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Miranda and the Right to Silence in England

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MIRANDA AND THE RIGHT TO SILENCE IN ENGLAND

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I. INTRODUCTION

For those who ply their trade, whether it be business or crime, in the burgeoning global economy, an understanding of and familiarity with the laws of other countries and how they compare to those in the United States is quite useful, if not essential. An experienced criminal suspect from the United States who finds himself facing interrogation by English police might be comforted to hear the police caution him about his right to remain silent in language that is reminiscent of the *Miranda* warnings in the United States. However, unless he pays close attention to everything the English police tell him, he may miss the fact that in England, unlike in the United States, the exercise of the right to silence might ultimately lead a jury to draw adverse inferences about the suspect's guilt.

To set the stage and highlight the difference between what interrogation suspects are told in the United States and England, this article will first outline the precise wording of the *Miranda* warning given to American suspects and the "caution" given to English suspects. Part II will discuss the history and current status of the right to silence in the U.S. (Part III) and Britain (Part IV), with particular emphasis on the propriety of drawing adverse inferences from the actual exercise of that right.

II. RIGHT TO SILENCE WARNING OR CAUTION

In *Miranda v. Arizona,*[1] the United States Supreme Court held that any criminal suspect who is subjected to custodial interrogation

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1. 384 U.S. 436 (1966).

must be informed of certain rights as the first step in protecting the suspect's Fifth Amendment privilege against self-incrimination.[2] Although the Court has not been explicit in defining when a suspect is in "custody," it is probably best considered the equivalent of a "formal arrest."[3] The Court has held that "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[4] Thus, "if a person in custody is to be subjected to interrogation, he must be informed in clear and unequivocal terms that he has the right to remain silent."[5] In addition, that warning "must be accompanied by the explanation that anything said can and will be used against the individual in court."[6] While *Miranda* also requires that such a suspect be informed of various aspects of the right to counsel,[7] those provisions of the *Miranda* warnings are beyond the scope of this article.

Since England does not have a written constitution,[8] any requirement that the police warn a suspect about a right to silence must be based upon common law or legislation passed by Parliament. The Police and Criminal Evidence Act of 1984 (PACE) provides that the Secretary of State (also known as the Home Secretary) "shall issue

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2. U.S. CONST. amend. V. (The 5th Amendment to the United States Constitution provides in pertinent part that no person "shall be compelled in any criminal case to be a witness against himself.")

3. In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the court held that "the roadside questioning of a motorist detained pursuant to a routine traffic stop" does not amount to "custodial interrogation." In reaching that conclusion, the Court stated that the "usual traffic stop is more analogous to a so-called *'Terry* stop' than to a formal arrest," suggesting that "custody" under *Miranda* is analogous to formal arrest. *Id.* at 439. *See* Terry v. Ohio, 392 U.S. 1 (1968) for an explanation of a "*Terry* stop."

4. Rhode Island v. Innis, 446 U.S. 291 (1980).

5. *Miranda*, 384 U.S. at 467-68.

6. *Id.* at 469.

7. *Id.* at 442. *Miranda* provides that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." *Id.* at 471. It also provides "that if he is indigent a lawyer will be appointed to represent him." *Id.* at 473.

8. Daniel J. Feldman, *England and Wales, in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 91 (Craig M. Bradley ed., 1999). *See* David Jenkins, *Both Ends Against the Middle: European Integration, Devolution, and the Sites of Sovereignty in the United Kingdom*, 16 TEMP. INT'L & COMP. L.J. 1 (2002) and A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1965) (discussing the doctrine of parliamentary sovereignty).

codes of practice in connection with ... the detention, treatment, questioning and identification of persons by police officers."[9] Pursuant to that authority, the Secretary has promulgated Code of Practice C which requires that a "person whom there are grounds to suspect of an offence must be cautioned before any questions about it ... are put to him ...."[10] The "caution" must be as follows: "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence."[11] The portion of the caution about "harming your defence" was necessitated by the passage of the Criminal Justice and Public Order Act of 1994,[12] which will later be discussed in detail. The suspect also has a right to have access to legal advice,[13] although, again, this aspect of the questioning process is beyond the scope of this article.

The actual warnings, or caution, about the right to remain silent are fairly similar in the United States and England. The striking difference between them is that in England, the suspect must also be cautioned about the consequences that might occur due to remaining silent. Although both countries had historically disallowed the drawing of adverse inferences from the exercise of the right to remain silent, England reversed itself on that point with the adoption of the Criminal Justice and Public Order Act in 1994.

III. THE RIGHT TO SILENCE AND ADVERSE INFERENCES - UNITED STATES

As early as 1893 the U.S. Supreme Court, in *Wilson v. United States*,[14] held that it was improper for the prosecutor to comment on the failure of the defendant in a criminal action to appear as a witness

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9. Police and Criminal Evidence Act, 1984, c. 60, § 66 (Eng.).

10. *Id* at App. A, § 10.1, Code of Practice C (Eng.). There are five Codes of Practice promulgated under PACE: Code A: the exercise by police officers of statutory powers of stop and search; Code B: the searching of premises by police officers and the seizure of property found by police officers on persons or premises; Code C: the detention, treatment and questioning of persons by police officers; Code D: the identification of persons by police officers; and Code E: the tape recording of interviews by police officers at police stations with suspected persons. CRIMINAL PROCEDURE: A WORLDWIDE STUDY, *supra* note 8, at 92.

11. Police and Criminal Evidence Act, 1984, App. A, § 10.4, Code of Practice C (Eng.).

12. Criminal Justice and Public Order Act, 1994, c. 33, § 34 (Eng.).

13. Police and Criminal Evidence Act, 1984, c. 60, §§ 56, 58 (Eng.).

14. 149 U.S. 60 (1893).

on his own behalf. Although *Wilson* was based on a federal statute, the rationale of the decision provided the basis for the holding in *Griffin v. California*,[15] in which the Supreme Court held that the Fifth Amendment privilege against self-incrimination "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."[16] The *Griffin* opinion quoted with approval from *Wilson*:

> It is not every one who can safely venture on the witness stand, though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would therefore willingly be placed on the witness stand.[17]

The *Griffin* court further held that "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice' which the Fifth Amendment outlaws."[18] The Court also characterized such comment as "a penalty imposed by courts for exercising a constitutional privilege"[19] in that "[i]t cuts down on the privilege by making its assertion costly."[20]

The Supreme Court reinforced the *Griffin* decision when it held in *Carter v. Kentucky*[21] that upon request by the defendant, the trial judge must instruct the jury that it may not draw any adverse inferences from the defendant's failure to testify. The Court had previously held, in *Lakeside v. Oregon*,[22] that such an instruction could be given over the defendant's objection. Of course, a defendant may waive the protection of the privilege by voluntarily testifying[23] and the scope of the "waiver is determined by the scope of relevant cross-examination."[24]

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15. 380 U.S. 609 (1965).
16. *Id.* at 615.
17. *Wilson*, 149 U.S. at 66.
18. *Griffin*, 380 U.S. at 614.
19. *Id.*
20. *Id.*
21. 450 U.S. 288 (1981).
22. 435 U.S. 333 (1978).
23. Rogers v. United States, 340 U.S. 367, 370 (1951).
24. Brown v. United States, 356 U.S. 148, 154-55 (1958).

More recently, in *Mitchell v. United States,*[25] the Court extended the no-adverse-inference rule to the sentencing stage of a criminal prosecution. The trial judge had relied, in part, on the failure of the defendant to testify, finding that she had been involved in the distribution of greater than five kilograms of cocaine, which resulted in a more severe sentence. However, the dissent in this case shows that there is less than unanimous support for the no-adverse-inference rule. Justice Scalia, joined by Rehnquist, O'Connor, and Thomas, took aim at the rationale of the *Griffin* decision and concluded that "the text and history of the Fifth Amendment give no indication that there is a federal *constitutional* prohibition on the use of the defendant's silence as demeanor evidence."[26] Of the four dissenters, only Thomas would actually reexamine *Griffin* and its progeny, while the others would simply not have extended it to the sentencing phase.

It should be noted that the above cited cases only dealt with the right to remain silent at the trial itself. They did not involve any kind of warning about the right to remain silent during interrogation or the exercise of that right. The *Miranda* decision, however, held that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of an accusation."[27] That statement might only apply to the defendant who not only remains silent at the interrogation, but who also remains silent at the trial. *Doyle v. Ohio*[28] is the leading case on the adverse use of silence in the face of *Miranda* warnings against a testifying defendant.

In *Doyle,* the defendant chose to remain silent after being given his *Miranda* warnings. When he testified for the first time at trial with a somewhat exculpatory story, he was cross-examined about why he had not come forth with that story when he was questioned by the police. The Supreme Court held that such impeachment violated the Constitution, but instead of relying on the Fifth Amendment privilege and the *Griffin* line of cases, the Court instead relied on the Due Process Clause in holding that it was simply "fundamentally unfair" to "allow the arrested person's silence to be used to impeach an

25. 526 U.S. 314 (1999).

26. *Id.* at 335 (Scalia, J., dissenting).

27. *Miranda,* 384 U.S. 436, at 468 n.37.

28. 426 U.S. 610 (1976).

explanation subsequently offered at trial."[29] The court reasoned that "while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings."[30]

An important question arises: why did the Court rely on Due Process fairness rather than the Fifth Amendment privilege against self-incrimination? Certainly one answer is that in 1976, when *Doyle* was decided, the Court had already started to distance the *Miranda* decision from the Fifth Amendment. *Michigan v. Tucker,*[31] decided in 1974, allowed the testimony of a prosecution witness whose identity had been discovered during the questioning of the defendant where the questioning violated *Miranda.* In reaching that decision, the Court first started referring to the *Miranda* safeguards as "not themselves rights protected by the Constitution . . . ."[32] The Court continued this distinction between a *Miranda* violation and a constitutional violation in such cases as *Oregon v. Elstad*[33] and *New York v. Quarles.*[34] Even though the Court has now recognized in *Dickerson v. United States*[35] that *Miranda* was a constitutional decision, it is not surprising that the Court in 1976 did not want to further legitimize *Miranda* by basing the decision in *Doyle* on the Fifth Amendment.

Another major reason for the due process basis in *Doyle* is the division the Court had begun to carve out between the affirmative use of the defendant's prior silence and the use of prior silence, or other arguably inconsistent conduct or statements, for impeachment purposes if the defendant elects to testify. Although *Griffin* and its progeny were fairly strict in prohibiting the use of silence to adversely affect a non-testifying defendant, the Court had previously recognized less protection for the testifying defendant.

In *Raffel v. United States,*[36] the defendant chose not to testify at his first trial, but when he testified at a second trial, the Court approved the use of his silence at the first trial for impeachment purposes. Although subsequent cases have cast some doubt on the

29. *Id.* at 618.
30. *Id.*
31. 417 U.S. 433 (1974).
32. *Id.* at 444.
33. 470 U.S. 298 (1985).
34. 467 U.S. 649 (1984).
35. 530 U.S. 428, 444 (2000).
36. 271 U.S. 494, 495 (1926).

continuing validity of *Raffel*,[37] that case, along with *Jenkins v. Anderson*[38] and *Fletcher v. Weir*,[39] clearly indicate the reduced concern the Court feels for the use of silence for impeachment. Likewise, in *Harris v. New York*[40] and *Oregon v. Hass*,[41] the Court has approved of the use of inconsistent pre-trial statements for impeachment, even though obtained in violation of *Miranda*. In all of these cases the Court has consistently pointed out the danger to the adversary system if the credibility of a defendant's trial testimony cannot be tested by the use of inconsistent pre-trial silence or statements.[42] It is one thing to prevent the use of silence when the defendant does not testify; it is something else to allow the defendant to get away with lying on the

37. In *Grunewald v. United States*, the Court held that it was error to permit the prosecutor, when cross-examining a defendant at trial, to use his assertion of his Fifth Amendment privilege as a witness before a grand jury for impeachment. *Grunewald*, 353 U.S. 391 (1957). "In effect, the Court limited *Raffel* to cases in which the probative value of the cross-examination outweighed its possible impermissible effect on the jury." Jenkins v. Anderson, 447 U.S. 231, at 241, n.2 (1980) (Stevens, J. concurring). Thus the *Grunewald* Court was "not faced with the necessity of deciding whether *Raffel* has been stripped of vitality by the later Johnson case [Johnson v. United States, 318 U.S. 189 (1943)] or of otherwise reexamining *Raffel*." *Grunewald*, 353 U.S. at 421.

38. *Jenkins*, 447 U.S. at 240-41 (approving the use of a defendant's pre-arrest, pre-Miranda warning silence for impeachment when the defendant chose to testify at trial).

39. 455 U.S. 603, 606-07 (1982) (per curiam) (approving the use of post-arrest but pre-Miranda warning silence for impeachment purposes when the defendant chose to testify at trial).

40. 401 U.S. 222, 225-26 (1971) (approving of the use of statements made immediately following the defendant's arrest for impeachment purposes when he testified inconsistently at trial, despite the fact that the pre-trial statements were preceded by defective Miranda warnings).

41. 420 U.S. 714, 723 (1975). In *Hass*, after being advised of his Miranda rights, the defendant asserted them by asking for a lawyer. The police refused to honor the request and continued questioning Hass. The Court ruled that the statement then obtained could be used for impeachment purposes when Hass testified at the trial. *See id.*

42. For example, in *Harris v. New York*, the Court stated that "privilege cannot be construed to include the right to commit perjury .... Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately ...." *Harris*, 401 U.S. at 225 (quoted favorably in *Jenkins v. Anderson*, 447 U.S. at 237-38). *Raffel v. United States* points out that when a defendant, who had not testified in his first trial, "takes the stand in his own behalf, he does so as any other witness, and within the limits of the appropriate rules he may be cross-examined ...." *Raffel*, 271 U.S. at 496-97.

witness stand in the face of arguably inconsistent pre-trial silence or statements.

The final reason for the failure to rely on the Fifth Amendment in *Doyle* is the Court's reluctance to find that any pre-trial silence is actually "compelled" under the Fifth Amendment. The Court has said, "[a]bsent some officially *coerced* self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions."[43] *Miranda*, of course, created a presumption that custodial interrogation was *inherently coercive*[44] unless there was compliance with the safeguards contained therein. Despite this attempt to equate "custodial interrogation" with the compulsion required for a violation of the Fifth Amendment, the Court has consistently held, in such cases as *Michigan v. Tucker,*[45] *New York v. Quarles,*[46] and *Oregon v. Elstad*[47] that a statement obtained in violation of *Miranda* has not necessarily been *compelled* in violation of the Fifth Amendment. Although the Court has now held in *Dickerson v. United States*[48] that *Miranda* is a constitutional decision, nothing in that decision necessarily changes the view that a statement, much less silence, obtained in violation of *Miranda* is still not compelled for Fifth Amendment purposes.[49] In *Jenkins v. Anderson,* which approved of the use of pre-arrest silence to impeach a testifying defendant, the Court held that "no governmental action *induced* petitioner to remain silent before arrest."[50] Thus, it would appear that any pre-trial silence on the part of a defendant will not be considered "compelled" by either the police[51] or the Fifth Amendment itself. It is only because the *Miranda* warnings themselves implicitly assure a suspect that silence "will carry no penalty"[52] that it is "fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be

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43. United States v. Washington, 431 U.S. 181, 187 (1977) (emphasis added).

44. *See* 384 U.S. 436.

45. 417 U.S. 433 (1974).

46. 467 U.S. 649 (1984).

47. 470 U.S. 298 (1985).

48. 30 U.S. 428 (2000).

49. *See* Albert W. Alschuler, Note, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996), for an in-depth discussion of the history of the right to remain silent and the privilege against self-incrimination.

50. 447 U.S. at 240 (emphasis added).

51. It might, of course, be conceivable that silence could be "compelled" by a police threat to beat the suspect if he says anything.

52. *Doyle*, 426 U.S. at 618.

used to impeach an explanation subsequently offered at trial."[53] One implication of *Doyle*, then, is that if the *Miranda* warnings were altered to include a suggestion that silence might in fact carry a penalty, as in England, perhaps it would no longer be *unfair* to impose such a penalty.

IV. THE RIGHT TO SILENCE AND ADVERSE INFERENCES – ENGLAND

England has long recognized a common law privilege against self-incrimination and a related right to remain silent. "Broadly speaking, the difference between them is that the privilege against self-incrimination deals with questions of direct compulsion of an accused person to provide evidence against himself, whereas the right to silence covers certain situations of indirect compulsion."[54] The common law privilege allows a person in any legal proceeding to refuse to answer questions or produce documents which would tend to incriminate him.[55] The right to silence raises the issue of whether any adverse evidentiary consequences may flow from a suspect's failure to answer police questions during interrogation or to testify at his trial, even though "[t]here is no directly enforceable duty to speak in these situations."[56]

In addition to the common law origins of the privilege against self-incrimination, it is also recognized in statute. The Criminal Evidence Act of 1898 provides that "[a] person charged in criminal proceedings shall not be called as a witness in the proceedings except upon his own application," and

> a person charged in criminal proceedings who is called as a witness in the proceedings shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than the one with which he is then charged . . . .[57]

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53. *Id.*

54. I. H. DENNIS, THE LAW OF EVIDENCE 126 (2d ed. 2002).

55. *See id.*

56. *Id.*

57. Criminal Evidence Act, 1898, c. 36, §§ 1-3 (Eng.). Section 2 provides that if an accused chooses to testify he "may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to any offence with which he is charged in the proceedings." Section 3 also contains some exceptions to the prohibition against asking questions on cross examination about crimes other than those charged.

In addition, the Civil Evidence Act of 1968 provides that "[t]he right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty . . . ."[58] The privilege is said to include "both answers that would incriminate the person directly and those which might incriminate indirectly, by forming part of a line of inquiry leading to the obtaining of evidence against the person."[59] This scope of the privilege is similar to the United States, where the privilege applies to any "link in the chain of evidence" needed to prosecute for a criminal offense.[60]

With respect to whether adverse inferences can be drawn from the exercise of the privilege at trial, the common law position was stated in *Regina v. Bathurst*:

> [T]he accepted form of comment is to inform the jury that, of course, he is not bound to give evidence, that he can sit back and see if the prosecution have proved their case, and that while the jury have been deprived of the opportunity of hearing his story tested in cross-examination, the one thing they must not do is to assume that he is guilty because he has not gone into the witness box.[61]

While that pronouncement makes it clear that an accused should not be assumed guilty just because he did not testify, it also clearly allows the judge to "make a thinly disguised attack on the defendant's decision not to give evidence by pointing out the absence of scrutiny that cross-examination affords."[62] That point was confirmed by the Court of Appeal in *R v. Martinez-Tobon,*[63] in which the court said that as long as the court does not contradict or nullify the essential direction that the accused is not to be assumed guilty because he has not given evidence, "the judge may think it appropriate to make a stronger comment where the defence case involves alleged facts which (a) are at variance with prosecution evidence or additional to it and

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58. Civil Evidence Act, 1968, c. 64, § 14(1) (Eng.).

59. DENNIS, *supra* note 54, at 131 (citing *Slaney* (1832) 5 C. & P. 213). *See also* Lamb v. Munster, 10 Eng. Rep. 110 (Q.B.D. 1882).

60. Hoffman v. United States, 341 U.S. 479, 486 (1951).

61. 2 Q.B. 99, 107-08 (Eng. C.A. 1968).

62. MARTIN HANNIBAL & LISA MOUNTFORD, THE LAW OF CRIMINAL AND CIVIL EVIDENCE 113 (2002).

63. *See* 98 Crim. App. R. 375 (1994).

exculpatory, and (b) must, if true, be within the knowledge of the defendant."[64]

Parliament has the authority to change the common and statutory law, and it has done just that. Numerous statutes "require individuals to answer questions, provide information and produce documents in a variety of procedura[l] contexts, with a threat of criminal sanctions for non-compliance."[65] The Criminal Justice and Public Order Act of 1994 (CJPOA) now provides that at the conclusion of the evidence for the prosecution, if the accused "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."[66] Thus, after the adoption of the CJPOA, the judge's comments about the failure of the defendant to testify can be quite explicit and no longer have to be "thinly veiled." The history and impact of the CJPOA will be discussed below in relation to the drawing of adverse inferences from the exercise of the right to silence during the interrogation process.

The English common law has long recognized a right to remain silent in the face of police interrogation. For example, in *Rex v. Leckey,*[67] the defendant, who was being investigated in a murder, was given the formal caution: "Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you wish to do so, but whatever you say will be taken down in writing and may be given in evidence."[68] Leckey replied, "I have nothing to say until I have seen someone, a solicitor."[69] In summing up the case for the jurors, the trial judge made several references to the fact that Leckey had not denied the murder when given an opportunity to do so. At one point he said,

> If a man is charged with murder and is not responsible, if he has not committed murder or anything like murder, what do you expect

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64. *Id.*

65. DENNIS, *supra* note 54, at 132 (citing in particular the Theft Act of 1968, § 31; the Criminal Damage Act of 1971, § 9; the Supreme Court Act of 1981, § 72; and the Children Act of 1989, § 98).

66. Criminal Justice and Public Order Act, 1994, c. 33, § 35 (Eng.). That section provides that it will not apply if "the accused's guilt is not at issue" or if "it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence." *Id.*

67. 1944 K.B. 80 (Eng. C.A.).

68. *Id.* at 81.

69. *Id.*

> him to say? Would you expect him to deny it .... Of course, members of the jury, he is not bound to say anything, but what would you expect?[70]

The judge further commented, "but can you understand how it comes about, if he be innocent of the charge made against him, that he never said: 'I did not murder the girl. When I left her she was perfectly all right?'."[71] The Court of Criminal Appeal held that such adverse comment on the defendant's silence was "misdirection" that would justify quashing the conviction.

In another leading case on the issue, *Hall v. R.*,[72] Lord Diplock wrote:

> It is a clear and widely known principle of the common law ... that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence .... It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordship's view silence alone on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation.[73]

Although this case affirmed a defendant's common law right to silence, the language that "in very exceptional circumstances an inference may be drawn from a failure to give an explanation" suggests that the right to silence may be qualified. Subsequent cases, like *R v. Chandler,*[74] have used that language to suggest that silence might be used against a defendant in a situation where the accused is on "even terms" with his accuser.[75]

Although the common law protection against any adverse inference being drawn from the exercise of the right to silence during questioning was well established, the above cases indicate that not all jurists thought the right should be completely unfettered. One concern in particular that was raised was the ability of a defendant to use the right to silence to assist in the presentation of an "ambush defence." An ambush defence "arises where a defendant fails to put

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70. *Id.* at 81-82.
71. *Id.* at 82.
72. [1970] 5 A.C. 108 (P.C. 1971).
73. *Id.* at 111-12.
74. 63 Crim. App. R. 1 (1976).
75. *See* HANNIBAL & MOUNTFORD, *supra* note 62, at 112.

forward his version of events at the police station but does so for the first time at trial."[76] Such a tactic obviously limits the amount of time the prosecution has to investigate the facts surrounding the defense and prepare a responsive strategy.

The first case to raise a concern about the "ambush defense" was *R v. Gilbert,*[77] in which the defendant raised a claim of self defense for the first time at trial. Sympathetic to the unfairness of the ambush defense, the court reaffirmed that the jury must be told that they must not draw the inference of guilt from the defendant's silence, while at the same time suggesting that "it may appear obvious to the jury in the exercise of their common sense that an innocent man would speak and not be silent"[78] and that "it may not be a misdirection to say simply 'this defence was first put forward at this trial.' "[79] In *R v. Alladice,*[80] the Lord Chief Justice wrote that there should be a right of the court to comment on failure by the defendant to reveal a defense which the defendant later springs on the prosecution.[81]

It was against this background of judicial concern about an unqualified right to silence, particularly with respect to the ambush defense, that the Royal Commission on Criminal Justice was established to investigate, among other things, whether the common law right to silence should be modified.[82] After hearing a broad range of views for and against the modification of the right to silence, the Royal Commission recommended in 1993 that the common law right to silence be maintained in its then current form, with the addition of a requirement that the defendant make some pre-trial disclosures.[83] Parliament, however, disregarded the recommendation of the Royal Commission and adopted the CJPOA, which allows the drawing of adverse inferences from a suspect's silence in a number of different situations. The CJPOA was modeled after certain provisions of the Criminal Evidence (Northern Ireland) Order of 1988 which had been in effect in Northern Ireland since 1988.[84]

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76. *Id.* at 114. *See also* DENNIS, *supra* note 54, at 147.

77. *See* 66 Crim. App. R. 237 (1978).

78. *Id.* at 243.

79. *Id.* at 244.

80. 87 Crim. App. R. 380 (1988).

81. *Id.* at 385-87.

82. HANNIBAL & MOUNTFORD, *supra* note 62, at 114.

83. *Id.* at 115.

84. DENNIS, *supra* note 54, at 147. *See* K.A. Cavanaugh, *Emergency Rule, Normalcy Exception: The Erosion of the Right to Silence in the United Kingdom,* 35 CORNELL

The most sweeping change with respect to the right to silence during interrogation is contained in section 34, which provides:

> (1) Where, in any proceeding against a person for an offence, evidence is given that the accused—
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> (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
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> (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned charged, or informed, as the case may be . . . .[85]

The section then provides that "the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper."[86] Since this section now effectively allows the court or jury to draw adverse inferences from the fact of the accused's silence during interrogation, it became necessary to amend the wording of the "caution" that is given to the suspect during interrogation. PACE Code C now provides that the following caution must be given: "You do not have to say anything. *But it may harm your defence if you do not mention when questioned something which you later rely on in court.* Anything you do say may be given in evidence."[87]

While section 34 retains the accused's right to remain silent, at least to the extent that the accused cannot be charged for a separate offense or contempt for remaining silent,[88] it is clear that the section now imposes a burden on the exercise of that right. It is also clear that section 34 does not operate to allow silence to only be used for impeachment purposes should the defendant choose to testify.

INT'L L.J. 491 (2002) (discussing the background of the right to silence in Northern Ireland).

85. Criminal Justice and Public Order Act, 1994, c. 33, § 34. (Eng.).

86. *Id.* The Criminal Justice and Public Order Act of 1994 also provides that such adverse inferences can be drawn when the accused fails to testify at the trial (§ 35), when he fails to account for any "object, substance, or mark" present during his arrest (§ 36), or fails to account for his presence at a particular place (§ 37). *Id.* at § 35-37.

87. Police and Criminal Evidence Act, *supra* note 11 (emphasis added).

88. DENNIS, *supra* note 54, at 147.

Rather, the section applies anytime a defendant has "relied" on a fact that he "failed to mention" during interrogation. The Court of Appeal has held that such reliance could occur simply by adducing a fact during the cross-examination of a prosecution witness and is not limited to facts raised during the defense's case-in-chief.[89]

Perhaps the most significant impact of this section is on the nature of the advice a legal advisor should give a suspect during interrogation. Prior to the adoption of section 34, it would have been fairly safe, as it is in the United States under *Miranda*,[90] to advise a client to remain silent. However, under section 34, such advice is much more difficult to give, since the legal advisor now has to "carefully weigh the risk of the suspect making inculpatory statements . . . against the drawing of adverse inferences at trial . . . ."[91] One English practitioner has referred to the "cat and mouse game" that now exists between defense lawyers and the police as a result of CJPOA.[92] Another commentator has referred to the "sea of uncertainty" in which custodial legal advisors must now operate.[93]

One particular aspect of this legal advice dilemma has to do with the effect, if any, legal advice to remain silent has on the operation of section 34 and the ability of the court or juries to draw adverse inferences. Under section 34, a judge should direct a jury that it may draw adverse inferences from silence only if "the reason for the silence was that the defendant had no story to give at the time of the interview or no story that he was prepared to have questioned or investigated."[94] The Court of Appeal has held that "if it is a plausible explanation that the reason for not mentioning facts is that the [defendant] acted on the advice of his solicitor and not because he had no, or no satisfactory, answer to give then no inference should be

89. R. v. Bowers, [1998] Crim. L.R. 817, *cited in* HANNIBAL & MOUNTFORD, *supra* note 62, at 123.

90. Remaining silent would be particularly good advice in the United States, not only because no adverse inferences can be drawn, but also because any statement that is made can be used for impeachment should the defendant testify inconsistently at trial. *See* Harris v. New York, 401 U.S. 222 (1971).

91. Raymond J. Toney, *English Criminal Procedure Under Article 6 of the European Convention on Human Rights: Implications For Custodial Interrogation Practices*, 24 HOUS. J. INT'L. L. 411, 432 (2002).

92. *Id.* at 431 (citing Ed Cape, *Advising on Silence: New Cases, New Strategies*, LEGAL ACTION, June 1999, at 14).

93. *Id.* (citing John Baldwin, *Police Interrogation: What are the Rules of the Game?, in* SUSPICION AND SILENCE: THE RIGHT TO SILENCE IN CRIMINAL INVESTIGATIONS 66, 72 (David Morgan & Geoffrey M. Stephenson eds., 1994)).

94. DENNIS, *supra* note 54, at 150.

drawn."[95] Recognizing that "directions pursuant to section 34 of the Act are never easy for a trial judge, particularly where reliance is placed on legal advice,"[96] the Court proceeded to provide a model direction which concluded with:

> If, on the other hand, you are satisfied that the true explanation for either defendant's failure is that he did not at that time have any answer to the allegations that were being put to him, or that he realised that such explanation as he had would not at that stage stand up to questioning or investigation by the police and that *the advice of the solicitor did no more than to provide him with a convenient shield behind which to hide*, then and only then can you draw such inferences as you consider proper from his failure.[97]

Thus, it is possible for a defendant to avoid having the jury told that it can draw adverse inferences from silence if that silence is based on advice from counsel. One obvious problem with this approach, of course, is that the jury will still be aware that the defendant remained silent during interrogation and might very well be inclined to draw an adverse inference even though the direction from the court is otherwise. A less obvious, but perhaps more troubling problem, is that a defendant will have to waive his attorney client privilege in order to convince a jury that legal advice was the valid reason for remaining silent during interrogation. In order to raise the issue of the reason for the silence, it will generally be necessary for the defendant to testify about the advice received from his lawyer during interrogation. The Court of Appeal has held that although disclosure of the fact that the defendant received legal advice does not constitute a waiver of the privilege, any disclosure of the reasons for the advice to remain silent will result in a waiver.[98] It used to be quite common for legal advisors to give their reasons for advising silence at the beginning of a tape-recorded interview.[99] However, the Court of Appeal has held that such disclosure of the reasons for the advice, but not just the fact of the advice itself, resulted in a waiver of the privilege and allowed the prosecutor to cross-examine the defendant about his conversations with his

95. R. v. Betts, 2 Crim. App. R. 16, ¶ 53 (Eng. C.A. 2001).

96. *Id.*

97. *Id.* at 271 (emphasis added).

98. R. v. Bowden, 2 Crim. App. R. 176, 176-77 (1999).

99. HANNIBAL & MOUNTFORD, *supra* note 62, at 134.

attorney.[100] Because of these rulings, English attorneys are now advised that in order to avoid a waiver of the privilege they should simply state the fact of the advice to remain silent and not any reasons that could be based on any privileged conversations with their client.[101]

Although, as suggested earlier,[102] Parliament is not bound by a constitution in the enactment of legislation, it is bound to some extent by the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, commonly referred to as the European Convention on Human Rights (ECHR), which the United Kingdom ratified on March 8, 1951.[103] The primary provision of the ECHR that applies to criminal prosecutions is Article 6, which essentially guarantees the right to a fair trial.[104] Previously, an English defendant who complained that his right to a fair trial under Article 6 of the ECHR had been violated could not obtain a remedy directly in the English courts. Instead, the person would have had to apply to the European Court of Human Rights in Strasbourg for a ruling that England, as a member state of the ECHR, had violated his Convention rights.[105] Such a ruling by the Strasbourg Court, however, did not change any English law or provide the aggrieved person any directly enforceable right.[106] In part because of England's poor record of voluntary compliance with the rulings of the European Court, Parliament passed the Human Rights Act of 1998, which essentially incorporates into English law the provisions of the ECHR.[107] Under the Human Rights Act, courts are under a duty not to act in a way that is incompatible with a Convention right and must interpret English law in a way that is compatible with the Convention.[108] With respect to case law, the English courts must disregard any precedent that is incompatible with the jurisprudence of the Convention. However, with respect to legislation, if it is not possible to interpret it in a way that is compatible with the Convention, the court may not declare the legislation void. Rather, the court may make a

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100. HANNIBAL & MOUNTFORD, *supra* note 62, at 134 (citing R. v. Fitzgerald [1998] 4 Archbold News 2 and R. v. Bowden, 2 Crim. App. R. 176 (1999)).

101. HANNIBAL & MOUNTFORD, *supra* note 62, at 134.

102. *See infra* Part II.

103. Toney, *supra* note 91, at 413 n.3.

104. *Id.* at 415 n.9.

105. DENNIS, *supra* note 54, at 35.

106. *See id.*

107. *See id.*

108. *See id.* at 35-36.

declaration of incompatibility with the Convention, with the expectation that Parliament will amend the legislation to bring it into compliance with the Convention.[109]

The final issue to be discussed is whether the provisions of the Criminal Justice and Public Order Act of 1994, that allow adverse inferences to be drawn from the exercise of the right to silence, constitute a violation of the European Convention on Human Rights as applied to England through the Human Rights Act of 1998. Although the privilege against self-incrimination and the right to silence are not specifically mentioned in Article 6 of the Convention, the European Court of Human Rights has held that "the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6."[110] The Court went on to hold, however, that these rights are not absolute and that "it is equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution."[111] One commentator has suggested that an adverse inference based on silence may be drawn in compliance with Article 6 if four conditions are met:

> (1) The accused must have been afforded access to legal advice before being interviewed . . . .
>
> (2) The jury must have been properly directed to consider the accused's reason for silence . . . .
>
> (3) An adverse inference from silence must not be the sole or main evidence for conviction . . . .
>
> (4) The facts -- as established by the other evidence -- must clearly call for an explanation from the accused, an explanation to be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution . . . .[112]

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109. *See id.* at 36.

110. HANNIBAL & MOUNTFORD, *supra* note 62, at 137 (citing Murray v. United Kingdom, 22 Eur. Ct. H.R. 29 (1996)).

111. *Id.*

112. Ian Dennis, *Silence in the Police Station: The Marginalisation of Section 34*, CRIM. L. REV. 25, 28-29 (Jan. 2002).

If these conditions are met, "we can now be reasonably confident that an English court will not be persuaded to make a declaration under section 4 of the HRA that section 34 is incompatible with Art. 6."[113]

Even though it appears that the application of section 34 is, thus, not a violation of Article 6, it has still not been enthusiastically received by the English judiciary. In one of the first cases to interpret section 34, Lord Bingham ended his discussion of the section with the "disparaging comment"[114] that "Parliament in its wisdom has seen fit to enact this section."[115] In the subsequent case of *R. v. Bowden,*[116] Lord Bingham wrote: "Proper effect must of course be given to these provisions. But since they restrict rights recognised at common law as appropriate to protect defendants against the risk of injustice, they should not be construed more widely than the statutory language requires."[117] At least one commentator has suggested that judges in subsequent cases have shown a willingness to follow this grudging application of section 34, turning it into an "extraordinarily technical rule of corroboration."[118] As a result, "section 34 has been increasingly marginalized."[119] Repeal of section 34, although "politically unlikely," would "certainly simplify the law and make the lot of trial judges an easier one."[120]

V. CONCLUSION

Both the United States and England have had a similar tradition of protecting the right to silence during the interrogation process. England, however, has chosen to depart from that tradition and lessen that protection by allowing adverse inferences to be drawn, under certain circumstances, from the exercise of that right. The United States has thus far stood firmly committed against the drawing of adverse inferences, at least in the face of *Miranda* warnings. That stance, however, is not based on any commitment to values underlying the privilege against self-incrimination and the right to silence, but rather simply on the notion that it is unfair to use

113. *Id.* at 27.
114. *Id.* at 29 (quoting R. v. Argent, 2 Crim. App. R. 32 (1997)).
115. R. v. Argent, 2 Crim. App. R. 32 (1997).
116. *See generally* 2 Crim. App. R. 176 (1999).
117. *Id.* at 181.
118. Dennis, *supra* note 112, at 38.
119. *Id.* at 37.
120. *Id.* at 38.

a suspect's silence against him after having just told him he had a right to remain silent. England, however, has altered that notion of unfairness by the simple addition of another warning that silence might in fact be harmful.