* note 13, at 96-97.

²³⁹ *Id.* at 97-99.

²⁴⁰ *Id.* at 96-97.

²⁴¹ *Id.* at 98-99.

²⁴² *Id.* at 100.

persons to confess more often or to testify in court, and they did not have a significant impact on judicial proceedings.²⁴³

Proponents of limiting the right to silence at trial have offered no evidence to support their claims that the accused frequently used silence at trial to gain acquittal, or that the use of adverse inferences would cure this supposed problem. In fact, the Singapore experience suggests that defendants do not usually use silence at trial, and that adverse inferences do not increase testimony by the accused.

G. WILL LIMITING THE RIGHT TO SILENCE REDUCE CRIME?

Proponents of limiting the right to remain silent argue that, by doing so, they will force more suspects to talk to the police, to confess, and to testify at trial. This, they argue, will increase convictions and thereby reduce crime. However, there is no convincing evidence that this is true. In fact, the evidence suggests that the use of adverse inferences will not reduce crime.²⁴⁴

Silence is not a serious impediment to the police in solving crimes. Suspects remain silent in only a small percentage of cases. In the Study's sample, only 4.5% remained silent,²⁴⁵ and, in Yeo's Singapore study, 6.6% of the pre-amendment suspects did not respond to police questioning.²⁴⁶ Thus, even without the threat of adverse inferences, suspects frequently responded to police interrogation.

Further, while studies indicate that one-half to three-quarters of suspects now confess,²⁴⁷ Yeo found that the use of adverse inferences actually increased denials.²⁴⁸ This runs counter to the theory that the amendment would cause suspects to confess more often,²⁴⁹ and lends weight to the Study's conclusion that adverse inferences would not increase confessions.²⁵⁰ Moreover, the Study showed that the use of adverse inferences does not significantly aid the police in solving crime by breaking down suspects' stories, as this occurred in only a small percentage of cases.²⁵¹ Even if one considers the use of silence a

²⁴³ *Id.* at 100-01. Yeo concluded that England might someday allow adverse inferences from the accused's failure to testify at trial, but that the Singapore experience offered no evidence to support diminishing the right to silence at police interrogation in England. To the contrary, Yeo cited the 1981 Royal Commission Report to argue that such a change would lead to an inquisitorial criminal justice system. *Id.* at 101 (citing Report of the Royal Commission on Criminal Procedure, Jan. 1981, Cmnd. 8092, ¶ 4.59).

²⁴⁴ See *supra* notes 238 to 256 and accompanying text.

²⁴⁵ LENO, *supra* note 5, at 17, 20; REPORT, *supra* note 5, at 53.

²⁴⁶ See *supra* note 192.

²⁴⁷ Mitchell, *supra* note 166, at 598-99; REPORT, *supra* note 5, at 51.

²⁴⁸ See *supra* note 213.

²⁴⁹ Yeo, *supra* note 13, at 95.

²⁵⁰ LENO, *supra* note 5, at 79-80.

²⁵¹ *Id.* at 62. They succeeded in whole or in part in only 5.4% of the cases where a

problem, adopting adverse inferences is not a remedy. In Yeo's study, for example, the percentage of suspects who talked to the police did not change significantly after Singapore allowed adverse inferences.²⁵²

The right to silence does not hinder efforts to solve crime by causing the police to drop a significant number of cases.²⁵³ For example, in the Study's sample of 848 cases, the police formally decided to take no further action in 268 cases.²⁵⁴ However, the suspect's silence was a factor in only 5 (2%) of these cases.²⁵⁵ Further, the suspect's silence rarely caused the prosecution to drop a case²⁵⁶ and in the few cases where the suspect's silence did cause the prosecutor to drop the case, the evidence was usually weak. The use of adverse inferences would most likely have made little difference in these cases because the accused could have simply denied the charge without adverse inferences being drawn and without fear of contradiction by the prosecution.

Also, those who exercise their right are as likely to be charged as those who do not.²⁵⁷ In fact, the study conducted by Williamson and Moston indicated that silence had no effect on the police's decisions to charge a suspect where the evidence was either weak or strong, but that in borderline cases, the police were more likely to charge suspects who remained silent.²⁵⁸ Further, as the Royal Commission's Study indicated, few suspects are acquitted in court because they remain silent.²⁵⁹ In fact, Williamson and Moston found that suspects who had

defense was raised. *Id.*

²⁵² Yeo, *supra* note 13, at 93. Yeo found that by allowing adverse inferences, Singapore did not significantly alter suspects' responsiveness to police questioning.

²⁵³ LENO, *supra* note 5, at 23.

²⁵⁴ *Id.* at 23-24.

²⁵⁵ *Id.* at 28; see *supra* note 213.

²⁵⁶ *Id.* at 39. The prosecution dropped 33 cases for insufficient evidence. In only 5 of the 33 cases, however, did the suspect remain silent. Even if the prosecutor's decision to drop these five cases—out of the 490 where charges were brought—could be attributable to the accused's silence, the use of adverse inferences would most likely make little difference. This is true because, in most of the cases in question, other evidence was "thin or non-existent." *Id.*

²⁵⁷ REPORT, *supra* note 5, at 53.

²⁵⁸ *Id.* (citing T. WILLIAMSON AND S. MOSTON, POLICE INVESTIGATION STYLES AND SUSPECT BEHAVIOR, FINAL REPORT TO THE POLICE REQUIREMENTS SUPPORT UNIT, Univ. of Kent Institute of Social and Applied Psychology, CANINAL BEHAVIOR AND MENTAL HEALTH 3 (1993)).

²⁵⁹ LENO, *supra* note 5, at 57-58, 40-43. In the Study's sample of 848 cases, 490 suspects were charged. Twenty-five of these suspects (5%) were acquitted by a jury after a contested trial. Of the 25, 17 (68%) raised their defense during the police interview. In three cases, suspects were acquitted after exercising their right to silence at a police interview. Because of the absence of other evidence, however, the prosecution's ability to invite adverse inferences would have made little difference because suspects could have denied their involvement without contradiction by independent evidence, and could have thus avoided any adverse inference. *Id.*

remained silent were convicted at a higher rate than suspects who did not.²⁶⁰ It also seems unlikely that the use of adverse inferences will cause more suspects to testify. Yeo's Singapore study found that the accused had rarely remained silent at trial before adverse inferences were allowed, and that the use of adverse inferences did not increase testimony by the accused.²⁶¹

The weight of evidence supports the conclusion of the Royal Commission's Study, that adverse inferences would not increase convictions.²⁶² However, even if the use of adverse inferences would increase conviction rates, it would have little effect on crime. Over 90% of the cases which come to court end in conviction.²⁶³ An increase in this percentage would have little impact on crime. More significant crime control issues are how to catch the criminals who avoid detection and apprehension, and how to prevent persons from becoming criminals and committing crimes.

The supposed problems with the use of the right to silence are greatly exaggerated and the promised benefits of curtailing the right are an illusion. Silence does not cause the police to drop a significant number of cases, allow a significant number of suspects to gain acquittal in court, or increase the use of the ambush defense. Moreover, promises that the use of adverse inferences will increase testimony by the accused, or reduce crime, are empty.

VI. ADVERSE INFERENCES WILL UNDERMINE THE ACCUSATORIAL SYSTEM OF CRIMINAL JUSTICE AND MOVE IT TOWARDS AN INQUISITORIAL MODEL

While the benefits of using adverse inferences are illusory, the costs are real. The use of adverse inferences will erode or eliminate the right to silence and, in doing so, shift the burden of proof to the accused, in some cases reduce the prosecution's burden of proof, and weaken or remove the presumption of innocence. These changes will undermine the accusatorial system of justice, moving the criminal justice system towards an inquisitorial model. Many of the benefits of the accusatorial system which these changes will jeopardize are characteristic of an open and democratic society, including a strictly limited

²⁶⁰ Report, *supra* note 5, at 53 (citing T. Williamson and S. Motion, *The Extent of Silence in Police Interviews*, in *The Right of Silence Debate* (Steven Greer and R. Morgan, eds., 1990)). According to prosecution barristers, 41% of those who had been silent were acquitted compared to 49% of those who had answered police questions. The defense barrister also indicated that 41% of those who had remained silent were acquitted compared to 54% of those who talked to the police.

²⁶¹ Yeo, *supra* note 13, at 96-99.
²⁶² LENO, *supra* note 5, at 79-80.
²⁶³ *Silents*, *supra* note 6, 17-18.

government, restrained in its ability to compromise individual dignity, privacy, and autonomy.

A. UNDERMINING THE ACCUSATORIAL SYSTEM

When a judicial system allows adverse comment on or adverse inferences from the suspect's silence, it erodes or eliminates the right to silence. The United States Supreme Court recognized this when it found that adverse comment "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly."²⁶⁴ Major's new law will exact a penalty—the inference of guilt—from silence, and effectively impose a duty to talk on suspects. The substitution of a duty to talk for a right to silence has serious implications. It shifts the criminal justice system from its accusatorial focus on proof by witnesses and extrinsic evidence towards an inquisitorial system's focus on the interrogation of suspects.

Adverse inferences undermine both the presumption of innocence and the burden of proof, concepts which are logically related. The burden of proof requires the prosecution to persuade the jury of the accused's guilt; the presumption of innocence allows the accused to "remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion . . ."²⁶⁵ The presumption of innocence, however, also conveys to the jury the warning that in its deliberations, it may rely on "nothing but the evidence, i.e., no surmises based on the present situation of the accused."²⁶⁶

Major's law shifts the burden of proof to the accused by making them talk to the police during interrogation, and then go forward with evidence through their own testimony. If the defendants fail to carry this burden by remaining silent, the court will penalize them with an inference of guilt.²⁶⁷ Imposing a burden on suspects to present their explanation, and sanctioning them for the failure to do so, resembles the confession "*pro confesso*," by which silent suspects were treated as if they had confessed.²⁶⁸ Supporters of Major's new law claimed, as did supporters of the old inquisitorial method, that the innocent have nothing to hide, and that only the guilty would refuse to answer.²⁶⁹

²⁶⁴ *Griffin v. California*, 380 U.S. 609, 614 (1965).

²⁶⁵ *Taylor v. Kentucky*, 436 U.S. 478, 483 n.12 (1978) (quoting 9 WIGMORE, EVIDENCE 407 (3d ed. 1940)).

²⁶⁶ *Id.* at 485 (quoting 9 WIGMORE, EVIDENCE 407 (3d ed. 1940)).

²⁶⁷ See *supra* text accompanying notes 11 and 12; *Griffin*, 380 U.S. at 614.
²⁶⁸ LEVY, *supra* note 25, at 23-24.

²⁶⁹ For the views of proponents of this justification for the confession *pro confesso*, see LEVY, *supra* note 25, at 269, 270-71. Jeremy Bentham was a noted supporter of this view: "silence . . . by common sense, as the report of universal experience, [is] certified to be

Major's new law will also effectively lower the government's burden of proof. Under the new law, if the prosecution establishes a *prima facie* case—even if it falls short of proof beyond a reasonable doubt—the accused will have to testify. If the accused refuses to testify, the prosecutor's case will be bolstered by an inference of the accused's guilt. This effectively lowers the prosecution's burden of proof to showing a *prima facie* case.²⁷⁰

Adverse inferences also undermine the presumption of innocence by forcing suspects to explain away their alleged involvement in a crime. The accused's failure to provide a satisfactory explanation gives rise to the inference that there is no explanation and that the accused is guilty.²⁷¹ Such an inference contradicts the presumption of innocence by allowing verdicts based not on the evidence, but on "surmises based on the present situation of the accused."²⁷²

B. MOVE TOWARDS AN INQUISITORIAL SYSTEM OF CRIMINAL JUSTICE

As the United States Supreme Court recognized in *Griffin v. California*, "comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice" . . .²⁷³ By adopting this remnant, England has reversed three-hundred years of progress towards the accusatorial system, with its reliance on independent witnesses and extrinsic evidence, and reverted back to the inquisitorial system, with its

tantamount to confession. . . . [JEREMY BENTHAM, *THE WORKS OF JEREMY BENTHAM* 39 (John Bowring ed., ed. V. II 1818). Bentham believed interrogation to be "the most efficient, and [in case of doubt] the indispensable, instrument for the extraction of truth. . . ." *Id.* In announcing the proposal to eliminate the right to silence, Home Secretary Michael Howard argued that "the innocent have nothing to hide." *NATURE*, Oct. 14, 1993, at 591. 592. Judge David Miller has postulated that "[i]f an accused person has a defence [sic], what possible objection can there be to disclosing it as soon as possible?" David Miller, *THE ECONOMIST*, Feb. 19, 1994, at 8 (editorial). Keith Harvey has argued that "[r]equiring suspects to provide explanations for their actions, and inferring an element of guilt when they fail to do so, is a more accurate reflection of reality. . . ." Keith Harvey, *THE ECONOMIST*, Feb. 19, 1994, at 8 (editorial).

²⁷⁰ Jackson, *supra* note 8, at 108-09. The reasoning of the Murray opinion, which upheld a "common sense" approach to adverse inferences, could according to the author, undermine the accusatorial system: "The traditional conception of the accusatorial criminal trial is that it is more than an inquiry into the accused's guilt. It is a demonstration by the prosecution of the accused's guilt, and it is arguably inconsistent with the principle that it is for the prosecution to demonstrate the accused's guilt to allow the accused's refusal to participate in the trial by testifying to play a part in the demonstration." *Id.* In its Report, the Royal Commission concluded that eliminating the right to silence would reduce the prosecution's burden of proof. *REPORT*, *supra* note 5, at 55.

²⁷¹ See *supra* notes 155 to 156 and accompanying text.

²⁷² Taylor v. Kentucky, 436 U.S. 478, 485 (1978) (quoting 9 WILMORE, EVIDENCE 407 (3d ed. 1940)).

²⁷³ Griffin v. California, 380 U.S. 609, 614 (1965) (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

reliance on obtaining suspects' confessions through interrogation.²⁷⁴ England witnessed the operation of the inquisitorial system administered by ecclesiastical courts and by the Crown's High Commission and Star Chamber. This system relied on forcing suspects to incriminate themselves, generally under oath, through proceedings which did not require accusers, but which often relied on secret informers.²⁷⁵ Suspects who refused to incriminate themselves were either treated as if they had confessed, or imprisoned.²⁷⁶

Modern inquisitorial systems have, in large measure, retained this focus on obtaining suspects' confessions through interrogation. For instance, in Italy, investigatory detention may last up to forty-eight hours, during which time the police may deny access to counsel.²⁷⁷ This period may be extended in the event of major offenses and when it is reasonable to believe that the suspect may flee.²⁷⁸ The lengthy detention of suspects for investigation and interrogation has raised questions about possible abuses. For instance, it has allegedly been used to coerce suspects to confess and has gained international attention after a number of prominent suspects in a corruption investigation committed suicide while in detention.²⁷⁹

Modern inquisitorial systems also allow magistrates to question suspects at a preliminary examination to decide whether or not to

²⁷⁴ Justice Frankfurter pointed out the protection the right afforded against inquisitorial procedures: "Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. . . . No doubt the constitutional privilege reaching evil—the recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Ulman v. United States*, 380 U.S. 422, 426, 428 (1965).

²⁷⁵ Levy, *supra* note 25, at 23; see also WILMORE, *supra* note 25, at 275.

²⁷⁶ Levy, *supra* note 25, at 23-24, 132, 142-43, 150, 156, 179.

²⁷⁷ *An Overview of Italian Justice*, *Am. Lawyer*, Mar. 1993, at 80 ("Unfortunately for prosecutors, the Italian Parliament has passed several amendments to the 1989 code, eliminating many of the new rights of the accused criminals, such as giving notice to defense lawyers immediately after arrest. Police can now hold and question suspects for 48 hours without notifying their lawyers.")

²⁷⁸ Ennio Amodio et al., *An Accusatorial System in a Civil Law Country: The Italian Code of Criminal Procedure*, 62 *TEMP. L. Q.* 1211, 1218 n. 24 and accompanying text (discussing ITALIAN CODE OF CRIMINAL PROCEDURE art. 253, 384 (1988)).

²⁷⁹ Giuseppe Di Federico, *The Crisis of the Judicial System and the Referendum on the Judiciary in ITALYAN POLITICAL: A Review* 29-33 (Robert Leonard & Piergiorgio Corbetta eds., 3d ed. 1989). *Italy's Jailed Energy Chief Found Dead in Cell*, *N.Y. TIMES*, July 31, 1993, at A3 (after the suicides of a number of suspects in detention, Milan prosecutors were alleged to have used pretrial detention to force suspects to confess and to testify against co-conspirators); JOHN TACUMAU, *In a Courtroom in Milan, Italian Society is on Trial*, *N.Y. TIMES*, February 6, 1994, at A3 ("the annual human rights report of the United States State Department recently criticized [a prosecutor's] use of the preventative imprisonment to coax confessions from suspects"). Detention has also been used to elicit confessions in Germany, according to DAMASKA, *supra* note 19, at 167; see *supra* note 36 and accompanying text.

charge the suspect,²⁸⁰ and allow the government to call the accused as a witness at trial. For instance, under Italy's inquisitorial "Code Rocco," which was crafted during the Fascist era and remained in effect for almost fifty years, interrogation of the accused was the first event at trial.²⁸¹ Often, those systems allow the trier of fact to draw adverse inferences from a suspect's refusal to answer questions.²⁸²

Major's system of adverse inferences will foster the same focus on interrogation and confessions as existing inquisitorial systems. The suspect will not have a right to silence, but a duty to talk; the burden of proof will shift from the government to the accused; the presumption of innocence will become an assumption of guilt, to be overcome only by the accused's explanation. These principles harken back to the confession *pro confesso*, and convey the same message: that the government has the power to interrogate suspects, and the suspects have the duty to talk, and to help to convict themselves.²⁸³

English police have sought to gain other powers characteristic of an inquisitorial system. For instance, police have suggested adopting the use of Italian-style investigating magistrates to "cross-examine terrorist suspects," and to make it a crime if a suspect refuses to answer a magistrate's question.²⁸⁴ Other suggestions have included charging people with a crime if they refuse to account to the police for their movements, shifting the burden of proof to the accused,²⁸⁵ allowing

²⁸⁰ MERRIMAN, *supra* note 98, at 130-31; DAVASKA, *supra* note 19, at 162.

²⁸¹ *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, 29 *COLUM. J. TRANSNAT'L L.* 245, 248-49, 269 (1991). Modern inquisitorial systems are noted for their focus on gaining evidence through the interrogation of the accused, and for sometimes allowing investigating magistrates to take the lead in investigating crimes and questioning suspects. Many of these systems also give the same magistrate adjudicatory power to resolve the case, not based on the evidence presented in court, but based in large measure on the dossier which they have compiled through their own investigation. MERRIMAN, *supra* note 98, at 130-31; LAFAVE & ISRAEL, *supra* note 19, at 38.

²⁸² MERRIMAN, *supra* note 98, at 130; BAYTON L. INGHAM, *THE STRUCTURE OF CRIMINAL PROCEDURE, LAWS AND PRACTICE OF FRANCE, THE SOVIET UNION, CHINA, AND THE UNITED STATES* 79 (1987) ("Therefore, [in France] not only the investigators but also the adjudicators are likely to draw adverse conclusions as to guilt from a refusal to answer questions and are not prevented by law from doing so."); DAVASKA, *supra* note 19, at 167 ("Judges can legitimately draw unfavorable inferences from the defendant's refusal to answer questions, and it is easy to see reasons why Continental defendants who choose to exercise their right to silence are few and far between.");

²⁸³ Under old inquisitorial procedure, if a suspect did not take the oath, he would be considered guilty *pro confesso*—as if he had confessed. LEVY, *supra* note 25, at 23-24.

²⁸⁴ *MIS WANTS 'Anti-Mafia' Laws to Crack Coalfields of IRA*, *THE SUNDAY TIMES*, Mar. 20, 1994, §1, at 1 ("Security chiefs want to encourage hardened terrorists to confess and give evidence against their leaders. They also want to punish those who do not co-operate. One controversial proposal is to make it a crime for suspects to refuse to answer questions by the special investigators.");

²⁸⁵ Andrew Grice et al., *Major Urged to Bring Back Interment*, *THE SUNDAY TIMES*, Mar. 13, 1994, §1, at 3 ("The government is expected to reject proposals by Sir Hugh Annesley,

the use of "first hand" hearsay evidence,²⁸⁶ using secret prosecution witnesses, and allowing the prosecution to keep information and informants secret.²⁸⁷ Still other proposed measures include the extension of provisions which allow the detention of terrorist suspects for up to ninety-six hours without charge under the "Prevention and Suppression of Terrorism Act,"²⁸⁸ and proposals to limit suspects' right to bail.²⁸⁹

By adopting the use of adverse inferences, England has moved towards the inquisitorial systems of past and present. It has turned its criminal justice system away from a reliance on independent witnesses and extrinsic evidence, and towards a reliance on obtaining suspects' confessions through interrogation. If police efforts gain momentum, the adoption of adverse inferences could be part of a larger trend towards adopting a more complete set of inquisitorial procedures. Such a transformation would likely follow the pattern established when adverse inferences were adopted in Northern Ireland. The government would urge the adoption of those measures to fight terrorism and particularly grave offenses, but would quickly apply them to the entire criminal justice system.

chief constable of the Royal Ulster Constabulary, for tougher measures including a new offense under which people could be charged for refusing to account for their movements to police."); CHARLES POLHARD, *Sop Protesting the Cuffly and Abusing the Franchise*, *THE SUNDAY TIMES*, Apr. 24, 1994, §4, at 7 (Mr. Polhard opposes the current allocation of the burden of proof and the fact that "what is on trial is the accusation against the offender." He suggests putting the "offender" on trial. His use of the word "offender" rather than "accused" highlights his assumption that the person on trial is presumed guilty.); "Anti-Mafia" Laws, *supra* note 284. *Contra Kohander v. Lawson*, 461 U.S. 353 (1983) (The Supreme Court struck down as overbroad a California statute which required a person loitering on the streets to provide credible and reliable identification in response to police questioning. The majority found the statute unconstitutionally vague on its face in violation of the Due Process Clause of the Fourteenth Amendment because it encouraged arbitrary enforcement. In a concurring opinion, Justice Brennan noted that while a police officer may ask a citizen a question, he may not compel an answer.);

²⁸⁶ *Howard's Hack*, *THE SUNDAY TIMES*, Apr. 17, 1994, §4, at 5 (editorial discussing a proposal by Sir Hugh Annesley, chief constable of the Royal Ulster Constabulary).

²⁸⁷ Michael Prescott et al., *Home Office Moves to Protect Informers*, *THE SUNDAY TIMES*, Apr. 17, 1994, §1, at 24 (proposal to allow prosecutors to disclose to the defense evidence which "they think relevant to the defense, holding back items that would identify secret sources or lead to witnesses becoming vulnerable to intimidation"). Another proposal would offer witnesses to terrorist acts anonymity. "They would testify by video link or from behind screens to prevent intimidation. Their identities would be withheld from defense lawyers." "Anti-Mafia" Laws, *supra* note 284.

²⁸⁸ *Time to Stop Whoring the IRA*, *THE SUNDAY TIMES*, Mar. 6, 1994, §4, at 5 (editorial).
²⁸⁹ Amendments to the right to bail appear in Public Order Act, *supra* note 2. The right to bail pending trial corresponds to the presumption that the suspect is innocent until proven guilty in court. *Stack v. Boyle*, 342 U.S. 1, 4 (1951) ("Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."); Schwerner, *supra* note 143 (editorial disapproving of the amendments to the right to bail).

C. EFFECTS OF THE MOVE TOWARDS AN INQUISITORIAL SYSTEM

England's shift towards inquisitorial methods jeopardizes many of the benefits protected by the accusatorial system of justice. It loosens the accusatorial system's limits on government's power to pry into the "private enclave" of an individual's thoughts and conscience.²⁹⁰ It also diminishes the accusatorial system's protection of individual autonomy and free choice because, when suspected of a crime, individuals are no longer free to choose whether or not to provide the government with evidence to aid in securing their own conviction; they are bound to do so or face an inference of their guilt.²⁹¹ The move towards inquisitorial methods also undermines the accusatorial system's protection of individuals from humiliation and abuse at the hands of government investigators. The inquisitorial system tempts law enforcement officers to use inhumane and unreliable methods to obtain confessions—a temptation which has been the source of miscarriages of justice.²⁹²

The use of inquisitorial methods could increase the number of innocent persons convicted. Adverse inferences give police an additional method of producing confessions. This could cause weak suspects to confess to crimes which they did not commit.²⁹³ In addition, the adverse inferences drawn from silence might be incorrect. Some innocent people might remain silent during interrogation because they are confused, or because they are unable or unprepared to produce a cogent explanation in the tense environment of a police interrogation. Some innocent people might not be capable of offering persuasive testimony from the witness stand, and in fact may further incriminate themselves due to excessive nervousness or timidity.²⁹⁴ Moreover, not all suspects who remain silent do so because of their guilt. Some remain silent to protect others. In the Royal Commission's Study, for instance, in twelve percent of the cases where suspects remained silent, they did so to protect others.²⁹⁵ In each of

²⁹⁰ See *supra* note 104 and accompanying text; *Tehan v. Shott*, 382 U.S. 406, 414 n.12 (1966) (quoting *U.S. v. Grunewald*, 233 F.2d 556, 581-82 (1955) (Frank, J. dissenting)), *rev'd* 353 U.S. 391 (1956).

²⁹¹ See *supra* note 105 and accompanying text; see also *Malloy v. Hogan*, 378 U.S. 1 (1964).

²⁹² See *supra* note 103 and accompanying text.

²⁹³ *REPORT*, *supra* note 5, at 55.

²⁹⁴ *Griffin v. California*, 380 U.S. 609, 613 (1965) (quoting *Wilson v. United States*, 149 U.S. 60, 66 (1893)). Regardless of innocence, persons previously convicted of crimes may also shun the witness stand, aware that if they testify, the jury would be informed of their prior conviction as impeachment evidence. *Griffin*, 380 U.S. at 615 (quoting *People v. Modesto*, 598 P.2d 753, 762-63 (Cal. 1965)).

²⁹⁵ *LENCI*, *supra* note 5, at 19-20. Of the 49 cases where suspects remained silent for some or all of the interrogation, five suspects admitted their own involvement, yet remained

these instances, an inference of guilt from silence could have resulted in the conviction of an innocent person.

The recent move towards an inquisitorial system could also signal a larger transformation in the relationship between the citizen and the state. The accusatorial system protects many of the characteristics of an open and democratic society—a strictly limited government, restrained in its ability to compromise individual dignity, autonomy, and privacy. Citizens of an accusatorial system do not have to account for themselves to the state. The state must prove them guilty of a crime before taking away their liberty.²⁹⁶ The inquisitorial system is inconsistent with the inherent distrust of authority which helped shape limited and democratic government.²⁹⁷

VII. CONCLUSION

While the law curtailing the right to silence in England might appear "tough on crime," studies show that it will not, in fact, reduce crime. It will, however, have significant effects on the criminal justice system. The right to silence is an essential element of the accusatorial system of justice. It prevents the operation of the engine which drives the inquisitorial system—the power to require, encourage, or force individuals to respond to government questioning. By adopting the use of adverse inferences, England has curtailed the right to silence, replaced it with a duty to talk, and moved back toward an inquisitorial system. This trade of tangible liberty for the illusion or symbol of security will transform not only the criminal justice system, but also the character of the relationship between the citizen and the state. While some claim that the right to silence is a relic and urge the adoption of adverse inferences and the inquisitorial system in the United States,²⁹⁸

silent about the involvement of others. In another case, a suspect refused to answer questions after he was found in a van containing stolen goods. He was released when another man later stepped forward to confess, and the police were satisfied that the original suspect had nothing to do with the offense. *Id.*

²⁹⁶ See *Kotler v. Lawson*, 461 U.S. 352 (1983); see also *Wickmore*, *supra* note 25, at 317 ("The privilege [against self-incrimination] contributes toward a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load.").

²⁹⁷ *LaFare & Isaacs*, *supra* note 19, at 43. See *supra* note 98 (discussing government of limited, enumerated powers); *Alfred H. Kelly et al., THE AMERICAN CONSTITUTION* 113 (6th ed. 1983); *Davison*, *supra* note 19.

²⁹⁸ *Maechling*, *supra* note 23, at 59.

history remembers "the dangers of pursuing legal quests for instantaneous transformations, utopian solutions, or even short-term manipulations that eventually might undermine the long-term goals of American law,"²⁹⁹ and counsels against it.

²⁹⁹ Stephen B. Presser, "Legal History" or the History of Law: A Primer on Bringing the Law's Past into the Present, 33 VAND. L. REV. 849, 852 (1982) (commenting on the role of the study of legal history).

CRIMINOLOGY

IS GENDER SUBORDINATE TO CLASS? AN EMPIRICAL ASSESSMENT OF COLVIN AND PAULY'S STRUCTURAL MARXIST THEORY OF DELINQUENCY

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I. INTRODUCTION

For Karl Marx, the problem of crime in capitalist societies was linked to the material forces of capitalism and class domination.¹ Although Marx did not extensively discuss the problem, he did remark that criminality seemed to be concentrated in the dangerous classes.² The lumpenproletariat, or "parasitic class" of criminals, consisted of unproductive, unorganized labor whose criminal activity victimized capitalists and productive labor alike.³ Neither Marx nor Friedrich Engels noted the gender regularity of criminality. Over the years, Marxist and neo-Marxist scholars have replicated this omission, and it appears to have become a legacy of criminological Marxism.

Scholars have noted racial differences among the criminal population. For instance, David Gordon contends that crime is a rational response to the pressures of class, society, and the competition manifest in capitalist systems.⁴ Racial division in the working class benefits capitalism, because the competition between excluded minorities and

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¹ See KARL MARX & FRIEDRICH ENGELS, *THE GERMAN IDEOLOGY* (1965).

² See *id.*

³ See generally IAN TAYLOR, PAUL WATSON, & JOHN YOUNG (1973).

⁴ David M. Gordon, *Capitalism, Class, and Crime in America*, 19 *CRIME & DELINQ.* 163 (1973).