

**THE RIGHT TO SILENCE AND THE PRIVILEGE AGAINST SELF-
INCRIMINATION : A CRITICAL EXAMINATION OF A DOCTRINE IN
SEARCH OF COGENT REASONS**

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CONSTANTINE THEOPHILOPOULOS

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PREFACE

The aim of this thesis is to analyse the silence principle (i.e. the right to silence and the privilege against self-incrimination) and to determine its place within procedural and constitutional law. Should the silence principle be entirely abolished, sustained as a limited evidentiary rule or elevated to the status of a constitutional right? The central question to be argued is whether the silence principle has a rationally justifiable and valid procedural place within the accusatorial-adversarial Anglo-American system of criminal justice.

The methodology employed in the main body of this thesis involves a critical and comparative examination of the silence principle and is founded on the following four legs :

- a) A historical analysis of the silence principle and its antecedents. Does the historical silence principle support the modern silence principle in description and scope?
- b) An analysis of the distinction between a "right" and a "privilege". Why is the accused's right to silence distinguished from the witness privilege? Is there a philosophical justification for the silence principle?
- c) A comparative study of the two major jurisdictions of the Anglo-American system of justice, namely :
 - i) The American silence principle constituted as the fifth amendment privilege against self-incrimination and entrenched within the U.S. Constitution;
 - ii) The English silence principle constituted until recently as a common law evidentiary rule contained within a body of ill-defined principles loosely referred to as the unwritten English Constitution. The common law rule has been statutorily formalized in the Criminal Justice and Public Order Act 1994 and will be greatly influenced by the new Human Rights Act 1998.
 - iii) The South African interpretation of a silence principle is caught between the two extremes of an American absolute right and an English evidentiary rule. Silence in South Africa is a relative right subject to a balance of interest and reasonable limitation. Which of these definitions is better suited as a template for an ideal silence principle?

- d) A comparative international study of the procedural differences between an inquisitorial and an accusatorial system. How does a principle of silence function outside the accusatorial system?

The conclusion of the thesis is that the most suitable role of a silence principle within the accusatorial system is one of a flexible compromise. While it does not deserve abolition neither does it deserve elevation into a constitutional right. Silence is best suited to the role of a procedural evidentiary rule. A circumstantial item of evidence with its trial admissibility determined by the criteria of relevancy and prejudice. If the legal, political and cultural pressures upon a particular jurisdiction are such as to demand constitutional entrenchment then the second best alternative is to define the silence principle as a relative right susceptible to a properly applied balance of interest test. The worst alternative is to define the silence principle in absolute terms. Silence as an evidentiary rule or a relative right means that it will sometimes be necessary to emphasise the autonomous interests of the individual in remaining silent and at other times the societal interest in crime prevention. Which interest is to be preferred and to what extent will depend on the prevailing social pressures of the day. It shall be argued that the elevation of a silence principle into a constitutional right stifles a critical examination of the essence of silence by disguising its inherent irrationality and lack of a philosophical *raison de être*. The interpretation of a silence principle as an absolute constitutional right by the Supreme Court of the United States is confusing, contradictory and riddled with innumerable exceptions. By contrast the English approach to silence is pragmatic and highly successful. The Criminal Justice and Public Order Act of 1994 gives a meaningful interpretation of silence which takes into account its logical flaws. The English statute is a successful compromise between the need to protect the individual during the criminal process and the need to combating crime in the most efficient manner possible. While the South African interpretation of silence is a workable compromise, South Africa may have been better served by defining its silence principle in terms of the pragmatic English statutory model which allows for the efficient but carefully controlled use of silence in the combating of crime.

CHAPTER 1

A DELICATELY POISED ARTIFICIALITY

"Silence" as an evidentiary principle is universally recognized as one of the defining characteristics of the Anglo-American legal system. The historical thread of the silence principle is caught up in the evolution of an adversarial and accusatorial type criminal justice system. In a broad sense it derives its meaning and clarity from a unique jurisprudence but it also serves to illustrate many of the absurdities and weaknesses prevalent in the accusatorial criminal system. It has become the catch-all phrase of a popular contemporary literature. The layperson mostly ignorant of the law is likely to be familiar with the endlessly repeated caution of the television police drama, "you have a right to remain silent and anything you say will be used in evidence against you". Of course the silence principle encompasses more than a mere rule of silence in the face of police questioning. It also includes the accused's "right" to silence at trial and the witness's "privilege" against self-incrimination during criminal, civil and other quasi-legal proceedings. The silence principle is not only a right to silence, it is also a right not to co-operate, not to be questioned and not to answer questions unless the individual chooses to do so in the unfettered exercise of a free will.

A wall of confusion surrounds the so-called "right" to silence and the "privilege" against self-incrimination. Apart from the obvious contradiction as to whether the silence principle is a "right", a "privilege" or merely an evidentiary "rule", the principle is not a uniform one but a bundle of disparate and sometimes overlapping immunities which arise at different stages of the legal process. The silence principle may generally be defined as a protective sphere which attaches to the individual during the criminal process. The traditional principle developed as a reaction to a number of historical pressures. Its primary historical justification is as a protection for the individual against state oppression, abuse of procedure and the compulsion of self-incriminatory evidence of guilt. Its secondary historical justification is as a guarantee against the unreliability of a confession coerced from the individual's mind by compulsion. Proponents of the silence principle have advanced it as the backbone of the accusatorial system. A principle which buttresses the central notion of a fair trial process by bringing about a proper balance between the individual-accused and the state-accuser. It is said to be a curb on government overreach, preventing abuse during custodial interrogation and maintaining a non-coercive relationship between interrogator and interrogee. It is also claimed to re-enforce the presumption of innocence so essential to the integrity of the Anglo-

American criminal system. In theory it has been equated by the American courts with "our high regard for human dignity",¹ "the inviolability of the human personality",² "a right to a private enclave where the [individual] may lead a private life",³ and is said to protect "the conscience and dignity of man".⁴ The silence principle is supposedly "one of the great landmarks in man's struggle to make himself civilized".⁵ An expression of the fundamental decency in the relationship developed between government and man. Intended for ages to come and designed "to approach immortality as nearly as human institutions can approach it".⁶ Silence is regarded as a hallmark of democracy⁷ and a principle of natural justice which has become permanently fixed in the jurisprudence of the American State.⁸ The English and Australian courts have similarly characterized the silence principle as a general rule commensurate with "great justice and tenderness".⁹ "A maxim of our law as settled and as wise as almost any other in it".¹⁰ An essential ingredient in the common law of human rights,¹¹ "a most important"¹² and "sacred right".¹³ The European Court of Human Rights has characterized the silence principle as a generally recognized international standard which lies at the heart of the notion of a fair trial.¹⁴ In theory the silence principle appears to be a substantial human and procedural right but in practice it has been subject to deep erosion and severe limitation. An intimate examination reveals a principle of great emotional and raw rhetorical power but one with a thoroughly inadequate jurisprudential foundation. The unpalatable truth is that the so-called "right" to silence and its corollary the "privilege" against self-incrimination finds its support more on sentiment than it does on philosophical reasoning. It is perhaps worth remembering Lord Templeman's qualified warning in *A.T and T Istel Ltd v Tully*, silence is an "archaic and unjustifiable survival from the past".¹⁵

Two clear and fundamental principles of the common law establish the proper and purposeful relationship between the state and the ordinary citizen within the state. First, there is the

¹ *Cohen v Hurley* 378 U.S 1 (1964).

² *Murphy v Waterfront Commission* 378 U.S 62 (1964).

³ *Miranda v Arizona* 384 U.S 436, 460 (1966).

⁴ *Ullmann v United States* 350 U.S 422, 446 (1950).

⁵ *Ullmann v United States* *ibid* at 426.

⁶ *Cohen v Virginia* 19 U.S 264, 387 (1821).

⁷ *Miranda v Arizona* *ibid* at 460.

⁸ *Brown v Walker* 161 U.S 591, 600 (1896).

⁹ *Harris v Southcote and Moreland* (1751) 2 Ves Sen 389, 394.

¹⁰ *R v Scott* (1856) Dears 2B 47, 61. *Livingstone v Murray* (1830) 9 Shaw 161 (Scotland).

¹¹ *Pyneboard (Pty) Ltd v Trade Practices Commission* (1983) 152 CLR 328, 346. *Sorby v Commonwealth* (1983) A.L.J.R. 248, 261.

¹² *Orme v Crockford* (1824) 13 Price 376, 388.

¹³ *Re Worrel, ex parte Cossans* (1820) 1 Buck 531, 540.

¹⁴ *Saunders v U.K* (1997) 23 E.H.R.R. 313 para 68.

¹⁵ *A T and T Istel Ltd v Tully* (1993) A.C 45, 53. Although Lord Templeman refers to the witness's privilege against self-incrimination in civil proceedings, his warning may equally apply to the defendant's privilege at trial.

right of every individual not to be subjected to physical or psychological abuse at the hands of the state. The infringement of this principle during the pre-judicial and judicial process does immense damage to the integrity and legitimacy of the entire legal system. It goes without saying that in the Anglo-American criminal system, a coercively induced confession or admission is inadmissible. Not so much for reasons of unreliability or an infringement of the accused's "right" to silence but because its admissibility would corrupt the trial and violate the moral underpinning of the criminal process. Second and to some extent derived from the first principle, is the right of the innocent individual to be protected against irregular conviction. Punishing a citizen by mistake undermines public confidence in the validity and efficiency of the criminal process. On the other hand a criminal system which allows a large number of the guilty to escape (usually on excessively technical grounds) risks undermining public confidence in its social legitimacy. A fair trial in a civilized legal system is therefore recognizably predicated upon these two primary principles. Each legal system must within its own cultural nuances achieve a fair balance between the protection of the individual citizen-rights and the societal-state interest in public order and the cost effective punishment of the wrongdoer. These two primary principles have evolved to assist in the maintenance of a fair but finely poised balance of interests.

To these two clear principles the common law has added a third, but unfortunately not so clear, principle, namely the principle of silence. The silence principle grants the suspect the legal power to remain silent during the police interview, the accused the right to refrain from testifying at trial and the witness the privilege to refuse the answering of incriminatory questions. It shall be argued in the course of this thesis that the silence principle, unlike the other two common law principles, actively creates an inevitable and totally unnecessary conflict with the societal interest in public order. Because of the artificial restraints it places on the ability of society to achieve a fair balance, genuine support for the silence principle has largely been conditioned by high sounding rhetorical flourishes and a sentimentality without clear reasoned jurisprudential foundations. A legal principle if it is to exist in harmony with other legal principles, must be susceptible to logical analysis, otherwise it simply serves to confuse and distort the legal process. A thorough examination of the Anglo-American legal literature will reveal a somewhat hypocritical lack of practical support for the silence principle. Both the English and the American courts, all too often, come to the pragmatic realization that the reality of fighting crime demands certain limitations on the individual's procedural and human rights. The United States Supreme Court has thought it unwise to pursue the ideal of a silence principle to its logical conclusion. Rather than develop a genuine constitutional right to silence, the Supreme Court has sought expedient refuge in a technical interpretation of the fifth amendment which confuses rather than clarifies the nature

and scope of the idea. The same is true of the English courts. The principle of silence is acclaimed as an important unwritten constitutional right of the English citizen.¹⁶ Yet the English courts give it even less practical support than do their American cousins. The unavoidable truth is that a silence principle hinders rather than aids in the establishment of a proper balance between the legal interests of the individual and the legal interests of society. Since the effect of a silence principle is to efficiently bar the admission of relevant evidence thereby suppressing the truth, silence should only be afforded legal recognition if the relationship it protects is of outstanding social importance and would be irredeemably harmed by the denial of recognition.

The accused's right to silence is sometimes misleadingly confused with the witness's privilege against self-incrimination.¹⁷ The term privilege against self-incrimination is used in the United States to describe collectively and somewhat confusingly the various fifth amendment immunities which attach to the suspect, the accused and the witness. Fifth amendment silence within the paradigm of the United State Constitution is explained as a right "not to be compelled in any criminal case to be a witness against himself", which means that American definitions of a right to silence and a privilege against self-incrimination will always be analysed within the framework of a *state compelled self-incrimination*. However, within the English and Commonwealth jurisprudential paradigm both the idea of silence and self-incrimination remain analytically distinct variations on a *common denomination*. The common denomination is the legally derived ability of not speaking out. In other words, the ability to refrain from a positive act. Primarily, the right to silence is the right not to be questioned. The privilege against self-incrimination is the privilege to refuse to answer damaging questions.¹⁸ Secondly, a person may not speak at all and yet his silence may serve to incriminate him. The non-physical act (of not speaking) leads to the legal consequence (self-incrimination).¹⁹ Analytically there is a difference between silence and self-incrimination.

¹⁶ The European Convention on Human Rights has been incorporated into domestic English law. The English court now has a specific written standard framework against which to compare all legal issues, law and precedent touching on human rights. (Human Rights Act 1998 incorporated August 2000).

¹⁷ In *R v Brophy* (1982) A.C 476, 481, the House of Lords analysed the right against self-incrimination in the language of the right to silence.

¹⁸ Williams *The Proof of Guilt* 3rd Ed London (1963) 37-38, suggests that only the right of a witness not to answer incriminating questions is properly to be regarded as a right against self-incrimination, whereas the right of an accused is a right not to be questioned. This distinction is declarative of the common law. In contrast Sec 35(3)(j) of the South African Constitution gives the accused a right against self-incrimination.

¹⁹ For example, the accused may exercise the right to silence in court, but if the judge comments on the silence, the accused's silence may incriminate him in the eyes of the jury. Similarly, if adverse

Silence : the right to silence is the legal power not to speak out or more precisely, a prohibition on the compulsion to speak. This wide legal power is an absolute immunity awarded to the suspect during the police interview (the suspect may remain silent in the face of interrogation) and to the accused at trial (the accused may refuse to take the witness stand and testify).²⁰ A silence immunity in this sense also means that the state may not, during the course of the trial, draw any adverse inferences from the accused's conscious choice of pre-trial or trial silence.

Self-incrimination : the privilege against self-incrimination is also an immunity not to speak but couched in the form of a protection against the compulsory production of self-incriminatory testimonial evidence. This legal power is a selective and relative immunity awarded to the individual (either the suspect, the accused, or more commonly the witness) who may refuse to answer only those selected prosecutorial questions which pose the possible risk of a future criminal prosecution.

Waiver : the final analytical component of a right to silence and a privilege against self-incrimination is that both may be waived. Waiver is a common feature of all rights and more so of the silence principle. When silence is waived, it is by the exercise of the individual accused's or witness's reasonably informed and reasonably exercised voluntary free will. It is a waiver by a free moral agent knowing the facts and consequences of the different courses of action open to him and freely choosing the one over the other. A waiver choice may be either express or implied but is always intentional.

Immunity : silence and self-incrimination are concerned with the protection (immunity) of the citizen against abuse of state power by those state organs charged with an investigatory or adjudicatory function. *The pre-trial stage* : silence and self incrimination at the pre-trial stage are usually weighed together because the effect of these protections only really manifests itself at the trial stage. *The trial stage* : silence at the trial stage is usually examined against the procedural framework of the accused's failure to testify. *The witness* : possesses only a privilege against self-incrimination and is immunized against a future risk of criminal prosecution. Immunity in this sense usually takes a statutory form and offers varying degrees of protection. The American immunity instrument provides a wide use and derivative use immunity which compels the witness to disclose all relevant information but prevents the derivative use of that testimony by the state. The English immunity instrument

inferences were allowed to be drawn in court from the accused's exercise of the pre-trial right to silence, this may amount to a denial of the privilege against self-incrimination.

²⁰ The blanket protection applies equally to the suspect at pre-trial and the accused at trial. The difference being that the suspect does not possess the right to refuse to be questioned. He may remain silent during the interrogation, but the accused has the right not to take the witness stand and may not be questioned at all.

is more haphazard offering various degrees of protection, depending on the constructive interpretation of each statute (although this is now likely to change with the incorporation of the European Convention of Human Rights into domestic English law). The South African witness privilege is effectively defined as a limited use immunity which operates only at the specific proceeding where the incrimination might occur.²¹

Competence and Compellability : a significant difference between the right to silence and the privilege against self-incrimination is characterized by the evidentiary rules of competence and compellability. The witness is competent, compellable and cannot refuse to take the witness stand.²² The witness need not answer incriminatory questions. The damaging questions may however, be properly put to the witness who must claim the privilege on a question to question basis. On the other side of the stand is the accused who is a competent witness for the defence, but an incompetent witness for the prosecution. He cannot be compelled to testify at his own trial.²³ On the one hand, the procedural rule which makes the accused a competent witness only for the defence is a re-enforcement of the accused's right to silence at trial. On the other hand, the rule which makes the accused an incompetent witness for the prosecution is a re-enforcement of the accused's privilege against self-incrimination. The accused cannot be compelled by the prosecution to give evidence against another co-accused.²⁴ The reason being that the accused may inadvertently during examination-in-chief give self-incriminatory evidence in an attempt to minimize his own role in the crime. This prosecutorial incompetency applies only for the period during which the co-accused are jointly tried. The accused becomes a competent witness for the prosecution the moment he pleads guilty, is acquitted of the crime or when a separation of trials is ordered. When the accused voluntarily gives evidence against a co-accused, he loses his protective shield and the prosecution may make use of the accused's evidence in cross-examination. The accused is said to have waived his protection and loses his privilege against self-incrimination.

Adverse Inferences : the consequence of exercising a right to silence is determined by assessing the commentary of the judge or prosecution and deciding whether or not a

²¹ *Ferreira v Levin* NO 1996 (1) SA 984 (CC), 1996 (1) BCLR (1) (CC), the constitutional right against self-incrimination is a use-immunity which guarantees the right to a fair criminal trial. If the right to a fair trial is not threatened, the self-incrimination rule has no application (at para 159). The link between a witness pre-trial self-incrimination immunity and the trial itself was forged on the unconstitutional nature of liquidation inquiries into company insolvencies (sec 417(2)(b) of the Companies Act 63 of 1973, which demanded self-incrimination).

²² Sec 14 of the English Civil Evidence Act 1968. Sec 203, 217 and 219A of the South African Criminal Procedure Act 1977 as qualified by sec 14 of the Civil Proceedings Evidence Act 1965.

²³ Sec 1(f) of the English Criminal Evidence Act 1898. Sec 196 of the South African Criminal Procedure Act 1977.

²⁴ The rule is necessary to prevent the prosecution from calling one accused to testify against another. The opportunity would then be created for the accused to be denied the privilege against self-incrimination by inadvertently giving evidence in chief which is self-incriminating.

reasonably adverse inference has been drawn. Three common sense inferences may be drawn from the exercise of the silence principle; (i) Silence in the face of an accusation may be taken as an implied admission of what is said against the accused. (An implied agreement). (ii) Silence, alone or coupled to other evidence, may infer a consciousness of guilt. This kind of inference may amount to an implied agreement but it also consists of an unintended display of consciousness of the correctness of the case against the accused. (iii) Silence may be used to evaluate other evidence or inferences drawn from other evidence, allowing the other evidence to be more readily accepted. Silence may aid in the establishment of a *prima facie* case against the accused. These are logical inferences which may, but not necessarily must be drawn from silence, either in the face of a question asked or of evidence presented against the accused and to which the accused has an opportunity to reply. None of these logical inferences may be drawn unless a denial, explanation or answer would be reasonably expected, having regard to all the circumstances.

Categories : Lord Mustill in *R v Director of the Serious Fraud Squad : ex parte Smith* ²⁵ succinctly describes a bundle of six rules of silence which differ in nature, origin and incidence :

- (a) A general immunity from being compelled on pain of punishment to answer questions.
- (b) A general immunity from being compelled on pain of punishment to answer questions which may incriminate.
- (c) A specific immunity of the suspect undergoing interrogation from being compelled on pain of punishment to answer questions of any kind.
- (d) A specific immunity possessed by an accused person at trial from being compelled to answer questions put to him in the dock.
- (e) A specific immunity possessed by a person charged with an offence from being interrogated.
- (f) A specific immunity possessed by an accused in certain circumstances from having adverse comment made on a failure to answer questions before trial or at the trial.

The modern conception of silence as it is presently understood in the Anglo-American legal system is not any single one of the above-mentioned immunities but a combination of immunity (c), (d) and (f). Immunity (c) and (d) are the traditional and historical justifications for silence. Immunity (f) is a more recent protection without a historical justification.

²⁵ (1992) 3 W.L.R 66 (1993) A.C (HL) 30-1.

For the sake of clarity and brevity, the right to silence and the privilege against self-incrimination shall be labeled, where so appropriate in the course of this thesis, by the catch-all term "the silence principle".

The meaning of a silence principle may also be illustrated by examining its relationship within the triad of procedural rights which make up the overarching principle of a right to a fair trial. The presumption of innocence has always enjoyed universal recognition as a fundamental tenet of procedural law. A golden thread designed to safeguard the rights of the individual at trial.²⁶ The conceptual relationship between a right to silence, a privilege against self-incrimination and the presumption of innocence has been something of a jurisprudential enigma. The view that a right against self-incrimination is the primary factor in the relationship has been expressed by the South African Cape Provincial Division,²⁷ the Australian High Court,²⁸ and the Canadian Supreme Court.²⁹ The position that a right to silence is the governing principle is held by the House of Lords.³⁰ However, in the seamless web of rights as recognized by *S v Zuma and others*,³¹ the most acceptable and coherent view holds that the dominant partner in the relationship should be the presumption of innocence.³² It is said that the character of a right to silence and a right against self-incrimination is best understood when flowing as a natural consequence of the presumption

²⁶ The presumption of innocence is a fundamental tenet of the common law. It is enshrined in sec 35(3)(h) of the South African Constitution and is the governing principle behind the silence and self-incrimination rights of the suspect and the accused. The presumption means that at trial the state bears the full burden of proof and the final evidential burden of persuasion. It is a golden thread running through the criminal law (*Woolmington v D.P.P.* (1935) AC 462, Lord Sankey at 481) and pervades the whole of the criminal justice administration (Stephens, *General View of the Criminal Law of England* 2 Ed (1890) 183.

²⁷ *Park-Ross v Director : Office for Serious Economic Offences* 1995 (2) SA 148 (C) 162. 1995 (2) BCLR 198 (C).

²⁸ *Pyneboard (Pty) Ltd v Trade Practices Commission* *ibid* note 11 at 346.

²⁹ *R v Jones* (1994) 2 SCR 229. *R v Herbert* (1990) 2 SCR 151, 57 CCC (3d) 1, 34. *Thomson Newspapers Ltd v Canada : Director Restrictive Trade Practices Commission* (1990) 1 SCR 425, 480. *R v P (MB)* (1994) 113 DLR 461, 477-8 referring to the right to remain silent and the presumption of innocence, "All of these protections, which emanate from the broad principle against self-incrimination, recognize that it is up to the state, with its greater resources, to investigate and prove its own case, and the individual should not be conscripted into helping the state fulfil this task".

³⁰ *R v Brophy* *ibid* note 17 at 481.

³¹ 1995 (2) SA 642 (CC) 1995 (4) BCLR 401 (CC). It is for the prosecution to prove the guilt of the accused beyond a reasonable doubt. Reverse the burden of proof and the right to remain silent after arrest, the right not to be compelled to make a confession and the right not to be a compellable witness against oneself, would be seriously undermined (para 33).

³² See also *S v Mbatha*; *S v Prinsloo* 1996 (2) SA 464 (CC). 1996 (3) BCLR 293 (C.C.). *S v Meaker* 1998 (8) BCLR 1038 (W), 1998 (2) SACR 73 (W), a reverse onus provision violates the right to remain silent (at 85D). *Osman and Another v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC), 1998 (11) BCLR 1362 (CC), the Constitution enshrines both the presumption of innocence and the right to remain silent during plea proceedings and at trial. These rights reinforce each other and are integral to a right to a fair trial (at para 12). Sopinka J in *R v Noble* (1997) 146 DLR 385 (Canada), states "the use of silence to establish a *prima facie* case infringes the presumption of innocence by relieving the

of innocence. The seamless web of rights dominated by the presumption of innocence is concerned with justifying the criminal justice system's limitation of liberty rights.³³ Disturbing the right to silence causes a damaging ripple effect throughout the fabric of the criminal justice system. By limiting or eroding the individual's right to silence the pivotal presumption of innocence is unbalanced and the resultant damage to the fair trial principle undermines the credibility of the entire criminal justice system.

Within the woof and sweep of the complex fabric making up a typical Anglo-American criminal justice system, the silence principle has the following procedural applications :

First, it is one of the rules which defines the parameters of the citizen's legal *duty to co-operate* with the state. The state's criminal investigatory organs rely heavily on the individual citizen's co-operation. The state may require the individual to answer questions and hand over documents. It may request the individual to subject himself to a forensic examination, intimate body sampling, identity parades and searches of person or property. In essence, the silence principle straddles the border between the compulsion of personal communicative testimonial evidence and physical external real evidence. Second, the silence principle provides an *evidential immunity* from judicial and prosecutorial comment. The prosecution (and sometimes the judicial officer) is usually prohibited from commenting to the jury on the accused's refusal to answer questions, both at pre-trial and at trial. In a non-jury system like South Africa, the judge must warn himself against being influenced by the accused's failure to testify.³⁴ Ideally, *no adverse inferences*, particularly of guilt, may be drawn from silence during the pre-trial or trial stage.³⁵ The United States Supreme Court has held in *Griffin v*

prosecution of its duty to establish its case unassisted by the accused". See also *R v Dubois* (1985) 23 DLR (4th) 503, 521-2.

³³ A balanced assessment of the jurisprudential relationship between a presumption of innocence, the right to silence and the privilege against self-incrimination can only be made once it is understood that criminal justice rights are based not only on the rationale of protecting human dignity but also as a justification for interference with the individual citizen's liberty. The foundational status of the presumption of innocence, its connection to the right to silence and its nexus with the fair trial concept can only be understood as a basket of protections which justify the criminal administrative system's interference with individual liberty. This is the essential American Constitutional reasoning and has been adopted by a South African court in *Uncedo Taxi Service Association v Maninjwa and Others* 1998 (3) SA 417 (E) 1998 (6) BCLR 683 (E).

³⁴ It is suggested that judicial comment and permission to the jury to make use of adverse inferences from silence should not apply outside the context of the jury trial : *S v Brown en 'n Ander* 1996 (11) BCLR 1480 (NC) 1490 1996 (2) SACR 49 (NC). However, even a judge (sitting without a jury) hardened by the constant exposure to a never-ending procession of guilty accused may find it difficult to appreciate the presumption of innocence. For the jaded judicial trier-of-fact, it may be even more important to be continually reminded of the necessity of a strict compliance with the rules of evidence. Seigel "Rethinking Adversariness In Non-jury Criminal Trials" (23) *Am. J. Crim. L* (1995) 1.

³⁵ Ideally, no inference should be drawn from the exercise of silence. Realistically however, human nature being what it is, the likelihood of adverse inferences being drawn by a layman jury is strong. What should be guarded against is the drawing of inferences which amount to guilt or damaging inferences which make the use of silence unreasonably costly for the accused. *Griffin v California* 380 U.S 609 (1965).

*California*³⁶ that neither the judge nor the prosecution may comment to the jury on the accused's failure to testify. *Miranda v Arizona*³⁷ prevents the state from making use of the suspect's silence during custodial interrogation and *Jenkins v Anderson*³⁸ allows pre-trial silence to be used only for the limited purpose of impeaching the accused's credibility at trial. In England the Criminal Justice and Public Order Act (1994) expressly allows for the drawing of adverse inferences in specific instances. The Canadian Supreme Court has re-affirmed the common law rule in *R v Noble*,³⁹ by barring adverse inferences of guilt from the accused's failure to testify. South Africa unambiguously follows the English common law. Adverse inferences may only be drawn from the accused's failure to rebut the state's *prima facie* case. These inferences may not amount to inferences of guilt. The extent to which the common law position will be altered by the constitutionalisation of the silence principle was left open by the Constitutional Court in *Osman and Another v Attorney-General Transvaal*.⁴⁰ Third, the silence principle is designed to provide the suspect with a *cautionary warning* during the police interrogation. The warning should also include an instruction on access to legal advice. Fourth, the silence principle within the law of evidence gives direct substantial and procedural support to two other evidentiary exclusionary rules. The rule against an involuntary confession, and the rule against the admission of evidence obtained by police deceit and trickery find a measure of jurisprudential support in the suspect's legally recognized ability to remain silent.⁴¹

The arguments for and against the silence principle are summarized here for convenience but will be analysed in greater detail in the succeeding chapters. The arguments in favour of a silence principle are as follows :

- (a) Silence is a fundamental component of a fair accusatorial trial process linking the presumption of innocence to the key procedural duty within the adversarial trial process, namely the state's burden of proving guilt unaided by the accused.
- (b) There are a number of reasons for silence which are consistent with innocence. The suspect may be embarrassed or shocked into silence by the accusation. He may have an antipathy towards the police which precludes co-operation. The

³⁶ *ibid.*

³⁷ 384 U.S 436 (1966).

³⁸ 447 U.S 231 (1980).

³⁹ (1997) 146 DLR (4th) 385 43 CRR (2d) 233. Sec 4(6) of the Canadian Evidence Act prevents judicial or prosecutorial comment on adverse inference use to the jury. But the judge may also not warn the jury against drawing inferences from silence.

⁴⁰ *Ibid* note 32 para 24. The Botswana Court of Appeal has held in *Attorney-General v Moagi* (1982) 11 BLR (CA) 131, 175 that an adverse inferences is permissible and does not offend the constitutional right of the accused once a *prima facie* case has been established. See *infra* chapter 11 note 50.

⁴¹ See in particular the clear definitions set out in the English Police and Criminal Evidence Act (1984) amended (1991), Sec 76 and Sec 78, hereinafter referred to as PACE.

accused may elect to remain silent at trial because of a poor demeanour, inability to express himself properly or a simple ignorance of the issues. Silence is a good protective shield for the immature, inadequate, weak or vulnerable suspect/accused most liable to manipulation under police questioning or prosecutorial cross-examination.

- (c) Silence protects against the cultural compulsion to speak and reduces the temptation to lie. Consequently, a silence principle reduces the risk of a false confession, perjury or misleading testimony. Silence enhances the truth-finding function of the adversarial process.
- (d) Silence is a strong shield against most state induced forms of physical and psychological abuse, including the inducements of trickery and deception.
- (e) Silence guards against unjustifiable infringements of the individual's liberty (a primary justification of the American fifth amendment), human dignity and privacy (a primary justification of the South African bill of rights). In this sense, it protects against the ultimate degradation of forcing the accused to convict himself from out his own mouth.
- (f) No logical or evidentiary relevant adverse inferences may be drawn from silence. A relevant and positive inference cannot be logically drawn from the negative "nothingness" of silence.
- (g) The witness privilege against self-incrimination encourages testimony and allows for an optimum functioning of the adversarial system. Immunising the witness strikes a good balance between the court's need for reliable and trustworthy information and the witness instinctive need for protection against prosecution.⁴²

The arguments against a silence principle may be summarized as :

- (a) The silence principle has no rational jurisprudential foundation and its historical antecedents do not support the generous interpretation and scope awarded to the modern principle. A legal principle which has no logical foundation serves only to distort rather than enhance the criminal process.
- (b) Following from the above, the silence principle serves only to inhibit a criminal process which should be better designed to expose rather than suppress legal facts in the pursuit of legal truth.
- (c) Other evidentiary testimonial privileges are able to socially, culturally and legally justify the exclusion of relevant evidence. Professional privilege excludes relevant evidence because it enhances the professional relationship between attorney and

⁴² The privilege encourages the witness to come forward and give evidence (encouraging testimony) and it re-enforces public opinion (self-incrimination is abhorrent to public opinion).

client. Marital privilege is a social necessity and supports the intimate relationship between the spouses. Public privilege excludes relevant evidence because its disclosure would be detrimental to the state interest. Only the privilege against self-incrimination is unable to supply a pressing social or legal rationale for its exclusion of relevant evidence.

- (d) The abolition of a silence principle would rationalize procedural law, make the criminal process practically more efficient and excuse the court from drawing absurdly fine distinctions on silence.
- (e) The abolition or limitation of the silence principle would not harm the individual, as adverse inferences would not be automatic, but dependent on the circumstance and reasonably evaluated in the light of all the evidence.
- (f) Silence is an effective shield for the knowledgeable and guilty accused but not for the innocent accused. When faced by an accusation the natural instinct of the guilty person is to remain silent and to obfuscate the facts whereas the innocent person is more likely to speak up in an attempt to explain the facts. The guilty accused, but not the innocent accused, is presented with a dilemma between disclosing evidence of guilt or suffering an adverse inference through saying nothing. The silence principle calls upon the law to dispense with the dilemma and allows the accused to conceal knowledge of guilt. Undoubtedly the choice forced upon the guilty accused is psychologically unenviable, but why should it be a function of the law to shield the guilty accused from making it?
- (g) When the accused fails to testify or to rebut a *prima facie* case (absent an innocent explanation), the logical and rational inference must be that the accused is guilty.
- (h) Statistically the silence protection is hardly ever exercised in the station house or at trial. Where it is exercised it results in high acquittal and low conviction rates. It is therefore futile to support a principle which is so under-utilized but which when efficiently utilized, has the dangerous potential to severely undermine law enforcement.
- (i) Silence is a weak protection against physical torture and psychological coercion. There are better alternatives which give a wider practical protection against sophisticated modern investigatory techniques (ie. The automatic right to have legal counsel present during all interrogations. The use of tape-recordings and video as a necessary part of the interrogation).

- (j) Use and derivative use immunity has become an effective modern substitute for the witness privilege against self-incrimination in most Anglo-American jurisdictions. The witness privilege is rapidly becoming a vestigial protection.

There are a number of strong psychological motivations built into the adversarial-accusatorial criminal system which makes a perfect right to silence unrealistic in practice. The average suspect, unlike the hardened professional criminal, feels a strong social pressure to cooperate with the police. The suspect's natural anxiety to explain his innocence coupled with the intimidating atmosphere of the interview room and the well-honed interrogation skills of the police, rapidly erode the suspect's resistance and will to claim the right to silence. The right to silence in such a hostile environment is a weak and ineffective protection more likely to be manipulated by the professional criminal than the average suspect. There are better practical safeguards available which are not susceptible to the corrosive environment of the police station. Once out of the station house and in the courtroom, the accused's right to silence is at best a two-edged sword. It may serve to keep the accused out of the witness stand, but it cannot prevent the layman jury from drawing a natural psychological inference of guilt. Despite judicial instruction to the contrary, damaging inferences may always be drawn once the jurors become aware not only of the accused's refusal to testify, but also of his previous refusal to answer police questions. There is simply no legal manner in which the natural jury inclination can be prevented. Statistical studies in England indicate that in response to the inherent psychological pressures built into the Anglo-American criminal process the majority of suspects choose to waive the right to silence.

Why is there such an implacable hostility towards the right to silence on the part of the law enforcement establishment? After all, the right to silence is an impractical and weak protection easily broken down in the interview room and exercised by a very small number of informed suspects. The underlying reason may well be that if the right to silence is ever taken seriously, its potential impact on the criminal investigation process would be extremely damaging. The criminal justice system is specifically organized around the interrogation, the confession and the guilty plea. An effective right to silence would seriously disrupt this process. A secondary reason may be the complicated moral dilemma presented to the ordinary police officer by the right to silence. On the one hand it is the training and instinct of a good policeman to break down the unco-operative suspect in order to obtain relevant evidence. On the other hand, the police officer is also charged with the duty of informing the suspect of his right to silence, the contrary aim of which is to inhibit the release of relevant evidence. The officer is placed in a moral quandary, caught between his professional responsibilities and the artificial duty imposed upon him by the right to silence. The result is

that the police officer often stretches or breaks the law in order to carry out his duty efficiently. The courts collude in this process by ignoring police trickery and deception or by imposing weak sanctions against obvious breaches of the law.

The general principle of silence is the progeny of the adversarial trial and to a large extent finds its justification in the unique nature of the Anglo-American criminal justice system. A process in which counsel for the state and the accused square up against each other and fight over the body of the accused before a neutral judicial "umpire". Libertarian protagonists have seized upon the unique nature of the common law criminal system as a primary justification for the silence principle. In the adversarial context, the state maintains a disproportionate power which necessitates a formidable array of procedural rules to level the "playing field" and to protect the accused's interest. The procedural rules of the adversarial system have been developed to ensure a fair trial contest. An arena is provided in which the primary goal of the state is to artificially establish guilt beyond a reasonable doubt and in which the aim of establishing truth is usually a secondary consideration. Within the artificial arena, removed as it is from practical reality, the silence principle finds a comfortable abode. One of the major purposes of a silence principle in this artificial process is said to do "with the finding of truth".⁴³ According to this muddled view, the silence principle enhances the reliability of the truth-seeking process by eliminating the abuses characteristic of an inquisitorial style criminal investigation.⁴⁴ It achieves factual accuracy by excluding unreliable confessions and by forcing the state to build its case through an independent investigation. In *Miranda v Arizona*,⁴⁵ the court defines the adversarial system as a demand "that the government seeking to punish an individual, produce the evidence against him by its own independent labours rather than the cruel expedient of compelling it from his own mouth". Yet in contradiction, the same court via Justice Stewart in *Tehan v United States*,⁴⁶ claimed that "the fifth amendment is not an adjunct to the ascertainment of truth" and Justice Cardozo in *Palkov v Connecticut*,⁴⁷ said "justice would not perish if the accused were subject to a duty to respond to orderly inquiry". Why is the automatic assumption made that crime is capable of being solved by the independent labours of the state unassisted by the accused? The nature of crime is such that often only the perpetrator has relevant knowledge of the crime. More importantly why should the trial be an artificially level playing field? Criminal justice is not a game and it is absurdly inappropriate to define the accused as a

⁴³ *Michigan v Tucker* 417 U.S 433, 448-9 (1974). *Oregon v Elstad* 470 U.S 298 (1985).

⁴⁴ *Murphy v Waterfront Commission* 378 U.S 52 (1964), "our preference for an accusatorial rather than an inquisitorial system of criminal justice".

⁴⁵ 384 U.S 436, 460 (1966). See also *Malloy v Hogan* 378 U.S 1, 8 (1964).

⁴⁶ 382 U.S 406, 415-18 (1966).

⁴⁷ 302 U.S 319, 325-26 (1937).

sportsman deserving of a sporting chance to escape justice. The notion smacks of antiquated etonian idealism. Another widespread assumption is the idea that the silence principle somehow protects the adversarial system against the pernicious influences of the inquisitorial system. Abolish the right to silence and the superior adversarial system would quickly degenerate into an inferior, unfair and oppressive inquisitorial type system. The silence principle is justified as a delicately poised protection standing between a fair "cricket match" type adversarial system and a harsh "Roman-gladiatorial" type inquisitorial system. Surely these unverifiable and bellicose libertarian assumptions are merely another example of the irrational and emotional use of language by proponents of a silence principle who are forced to base their arguments on sentimentality rather than on well reasoned facts?

Once removed from the artificial environment of the trial process, the flawed pretences of a silence principle reveal themselves. In the real world personal accountability is the usual societal moral norm. The wrongdoer is expected to personally account for his transgression of social rules. The young child caught with his hand in the cookie jar is not instructed on his right to remain silent, but requested to make an honest and revealing disclosure. Yet, in the artificial world of the courtroom, the silence principle entrenches non co-operation and expressly denies the necessity for personal responsibility and a moral duty to account for wrong actions. Indeed, in the United States and now in South Africa, the ideal of non co-operation is raised to the status of a constitutional right. The artificial nature of the adversarial system means that innocence or guilt is not predicated on the true facts but is conditioned solely by the prosecution's ability to prove guilt in accordance with a number of highly technical evidentiary rules and procedures. The slightest distortion of this delicately poised artificiality has wide-ranging and damaging ramifications for the entire criminal process. In South Africa the distortion is triggered by a first world standard in procedural laws but a third world's lack of economic resources and a consequent inability to practically enforce the high theoretical standards. The result is a gradual breakdown of the criminal justice system and an increasing inability to cope with spiraling levels of criminality. *What South Africa requires is a less aggressive adversarial system in which excessively technical and artificial rules are systematically reformed or abolished.* The silence principle is one of the artificial rules which needs to be reconsidered.

In theory, the adversarial accusatorial court is expected to be a fair and disinterested trier-of-fact nobly protecting the human interests of the accused. The state legislates high sounding rules to protect these seemingly noble sentiments. The reality is quite different. In practice, almost 95% of criminal convictions in the United States are obtained through a formal system of plea-bargaining. Although it is difficult to establish precise figures, in South Africa, the U.K

and Australia a significant minority of convictions occur through the use of informal plea-bargaining arrangements. These convictions by-pass the trial process and take place in the back room via the negotiated guilty plea where none of the so-called noble protections apply. The accusatorial criminal system, despite its high sounding rhetoric, is only partially a system based on due process and a fair trial. In some measure the criminal process has been cynically reduced and redirected to the exploiting of cost-efficient guilty pleas without the need for recourse to time-consuming and expensive trials. The accusatorial system is unavoidably seared by the mark of hypocrisy. On the one hand it upholds the silence principle as a fundamental constitutional value, but on the other hand, the system relies extensively on inducing so-called voluntary confessions. The irony is that the accusatorial system elaborately protects the accused through his right to silence in an open public trial where the danger of abusing the accused's right is minimal. But behind the scenes police interrogators surreptitiously induce confessions and state prosecutors negotiate these confessions into guilty pleas. Why? Could it be that obtaining a conviction in the modern judicial trial in which the accused is shielded by a comprehensive presumption of innocence and an elaborate right to silence is now so difficult that the criminal system is forced to rely on extra-judicial devices for a significant number of its convictions.

The accusatorial and adversarial criminal justice process is a finely poised system which requires a vigilant maintenance and a constant fine tuning. The South African criminal system is a perfect illustration of what can go wrong when this delicate system is mal-administered. At the pre-trial stage there is an undermanned, overworked and ill-equipped police force whose investigatory processes are often incomplete and marred by insufficient or inadmissible evidence. At the trial stage, the inexperienced state prosecutor must build up a *prima facie* case from an incomplete police docket and then somehow match the trial standard of a proof beyond reasonable doubt. All this in the teeth of highly technical procedural safeguards for the accused. The result is an army of professional criminals well advised by expensive defence counsel who escape liability by hiding behind the right to silence. Naïve, ignorant and incompetently represented petty criminals who waive their right to silence and having no other effective back-up procedural safeguards fill the prisons in their tens of thousands. The consequence is a desperate discussion on introducing a formal plea-bargain procedure modeled on the American experience.⁴⁸ The goal, to increase the pre-trial bargained conviction rate to the American level. The solution, libertarian proponents would

⁴⁸ Debate around the introduction of a formal plea-bargain procedure is still in its infancy. Although it is presently impossible to determine the number of convictions induced by informal plea-bargaining, once a formal system is in place bargained guilty pleas are likely to increase significantly to American levels. See further *Discussion Paper* 94. Jan 2001, project 73, Simplification of Criminal Procedure (Sentence Agreements).

say, is a better funded and comprehensively staffed criminal justice system. Agreed! But also a silence principle which is less than a fundamental human right and more like an evidentiary rule capable of rational and pragmatic judicial evaluation. A shield certainly! But not one behind which the guilty accused may find an absolute shelter.

The main body of this thesis shall be made up of an analysis of the English and the American treatment of the silence principle. A valuable insight may be gained from a comparison between the English reduction of the silence principle into a mere evidentiary rule and the American elevation of the principle into an absolute constitutional right. In America the silence principle is based on a constitutional interpretation of the fifth amendment (1791 Constitution), whereas the English principle is statutorily subsumed in the Criminal Justice and Public Order Act 1994. The structure of the English and the American debate over the silence principle is significantly different.

The American principle is generally defined in absolute terms and is not subject to legislative curtailment. The American debate is a limited one about the scope of the constitutional right rather than an unlimited one over its inherent nature. By contrast, in a parliamentary sovereignty such as England, the debate is more radical and focuses on the very essence of silence as a fundamental common law principle. The trend in England has been towards erosion and formal legislative attrition of the silence principle. The English practice, because it does not have the ready benefit of a written constitution is to seek immediate relief of specific individual grievances rather than express rights in broad general terms as is the American way. Although there is no English inspired constitutional code which protects basic individual rights, England has recently incorporated the European Convention on Human Rights into domestic law (Human Rights Act 1998). The Human Rights Act's influence on the jurisprudence of the silence principle is likely to be considerable. By contrasting the American and the English experience a vibrant picture of the silence principle is created as it is presently practiced and understood in the Anglo-American criminal justice system. An intimate and comparative study is also relevant to the South African experience. South Africa is currently caught in a legal cultural divide. On the one hand the South African silence principle is squarely and unimaginatively based on English antecedents and precedents. In the past South African adjective law has always looked to England for its jurisprudential inspiration. On the other hand, the constitutionalisation of the silence principle will mean that Canadian and American precedent will become increasingly more persuasive as the English influence begins to wane. Canadian constitutional law will become generally influential over the entire spectrum of constitutional practice and American influences are likely to be specifically limited to certain key areas of the South African Bill of Rights, one of

which is likely to be the right to silence.⁴⁹ The focus of the South African debate will undoubtedly shift from one in which the nature of the principle is questioned to one in which the scope of the principle is defined. Ironically, in the face of rising crime levels, the English have chosen to limit silence as an unjustifiable obstruction to the efficient investigation and prosecution of criminals. South Africa, despite its limited economic resources, has chosen instead the luxury of institutionalizing silence by raising it to the status of a procedural right. Once silence as a constitutional procedural right is annexed to the notion of a fair trial, it becomes impossible to negotiate. Essential reform becomes difficult and, in an attempt to solve the problem, more and more superficial and artificial layers are added to the criminal process which serves only to disguise rather than resolve the problem. By contrast, the Australians have elected not to entrench a silence principle within the federal constitution. Consequently, each of Australia's five states has the power to statutorily modify or even abrogate the silence principle. It can only be a healthy process for every jurisdiction, at intervals, to examine the tenets of its legal system in order to determine whether the rules remain relevant to the socio-legal demands of the day. By constitutionalising silence, the South African legal system has partially closed the door on this dynamic avenue of legal reform. In addition to an analysis of the Anglo-American jurisprudence, a secondary examination will also be made of the inquisitorial system's treatment of the silence principle. Although the silence principle is a unique creation of the accusatorial system, it does play an important role in the trial process of the inquisitorial system (a legacy of the French Revolution's absorption of English legal principles). In addition, the European Convention on Human Rights has recently been interpreted to include a right to silence (sec 6(1)) which is closely linked to the notion of a fair trial and the presumption of innocence. A complete understanding of the silence principle requires a comparison between the two major Western legal traditions.

The erosion of the English silence principle is due in large measure to a renewed popularity of a modernized Benthamite-Utilitarian⁵⁰ philosophy which conceives of silence as no more than an instrumental protection for certain procedural interests of the criminal defendant. Silence is negotiable on the basis that it is only one of a number of alternative protective devices, most of which are more effective as procedural shields. At the other end of the

⁴⁹ The Canadian Charter of Rights and Freedoms does not contain an express right to silence at the pre-trial stage (at best sec 10(b) recognizes the right to be informed of counsel and a failure to warn a suspect of such a right may indirectly exclude statements made by the suspect). Sec 11(c) and sec 13 only prevent self-incrimination at the trial but not the pre-trial stage. The backbone of the Canadian right to silence remains the common law and statutory law. Because of the incomplete and limited nature of the Canadian Constitutional silence principle, American fifth amendment jurisprudence is likely to remain far more persuasive in the jurisprudence of a South African right to silence.

⁵⁰ Bentham *Rationale of Judicial Evidence* Book II ch 3 Bowring Ed 1843.

spectrum the entrenchment of a constitutional silence principle is due to a libertarian ethos of human rights which emphasizes the needs of the individual over the interests of society. Unfortunately the libertarian reference does not allow for a rational justification of the silence principle and the inquiry around the evidentiary value of silence is sometimes obscured by the lavish use of rhetorical rather than substantive arguments. For example, one of the central libertarian arguments is that if the sovereign state seeks to prosecute, convict and punish the criminal accused, it must do so on the strength of evidence gathered through its own independent exertions rather than through the coerced assistance of the accused. However immutable this justification for silence may be in theory, it has been set aside in a host of cases in which the accused has been compelled to aid his accusers in the search for the evidence needed to secure his conviction. The accused is legally compelled to participate in an identity parade, to speak, write, spell, to provide superficial body evidence of fingerprints, shoeprints, height, colouring, shape, to walk in a certain way, to supply intimate blood, and DNA tissue sampling. South Africa has legislated a statutory obligation which compels rape suspects to furnish blood samples in order to determine HIV status. The significant difference between a libertarian definition of a largely theoretical silence principle and its practical irrelevancy is illustrative of the smoke and mirror libertarian approach to the silence debate.

The thesis has been developed and framed in a manner which provides the answers to a number of critical questions. The intention is to provide an easily understood and comprehensive quantum of information about the nature of silence and the use made of silence in the various key stages of the legal process. The difference between silence as a constitutional right and as a mere evidentiary rule will be examined, as will the manner in which cultural nuances effect the application of the silence principle. The thesis will ask and attempt to answer the following questions :

- (a) How did the component elements (the right to silence and the privilege against self-incrimination) of a silence principle evolve? What is the difference between the historical principle and its modern counterpart?
- (b) Is the silence principle more appropriate to a right, a privilege or an evidentiary rule? Does the silence principle possess a logical foundation and are there rationales which justify it?
- (c) Should a constitutional right to silence be defined in absolute or relative terms and be subject to a balance of interest analysis? Which is the most appropriate, the American right defined in absolute terms which excludes a balance of interests, the English rule defined in evidentiary terms and open to statutory modification, or

the South African right defined in relative terms and susceptible to a balance of interests analysis?

- (d) When, how and to whom does a right to silence and a privilege against self-incrimination apply? Do they only apply to the suspect, accused or the witness? What about the pre-arrest suspect and the preliminary interviewee? Before or after caution and only in criminal proceedings? Is there a difference between testimonial and non-testimonial evidence, oral and documentary testimony, natural and juristic personae?
- (e) How is silence used and does it have any evidentiary value in itself? May silence infer guilt or does it merely add circumstantial evidence to an already established *prima facie* case? Is silence capable of acting as a prior inconsistent fact able to undermine the accused's credibility at trial? May the judge and the jury comment on silence? May the jury be directed to ignore the accused's silence? Under what circumstances and in terms of which requirement may a privilege of self-incrimination be evoked?
- (f) What lessons are to be learnt from a comparative analysis of the major Anglo-American jurisdictions? What valuable insights may be derived from a comparison between the accusatorial and inquisitorial legal systems?

Many of the legal conclusions reached in answering these questions will depend on where the balance is struck between a utilitarian reasoning in which all relevant information is to be made available to the trial officer in the interests of truth and a libertarian reasoning in which certain kinds of relevant information are to be excluded because individual rights must be protected against infringement by state organs. The thesis is therefore written within the following paradigm. At best, it may be argued that a silence principle provides some measure of protection against state-sponsored physical and psychological procedural abuse of the accused at the hands of the police interrogator and later, at the hands of the state prosecutor. The idea of a silence principle as a procedural protection for the suspect during custodial interrogation was the sole consideration in persuading Wigmore to end his initial objection to silence and to accept a narrow pre-trial evidentiary based silence rule.⁵¹ At worst, a silence principle actively suppresses relevant evidence and subverts the basic purpose of the criminal justice system which is to arrive at the legal truth. The old adage that

⁵¹ Wigmore *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* McNaughton Ed, Little Brown & Co (1961).

the criminal trial is not about truth but about justice should be dismissed with contempt. Just as science is about the search for natural truth, so the law should be about the business of legal truth.

During the course of this thesis a number of conclusions will become readily apparent :

- (a) The historical antecedents of the silence principle do not support the modern definition and the wide scope of the contemporary silence principle;
- (b) There are no rational justifications for the silence principle. A constitutionalised silence principle is built on weak philosophical foundations. The silence principle is truly a mansion built on sand;
- (c) The elevation of the silence principle above an ordinary evidentiary rule gives silence a ring of absoluteness. It then becomes difficult to apply a proper and necessary balance of interest test.
- (d) The constitutional entrenchment of the silence principle limits the legal establishment's ability to review and reform. The debate about silence within the court becomes a sterile and artificial one over the scope of the principle rather than a dynamic one about its nature and essence.
- (e) When a constitutional right to silence is limited (and only in the most exceptional circumstance), the various justifications for the limitation are usually awkward, unconvincing explanations based on an artificial logic. Many of the United States Supreme Court decisions which limit silence fall into this category.
- (f) Silence can only be meaningfully understood in terms of a compromise. Silence does have a place within the legal hierarchy, not as a constitutional right, but more as an evidentiary rule capable of rational judicial evaluation. It may have some value as a protection during custodial interrogation, but its protective value at trial is illusory, especially in a jury-type trial system.
- (g) The silence principle's protective value in a jury-based trial process is illusory as there is no method by which the court can control the thought processes of the jury. The juror may draw any kind of conscious or unconscious, reasonable or unreasonable adverse inference as he or she may think fit. The silence principle's protective value in a non-jury trial process is simply superfluous. The professional judge as the trier-of-fact is unlikely to draw an unreasonable adverse inference from the accused's silence.

CHAPTER 2

HISTORICAL ANTECEDENTS

2.1 A Historiographic Perspective

In order to formulate a comprehensive and critical framework within which to analyse the modern "right" to silence and its adjunct the "privilege" against self-incrimination, it is first necessary to understand the idea within its historical context. The strong passion which a silence principle evokes within its proponents, the contrary and equally strong antagonism expressed by its critics, begins to be better understood once the origin and evolution of the legal principle is examined at some length. In the words of Frankfurter J, "a page of history is worth a volume of logic".¹ The silence concept encapsulated by the Latin maxim "*Nemo Tenetur Prodere Seipsum*"² is said to be a unique and fundamental factor in the development of the Anglo-American criminal procedure and one of the key events in humankind's struggle to be civilized.³ The giants of English law, Blackstone and Gilbert regard the idea as illustrative of the best in English jurisprudential development.⁴ While Bentham responds to the idea of silence by characterizing it as a "pretence" and "nonsense on stilts".⁵ The origin of the initial privilege against self-incrimination is too obscure to be dated precisely. Nevertheless the philosophical idea is born in a time of extreme social ferment,⁶ roughly between the demise of the last Plantagenet kings⁷ and the rise of the sturdy Tudor dynasty.⁸ It is a child of the religious, political and constitutional struggles which mark sixteenth and seventeenth century England. As a comprehensive but abstract legal principle it comes of

¹ *Ullmann v United States* 350 U.S 422, 438 (1956).

² The ancillary argument is made that the true source of the Latin maxim is to be found in the early Hebraic and Talmudic texts. Rosenberg and Rosenberg "In The Beginning, The Talmudic Rule Against Self-Incrimination" (63) *New York U. L. Rev* (1988) 955, Lamm "The Fifth Amendment and Its Equivalent in Jewish Law" (17) *Decalogue J* (1967) 1, Horowitz "The Privilege Against Self-Incrimination – How Did It Originate" (31) *Temp. L.Q.* (1958) 121 suggests that the silence principle was incorporated into Roman and later English common law through the influence of early Hebraic religious writings. Puritan intellectuals well versed in biblical theology were influenced by authoritative rabbinical interpretations of the Talmud. But see Mazabow "The Origin Of The Privilege Against Self-Incrimination Jewish Law" (104) *SALJ* (1987) 710.

³ Griswold *The Fifth Amendment Today* (1955) 7.

⁴ Blackstone *Commentaries On The Laws of England* Oxford Clarendon (1765) 68, Gilbert *The Law of Evidence By A Late Learned Judge* (1756) 140.

⁵ Bentham *Rationale of Judicial Evidence* Bowring Ed (1843).

⁶ *Quinn v United States* 349 U.S 155, 161 (1955), "the privilege was hard-earned by our forefathers. The reason for its inclusion in the constitution and the necessities for its preservation, are to be found in the lessons of history".

⁷ *The Plantagenets*; Henry III (1207-72) and Edward III (1312-77).

⁸ *The Tudors*; Henry VIII (1509-47) the establishment of an Anglican state church, Mary (1553-58) the conflict between state-sponsored Catholicism and early Anglicanism, Elizabeth I (1558-1603) the reverse conflict between state-sponsored Anglicanism and minority Catholics and Puritans.

age after the Glorious Revolution and the eclipse of the weak-willed Stuarts.⁹ The historical development of the silence principle as a protective procedure is the consequence of two fundamental pressures. The principle evolves as a protection against state oppression and state abuse of process to compel evidence of guilt. It is also the result of a reaction to the unreliability of a confession forced from the individual's mind by compulsion, fear, torture, flattery or hope. The modern reformulation and elevation of an accused's silence principle (as opposed to the privilege against self-incrimination) into a working procedural rule within the criminal trial structure does not begin until the late eighteenth century. The accused's right of silence is the result of essential structural reforms to English criminal procedure and the introduction of an organized state-controlled police force. The removal of restrictions on access to defence counsel and defence witnesses, the articulation of a coherent standard of proof, the removal of all bars on the accused as a competent witness culminated in the development of a strong trial and pre-trial "right" to silence. The criminal process has come full circle from its immature beginning which places all the affirmative burdens on the defendant to prove his own innocence, to a mature system where the state is required to prove guilt and the defendant need only passively challenge a *prima facie* case. The exact origins and development of the silence principle has triggered a confused debate amongst legal historians which serves to cloud rather than clarify the important issues. Ironically the confusion surrounding the origin of the historical silence principle is self-perpetuated in the confusion about the justification and purpose of the modern silence principle.

The Orthodox view. The traditional school closely follows the approach initially scouted by Bentham. The privilege against self-incrimination develops as a defensive mechanism prompted by the religious and political state inspired persecutions of the sixteenth and seventeenth centuries. A principled resistance led by England's persecuted non-conformist minorities against the inquisitorial methods¹⁰ of the prerogative and ecclesiastical courts.¹¹ In Wigmore's classical account¹² the notorious agitation of political "Levellers" and extreme Puritan sects between 1637 and 1641 contributed to the abolition of the controversial Star Chamber and High Commission courts and the sweeping away of the inquisitorial *ex officio* oath procedure. (An oath in God's name to answer truthfully, designed to elicit self-incriminatory answers). "With all this stir and emotion a decided effect is produced and is

⁹ *The Stuarts*; James I (1603-25) the initial struggle between king and parliament, Charles I (1625-1649) the triumph of parliament over monarchy, Cromwell and the Commonwealth (1651-1658), Charles II (1660-1685) the Restoration, James II (1685-1688) the Glorious Revolution of 1688, the replacement of the Stuart House by the present Hanoverian House of Windsor, the final subordination of monarchy and the lasting triumph of parliamentary rule.

¹⁰ Randal "Sir Edward Coke And The Privilege Against Self-Incrimination" (8) *S.C.L.Q.* (1956) 420-21.

¹¹ Wolfram "John Lilburne : Democracies Pillar of Fire" (3) *Syracuse L. Rev.* (1952) 218.

¹² Wigmore *A Treatise On Evidence* McNaughton ed (1961) vol VIII, sec 2250, 267-295.

immediately communicated naturally enough to the common law courts".¹³ According to Wigmore, the privilege creeps into the procedure of the common law courts indirectly as a result of a confusion and association of ideas.¹⁴ He regards the privilege as a distinct creation of reformation and revolution. References to self-incrimination in the medieval common law record are explained away as clashes over jurisdiction between the common law and church courts.¹⁵ Indeed, until the sixteenth century the common law courts themselves often made use of self-incriminatory questioning and parliament continued to pass legislation allowing for such questioning.¹⁶ In the reign of Elizabeth I, Puritan and Catholic minorities, opponents of the newly established Anglican Church began to question the inquisitorial *ex officio* procedure of the High Commission and other principal state instruments for the suppression of heresy. In the 1630s the renewal of the attack against state sponsored oppression by Lilburne and the dissident "Levellers" eventually led to the abolition of both High Commission and Star Chamber. The collapse of the inquisitorial state and church courts, a statutory prohibition against self-accusation, created the idea of a self-incrimination principle which percolated first through the common law procedure and then by example into civil proceedings.¹⁷

Levy¹⁸ generally follows Wigmore's chronology but with an important difference. He argues that the groundswell of antagonism against the *ex officio* oath has far deeper roots in the medieval common law courts.¹⁹ What Wigmore explains away as disputes over vague and unformed jurisdictional boundaries, Levy sees as early evidence of a developing hostility against inquisitorial and self-incriminating oaths.²⁰ The evolution of a privilege against self-incrimination within common law procedure does not occur by a vague association of ideas, as Wigmore explains it, but as a definite response to an active and aggressive political

¹³ Wigmore *ibid* at 289.

¹⁴ Wigmore *ibid* at 291-92. Wigmore divides the process into two distinct periods. (1200 to 1600) individuals manipulated the vague idea of a conscience-driven principle against self-incrimination as a defence when forced by the ecclesiastical court to swear *ex officio*. (1600-1700) the defendant began to assert the privilege, by now well-established as a defence in the common law courts (at 269).

¹⁵ Wigmore *ibid* at 276-280.

¹⁶ Maquire "Attack Of The Common Lawyers On The Oath *Ex Officio*" in *Essays in History in Honour of C M Howard Wittke* Ed (1967) 202, 204. Wigmore *ibid* at 271 maintains that until the 16th Century the common courts made no objection to the imposition of the *ex officio* oath, provided it was administered on due presentation, namely on a charge *per famam* or *per clamoriam insinuationem*.

¹⁷ Wigmore *ibid* at 290. "By the time of the English Civil War [1642-48] it [the privilege] is but a bare rule of law. It begins to coalesce only in the reactionary period of the restoration [1660-1685] and the revolution [1688] with the ascendancy of Whig [over Tory] principles and the rejection of absolutist Stuart practices".

¹⁸ Levy *Origins Of The Fifth Amendment* New York (1968).

¹⁹ *Ibid* at chapter II, 43-83.

²⁰ Gray "Prohibitions And The Privilege Against Self-Incrimination In Tudor Rule And Revolutions" in *Essays for G R Elton* Cambridge C.U.P (1982) has lent his support to Wigmore's rather than Levy's version. For example Gray identifies the prohibition cases of the 17th Century as disputes over jurisdiction rather than as fundamental clashes between rival systems.

struggle. The privilege against self-incrimination is the positive result of a four hundred year conflict between two radically different systems of criminal procedure.²¹ On the one hand there is the English common law which by stages through the centuries gradually upholds the basic liberties of the ordinary Englishman. Champions of the common law, men such as Beale,²² Fuller²³ and Coke²⁴ use the inherent principles of the common law to fashion a strong legal privilege against self-incrimination. On the other hand there is the inquisitorial process of the ecclesiastical courts founded on Roman law and designed specifically to suppress religious deviance. A process vigorously exploited over the centuries in the interest of church and state by the likes of Bishop Grosseteste,²⁵ Archbishops Whitgift²⁶ and Laud.²⁷ The privilege against self-incrimination is a common law invention intended to protect the indigenous accusatorial criminal procedure against erosion by a continental inquisitorial process. The battle line between these rival systems is drawn around the legality and reach of the *ex officio* oath. During the Tudor period the defendants most often entangled within the coils of inquisitorial process were Puritan²⁸ and Catholic²⁹ non-conformist minority groups. Conscientious objectors opposed to the practices of the newly established Elizabethan Anglican Church. The Puritans sought to purify the English Church by cutting away the last vestiges of popish rites and paraphernalia. In turn, the Catholics sought to draw the Anglican Church back to the roots of the one true faith. Both were bitter religious enemies, but ironically, united, in their legal objection to, and in the defences used against the *ex officio* procedure. These objections were primarily directed against the Court of the High Commission.³⁰ Unlike other ecclesiastical courts, the High Commission was a roving inquisition with wide jurisdictional powers employed by the government to ferret out religious dissent. The main tool employed for this purpose was the cost effective *ex officio* oath and a process which centred around coerced testimony and a condemnation from out the accused's own mouth. The initial defences of its victims were unsophisticated appeals to biblical injunctions and vague referrals to rights of conscience.

²¹ Levy *ibid* at 20-24, 29-35, 39-42.

²² Beale, Clerk of the Privy Counsel (1580-1590) revived the argument that the *ex officio* oath was contrary to *Magna Carta*. Levy *ibid* at 170-172.

²³ Fuller (1604-1610) an active defence counsel for Puritan dissidents. Levy *ibid* at 232-242.

²⁴ Edward Coke, Chief Justice of Common Pleas under James I. Levy *ibid* at 229-265.

²⁵ Bishop Grosseteste (1235-1253) the first churchman to apply the new *ex officio* oath procedure in England even against the express opposition of Henry III. Levy *ibid* at 47.

²⁶ Whitgift, Archbishop of Canterbury under Elizabeth I used the High Commission as a weapon against religious minorities. Levy at 109-135.

²⁷ Laud, Archbishop of Canterbury under Charles I also used the High Commission and the Star Chamber as aggressive weapons against the Puritan minority.

²⁸ Levy, *ibid* at 136-172.

²⁹ Levy, *ibid* at 83-108.

³⁰ Usher *The Rise And Fall Of The High Commission* Tyler Ed (1968) is the most complete work on the functioning of this court.

But when combined with the efforts of the professional common lawyer, the defences grew in sophistication and became a formidable legal weapon. Writs of prohibition and habeas corpus prohibiting ecclesiastical courts from proceedings on the basis of the *ex officio* oath gained credence.³¹ These writs exemplified the fundamental common law notion that an English subject had the right not to be coerced into giving evidence against conscience and contained the first explanations by common law judges of a legal rule against self-incrimination.

In addition to the ecclesiastical and common law courts, there was a third judicature dispensing the monarch's direct justice through a Privy Council and associated royal prerogative courts. These state institutions had no peculiar jurisdiction of their own but dealt with a whole range of issues concerning the sovereign's interests. These prerogative courts unhesitatingly intervened in matters equally within and beyond the traditional jurisdictional reach of the common and ecclesiastical courts. The prerogative courts were only distinguishable from the common law courts in the procedure followed and not by a defined substantial jurisdiction. The Court of the Star Chamber,³² for example, adopted an inquisitorial procedure based on the *ex officio* oath. The procedure was flexible and could be modified according to the matter being examined. With the merging of state and church in the person of the monarch during the sixteenth century, the jurisdictional distinction between the secular and the spiritual sphere became blurred.³³ The Court of the High Commission began to be identified with the monarch's spiritual duty to stamp out religious heresy. The Court of the Star Chamber was identified with the monarch's secular duty to crush political deviance.³⁴ By the beginning of the seventeenth century the defendant was faced by a bewildering array of different tribunals, all with confusing and sometimes interlinked jurisdictions. If brought before the Court of the Star Chamber, the defendant would be regarded as a primary source of testimony and coerced by oath, interrogation and by leading

³¹ Coke used his position as Chief Justice of the Common Pleas (1606) and later Chief Justice of the King's Bench (1613) to oppose the power of the High Commission. Levy *ibid* at 330. Randal *ibid* note 10 at 420-22.

³² The Court of the Star Chamber had developed by the 16th century into a distinct court, its proceedings were secret, its methods within its own discretion and included inquisitorial techniques. Radcliffe and Cross *The English Legal System* Cross and Hand 5th Ed (1971) 107-8.

³³ Henry Tudor VIII broke away from Rome and formed the Anglican Church with himself as its spiritual head. (Act of Supremacy 1534). The new church was basically Catholic in theology but no longer acknowledged the pope. Ecclesiastical matters now became matters of state and religious heresies were considered treason against the state.

³⁴ Henry VIII employed inquisitorial processes to establish Anglican supremacy. His Catholic daughter Mary used the inquisitorial process of the Star Chamber to persecute Protestantism and to re-establish the Catholic Church. Elizabeth I simply reversed the process and used the prerogative courts to persecute Catholics and to solidify Anglicanism. Charles I used the prerogative courts for political purposes against a hostile parliament. His failed policies led to the abolition of both the Star Chamber and High Commission in 1641. The ecclesiastical courts were temporarily revived by Charles II but with the express exclusion of the *ex officio* oath.

questions into providing self-accusatory information. The Court of the Star Chamber gradually acquired a notoriety in matters of political conscience equal to that of the High Commission in matters of religious conscience. The political and social upheavals during the reign of Charles I redirected the attack against the *ex officio* oath by giving it a new and constitutional dimension. Central to the political agitations of the 1600s was John Lilburne who made civil disobedience a way of life.³⁵ In his various trials, speeches and pamphleteering, he highlighted the moral and ethical illegality of the *ex officio* oath.³⁶ Spurred on by public opinion, parliament abolished the Star Chamber and High Commission in 1641 and prohibited the use of oaths in the remaining ecclesiastical courts.³⁷ By 1700 all English courts had accepted the fundamental legal principle that compelling a self-incriminatory answer in a criminal trial was improper.³⁸ In terms of the traditional Wigmore-Levy theory, the evolution of a legal principle against self-incrimination is explained as a struggle against the *ex officio* oath represented by the ecclesiastical and later by the prerogative courts. It begins as a simple inchoate resistance to an unjust procedure. With time the defence becomes increasingly more sophisticated as it is used in turn by the common law courts to protect their jurisdiction, the Catholics to escape heresy charges, the Puritans to secure religious freedom, and finally, by politically motivated activists in the struggle to limit monarchical absolutism and to implement parliamentary rule-based government. The High Commission and the Star Chamber serve as the focus for these variously motivated resistances to the *ex officio* oath. From the abolition of these courts and their procedures, the legal privilege against self-incrimination is forged. According to Levy, the privilege against self-incrimination is primarily the creation of a four hundred year long struggle for dominance between the domestic accusatorial criminal procedure and the continental inquisitorial process.³⁹ Within this broad context it is also secondarily the culmination of the struggle against church and state for personal religious and constitutional liberty. The privilege against self-incrimination to some extent symbolizes the victory of individual rights over state interest. The evolution of the privilege as a protection of conscience, human dignity and personal liberty (first generation rights)⁴⁰ has given it a

³⁵ Levy *ibid* at 266-300. Wolfram *ibid* at note 11 at 216-218, 241.

³⁶ Lilburne, a prominent member of the Puritan "leveler" sect, suffered four prosecutions between 1637 and 1649. These prosecutions were instituted initially by the court under Charles I but later by the court under Cromwell. He died in 1657.

³⁷ Abolition of the High Commission 1641 (Statute 16 Car. I ch 11) and later (Statute 13 Car II c 12 (1661)).

³⁸ Levy *ibid* at 301-330. The privilege against self-incrimination was firmly entrenched when in 1688 James II attempted to prosecute seven bishops for defying his edict abolishing all laws against Catholic non-conformists.

³⁹ Building on a common law tradition, after 1688, the English criminal justice system began slowly to move towards a modern style accusatorial-adversarial system. Levy *ibid* at 280-320, 321-323.

⁴⁰ Flinterman "Three Generations Of Human Rights Rights" in Berting J *et al* *Ed Human Rights in a Pluralist World* Westport (1990) but in contrast see Donnelly "Human Rights, Individual Rights And

unique and distinctive nature which separates it from the general run of the mill legal rule. For this reason alone, proponents of a modern silence principle feel justified in elevating the principle into a constitutionally entrenched right. A special value, quite separate from its identity as an evidentiary rule of evidence, is attached to the idea of silence because of its seemingly important role in the historical struggle to develop a human rights culture. The pervasiveness of a so-called right to silence in all Western criminal systems (and some Oriental systems) is testimony to its unique appeal. It is understandable therefore why attempts to abolish or limit the "right" to silence have been met by a fanatical resistance more often based on inward emotional sentimentality than on objective reason.

The Canon view : In strong contrast to the traditionalist school, a more recent theory advanced by Helmholz and Macnair⁴¹ suggests that the development of a privilege against self-incrimination arises not in common law, but in canon law.⁴² It was not the invention of the common law lawyer as proposed by Levy but a well-established defensive principle of medieval religious thought about controversial rules of canon law.⁴³ According to Macnair, hostility against self-incrimination and the danger that oath-swearing and perjury represented for the Christian soul was always part of the religious debate and was never a common law principle until much later, at least after 1688.⁴⁴ Helmholz also demonstrates that the roots of the privilege are to be found in the *ius commune*. A merger of Roman and Canon rules and a sophisticated legal system used extensively throughout the continent and in all the English prerogative and ecclesiastical courts.⁴⁵ The privilege originated in debate between canon lawyers as early as the thirteenth century. By the late sixteenth century regular use was being made of a canonical rule against self-incrimination in ecclesiastical courts. When the seventeenth century common law courts began to interfere and intervene within the jurisdictional sphere of the High Commission, they did so simply to prevent abuse of the inquisitorial procedural rules by the state-manipulated Commission. In other words, the common law courts were simply requesting the Commission to abide by the canon law rules of inquisitorial procedure which the Commission and the Star Chamber were abusing in their

Collective Rights" in Berting J *et al* Ed *Human Rights In A Pluralist World* Westport (1990) and *Universal Human Rights In Theory and Practice* Ithica (1989).

⁴¹ Helmholz "Origins Of The Privilege Against Self-Incrimination, The Role Of The European *Ius Commune*" (65) *New York U. L. Rev* (1990) 1962-1990. Macnair "The Early Development Of The Privilege Against Self-Incrimination" (10) *Oxford Journal Legal Studies* (1990) 66-84. Writing independently of each other both authors arrive at the same conclusion.

⁴² Helmholz *ibid* at 964. Macnair *ibid* at 67, suggests a unique approach in which the silence principle was first applied to witnesses and then to allegations of crime in civil proceedings before the criminal accused was given a right to remain silent at trial.

⁴³ Helmholz *ibid* at 963-964, "focusing exclusively on 17th century common law judicial commentary has resulted in a narrow and misleading account of the origins".

⁴⁴ Macnair, *ibid* at 64.

⁴⁵ Helmholz, *ibid* at 967.

hunt for religious and political dissidents.⁴⁶ The Wigmore-Levy claim that the privilege against self-incrimination is the result of the common law's resistance to encroachment by inquisitorial procedure is therefore historically incorrect.⁴⁷ The evolution of a rule against self-incrimination is based firmly in Roman-canon law and the common law simply incorporated the well-documented rule at a much later date. The general theory outlined by Wigmore-Levy is correct in its broad perspective. The modern principle does owe its existence to the central role played by the common lawyer who took up its cause and expanded it. Much of the traditional argument about the struggle against the *ex officio* oath remains valid. As Wigmore and Levy clearly note, one of the reasons for the rapid expansion of the principle is the Tudor-Stuart constitutional struggles of the mid-sixteenth to the mid-seventeenth century. However, the traditional argument needs modification in certain essential respects. First, according to Helmholz, the maxim *nemo tenetur* is to be found in many of the medieval canon law references,⁴⁸ and also in continental manuals on civil and criminal procedure.⁴⁹ The principle appears in European precedent as a sub-rule of inquisitorial procedure centuries before the rule appeared in the common law.⁵⁰ Macnair suggests that the earliest examples of the application of a privilege against self-incrimination in an English forum are to be found in the equity courts which applied canon law and not in the common law courts.⁵¹ Second, an examination of the common law sources reveals that the common law contained no actual privilege against self-incrimination.⁵² The common law courts continued to use self-incriminatory type questions well after the Stuart Restoration in 1660, especially in cases of contempt and abuse of process. Most of the objections to the *ex officio* oath cited by Levy are in fact, based on claims that the oath infringed inquisitorial procedure and not a common law privilege.⁵³ Grey argues that the common law judges issued writs of prohibition against the oath only after other substantive reasons, apart from the privilege, were shown to exist.⁵⁴ Third, arguments in manuscript treatises and case precedent of the English ecclesiastical courts are based almost exclusively on a jurisprudence derived directly from the *ius commune*. Evidence indicates that objections to the *ex officio* oath are largely taken from the

⁴⁶ Grey, *ibid* note 20 at 348. Helmholz, *ibid* at 973. Macnair, *ibid* at 68.

⁴⁷ Levy's treatment of the origins of the maxim *nemo tenetur* is inconsistent. He accepts its canonical origin (at 70, 285). He denies its canonical origin (at 95, 329). He refers to the origin as nebulous (107) and mysterious (329). Wigmore is more correct in assuming it to be of canonical origin (at 275-276). Macnair, *ibid* at 67, 68.

⁴⁸ Helmholz, *ibid* at 967. the maxim appears in the most basic guides to canon law, the *Glossa Ordinaria* to the *Decretals* (1243) of Pope Gregory IX, and are endorsed by Innocent IV (*Quinque Decretalium ad X* 1.6.54 *dudum* no 11 (1570)) and the canonist Panormitanus (*Decretalium ad X* 2.18.2 *Cum super* no 16 (1555)).

⁴⁹ Helmholz, *ibid* at 967, note 28, 29.

⁵⁰ Macnair, *ibid* at 70-72.

⁵¹ Macnair, *ibid* at 69.

⁵² Wigmore (McNaughton Ed 1961) note 12 at 353-54.

⁵³ Helmholz, *ibid* at 987-989.

⁵⁴ Grey, *ibid* note 20 at 353-54.

Roman-canonical law of the time and not from the common law.⁵⁵ None of these objections are sourced, as Levy suggests, from a supposed right of conscience, *Magna Carta* or are a pure invention of the common law.

The Adversarial view : A third theory proposed by Langbein⁵⁶ argues that the emergence of a common law trial based silence principle is more accurately placed at the end of the eighteenth century.⁵⁷ As a practical and workable principle, it coincides with the rise of an adversarial model of criminal justice based on an increasingly central role assigned to the defence counsel. Contrary to the traditionalist view, the procedural mechanisms of the sixteenth and seventeenth century trial did not allow for the evolution of a silence principle. The Stuart trial system, in particular, was structured in such a way as to give the accused every incentive to speak out defensively against the charge. The trial was centred around the accused. The accused who deliberately chose to remain silent in the face of judicial and prosecutorial questioning could not reasonably hope to prove his innocence. Langbein is skeptical of Wigmore's rather vague claim that the privilege creeps into the common law trial process indirectly and as an association of ideas.⁵⁸ In this regard Wigmore can only be referring to the association of two ideas. On one hand, a privilege against the inquisitorial *ex officio* oath which coerces the suspect into answering questions about conscience and religious or political beliefs. On the other hand, the expectation that the accused should respond in person to the charges and evidence levelled against him in a criminal trial. It is difficult to understand how these widely separate ideas can be susceptible to confusion or association even during the "stir and emotion" caused by the collapse of the High Commission and Star Chamber.⁵⁹ Viewed in this light the traditional emphasis on the privilege as a narrow defensive rule which leads to the abolition of the *ex officio* oath procedure and then is somehow translated into a general criminal rule is somewhat misleading. While the privilege is an effective remedy against misuse of ecclesiastical procedure, its highly abstract nature would have had no discernable practical influence on

⁵⁵ Helmholz, *ibid* at 969.

⁵⁶ Langbein "The Historical Origins Of The Privilege Against Self-Incrimination At Common Law" (92) *Mich. L. Rev.* (1994) 1047-1085.

⁵⁷ Langbein, *ibid* at 1047.

⁵⁸ Langbein is critical of Wigmore's historical sources (at 1077-1081). Wigmore quotes seventeen cases as authority for his view (at 290 note 105). Langbein suggests that Wigmore has incorrectly analysed these cases.

⁵⁹ Wigmore (at 289) "a decided effect is produced and is communicated naturally enough to the common law courts". Holdsworth *A History Of English Law* 7 Ed London and Boston 6th (1966) 199 indirectly supports Wigmore, "[the privilege] is the somewhat illogical outcome of the disputes between the common law and the ecclesiastical courts". Langbein (at 1075) replies that it is muddled thinking to expect "the common law courts which had never employed the *ex officio* oath, to re-cast their criminal procedure for the purpose of implementing a notion that the common law courts had until then asserted only as a corrective against the incompatible procedure of detested non-common law courts".

the criminal trial with its differing procedural rules.⁶⁰ Certain specific procedural techniques militated against the successful development of a privilege against self-incrimination within the Tudor-Stuart criminal trial system. The primary inhibitory factor was the denial of access by the accused to defence counsel.⁶¹ Only once defence counsel was allowed to take the accused's place and test the state's case could the pressure on the accused to testify be relieved. Absent defence counsel the accused had to conduct his own defence and in this environment a silence principle could not develop. Other secondary inhibiting factors included restrictions on defence witnesses,⁶² the undefined nature of the prosecutorial standard of proof,⁶³ the inability of the accused to properly prepare for trial,⁶⁴ the harsh pre-trial procedure which often forced the accused to incriminate himself and made these incriminating statements available at trial,⁶⁵ the accused as the best source of evidence and a jury influenced sentencing process.⁶⁶ These processes taken together exerted a strong pressure on the accused to speak up in his own defence. Without defence counsel as a shield and guide the accused's refusal to respond to the evidence against him would have amounted to a forfeiture of all defences.⁶⁷ In stages throughout the eighteenth century, these inhibiting factors gradually began to disappear as the jurisprudential understanding of the trial process changed. In particular, the role of defence counsel gradually began to assume greater importance.⁶⁸ With defence counsel as a shield, the trial became an opportunity to test the prosecution case. By casting doubt on the state's presentation of evidence, the defence counsel began to shift the focus of the trial away from the accused. The state acquired an increasing burden of proof.⁶⁹ It was these profound eighteenth century changes in trial structure which contributed to the development of a silence principle.

⁶⁰ The Latin slogan *nemo tenetur* did gain popular appeal during the Tudor-Stuart period but "the slogan did not make the privilege, it was the privilege which developed much later, that absorbed and perpetuated the slogan" (Langbein at 1083).

⁶¹ Langbein, *ibid* at 1054.

⁶² *Ibid* at 1055.

⁶³ *Ibid* at 1056.

⁶⁴ *Ibid* at 1057.

⁶⁵ *Ibid* at 1059.

⁶⁶ *Ibid* at 1062-1063.

⁶⁷ Langbein, *ibid* at 1084, "Indeed in a system which emphasized capital punishment, the right to remain silent was the right to commit suicide. Only when defence counsel succeeded in restructuring the criminal trial did it become possible to fashion a true privilege against self-incrimination at common law".

⁶⁸ Common law prohibitions against defence counsel changed slowly from 1696 to 1836, but defence counsel only became a significant part of the trial process in the 1780s (Langbein at 1048).

⁶⁹ Beattie "Scales Of Justice, Defence Counsel And The English Criminal Trial in the 18th and 19th Centuries" (9) *Law and Hist. Rev* (1991) 233-35, 238, 244.

2.2 The Wigmore-Levy Orthodox Theory

The "stir and emotion", as Wigmore puts it, which was eventually to give rise to a privilege against self-incrimination has its beginning in the eleventh century. Prior to the Norman conquest, Saxon England⁷⁰ had no separate ecclesiastical court system. Churchmen and noblemen together presided over popular country courts (the courts of the hundred and of the shire),⁷¹ with a general and indiscriminate jurisdiction to decide all civil, criminal and religious issues. William I, the Norman conqueror of England, in accordance with accepted continental practice established a separate and parallel ecclesiastical court system under church control. By the mid-twelfth century England had developed two rival and competing court systems. A common law system derived from the old secular Saxon-Germanic process practiced in the King's court and covering all non-church legal matters. A foreign influenced ecclesiastical court system deriving its substance and procedure from continental canon law⁷². The differences between these rival systems was significant and the privilege against self-incrimination owes its origin to the inevitable competition and jurisdictional conflict between these rival systems. The ecclesiastical court utilized an inquisitorial procedure in which the prosecutorial and judicial functions were fused in the person of the judge.⁷³ This basic inquisitorial procedure was to remain unchanged for many centuries. By contrast, the common law courts utilized a developing accusatorial system which was eventually to be characterized by an adversarial division of functions. In its more sophisticated medieval form the common law court assigned responsibility to a grand jury for the presentation of the charge, a prosecutor organized the evidence for the king, a judge presided over the trial and what was to become a "petit" jury rendered the verdict. According to Wigmore-Levy it is in the clash between these rival systems that the privilege against self-incrimination was born.

⁷⁰ The Saxons, a Germanic tribe, conquered Roman Britain (430 AD). The last Saxon king, Harold I was defeated by William I of Normandy at the Battle of Hastings (1066). The subsequent history of England is of a Saxon underclass (English speaking) ruled by a Norman aristocracy (French speaking) until the emergence of a common English identity in the 14th century. In fact, the formal language of the courts was for many centuries a mixture of Latin and French.

⁷¹ Levy *ibid* note 18 at 5. Wigmore *ibid* note 12 at 270. Saxon England was divided into 34 shires. Each shire court was presided over by either a Bishop, Earl or Sheriff. Shires were further divided into smaller courts or "hundreds". A sheriff presided over a hundred. The courts convened at monthly intervals and had a wide jurisdiction in all civil, criminal and religious matters. Thompson and Johnson *An Introduction To Medieval Europe* Allen and Udwin London (1985) 432-462.

⁷² A system of law which still dominates modern Europe, and derived from the *Corpus Iuris Civilis* of Justinian, Byzantine Emperor (527-565).

⁷³ Levy, *ibid* at 39-42.

The ancient Norman-Saxon trial procedure was based on one of the many variations of primitive Germanic oath practices.⁷⁴ The trial process consisted of an initial determination of which party had the right of proving either the claim or the defence and the form of proof.⁷⁵ Proof and judgement in this primitive system was not a rational evaluation based on intrinsic merit. It was instead a direct appeal to God.⁷⁶ Proof was one sided in the sense that only one of the parties, selected by the judge, could prove or disprove the dispute. Judgement lay in the selected party's success or failure. The actual adjudication would take the prescribed form of either a compurgational oath⁷⁷ (*purgatio canonica*) or trial by ordeal⁷⁸ (*purgatio vulgaris*) including fire, poison, water or ordeal by battle. The compurgational oath, trial by witness or trial by oath, was characterized by a ritual observation of form. The function of the oath was to provide a standard incantation for executing a spiritual ritual or intercession with God which was believed to produce a just result. Any variation in the oath, stammering, stumbling or word changes was said to burst the oath. "Bursting" meant that God had rejected the oath and judgement could be immediately granted against the losing party. In trial by oath the defendant's oath depended for its validity on the support of a number of fellow compurgators (*iusiurandum de credulitate*) who were prepared to add their oaths to the defendant's oath. The reasoning behind this numbers game was that neither the defendant nor his fellow swearers would endanger their mortal souls by the sacrilege of false swearing. The compurgational oath fell into disuse early in the thirteenth century because it had become little more than a corrupt swearing contest.⁷⁹ As long as the defendant could round up the requisite number of fellow compurgators, he would win his judgement irrespective of whether or not his fellow oath swearers had knowledge of his truthfulness. Nevertheless the primitive adjudicatory method had one unique feature which was to be enshrined within future developments of the common law process. The early method was accusatory in nature and was to remain accusatory as the system evolved. The judge's role was simply to enforce the observance of the prescribed rules. The judge had no role in the

⁷⁴ Silving "The Oath Part I" (68) *Yale L.J* (1959) 1361-64, "The Germanic law was ritualistic, oath specific and infused with religious and magical notions. The proceeding was oral, personal and confrontational".

⁷⁵ Silving, *ibid* at 1362. "The court decided not on the merits but on the manner of proof". Levy at 5, "Judgement proceeded trial because it was a decision on what form the trial would take".

⁷⁶ Thayer *Preliminary Treatise On Evidence At The Common Law* (1898) 9-16. Pollock and Maitland *The History of English Law* 2 Ed vol 2 (1898) 603. In the irrational trial mode the investigator surrenders his task to the forces of revelation and his reason plays no more role. This mode is based on the notion of a direct intervention of God in human affairs. Stone *Evidence, Its History And Policies* Butterworths (1991) 2-4.

⁷⁷ Holdsworth *ibid* note 59 at 302-12. Thayer *ibid* at 16-46. Stone *ibid* at 4-5. The oath invokes divine wrath and when the oath swearer remains unaffected it is a divine indication of his innocence.

⁷⁸ Stone, *ibid* at 6. In the ordeal, the person undergoing the test is condemned unless divine intervention directly negatives the condemnation. He is subject to a certain experience which produces a certain effect. If the effect is produced, the person is condemned. If it is not produced, then divine intervention has absolved the person.

⁷⁹ Levy, *ibid* at 5-6,9. Wigmore, *ibid* at 273. Randal, *ibid* note 10 at 420.

actual judgement, deciding only which party to put to the proof and the form which the proof was to take.⁸⁰ In 1215 the Fourth Lateran Council abolished the compurgational oath and in its place introduced a new inquisitorial oath based on the reforming *decretals* of Pope Innocent III.⁸¹ The new oath was no longer a self-determinative and irrational appeal to divine intervention but functioned as a means of providing the judge with evidence for a rational solution of factual issues. In England the old compurgational oath had never generated any opposition because it was a simple declaration of innocence based on an appeal to divine intervention. The new inquisitorial oath by its very nature was bound to evoke strong objections. It provided a perfect vehicle for the judge to probe the accused's mind. In the beginning the probing and questioning was limited to the specific charge (always against morals or religion) but the oath procedure was later to become the basis of a roving inquisition probing without specific reference. The new oath was to become an efficient state directed exploratory device in the future war against heresy and other non-conformities.⁸² It is in the opposition to the inquisitorial oath that the beginning of a privilege against self-incrimination may be identified.

In the secular king's court, trial by ordeal was gradually replaced by an early form of trial by jury. Jury by "presentment" and "inquest" were early attempts by the Angevin monarchy to establish an organized and centralized legal administrative process.⁸³ It became the practice to summon trustworthy men from the district in which the king's court sat, who were sworn to tell the truth based on their personal knowledge about the serious issues in the community. The main function of "presentment" was to decide whether there was sufficient evidence to put a suspect on trial.⁸⁴ This process was eventually to be guaranteed by the *Magna Carta* right not to be put on trial without first being charged by credible witnesses.⁸⁵ With the formal abolition of the ordeal, judges began to fill in the gap by asking presenting juries to take over the role of adjudicating guilt and entering a verdict. Consequently, two separate kinds of

⁸⁰ Plascowe "The Development Of The Present Day Criminal Procedure In Europe and America" (48) *Harvard L. Rev* (1935) 437-441, 445-46, 453-460.

⁸¹ Levy, *ibid* at 25-29. Wigmore, *ibid* at 275. Innocent III's determination to destroy all heresy is the driving force behind the inquisitorial procedure. Davis *A History Of Medieval Europe* Longman Grp Ltd (1979) 341-353.

⁸² Radcliffe and Cross *The English Legal System* Cross and Hands 5th Ed (1971) 107-108. Wigmore, *ibid* at 274-275. Levy, *ibid* at 29-39.

⁸³ For example, the *Doomsday Book* was compiled on the verdicts of jurors selected from each locality. Thayer *ibid* note 76 at 51. Holdsworth, *ibid* note 77 at 313. Levy, *ibid* at 8.

⁸⁴ The early jury was not an adjudicatory body but a source of proof, the juror was selected because of his ability based on a personal knowledge to give truthful answers. Thayer *ibid* at 53. Pollock and Maitland *ibid* at 658. Holdsworth *ibid* at 314. Levy *ibid* at 8-9.

⁸⁵ Chapter 26 of *Magna Carta* "no bailiff shall put any man to his open law, nor to an oath upon his own bare saying, without faithfull witnesses". Note *Magna Carta* was a charter of liberties extorted from John I (1215) by his barons, and amended 1216, 1217, 1225. The 1225 version was incorporated into English statutory law.

juries developed. A presenting jury in which the accusation was made and a trial jury in which guilt was decided. The jury system thus began its long evolution from a collection of knowledgeable witnesses basing judgements on personal experiences to an independent disinterested decision-maker basing judgements on the evidence presented to the court.⁸⁶ By the time the inquisitorial *ex officio* oath was introduced into England as a replacement for the abolished ordeal in the ecclesiastical courts, trial by jury was well established in the ordinary common law courts. The stranglehold which inquisitorial Roman-canon law took on the secular courts of Europe was not to be duplicated in the ordinary English common law courts which continued to use the older mechanism of proof by verdict of jury.

Three new methods of adjudication based on variations of the inquisitorial oath were introduced by the Lateran Council. The three actions, imitations of Roman civil law, were the *accusatio* in which the accuser voluntarily accused the defendant, bore the risk of proving his accusation and the risk of punishment if he failed. The *denunciatio* in which the private accuser secretly denounced the suspect to the court and the *inquisitio*, in which the court acted as accuser, prosecutor, judge and jury.⁸⁷ The inquisitorial process allowed the court to act summarily, to disregard rules, forms and other legal impediments. The suspect could be detained and questioned on the mere suspicion of *infamia*.⁸⁸ The absence of evidence against the accused at the initial inquiry was irrelevant as the inquisitorial process relied on the accused as its main source of testimony.⁸⁹

First, the accused was forced to take the oath *de veritate dicenda*. An oath in God's name to answer truthfully.⁹⁰ In its popular form the oath became known in England as the *oath ex officio*.⁹¹ The oath was the primary mechanism of the inquisitorial procedure and was specifically designed to elicit self-incriminatory answers. Second, the oath's effectiveness was enhanced by keeping the accused at all stages completely in ignorance of the accusation, accuser and evidence brought against him. Third, the accused had no choice but to take the oath. A refusal to swear or silence in the face of questioning would give rise to two adverse inferences. Either an inference of guilt *pro confessio*, as if he had confessed,

⁸⁶ Stone *ibid* at 16-23. Levy *ibid* at 16-22. See also O'Conner "The Transition From Inquisition To Accusation" (8) *Crim. L. J.* (1984) 351-372.

⁸⁷ Levy *ibid* at 23. Wigmore *ibid* at 275.

⁸⁸ *Infamia* could be established by common report (*fama*), suspicion (*clamosa insinuatio*) but the easiest and most popular method was by judicial suspicion (*ex officio mero*). Levy at 23. Wigmore at 275. Maguire "Attack Of The Common Lawyers On The Oath Ex Officio" in *Essays In History In Honour Of C M Howard Wittke* Ed (1967) 203.

⁸⁹ Levy *ibid* at 23-29.

⁹⁰ Silving *ibid* note 74 at 1366. Berger *Taking The Fifth* Lexington Books (1980) 6. Corwin "The Supreme Courts Construction of the Self-Incrimination Clause" (29) *Mich. L. Rev.* (1930) 1, 6, "The oath was foolproof in securing a conviction".

⁹¹ *Ex officio* : by the authority of the judge and in two essential forms *ex officio promotio* (on an accusation made by an individual to the judge). *Ex officio mero* (purely on the authority of the judge).

or an inference of contempt.⁹² The *ex officio* oath was introduced into the English ecclesiastical courts by Cardinal Otho, papal-legate of Pope Gregory IX⁹³ in 1236. It was first employed by Bishop Grosseteste of Lincoln (1235-1253) who instituted a roving inquisition into the morals of his diocese.⁹⁴ Opposition to the new oath procedure developed almost immediately and was due largely to the uncomfortable differences between the rival procedures. The common law trial by jury presented the accused with a public accusation by an identified accuser to a specific charge before a sworn jury. On the other extreme, the *ex officio* inquisition proceeded against the accused, often by force, without showing probable cause or specifying the nature of the accusation and allowed the judge to question widely until some moral violation was uncovered. The *ex officio* procedure was without doubt a highly efficient device in exposing moral and religious infractions. But it could not be compared favourably with the procedural advantages enjoyed by the defendant in the common law court.

In response to the increasingly widespread use of the *ex officio* procedure by the church, Henry III (1216-72) issued writs prohibiting his English subjects from answering questions under oath.⁹⁵ The common law courts also issued writs of prohibition against church proceedings which infringed common law jurisdiction. These prohibitory writs were statutorily formalized when parliament passed several laws, *De Articuli Cleric* and the *Prohibitio Formata De Statuto Articuli Cleri*, limiting church usage of the *ex officio* oaths to matrimonial and testimonial causes, *nisi in causis matrimonialibus vel testamentariis*.⁹⁶ Nevertheless inquisitorial processes began to creep into secular practice largely as a result of its effectiveness in securing easy, informal and cost-effective convictions. By the fourteenth century most state organs, Privy Council, Chancery and Exchequer were making use of some kind of inquisitorial administrative process.⁹⁷ The Privy Council in particular administered several prerogative courts whose procedures were highly discretionary, including the power to employ the *ex officio* oath.⁹⁸ The Star Chamber, one of the judicial

⁹² Levy *ibid* at 22-23.

⁹³ Weigmore *ibid* at 270. Levy *ibid* at 46. Burger *ibid* note 90 at 6.

⁹⁴ Levy *ibid* at 47. Maguire *ibid* note 88 at 205-206.

⁹⁵ Levy *ibid* at 47. Maguire *ibid* note 88 at 205-206. Burger *ibid* note 90 at 7. Morgan "The Privilege Against Self-Incrimination" (34) *Minn. L. Rev.* (1949) 2-3.

⁹⁶ *De Articuli Cleric* (9 Ed W2. 1315-1319). *Articuli Cleri* (1 STAT. at LG 403) "no layman may be tried for heresy, or other enormities, save causes matrimonial and testamentary, by the *ex officio* oath". By its nature *ex officio* was a satisfactory process when applied to matrimonial matters, but because of its design limitations subject to abuse when applied to heresy and other political proceedings.

⁹⁷ Edward I (1272-1307) was principally responsible for centralizing and unifying the various arms of government.

⁹⁸ The Privy Council consisted of the most powerful clerics, nobles of the realm and developed into England's most formidable political body. *Introduction To Select Cases Before The King's Council* (1243-1482). Leadman and J Baldwin Ed, Seldon Society, vol 35 (1918). These prerogative courts

arms of the Privy Council was to play a pivotal role in arousing opposition to the *ex officio* oath. Early common law court and parliamentary opposition to the utilization by both church and state of the *ex officio* procedure symbolized the nature of the opposition which was gradually to give rise to a right against self-incrimination.⁹⁹ Parliament attempted to combat state use of the *ex officio* oath by petitioning the crown and statutorily¹⁰⁰ prohibiting Privy Council use of the oath on the authority of *Magna Carta*.¹⁰¹ In parallel the common law courts resisted the use of the oath by the ecclesiastical courts because of an increasing encroachment on their jurisdiction.¹⁰² Between 1250-1400, there was a burgeoning objection to the compulsory oath but as yet, no objection to the idea of compulsory self-incrimination. The rise of Lollardy¹⁰³ and other heretical sects around 1400 allowed the church to implement a brutal campaign in order to eliminate religious deviance. By emphasizing the social, political and spiritual dangers of heresy, the church was able to coerce both crown and parliament into a reluctant co-operation. Parliament passed the *De Heretico Comburendo*,¹⁰⁴ giving the church temporal powers in the administration of the *ex officio* procedure. Crown support for the anti-heresy campaign legitimized the *ex officio* oath and opposition to inquisitorial procedure temporarily vanished.¹⁰⁵ The church gained a temporary statutory endorsement for its inquisitorial powers. By 1500 a renewed and revitalized resistance to inquisitorial procedure re-emerged. William Tyndale (1525) condemned the oath as a violation of individual conscience.¹⁰⁶ John Lambert (1537) was possibly the first to argue, "no man is bound to betray himself" to which he attached the Latin maxim "*nemo tenetur prodere seipsum*". Lambert's claim was narrow. He did not assert a privilege against

were created by the king, *parens patriae*, in the exercise of his residuary power after the establishment of the common law courts. Legal matters for which there was no common law writ and which could not be heard in a common law court fell under the king's prerogative jurisdiction. The prerogative courts included Chancery, Admiralty, Star Chamber and the later High Commission. Levy *ibid* at 49. Maguire *ibid* note 88 at 207.

⁹⁹ Wigmore regards medieval opposition to the *ex officio* oath as a mere jurisdictional dispute. Levy, Maguire and Berger go beyond the jurisdiction issue and see a distinct pattern of an opposition based on a privilege against self-incrimination appearing in this period.

¹⁰⁰ Statute of Purveyors (24 Edw 3 ch 4 (Eng)) and (42 Edw 3 ch 4 (Eng)), "no man shall be put to answer without presentment by jury, by due process and writ original, according to the laws of the land".

¹⁰¹ Parliament opposed the oath on the basis of *Magna Carta*, chapter 29 "every subject is entitled to an indictment, by jury, trial by jury, in a common law court". Morgan *ibid* note 95 at 4-5.

¹⁰² Berger *ibid* note 90 at 8. Morgan *ibid* note 95 at 5.

¹⁰³ An English movement for ecclesiastical reform based on the teachings of John Wycliffe (1370-1414) condemning transubstantiation, the sacraments, celibacy, and insisting upon the translation of the bible into English. Levy *ibid* at 54.

¹⁰⁴ A powerful lobby of prelates forced through parliament the *ex officio* statute (2 Hen IV c 15) (2 STAT at LG (Eng) 415).

¹⁰⁵ Herman "The Unexplained Relationship Between The Privilege And The Confession Rule (Part I)" (53) *Ohio. St. L. J.* (1992) 112. Levy *ibid* at 56-61. Berger *ibid* note 90 at 8. Maguire *ibid* note 88 at 308.

¹⁰⁶ Tyndale *The Obedience Of A Christian Man*, a work according to Levy which foreshadowed the idea of a privilege against self-incrimination by stating that it was wrong to compel individuals to testify against each other. Levy at 63-67.

self-incrimination. Instead, he refused to answer on oath until he had been formally accused and given notice of the charge. St German through his influential treatise, attacked the ecclesiastical courts in general and the *ex officio* oath in particular. He argued for the supremacy of the common law over canonical law.¹⁰⁷ Reacting to these pressures, parliament with the cynical support of Henry VIII (1509-1547) approved the repeal of the *Heretico Comburendo* in 1534.¹⁰⁸ The use of the *ex officio* oath was not abolished, but it was severely restricted by the requirement of a formal charge presentation before the oath was sworn.

The Henrician reformation (1534-1547) was the watershed which shifted the struggle against the *ex officio* procedure from the purely religious stage on to the open political arena. Henry VIII excised the English church from the authority of Rome, denied Papal supremacy and installed himself as head of a new Anglican Church.¹⁰⁹ With the merger of identity between church and state, the jurisdictional divide between ecclesiastical and secular courts became less distinct. The fusion of secular and spiritual powers within the person of the sovereign meant that ecclesiastical issues became matters of state and religious violations were turned into criminally treasonable acts.¹¹⁰ To ensure political and religious orthodoxy the state adopted inquisitorial procedures. The Henrician Star Chamber, and later the Elizabethan High Commission were the principal state tools in a struggle which became increasingly more politicized. The notion of a rule against self-incrimination takes on a new coherence which it had previously lacked. The idea of self-incrimination is born as a result of the creation, development and state manipulation of the High Commission and Star Chamber. It is no longer a mere objection against *ex officio* process in purely religious matters, but is now partially defined by the constitutional struggle between parliamentary rule of law and monarchical absolutism. Henry VIII cynically employed the oath and inquisition against all internal Catholic opposition in his efforts to solidify Anglican Church supremacy. His daughter Mary I (1553-58) in turn created an early version of the High Commission and used it to re-introduce Catholic supremacy at the expense of Anglican Protestantism.¹¹¹ The first coherent and widespread attempts by accused heretics to claim a privilege against self-incrimination arise as a consequence of the brutal Marian inquisition. These privilege claims, based on an appeal to conscience, consisted of a general refusal to take the *ex officio* oath

¹⁰⁷ St German, a well know common lawyer, popular for his biting commentaries against the *ex officio* oath. Levy at 64.

¹⁰⁸ Repealing statute 25 Hen 8 ch 14 (Eng) (4 STAT at LG (Eng) 279-79).

¹⁰⁹ Act of Supremacy (1534). Confirmation of the Anglican State Church.

¹¹⁰ Secular rather than spiritual considerations now dictated government policy. Treason and sedition were the crimes for which religious non-conformists were prosecuted under the Anglican establishment.

¹¹¹ Levy *ibid* at 75-77. Herman *ibid* note 105 at 116.

or to answer incriminatory questions.¹¹² The efficiency of the Marian Commission established a precedent which would assist Elizabeth I (1558-1603) in establishing a far stronger Court of the High Commission. When Elizabeth I took power, she simply reversed the roles of Anglican and Catholic by re-establishing Anglicism as the official state religion. She also began a concerted and repressive campaign to pacify her Catholic subjects. The Elizabethan High Commission became the primary weapon in the rooting out of Catholic heretics.¹¹³ The Elizabethan religious settlement of 1559 which re-established the Anglican State Church¹¹⁴ was a moderate policy calculated to appeal to the conservative majority by being Protestant in doctrine but traditionally Catholic in ceremony. It however served to alienate non-conformist minorities. It was an offence to Catholics because it was so Protestant in theology and repugnant to Puritans because it was not thorough going enough in its reformation. By 1580 Puritan dissidents had replaced Catholics as the main source of danger to the established Anglican Church.¹¹⁵ John Whitgift, Archbishop of Canterbury, was appointed to head a reformed, reconstituted High Commission with a discretionary mandate to punish religious non-conformity.¹¹⁶ The suspect was summoned before the High Commission without being informed of the accusation or the identity of his accuser. The suspect was required to take the *ex officio* oath and to answer questions which attempted to establish guilt for a crime never disclosed. A refusal to swear would result in a referral to the Star Chamber and a possible criminal charge. A truthful answer would expose the suspect to a charge of heresy or treason. To lie under oath would risk perjury and constitute a sin against scripture. To defend against this dilemma Puritan intellectuals began to develop an argument based on the legal reasoning that the oath *ex officio* was an unconstitutional violation of *Magna Carta*.¹¹⁷

¹¹² This period is well documented in John Foxe *The Book Of Martyrs* (1536) which describes the trials of famous heretics during the Marian inquisition. Each trial description contains an account of the abuse of common law rights by the inquisition and the *ex officio* oath. Levy *ibid* at 79-81.

¹¹³ Usher *The Rise And Fall Of The High Commission* (1913) 16, 24-25. Levy at 83-96. Herman *ibid* note 105 at 116-117. By 1585 all English Catholic priests were by law guilty of treason.

¹¹⁴ The Act of Supremacy (1 Eliz. c. 1 (Eng)) is important in establishing crown control over religious matters, restoring state authority over "all manner of errors, heresies, schisms, abuses, offences and enormities" (sec III). "To examine upon their corporal oath" (sec X). The *ex officio* oath in this regard is secured in letters patent 1583, 1590 and 1593.

¹¹⁵ Catholicism represented a largely external threat, but Puritanism went to the very heart of the Protestant establishment. Levy *ibid* at 117, 120.

¹¹⁶ The High Commission's powers included the *ex officio* oath, the right to impose immediate fines and other forms of punishment, the power to summon witnesses and to punish disobedience to its orders. It had no defined geographical jurisdiction and was a refined example of a roving inquisition. Pollard "Council, Star Chamber And Privy Council Under The Tudors" *Eng. Hist. Rev.* (1922).

¹¹⁷ Beale, clerk of the Privy Council, and a leading critic of the High Commission, revived the argument that the *ex officio* oath was contrary to *Magna Carta*. Although historically inaccurate, his account did serve the purpose of turning the *Magna Carta* from a document guaranteeing aristocratic rights into a charter protecting the basic rights of all. Levy *ibid* at 139-150.

As yet, the opposition was focused on the *ex officio* oath procedure. Only in later generations would the same argument be made that involuntary self-incrimination violated the due process of the common law courts. The High Commission and the Star Chamber became the focal point of a sustained campaign based on a legally articulated right against self-incrimination.¹¹⁸ These defensive arguments against inquisitorial processes rested on the well reasoned idea that both *Magna Carta* and the common law limited the crown's sovereignty. Parliament as a source of the common law could limit the power of the crown's prerogative courts.¹¹⁹ By the beginning of the seventeenth century the opposition to the oath procedure was no longer a religious one, but had become a political-constitutional struggle between parliament and the common law courts against the crown and its prerogative courts.

During the Stuart dynasty the common law courts began to play a pre-eminent role in the development of the right against self-incrimination.¹²⁰ Edward Coke, Chief Justice of the Common Pleas, and Nicholas Fuller, lawyer and member of parliament, rose to prominence during the reign of James I (1603-1625). Fuller attacked the oath at every turn and spoke out against the High Commission and in support of *Magna Carta*.¹²¹ Coke asserted the superiority of the common law and set definite limits to inquisitorial procedure.¹²² He issued numerous prohibitory writs against the illegal use of the oath in ecclesiastical procedure. According to Coke, ecclesiastical courts acquired jurisdiction only on the authority of parliament and the common law court as the instrument of parliament. Common law courts could set limits on ecclesiastical jurisdiction. He reaffirmed parliament's ability to make law in this regard, defended the individual's right to the benefit of the common law procedure and

¹¹⁸ For example, Thomas Cartwright (1535-1603) argued that the oath invaded privacy, violated conscience and was contrary to religious principles. Pearson *Thomas Cartwright And Elizabethan Puritism* Cambridge (1925). Levy states that Cartwright asserted a privilege similar to the modern one. John Udall was probably the first accused to assert a privilege against self-incrimination before a common law court (1590). His silence was construed as an inference of guilt and he was convicted of heresy (1 How St. tr 1275-1289 (1590)).

¹¹⁹ James Morice, member of parliament, argued that the oath violated the common law by presuming the accused guilty and forcing the accused to prove the presumption true. The presumption violated Chapter 29 *Magna Carta* because criminal proceedings were governed by the law of the land as determined by parliament and not by the crown and its special courts. (Levy at 194-196). The oath also violated chapter 28 which required due and proper presentation of the charge by a jury (Levy at 235-236).

¹²⁰ Wigmore's account differs slightly from that of Levy and Maguire. According to Wigmore there is no real indication of a privilege before the reign of James I. Prior to this, the conflict centred around jurisdiction and abuse of *ex officio* procedure. Unlike Wigmore, Levy regards the prohibition cases in the reign of Elizabeth (1558-1603) and James I (1603-1625) as positively hostile to compulsory self-incrimination. Both however, agree that the privilege was well established by the restoration of Charles II (1660).

¹²¹ Fuller, a prominent supporter of Puritanism, defended Cartwright (1590-1) before the High Commission and was himself imprisoned by the High Commission in 1607. Levy *ibid* at 229-241.

¹²² Chief Justice Common Pleas (1606) Chief Justice King's Bench (1613). Dismissed from office (1616), continued as a member of parliament to argue for the common law courts and against the Crown's prerogative courts. Levy *ibid* at 229-257. Wigmore *ibid* at 280.

limited the *ex officio* oath to matters testimonial and matrimonial. But Coke also employed methods other than the writ of prohibition¹²³ to accomplish his goal. In both *Boyer v High Commission*¹²⁴ and *Burrowes v High Commission*¹²⁵ he argued, one of the first sitting English judges to do so, that laymen could not be examined under the *ex officio* procedure because of the legal rule *nemo tenetur prodere seipsum*.¹²⁶ Although most of the case decisions during Coke's period of office are limited to overruling *ex officio* procedure on jurisdictional grounds, his legal reasoning supported the growing notion that it was immoral to compel self-incrimination.¹²⁷ As a result of the well-orchestrated attacks on the prerogative and ecclesiastical courts, the use of the *ex officio* process gradually declined during the period 1616 to 1633.¹²⁸ The theoretical basis of a privilege against self-incrimination had by now become well established. Resistance to the oath was no longer singularly based on the unfairness of the *ex officio* oath. It had by 1630 acquired a much broader meaning as a basic right against involuntary coercion and the violation of human dignity contrary to the instinct of self-preservation.¹²⁹ Resistance to the *ex officio* oath became politicized when in 1634 Charles I and Archbishop Laud revived the controversy. Under Laud the High Commission came to dominate the Star Chamber, both being used by the state as security agencies.¹³⁰ A resurgent Star Chamber began to reach into areas where its influence had never gone before.

¹²³ A writ of prohibition was usually issued by the common law court preventing the ecclesiastical court from proceeding on the basis that the matter before it concerned temporal issues outside of the ecclesiastical court's competence. Randal "Sir Edward Coke And The Privilege Against Self-Incrimination" (8) *S. C. L. Q* (1956) 437, 446, 450.

¹²⁴ 80 Eng Rep 1052 K.B (1615).

¹²⁵ 81 Eng Dep 42, 43, K.B (1616). See also *Collier v Collier*. 72 Eng Rep 987 K.B (1589) and *Edwards* 13 Coke Dep 9-10 (1609). All these cases in Coke's reports at Co. Rep 26, 77 Eng Rep 1308 (1607).

¹²⁶ There were by 1600 many instances of defendants making use of the Latin maxim. Lambert (1538), Tresham (1581). Beale (1584). Udall (1586) and (1590).

¹²⁷ Coke argued three points consistently throughout his legal career. (a) the ecclesiastical judge had to make known the charge before proceeding. (b) the judge could inquire into words or acts but never into thoughts. (c) no lay person could be examined under the *ex officio* oath except in matters matrimonial or testimonial.

¹²⁸ By contrast the *nemo tenetur* principle was never evoked by an accused in a criminal matter before a common law court. The trial process of the common law court continued to pressure the accused into making self-incriminating statements.

¹²⁹ Levy *ibid* at 263-264.

¹³⁰ Levy *ibid* at 271. Berger *ibid* note 90 at 15. Charles I in a letter to the High Commission (Feb 4 1637) insisted upon a more vigorous enforcement against non-conformists. He complained about dissenters who had "grown to that obstinacy, that some refuse to take their oaths, and others, being sworn, refuse to answer". These should be forced "to answer upon their oaths in causes against themselves and to answer interrogators touching their own contempts objected against them". Letters to the High Commission (1637) *Hazard State Papers* vol I 482 (Rymer 190).

The prerogative courts retained the practice of extracting incriminatory testimony through the efficient use of the confession *pro confessio*.¹³¹ Both the High Commission and the increasingly notorious Star Chamber became the focal point of a revitalized opposition along the lines championed by past heroes, Beale, Cartwright, Morice, Fuller and Coke. The culmination of a four hundred year struggle against the *ex officio* procedure, according to Levy, is symbolized by the trial of John Lilburne, an anti-Stuart leveler and Puritan, popularly known as Freeborn John.¹³² Charged with distributing heretical books, his 1637 trial focused the entire nation's attention upon the proceedings in the Star Chamber. The refusal of Lilburne to swear the *ex officio* oath or to answer against himself is said by Levy and Wigmore to be the final link in the development of a privilege against self-incrimination.¹³³ In the struggle for personal liberty and conscience Lilburne argued that "it was contrary to the law (*Magna Carta*) to force a man to answer questions concerning himself". A free man has the right to silence and adversaries must state the charge against him and prove it by means of their own witnesses.¹³⁴ Lilburne's trial served as the catalyst for a renewed and final struggle fought along three separate battlefronts. The first was a political confrontation between the Crown (insistent upon a divine right to rule) and parliament (supporters of the rule of the land and *Magna Carta*). The second was a religious clash between the Crown (aligned with the Anglican Church) and parliament (dominated by Puritans). The third was a purely legal battle between the Crown (and its reliance on the prerogative courts) and parliament (supporter of the common law courts). In this aspect it was also a jurisdictional struggle between the Crown and its support of inquisitorial procedure and parliament loyal to the accusatorial system of justice. Lilburne's trial underlined a turning of the political tide against the Crown. It highlighted the first tremours of a social revolution which was to lead to civil war (1642-1649). In 1641 the long parliament¹³⁵ dominated by Puritan factions and galvanized by public resentment over Lilburne's unfair treatment, finally abolished the High

¹³¹ In terms of the *pro confessio* procedure, defendants who refused to give self-incriminatory testimony were treated as if they had confessed. The same was applied to the defendant who did answer but did so in an incomplete manner. Levy *ibid* at 269-271.

¹³² Lilburne suffered a number of prosecutions between 1637 and 1653. The Star Chamber under Charles I (1637), a common law trial (1649) and a common law trial under Cromwell (1653). Although he won all his cases, he was forced into exile and then imprisoned. He died in 1657 aged 43. Levy at 273. See also Levy "John Lilburne and the Rights of Englishmen" *Constitutional Opinions* Oxford Un. Press (1981) 14-39.

¹³³ Levy *ibid* at 272-278. Wigmore *ibid* at 282-283. Griswold *The Fifth Amendment Today* (1955) 1, 2, 3.

¹³⁴ Lilburne's trial 3 Howell St. tr. 1315, 1318 (1637). Wolfram "John Lilburne's Democracies Pillar Of Fire" (3) *Syracuse L. Rev* (1952) 218.

¹³⁵ The long parliament was called by Charles I, desperate for funds to finance a war against his rebellious Scots subjects. Phillips "The Last Years Of The Star Chamber (1630-1641)" *Transactions Royal Historical Society* 4th XXI (1939). Levy *ibid* at 278-279.

Commission, Star Chamber and swept away the inquisitorial oath procedure.¹³⁶ Later at his second trial (1649), Lilburne placed the privilege against self-incrimination within its proper and familiar modern context.¹³⁷ For the first time a high English court expressly recognized a rule against self-incrimination within the constitutional context of a fair trial and due process of law. The abolition of inquisitorial procedures did not have an immediate effect on the common law courts.¹³⁸ The trials of the twelve bishops (1641), King Charles's regicide trial (1649) and the notorious Scroop's trial (1660),¹³⁹ illustrate a slow but steady immersion of the privilege into English jurisprudence. However, by the Restoration (Charles II 1660-1680) the principle was fully acknowledged in all courts.¹⁴⁰ By the Glorious Revolution (1688) it was commonplace.¹⁴¹

The opposition to the *ex officio* oath ended in the common law right of the criminal accused to remain silent and not to furnish self-incriminatory evidence. The accused could now demand that the state prove its case against him by way of independent witnesses. The rule harmonized with a number of other procedural rules. The object of which was to ensure a fair trial, to protect the presumption of innocence and to place the burden of proof squarely on the shoulders of the state. The rule against self-incrimination also stood for the idea that it was inherently cruel to force the accused to expose his guilt. Its historical antecedents had forged it into a fundamental principle of the accusatorial due process of law.

But the rule was more than a mere procedural rule. On a much higher level it had come to symbolize religious liberty, personal conscience, human dignity and the right to privacy, freedom of speech and of politics.

¹³⁶ 16 Car I ch 10 (Star Chamber) 16 Car I ch 11 (High Commission (1641)). The statute describes the Star Chamber as "an intolerable burden to the subjects and the means to introduce an arbitrary power and government". All matters formerly examinable before the Star Chamber would from the abolition be addressed by the common law courts. An argument has also been raised that the abolition of the prerogative courts was not the result of the popular opposition to the *ex officio* oath but was more the result of the abuse of prerogative powers by Charles I.

¹³⁷ Lilburne states, "by the laws of England, I am not to answer to questions against or concerning myself". To which Judge Keble replied, "You shall not be so compelled". 4 St. tr 1269, 1292-3 (1649).

¹³⁸ In 1647 the Levellers presented a petition to parliament demanding the constitutional changes advocated by Lilburne. In *the humble petition of many thousands* article 3 stated, "you permit no authority whatsoever to compel any person to answer to any question against themselves except in cases of private interest".

¹³⁹ *Bishops case* 4 Howell st. tr 3, 65 (1641). *King Charles case* 4 How St. tr 993, 1101 (1649). *Scroop's case* 5 How St. tr 1034, 1039 (1660). In *Scroop* the judge expressly conceded "you are not bound to answer me, but if you will not, we must prove it" (at 1034).

¹⁴⁰ Levy *Constitutional Opinions* Oxford Uni Press (1981) 200-202. Havinghurst "The Judiciary and Politics in the Reign of Charles II" (60) *L.Q.R.* (1950) 62-78.

¹⁴¹ In *Entick v Carrington* 19 How St. tr (1765) 1073, Lord Camben says "It is very certain that the law obliges no man to accuse himself because the necessary means of compelling self-accusation, calling upon the innocent and guilty would be both cruel and unjust".

The impetus for the creation of the privilege against self-incrimination according to the Wigmore-Levy theory was a four hundred year long common law inspired resistance to the *ex officio* oath. How was such a persistent hostility against the inquisitorial oath in England sustained? After all the *ex officio* oath was nothing more than an oath sworn by the defendant to tell the truth. The antagonism towards the oath appeared to have arisen partly from an objection against its nature but also from the context in which it was used. It was primarily a state device aimed at heretical opponents of the church establishment and thus by association opponents of the state itself. It was also a political weapon in the constitutional struggle between two radically different forms of political philosophy. On the European continent the same inquisitorial procedures were aimed at similar religious and political dissidents but without triggering comparable levels of hostility. The inquisitorial process to this day continues to dominate most European legal systems. Yet in England from its very inception, the Roman-canonical procedure was met by a hostile and consistent criticism. What precisely was wrong with the English form of the inquisitorial procedure and why did it give rise to a privilege against self-incrimination? One of the earliest arguments raised against the *ex officio* oath was that it violated biblical principles.¹⁴² Christian theology prohibits the swearing of an oath, the purpose of which was to produce self-incriminatory testimony. Self-accusation and the confessional ritual should always be a private matter between God and the individual. The strict biblical injunction was understood to work on two levels. On one level lying under oath was regarded as a blasphemy against God. Even an unthinking, unknowing falsehood under oath would place the swearer in peril of his soul.¹⁴³ On another level, the oath was viewed as an obvious violation of individual conscience, hence John Udall's sixteenth century appeal to freedom of conscience as a justification for refusing the oath.¹⁴⁴ Second, a strong and uniquely English Puritan objection to the oath gradually emerged, based on the inflexible conviction that certain religious beliefs should be beyond the ability of a secular power to question or to punish. Resistance towards the oath may be regarded as a substitute symbol for a religious tolerance which was absent in Tudor and Stuart society. At the same time resistance to the oath was a rallying point in the struggle against monarchial absolutism and the privilege against self-incrimination was regarded as a justifiable defence in the face of state tyranny. One of the defences raised by Lilburne at his second trial in 1649 was that a right against self-incrimination was not only a protection of religious belief, but also an expression of political liberty and conscience. Third,

¹⁴² The Bible is fairly consistent in its disapproval of oath taking in general. Matthew 5 : 33-7, Exodus 20 : 7, Deuteronomy 5 : 11. But see *infra* note 182.

¹⁴³ Coke, Chief Justice of the Common Pleas characterizes the oath as the "invention of the devil to destroy miserable souls". Randal *ibid* note 123 at 445.

¹⁴⁴ Kemp "The Background Of The Fifth Amendment In English Law" (1) *Wm and Mary L. Rev* (1958) 281. Wigmore *ibid* at 286. See also Udall's trial 1 How St. tr 1275, 1289 (1590).

the *ex officio* procedure was designed as an extremely effective operational medium for a "fishing expedition" type inquisition.¹⁴⁵ The *ex officio* oath procedure was simultaneously an effective state tool but also an extremely dangerous one because it placed every ordinary citizen at risk in their daily religious observances. Inquisitorial questioning could easily entrap innocent suspects who thereby unwittingly accused themselves. Furthermore, the oath was always administered prior to the presentation of the charge. Without being informed of the charge against them, unprepared suspects were easily tricked or surprised into providing self-incriminatory evidence. Fourth, suspects who swore the oath were often faced with the inherently cruel alternative of either exposing themselves to punishment in hell for lying in violation of the oath or exposing themselves to bodily punishment by admitting to the offence.¹⁴⁶ Tyndale described the dilemma succinctly "[It is] a cruel thing to break into a man's heart, and to compel him to put either soul or body in jeopardy, or to shame himself".¹⁴⁷ According to sound jurisprudential principles, a "good" law must always take into account human weakness whenever possible.¹⁴⁸ A law or a legal rule inconsistent with human nature serves only to burden the conscience. The *ex officio* procedure was "bad" law because it concentrated exclusively on exploiting human frailties. Self-incriminatory testimony coerced from the defendant by inquisitorial process was certain to be intrinsically untrustworthy. All legal rules should be based on ideals compatible with human nature, an aspect of which is the purely human desire for protection against self-incrimination. The *ex officio* process unashamedly confronted the defendant with an inhumane choice between harmful disclosure, contempt or perjury. A legal process such as the *ex officio* oath could not expect to survive especially when it sought to compel the individual into making unnatural choices. Fifth, the oath procedure was an unacceptable violation of individual human dignity and privacy.¹⁴⁹ According to Coke, "no man should be compelled to answer for his secret thoughts and opinions".¹⁵⁰ However, in this regard the state was left with no other alternative. The struggle against religious non-conformity could only be fought with procedures which unacceptably intruded upon individual privacy. Heresy by its very nature was a crime of psychology, of secrecy and intimate conscience.¹⁵¹ The suppression of heresy presented the state with certain unique enforcement problems. There were only three practical methods by which the state could effectively prosecute the offence. The

¹⁴⁵ See the modern argument *infra* chapter 4 p. 147-149.

¹⁴⁶ The modern version of the dilemma and trilemma defence is to be found in *Murphy v Waterfront Commission*, *infra* chapter 4 p. 112 and p. 115-116.

¹⁴⁷ Tyndale *The Obedience Of A Christian Man* (1528). Levy *ibid* at 63.

¹⁴⁸ Connery "The Right To Silence" (39) *Marq. L. Rev* (1956) 180, 183.

¹⁴⁹ See the modern argument for privacy *infra* chapter 4 p. 118-129.

¹⁵⁰ Coke's judgement in *Jenners case* : Stowe MS 424, Fols 159 b, 160 a (1611).

¹⁵¹ Wolfram "John Lilburne : Democracies Pillar Of Fire" (3) *Syracuse L. Rev* (1952) 218, 219, "heresy was likely to be committed in the mind rather than by deed or word. Witnesses to a man's non-conformist thoughts are difficult to procure".

perpetrator himself had to be forced into a confession or an accomplice had to be persuaded to turn state's witness. Both these methods were difficult to apply. After all, the perpetrator would not always confess, nor were there many obliging accomplices. Both perpetrator and accomplice were essentially engaged in religious activities which neither believed to be wrong. The third method or the *ex officio* oath was precisely designed to take these practical difficulties of combating heresy into account. Without a procedure which placed the perpetrator under oath to speak truthfully and then probed his inner thoughts, heresy could never be proved. Thomas More (1478-1535), English Chancellor under Henry VIII, warned "the streets were likely to swarm with heretics".¹⁵² Archbishop Whitgift, head of the High Commission under Elizabeth I, was coldly analytical in his reasoning, "heretics spread their poison in secret and make it impossible to produce witnesses against them".¹⁵³ Hence the state's willingness to apply inquisitorial procedures in its continuous attempts to enforce political, religious and social orthodoxy. The more vigorous the state attempt to enforce conformity, the stronger grew the opposition and with it a burgeoning privilege against self-incrimination.

The Wigmore-Levy traditional theory¹⁵⁴ may be criticized in a number of important respects. The difficulty with Wigmore's and Levy's accounts are that they refer ambiguously to the catch-all word "privilege" without precisely defining the meaning of the word. Are they referring to a rule against silence, a rule against self-incrimination, or a rule against self-accusation. In all probability, they are referring to a "witness" type privilege against self-incrimination. In this sense the abolition of inquisitorial procedures during the seventeenth century does contribute to the establishment of an immunity from the obligation to provide self-incriminatory testimony. It may well be reasoned that a narrow privilege is established by the Restoration or no later than the Glorious Revolution of 1688 in cases of heresy, sedition and treason.¹⁵⁵ The seventeenth century privilege was based on an objection to the

¹⁵² Levy *ibid* at 65.

¹⁵³ Levy *ibid* at 139.

¹⁵⁴ Despite the obvious flaws in the Wigmore-Levy orthodox account, judicial precedent continues to endorse the view. *Hammond v The Commonwealth of Australia and others* (1982) 152 C.L.R. 188, 201, 203. *Bishopgate Investment Management Ltd v Maxwell and Others* (1993) CH 1 (CA) 17-18. *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993). 118 A.L.R. 392, 404, 426, 440. *Petty and Maiden v The Queen* (1991) 65 A.L.J.R 634. *S v Zuma* 1995 (2) SA 642 (CC) para 30. In contrast see Ackermann J's reference to the Langbein theory in *Ferreira v Levin NO and Others* 1996 (1) SA 984 (CC), para 92n 124.

¹⁵⁵ If the privilege is limited to this narrow instance, then it serves not only as a protection of conscience and human dignity but also as a protection against torture. While torture was never commonplace in the English criminal system, it was applied with reasonable frequency in cases of state sedition and treason. It was also to some extent indirectly a part of the criminal pleading process, especially *paine fort et dure*. Langbein regards Levy's argument that the privilege is well established by 1688 as a safeguard of liberty and dignity as incorrect. Langbein contends that no

taking of the *ex officio* oath, a curb on the intrusive powers of state officials and a practical preventative against fishing expeditions. It was a privilege inconsistent with the usual seventeenth century criminal trial and was never, other than peripherally, a part of the common law criminal procedure. The Wigmore-Levy account cannot therefore be referring to the accused's right to silence within the criminal trial process, an altogether different conceptual idea. Langbein has conclusively demonstrated that a trial right to silence is the product of a lawyer-driven adversarial system developed in the late eighteenth century.¹⁵⁶ Both Wigmore and Levy locate the origin of the privilege in the common law tradition, but offer no real verifiable proof in this regard. Levy, in particular, explains the development of the privilege as a consequence of the clash between rival inquisitorial and common law procedures. Yet Helmholz and Macnair¹⁵⁷ have unquestioningly documented the source of the privilege in early canon law and not in common law. The privilege is clearly a rule of early canon law and was only later incorporated into the common law. Wigmore neatly sidesteps and Levy completely ignores the fact that compulsory self-incrimination had been an integral part of due process in the common law courts for many centuries. The ordinary courts, King's Bench, Common Pleas and even the Exchequer, had regularly used compulsion on defendants and witnesses and continued to do so long after the abolition of the prerogative courts in 1641. Holdsworth writes that beginning in the early Middle Ages, the accused had no privilege against self-incrimination.¹⁵⁸ The focus of the criminal trial centred around the examination of the accused and remained so until the eighteenth century.

In practice, the accused was regularly forced to plead at the criminal arraignment by way of *paine fort et dure*.¹⁵⁹ The accused was subject to a preliminary hearing and the refusal to answer the committing magistrate's question was admissible as evidence against the accused at the subsequent trial. The *nemo tenetur seipsum* principle held no advantage for the criminal accused but the suspect or witness brought before a prerogative court could claim the privilege with a reasonable chance of success. Both Wigmore and Levy are vague on the transmission method by which a supposedly common law principle is re-incorporated into the seventeenth century criminal trial procedure. Wigmore refers to a natural association

mention was made of the privilege in the Bill of Rights 1689, nor did the Whig reformers mention it when drafting the procedural safeguards for the Treason Act of 1696 (at 1053).

¹⁵⁶ See *infra* p. 56.

¹⁵⁷ See *infra* p. 49.

¹⁵⁸ Holdsworth *ibid* note 59 at 199.

¹⁵⁹ In terms of the Statute of Westminster (1275), during the plea process the reluctant accused would have weights piled upon him until he consented to plead. As the criminal proceeding was stayed until the accused pleaded, torture was often employed to speed up the process and to coerce the accused into pleading. Stephen *History Of The Criminal Law of England* (1883) 297–301. The practice of physically forcing the accused to plead continued until 1741. After its abolition, a refusal to plead was admissible as an inference of guilt. By 1827 a refusal to plead was treated as a plea of not guilty. Baker *An Introduction To English Legal History* 3rd Ed (1990) 580-81.

and confusion of ideas which magically results in the emergence of a fully fledged privilege in the criminal trial at some imprecise time during the 1600s. Levy finds the nexus in the privilege's direct response to an aggressive religious and political struggle of the middle 1600s. Nevertheless, it is unclear how a privilege limited to and forged on the ideals of religious conscience and political liberty could have crept into and reconciled itself to the ordinary criminal court procedure, with its mundane day-to-day concern over murderers, rapists and thieves. Levy argues that the various trials of John Lilburne, the popular figure of dissent in seventeenth century England, are a primary catalyst in the formation of the modern privilege. According to Levy, Lilburne's principled opposition to the *ex officio* oath and the inquisitorial rule of enforced self-incrimination generated the impetus for the development of a modern privilege. A number of commentators disagree on the extent of Lilburne's historical importance. April¹⁶⁰ explains Lilburne's trial defence not as an opposition to the *ex officio* oath *per se*, but as an opposition to all questioning based on unspecified charges. In his view, an exclusive opposition to the *ex officio* oath would have been absurd. At the time similar oaths were being administered as standard practice in the common law courts. Lilburne's opposition was that while the oath could be administered at trial, there was no precedent or authority to administer it in a proceeding which was entirely exploratory and inquisitorial. Lilburne's objection is a narrow one, limited to the exploratory use of the oath in the High Commission and Star Chamber. In this sense it is unrelated to a defence based on the privilege against self-incrimination. Silving¹⁶¹ regards Lilburne's refusal to swear to the oath as an indignant protest against his inability to choose the compurgational oath instead. Not being given the choice, he refused to swear to an inquisitorial oath which was not part of the law of the land nor part of his English birthright. Langbein¹⁶² the harshest critic of the orthodox school, rejects the idea that Lilburne played any pivotal role in the development of the privilege. Langbein regards Lilburne as a rather peripheral figure. If any slight importance is to be attached to Lilburne, it is in his pointed comments on the inadequacies of the trial procedure. Lilburne's refusal to answer interrogatory questions was not based on a privilege against self-incrimination, but on the trial procedural rule that the prosecution must be put to the proof of its accusation.¹⁶³ Lilburne's defensive strategy is therefore inconsistent with a privilege. Indeed, taking into account the structure of the seventeenth century trial and its formal pressures to testify, Lilburne would have had no other alternative but to conduct an aggressive and spirited defence if he wished to be found not guilty. There is a significant

¹⁶⁰ April "A Re-Appraisal Of The Immunity From Self-Incrimination" (39) *Min. L. Rev* (1954) 83-84.

¹⁶¹ Silving "The Oath Part I" (68) *Yale L.J* (1959) 1366.

¹⁶² See *infra* note 199.

¹⁶³ Lilburne's defence is filled with examples of his request for the prosecution to prove its case. "Sir, I deny nothing, but prove it first". *Lilburne's trial* 4 St. tr 1269 (1649). Lilburne used his refusal to answer questions as part of a greater strategy which was to place the onus of proof upon the prosecution, at 1340, 1341, 1382, 1388 and 1389.

conceptual difference between the older Wigmore-Levy theory and the more recent Langbein theory. If the Wigmore-Levy theory is to be believed, then the Lilburne trials are an exception and a historical oddity. It would be absurd to reason that at the time when the English common law judges were supposedly upholding the political accused's immunity from inquisitorial self-incriminatory practices, they were also vigorously and hypocritically compelling the accused in a criminal trial to all sorts of self-incriminatory questioning.

2.3 The Helmholtz-Macnair Roman-Canon Theory

Research into a broad spectrum of source material has led to a re-evaluation of the origins of a privilege against self-incrimination. Helmholtz and Macnair¹⁶⁴ place the privilege's earliest roots in the Roman and canon laws of the *ius commune*. Far from being a developing rule of the common law as Levy suggests,¹⁶⁵ the privilege sprang from a continental source. The maxim *nemo tenetur* originated within the *ius commune* as a defensive sub-principle of inquisitorial procedure centuries before its appearance within the common law.¹⁶⁶ By the thirteenth century it was part of the *glossa ordinaria* to the *decretals* (1234) of Pope Gregory IX.¹⁶⁷ Resistance against abuse of the *ex officio* procedure arose from within the *ius commune*, initially articulated by the civilian lawyer and later by the common lawyer.¹⁶⁸ Macnair states "that up until the revolution of 1688, the common lawyers shared the same 'mental universe' of the canonists on the question of self-incrimination".¹⁶⁹ During the sixteenth century arguments based on a canonical privilege against self-incrimination were regularly being raised against procedural abuse of the *ex officio* oath in the English ecclesiastical courts.¹⁷⁰ A canonical rule of privilege was a standard litigation process in the

¹⁶⁴ Helmholtz "Origins of the Privilege Against Self-Incrimination : The Role Of The European *ius Commune*" (65) *Nw. Y. Un. L. Rev* (1990) 962, criticizes Levy for relying exclusively on the opinions of seventeenth century common law judges thereby giving a misleading account of the privilege's origin (at 964). Macnair "The Early Development Of The Privilege Against Self-Incrimination" (10) *Oxford J. Legal. Studies* (1990) 66, who suggests that, "the privilege came into the English law from the common family of European law, particularly the canon law (at 67).

¹⁶⁵ Levy *ibid* at 329-330, incorrectly states "the *nemo tenetur* maxim has come a long way from its mysterious origins. Reputedly, a canon law maxim, it had never existed in any canon law text". See also Wigmore *ibid* at 296-301, Macnair *ibid* at 70, Helmholtz *ibid* at 967.

¹⁶⁶ Helmholtz *ibid* at 967. Macnair *ibid* at 69 "the earliest applications of the privilege are in equity courts not at common law". Neither Wigmore nor Levy dealt adequately with the equity authorities. Levy simply did not distinguish them from the common law authorities. Wigmore cites equity and common law cases promiscuously to prove that a privilege was well established in the Restoration.

¹⁶⁷ Helmholtz *ibid* at 967, "It was also endorsed by Innocent IV and Panormitanus probably the most influential writers on medieval canon law.

¹⁶⁸ Gray "Prohibitions And The Privilege Against Self-Incrimination In Tudor Rule And Revolutions", in *Essays for G R Elton* Cambridge C.U.P. (1982) 345, "medieval common law did not contain a straightforward privilege ... it had little place for one because trial was normally by jury, and the jury was conceived as the source of truth from its own knowledge".

¹⁶⁹ Macnair *ibid* at 67.

¹⁷⁰ Helmholtz *ibid* at 969-973.

ecclesiastical court. "When the defendant in an ecclesiastical court wished to evoke a common law rule, he did so by introducing a royal writ of prohibition preventing the church judge from taking any action at all. However, such an action was usually a last resort for the defendant. His first step was to take an objection under the law of the church itself".¹⁷¹ English lawyers and the common law courts were therefore reliant on a well established canonical principle in their later struggle against the procedural abuses of the state's prerogative courts.¹⁷² Nevertheless, much of the Wigmore-Levy theory remains valid, particularly the argument that the constitutional struggles of the mid-seventeenth century popularized and expanded the witness privilege, contributing to its establishment as a valid legal common law principle.¹⁷³ The conclusion which emerges from an analysis of reports, treatises and research on the ecclesiastical courts does not suggest, as Levy claims, that the privilege is wholly forged in the bitter struggle between rival common law and inquisitorial systems. Neither was the seventeenth century privilege an absolute one in the modern sense but a relative one¹⁷⁴ subject to exception and raising complex issues of canon law. The privilege of the *ius commune* was the defendant's qualified right to refuse to answer questions. It was a protection only against intrusion into private affairs by officious magistrates who had little more than innuendo to proceed on. The canon privilege was qualified by a balancing test in which the interests of the church, the quality of the evidence and the intrusiveness of the questions were weighed against the moral interests of the individual under investigation. The defendant in the ecclesiastical court could defend against procedural irregularities by raising certain exceptional objections. These canon rule objections to the *ex officio* oath were generally founded on the principle *nemo tenetur* and incorporated two highly specific variational forms. A refusal to take the oath at all on the basis that the whole procedure was invalid because it lacked an identified accuser, *nemo punitur sine accusatore*,¹⁷⁵ or a refusal to answer incriminating questions after having taken the oath on the moral basis that no one is bound to reveal his own shame, *nemo tenetur detergere turpitudinem suam*.¹⁷⁶ Only as a last resort once the canon rule objections had failed, would the civilian litigant seek a common law writ of prohibition staying the ecclesiastical judge from proceeding. The records indicate that whenever common law

¹⁷¹ Helmholz *ibid* at 973.

¹⁷² Helmholz *ibid* at 968.

¹⁷³ Helmholz *ibid* at 990.

¹⁷⁴ For an interpretation of the absolute nature of the American 5th amendment, see *infra* chapter 5 p. 159. For the English relative statutory right see *infra* chapter 9 and for the South African relative constitutional right see *infra* chapter 11.

¹⁷⁵ Helmholz *ibid* at 975.

¹⁷⁶ Helmholz *ibid* at 981.

judges intervened to prevent procedural abuse of the *ex officio* oath, they were merely enforcing a canon law rule upon the ecclesiastical courts.¹⁷⁷

The early church accepted the oath procedure reluctantly and placed narrow constraints on its use. The oath was only used as a substitute medium of proof.¹⁷⁸ A necessary alternative in the absence of valid documentary evidence or reliable witnesses, *indubiis et necessariis*. During the medieval age and under church influence, the oath developed from a compurgational mode of irrational proof into an oath *de veritate dicenda*.¹⁷⁹ In his *Summa Theologica*, Thomas Aquinas argued that the individual was not obliged to take the oath.¹⁸⁰ However, once the oath had been administered either *fama publicus* (on the basis of sufficient knowledge), or *probatio simplena*, the individual was then obliged to confess. The early privilege began its existence as a limitation upon this public duty to confess. The church demanded only private auricular confession. Far from reflecting the modern idea that a defendant has an absolute right to remain silent, the original privilege may simply have been a disqualification of public confession. Private confession was never protected by the canon privilege because a religious confession of sin was good for the Christian soul. The canon maxim from which the privilege was derived is set out as *licet nemo tenetur seipsum prodere, tamen proditis perfaman tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare* and translated as “no-one is bound to inform or produce (*prodere*) against himself, but when exposed by public repute (*fama publicus*), he is held (*tenetur*) and permitted (*Licet*) to show (*ostendere*) if he can, his innocence and purge himself (*purgare*).¹⁸¹ The maxim, when read as a whole, does not establish a privilege

¹⁷⁷ Gray *ibid* note 167 at 348-350, “common law courts had the naked procedural power to stop what they did not like in non-common law courts. Most High Commission cases arose on Habeas Corpus rather than on a writ of prohibition.

¹⁷⁸ Silving “the Oath Part I” (68) *Yale L. J.* (1959) 1344. “It was conceded to be a medicine which though disagreeable was at times indispensable”.

¹⁷⁹ *De veritate dicenda* “an oath to tell the truth”. Oaths had obtained a special significance by the sixteenth century. In the *ius commune* there were at least 174 ways in which they could be applied.

¹⁸⁰ *Summa Theologica*, part III, art 2 (at 257-58) Newton Press Ed (1988), “the individual once he has taken the oath is not obliged to tell the whole truth. He may remain silent, for there is a difference between silence and falsehood, but where there is *infama*, or express evidence of guilt, and he is asked to confess, he cannot conceal the truth”. See St Augustine *The City Of God* New York Ed (1982) only oaths taken in falsehood or without necessity were prohibited (at 135).

¹⁸¹ Wigmore “Nemo Tenetur Seipsum Prodere” (5) *Harvard L. J.* (1892) 83-84, n2, translates the maxim as “though no one is bound to become his own accuser, yet when once a man has been accused by general report, he is bound to show whether he can prove his innocence and to vindicate himself”. According to Silving *ibid* note 177 at 1367, Wigmore’s translation is erroneous because he ignores the decisive word *Licet* and *ostendere* is wrongly translated as to ‘prove’. Silving (at 1367-68) concludes that the maxim refers instead to the compurgational oath. Macnair *ibid* at 70-71 suggests that the maxim refers to the oath *de veritate dicenda*. It is also argued that the use of the word *prodere* indicates that the maxim meant no more than that the individual had no positive obligation to ‘seek out’ the proper authorities and to inform against himself. He could simply wait until summonsed by the proper court process. The differences in translation and meaning illustrate the obscurity of the Latin phrase.

against self-incrimination. On the contrary, it expressly declares that incriminating answers may be given in certain circumstances. When the first part of the maxim, *nemo tenetur seipsum prodere*, is separated from the remainder, a false translation is created, implying an unqualified privilege against self-incrimination. It was this misleading truncation, *nemo tenetur prodere seipsum*, taken out of its proper context that Edward Coke, Chief Justice of the Common Pleas, manipulated in his personal crusade against the ecclesiastical court system of James I.¹⁸² By the middle of the seventeenth century, the privilege had grown into a right not to be interrogated under oath in the absence of a well founded suspicion. A magistrate was expected to have some kind of probable cause before asking the defendant to respond under oath to incriminating questions.

An important initial criticism of the English *ex officio* procedure as applied by the prerogative High Commission and Star Chamber was that it violated biblical injunctions. Jesus said "Thou shalt not foreswear thyself, but shall perform unto the Lord thine oaths, but I say unto you, swear not at all",¹⁸³ and again, "Woman where are thine accusers, hath no one condemned thee?"¹⁸⁴ These biblical prescriptions served to justify non-conformist opposition to oath swearing in general and the *ex officio* oath in particular. According to seventeenth century jurisprudence, commencing a criminal proceeding by means of an oath process and without a verified accuser was contrary to both divine law and the law of the land. The defendant's refusal to swear in the absence of an accuser could be motivated by a claim to the canon rule *nemo punitur sine accusatore*. On a more pragmatic level, the argument was made that the *ex officio* procedure distorted natural justice by corrupting judicial impartiality.¹⁸⁵ In the absence of an official accuser, the judge could no longer be a neutral communicator between the accused and the accuser (*proditus perfaman*).

By making the judge into both accuser and adjudicator, *ex officio mero*,¹⁸⁶ the High Commission and the Star Chamber were abusing the ordinary canon law procedure. One of the more telling criticisms of the *ex officio* procedure as applied in these prerogative courts was that it deviated from the established canonical procedure. The established canon

¹⁸² See *supra* Edward Coke, at p. 40-41. Bentham *Rationale Of Judicial Evidence* Bowring Ed (1843) suggests that the *nemo tenetur* principle is an invention of Lord Coke. Certainly much of what he declared to be English law became so on his *ipse dixit*.

¹⁸³ Matthew 5 : 33-37. Christian theologians of the early church concluded that Christ's words should not be taken literally, as it is sometimes contradicted. St Paul was a foremost supporter of the oath at Romans 1 : 9 : 2, Corinthians 1 : 23 : 11 : 31. As was Abraham of the Old Testament at Genesis 21 : 23-24, Hebrews 6 : 13.

¹⁸⁴ John 8 : 10-11. Helmholz *ibid* at 975.

¹⁸⁵ Helmholz *ibid* at 975.

¹⁸⁶ Macnair *ibid* at 72 "the use of the *ex officio mero* procedure opened the way for fishing interrogatories on matters unconnected with the original accusation or presentment".

process allowed for inquisitorial questioning on oath subject to a trustworthy accusation made by an accuser with a reasonable interest in the outcome of the proceedings. An important requirement of this standardized system was that the accusation had to be made known to the defendant before the administration of the oath and the commencement of questioning. The canon procedure was designed to apply in the average ecclesiastical court acting against religious transgressions and imposing excommunication, public penance and other spiritual punishments.¹⁸⁷ By contrast, the High Commission and Star Chamber targeted political transgressions, not religious ones, and abused the oath procedure in order to secure secular penal punishments. To make matters worse, the High Commission relied upon a rarely used exception to the standard canonical procedure. This exceptional oath process was initiated by *fama publicus* but only on reasonable suspicion and probable cause. To justify proceedings by way of *fama publicus*, certain strict requirements had to be met. The *fama* had to be the true source of the prosecution, proved by the testimony of a trustworthy witness and not a mere malicious rumour spread by an enemy of the defendant.¹⁸⁸ The *fama publicus* variation on the standard canon process was developed in the thirteenth century to combat heresy, on the reasonable ground that exceptional crimes demanded exceptional remedies. It was never intended to target political crimes and was abolished by the Catholic Church in 1725.¹⁸⁹ Critics of the High Commission and the Star Chamber charged the prerogative courts with abusing and manipulating the exceptional requirements of the *fama publicus* oath process in the secular interests of their political master. In order to be effective as a roving political inquisition, the judges of these prerogative courts proceeded *ex officio mero*¹⁹⁰ and by *fama publicus*. Judicial investigations were initiated on purely personal suspicion, thereby creating an artificial and wholly unverifiable subjective source of *fama publicus*. In the unbalanced procedure as applied in the prerogative courts, there was no means of determining the reasonableness of the judicial

¹⁸⁷ The jurisdiction of ecclesiastical courts was limited to religious issues, such as heresy, blasphemy, witchcraft, profanity, schisms, atheism, etc. Also morality issues : fornication, adultery, incest and bigamy. Criminal jurisdiction was strictly limited to matters of usury, defamation, drunkenness, public misconduct and breaches of contract. Some kinds of ecclesiastical sanction, for example excommunication, could be turned into a penal punishment but only through a common law writ *de excommunicato capiendo*. At frequent intervals the jurisdiction of the church courts was statutorily limited to matters testimonial and matrimonial only.

¹⁸⁸ Helmholz *ibid* at 976-977.

¹⁸⁹ Silving *ibid* note 178 at 1347. Macnair *ibid* at 71. Levy *ibid* at chapter 2.

¹⁹⁰ The High Commission justified its extraordinary procedure by relying on the Elizabethan Act of Supremacy 1 Eliz 1 ch 1 sec 8 (1558) for authority. The Act of Supremacy granted the High Commission special powers permitting it to ignore standard canon law and even common law rules. Critics of the High Commission argued that all statutes including the Act of Supremacy were subject to interpretation by the common law. The High Commission was therefore bound to follow the limitations on its procedure as set down by the common law judges. In *Spendlow v Smith* 80 Eng Rep 234 K.B. (1615) it was asked "the question is whether the High Commission or the common law judges will have the exposition of the Elizabeth I statute, and we are of the opinion that the judges of the common law will". Gray *ibid* note 168 at 354-356.

accusation, nor was it possible to establish the accuracy of the charge before the swearing of the oath. The rise of a privilege against self-incrimination may be viewed against this background, as a defensive measure against prerogative courts which abused established canonical procedure for political purposes.

Another defensive measure designed to combat the abuse of the oath procedure was based on the canon rule, *nemo tenetur detegere turpitudinem suam*, "no one is compelled to bear witness against himself, because no one is bound to reveal his own shame".¹⁹¹ In terms of this rule the defendant could swear the oath and still selectively refrain from answering self-incriminatory questions. An important principle of religious faith was the expectation of a private and personal confessional relationship between individual and God. It was immoral to compel a public confession. The privilege against self-incrimination developed as a protection of private confession and as a prevention against unacceptable public confession. St John Chrysostomos, a fourth century Greek Church Father, said "I do not say that you should betray yourself in public, nor accuse yourself before others, but that you obey the prophet when he said, reveal your ways unto the Lord".¹⁹² The *ex officio* procedure, especially the *ex officio mero* process, by its nature required public utterances of self-incriminatory testimony, thereby infringing the theological distinction between private and public confession. The *ex officio* procedure not only infringed the private confessional relationship, but also violated the individual's personal autonomy¹⁹³ and privacy.¹⁹⁴ Furthermore, forcing the defendant under oath to answer incriminating questions was a strong temptation for perjury and exposed the individual to the cruel dilemma of choosing between perjury, contempt or self-incrimination.¹⁹⁵ These objections and the privilege which arose from them were not absolute but relative defences. Inquisitorial questioning under oath remained a valuable canonical tool only as long as the strict requirements were rigidly complied with. Civilian lawyers did not consider the privilege to be a fundamental or absolute right, but simply a protection against a narrow kind of abusive and intrusive judicial process. The canon principle *nemo tenetur* developed in response to the danger posed by the politically manipulated prerogative courts in their abuse of inquisitorial procedures and probable cause. In this sense, it was a narrow protection designed to shield the individual

¹⁹¹ Helmholz *ibid* at 981.

¹⁹² Silving *ibid* note 177 at 1344, Helmholz at 982. Haslehurst *Some Account Of The Potential Discipline Of The Early Church In The First Four Centuries* Haysmond 1st Ed (1921) 101.

¹⁹³ See *infra* chapter 4 p. 124-129..

¹⁹⁴ See *infra* chapter 4 p. 118-129..

¹⁹⁵ The argument that the *ex officio* oath encouraged perjury was first made before the King's Bench in *Maunsell and Ladd* (1607) (B. L. Add Ms 25206 in fols 55 and 59). The accused sought a habeas corpus writ against the High Commission and defence counsel argued that perjury was the inevitable result of the *ex officio* oath especially if the High Commission proceeded by *interrogatorii captiosi* – questions designed to entrap the unsophisticated defendant. Gray *ibid* note 168 at 360-363.

from roving and fishing expeditions. The *nemo tenetur* principle was therefore a perfect defensive tool against a High Commission and Star Chamber which routinely undertook these roving inquisitions. In summary, a number of important points about the operation of the *nemo tenetur* principle may be isolated. First, the silence principle developed out of an opposition to the High Commission and Star Chamber prerogative courts. It was essentially a limited defensive shield against religious and political prosecution. Second, the trial procedure in these prerogative courts lacked both a specific accuser or a specific chargeable allegation and was directed at thoughts as well as deeds (A typical fishing expedition). Third, the *ex officio* oath was intended to exploit strongly held religious beliefs. In the seventeenth century religion was much more powerful than it is today. The spiritual sanction of lying (a risk of eternal damnation) was a greater risk than mere perjury, compelling the accused to speak the truth even at the cost of self-accusation. The *ex officio* oath therefore imposed a form of spiritual torture. The silence principle was designed as a legitimate moral defense against the infliction of *ex officio* spiritual torture. Fourth, there were two notable exceptions to the *nemo tenetur* principle. When there was a specific accuser, someone with an interest in the accusation and the conviction, the defendant was morally and legally obliged to swear the oath. The privilege did not operate in the case of public *fama*, a well grounded suspicion that a specific person had committed a religious or political crime. Fifth, irregular trial proceedings could be defended against in a number of ways, either by argument within the prerogative court itself or by writ of prohibition or *habeas corpus* emanating from the common law courts. However, when the common law courts intervened they did so in a supervisory capacity, not by applying the common law but by requiring the prerogative courts to adhere to their proper procedures (a kind of notice of bar).

If the Helmholtz and Macnair analysis of the canon law sources is correct, then the privilege against self-incrimination is not a common law innovation nor is it entirely forged from the conflict between rival systems. Instead, it is a defensive sub-rule of canon law developed as a protection against abuse of established inquisitorial, *de veritate dicenda*, procedure. The idea is taken up by the seventeenth century common lawyer and expanded into its modern format. This transition from canon to common law occurs because the seventeenth century common and civilian lawyer shared much the same mental universe. The intellectual intercourse between the various legal fraternities resulted in a canon law rule being pressed into service within the common law courts.¹⁹⁶ The canon privilege focuses upon improper methods of coercing information from the defendant while allowing acceptable self-incriminatory testimony within the properly applied and recognized canon law instances.

¹⁹⁶ Helmholtz *ibid* at 989, "Lawyers have long chosen good ideas wherever they have found them. They press them into service in the short term interests of their clients".

Essentially it prevents a public confession but not a private confession. In this sense it can hardly be defined as a right to silence but only as a qualified witness-type right against self-incrimination. The modern privilege is also much narrower, applying only to an actual or potential criminal proceeding. The traditional privilege is much wider and could be triggered not only in criminal proceedings, but on the risk of civil liability and injury to personality. In fact, it could be triggered whenever the seventeenth century witness or defendant faced a state forum requiring some manner of public confession. Helmholz and Macnair argue that the idea of a privilege against self-incrimination did not appear in the common law until well after the Glorious Revolution (1688) and is first noted in civil-inquisitorial cases¹⁹⁷ and only later in criminal cases. By the turn of the eighteenth century, the privilege has become established as a common law legal principle. Gilbert, the leading eighteenth century authority on the law of evidence, writes "our law in this differs from the civil law, that it will not force a man to accuse himself, and in this we do certainly follow the law of nature, which commands every man to endeavour his own preservation".¹⁹⁸ The privilege is by the eighteenth century so well established that its canon law origin and heritage have become totally obscured.

2.4 The Langbein Adversarial Theory

Langbein¹⁹⁹ argues that the accused's right to silence could not have gained a widespread or practical acceptance during the seventeenth century. The right to silence was sometimes applied in the seventeenth century but only in exceptional and limited circumstances. The accused was sometimes allowed to exercise a right to silence when the presiding magistrate wrongly administered the oath to the accused or where a non-party witness, once sworn, refused to answer to an incriminating question. The procedural framework of the ordinary criminal trial of those times had no place for the tactical use of silence by the accused. Quite the converse, the seventeenth century trial exerted certain pressures which forced the accused to take an active part in the proceedings against him.²⁰⁰ The mechanics of the trial

¹⁹⁷ Examples are *Bracy's case* (1696) H 1696-7, 1 Ld Raym 153" privilege applied to an examinee in bankruptcy proceedings". *Cox v Copping* (1698) P1698 5 Mod 395, 1 Ld Raym 337, "the court refused to admit certain documents on the ground that it would be unfair to expose the defendant's documentary evidence to the plaintiff". *R v Worsenham* (1701) 1 Ld Raym 705, *R v Mead* (1704) 2 Ld Raym 927, "the courts in both cases refused the production of certain books on the ground that it would compel the defendant to produce evidence against himself in a criminal cause". For the privilege's modern application to documentary evidence see *infra* chapter 7.

¹⁹⁸ Gilbert *The Law Of Evidence* (1756) 139-140.

¹⁹⁹ Langbein "The Historical Origins Of The Privilege Against Self-Incrimination" (92) *Mich L. Rev* (1994) 1047.

²⁰⁰ Beattie *Crime And The Courts In England (1660-1800)* 1986. See also the old authorities, *Blackstone Commentaries On The Laws Of England* Oxford Clarendon (1756-1769) 4 vols and

system did not allow for defence counsel. The accused was obliged to formulate his own defence without outside assistance. A right to remain silent at trial means absolutely nothing without a defence counsel. If the accused does not have a lawyer to speak for him, his silence is self-destructive as it simply leaves the prosecution's case unanswered. Langbein explains, "the right to remain silent when no one else can speak up for you is simply the right to slit your throat".²⁰¹ It is the gradual rise of an adversarial system and the increasingly dominant role played by defence counsel which allows the accused to make use of his silence as a tactical advantage. The Wigmore-Levy contention that a privilege against self-incrimination reigns supreme in the criminal trial by the late seventeenth century is apparently irreconcilable with the Langbein account. The only manner of resolving the inconsistency is to draw a distinction between the privilege against self-incrimination and the right to silence. Analytically, a principle of silence is quite different from a principle of self-incrimination. Silence deals with the prohibition placed on a compulsion to speak and the inferences which may be drawn at trial from a failure to testify. Self-incrimination deals with the extent to which the individual may be compulsorily conscripted by a state process to give incriminatory testimony against himself. The Wigmore-Levy theory therefore, traces the development of a witness type privilege against self-incrimination as a protection against state coercion. Langbein traces the evolution of the accused's right to silence at trial as a protection against the compulsion to testify. The existence of a privilege against self-incrimination during the seventeenth century should not be confused with the non-existence of a criminal right to silence. While the privilege is an effective remedy against the inquisitorial oath procedure, its highly abstract moral nature and its identification with political issues would have had no discernible influence over the mundane common law criminal trial. The right to silence develops along a different path to that of a privilege against self-incrimination. Langbein argues that a right to silence is essentially the product of a lawyer driven adversarial trial structure and illustrative of a fundamental philosophical shift in the understanding of criminal prosecution.²⁰² Under the influence of an adversarial tension between prosecution and defence counsel, the trial begins its evolution from the seventeenth century emphasis on the accused's guilt to the modern emphasis on the accused's innocence.²⁰³

Stephen A *History Of The Criminal Law Of England* London 1883, *A General View Of The Criminal Law of England* 2nd Ed (1890).

²⁰¹ Langbein *ibid* at 1054, defines this kind of criminal procedure as the "accused speaks" trial system.

²⁰² Langbein *ibid* at 1068-71. A radical re-evaluation of criminal procedure creates a new lawyer driven "testing the prosecution" trial system.

²⁰³ Langbein "The Criminal Trial Before The Lawyers" (45) *Un. Ch. L. Rev* (1978) 45 and "Shaping The Eighteenth Century Criminal Trial, A View From The Ryder Sources" (50) *Un Ch. L. Rev* (1983) 1 and *Prosecuting Crime In The Renaissance* (1974). Beattie "Scales Of Justice, Defence Counsel And The English Criminal Trial In The 18th And 19th Centuries" (9) *Law and Hist. Rev* (1991) 221. Phillips

In the ordinary common law court system of the sixteenth and seventeenth centuries, the criminal trial process was divided into two stages. The first stage, in terms of the Marian committal statute (1555),²⁰⁴ was a preliminary pre-trial inquiry or investigation before a state appointed Justice of the Peace,²⁰⁵ the purpose of which was to collect and collate all the evidence for and against the accused.²⁰⁶ The object of the magisterial examination was to subject the accused to a careful and wide-ranging questioning on every detail of the alleged crime. One of the more important aspects of the preliminary inquiry was that the accused was never questioned under oath, nor was he legally obliged to answer the interrogatory type questions. However, a failure to provide answers would be noted in the magistrate's deposition and submitted as evidence in the subsequent trial. Silence during the pre-trial inquiry would often be construed as an adverse inference of guilt against the accused. Another aspect of the preliminary process was that the standard treatment of the defence witness varied from that of the prosecution witness. The prosecution witness could only be questioned under oath, while the defence witness was questioned unsworn.²⁰⁷ The underlying reasoning being that the prosecution witness was thought of as inherently more credible and reliable than the defence witness. The preliminary inquiry offered the state a cost-efficient opportunity to obtain self-incriminatory evidence from an uncounselled, unsworn and often confused accused. The pre-trial examination also allowed the magistrate to function as a kind of back-up prosecutor. Usually the private citizen-accuser conducted the prosecution's case, but where there was no private accuser available, it was the magistrate who investigated, bound witnesses to appear at trial and orchestrated the prosecution. At the second or trial stage,²⁰⁸ a jury was sworn, the accused's plea was taken and the magistrate's deposition was read out. The prosecution witness was called first and

"Goodmen To Associate And Bad Men To Conspire (1780-1860)" in *Policing and Prosecution in Britain* Hay and Snyder Ed (1988).

²⁰⁴ 1 and 2 Phil and Mar C13, 2 and 3 Phil and Mar C10 (1554) and (1555). The origin and effect of these acts is discussed in Langbein *Prosecuting Crime In The Renaissance* (1974) 5-125.

²⁰⁵ The main purpose was to question and collect evidence, particularly as no police force existed in those times. The inquiry was a necessary investigatory tool.

²⁰⁶ It was standard procedure for the magistrate to focus on the prosecution witness and to under-emphasise the accused's witness. This prejudice reflects the prevailing legal cultural notion of a presumption of guilt against the accused. The procedure designed to collect only prosecution evidence was based on the Marian Committal Statute of 1555. If the accused declined to testify at trial or attempted to deny his pre-trial statement, the statement would be evoked against him at trial. Even Levy recognized that the privilege against self-incrimination "scarcely existed in the pre-trial stages of a criminal proceeding" (at 325).

²⁰⁷ Not until 1848 (11 and 12 Vict CH 42) were rules enacted which warned the accused of his ability to refuse to answer questions at pre-trial and cautioned him about the adverse inferences which could be drawn from his silence. Freestone and Richardson "The Making Of English Criminal Law, John Jervis And His Acts" *Crim. L. Rev* (1980) 5.

²⁰⁸ Stephen *ibid* note 200 at Vol. I 347-348. See also Smith *De Republica Anglorum* Mary Dewar Ed (1982) book 2, ch 23 and his analysis of the structure of the 16th century trial. See Langbein *ibid* note 199 at 1049.

again questioned under oath. The accused was obliged to challenge the prosecution evidence as it unfolded. The trial was carefully structured to allow for a confrontational dialogue²⁰⁹ between the prosecution witness and the accused, forcing the accused to respond immediately to each item of evidence as it was adduced against him. The trial process counted heavily against the accused. He was given no advance notice of the prosecution's case, no legal counsel to assist in challenging the factual issues and no means of securing the attendance of the defence witness at trial. Perhaps the greatest handicap for the defence was the inability of the accused and the defence witness to testify under oath. Both were only entitled to give unsworn testimony from the stand resulting in an often insurmountable credibility problem.²¹⁰ The operating presumption during the trial was one of guilt and the adverse procedures of the trial strongly inhibited the accused's ability to discharge the burden and establish proof of innocence. In this type of environment, silence offered the accused no tactical advantage at all. Instead, the benefit lay in responding immediately and positively to each item of prosecution evidence. The trial initiative was firmly in the hands of the prosecution and the accused invariably responded reactively rather than proactively. Seventeenth century statistics disclose that virtually all accused consciously chose to speak out either at the pre-trial or the trial stage.²¹¹ The trial process was often a mere formality, reduced to a straightforward analysis of the accused's pre-trial or trial self-incriminatory testimony.²¹² The seventeenth century notion of proof differed substantially from the modern concept. Proof was always constituted *a priori* at the pre-trial inquiry and not by a process of rational analysis. Admissibility of evidence was not linked to the more modern idea of relevancy, but dependent on the idea that some kinds of evidence were lawful and others unlawful. The idea that evidence should be subject to a critical evaluation determinative of its intrinsic value and weighed against conflicting evidence during

²⁰⁹ Langbein *ibid* note 199 at 1049, the accused and the accuser in "altercation".

²¹⁰ The reason for not administering the oath to the accused were based largely on the logic that the accused was better protected by not being sworn. Allowing the accused to swear an oath would force the accused to incriminate himself, tempt the accused to commit perjury and could be construed as a forced confession. Stephen *ibid* note 200 at vol I 354, suggests that the real reason for prohibiting the accused from swearing was to increase the power of the prosecution. Gilbert *ibid* note 198 at 139, says that the accused was "utterly removed from being evidence for want of integrity". Phillips *A Treatise On The Law Of Evidence* 2 Ed (1815) 34, "accused are excluded from the oath on the want of integrity and not as some supposed to save them from the temptation of perjury". The primary purpose of this disqualification appeared to be the necessity of keeping untrustworthy evidence from the jury.

²¹¹ Beattie *ibid* note 200 at 348-349, "there was no thought that the prisoner had a right to remain silent on the grounds that he would otherwise be liable to incriminate himself the assumption was clear that if the case against him was false, the prisoner ought to say so and suggest why, and that if he did not speak that could only be because he was unable to deny the truth of the evidence".

²¹² Trials were speedy affairs, processed while the parties' memories were fresh. There was no *voir dire*, no opening or closing statements, no evidentiary or procedural motions, magistrates often obtained a standard pre-trial confession, cross-examination was a rudimentary process hesitantly conducted by the accused.

the trial process was as yet unformed. Once the preliminary investigation had built up a case of lawful proof against the accused, a presumption of guilt arose and the onus was on the accused to explain away the prosecution's lawful proof item by item.

The procedural processes deliberately designed to coerce the accused into an active participation in the trial and which mitigated against the development of a right to silence may be described as follows : First and most importantly, the accused was denied outside independent legal representation.²¹³ The court was expected to take on the dual function of prosecutor and defence counsel. According to Beattie, "the common practice was for the judge to take the prosecution's witness through the testimony, line by line, acting as both examiner and cross-examiner until satisfied that the fullest possible case existed".²¹⁴ On the other hand, judicial assistance for the accused was strictly limited to advise on questions of law and never on factual issues.²¹⁵ The judge could shield the accused from illegal procedures, but could not assist the accused in organizing a defence.²¹⁶ The accused was obliged to formulate his own factual defence and at the same time, to counter the prosecution's factual evidence as it unfolded.²¹⁷ According to prevailing logic, the accused was denied legal counsel for the following reasons : The accused was regarded as the primary and best source of evidence.²¹⁸ The assumption was made that an innocent accused could easily persuade the jury of his innocence. By contrast, the guilty accused through speech, gesture, demeanour and manner, would betray himself to the jury.²¹⁹ Allowing defence counsel to shield the accused would constitute an artificial defence thereby preventing access to the best form of evidence, namely the accused himself.²²⁰ Second, the accused's ability to conduct his own defence was inhibited by a number of other procedural obstacles. The accused was unable to efficiently utilize his defence witnesses.

²¹³ Langbein *ibid* note 199 at 1049-1066. Beattie *ibid* note 200 at 339, 360. For both authors, the absence or presence of a defence counsel is the central reason for the absence or presence of a silence principle.

²¹⁴ Beattie *ibid* note 200 at 342.

²¹⁵ Coke *The Third Part Of Institutes Of The Law Of England, Concerning High Treason And Other Pleas Of The Crown* Cap 63 p137 (1637). Langbein *ibid* note 199 at 1050n9.

²¹⁶ Beattie *ibid* note 203 at 223, 233, 236-47, 254.

²¹⁷ Even when the accused was provided with defence counsel around the middle of the 18th century, the counsel's role was strictly limited to advice on legal issues, never on factual matters. Beattie *ibid* note 199 at 360 "Counsel knows his duty at trial and may speak for the accused on any matter of law, but cannot do so in matters of fact, the accused must manage his entire defence in the best manner he can", in *Derby (Surrey Assize Proceedings)* Lent 1752 at 2-11.

²¹⁸ Modern inquisitorial trial systems continued to regard the accused as a primary source of evidence. The trial system is structured around the accused.

²¹⁹ Langbein *ibid* note 199 at 1053, who quotes the authority of Hawkins *A Treatise Of The Pleas Of The Crown* London (1721) Sweet and Maxwell (1931).

²²⁰ Langbein *ibid* note 199 at 1054.

The accused had no legal power to subpoena witnesses.²²¹ In addition, the usual practice was to detain the accused before trial, thereby preventing him from locating defence witnesses and properly developing his defensive argument.²²² By contrast, the magistrate, during the pre-trial inquiry, was required to bind the prosecution witness to appear at trial. No such admonishment was given to the defence witness. The accused was also denied advance warning of the charge against him, making it difficult to develop a coherent defence. Significantly, the accused had to make do on unsworn testimony. Unlike the accused or defence witness, the prosecution witness gave testimony on oath and was entitled to decline to answer any question which could lead to a criminal punishment²²³ (a witness privilege against self-incrimination). The accused's protection on the other hand, was assumed to lie in not being sworn at all. The unbalanced difference being that the unsworn accused did not enjoy a corresponding protection or right of silence. Third, there was as yet no properly defined standard of proof. The beyond a reasonable doubt standard had not yet been developed. The seventeenth century standard was vague and shifting.²²⁴ The accused was hampered by his inability to determine just how and when the proper threshold level of proof had been reached. The vagueness of the standard is illustrated by the dictum of Scroogs J in the *Popish Plot* case,²²⁵ who defined it as "the proof belongs to the Crown to make out those intrigues of yours, therefore you do not need counsel, because the proof must be plain upon you, and then it will be vain to deny the conclusion". This was made more difficult because the accused in practice bore a substantial burden of proof and rebuttal was often a hesitant process without clear cut guidelines. The consequence of the inchoate standard of proof was that the jury was allowed a wide latitude in reaching its verdict. Fourth, the jury played a crucial role in the allocation of the appropriate sentence. The seventeenth century jury had the power, especially in cases concerning the death penalty, to select a lesser sanction. By currying sympathy from the jury, the accused could hope to persuade the jury towards a more lenient verdict.²²⁶ Remaining silent during the sentencing stage of the trial

²²¹ *Lilburne* 3 How St. tr 1315 (1637) is forced to request the court for subpoenas for "certain parliamentary men who will not come in save by compulsion".

²²² Stephen *ibid* note 200 at vol I 356-357.

²²³ *John Friend's case* 13 How St. tr 1, 17 (1696). Lord Treby on the nature of a sworn witness, "no man is bound to answer any question which will subject him to a *penalty* or to *infamy*". Lord Treby is simply restating the rule against self-incrimination (see *supra* Wigmore-Levy theory).

²²⁴ Shapiro *Beyond Reasonable Doubt And Probable Cause, Historical Perspectives On The Anglo-American Law of Evidence* (1941) 1-41. The most common directive to the jury was "if the evidence is sufficient to satisfy your conscience" (at 14). The vague formula was replaced by the modern doubt rule in the late 18th century (at 21-25).

²²⁵ *Popish Plot case* 12 How St. tr 1.14 (1678) Scroggs J.

²²⁶ Langbein *ibid* note 199 at 1062-1064. The distinction between the main trial and the sentencing stage of the early criminal trial was not as clear cut as it is today.

would therefore not be to the advantage of the accused.²²⁷ Fifth, the cumulative effect of a refusal of counsel, an identification of the accused as the best source of evidence, a pre-trial process which allowed the accused's silence to be adduced as evidence at trial, the credibility problem of giving only unsworn testimony on the stand, sundry other restrictions on defence preparation and the sentencing power of the jury successfully mitigated against the development of a trial right to silence.

The turning point in the development of a trial right to silence began with a change in the philosophical understanding of the criminal prosecution.²²⁸ The axis of a new jurisprudential reasoning was based on a re-interpretation of the *nemo tenetur prodere seipsum* principle. The idea that a confession coerced by physical or spiritual torture was essentially unreliable was re-developed as a protection against self-incrimination. The well-established rule which permitted a non-party witness, once sworn, to refuse to answer all self-incriminating questions was extended into a protection for the accused against compulsory self-incrimination. The Treason Act of 1696²²⁹ initiated the very first reforms and commenced the process of expanding the accused's defensive trial rights. To compensate for the fact that judges were appointed by and subservient to the state,²³⁰ the Treason Act eliminated a number of procedural disadvantages which had prevented defendants from providing "a just and equal means for defence of their innocences".²³¹ The Treason Act swept away the prohibition on defence counsel, allowed the accused a copy of the charge sheet and permitted defence counsel to examine, cross-examine and address the jury on the merits of the accused's defence.²³² More importantly, the Act also granted to the accused the power to have witnesses subpoenaed and sworn.²³³ Although initially limited to treason trials, the

²²⁷ In order to reduce his sentence, the accused needed to evoke a sympathetic response from the jury by justifying the reason for the crime and by appealing to good character.

²²⁸ In the 17th century, scientific philosophy began to take on a rational bias under the influence of Voltaire (1694-1788) Rousseau (1712-78) Montesquieu (1699-1755) Hume (1711-76) and Locke (1632-1704). New standards of rational inquiry were developed including the idea of relevancy as a pre-requisite for admissibility and a rational/logical assessment of evidence.

²²⁹ *Treason Act* (7 and 8 Will III Ch 3 (1696)). The Act was a reaction to the Popish Plot trials of the 1670s, in which a number of politically prominent individuals were falsely accused of treason on the single perjured testimony of Titus Oates, a paid government informer. Hampered by a trial process which prevented an effective defence many innocent individuals suffered a traitor's death. Kenyon *The Popish Plot* (1972) 225. Havighurst "The Judiciary And Politics In The Reign Of Charles II (part II)" (66) *L.Q.R.* (1950), 62. Stephen *ibid* note 200 at vol I 383-92.

²³⁰ Judicial appointments were gifts of the Crown, either *sebene gesserit* or *durante bene placit*. Havighurst "James II And The Twelve Men In Scarlet" (69) *L.Q.R.* 522 (1953). The reforms of 1696 and 1730 were partially based on the evening-up principle. Judges favoured the Crown and to counter this tendency, defence counsel were admitted to evenly balance the trial.

²³¹ 7 and 8 Will III CH 3 Sec 1 to sec 7.

²³² Shapiro "Political Theory And The Growth Of Defence Safeguards In Criminal Procedure, The Origins Of The Treason Trial Act" (11) *Law and Hist Rev* (1993) 215.

²³³ The legal ability of the accused to testify under oath in a criminal trial was a statutory power conferred by 1 Anne STAT 2C9 (1703).

use of defence counsel began to sneak into the routine procedures of the ordinary criminal trial. By the late eighteenth century, court practice and judicial discretion combined to widen counsel's window of opportunity.²³⁴ Judges used their discretion more frequently to allow defence counsel and by the nineteenth century, there was an accelerated change in courtroom procedure as the utilization of defence counsel took hold and became commonplace. The increasing use of defence counsel began to sway and shift the focus of the criminal trial in the most fundamental manner. The idea that the accused was to be regarded as innocent until sufficient evidence proved otherwise gained momentum. By casting doubt upon the validity of the factual evidence presented by the prosecution, the defence counsel managed to bring increasing pressure to bear on the prosecution to prove its case.²³⁵ The onus of proof gradually swung away from the accused towards the state, placing the burden on the prosecution to rebut what was then considered to be an innovative and developing presumption of innocence.²³⁶ The intimate jurisprudential relationship between a presumption of innocence and the right to silence as a "seamless web" of rights recognized by the South African Constitutional Court in *S v Zuma and Others*,²³⁷ may be said to have its origin in the development of an adversarial lawyer driven system of criminal justice. It is in the nineteenth century changes which sculptured a new adversarial trial system that the true beginning of the accused's trial right to silence is to be found (as opposed to the witness or defendant's privilege against self-incrimination which has its beginning in the political trials of the seventeenth century). What had previously been a disadvantage now became an advantage. The accused's new-found ability to shelter behind defence counsel allowed him to use his silence as a tactical offensive trial weapon. The accused had only to take care not to contribute evidence (in the form of an admission or confession), in order to make it increasingly more difficult for the prosecution to prove its case.

The factors which contributed to the rise of an adversarial system thereby establishing a fertile environment for the development of a right to silence may be summarized as follows : First, the influence of defence counsel was crucial in the development of a modern adversarial trial system. Defence counsel played an essential role in separating the defensive and testimonial functions of the accused who had been previously obliged to both defend himself and testify at his own trial. By taking over the defensive function, the defence

²³⁴ Langbein "The Criminal Trial Before The Lawyers" (45) *Un Ch. L. Rev* (1978) 307, 311-312. Beattie *ibid* note 200 at 352-62.

²³⁵ Beattie *ibid* note 200 at 361-362 and *ibid* note 203 at 233-35, 244. Langbein note 199 at 1069 and *ibid* note 203 at 84-114.

²³⁶ Beattie *ibid* note 200 at 375 and *ibid* note 203 at 238.

²³⁷ 1995 (2) SA 642 (CC). 1995 (4) BCLR 401 (CC).

counsel freed the accused from testifying, rendering the accused's testimonial function somewhat unnecessary. Hence a burgeoning defensive right to silence. Second, the necessity to counter every item of evidence as it was adduced in a kind of spontaneous reactive confrontational dialogue between the accused and the prosecution witness was replaced by organized and distinct party burdens. The prosecution bore the burden to commence proceedings by adducing evidence and the accused bore a proactive burden to rebut such evidence.²³⁸ Third, the development of an adversarial party-party relationship resulted in a rationalization of a coherent standard of proof. The rather vague and shifting standard was replaced by a new beyond a reasonable doubt standard of proof.²³⁹ The prosecution was put to the proof of its case without the assistance of the accused. Silence by the accused made it more difficult for the prosecution to meet the necessary threshold level of proof. Fourth, by a vigorous cross-examination of the prosecution witnesses, defence counsel limited the number of factual issues which needed to be answered, thereby reducing the necessity for the accused to testify and indirectly encouraging the use of silence as a tactical advantage.²⁴⁰ Fifth, the increasing effectiveness of defence counsel in turn forced the state to employ a distinct and professional body of prosecuting counsel. To shield their clients against examination by these professional prosecutors, defence counsel began to make increasingly more use of the silence principle by keeping the accused out of the stand. The defence tactic of refusing to allow the accused to testify was so effective that the common law accused was eventually declared an incompetent witness at his own trial. A disability which was only legislatively removed in 1898. Sixth, the central and dual role previously played by the judge as both prosecutor and defender declined in importance as a distinct professional class of prosecutor and defence counsel usurped the functions of examining and cross-examining the witness. The judge, reduced to the role of an impartial referee, could now devote his time to ensuring a fair trial and a proper protection for the accused's trial rights, including the right to silence. This process also reduced judicial influence over the jury which increasingly became a neutral trier-of-fact. With the exception of the accused's testimonial disqualification as a trial witness, the familiar modern trial format was well established by the middle of the nineteenth century. (Until the end of the nineteenth century the development of the American silence principle followed a similar pattern to that in England).

²³⁸ Langbein *ibid* note 199 at 1070.

²³⁹ Langbein *ibid* note 199 at 1070.

²⁴⁰ Beattie *ibid* note 203 at 235.

The removal of the accused's testimonial disqualification by the Criminal Evidence Act 1898²⁴¹ (in South Africa by the Administration of Justice Act 1886 (Cape)) was not without controversy.²⁴² Those in favour of the Act argued that the accused should have exactly the same procedural rights as other witnesses, including the ability to testify under oath. The disqualification was unfair as it substituted a presumption of perjury for a presumption of innocence.²⁴³ Opponents, on the other hand, argued that the accused would be exposed to the rigours of cross-examination. The jury could draw adverse inferences from the accused's silence, regardless of specific judicial cautionary instructions and the accused would be faced with an undeniable temptation to commit perjury. For example, Stephen, the leading English commentator on evidence, noted "it is not in human nature to speak the truth under such pressure as would be brought to bear on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion".²⁴⁴ Nonetheless, the only restriction on both the English and South African Acts was to bar the prosecution²⁴⁵ from commenting on the accused's failure to give evidence.²⁴⁶ It was thought that the bar on commentary coupled with the accused's right to silence was a sufficient qualitative substitute for the testimonial disqualification.²⁴⁷

At the beginning of the twentieth century the silence principle emerged as a specific immunity against police custodial interrogation (an immunity from being compelled on the pain of

²⁴¹ Parker "The Prisoner In The Box, The Making Of The Criminal Evidence Act 1898" in *Law and Social Change in British History*. Guy and Beale Ed. (1984) 160.

²⁴² The removal of the testimonial disqualification came much earlier in America. Maine (1864), by the end of the 19th century all American states with the exception of Georgia (1962) had done so. (Act of March 16 (1878) 20 STAT 30 at 18 U.S.C. sec 348, 1994). Bodansky "The Abolition of the Party-Witness Disqualification, An Historical Survey" (70) *KY. L. J* (1982) 91.

²⁴³ In the many English parliamentary debates of the 19th century over this question, the primary relief sought by reformers was not a right to silence, but greater powers for the defence counsel. The increasingly more important role of defence counsel, recognized in the mid 19th century (6 and 7 Will IV C114 1836), contributed to a changing philosophical thinking on criminal procedure. Modern legal ideas began to be reflected in case law, *R v Arnold* 173 Eng Rep 645, 645-46 K.B (1838) and also in statute. The Jervis Act 11 and 12 Vict CH 42 sec 18 (1848).

²⁴⁴ Stephen *ibid* note 200 at vol I 202.

²⁴⁵ Curiously the 1886 Cape statute contained no provision restricting prosecutorial comment on the accused's silence, this only came later. In America only a few state statutes restricted prosecutorial comment, others did not. In 1966 the U.S. Supreme Court in *Griffin v California* banned all prosecutorial and judicial commentary on silence.

²⁴⁶ All the competency statutes, the English 1898 Act, the South African 1886 Act, the Australian 1893 Act and the American Federal 1878 Act, expressly preserve the accused's ability to make an unsworn statement from the stand without exposure to cross-examination. This ability was removed in South Africa in 1977, England 1982 (Criminal Justice Act sec 72), America in the 1920s (*Commonwealth v Stewart* 151 N.E 74 (Mass 1926)).

²⁴⁷ For a historical development of the American right against self-incrimination see Moglen "Taking The Fifth, Reconsidering The Origins Of The Constitutional Privilege Against Self-Incrimination" (92) *Mich. L. Rev* (1994) 1086-1130. Urick "The Right Against Compulsory Self-Incrimination In Early American Law" (20) *Columbia Human R. L. Rev* (1988) 107. Mayers "The Federal Witness Privilege Against Self-Incrimination" (4) *Am. J. legal. Hist* (1960) 107. Morgan "The Privilege Against Self-Incrimination" (34) *Minn. L. Rev* (1949) 1.

punishment to answer interrogatories of any kind) and a specific immunity against taking the witness stand at trial (an immunity against being compelled to give evidence or to answer questions under examination or cross-examination). There was as yet no immunity against the drawing of adverse inferences from the failure to answer questions or give evidence at the pre-trial and trial stages. *The early twentieth century silence principle was a simple evidentiary procedural rule underscored by utilitarian logic and sustained by the same rationales as those of its direct ancestor, namely an abhorrence of compulsion and a concern that evidence obtained by state coercive practices was inherently unreliable.* It was not until the middle of the twentieth century that a resurgent human rights culture adopted the reasoning that no adverse inferences could be drawn from the defendant's silence. At first, a no-inference rule was strictly limited to the pre-trial stage after the administration of a cautionary warning. This limited prohibition had its genesis in the Judges Rules (1912), the repeal of the John Jervis Act (1848) by the Criminal Justice Act (1925) and the provision for an obligatory caution once a defendant was charged with an indictable offence. The re-interpretation of the caution in *R v Naylor*²⁴⁸ and *R v Leakey*,²⁴⁹ as an "invitation to say nothing" gave rise to the unwarranted impression that it was wrong to draw any adverse inference from silence in response to the caution. An interpretation which was adopted by *Hall v The Queen*²⁵⁰ as a principle of the common law and affirmed as such by the Privy Council and the Court of Appeal in *Parkes v The Queen*.²⁵¹ It was not until the last quarter of the twentieth century that adverse inferences from the accused's silence in court began to be prohibited. None of these quite modern prohibitions on adverse inferences has a sustainable underlying rationale nor are they based on historical precedent. The practical reason for limiting adverse inferences from silence appears to be judicial distrust of the intellectual capacity of layperson juries to draw common sense inferences from the accused's failure to give evidence.²⁵² *The twenty-first century silence principle within the Anglo-American system consists of a right to silence at pre-trial and trial, a prohibition against adverse inferences and a displacement of the historical utilitarian foundations of the principle by a human rights culture based primarily on moral sentimentality rather than on sound jurisprudential logic.*

²⁴⁸ (1933) 1 KB 685 at 687.

²⁴⁹ (1944) 1 KB 80 at 86.

²⁵⁰ (1971) 1 WLR 298. This decision was criticized by *R v Chandler* (1976) 1 WLR 585. See also *R v Christie* (1914) AC 545 and *R v Bathurst* (1968) 2 QB 99. For a full exposition of the English position see *infra* chapter 8.

²⁵¹ 64 Cr App R25. See also *R v Sparrow* (1973) 1 WLR 488. *R v Martinez-Tobon* (1994) 1 WLR 388.

²⁵² A reasoning which has absolutely no relevance within the South African trial context, yet South African courts have blindly followed English precedents by imposing the very same limitations.

A review of the origins of both the privilege against self-incrimination and the right to silence illustrate a number of fundamental ideas necessary for a proper understanding of the modern principle.

The witness privilege against self-incrimination is a creation of the 17th Century, the accused's trial silence is the creation of the 18th Century :

The origin of the privilege against self-incrimination is to be found in the seventeenth century. The product of a religious and later a political struggle against the inquisitorial *ex officio* oath procedure. Its roots lie in the early Roman-canonical law as a defensive sub-principle against abuse of oath procedure. The English common law courts take up the cause and the privilege becomes a symbol of the jurisdictional struggle between the ecclesiastical and the common law courts. Later the privilege develops into a defensive tool against religious and political oppression. It assumes a dual function. On the one hand, a symbol of the struggle between parliament (the rule of law) and monarchy (the divine right of kings). On the other, a symbol of the struggle between the individual interest (in search of first generation rights) and the state interest (in search of stability and orthodoxy). Analytically, *the principle of self-incrimination deals with the extent to which the individual (the witness or the accused) may be compulsorily conscripted by a state procedure to give incriminatory testimony against himself. It is an effective defence against state organized roving fishing expeditions.*

The accused's right to silence within the common law courts follows a completely different evolutionary path and should not be confused with the witness privilege. A right to silence is the end result of a unique lawyer driven adversarial system and the rise of defence counsel in the eighteenth and nineteenth centuries. The eighteenth century "Age of Reason" prompts a radical philosophical rethinking of the criminal process. The result is a separation of the defensive and testimonial functions previously merged in the accused's person and a developing adversarial tension between prosecution and defence. Analytically *the principle of trial silence deals with the prohibition on a compulsion to speak. At pre-trial, a failure to reply to an interrogatory question and at trial, a failure to testify. As a twentieth century innovation the silence principle also deals with the prohibition on the drawing of adverse inferences.*

The orthodox school of history strongly suggests that the primary rationale in the development of a principle against self-incrimination is the natural human abhorrence of using coercive methods in the extraction of incriminating testimony. The rationale is essentially a human rights argument based on the fundamental necessity of protecting liberty, privacy and human dignity against the cruelty of both physical and psychological compulsion. Secondly, the principle against self-incrimination is said to promote the truth seeking function of the legal process. By excluding coerced confessions and admissions,

the accuracy and reliability of the adjudicatory procedure is enhanced. The more recent adversarial school of thought suggests that the rationale behind a right to silence is to be found in the procedural protections enjoyed by the individual at both the pre-trial and trial stages. The trial silence principle is best understood as an instrumental protection and part of the jurisprudential triad between a right to a fair trial and the presumption of innocence.

The historical privilege is both more narrow and at once broader than the modern privilege :

The modern privilege against self-incrimination is a wide protective shield against all kinds of personal incriminatory testimony. By contrast the historical privilege was a more narrow rule focused only on a limited number of self-incriminatory statements. It must be remembered that self-incrimination was an established and culturally acceptable practice in both the early common law and ecclesiastical courts. The medieval canon privilege was a protection only against public confession but not against private confession. The seventeenth century privilege was essentially a limited defensive legal device against the misuse of inquisitorial oath procedure by the prerogative courts of the High Commission and Star Chamber. The privilege was a prohibition against certain kinds of interrogations under oath, including a protection against torture²⁵³ and the extraction of involuntary confessions.²⁵⁴ A sworn witness could decline to answer questions on the ground of possible self-incrimination but the unsworn witness was expected to answer. Similarly, until the nineteenth century, magistrates continued to encourage the accused to speak during the pre-trial interrogation

²⁵³ The development of the privilege against self-incrimination was in some measure a reaction against the use of torture, particularly within the prerogative courts. The rationale behind the use of torture was not to obtain evidentiary facts but solely to extract a confession of guilt. The use of torture in the English courts was never as widespread as on the continent and was generally confined to treason and other "state" crimes. The use of torture was an extraordinary procedure which only the power of the crown could justify, it could only be applied by command of the king or the king's Council. Levy *ibid* at 326 quite correctly reasons that where there is a right against self-incrimination there is necessarily a right against torture. Stephen *ibid* note 200 at 440 noted, "the maxim *nemo tenetur* was all the more popular because it condemned the practice of torture for the purpose of evidence, then in full use on the continent and in Scotland". See further Levy *ibid* at 326-328. Wigmore *ibid* at 315-317. Herman *ibid* note 105 at 178-179. Interestingly, judicial torture was not abolished in France until 1789, Russia, 1801 and in some German states 1831. Sherman "Informal Immunity, Don't You Let The Deal Go Down" (21) *Loyola L. Angeles. L.R.* (1987) 1, 9-14.

²⁵⁴ At the time of the abandonment of torture an admissibility rule against involuntary confessions developed. The original voluntariness rule was merely another method of restating the old rule that torture for the purpose of obtaining confessions was illegal. Herman *ibid* note 105 at 176-180. Wigmore *ibid* at 401 sec 2266. Initial confessional law was based on the rule that involuntary confessions were admissible because of an inherent unreliability (*R v Warickshall* (1783) 1 Leach 263) but in *R v Sang* (1980) A.C 402, 436, the view was expressed that the underlying rationale was really the *nemo tenetur seipsum* maxim. Statutory law (PACE 1984) has now abolished the old common law principles and introduced a rule based on "oppression" (sec 76(2)) – anything done or said which is likely to render a confession unreliable. The statutory rule includes elements of reliability as well as the discipline and protective principles. In South Africa it is still good law, *R v Camane* 1925 AD 570, that a necessary corollary of the right to remain silent is the right not be compelled to make a confession.

stage and again at trial. The accused's silence could and often did draw an adverse inference of guilt. The historical privilege was in some respects much wider than the modern privilege. The modern privilege may only be invoked by a witness who is at risk of a possible criminal charge. The older privilege could be successfully triggered when there was both a risk of criminal punishment and a risk of civil liability, including defamation. Furthermore, the older privilege operated not only within the domestic jurisdiction, but also against the risk of a foreign prosecution. The modern privilege does not extend immunity to the witness who fears the possible risk of prosecution within a foreign forum.

The historical privilege was always a relative principle, the modern privilege is sometimes relative and sometimes absolute :

The historical privilege was a limited and relative shield of the *ius commune*, subject to a balancing test in which the individual interest was always weighed against the church or state interest. In the same way the accused's original right to silence also reflected a balancing of interests pragmatism. Adverse inferences, sometimes of guilt, were drawn in the appropriate circumstance at pre-trial and at trial. By contrast the modern American privilege against self-incrimination (including the corollary right to silence) is deemed an absolute constitutional safeguard which no amount of evidence can overcome. In its core area, the privilege is absolute and only on the periphery is it subject to influence by a balance of interest principle. The European Court of Human Rights has recently reinterpreted sec 6(1) of the European Convention of Human Rights and has introduced a right to silence couched in language with absolute overtones. In the same vein the South African right to silence (Sec 35 F.C. 1996) is defined as a relative right subject to limitation by sec 36, although in time, it might prove to have certain absolute features. On the other hand, the present English statutory right to silence, the Criminal Justice and Public Order Act 1994, sensibly permits the state to draw adverse inferences in the appropriate circumstance from both the accused's pre-trial (sec 34) and trial (sec 35) silence.

A confusion of ideas and a reification of slogans :

The privilege against self-incrimination and the right to silence have always been subject to a certain confusion of ideas and language. This confusion is compounded by the interchangeable and promiscuous use of the word "right" and the word "privilege". A right is a philosophical concept quite distinct from a privilege. A right to silence has an origin and nature different from the origin and nature of a privilege against self-incrimination, even though both are based on the same fundamental principle of self-protective "silence". This confusion of ideas allows the advocates of a "silence" principle to justify it by an appeal to emotion, through the medium of a human rights-based language, without being held to a

rational proof of its merits. Bentham, the utilitarian philosopher, criticizes adherents of the "silence" principle who adopt the principle merely because it is born in the struggle against state compulsion or coercion. What could be more natural, he says, "than that a people, infants as yet in reason, giants in passion, should reject every feature of tyranny and unquestionably accept every feature against it?"²⁵⁵ The fact that tyrants have historically abused the witness and the accused in the course of compelling them to answer does not prove that it is always logical or rational to excuse them from responding to lawful inquiry. The development of the modern "silence" principle is a perfect example of how old ideas can be adapted to new functions. Wigmore notes, "If one instance better than another serves to exemplify the manner in which history may cover up the origin of a legal principle, destroy all traces of its real significance, change and recast its purpose and its use, while preserving an identity of form It is the rule that no man shall be compelled to criminate himself".²⁵⁶ The old maxims are dressed in new shorthand slogans and old doctrines acquire new meanings which take on a self-perpetuating life of their own. The original canon law maxim, *licet nemo tenetur seipsum prodere, tamen proditis per famam tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare* (no-one is bound to inform against himself, but when exposed by public repute, he is held and permitted to show if he can, his innocence and purge himself) which does not establish a so-called privilege against self-incrimination, has been truncated and paraphrased to the popular "*nemo tenetur seipsum prodere* or "no one is bound to betray himself" which in turn has been converted into the declaration "no one shall be compelled in a criminal case to be a witness against himself". The slogan, *a privilege against self-incrimination* begins to sound like the slogan *a right to silence*. Much of the history of the silence principle has been a confusion of ideas and a slippage from one doctrine and slogan to another without a true appreciation of the conceptual differences between them. The development of a silence principle is governed by a gradual but progressive slippage in the various historical purposes of the privilege, from the original rule of limiting the burden of religious confession to a rule of condemning abuse of interrogation under oath. Both rules are then fused into a wide condemnation of all incriminatory interrogation. In the course of the centuries these old doctrines are moulded into a single modern principle that it is unfair to expect the accused to participate actively in the criminal process against him. History does not support the definition or constitutional status awarded to the modern right to silence and its modern corollary the privilege against self-incrimination. Proponents of the silence principle who seek a historical justification for their opinion are perhaps unknowingly adding to the confusion.

²⁵⁵ Bentham *Rationale Of Judicial Evidence* Vol III Chapter 7 at 456, 460, Bowring Ed 1843.

²⁵⁶ Wigmore "Nemo Tenetur Seipsum Prodere" (5) *Harv. L. Rev* (1891) 71.

2.5 CHRONOLOGY

A.D.	EVENT	LEGAL CONSEQUENCE
1066	Conquest of England by William I (1066-87) of Normandy	Introduction of an inquisitorial ecclesiastical procedure
1150	Reign of Stephen (1135-54)	Stephen attempts to proscribe the teaching of Roman law in England. Two distinct and rival legal systems exist side by side. An ecclesiastical court system based on inquisitorial procedure and a secular King's court based on an indigenous Germanic-Saxon process. The result is a double judicial system and a struggle over jurisdictional limits.
1180	Henry II (1154-89)	The development of a jury based procedure despite the influence of substantive Roman law. The jury system represents a centralizing instrument of royal power within the common courts. Trial by jury effectively bars the introduction of a canon law procedure in the secular courts.
1215	Reign of John I (1194-1216)	John is forced to sign the <i>Magna Carta</i> (June 1215) as a redress of baronial grievances. The Charter binds the crown not to outlaw or imprison except by the law of the land or a judgement by jury. The Charter is incorporated into statutory law in 1225 and becomes a symbol of freedom. It forms one of the legal justifications (albeit incorrectly) for a claim of privilege against self-incrimination by Puritan non-conformists of the 17 th century.
1215	Fourth Lateran Council	Pope Innocent III abolishes the ancient Germanic based compurgational oath and replaces it with a Roman-canonical oath <i>de veritate dicenda</i> or as it is popularly known in England, the oath <i>ex officio</i> .
1236	Otho Papal-legate for Gregory IX introduces the <i>ex officio</i> oath into England	The compurgational oath had never aroused any opposition in England as it was a simple declaration of innocence based on an appeal to God. The new <i>ex officio</i> oath did arouse hostility because it allowed the judge to probe and explore the mind of the witness.
1246	Henry III	Henry attempts by means of prohibitory writs to prevent Bishop Grosseteste from abuse of the <i>ex officio</i> oath procedure.
1326	Edward II	The statute <i>De Articulis Cleri</i> resolves the

A.D.	EVENT	LEGAL CONSEQUENCE
1368	Edward III	<p>jurisdictional dispute between the rival systems by limiting ecclesiastical jurisdiction to matters matrimonial and testimonial and this limitation prevails until the end of church courts in England.</p> <p>Confirms the rights and freedoms of his subjects as set out in the <i>Magna Carta</i>, "no man shall be put to answer without presentment, before justices, or matter of record, or by due process and writ original, according to the old law of the land".</p>
1400	Rise of Lollardy (a heretical sect)	
1401	Henry IV	<p>Statutory formalisation of the <i>ex officio</i> oath procedure <i>De Heretico Comburendo</i> as a reaction to the Lollard heresy. First use of the <i>ex officio</i> procedure outside of matrimonial and testimonial matters. The massive opposition to the <i>ex officio</i> oath in the 16th and 17th centuries would never have occurred if the <i>ex officio</i> procedure had been confined to testimonial matters in the ecclesiastical courts. The precedent set here allowed the later use of the <i>ex officio</i> oath in the state struggle against heresy and political non-conformity.</p>
1487	The Court of the Star Chamber	<p>First appearance of the Star Chamber Court evolving from the King's Council as a prerogative administrative instrument. The <i>ex officio</i> oath becomes the usual fact-finding procedure of the prerogative courts.</p>
1525	William Tyndale	<p>An influential English intellectual who criticizes the <i>ex officio</i> oath in his widely read <i>Obedience Of A Christian Man</i>.</p>
1534	Henry VIII	<p>Mounting opposition to the <i>ex officio</i> oath initiated by Tyndale results in the repeal of the <i>De Heretico</i> act and the restriction of the <i>ex officio</i> procedure by the requirement of a formal charge and due process before the taking of the oath.</p>
1534	Henry VIII becomes head of a new Anglican Church	<p>The Act of Supremacy severs the union between the English Church and the Catholic Church. Fusion of state and church in the person of the monarch. The Star Chamber is assigned the task of securing conformity to the new arrangement of church and state in one political head.</p>

A.D.	EVENT	LEGAL CONSEQUENCE
1532-1537	John Lambert	Is the first person to make use of the Latin maxim <i>Nemo Tenetur Seipsum</i> in defending himself against a heresy prosecution. His objection was not against the process of compulsory self-incrimination but only against the use of the oath as a tool to reveal crimes which were unknown or unproved.
1550	The procedure of the common law criminal court The procedure of the ecclesiastical and prerogative courts	From the medieval period to the middle of the 16 th century the accused before a criminal court could not refuse to answer incriminating questions. The older method of proof forced the accused to a direct denial of the charge under oath. In the 16 th century the legislature had no hesitation in sanctioning modes of proof which directly involved the examination of the accused. Until the middle of the 18 th century the examination of the accused is a central feature of the criminal court. The resistance to the inquisitorial process of the prerogative courts begins to take on a political dimension. This political resistance results in the abolition of inquisitorial procedure. In the ruin of inquisitorial processes a privilege against self-incrimination is born.
1553	Mary I	The accession of Mary leads to the re-establishment of the Catholic Church and a bloody purge of Anglicanism. Mary establishes the first High Commission court to suppress Protestant heresy. The Marian committal statute (1555).
1558	Elizabeth I	Elizabeth's new Act of Supremacy results in a politico-religious compromise. The establishment of a sophisticated High Commission under Archbishop Whitgift to suppress political and religious deviance. The High Commission and its specialized <i>ex officio</i> oath procedure is used as a fishing expedition against Catholic and Puritan dissident minorities.
1589	Sir Edward Coke	As an ordinary attorney and Attorney-General, Coke becomes an active opponent of the <i>ex officio</i> oath procedure in the church courts. In <i>Collier v Collier</i> he first uses the defence <i>nemo tenetur seipsum</i> .
1591	Thomas Cartwright	The trial of Cartwright illustrates the emergence of a highly politicized Puritanism as a major

A.D.	EVENT	LEGAL CONSEQUENCE
1606	James I	<p>irritation to the Crown. Morice, Beale and Fuller are prominent members of this burgeoning opposition movement.</p> <p>Coke becomes Chief Justice of the Common Plea. His fixed determination is to set the common law supreme above bishops, ecclesiastical courts and even above the king.</p>
1616	Lord Edward Coke	<p>As Chief Justice of the King's Bench, he uses the slogan <i>nemo tenetur seipsum</i> as a means of interfering with ecclesiastical oath procedures, especially in cases of a criminal nature. In <i>Burrowes v High Commission</i>, Coke limits the High Commission's oath procedure to testimonial causes and declares that the High Commission has no jurisdiction to examine on oath in criminal (political crime) cases.</p>
1634	Charles I	<p>Charles re-organizes the Star Chamber and High Commission. Under Archbishop Laud a new campaign is launched against the King's political opponents (diverse Puritan sects).</p>
1637	John Lilburne	<p>The Wigmore-Levy theory contends that the mounting tension within the popular courts to the <i>ex officio</i> procedure comes to a head in John Lilburne's first trial. It is in "Freeborn" John's struggle for what he regards as the basic constitutional liberties of an Englishman that the origin of a well reasoned privilege against self-incrimination is to be found.</p>
1641	The long Parliament	<p>Parliament abolishes the unpopular Star Chamber and High Commission together with the inquisitorial oath procedure. The privilege against self-incrimination, at least in theory, becomes a legally accepted principle.</p>
1642-1648	English Civil War	<p>Political struggle between parliament (the supporter of the common law courts) and the Crown (the supporter of the prerogative-inquisitorial type courts).</p>
1645-1658	Cromwell and the Commonwealth	<p>During the dictatorial rule of Cromwell, a narrow privilege against self-incrimination becomes entrenched as a custom of English law.</p>
1660	The restoration of Charles II	<p>The privilege against self-incrimination begins to be incorporated into the criminal common law court system as an effective and practical defensive tool against political and religious</p>

A.D.	EVENT	LEGAL CONSEQUENCE
1670	Popish Plot trials	<p>crime prosecutions.</p> <p>Highlights the inequity and unfairness of the criminal trial in which the accused enjoys very few procedural advantages. The trial judge acts as the accused's defence counsel in matters of law only. The accused is left on his own as to matters of fact. The accused and his defence witnesses give unsworn testimony while the state witnesses give sworn testimony, a massive credibility problem.</p>
1688	Trial of the Twelve Bishops	<p>Archbishop Sancroft utilizes the privilege against self-incrimination as part of his legal defence. The defence is accepted by the court. <i>By the end of the 17th century there is a narrow but well-established privilege against self-incrimination for political and religious crimes.</i></p>
1688	The Glorious Revolution	<p>The last Stuart, King James II is removed from the English throne. Parliament is now supreme and the Crown is relegated to a subsidiary role. The common law courts are dominant and the ecclesiastical courts, although revived in 1662, have fallen into practical disuse except for the discipline of the clergy.</p>
1700	<p>The conceptual clash between the Orthodox common law theory and the revisionist <i>ius commune</i> and adversarial theories</p> <p>Helmholz-Macnair theory</p> <p>Langbein theory</p>	<p>According to the Wigmore-Levy theory, the privilege against self-incrimination is a well-established procedural tool of the common law criminal trial by the end of the 17th century. Wigmore sees the absorption of the privilege into the criminal trial as a gradual process of assimilation. Levy sees it as an active and dynamic incorporation, the result of the traumatic social upheavals of the time.</p> <p>According to Helmholz and Macnair the privilege was a part of the English ecclesiastical law and not the common law. The privilege was a limited defensive procedural device of the <i>ius commune</i> against the compulsive confessional pressure of the <i>ex officio</i> oath. It was not regarded as a fundamental personal right but as a curb on the intrusive powers of the inquisitorial court.</p> <p>According to Langbein, there is no evidence of the existence of a privilege in the 17th century criminal trial which continues to be dominated by institutional pressures for the compelling of incriminatory evidence from the accused. (An</p>

A.D.	EVENT	LEGAL CONSEQUENCE
	Resolution	<p>accused speaks trial). For example, the Marian Committal Statute (1555) was designed to pressure the accused into incriminating himself and to collect evidence on behalf of the State against the accused. The accused's pre-trial statements were used in evidence against him at trial.</p> <p>In all probability Wigmore and Levy are correct in identifying a narrow <i>witness privilege against self-incrimination</i> in the common law courts. A witness privilege is conceptually different from the <i>accused's right to silence</i>. The structure of a 17th century criminal trial precludes the development of a right to silence but allows for a narrow non-party witness privilege against self-incrimination once the State witness is sworn.</p>
1701	Judicial appointments reformed	<p>Until 1701 judges held office at the pleasure of the Crown. Reform of the appointment process now allows the judiciary a measure of objective impartiality and an immunity from interference by the Crown.</p>
1702	Legislative reforms	<p>Legislation is enacted to allow the defence witness to give sworn testimony in the ordinary felony trial and makes other minor procedural changes. This legislation is the consequence of the Treason Trial Act (1696) which allows the accused pre-trial access to the preliminary charge sheet and a grace period in which to prepare a defence.</p>
1710-1730	A gradual change in the trial process begins	<p>According to Langbein, a process of testing the prosecution's case begins to develop. The exercise of judicial discretion permits the accused to make use of defence counsel in the ordinary criminal court. <i>The beginning of the modern adversarial trial process</i>. Nevertheless the court continues to emphasise the advantages of treating the accused as the central testimonial resource.</p>
1776-1784	American constitutional entrenchment of the privilege against self-incrimination	<p>Incorporation of a privilege in the provincial state constitutions. Maryland (1776), North Carolina. (1780) Massachusetts (1784) New Hampshire (1784).</p>
1789	First session of the U.S. Congress	<p>First draft of a Federal United States Constitution</p>
1791	Second session of the U.S. Congress	<p>Ratification of the U.S. Constitution and the incorporation of a fifth amendment privilege</p>

A.D.	EVENT	LEGAL CONSEQUENCE
		against self-incrimination as the protection for the liberty of the citizens. The authors of the fifth amendment regarded it as a safeguard against the introduction of an English style Star Chamber procedure. It was not as yet defined as a fundamental and absolute personal right.
1792	Fox's liberal Act	Faced by an increasing use of professional defence counsel in the criminal trial, the English prosecution service re-organises itself. Private associations for the prosecution of felonies are established (1770-1790). The decline of judicial influence over the jury trial beings.
1795	Defence counsel appear in 36% of criminal trials	The primary duty of the defence counsel is to shield the accused, to conduct the defence and to cross-examine state witnesses.
1800	The adversarial fair trial concept	The old inchoate standard of proof is redefined into a crisp easily applied formula. The initial development of a presumption of innocence as part of a fair trial concept. The systemization of the legal literature in the form of organized law reports (<i>nisi prius</i> reports).
1836	Judicial impartiality	The adversarial trial process is now the accepted norm. The judge becomes an impartial controller as professional counsel usurp the functions of defence and prosecution. The defence counsel is now by statute also allowed to address the jury.
1848	John Jervis Act	The introduction of a legal cautionary rule warning the accused that he may decline to answer questions in the pre-trial interrogation and that his answers could be used as evidence against him at trial. The final legislative abolition of the Marian Committal Statute 1555.
	Incompetent witness	The accused is an incompetent witness for the defence and is legally prohibited from taking the witness stand on oath.
1878-1898	Competent witness for the defence	The removal of all testimonial bars on the accused. The American Federal Act (1878), the South African Administration of Justice Act (Cape) (1886), the English Criminal Evidence Act (1898).
1900	The right to silence	The early 20 th century silence principle is a limited specific utilitarian immunity against pre-trial custodial interrogation and trial examination.

A.D.	EVENT	LEGAL CONSEQUENCE
1913	The Judges Rule (Introduced into South Africa only in 1931)	<p>There is as yet no specific prohibition against the drawing of adverse inferences.</p> <p>The refinement of the old cautionary warning. The repeal of the John Jervis Act by the Criminal Justice Act (1925) and the reform of criminal procedure rules. The Judges Rules represent the first tentative steps towards the evolution of a no adverse inference rule.</p>
1933 to 1944	The Seminal cases	<p><i>R v Naylor</i> (1933) 1 K.B 685 and <i>R v Leckey</i> (1944) 1 KB 80. The interpretation of the caution to mean an "invitation to say nothing" and a second step towards the prohibition against the drawing of adverse inferences from silence.</p>
1937	The fifth amendment	<p>In the first quarter of the twentieth century the American fifth amendment belongs to a distinctly second class group of constitutional rights. <i>Palkov v Connecticut</i> 302 U.S 319 (1937).</p>
1960 – 1969	The American Warren Court	<p>The Warren Supreme Court elevates the fifth amendment into the first rank of constitutional protections.</p>
1965	The American no-inference, no-comment rule	<p><i>Griffin v California</i> 380 U.S 609 (1965). Neither the prosecution nor the judge may draw an adverse inference from the accused's failure to testify at trial. The prohibition is an absolute one and is not susceptible to a balance of interests.</p>
1966	The <i>Miranda</i> warning	<p><i>Miranda v Arizona</i> 384 U.S 436 (1966). A set of custodial procedural safeguards designed to shield the suspect from the coercive influences of police interrogation. The fifth amendment is extended outside of its pure contextual meaning. The silence principle becomes part of an obligatory police caution and is linked to a coerced confession rule.</p>
1966	The United Nations	<p>The International Covenant on Civil and Political Rights. Article 14(g) expressly provides for a privilege against self-incrimination.</p>
1968	The English Civil Evidence Act	<p>The statutory codification of the witness privilege against self-incrimination (Sec. 14). The South African equivalent, Sec. 14 of the Civil Proceedings Evidence Act is introduced in 1965.</p>
1970 to 1976	The English no-inference rule	<p>The adoption of the no-inference rule as a principle of the common law, <i>Hall v The Queen</i> (1971) 1 WLR 298. The final affirmation of a no-</p>

A.D.	EVENT	LEGAL CONSEQUENCE
1977	The South African Criminal Procedure Act	inference rule in <i>Parkes v The Queen</i> (1977) 64 Crim. App. R. 25. The statutory codification of the common law silence principle directly or indirectly in Sec. 203, Sec. 217, Sec. 219A.
1982	The Canadian Constitution Act (Part I)	The Charter of Rights and Freedoms. The common law definition of a witness privilege against self-incrimination is directly defined in Sec. 11(c) and indirectly in Sec. 13. The Charter makes no mention of a right to silence which is only residually incorporated by virtue of Sec. 7
1984	The Police And Criminal Evidence Act (PACE)	Statutory safeguard against the admission of involuntary confessions. A judicial discretion to exclude involuntary confessions. The attachment of a specific police code of conduct regulating arrest and interrogation procedures. A mandatory police administered right to silence caution.
1985	The Singapore Criminal Procedure Act (Chapter 68) 1985	The Criminal Procedure Code of Singapore is amended to provide for adverse inferences against the accused who fails to mention relevant facts either during pre-trial interrogation or trial examination.
1990	New Zealand Bill of Rights Act (Note the Australian Constitution makes no mention of a silence principle).	In Sec. 23(4) everyone who is arrested or detained shall have the right to refrain from making a statement and to be informed of that right. The silence principle is also indirectly recognized in Sec. 366(1) of the Crimes Act (1961). There is no codification of the witness privilege against self-incrimination.
1993	<i>Funke v France</i> 16 EHRR 297	<i>Funke</i> re-interprets Sec. 6(1) of the European Convention on Human Rights by making the silence principle an integral element of the right to a fair trial.
1994	The English Criminal Justice And Public Order Act (no South African equivalent)	The introduction of clearly defined statutory rules on the nature and kind of adverse inference to be drawn from an invocation of silence at pre-trial (Sec. 34) and at trial (Sec. 35).
1996	The South African Constitution	The elevation of the silence principle from a utilitarian common law rule into a fundamental constitutional human right (Sec. 35(1)(a)(b), (3)(h)(j)).

A.D.	EVENT	LEGAL CONSEQUENCE
1998 - 2000	The Human Rights Act	The incorporation of the European Convention of Human Rights into English domestic law. The beginning of a steady erosion of the utilitarian basis of the present English statutory definitions of the silence principle.

CHAPTER 3

RIGHTS, PRIVILEGES, MORALITY AND RATIONALITY

3.1 The Logic of Rights and Privileges

The silence principle in constitutional and evidence law has long been subject to an alarming degree of confusion. The interchangeable use of a "right" and a "privilege" for what are arguably two different concepts is misleading. A "right" to silence usually attaches to the accused during the criminal process. A "privilege" against self-incrimination is invoked by a witness called to offer testimony in either a criminal or a civil proceeding. In English and Commonwealth jurisdictions there is a tendency to label both generally as a "right to silence", whereas the Americans tend to use the catch-all sentence a "privilege" against incrimination. The confusion is compounded by the fact that the "right" and the "privilege" have different historical antecedents. Furthermore, a "right" denotes a strict human interest. It is an expression of a fundamental human value which demands legal protection by its very nature. A "privilege" on the other hand, is considerably less valuable than a "right". It is a type of special treatment accorded, usually by the State, as a favour or concession. While an intrinsic "right" is unalienable, a concessional privilege may be revoked or withdrawn at any time. A "right" imposes a limitation on the exercise of government powers by strictly defining the relationship between the citizen and the state. The state cannot arbitrarily create a "right" in the way it creates a "privilege". The state merely interprets and validates claims to an already existing right in a contested circumstance. A "privilege" entitles the citizen to withhold relevant information from a court with the legal power to demand disclosure. "Privilege" may on one level be defined as a rule against disclosure and on another level as a rule of admissibility. Nevertheless, if the "privilege" is waived or if the privileged information escapes into the public domain, the court is legally obliged to act on it. A "privilege" is intrinsically of a lesser value than a "right".

To add to the confusion, the silence principle is sometimes explained as an immunity and defined either as an immunized "right" or an immunized "privilege". The words immunity, right and privilege are often applied interchangeably although the philosophical differences between them are quite significant. The accused's "right" is sometimes said to be more valuable than the witness "privilege" because the accused is faced with an immediate and urgent threat to his liberty. The accused is confronted by the immediate weight of the state's resources, whereas the witness risks only the possibility of a future criminal charge. The

accused's need is more immediate and therefore his "right" is more valuable. The witness's need is less immediate and therefore his "privilege" is less valuable.

Despite the inherent philosophical difference between a "right" and a "privilege", common law jurisdictions tend to be arbitrary in the way they label and make use of these differing concepts. In America both the "right" and the "privilege" are constitutionally entrenched. There is also a certain sense of absoluteness attached to the constitutional guarantee. In England and Australia the "right" and the "privilege" are not constitutionally guaranteed. They are ordinary principles of the common law which sometimes enjoy statutory support and are sometimes vulnerable to statutory abrogation. In South Africa the accused's "right" to silence (Sec 35(1)(a)) and "right" against self-incrimination (Sec 35(3)(j)) is constitutionally guaranteed but only as a relative and not an absolute "right". In the Canadian Charter of Rights and Freedoms only the accused's and the witness's "privilege" against self-incrimination is constitutionally entrenched. No mention is made of a "right" to silence which is only indirectly incorporated into the Canadian Constitution through sec 7 and then only as a residual supplement to the self-incrimination clause.

The confusion between a right and a privilege stems largely from the increasingly dominant role that rights-based moral theories play in the modern world. Since the Second World War (Europe) and the Vietnam War (America), there has been an overwhelming tendency to advance legal arguments in terms of a rights-based terminology.¹ In the modern Western world the various human right doctrines have overshadowed alternative moral philosophies as the primary mechanism for social and legal reform.² Utilitarianism as a persuasive alternative moral theory has been rendered unfashionable not for want of rationality but for want of publicity. In the continuing debate between natural and positive law, the advantage lies with a rights-based theory because it prioritises individual interests over and above the more abstract utilitarian conception of a communal worth and net happiness. Within the present Western cultural experience the good of the part is preferred to the good of the

¹ This tendency stands in sharp contrast to the meaning of the opening sentence of the 1789 version of the American Constitution. "To establish justice, ensure domestic tranquility, provide for common defence and promote the general welfare", expresses the *utilitarian ideal* of promoting the well-being of the nation as a whole rather than as a protection of individual human rights. By contrast, Davidson *Human Rights* Buckingham (1993) 167 speaks of a resurgence of *natural law* principles in the 20th century as exemplified in the Universal Declaration of Human Rights (1948) and the U.N Charter. Bassiouni *The Protection Of Human Rights In The Administration Of Criminal Justice Etc* New York (1994) XXIV, referring to the provisions of the U.N. Charter states, "These provisions unequivocally assert the existence, primacy ... of internationally protected human rights [in all] national legal systems that have ratified the charter irrespective of [sovereign claims]".

² The last 50 years has seen the introduction of various human rights instruments. For example, the Universal Declaration of Human Rights (1948), the International Covenant of Economic, Social and

whole. Utilitarianism is a maximizing collective principle requiring the state to maximize the total nett sum or balance of happiness of all the citizenry.³ It is an abstract ideal into which an individualizing principle of silence cannot fit comfortably. On the other hand, a natural rights-based theory is a distributive and individualizing ideal giving priority to specific basic interests of each individual citizen and in which a silence principle finds a comfortable albeit superficial niche. There is an intellectually unbridgeable gap between utilitarianism (for which maximizing nett happiness is the ultimate criterion of value) and a theory of basic human rights (which insists upon protecting values of individual welfare). By recognizing and organizing these individualizing welfare values, the human rights-theory conflicts with and pulls against the maximizing aggregate principle espoused by utilitarianism. Yet a human rights-based moral theory of law exhibits a serious flaw which is often ignored. According to Hart,⁴ "It cannot be said that we have had a sufficiently detailed or adequately articulated theory showing the foundations for such rights and how they relate to other values. Indeed, the revived doctrines of basic rights are still unconvincing". A recurring theme of this thesis shall be that a human rights-based principle of silence does not possess a sufficiently rational justification. No legal principle should be entrenched within constitutional law simply because it is emotionally appealing and fashionably acceptable. There must be a logical foundation on which to articulate a coherent and cogent rationale. The so-called "right" to silence possesses neither logic, morality or reason.

In the light of South Africa's apartheid legacy the constitutional entrenchment of a right to silence comes as no surprise. Human rights theory dominates every intellectual and legal debate. It is hardly surprising therefore that South African constitutional experts have been seduced by siren appeals to the heart instead of by sound juridical reasoning. In the words of one such expert, "the infringement of human dignity by the compelled or enforced self-incriminating production of testimony is obvious. The cruelty of compelling testimony is plain to every thinking person and a remnant of apartheid criminal procedure". The use of the words "obvious" and "plain" is the usual refuge of those libertarians who cannot articulate satisfactory reasons for their ideas. A basic question frequently lost sight of in the post-apartheid euphoria is whether "silence" is indeed a normative right. Are there sufficient moral and rational criteria justifying the fundamental character of "silence" which entreat constitutional entrenchment? Is "silence" the safeguard of conscience, human dignity and

Cultural Rights (1966), the European Convention on Human Rights (1953). Surprisingly enough, even an English Human Rights Act (1998).

³ See Hart's Essays in *Jurisprudence and Philosophy* Essay 8, Clarendon Press (1983) 182.

⁴ *Ibid* at 195 "Right-based theories cannot compare to the clarity and detailed certainty of utilitarianism".

personal autonomy which libertarians so readily assume, or are these merely pretty words without rational substance?

A utilitarian construction of the silence principle would define it as no more than an instrumental evidentiary rule. A libertarian construction would elevate silence into a constitutional right. The difference between a "rule" and a "right" is profound. A rule is objective, susceptible to logic and governed by accepted norms of substantial law. A right, however, may not be susceptible to logic. The assertion "a right to silence" immediately presents a number of ambiguities. These ambiguities arise from the uncertainty as to the precise nature of the relationship which exists between the right bearer and the corresponding duty which arises from the exercise of the right. When X states "I have a right to silence" does that mean that everybody else owes a duty to do something for X, or that X himself has no duty not to do something, or that X by asserting his right, causes others to acquire a new or to loose an existing duty. A right therefore is susceptible to a number of different philosophical explanations and a host of various definitions. These meanings and definitions are distinguishable according to the nature of the relationship between the right bearer and the duty being asserted. A right may be further divided into two specific categories. It is either an objective right (expressing a logically determinable value of substantive law) or it is a subjective right (expressing a subjective value which is not usually susceptible to logic). An objective legal right expresses an end goal value which it promotes by empirical evidence and which is capable of definitive resolution. A subjective right on the other hand, expresses a basic attitude for which no reason can be given. It is in a sense an irrational right because it is subject to emotion and incapable of definitive resolution. A right to silence possesses only a bare subjective value. One either agrees with the assertion of the right or one disagrees. Silence is not capable of objective resolution. The primary problem with the right to silence is that libertarians attempt to disguise its bare subjective value by using the language of normative objectivity and by carefully exploiting the ambiguity inherent in the meaning of the word "right".

Legal Right Definitions : In order to understand the rationales, laid out in Chapter Four, which are said to justify the right to silence, it must first be determined whether it is possible to characterize "silence" as an affirmative legal right. A number of everyday definitions of a legal right may be established. First, a right may be defined as the *absence of a prohibition*. In this sense the right is framed negatively. There is no legal norm which imposes a duty not to perform the conduct forming the object of the right. The individual has a right to act

because there is no prohibition to abstain from it. Hohfeld⁵ characterizes this type of right as a *liberty right*. Second and by contrast, the opposite definition recognizes a right as a *positive authorization*. Unlike the absence of a prohibition, this kind of legal right is predicated on the existence of a positive legal norm. A positive norm which permits the conduct forming the object of the right as a *permissive right*. Third, a legal right may also be viewed as a *reflection of an obligation* or as a correlative to the obligations of others. Within this reference, a *liberty right* has no substance without a defining perimeter of obligation and a *permissive right* is dependent for its validity on a positive obligation emanating from a granting authority. Fourth, a right may also be defined as a power. A *power right* is the right which imposes a duty on the citizen to perform certain acts as prescribed by a higher, more powerful authority. Silence, because of its loose unspecific and rather negative nature, is equally susceptible to definition as a liberty, obligatory, permissive or power right. However, the majority of theorists, Bentham included, conceive of a right of silence as a benefit flowing from a defined legal obligation. The silence principle is properly understood as a *benefit right* because this definition corresponds best with the normative consequence expected of a silence principle. An individual acquires a benefit (right) when one of his interests is the reason for imposing a duty (obligation) on another (usually the state). Finally, there is the fashionable and more modern characterization of a right as an *immunity*. Hohfeld defines this type of right as a liability in respect to the power of another, of which the correlative is a disability or a lack of power. Immunity rights are important because most constitutional rights are conceived and spoken of in terms of the language of use-immunity. The post Second World War right to silence is best explained as a human right immunity consisting of a combination of two basic components. Primarily, silence is an immunity against the state's coercive power to compel the disclosure of *self-incriminating* evidence. A prohibition against the state's abusive infringement of the individual's mind. This immunity operates as a protection against pre-trial police interrogation and trial prosecutorial examination. It is also indirectly a protection, for both the individual and the court, against the unreliability of a coerced admission or confession. Secondly, it is a direct immunity, except in a number of limited circumstances, against the drawing of adverse inferences from the individual's conscious choice to remain silent. No adverse inferences may be drawn from the choice to remain silent during the pre-trial interview or the failure to testify during the trial. The main obstacle in the path of a coherent analysis of the silence principle is that proponents of the privilege against self-incrimination and the right to silence have incorporated the language of all of the abovementioned right definitions in their arguments without keeping to the proper distinctions. Scrambling together the separate categories of rights results in confusion about

⁵ Hohfeld in *Rights And Jural Relationships In The Philosophy Of Law* 3rd Ed (1986).

the core nature of the silence principle. The use of a rights-based terminology merely adds rather than detracts from the confusion surrounding the silence principle. Libertarian theorists in particular, often blur the conceptual differences between a right and a privilege by using both terms indiscriminately to refer to the same idea. In the words of *California v Byers*, “only rivers of confusion can flow from a lake of generalities”.

Philosophical Meaning : Most legal theorists assume that a legal relationship may be reduced to a right and a corresponding legal duty or obligation. A duty or legal obligation is said to be that which one ought or ought not to do. Duty and right therefore appear to be correlative terms. Every first year law student is taught that when a right is infringed a duty is violated. For example, the accused has a right to silence and the state has a corresponding duty not to violate that right. However, the simple relationship “right-duty” is philosophically inadequate and leads to ambiguity. It is the ambiguity around the “right-duty” legal dualism which allows the word “right” to be used indiscriminately to mean a privilege, an immunity or a power all at the same time. According to Hohfeld,⁶ the usual explanations of a right are much too vague and its popularly accepted relationship to duty much too simplistic. Hohfeld would draw a much more precise relationship by highlighting and contrasting the nature of the connection between a right and a privilege. A *right* and its jural correlative, a *duty*, are similarly reflected in the relationship between a *privilege* which is the opposite of a *duty* and its correlative, a *no-right*, which is the opposite of a *right*.⁷ For example, X (the landowner) has a right to prevent Y (the trespasser) access to his land. X has a privilege of entering his own land (X does not have a duty to stay off). The privilege of entering the land is a negation of the duty to stay off. A duty in this sense has a meaning precisely the opposite to that of a privilege. Consequently, the correlative of a privilege is the negation of a duty or a no-right. X’s right that Y shall not enter on to the land is Y’s correlative duty not to enter. X’s privilege of entering his own land is the correlative of Y’s no-right that X shall not enter. Therefore a privilege is defined as a negation of a legal duty (i.e. the opposite of a legal duty) and the correlative of a “no-right”.⁸ The accused’s privilege against self-incrimination means the mere negation of a legal duty to testify. *It is therefore logically mistaken to use the word right to refer indiscriminately to a privilege. The two concepts are not mutually interchangeable.* X (the landowner) also has the *power* to change Y’s legal relationship by personally transferring the land to Y, which correlates with Y’s *liability* to have the relationship changed. X has an *immunity* against Y, preventing Y from unilaterally transferring the land to himself,

⁶ Hohfeld *ibid* at 308-312. See also Lyons “Correlative Of Rights And Duties” in *Philosophy Of Law* 3rd Ed (1986) 324-329; Radin “A Re-statement of Hohfeld” (51) *Harv. L. Rev* (1938) 1141.

⁷ Hohfeld *ibid* at 309.

⁸ Hohfeld *ibid* at 309.

which correlates with Y's *disability* to do so. X and Y's relationship to each other and the land turns on an interrelated nexus of correlative and opposite denominators. A legal relationship cannot be defined simplistically as a right, but consists of a complicated bundle of rights, privileges, powers and immunities. The advantage of a Hohfeldian type of analysis is that it enables real normative choices to be disentangled from verbal confusions. There is a temptation to move from the proposition "I have a right to silence" to "so you have a duty not to infringe my right to silence". This kind of false logic may be avoided once it is realized that the word right stands for four quite dissimilar relationships, each defined by a common denominator, "*Right-duty, privilege-no-right, power-liability and immunity-disability*."

The Hohfeldian explanation of a right as a jural correlative relationship implies that a right is relative. It is at the bare minimum susceptible to a balancing of interest between the right (or privilege) possessed by one against the duty (or no right) possessed by another. Galligan for example, defines a right as a protective interest, "to have a right is to have a justified claim that an interest should be protected by the imposition of correlative duties. To warrant protection an interest must evoke a value which is important enough to outweigh conflicting values and goals and important enough to justify the imposition on others".⁹ It is in this relative sense that most Anglo-American rights may be understood. Relative rights underscore the unwritten English constitution and the written Canadian, South African and Australian constitutions. (Relative rights also underscore all European civil law constitutions). On the other hand, a right may also be defined as absolute in the sense that it does not allow for a balancing of independent interests. An absolute right implies a near total prohibition against infringement. Dworkin¹⁰ would argue that this is the proper nature of a right. Taking rights seriously is to regard the right as a "trump". The right will always prevail over mere utilitarian goals. The nature of the American fifth amendment right in its core essence may well be defined as a Dworkinian absolute right which must always prevail except in exceptional circumstances. A right based on a deontological view of morality does not allow for limitation except in the rare circumstance in which it is necessary to protect a more important right or to ward off some great threat to society. McCloskey would define a right as a positive entitlement, "rights are things that a person has, possessed independently of other persons and independently of what else ought to be".¹¹ To Kleinig a right is a "minimum condition in which a human being may flourish as a moral agent and which ought

⁹ Galligan "The Right To Silence Reconsidered" *Current Legal Problems* (1998) 69, 88.

¹⁰ Dworkin "Taking Rights Seriously" in *Oxford Essays In Jurisprudence* Simpson Ed (1973).

¹¹ McCloskey "Rights : Some Conceptual Issues" (54) *Aus. J. of Phil.* (1976) 99, at 99 and 102, "The account of rights in terms of powers, claims, expectations, liberties are to be rejected in favour of this positive view".

to be secured for him if necessary by force".¹² Traditionally a right has always been considered as a "liberty each man has, to use his power, as he will himself for the preservation of his own nature".¹³ The logical flaw in these distinct definitions of a right as a liberty, power, expectation, entitlement, moral enhancer or protective interest is that theory is invariably out of step with reality. For example, a person trapped in a cave may have a right to liberty in theory but is unable to exercise that right in practice. A person may possess the right to write a novel but lacks the creative power to do so. A labourer may have a right to employment but no reasonable expectation of ever obtaining one. Why then is it so readily assumed that a theoretical right to silence places practical restraints on the state?

Despite the significant variations in the many explanations for the definition of a right, a common thread may be identified. A right and its jural corollary a privilege, however defined, possess at a bare minimum some kind of positive attribute or quality. What is relevant, irrespective of the definition, is that each conceptualization of a right provides for an *advantage*. For example, the right to life positively protects against human created dangers. The right to a fair trial imposes a positive procedural burden on the state. In this vein, the silence principle prevents adverse inferences being drawn against the accused by reason of a failure to testify or to provide information. Accordingly, the positive attribute identified in both the right and the privilege must confer a *moral* and a *rational advantage*. A right however defined, must be foundationally morally and rationally coherent. An affirmative legal right derived from a normative and autonomous system must possess an internal and transparent rationality. A right becomes *internally rational* (as a first step) when it generates a consistent set of reasons which are sufficient by themselves to justify the standard articulated and the obligation created by the right. The right becomes *transparently rational* (as a second step) when these consistent reasons are a sufficient *moral justification* of the standard and the obligation. A legal right must necessarily and contingently possess the elements of rationality and morality. The purpose of the next two chapters is to determine whether or not these elements are indeed possessed by the so-called "right to silence".¹⁴ In this chapter the moral basis of a silence principle will be reviewed. In the fourth chapter the rational justifications for silence will be subjected to a critical examination.

¹² Kleinig "Human Rights, Legal Rights And Social Change" in *Human Rights* Kamenska and Tay Ed (1978) 44-45. For the contrary view see Marshall "Rights, Options And Entitlements" in *Oxford Essays in Jurisprudence*, Simpson Ed (1973) 228, 241. "A right is a claim or entitlement to a benefit from the performance of a certain obligation".

¹³ Hobbes *Leviathan* Penguin Ed (1996) 129-30.

¹⁴ See Bickenbach "Law And Morality" in *Law And Philosophy* vol 29 (1989) 300.

3.2 The Moral Fulcrum

There is a close historical relationship between law and morality. Many important criminal rules may be traced to a pre-existing moral precedent. The proper relationship between law, morality and the silence principle may be reduced to the following five paradigms :

Natural law¹⁵ : Law reflects morality, for without morality law is but naked power. The law is a natural exhortatory system founded on a superhuman source. A supernatural authoritative source of law which imposes conditions on human existence which no human lawmaker can remove. Natural law carries the moral authority of divine law and the law of nature. Natural law is connected to divine law through the human soul (which links the person to the divine), through human conscience (which enables the individual to distinguish between right and wrong) and through the human mind (the mental ability to understand right from wrong). Blackstone states it succinctly, "Law commands that which is morally right and prohibits that which is morally wrong". The natural law paradigm is presently the most popular method of explaining silence as a fundamental right. *The right to silence is a divinely inspired human right, the aim of which is partly to protect the human personality and partly to prohibit wrongdoing.*

Utilitarian-positivist law : Law is separable and different to morality.¹⁶ Law is a command from a determinate and accountable sovereign and is used as a sanction to achieve a necessary human purpose. The morality of law depends (not on a divine source as in natural law), but upon the morality of its purpose and its effectiveness in achieving that purpose. Law does not exist for its own sake but in the rational use to which it is put and the results it helps bring about in the real world. Jeremy Bentham regards law as a social sanction with the moral purpose of creating a society in which the greatest number of persons enjoy the greatest happiness, "should not the purpose of law be to enrich the quality of life of those who live under it? And is not its true relationship with morality to be found in the goodness or badness of the results it produces?". Utilitarianism is the great opponent of

¹⁵ A modern right is naturally associated with a deontological approach to morality. Rawls "A Theory Of Justice" Chadwick Ed (1971) 22-4, 27 describes an ordered society but one in which a subject is not bound to obey laws when basic interests are not protected as having priority over mere utilitarian increases in net happiness. Dworkin "Taking Rights Seriously" in *Oxford Essays in Jurisprudence* Simpson Ed (1973) 202, 213 denies that the prospect of utilitarian gains can justify preventing a human being from doing what he has a right to do. The general good is never an adequate excuse for limiting rights. Nozick "Philosophical Explanations" in *Oxford Essays In Jurisprudence* Simpson Ed (1981) 490-495 speaks of a set of near absolute individual rights which form the foundations of morality. Each subject as long as he does not violate the same rights of others has the right to be free of all forms of coercion.

¹⁶ It has been persuasively argued by Hart that some criminal laws are not necessarily dependent on moral foundations. Hart *The Concept Of Law* (1961) chapter 6. See also Woodard "Thoughts On The Interplay Between Morality And The Law" (64) *Notre Dame L. Rev* (1989) 784-804.

Natural law and would either abolish or reduce the silence principle to a mere evidentiary rule. *A silence principle is only morally and rationally justifiable if it promotes the greater well-being of society. When it inhibits the law enforcement interests of society (works against the greater happiness of society), it becomes morally and rationally unjustifiable.*

Neutral law : Law is morally neutral because it is founded on the impartiality of the legal process itself. Law is the creation of an institutional process, framed by a legislature, implemented by an administration, applied by a judiciary and enforced by the police service. All of these constituent elements are parts of the legal mechanism which by a ceaseless fine-tuning, work harmoniously together. The morality of law is not to be found in substantive rules or procedures but in the countless incremental changes made within the legal process in a response to practical social needs. *The silence principle is a cog in an enormously delicate, complicated, but neutral legal machine.* Within this mechanism silence as an evidentiary rule works harmoniously with other evidentiary rules. But silence as an elevated constitutional rule causes disharmony as other rules are forced to readjust and re-accommodate to a higher right to silence. A constitutional right to silence unbalances the legal machinery and makes a radical rethinking necessary.

Custom law : Law is a stage in the development of society's value system as certain social habits become social values requiring special protection by the legal process. In all social organizations there is a dynamic interplay between custom, morality and law. Of the customs, habits and ideas that govern the everyday lives of persons, some are followed through unthinking inertia, some are endowed with moral authority and some are enforced as law by legal sanction. This process is a constant dynamism as ideas and ideals change through time. As old and new issues disappear and reappear in new guises. Law is not the result of morally or rationally agreed-upon decisions. It is the result of tradition and of each society's unique cultural evaluation of the issues that exist at a particular time. The silence principle in this sense has no rational basis and exists as a matter of custom, public tolerance and timing. It has intrinsic worth only because society at that particular time is ready and willing to accept it as an appropriate response to a specific culturally perceived wrongness. A South African right to silence may be partially explained in terms of this paradigm. *The elevation of silence to a constitutional right is society's cultural reaction and revulsion against apartheid.*

Marxist law : Law is the opposite of morality and is a form of institutionalized immorality. Morality can only exist in a classless society in which each individual takes from the society's resources only as much as is required for his immediate needs. Law in an organized hierarchical society is an instrument of oppression created by the ruling elite to protect their own interests. The law which preserves these elitist interests is immoral because it acts to the detriment of the unpropertied masses. In a classless society in which all property is

collectively owned a silence principle becomes redundant. The state is identified with the people and the state always acts in the interests of the people. *An individualized and protectionist human right of silence is therefore irrelevant as the collective state entity can never exploit or abuse the interests of the citizenry.*

The international trend in modern jurisprudence is a selective one which, since the Second World War, has increasingly favoured a natural and human rights-based theory of law and morality. Within this global culture of fundamental human rights all modern constitutions to some degree or another contain a chapter or declaration of rights. The American and Japanese constitutions contain a complex of fundamental norms which negatively and positively bind the state. The right to silence is conceived of as a protection limiting the manner in which the state may act against the citizenry. The German, Canadian and South African culture of human rights is based on value orientated constitutional norms. The core of the German *Grundgesetz* is article 1(1), "human dignity is inviolable. To respect and protect it is the duty of all state authority". The Canadian Charter of Rights and Freedoms guarantees the free and democratic rights of the individual and a respect for the inherent dignity of the human personality. Central to the South African Bill of Rights is the safeguard of human personality vouched for in sec 10 (inherent human dignity) and sec 1(a) "human dignity, the achievement of equality and the advancement of human rights and freedoms". In these constitutions the silence principle is one of the qualifications of a fundamental human personality. Recently the European Court of Human Rights has read into sec 6(1) of the European Convention on Human Rights a right to silence which it had apparently overlooked for some 30 years.¹⁷ The Australian High Court has re-interpreted the privilege against self-incrimination by using human rights rhetoric.¹⁸ England with its proud heritage of an unwritten constitution has legislated a Human Rights Act (1998) which incorporates the principles of the European Convention into domestic English law. What all these human rights instruments share is the common but vaguely articulated notion that somehow state compelled self-incrimination is morally harsh. (The kind of compulsion outlined here is not defined as physical or mental torture, unacceptable to all, but as the psychological pressures which arise as a natural consequence of the criminal process). Opposite to this constitutionalised culture of human rights lies a utilitarian theory which argues that a criminal

¹⁷ No practical conclusion about the inherent limitations on the European right can be drawn as no specific provision is made in Sec 6(1). *Funke v France* (1993) 16 EHRR 297, 326, which conjured a right to silence from Sec 6(1) makes no mention of its parameters. *Saunders v U.K.* (1997) 23 EHRR 313 holds that a right to silence does not allow for a balancing of interests as it is an integral feature of a right to a fair trial which by its very nature cannot be subject to a limitation. *Murray v U.K.* (1996) 22 EHRR, 45, speaks of the right as a generally recognized international standard which lies at the heart of the notion of a fair procedure under Sec 6.

¹⁸ *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

system which labels silence as the right moral choice in the face of a reasonable accusation is unbalanced and morally skewed.

The influential libertarian Greenawalt¹⁹ suggests that the basic core of the silence principle is morally justified and deserves constitutional protection. Greenawalt centers his argument on the idea that compelled self-incrimination is morally cruel. The state must observe moral restraints which resemble those which private citizens respect between themselves. The respect which individuals owe each other (and which depends on the intimacy of the personal relationship) may be extended to the respect which government owes to its citizens. The extent of the respect depends on the degree of the relationship between state and individual.²⁰ In a relationship between private individuals there is no general moral obligation for the individual to explain his conduct. A refusal to do so does not always justify an adverse inference. A failure to answer the accuser who possesses at best only a slender basis for his suspicions can never be morally improper. In these circumstances an angry "mind your own business" is more appropriate. The moral obligation to respond exists only when the basis for suspicion is strong and where the relationship between accused and accuser is a relatively personal one.²¹ In Greenawalt's view of ordinary morality a person interrogated on slender suspicion may appropriately remain silent, but a person questioned on well-founded suspicion may not. Greenawalt's argument contains a number of obvious flaws. It is doubtful whether the moral relationship between private individuals can be logically extrapolated to the relationship which exists between the state and the individual.²² State authorities usually arrest a suspect on more substantial grounds than mere suspicion. Certainly once the suspect has been formally charged and compelled to stand trial the state should possess a *prima facie* case against him. The accused's relationship to the state in this circumstance bears little resemblance to the moral relationship between private individuals.²³ It is illogical to characterize the relationship between the accused and the state-accuser as a close personal one which renders accusatory questioning morally impermissible. Greenawalt fails to persuade that silence in the criminal investigatory process is in line with ordinary moral behaviour. Greenawalt's idea flies in the face of common sense. All other recognized privileges, marital, professional-legal and state privilege, protect

¹⁹ Greenawalt "Silence As A Moral And Constitutional Right" (23) *William and Mary L. Rev* (1981) 15-71. "Perspectives On The Right To Silence" in *Crime, Criminology and Public Policy* Hood Ed 235-268.

²⁰ *Ibid* *William and Mary L. Rev*, 19, 20-33, 34-43.

²¹ *Ibid*, 27-31.

²² *Ibid*, 34, but see Moskowitz "The O.J Inquisition; A United States Encounter With Continental Criminal Justice" (28) *Van. J. Transnat. Law* (1995) 1140.

²³ Greenawalt recognizes that his moral theory applies only to the pre-trial stage and does not support a right to silence at trial, *ibid* 59.

relationships having real social value.²⁴ By contrast, the morality of a silence principle applies only to the “arrested” and “accused” person who has either broken the law or is suspected of doing so. The moral value of a silence principle in the criminal process seems to defy ordinary common sense notions of decent conduct.²⁵ United States Justice Friendly expresses the criticism most succinctly,²⁶ “No parent would teach such a doctrine to his children. The lesson parents teach is that while a misdeed will generally be forgiven, a failure to make a clean breast of it will not be. Every hour of the day, people are being asked to explain their conduct to parents, teachers and employers. Those who are questioned consider themselves morally bound to respond and the questioners believe it proper to take action if they do not”. How may a silence principle be justified on moral grounds when it stands in the way of a conviction, impedes the state in providing fully for the security of society and sometimes prevents satisfaction and restitution to the victims of crime. It is the inability to develop a sustainable moral basis for the silence principle which robs it of its authority and renders it opaque and irrational rather than transparently rational. There are no consistent reasons which provide a sufficiently moral justification for silence. A rights-based theory of the kind outlined by Greenawalt finds it difficult to explain the silence principle in coherent terms which takes into account the basic common sense observation “truth not silence is the right moral choice in the face of a reasonable accusation”. In the words of McCormick,²⁷ “[The courts] as they become conversant with the history of the privilege will see that it is a survival that has outlived the context that gave it meaning and that its application today is not to be extended under the influence of a vague sentimentality but is to be kept within the limits of realism and common sense”.

Libertarian proponents of a silence principle unable to confront the moral dilemma directly, are forced to resort to enigmatic orations. Lord Salmon,²⁸ “[The silence principle] is a sense of instinct for what is just which is innate in our people”. Lord Devlin,²⁹ “It is a natural thought of England”. Lord Gillies,³⁰ “It is a sacred and inviolable principle”.

²⁴ The effect of an evidentiary privilege is to prohibit the admission of relevant evidence and thereby suppress the truth. Privileges are recognized only because the protected relationship is of outstanding social importance and would be harmed by denying recognition to the privilege.

²⁵ Schaefer *The Suspect And Society* Hamilton Press Ed (1960) 59-60 “the chief difficulty with a [silence principle] is that it runs counter to our ordinary standards of morality”.

²⁶ Friendly “The Fifth Amendment Tomorrow : The Case For Constitutional Change” (37) *Uni. Cinn. L. Rev* (1968) 671, 680. By contrast Greenawalt suggests that Friendly has got it wrong. Silence in the face of accusation is an ordinary standard of morality.

²⁷ McCormick “Some Problems And Developments In The Admissibility Of Confessions” (24) *Texas. L. Rev* (1946) 239, 277. Louisell “Criminal Discovery and Self-Incrimination” (89) *Cal. L. Rev* (1965) 94, a strong advocate of silence nevertheless says, “the rule is psychologically and morally unacceptable as a general principle in human relationships”.

²⁸ House of Lords debate on the Criminal Law Revision Committee, 11th Report, Cmnd, 4991 (1972).

²⁹ *R v Bodkin Adams*, unreported (1957) but referred to in the House of Lords debate.

³⁰ *Livingstone v Murray* (1830) 9 Shaw 161.

A similar vague sentimentality is echoed by fraternal brothers in America. Justice Brennan,³¹ “[The fifth amendment] is an expression of our common conscience, a symbol of America which stirs our hearts”. Justice Bradley,³² “[Compelled self-incrimination] may suit the purposes of despotic power but it cannot abide the pure atmosphere of political liberty and personal freedom”. The deliberate use of the words instinct, innate, sacred, inviolable and conscience is designed to obfuscate reason by appealing directly to the heart. Here there is no appeal to logic or reason. Emotional sentimentality is the final resort of the human rights theorist. The reliance on opaque notions of morality explained in terms of high sounding rhetoric and driven by calls to a national culture is also ludicrously unpersuasive. Why is it automatically assumed that in the pure atmosphere of political liberty there is a morally driven demand for a personal right to silence? Where is the moral nexus? Why would political liberty be morally infringed by a state demand for information from a properly arrested suspect? The protagonist of a silence principle concedes not only the moral high ground but also the realm of logic. A silence principle is simply not internally rational. Lord Salmon, on the logic of silence, “our law has never been built on logic alone, still less on abstract theory”.³³ Justice Frankfurter, “a page of history is worth a volume of logic”. Horowitz blandly claims, “the privilege is not good legal logic, but is a religious principle of humaneness and mercy engrafted upon the common law”.³⁴ Schaefer, one of the United States’s most distinguished jurists, has characterized the silence principle as a doctrine in search of a reason. The modern silence principle, whether disguised as a right or a privilege, is invoked in circumstances which create the immoral impression that it is no longer a protection for the innocent, but rather a safe sanctuary for those who break society’s rules. In the present South African debate over the unbalanced procedural advantage enjoyed by criminal rights as opposed to victims’ rights, a constitutional right to silence is clearly perceived by the majority of the citizenry to be a shelter for the guilty rather than an aid to the innocent. Wherein lies the morality of silence? Why do we allow the so-called right to silence to contribute towards the undermining of the legitimacy of our criminal justice system?

³¹ *Malloy v Hogan* 378 U.S 19 n7 (1964).

³² *Boyd v United States* 116 U.S 616, 631-32 (1886).

³³ *Ibid* note 28, House of Lords debate, 1608.

³⁴ Frankfurter J in *Ullman v United States* 350 U.S 422, 438 (1956). Horowitz “The Privilege Against Self-Incrimination – How did it Originate”, (31) *Temp. L. Q* (1958) 121, 143 *Miranda v Arizona* 384 U.S 436, 480 (1966) referred with approval to the quote, “the quality of a nation’s civilization can be largely measured by the methods it uses in the enforcement of its criminal law”. These kinds of generalizations offer little to justify the existence of the privilege and only add to the confusion. *California v Byers* 402 U.S 424, 469 (1971) notes “only rivers of confusion can flow from a lake of generalities”.

Is there a proper place for a silence principle within the accusatorial system of criminal justice? Should it be abolished entirely or allowed a severely circumscribed role? In the Anglo-American system the testimonial value of silence may be reduced to the following three basic models :

1. *An evidentiary rule* : silence is merely a circumstantial item of evidence. Its probative value is an inferential question determined by relevancy and prejudice. As a common law rule it is subject to statutory abrogation. The extent of its scope and influence is circumscribed by the legal-cultural pressures of the day. This construction of silence is the English, Australian and majority Commonwealth preference.
2. *A relative constitutional right* : as a result of cultural pressures within the society some Commonwealth jurisdictions have opted for a constitutional entrenchment of the silence principle but one subject to a reasonable and justifiable balance of interest test. Through the use of internal and external modifiers, the legitimate interest of the state is weighed against the protective interest of the citizen. This construction of silence is the South African and Canadian preference. To some extent it is also the preference of other legal systems such as the German and the Japanese.
3. *An absolute constitutional guarantee* : silence within the core criminal process is an absolute guarantee which precludes a balance of interest analysis. Within the trial context the accused has an absolute right to silence. A balance of interest test is only permissible on the periphery, in the context of the non-party witness privilege and state regulation of non-criminal practices. This construction is the American preference.

It is suggested that the proper place for a silence principle lies somewhere between the extremes of abolition and absolute constitutional entrenchment. The suggestion is advanced that a silence principle should be properly construed as a mere evidentiary rule, limited in scope, taking its place within the body and rules making up the unique common law system of evidence. The law of evidence is primarily comprised of artificial exclusionary rules, utilitarian in design and concerned with aiding the court in the discovery of truth by excluding probative material which may lead the court into error. As has been briefly demonstrated above and will be further demonstrated in the following chapters, no moral or rational considerations have been advanced which mitigate against the use of silence as an ordinary item of circumstantial evidence possessing the same probative weight as all other circumstantial evidence and subject to the same test of relevancy. No sufficiently moral justification has been advanced as to why silence deserves a special kind of protection not

afforded other procedural or evidentiary rules : Moody J in *Twining v New Jersey*³⁵ reaches into the heart of the matter when he concludes, "the wisdom of the [right to silence] has never been universally asserted to since the days of Bentham [It] is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient".

3.3 Utilitarian Rationality

The primary moral arguments for and against the silence principle span the entire spectrum between a human rights and a utilitarian based philosophy. On the one hand natural law proponents view the silence principle as a fundamental principle of the Anglo-American criminal system. The dominance of this view in South Africa is illustrated by the upliftment of an ordinary evidentiary rule of silence into a constitutionally entrenched right to silence.³⁶ On the other hand, positivist opponents are skeptical about the elevation of silence into a constitutional right. Ideally the criminal justice system should be a system designed specifically to search for legal truth.³⁷ In the utilitarian construction of truth considerable moral concern is shown for individual and personal interests.³⁸ However, the criminal process should not provide the individual with extra safeguards other than those required by a rectitude of decision or greater safeguards than are consistent with the principle of utility. To define the silence principle in the language of constitutional human rights is to appeal directly to emotion and never to reason. Silence as an evidentiary rule of the criminal process aids in the search for legal truth. Silence as a constitutional right merely inhibits that search.³⁹

³⁵ 211 U.S 78, 113 (1908). Similar reasoning is to be found in *Adamson v California* 322 U.S 40 (1947).

³⁶ Sec 25 of the 1993 and Sec 35 of the 1996 Constitution.

³⁷ McConville "Silence In Court" *N.L.J* (1987) 1169, argues that criminal procedure is not an inquiry into truth but a process in which different versions of legal reality compete. Legal truth does not have an independent or discoverable existence outside of the court, instead it is dependent on the adversarial "winner takes all" structure. Legal truth is based on perceptions. Human beings construct legal truth based on changing perceptions of reality. In this sense legal truth is neither fixed nor permanent. By contrast, utilitarians argue that defining procedural rules in terms of human rights simply adds to the confusion, impermanence, vagueness and inability to define legal truths. Defining legal rules in terms of utility cuts through the confusion. A utilitarian definition of truth is practical and the best that can be hoped for.

³⁸ See Harts' incisive defence against the criticism that utilitarianism is a maximizing philosophy in which the individual has no intrinsic worth except as a point or fragment within the total aggregate of community happiness, *Essays In Jurisprudence And Philosophy*, Oxford, Clarendon Press (1983) 201, 205-209.

³⁹ Zuckerman *The Principles Of Criminal Evidence* Oxford Clarendon Press (1989) attributes the English courts lackluster support of a right to silence not only to the awareness of the practical problems which would result from a strong enforcement of the right but also to its weak rational foundation.

Central to the rationalist tradition is Bentham's famous commentary on the silence principle in the polemical work "*A Rationale of Judicial Evidence*" (particularly Book IX).⁴⁰ Under the persuasive influence of his forceful arguments, many of the technical exclusionary rules which once bedeviled English criminal procedure have been discarded. Despite his antiquity a contemporary and persuasive reasoning may be deduced from Bentham's eclectic theory of law which serves as the foundation for many of the critical modern arguments against the silence principle. There are a number of problems with a strict Benthamite approach. Bentham ignores the pre-trial stage of the criminal process and concentrates exclusively on the trial stage. Nevertheless utilitarian reasoning applies with equal validity to both the pre-trial and the trial stages of the criminal process. His theory shows its antiquity by failing to account for the fact that a significant number of guilty pleas are determined before trial during a pre-trial negotiatory process (formal or informal plea-bargaining processes). Bentham's theory gives no precise guidelines on how to deal with the wrongful conviction of the innocent. If the essence of the trial is an accuracy of outcome, then guilt and innocence must be correctly determined. Unfortunately the trial process is often imperfect and sometimes the innocent are wrongly convicted. Bentham's theory offers no reasonable explanation on how utility may overcome the problem of mistaken convictions. Bentham's "free proof" natural system does not acknowledge the existence of values which place legitimate limitations on the admissibility of relevant evidence and exist independently of rectitude. Bentham speaks only of "actions". He is unaware of the distinction drawn by later philosophers between act-utilitarianism and rule-utilitarianism.⁴¹ For Bentham an act is right if it results in the best consequence. But it may also be reasoned that an act is right if it is required by a rule where the following of the rule has the best consequence. Rule-utilitarianism is better suited to explaining the consequences of a silence principle. While Bentham's contribution is acknowledged, a more up-to-date open indirect rule-utilitarian theory is developed to explain the silence principle in the following pages.

Rectitude of decision within a natural system of free proof is the basic principle of a utilitarian dialecticism. The essential model may be reduced to "the desired end of adjudication is rectitude of decision which must be consistent with utility and an accurate determination of true past facts, proved by a specific standard of probability on the basis of rational analysis of relevant evidence presented to an impartial decision maker. The desired end may be

⁴⁰ *Rationale Of Judicial Evidence*, book IV, IX (parts IV, VI and VII), Bowring Ed, William Tait, Edinburgh 1843 (hereinafter cited as *R.J.E.*).

⁴¹ Austin *The Province Of Jurisprudence Determined* Lectures 2-4, Oxford Press, Clarendon (1955). Mill "*Utilitarianism*" Penguin Ed (1999), philosophy series. Hare "Ethical Theory And Utilitarianism" in Lewis (Ed) *Contemporary British Philosophy* (4th series) 1976.

modified where utility requires it, on the collateral grounds of delay, vexation and expense".⁴² From this model the primary values of a utilitarian theory of evidence within a utilitarian criminal process may be unraveled. First, the direct object of adjudication is rectitude or accuracy of decision and the correct application of the law to the proven facts.⁴³ Second, rectitude of decision may be influenced or modified by collateral delay, vexation or expense (the inevitable costs of enforcing the law). The collateral costs of achieving rectitude should be kept to a minimum in the fashioning of evidentiary guidelines.⁴⁴ A natural system of free proof is the most convenient means of minimizing these collateral costs. Third, all procedural law is logically valid only insofar as it lends itself to the reasonable implementation of the substantive law. The proper functioning of the law of evidence is to provide an accuracy of outcome. Accuracy demands that all probative evidence concerning the facts-in-issue must be admitted subject only to the possible collateral costs of delay, vexation and expense.⁴⁵ Fourth, the most rational method of achieving evidentiary "accuracy of outcome" is by allowing the trier-of-fact access to all the probative evidence unhindered by technical exclusionary rules. A process of "free proof" within a natural system is preferable to a process of exclusionary rules within a technical system.⁴⁶ Fifth, mandatory artificial rules which exclude reliable probative evidence have no place within utilitarian reasoning. However, there is a place for other rules, guidelines, instructions and judicial discretions which are consistent with utility and which advance the accuracy of outcome. Sixth, when applying utilitarian reasoning to a silence principle the key issue to be determined is whether or not the protection of silence consistently excludes the admission of relevant evidence thereby hindering rectitude of decision and preventing accuracy of outcome.

⁴² Twining *Theories Of Evidence : Bentham And Wigmore* Weidenfeld and Nicolson, London (1985). Postema "The Principles Of Utility And The Law Of Procedure, Bentham's Theory Of Adjudication" (11) *Georgia L. Rev* (1977) 1393, *Bentham And The Common Law Tradition*, Clarendon Press, Oxford (1986). Menlowe "Bentham, Self-Incrimination And The Law Of Evidence", *Law. Q. Rev* (1988) 286. Lewis "Bentham's View Of The Right To Silence" (43) *Current. L. Problems* (1990) 135, 145, 146.

⁴³ By rectitude Bentham means "conformity with the law". The law forms public expectations and regulates hopes and fears. If judicial decision making is conformable to the expectation the public is satisfied. Let the expectation be disappointed and insecurity and alarm commences. "Let in the light of evidence. The end it leads to is the direct end of justice, rectitude of decision", *R. J. E* VIII at 37.

⁴⁴ Relevant evidence may only be excluded where its admission would be attended by predominant collateral inconvenience, *R.J.E* VII at 336-7. This kind of utilitarian balance is reflected in the U.S federal rules of evidence (rules 401, 402, 403) and the English Police and Criminal Evidence Act (PACE) 1984.

⁴⁵ *Vexation* : a witness's reluctance to attend court or to disclose evidence. The sheer volume of evidence presented may sometimes be vexatious to the judge. *Expense* : witnesses and evidence excluded because neither party can bear the monetary and legal costs involved. *Delay* : a balance between the need to include all relevant evidence and the need to ensure a speedy trial.

⁴⁶ A *technical system* subordinates the production of evidence to a system of detailed exclusionary rules, "a Byzantine collection of exclusions, privileges, presumptions and formulae for weighing evidence" *R.J.E.* VII at 99-100.

Bentham is the first jurist to make the crucial taxonomical distinction between substantive and objective law. The utilitarian function of substantive law requires the maximization of overall community happiness by limiting socially harmful behaviour. The adjective law in turn gives effect to substantive law by maximizing its execution in the most efficient manner possible. The specific function of the law of evidence within the adjective process is a rectitude of decision which identifies relevant facts and renders them admissible in a court so that substantive law can be correctly applied.⁴⁷ The link between utility and substantive law means that the societal expectations of security and stability raised by the substantive law are not disappointed. The preservation of society's security is therefore a major concern of utility.⁴⁸ The problem with Bentham's reasoning is that he ignores the wider nature of adjudication by concentrating exclusively on the trial process. Rectitude has a generic application. It should apply equally to the pre-trial process and other administrative or tribunal processes. It applies wherever the law is systematically and regularly employed and there is a need for a high degree of factual accuracy. The primary purpose of Bentham's natural system is the need to maximize execution/implementation of substantive law by minimizing the inevitable collateral costs involved. There are two recognizable costs, those involving inevitable vexation, expense or delay and those involving the possible danger of misdecision. A balance must be found between the primary and the collateral ends of adjective procedure in order to enhance utility. When the execution of the law demands preponderant vexation or risk of misdecision, the principle of utility supplies a solution by preferring rectitude of decision. The principles of utility and rectitude of decision within the natural system serve to establish a sufficiently high standard of proof (the standard ought to be as high as is required by truth and utility) and guarantees the presumption of innocence so essential to the adversarial system.⁴⁹ Three important evidentiary notions may be derived from Bentham's theory. First, a natural free proof system is proposed which contains no mandatory or artificial exclusionary rules – the very antithesis of our modern law of evidence. Second, questions about the admissibility of evidence are primarily questions of relevancy and empirical fact and never simply questions of law. Third, it follows logically that all

⁴⁷ Postema *ibid* note 42 of 1395-97.

⁴⁸ Substantive law raises certain societal expectations which can never be satisfied. One of the reasons for this is the excessive technicality of the protective rules which surround the accused in the accusatorial criminal process. Substantive law can never be successfully applied because it is hindered by these technical rules and the result is the insecurity and alarm of the ordinary citizen. South Africa is a typical case study.

⁴⁹ Bentham refers to the principle of rectitude as "innocence protecting". The primary protection of innocence flows from a utilitarian structured trial process. A number of trial structures consistent with utility, such as a high standard of proof serve to protect innocence. A utilitarian concern for the innocent does not depend on vague notions of rights, due process or fairness but on practical trial processes. *R.J.E.* VII at 345.

relevant evidence is *prima facie* admissible unless its production involves preponderant vexation or risk of misdecision.

A modern utilitarian theory of evidence is not rigid and allows for the exclusion of some types of evidence and the inclusion of some kinds of rules in the interests of utility. Whenever the costs of admitting evidence outweigh the benefit of executing substantive law, the evidence ought to be excluded. Modern utilitarianism does not suggest that all rules must be abolished, merely the costly mandatory ones. Experience shows that some rules do have intrinsic value in avoiding inaccuracy and are therefore consistent with utility. Modern utilitarianism goes one step beyond Bentham's rather undifferentiated concept of rectitude.⁵⁰ The modern utilitarian concept of a trial no longer implies a simple blanket notion of rectitude. Exclusionary rules consistent with rectitude and utility are possible. Modern notions of rectitude are best served by "free" proof coupled with a framework of guidelines, judicial discretions and a limited number of advisory rules. Some categories of evidence the probative value of which are difficult to assess, high risk evidence, potentially prejudicial evidence (i.e. involuntary confessions, accomplice and children's evidence, similar fact evidence, improperly obtained evidence, etc) may justify strict rules and still be consistent with utility. Indeed, the modern tendency in the law of evidence is towards the shedding of excessively technical rules and the redefining of others along utilitarian guidelines. For example, cautionary rules concerning accomplice, children and rape victim testimony are no longer mandatory rules but advisory guidelines giving the trier-of-fact a discretion in the evaluation and weight to be attached to such evidence. In England the rules governing confession admissibility have also moved away from a rigid highly technical common law test of involuntariness to a statutory (Sec 76 PACE) and more realistic assessment based on reliability.⁵¹ The South African Hearsay rule has also been statutorily and substantially redefined. A reconstruction which applies a flexible and ultimately utilitarian approach to the question of hearsay admissibility.⁵² Similar fact evidence has also been flexibly re-interpreted and this type of evidence is admissible once a logical nexus has been established between the evidentiary fact and a fact-in-issue. The English Criminal Justice and Public Order Act 1994 which allows adverse inferences from silence in certain circumstances is also unashamedly utilitarian in purpose and design.⁵³ The modern intention is to remake the law

⁵⁰ Ibid *R.J.E.* at 335.

⁵¹ See *infra* chapter 8.

⁵² Sec 3, Law of Evidence Amendment Act 1988. The English hearsay rule has also been largely discarded in civil cases in favour of a flexibly structured approach. Civil Evidence Act 1968, see also the Criminal Justice Act 1987, part II.

⁵³ See *infra* chapter 9.

of evidence by abolishing, where possible, excessively technical rules and to redraft other necessary rules. It is within this reforming context that the silence principle should be subject to a process of re-evaluation. Within a modern utilitarian framework of evidence, a silence principle should be regarded as merely another rule subject to the same relevancy test as all other evidentiary rules. Inferences flowing from silence are then no more than items of circumstantial evidence.

Bentham's antagonism towards exclusionary rules allowed him to devote considerable space in his work to the disposing of specific justifications (pretences as he called them) supporting the so-called right to silence.⁵⁴ Today only the argument from harm (*the old woman's reasoning*) and the argument from equity (*the fox hunter's reasoning*) carry the most persuasive force. According to the *old woman's reasoning*, the accused should be protected like an old woman from the effect of psychologically damaging self-incrimination. The argument that the state should be prevented from questioning the accused because a special kind of immoral and psychological harm is done to the individual through the compelled use of his self-incriminatory evidence is dismissed by Bentham. Punishment by detention is equally harmful to the accused, but does not attract the same weight of protection.⁵⁵ If the accused deserves protection from the cruelty of compelled self-incriminatory testimony, why then is he obliged to suffer the severe cruelty of incarceration?⁵⁶ It is also mistaken to assume that it is more cruel to be condemned by one's own admissions than by the evidence of an intimate third party. Zuckerman gives the following example: "Is it more cruel to force a woman to testify against herself and less cruel to force her to testify against her child?"⁵⁷ Surely it is illogical to provide a legal right of silence to the woman in the first situation, but to refuse it to her in the second? Furthermore, the right to silence protects only against oral communicative self-incriminatory testimony, it does not protect against physical self-incriminatory evidence (fingerprints, blood samples, etc). It is absurd to suggest that it is more cruel to admit self-incriminatory oral testimony but less cruel to allow equally incriminatory physical evidence.⁵⁸ "Tis hard upon a man to be obliged to incriminate

⁵⁴ Bentham's criticism of the silence principle is not an isolated argument. Bentham's reforming vision is meant to apply to the entire criminal justice system.

⁵⁵ The accused is faced with the dilemma of telling the truth (and being convicted) or committing perjury (in order to escape conviction). Why should this present a dilemma, after all, it logically only applies to the guilty accused and not to the innocent accused.

⁵⁶ Thomas "The So-Called Right To Silence" (14) *New Zealand Uni. L. Rev* (1991) 308-309. Menlowe *ibid* note 42 at 296-299.

⁵⁷ Zuckerman "The Right Against Self-Incrimination, An Obstacle To The Supervision Of Interrogation" (102) *L.Q.R.* (1986) 63.

⁵⁸ In England *R v Apicella* (1986) 82 Cr App R 295 (CA) rejected the defence that a sample of body fluid used in evidence against a rape accused amounted to an oral confession. Adverse inferences may be drawn from the failure to give consent to the taking of an intimate sample Sec 62 (10) PACE (1984).

himself”,⁵⁹ is therefore illogical sentimentality. Giving such sentimentality any credibility would deprive the court of relevant evidence, undermine truth/utility and benefit the guilty at the expense of the innocent.⁶⁰

Once relevant and reliable evidence is withheld from the trier-of-fact the search for truth in a fair trial is made more difficult. Bentham is therefore critical of any rationale based on the idea of defensive trial fairness – *the fox hunter’s reasoning*. It is unfair, so the reasoning goes, to compel the accused, hindered by a lack of resources, to testify against himself. Confronted by the full power and resources of the state the accused is perceived to be at an unfair disadvantage. The right to silence redresses the balance, making the trial more fair in the sense that the state and the accused are now evenly matched. Bentham would argue that fairness in this naive sense is only appropriate in a sporting event. This kind of naiveté is based on a gentleman’s agreement that the fox should be given a fair chance to run before being hunted down and therefore the accused should also be given a sporting chance during his trial before being convicted. Fairness in a sporting event cannot be logically compared to fairness in a criminal trial.⁶¹ Why should an artificial balance be manufactured between the defence and the prosecution? Apart from human rights rhetoric, there is no logical justification for not directing the full resources of the state against the prevention of crime and the conviction of criminals.⁶² Utilitarian fairness is totally different from sporting fairness. A fair trial in the utilitarian sense ensures that the end result of the trial is an accurate and truthful one. Fairness means that the accused should only be convicted if the evidence proves his guilt beyond a reasonable doubt. One of the modern and popular justifications for a right to silence indirectly echoes the foxhunter’s reasoning. A fair trial requires a strong presumption of innocence which in turn, is supported by a strong right to silence. By weakening or abolishing silence, the presumption of innocence is undermined and the trial

⁵⁹ “The suffering is that which is inflicted by the punishment itself. In that alone consists the real affliction. As to the supposed addition – a mere metaphorical quantity – except in the mind of the rhetorician, it has no existence”, Bentham *R.J.E.* VII 422, 452, 469.

⁶⁰ There are two possible exceptions to this reasoning : (a) the innocent accused who wishes to protect a third party – although why the accused should be protected from embarrassing disclosures, when the ordinary witness is not, appears to be somewhat illogical; (b) where the accused is a bad witness against himself – but here it matters very little even if a right to silence is awarded, once the prosecution has made out a *prima facie* case, the bad witness is in no worse a position if he defends himself badly than he would be if he had a right to silence and could refuse to defend himself at all. Menlowe *ibid* note 42 at 298-299.

⁶¹ Another argument against the link between silence and a fair trial is that it does not compare apples to apples. Logically the accused should be compensated by giving him the same resources as those available to the state. An advantage for the state should be compensated by a like advantage to the accused. Like should balance like. Since a right to silence is not available to the state, it cannot be a fair like compensation for the accused.

⁶² The inquisitorial-civil system of Europe which concentrates the full state resource against the accused has a totally different concept of fairness. See *Infra* chapter 11.

becomes much less fair.⁶³ To the utilitarian this kind of reasoning confuses the real meaning of a fair trial. The utilitarian conception of fairness is a far stronger guarantee for a presumption of innocence. The presumption of innocence once given a utilitarian justification does not require the support of a right to silence. The presumption of innocence is strengthened because once rectitude of decision is properly applied, the outcome should be the fair conviction of the guilty and the release of the innocent.

Bentham does not write directly about the adjunct to the right to silence, namely, the witness privilege against self-incrimination. Nevertheless, allowing for such an exclusionary rule would be inconsistent with this general theory which requires all evidence to be admitted except when collateral ends predominate. Accordingly, a witness who refuses to give self-incriminatory evidence may be charged with contempt. Suppose the witness is forced to give incriminating evidence and is duly convicted on the sole basis of his self-incrimination, would this not serve to undermine the presumption of innocence? Rule-utilitarianism argues that a "privilege" is the wrong solution.⁶⁴ The better approach is to abolish the "privilege" and to substitute a rule of immunity. Immunity prevents the witness's self-incriminatory testimony from being used against him in a subsequent trial, but at least the evidence is receivable against the accused.⁶⁵ In practice an immunity rule (which allows the use of evidence in some situations) is less costly than the more technical privilege (which denies the use of evidence in all situations) and is more consistent with utility.

The crucial importance of utilitarian theory is that it offers a practical and rational methodology by which the influence of a silence principle may be ameliorated or removed entirely without distorting key elements of the accusatorial procedure. Within utilitarian parameters the prosecution is obliged to establish a *prima facie*⁶⁶ case on the commencement of the trial. This process is recognized in all the Anglo-American jurisdictions by allowing for discharge of the accused at the close of the State's case if the burden is not met.⁶⁷ The evidence led by the state must be such that a reasonable person

⁶³ For example in Sec 35(3)(h) of the South African Constitution a fair trial is defined in terms of a presumption of innocence and a right to silence. See also *S v Zuma* 1995 (2) SA 642 (C.C).

⁶⁴ Zuckerman *ibid* note 57 "concludes that the privilege is not an effective protection as it creates a harmful conflict with the more important procedural protections and with society's need for crime control.

⁶⁵ See *infra* chapter 10 (English view) and chapter 7 (American view).

⁶⁶ *Murray v D.P.P* (1994) 1 WLR (H.L) : Lord Murray (at 3) gives the meaning of a *prima facie* case as "consisting of evidence [direct or circumstantial] which [combined with legitimate inferences based upon it] could lead a properly directed jury [or judge] to be satisfied beyond reasonable doubt that each of the essential elements of the offence has been proved".

⁶⁷ The South African Criminal Procedure Act, sec 174, *S v Shuping and others* 1983 (2) SA 119 (B) 120H, 121A. *S v Mpetha and others* 1983 (4) SA 262 (C). Similar provisions apply in English, USA, Australian, Scottish, Canadian and New Zealand law.

would find in favour of the state before the defence is called upon to assume the evidentiary burden in rebuttal. According to utilitarian procedural theory, a weak circumstantial case intentionally built up by rigorous cross-examination will not suffice to establish the *prima facie* standard required of the prosecution. Something more is required by way of sufficient evidence.⁶⁸ The absence of a right to silence therefore does not serve to advantage the prosecution by taking away from its burden or by adding to the accused's burden.

Alternatively in a trial system which does possess a right to silence, utilitarian theory ameliorates the influence of such a right by allowing an adverse inference to be drawn from the accused's silence. The inference to be drawn depends largely on the strength of the prosecutorial case and amounts only to additional circumstantial evidence against the accused. It is unnecessary to accept Bentham's view that an adverse inference from silence must always amount to an inference of guilt. What inferences are properly to be drawn from the accused's silence depends upon the circumstances and is a question of logic. If there is no *prima facie* case to answer then no proper or logical inferences can be reasonably drawn from the accused's silence. On the other hand, if the evidence taken as a whole calls for an explanation and no such explanation is forthcoming, an inference of guilt may be drawn as a matter of common sense.⁶⁹ The utilitarian process inspires confidence in the criminal justice system because it allows suspects to be convicted on the basis of sufficient evidence. A system which lacks artificial exclusionary rules and allows adverse inferences to be drawn from the accused's silence inevitably strengthens the public belief in its efficiency and legitimacy. The presumption of innocence, a safeguard of truth within the adversarial system, is also strengthened by utilitarian application. The presumption of innocence in the utilitarian sense amounts to a claim that the prosecution must establish a *prima facie* case in order to initiate the criminal process. The obligation to produce sufficient evidence renders it highly probable that the court is getting to the truth. A utilitarian process which removes all obstacles barring the path to legal truth can only serve to strengthen the presumption of innocence.

⁶⁸ According to utilitarian theory, the best reason for confidence in a criminal system is the societal belief that the accused is being convicted on the basis of sufficient evidence. Sufficient evidence gives a better probability of accuracy of outcome and leads directly to verifiable legal truth.

⁶⁹ In the common law tradition an adverse inference may be drawn from a failure to testify but cannot by itself prove guilt. See *infra* chapter 8 (Commonwealth position) and chapter 11 (S.A. position). England statutorily allows adverse inferences from silence in certain circumstances. South Africa with its constitutional entrenchment of silence, is moving away from the English and Commonwealth tradition towards the American position as illustrated by *Miranda v Arizona* and *Griffin v California* *infra* chapter 11.

3.4 Philosophical Dispositions

Two mainstream philosophical explanations of the silence principle within the criminal process and the evidentiary rules which regulate it may now be deduced. A general utilitarian theory which emphasizes rectitude and subjects the criminal process to a strict analysis based on accuracy of outcome. The Benthamite direct act – utilitarian theory of the nineteenth century has been superseded by a modern open and indirect rule-utilitarianism centred on the principle of rectitude but one also acknowledging that some kinds of evidentiary rules are necessary to safeguard against wrongful convictions. Modern utilitarianism recognizes that some collateral costs are inevitable in order to protect the innocent. Certain types of evidentiary rules are necessary even at the cost of increasing the risk of guilty acquittals. Nonetheless, the security of society, the confidence society has in the criminal process and the aggregate net increase in society's welfare should never be compromised. Utilitarian theory is perhaps best suited to explaining the silence principle (its relevancy or irrelevancy) because utilitarianism is an analytic model based on interpreting consequences. The criminal process and the procedural rules which drive that process is also entirely about consequences. Utilitarianism has the ability to analyse these consequences and to provide rational explanations from which practical and workable propositions about the criminal process may be derived. On the other hand, a human rights theory proposes certain protective legal rights which are unalienably attached to the human being⁷⁰ (the silence principle is a primary example of such a right). Although there are numerous variations of the human rights doctrine, the common thread is as follows. The idea that a natural higher law exists which should be elevated above positive law and that respect for human rights is a prerequisite for justice. The view of the state authority as the greatest potential danger to human rights. A human rights doctrine disregards rectitude/accuracy of outcome and concentrates exclusively on the criminal procedural relationship between the individual and the state. The human interest is absolute and the state interest is subordinate to the exclusivity of human needs. Probative evidence may be excluded from the trial process in order to serve more valuable social and human needs independent of rectitude. The right to silence is therefore a higher human interest which takes precedence over mere evidentiary and other procedural rules of the criminal process. Silence as a human interest deserves elevation to a constitutional right despite the inhibitory

⁷⁰ Henkin *The Age Of Rights* New York (1990) 4-5; "In sum, the idea of human rights is that the individual counts, dependent on his or her part in the common good. Autonomy and liberty must be respected and the individual's basic economic-social needs realized as a matter of entitlement, not of grace or discretion". See also Donnelly "Human Rights, Individual Rights and Collective Rights" in J Berting et al, *Human Rights In A Pluralistic World*, Wesport (1990). Howard *Human Rights In Search For Community* Boulder (1995).

consequential effect it has on the criminal process. The definition of silence in the language of human rights is certainly stirring and sentimental. The main problem with a human rights doctrine is that apart from its high sounding terminology, there is no rational basis on which to build a logical conceptual picture or a justification of silence.⁷¹ The idea that human rights is somehow the minimum condition for human existence may also lead to a moral distortion. According to Gordon⁷² a right-based theory may be dangerous because it invokes ethical principles that it claims are universal and absolute. "At the same time because it implicitly asserts the most extreme moral claim possible, it is not concerned merely with wrong acts but rather with the distinction between absolute righteousness and absolute wrongness". It may distort morality by providing a "justification for inflicting suffering in much the same way that claims of righteousness have justified the bloodiest acts of holy wars".⁷³ The so-called right to silence also invokes a similar sentiment. It triggers an emotional defence and draws an absolute battle line but provides no moral or rational justification for its elevated status.

In the continuing debate about the silence principle four specific schools of thought may be identified. On the one extreme, *act-utilitarian abolitionists* would banish the silence principle entirely without replacing it with other safeguards except those procedural rules already inherent within the criminal process. The older pure form of utilitarianism would deny to the suspect or the accused any form of a silent right at all. The modern and diluted *rule-utilitarian reductionist* version would sweep away all excessively technical, artificial and exclusionary rules but allow certain protective evidentiary guidelines consistent with utility and the accuracy of outcome. Perhaps allowing for a limited pre-trial rule as a safeguard during the police custodial interrogation. The erosion and limitation of the silence principle in many Anglo-American jurisdictions is a response to, and a systematic accommodation with, this diluted utilitarian vision. One of the flexible views adopted by modern utilitarians is that a silence principle may have a limited place in evidentiary law. It does not deserve abolition but neither does it deserve elevation into a constitutional right. A middle ground is preferable in which silence counts as a mere item of circumstantial evidence subject to rectitude of decision. The same probative value should be attached to an inference from silence as would be attached to any other circumstantial item of evidence.

⁷¹ Howard *ibid* at 12-13 defines human rights as "nothing more than what human beings proclaim they ought to be. They are universal in the sense that they ought to be universal". This definition typically illustrates the empty rhetoric of a right-based theory especially in respect to the silence principle. What is meant by the idea "ought to be" and "ought to be universal". These high sounding words say nothing about the rational justification for a right to silence.

⁷² Gordon "The Concept Of Human Rights : The History And Meaning Of Its Politicization" *Brooklyn. J. of Int. L.* (1998) 691.

⁷³ Gordon *ibid* at 699, 790.

Substitution abolitionists straddle the centre and argue for the abolition of silence in exchange for the substitution of other procedural safeguards. Other procedural methods of protection are available which do not carry the cost associated with the silence principle and the potential loss of reliable evidence. A good illustration is in the context of commercial fraud where the silence principle constitutes an expensive obstacle to the tracing of misappropriated assets.⁷⁴ Provided that all the defendant's legitimate interests are protected only the guilty would seek to profit from a pre-trial and trial right to silence. Legitimate substitute protections include tape and video recordings of police interrogations, limited pre-trial detention periods, access to compulsory competent legal advice during interrogation and at trial. Zuckerman⁷⁵ suggests a criminal trial process regulated by the direct search for truth, (a utilitarian concept), including safeguards against wrongful conviction, false confessions and a minimum standard of procedural fairness covering both the suspect and the accused.⁷⁶ On the other extreme lie the two libertarian schools. The *symbolic libertarian*⁷⁷ would retain the right to silence not so much for its intrinsic value, but more for its symbolic significance. The right to silence is a keystone protection, a cultural mindset entrenched within the accusatorial system which prevents the state from loosening the constraints imposed upon police investigations. It is the symbolic banner behind which libertarians may rally in order to prevent the state from unleashing its full power. The right to silence is the symbolic expression of the presumption of innocence motivating adequate protections for the accused at trial. *Personality*⁷⁸ and *Instrumental retentionists*⁷⁹ view the right to silence as an integral component of the accusatorial trial system. An effective right to silence coupled with a strong presumption of innocence guarantees procedural and substantive fairness at trial.⁸⁰ Human right advocates regard the right to silence as a critical protection of personal autonomy, privacy and dignity which liberates the individual from the imposition of improper physical and psychological cruel choices. *Instrumental protectionism* suggests that the abolition of the

⁷⁴ Lord Templeman's commentary in *A.T and T. Istel v Tully* (1993) AC 45, 53.

⁷⁵ Zuckerman *The Principles Of Criminal Procedure* Clarendon Press, Oxford (1989), chapter 4.

⁷⁶ The introduction of the *Police and Criminal Evidence Act 1984* has greatly increased the English suspect's safeguards rendering the right to silence unnecessary. Prior to PACE, the protection offered to the suspect was limited. The voluntary test for confession admissibility was subject to a wide range of highly technical exceptions and distinctions. Breaches of the weak judges rules rarely resulted in the exclusion of testimony, hence the need for a silence principle. However, post PACE courts have interpreted the statutory requirements of confession admissibility strictly and the code of practice rules have strengthened the suspects safeguards making the silence principle redundant.

⁷⁷ Galligan "The Right To Silence Reconsidered" *C.L.P.* (1988) "The [silence principle] is simply part of the [Ango-American] culture, it provides important symbols about how the individual person stands within the culture and about how authority is constituted".

⁷⁸ See *infra* chapter 4 p. 112-129.

⁷⁹ See *infra* chapter 4 p. 134-151.

⁸⁰ The wording of sec 35(3)h of the South African Constitution (1996) is a fair example of the libertarian philosophy which links the idea of a fair trial with the principle of silence and the presumption of innocence.

right to silence would shift the burden of proof incrementally towards the criminal defendant. Excising the right to silence undermines the presumption of innocence and alters the basic fabric of the accusatorial system by introducing new inquisitorial elements.⁸¹ Remove silence and a catastrophic domino effect results which jeopardizes the protection of the innocent from unjust convictions, encourages fishing expeditions by the state and heightens the coercive interrogatory pressure on the suspect thereby increasing the risk of false confessions. It would also precipitate a decline in policing standards as the police begin to concentrate resources on the suspect rather than searching for independent sources of evidence.

The silence principle is treated as self-obvious and rarely in need of justification. Advocates of the right to silence regard it as sacrosanct. Criticism of the right arouses a barrage of emotional defences often approaching near religious adulation.⁸² Yet in terms of utility, a protection against self-incrimination excludes the best kind of evidence increasing the risk of vexation, delay, expense and misdecision. Such an exclusion needs to be justified. It is not self-evident. At the end of the day an exclusionary rule, if it is to be elevated to the ranks of a constitutional right, must contain the inherent and essential criteria of transparent morality and rationality. It is insufficient to qualify a constitutional right with generous praise which cannot be translated into logically consistent applications of a clearly understood purpose. When a legal rule fails to satisfy the test of rationality, it must be revised or abandoned in favour of other principles which better suit legal needs. The silence principle whether in the guise of a normative procedural or substantive right possesses none of these essential criteria. *A mandatory exclusionary rule which cannot be substantiated by reason or morality serves only to obfuscate the process by which legal truth is derived without offering any tangible benefit in return.* In the following chapters the confusion surrounding the so-called

⁸¹ Easton *The Case For The Right To Silence* Avebury (1996) 109, states, "The privilege is built into the edifice of the adversarial system. If the right to silence were lost, this would shift the trial system from an adversarial one to an inquisitorial one". "If drawing adverse inferences from silence were simply grafted on to the existing adversarial system, we would be left with the worst aspects of each system". The problem with Easton's reasoning (a) is that she assumes an automatic shift in burdens – which is not necessarily true; (b) she also assumes a shift towards the inquisitorial system – she is perhaps unaware that the adversarial system already contains a number of inquisitorial elements, just as the inquisitorial process contains a number of accusatorial elements – See Goldstein "Reflections On Two Models" (26) *Stanford L.J.* (1974) 1018.

⁸² Howard *ibid* note 70, at 13, refers to human rights as being religiously justified. A number of authors have sought to find a justification for the silence principle in religious history. Horowitz *ibid* note 34 at 142, speaks of the silence principle as grounded on cardinal principles of Judeo-Christian religious law. Lamm "The Fifth Amendment And Its Equivalent In Jewish Law" (17) *Decalogue. J.* (1967) 1, 12. Rosenberg and Rosenberg "In The Beginning : The Talmudic Rules Against Self-Incrimination", (63) *New York Un. L. Rev* (1988) 955. See also Douglas J's reference to Jewish religious law in *Garrity v New Jersey* 385 U.S 493, n5, (1967) and Warren C.J's similar reference in *Miranda v Arizona* 384 U.S 436, 458, n27 (1966). By contrast, see Mazabow "The Origin Of The Privilege Against Self-Incrimination : Jewish Law?" *S.A.L.J.* (1987) 710.

right to silence in all the major Anglo-American jurisdictions will be highlighted. The inability of the Anglo-American legal establishment to provide a consistent rational and logical basis for the silence principle has led to much distortion and confusion. A bewildering web of conflicting legal opinions, procedural confusions, and incoherent court decisions at all hierarchical levels have been created over the past 200 years which appear to dangle in the air without proper jurisprudential support. It is important that all legal rules are anchored on rational criteria. Especially those rules which have achieved constitutional status. A constitutional right has the power to intrude across the broad spectrum of the law. It must be susceptible to logical analysis otherwise it becomes inflexible and difficult to negotiate. A constitutional rule which lacks a rational justification has the potential to distort the criminal process because it is subject only to sentimentality and not to reason. The association of legal rules with a deontological conceptualization of morality and legality simply leads to confusion. It is a recurring theme of this thesis that only utilitarianism can coherently explain the existence and source of rights, and provide a rational system for prioritizing rights when they are in conflict. The fundamental difference between a deontological silence principle and a utilitarian silence principle is that a deontological silence rule elevated into a constitutional right becomes inflexible and applies with a high degree of absoluteness,⁸³ whereas a utilitarian silence rule is derivative, relative and subject to a purposeful balancing of interests. A utilitarian rule is easier to negotiate into a stable, balanced relationship between the state and the individual interest.

⁸³ The inflexibility of a constitutional right is illustrated by Black J's opinion in *Grunewald v United States* 353 U.S 391, 425-426 (1975), "I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them".

CHAPTER 4

JUSTIFYING THE SILENCE PRINCIPLE

4.1 MODELS OF SILENCE

Herbert Packer describes the Anglo-American justice system as a tension between procedure and substance in the enforcement of criminal law.¹ The crime control and due process models are defining normative models of criminal procedure which describe the dynamism of the criminal process from arrest to conviction.² The *crime control* model emphasizes the interests of society in suppressing criminal conduct. Demanding that the criminal process be efficient and productive in the screening of the innocent from the guilty.³ Managerial efficiency and a smooth administrative processing is preferred over judicial fact-finding.⁴ The *crime control* model is best described in utilitarian terminology as an efficiency in the criminal process which maximizes the net society welfare. Crime control requires the abolition or limitation of all unnecessary exclusionary and protective rules (including an artificial silence principle) which impede the conviction of the guilty. It views the silence principle as an unjustified obstruction to the efficient investigation and prosecution of criminals. The *due process* model is opposite. Although it stresses reliable fact finding, due process favours the reduction of possible error by a properly constituted judicial processing.⁵ The *due process* model is prepared to sacrifice a degree of efficiency in the interest of minimizing error. Drawing its inspiration from a human rights doctrine, it emphasizes human value over and above official managerial power. Procedural exclusionary rules and protective devices such as the silence principle are essential in minimizing the possibility of wrongful convictions. Due process is an appeal to the principle of legality and human value. In essence the *crime control* model resembles an assembly line process while its polar opposite, *due process*, requires that the criminal proceeding be structured

¹ Packer "Two Models Of The Criminal Process" (113) *Un. Penn. L. Rev.* (1964) 1-68.

² Goldstein "Reflections On Two Models, Inquisitorial Themes In American Criminal Procedure" (26) *Stanford L. Rev.* (1974) 1015-1016. Damaska "Evidentiary Barriers To Convictions" (121) *Un Penn. L. Rev.* (1973) 574-577. By contrast see Griffiths "Ideology And Criminal Procedure" (79) *Yale L. J.* (1970) 359, who suggests that Packer's models are two manifestations of the same ideological view of a narrow accusatorial type criminal justice system. Griffith would consolidate the Crime Control and Due Process models into a single "Battle" model contrasted by an alternative "Family" model. The "Family" model is founded on a highly individualized approach to criminal punishment based equally upon the needs of the convicted criminal and society. Although an interesting intellectual argument, Griffith's "Family" model bears no resemblance to any accusatorial system in the world. It may bear a general approximation to some foreign non-accusatorial systems.

³ Packer *ibid* at 10-12, 24-25, 31-38, 35-40.

⁴ Packer *ibid* at 10-12.

⁵ Packer *ibid* at 13-20.

as an obstacle course.⁶ The *crime control* model is fundamentally an affirmative model.⁷ Its justification is utilitarian and its validating authority is usually a legislative process. In terms of the control model restrictions placed on the silence principle are usually statutory ones. For example, sec 35-38 of the English Criminal Justice and Public Order Act 1944.⁸ The *due process* model is negative because it places limitations on official power by emphasizing human rights.⁹ Its validation requires an appeal to supra-legislative law, usually constitutional law. For example, the right to silence is constitutionally entrenched in sec 35 of the South African Constitution (1996) and the fifth amendment in the American Constitution. The modern root of the controversy over the silence principle may therefore be seen as a dynamic tension between the societal interest in convicting the greatest number of criminals in the most efficient manner possible and the need to protect human value within a humanized criminal process.

Two strands of human rights arguments may be discerned within the due process model. **Personality rationales** seek to justify and explain the privacy and personal autonomy aspects of a right to silence.¹⁰ Compelled self-incrimination is an unacceptable infringement of personality because it imposes psychologically cruel choices.¹¹ It invades privacy¹² and infringes human dignity by inhibiting respect for the inviolability of the human personality.¹³ **Instrumental rationales** purport to justify the right to silence as a procedural device which furthers the essential humanizing goals of the accusatorial system.¹⁴ Silence prevents the compulsion of involuntary testimony, removes the temptation to employ investigatory short cuts and encourages witnesses to appear and testify. Silence strengthens the presumption of innocence, and guarantees the burden of proof placed on the accused, thereby ensuring a fair trial process. Abolish the foundational right to silence and the entire edifice of the accusatorial system begins

⁶ Packer *ibid* at 13.

⁷ Packer *ibid* at 22.

⁸ See *infra* chapter 9. See also the Singapore Act chapter 11.

⁹ Packer *ibid* at 22.

¹⁰ The English perspective is in Galligan "The Right To Silence Reconsidered" *C.L.P.* (1988) 69, but see the refutation in Robertson "The Right To Silence Ill-considered" *Vict. Un. Wellington. L. Rev* (1991) 139.

¹¹ The American perspective : Bonaventure "An Alternative To The Constitutional Privilege" (49) *Brooklyn. L. Rev.* (1982) 31, 53-56. Greenawalt "Silence As A Moral And Constitutional Right" (23) *Wm and Mary. L. Rev* (1981) 15, Sunderland "Self-Incrimination And The Constitutional Privilege" *Wake Forest L. Rev* (1979) 171, 179-80. Louisell "Criminal Discovery And Self-Incrimination : Roger Trantor Confronts The Dilemma" (53) *Cal. L. Rev* (1965) 89, 95. Meltzer "Required Records, The McCarran Act And The Privilege" (18) *Un. Ch. L. R* (1951) 687, 692-93. Also Wigmore *Evidence*, Sec 2251, McNaughton Ed (1961).

¹² Aranella "Schmerber And The Privilege Against Self-Incrimination" (20) *Am. Crim. L. Rev* (1982) 31, 41-42. Gerstein, "Privacy And Self-Incrimination" (80) *Ethics* (1970) 87 and "Punishment And Self-Incrimination" 16 *Am. J. Juris* (1971) 84. Menza "Witness Privilege, Unconstitutional, Unfair, Unconscionable" (9) *Seton. Hall. Cons. L. J.* (1999) 505, 524-29. McKay "Self-Incrimination And The New Privacy" *Sup. Cr. Rev* (1967) 193, 230. Ratner "Consequences Of Exercising The Privilege Against Self-Incrimination" (24) *Un. Ch. L. Rev* (1957) 472, 488-89.

¹³ *Murphy v Waterfront Commission* 378 U.S 52, 55 (1964).

¹⁴ McKay *ibid* note 12 at 209.

to crumble.¹⁵ The libertarian English common law justification is expressed by Murphy J in *Pyneboard (Pty) Ltd v Trade Practice Commission*¹⁶ :

"The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigation. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society's acceptance of the inviolability of human personality".

The libertarian American justification is encapsulated by Goldberg J in *Murphy v Waterfront Commission*.¹⁷ The privilege against self-incrimination reflects many of our fundamental values and most noble aspirations. Its principal justifications rest on the following :

- "a) *Our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt* (a personality argument – but see Bentham's old woman reasoning);
- b) *Our preference for an accusatorial rather than an inquisitorial system of criminal justice* (an instrumental argument – but also a conclusionary statement which offers no reason on how the conclusion is reached);
- c) *Our fear that self-incriminating statements will be elicited by inhumane treatment and abuses* (a personality argument – in need of empirical verification);
- d) *Our sense of fair play which dictates a "fair state – individual balance"* (an instrumental argument closely related to (b) – but see Bentham's foxhunting reasoning);
- e) *Our 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* (a personality argument – based on the idea of individual moral autonomy);
- f) *Our distrust of self-deprecatory statements* (a personality argument closely related to (c));
- g) *Our realization that the privilege while sometimes a shelter for the guilty, is often a protection for the innocent* (an instrumental argument – empirically unverifiable)".

¹⁵ For the English perspective, Dennis "Instrumental Protection, Human Rights Or Fundamental Necessity" (54) *Cam. L.J.* (1995) 342-76. Easton *The Right To Silence* Avesbury (1991) ch 6. Greer "The Right To Silence : A Review Of The Current Debate" (53) *M.L.R.* (1990) 709. Zuckerman "Trial By Unfair Means" *Crim. L. Rev* (1989) 855-856 and "The Right Against Self-Incrimination, An Obstacle To The Supervision Of Interrogation" (102) *L.Q.R.* (1986) 43, 63. McConville "Silence In Court" *N.L.J.* (1987) 1169. Dennis "Reconstructing The Law Of Criminal Evidence" *C.L.P.* (1989) 21. Williams "The Tactics Of Silence" (137) *N.L.J.* (1987) 1107.

¹⁶ (1983) 152 *C.L.R.* 328, 346.

¹⁷ 378 U.S 52, 55 (1964).

4.2 PERSONALITY RATIONALES

The difficulty in developing a moral foundation for the silence principle is compounded by an inability to formulate logical and coherent rationales. A number of endeavours have been made. Proponents of the personality rationales seek to justify the silence principle by clothing it in the rhetorical cloak of human dignity and individuality. Sec 10 and sec 14 of the South African Constitution (1996) entrench the right to human dignity and privacy respectively. Could the protection of these facets of personality serve as a sufficient rational justification for the existence of a fundamental right to silence.¹⁸ Personality based theories operate on the assumption that the individual much like the state has sovereign existence. A personality doctrine draws its rationalization from John Locke's theory of government as a contractual relationship between the individual and the state. The sovereign individual must not yield to the state the power to compel evidence. The state and the citizen are equals, neither may exert undue influence over the other. The state in particular has no right to compel the sovereign individual to surrender or impair the right to self-defence. From these constitutional guarantees, two defensive arguments may be deduced. The concept of *cruelty* justifies the silence principle by holding compelled self-incrimination to be inherently cruel.¹⁹ The concepts of *privacy* and *autonomy* give validity to the silence principle because state compulsion improperly infringes the personal space surrounding each individual.²⁰ Opposite to these two standard theories is the notion based on *self-protective perjury*. An alternative normative theory which explains and validates the silence principle in terms of the criminal law concept of *situational excuse*.²¹ The fundamental objection to compelled self-incrimination underlying the personality theories is that state compulsion treats the individual as a mere "thing" for the impersonal extraction of evidence. Silence is the exercise of an affirmative right which, according to Kantian principles, justifies excluding the state from the mind and the soul.

¹⁸ The right to dignity occupies a central place in the South African Constitution and is mentioned in sec 4, sec 7(1) and sec 10. *S v Makwanyane* 1995 (6) BCLR 665 (C.C) 1995 (3) SA 391 (C.C) para 144 describes the right to dignity and the right to life as the most important human rights. Dignity is at the heart of the right not to be tortured or to be punished in a cruel, inhuman or degrading way (at para 111). It is the central human right from which all other rights flow. See the seminal work Dolinko "Is There A Rationale For The Privilege Against Self-Incrimination" (33) *U.C.L.A. L. Rev* (1986) 1063-1148, many of the distinctions drawn in this chapter are based on Dolinko's seminal work. Griswold *The Fifth Amendment Today* (1955) 7, "we do not make even the hardened criminal sign his own death warrant, or dig his own grave ... We have through history developed a considerable feeling for the dignity and intrinsic importance of the individual. Even the evil man is a human being". See also *Environmental Protection Authority v Caltex Refining Co Pty Ltd* (1993) 118 ALR 392, 404-405 per Mason C.J.

¹⁹ Goldberg J in *Murphy v Waterfront Commission*, *ibid* note 17, see argument (a). *Brown v Walker* 161 U.S 591 (1896). Note, cruelty is of a psychological and not of a physical nature. While the development of a silence principle is the result of a reaction against torture, no western theorist today would suggest the prevention of physical torture as a sufficient reason for the modern principle.

²⁰ Goldberg J in *Murphy v Waterfront Commission* per argument (e).

²¹ Stuntz "Self-Incrimination And Excuse" (86) *Columbia. L. Rev* (1988) 1227.

4.2.1 The Cruelty Defence

The cruelty defence rests on the notion that it is inhumanely cruel to compel a suspect to give evidence out of his own mouth thereby subjecting himself to a criminal sanction. The cruelty argument can be traced back in time to the medieval Thomist criticism of the popular but theologically flimsy morality of oath swearing²² which infringed the natural God-given duty of preserving the soul. It also served as an important jurisprudential defence to ecclesiastical inquisition during the 17th century,²³ only to be dismissed by Bentham in the 19th century as the old woman's reasoning.²⁴ Louisell restates the modern doctrine as "it is essentially and inherently cruel to make a man an instrument of his own condemnation".²⁵ Greenawalt argues that the moral restraints which prevent self-accusation between private individuals should also apply to the relationship between the state and the citizen. He invokes the cruelty argument as a justification that the state should honour the individual's moral entitlement to remain silent.²⁶ The cruelty defence has some direct emotional appeal but sentimentality by itself is an insufficient justification. The argument loses much of its moral persuasiveness because its underlying premise presumes a guilty accused. The innocent accused would have nothing to lose by answering questions truthfully. No cruelty is involved in requiring the innocent person to speak out. Only the guilty accused would be faced by the cruel choice. It is also difficult to argue that the interests of the guilty in evading criminal punishment is worthy of protection or of a priority greater than that of the victim.²⁷ No rational explanation is advanced as to why compelled self-incrimination is unacceptably cruel. Proponents appeal to intuition rather than reason. According to Ellis, "We cannot demonstrate why it is cruel. We feel that it is cruel, beyond this we cannot go".²⁸ Is it possible to see beyond this kind of human rights emotional language and to isolate a logical basis for a right to silence?

²²In a medieval culture saturated by strongly held religious beliefs, compelled self-incrimination presented the accused with a genuine moral dilemma, the choice between earthly punishment or divine retribution. St Thomas Aquinas in his *Summa Theologica* argued that silence in the face of an oath was justified in the absence of accusation or express evidence of guilt. See Silving "The Oath Part I" (68) *Yale L.J* (1951) 1329, 1343-50, 1382.

²³Cartwright, Lilburne and other Puritan leaders attacked the *ex officio* procedure on the basis of the cruelty implicit in an oath swearing.

²⁴See *supra* Bentham chapter 3 p.101.

²⁵Louisell "Criminal Discovery And Self-Incrimination" (53) *Cal. L. Rev* (1965) 89, 95.

²⁶Greenawalt "Silence And Moral And Constitutional Right" (23) *Wm and Mary L. Rev* (1981) 34-38. See *supra* chapter 3 p.92. The contrary view suggests that Greenawalt's reasoning leads to a moral paradox. On the one hand the silence principle is justified on the basis of its moral dignity. On the other hand, Greenawalt's idea of morality is contrary to normal social practice. In family relationships an individual's non-disclosure is morally unacceptable.

²⁷Dennis "Instrumental Protection, Human Rights Or Functional Necessity" (54) *Cam. L. J.* (1995) 359.

²⁸Ellis "A Comment On The Testimonial Privilege Of The Fifth Amendment" (55) *Iowa L. Rev* (1970) 838-39, "Are we then to reject the cruel trilemma argument [because] we cannot rationally explain it irrational feelings play a valid role in justifying the privilege".

Perhaps compelled self-incrimination is cruel because it imposes an unacceptably *cruel trilemma*. The accused is faced with an impossibly difficult psychological choice. The accused must either produce evidence of a crime (and thereby subject himself to a criminal penalty) or remain silent (and expose himself to contempt) or lie (and subject himself to perjury).²⁹ The trilemma argument has garnered support from the United States Supreme Court as well as American academics.³⁰ Unfortunately the trilemma argument cannot be logically substantiated. The question well worth asking is how much weight should be attached to the accused's possible experience of cruelty given the more substantial degradation wrought upon the accused and society by the commission of the offence in the first place. Given that worse consequences in the form of prison sentences and incarceration are regularly inflicted upon those who commit crimes, the idea of a trilemma as disproportionately cruel is logically absurd. There is no other kind of cruelty inherent in self-incrimination except the possibility of punishment. Unless the argument is made that all criminal penalties (punishment) are inherently cruel (and therefore socially unacceptable), there can logically be no cruelty unique to self-incrimination.³¹ Furthermore as Bentham remarked some 150 years ago, "it is mistaken to think it more cruel to be condemned by one's own admission than by the evidence of some third party".³² The cruelty imposed upon the accused when condemned, say by a loved one, cannot be less cruel than if he were to condemn himself. Persons are often compelled to give testimony in any number of trial situations which force upon them so-called cruel choices. Mayers states, "requiring a mother to testify against her own son on trial for his life is surely a greater cruelty than requiring an ordinary witness to disclose some minor penal infraction".³³ Ellis criticizes this type of example, "are we really to be persuaded to abandon the privilege on the ground that in some [exceptional] cases, its absence might be less cruel".³⁴ Nonetheless, it is possible to foresee a situation in which the witness may well be forced to disclose incriminatory evidence against a

²⁹ Although the trilemma argument traditionally applies in the trial proceeding, a variation applies at the pre-trial stage. The suspect must choose between lying (and risk being caught in an incriminating contradiction), remaining silent and facing (the possibility of continued detention) and (a possible adverse inference of guilt). Dennis *ibid* note 27 at 358-359.

³⁰ See in particular *Murphy v Waterfront Commission* *ibid* note 17 and *Pennsylvania v Muniz* 110 SCt, 2638, 2648 (1990). Western and Mandell "To Talk, To Balk, To Lie, The Emerging Fifth Amendment Doctrine Of The Preferred Response" (19) *Am. Crim. L. Rev* (1983) 521. Greenawalt *ibid* note 26 at 259. O'Brien "The Fifth Amendment" (54) *Notre Dame Lawyer* (1978) 26, 43. McNaughton "The Privilege Against Self-Incrimination" (51) *J. Crim. L.C and P.S* (1960) 154, who refers to the choice as one amongst the three horns of the triceratops, harmful disclosure – contempt – perjury.

³¹ Bentham *supra* chapter 3, *R.J.E.* book IX, ch III (Bowring Ed 1843) sec 3, 231 "Whatever hardship there is in a man being punished, that, and no more, is there in his being made to criminate himself". Although punishment entails a degree of cruelty, society considers it justifiable. Why should a line be drawn between impermissible and permissible cruelty in such a way that makes it dependent on the existence of a silence principle?

³² Bentham *ibid* at 236.

³³ Mayers *Shall We Amend The Fifth Amendment* (1959) 168-169.

³⁴ Ellis *ibid* note 28 at 837, "It is questionable whether the mother faces a real trilemma. How many judges would place a mother in such a position?"

parent, sibling, spouse, child, even an employee or employer. After all compulsory appearance at trial and compulsory disclosure on the witness stand is an everyday occurrence. A lack of careful analysis and a ready willingness to adopt emotional rights-based ideas is the reason why South African courts unhesitatingly impose harsh choices upon the innocent witness but (absurdly) find it unacceptably cruel to impose a similar trilemma choice upon the accused.³⁵

An alternative hypothesis to the cruelty argument is the *hypocrisy* argument which holds self-incrimination to be cruel because it is contrary to the basic human instinct of self-preservation. To compel incriminatory evidence is to establish an impossible ethical standard which almost all human beings are incapable of meeting. To cite Sunderland, "a [legal] philosophy must be based on the passion most common to human beings, the desire for self-preservation".³⁶ Evidence gained in violation of this fundamental characteristic of human nature is intrinsically untrustworthy.³⁷ It cannot be hypocritical to punish the accused for his failure to render self-incriminatory evidence when every other human being would do the same if placed in a similar situation. Unfortunately the conclusion to be drawn from the hypocrisy argument is one of moral dilution rather than moral reinforcement. Why should it be moral to conceal or deny the truth, even in the face of self-preservation?³⁸ It is not a sufficient excuse to hold that society has no moral right to punish the accused for doing what every other member of society would do in the place of the accused.

Notwithstanding the charge of hypocrisy and self-preservation, South African law does sometimes punish the wrongdoer for behaving in a way that all other persons would behave. For example, the law will punish the accused who destroys relevance evidence, who suborns perjury or who uses bribery/threats to cover up his criminality. In particular, South African criminal law does not exonerate the accused who culpably brings about the conditions of his own

³⁵ For example, the rape victim faces the cruel choice of testifying and having her sexual history cross-examined or remaining silent and allowing the rapist to go free. The South African witness in organized crime trials faces an inherently cruel choice in deciding to testify or not. Refuse to testify and face the sanction of the state. Testify and face the real danger of being murdered.

³⁶ Sunderland "Self-Incrimination And Constitutional Principle" (15) *Wake Forest. L. Rev* (1979) 179-80. Meltzer "Required Records, The McCarran Act And The Privilege Against Self-Incrimination" (18) *Un. Ch. L. Rev* (1951) 687, 701.

³⁷ Kenealy "Fifth Amendment Morals" *Cath. Law* (1957) 340, 342.

³⁸ After all the wrongdoer possesses the ability to tell the truth, he simply does not want to exercise that ability because it is a difficult and unpleasant choice. While it is a *difficult* moral choice, it is not an *impossible* one. Why should the wrongdoer be held to a lower standard rather than a higher one? Lord Coleridge in *R v Dudley and Stephens* (1884) 114 Q.B.D. 273, "We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation [or self-preservation] to be an excuse, though he might himself have yielded to it" (at 288). Even if the choice is an impossible one, English law holds that the wrongdoer is not entitled to the defense of self-preservation. No person has the choice of taking the life of an innocent simply in order to preserve his own. South African law was the same (*R v Werner* 1947 (2) SA 828 (A)) until the seminal case (*R v Goliath* 1972 (3) SA 1 (A)).

excuse and the need for his self-preservation. It is not *contra bonos mores* for the law to punish a drug addict for the possession of illegal narcotics or an alcoholic for public drunkenness,³⁹ even though most persons would have broken the same laws were they similarly addicted. Necessity (a defence against the substantive element of unlawfulness) will not negate a criminally wrongful act on the part of the accused who has voluntarily joined a criminal gang and is subsequently coerced into committing a crime. Especially when he foresees that he may be placed in a situation of emergency which calls for his self-preservation.⁴⁰ The addict, alcoholic and reluctant thief are punishable because of a freely willed wrongful act. By placing themselves voluntarily in the predicament, they have become culpable even though most human beings would have acted similarly. Therefore it cannot be cruelly hypocritical to punish the accused for withholding self-incriminatory evidence because the accused, by his own voluntary and blameworthy act, places himself in the circumstance requiring self-incrimination.

The final submission favouring a cruelty defence brushes aside the idea of an unacceptably difficult choice inherent in the *trilemma* and *hypocrisy* arguments. According to the *value* argument the crucial factor in making compelled self-incrimination unnaturally cruel is that the accused is forced to inflict harm on some personal value most dearly cherished, namely honour, reputation, happiness or simply to himself. Compelled self-incrimination is a *unique* kind of cruelty, far more intensely degrading than the nominal cruelty suggested by the *trilemma* and *hypocrisy* arguments. Dolinko illustrates the argument, "a sadist who forces a mother to choose which of her children will be killed, inflicts not only an extra quantum of suffering upon the mother, but also a unique form of cruelty. Would not this aggravated form of cruelty be present, although to a lesser degree, if an accused was forced to furnish evidence exposing himself to a criminal sanction. If it is cruel to inflict harm on a person, is it not aggravatingly cruel to compel a person to inflict harm on themselves?"⁴¹ As a consequence, enforced self-incrimination resulting in loss of honour or reputation would inflict an unnaturally intense suffering and unhappiness upon the accused. Compelling the individual to inflict harm upon himself aggravates the cruelty of simply inflicting it on him without his participation. Is it reasonable to

³⁹ It is not an infringement of the fifth amendment to punish the alcoholic for public intoxication or the heroin addict for possession, *Powell v Texas* 392 U.S 514 (1968), *United States v Moore* 486 F.2d 1139 (D.C.Cir. 1964).

⁴⁰ *S v Bradbury* 1967 (1) SA 387 (A), "a man who voluntarily and deliberately becomes a member of a criminal gang with the knowledge of its disciplinary code of vengeance cannot rely on compulsion for a defence". (Holmes J.A at 404) and Burchell, Milton *Principles Of Criminal Law* (1997) 164-165. See the contrary view in *R v Mohamed* 1938 AD 30, *S v Pretorius* 1975 (2) SA 85 (SWA) and Snyman, *Criminal Law* (1995) 111-112 who considers Holmes J.A's decision in *Bradbury* to be an application of the discarded *versari* doctrine. American law (model Penal Code Sec 302 (2)) is the same as the English law. The duress (necessity) defence does not apply where the defendant places himself in a position in which he is likely to be subject to coercion.

⁴¹ Dolinko *ibid* note 18 at 1102.

label compelled self-incrimination as uniquely and aggravatingly cruel? How is the word aggravating to be defined? A legal rule can only be termed aggravating when it exceeds the parameters imposed by the moral and legal convictions of society.⁴² The process of convicting and punishing the accused is in itself not inherently cruel. Forcing the accused to participate in this process by compelling self-incrimination is logically defensible.⁴³ If punishment is a desired goal of our legal system despite the loss of honour or happiness which it inflicts, then compelled self-incrimination which promotes the desired end cannot be aggravatingly cruel. Moreover, the purpose of compelling self-incrimination is not to inflict harm upon the accused, but to arrive expeditiously at the truth. The innocent accused who is compelled to tell the truth cannot be said to have suffered an aggravating loss of honour. Likewise, any harm suffered by the guilty is justifiable because the determination of truth and the punishment of wrongdoing can never be considered aggravatingly cruel.⁴⁴

The cruelty argument in all three of its manifestations is logically flawed. The theory is unable to explain why self-incrimination in the way it is applied should be defined as uniquely or inherently cruel. The use of a human rights terminology may evoke sentimentality, but words by themselves are insufficient unless supported by well reasoned arguments. The protection against cruelty as a justification for the silence principle falls by the wayside. The cruelty argument is also fatally deficient in that it ignores the necessity for a truth-finding function. Cruelty arguments make no accommodation for the inclusion of a truth-finding mechanism which is at least as important as the presumed hardship of self-incrimination.

4.2.1 The Privacy Defence

Having noted the illogicality of a cruelty justification for the silence principle, advocates have instead turned to the various defences embraced by the concept of privacy. Superficially the privacy defence as the underpinning rationale for a silence principle appears ideally attractive. The nature of a silence principle is intimate and personal. It proscribes state intrusion by

⁴² To define self-incriminatory behaviour as cruel implies that it is excessive, unjustified or unreasonable behaviour in the sense that the individual does not deserve to be treated in this manner as judged against the *boni mores* of society.

⁴³ In a well ordered society punishment is a desirable sanction. Although there is nothing intrinsically desirable about the imposition of suffering, the punishment of some wrongdoers, benefits and adds to the nett welfare of all society. In terms of utility, punishment is a desirable end goal and should not be regarded as inherently cruel when it benefits society as a whole.

⁴⁴ If the personal qualities of honour, reputation, etc., are inherently important to the wrongdoer, why expose them to risk in the first place? Within the South African organized and professional criminal community, punishment, incarceration and prison terms are viewed as a badge of honour rather than as a cruel degradation of personal values.

respecting a private inner sanctum of feeling and thought.⁴⁵ According to Douglas J in *Griswold v Connecticut*⁴⁶ “the [fifth amendment] enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment”. Privacy prevents personal debasement according to *United States v Wade*⁴⁷ per Fortas J. The silence principle operates as a safeguard of the individual’s substantive right to privacy, “a right to a private enclave where the individual may lead a private life”.⁴⁸ The law should secure for each individual a right to determine how and to what extent his thoughts, sentiments and emotions may be communicated to others.⁴⁹ American academics have generally endorsed privacy protection as the mainstay of the silence principle. Ratner⁵⁰ refers to privacy as a constitutional facet of the silence principle. McKay,⁵¹ drawing upon the interrelationship between the fourth and the fifth amendments, suggests that a fifth amendment privacy right would offer indirect support to the fourth amendment (searches and seizures) and would be a logical corollary of the first amendment. In American law the right to privacy has acquired a much wider constitutional dimension than in the English common law. American privacy is described as the most comprehensive and the most valued by civilized men.⁵² On the other hand, English common law does not recognize a specific legal right to privacy. In *Malone v Metropolitan Police Commissioner*⁵³ and in *R v Khan*⁵⁴ (*Sultan*), the English courts refused to accept that evidence obtained by a breach of privacy was automatically inadmissible as a matter of law. According to the common law, it would be absurd

⁴⁵ In sec 14 of the South African Constitution, privacy consists of both a general right and a specific prohibition against unlawful searches and seizures. By contrast, the United States separates general privacy (14th amendment) from searches and seizures (4th amendment). The German constitution also separates personality protection (art 2(1)) from privacy of telecommunications (art 10). A right to privacy protects (i) the right to be left alone in respect to body, place and intimate relationship, (ii) to allow for the development of personality, self-realisation, (iii) to allow for control over private information about self. Fried “Privacy” (89) *Yale L.J.* (1980) 435-36, privacy is “our control over the quantity and quality of information about us in the mind of others”. Gravison “Privilege And The Limits Of The Law” (89) *Yale L.J.* (1980) 428-29 regards privacy as “a limitation of another’s access to the individual” Dolinko *ibid* note 18 at 1107-1112.

⁴⁶ 381 U.S 479, 484 (1965). *Tehan v United States* 382 U.S 406, 416 (1966) per Stewart J “the privilege stands as a protection for the right of each individual to be let alone”.

⁴⁷ 388 U.S 218, 261 (1967).

⁴⁸ *United States v Grunewald* 351 U.S 391, 446 (1957) (Frank J). See also Goldberg J’s argument *ibid* note 17 at (e). *Couch v United States* 409 U.S 327, 328 (1973) and *Miranda v Arizona* 384 U.S 460, 463 (1966) refer to the right of each individual to a private enclave.

⁴⁹ Warner and Brandeis “The Right To Privacy” (4) *Harv. L. Rev* (1890) 193, 198 “privacy is an inviolate aspect of personality”. A definition common to many American cases, see Goldberg J’s argument (e) *ibid* note 17.

⁵⁰ “The Consequence Of Exercising The Privilege Against Self-Incrimination” (24) *Un. Ch. L. Rev* (1957) 488-489.

⁵¹ “Self-Incrimination And The New Privacy” *Sup. Cr. Rev* (1967) 193.

⁵² The American right to privacy is one of the integral parts of “liberty” protected by a number of due process clauses. Privacy is defined and protected directly in the fourth amendment and indirectly in the first, third, eighth and ninth amendments. In all these amendments it is defined relatively and subject to a balance of interest test. *Tribe American Constitutional Law 2nd Ed* (1988) 1308-09.

⁵³ (1979) 2 W.L.R 700.

⁵⁴ (1996) 3 ALL E.R 289. Privacy as a justification for a silence principle has only been accepted judicially by Murphy J in *Pyneboard Pty Ltd v Trade Practices Commission* *ibid* note 16.

to advance privacy (which is not a recognized rule of law) as a justification for the silence principle (which is a recognized rule of law). The right to privacy has recently been incorporated into English Statutory law through the Human Rights Act (1998). Galligan suggests that privacy is important because it justifies personal identity and autonomy, "without a zone of privacy personality cannot exist".⁵⁵ A silence principle based on privacy is a necessary protection against government "big brother" monitoring of thoughts and desires. A silence principle safeguards the individual's mental and emotional state. Thoughts, knowledge, beliefs and ideas must be defended against outside intrusion, for the revelation of these intimacies would have devastating social consequences.

The development of a traditional privacy argument is traceable throughout the 17th and 18th centuries. Although never specifically recognized as a legal rule, privacy did serve to frustrate "belief control" laws⁵⁶ and state sponsored "belief probes". Within the narrow historical context of a protection against inquisitorial religious and political belief probes the privacy rationale did serve as a reasonable justification for a silence principle.⁵⁷ Outside of this narrow instance it has no logical application. To justify a silence principle based on privacy as applied in the day-to-day criminal trial process, the privacy advocate must overcome four objections. First, the silence principle protects only against *personal self-incrimination* and not against third party disclosure. The wrongdoer is privileged from providing evidence but not from its production by others. Why should only one special type of privacy infringement be ruled out? Second, the silence principle offers no protection against compelled disclosure of *non-incriminating evidence*. Why does the silence principle rooted as it is in a concern for personal privacy prevent only an extremely narrow range of privacy intrusions? Third, the silence principle is much too rigid. It has the ring of absoluteness about it and makes no allowance for *interest-balancing*. Why should the compulsion of private testimony be regarded as improper especially when the state interest overrides the individual's privacy interest? Fourth, an act of *immunity* is logically inconsistent with a privacy centred silence principle. It is impossible to reconcile the privacy aspect of a silence principle against the idea of immunity which requires a surrender of privacy. The primary problem confronted by a privacy argument is similar to the problem which confronts and defeats

⁵⁵ Galligan, "The Right To Silence Reconsidered" *C.L.P.* (1988) 69, 88. McKenna "Police Interrogation" (120) *N.L.J.* (1970) 666-7, "to oblige the suspect to disclose his secret thoughts and acts is to diminish his freedom".

⁵⁶ McNaughton, "The Privilege Against Self-Incrimination, Constitutional Affection, etc" (51) *J. Crim. L. Criminology. Pol. Sci* (1960) 145-146.

⁵⁷ Ellis *ibid* note 28 at 843, "the privacy argument loses force when not applied to religious and political belief probes, and is mere rhetoric in the context of the ordinary criminal trial". See also Amar and Lettow "Fifth Amendment Principles : The Self-Incrimination Clause" (93) *Mich. L. Rev* (1995) 891, "if the privacy rationale was logical, it would require equal application to civil proceedings". Stuntz "Self-Incrimination And Excuse" (88) *Columb. L. Rev* (1988) 1234 "If the privilege is designed to protect privacy its

the cruelty argument. The privacy theorist must explain why the privacy interest protected by a silence principle is uniquely and inherently important. In other words, why is the privacy infringement caused by compelled self-incrimination qualitatively different from the loss of privacy occasioned by a third party disclosure of the same information.

Why only personal self-incrimination? : Privacy theorists appeal to the sacrosanct notion of mental privacy. The compulsion of self-incriminatory information inflicts a privacy loss greater and different from the loss inflicted by third party disclosure. The silence principle protects the central mental core of the individual's mind by shutting out compelled disclosure of personal thoughts, beliefs and feelings. Compelled self-incrimination is objectionable because it erodes the individual's capacity to control state access to private thoughts.⁵⁸ The protection of mental and physical privacy interests is of course an essential priority in all civilized societies, but these rights are relative rather than absolute. In many circumstances, a state induced infringement of mental privacy is lawful. In criminal matters, the court is obliged to infringe the accused's mental privacy in order to establish the requisite *mensrea* necessary for liability.⁵⁹ Criminal liability is established by a judicially controlled inquiry into the psychological aspects of the cognitive (intellectual intuition) and conative (control of will) mental elements. By observation, examination of physical evidence and a questioning of witnesses, the court builds up an indirect image of the accused's mind. The state must also prove intention either in the form of *dolus directus*, *indirectus* or *eventualis* by determining the accused's state of mind at the time of the commission of the unlawful act. The establishment of criminal guilt requires a justifiable intrusion into the individual's sphere of mental privacy. Why then should it be morally objectionable and irrational to obtain the same mental image directly through compelled self-incrimination.⁶⁰ Privacy theorists attempt to neutralize the problem with the following sophism – questioning which forces direct self-incrimination causes intense pain and embarrassment, more so than information obtained indirectly from third party sources. The claim implies an empirical connection between

application would turn on the *nature* of the disclosure and yet fifth amendment law focuses on the *criminal consequences of disclosure*".

⁵⁸ Arenella "Schmerber And The Privilege Against Self-Incrimination" 20 *Am. Crim. L. Rev.* (1982) 41 views mental privacy as the most important value in the support of a "right to silence".

⁵⁹ The essential subjective elements of a crime are : *criminal capacity* (the mental ability to appreciate the wrongfulness of an act and the mental ability to act in accordance with that appreciation) : *intention* (the ability to direct the will at a particular act and to appreciate the wrongfulness of such an act).

⁶⁰ It could be argued : questioning witnesses, examining physical evidence, yields only a second-hand kind of knowledge about a person's mental condition. Compelled self-incrimination is unacceptable because it is a direct first-hand intimate assault on mental privacy. Disclosure of second-hand knowledge being less intimate and indirect is thus more tolerable. This reasoning is based on a *Cartesian* conception of direct knowledge of one's own mind and indirect knowledge of another's mind. The conception contains an artificial distinction which has been shown to be empirically without value – Wittgenstein *Philosophical Investigations* (1987), Philosophy Series, chapter 3. *The Cartesian* mind-body duality is unable to rationally explain why first-hand direct disclosure of information is uniquely different from second-hand indirect disclosure of information acquired by observation and examination.

a privacy infringement and the experience of pain or embarrassment. There is, of course, no such causal nexus, because the individual's privacy may still be infringed without personal knowledge of the infringement, in which case no experience of shame would result.⁶¹

Why not non-incriminating information? The silence principle protects only against the disclosure of *self-incriminatory* information. The silence principle is inoperative when there is no risk of self-incrimination. The individual is obliged to disclose non-incriminating information. Why so narrow a construction? Privacy as a reason for a silence principle requires a much broader interpretation. The disclosure of non-incriminating information is after all as great an invasion of privacy as is the disclosure of incriminating information. Sometimes the disclosure of non-incriminating information may have great damaging consequences. Is compelling a mother to give evidence revealing her son's guilt in a criminal case less private than compelling a motorist to admit to a traffic infraction? If privacy is the bastion of a silence principle, why can a person not rely on it to deny information about sensitive financial affairs to the inland revenue or to withhold names and addresses from the police. The possibility of civil liability does not give the individual a right to silence. Nor does an attorney in disbarment proceedings possess a privilege merely because his answers may lead to disbarment. An illegal immigrant cannot refuse to answer questions about status. If the purpose is to protect privacy, why does the silence principle not protect against the taking of fingerprints, bodily samples and other physical non-testimonial kinds of evidence?⁶² How does a right to privacy justify the silence privilege for documents which have an existence independent of the accused's consciousness? State compulsion of inanimate papers can never be said to be an infringement of mental privacy. Privacy as a justification for a silence principle cannot be logically sustained on the narrow parameters currently defining the silence principle.

Why no interest balancing? The individual right to privacy is not an absolute one. Quite often the privacy interest is balanced against the public interest. Privacy must give way when the state

⁶¹ Criminal infringement of privacy is defined as *crimen iniuria (dignitas)* "the unlawful and intentional violation of the privacy of another". The crime is committed regardless of whether or not the victim is aware of the intrusion, *R v Holiday* 1927 C.P.D. 395, *R v Daniel* 1938 T.P.D 312. In other words, *crimen iniuria* is committed the moment mental privacy is infringed and does not depend on the victim's knowledge of the intrusion.

⁶² Arenella *ibid* note 12 at 41, "the *Schmerber* decision distinguishes between the state's open access to the accused's body and the accused's right to limit access to his mind. The attempt to limit state-inspired intrusions of mental privacy underlie the silence principle's historical development". See *infra* chapter 7 and chapter 10.

interest is stronger.⁶³ If the concept of privacy underlines the silence principle, then compelled self-incrimination would be forbidden only if it was unreasonable.

Hence, self-incrimination should be allowed where the state can identify a strong specific enough interest in disclosure. Certainly, the American fourth amendment protection of individual privacy applies interest balancing by allowing reasonable searches and seizures. It reflects a balance of privacy and enforcement interests.⁶⁴ The South African right to privacy (sec 14 of the Constitution 1996) has always been interpreted to include an interest balancing in both its common law and constitutional guises.⁶⁵ By contrast, the silence principle is normally never interpreted to include interest balancing. The American fifth amendment privilege of silence does not bend under the weight of competing interests.⁶⁶ The U.S Supreme Court has ruled "interest balancing is not only unnecessary, it is impossible".⁶⁷ In the pure fifth amendment context of the criminal trial interest balancing has no place. The accused's right not to testify is rigid and absolute.⁶⁸ Only in the context of pre-trial silence⁶⁹ and in certain peripheral situations⁷⁰ does the Supreme Court allow for a reasonable balance of interest analysis.⁷¹ By contrast, the English courts have often applied a flexible balance of interest analysis to the common law silence principle. Recent statutory amendments to the English silence principle reflect the growing importance of placing societal needs above the individual's privacy interest.⁷² In jurisdictions which have elevated the silence principle into a constitutional right, the tendency is to treat the right as relative in theory, but absolute in practice. The accused's right not to

⁶³ *Roe v Wade* 410 U.S. 113, 153 (1973) "some kind of state regulation of the right to silence is appropriate". *Doyle v State Bar* 32 Cal 3d P2d (1982) "a client's privacy interest is not absolute but must be balanced against the public interest".

⁶⁴ The U.S. Supreme Court has held "reasonableness" to require balancing the interest of intrusion into fourth amendment rights against government interests promoted by the intrusion. See *United States v Villamonte-Marquez* 462 U.S. 588 (1983) and also *Tennessee v Garner* 105 SCt 1699 (1985) at 1700 which considers "the balancing of interests as the key principle of fourth amendment rights".

⁶⁵ *Berstein v Bester* NO 1996 (2) SA 751 (C.C). A legitimate expectation of privacy is an objectively reasonable one, "the contents of the right [to privacy] is crystallized by mutual limitation. Its scope is already delimited by the rights of the community as a whole" (at para 69, 79). A reasonable infringement of privacy involves a two step inquiry – Is there a factual infringement of privacy and may the factual infringement be justified in terms of the limitation clause. See also *Mistry v Interim Medical and Dental Council of S.A.* 1998 (4) SA 1127 (CC).

⁶⁶ 'Privacy' protected by the fourth amendment is a broad right, but individual privacy does not connote granite security against the well founded suspicions of the king's minions. By contrast, though narrow, the fifth amendment tolerates no penetration by judicial order on any ground – Uviller "Evidence from the Mind of the Criminal Suspect" 87 *Columbia L. Rev* (1981) 1145.

⁶⁷ *Fisher v United States* 425 U.S. 400 (1976) at 403, "the fifth amendment strictures, unlike the fourth, are not removed by showing reasonableness". *New Jersey v Portash* 440 U.S. 450, 459 (1979).

⁶⁸ *Griffin v California*, chapter 6 p.217-226.

⁶⁹ *Miranda v Arizona*, chapter 5 p.163-193. *Jenkins v Anderson* chapter 6 p.212-213.

⁷⁰ *California v Byers*, chapter 5 p.163-193 and chapter 7 p.253.

⁷¹ As will be further illustrated in this thesis, the American courts frequently pay lip service to an absolute right to silence, while tacitly acknowledging the need for a comprehensive balance of interest test.

⁷² See *infra* chapter 9 p.320-321 in particular the Criminal Justice and Public Order Act 1994.

testify will in practice always outweigh the state interest. The irrational presumption continues to persist that when a heinous crime is committed the accused is morally justified in withholding self-incriminatory evidence because he prefers to remain in a private enclave, an enclave from which the state is *prima facie* sure he departed to do violence to another.

What about immunity? Despite recognition of personal privacy as one of the stated purposes of the fifth amendment, the U.S. Supreme Court has nevertheless held in *Brown v Walker*⁷³ and *Ullmann v United States*⁷⁴ that a grant of immunity renders the individual's privacy interest irrelevant. The silence principle does not prevent state compulsion of personal information as long as the compelled information is not used as evidence against the individual in a subsequent criminal prosecution. In *Ferreira v Levin NO*,⁷⁵ the South African Constitutional Court has held that incriminatory evidence compelled from an examinee in terms of a statutory inquiry may not be used in a subsequent criminal proceeding. The South African right against self-incrimination is nothing more than a use immunity.⁷⁶ A privacy based silence principle cannot be reconciled with an immunity doctrine which allows for the surrender of privacy.⁷⁷ Privacy is a substantive interest of which the nature of the disclosure is important and not the consequence. Privacy is still infringed (substantively) by compelling testimony even though no evidentiary use (consequentially) is made of the immunized testimony.⁷⁸ A silence principle which gives way in the face of immunity cannot be reconciled with a privacy principle which is logically incompatible with an immunity doctrine.

4.2.2 Autonomy and Controlled Privacy

Protagonists of the privacy rationale have failed to explain away the major objections to a silence principle justified on the ground of privacy. Few have really attempted to do so. The exception is Gerstein,⁷⁹ a strong adherent of privacy whose work has been labeled the fullest philosophical defence of the privilege against self-incrimination.⁸⁰ Gerstein bases his reasoning on the

⁷³ 161 U.S 591, 598 (1896).

⁷⁴ 350 U.S 422, 439 (1956).

⁷⁵ 1996 (1) SA 984 (C.C).

⁷⁶ De Waal et al *The Bill Of Rights Handbook* 2nd Ed Juta (1999) 581. See also *Davis v Tip NO* 1996 (6) BCLR 807 (W) and *Sea Point Computer Bureau v McLoughlin NO* 1996 (8) BCLR 1071 (W).

⁷⁷ For a detailed analysis of immunity doctrine, see chapter 7 and chapter 10.

⁷⁸ Stuntz "Self-Incrimination and Excuse" (88) *Columbia L. Rev* (1988) 1234 "[Privacy] application would turn on the nature of the disclosure the government wished to acquire and yet settled fifth amendment law focuses on the criminal consequences of disclosure".

⁷⁹ Gerstein "The Demise of Boyd : Self-Incrimination and Private Papers in the Burger Court" 27 *UCLA. L. Rev* (1979) 343 and "Punishment and Self-Incrimination" 16 *Am. J. Juris* (1971) 84.

⁸⁰ Greenawalt *ibid* note 26 at 21.

foundation of Fried's control theory of privacy.⁸¹ Privacy in this context means control over information about individual existence. Privacy has intrinsic value because it is integral to each individual human being. Self-incrimination is wrong because it forces an individual to divulge information of great personal significance. The weapon of self-incrimination weakens individual control and infringes individual autonomy in a morally reprehensible fashion. Gerstein says, "I am thinking about what is likely to be involved in a confession, the admission of wrongdoing, the self-incrimination, the revelation of remorse. I would argue that a man ought to have absolute control over the making of such revelations".⁸² Gerstein's argument thus revolves around two assumptions. First, compelled self-incrimination degrades those subjected to it by interfering with autonomous moral development. Second, compelled self-incrimination denies to the individual exclusive control of such a development. A forced public confession of self-condemnation retards the individual's ability to take genuine responsibility for his wrongful action. Compelled confessions are thus axiomatically immoral. Gerstein's theory successfully refutes at least three of the four major objections leveled against the privacy defence. The silence privilege protects only self-incrimination and not third party disclosure because it entails the unique revelation of personal remorse. Similarly, only incriminatory evidence and not non-incriminatory evidence is protected because self-incrimination is a human reaction and thus, by its very nature, a peculiarly immoral revelation of remorse and self-condemnation. Interest balancing in these core areas is absolutely prohibited even in beneficial situations, because a person is rightfully entitled to absolute control over all personal revelations. The concept of moral autonomy, in Gerstein's opinion, may be extended to form the template underpinning all the other major justifications of the silence principle. In particular, the cruelty of compelled self-incrimination is thought of as founded on a concern for autonomy. Enforced incrimination is cruel because of the unique kind of moral degradation which it inflicts upon the autonomous individual.⁸³ Moral autonomy may also be understood as assisting the silence privilege in maintaining a fair state-individual balance. Autonomy aids in securing an effective fact-finding procedure by forcing the state to establish guilt through its own independent labour. Moral autonomy, the right to defend oneself, and the presumption of innocence are interlinked and intrinsic elements of the adversarial-accusatorial system. These values taken as a coherent

⁸¹ "The privilege against self-incrimination is the affirmation by society of the extreme value of the individual control over personal information", Fried *ibid* note 45 at 437.

⁸² *Fisher v United States* 425 U.S 400 (1976) at 406, "it is wrong to compel the act of self-condemnation because of what it forces us to reveal about ourselves". *Bellis v United States* 417 U.S. 91 (1974) at 96, "the privilege secures for the individual a private enclave where he may lead a private life". See also *Andersen v Maryland* 427 U.S 463 (1976). Confessions require painful self-incrimination of the innermost recesses of the conscience. Such a self-examination is so painful that it must remain under the individual's exclusive control and can never be compelled. Gerstein's notion of enforced self-incrimination is so painful that it must remain under the individual's sole control and can never justifiably be compelled, is curiously enough merely a restatement of Bentham's "old woman's reasoning", see *supra* chapter 3.

⁸³ See *supra* notes 22-44 and accompanying text.

whole, establish the framework within which the accused operates as a morally autonomous agent.⁸⁴

Why should the individual have absolute control over the making of a compelled self-condemnation? Gerstein argues that certain revelations about moral character are uniquely private and the individual should have total control over these revelations in order to enhance moral development. In reasoning so, Gerstein is confronted by the same problem which confronts the cruelty theorist. Why is Gerstein's kind of self-knowledge uniquely private or qualitatively different from other kinds of privacy to which a silence principle does not apply. Gerstein merely states the proposition, self-incrimination is peculiarly private, beyond this bare assertion he does not go.⁸⁵ Self-knowledge may be private, but why it should be peculiarly private, is not susceptible to a rational analysis and this flaw is a major downfall of Gerstein's theory. A number of other problems present themselves. First, on what ground may the existence of an absolute right to autonomy be demonstrated? Gerstein is unable to provide evidence in substantiation of a subjective opinion at odds with objective reality. In practice, few individuals are able to consciously exercise exclusive or absolute control over their own moral development. Throughout his lifetime the human being is moulded and influenced by a barrage of "morality" inducing propaganda attributable to state, church and family. The ubiquitous effect of such brainwashing propaganda is usually far beyond the individual's ability to control. Neither is the individual rightfully entitled to an exclusive control over his moral development. As a social animal, the individual is subject to certain social *mores*. Society places a number of justified constraints on individual moral development. For example, a person may want to experiment with crime because the experience will teach him valuable moral lessons and in the process, enhance his moral development. Society will obviously not allow the personal freedom in which to undertake such socially damaging experimentation. Exclusive control over moral development is not a sacrosanct principle, especially when it causes damage to the community fabric or is exercised at the expense of community social values.

Second, criminal punishment serves an important rehabilitative function apart from its usual retributive effect. Enforced prison rehabilitation which attempts to shape and strengthen moral character cannot be viewed as an improper infringement of the prisoner's freedom of conscience. If the use of punishment to reform criminals is not an impermissible interference in their moral autonomy, neither is the use of compelled self-incrimination. Third, undoubtedly, a majority of criminals will undertake the painful process of autonomous self-examination in order

⁸⁴ Gerstein *ibid* note 79 at 350-1. Also Gerstein "The Self-Incrimination Debate In G. Britain" (27) *Am. J. Comp. L* (1979) 98.

⁸⁵ Gerstein *ibid* note 79 at 91-93.

to personally acknowledge guilt and strengthen moral fibre. In South Africa however, there is a significant minority of hardened insensitive career criminals who do not consider themselves bound by community moral codes and are therefore neither willing nor capable of such an autonomous self-examination. Compelling self-incriminatory evidence from these career criminals would not result in the revelation of remorse or the pain of self-condemnation. Furthermore, in the absence of a silence privilege, the state will not necessarily employ its power to deliberately expose the accused's criminal conscience. The evidence demanded from the accused by the prosecution is a confession of what he has done, not how he feels about it. There is thus no absolute connection between compelled self-incrimination and the expression of remorse. No good reason exists to accept Gerstein's unrealistic premise – enforced self-incrimination always compels self-condemnation and remorse.⁸⁶

Fourth, the central right not to confess, as Gerstein defines the prohibition against self-incrimination, is secured only by his insistence on a broad and general right to silence. Police interrogation would become redundant under so wide a definition. It would be impossible for the interrogator to determine beforehand what kind of questions might result in impermissible confessions. In order to protect the core right not to confess, Gerstein's insistence on a blanket right to silence would have the effect of unrealistically hampering police inquiries.⁸⁷ Finally, Gerstein's hypothesis presumes a false dichotomy. Either the criminal is allowed absolute privacy to determine his own moral development, or he is degraded by compelling a confession. Gerstein fails to take cognizance of a third alternative recently advocated by the English Criminal Justice and Public Order Act 1994 which allows reasonable but limited inferences to be drawn from the accused's silence. If compelling self-incrimination is truly painful, then allowing a silence privilege but drawing an adverse inference from such silence would not constitute an impermissible infringement of moral autonomy nor raise questions of conscience.⁸⁸ Gerstein's theory has a certain visceral appeal. Unfortunately, after careful scrutiny, the argument fails to satisfy the rational senses.

The quintessential privacy rationale strives to establish an area of autonomy, "for each individual free from the government's malignant or benign influence".⁸⁹ The silence privilege enhances

⁸⁶ Gerstein fails to acknowledge a viable alternative use of the silence principle. One which interprets the accused's silence as a damaging item of circumstantial evidence and which does not expose the accused's conscience. Drawing adverse inferences from silence and applying the appropriate probative value to these inferences, depending on the circumstance, does not infringe autonomous moral development.

⁸⁷ Menlowe "Bentham And The Law Of Evidence" *L.Q. Rev.* (1988) 300.

⁸⁸ Hart "Bentham And The Demystification Of The Law" (36) *M. L. Rev.* (1973) 13. Menlowe *ibid* 301.

⁸⁹ Babcock "Fair Play; Evidence Favourable to an Accused" (34) *Stan. L. Rev.* (1982) 1138.

autonomy by protecting the individual's ability to take responsibility for his own deeds.⁹⁰ The essential concept deduced herefrom is a kind of absolute personal autonomy. The South African legal system recognizes personal autonomy by punishing conduct only after the individual has freely chosen to commit a wrongful act.⁹¹ However, the individual-in-society is willing to sacrifice some degree of personal autonomy in order to advance essential community values. In certain circumstances the citizenry is obliged to co-operate with the state. In all social relationships some degree of conformity is required. A summons cannot be ignored nor may a suspect flee the country or suborn perjury. Official documentation must be truthfully filled in on pain of sanctions. No privilege adheres to non-incriminatory information or in respect to civil proceedings. In the interest of communal existence, the individual surrenders a limited degree of personal autonomy, especially in circumstances where the cost outweighs the benefit. It is therefore illogical to insist that the benefit of enforced self-incrimination is always outweighed by the harm the practice inflicts upon personal autonomy. South African statutory provisions directly acknowledge the individual-society balance and the need to compel self-incrimination by carving out pragmatic exceptions to the silence privilege. In *Ferreira v Levin NO*, the Constitutional Court held sec 417 of the Company Act to be an infringement of sec 35 and the right to a fair trial. The court compromised by allowing the compulsion of incriminating evidence during the formal inquiry stage, but immunizing the defendant and preventing the use of such compelled evidence at a subsequent criminal proceeding.⁹² Clearly, efforts to combat corruption, sophisticated white collar crime and complex corporate fraud may be irremediably damaged by the prosecution's inability to obtain direct evidence from the accused, sometimes the only available source of evidence.⁹³ In the United States similar state and federal provisions are to be found. Additionally, corporations are unable to assert the privilege on their own behalf and corporate officers incriminated by company records are likewise denied the privilege.⁹⁴ *Boyd v United States*.⁹⁵ which prevents compulsory process against business records based on fourth and fifth amendment protection has been largely undermined by a spate of judgements which remove the privilege from a wide category of required records.⁹⁶ In England, a large

⁹⁰ Schrock, Welsh and Collins, "Interrogation Rights; Reflections on *Miranda v Arizona*" *Cal. L. Rev* (1978) 49.

⁹¹ All Western systems are based on *after the fact* criminal liability as opposed to the alternative *before the fact* liability which would require unacceptable brainwashing and conditioning.

⁹² 1996 (1) SA 984 (C.C) See *supra* note 75.

⁹³ Since 1990, government statistics have shown a 150% increase in white collar crime.

⁹⁴ *United States v White* 322 U.S 361 (1911) at 364, "the privilege is a personal one applying only to natural persons". See chapter 7 p.229-230.

⁹⁵ 116 U.S 616 (1886). See *infra* chapter 7 p.241.

⁹⁶ *Warden v Hayden* 387 U.S. 294 (1967); *Fisher v United States* 425 U.S. 399 (1976); *Couch v United States* 409 U.S. 327 (1973). See also Saltzburg "The Required Records Doctrine, Its Lessons" (53) *U. Chi. L. Rev* (1986) 7 and Gerstein "Demise of *Boyd*" *ibid* note 79. See *infra* chapter 7 p.247-254.

number of statutory provisions abrogate the privilege. Notably, sec 3(1) of the Theft Act 1968, Sec 9 of the Criminal Damage Act 1971, as well as sec 290, 291 of the Insolvency Act 1984 and sec 434, 436 of the Companies Act 1948.⁹⁷ Unlike the case in North America, the English privilege can be claimed by an entity possessing legal personality.⁹⁸ The wide range of exceptions to the silence privilege suggests that it may not be so fundamental a principle after all.⁹⁹ The human rights rationale in the form of cruelty, privacy or personal autonomy cannot in the final analysis present a sufficiently credible basis for a rational justification of the silence principle. Indeed, all three of these arguments exhibits a common flaw. In the words of Dolinko,¹⁰⁰ "each of these arguments suffers from the central problem of 'overbreath'. Each rests on principles that, if taken seriously, would rule out not merely compelled self-incrimination, but a host of other practices which are not regarded as unacceptable". There is *nothing morally intrinsic enough* in the personality rationales which would logically justify allowing them to trump the retributive and deterrence functions of a well-balanced criminal justice system. To allow these individualistic rationales to do so would be extremely dangerous. For example, police could no longer detain or question suspects if privacy was the overriding concern. The court could no longer hold criminal trials if individual protections trumped the duty to testify. Nevertheless, despite the illogicality of the various individualistic personality rationales, this kind of reasoning presently underlines the European Court of Human Rights' understanding of a silence principle (*Saunders v United Kingdom*).

4.3 SITUATIONAL EXCUSE THEORY

Human rights advocates of the silence principle are unable to confront the basic moral notion that truth not silence is the right choice in the face of an accusation. Instead both Greenawalt and Gerstein, the leading normative advocates of a silence principle, adopt the opposing idea that silence in the face of accusation is the proper moral choice.¹⁰¹ Stuntz recognizing the subjective and ultimately irreconcilable nature of the traditional arguments, has proposed an alternative normative solution based on the substantive criminal law concept of situational excuse.¹⁰² Stuntz argues that the silence principle may be justified by the application of a criminal law excuse principle. Silence may be explained by examining the manner in which self-

⁹⁷ Heydon "The Privilege Against Self-Incrimination" *L.Q. Rev.* (1977) 214. See *Re Paget* (1927) 2 CH 85 for an elaboration of the Insolvency Act. See *R v Sellig* (1991) 4 ALL ER 429 for the Companies Act. Further, also Andrews and Hurst *Criminal Evidence* (1998) 351.

⁹⁸ *Triplex Safety Glass Co Ltd v Lanceqaye Safety Glass Co Ltd* (1937) 2 ALL ER 613.

⁹⁹ *Tapper Cross on Evidence* (1995) 454.

¹⁰⁰ Dolinko *ibid* note 18. For the European perspective on the silence principle, see *Saunders v United Kingdom*, *infra* chapter 10 p.92-93.

¹⁰¹ See *supra* chapter 3 p.92-93, and *supra* p.88-101.

¹⁰² Stuntz "Self-Incrimination And Excuse" (86) *Columbia L. Rev* (1988) 1227-1296.

exculpatory perjury develops in a criminal procedural system in which the silence principle is absent. Excuse theory in such a system is a proper alternative, as it accommodates the idea that while adjudicative truth is paramount, promoting truth is sometimes too much to ask of the average person.¹⁰³ The term excuse covers a number of theoretically distinct ideas.¹⁰⁴ In the sense used by Stuntz, it excuses a provisionally wrongful act by the accused because, in certain circumstances, a person should not be punished for making the wrong choice.¹⁰⁵ The standard rights-based justifications, cruelty, privacy and autonomy suggest that a silence principle is imperative in protecting basic human rights. Excuse theory justifies the silence principle in a completely novel way. In excuse theory silence protects a category of wrongful conduct. Excuse focuses on temptation. Stuntz's notion is to explain a silence principle in circumstances which create a serious temptation to lie and in which excusing perjury is systematically affordable.¹⁰⁶ Absent a silence privilege, the law would have to recognize an excusatory defence based either on duress or necessity. The resulting "privilege to lie" would make innocent defendants worse off. If the jury recognizes that perjury would not be punished, it would then place less faith on the defendant's testimony, including the testimony of innocent defendants. Hence, the justifiable necessity of a silence principle. In particular, those who violate a criminal norm when the law abiding citizen might well have done the same thing are often excused from criminal liability, especially in situations of necessity or duress. Similarly, a witness who chooses perjury when confronted by the unfortunate dilemma between self-incrimination and perjury should not be condemned for making the wrong choice. The defence of necessity thus excuses the wrongfulness of the perjurious act and excludes criminal liability.

Excusing perjury directly however, leads to two undesirable consequences.¹⁰⁷ First, routine court excusal of perjury would strip away the potential cost attached to lying and thus undermine witness credibility. Second, immunizing perjury would significantly increase the amount of false testimony in a trial and erode public confidence in the legitimacy of the criminal justice system. The solution therefore lies in the *indirect* approach of *immunizing silence* rather than perjury itself. A privilege which immunizes silence and reduces the pressure to lie is an elegant solution

¹⁰³ Stuntz *ibid* at 1242 "by grounding the silence principle in substantive criminal law values, excuse theory affirms the silence principle's importance but does so in a way that it incorporates society's moral preference for truth".

¹⁰⁴ Stuntz defines his concept within the terms of American criminal law which is reasonably similar to South African criminal concepts. Three kinds of excuse exist in criminal law (a) insanity excuses mental-criminal capacity, (b) mistake of fact or sometimes of law excuses intention, (c) duress (necessity) excuses a wrongful act made in a difficult pressurized situation.

¹⁰⁵ The problem faced by situational excuse is whether or not to punish the accused for committing a wrongful act under pressure in certain well-defined emergency circumstances.

¹⁰⁶ Stuntz's theory shifts the focus from a standard emphasis on the methods used by the state to obtain self-incriminating evidence to a novel emphasis on temptation as an explanation for the existence of a silence principle

¹⁰⁷ Stuntz *ibid* at 1229.

to the pervasive problem of self-protective perjury. According to Stuntz, the essential philosophical reasoning is, "Anglo-American law has a tradition of acquitting certain categories of offenders, even while acknowledging that their conduct is criminal. The tradition helps explain why as a society we wish people would confess to their crimes but are unwilling to force them to do so".¹⁰⁸ Situation excuse theory is thus an attractive medium through which to view the silence privilege. The excuse argument depends upon the key notion of balancing and cost. Excuse hinges on the balance between the threat to the individual interest and the importance of obeying the law notwithstanding the threat. Necessity excuses a wrongful act because in certain situations, the choice to obey the law is terribly costly.¹⁰⁹ The more costly it is to comply with the law, the more excusable it is to commit a crime. It could be said that the harm inflicted by self-incrimination far outweighs the potential harm which may result from perjury and the accused's decision to lie is excusable. A silence privilege which protects the accused who wishes to avoid self-incrimination and which simultaneously prevents self-protective perjury is thus rationally and morally justifiable.¹¹⁰ The relative cost factor explains why the privilege protects only self-incrimination and not non-incriminating testimonial evidence.¹¹¹ Situational excuse theory would appear to be a perfectly rational justification for a silence privilege and is sufficiently broad enough to apply not only in the courtroom situation, but also during police interrogation.¹¹²

According to Stuntz, the advantages of an excuse based privilege are essentially twofold. One of the greatest problems with a general silence privilege is that it bars relevant evidence and therefore obstructs the legal path of truth, making it so much harder to reach an accurate decision. An excuse based privilege which immunizes silence in a situation where the accused would be tempted to lie should make the trial process function smoothly by ensuring the reliability of admissible testimony. The manageable cost of an excuse based privilege helps explain why the privilege is so widespread in all Western legal systems. The most significant

¹⁰⁸ *ibid* at 1242.

¹⁰⁹ The criminal law concept of duress (necessity) suggests a two step inquiry : (a) the cost to the accused of obeying the law (*a degree of pressure*), (b) the importance to society of resisting that pressure (*a degree of deterrence*). Stuntz *ibid* at 1246-51. In some circumstances the cost of obeying the law for the average person (his self-interest) may be outweighed by the benefit of committing the crime. Excuse as a deterrent device is justifiable because sometimes the individual cannot be deterred by law, at an acceptable cost to society, from acting wrongfully.

¹¹⁰ The two step inquiry is measured against an objective reasonable standard.

¹¹¹ Situational excuse theory proposes that the formal elements of a silence principle, namely *compulsion of incriminatory testimonial* evidence should be viewed as the mirror image of an excuse doctrine which would exist in a criminal system absent a silence principle. Stuntz *ibid* at 1262-1280.

¹¹² Stuntz *ibid* at 1295. Although it can be argued that the application of a silence privilege in the arena of interrogation is based more on deterrence than on excuse, *ibid* at 1264-1272.

advantage of an excuse theory¹¹³ is that it reduces the importance of the so-called "right" to silence. The excuse based privilege is a fairly inexpensive one, a useful tool in avoiding petty injustice. In other words, excusing wrongful conduct by removing the temptation to lie is no more fundamental to a criminal justice system than are other excuses which negate unlawfulness, i.e. private defence, consent, etc. It is therefore inaccurate to suggest, as do the mainstream theories, that silence is a fundamental protection for basic human liberties and dignities. *Reducing the silence privilege to a mere substantive law principle helps to explain why society so readily encroaches upon and restricts the scope of the privilege.*

A number of criticisms may be leveled against situational excuse theory. First, situational excuse as a normative theory suffers from a major conceptual error. Stuntz argues that a legal process which includes a silence principle is much more cost-effective than a legal process which compels testimony and where the accused is likely to regularly perjure himself. In a legal system which compels testimony, the court would be obliged to regularly excuse perjury, thereby undermining witness credibility and increasing the amount of false testimony at trial. Public confidence in such a criminal system would be severely shaken, hence the legitimate need for a silence privilege. Stuntz makes the assumption that absent a silence principle, the court would be forced to recognize and develop a practical excuse methodology based on self-protective perjury. On the contrary, an examination of the substantive criminal law fails to reveal any excuse based methodologies for other forms of criminal self-preservation.¹¹⁴ For example, the criminal law does not condone self-protective bribery, self-protective destruction of evidence or obstruction of justice. There is no reason to assume that absent a silence privilege, the court is likely to develop an excuse based on self-protective perjury. Stuntz also argues that a perjury penalty, by imposing a cost on false testimony, enhances the credibility of the innocent accused who testifies in his own defence. The problem with this argument is that perjury is inherently a rather weak kind of deterrent. The potential penalty of punishment and incarceration far outweighs the perjury penalty. The accused's desire to avoid a possible conviction is a far stronger inducement for giving false exculpatory evidence than the mere possibility of a perjury sanction. Furthermore, a credible excuse argument is dependent on the actual existence of a punishment for perjury. If there is no actual threat of perjury punishment, there is proportionally no need for excuse. In South Africa perjury prosecutions are few and far between. In effect no real threat exists and the value of an excuse rationale is correspondingly reduced. Would the public confidence in a criminal process, absent the silence principle, be diminished by the regular excuse of self-protecting perjury? The ordinary system of civil trials does not suggest such a danger. The civil trial system contains neither a silence principle nor a sanction for

¹¹³ Stuntz *ibid* at 1295.

¹¹⁴ Snyman *Criminal Law* (1995). Burchill and Milton *Principles Of Criminal Law* (1997).

perjury. There are often strong inducements for civil litigants to give false exculpatory testimony, yet public confidence in the civil trial system has not been eroded.

Second, a moral distinction exists between necessity (duress) as a justification and necessity (duress) as an excuse. Necessity is sometimes viewed as justifying the accused's voluntary act by changing a potentially wrongful act into an actual rightful act. The accused is not criminally liable because the potentially wrongful act is justified by the *boni mores* of society. Necessity as an excuse is conceptually different. The excused act remains wrongful. The accused fulfils all the elements of criminal liability but is excused from the consequence of punishment.¹¹⁵ Necessity in the form of a justification is far more moral than necessity in the form of excuse. Stuntz's theory relies on necessity as an excuse of a wrongful act (self-protecting perjury) by a guilty accused. The idea that a guilty accused's wrongful act is excusable undermines the moral foundation of situational excuse theory. It is morally indefensible to excuse lying during trial, especially when the lie serves to compound the lying accused's crime. Ironically, the bringing out into the open of the accused's lies is sometimes useful to the prosecution. False alibis, denials, false explanations can be checked and cross-examined. The experienced prosecutor may manipulate the accused's lies into strong evidence against the accused.

Third, and more importantly, the parameters of the traditional necessity plea is strictly limited and applicable only to situations of extreme immediate peril. Simple self-protective perjury cannot be construed as the kind of grave immediate peril which need give rise to a plea of necessity. The idea of a broad based situational excuse defence encompassing the circumstance of imminent perjury as advocated by Stuntz is arguably an implausible and unrealistic extension of necessity.¹¹⁶ Fourth, a number of American jurists have analyzed the excuse argument in some detail and have found it to be contrary to conventional doctrine. American criminal law does not excuse the individual who voluntarily and culpably brings about the condition of his own excuse, a condition which specifically applies when a person perjures himself in order to avoid criminal liability.¹¹⁷ The South African position in this regard is somewhat ambiguous. South African

¹¹⁵ The conceptual division between necessity (as a justified rightful act) and necessity (as an excusable wrongful act) is an international one. Fletcher *Rethinking Criminal Law* (1978) 511-14, 552-79. The German penal code, sec 34 and sec 35, makes a similar distinction. South African substantive criminal law defines necessity as a justification rather than as an excuse, Snyman *Criminal Law* (1995) 109-111, Burchell and Milton *Principles Of Criminal Law* (1997) 157-158. Although it has been argued that in the context of serious crime (the taking of life), necessity as an excusable unlawful act may be more in line with the modern South African spirit of constitutionalism Paizes (1996) 113 SALJ 237ff.

¹¹⁶ The necessity defence is strictly defined. The defence is applicable only when a legal interest is endangered in an emergency by an imminent or commencing threat, provided that the accused's protective act is not out of proportion to the interest infringed. These parameters are strictly applied and once the accused's act exceeds the parameters it becomes an unlawful act. The courts require a high quantum of evidence before the defence can succeed.

¹¹⁷ See *supra* note 39-40 and accompanying text.

courts normally display an attitude of skepticism towards the defence of necessity. The trend is towards restricting the parameter and sphere of application rather than broadening it. A reluctant High Court of Appeal is therefore unlikely to allow the extension of a plea of necessity in this particular circumstance. Fifth, Stuntz views the modern fifth amendment doctrine as being based on a theory of choice and balancing. The plurality opinion in *California v Byers*¹¹⁸ is cited as authority for this contention. A situational excuse theory which is also defined by interest-balancing is therefore compatible with and serves to explain much of fifth amendment reasoning. Stuntz's understanding of present fifth amendment theory would appear to be incorrect. Interest balancing is impermissible, especially where core violations of the privilege are at issue.¹¹⁹ At best, interest balancing applies in peripheral issues involving government practices aimed at ensuring regulatory efficiency. When the government aim is to secure criminal convictions, interest balancing is absolutely forbidden. Sixth, situational excuse theory will ultimately serve to obscure the valuable distinction between adjective law and substantive law. The law of evidence is already sufficiently bedeviled by substantive law intrusions.¹²⁰ Additional inroads are undesirable. The confusion which may result from the acceptance of an excuse based privilege far outweighs any practical benefit. Nevertheless situational excuse theory, despite its flaws, is illustrative of the idea that a silence principle need not always be explained in terms of a human rights or instrumental protection, nor need it be elevated to the status of a constitutional right. A silence principle is capable of objective definition through the application of ordinary substantive and procedural legal rules. Rationales for a silence principle which seek their meaning amongst legal rules are preferable to justifications which seek their reasoning in other philosophical arenas outside of the law.

4.4 INSTRUMENTAL RATIONALE

4.4.1 Legitimate Instrumental Value

The legal order is designed to promote certain norms which society regards as intrinsic to a functional body politic. Criminal law in particular establishes and regulates the minimal conduct essential to an orderly society. The dual purpose of criminal law is the imposition of criminal penalties for violations of proper conduct and the maintenance of a buffer between state and individual. Consequently, the criminal justice system promotes a number of essential objectives. Primarily there is the need to maximize the probability of only convicting the guilty by minimizing

¹¹⁸ 402 U.S 424, 499 (1971).

¹¹⁹ See *infra* chapter 5 p.159-160 and chapter 7 p.253-254 and 279.

¹²⁰ Other substantive law concepts influencing adjective evidence law include irrebuttable presumptions of law, estoppel, parole evidence rule etc.

the chance of mistaken conviction. An additional procedural goal requires the establishment of mechanisms for individual and personal protection against state exploitation. The criminal process must be linked to controls which prevent it from operating at maximum efficiency because of its potency in subjecting the individual to exploitative and coercive state power.¹²¹ Indeed, this has been an important concern amongst American authorities. In *McNabb v United States*,¹²² Frankfurter J advances the consensual opinion, "the history of liberty has been the history of observance of procedural safeguards". Equally important is the need to ensure public respectability. Any erosion of the moral impact of a criminal sanction decreases the overall effectiveness of the criminal law. The widespread disrespect in certain South African quarters for a white dominated judiciary engenders cynicism, distrust and undermines the legitimacy of the entire law enforcement establishment. For these reasons the South African Constitution contains essential safeguards designed to bolster the moral legitimacy of the present state apparatus and to forestall abuse of the criminal process by governments with totalitarian sympathies.¹²³ The goals served by a legitimate criminal system, it is argued, are sustained and promoted by an effective instrumental silence principle.

One of the normative effects of a silence principle is the instrumental value it has on the maintenance of a proper and fair state-individual balance. As some American commentators have called it, "our preference for an accusatorial rather than an inquisitorial system".¹²⁴ Viewed in this light the silence principle derives its philosophical reasoning from a Hobbes-Lockean concept of interlocking sovereign social and contractual relationships. Silence is not an end in itself, but represents a factor in the basic balance of power and rights which exists between the state and the individual. But if the silence principle is to be explained and justified exclusively in terms of a narrow instrumental value, then it cannot logically be categorized as a constitutional right. An exclusively instrumental explanation reduces the silence principle to a mere procedural rule amongst many other procedural rules. If silence has only instrumental worth, it can at best only be defined as a protection against *self-incrimination* and never as a "right" against *self-*

¹²¹ Hall "Objectives Of Federal Criminal Procedural Revision" 51 *Yale L. J.* (1942) 728 and Schaefer "Federalism And State Criminal Procedure" 70 *Harv. L. Rev.* (1956) 5.

¹²² 318 U.S 332, 347 (1943).

¹²³ This argument is particularly relevant to Southern Africa. Unstable regimes tend to abuse the criminal process in order to strengthen their weak authority. Stable governments in power for a considerable period tend to confuse the distinction between state and government by misusing the criminal process and its organs for narrow party political ends. It is argued that a silence principle is one of a bundle of instrumental devices which inhibit the tendency towards abuse of power. To prevent potential state coercion, the South African Constitution (1996) therefore guarantees certain procedural rights, sec 7 and 8 (rights and applications), sec 12 (freedom and security), sec 19 (political rights), sec 32 (access to information), sec 33 (just administrative action), sec 34 (access to the courts) and sec 35 (a right to silence).

¹²⁴ *Murphy v Waterfront Commission*, *ibid* note 16 per Goldberg J's argument (b) and (d). *Miranda v Arizona* 384 U.S. 436, 480 (1966).

accusation.¹²⁵ A narrow instrumental interpretation of the silence principle implies a limitation in scope and applicability. Silence as a mere instrumental value exists in harmony and does not come into conflict with other procedural rules. Silence as a constitutional value means that all other legal rules must be adapted to accommodate the elevated status of the silence principle. A claim to silence in its instrumental form is never triggered where the personal disclosure is not incriminatory or the individual has been immunized. (For example, immunity grants which do not disturb a state-individual balance are compatible with silence as an instrumental protection. By contrast an immunity grant is incompatible with a silence principle predicated in human rights terminology as a protection of personal privacy/autonomy).¹²⁶ Silence as a mere procedural rule exhibits fewer contradictions than silence as a constitutional right. The value of an instrumental legal rule is usually analysed by examining both its *intrinsic* and *coherent worth*. Intrinsic worth is judged by the unique benefit which the rule confers on the legal system as a whole. The rule must properly protect the interests it was designed for and must also help decide issues in the grey area between the designed rule and other rules. Coherent worth is measured by the overall benefit which the rule brings to all the other rules within the legal system. The rule should at a minimum enhance the functioning of other rules and cogently fill in the gaps which other rules are unable to do. The overall legal merit of a silence principle must therefore be determined by evaluating its intrinsic merit and the coherent benefit it offers to other rules within the accusatorial criminal process. Intrinsic and coherent worth is also indicative of a secondary value. A high degree of intrinsic and coherent worth contributes to the *legitimacy* of the legal rule in the eyes of society. The following analysis will reveal that the silence principle has very little intrinsic worth because it is a relatively weak shield for those interests it is designed to protect. Neither does it coherently add to, or for that matter, detract from other procedural rules within the accusatorial system. As a protection for the accused, it is perceived to be a criminal right rather than a victim's right and an obstacle to crime enforcement. It therefore has a low legitimacy value in the eyes of society.

4.4.2 Protecting the Innocent

"The privilege while sometimes a shelter for the guilty, is more often a protection to the innocent" is a widely cited dictum of Goldberg J. in *Murphy v Waterfront Commission*.¹²⁷ The wrongful

¹²⁵ Friendly *Benchmarks* (1967) 271, "What is important is that on any view the fifth amendment does not forbid the taking of statements from a suspect, it forbids compelling them rather than being a 'right to silence', the right, or better the privilege, is against being compelled to speak. This distinction is not mere semantics, it goes to the very core of the problem".

¹²⁶ See *supra* notes 45-100.

¹²⁷ 378 U.S. 52, 55 (1964) per Goldberg J's argument (g). The problem with the innocence argument is that it amounts to an empirical statement, yet no evidence is advanced to support it. This kind of high sounding rhetoric is extremely common. The silence principle is often described in pretty words devoid of

conviction of the innocent is considered a severe moral harm warranting special measures to prevent its occurrence.¹²⁸ The silence principle is one of the special measures designed to protect the innocent. Not all would agree. Pound condemns the privilege "as a device which serves not the innocent, but rather the evil purposes of criminals and malefactors who are well advised".¹²⁹ McKay states, "it does not add to the clarity of thought to pretend that any substantial portion of those who assert the privilege are innocent of all wrongdoing".¹³⁰ According to Bentham the privilege deprives a court of evidence and reduces the probability for a truthful verdict. In this sense the privilege provides a shelter for the guilty by derogating rather than improving the chance for an accurate decision. In Bentham's precise words, "If all the criminals of every class had assembled and framed a system after their own wishes, is not this rule the very first which they would have established for security? Innocence never takes advantage of it, innocence claims the right of speaking, as guilt invokes the privilege of silence".¹³¹ Nevertheless, proponents argue that a silence privilege protects the innocent but nervous accused who by a poor demeanour on the witness stand, creates an unfavourable impression upon the court. It is said to be particularly valuable to those individuals who suffer from social or intellectual disadvantages (inarticulate, uneducated, suspicious, frightened and suggestible individuals). Yet these kind of persons are the least likely to make use of a silence protection. They almost invariably respond to police questioning. The privilege may also benefit the accused by limiting the prosecutorial ability to adduce evidence of previous convictions.¹³² The former argument is contrary to commonsense and human nature. In the words of Ayers, "without denying the extraordinary case of a man whose record is so bad, and whose honest exculpatory story so implausible that he elects to remain silence, in the majority of cases, even a hardened criminal when wrongly accused, would want to have his say".¹³³ Menlowe, arguing

substance and reason. See also *Wilson v United States* 149 U.S. 60, 66 (1893), it is not everyone who can safely venture on to the witness stand though entirely innocent of the charge against him. Dolinko *ibid* note 18 at 1075-76.

¹²⁸ On the moral harm caused by a wrongful conviction, see Dworkin "Principles, Policies, Procedures" in *Crime, Proof and Punishment* Tapper Ed (1981) 193.

¹²⁹ Pound "Legal Interrogation Of Persons Accused Or Suspected Of Crime" (24) *J. Crim. L. C and P. S.* (1934) 1014, 1015.

¹³⁰ McKay "Self Incrimination And The New Privacy" *Sup. Ct. Rev* (1967) 193, 208. Griswold "The Right To Be Left Alone" (55) *Nw. U. L. Rev* (1960) 216, 223 says, "the privilege protects the guilty more often than it does the innocent". In *Tehan v Shott* 382 U.S. 406, 414 (1966) the Supreme Court held, "the basic purposes that lie behind the privilege do not relate to protecting the innocent from conviction".

¹³¹ Book IV, *R.J.E.*, 240-245 (Bowring Ed 1843).

¹³² Prosecutorial comment on the accused's failure to testify is absolutely forbidden in American law. This appears to be motivated by a concern for the accused with a poor demeanour or a prior record, *Griffin v California* 380 U.S. 609 (1965).

¹³³ Ayers, "The Fifth Amendment And The Inference Of Guilt From Silence" (78) *Michigan L. Rev.* (1980) 869 levels a well argued criticism against the decision in *Griffin v California* 380 U.S. 609 (1965) which bars any comment on a failure to testify. Berger *Taking The Fifth* (1984) 27. The justification for a silence principle based on prior conviction depends upon the prosecution's ability to impeach the accused with his prior conviction. There is no room for such a justification in a system which disallows prior conviction

along Benthamite utilitarian lines, has convincingly shown that once the prosecutor has established a damaging *prima facie* case, the accused is in no worse a position whether he defends himself badly or refuses to defend himself at all.¹³⁴ A poor demeanour may always be counteracted by defence counsel through further explanation and evidence.¹³⁵ The latter argument based on prior convictions, is also unconvincing. In the Anglo-American system of law, prior convictions are always inadmissible unless exceptionally received, either as similar fact evidence of high probative value or under statutory exceptions. Exclusions of prior convictions is thus amply provided for and renders redundant the protection offered by a silence privilege.¹³⁶ Finally, the protagonists fail to comprehend that all witnesses are faced with the same circumstance. No convincing reason is advanced as to why poor demeanour or previous convictions do not unfairly compromise the accused who voluntarily takes the stand. Why should poor demeanour or previous convictions become prejudicial only in the circumstance where the potential witness is a reluctant defendant who voluntarily refuses to take the stand in his own defence. In the opinion of Williams,¹³⁷ the real reason for a claim of silence is invariably the fear of cross-examination and the piecemeal destruction of a light-weight defence. Indeed, Goldberg J's dictum in *Murphy v Waterfront Commission* has now been repudiated by a majority of American scholars. The contemporary American and British juror is more likely to regard the accused's failure to testify as evidence of guilt rather than of innocence. The accused is usually better advised by counsel to take the stand. In the South African courtroom, the experienced judge sitting without an easily persuadable layman jury, would be expected to reach a truthful verdict without being influenced either by poor demeanour or prior convictions.

evidence and effectively instructs jurors to ignore poor performance on the stand. Stein "The Refoundation Of Evidence Law" (9) *Can. J. L. and Jurisprudence* (1996) 279, 332, n218.

¹³⁴ If the accused testifies he may give the impression of lying. If he does not, he may leave damaging evidence uncontroverted. Proponents therefore assume that the accused is worse off without a right to silence. This assumption is incorrect if a utilitarian vision is allowed for. In terms of Benthamite utility, silence is only circumstantial evidence. In a court which allows adverse inferences, the accused risks no more than an ordinary witness who claims silence. He is not worse off by reason of his poor demeanour. Being a poor witness need not add circumstantial evidence to the state's case because poor demeanour goes to *credibility* and *not to substance*. Menlowe "Bentham, Self-Incrimination And The Law Of Evidence" *L.Q.R.* (1988) 298.

¹³⁵ A failure to testify on the basis of poor demeanour is never communicated to the jury. The jury, unaware of the accused's reason for not testifying, may well on its own initiative draw an adverse inference. It is preferable to allow the accused to testify and then to explain away poor demeanour. Both judge and jury should be capable of making allowances for poor demeanour. In contrast, see Bradley "Silence At Sentencing" *Trial* (1999) 88-89, Shulhofer "Some Kind Words For The Privilege Against Self-Incrimination" (26) *Val. V. L. Rev* (1991) 330-31.

¹³⁶ Similar fact evidence of prior convictions is exceptionally admissible only if a relevant nexus is established. It is usually inadmissible because its prejudicial effect outweighs its probative value. To be admissible a logically relevant nexus must be established between the prior conviction and the present fact in issue. *D.P.P. v Boardman* (1975) 3 ALL. ER 887. *Makin v Attorney-General New South Wales* 1897 AC 57 (P.C) 65. Statutory South African provisions excluding prior convictions, are sec 197 and sec 211 of the *C.P.A.* (1977). On the other hand, statutory provisions which allow prior convictions are sec 240 and sec 241 of the *C.P.A.* (1977) (possession of stolen property), but these provisions are not in any event covered by a silence principle.

4.4.3 State Exploitation

The silence principle is also understood to assist in avoiding mistaken convictions by making the trial process a fair contest between equals.¹³⁸ The “silence privilege” ensures a fair fight in which both sides have an equal chance of success by preventing the outcome from merely reflecting the state’s superior power. The status of the accused as an “equal” adversary is a fundamental element of the adversarial process.¹³⁹ Any significant weakening of the right to freely determine whether to speak or remain silent can only be seen as a grave injury to the process. A fair play argument adjusted to fit Lockean social theory is also advanced.¹⁴⁰ A social contract exists between the sovereign state and the sovereign individual whereby no one may be deprived of liberty or life except by consent. The state cannot compel a sovereign individual to surrender his right of self-defence. Sovereignty embodies the idea of equality between the individual and the criminal justice system. The infringement of individual sovereignty by the criminal process is thus illegitimate and morally reprehensible.¹⁴¹ The notion of an unassailable individual sovereignty is reminiscent of the previously discussed moral autonomy argument and is similarly flawed.¹⁴² The proper relationship between state and citizen is not one of equal sovereignty. The individual cannot enact laws, print money, or declare war. The state may in certain circumstances infringe the individual’s nominal sovereignty. Citizens who tamper with evidence, threaten witnesses or attempt to flee jurisdiction may be punished without impermissibly infringing citizen rights or harming the integrity of the criminal system. The “fair trial” contest argument is circular in reasoning and conceptually misleading. The argument fails to determine the factors needed for

¹³⁷ Williams “The Tactics Of Silence” (27) *N.L.J.* (1987) 1107.

¹³⁸ Gerstein “The Self-Incrimination Debate In Gt. Britain” (27) *Am. J. Comp. L.* (1979) 98. The different conceptual approaches to adversarial procedure are reflected in the continuing debate between the ‘Utilitarian’ and ‘Libertarian’ schools of thought.

¹³⁹ Equal means that the strategic advantages held by the prosecution must be evened out so that the accused is not simply convicted by virtue of the state’s superior resources.

McNaughton’s “The Privilege Against Self-Incrimination” (51) *J. Crim. L. Criminology P.S.* (1960) 138. Arenella “Rethinking The Functions Of Criminal Procedure” (72) *Geo. L. J.* (1983) 185, 201. Green “The Privileges Last Stand : The Privilege Against Self-Incrimination” (65) *Brook. L. Rev* (1999) 627.

¹⁴⁰ Locke *An Essay Concerning The True Original Extent And End Of Civil Government, In Two Treatises on Government* (Penguin 1986) 196.

¹⁴¹ Fortas “The Fifth Amendment” 25 *Clev. B. Ass’n. J.* (1954) 91, 98, “the privilege reflects the limits of the individual’s attornment to the state and in a philosophical sense insists upon the equality of the individual and the state”.

¹⁴² See *supra* p.124-129..

deciding what kind of individual-state balance is fair and equal. It also fails to decide whether the balance may be achieved in other ways without over-extending the silence principle. The answers to these questions is dependent on other kinds of silence justifications and on the value judgements of independent decision-makers and cannot be solely derived from the present argument itself.

The view of the adversarial system as a serious form of combat in which the rules are designed to ensure equality and fair play is also contrary to utilitarian pragmatism.¹⁴³ Turning the trial into a cricket match serves only to obfuscate the purpose which is to arrive at the equitable truth. The analogy between a criminal trial and a sporting event is illustrated by Bentham in his "fox hunter's reasoning".¹⁴⁴ The idea of fairness in the sense used by sportsmen is introduced into the trial to prevent compelled self-incrimination. The fox [accused] is to have a fair chance to save his life. He must have leave to run a certain course for the express purpose of giving him an opportunity to escape. In the sporting code a fair play rule is rational. However, a trial is not a recreation sport, so that fairness in the sporting sense should not reasonably apply.¹⁴⁵ The determination of truth, however it is defined,¹⁴⁶ requires the full deployment of all the relevant facts. To bar relevant self-incriminatory evidence is simply to impede the search for truth. Truth is naturally the best safeguard against mistaken conviction and the best protection for the innocent.

There are a number of evidential rules which insulate the individual against superior state resources and prevent unjust convictions. Obvious examples are the "beyond a reasonable doubt standard" and the state obligation to disclose exculpatory evidence. Judge Learned Hand, in *United States v Garson*,¹⁴⁷ gives the following opinion, "Under our criminal law the accused has every advantage. While the prosecution is held rigidly to the charge, he need not disclose the barest outline of his defence. He cannot be convicted when there is the least bit of doubt ... What we need to fear is the archaic formalism and the watery sentiment that obstructs, delays, and defeats the prosecution of crime". Judge Hand is being overzealous. The accused does not possess every advantage, although he has a good many. According to the fair play argument,

¹⁴³ Fortas *ibid* note 141 at 131-132, refers to the ancient compact which depicts the criminal trial as a case of equals meeting in battle, in which the sovereign state has no right to compel the sovereign individual to surrender or impair his right of self-defence.

¹⁴⁴ See *supra* chapter 3 p.102-103.

¹⁴⁵ Book VII, *R.J.E.* (Bowring Ed 1843). Also cited in Wigmore *Evidence* para 2251, 297, n2 (McNaughton Ed 1961).

¹⁴⁶ The Utilitarian viewpoint is that *legal truth* is discoverable by empirical means. The Libertarian view expressed by McConville "Silence In Court" (11) *N.L.J.* (1987) 1169, holds that a trial is not a search for empirical truth. It is an arena in which different versions of reality compete. Legal truth is not a discoverable entity existing outside the trial process. It is a product of the trial process itself.

¹⁴⁷ 291 F. 646 649 (S.D.N.Y. 1923).

these rules require further reinforcement by a silence "privilege". It is difficult to see why this should be so. After all, compelled self-incriminatory testimony is not inherently unfair in terms of the values served by the adversarial system. Particularly since self-incriminatory testimony is routinely admissible in civil proceedings. *The fair play argument is thus in substance no more than a belief based on spurious reasoning.* The fair play argument may be reduced to a bare question to which there is no logical answer. Why should the state be prevented from adducing relevant evidence simply because it enjoys a so-called "unfair" advantage? Proponents are forced to resort to vaguely articulated feelings. "We are once again dealing with value judgements, with an issue of conscience, with a "feeling" of justice which is [not] rationally explicable".¹⁴⁸ However, "feeling" is not a valid criterion for explaining a legal principle.

The presumption of innocence¹⁴⁹ is said in *Woolmington v D.P.P.* to run, "like a golden thread through the fabric of the criminal law."¹⁵⁰ The presumption of innocence is now a fundamental right in Britain. Article 6(2) of the European Convention on Human Rights is now incorporated into English domestic law through the Human Rights Act (1998). Presumption of innocence and silence "privilege" taken together require the prosecution to prove its case unaided by the accused.¹⁵¹ The accused is given the right to silence as a shield which he may use against the dangers of cross-examination. To allow the prosecution to take up this silence and use it as a sword against the accused would be a violation of a basic principle of adversary justice.¹⁵² The onus of proof which rests upon the prosecution is not simply a burden to adduce evidence and to establish guilt beyond a reasonable doubt. It is also a burden to do so unassisted by the accused.¹⁵³ To compel speech or to allow an adverse inference from silence would represent a significant shift within the prosecutorial burden, "effectively legitimizing the conversion of the lowest threshold in evidence, a bare *prima facie* case, into the highest proof beyond a reasonable doubt".¹⁵⁴ In essence the silence privilege reinforces the presumption of

¹⁴⁸ Ellis *ibid* note 28 at 843, "it is not an issue which is amenable to empirical investigation nor can answers be derived by reasoning".

¹⁴⁹ What the slogan *presumption of innocence* actually means is quite elusive. Logically a presumed innocent person should never be charged in the first place. It is said by some commentators that the presumption simply means that the prosecution must go first. Yet in the civil world, the prosecution does not go first and the central feature of these trials is the interrogation of the accused by the judge.

¹⁵⁰ *Woolmington v D.P.P.* (1935) AC 462 at 481 (HL) and *S v Zuma* 1995 (2) SA 652 (CC), 1995 (4) BCLR 401 (CC) at para 36, *S v Bhulwana*, *S v Gwadiso* 1996 (1) SA 388 (CC) 1995 (12) BCLR (CC) at para 24.

¹⁵¹ *Miranda v Arizona* 384 U.S. 436 (1966) 415, *Murphy v Waterfront Commission* 378 U.S. 55 (1964). Also Wigmore para 2251 at 317 (McNaughton Ed 1961).

¹⁵² Gerstein *supra* note 79 at 110.

¹⁵³ *Tehan v Shott* 382 U.S. 406, 415 (1966), "the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent but rather to preserving the *integrity* of the judicial system in which the guilty are not to be convicted unless the prosecution shoulder the entire load. It must do so unassisted by the accused."

¹⁵⁴ McConville *ibid* note 146 at 1169.

innocence¹⁵⁵ and preserves the integrity of adversarial procedure by forcing the prosecution to shoulder the entire load.¹⁵⁶ To adduce relevant evidence and establish guilt by its own independent labours. Lord Devlin in *R v Bodkins Adams*¹⁵⁷ describes the accused's silence as an affirmation of his autonomy and equality within the criminal procedure. His silence must be taken to mean, "Ask me no questions, I shall answer none. Prove your case". Abolish or weaken the silence principle and the burden of proof begins, by increments, to shift towards the accused.

Reasoning of this kind exposes a general ignorance about the working of the evidentiary onus rules. During the trial both the state and the defence are faced with two distinct burdens. First, there is the *primary onus* of proof which in a criminal trial is initially fixed upon the state and remains so throughout the course of the proceedings. The state is expected to establish an essentially uncontroverted case in respect of all the criminal elements and must meet the expected threshold quantum of proof.¹⁵⁸ Second, there is an *evidentiary burden* which shifts between the state and the accused, depending on which party has established a *prima facie* case.¹⁵⁹ Tactically the accused will at times during the trial bear an evidentiary burden of rebuttal. Technically it is incorrect to argue that the accused should never bear a burden or that the state should always shoulder the entire burden. Does an evidentiary burden in terms of which the accused must lead evidence in rebuttal constitute a limitation on the presumption of innocence? To speak of a shift in the burden of proof once the silence principle is limited is unconvincing. How can a silence principle designed to exclude self-incriminatory evidence (a source of evidence) have any influence over the fixed primary burden of proof which does not concern itself with evidentiary sources? According to the law of evidence a primary onus of proof cannot be influenced by the way in which evidence is gathered. What it does concern itself with is the *total sufficiency* of evidence. The state's primary burden is discharged once the quantum and cogency of the evidence is sufficiently persuasive to overcome the threshold level

¹⁵⁵ McConville *ibid* at 1170, "removing the silence privilege or allowing an adverse inference to be drawn from silence has the effect of destroying the presumption of innocence and replacing it with a presumption of guilt".

¹⁵⁶ *R v Noble* (1997) D.L.R. (4th) 385, 43 CRR (2d) 233 (Canada) at D.L.R. 418, "In order for the burden of proof to remain with the crown ... the silence of the accused should not be used against him or her in building the case for guilt". See also *R v S (RJ)* (1995) 1 SCR 451 26 CRR (2d) 1, 76 and *Thomson Newspapers Ltd v Canada (Director Restrictive Trade Practices Commission)* (1990) 1 SCR 425, 428.

¹⁵⁷ Unreported, cited in the House of Lords debate on the *Criminal Law Revision Committee* 11th Report.

¹⁵⁸ The burden of proof is a metaphorical expression for the duty which one or other of the parties has of finally satisfying the court that he is entitled to succeed. The incidence of the burden of proof (Wigmore's risk of non-persuasion) decides which party will fail on a given issue, if after hearing all the evidence, the court is left in doubt. It is fixed on one or other of the parties as a matter of substantive law. *Tregea v Godart* 1939 AD 16 at 23, Hoffmann, Zeffertt S.A. *Law of Evidence* 4 Ed Butterworth 1996.

¹⁵⁹ The evidentiary burden of combating a *prima facie* case made by one's opponent. *South Cape Corp (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548.

and the establishment of proof beyond a reasonable doubt. This purpose has no logical connection to whether or not the state by its own independent labours or the accused by his own unwilling contribution has added to the quantum of evidence. In other words, how can a silence principle designed to protect against a particular kind of evidence, conceptually influence a burden/onus which is designed to account only for the quantum/cogency of all kinds of evidence and which is not designed to acknowledge the various sources of such evidence. Abolishing or weakening the silence principle cannot therefore within the meaning of evidentiary rules, shift the onus of proof towards the accused.

The burden of proof argument also becomes speculative and unconvincing when it makes the unverifiable assumption that the integrity of the accusatorial system is impaired by the prosecution shouldering less than its due legal burden. An examination of the law of evidence reveals that the state does not always shoulder the entire burden nor is the silence principle an effective procedural device for ensuring a rigid maintenance of this threshold focus.¹⁶⁰ Questioning the accused for his account of the *facta propanda* or drawing an unfavourable inference from his failure to do so does not necessarily breach the proper relationship between state and accused. After all, the routine acceptance of voluntarily made admissions or confessions¹⁶¹ is an example of direct assistance rendered by the accused which allows the prosecution to prove its case. In many instances the accused is legally obliged to assist the prosecution even against his own will. The accused may be compelled to furnish non-testimonial items such as evidence of body appearance, fingerprints, voice and handwriting samples.¹⁶² The state may compel the accused to appear in an identification parade.¹⁶³

The U.S. Supreme Court in *Schmerber v California*¹⁶⁴ has admitted blood samples taken without consent. The English Court of Appeal in *R v Apicella*¹⁶⁵ allowed a specimen of bodily fluid to prove rape. The Police and Criminal Evidence Act 1984, sec 62(10) permits an adverse in-

¹⁶⁰The state does not always shoulder the entire burden. There are important exceptions, apart from the evidentiary burden of rebuttal, in terms of which some of the burden falls upon the shoulders of the accused. Generally, the accused can be compelled to stand trial and to cooperate in the process which leads to his conviction. First, he can be compelled to provide non-testimonial physical forms of evidence even against his will. Second, the state is permitted to adduce voluntary admissions and confessions obtained directly from the accused. Third, the accused may be sanctioned for destroying evidence, bribing or intimidating witnesses. In terms of these three exceptions, the accused bears some of the burden of proof.

¹⁶¹Sec 217 and 219A of the C.P.A. (1977).

¹⁶²Sec 228 C.P.A. (handwriting). See 212(4) and (6) C.P.A. (fingerprints).

¹⁶³*Rassol v R* 1932 N.P.D. 112 and *R v Gericke* 1941 C.P.D. 211 (voice identification).

¹⁶⁴384 U.S. 757 (1966). See also *United States v Dionisio* 410 U.S. 1 (1973) (voice exemplar), *Gilbert v California* 388 U.S. 263 (1967) (handwriting exemplar). See *infra* chapter 7 p.236-237.

¹⁶⁵(1986) 82 Cr. App. R. 295 (CA). See *infra* chapter 10 note 123-130 and accompanying text.

ference from failure to give consent to the taking of an intimate sample.¹⁶⁶ A Scottish court has admitted evidence of teeth impressions.¹⁶⁷ New Zealand and Scotland allow evidence of a suspect's aroma.¹⁶⁸ It has also been argued that the accused's decision to remain silent at trial is neither a testimonial nor a communicative act to which the silence principle should properly apply. Rather, it is a physical reality of the trial and should be treated in the same way as other evidence of physical description or behaviour. If the state does not breach its duty when adducing evidence of fingerprints, blood type or line-up description, then neither does it do so when it admits physical evidence of the accused's failure to testify. It is erroneous therefore to assume that the prosecution can never meet the burden of proof by relying on compelled testimony from the accused. The prosecution has presumably through its own unassisted efforts determined exactly what kind of questions need to be put to the accused. The prosecutorial goal in questioning the accused is to impeach credibility and to highlight inconsistencies in the exculpatory evidence. An experienced prosecutor should never put questions to the accused without a fairly good idea of what kind of answers to expect in return.¹⁶⁹ Relying on testimony compelled from the accused is logically defensible. The "entire load" or "full burden of proof" language used by adherents of a silence principle is thus a mere solecism. The state would still be obliged to bear the full burden of proving guilt beyond a reasonable doubt, whether the privilege existed or not. The silence principle in reality serves only to influence the *kind* of evidence which the state may adduce to meet the requisite burden and not the existence or the stringency of the burden itself.

Proponents have sought to justify the silence privilege as a protective measure against oppressive and unnatural abuse of power by state organs. Indeed, the protection against torture is widely but erroneously believed to be a primary factor in the evolution of the English common law right to silence. Historical evidence suggests the contrary. According to Langbein,¹⁷⁰ the use of torture remained an exclusive prerogative of the highest central authority, exceptionally confined to political crimes and exerted no lasting influence over the common law courts. Torture reached a peak during the Tudor era but had disappeared entirely by 1640 without

¹⁶⁶If consent is refused, the court may draw such inferences as appear proper, and the refusal may be treated, or amount to, corroboration of any evidence against the suspect – Easton. "Bodily Samples and the Privilege Against Self-Incrimination" *Crim. Law Rev.* (1991) 19. See also sec 37 and sec 225(1) of the C.P.A. (1977) in particular *S v Binta* 1993 2 SACR 553 (C).

¹⁶⁷ *Hay v H.M.A.* 1968 J.C. 40.

¹⁶⁸ *R v Lindsay* (1970) NZLR 1002 and *Patterson v Nixon* 1960 J.C. 42. The South African A.D. regards such evidence as inadmissible and untrustworthy on account of the danger of misunderstanding a tracker dog's behaviour. *R v Trupedo* 1920 AD 58 and *S v Shabalala* 1986 (4) SA 734 (A).

¹⁶⁹ Colman *Cross-Examination: A Practical Handbook* (1990) 169.

¹⁷⁰ Langbein "Shaping The Eighteenth Century Criminal Trial" *U. Chicago L. Rev.* (1983) 168. See *supra* chapter 2.

comment or controversy.¹⁷¹ The prevention of torture cannot therefore be regarded as an essential modern-day function of a silence privilege. Nevertheless, some proponents argue, a criminal justice system without the silence privilege would severely tempt police and prosecution to solicit self-incriminatory statements through the overt or disguised employment of physical and psychological coercive tactics. The real danger is not that the accused will be beaten in open court, but rather the possibility of mistreatment which falls short of actual torture. Examples include prolonged interrogation without sleep or food, isolation, and other psychological tricks of the trade in which police and prosecution are well versed.

The protection of official morality requires the existence of a silence privilege because it removes the temptation to employ short cuts. It is far more enjoyable to sit in a sheltered police station and extract coerced confessions than to go about in the sun hunting up evidence.¹⁷² The silence "privilege" prevents official lassitude and acts as an additional incentive for effective police work. According to Ayers, "the privilege is a prophylactic which deters not only the commission of inhumane acts, but also the manufacture and reliance on unreliable testimony".¹⁷³ In defence of this argument, proponents cite Wigmore, "any administrative system which permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof must itself suffer morally thereby".¹⁷⁴ The truth of this assertion is by no means self-obvious. A principle which prevents police investigators from questioning the very person best qualified to render a truthful account is patently irrational. Friendly comments, "it requires the police to operate under the rules of blind man's buff" and "assumes what is not always the case, namely that other forms of evidence will be available without interrogation, if only the police are bright enough to find them".¹⁷⁵ Interrogation of the accused and the search for evidence *aliunde* should not be seen as alternative or conflicting avenues to the same result. They are complementary methods and the use of both promotes a thorough and comprehensive investigation, more so than could be achieved by the use of each method separately. The practical reality is that if state authorities wish to torture a suspect then no legally constituted silence principle will effectively deter them. A silence "privilege" is a rather weak protection against police interrogation. The violent

¹⁷¹ Torture was exclusively confined to politically motivated crimes. The physical extraction of information concerning treason, sedition and identification of accomplices. There is little documented use of torture in the ordinary common law courts after 1603 and by 1640 the use of torture even for political crimes had disappeared. Torture was never directed at obtaining self-incriminatory evidence for civil or criminal purposes. The movement to abolish torture was therefore not a likely role-player in the development of a silence privilege : See *supra* chapter 2 notes 155, 159 and accompanying text.

¹⁷² Stephen *A History Of The Criminal Law In England* (1883) 442.

¹⁷³ Ayers *supra* note 133 at 850.

¹⁷⁴ Wigmore para 2281 at 296 n2 (McNaughton Ed 1961). Although it could be said that Wigmore was referring only to judicial conduct and not to police practice.

¹⁷⁵ Friendly "The Fifth Amendment Tomorrow, The Case For Constitutional Change" (37) *Un. Cin. L. Rev* 671, 691. See also Black J's dissenting opinion in *Berger v New York* 388 U.S 41, 70 (1967), "it is always easy to hint at mysterious means available just around the corner to catch outlaws".

treatment of Black detainees, despite the existence of a right to silence, during the Apartheid decades is sufficient proof of this. Furthermore, studies in England show that a majority of suspects make incriminating statements under police questioning.¹⁷⁶ The silence principle is a weak buffer against a criminal justice system deliberately organized around the pressures of interrogation, confession and the guilty plea. The silence principle would disrupt this well-oiled process, hence its relative ineffectiveness. The psychologically oppressive environment of a police station, coupled with the isolation of the suspect, combines to make it extremely difficult for the average person to consciously assert a right to silence.¹⁷⁷ The silence principle is not an adequate protection in the police station. There are other and better safeguards against the dangers of compulsive and manipulative questioning. Safeguards against inhumane interrogation are best sought for in the technical rules which render coerced confessions inadmissible.¹⁷⁸ Statutory rules of this nature make it highly improbable that police interrogators would adopt coercive methods to solicit evidence ultimately rendered inadmissible. In England, the Police and Criminal Evidence Act 1984 (PACE) has made an enormous contribution towards limiting and controlling the exercise of police power over the suspect in custody. The emphasis of the code is in creating physical and procedural conditions which minimize the risk of unreliable statements. Sec 76(2) in particular obliges the prosecution to prove beyond a reasonable doubt that evidence was not oppressively obtained.¹⁷⁹

The provisions of Code C and E set out in detail the limits of police questioning. These codes of police practice are reinforced by the increasing willingness of the English courts to apply the statutory discretion in terms of sec 78. The recent introduction of mandatory tape-recordings of police interviews¹⁸⁰ has now given the courts a greater ability to exclude involuntary admissions and confessions.¹⁸¹ Scottish jurists have advocated the establishment of a Sheriff's tribunal wherein the voluntariness of certain statements made during police interrogation may be challenged. Justice Schaefer proposes a system of judicially supervised interrogations in the

¹⁷⁶ Moston, Stephenson, Williamson "The Incidence, Antecedents And Consequences Of The Use Of The Right To Silence During Police Questioning" (3) *Criminal Behaviour and Mental Illness* (1993) 30-47. Gudjonsson *The Psychology Of Interrogations, Confessions and Testimony* Chichester Wiley (1992).

¹⁷⁷ In the police station the hardened professional criminal is more likely to gain an advantage from the silence privilege, whereas the ordinary suspect is likely to be intimidated into giving up his rights.

¹⁷⁸ Sec 217A and 219 of the C.P.A. (1977).

¹⁷⁹ Menlowe *ibid* note 87 at 239. Zuckerman "The Inevitable Demise Of The Right To Silence" *N.L.J.* (1994).

¹⁸⁰ Tape, video-recordings, accompanied by precautions against tampering and editing have proved to be effective protections within the formal police interrogation interview. Of course, realistically, no device or technique or legal rule can effectively protect against intentional police coercion but these technological devices offer a far greater practical protection than a mere legal silence rule.

¹⁸¹ English judges have made no attempt to justify the PACE statutory discretionary powers in terms of a silence rationale. But have instead sought justification in terms of a reliability principle. *R v Canale* (1990) 91 Cr. App. R 1 "the need to respect statutory rights". *R v Walsh* (1989) 91 Cr. App. R 161 "the need for police propriety in obtaining evidence". See *supra* chapter 8 p.293-295.

presence of a magistrate, or perhaps for practical reasons¹⁸² before an impartial third party observer specially appointed to oversee pre-trial interrogation. Essentially a balance must be found between police efficiency in crime control and the protection of the individual against coercive treatment at the hands of law enforcement officers. Whether a silence "privilege" forms part of such a balance is usually determined by a socio-political compromise within each legal system. The Criminal Justice and Public Order Act 1994 is the compromise arrived at in England. A compromise which allows the accused a limited but well defined silence "privilege" without inhibiting effective law enforcement. The use of silence by the accused offers certain pre-trial and trial advantages, but it also entails certain disadvantages. The accused or his legal adviser must tactically balance the use made of the accused's silence against the known adverse inferences which the state is entitled to draw from such usage.¹⁸³

Proponents also advance the plausible argument that a silence "privilege" protects unpopular minority opinion against potential prosecution by the mainstream orthodoxy. Without a right to silence, the state would be tempted to set up investigatory committees and other forms of roving inquisitions with the express purpose of ferreting out dissident minority opinion. Citizens could be harassed by these belief probes into providing compelled incriminatory testimony about unpopular political, moral or religious beliefs. The silence principle provides the individual with the ability to frustrate government inquiries which may result in a potential abuse of power.¹⁸⁴ Senator McCarthy's anti-communist witch hunt during the 1950s immediately springs to mind. Targeted individuals who took refuge behind the silence "privilege" were instantly and disapprovingly characterized as fifth amendment Communists. In addition, any number of persons could be rounded up by the police in fishing expeditions, brought before investigatory tribunals and cross-examined to determine whether or not they had committed crimes. The silence "privilege" therefore serves to protect various politically and criminally targeted individuals from state exploitation.

¹⁸² It is impractical and costly to maintain a supply of magistrates on a 24-hour basis. Although many countries do so on a rotational basis. Friendly *ibid* note 175 at 714-5. Schaefer *The Suspect And Society* Maxwell Ed (1967) 59-60.

¹⁸³ *Infra* chapter 8. See the comments of Lord Lane C.J. in *R v Alladice* (1988) 87 Cr. App. R. 380, 385 on the permissible use of adverse inference drawn from silence. Lord Lane's comments had a major influence on the drafting of the Criminal Justice and Public Order Act 1994..

¹⁸⁴ McNaughton *ibid* note 56 at 145. Kalven "Invoking The Fifth Amendment" (a) *Bull. Atom. Scientists* (1953) 182-183.

The argument however, confuses the antiquated historical role of a silence "privilege" with its narrowly defined modern functions. First, belief probes target the kind of person who is least likely to want to remain silent.¹⁸⁵ Indeed, the non-conformist with a strong political or religious conscience will want to speak out in defence of his beliefs. The silence principle as a protection against belief probes is practically superfluous in the normal day-to-day criminal investigation which targets non-political crime.¹⁸⁶ It is doubtful whether the average rapist or murderer harbours particularly strong beliefs. Anyway, a silence "privilege" cannot defend the non-conformist against subtle indirect non-criminal government tactics designed to extract sensitive information and to ostracise suspected radicals. Silence is simply an ineffective safeguard against administrative rules barring dissidents from government employment, blacklists or deportation of unwanted radicals. Second, the silence principle does not offer an adequate protection against state inspired criminal fishing expeditions. An individual does not become a criminal defendant until a reasonable quantum of evidence has been accumulated against him. He cannot simply be brought before the court on mere suspicion alone. The police cannot arrest at random but must possess at least some reasonable cause. Sec 39 of the C.P.A. (1977) (South Africa) compounded by possible state exposure to charges of illegal arrest and malicious prosecution are thus far more efficient tools in frustrating criminal fishing expeditions. Third, the language of the South African Constitution narrowly construes the right to silence, making it applicable only to criminal proceedings. During the course of a criminal trial there is usually no question of controversial beliefs or unpopular associations arising as *facta propanda*. The limited modern right to silence is thus grossly inadequate as a protection against politically motivated belief probes. Other constitutional shields, in particular the rights to equality (sec 9), freedom of person (sec 12), of religion, belief and opinion (sec 15), of speech and expression (sec 16), of association (sec 18), of assembly, demonstration and petition (sec 17), and reasonable access to unrestricted information held by the state (sec 32) are collectively far more effective in thwarting this species of state tyranny. A typical South African example would be the now repealed act which made membership in the Communist Party and other proscribed political organizations illegal. Citizenry protection against such exploitative state action is best found in other constitutional safeguards and not in a principle of silence. State action which seeks to create new opportunistic and oppressive crimes contrary to constitutional provisions would undoubtedly be struck down by the Constitutional Court. The argument that a citizen should not be harassed or exploited by the police and other state organs suffers from the same logical flaw which bedevils other rationales favouring the silence principle. It simply does not lead to the required conclusion. Certainly, the state must not harass the citizenry, but how does a silence

¹⁸⁵ John Lilburne, the 17th century religious and political non-conformist, is a stereotypical example of the dissident. See *supra* chapter 2 p.42.

¹⁸⁶ Wigmore *Evidence* para 2251 at 314 (McNaughton Ed 1961).

principle actually protect the individual against such harassment. In truth, what protects the citizen is a democratic political system which curbs the power of the state and awards the citizen with various and multiple remedies against it.

4.4.4 State Legitimacy

The state ability to regulate a structured society *consensus populi*, would be severely undermined without a strong belief in the legitimacy of the criminal justice system. The silence principle has traditionally illustrated the relationship between a free man and the state and would seem the ideal medium by which to foster a common public belief in such legitimacy. In this regard, the silence principle is variously referred to as an important advance in the development of liberty,¹⁸⁷ a safeguard of human conscience,¹⁸⁸ and the hallmark of democratic values.¹⁸⁹ The attempt to compel self-incriminatory evidence is distasteful to the citizenry, because compelling evidence infringes human dignity and weakens the democratic linchpin cementing society. This argument is particularly influential in South Africa. A cynical manipulation of justice mechanisms by the old Apartheid regime has heightened sensitivities towards the justice establishment and significantly eroded popular esteem. In order to erase a tarnished image, prevent recidivism and restore popular respect, it is thought necessary to constitutionally entrench a fundamental right to silence. The silence principle is thus viewed as an essential tool in the restoration of an efficient, moral and legitimate criminal justice system free of the old apartheid baggage. The argument presumes a direct empirical connection between the silence principle and the idea of legitimacy, a nexus which has never been substantiated by reliable evidence. Indeed, the contrary view may be equally valid, namely a silence "privilege" actually erodes rather than improves the respectability of a criminal system. In South Africa there is a widely held belief that the criminal justice system fosters a culture of "criminal rights" while ignoring "victim rights". A silence privilege is said to be part of criminal rights. The general public often perceives the exercise of silence by the accused as an inference of guilt. Certainly in England and the United States, there is a strong undercurrent notion that silence is for all practical purposes a sanctuary for the guilty.¹⁹⁰ Courts in America are obliged to instruct laymen juries to ignore the inference.¹⁹¹ Moreover, in the words of Schaefer, "Those who advocate a right to silence bear the burden of justifying its divergence from everyday morality".¹⁹² According to Judge Friendly,

¹⁸⁷ Per Frankfurter J in *Ullmann v United States* 350 U.S. 422-426 (1956).

¹⁸⁸ Per Douglas J in *Ullmann v United States* at 631.

¹⁸⁹ Per Warren J in *Miranda v Arizona* 384 U.S. 436-660 (1966).

¹⁹⁰ Frank J believed it likely that jurors would view the accused's failure to testify as evidence of guilt. "This powerful inference has the effect of coercing a defendant into abandoning his privilege". *United States v Grünwald* 353 U.S. 391 (1957).

¹⁹¹ *Carter v Kentucky* 450 U.S. 288 (1981) and *Griffin v California* 380 U.S. 609 (1965).

¹⁹² "Federalism And State Criminal Procedure" (70) *Harv. L. Rev.* (1956) 26.

"A right to silence is generally perceived to be contrary to normal moral behaviour".¹⁹³ Hook sees the privilege as an insult to the average man's common sense.¹⁹⁴ Louisell, a strong supporter of the silence "privilege" is forced to admit that in the field of criminal procedure, "the rule is psychologically and morally unacceptable as a general principle in human relationships."¹⁹⁵ There exists a chaotic ambivalence about the so-called "right" to silence. On one hand the silence principle is viewed as an old valuable, fundamental and morally enhancing privilege. On the other hand, it is easily encroached upon. Society readily departs from its company because it is not perceived as containing a fundamental or inherent moral component. Common sense alone dictates that there are more effective methods of bolstering the legitimacy of the criminal justice system. In reality, public perceptions of institutional state legitimacy are profoundly influenced by political, educational and economic criteria. Developments in these fields overshadow whatever puny influence a silence privilege may or may not exert.

In essence therefore, a silence "privilege" popularly viewed as contrary to common sense and plebian morality simply has no effect on the supposed moral turpitude prevalent in the South African justice system.¹⁹⁶ The inescapable conclusion must be that a right to silence does not justify nor operate as a device for achieving any of the objectives imputed to a criminal system. The silence principle as an instrumental justification for individual interests within the Anglo-American criminal justice system has neither intrinsic nor coherent worth. As a procedural rule which operates to the advantage of the suspected wrongdoer, it may even contribute to the erosion of the legitimacy of the South African criminal system, at least in the eyes of society.

The vision of the silence principle as a human right and an instrumental expression of a fundamental decency in the relationship between government and citizen has great symbolic value. To the libertarian the silence principle is worth protecting as a bulwark against the ever-increasing state tendency to encroach upon the prerogatives of its citizenry. Unfortunately, it is a symbol with hollow foundations. A legal rule or a legal right must be based at a bare minimum on the building blocks of logic and reason. Without these essential elements of Western jurisprudence, the concept of a silence principle as a rallying point against government exploitation is simply illusory. This point is well illustrated by the confusion and ambivalence surrounding the American fifth amendment. Moreover, the libertarian warning is unnecessary. It

¹⁹³ Friendly *ibid* note 175 at 690.

¹⁹⁴ "Let any sensible person ask himself whether he would hire a babysitter for his children if she refused to reply to a question bearing upon the proper execution of her duty with a response equivalent to the privilege against self-incrimination?" Hook *Common Sense And The Fifth Amendment* (1957) 121.

¹⁹⁵ "Criminal Discovery And Self-Incrimination" (89) *Cal. L. Rev.* (1965) 94.

¹⁹⁶ Indeed, the current belief amongst professional criminals in South Africa is that true guilt or innocence is not determined by the actual facts but by the ability of defence counsel and the inability of the state to sustain a successful prosecution against the accused.

is not suggested that the suspect or the witness be compelled to answer nor that the accused be coerced into giving testimony. Extracting answers by means of physical compulsion or psychological pressure is unequivocally wrong. Instead, the proposal is advanced that the defendant who refuses to respond to the police within a properly constituted interview, or to give evidence in court must do so in the full knowledge that his defensive use of silence may draw a reasonable and adverse inference against him.¹⁹⁷ This logical proposal does not erode the protection against torture (a danger which is in any event anachronistic in modern Western jurisdictions) nor should it impose an unacceptable psychological compulsion on the criminal defendant. What it does mean though is that the silence principle is at best an ordinary evidentiary rule. Its nature is such that it cannot be elevated into a fundamental right without obfuscating its purpose and distorting its legal effect. In the following chapters an in-depth analysis will be made of the silence principle. Beginning with an examination of the American fifth amendment clause which raises the silence principle to the status of a constitutional right. In counterpoint, a comparative analysis will also be made of the present statutory limitations on the common law definition of silence brought about by the English Criminal Justice and Public Order Act 1994. The conclusion will be that a silence principle is best suited to the role of an evidentiary rule and is most unsuited to that of a constitutional right.

¹⁹⁷ It may be noted that the personality rationale (cruelty, privacy, autonomy) does not logically support a rule barring the use of adverse inferences drawn from the suspect's silence during interrogation. The traditional American rule barring adverse inference usage is based in reliance theory. In *Doyle v Ohio* 426 U.S. 610 (1976), the court barred the use of adverse inferences from interrogatory silence as a violation of due process underpinned by reliance (an instrumental protection). However, this kind of reasoning is unconvincing as the reliance interests of the suspect may always be modified by informing him about the use and effect of adverse inferences. This is the current practice in England and Europe. In *Murray v United Kingdom* 22 EHRR 29 (1996) the court held that drawing on adverse inference from silence is not a breach of the European Convention on Human Rights.

CHAPTER 5

THE AMERICAN EXPERIENCE

5.1 The Watershed Years

At first glance the privilege against self-incrimination contained within the fifth amendment of the United States Constitution appears to be fairly straightforward. The language simply provides, "no person shall be compelled in any criminal case to be a witness against himself". This single sentence has had a profound effect on domestic jurisprudence and has influenced many other foreign constitutional entrenchments of the right to silence and the privilege against self-incrimination. For example, the South African right to silence contained in the Interim Constitution (1993) is heavily influenced by its American predecessor and several of the key features incorporated into the Final Constitution (1996) may be traced to the jurisprudence developed around the fifth amendment.¹ Although the wording of the fifth amendment is simple enough, the meaning has undergone extensive judicial interpretation through an evolutionary process covering some 200 years. Judicial interpretation during these years has expanded the scope of the privilege well beyond the literal meaning of the wording.² The Supreme Court has remarked, "to apply the privilege narrowly or begrudgingly, to treat it as a historical relic is to ignore its development and purpose".³ In this sense the Supreme Court has adopted a broad policy based interpretation of the privilege as an expanding right capable of sustaining growth and encompassing new situations as they arise.⁴ The fifth amendment must be construed in a manner which is consistent with the following baseline criteria. First, a legitimate evaluation of the fifth amendment must include a proper analysis of the literal language and meaning of the clause,

¹ Sec 25 (1993 constitution) particularly sec 25(3)(d) "... and not to be a compellable witness against himself or herself". See also sec 35 (1996 constitution) particularly sec 35(3)(j) "... not to be compelled to give self-incriminating evidence".

² See Berger *"Taking The Fifth"* (1946) at 49-50 "if the privilege was interpreted narrowly it would simply prohibit the prosecution from compelling the defendant from testifying. 150 years ago this kind of interpretation would have been redundant since the defendant was already an incompetent witness at his own trial, a testimonial disqualification only removed in America (1878) and England (1898).

³ *Quinn v United States* 349 U.S 155, 162 (1955). "The privilege is a right hard earned by our forefathers. The reason for its inclusion in the constitution and the necessity for its preservation are to be found in the lessons of history", *Ullmann v United States* 350 U.S 422, 426 (1956).

⁴ *Gompers v United States* 233 U.S 604, 610 (1915), the interpretation of constitutional provisions is to be gathered "not simply by taking the words and a dictionary but by considering their origin and the line of their growth".

interpreted against the background of the entire constitutional text.⁵ Second, an account must be taken of the intention, so far as it may be perceived, of the original constitutional authors.⁶ Third, consideration must be given to previous precedent. Within this contextual framework the United State Supreme Court has liberally interpreted the fifth amendment to include a right to silence, a right to have counsel present during interrogation, a right to be advised of the right to silence and a no-inference rule. Despite the fact that nowhere in the actual wording of the fifth amendment clause are these rights literally described.⁷ The wording itself raises a number of difficulties. Why the phrase "to be a witness against himself" was selected instead of the more appropriate and specific "evidence against himself" is unclear. Why the words "self-incrimination" or "silence" were so deliberately omitted also remains a mystery. Perhaps by leaving the phrase deliberately opaque the original authors intended to allow for its expansion as the need arose. It may also be that the original drafters of the fifth amendment did not attach any particular importance to the clause. In *Twining v New Jersey*⁸ it was noted that of the thirteen states which ratified the 1791 Federal Constitution, four did so without making any reference to the privilege. Early Federal and State court decisions virtually ignored the privilege and matters involving self-incrimination were invariably decided under the common law doctrine of voluntariness (the exclusionary evidentiary rules governing confession).⁹ In 1897 the Supreme Court in *Bram v United States*¹⁰ held for the very first time that questions addressing the common-law doctrine of voluntariness should also involve an inquiry into the fifth amendment right against compulsory self-incrimination.¹¹ The court noted "[when] a question arises whether a confession is incompetent because it is not voluntary ... the issue is controlled ... by the fifth

⁵ *Hoffmann v United States* 341 U.S 479, 486 (1951). *Councilman v Hitchcock* 142 U.S 547, 562 (1892), "a liberal contextual construction is necessary to protect the right, the fifth amendment was intended to secure".

⁶ But see Wigmore Sec 2252 at 324-5, McNaughton Ed (1961) "whatever the original authors of the privilege meant by the wording is not known and there are today few legislative guides allowing for an insight into those 18th century minds". Wigmore also argues that the privilege should be recognized only within the narrowest limits required by the privilege, "Nemo Tenetur Seipsum Prodere" (5) *Harv. L. Rev.* (1891) 71, 87.

⁷ The Supreme Court has expanded the meaning of the privilege one step at a time, case by case. This lack of consistency and clear guidance has deprived the lower courts of a proper framework in which to apply the privilege to cases *a quo*. Tarallo "The Fifth Amendment Privilege Against Self-Incrimination" (27) *New Eng L. Rev.* (1992) 138-139.

⁸ 211 U.S 78, 109 (1908). Wigmore, sec 2252 at 325 notes that of 15 Federal cases by 1868 involving the problem of self-incrimination, none were decided by reference to the fifth amendment. See also Kauper, *Beytagh Constitutional Law* Little Brown and Co. (1980) 548.

⁹ *Hopt v Utah* 110 U.S 574, 584-85 (1884). *Pierce v United States* 160 U.S 355 (1896).

¹⁰ 168 U.S 532 (1897).

¹¹ Confession law and the privilege against self-incrimination follow different traditions and serve different purposes. According to Levy *Origins Of The Fifth Amendment* (1968) 329, n43, the privilege originates in the struggle against the *ex officio* oath whereas confession law is the result of a gradual accretion of *ad hoc* decisions starting in the early 1700s.

amendment".¹² Early American procedural law held the privilege to be binding only on a federal level. The Supreme Court of those days concluded that the fifth amendment was not so fundamental as to require enforcement on the local state level. The states were left to decide on their own initiative whether or not to incorporate a constitutional protection into their local constitutions. *Twining v New Jersey*¹³ found the fifth amendment binding only on the federal level and concluded that it was not an "immutable principle of justice". It was much later in 1964 that *Malloy v Hogan*¹⁴ reversed earlier precedent and held the fifth amendment fully binding upon all states through the due process mechanism of the fourteenth amendment. Over the intervening years the Supreme Court has established a number of basic rules in the application of the privilege. First, all invocations of the privilege must be liberally interpreted, always in favour of the claimant rather than against him.¹⁵ Second, an invocation of the privilege is not dependent on a particular choice of words and no specific ritual formula is required.¹⁶ Third, the privilege may be asserted in all proceedings, civil or criminal, administrative or judicial, investigatory or adjudicatory.¹⁷ Fourth, waiver of the privilege must be made voluntarily, knowingly and intelligently.¹⁸ Fifth, the accused's privilege in the courtroom (more appropriately his right to silence) is a blanket privilege, whereas the witness privilege against self-incrimination is a relative one which must be invoked on a question to question basis. Sixth, once the privilege has been claimed, no evidentiary use may be made of the suspect's pre-trial silence during custodial interrogation, nor of the accused's silence or failure to testify during the trial.

In the early twentieth century the American privilege against self-incrimination and its corollary right to silence was regarded as belonging to a distinctly second-class group of constitutional safeguards. None of these safeguards was considered essential to an orderly

¹² *Bram* *ibid* note 10 at 542.

¹³ *ibid* note 8 at 223, "It would go too far to rate [the privilege] as an immutable principle of justice which is an inalienable possession of every free citizen of a free government ... it cannot be ranked with the right to a hearing before condemnation ... it has no place in the jurisprudence of civilized and free countries outside the domain of the common law". This decision reaffirmed in *Snyder v Massachusetts* 291 U.S 97 105 (1934). *Cohen v Hurley* 366 U.S 117, 127-28 (1961).

¹⁴ 378 U.S 1, 6 (1964). The first 10 amendments (Bill of Rights) to the 1791 Constitution were initially intended to protect the individual against Federal Government interference (*Barron v The Mayor and City Council of Baltimore* 32 U.S (7 Pet) 243, 8 L Ed 672 (1833). After the enactment of the fourteenth amendment (A Civil War amendment), the question arose as to whether the Bill of Rights was protected against state abridgement. Consequently the 20th century has seen the application of the Bill of Rights to state proceedings.

¹⁵ *Hoffman v United States* 341 U.S 479, 486 (1951). *Councilman v Hitchcock* 142 U.S 547, 562 (1892). "The privilege is as broad as the mischief against which it seeks to guard", which was partly overruled by *Kastigar v United States* 406 U.S 441, 455 (1972).

¹⁶ *Quinn v United States* 349 U.S 155, 162 (1955) "no magic language is required to assert the privilege which is effectively invoked by any language which the court should reasonably be expected to understand as an attempt to claim the privilege".

¹⁷ *Kastigar v United States* 406 U.S 441, 444 (1972).

¹⁸ *Midrand v Arizona* 384 U.S 436, 444 (1966) citing *Escobedo v Illinois* 378 U.S 478, 490 n14 (1964).

criminal procedure system or a just society. *Palkov v Connecticut*¹⁹ exemplifies the prevailing philosophy of those days, “[the immunity from self-incrimination] might be lost and justice still be done no doubt there would remain the need to give protection against torture, physical or mental. Justice, however, would not perish if the accused were subject to a duty to respond to orderly inquiry”. During the 1960s the shift towards a culture of Human Rights triggered a number of significant changes in American criminal procedure. The liberal Warren Supreme Court was instrumental in initiating major modifications to criminal procedure based on a re-interpretation of the constitution. These changes are illustrated by *Massaih v United States* (1964),²⁰ for the first time a right to counsel is extended to the accused at post-indictment interrogation. *Jackson v Denno* (1964),²¹ a jury may only hear a voluntary confession. *Escobedo v Illinois* (1964),²² the suspect is entitled to legal counsel immediately after arrest. *Griffin v California* (1965),²³ the state may not draw any adverse inferences from the accused’s failure to testify at trial. *Miranda v Arizona* (1966),²⁴ a seminal decision in which the Supreme Court equates confessional law with the privilege against self-incrimination. The term compelled self-incrimination becomes an almost generic category encompassing both the traditional privilege and the voluntary or involuntary confession which arises from the interrogational relationship between the suspect and the police interviewer. In *United States v Wade* (1967),²⁵ the suspect is entitled to a right to legal counsel at post-arrest identification parades. With these and other decisions the Warren court elevated the privilege against self-incrimination into the first rank of constitutional protections. The fifth amendment high water mark was reached in *Miranda* and *Griffin* which established a culture of comprehensive constitutional safeguards for the criminal defendant. The Burger Supreme Court of the 1970s and subsequent courts, especially the Supreme Court of the Reagan years, have gradually chipped away at these amplified fifth amendment protections. Currently the parameters of the privilege are being redefined and in the perpetual antagonistic struggle between government and individual interest, the balance has begun to swing in favour of the state interest.

Social-testimonial privileges abound in the law of evidence and other than the privilege against self-incrimination include the husband-wife privilege, the attorney-client privilege, the state-citizen privilege and some not recognized by law such as the priest-penitent privilege,

¹⁹ 302 U.S 319, 325-26 (1937) per Cardozo J.

²⁰ 377 U.S 201 (1964).

²¹ 378 U.S 368 (1964).

²² 378 U.S 478 (1964).

²³ 380 U.S 609 (1965).

²⁴ 384 U.S 434 (1966).

²⁵ 388 U.S 218 (1967).

the doctor-patient privilege and the journalist-source privilege.²⁶ Of all these identifiable privileged relationships only the privilege against self-incrimination has been held important enough to achieve an elevated constitutional status. The first ten amendments of the United States Constitution are collectively referred to as the Bill of Rights. Yet of all these rights, only the principle of self-incrimination has been labeled a "privilege". All the other constitutional protections are referred to as rights. (The right against unreasonable searches and seizures (fourth amendment), the right to a jury trial (seventh amendment), the right to confront the accuser (sixth amendment) and the right to counsel (sixth amendment)). In American jurisprudence there appears to be a semantical and conceptual confusion between the use of the word "right" and the word "privilege".²⁷ Nevertheless, despite the difference in language, the privilege against self-incrimination has the same constitutional force as all the other entrenched rights. Because the privilege against self-incrimination is constitutionally entrenched, it has not been subject to the same erosion and subtraction of its influence as has recently characterized the contraction of the English right to silence. The scope and reach of the American privilege is correspondingly much wider than its English counterpart. The criticisms launched against the American privilege are more subdued than those launched against the English right to silence.²⁸ A common characteristic of some American commentators is to elevate the Constitution into a "holy grail". The privilege against self-incrimination is a typical example of an essentially legislative enactment elevated to the often unreasonable status of natural law, immutable and untouchable.

Across the Atlantic this vision is not shared by even the most fanatical of English supporters. Constitutional entrenchment of the privilege may have benefited the accused but it has also had a number of negative effects. By limiting the government's ability to use the suspect as a testimonial source in pre-trial interrogation, the privilege has driven interrogation techniques underground. Substitute interrogation techniques involving deception, trickery, wiretaps, sting operations and the use of bribed informants have become commonplace.

²⁶ Wigmore *ibid* note 6 at sec 2192 note 11. Friendly "The Fifth Amendment Tomorrow, The Case For Constitutional Change" (37) *U. Cin. L. Rev.* (1968) 671, 672 states that unlike other testimonial privileges the fifth amendment sanctions conduct which would be unacceptable socially and ethically outside of the courtroom.

²⁷ There is a significant jurisprudential difference between a *privilege* and a *right*. Rights impose limitations on the exercise of state power. Rights are not gifts of the state. Privileges on the other hand, are derived from and may be revoked by the state : A right is in theory far superior to a privilege, see *supra* chapter 3 p.81.

²⁸ See *infra* chapter 8.

Trial avoidance in the form of plea-bargaining is now the norm and the trial process has been relegated to a backwater. In England, legislative curtailment of the right to silence has reduced the perceived pressure on law enforcement organs in the face of rising crime levels. In the United States this is not an option. The tension between the state interest and the criminal defendant's private interests, the ever-changing search for the correct balance between these interests will continue to bedevil American constitutional law. An obvious target in this dynamic tension is the privilege against self-incrimination. Doctrinally the influence of the privilege has spread across every nook and crevice of American substantive and procedural law. In the last twenty years alone almost seven hundred academic journal entries have been cited describing the privilege against a background of all conceivable areas of the law. From drug enforcement through to juvenile correction and even the treatment of war criminals.²⁹ The sheer immensity of the privilege has added to the problems of American scholars who find it increasingly difficult to persuasively explain what the privilege means and why.³⁰

In its modern form the fifth amendment has been extended outside of its traditional pre-trial and trial sphere. The scope of the privilege now includes grand jury proceedings,³¹ legislative investigations,³² and civil cases where truthful assertions may result in forfeiture, penalty or criminal prosecution. The fifth amendment protection is triggered from the time the inquiry has begun to focus on a particular suspect through to police interrogation and to the trial itself, including other quasi-judicial and non-judicial procedures.³³ However, not all is expansion and the privilege has suffered a number of limitations. It has been curtailed somewhat through the mechanism of immunity grants.³⁴ "Implied consent" and the "required

²⁹ The privilege has been applied to environmental issues, professional disputes concerning teachers, lawyers, public officials, military personnel, employers, pilots and police officers. The privilege is incorporated into legislative reforms such as the Gun Control Act, Interstate Commerce Act. Also to quasi-public records, congressional investigations, deportation hearings and psychiatric examinations. For example, see Lillquist "Constitutional Rights At The Junction" (81) *Virginia L. Rev* (1995) 1989, Freitas "Extending The Privilege Against Self-Incrimination To Juvenile Hearings" (62) *Un. Ch. L. Rev* (1995) 301, Iijima "The War On Drugs" (29) *Har. Civ. Rights-Civ. Lib. L. Rev* (1994) 101, Patton *The World Where Parallel Lines Converge (Civil and Criminal Child Abuse)* (24) *Georgia L. Rev.* (1990) 473, Stanley "Conflict Between The Internal Revenue Code And The Fifth Amendment" (15) *Un. Balt. L. Rev.* (1986) 527, Hazard, Beard "A Lawyer's Privilege Against Self-Incrimination In Professional Disciplinary Hearings" (96) *Yale L. Rev.* (1987) 1060.

³⁰ As a result of the great influence of the privilege, the courts and academic commentators have sometimes over-emphasised the privilege, thereby ignoring or eclipsing other constitutional clauses of equal legal standing.

³¹ *United States v Kordel* 397 U.S. 1, 6 (1970), *Gardner v Broderick* 392 U.S. 273 (1968).

³² *Watkins v United States* 354 U.S. 178, 195-6 (1957), *Emspak v United States* 349 U.S. 190 (1955).

³³ *Quinn v United States* 349 U.S. 155 (1955) legislative classifications; *Councilman v Hitchcock* 142 U.S. 547 (1892) grand jury proceedings; *McCarthy v Arndstein* 266 U.S. 34 (1924) civil proceedings; *Garrity v New Jersey* 385 U.S. 493 (1967) grand jury investigating state corruption; *Baxter v Palmigiano* 425 U.S. 308 (1976) prison disciplinary hearing.

³⁴ *Kastigar v United States* 406 U.S. 444 (1972).

records" doctrines have also imposed limitations on privacy interests and by extension increased the exposure of the individual to legitimate state compelled self-incrimination.³⁵ The Supreme Court's decision in *Schmerber v California*³⁶ to distinguish between communicative personal testimony and real physical evidence has caused the privilege to retreat. *Hale v Henkel*³⁷ and *United States v White*³⁸ draw a line between natural and juristic personae. Unlike English and European Community Law³⁹ the American privilege is considered to be the sole prerogative of the human being and cannot be claimed by the corporate entity. The periodic waxing and waning of the privilege is the result of judicial interpretations and culturally influenced constructions of the rationales which traditionally underlie the historical privilege. It is also the result of societal cultural ambivalence which on one hand demands a strong guarantee against government tyranny and yet on the other, frowns upon any impediment to the law enforcement functions of the state. Despite the Supreme Court's elaborate praise of the privilege, it remains difficult for the discerning commentator to unravel the central reasoning which supposedly underlies the privilege.⁴⁰ By contrast, the language of the first amendment is crisp, and makes it possible to build an easily understood and well reasoned constitutional rule of prohibition. The wording of the fourth amendment clearly confines the issues to a factual question of reasonability, but the language of the fifth amendment, although straightforward, does not yield to a convenient formula. The Supreme Court has been obliged to fashion for itself standards on which to hang the privilege and, in doing so, has never quite managed to make up its mind as to what the privilege is supposed to do or whom it is intended to protect.⁴¹ The difficulty with these standards are that they conceal fundamental uncertainties about the privilege. The policy of the Supreme Court has been to endorse the privilege with generous praise but without explaining the underlying rationales or translating them into logically consistent applications of a clearly understood purpose. When a legal principle fails to meet the simple test of logic, it results in ambiguity. The history of the Supreme Court's treatment of the fifth amendment privilege is one riddled with inconsistency. For example, in *Miranda v Arizona*⁴² the court speaks of the privilege as "a noble principle transcending its origins" and "a right which is the hallmark of our democracy". Yet, in *Schmerber v California*, the court concludes, "the

³⁵ *Shapiro v United States* 335 U.S. 1 (1948); *Marchetti v United States* 348 U.S. 922 (1966); *Baltimore City Dept v Bouknight* 493 U.S. 549 (1990).

³⁶ 384 U.S. 757, 760-65 (1966). See also *Gilbert v California* 388 U.S. 263, 265-7 (1967).

³⁷ 201 U.S. 43 (1906).

³⁸ 322 U.S. 694 (1944)

³⁹ See *infra* chapter 10 .

⁴⁰ See *supra* chapter 4.

⁴¹ For a comprehensive list of Supreme Court policy justifications, see *Murphy v Waterfront Commission* 378 U.S. 52, 55 (1964), *Tehan v Shott* 382 U.S. 404, 414-16 (1966), *Miranda v California* 384 U.S. 436, 460 (1966) and *Malloy v Hogan* 378 U.S. 1, 8 (1964).

⁴² 384 U.S. 436, 460 (1966).

privilege has never been given the full scope which the values it helps protect suggest".⁴³ In one breath the Supreme Court recognizes the privilege as a fundamental hallmark of democracy and in another elects to interpret it in a way which denies its full scope.

According to the Supreme Court, the fifth amendment privilege against self-incrimination may be invoked at two distinct stages of the criminal process. First, during the custodial police interrogation, the *Miranda* procedural safeguards may be triggered to protect the suspect and to guarantee his voluntary statements by dissipating the coercive atmosphere in the interview room. The *Miranda* rule is a brave attempt at finding a workable compromise to the antagonistic pressures of balancing the individual's protective interest against the state interest in achieving low cost convictions. The *Miranda* balance of interest test is a flexible approach which deters unlawful police practices and limits the obstacles against the admissibility of probative evidence. While the *Miranda* rights are not themselves a constitutional protection, they are a sturdy prophylactic standard designed to safeguard the fifth amendment privilege. Second, in the courtroom the accused may evoke an absolute privilege against self-incrimination which does not allow for a balance of interest test. According to *New Jersey v Portash*,⁴⁴ balancing of interests is thought of as necessary in a *Miranda* type case when the attempt to deter unlawful police practices collides with the need to prevent perjury. However, in the courtroom where the constitutional privilege in its most pristine form operates, a balancing of interests is simply impermissible.⁴⁵

In all its seminal decisions, the Supreme Court has paid an arbitrary lip service to the notion of a pure privilege. The only practical method by which the various judgements may be reconciled and reduced to a coherent formula is by applying a balancing of interests analysis. The increase or decrease in the scope of the privilege and the exceptions which exclude the privilege entirely can only be systematically explained if regard is had to the perpetual struggle between the state and the individual. When the state interest is more important the privilege wanes, when the individual interest is in the ascendancy the privilege waxes. Nevertheless, the Supreme Court, in theory at least, holds fast to a single defining standard.

⁴³ 384 U.S. 757, 762 (1966).

⁴⁴ 440 U.S. 450, 459 (1979). See also *Michigan v Harvey* 494 U.S. 344, 351 (1990).

⁴⁵ "The fifth amendment has always been interpreted as an absolute "liberty" type right, imposing limitations on the exercise of governmental powers. It is set forth in absolute terms, neither conditioned nor qualified and therefore not subject to judicial inventiveness. Where other constitutional rights, the first amendment (free speech) and the fourteenth amendment (searches and seizures) are interpreted in relative terms, it is suggested that these rights are not so much absolute rights as they are deliberately intended to be mere limitations on state interference". Douglas "Statutory Immunity And Its Constitutionality" (22) *M. L. Rev.* (1957) 75, 87-88. The fifth amendment is absolute because it protects a complex of values based on the substantive dignity and integrity of the

Whenever the state seeks to induce self-incrimination in order to secure a criminal conviction, the privilege is absolute, but on the periphery in non-criminal regulatory practices a balance of interests is permissible. In *California v Byers*⁴⁶ Justice Harlan attempted to set out a uniform balance of interest test. This is not a particularly easy task as neither constitutional history nor the fifth amendment itself offers a clear guideline as to the purposes and values underlining the privilege. Despite these difficulties, the weighing of the state interest against the individual interest and the resultant choice should include an assessment of the following :

- a) Whether the choice infringes the purposes served by the privilege;
- b) The extent of the infringement;
- c) Whether the state interest in infringing the privilege is justifiable.

Justice Harlan's model is flexible as it recognizes that the privilege protects different interests whose significance varies according to the circumstance. For example, a state infringement of the individual interest in a civil proceeding should be treated differently to one in a criminal proceeding. The Harlan model provides the court with a reasonable test which rationally accommodates the state interest in securing reliable information from its citizens against the individual's need in receiving adequate procedural protection. Justice Harlan's model is similar to the specific balancing test deliberately incorporated into the South African Constitution. In terms of the limitation clause, sec 36, specific provision is made for the limitation of citizen rights in the furtherance of a legitimate state interest (Sec 36 is a legal and social safety valve). In assessing justifiable infringements on individual rights, the South African court must take into account purpose, proportionality and the benefit to the state. Determining the proper balance requires an analysis of a number of relevant factors set out in sec 36(a) – (e) :

- a) the nature of the right;
- b) the importance of the purpose of the limitation;
- c) the nature and the extent of the limitation;
- d) the relationship between the limitation and the purpose;
- e) less restrictive means to achieve the purpose.

The South African constitutional right is a relative right whereas the American fifth amendment has always been interpreted in near absolute terms. For this reason the South African balancing of interest test is better developed, more refined and takes into account a

individual. It makes the procedural demand that the state, in seeking to punish the accused, must do so through its own independent labours, *Miranda v Arizona* 348 U.S. 436, 460 (1966).

⁴⁶ 402 U.S. 424, 434 (1970).

greater variety of factors than the Harlan model. In this respect American constitutional jurisprudence has much to learn from recent South African developments.

Notwithstanding a lack of clear guidance and conflicting decisions by the United States Supreme Court, the privilege against self-incrimination may be taken to include the following bare essentials. In criminal proceedings the suspect is entitled to procedural protection from the moment the criminal inquiry begins to focus upon him (*Escobedo v Illinois*)⁴⁷. The privilege once triggered, is sustainable throughout the custodial interrogation stage, although susceptible to a balance of interest analysis (*Miranda v Arizona*)⁴⁸. At trial the privilege is absolute and the prosecution may not comment on the accused's failure to testify as this would impose an impermissible burden on the accused's constitutional rights (*Griffin v California*)⁴⁹.

In civil proceedings the witness may not be compelled to answer incriminating questions which risks a subsequent criminal prosecution before a criminal court, an administrative tribunal or a legislative investigatory committee (*Councilman v Hitchcock*)⁵⁰. The privilege protects the witness from being compelled to provide evidence of a testimonial and communicative nature (*Schmerber v California*)⁵¹, but not in respect to real physical forms of evidence. Documentary evidence is protected but is subject to an act of production compelled by the state (*Fisher v United States*)⁵². Certain private records are not protected and are subject to a required record's exception (*Shapiro v United States*)⁵³. Once the danger of incrimination has been removed by a sufficient use and derivative use grant of immunity, the witness must testify and may no longer evoke the privilege (*Kastigar v United States*)⁵⁴. Even if the privilege is successfully invoked in respect to a particular question, it cannot operate to end other examinatory questioning. The privilege is deemed waived

⁴⁷ 378 U.S. 478 (1964).

⁴⁸ 348 U.S. 436, 468 (1966). Miranda warns the prosecution, "It is impermissible to penalize an individual for exercising his fifth amendment privilege when he is under police custodial interrogation. The prosecution may not ... use at trial the fact that he stood mute or claimed his privilege in the face of accusation".

⁴⁹ 380 U.S. 609, 614 (1965), "the accused cannot be compelled to take the witness stand, neither may the judge or prosecution comment on the failure to testify". The accused may refuse to answer questions which infer guilt or which causally lead to a conclusion of guilt.

⁵⁰ 142 U.S. 547 (1892).

⁵¹ 384 U.S. 757 (1966).

⁵² 425 U.S. 391 (1976).

⁵³ 335 U.S. 1 (1948).

⁵⁴ 406 US 441 (1972)..

unless it is unequivocally invoked and the decision to grant the privilege lies with the court and not the witness (*Colorado v Connelly*)⁵⁵.

It must be noted that there is a conceptual and jurisprudential difference in the manner in which the American constitutional privilege, as opposed to the English principle, is interpreted. The American conceptual distinction between a privilege against self-incrimination and the right to silence is a weak one. Since the fifth amendment speaks only of a compulsion, both self-incrimination and silence are indiscriminately analysed against the background of a state-induced compulsion. Within this compulsion paradigm silence inevitably becomes simply another question of self-incrimination. By contrast, English and Commonwealth jurisprudence tends to draw a sharp distinction between the privilege against self-incrimination (usually claimed by a witness *to* the criminal proceeding) and the right to silence (usually claimed by the accused *in* a criminal proceeding). The English common law right to silence and the privilege against self-incrimination is based on an "absence" of any obligation on the part of the criminal defendant to speak and an "absence" of any right by the police or prosecution to infer or coerce testimony from the defendant. The American tradition, by contrast, places an "absolute" and "positive" bar on the coercion of self-incriminatory statements. English jurisprudence suggests that it is inaccurate to describe the compellable witness as possessing a right to silence, for the witness must take the stand and may only refuse to answer self-incriminating questions. On the other hand, the right to silence, as a right not to speak, belongs only to the criminal accused. The distinction between a right to silence and a privilege against self-incrimination is an important one⁵⁶. For the sake of logic and consistency, the distinction shall be maintained throughout this thesis. However, the use of the word privilege as a generic term for the American silence principle shall be retained for the next three chapters as this is the most familiar designation of the fifth amendment clause.

⁵⁵ 479 U.S. 157 (1986). See also *Moran v Burbine* 475 U.S. 412 (1986), an explicit claim must be made or else the witness is tacitly considered to have waived the privilege. The claim must be predicated upon a substantial risk of a subsequent criminal prosecution.

⁵⁶ **Canada** : the Canadian constitutional right is heavily influenced by its American counterpart. Sec 11 (c) and sec 13 of the Charter refer only to the witness's right against self-incrimination while failing to expressly mention a right to silence. The Canadian silence principle is only saved from an Americanised blurring of the distinction between the privilege against self-incrimination and the right to silence by its strong English common law inheritance (sec 7 indirectly incorporates a right to silence into the Charter).

South Africa : sec 35(1)(a)(b), sec 35(3)(h)(i)(1996) Constitution refers to both the accused's right to silence and his right against self-incrimination. In theory the accused possesses a right to silence in the sense that he may refuse to testify. Once he elects to testify, he loses his protection and may be cross-examined on all the issues he has put into dispute. His right to silence diminishes but he does not acquire a corresponding right against self-incrimination. The accused is not in the same position as the non-defendant witness, he cannot elect to selectively answer questions. To award the accused a right against self-incrimination as the South African Constitution does, is at least in theory, illogical.

The vast majority of American jurists consider the constitutional right to be a fundamental principle of American jurisprudence but are unable to advance a sufficiently persuasive *raison d'être* to support a notion built largely on an uncritical adherence to a slavish *stare decisis*. For example, the libertarians, Greenwalt⁵⁷ and Gerstein⁵⁸, influential protagonists of the privilege, are unable to provide reasoned justifications which are moral and logical in theory and consistent in practice. American theorists who are critical of the privilege are strangely hesitant in calling for its abolition. Perhaps this is the result of a monumental and authoritative constitutional jurisprudence which frowns on direct criticism. Friendly⁵⁹, despite a wide ranging attack on the principle, concedes the usefulness of silence at least until alternative protections for first amendment rights are in place. Dolinko⁶⁰, the most persuasive of American critics, also draws back from advocating the abolition of the silence privilege on the rather flimsy ground that a rule whose existence lacks any principled justification is nevertheless functionally important, because its repeal may do violence to the legal system as a whole. A reasoning which is both tenuous and contradictory to the main theme of his impressive work. Wigmore, who initially advocated the negation of the privilege was eventually to concede the necessity of its existence, but within narrowly prescribed boundaries⁶¹. Stuntz⁶² would topple the silence privilege from its fundamentalist pedestal and reduce it to the petty rank of a mere substantive law principle. Amongst American theorists therefore, the privilege has been largely safe from radical attack. Debate has centred more on an analysis of the periodic broadening and erosion of its protective sphere without touching on the sensitive issue of whether there should be a privilege at all. In the main, the reluctance of the American legal fraternity to criticize the privilege against self-incrimination is based on a common desire to preserve the functional integrity of the criminal justice system. If there is a uniform theme in the dicta of the Supreme Court, then it is this. Yes, we recognize that we have been unable to provide a rational justification for the existence of the privilege! Yes, we admit that in all probability we will be unable to develop a principled foundation, but to abolish the privilege would remove one of the established

⁵⁷ Greenawalt "Silence As A Moral And Constitutional Right" (23) *William and Mary L. Rev.* (1981), "Perspectives On The Right To Silence" in *Crime Criminology and Public Policy* Hood Ed. See *supra* chapter 3 p.92-93.

⁵⁸ Gerstein "Privacy And Self-Incrimination" (80) *Ethics* (1970) 87, "Punishment And Self-Incrimination" *Am. J. Juris* (1971) 84, "The Demise of Boyd, Self-Incrimination And Private Papers In The Burger Court" (27) *UCLA. L. Rev* (1979) 343. See *supra* chapter 4 p.124-129.

⁵⁹ Friendly *ibid* note 26.

⁶⁰ Dolinko "Is There A Rationale For The Privilege Against Self-Incrimination" (33) *U.C.L.A. L. Rev* (1986) 1063.

⁶¹ Wigmore *ibid* note 6.

⁶² Stuntz "Self-Incrimination And Excuse" (86) *Colombia L. Rev* (1988) 1227, and "The Substantive Origins Of Criminal Procedure" (105) *Yale L. J* (1995) 393. See *supra* chapter 4 p.129-134.

functional mainstays of the adversarial trial process and cause immense damage to the American criminal system as a whole!

5.2 The Miranda Legacy – Custodial Interrogation

The Warren Supreme Court in its 1966 decision *Miranda v Arizona*⁶³ deliberately sets out a landmark judgement which has significantly influenced the course of United States pre-trial criminal procedure over the past three decades.⁶⁴ The controversial decision has profoundly affected the nature of the fifth amendment privilege,⁶⁵ as well as channeling the rules governing confessional law into an altogether new direction. In essence *Miranda* draws a “bright line” to be followed by law enforcement officials, the suspect and the court. A “bright line” defined as an automatic exclusionary rule for coerced statements made by a suspect during custodial interrogation. *Miranda* aims at placing the suspect on an equal footing with the interrogator by providing the suspect with certain procedural safeguards and by demanding that any admission or confession made by the suspect be dependent on a knowing and intelligent waiver of fifth and sixth amendment rights. The *Miranda* exclusionary rule is based on a framework of four essential elements. Before interrogation, the police must warn the suspect of his right to remain silent.⁶⁶ Anything said may be used against the suspect at trial. The suspect has a right to consult with an attorney of his choice and to have the attorney present during interrogation. If the suspect is indigent, an attorney will be appointed to represent him.⁶⁷ When the interrogation is conducted without the presence of an attorney, the state bears a heavy burden to show that the suspect waived his rights in a voluntary and intelligent manner.⁶⁸ Two reasons are advanced by the Warren Court for developing a new fundamental rule. First, the common law involuntary confessional test was

⁶³ 384 U.S. 436 (1966). The “Warren Court” named after the incumbent Chief Justice at the time, C J Warren.

⁶⁴ There is a vast literature on the *Miranda* decision : The more influential articles are : Weisselberg “Saving Miranda” (84) *Cornell L. Rev* (1998) 109. Garcia “Is Miranda Dead, Was It Overruled Or Is It Irrelevant” (10) *St Thomas L. Rev* (1998) 461. Stack “Criminal Procedure, Confessions, Waiver Of Privilege” (25) *Seton Hall L. Rev* (1994) 353. Dripps “Beyond The Warren Court And Its Conservative Critics” (23) *U. Mich. J. L Rev* (1990) 591.. Saltzburg “Miranda Revisited : Constitutional Law Or Judicial Fiat” (26) *Washburn. L. J* (1986) 1. Marcus “The Supreme Court And The Privilege Against Self-Incrimination” (38) *Oklahoma L. Rev* (1985) 719. Grano “Voluntariness Free Will And The Law Of Confession” (65) *Va. L. Rev* (1979) 859. Sunderland “Self-Incrimination And The Constitutional Law Principle” (15) *Wake Forest L. Rev* (1979) 171. Berger “The Unprivileged Status Of The Fifth Amendment Privilege” (15) *Am. Crim. L. Rev* (1978) 201. Kamisar “A Dissent From The Miranda Dissents” (65) *Mich. L. Rev* (1966) 59. Other interesting articles on *Miranda* are Markman “The Fifth Amendment And Custodial Questioning. A Response To Considering Miranda” (54) *U. Chi. L. Rev* (1987) 938. Caplan “Questioning Miranda” (38) *Vand. L. Rev* (1985) 1417.

⁶⁵ The *Miranda* decision breaks new ground because the Fifth Amendment literally only applies to criminal trials and makes no mention of the pre-trial police interrogation process.

⁶⁶ *Miranda* *ibid* at 478.

⁶⁷ *Ibid* at 467 – 473 and 479.

⁶⁸ *Ibid* at 475.

a vague, unclear and insecure test of admissibility. The exclusionary test set out in *Miranda* is clear and unambiguous. Second, the atmosphere of custodial interrogation is inherently coercive. The *Miranda* safeguards counter-balance and dissipate the coercive interrogation room atmosphere and make the possibility of a voluntary confession more likely. From the outset both the policy and the legal nature of the *Miranda* doctrine were in doubt. The doctrine was initially intended to serve two policy functions. Primarily it was designed as a protection for the suspect's personal right to silence (and not to incriminate himself) during custodial interrogation. Secondly, it was also intended as a disciplinary tool with the purpose of dissuading police from exploiting the coercive atmosphere of the police station and from employing dubious interrogation techniques. In practice though, the doctrine has driven interrogation techniques underground and has stimulated a plethora of police interviewing manuals concerned with circumventing the *Miranda* warnings. The legal status of *Miranda* is also open to doubt. Is the doctrine an absolute (no balance of interest) or a relative (balance of interest allowed) constitutional right? If it has no constitutional authority, may it be reduced to a mere prophylactic safeguard? Numerous post-*Miranda* Supreme Court decisions have leveled the doctrine to no more than a prophylactic standard announcing rights which are not themselves constitutionally protected.⁶⁹

The scope of the *Miranda* protection has been subject to deep erosion. Evidence going to "credibility" may be used in cross-examination where the accused testifies inconsistently to some element of his confession⁷⁰ or in rebuttal of his confession.⁷¹ There is a "public safety exception" allowing the police officer to exclude the *Miranda* catalogue in a circumstance endangering public safety.⁷² The fruits of the "poisonous tree doctrine" (which excludes derivative evidence acquired indirectly from an infringement of a constitutional right) is not applicable to some kinds of *Miranda* breaches.⁷³ The *Miranda* doctrine is generally a controversial attempt to find a workable compromise to the perennial problem of balancing the state public interest in achieving low-cost convictions against the personal interest of the accused in a fair and just criminal process.⁷⁴ Many such compromise solutions have been proposed and have spawned heated debate on both sides of the Atlantic. In England the fulcrum has shifted in favour of the state public interest through the enactment of both the

⁶⁹ *Michigan v Tucker* 417 U.S. 433, 444 (1974) per Rehnquist J "[the *Miranda* rules) are not themselves protected by the Constitution but were instead measures to insure that the right against self-incrimination was protected ... to provide practical reinforcement of that right". See also *Oregon v Elstad* 470 U.S. 298 (1985).

⁷⁰ *Harris v New York* 401 U.S. 222 (1971).

⁷¹ *Oregon v Hass* 420 U.S. 714 (1975).

⁷² *New York v Quarles* 467 U.S. 649 (1984).

⁷³ *Michigan v Tucker* 417 U.S. 433 (1974).

⁷⁴ *Miranda* *ibid* at 479, 488 – 490. *Miranda* has downplayed the interests of society in favour of the individual. *Miranda* emphasizes personal privacy from unsolicited state intrusions.

Police and Criminal Evidence Act 1984 (PACE) and the tough Criminal Justice and Public Order Act 1994 (CRIMPO). In the United States, the Supreme Court has over the past thirty years gently but persistently chiseled away at the edifice of the *Miranda* safeguards. Nevertheless, it is a fundamental principle that after triggering the *Miranda* warning, the government is absolutely prohibited from making evidentiary use of the suspect's silence. The suspect's silence in the face of interrogation and inferences drawn from this silence are inadmissible at trial.

Traditionally, the United States Supreme Court has adhered to the common law voluntariness doctrine which defines coerced confessions in terms of ordinary evidentiary rules and without reference to constitutional principles.⁷⁵ In *Hopt v Utah*,⁷⁶ *Wilson v United States*⁷⁷ and *Pierce v United States*,⁷⁸ the Supreme Court defined the common law rule in the following terms : "[a confession] is admissible in evidence if it is freely and voluntarily made and inadmissible where induced as a result of a threat or promise by or in the presence of a person in authority, which threat or promise operates on the fears or hopes of the accused, depriving him of the freedom of will or self-control".⁷⁹ The common law voluntary test examines the subjective state of mind and the credibility of the accused's testimony, rather than the procedural rules used in obtaining the testimony. The nexus between evidentiary confessional law and the constitution was first tentatively explored in *Bram v United States*.⁸⁰ After an examination of historical precedent, *Bram* held that the fifth amendment and the common law voluntariness rule were causally related because both prevented similar wrongs

⁷⁵ Wigmore *Evidence In Trials* sec 824 (McNaughton Ed) (1961) identifies two ways of excluding confessions (a) is the confession trustworthy; b) whether the facts surrounding the confession suggest that it is false. Wigmore applies this reasoning only to the common law confession definition because he interprets the fifth amendment narrowly. Grano "Voluntariness, Free Will And The Law Of Confession" (65) *Val. L. Rev* (1979) 859 notes that there are two standards subsumed in a proper definition of voluntariness : (a) a right not to be coerced into confessing (a volitional and mental freedom), (b) the right not to have police use tactics that result in an unfair advantage or improper exploitation.

⁷⁶ 110 U.S 574, 584 – 585 (1884).

⁷⁷ 162 U.S 613, 622 – 23 (1896).

⁷⁸ 160 U.S 355, 357 (1896).

⁷⁹ *Hopt v Utah* at 584 – 585. See also Ogletree "Are Confessions Really Good For The Soul? A Proposal To Mirandize Miranda" (100) *Harv. L. Rev* (1987) 1826, 1831. Tomkovicz "Standards For Invocations And Waiver Of Counsel In Confession Contexts" (71) *Iowa L. Rev* (1986) 975. Please note that for the purpose of this thesis no distinction is drawn between a confession (to all the crime) and an admission (to part of the crime), nor between exculpatory or inculpatory statements. *Miranda* holds that for the purpose of explaining the connection between confessional law and the fifth amendment privilege, no such distinction need be made (at 476, 477). See also *Aschcraft v Tennessee* 327 U.S 276, 278 – 279 (1946).

⁸⁰ 168 U.S 532, 542 (1897). For a discussion of *Bram* see Dix "Mistake, Ignorance, Expectations Of Benefit And The Modern Law of Confessions" *Wash. U. L. Q* (1975) 275, 960. Uniman "The Soap Box Exception To The Miranda Rule : Fifth Amendment Protections Slip Down The Drain" (15) *Seton Hall L. Rev* (1985) 685, 688.

and secured similar safeguards.⁸¹ *Bram* has been criticized for its unsubstantiated assumption that the fifth amendment necessarily determines the voluntariness of a confession.⁸² The *Bram* decision applied only on the federal level and subsequent state court decisions reverted to the pre-*Bram* evidentiary voluntariness rule. *Ziang Sung Wan v United States*⁸³ and *Perovich v United States*,⁸⁴ defined coerced confessions purely in terms of traditional evidentiary rules. The traditional rule was modified in *Brown v Mississippi*,⁸⁵ which made no reference to the fifth amendment and grounded its decision on the fourteenth amendment "due process" rule. The *Brown* test concentrates on due process and the police conduct used in eliciting confessions.⁸⁶ *Brown* effectively merges the common law component which focuses on the suspect's state of mind and the credibility of his statement with the procedural due process component of the fourteenth amendment which focuses on the interrogation methods employed by the police.⁸⁷ From the 1940s through to the 1960s the "modified due process" model continued to be the preferred norm determining on an *ad hoc* case by case basis whether a confession was truly the product of the suspect's free will.⁸⁸ The Supreme Court eventually adopted a "totality of the circumstances"⁸⁹ due process model to assess whether a confession was the product of a rational intellect and a free will or whether the accused's will was overborne by police tactics.⁹⁰ Despite a shift from the common law emphasis on the overall reliability of the statement to an emphasis on a scrutiny of police conduct the Supreme Court did not articulate the totality of circumstances approach with any great degree of specificity. The due process standard did not allow for a

⁸¹ *Bram* *ibid* at 543, 583, 585.

⁸² Wigmore *ibid* note 75 describes *Bram* as the height of absurdity in the misapplication of the law.

⁸³ 266 U.S 1, 14 – 17 (1924).

⁸⁴ 205 U.S 86, 91 (1907), noting that the Supreme Court's unwillingness to confront the constitutional issue of confession was based on precedent and the common law which excluded confessions purely in terms of evidentiary rules.

⁸⁵ 297 U.S. 278 (1936) the court excluded an involuntary confession in a state court by using the fourteenth amendment due process clause (at 286 – 287), due process requires that all state action "be consistent with the fundamental principles of liberty and justice which underlie our civil and political institutions".

⁸⁶ The fourteenth amendment due process clause reads in part, "nor shall any state deprive any person of life, liberty, or property, without due process of law".

⁸⁷ See Link "Fifth Amendment – The Constitutionality Of Custodial Confessions" (82) *J. Crim. L. Criminology* (1992) 878.

⁸⁸ For a full discussion on the development of the voluntary test see Kamisar "On The Fruits Of Miranda. Violations, Coerced Confessions And Compelled Testimony" (93) *Mich. L. Rev* (1995) 929, 936 – 41.

⁸⁹ The "totality of circumstance" requires an assessment of police conduct in procuring the confession as well as the status and characteristics of the suspect. Crossley "Note : Miranda And The State Constitution : State Courts Take A Stand" (39) *Vand. L. Rev* (1986) 1693, 1705. The classic formulation of this approach is in *Columber v Connecticut* 367 U.S 568, 602 (1961), "is the confession the product of an essentially free will and unconstrained choice by its maker? If it is, the confession may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process".

⁹⁰ Factors to be assessed were the ability to withstand interrogation, the length of interrogation, opportunity for sleep and eating, suspect's education, the use of physical and psychological pressure.

satisfactory judicial review, gave little guidance to the police on correct interrogatory techniques and was based on an elusive, measureless standard of psychological coercion.⁹¹ According to *Irving v Stone*,⁹² “the chief result of the *ad hoc* case-by-case assessment of due process was an unpredictability, in which inchoate notions of propriety concerning local police conduct guides the court decision and which does not shape the conduct of local police one whit”. Similarly, in *Miranda v Arizona*,⁹³ Justice Harlan remarks, “The court has never pinned the voluntariness rubric down to a single meaning but on the contrary infused it with a number of different values apart from direct physical coercion [in which the police overreach normal civilized behaviour] ... no single or fixed combination of [values] guarantees exclusion [of confessions]”. The dissatisfaction with the common law voluntariness rule in England has also triggered significant changes in the standard of confession admissibility. Sec 76 and sec 78 of the Police and Criminal Evidence Act 1984 (PACE) now embody unique statutory modifications to confessional law.⁹⁴ (By contrast, the South African rule of confessional admissibility is a statutory formulation of the ordinary English common law as it was in 1830).⁹⁵

By the mid-1960s the United States Supreme Court was ready to replace the vague voluntariness rule with an objective concrete standard. In a number of cases beginning with *Malloy v Hogan*,⁹⁶ the Supreme Court abandoned the modified due process voluntary approach and made the admissibility of confessions dependent upon an objective constitutional standard based on the fifth and sixteenth amendment.⁹⁷ *Malloy* proclaimed that the admissibility of confessions in state courts would be governed by the same standards employed in the federal courts since *Bram*. The new objective standard was made applicable to the state courts by means of the familiar fourteenth amendment due process

⁹¹ The due process totality model was a soft value-laden standard difficult to apply because it lacked uniform factors. It lacked clear guidelines for the courts and clear procedural standards for the police.

⁹² 347 U.S 128, 138 – 139 (1954).

⁹³ 384 U.S at 507 – 508. See Kasimar “What Is An Involuntary Confession” (17) *Rutgers L. Rev* (1963) 745 – 46 who suggests that the voluntariness rule is an old threadbare generality, an empty abstraction designed to vilify certain effective interrogation techniques.

⁹⁴ See *infra* chapter 8 p.290-292.

⁹⁵ The South African common law voluntary definition of confession is statutorily defined in sec 217 (confessions) and sec 219A (admissions). Zeffertt and Hoffmann *South African Law of Evidence* 4th Ed (1996). Australia has chosen to follow the English example and has statutorily modified its confession rule by excluding the voluntariness concept, i.e. Evidence Act 1995 (Cth), Evidence Act 1995 (NSW). Dennis “The Admissibility Of Confessions Under Sec 84 And 85 Of The Evidence Act 1995” (18) *Sydney L. Rev* (1996) 34.

⁹⁶ 378 U.S 1 (1964). *Malloy* is the first twentieth century state case to merge the fifth amendment with the confessional rule (*Bram* is a nineteenth century federal case). *Malloy* noted the state/federal court distinction and concluded that the same standard must govern the accused’s silence in both federal and state proceedings (at 7 and 11).

⁹⁷ *Malloy* justified the shift from a due process model to a fifth and sixth amendment model on the ground that the American criminal justice system was accusatorial not inquisitorial in nature (at 7).

clause.⁹⁸ Following hard on the heels of *Malloy*, the Supreme Court announced two other decisions which illustrated the dissatisfaction with the modified due process approach. In both cases the Supreme Court applied a sixth amendment rather than a fifth amendment type analysis. In *Massiah v United States*,⁹⁹ the court held that a suspect possessed a right to counsel during a post-indictment interrogation. Any infringement of the suspect's sixth amendment right rendered his confession inadmissible. Following logically from *Massiah's* reasoning the court in *Escobedo v Illinois*¹⁰⁰ extended the sixth amendment protection to pre-indictment confessions by holding that the suspect's right to counsel becomes operative the moment the police investigation focus shifts from the preliminary investigatory to the formal accusatory stage.¹⁰¹ *Malloy*, *Massiah* and *Escobedo* laid the initial foundations for the *Miranda* decision and foreshadow the demise of the voluntary and due process model. The linking of confessional law with the sixth amendment and the dramatic switch from a due process to a six amendment analytical scheme did not solve the problem concerning the unclear standards applied in confession cases. State and federal courts continued to struggle with the ambiguous *Escobedo* sixth amendment focus standard.¹⁰²

The confusion surrounding the vague and shifting standards of confessional law was finally resolved in *Miranda v Arizona*. *Miranda* represents a radical departure from prior precedent. Police interrogation before *Miranda* had never been fully analysed in the language of fifth amendment jurisprudence. In *Miranda* the Supreme Court comprehensively rejects prior confession admission standards based on common law voluntary rules, due process or sixth amendment principles. Instead, the *Miranda* rule looks to the fifth amendment's self-incrimination clause to prohibit the use, in court, of inculpatory statements made during a custodial interrogation. The *Miranda* intention is to seek a meaningful, precise and clear standard of confession voluntariness which covers not only inadmissible inculpatory

⁹⁸ Shulhofer "Reconsidering Miranda" (54) *U. Chi. L. Rev* (1987) 440 – 46, criticizes the Supreme Court for confusing the fifth amendment concept of "compulsion" with the due process concept of "involuntariness". This confusion has led to an uncertainty about the nature of a confession in the *Miranda* decision.

⁹⁹ 377 U.S 201, 204 (1964).

¹⁰⁰ 378 U.S 478 (1964).

¹⁰¹ *Escobedo* at 490 – 491, 492, "where the investigation is no longer a general inquiry ... but has begun to focus on a particular suspect ... and the suspect has requested and been denied an opportunity to consult with a lawyer ... no statement elicited by the police may be used against him in a criminal trial". *Escobedo* has been criticized because prior precedent does not indicate that a suspect can invoke a sixth amendment right to counsel before the criminal charge, neither does the sixth amendment guarantee a right to silence.

¹⁰² Some state courts interpreted *Escobedo* narrowly (a constitutional violation occurs once the suspect specifically requests and is refused counsel). *Hawaii v Cummings* 49 Hawaii 522 423 P2d (1967). Other courts adopted a broader view (once the suspect has effectively been denied counsel). *State v Neely* 239 Oregon 487, P2d 482 (1965), See Bowman "The Right To Counsel During Custodial Interrogation" (39) *Vand. L. Rev* (1986) 1159. Warden "Miranda : Some History, Some Observations And Some Questions" (20) *Vand. L. Rev* (1966) 39.

statements induced by extreme forms of physical and psychological interrogatory pressures, but also those statements obtained through more subtle techniques such as persuasion, trickery and deception. The *Miranda* doctrine would produce voluntary statements by establishing a set of procedural safeguards designed to dissipate the coercion inherent in custodial interrogation.

*Miranda v Arizona*¹⁰³ is really four cases sharing similar facts, deliberately joined together for the sole purpose of allowing the Supreme Court a forum in which to articulate the new pre-trial standard. All four cases involve the isolation of the suspect in a police dominated environment resulting in the extraction of self-incriminatory statements induced in the absence of sufficient warnings about constitutional rights. *Miranda* seeks to provide a non-coercive neutral environment in which the suspect may make an informed choice, whether or not to exercise the fifth amendment privilege against self-incrimination.¹⁰⁴ An environment which relieves the suspect of the pressure to speak and which allows for a free and rational decision making process.¹⁰⁵ Where the suspect elects to waive his rights and privilege, the choice must be made knowingly, intelligently¹⁰⁶ and constitute an unfettered exercise of free will. The essence of the *Miranda* safeguard may be defined in the following sentence, “where the suspect is detained or placed in custody and is about to be subjected to police interrogation, the suspect must be informed of his right to silence¹⁰⁷ and his right to have legal counsel present.¹⁰⁸ These rights must be rigidly honoured,¹⁰⁹ unless the suspect waives his right and does not at a later stage re-assert them. If the suspect voluntarily chooses to waive his right he must be informed of the possible subsequent use and effect of

¹⁰³ 384 U.S. 436 (1966). *Miranda* is the deliberate co-joining of one federal and three state cases. *Westover v United States* 342 F.2d 684 (1965), *Miranda v Arizona* 98 Ariz. 18, 401, P.2d, 721 (1965), *California v Stewart* 62 Cal. 2d 571, 400 P.2d 97, 43 Cal. rept. (1965), *Vignera v New York* 15 N.Y. 2d 970, 207, N.E. 2d 527, 529, N.Y. 2d (1965).

¹⁰⁴ *Miranda* at 461, “an individual swept from familiar surroundings into police custody, surrounded by antagonistic forces and subjected to the techniques of persuasion ... cannot be otherwise than under a compulsion to speak”.

¹⁰⁵ The *Miranda* warning is a strong *per se* exclusionary rule, “no evidence obtained as a result of the interrogation can be used” (at 476 – 477, 479), expressly tied to the fifth amendment (at 476). By holding that the fifth amendment protects the suspect in an inherently coercive interrogation which may only be dissipated by a specific procedure, the *Miranda* doctrine establishes an *irrebuttable presumption* (at 476 – 77, 467 – 69). By contrast, Grano *Confessions, Truth And The Law* (1993) 185 – 189 concludes from an examination of constitutional history that there is nothing in the fifth amendment which authorizes the court to create a code-like set of rules. Friendly “A Postscript On *Miranda*” in *Benchmarks* (1967) 266 – 67, criticizes *Miranda* for utilizing the Bill of Rights to prescribe a detailed code of criminal procedure.

¹⁰⁶ *Ibid* at 444, 479.

¹⁰⁷ *Ibid* at 467 – 468.

¹⁰⁸ *Ibid* at 471.

¹⁰⁹ *Ibid* at 473 – 74.

self-incriminatory evidence during trial".¹¹⁰ In order to strengthen procedural safeguards, the suspect is also empowered to claim the right to legal counsel.¹¹¹ However, the right to have legal counsel present during the interrogation process does not flow from the sixth amendment's express conferral of that right. Instead it arises indirectly from the fifth amendment. According to *Miranda*, the right to have legal counsel present is an indispensable adjunct of the fifth amendment privilege.¹¹² Despite the similar and overlapping protection offered by both the fifth and the sixth amendments, the two clauses do not duplicate but rather complement each other. In order for the sixth amendment right to counsel to become operative, there must be a deliberate inducement of statements by the state *after* the institution of formal legal proceedings. On the other hand, for the fifth amendment ancillary right to counsel to arise, there must be a coercive interrogation in a custodial setting *before* legal proceedings have been initiated.¹¹³

The *Miranda* procedural safeguards are not directly mandated by the Constitution. The fifth amendment does not contain language which directly confers these safeguards on the suspect. Rather, these warnings flow indirectly from the constitution and are deliberately designed to protect and consolidate the suspect's right to silence and privilege against self-incrimination which is itself constitutionally entrenched. Whether or not the *Miranda* rules should be constitutionally mandated remains an unanswered question. Majority academic opinion supported by a number of Supreme Court dicta suggest that the safeguards are mere prophylactic rules not protected by the Constitution.¹¹⁴ Nevertheless, the Supreme Court supports the reasoning that the *Miranda* rules may only be modified or replaced by alternative and equally effective substitutes. Absent other safeguards at least as effective, the *Miranda* rules are constitutionally necessary to deter compelling interrogatory pressures which violate the fifth amendment.¹¹⁵ (A similar debate rages in England where it has been held that the procedural safeguards established by the Police and Criminal Evidence Act 1984 (PACE) provide sufficient guarantees for a voluntary confession).

The *Miranda* decision breaks through to a new ground, and extends the fifth amendment into an arena not previously contemplated by the eighteenth century authors of the constitutional

¹¹⁰ Ibid at 467 – 69.

¹¹¹ Ibid at 469.

¹¹² Ibid at 469 and 471.

¹¹³ *United States v Henry* 447 U.S 264, 272-75 (1980), finding that in the absence of custodial interrogation, the sixth amendment right to counsel is preferable to the fifth amendment.

¹¹⁴ *Michigan v Tucker* 417 U.S 433, 444 (1974), *New York v Quarles* 467 U.S 649, 654 (1984), *Oregon v Elstad* 470 U.S 298, 291 (1985). See also Strauss "The Ubiquity Of Prophylactic Rules (55) *U. Chi. L. Rev* (1988) 190.

¹¹⁵ *Withrow v Williams* 507 U.S 680, 594 (1993) "absent safeguards at least as effective, the *Miranda* rules are constitutionally necessary".

privilege. *Miranda* justifies going beyond the traditional parameters by emphasizing the benefit to both society and the individual. The Supreme Court embraces a "carefully crafted balance designed to fully protect both the defendant's and society's interests".¹¹⁶ A designed test which must on one hand prevent coerced confessions and yet on the other hand, facilitate law enforcement efforts. Whether or not *Miranda* has achieved a proper and finely poised balance is an unsettled question. Conventional wisdom holds that *Miranda* has had a negligible effect on law enforcement. The number of convictions and the overall number of confessions has not decreased as a result of the *Miranda* safeguards.¹¹⁷ A minority school holds the opposite view and advances statistical and empirical evidence indicating a small but significant decrease in the post-*Miranda* confession rate.¹¹⁸ International comparisons with England and Canada suggest further evidence of a declining confession rate.¹¹⁹ In England similar statistical comparisons between the English pre-PACE regime (one which did not contain strict *Miranda* type safeguards) and the post-PACE regime (one which now possesses similar *Miranda* type protections) shows a comparable confessional rate decline towards American levels. One of the reasons for the enactment of the Criminal Justice and Public Order Act 1994 was to curtail the declining confessional rate. In effect *Miranda* is a libertarian attempt at a workable compromise. *Miranda* does not prohibit all interrogation. Interrogation even without counsel present may continue subject to procedures which protect fifth amendment rights. Neither does *Miranda* prevent police officers from questioning individuals who possess relevant information but are as yet not suspected of any crime. The procedures set out in *Miranda* are the minimum necessary to protect the fifth amendment but other procedures may be implemented so long as they are fully as effective in informing suspects of their right to silence and in affording a continuous opportunity to exercise it.¹²⁰

¹¹⁶ *Moran v Burbine* 475 U.S. 412, 434, n4 (1986).

¹¹⁷ Schulhofer "Miranda's Practical Effect : Substantial Benefits And Vanishing Small Social Costs" (90) *Nw. U. L. Rev* (1996) 552, n214, and "Bashing Miranda Is Unjustified ... And Harmful" (20) *Harv. J. L. and Pub Poly* (1997) 347, 348.

¹¹⁸ Cassell "Miranda's Social Costs : An Empirical Reassessment (90) *Nw. U. L. Rev* (1996) 387, 408-409 and "All Benefits, No Costs, The Grand Illusion of Miranda's Defenders" (90) *Nw. U. L. Rev* (1996) 1084. Thomas "Is Miranda A Real-World Failure? (43) *UCLA L. Rev* (1996) 821.

¹¹⁹ Statistics from Britain and Canada suggest a declining confession rate after the incorporation of *Miranda*-type protections. Under the old pre-PACE regime, the English police obtained confessions in between 61% to 85% of the cases, a rate at least 20% higher than the prevailing American confession rate after *Miranda*. See Cassel *ibid* at 419-22.

¹²⁰ *Miranda* as a compromise, see Herman "The Supreme Court, The Attorney-General And The Good Old Days Of Police Interrogation" (48) *Ohio. St. L. J* (1987) 733, 735-736. Klein "Miranda Deconstitutionalized" (143) *U. Pa. L. Rev* (1994) 423-26.

The *Miranda* judgement draws a number of other conclusions which are important for a comprehensive understanding of the pre-trial application of the privilege against self-incrimination and the right to silence. The decision sets out the following :

- a) An analysis of some of the philosophical rationales underpinning the privilege against self incrimination.
- b) Judicial recognition of the nexus between the fifth amendment privilege and the confessional exclusionary rule.
- c) A right to silence and to legal advice justified in terms of the fifth amendment (which is silent on legal advice) rather than in terms of the sixth amendment (which specifically refers to legal advice).
- d) A brief judicial definition of the concept "custodial interrogation", and an anticipation of the problems besetting the question of waiver of constitutional rights.

In respect to the first point, the court assesses the philosophical nature of the privilege against self-incrimination against the familiar background of the two inherently conflicting interests which exist in the pre-trial stage. On one hand, society's need for a professional interrogation service and low-cost criminal processing. On the other hand, the preservation of the individual interest against unjust government intrusion. *Miranda* illustrates the shift away from the traditional rationales which emphasise protection of the innocent and the furtherance of truth, to the more fashionably modern idea that government respect the dignity and integrity of its citizens.¹²¹ The court assumes that the protection of the individual interest far outweighs the social interest in effective law enforcement, "the whole thrust of our discussion demonstrates that the constitution has prescribed the rights of the individual when confronted with the power of government, when it provided in the fifth amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abrogated."¹²² The court speaks of a noble principle which, "transcends its origins" and nurtures the individual's unassailable right to a "private enclave"¹²³ where [the individual] may lead a private life, a hallmark of our democracy". The privilege is reduced to a simple but fundamental value reflecting "the inviolability of the human personality" and the "avoidance of cruel"¹²⁴ expedients compelling evidence from an individual's own mouth".¹²⁵ The mechanism which protects these values is borne by the government which shoulders the entire burden

¹²¹ See *supra* chapter 4 p.112-113.

¹²² *Miranda* at 479 and 488-90.

¹²³ See *supra* chapter 4 p.118.

¹²⁴ See *supra* chapter 3 p.114

¹²⁵ *Ibid* at 459-61.

by maintaining a "fair-state individual balance."¹²⁶ The danger to be guarded against is the physical or psychological compulsion intrinsic to the interrogation process.¹²⁷ Compulsion is inhumane as it infringes the desire for self-preservation and liberty fundamental to the American socio-political system. These libertarian arguments have been confronted and exposed in chapter four. *Miranda* is a typical illustration of the sentimentality expounded by libertarians in their search for fifth amendment justifications. It is the product of a post-World War human rights culture.

The second point examines the causal relationship between coerced confessions and the privilege. *Miranda* addresses the rule against the admission of involuntary confessions, not in evidentiary language, but in constitutional terms. The confessional exclusionary rule now forms part of the privilege against self-incrimination and is encompassed by the fifth amendment. Is there a nexus between the confession rule and the privilege against self-incrimination? Wigmore thought not and found no historical connection between the two.¹²⁸ Levy on the other hand, while acknowledging the historical differences between the two concepts, does recognize an intimate connection. "There remains ... an indissoluble nexus between the two, because both involve the involuntary acknowledgement of guilt. Every coerced confession was a violation of the right against self-incrimination".¹²⁹ The right against self-incrimination and the confession rule seem logically to merge in the fifth amendment because of the element of compulsion common to both. The confessional exclusionary rule and the privilege reflect the same common idea, "a determination to hold public authorities up to a humane and honourable standard of conduct in the treatment of persons suspected or accused".¹³⁰ According to *Miranda*, it matters not if the compulsion takes the form of psychological coercion in the case of an inadmissible confession or whether the coercion is an unfree choice between perjury and self-incrimination. Humane

¹²⁶ Ibid at 460. "The fifth amendment is the mainstay of our adversarial system. Distinguishing our adversarial system from an inquisitorial system.

¹²⁷ Justice White dissenting (*Miranda* at 533-534) notes the following incongruity. A suspect in custody who spontaneously blurts out an admissible confession, without first being warned of his right is not being coerced, but if the police ask him a single question, without warning him and he makes a spontaneous admission, his response is somehow compelled.

¹²⁸ Wigmore *Evidence In Trials* McNaughton Ed (1961) sec 823 (338-339) "a confession is not rejected because of any connection with the privilege". Grano *Confessions, Truth And The Law* (1993) "Miranda erred from an historical perspective in perceiving an intimate connection between the privilege and the admissibility of confessions".

¹²⁹ Levy "Origins Of The Fifth Amendment" (1968) 328, 329 "the voluntary confession rule functioned as an exclusionary rule that protected the accused's right against self-incrimination in the pre-trial stages of the criminal process".

¹³⁰ Maguire *Evidence Of Guilt* (1959) 109.

conduct is the standard which links confessional law to the privilege against self-incrimination. Both serve as a protection against physical or psychological compulsion.

Third, *Miranda* stresses the need for ready access by the suspect to legal assistance.¹³¹ The suspect may request the presence¹³² of an attorney at any time during the interrogation process. A right to counsel at this stage is said to protect the suspect from an unwitting and unknowing incrimination. It helps the accused in dealing with the highly technical criminal process. The fifth amendment right to counsel has been strongly criticized because it draws its formulisation and precedent from the sixth amendment which has no application to police interrogation.¹³³ The fifth amendment is silent on the issue of legal advice and the *Miranda* court appears to have conjured a right to legal assistance from thin air. Justice Harlan (dissenting) remarks that there is "powerful historical and precedential evidence ... the [sixth] amendment does not justify the type of rule fashioned in *Miranda*".¹³⁴ The sixth amendment, literally interpreted, is directed at safeguarding the post-indictment procedural rights of the accused.¹³⁵ To employ sixth amendment precedent to justify the extension of a fifth amendment right to counsel to the pre-indictment stage of police interrogation is simply incorrect and bad law. Furthermore, in creating a fifth amendment right to legal counsel, the court has partially shifted the focus away from the question of the suspect's free will to a question about the will of the counsel and the counsel's influence over the suspect.¹³⁶ Nevertheless, on a practical level, both the fifth amendment right to counsel and the sixth amendment right to counsel dovetail with each other and provide a continuous level of legal assistance from the moment of arrest through to the moment of trial.

The *Miranda* judgement touches briefly on the meanings of custodial interrogation and waiver. Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of

¹³¹ *Miranda* at 469, 471. See also Tomkovicz "Standards For Innovation And Waiver In Confessional Contexts" (71) *Iowa L. Rev* (1986) 975, 977 (note 1) 983, 990-91.

¹³² Unlike the sixth amendment right to counsel which arises automatically, the fifth amendment right to counsel must be consciously invoked by the suspect. *Miranda* at 470.

¹³³ Grano *Confessions, Truth And The Law* (1993) 186-189, suggests that the court made a mistake when it abandoned the sixth amendment (the *Escobedo* ruling, *supra* note 100-101) in favour of the fifth amendment. But even the sixth amendment has its problems. Neither the constitutional text nor the history of the right to counsel support its extension into the interrogation room (prior to the filing of charges). The sixth amendment only guarantees the right to the accused "in all criminal prosecutions" and as "assistance for his defence". The arrested suspect who is sitting in a police interrogation room hardly fits the description created by the text. (Grano at 157-60).

¹³⁴ Harlan J (dissenting) at 510, 514.

¹³⁵ The sixth amendment reads, "in all *criminal prosecutions*, the accused shall enjoy the right to a speedy public trial, by an impartial jury ... and to have the assistance of counsel for *his defence*".

¹³⁶ White J (dissenting) at 536-537.

action in any significant way".¹³⁷ In determining custody, a court should ask the question whether or not a reasonable person in the suspect's circumstance would regard himself as formally arrested or otherwise free to leave the station house.¹³⁸ Interrogation is defined as an express questioning with a determinable goal in mind or the functional equivalent of an express questioning.¹³⁹ Interrogation includes practices, actions or utterances which the interviewer should know will reasonably invoke an incriminatory response from the suspect. The *Miranda* safeguards, based as they are on the suspect's free choice, may be waived at any stage.¹⁴⁰ In order for the suspect's waiver to be valid, the waiver must have been made voluntarily, knowingly and intelligently.¹⁴¹ Waiver is decided against a strict standard.¹⁴² The standard required is an express assertion by the suspect that he is willing to speak to the police followed immediately by a written statement to that effect. A waiver may not be presumed from mere silence; it must consist of a positive act. The fact that a confession is eventually obtained from the suspect does not automatically infer a valid waiver of rights.¹⁴³ Neither may a waiver be implied simply because the suspect has answered a few questions or given information prior to invoking the privilege.¹⁴⁴ A waiver obtained under coercive circumstances, in which the suspect is threatened, tricked, cajoled or persuaded into confessing may never be construed as a valid waiver.¹⁴⁵ Where the waiver is obtained in questionable and suspicious circumstances, the state bears a heavy burden of proving the validity of the waiver.¹⁴⁶

The *Miranda* majority opinion was severely criticized by the minority dissent.¹⁴⁷ Justice White, in particular, strongly attacks the conclusion reached by the majority as unsupported by both the history and the language of the fifth amendment.¹⁴⁸ White J identifies the

¹³⁷ *Miranda* at 444.

¹³⁸ See further the definition of *custody* in *Berkermer v McCarthy* 468 U.S 420, 442 (1984) as the functional equivalent of arrest.

¹³⁹ Interrogation defined in *Rhode Island v Innis* 446 U.S 291, 300 (1980) as any conduct which the police know is likely to elicit an incriminating response.

¹⁴⁰ *Miranda* at 444, 479. See also Thomas "An Assault On The Temple Of *Miranda*" (85) *J. Crim. Law And Criminology* (1995) 807-27.

¹⁴¹ *Ibid* at 479. but note the logical flaw in the *Miranda* doctrine. If the interrogation room is inherently coercive, how can the suspect validly waive his *Miranda* rights? (White J dissenting at 536).

¹⁴² *Ibid* at 475. the *Miranda* court applied the strict standard suggested in *Johnson v Zerbst* 304 U.S 458, 464 (1938), "courts indulge every reasonable presumption against waiver ... and do not presume acquiescence in the loss of fundamental rights".

¹⁴³ *Miranda* *ibid* at 475.

¹⁴⁴ *Ibid* at 475-476.

¹⁴⁵ *Ibid* at 476, "even absent threats or promises by the police a waiver may be deemed invalid if obtained under coercive circumstances".

¹⁴⁶ Because the state controls the interrogation process, a heavy burden rests on the state to prove a valid waiver of rights.

¹⁴⁷ *Miranda* is a 5 to 4 decision, written by Warren C.J. and supported by Justices Black, Douglas, Brennan and Fortas. Justices White, Harlan, Stewart and Clark dissenting.

¹⁴⁸ White J at 531-532, 526-527.

privilege only as a trial right in which the state may not compel the testimony of the accused. The privilege does not encompass a right against police custodial interrogation. In effect, White J accuses the majority of judicial legislation. The *Miranda* doctrine establishes a new constitutional barrier to the ascertainment of the truth. He also challenges the majority's underlying assumption that compulsion is inherent in every custodial interrogation.¹⁴⁹ He perceives the majority as having unjustifiably elevated personal autonomy over societal interests in security, noting, "more than the human dignity of the accused is involved, the human personality of others in society must also be preserved".¹⁵⁰ White J characterizes the basic function of government as the duty to provide a continuous protection to the individual and his property.¹⁵¹ The *Miranda* doctrine hinders this essential function. White also points to the inherent reliability of a confession which contributes to the certitude with which we may believe the accused is guilty, especially when corroborated by external physical evidence.¹⁵² The majority's contention that a confession is harmful to the accused is rejected, instead the confession is deemed to "provide a psychological relief and enhances the prospects for rehabilitation".¹⁵³ The majority's exclusionary rule also gives rise to a number of practical problems. First, the assertion of the warning during custodial interrogation results in an immediate cut-off of all questioning, including reasonable questioning, but coercive questioning may continue indefinitely after a waiver of rights. The *Miranda* rule smacks of impracticability. Second, if custodial interrogation is inherently coercive, how does the warning go about *reducing* the coercive level? Alternatively, how does a failure to give the warning contribute to an *increase* in the coercion level?

5.3 The Retreat From Miranda

The Supreme Court retreat from *Miranda* began almost immediately. The resignation of Chief Justice Warren, a reshaping of the Supreme Court personnel and a reactionary conservative political environment gradually becoming more intolerant of constitutional rights for criminals combined to trigger a reappraisal of the *Miranda* safeguards.¹⁵⁴ A number of

¹⁴⁹ White J at 532-537.

¹⁵⁰ *Ibid* at 537.

¹⁵¹ *Ibid* at 539.

¹⁵² *Ibid* at 538.

¹⁵³ *Ibid* at 538.

¹⁵⁴ Blaine "Miranda (*Miranda v Arizona*) Under Fire" (10) *Seton. Hall. Const. L. J* (2000) 1007-52. Dripps "Is The *Miranda* Case Law Really Inconsistent? A Proposed Fifth Amendment Synthesis" (17) *Constitutional Comm* (2000) 19, 48. Weisselberg "Saving *Miranda*" (84) *Cornell L. Rev* (1998) 109-92. Marcus "A Return To The Bright Line Rule Of *Miranda*" (35) *Wm. And Mary L. Rev* (1993) 93, 143, "suggesting that the Supreme Court has invited police to evade *Miranda*'s normative prescriptions". Kamisar "On The Fruits Of *Miranda*. Violations, Coerced Confessions And Compelled Testimony" (93) *Mich. L. Rev* (1995) 929-1010. Chertoff "Chopping *Miranda* Down To Size" (93) *Mich. L. Rev* (1995) 1713-23.

key factors have contributed to the gradual erosion. First, the Supreme Court has been unable to explain the intimate legal connection between the confessional rule and the privilege against self-incrimination. The court has made several conceptual leaps of faith. It initially equated the exclusionary-evidentiary confession rule of "involuntariness" with the involuntariness doctrine of the fourteenth amendment due process clause. It then subsequently conflates the "involuntariness" principle of due process with the "compulsion/coercion" principle of the fifth amendment. Much of the debate and confusion surrounding the *Miranda* decision arises from the opaque nature of these apparently necessary and intimate connections.

Second, the fundamental weakness of the *Miranda* "bright line" exclusionary rule is that it seeks to do everything and in practice, ends up doing very little. The strict inflexible rule is both over-inclusive and under-inclusive. If *Miranda's* aim is to negate the inherent coercion of custodial interrogation, then logically, the exclusionary rule should apply to *all* statements made by the suspect, regardless of a knowing waiver.¹⁵⁵ The *Miranda* rule is also under-inclusive because it does not prevent coercion by unscrupulous police officers who will use trickery or deception to get round the waiver requirement.¹⁵⁶ To empower the police officer with the task of administering the *Miranda* warning is a little like asking the cat to warn the mouse that it is about to be eaten. The focus has shifted from an analysis of a "voluntary confession" traditionally hedged by a large number of protective rules, to an analysis of an effective and "knowing waiver". In practical reality, it is now easier for the dishonest police officer to fabricate a simple waiver of rights rather than to counterfeit convincing indications of voluntariness. Instead of strengthening the suspect's position, *Miranda* has made it easier for police to obtain a waiver of rights and consequently, an admissible confession.

Third, in order to strengthen pre-trial procedural safeguards, *Miranda* has awarded the suspect with a right to legal advice. The right to legal counsel does not arise from the sixth amendment as would be naturally expected, but indirectly from the fifth amendment itself. Yet, the fifth amendment is expressly silent about legal counsel. *Miranda* appears to have conjured a right to counsel from thin air. In doing so, the court has partially shifted the inquiry away from the suspect's knowing waiver to a question about the intention of the legal counsel, his advice and influence over the suspect.

¹⁵⁵ *Miranda*, White J (dissenting) at 533.

¹⁵⁶ *Miranda*, Harlan J (dissenting) at 505.

Fourth, within three years of *Miranda*, the U.S Congress passed the Omnibus Crime Control and Safe Streets Act 1968 (codified in 18 U.S.C. sec 3501 (1994)) allowing for the federal legislative re-establishment of the evidentiary confessional rule which *Miranda* had rejected. The relevant provision allows the judge, in deciding the admissibility of confessions, to take into account not only the *Miranda* rule, but also to examine voluntariness. "A confession shall be admissible if it is voluntarily given".¹⁵⁷ Although successive federal administrations have declined to argue that sec 3501 does supercede *Miranda*, at least in theory, federal courts were bound to apply sec 3501 and not *Miranda*. The Supreme Court has in *Dickerson v United States*,¹⁵⁸ declared sec 3501 to be unconstitutional. The court has in effect upheld the principle that a violation of the *Miranda* safeguards gives rise to an irrebuttable presumption of involuntariness rendering the suspect's confession inadmissible.¹⁵⁹ The court relies entirely on precedent for its decision and does not analyse the fifth amendment privilege on its merits. In the words of Chief Justice Rehnquist, "whether or not we would agree with *Miranda's* reasoning and its resulting rule ... the principles of *stare decisis* weigh heavily against overruling it now".¹⁶⁰ *Miranda* survives on technical grounds, but the doctrinal nature of the *Miranda* rule and the pre-trial silence principle remains unclear.

Fifth, *Miranda* does not apply in an impeachment procedure. In *Harris v New York*,¹⁶¹ Chief Justice Burger argued that a statement taken in violation of *Miranda* could be used to impeach the suspect's testimony at trial.¹⁶² Subsequently, in *Oregon v Hass*,¹⁶³ the suspect's statement made while police deliberately ignored his request for legal counsel was deemed to be admissible for impeachment purposes.

¹⁵⁷ 18 U.S.C sec 3501 (a)(b) 1, 2, 3, 4, 5, "a confession shall be admissible in evidence if it is voluntarily given". The statute overrules *Miranda* and decrees a return to the voluntariness standard discarded by *Miranda*. See Cassel "The Statute That Time Forgot : 18 U.S.C Sec 3501 And The Overhauling Of *Miranda*" (85) *Iowa L. Rev* (1999) 175 "arguing that determining confessions on a case-to-case basis as prescribed in sec 3501 is constitutionally and socially acceptable".

¹⁵⁸ 120 S. Ct. 2326 (2000) particularly at 2329-30.

¹⁵⁹ Grano "Prophylactic Rules In Criminal Procedure : A Question Of Article III Legitimacy" (80) *Nw. U. L. Rev* (1985) 154-56, suggesting "that *Miranda's* prophylactic rule is overbroad because it establishes an irrebuttable presumption".

¹⁶⁰ *Ibid*, *Dickerson* at 2336. The Supreme Court overturned the decision of the fourth Circuit in *United States v Dickerson* 166 F.3d 667 (4th Cir 1999) which had ruled that 18 U.S.C. sec 3051 superceded the *Miranda* warning requirements. Blaine *supra* note 154 at 1042-1052 argues that sec 3501 by adopting the pre-*Miranda* voluntariness test, fails to replace the *Miranda* safeguards with adequate substitutes which effectively protect the suspect's constitutional rights". See also Lunney "The Erosion Of *Miranda* : *Stare Decisis* Consequences" (48) *Cath. U. L. Rev* (1999) 727.

¹⁶¹ 401 U.S 222 (1971).

¹⁶² *Ibid* at 224-25, *Harris* creates an inducement for police to violate *Miranda*.

¹⁶³ 420 U.S 714, 723 (1975). *Haas* gives an open invitation to police to ignore the suspect's request for counsel in certain circumstances.

Sixth, it is still unclear whether the *Miranda* safeguards are constitutionally mandated or whether they are mere prophylactic rules. *Michigan v Tucker*¹⁶⁴ appears to be *Miranda*'s nemesis. *Tucker* has declared the *Miranda* procedural safeguards to be mere prophylactic measures without constitutional authority.¹⁶⁵ The primary effect of *Tucker* is to cut off *Miranda* from its constitutional foundation and to make it easier for police to circumvent and infringe the procedural safeguards. Modern police manuals devote much space to methods by which the prophylactic rules may now be safely circumvented. The secondary effect of *Tucker* is to make "the fruit of the poison tree" doctrine¹⁶⁶ which is constitutionally grounded, unavailable to violations of the *Miranda* safeguards,¹⁶⁷ *Tucker* is endorsed by *Oregon v Elstad*,¹⁶⁸ which stresses the prophylactic nature of the *Miranda* warnings. "A *Miranda* violation does not necessarily contravene the fifth amendment, sometimes it merely triggers a presumption of coercion".¹⁶⁹ *Elstad* serves as the perfect inducement to lower courts which seek to avoid the application of the poison fruit doctrine to *Miranda* type violations.

Seventh, in *New York v Quarles*,¹⁷⁰ the Supreme Court carved out a public safety exception to the *Miranda* doctrine. The court labeled the *Miranda* warnings as "prophylactic ... not themselves rights protected by the Constitution, but ... measures [designed] to insure that the right against self-incrimination is protected".¹⁷¹ On a cost-effective basis the concern for public safety justifies dispensing with the *Miranda* warnings,¹⁷² thereby making the suspect's statement admissible at trial.

Eighth, the clear *Miranda* definitions of custody and interrogation have been blurred, narrowed and softened in *Rhode Island v Innis*,¹⁷³ and *Illinois v Perkins*.¹⁷⁴ One of the consequences of these softened definitions is that police use of interrogatory tactics outside of custody have increased as have confessions obtained on the street.

¹⁶⁴ 417 U.S 433, 444 (1974).

¹⁶⁵ *Ibid* at 434, 444, "we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process".

¹⁶⁶ The fruit of the poisonous tree doctrine is uniquely American and excludes derivative evidence acquired indirectly through breach of a constitutional right – the doctrine is inapplicable to *Miranda* breaches.

¹⁶⁷ See also Stone "The *Miranda* Doctrine In The Burger Court" *Sup. Ct. Rev.* (1977) 99, 106.

¹⁶⁸ 470 U.S 298 (1985) and *Duckworth v Eagan* 492 U.S 195, 203 (1989) "Miranda is a prophylactic rule not required by the Constitution. Roberts "Duckworth v Eagan : Changing *Miranda*'s Requirement To A Reasonably Clear Warning" (43) *Rutgers. L. Rev* (1990) 91.

¹⁶⁹ *Elstad* *ibid* at 305, 306-7. "Miranda may provide a remedy, even to the suspect who has suffered no identifiable constitutional harm".

¹⁷⁰ 467 U.S 649 (1984).

¹⁷¹ *Ibid* at 654.

¹⁷² *Ibid* at 649. "The need for answers to questions in a situation posing a public safety threat outweighs the need for the prophylactic rule protecting the fifth amendment" (Rehnquist J at 657).

¹⁷³ 446 U.S 291, 303 (1980).

¹⁷⁴ 496 U.S 292, 297 (1990).

Ninth, over the last thirty years the Supreme Court has devoted much of its precious time to the establishment of exceptions to the *Miranda* doctrine. The debate around *Miranda* has always been somewhat negative in the sense of where and how to limit it. The previous debate around the common law confessional rule as an evidentiary exclusionary principle was never subjected to the same intense controversy, nor indeed, were equivalent exceptions created for the confessional rule. The pre-*Miranda* voluntariness rule now appears paradoxically to offer a greater protection to the suspect than the *Miranda* safeguards.

Finally, apart from *Dickerson v United States*, the counter-argument and the attempt to claw back lost ground, to re-affirm *Miranda* is to be found in *Edwards v Arizona*¹⁷⁵ and *Withrow v Williams*.¹⁷⁶ *Withrow* stands as a strong consolidation of the *Miranda* principle. The court describes *Miranda* as a bulwark protecting a fundamental trial right, "prophylactic though it may be, in protecting a defendant's fifth amendment privilege against self-incrimination. *Miranda* safeguards a fundamental trial right".¹⁷⁷ The *Withrow* decision is a reinforcement of the revisionist view that absent an alternative, equally efficient rule, the *Miranda* safeguards are constitutionally mandated to negate compelling interrogatory pressures. *Miranda* safeguards cannot simply be abrogated without replacement by a substitute set of rules which cancel compelling interrogation pressures in the interview room and serve to establish a clear bright line rule for police interview practices.¹⁷⁸ However, the *Withrow* judgement is ambiguous as it confuses the distinction between a prophylactic rule and a fundamental trial right by running them together. It is either one or it is the other, it cannot be both.¹⁷⁹

Edwards v Arizona,¹⁸⁰ in turn, strengthens the *Miranda* imperative that once a suspect invokes his right to counsel, interrogation must cease immediately. The police cannot continue interrogation without the presence of counsel, even if they manage to persuade the

¹⁷⁵ 451 U.S 477 (1981).

¹⁷⁶ 507 U.S 680 (1993). See also Rosenberg "Withrow : Reconstitutionalizing Miranda" (30) *Hous. L. Rev* (1993) 1685.

¹⁷⁷ *Ibid* at 691-92.

¹⁷⁸ Schulhofer "Miranda's Practical Effect : Substantial Benefits And Vanishingly Small Social Costs" (90) *Nw. Un. L. Rev* (1996) 555, "In sum *Miranda*'s safeguards (prophylactic though they may be) cannot simply be abrogated. They can be replaced only by other rules, likewise prophylactic and such substitutes must serve at least equally well to dispel compelling interrogation pressures".

¹⁷⁹ O'Conner J (dissenting in part) *Withrow* at 697-714, describes *Miranda* "not as an impenetrable barrier to the introduction of compelled testimony", but as "leaking as a sieve", riddled with ambiguities, qualifications and exceptions.

¹⁸⁰ 451 U.S 477 (1981).

accused to change his mind.¹⁸¹ When a suspect unequivocally demands an attorney before being questioned, he must receive the full weight of the *Miranda* safeguards.¹⁸² The flaw in *Edwards* is that it demands a strong unequivocal waiver. The irony of *Miranda* is that although it was designed to protect the indigent, weak and intimidated suspect, it ends up protecting the tough, hardened recidivist criminal who has the emotional make-up to resist the "inherent" pressures of custodial interrogation. Neither *Miranda* or *Edwards* serves to protect the cowed, intimidated or the frightened. *Edwards* compounds the problem by placing the decision on whether the suspect made an unequivocal waiver in the hands of the police officer, the very person in control of the inherently coercive interrogation process. Whatever protection *Edwards* offers to the suspect is more than counter-balanced by the decision in *Davies v United States*.¹⁸³ In qualifying *Edwards*' use of the sentence, "unequivocal claim to legal assistance", *Davies* holds that the suspect must unambiguously and with sufficient clarity, articulate his desire for counsel, "absent an unequivocal request for counsel *Miranda* safeguards are evanescent".¹⁸⁴ By requiring a direct assertive request, *Davies* has in practice rewarded the hardened criminal suspect and penalized the weak and the frightened. *Edwards* has been further circumscribed by the public safety exception carved out by *New York v Quarles*. The *Miranda* safeguards and the *Edwards* rule, as deterrents, evaporate in the face of public safety concerns. Society's need to procure information from the suspect about the location of a dangerous weapon overrides the suspect's need for an attorney.¹⁸⁵ Both *Davies* and *Quarles* appear to be effective and practical limitations on the *Miranda*, *Withrow* and *Edwards* protections.

In the aftermath of the *Miranda* judgement, the Supreme Court has sought to find a natural balance between the interests of society in securing reliable confessions and the competing interests of the individual in remaining free from compulsory self-incrimination.¹⁸⁶ In practice, the Supreme Court has chosen to restrict *Miranda* and to narrowly define the scope and nature of the individual's right to pre-trial silence. While acknowledging the advantage of a bright line standard for confessional admissibility, the Supreme Court has also been reluctant

¹⁸¹ *Arizona v Robertson* 486 U.S 675 (1988) and *Minnick v Mississippi* 498 U.S 146 (1990) reinforce and extend *Edwards* to its logical limits.

¹⁸² *Smith v Illinois* 469 U.S 91, 95 (1994) the court expressly declined to answer to what would constitute a valid and binding invocation of the right to counsel.

¹⁸³ 512 U.S 452, 459-60 (1994).

¹⁸⁴ *Ibid* at 462.

¹⁸⁵ *United States v Mobley* 40 F.3d 688 (4th Cir 1994) *Trice v United States* 662 A.2d 891, 895 (D.C. 1995).

¹⁸⁶ Garcia "Is *Miranda* Dead, Was It Overruled, Or Is It Irrelevant" (10) *St. Thomas. L. Rev* (1998) 461, "the Supreme Court has handed down a number of opinions which has rendered *Miranda* meaningless through a series of contradictory and baffling interpretations, which has stripped *Miranda* of its allure as the symbol of an attempt to balance individual rights against potential law enforcement abuse".

to extend the meaning of the silence principle beyond the traditional fifth amendment parameters. The fencing in and containment of the *Miranda doctrine* is clearly illustrated in the normal course of the pre-trial criminal process, particularly in the categories of custody, interrogation, waiver, impeachment and public safety.

Custody : The Supreme Court's primary concern in *Miranda* is that the atmosphere created by a police interrogation may coerce the suspect and "subjugate the individual to the will of the examiner".¹⁸⁷ The court broadly defines custody as a significant deprivation of the suspect's freedom by the authorities. The crucial question to be asked before the *Miranda* safeguards are triggered is whether or not the suspect has been "deprived of freedom" and "placed in custody".¹⁸⁸ These custodial parameters were initially defined in very generous terms. For example, in *Orozco v Texas*,¹⁸⁹ the court extended the meaning of custody to police questioning outside the formal interview room. The suspect being questioned and arrested in his own bedroom. *Orozco* has been heavily criticized as an absurd extension of the *Miranda* safeguards outside of the police station.¹⁹⁰ In reaction subsequent cases narrowly restricted the definition of custody. *Berkemer v McCarthy*¹⁹¹ held that the *Miranda* safeguards were not triggered by a routine police stop and search, "questioning incidental to an ordinary traffic stop is quite different from a station house interrogation which is frequently prolonged and the defendant is aware that questioning will continue until he provides his interrogators with the answers they seek".¹⁹² In *Beckwith v United States*,¹⁹³ the court refused to apply *Miranda* to an I.R.S. investigation conducted at a private home. The present definition of custody judged against the standard test of "deprived of freedom in a significant way" is a question of degree and circumstance. The Supreme Court has failed to issue an authoritative ruling on this question and it is uncertain whether the *Miranda* safeguards

¹⁸⁷ *Miranda* *ibid* at 457.

¹⁸⁸ Crucial questions to be considered when determining custody are : (a) whether the individual is a suspect or an arrestee (not in custody until arrested). *United States v Davies* 646 F.2d 1298, 1302 (8th Cir 1980), (b) the period of the suspect's detention (twenty minutes in the back of a squad car sufficient to constitute custody), *United States v Chamberlin* 644 F.2d 1261, 1267 (9th Cir 1980), (c) the constraints placed upon the suspect prior to questioning (was the suspect handcuffed), *United States v Booth* 669 F.2d 1231, 1236 (9th Cir 1981).

¹⁸⁹ 394 U.S 324, 326 (1969). See also *Mathis v United States* 391 U.S 1 (1968).

¹⁹⁰ Critics appear to ignore the reality that even outside the police station, the suspect may perceive himself to be in a coercive atmosphere, deprived of his freedom and surrounded by police interrogators. *Oregon v Mathiason* 429 U.S. 492 (1977), "if the respondent entertains an objectively reasonable belief that he is not free to leave during questioning, then he is deprived of his freedom".

¹⁹¹ 486 U.S 420 (1984). *Berkemer* also holds that *Miranda* is not applicable to "stop and frisk" procedures (body search procedures) where there is a reasonable suspicion that the suspect is involved in a criminal activity (at 441). See also *Terry v Ohio* 392 U.S 1 (1968).

¹⁹² *Bekemer* *ibid* at 425.

¹⁹³ 425 U.S 341 (1976).

should apply to police interrogation on the street, in the squad car, or at the scene of the crime. This is in marked contrast to the English position where the Police and Criminal Evidence Act (PACE) 1984 has thoroughly canvassed the issue and established easily understood guidelines.

Interrogation : Simply defined in *Miranda* as questioning initiated by a law enforcement officer after the suspect has been taken into custody. In *Brewer v Williams*,¹⁹⁴ the court gives a wide meaning to the notion of interrogation. Police cajoled a murder suspect into revealing the location of the victim's body by emphasizing the necessity of finding the body quickly in order to give it a Christian burial. The detectives purposively sought to isolate the suspect from his attorney in order to obtain self-incriminatory admissions.¹⁹⁵ The court found the manipulative "burial speech" to be an interrogation falling within the *Miranda* definition. A narrower meaning to interrogation is given in *Rhode Island v Innis*.¹⁹⁶ While in a squad car, police persuaded the suspect into giving up the location of a missing shotgun by stressing the importance of discovering the weapon before it could be found by handicapped pupils from a nearby school. *Rhode Island* held that there had been no interrogation by the police officers as their questions and conversation had not been purposively designed to elicit incriminatory answers.¹⁹⁷ The court noted that interrogatory practices do not only involve express questioning, but may include other tactics designed to persuade or coax answers. The key is whether words or actions on the part of the police are reasonably likely to elicit an incriminatory response. Despite the factual similarity between the two cases, in *Brewer* the "burial speech" was found to be interrogatory in nature, whereas the *Rhode Island* "gun speech" was found to be non-interrogatory. The Supreme Court has failed to explain the distinction.

Resumption of interrogation : According to *Miranda*, the right to silence must be scrupulously honoured. An important question is whether the police may resume interrogation at a later date, after the suspect has at first declined to speak. In *Michigan v Mosley*,¹⁹⁸ the suspect asserted his right to silence after being advised of his *Miranda* rights

¹⁹⁴ 430 U.S. 387 (1977), "the suspect was being transported from one city to another after an agreement had been reached between the police and legal counsel that no interrogation would be undertaken during the journey".

¹⁹⁵ *Ibid* at 399.

¹⁹⁶ 446 U.S. 291 (1980). See also White "Interrogation Without Questions : Rhode Island and Henry" (78) *Mich. L. Rev* (1980) 1209 Helderman "Revisiting Rhode Island v Innis : Offering A New Interpretation Of The Interrogation Test" (33) *Creighton L. Rev* (2000) 729.

¹⁹⁷ *Ibid* at 298-299.

¹⁹⁸ 423 U.S. 96, 104 (1975).

and on the commencement of questioning about certain robberies. Some two hours later, a different police officer resumed questioning about a murder unrelated to the robberies. The suspect, although once again advised of his *Miranda* rights, incriminated himself.¹⁹⁹ The question is whether *Miranda* prohibits a second attempt at interrogation. The *Mosley* court held that police may take a second bite at the apple. Once the suspect indicates a desire to remain silent, interrogation must cease. Police may resume questioning after a significant period of time has elapsed, a fresh *Miranda* warning is issued, and the right to cut off questioning is scrupulously honoured.²⁰⁰ To hold otherwise would be to transform the *Miranda* safeguards into a wholly irrational obstacle to legitimate investigative activity.²⁰¹ In contradiction to *Mosely*, *Edwards v Arizona*²⁰² fashions an altogether different rule. The suspect asserted not his right to silence, but his right to legal assistance, asking "I want an attorney before making a deal". The police officer immediately ceased interrogation. The next day different police officers interrogated the suspect, advised him of his *Miranda* rights and proceeded to obtain a confession. The court held the confession to be inadmissible because once the suspect invokes his right to counsel, he cannot ever again be questioned without an attorney present.²⁰³ There is a significant difference between the *Mosely* and the *Edwards* decisions. According to these two decisions, the *Miranda* doctrine places more importance on the long-term effects of a right to counsel, while downplaying the effect of a right to silence. A request for an attorney means that interrogation must cease immediately and cannot recommence without an attorney present.²⁰⁴ A request to remain silent has no such limitation and interrogation may recommence after a reasonable period has elapsed.²⁰⁵ In *Edwards*, the balance of interests tips clearly in favour of the accused and against the interests of law enforcement. *Edwards* is a temporary re-affirmation of the *Miranda* doctrine. After *Edwards* the court resumes the normal practice of striking the balance of competing interests firmly in favour of law enforcement. In *Oregon v Bradshaw*,²⁰⁶ the suspect, after

¹⁹⁹ *Ibid* at 98.

²⁰⁰ *Ibid* at 104, 107.

²⁰¹ *Ibid* at 102.

²⁰² 451 U.S. 477 (1981).

²⁰³ Unless the suspect re-initiates further communication (at 485-486). See also *Minnick v Mississippi* 498 U.S. 146 (1990).

²⁰⁴ *Edwards* requires a direct unequivocal claim for legal counsel. In this sense, it supports the hardened criminal and fails the weak, intimidated suspect who is much too frightened to claim his rights. Ainsworth "In A Different Register : The Pragmatics Of Powerlessness In Police Interrogation" (103) *Yale L. J.* (1993) 259, 261 suggests that *Miranda* and *Edwards* discriminate against the indirect speech patterns of females, Afro-Americans, Asian and other ethnic minorities who are not culturally adapted to make assertive and direct claims. See also Clarke "Say It Loud : Indirect Speech And Racial Equality In The Interrogation Room" (21). *Un. Arkansas L. Rev.* (1999) 813-27

²⁰⁵ *Edwards* at 482, "*Miranda* distinguishes between two requests made by the suspect ... if [he] indicates that he wishes to remain silent the interrogation must cease. If he requests counsel the interrogation also ceases until an attorney is present (quoting *Miranda* at 474). Shapiro "Thinking The Unthinkable : Recasting The Presumption Of *Edwards v Arizona*" (53) *Oklahoma L. Rev.* (2000) 11-34.

²⁰⁶ 462 U.S. 1039 (1983).

claiming his right to counsel, proceeded to ask the police officer, "Well, what will happen now?". According to *Bradshaw* a question of this nature opens a window and shows a willingness for further questioning, rendering a continued interrogation permissible.²⁰⁷ Other subsequent cases, such as *Moran v Burbine*²⁰⁸ and *Davis v United States*²⁰⁹ are examples of a deliberate and well-crafted attempt by the Supreme Court to limit the *Edwards* ruling and to prevent the police from unnecessarily losing an opportunity for interrogating uncounselled suspects. The Supreme Court has clearly stated that society has a "legitimate and substantial interest in law enforcement's ability to secure reliable admissions from the suspect".²¹⁰ In the balance of competing interests, the suspect's interests are adequately protected by the *Miranda* panoply. Any additional benefits a properly warned suspect may obtain from an extension of the *Miranda* safeguards would be minimal at best and come at a great cost in lost admissions and confessions.²¹¹

Waiver : *Miranda* establishes a strict constitutional standard for the waiver of a suspect's rights. A valid waiver must be made voluntarily, knowingly and intelligently. The strongest proof of waiver would be an express written or oral statement to that effect. In practice though, other means of establishing waiver should not be ruled out. The burden is on the state to establish a legitimate waiver of rights. According to *Miranda*, an express statement that the individual is willing to make a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after a warning is given.²¹² In *North Carolina v Butler*,²¹³ the Supreme Court endorsed a "totality of circumstances" approach for the determination of a valid waiver. An express statement of waiver is not an absolute prerequisite for the finding of a valid waiver, "at least in some cases waiver can be clearly inferred from silence, coupled with a course of action indicating waiver, including the words of the suspect at interrogation".²¹⁴ The question of waiver is essentially determined by the particular facts and circumstances surrounding each individual case, including the background, experience and conduct of the suspect.²¹⁵ Against this standard, any waiver obtained in a coercive atmosphere or one suggestive of trickery or deceit will be deemed invalid. The Supreme Court has been flexible in defining the exact meaning of police trickery

²⁰⁷ *Ibid* at 1045-46.

²⁰⁸ 475 U.S 412 (1986).

²⁰⁹ 512 U.S 452 (1994).

²¹⁰ *Moran* *ibid* at 427.

²¹¹ *Ibid* at 427.

²¹² *Miranda* at 475.

²¹³ 441 U.S 369 (1979).

²¹⁴ *Butler* at 373, 376.

²¹⁵ *Ibid* at 374-375. See also *Johnston v Zerbst* 304 U.S 458 (1938).

or deceit and has often granted the police a wide latitude in this respect.²¹⁶ *Moran v Burbine*²¹⁷ is a deliberate example of how the court skews the balance away from the *Miranda* protection of individual rights in favour of effective police law enforcement.²¹⁸ In *Moran* police intentionally failed to warn the suspect of his attorney's attempt to contact him and also misinformed the attorney about the time and place of formal interrogations. During an interrogation in the absence of his attorney, the suspect confessed. At trial the attorney attempted to suppress the initial confession. The court held that events occurring outside of the suspect's knowledge and presence could not affect his ability to intelligently waive his rights.²¹⁹ The deceitful misinformation of the suspect's attorney was irrelevant as it had no influence on the validity of the suspect's waiver. To hold otherwise would unnecessarily injure the interests of law enforcement.²²⁰ With reference to the fifth amendment, the court concluded that the police are under no obligation to inform the suspect of his attorney's attempt to reach him.

A further elaboration is suggested by *Colorado v Connelly*,²²¹ which defines a voluntary waiver in substantially the same terms as a voluntary confession. The suspect must be acting out of his own free will, without coercion, and in an atmosphere free of overt police pressure.²²² A voluntary waiver requires a certain quantifiable degree of knowledge and intelligence in its exercise. Knowledge is determined by the suspect's ability to fully understand and access all information concerning his circumstance. A valid waiver in terms of the *Miranda* standard must amount to an intelligent and knowledgeable awareness of his factual and legal circumstance. But this does not mean that the police are obliged to supply the suspect with additional information over and above the bare *Miranda* warning. The *Moran v Burbine* judgement reduces the *Miranda* standard to a mere residual, basic and abstract knowledge of the suspect's fifth amendment right, "The constitution does not require that police supply the suspect with a flow of information to help him calibrate his self-interest

²¹⁶ Ironically the English courts have also been lenient in interpreting the meaning of police deceit or trickery. See *infra* chapter 8 p.296-197.

²¹⁷ 475 U.S 412 (1986).

²¹⁸ *Moran* is an example of the Supreme Court's attempt to limit the scope of both *Miranda* and *Edwards*. The basis of the *Moran* reasoning is that police should not be unnecessarily deprived of the opportunity to interrogate an uncounselled suspect. See further Kuller "Note Moran : Supreme Court Tolerates Police Interference With The Attorney-Client Relationship" (18) *Loyola. U. Chi. L. J* (1986) 251. Hirsch "Criminal Procedure II : The Privilege Against Self-Incrimination" *Ann. Surv. Am. L* (1988) 251.

²¹⁹ *Moran* at 422. The consequence of *Moran* will inevitably muddy *Miranda's* otherwise clear waters (at 425).

²²⁰ *Ibid* at 423-424, 426-427.

²²¹ 479 U.S 157 (1986).

²²² *Ibid* at 173-4.

in deciding whether to speak".²²³ A valid waiver of the suspect's right to silence and right to counsel must be voluntary and based on a certain quantifiable level of knowledge. However, the police are not obliged to add to this knowledge beyond a bare acknowledgement of the suspect's *Miranda* and fifth amendment rights.

A problem which remains unresolved in this regard is the effect of an equivocal and vague assertion of the *Miranda* protections. Particularly an uncertain and equivocal request for legal counsel. Three different standards based on an analysis of the word "equivocal" have been proposed. First, a *threshold of clarity standard*²²⁴ is advanced in which the suspect's request must conform to a clear and unequivocal invocation of the right to counsel. All requests for legal assistance must reach a certain threshold of clarity in order to trigger the fifth amendment protection. Second and at the other extreme, the *ambiguity standard*²²⁵ would allow all and any ambiguous or equivocal requests for an attorney to immediately terminate the interrogation. Third, an intermediate proposal or *clarification standard*²²⁶ seeks a compromise solution, in terms of which the interrogator must immediately attempt to clarify the suspect's vague invocation. The interrogator must cease the interrogation and ask questions deliberately designed to determine whether or not the suspect is indeed seeking legal advice. The clarification standard is a well balanced middle course between two extremes in which the threshold of clarity standard unduly weakens the suspect's right to counsel and the ambiguity standard unnecessarily restricts the police officer in his investigation. Despite the balanced nature of the clarification standard, the Supreme Court has elected to adopt the extreme threshold of clarity approach. In *Davis v United States*,²²⁷ the suspect mentioned during the interrogation, "maybe I should speak to a lawyer", but continued answering questions. A while later, he repeated, "I think I want a lawyer before saying anything else" and the interview was terminated. The *Davis* court, in a further restriction of the *Miranda ideal*, held that the suspect must articulate his desire to have counsel present with a sufficient degree of clarity. If the sufficient clarity threshold is not

²²³ *Moran* at 423.

²²⁴ First announced in *People v Krueger* 412 N.E. 2d 537 (Ill. 1980). See also *Eaton v Commonwealth* 397 S.E. 2d 385, 395 (Va. 1990).

²²⁵ *Maglio v Jago* 480 F.2d 202 (6th Cir 1978). See also *Ochoa v State* 573 S.W2d 796 Tex Crim App. (1978).

²²⁶ *Towne v Dugger* 899 F.2d 1104 (11th Cir 1990). See also *United States v Fouche* 833 F.2d 1284, 1286 (9th Cir 1987). *Nash v Estelle* 597 F.2d 513, 517 (5th Cir 1979).

²²⁷ 512 U.S. 452 (1994). It is instructive to note that the lower courts have extended the *Davis* ruling and hold that during custodial interrogation police are entitled to ignore a suspect's equivocal request to remain silent. *United States v Johnson* 56 F.3d 947, 955 (8th Cir 1995). *Leyva v State* 906 P.2d 894, 901 (Utah) Ct App (1995). *State v Baron* 658 A.2d 54, 65 Vt (1995).

reached, the interrogator may validly continue with the interrogation.²²⁸ The police may therefore ignore the suspect's equivocal request for counsel and continue in the normal way.²²⁹ The court does recognize certain disadvantages which may prevent the suspect from clearly articulating his request for counsel. Factors such as fear, intimidation, lack of linguistic skills and ignorance are also to be assessed in determining the threshold of clarity. *Davis* is the perfect illustration of the prevailing modern and antagonistic approach to the *Miranda* ideal.²³⁰ The interest of a properly warned suspect in having an attorney present in equivocal circumstances is outweighed by society's substantial interest in having the police interrogate uncounselled suspects.²³¹ In effect, the Supreme Court is saying about *Miranda*, so far but no further.

Impeachment and the Public Safety Exception : In defining the *Miranda* doctrine as a mere prophylactic rule²³² not mandated by the Constitution, the Supreme Court has driven a wedge between the pre-trial process and the fifth amendment. It has also allowed lower courts an opportunity to re-interpret the nature of impeachment law and to create a necessary exception in favour of law enforcement. In both English and American evidentiary law, it is accepted practice to use certain kinds of evidence for the limited purpose of attacking the suspect's credibility at trial. The question is whether inculpatory statements induced in violation of the *Miranda* safeguards may be admitted for impeachment purposes. *Harris v New York* is one of the precursors of the prophylactic rule and is a strong illustration of the Supreme Court's reluctance to characterize *Miranda* as a constitutional right. *Harris v New York*²³³ holds that where a confession has been obtained contrary to *Miranda* (i.e. the police have failed to give an adequate *Miranda* warning) the suspect may nevertheless be cross-examined in order to undermine the credibility of his testimony at trial. *Harris* suggests as a matter of principle, "the shield provided by *Miranda* cannot be perverted into a licence to

²²⁸ *Ibid* at 459-60.

²²⁹ *Ibid* at 460-65.

²³⁰ Holly "Ambiguous Invocations Of The Right To Remain Silent : A Post *Davis* Analysis And Proposal" (29) *Seton Hall. L. Rev* (1998) 558-98. Faulkner "So You Kinda, Sorta, Think You Might Need A Lawyer? Ambiguous Request For Counsel After *Davis*" (49) *Arkansas L. Rev* (1996) 275-303. Kennelly "Note *Davis v U.S.* : The Supreme Court Rejects A Third Layer Of Prophylaxis" (26) *Loyola. Un. Chi. L. J*(1995) 594-595.

²³¹ Shortly after the *Davis* decision, the Eleventh Circuit in *Coleman v Singletary* 30 F.3d 1420 (1994) extended the *Davis* rule to equivocal invocations of the right to remain silent.

²³² For an analysis of the prophylactic rule see Strauss "The Ubiquity Of Prophylactic Rules" (55) *U. Chi. L. Rev* (1988) 190, "arguing that in constitutional law prophylactic rules are the norm not the exception. La Fave "Constitutional Rules For Police : A Matter Of Style" (41) *Syracuse L. Rev* (1990) 849; Grano "Prophylactic Rules In Criminal Procedure, A Question Of Article III Legitimacy" (80) *Nw. U. L. Rev* (1985), "the *Miranda* prophylactic rule is much too broad and presumptive".

²³³ 401 U.S 222 (1971) the accused was convicted of selling heroin to an undercover agent. At trial, he admitted only to selling baking powder. The judge allowed the admission of an earlier statement made to the undercover agent as a prior inconsistent statement, even in the face of an initial inadequate *Miranda* warning.

use perjury by way of defense ... the petitioner's credibility was appropriately impeached by use of his earlier conflicting statements.²³⁴ As long as the evidence is trustworthy, it may be used in the normal truth-testing impeachment process. The police conduct in the circumstance was considered to be a "minor" *Miranda* infringement as the suspect's statement was neither induced through coercion, nor involuntary in terms of the fourteenth amendment. What the court really means without saying so, is that a mere *Miranda* infringement does not violate the Constitution. *Harris* therefore tears the *Miranda* ruling away from its fifth amendment foundation.

Harris also sends a mixed message to the police. On the one hand, it half-heartedly punishes them for inducing statements contrary to *Miranda*. On the other hand, it encourages police to continue with an improper practice on the good chance that an illegally obtained statement may be admitted at trial for a limited purpose.²³⁵ The crucial importance of *Harris* is that it constitutes an important retreat and dilution of the fifth amendment basis of the *Miranda* doctrine. By characterizing *Miranda* as a mere prophylactic standard and embracing a deterrence rationale, *Harris* also deliberately ignored the main object of the *Miranda* judgement. *Miranda* surrounds and protects the individual with a strong buffering shield in order to produce a genuine voluntary confession. By weakening that shield, *Harris* symbolizes the slow but steady retreat by the Supreme Court from the *Miranda*²³⁶ ideal. Another major limitation of the *Miranda* doctrine occurs in the circumstance in which the public safety is at risk. A persuasive argument is adduced that police officers in the field ought to be allowed to solicit statements from the suspect, even in violation of *Miranda*, whenever the public interest demands it. In *New York v Quarles*,²³⁷ the police cornered a rape suspect in a late-night supermarket, overpowered him and then, in violation of the suspect's *Miranda* rights, proceeded to interrogate him on the whereabouts of his hidden gun.²³⁸ A statement induced from the suspect in this circumstance is inadmissible at trial. However, *Quarles* ruled that where the public safety is endangered, police officers should not be discouraged from interrogating a detained suspect "... the need for answers in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the

²³⁴ Ibid at 224 – 226.

²³⁵ See Stone "The *Miranda* Doctrine In The Burger Court" *Sup. Ct. Rev* (1977) 99, at 112 and 114.

²³⁶ The *Harris* decision is expanded in *Oregon v Hass* 420 U.S 714 (1975) "the suspect's statement may be used to impeach his testimony at trial even when the police deliberately ignored the suspect's request for legal counsel (at 715-16). According to Stone, *ibid* note 235 at 129, "*Hass* constitutes an open invitation to the police to disregard the suspect's right to legal assistance".

²³⁷ 467 U.S 649 (1984). Rehnquist J (as he was then), the *Miranda* warnings are, "prophylactic ... not themselves rights protected by the constitution" (at 654).

²³⁸ *Ibid* 655.

fifth amendment against self-incrimination. We decline to place officers ... in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warning in order to preserve the admissibility of evidence they might uncover".²³⁹ *Quarles*, by applying a cost-benefit analysis, makes it clear that the *Miranda* warnings can now be excluded in an emergency situation where public safety takes preference over individual rights.²⁴⁰

The cumulative effect of post-*Miranda* precedent may be read as a steady retreat from the *Miranda* constitutional ideal. The definition of custody and custodial interrogation has been softened and blurred. *Harris v New York* allows for the impeachment of a suspect's credibility at trial by statements induced in violation of the *Miranda* requirement. The *Harris* exception is extended in *Oregon v Hass* and both decisions push the *Miranda* rule further from its constitutional underpinning. *Michigan v Tucker* undermines *Miranda* by characterizing its safeguards, not as constitutional rules, but as mere prophylactic measures designed specifically to protect the right against compulsory self-incrimination. The *Tucker* reasoning is further developed in *Oregon v Elstad*. The prophylactic rule cannot exclude as the fruit of an earlier unwarned statement, any subsequent statements given after a proper warning. The hesitant and rather weak re-affirmation of *Miranda* in *Withrow v Williams* and more recently in *Dickerson v United States* does little to counteract the alienation of *Miranda* from the fifth amendment. The labeling of *Miranda* as non-constitutional and prophylactic contributes to the creation of a wholesale public safety exception in *New York v Quarles*. The *Quarles* judgement represents a radically different vision of fifth amendment values than the vision expressed in *Miranda*. The contraction of *Miranda* reflects the changing composition of the Supreme Court (the Burger Court of the 1970s has had a substantial impact on the *Miranda* ruling) and the conservative political climate of the Reagan – Bush presidencies.²⁴¹ In *New York v Quarles*, O'Connor J remarks, "the Court is sensitive to the substantial burden the *Miranda* rule places on local law enforcement efforts, and consequently refuses to extend the decision or increase its strictures on law enforcement

²³⁹ Ibid at 657, "the court refuses to force a police officer the choice between a concern for public safety and a desire to obtain a confession". See also Reiner "The Public Safety Exception To *Miranda* : Analyzing Subjective Motivation" (43) *Mich. L. Rev* (1995) 377-407.

²⁴⁰ Weller "The Legacy Of *Quarles* : A Summary Of The Public Safety Exception To *Miranda*" (49) *Baylor. L. Rev* (1997) 1107-29. Goodman "Case Note – *New York v Quarles*" (16) *St. Mary's L. J* (1985) 489.

²⁴¹ The Reagan administration threw up some of the most ardent critics of *Miranda* and the right to silence. Attorney-General E. Meese being the most visible public figure supporting the abolition of the silence principle. See Agronsky "Meese v *Miranda* : The Final Countdown" *A.B.A.J* (1987) 86. During the decade of conservative government in England both Thatcher and Major promoted a crime fighting

agencies in any way".²⁴² It is instructive to note that the English pre-trial silence principle has also suffered attenuation during the conservative reign of the Thatcher – Major combination. In the face of considerable controversy, Chief Justice Burger, himself a vehement critic, said, "the meaning of *Miranda* has become reasonably clear ... I would neither overrule *Miranda*, disparage it, nor extend it at this late date".²⁴³ Nevertheless, the present trend is to dilute the constitutional basis of the *Miranda* safeguards. To disparage and to reduce *Miranda* to a porous standard which may be re-evaluated when it conflicts with other more important or immediate social interests.

The reduction of *Miranda* has in turn diminished the silence principle in the pre-trial context. The right to silence is now regarded as an obstacle which, although it cannot be ignored, may at least be circumscribed and circumvented when it proves an obstacle to efficient police interrogation and low-cost convictions. Despite Chief Justice Burger's opinion that *Miranda* is a reasonably clear rule, many critics regard the *per se* exclusionary rule as just one more attempt to establish another constitutional straightjacket. Far from clarifying and simplifying the confessional rule, *Miranda* has given rise to a jurisprudence which is structurally more complex than anything that existed under the common law voluntariness standard.²⁴⁴ The voluntariness component of the confessional rule has been buried under an avalanche of words about the definitions of custody, interrogation and the intractable problem of waiver. The *Miranda* doctrine has become, despite the warning spoken by Bentham some two hundred years ago, a technical rather than a natural rule which is distorting "the fact-finding process with its Byzantine complexity".²⁴⁵ The differences between the *Miranda* proponents and its opponents are centred on two recurring but divergent philosophical themes explained in libertarian and utilitarian terms. Proponents argue for a libertarian focus

policy, the result of which was the Criminal Justice and Public Order Act 1994 which limits both pre-trial and trial silence.

²⁴² *Quarles*, O'Conner J at 662.

²⁴³ *Rhode Island v Innis*, Burger C.J at 304.

²⁴⁴ *Oregon v Elstad* 470 U.S 298 (1985) is the perfect illustration of the Supreme Court's ambivalence towards *Miranda* : While stressing the prophylactic nature of the *Miranda* doctrine (at 305), the court notes that an infringement of *Miranda* does not necessarily also mean an infringement of the fifth amendment (at 326-7). *Miranda* is only a preventative medicine used to provide a remedy, even to the defendant who has suffered no identifiable constitutional harm (at 307). Apart from its complexity, the *Elstad* decision is also somewhat illogical. (a) Both *Miranda* and the fifth amendment prohibit the extraction of coerced confessions. Yet, according to *Elstad*, a coerced confession infringing *Miranda* may at the same time not be a coerced confession as defined by the fifth amendment; (b) *Miranda* is sometimes explained as a bright-line rule clearly defining custodial interrogation (at 317) and at other times, it is criticized for raising unnecessarily difficult questions about custody and admissibility (at 316). Either *Miranda* is a good precedent or it is not, it can't be both, (c) The fruit of the poisonous tree doctrine is held to be inapplicable to *Miranda* breaches (at 318). Why bother excluding the initial confession if its derivative evidence (which has the same evidentiary value as the confession) is admissible. See also Wollin "Policing The Police : Should *Miranda* Violations Bear Fruit?" (53) *Ohio St. L. J* (1992) 805.

²⁴⁵ Bentham *Rationale Of Judicial Evidence* Bowring Ed (1843) Chp 3, 42-46.

on human rights and due process. Opponents are more concerned with utilitarian efficiency and a crime control process which places more value on societal interests than on ordinary individual human needs. In the middle of this helter-skelter of conflicting interests, stands the Supreme Court hesitant and unsure. Its most influential argument for maintaining the *Miranda* doctrine is based more on functional necessity than on a principled reasoning. The Court has argued that abolishing *Miranda* would send a negative rather than a positive message to both law enforcement organs and society. Overruling *Miranda* might cause the police to believe that society does not care how they extract confessions. To some extent *Miranda* has become a symbol for the disadvantaged. On the surface at least, *Miranda* suggests an equality of treatment. It permits all suspects, including the indigent and the ignorant, to make intelligent choices about co-operation with the police.²⁴⁶ Overruling *Miranda* may convey the message that the criminal system does not care for the downtrodden.

The main jurisprudential problem with the *Miranda* doctrine and with which the Supreme Court is unable to grapple, is the twofold question about the effectiveness of its procedural safeguards and the resultant exclusion of truthful evidence. If *Miranda* is effective, then it generally benefits the guilty suspect more than it does the innocent. Why should the courts automatically suppress confessions by guilty suspects simply because the police by some oversight failed to adhere to the strict technical *Miranda* ruling? As a result of defining custodial interrogation as inherently coercive, the *Miranda* doctrine has generated an unjustified hostility towards police interrogation both within and outside of the criminal justice system. At the same time, it undeservedly elevates the pre-trial right to silence into some kind of holy grail, immutable and inviolable. In the light of the present redevelopment and reorganization of a modernized *Miranda* rule, it may well be argued that *Miranda* no longer constitutes a strong statement about the constitutional dimensions of the fifth amendment and the right to silence. It has become merely another weak prophylactic non-constitutional rule only effective within the pre-trial custodial process.

²⁴⁶ On a purely practical level, the modern re-interpretation of *Miranda* gives the police a wide functional latitude. For example, (a) *Harris*, by admitting prior statements made in violation of *Miranda* for impeachment purposes, provides the police with a practical method of indirectly admitting incriminating evidence; (b) *Hass*, by permitting statements made after a claim for legal representation to be admitted for impeachment purposes, allows the police to safely disregard the suspect's invocation of a right to legal counsel in certain circumstances; (c) *Quarles*, by carving out a public safety exception allows police to detain and question without mirandising; (d) *Tucker*, by defining *Miranda* as a mere prophylactic rule, encourages police to find new ways of circumventing the *Miranda* safeguards. The functional message to police is that they need not cease interrogating a suspect simply because he has asserted the fifth amendment privilege against self-incrimination.

CHAPTER 6

THE PRE-TRIAL AND TRIAL NO-INFERENCE RULE

6.1 Evidentiary Value of Silence

Fifth amendment jurisprudence permits only a limited evidentiary use of the silence principle.¹ In theory, absent both statutory and constitutional prohibitions, the prosecution is free to use the accused's pre-trial and trial silence in one of two ways. The prosecution may use the accused's silence *substantively* as part of its *prima facie* case-in-chief in establishing guilt directly, or it may use the accused's silence *indirectly* for impeachment purposes only. In practice, the Supreme Court assumes, without explaining, that the fifth amendment permits only the impeachment use of silence and bars the use of silence to establish guilt. In certain limited circumstances pre-trial silence may be admissible to impeach the accused's credibility.² In this sense, silence is admissible as a prior inconsistent statement undermining the accused's in-court exculpatory testimony.³ The accused who elects to testify and who seeks to excuse himself, risks the impeachment of his testimony at cross-examination. The right to testify grants the accused the power to present a defence, it does not guarantee protection against the state's truth testing techniques. The accused who testifies casts aside his cloak of silence and opens himself to a comprehensive cross-examination and impeachment.⁴ In the appropriate circumstance, silence in the face of a pre-trial interrogation may be used by the prosecution as testimonial evidence.⁵ In fact, the Supreme Court has sometimes permitted the prosecution to impeach the testifying accused with pre-trial testimony induced contrary to the *Miranda* safeguards and which is constitutionally inadmissible in the case-in-chief.⁶ By contrast, the accused's silence at trial (i.e. the failure to

¹ Silence is a refusal to provide information. The American definition relies on a refusal to provide self-incriminatory facts, either complete, partial or even implied. Generally, silence cannot be used as evidence to prove a fact-in-issue, it is relevant only if it bears on the accused's credibility.

² The presumption behind silence as an impeachment tool is that the individual does not know of any exculpatory facts, otherwise he would deny the accusation. *Jenkins v Anderson* 447 U.S. 231, 239 (1980), "impeachment means that the accused who remained silent during custodial interrogation cannot now at trial be telling the truth".

³ The court decides on a case-by-case basis if the prior silence is sufficiently inconsistent to be admissible as impeachment evidence. See *Jenkins v Anderson* *ibid* at 240.

⁴ Weston and Mandell "To Talk, To Balk, Or To Lie, The Emerging Fifth Amendment Doctrine Of The Preferred Response" (19) *Am. Crim. L. Rev* (1992) 521-22, "the privilege protects the accused who remains silent, but not the accused who chooses to testify falsely".

⁵ Aranella "Schmerber And The Privilege Against Self-Incrimination : A Reappraisal" (20) *Am. Crim. L. Rev* (1952) 31.

⁶ *Miranda supra* chapter 5 p.169-173. *Harris v New York supra* chapter 5 p.179, 189-191. *Oregon v Elstad supra* chapter 5 p.179. The Supreme Court allows the prosecution to impeach the accused with evidence which violates the *Miranda* safeguards.

testify) is an absolute protection. No evidentiary use may be made of trial silence, either as substantive evidence of guilt or for the limited purpose of impeachment. Through judicial precedent, the Supreme Court has developed two basic models for the evidentiary evaluation of pre-trial and trial silence.⁷ The **coercion model** focuses on the various interpretations of the functional nature of the compulsion/coercion dynamism as defined in the fifth amendment. The coercion model may be interpreted in three different ways : (a) Testimonial evidence is inadmissible when it is coercively induced in direct violation of the constitutional prohibition. A *Constitutional prohibition rule* based on the precedent of *Adamson v California*;⁸ (b) No adverse inferences either direct or indirect, may be drawn from such coerced evidence. A *prohibited-inference rule* based on *Jenkins v Anderson*, *Fletcher v Weir*, *Griffin v California* and *Lakeside v Oregon*;⁹ (c) Evidence is inadmissible when it is induced by improper police conduct during coercive custodial interrogation. A *prophylactic-exclusionary rule* drawn from *Miranda v Arizona*.¹⁰

The second approach or the **impermissible-burden model** is a unique analysis which excludes evidence whenever the accused's constitutional rights are unjustifiably and unfairly burdened. The impermissible-burden model is based largely on the seminal case *Griffin v California*.¹¹ The coercion and the impermissible-burden models, although clearly designed for the evaluation of affirmative and positive testimony, may also be adapted for the analysis of negative testimony in the form of silence. The *fundamental question in fifth amendment jurisprudence is the extent to which the constitution protects the silence principle based on the accused's unequivocal claim of privilege and whether or not negative inferences may be drawn from a claim of privilege.*

Unlike the ordinary evidentiary use of testimony as a positive statement, silence is at best circumstantial evidence based on a negative inference. The question is whether relevant and admissible evidence may be logically derived from the negative assertion of silence. A number of essential requirements must be met before silence acquires evidentiary weight. First, the silence on which the prosecution intends to rely must amount to a testimonial

⁷ Ratner "The Consequences Of Exercising The Privilege Against Self-Incrimination" (24) *Un. Chi. L. Rev* (1957). Ayers "The Fifth Amendment And The Inference Of Guilt From Silence : Griffin After Fifteen Years" (78) *Mich. L. Rev* (1980) 841. Poulin "Evidentiary Use Of Silence And The Constitutional Privilege Against Self-Incrimination" (52) *Geo. Wash. L. Rev* (1984) 191, "Poulin is probably the most influential work on evidentiary use of silence. Patrick "Towards The Constitutional Protection Of A Non-Testifying Defendant's Pre-arrest Silence" (63) *Brooklyn. L. Rev* (1997) 897.

⁸ 332 U.S 46 (1947).

⁹ *Jenkins* 447 U.S 231, 238 (1980), *Fletcher* 455 U.S 603, 606-7 (1982), *Lakeside* 435 U.S 333 (1978).

¹⁰ 384 U.S 436 (1966).

¹¹ 380 U.S 609 (1965).

communication. The crucial test of testimonial silence is whether or not it involves, “[the accused’s] consciousness of the facts and the operation of his mind in expressing it” [or not expressing it].¹² In this sense, the accused’s silence in the face of an accusation must amount to a tacit admission of the truth of the facts contained in the accusation. Second, improper state action is a necessary requirement for the assertion of the fifth amendment right to silence. “The sole concern of the fifth amendment ... is government coercion. The fifth amendment privilege is not concerned with moral and psychological pressures to confess emanating from sources other than official coercion”.¹³ One of the integral problems faced by the Supreme Court in its analysis of fifth amendment silence has been the determination of the presence or absence of compulsion. On a strict interpretation compulsion must be present in order to trigger the fifth amendment privilege. Third, the main question about silence is one of probative value. Relevance and thus the admissibility of all kinds of positive evidence is determined by weighing probative value against prejudicial effect. Silence is negative evidence and it is therefore conceptually difficult to weigh its probative value against the prejudicial effect of its reception.¹⁴ Usually silence is accorded the evidentiary weight that commonsense dictates it should have in that particular circumstance. As a result of the conceptual problems posed by an evidentiary analysis of silence, the Supreme Court has sometimes confused and misapplied the *coercion* and *impermissible-burden* approaches. In a number of its decisions, the Supreme Court has made use of the language of one model and the reasoning of the other. It is therefore difficult to clearly distinguish the Court’s reasoning in the more important cases.

Fourth, once it has been decided that silence has evidentiary weight, the prosecution may proceed to use silence against the accused in three possible ways. (i) The prosecution may in cross-examination use the accused’s pre-trial silence to impeach his credibility; (ii) The prosecution may draw an adverse inference from the accused’s pre-trial and trial silence in its closing argument; (iii) The judge may instruct the jury to consider the accused’s pre-trial and trial silence in their deliberations. The prosecution’s use of silence is conditioned upon whether or not the accused takes the stand. By taking the stand the accused effectively waives his in-trial constitutional protection. His usually exculpatory statements on the stand may now be subject to prosecutorial cross-examination. As prosecutorial questioning begins

¹² *Pennsylvania v. Muniz* 496 U.S. 582, 594 (1990). See also *Doe v. United States* 487 U.S. 201 (1988).

¹³ *Colorado v. Connelly* 479 U.S. 157, 169-170 (1988).

¹⁴ *Jenkins v. Anderson* *ibid* at 240, “each jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as probative or prejudicial”. *United States v. Hale* 422 U.S. 171, 176 (1975), “in most circumstances silence is so ambiguous that it is of little probative value ... silence gains more probative weight where it persists in the face of accusation ... in such circumstance, the accused would be more likely than not to dispute an untrue accusation. Failure to

to unravel these exculpatory statements the accused can no longer re-invoke his shield.¹⁵ When the accused refuses to respond to further cross-examination, the prosecution is entitled to draw an appropriate inference from the accused's silence and to direct such comment to the jury. Fifth, whereas silence during the trial is concerned with the accused's failure to testify, pre-trial silence mainly but not exclusively, deals with the impeachment evidentiary value of the accused's exercise of his right to testify. Silence is most commonly used by the Supreme Court for its impeachment value.¹⁶ The evidentiary value of impeachment is dependent on the establishment of an inconsistency between the accused's exculpatory in-trial statements and his contradictory pre-trial silence. Silence therefore, must be shown to have a valid testimonial capacity.

Sixth, the question of waiver is important. The scope and nature of the accused's waiver of his right to silence determines the proper use to which silence and other evidence may now be put.¹⁷ A waiver of privilege is the intentional, conscious, informed and unambiguous giving up of a known right. Waiver may either be express or it may be inferred from the accused's decision to testify or from the substance of his testimony. Waiver may also be inferred from the accused's conduct or behaviour during the pre-trial custodial process. When the accused waives his fifth amendment privilege, the prosecution is entitled to use silence as substantive or impeachment evidence, provided that it is admissible in terms of ordinary evidentiary principles. The Supreme Court has never defined the limit of the scope of a waiver, but it is generally assumed to mean that the state may cross-examine the accused. Waiving the right to silence does not mean that the normal procedural protections of evidence are also excluded. Cross-examination will still be controlled by the usual procedural rules. These procedural rules are intended to promote other values and are

contest an accusation ... is considered evidence of acquiescence only if it would be natural under the circumstances to object to the assertion in question". See *infra* note 94.

¹⁵ *Brown v U.S* 356 U.S 148, 155-156 (1958), "to allow the accused to re-invoke the privilege at will during cross-examination is a positive invitation to the accused to mutilate the truth". *Jenkins v Anderson* *ibid* at 238, "[an accused] may decide not to take the witness stand because of the risk of cross-examination. But this is a choice of litigation tactics. Once [the accused] decides to testify, [the] interests of the other party and regard for the function of courts of justice to ascertain the truth, become relevant and prevail in the balance of considerations determining the scope and limits of the privilege".

¹⁶ Testimony may be impeached by showing prior contradictory statements or bad character (Federal rules of evidence, 608, 609, 613). *Jenkins and Anderson* *ibid* at 238-39 suggests "common law ... allows witnesses to be impeached by their previous failure to state a fact in circumstances in which the fact naturally would have been asserted". The effect of impeachment is to impair the accused's credibility and to enhance the prosecutorial *prima facie* case. Impeachment evidence may also unduly influence the jury, who may draw an adverse inference of guilt from impeachable silence. Impeaching silence infringes the following philosophical policies : (i) Impeaching silence invades the accused's *mental privacy*; (ii) It forces the accused to confront the *cruel dilemma*; (iii) it erodes the protection surrounding the *innocent* and threatens the *fair-state balance*.

¹⁷ *Jenkins v Anderson* *ibid* at 235, "an accused waives his fifth amendment immunity from giving testimony when he offers himself as a witness".

therefore not waived along with the right to silence. Similarly, if the accused elects to testify and to waive his trial right to silence, it does not mean that he intends to waive his pre-trial right to silence. The election to testify should not be construed as implying a waiver of other independent constitutional protections.¹⁸ Finally, there is a conceptual difference between silence and self-incrimination. In English jurisprudence, this distinction is faithfully reflected in both case and statutory law. However, in American jurisprudence, the distinction is somewhat obscure. The fifth amendment speaks only of a “compulsion” which must not induce the individual to be a “witness against himself”. Within this witness compulsion paradigm there is no mention of silence. Fifth amendment analysis focuses entirely on the meaning of “compulsion/coercion” or “burden” and self-incrimination of a “witness”. Silence within this analysis tends to be subsumed by the meaning of compulsion and merged within the notion of self-incrimination.

6.1.1 The Coercion Model

The constitutional-prohibition rule : In general testimony improperly coerced by the state is an infringement of the accused’s fifth amendment constitutional right and is therefore inadmissible at trial. In certain circumstances, silence may amount to a compelled testimonial statement and the evidentiary use of the compelled silence is accordingly prohibited.¹⁹ Coercion or compulsion (both terms are sometimes used interchangeably) is normatively defined as a force, influence or pressure deliberately exerted upon the mind of the individual with the aim of inducing speech. Compulsion is narrowly concerned with the exertion of psychological pressure, either subtle or overt. Coercion encompasses all forms of compulsion and is widely defined as amounting to an overt use of both psychological and physical force. Coercion is usually found in the police interrogation room and in the courtroom. Interrogation is specifically designed to subjugate the mind of the interrogee to the will of the interrogator. Isolation, deprivation of freedom, fear, intimidation and forceful questioning techniques are all forms of coercion inherent within custodial interrogation. Within the courtroom the prosecution’s ability to comment on the accused’s failure to testify may amount to a coercive pressure, compelling the accused to speak up in his own defence. The coercion model is best explained by the words of Murphy J (dissenting) in *Adamson v*

¹⁸ *New Jersey v Portash* 440 U.S 450 (1979), inconsistent statements made to a grand jury under a grant of immunity could not be used to impeach the accused when he elects to testify at trial. By contrast, both *Raffel* and *Jenkins* allow the court to use prior testimonial silence for impeachment purposes once the accused elects to testify at trial, on the basis that an election to testify is a broad implicit waiver of constitutional rights. Both *Raffel* and *Jenkins* are in conflict with *Portash*.

¹⁹ See in particular *Griffin v California* 380 U.S 609, 615 (1965) and *Raffel v United States* 271 U.S 494 (1926).

California,²⁰ "(a) if the [accused] does not take the stand, his silence is used as the basis for drawing unfavourable inferences against him ... thus he is compelled, through his silence, to testify against himself; (b) if he does take the stand, thereby opening himself to cross-examination ... he is necessarily compelled to testify against himself. In that case, his testimony on cross-examination is the result of the coercive pressure of the [statutory] provision rather than his own volition".

The coercion model concentrates on an analysis of whether or not the accused's pre-trial and trial silence is the result of some kind of state-induced coercion. When confronted by an accusation, the accused has a number of choices; he may testify and become a witness against himself or he may remain silent. If the accused's silence is the basis for a negative inference against him, the accused has in essence become a compelled witness against himself. The accused has been coerced by the state to be a witness. The constitutional-prohibition model examines the compulsion which places the accused in a position where he must either speak or remain silent. If the result of that coercive choice is silence, the fifth amendment prohibits the accused's silence being used as testimony against him. *Griffin v California* is a perfect example of the coercion model at work. The accused is given the choice of remaining silent or testifying. The *Griffin* court defines this choice as coercive and the accused's subsequent silence cannot be used against him. The accused's pre-trial choice of silence may also be defined as coercive. When the interrogator confronts the suspect with a choice between speaking up or remaining silent, and the suspect chooses silence, no evidentiary use may be made of such a compelled silence. When the state intends to make use of both the accused's pre-trial silence (a negative statement) and his affirmative (positive) statements made during custodial interrogation, the accused is placed under a double-bind coercion. Here the accused is damned if he does and damned if he doesn't.²¹ However, where the state leaves the accused with a choice which does not violate his constitutional rights, then his compelled silence may nevertheless be admissible. For example, the accused is sometimes confronted by the coerced choice of either taking a blood test (to prove intoxication) or refusing one in which case a presumption of guilt arises. The accused's refusal amounts to a testimonial choice but not one which is the product of a prohibited constitutionally defined coercion. Similarly, the accused's silence in *Jenkins v Anderson* is deemed admissible as impeachment evidence against him as it is not the product of a constitutionally prohibited coercion. At the time of Jenkins's silence, the police

²⁰ 332 U.S 46, 123, 124 (1947).

²¹ *Adamson v California* ibid at 220. See also Herman "The Supreme Court And Restrictions On Police Interrogation" (25) *Ohio St. L. J* (1964) 449-467.

had neither interviewed him nor arrested him. Jenkins's silence has admissible testimonial value because he has not as yet been subjected to any state coercion.

The prohibited-inference rule : The accused's silence is only relevant as evidence if it gives rise to an inference consistent with the prosecution's *prima facie* case. If the accused's silence is the result of a proper exercise of his fifth amendment right, no evidentiary use may be made of the accused's silence.²² Two kinds of inferences are possible. Clearly inadmissible would be a direct inference of guilt drawn from either the accused's pre-trial or trial silence. However, within certain circumstances, the indirect use of the accused's pre-trial silence is permissible but only for the limited evidentiary purpose of impeaching the accused's credibility. *Griffin v California*²³ is authority for the prohibition of adverse inferences flowing from the accused's failure to testify at trial. *Jenkins v Anderson* and *Fletcher v Weir*²⁴ are authority for the drawing of adverse inferences from pre-arrest pre-trial silence for impeachment purposes. The impeachment testimonial value of silence is conditioned upon two presumptions. The presumption that in a similar situation a reasonable person would have denied the accusation unless it was true (an objective-reasonable test). The evidentiary use of impeachable silence is also dependent on the probative value of the inference to be drawn and the effect of any resultant prejudice.²⁵ There are any number of reasons why the accused chooses silence. Ignorance, fear, intimidation, uncertainty about future legal consequences are all factors which may decrease the probative value of the inference or increase its possible prejudicial effect (a subjective test). Nevertheless, the accused's silence as an impeachment device is a well-established prosecutorial tool. The prosecution will usually use silence to contradict the accused's testimony and to draw a testimonial inference inconsistent with the accused's trial testimony. The prosecution may also use the accused's silence to infer that the accused has no truthful exculpatory story to tell. In *Lakeside v Oregon*,²⁶ the court applied a prohibited inference rule which distinguished between adverse inferences deemed improper and positive instructional adverse inferences considered proper as they did not encourage the jury to make negative speculations.

²² See Poulin *supra* note 7 at 222-28. Ratner *supra* note 7 at 491-492. See also Bradley "Griffin v California : Still Viable After All These Years" (70) *Mich. L. Rev* (1981) 1290-1293.

²³ *Griffin* *ibid* at 614-615.

²⁴ *Jenkins* *ibid* at 238, *Fletcher* *ibid* at 606-7.

²⁵ *Grunewald v United States* 353 U.S 391 (1957), *United States v Hale* 422 U.S 171 (1975) both hold that silence has absolutely no probative value. *Baxter v Palmigiano* 425 U.S 308, 316, 320 (1976) in allowing an adverse inference to be drawn from a prisoner's exercise of silence during a prison disciplinary board, held that adverse inferences from silence do have probative value in a disciplinary hearing but not in a formal criminal proceeding. The *Baxter* decision is illogical since silence should have the same probative value, irrespective of the nature of the proceedings.

²⁶ 435 U.S 333 (1978).

The prophylactic-exclusionary rule : Is also formulated to deter improper state violations of constitutional rights.²⁷ The suspect's statements are inadmissible if police improperly infringe the prophylactic standard endorsed by *Miranda*. When the suspect is exposed to an inherently compelling pressure",²⁸ his silence cannot be held against him. The state has placed the individual in a situation in which, regardless of his response, he is compelled to provide incriminating testimonial evidence, either in the form of a negative silent statement, or a positive affirmative statement. Underlying the prophylactic-exclusionary rule is the concern that "during custodial interrogation, the pressure on the suspect to respond flows [not from the threat of contempt sanctions], but rather from the inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely".²⁹ The custodial post-arrest interrogee is faced with three possibilities. He may respond and thereby incriminate himself. He may lie and thus expose himself to the inference of a guilty conscience or he may remain silent. The prophylactic-exclusionary rule is designed to protect this kind of silence and to prevent it from being used as testimony against the accused.³⁰ The pre-arrest interrogee is in a similar but slightly worse situation. His silence in the face of police questioning is not protected by the prophylactic rule which is triggered only after arrest. Pre-arrest silence may be used as testimonial evidence. Whether the fifth amendment attaches to the evidence of a non-testifying pre-arrest suspect has not as yet been resolved by the Supreme Court. The prophylactic exclusionary rule has limited utility in assessing testimonial evidence in the form of silence. The exclusionary rule is best suited to cases in which the state attempts to admit positive evidence obtained in violation of a constitutional protection. If the reaction to improper state conduct is silence, a negative response, it is difficult to see exactly how the exclusionary rule applies. The *Miranda* rule is specifically formulated to deter the evidentiary use of improper affirmative testimony and is not designed to deal with the opposite, namely a negative expression of silence.³¹ More importantly, silence by definition emphasizes fifth amendment values which are different from those identified in *Miranda*. Ideally, when the suspect invokes his right to silence, the court should concentrate on protecting the exercise

²⁷ The two most important decisions defining the exclusionary rule are : *Mapp v Ohio* 367 U.S 643 (1961), "evidence is inadmissible if obtained in terms of an unreasonable search and seizure – a violation of the fourth amendment. *Miranda v Arizona* 384 U.S 436 (1966), "evidence is inadmissible if obtained in terms of a coercive police interrogation", a violation of a prophylactic exclusionary rule.

²⁸ *Miranda* ibid at 467.

²⁹ *Pennsylvania v Muniz* 496 U.S 596-97 (1990).

³⁰ This reasoning is based on the cruel trilemma argument. At trial the accused may remain silent and have an adverse inference drawn against him; he may speak up and incriminate himself, or he may lie and face a perjury/contempt charge. At the pre-trial stage, the suspect faces the same trilemma except that the perjury threat is substituted by an inference of a guilty conscience threat. The cruel trilemma applies equally to the pre-arrest suspect, the custodial interrogee and the accused.

³¹ See in particular *Harris v New York* and *Oregon v Elstad* *supra* chapter 5 p.179, 189-191.

of the right rather than shifting the focus to an examination of improper state conduct.³² Of course, once the suspect has waived his constitutional right to silence, there is no reason to limit the evidentiary use of the suspect's pre-trial silence.³³

6.1.2 The Impermissible-Burden Model

The impermissible-burden model examines the state's evidentiary use of the accused's silence by determining whether or not the burden placed on the accused's right is unconstitutional. Evidentiary use of testimony is prohibited when it places a compulsive burden on the exercise of the individual's fifth amendment privilege.³⁴ The impermissible-burden rule makes use of a three pronged test : (i) whether the state use of silence as testimony burdens the exercise of the accused's fifth amendment, (ii) whether this kind of silence usage impairs the fundamental policies underlying the fifth amendment,³⁵ (iii) whether the advancement of the state interest warrants the impairment of the fifth amendment.³⁶ The rule involves an intricate balance of interests and suffers from a certain degree of unpredictability. What constitutes a burden, what degree of weight is to be attached to the accused's interest as opposed to the state interest is purely a matter of subjective selectiveness. The factors to be balanced are left entirely to the court's subjective discretion. The test specifically prohibits the evidentiary use of silence which infringes the fifth amendment's underlying policies. Yet an examination of Supreme Court case law reveals no consensus on the kind, type and number of justifications which supposedly underly the fifth amendment privilege. Indeed, as has been demonstrated in Chapter 4, all of the underlying policies enumerated in seminal decisions such as *Murphy v Waterfront Commission* and *Miranda v Arizona* contain fundamental moral and logical flaws.³⁷ One of the main problems with the impermissible-burden test is determining how and where the line is to be drawn between a burden which amounts to a compulsion,³⁸ a burden which may perhaps not be

³² Logically where the suspect remains silent in the face of state interrogation, there is no improper conduct to deter.

³³ *Anderson v Charles* 447 U.S 404, 408 (1980), "unless the silence represents a tacit revocation of waiver".

³⁴ See also *Carter v Kentucky* 480 U.S 288 (1981).

³⁵ See also *McGautha v California* 402 U.S 183, 213 (1971), "the threshold question is whether compelling the balance of interests impairs to an appreciable extent any of the policies behind the right involved"

³⁶ Ayers "The Fifth Amendment And The Inference Of Guilt From Silence : Griffith v California After Fifteen Years" (78) *Mich. L. Rev* (1980) 841, 851.

³⁷ According to the impermissible-burden model, the use of silence by the state would shift the state-individual balance towards the prosecution, erode protections for the innocent, increase the likelihood of coercing statements from the accused and present the accused with a cruel dilemma.

³⁸ *Garrity v New Jersey* 385 U.S 493 (1967), police officers under internal investigation were advised that claiming a right to silence would mean removal from employment. The use of affirmative

strictly defined as compulsive, but is nevertheless heavy enough to deserve exclusion and a burden which is slight and thus permissible.³⁹ There should be some kind of a threshold which distinguishes impermissible burdens from permissible burdens. The Supreme Court has never clearly articulated such a threshold level. The classical application of the impermissible-burden rule is to be found in the seminal case *Griffin v California*.⁴⁰ The court specifically holds that prosecutorial use of the accused's trial silence amounts to an impermissible burden on the accused's fifth amendment privilege.⁴¹ The prosecution is barred from making use of the accused's failure to testify either as direct or indirect evidence of guilt. However, the *Griffin* decision is conceptually flawed as it fails to distinguish between the burden placed on the accused's in-trial silence and the accused's pre-trial silence. A comparison between the two burdens indicates that prosecutorial use of pre-trial silence would amount to a far heavier burden. Prosecutorial commentary on the accused's trial silence places only a small additional burden on the accused's constitutional right as the jury is already in a position to observe the accused's failure to testify. By contrast, the jury is usually unaware of the accused's pre-trial silence and once this testimony is admitted, it places a far heavier burden on the accused's constitutional right.⁴² Yet the use of pre-trial silence is permitted, although narrowly for impeachment purposes only, but trial silence usage is absolutely prohibited.

In *Jenkins v Anderson*, the Supreme Court for the first time applied the impermissible-burden test enunciated in *Griffin* to pre-arrest silence.⁴³ The court distinguished between the two types of burdens by reasoning that the state interest more than outweighed the burden placed on the accused's pre-arrest right to silence. The impeachment use of the accused's pre-trial right to silence did not seriously impair the policies underlying the constitutional right to testify, "impeachment follows the accused's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial".⁴⁴ Once the accused elects to

statements induced in such a coercive atmosphere amounted to an impermissible burden at trial on their fifth amendment rights.

³⁹ The mere threat of using pre-trial silence adversely against the accused at trial did not amount to an impermissible burden. *McGautha v California* *ibid* at 213, "it is not contended ... that the mere force of evidence is a compulsion of the sort forbidden by the privilege".

⁴⁰ 380 U.S 615 (1965).

⁴¹ *Griffin* *ibid* at 614-615 defines the prohibition on trial silence as an impermissible burden, but the court does not use the word compulsion, nor does the court explain the difference between a "burden" and a "compulsion".

⁴² The analysis of a burden is compounded by the problem that a suspect, when he makes the election to remain silent, does not as yet foresee that his pre-trial silence may be used against him at some remote future trial. Usually the suspect is advised of his right to remain silent by his legal counsel. The Supreme Court has not commented on the effects of a lawyer advised silence on the impermissible burden test.

⁴³ *Jenkins* *ibid* at 236-238.

⁴⁴ *Ibid* at 238.

testify, he loses his protection and opens himself to cross-examination. *Jenkins* expressly declines to comment on the extent to which pre-trial silence is or is not protected by the fifth amendment.⁴⁵ Two conceptual alternatives present themselves. If pre-arrest silence falls within the constitutional ambit of the fifth amendment then prohibiting a substantive inference of guilt derived from pre-arrest silence builds naturally on the *Griffin* decision. On the other hand, if pre-arrest silence does not amount to an exercise of the fifth amendment privilege, then pre-arrest silence may be treated like any other item of evidence. In terms of this reasoning, pre-arrest silence may only be inadmissible if it were found to be an impermissible burden on the accused's constitutional right not to testify at trial. The impermissible-burden test, despite a certain degree of unpredictability, has become the Supreme Court's main analytical tool. *In essence, present fifth amendment jurisprudence prohibits the use of either pre-trial or trial silence as a substantive indication of guilt. Pre-trial silence is admissible, but only for the narrow purpose of impeaching the accused's credibility once he has voluntarily elected to testify.*

6.2 Miranda To Jenkins : The Pre-Arrest And Pre-Trial Impeachment Cases

The Supreme Court has held that the fifth amendment not only informs the arrested suspect of his right to remain silent, but also prohibits any use of the cautioned suspect's silence as substantial evidence by the prosecution. The arrested suspect on invoking his constitutional right cannot be penalized in court for remaining silent. At most, the prosecution may impeach the credibility of the accused with his pre-trial silence but only once the accused has voluntarily elected to testify. Evidentiary use of silence by the prosecution is only permissible when the accused has knowingly and voluntarily waived the fifth amendment privilege as a constitutional procedural protection. Although these general rules appear to be a clear summary of the Supreme Court's position, a closer examination of the more important court decisions shows a remarkable degree of inconsistency.⁴⁶ The admission or exclusion of pre-arrest and pre-trial silence as evidence, the inferences to be drawn from such silence usage, varies significantly from one case to the other. The ambivalence surrounding the evidentiary usage of pre-arrest silence is largely due to a number of contradictory factors.

⁴⁵ *Jenkins* *ibid* at 236 n 2.

⁴⁶ Jackson "The Right To Silence : The Use of Pre-Arrest Silence" (68) *Un. Cinn. L. Rev* (2000) 505.29. Speck "The Weight Of Silence, Determining The Use Of Pre-Arrest Silence As Substantive Evidence" (21) *Am. J. Trial Advocacy* (1997) 413. Patrick "Towards The Constitutional Protection Of A Non-Testifying Defendant's Pre-Arrest Silence" (63) *Brooklyn L. Rev* (1997) 897. Notz "Pre-Arrest Silence As Evidence Of Guilt" (64) *Un. Chicago L. Rev* (1997) 1009. Pettit "Should The Prosecution Be Allowed To Comment On A Defendant's Pre-Arrest Silence In Its Case-In-Chief" (29) *Loyola. Un.*

First, the fundamental problem with the Supreme Court's analysis of pre-arrest silence is that the court has failed to give an authoritative opinion on whether or not pre-arrest silence may be used by the prosecution as substantive evidence of guilt. The result is a conspicuous gap. The seminal case, *Jenkins v Anderson*,⁴⁷ addresses only the use of pre-arrest silence for impeachment purposes. The court expressly leaves open the constitutionality of a substantive use of pre-arrest silence.⁴⁸ The Federal Courts of Appeal have been asked to fill the gap on their own. The predictable result is a number of contrary judgements. In reaching diverging conclusions the circuit courts have relied on two distinct strands of fifth amendment case law.⁴⁹ The circuit courts favouring the substantive exclusion of pre-arrest silence rely on the authority of *Griffin v California*.⁵⁰ According to *Griffin*, silence is an absolute constitutional right and the prosecution is absolutely precluded from the evidentiary use of silence. If *Griffin* is taken to its logical conclusion, it should also preclude the substantive use of pre-arrest silence. The Supreme Court has previously held that fifth amendment protections are not limited to the trial context.⁵¹ An inability to protect the right at one stage of the criminal process may make its invocation useless at a later stage.⁵² Using the suspect's pre-trial silence to suggest guilt may impermissibly burden the fifth amendment right. Such a penalty would discourage the accused from exercising the fifth amendment. Prosecutorial comment on pre-arrest silence is also likely to penalize the accused more heavily than prosecutorial comment on a failure to testify at trial.⁵³ On the other hand, the circuit courts favouring a substantive evidential inclusion of pre-arrest silence rely on *Jenkins v Anderson*.⁵⁴ The *Jenkins* reasoning is in some regards contrary to the spirit of *Griffin*. The evidentiary use of silence is determined by an impermissible-burden test in which the court weighs the legitimacy of the challenged silence usage against the burden such usage places

Chic. L. J (1997) 181. Abaray "Note : *Jenkins v Anderson*" (49) *Uni. Cinn. L. Rev* (1980) 858. Schiller "On The Jurisprudence Of The Fifth Amendment Right To Silence" (16) *Am. Crim. L. Rev* (1979) 197.

⁴⁷ 447 U.S 231 (1980).

⁴⁸ *Ibid* at 236 n. 2.

⁴⁹ See McKeegan "Note : The Fifth Amendment And A Defendant's Pre-Arrest Failure To Come Forward" (46) *Albany L. Rev* (1982) 546, 555, who argues for the substantive admission of pre-arrest silence on the ground that it is not a *compelled* self-incrimination as defined in the fifth amendment.

⁵⁰ 380 U.S 609 (1965) particularly 613-615.

⁵¹ *Kastigar v United States* 406 U.S 441, 445 (1972), "the privilege protects against any disclosure that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used".

⁵² *Michigan v Tucker* 417 U.S 433, 440-1 (1974).

⁵³ The First, Seventh and Tenth Circuit Courts favour the *exclusion* of all substantive use of pre-arrest and pre-trial silence on the reasoning set out by *Griffin*. See *United States v Burson* 952 F.2d 1196 (10th Cir) 1991, *Coppola v Powell* 878 F.2d 1562, 1568 (1st Cir) 1989. *Savory v Lane* 832 F.2d 1011, 1017 (7th Cir) 1987.

⁵⁴ The Fifth, Ninth and Eleventh circuits allow a substantive inference of guilt to be drawn from the accused's pre-arrest silence. Taking advantage of *Jenkins's* failure to render an express opinion in this regard. See *United States v Oplinger* 150 F.3d 590, 593 (5th Cir) 1996, *United States v Rivera* 944 F.2d 1563, 1568 (11th Cir) 1991, *United States v Thompson* 82 F.3d 849 (9th Cir) 1996.

on the policies behind the fifth amendment.⁵⁵ *Jenkins* differs from *Griffin* in arguing that, in certain circumstances, the evidentiary use of silence is a permissible rather than an impermissible burden. The pre-arrest use of silence is permissible, especially when the accused has voluntarily chosen to take the stand and testify. In addition, some kind of state action is a necessary prerequisite for the triggering of the fifth amendment. The fifth amendment has no constitutional force in the face of a purely private action. The criminal suspect who has no contact with a law enforcement organ prior to his arrest may not bar prosecutorial use of his pre-trial silence made to the face of another private individual. The fifth amendment may only be raised when the prosecution seeks to make testimonial use of "silence" induced or coerced by the state from the accused.⁵⁶ The consequence of such diversity of opinion is a certain conceptual confusion about the nature of pre-arrest silence. What kind of testimonial relevancy should be attached to pre-arrest silence? May the prosecution's use of pre-arrest silence be defined as a constitutional infringement? If so, is it an infringement of the accused's fifth amendment silence right or of his fourteenth amendment due process right?

Second, some commentators have argued that pre-trial silence should not be analysed in terms of constitutional law principles. Instead, pre-trial silence should be examined for its probative value as an item of circumstantial evidence⁵⁷ in accordance with ordinary evidentiary rules. When pre-arrest silence is used to directly infer guilt its probative value is extremely low.⁵⁸ Its prejudicial effect is extremely high because pre-arrest and pre-trial silence is too ambiguous and by itself cannot determine the innocence or guilt of the accused. When pre-arrest silence is used for impeachment purposes only, it becomes less intrusive on the accused's constitutional rights.⁵⁹ The probative value of pre-arrest silence as impeachment evidence is high and its prejudicial effect limited. The use of pre-arrest silence

⁵⁵ See Snyder "A Due Process Analysis Of The Impeachment Use Of Silence In Criminal Trials" (29) *Wm. And Mary L. Rev* (1988) 285, 330, who argues for the view that *Jenkins* was wrongly decided and should have been founded on an analysis of the fourteenth amendment.

⁵⁶ *Colorado v Connelly* 479 U.S 157, 169-70 (1988), "the sole concern of the fifth amendment is government coercion. The fifth amendment is not concerned with moral or psychological pressures emanating from sources other than official coercion". For example, in *United States v Oplinger* 150 F.3d 1061, 1063-64 (9th Cir) 1998, the accused's silence was in response to questions from his bank supervisors. The fifth amendment was not violated by the substantive admission of his pre-arrest silence because the accused at that stage was not being subjected to an interrogation by law enforcement officials.

⁵⁷ Circumstantial evidence consists of proved facts from which other connected facts (by inference) are established.

⁵⁸ Silence is ambiguous since there may be other innocent reasons for its existence, including intimidation, ignorance, hostility to questioning and a strong belief in the right to remain silent.

⁵⁹ The use of pre-arrest silence for impeachment purposes is constitutionally permissible because the accused has already made the voluntary choice of testifying. Consequently, the accused is not forced or compelled by the state to be a witness against himself.

as impeachment evidence is further legitimized by the fact that the accused voluntarily takes the stand and is not forced to be a witness against himself. The problem of pre-trial silence may be solved purely in terms of evidentiary principles without the need to refer to confusing constitutional definitions.

Third, a fundamental reason for prohibiting the evidentiary use of silence is that it unfairly infringes the accused's constitutional rights. In terms of the impermissible-burden test, silence as evidence is prohibited because it penalizes the accused's fifth amendment right by burdening the policy justifications underlying the fifth amendment. It is argued that allowing the prosecution to rely on silence transforms the accused's silence into a testimonial admission. A testimonial admission which is then substituted for the hard evidence the state is obliged to obtain through its own endeavours. It amounts to a shift in the burden of proof from the state to the accused.⁶⁰ The substantive use of silence to infer guilt would also violate the fifth amendment's ability to act as a shelter for the innocent accused.⁶¹ Furthermore, when the accused's silence is used to imply his guilt, a definite cruel dilemma is created in which the accused has the choice of either making a self-accusatory affirmative statement, or of perjuring himself, or by remaining silent open himself to an adverse inference of guilt.⁶² The fifth amendment is also employed to deter police misconduct. If the police know that the accused's pre-arrest silence is available for use at trial, there is the incentive to manipulate the time of arrest and the delivery of the *Miranda* warning in order to ensure the admissibility of pre-arrest silence. However, all of the policies supposedly justifying the fifth amendment and precluding the evidentiary use of silence are based on justifications which have been rationally refuted (see Chapter Four). The impermissible-burden test and the policies which support it are based on a shallow foundation.⁶³ The Supreme Court's continued reliance on these irrational policies is one of the reasons for the confusion about the nature, purpose and evidentiary value of pre-arrest silence.

Fourth, the Supreme Court's reduction of the *Miranda* post-arrest custodial safeguards to a mere prophylactic rule has an important spillover effect on the treatment of pre-arrest silence. The porous nature of the *Miranda* safeguards allow the police a wide latitude. Quite often the court favours the interrogator to the detriment of the interrogee. The circuit courts, in

⁶⁰ See Poulin "Evidentiary Use Of Silence And The Constitutional Privilege Against Self-Incrimination" (52) *Geo. Wash. L. Rev* (1984) 191, 210-211.

⁶¹ *Ibid* at 212. See also *Ullmann v United States* 350 U.S 422, 426-28 (1956) and *Grunewald v United States* 353 U.S 391, 421 (1957) "the basic function of the privilege is to protect innocent men. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances".

⁶² *Ibid* Poulin at 211.

⁶³ See *supra* chapter 4.

particular, exhibit an ambivalence in dealing firmly with dubious police interrogation methods involving deception and trickery. Judgements on waiver of suspect's rights are often weighed and interpreted in favour of the police interrogator. The wide latitude granted to the police after the suspect's arrest is also reflected in the flexible police friendly way the courts deal with the suspect's pre-arrest silence. The circuit courts have traditionally been biased in favour of the police. In contrast to the inconsistency of American court decisions, English case law and statute is clear about the kind and extent of the various inferences to be drawn from both pre-arrest and post-arrest silence.⁶⁴ There is an urgent need for the United States Supreme Court to follow in the footsteps of its English cousin and to develop a uniform and systematic set of rules on the correct pre-arrest and post-arrest evidentiary use of silence. What is called for is a proper federal system of rules which would enable the defence attorney to give correct legal advice and allow the accused to plan a reasonable trial strategy. A federal rule-based system of information is vital to the accused as he determines when to remain silent, when to speak out, when to testify and the possible consequences of cross-examination. A federal system would also take into account the potential prejudice effect of silence on the jury, who are well known for their propensity to consider silence as an admission of guilt.

Fifth, the Supreme Court's ambivalence towards the *substantive* use of pre-arrest silence is largely built on a confusion about the appropriate *impeachment* use of silence. Impeachment is an evidentiary tool which allows the prosecution through cross-examination to attack the credibility of the suspect and permits the trier-of-fact to draw reasonable adverse inferences about the accused's truthfulness. Impeachment technique must establish a contradiction between the evidence given at trial and a statement made by the accused on a previous occasion before the trial. In certain circumstances silence (if it is to have testimonial value) may be used to establish the contradiction. When the suspect (as he then is) remains silent upon hearing an accusing statement, his silence may be construed as an agreement to that statement. At trial the accused's (as he now is) exculpatory evidence may be contradicted by his previous silence. Silence is not a statement as such, rather it is a kind of negative "omission" which may have communicative value. Silence if it is to have impeachment value, must be inconsistent with either other acts of silence or other positive exculpatory statements. Impeachment use of silence may only be made where there is no other reasonable explanation for the suspect's silence. Impeachment of an accused's trial testimony involves specific considerations more important than the traditional concerns about the evidential use of silence. The Supreme court's readiness to admit "silence" evidence for

⁶⁴ See *infra* chapter 8 p.283-287.

an impeachment purpose is grounded on the following considerations. Primarily, impeachment use of silence concerns the question of credibility or perjury and only becomes a trial issue when the accused decides to take the stand. Perjury or credibility are not in issue if the accused decides not to testify. Every criminal accused has the right to choose to testify or to refuse to testify. If the accused chooses to testify and then perjures himself, the fifth amendment cannot be construed to include the right to be protected against the consequences of such perjury.⁶⁵ Secondly, when the accused chooses to testify, he is assumed to have waived his fifth amendment right. *Raffel v United States*⁶⁶ clearly holds, “the safeguards against self-incrimination are for the benefit of those who did not wish to become a witness on their own behalf and not for those who do”. This aspect of the *Raffel* judgement is reaffirmed by *Jenkins*.⁶⁷ Finally, on a practical level, the impeachment use of silence is less likely to discourage the accused from exercising his fifth amendment right than the substantive use of silence. One of the reasons for barring the use of pre-arrest silence (as an inference of guilt) is that it is likely to interfere with the accused’s voluntary decision to exercise the fifth amendment. Impeachment use of silence (as an inference which goes only to credibility) is less likely to interfere with the accused’s choice. Although the Supreme Court regards impeachment as a traditional truth-testing device, there has been no uniformity in the way the court interprets the nature of impeachment use. The Supreme Court’s conflicting interpretations of impeachment usage can be traced from the prior silence stage right through to the post-arrest stage.

Prior Trial Silence : *Raffel v United States*⁶⁸ is the earliest case to analyse the evidentiary use of prior trial silence as a prosecutorial impeachment tool. During the accused’s first trial, he elected not to testify and at his second trial he changed his mind, took the stand, and was cross-examined by the prosecution on his prior trial silence. The court argued that impeachment of the accused by the drawing of adverse inferences from a previous trial protected silence did not infringe the accused’s fifth amendment right.⁶⁹ The prosecution may, during cross-examination at the second trial, impeach the accused’s credibility in terms of the prior-inconsistent statement rule regardless of whether the prior inconsistency is a positive contradictory statement or a prior trial silence or any other type of inexplicable

⁶⁵ Impeachment of the accused’s credibility has a long history. It is clearly framed in the Federal Rules of Evidence, FRE 801 (d)(1)(A) and FRE 613. *Harris v New York supra* chapter 5 and *Oregon v Hass, supra* chapter 5 allow the impeachment use of evidence even when such evidence is obtained in violation of the *Miranda* rule.

⁶⁶ 271 U.S 494, 499 (1926).

⁶⁷ 447 U.S 231, 240-241 (1980).

⁶⁸ 271 U.S 494 (1926).

⁶⁹ *Ibid* at 499.

silence.⁷⁰ Especially when the accused has voluntarily waived his constitutional protection by deciding to testify during the second trial. *Raffel* is an anomaly as a number of cases following it refused to be bound by its reasoning. In *Grunewald v United States*,⁷¹ the accused remained silent during a pre-trial grand jury hearing, but chose to testify at his trial. The prosecution's attempt to impeach the accused's credibility by a cross-examination of his prior grand jury silence was held to be improper. *Grunewald* based its decision on the supervisory powers granted to it over federal courts⁷² and made no mention of the constitutional nature of silence.⁷³ In *Stewart v United States*,⁷⁴ the accused took the stand at his third trial, having remained silent during the inconclusive previous two. The prosecution comment, "this is the first time you have gone on the stand, isn't it Willie?" was held to be an improper breach of trial rules because the potential prejudice to the accused could not be rectified by a judicial cautionary instruction.⁷⁵ Both *Grunewald* and *Stewart* base their reasoning on principles of evidentiary law and make no reference to constitutional law. The irony is that *Raffel* bases its reasoning on constitutional principles and allows for the impeachment use of prior trial silence. *Grunewald* and *Stewart* base their reasoning on evidentiary principles, but do not allow for the impeachment use of prior-trial silence.

Pre-Arrest Silence : The evidentiary effect of pre-arrest pre-*Miranda* silence was dealt with by the seminal case *Jenkins v Anderson*.⁷⁶ According to *Jenkins*, the use of pre-arrest silence to impeach the accused's credibility at trial does not violate either the fifth amendment or the fourteenth amendment due process clause.⁷⁷ Impeachment use of pre-arrest silence does not infringe the accused's constitutional rights because the accused voluntarily takes the stand and knowingly waives his protective constitutional shield.⁷⁸ By making use of an impermissible-burden test (first mooted in *Griffin v California*) the court reasons that the policies underlying the fifth amendment are not significantly burdened by the impeachment use of pre-arrest silence.⁷⁹ The court does not however, discuss what it believes these pertinent policies to be.⁸⁰ *Jenkins* also declines to discuss, whether and to

⁷⁰ Ibid at 499 but see also *Reagan v United States* 157 U.S 301, 305 (1895).

⁷¹ 353 U.S 391 (1957).

⁷² Ibid at 424.

⁷³ Though *Grunewald* distinguishes the *Raffel* judgement on the facts, the court makes no comment on *Raffel's* constitutionally based reasoning (at 421).

⁷⁴ 366 U.S 1 (1961).

⁷⁵ Ibid at 2, 4 and 5. The prosecution actually commented twice on the accused's prior trial silence.

⁷⁶ 447 U.S 231 (1980), "the accused waited two weeks before reporting the murder to the police. The prosecution impeached the accused on the ground that he should not have waited so long before telling the police".

⁷⁷ Ibid at 232, 238, 240-41.

⁷⁸ Ibid at 238.

⁷⁹ Ibid at 236-7.

⁸⁰ Ibid at 236. Commentators are forced to fall back on the traditional policies as outlined in *Murphy v Waterfront Commission* 378 U.S 52 (1964).

what extent, pre-arrest silence is privileged under the fifth amendment at all.⁸¹ Reliance on the *Raffel* precedent enables the court to sidestep the issue of whether the accused's silence is actually an invocation of the fifth amendment right to silence. On a fundamental level, *Jenkins* illustrates the Supreme Court's inability to articulate a philosophical justification for the silence principle. This inability is encapsulated by the court's failure to determine, (a) to what extent, if any, pre-arrest silence falls under the fifth amendment, (b) its express failure to decide whether substantive use may be made of pre-trial silence, and (c) by its failure to explain the nature of the so-called underlying policies. The constitutionality of a prosecutorial use of pre-trial silence is important because it influences the application of the impermissible-burden test. If pre-arrest silence falls within the ambit of the fifth amendment, then the focus of the impermissible-burden test is on whether or not pre-arrest silence is impermissibly burdened by its use as evidence at trial. If pre-arrest silence does not fall within the ambit of the fifth amendment, then the test must focus on the accused's choice to remain silent at trial, namely, is the right not to testify at trial impermissibly burdened by the accused's exercise of a pre-arrest refusal to answer interrogatory questions. *Jenkins* also adopts a *Harris*-style balance of interest analysis. The accused's interest in avoiding impeachment is outweighed by the state's substantial interest in obtaining a conviction and enhancing the truth-finding capacity of the criminal process. The impeachment use of silence is permissible because it ensures that the accused speaks truthfully and accurately and does not perjure himself when he takes the stand.⁸² By allowing the state to make use of impeachment silence the reliability of the criminal process is also enhanced.

The court reaches its decision partly on the reasoning of *Raffel v United States* which it logically distinguishes from *Grunewald* and *Stewart*. Impeachment use of silence is justifiable because it does not significantly add to the trial pressure exerted by the jury expectation on the accused to take the stand and explain his innocence. *Grunewald* and *Stewart* do not establish a constitutional judicial precedent as they are merely case-by-case decisions concerning evidentiary rules on the probative value of silence usage.⁸³ Commentators have criticized *Jenkins*, because it equates a *Raffel*'s prior-trial type of silence with a pre-trial type of silence. A factual divide which may be too wide to adequately bridge. Other commentators have argued that pre-trial impeachment use of silence should always be

⁸¹ *Ibid* at 236 n 2, but see Poulin *supra* note 7 at 215-217 who argues that allowing impeachment use of pre-arrest silence does in fact impermissibly burden the fifth amendment.

⁸² Both *Harris v New York* 401 U.S 222, 223 (1971) and *Jenkins* at 238, admit otherwise inadmissible evidence for the purpose of challenging the credibility of the accused's testimony and to ensure that the accused does not perjure himself.

⁸³ The minority opinion in *Jenkins* (Marshal J, Brennan J) hold that *Raffel* was wrongly decided and logically undermined by *Grunewald*, *Miranda* and *Griffin*.

construed as an impermissible burden on the accused's constitutional rights which never enhances the state interest above the individual interest (a reasoning based on the absolute nature of the *Griffin* prohibition rule) and on the notion that compelling the accused to supply a link in the evidence against him before arrest is contrary to the inherent nature of an adversarial system of justice.⁸⁴ By contrast, in England, clear statutory rules have been set out which clearly indicate what kinds of adverse inferences from pre-arrest silence may be safely drawn by the prosecution at trial.⁸⁵ Lower court decisions generally reflect the confusion found at the Supreme Court level.⁸⁶ Some circuit courts, for example, *United States ex rel, Allen and Rowe*,⁸⁷ argue that pre-trial silence must first be established as contradictory before it may be used as an impeachment device. Usually, silence is so ambiguous that it fails to establish the necessary contradiction. Other lower courts, for example, *United States v Vega*,⁸⁸ hold the exact opposite and allow the impeachment use of pre-trial silence especially in the circumstance where the accused silence is highly probative.

Post-Arrest, Pre-Miranda Silence : The prosecution is entitled to use the accused's silence for impeachment purposes if the silence occurs after arrest but before the *Miranda* warning is administered. In *Fletcher v Weir*,⁸⁹ the accused's exculpatory defence at trial was impeached on the basis of his post-arrest but pre-*Miranda* silence. The court reasons that when the accused has not yet been advised of his rights, impeachment use of silence does not violate the fourteenth amendment due process clause.⁹⁰ At the pre-*Miranda* stage, there is as yet no positive state guarantee that the accused's silence will not be used against him.⁹¹ Although *Fletcher* argues along constitutional and not evidentiary lines, it evaluates silence in terms of the fourteenth amendment and makes no mention, as would be expected, of fifth amendment principles. Both *Jenkins* and *Fletcher* taken together, establish the notion that

⁸⁴ The *Jenkins* minority (at 245-46) cite three criticisms for their dissent : (i) the accused's silence at any stage of the criminal process is ambiguous; (ii) the possibility of impeachment now compels the suspect to speak up at interrogation in order to preserve the right to present an exculpatory defence at trial without being penalized, (iii) impeachment impermissibly burdens constitutional rights and cuts down on the accused's choices at trial.

⁸⁵ See *infra* chapter 9 p.327-334.

⁸⁶ Note the logical contradiction between the minority and the majority positions in *Jenkins*. The minority argue that impeachment use of pre-arrest silence is unconstitutional and contrary to the inherent nature of an adversarial system of justice. The majority argue that impeachment use prevents perjury and enhances the reliability and truth-finding capacity of the adversarial system.

⁸⁷ 591 F.2d 391, 394 (7th Cir) 1979.

⁸⁸ 589 F.2d 1147, 1151 (2nd Cir) 1978.

⁸⁹ 455 U.S 603 (1982).

⁹⁰ *Fletcher* establishes that only the accused's express reliance on the *Miranda* safeguards activates the protection and not some general notion of fairness. As a matter of constitutional law, the use of pre-arrest silence does not violate due process rights until the state induces the suspect to remain silent by reading to him his *Miranda* rights (at 607).

⁹¹ The flaw in *Fletcher* is that it encourages police officers to delay giving the *Miranda* warning in the hope of using the suspect's silence against him.

pre-arrest and post-arrest but pre-*Miranda* silence may be utilized to impeach the accused's credibility at trial. Unfortunately, both courts decline to comment on whether or not the prosecution may make substantive use of pre-*Miranda* silence as an adverse inference of guilt. A significant distinction therefore, exists between the substantive value of pre-*Miranda* and post-*Miranda* silence.

Post-Arrest, Post-*Miranda* Silence : As has been previously stated, *Miranda v Arizona*⁹² establishes an affirmative duty on the state to warn the suspect of his custodial rights at the pre-trial interrogation stage. In terms of the prophylactic-exclusionary rule, "it is impermissible to penalize an individual for exercising his fifth amendment privilege when under police custodial interrogation. The prosecution may not ... use at trial the fact that he stood mute or claimed his privilege in the face of accusation".⁹³ *Hale v United States*⁹⁴ builds on the *Miranda* doctrine and holds that post-arrest silence is inadmissible for impeachment purposes and may not be used to contradict later exculpatory testimony. Once the *Miranda* warning has been administered, the accused's silence would lack sufficient probative value and thus have no evidentiary relevance. Unlike *Miranda*, *Hale* does not structure its reasoning on a fifth amendment foundation and interprets silence purely in terms of traditional evidentiary principles.⁹⁵ Accordingly, *Hale* notes that silence is ambiguous and its probative value is significantly outweighed by its high potential prejudice.⁹⁶ A jury would likely misinterpret silence and award it more probative value than is appropriate.

In addition to *Miranda* and *Hale*, *Doyle v Ohio*⁹⁷ probably represents the high water mark of the accused's protective defence against the prosecution's impeachment use of silence. *Doyle* does not analyse pre-trial silence either in terms of evidentiary rules or fifth amendment principles, instead it elects to rely on the fourteenth amendment due process clause.⁹⁸ The accused's post-arrest silence exercised as a result of a properly administered

⁹² 384 U.S 436 (1966).

⁹³ Ibid at 468.

⁹⁴ 422 U.S 171, 176 (1975).

⁹⁵ *Hale* neatly sidesteps the issue of whether impeachment use of the accused's post-arrest silence impermissibly burdens his choice to remain silent at trial, or whether such use impermissibly coerces him to take the stand and explain himself, or whether his post-arrest silence is the product of a state coercion (at 181).

⁹⁶ The court noted (at 176-177) that silence has no probative value, (i) because of the intimidating atmosphere of the interview room, (ii) emotional reasons, misunderstanding of questions, fear or unwillingness to incriminate another, (iii) hostile and unfamiliar conditions. In sum, the inherent pressures of custodial interrogation compounds the difficulty of identifying the probative value of silence.

⁹⁷ 426 U.S 610 (1976).

⁹⁸ Stevens J dissenting (at 620-621) criticizes the majority's due process reasoning as "estoppel" in disguise. By informing the suspect of his right to remain silent, the state is in effect estopped from

Miranda warning may not be used for impeachment purposes, to do so would constitute a fundamentally unfair process. The use of post-arrest silence violates due process for two reasons. First, the accused's silence is ambiguous once the *Miranda* warning has been administered.⁹⁹ Second, even if silence has a high probative value, it would be procedurally unfair to penalize the accused for relying on his right.¹⁰⁰ *Doyle* has been criticized because it bases its reasoning on the fourteenth amendment rather than on the more appropriate fifth amendment. By basing its reasoning on fourteenth amendment grounds, *Doyle* skillfully avoids a re-interpretation of the *Raffel* decision. According to *Doyle*, the prosecution is entitled to make use of the accused's pre-arrest silence because no *Miranda* warning has as yet been administered and therefore, no procedural unfairness arises. In *Doyle*, the procedural unfairness arises because the accused has already been mirandised and his silence consequently cannot be used against him. In contrast to *Doyle*, it has also been previously noted that *Harris v New York*¹⁰¹ allows for the impeachment use of the accused's prior inconsistent statements even where the police have failed to properly mirandise the accused and are in violation of the fourteenth amendment. *Harris* is distinguished from the other post-arrest silence cases on the ground that it involves impeachment by previous positive contradictory statements and not impeachment by silence. Nevertheless, the underlying *Harris* principle is applicable to the post-arrest silence situation.

The prosecution is entitled to make impeachment use not only of the accused complete pre-trial silence, but also of his incomplete silence. In *Anderson v Charles*,¹⁰² the court is concerned with the circumstance in which the accused is only partially silent following arrest. When the accused makes one incomplete statement on arrest and other contradictory statements at trial, the court speaks of a "formulastic silence". Each of two inconsistent descriptions of an event may be said to involve formulastic silence whenever the one version omits facts included in the other version. Apart from its definition of formulastic silence, the *Anderson* court reasons that cross-examination which merely seeks to inquire into prior inconsistencies¹⁰³ makes no unfair use of silence. The problem with *Anderson* is that it draws a very fine distinction between permissible impeachment use of silence and

relying on silence as evidence at trial. Estoppel theory is also adopted in a limited fashion by *Fletcher v Weir*.

⁹⁹ *Ibid* at 617.

¹⁰⁰ *Ibid* at 617, 618.

¹⁰¹ 401 U.S. 222, 223 (1971). The impeachment use of positive prior inconsistent statements is admissible only in the limited circumstance when the failure to Mirandise is the result of a public emergency in which the police must act quickly. The state interest in obtaining the truth is balanced against the accused's interest in avoiding impeachment.

¹⁰² 447 U.S. 404 (1980).

¹⁰³ *Ibid* at 406.

impermissible use of silence. It also fails to determine the exact degree of inconsistency required before impeachment use may be made of the accused's partial silence.

In general, the use of silence as an impeachment tool has become common practice in the American courtroom despite the ambivalent nature of some of the Supreme Court dicta. In theory, the constitution is supposed to protect the criminal defendant through all the stages of the criminal process. The mirandised accused is entitled to remain silent at the post-interrogatory stage, including bail hearings, preliminary grand jury proceedings and motion hearings. In practice though, realistic considerations, including reduction in crime levels, cost-efficient convictions, necessitate a gradual erosion of both the *Miranda* prophylactic safeguards and the *Doyle* fourteenth amendment due process protection. *Miranda* and *Doyle* taken together, illustrate the Supreme Court's high-minded attempt to fashion a strong pre-trial protective buffer. *Jenkins* and *Anderson* on the other hand, highlight the Supreme Court's pragmatism and the practical necessity for leaving open wide loopholes in the substantial pre-trial barrier. An astonishing contradiction. What the Supreme Court concedes with *Miranda*, it apparently wants to take back with *Jenkins*.

Across the continental divide in Commonwealth jurisdictions, common law evidentiary use of silence follows a similar but more consistent pattern. Pre-trial pre-caution silence is admissible at trial and the prosecution may use silence in its argument, but the use of silence as evidence may never amount to a direct inference of guilt. The normal practice is for silence to be used in evaluating other evidence once a *prima facie* case has already been established. Pre-trial post-caution silence as evidence is inadmissible at trial. In most commonwealth jurisdictions, pre-trial silence is regarded as an important protection to be nurtured at all costs. Nevertheless, a number of important exceptions exist. In terms of sec 34 of the English Criminal Justice and Public Order Act 1994,¹⁰⁴ the prosecution is entitled to comment on the accused's pre-trial silence whenever the accused attempts to make use of an alibi ambush tactic at trial. The accused's silence at the pre-trial stage about his alibi may be turned against him by the prosecution in undermining the credibility of an alibi belatedly introduced at trial. Similar statutory powers exist in Singapore and Malaysia. In Canada the prosecution may also draw an adverse inference against the accused who has failed to disclose his alibi timeously during the pre-trial stage in a manner sufficient to allow the police to fully investigate the merits of the alibi. However, in Australia and New Zealand, no adverse inference may be drawn from the accused's belated alibi defence, either directly or

¹⁰⁴ See *infra* chapter 9.

indirectly, as to credibility.¹⁰⁵ In South Africa, pre-trial silence may draw an adverse inference in common law when the suspect is unable to explain a suspicious circumstance. The court is also entitled to take into account a surprise alibi-defence or any other fact which is first disclosed at trial and not to the police during the pre-trial interrogation. The failure to disclose an alibi-defence timeously thereby preventing the police from verifying it may weaken the defence and strengthen the state's *prima facie* case.

The Supreme Court's uncertain approach to the nature and scope of pre-trial silence is illustrated by its inability to produce a clear and uniform jurisprudential foundation for its contrary decisions. Is the admissibility of pre-trial silence for impeachment purposes predicated on an evidentiary rule in which admissibility is determined by weighing probative value against potential prejudice? Is it a constitutional principle, in which case does it fall within the ambit of the fourteenth or the fifth amendment? In *Doyle v Ohio* and *Fletcher v Weir*, the Supreme Court relies on the fourteenth amendment to deny the prosecution the use of the accused's post-*Miranda* silence. In *Jenkins v Anderson*, the Supreme Court relies on a fifth amendment impermissible-burden test to allow the prosecution to impeach the accused's pre-trial silence. Any burden on pre-arrest silence is outweighed by the importance placed by the legal system on the crucial role of cross-examination and the process of truth finding. "Impeachment follows the [accused's] own decision to cast aside his cloak of silence". Alternatively, it may be possible to dispense with the constitution altogether and to base the admissibility of pre-trial silence purely on evidentiary grounds alone. The Supreme Court has previously indicated a willingness to use an evidentiary analysis in order to resolve difficult issues regarding the admissibility of the accused's pre-trial silence. In *Grunewald v United States*, the prosecution is prohibited from using the accused's grand jury silence for impeachment purposes because the prejudicial effect of the silence outweighs its probative value. Similarly, in *United States v Hale*, the precursor to *Doyle*, the court holds that the accused's post-*Miranda* silence may not be used against him because of its potentially high prejudicial effect. Silence need not always be subject to a constitutional analysis. A constitutional analysis of silence will often lead to conceptual problems. The better method of explaining silence is to reduce it to the level of an ordinary evidentiary rule. The contradiction and conflict sometimes found between the various Supreme Court judgements mirrors the volatile undercurrent of a "push and pull" dynamism between a utilitarian philosophy which seeks to admit all relevant evidence (in terms of evidentiary rules) and a libertarian ethos which seeks to limit (in terms of constitutional human rights), the amount of relevant evidence available to the "trier-of-fact".

¹⁰⁵ See *infra* chapter 8 p.315.

6.3 The Griffin No Comment rule : Trial Silence

The straight forward and simple language of the fifth amendment has created many grey areas and left many unanswered questions. The attempts by the Supreme Court to fill in the blank spaces has resulted in a large measure of uncertainty. The literal language of the fifth amendment, “no one shall be compelled to be a witness against himself” does not directly apply to the problem of trial silence.¹⁰⁶ After all, when the accused chooses not to testify and the prosecution comments on such silence, it cannot be said that the accused has been compelled to incriminate himself.¹⁰⁷ Nevertheless, the Supreme Court has held that basic jurisprudential policies such as “a witness compulsion”, “human dignity” and “trial fairness” are compromised when the prosecution makes an adverse inference (usually one of guilt) from the accused’s silence at trial and draws the jury’s attention to it. In the American legal system the silence principle at trial is generally understood to consist of an interactive mélange of two specific immunities. The traditional fifth amendment privilege as interpreted by its original authors was limited to a narrow immunity, possessed by the accused, against a state-induced compulsion to give evidence or to answer questions at trial. In the course of the twentieth century, the Supreme Court has reshaped and elevated the silence principle into a constitutional right of the first rank. As a consequence of this constitutional elevation, the Supreme Court has grafted on to the traditional immunity a modern immunity, possessed by the accused at trial, from having *adverse inferences* drawn or made by the prosecution on the failure to give evidence or a failure to testify.

This modern immunity has no historical or rational justification and is a pure invention of the United States Supreme Court¹⁰⁸ and its fraternal brothers in England, Australia, Canada, New Zealand and South Africa.¹⁰⁹ Trial silence should also be separated from pre-trial silence as there is a significant jurisprudential difference between silence at the pre-trial and silence at the trial stage of the criminal system. The analysis of pre-trial silence, from *Miranda* through to *Jenkins*, always involves some form of direct or indirect interest

¹⁰⁶ The original authors of the Constitution had no need to incorporate a protection for the accused’s failure to testify, as the accused was at that stage an incompetent witness. This disability was only removed at the end of the 19th century.

¹⁰⁷ A minority of academics have argued that although prosecutorial commentary does not compel testimony, it does compel self-incrimination. If silence can be defined as self-incriminatory, then silence becomes compulsive by being unavoidable and forcing the accused to take the stand in rebuttal. However, this is a flawed argument because, if taken to its logical conclusion, it would label all types of incriminatory evidence as compulsory, rendering the trial process impossible.

¹⁰⁸ See the dissent in *Mitchell v United States* 526 U.S 314 (1999) per Scalia J at 325.

¹⁰⁹ See *infra* chapter 8.

balancing. Trial silence is different. The right not to testify is an absolute and inflexible right which is not susceptible to a reasonableness criterion or interest balancing analysis. Although it is internationally recognized that rights are relative, in the American context, the prosecution's inability to comment on the accused's failure to testify is an inflexible and absolute rule which does not allow for limitation or exception. The Supreme Court's landmark decision in *Griffin v California*¹¹⁰ may be regarded as an absolute rule of prohibition against the infringement of the accused's trial right to silence. The prosecution is prohibited from drawing adverse inferences from silence and communicating it to the jury. The *Griffin* rule is unique. In England and other commonwealth jurisdictions the accused may refuse to testify, but the judge may comment on a failure to testify and the court is generally allowed to draw adverse inferences from trial silence.

The accused's trial right to a no-inference instruction on the federal level has its origin in statutory law.¹¹¹ The federal statute creates a statutory bar on the prosecution ability to comment on the accused's failure to testify. In *Wilson v United States*,¹¹² the Supreme Court interprets the statute to mean, "any comment, especially hostile comment, upon a failure to testify must be excluded".¹¹³ *Bruno v United States*¹¹⁴ expands the statutory meaning by requiring the judge, on a defence request, to instruct the jury not to draw an adverse inference from the accused's exercise of a right to silence. The federal statutory protection was extended to state proceedings through the mechanism of the fourteenth amendment by *Malloy v Hogan*.¹¹⁵ *Malloy* emphasized the importance of maintaining a uniform standard of constitutional rights at both the federal and state level.¹¹⁶ Notwithstanding the reference to the federal statute, *Griffin v California* is the first Supreme Court decision to hold that prosecutorial comment on the accused's failure to testify amounts to a direct infringement of the fifth amendment.¹¹⁷ The court directly prohibits prosecutorial comment on the accused's silence as well as a jury instruction which equates silence with guilt. The effect of defining the

¹¹⁰ 380 U.S 609 (1965).

¹¹¹ Federal Statute 18 U.S.C Sec 3481 (1948) amended (1976) and (1988), "a person charged, shall at his own request, be a competent witness. *His failure to make such a request shall not create a presumption against him*".

¹¹² 149 U.S 60 (1893).

¹¹³ *Ibid* at 62, 65. The following prosecution comment was held to violate federal law, "if I am ever charged with a crime ... I will go upon the stand and hold up my hand before heaven and testify to my innocence of the crime".

¹¹⁴ 308 U.S 287 (1939).

¹¹⁵ 378 U.S 1 (1964).

¹¹⁶ *Malloy* overruled both *Twining v New Jersey* 211 U.S 78 (1908) and *Adamson v California* 332 U.S 46 (1947) which had held the fifth amendment inapplicable in state proceedings.

¹¹⁷ 380 U.S 609, 613-615 (1965).

no-comment rule in constitutional terms means that no legislative amendment of the rule is now possible.

To a certain degree, the *Griffin* rule, as a constitutional prohibition, has placed limits on prosecutorial maneuverability during the trial process. The prosecution is now faced with an often imprecise and shifting boundary between proper and improper commentary. The prosecution bears the full burden of proof beyond a reasonable doubt and is required to prove every principal fact-in-issue. To establish a *prima facie* case and to meet the standard of proof, the prosecution should be allowed to use not only all relevant forms of extraneous positive evidence, but also testimony based on what amounts to an absence of key evidences or defences. Not all crimes produce extraneous evidence, the private and secretive nature of crime is such that evidence may be highly personal and within the knowledge of only the accused. As any experienced trial lawyer well knows, the absence of a key evidence or defence is often relevant to the fact-in-issue. Yet the *Griffin* rule constrains the prosecution in the use it may make of the accused's failure to testify and present evidence. The prosecutor must also take extreme care in the precise language which he employs at examination-in-chief, cross-examination and final summation in order to avoid making improper comments which infringe the *Griffin* no-comment rule.¹¹⁸ Improper commentary may well lead to appeal and dismissal on technical grounds. One certainty the prosecution may rely on. No improper comment is made when the prosecution, in closing argument, refers to its *prima facie* case as "unrefuted", or "uncontradicted" by the accused's failure to testify.¹¹⁹ The judge is also faced with a problem of interpretation and application. How to determine the thoughts of jurors and the influence on juries of prosecutorial statements which may or may not contain an impermissible meaning? The effect of the *Griffin* no-inference rule is to make it tactically difficult for the prosecution to prove its case. The result has been a systematic trial avoidance and a preference to settle matters by means of easy plea-bargains.

During the initial state trial proceeding, Griffin failed to testify. The prosecution was allowed to draw the jury's attention to the accused's silence, "[the defendant] has not seen fit to take the stand and deny or explain. [The victim] is dead, she can't tell you her side of the story,

¹¹⁸ To assess improper commentary, the judge must examine (i) the language, intention and effect of the comment on the jury, (ii) the judge may also look to his own perception of the comment. Once impropriety is established, the next question is to assess whether the comment is prejudicial or harmless. The standard test is reasonable doubt. If the comment is not prejudicial beyond a reasonable doubt, then the error is harmless. *Chapman v California* 386 U.S 18 (1967).

¹¹⁹ See *Lockett v Ohio* 438 U.S 586, 595 (1978), "the prosecution's closing remarks add nothing to the impression already created by the accused's refusal to testify after the jury had been promised by the accused's lawyer that the accused would take the stand".

the defendant won't".¹²⁰ Prosecutorial commentary in which deliberate adverse inferences could be drawn from the accused's failure to testify was a common practice in California and entrenched within the Californian state constitution (since repealed).¹²¹ In rejecting the lower court decision and forcing an amendment to the Californian constitution, the Supreme Court clearly sets out a strong prohibition which prevents judicial and prosecutorial comment on the accused's silence. Drawing adverse inferences from trial silence would in effect, "[impose a penalty] ... for exercising a constitutional privilege". *Griffin's* penalty doctrine prohibits the drawing of adverse inferences because these inferences "cut down on the [fifth amendment] privilege by making its assertion costly ... what the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him, is quite another. We hold that the fifth amendment ... forbids either commentary by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt".¹²² In terms of this reasoning adverse inference comment imposes an impermissible-burden upon the accused's constitutional rights by weighing down the exercise of a right to silence and undermining the policies which support the right. The burden placed on the accused right will always outweigh any possible advantage to the state interest.

The *Griffin* rule has been criticized because it shifts the focus away from the traditional definition of compulsion. The impermissible burden and penalty doctrine advocated by *Griffin* is conceptually at odds with the state coercion model which traditionally triggers the fifth amendment.¹²³ In addition, whatever compulsion may exist in the trial does not emanate from the prosecution, but arises from the accused's own conscious choice in not testifying. The burden test is also illogical as it concentrates on analyzing the impermissible burden imposed upon negative non-testimonial silence when it should instead concentrate on prohibiting the compulsion of positive testimony. It is difficult to understand why the individual interest must always outweigh the state interest. Surely when evaluating a burden or penalty (particularly commentary directed at the jury) more weight should be given to the prosecution interest in ascertaining the truth through the use of carefully controlled jury instructions. It has also been argued that the *Griffin* rule¹²⁴ is at once much too wide and much too narrow. It is too wide because it necessitates an almost automatic reversal when there is improper comment on the accused's silence, irrespective of the strength of the

¹²⁰ Ibid *Griffin* at 611.

¹²¹ California Constitution Art 1 sec 13 (repealed 1974).

¹²² Ibid *Griffin* at 614-615.

¹²³ Ibid *Griffin* per Stewart J at 620-622.

¹²⁴ Ayers "The Fifth Amendment And The Inference Of Guilt From Silence" (78) *Mich. L. Rev* (1980) 841-871.

prosecution's *prima facie* case.¹²⁵ It is too narrow because it fails to counteract the natural inference of guilt which arises in the minds of a layperson jury when confronted by a non-testifying accused.¹²⁶ Often the strength or weakness of the prosecution's *prima facie* case will determine the type of inference drawn by the jury. Common sense dictates that an innocent accused would want to testify especially in the face of a strong *prima facie* case.¹²⁷ When the prosecution's *prima facie* case is based on facts beyond the knowledge of the accused, a failure to testify will carry little weight. If the facts are necessarily within the knowledge of the accused, a failure to explain will logically point to a consciousness of guilt. In the words of *Adamson v California*,¹²⁸ "It seems natural that when the [accused] fails to testify ... the prosecution should bring out the strength of the evidence by commenting upon the accused's failure to explain or deny it".

The main problem with the *Griffin* rule or the penalty test, is in the court's failure to explain the exact nature of the burden. A fundamental dichotomy in the *Griffin* reasoning is that it fails to reconcile the traditional constitutionally defined "state coercion test" with the radically new "impermissible burden test". How does prosecutorial commentary impose a penalty which weighs down the accused's exercise of the fifth amendment? What precise degree of weight is required to make the burden on the accused's right impermissible? *Griffin* fails to define the meaning of the key concept "compulsion" even though it recognizes that prosecutorial comment would in effect "compel" the accused to testify.¹²⁹ The trial process is replete with all kinds of evidentiary burdens which place equally strong pressures on the accused to testify, yet are nevertheless constitutionally admissible. Why does the so-called compulsion arising from the prosecution's commentary deserve special protection over and above other kinds of evidentiary compulsions? These central issues have not been addressed by *Griffin* nor by subsequent Supreme Court decisions. There are a number of different burdens placed on the accused during the trial process. The primary burden or

¹²⁵ *Ibid* Ayers at 844. In contrast, *Chapman v California* 386 U.S 18, 24 (1967) notes that an infringement of the *Griffin* rule does not always result in automatic reversal, but merely shifts the onus on to the prosecution to show that its improper comment did not contribute to the guilty verdict.

¹²⁶ *Ibid* at 845. While it is a realistic truth that no judicial instruction will prevent the jury from drawing an adverse inference if it is so inclined, it does not follow that the court should abandon rules which increase fairness. Bradley "Griffin v California, Still Viable After All These Years" (179) *Mich. L. Rev* (1981) 1291. It should be noted that most juries actually heed judicial instructions.

¹²⁷ *Ibid* Ayers at 846. Common sense assumes that innocent accused would want to explain their innocence. A failure to testify may give rise to a logical and rational inference that the accused has something to hide.

¹²⁸ 332 U.S 46, 56 (1947). See also *Baxter v Palmigiano* 425 U.S 308, 319 (1976).

¹²⁹ The Supreme Court is vague about the new meaning of compulsion. For example, *Carter v Kentucky* 450 U.S 288, 306 (1981) per Powell J, holds "a defendant who chooses not to testify can hardly claim that he was compelled to testify". .. But in contrast, *Lakeside v Oregon* 435 U.S 333, 339 (1978) holds, "unconstitutional compulsion is inherent in a trial where prosecutor and judge are free to ask the jury to draw adverse inferences from the defendant's failure to take the stand".

compulsion to testify usually arises from the strength of the *prima facie* evidentiary case against the accused. A strong prosecutorial case based on direct evidence will exert a strong compulsion on the accused to testify. On the other hand, a weak circumstantial case may exert no pressure at all.¹³⁰ The Supreme Court has always held that evidentiary driven pressures will never amount to improper forms of compulsion.¹³¹ In *McGautha v California*,¹³² the choice to testify or remain silent during a unitary proceeding¹³³ did not amount to an unconstitutional compulsion, but was characterized as one of the many “difficult judgement choices” often confronted by the accused. Other kinds of evidentiary pressures such as commentary based on inferences derived from the accused’s possession of unexplained firearms,¹³⁴ stolen property¹³⁵ or drugs¹³⁶ has been held to be constitutionally admissible. No compelled self-incriminatory pressures arise from such adverse prosecutorial commentary, nor is the accused’s exercise of the fifth amendment penalized or impermissibly burdened. The presentation in court of all these kinds of evidences and a prosecutorial commentary on these evidences generates a significant pressure on the accused to testify in order, at a minimum, to rebut the *prima facie* case against him. Yet such evidentiary compulsions are tolerated because any attempt to eliminate them would seriously inhibit the truth-finding capability of the criminal system. The nature of the evidentiary pressure to testify is rationally not increased or decreased in any significant way by penalizing the prosecution from drawing an adverse inferences from the accused’s failure to testify. The average jury will draw the appropriate inference anyway. The pressure to testify which *Griffin* defines as a constitutional penalty is really a product of the cogency and weight of evidence. Prosecutorial commentary on the accused’s silence is merely a rational outcome of this evidentiary pressure and does not add to it. It is therefore illogical to assert that prosecutorial comment on the accused’s silence amounts to a compulsion which places an impermissible burden on the accused’s constitutional rights.

The nature of the compulsion, deduced from the *Griffin* judgement, is conceptually different from the traditional and historical definition of fifth amendment compulsion. The *Griffin* notion of compulsion can be defined in any number of different ways. Instead of labeling prosecutorial commentary as a compulsion, it can just as easily be defined as a device for

¹³⁰ *William v Florida* 399 U.S 78, 84 (1979), “the pressure on the defendant varies greatly depending on the nature of the government’s proof”.

¹³¹ *McGautha v California* 402 U.S 183, 213 (1971).

¹³² *Ibid* at 211-213.

¹³³ A unitary proceeding is a combined system of trial and sentencing which forces the accused to testify if he wishes to qualify for the right to address the sentencing authority.

¹³⁴ *County Court Ulster v Allen* 442 U.S 140, 145 (1979).

¹³⁵ *United States v Barnes* 412 U.S 837, 846 (1973).

¹³⁶ *Turner v United States* 396 U.S 398, 417 (1970).

promoting rational inquiry and accurate fact finding.¹³⁷ The confusion about the exact meaning of compulsion in *Griffin* is illustrated by the dictum of Douglas J, who speaks of prosecutorial commentary which draws adverse inferences as, "a remnant of the inquisitorial system of criminal justice which imposes a penalty on the privilege".¹³⁸ This kind of reasoning highlights a number of fallacies. First, as has been amply demonstrated in Chapter 2, the historical right to silence was a limited procedural defence directed against state compulsion of self-incriminatory evidence only. It was never a wide protection against the drawing of adverse inferences. Historically the drawing of adverse inferences from the accused's trial silence was always a central feature of the accusatorial court and indeed still plays a prominent role in the English and other Commonwealth trial processes. The nexus sought to be drawn by Douglas J, between the infringement of the accused's "free will" and the "coercion" of an inquisitorial process is based on a sentimental libertarian philosophy which is conceptually irrational. The compulsive pressures to be found in a modern inquisitorial system are no less and no more severe than in the accusatorial system, merely different.¹³⁹ Anglo-American jurists are sometimes ignorant of the nature of the modern inquisitorial system. When reference is made to the inquisitorial system, it is usually a derogatory reference to a system based on the compulsion of self-incriminatory evidence. The medieval inquisition was such a system but the modern civilian system is totally different. If Douglas J is instead referring to the old medieval inquisition, then his reasoning is simply an historical oddity. Nevertheless, a valuable point may be made by distinguishing between the inherent compulsion central to the medieval inquisition and the modern compulsion incidental to an accusatorial system. The investigatory process of the medieval inquisition was integrally based on the extraction of confessions by direct physical compulsion. The penalty of physical coercion was imposed as a matter of indiscriminate routine, both on the guilty and innocent alike. The compulsion which arises in a modern accusatorial trial process is more discerning, completely different and based on a psychological pressure induced by a developing prosecutorial case and the cogency of the evidence presented. Prosecutorial commentary is merely a procedural device which highlights these evidentiary pressures. The compulsion induced by prosecutorial commentary in an accusatorial trial, unlike the medieval inquisition, will therefore selectively penalize only the guilty accused and not the innocent accused who chooses to remain silent.

¹³⁷ *Ibid Griffin* per Stewart J (dissenting) at 621-622.

¹³⁸ *Ibid Griffin* per Douglas J at 614-615.

¹³⁹ See *infra* chapter 11.

The *Griffin* no comment-no inference rule was further refined in *Lakeside v Oregon*.¹⁴⁰ In terms of this judgement only a prosecutorial comment which seeks to draw an adverse inference is susceptible to a constitutional impermissible burden.¹⁴¹ The trial judge who intends to provide the jury with a cautionary no-inference instruction does not impermissibly burden the exercise of the accused's fifth amendment rights,¹⁴² even if the no-inference caution is issued against the wishes of the accused. Critics have noted that *Lakeside* is partly inconsistent with *Griffin* as it appears to favour the state interest above the individual interest. A judge should not have the procedural discretion to override the accused's wishes in this regard.¹⁴³ By increasing judicial discretion at the expense of the accused's interest, *Lakeside* has somewhat narrowed the scope of the *Griffin* rule. *Carter v Kentucky*,¹⁴⁴ in turn, addresses a number of issues left unresolved in both *Griffin* and *Lakeside*. The *Carter* decision (per Stewart J) holds that the fifth amendment gives the accused a right to a no-inference instruction upon a proper request.¹⁴⁵ The judge has a constitutional obligation, when so requested by his defence, to reduce jury speculation about the accused's silence by instructing the jury on the nature of the fifth amendment privilege. Oral argument, counsel argument or even the presumption of innocence by themselves are an inadequate substitute for a proper judicial no-inference instruction.¹⁴⁶ The court reasons that although the penalty exacted in *Griffin* was based on an adverse comment, the penalty may be just as severe when, although the prosecution draws no adverse inference, the jury is given no instruction on the accused's silence. In such a circumstance, the uninstructed jury may well draw adverse inferences from the accused's silence. However, *Carter* does not explain whether a judicial failure to give the instruction when requested to do so will ever constitute harmless reversible error. In the sole dissent, Rehnquist J,¹⁴⁷ makes a number of important criticisms: He argues that neither precedent nor the constitution serve as authority for the Supreme Court's development of a no-inferences commentary rule. On the contrary, as a matter of logic and constitutional interpretation, an adverse-inference instruction to the jury does not

¹⁴⁰ 435 U.S. 333 (1978). The *Griffin* rule prohibits only adverse comment on the defendant's failure to testify. A judicial instruction that the jury draw no inference at all is an entirely different kind of comment. This type of no-inference comment does not create the same kind of compulsion on the defendant found impermissible in *Griffin*.

¹⁴¹ *Ibid* at 34-341.

¹⁴² *Ibid* at 399, "the basis of the judgement is to provide appropriate and correct instruction to the jury. To clarify the issues in the juror's mind.

¹⁴³ *Lakeside* rejects the argument that a judicial instruction which overrides the defence objection is contrary to the sixth amendment. A judge has an overriding duty to ensure a fair trial and counsel cannot interfere with this duty.

¹⁴⁴ 450 U.S. 288 (1981). Note that as a matter of federal law, the decision in *Carter* had already been pre-empted by *Bruno v United States* 308 U.S. 287 (1939).

¹⁴⁵ *Ibid* at 300-303.

¹⁴⁶ Powell J (concurring) reasoned that the precedent laid out by *Griffin* compelled the court's judgement, which was not decided on constitutional principles (at 312).

¹⁴⁷ *Ibid* Rehnquist J (dissenting) at 314.

amount to a constitutionally impermissible burden on the accused right because the prosecution by making the comment, has not compelled or coerced the accused to incriminate himself. Renhquist also criticizes judgements such as *Griffin* and *Carter* which make use of vague concepts such as “burdens” and “penalties” to limit judicial control over criminal proceedings, and then compound the problem by not giving proper definitions for these burden or penalty tests.

The effect of both *Griffin* and *Carter* is to expand the scope of the right to silence at trial. To emphasise the interest of the individual accused over the government interest and to make trial silence into an inflexible instrument with absolute overtones. *Mitchell v United States*¹⁴⁸ considers whether or not the accused’s invocation of silence and a refusal to testify extends to the sentencing stage of the criminal process. Kennedy J, for the majority, argues that the fifth amendment applies equally to the sentencing proceeding and the accused does not waive the right to silence at the sentencing stage simply by pleading guilty during the main trial.¹⁴⁹ Using *Griffin* as its authority, the court declares that at sentencing the prosecution may not draw an adverse inference from the accused’s silence when it determines facts relating to the circumstances of the crime.¹⁵⁰ According to the dissent, Scalia J¹⁵¹ and Thomas J,¹⁵² *Griffin* itself is wrongly decided and it is illogical to extend the ambit of *Griffin* into the sentencing stage. To do so would create an impediment to accurate fact-finding during sentencing in a circumstance in which the traditional rationales for the fifth amendment have lost much of their force because the accused has voluntarily incriminated herself by pleading guilty. According to the minority, *Griffin’s questionable no-inference privilege lacks “foundation in the Constitution’s text, history or logic.”*¹⁵³

¹⁴⁸ 526 U.S 314, 325-28 (1999).

¹⁴⁹ *Ibid* at 325 per Kennedy J, “were we to accept the government’s position ... The result would be to enlist the defendant as an instrument in his or her own condemnation, undermining the long tradition and vital principle that criminal proceedings rely on accusations proved by the government not on inquisition conducted to enhance its own prosecutorial power”.

¹⁵⁰ *Ibid* at 325, “if the defendant was left unprotected by the *Griffin* rule at the sentence stage, the prosecutor could charge him with crimes without specifying all the aggravating factors. The prosecutor could then secure a guilty plea and prove the aggravating factors by enlisting the defendant’s self-damaging silence”.

¹⁵¹ *Ibid* Scalia J (dissenting) at 331-337.

¹⁵² *Ibid* Thomas J (dissenting) at 341-342.

¹⁵³ *Ibid* at 341.

The Supreme Court has created a unique trial protection for the accused which does not exist in other Anglo-American jurisdictions. The prosecution may not draw an adverse inference from the accused's failure to testify and may not comment to the jury on the accused's trial silence. In practice, of course, the no-comment rule cannot prevent the jury from drawing its own adverse inference from the accused's silence (*Griffin v California*). The trial judge may issue a no-adverse inference instruction to the jury, even against the accused's objection (*Lakeside v Oregon*). The judge is obliged to give a no-adverse inference instruction to the jury on the accused's proper request (*Carter v Kennedy*). The no-comment rule does not prevent prosecutorial commentary on the cogency of the state's *prima facie* case. Comment may also be made on the absence of potential defence witness testimony other than the accused. Judicial comment on the accused's failure to explain the possession of stolen property may be directed to the jury. The fifth amendment right to trial silence also extends to the sentencing stage despite the accused's plea of guilt at the main trial (*Mitchell v United States*). The scope of the right to trial silence has been expanded and now offers the accused a substantial constitutional protection.

During the last thirty years and under the influence of a burgeoning Western culture of human rights, the Supreme Court has plucked the fifth amendment from an obscure group of second-class rights and has moulded it into a sophisticated first-class shield. The court has also shifted its focus from the traditional requirement of a state-induced compulsion, as historically defined in the fifth amendment, in favour of broader and looser definitions. The Supreme Court has, surprisingly, failed to give an accurate definition of the proper scope and limitation of the accused's right to silence. The difficulty in interpreting the ambiguous language, unclear history and disputed policies of the fifth amendment is the main cause of the Supreme Court's contrary and uneven treatment of the silence principle. Without a meaningful and comprehensive review of the policies underlying the privilege against self-incrimination, Supreme Court judgements will always be inhibited by a narrow reliance on ambiguous language, irrational libertarian sentimentality and disputed history. Instead of becoming a flexible, reasonable and adaptable protection, the fifth amendment has grown into an inflexible, rigid protection with certain absolute overtones. In Commonwealth jurisprudence, silence-at-trial is treated somewhat differently. Although silence has no direct evidentiary value in itself, it may play a role after the state has established a *prima facie* case. A failure to testify adversely affects the accused by strengthening the state's *prima facie* case, and by leaving it uncontroverted on vital facts-in-issue. In England, sec 35 of the Criminal Justice and Public Order Act (1994) is a statutory consolidation in precise language, of what is generally a common law doctrine in other Commonwealth jurisdictions. In terms of the common law, judicial but not prosecutorial comment on the accused's silence at trial may

be directed to the jury in certain factual circumstances. In most Commonwealth jurisdictions, the judge is allowed a carefully worded comment which neither over or under-emphasises silence. A balanced commentary which should objectively assess, for the jury's benefit, the permissible inferences which may be drawn in the particular circumstance. The judge must however, make it clear that silence in itself does not amount to an admission of guilt, nor may it constitute corroboration of guilt. Sec 35(3) of the English Criminal Justice and Public Order Act (1994) allows the judge and the prosecution a much wider commentary discretion than is allowed in other Commonwealth jurisdictions. A similarly wide discretion is statutorily given to judicial commentary in Singapore and Malaysia. South Africa, despite elevating the silence principle into a constitutional right, will hopefully continue to apply common law rules as currently adapted for non-jury trials.¹⁵⁴

¹⁵⁴ For a comment on the South African non-jury trial system see *infra* chapter 11.

CHAPTER 7

THE AMERICAN WITNESS PRIVILEGE

7.1 The Privilege Against Self-Incrimination

The fifth amendment clause reads :

"no person (1) shall be compelled (2) in any criminal case (3) to be a witness (4) against himself (5)".

To successfully rely on the testimonial privilege against self-incrimination the reluctant witness must prove to the court's satisfaction that each of the five elements of the privilege as set out in the fifth amendment clause are applicable. The modern definition and scope of the privilege is the result of the United States Supreme Court's interpretation of these individual elements.¹ The Supreme Court recognizes that the "Constitution contains no formulae with which we can calculate the full scope of the privilege"² The Court has been obliged to fashion *ad hoc* standards for the application of the privilege. These standards are derived mainly from the history and purpose of the privilege including the character and urgency of other public interests. An important distinction must be borne in mind. The non-party witness privilege is always a relative constitutional right, whereas the accused's trial privilege has certain absolute features. The accused need not take the stand and his refusal to testify may not be held against him. While other constitutional rights may give way in certain circumstances, the use of the words "no person shall" implies that the fifth amendment privilege does not bend under the weight of competing interests during the course of a criminal trial. On the other hand, the witness privilege is a relative one which may be claimed on a question by question basis and only when there is a reasonable apprehension of a future criminal sanction. No adverse inferences may be drawn from the witness claim of privilege. The reasonable apprehension of civil fines, penalties and other forfeitures may also be sufficient to trigger the privilege.

¹ Tarallo "The Fifth Amendment Privilege Against Self-Incrimination, The Time Has Come For The U.S. Supreme Court To End Its Silence" (27) *New. Eng. L. Rev* (1992) 137.

² *Spevack v Klein* 385 U.S 511, 522-23 (1967) Harlan J dissenting.

7.1.1 “Person” : Who May Claim The Privilege?

The subject of the Constitutional guarantee has been literally described as a “person”. The word “person” in the fourteenth amendment has been defined as both a natural and a juristic person.³ By contrast, the reference to a person in the fifth amendment has been narrowly construed to mean a “natural person”. The privilege against self-incrimination is said to be a highly personal kind of testimonial privilege. Since the seminal case of *Hale v Henkel*,⁴ the Court has regularly restricted the availability of the privilege to natural persons, noting a clear distinction between the individual and the corporation. Natural personal rights flow from the Constitution, while corporate rights flow from the company charter of incorporation. (By contrast, the South African Constitution specifically binds both the natural and the juristic person, by taking into account the extent, the nature of the right and the duty imposed by the right (sec 8(2)). According to American jurisprudence, a charter of incorporation is a state benefit granted to the juristic person in the interest of the public weal. The Corporation owes its existence to the state and cannot shield its actions from scrutiny in the public interest. On a practical level it would be difficult to prosecute corporations if they were allowed to hide behind a privilege. Incriminating corporate documents are often the only evidential source of corporate wrongdoing. The person-corporation dichotomy is justified in terms of a “visitation powers” doctrine which allows the state the power to investigate the corporation.⁵ *United States v White*⁶ describes the privilege as a purely personal one, “designed to prevent the use of legal process to force from the lips of the [witness] the evidence necessary to convict”.⁷ *White*, in denying the privilege to a labour union, also develops an “impersonality test”, which is a reasonable assessment in the circumstances that, “a particular type of organization has a character so impersonal in scope [from] its membership it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only”.⁸ *Bellis v United States*⁹ justifies the privilege by examining its historical antecedents, “[the privilege] should be limited to its

³ *Santa Clara County v Southern Pac. R.R* 118 U.S 394, 396 (1886).

⁴ 201 U.S 43 (1906). See also *Rogers v United States* 340 U.S 367, 371 (1951).

⁵ Critics have argued that in developing a “visitation powers” rationale, the Supreme Court has been motivated primarily by expediency. Meltzer “Required Records, The McCarran Act” (18) *Un. Chi. L. Rev* (1951) 687, 701. The visitation rationale may simply disguise the Court’s true purpose which is to promote the state regulatory interest. The English Court has also developed a visitations power theory but extends the privilege to the corporation. Sweeney “The Fifth Amendment Privilege And Collective Entities” (48) *Ohio St. L. J* (1987) 295-316. Shapiro “From Boyd To Braswell” (11) *Whittier L. Rev* (1989) 295, 305.

⁶ 322 U.S 694 (1944).

⁷ *Ibid* at 698.

⁸ *Ibid* at 701.

⁹ 417 U.S 85 (1974).

historical function of protecting only the natural individual from compulsory incrimination".¹⁰ In terms of the "collective entity doctrine"¹¹ to which the Supreme Court has adhered to for some sixty years, the privilege is denied to corporations, associations of all kinds, churches, political parties, social clubs and even to partnerships.¹² The *Hale v Henkel* rule has also formed the basis for the denial of the privilege to corporate officers holding corporate documents in a representative custodial capacity.¹³ In *Braswell v United States*,¹⁴ a corporate custodian may not invoke the fifth amendment and refuse to produce corporate records, even if the act of production might be personally incriminating. Again, the court notes that a corporation is not guaranteed the fifth amendment right because it is created and limited by the state.¹⁵ In his representative capacity, the corporate custodian assumes the duty to comply with the state order to produce corporate documents.¹⁶ The refusal of the privilege to the corporate custodian is justified on the ground that otherwise, "it would have a detrimental impact on the government's ability to prosecute white collar crime".¹⁷ The American interpretation of the privilege against self-incrimination stands in sharp contrast to the English, Commonwealth and European position which extends the privilege to all artificial or juristic personae. The only exceptions to this fairly universal rule are Canada and Australia, which, under American influence, have recently shifted camp and now deny the privilege to artificial entities.¹⁸ The practical consequence, in American law, of limiting the privilege only to the natural person means that the privilege may only be invoked by the individual and only when compelled testimony incriminates the individual personally.

¹⁰ *Ibid* at 90.

¹¹ The collective entity doctrine is the cumulative result of the reasoning in the *Hale*, *White* and *Bellis* cases. The entity is defined as "an organization which is recognized as an independent entity apart from its individual members". See *Braswell v United States* 487 U.W 99, 104 (1987). Massing "Note : The Fifth Amendment, The Attorney-Client Privilege And The Prosecution Of White Collar Crime" (75) *Virginia L. Rev* (1989) 1179.

¹² *Wilson v United States* 221 U.S 361 (1911).

¹³ *Bellis* *ibid* at 88, *Wilson* *ibid* at 384-395, *Braswell* *ibid* at 110.

¹⁴ *Braswell v United States* 487 U.S 99 (1987).

¹⁵ *Ibid* at 105.

¹⁶ *Ibid* at 110.

¹⁷ *Ibid* at 115. "the Government may make no evidentiary use of the custodian's personal incrimination" (at 118-119).

¹⁸ In **South Africa**, the question whether the constitutional right against self-incrimination (as opposed to the common law privilege) is possessed by a corporation was avoided in *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and Others* N.N.O 1996 (8) BCLR 1071 (W). In **Canada** the Constitutional human rights status of the privilege prevents its extension to the corporation (the common law position being reversed in *R v Amway Corporation* (1989) 1 SCR 21 and *BC Securities Commission v Branch* (1995) 2 SCR 3,29. In **Australia**, despite the absence of the privilege from the Constitution, the human rights status of the privilege is recognized in *Environment Protection Authority v Caltex* (1993) 178 CLR 477.

7.1.2 “Shall be Compelled” : What is Compulsion?

The privilege does not prohibit the admissibility of all incriminatory statements made by the witness. It prohibits only incriminating testimony which has been forced from the witness by a government compelled act.¹⁹ In traditional terms “compulsion”, apart from its obvious physicality, also means the power to force a witness to testify by the use of subpoena, contempt, imprisonment or other state induced legal sanctions.²⁰ The authors of the Constitution clearly did not design the fifth amendment to prevent voluntary self-incrimination but only to shield the witness from official state compulsion or coercion. In *United States v Washington*,²¹ per Burger C J, when the witness chooses to answer questions the privilege will not apply, “absent some officially coerced self-accusation, the fifth amendment privilege is not violated by even the most damning admissions”.²²

Some confusion has been generated by the Supreme Court’s interchangeable use of the words compulsion and coercion. However, both words appear to have substantially the same meaning.²³ Compulsion which renders testimony inadmissible need not always rise to the level of an overbearing physical or psychological pressure. Any necessary pressure, penalty or interference deliberately imposed for the purpose of eliciting self-incriminatory testimony is sufficient to violate the fifth amendment privilege. *Bram v United States*²⁴ notes, “the law cannot measure the force of the influence used or decide its effect upon the mind of the prisoner [or witness] and therefore excludes the [oral or written] declaration if any degree of influence has been exerted”.²⁵ The two most obvious and important forms of compulsion on the criminal defendant, namely police compulsion within the custodial interrogation context (*Miranda v Arizona*) and prosecutorial compulsion at trial (*Griffin v California*) have already been canvassed at some length.²⁶ The remaining instances of compulsion are the following. First, a legal compulsion exerted on the witness through the court’s ability to subpoena the reluctant witness to appear and take the stand. The witness who disobeys the

¹⁹ *State v McKnight* 52 N.J 35, 52-53, 243, A2d, 240 (1968) the war against crime would be lost if all incriminating evidence were excluded, “it is no more unfair to use the evidence [the accused himself may furnish] than it is to turn against him clues at the scene of the crime which a brighter criminal would not have left”.

²⁰ Wigmore Sec 2266 McNaughton Ed (1961).

²¹ 431 U.S 181 (1977).

²² *Ibid* at 187. Of course where the witness voluntarily waives the privilege, the state may admit any evidence obtained, *Garner v United States* 424 U.S 648, 654 (1976).

²³ The similar definitions of coercion and compulsion have been confirmed in *James v Kentucky* 466 U.S 341 (1984) and *Carter v Kentucky* 450 U.S 288 (1981).

²⁴ 168 U.S 532 (1897).

²⁵ *Ibid* at 543.

²⁶ See *supra* chapter 5 (*Miranda*) and chapter 6 (*Griffin*).

court order may be guilty of contempt.²⁷ This kind of compulsion is regarded as part of the legitimate court procedure. Secondly, administrative sanctions imposed on the individual outside the courtroom may sometimes attract the privilege. In *Garrity v New Jersey*,²⁸ and *Gardner v Broderick*,²⁹ a number of police officers were threatened with dismissal if they invoked the privilege and did not testify before a grand jury investigating police corruption. The Supreme Court held that testimony induced under such compelled circumstances could not be used in a subsequent criminal proceeding. Similarly, in *Lefkowitz v Cunningham*,³⁰ the threat by the government to take away potential economic benefits by firing public employees was defined as a form of compulsion amounting to a violation of the fifth amendment. One of the main characteristics of government compulsion is that it must focus directly on the person claiming the privilege. The privilege is a personal protection and cannot be invoked against incriminating evidence compelled from third parties. In *Couch v United States*,³¹ the defendant's accountant and in *United States v Fisher*,³² the defendant's attorney were compelled by the Internal Revenue Service to produce highly incriminating tax documents. In both instances the Supreme Court held that the privilege was not available to the defendants because the compulsion was exerted upon their agents and not upon them personally. In *Andresen v Maryland*,³³ the defendant stood passively by as documents were seized from his office. The court held that the seizure of the documents and their subsequent use at trial did not "compel the petitioner to testify against himself".³⁴ The court makes a distinction between the seizure of documents and a subpoena of personal records. "Although the privilege may protect an individual from complying with a subpoena for the production of his personal records [because the act of production constitutes a compulsory authentication of incriminatory information], a seizure of the same material by law enforcement officers differs in a material respect, the individual against whom the seizure is directed is not required to aid in the discovery, production or authentication of the incriminatory evidence".³⁵ The privilege is not a shield against incrimination. It merely shields the defendant from being compelled as a witness, to be the instrument of his own incrimination.³⁶

²⁷ *Brown v United States* 359 U.S 41 (1959).

²⁸ 385 U.S 493 (1967).

²⁹ 392 U.S 273 (1968).

³⁰ 431 U.S 801 (1977).

³¹ 409 U.S 457 (1913).

³² 425 U.S 391 (1976).

³³ 427 U.S 463 (1976).

³⁴ *Ibid* at 471.

³⁵ *Ibid* at 473-74.

³⁶ *United States v Doe* 465 U.S 605, 610 (1984), the element of compulsion is missing if records are voluntarily created. See also *Gilbert v California* 388 U.S 263, 265-67 (1967), *Katz v United States* 389 U.S 347, 354 (1967).

7.1.3 "Any Criminal Case"

The Supreme Court has refused to give a literal and narrow³⁷ meaning to the sentence, in "any criminal case". In *Councilman v Hitchcock*,³⁸ the word "criminal" was given a liberal meaning. A grand jury or other administrative proceeding falls within the fifth amendment context when it is criminal in nature and the deponent or the witness is faced with the possibility of a criminal charge. The privilege is widely available in all proceedings, civil or criminal, legislative or judicial, investigative or adjudicative, in which testimony is compelled and may subsequently be used against the witness in a future criminal trial.³⁹ The privilege is not ordinarily dependent upon the nature of the proceedings in which the testimony is sought. It applies alike to criminal and civil proceedings, "whenever the answer might tend to subject to criminal responsibility him who gives it".⁴⁰ The compelled testimony must causally place the witness at risk of a possible criminal charge.⁴¹ The privilege is not triggered if the compelled testimony exposes the witness to the danger of a sanction other than a criminal charge. In *U.S. Ex re : Bilokumsky v Tod*,⁴² the privilege could not be invoked during the hearing as the sanction contemplated was a deportation order, and was therefore non-criminal in nature. Similarly, in *Baxter v Palmigiano*,⁴³ a prison disciplinary hearing, "the use of the prisoner's silence against him was permissible because his silence was not dispositive of guilt and was given no more evidentiary value than was warranted by the facts".⁴⁴ When the proceeding is essentially civil, the presence of some safeguards usually associated with a criminal trial does not convert the proceeding into a criminal prosecution, nor provide the witness with a full range of criminal rights".⁴⁵ On the other hand, when the proceeding is civil

³⁷ To have done so would have restricted the development of the scope of the privilege and excluded grand jury investigations, legislative proceedings, civil trials, coroner's inquest and other investigations by administrative agencies. Wigmore sec 2252 at 326-328 McNaughton Ed (1961) and *Kastigar v United States* 406 U.S 441, 444 (1972).

³⁸ 142 U.S 547 (1892).

³⁹ The use of the word "any" as a prefix to the fifth amendment clause beginning "any criminal trial", implies a broad interpretation. In *McCarthy v Arndstein* 266 U.S 34 (1924) it was held that the privilege may be invoked in a civil trial (i.e. bankruptcy hearing) as long as the testimony places the individual at risk of a criminal prosecution.

⁴⁰ *McCarthy v Arndstein* ibid at 40.

⁴¹ Good examples of conduct in civil actions which also gives rise to a crime are : civil rights actions involving assault, securities actions involving fraud, personal injury actions involving criminal negligence, etc.

⁴² 263 U.S 149 (1923) where silence is not protected, it is accorded its usual evidentiary value. Silence is often evidence of the most persuasive character (at 153-154). Deportation hearings are civil in nature and there is no provision which forbids the drawing of adverse inferences from silence (at 154-155).

⁴³ 425 U.S 308 (1976) "the fifth amendment does not preclude the drawing of adverse inferences where the privilege is claimed by a party to a civil cause" (at 318).

⁴⁴ Ibid at 318.

⁴⁵ *United States v Ward* 448 U.S 242 (1980) and *Allen v Illinois* 478 U.S 364 (1986).

but is punitive in purpose and effect, so as to negate the civil intention, it must be considered criminal and the privilege will apply.⁴⁶

7.1.4 "To be a Witness" : Testimonial and Non-Testimonial Evidence

The fifth amendment is a testimonial based privilege⁴⁷ and does not prohibit the compelled production of physical real evidence. Unfortunately, both the meaning of this limitation and the underlying rationale which justify it are flawed. The Supreme Court has recently acknowledged that physical evidence has certain communicative aspects which are functionally similar to testimony.⁴⁸ In some cases the blurring of the distinction between non-physical testimonial and physical non-testimonial evidence has led to an expansion of the privilege.⁴⁹ In other cases similar expansionist attempts have failed.⁵⁰ Nevertheless the Supreme Court has gradually eroded the distinction between testimonial and non-testimonial evidence. Under Wigmore's immense influence a traditional distinction has developed between testimonial evidence which requires the co-operation of the witness and non-testimonial non co-operative passive forms of evidence; "The object of the privilege is plain. It is the employment of legal process to extract from the person's own lips an admission of his guilt, which will take the place of other evidence".⁵¹ The distinction is also based on evidentiary probative value. Non-testimonial physical evidence has a high probative value, while testimonial non-physical evidence attracts the privilege because it is far more likely to be susceptible to coercive influences. To be "a witness against oneself", the Supreme Court has reasoned, relates only to the act of testifying. The fifth amendment therefore proscribes compulsion of incriminating evidence only insofar as the evidence compelled is testimonial in nature. Intimate, non-intimate blood fluid, D.N.A.,⁵² body samples, fingerprints and handwriting samples are not testimonial but purely physical, non-intrusive and passive

⁴⁶ *Ward* *ibid* at 248-9, *Allen* *ibid* at 369. A proceeding is essentially civil when it does not promote the traditional aim of punishment, retribution and deterrence.

⁴⁷ Volk "Automobiles : Refusals Of Test, Admissibility, North Dakota's Privilege Against Self-Incrimination" (71) *North Dakota L. Rev* (1995) 821. Geyh "The Testimonial Component Of The Right Against Self-Incrimination" (36) *Cath. U. L. Rev* (1987) 611. Moylan et al "The Privilege Against Compelled Self-Incrimination" (16) *Wm. Mitchell L. Rev* (1990) 287.

⁴⁸ *United States v Hubbel* 120 S. Ct. 2037, 2043 (2000) and *Pennsylvania v Muniz* 496 U.S 582, 594-98 (1990).

⁴⁹ *Hubbel* *ibid* at 2048. *United States v Doe* 465 U.S 605, 612-14 (1984) both holding that an act of producing documents may be testimonial.

⁵⁰ *Muniz* *ibid* at 592, *South Dakota v Neville* 459 U.S 553, 564 (1983).

⁵¹ Wigmore Sec 2250 McNaughton Ed (1961).

⁵² D.N.A. sampling is highly accurate for identification purpose, and is non-intrusive in the sense that a simple hair sample or saliva swab will suffice.

means of identification. *Holt v United States*⁵³ suggests the traditional distinction, "the prohibition of compelling a man in a criminal court to be a witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material".⁵⁴ In the seminal judgement *Schmerber v California*,⁵⁵ the court elaborates on the distinction and introduces a new "communicative" element, "unless a defendant is somehow compelled to reveal, through words or actions, the contents of his thought processes, he cannot be compelled to be a witness against himself".⁵⁶ The *Schmerber* definition extends further than Wigmore's narrow testimonial analysis.⁵⁷ A nod or a head shake and other assertive acts which reflect the witness's subjective intention to communicate thoughts to another are as much testimonial as the spoken word.⁵⁸ According to the assertive *Schmerber* conduct test, certain body responses (for example, responses to polygraphs and lie detector tests) also have a testimonial quality, "[] lie detector tests measuring changes in body functions, may actually be directed to eliciting responses which are essentially testimonial. To compel a person to submit to testing in which an effort will be made to determine his guilt or innocence on the basis of psychological responses, whether willed or not, is to evoke the spirit of the fifth amendment".⁵⁹ On this basis polygraph measurements of the defendant's involuntary physiological responses are not to be labeled as physical or real evidence.⁶⁰ It should be

⁵³ 218 U.S. 245 (1910) the defendant was forced to model a blouse for fitting and identification purposes. The defendant claimed that the physical act of modeling was a compelled self-incrimination. The court rejected the claim.

⁵⁴ *Ibid* at 252. *Holt's* definition follows Wigmore's narrow historical view of the privilege. A witness may be defined as a person who reveals the contents of his mind, *Curcio v United States* 354 U.S. 118, 128 (1975), regardless of the format of the revelation. The privilege protects a private inner sanctum of individual feeling and thought.

⁵⁵ 384 U.S. 757, 763-64 (1966). A blood sample forcibly taken from the accused and its resultant chemical analysis was used as evidence.

⁵⁶ *Ibid* at 761.

⁵⁷ *Ibid* at 764. Blood sample evidence is not a product of the accused's testimonial capacity (he merely acted as a donor) but of the state's independent labours in testing. It is not compelled from the defendant's own mouth. Therefore, the use of a blood sample for physical identification purposes is not evidence of a testimonial-communicative nature.

⁵⁸ The assertive conduct test draws a distinct line between : (a) conduct which reflects the individual's subjective intention to communicate to another (a clear testimonial act); (b) conduct which may convey something about the individual's state of mind to an objective observer, even though the individual does not intend to communicate anything (not a testimonial act and not covered by the privilege). For example, evidence of flight from the crime scene or escape from custody is not testimonial as the individual does not intend to communicate a consciousness of guilt to the objective observer, even though the observer gains some insight from the individual's action, the insight is gained without any help from the individual.

⁵⁹ *Schmerber* *ibid* at 764.

⁶⁰ Arenella "Schmerber And The Privilege Against Self-Incrimination : a Reappraisal" (20) *Am. Crim. L. Rev* (1982) 44-45, proposes a more comprehensive definition of what constitutes communicative and testimonial conduct. Conduct is testimonial, (a) when it reflects the witness's subjective intent to communicate his thoughts to another, (b) when the state forces the witness to involuntarily disclose his private thoughts, feelings, belief about the crime, (c) the state proposes to make use of these thoughts as evidence.

noted that in Germany lie detector evidence is absolutely inadmissible (German Penal Code Section 136(a)) because the equipment records the unconscious process of a person's respiration and blood pressure. The use of this kind of physical data may mean that the accused is forced to supply evidence against his free will. *Schmerber* clearly allows for the prosecutorial use of physical evidence even though the compulsion of such evidence impairs fundamental fifth amendment justifications. The question sought to be answered by *Schmerber* is the extent to which the individual may be forced to participate in his own self-condemnation. To exclude the application of the privilege from physical and passive forms of incriminatory evidence reflects a practical compromise between the state interest in unrestricted access to all relevant evidence and the individual interest in refusing to assist in self-accusation. In practical terms, the efficiency of law enforcement would be severely compromised⁶¹ if the defendant could not be compelled to give up non-intimate and intimate body identification samples. The Supreme Court has acknowledged that the compromise is a difficult one,⁶² and that the outer boundaries of the testimonial category, as opposed to its core notion, are as yet unclear.⁶³

The *Schmerber* reasoning is consolidated in *United States v Wade*,⁶⁴ and *Gilbert v California*.⁶⁵ In *Wade* the defendant (a bank robber) was identified after being compelled to participate in an identification parade and forced to utter the words, "put the money in the bag". In *Gilbert* the defendant (also a bank robber) was compelled to participate in a line-up and to furnish a sample of handwriting for comparison purposes with the original demand note abandoned at the crime scene. According to *Gilbert*, "It by no means follows ... that every compulsion of an accused to use his voice or writings compels a communication. A mere handwriting exemplar, in contrast to the content of what is written, like the voice or the body itself, is an identifying physical characteristic outside of its protection".⁶⁶ As long as the defendant is a mere actor, and not the author, speaking or writing words chosen for him by others, for the purpose of identifying physical characteristics, the use of voice or handwriting is no more testimonial than the display of his face. The obvious criticism of the *Gilbert* judgement is that it is manifestly inconsistent with the compelled production of document rule developed in *United States v Fisher*⁶⁷ and *United States v Doe*.⁶⁸ While speech and hand-

⁶¹ Pragmatism and practicality are two of the reasons, advanced by Wigmore, for restricting the privilege to testimonial self-incriminatory statements.

⁶² *Doe v United States* 487 U.S 201, 214-215 (1988).

⁶³ See *Muniz* *ibid* note 48 at 589 and Kimmet "Fifth Amendment At Trial" (87) *Geo. L. J* (1999) 1627.

⁶⁴ 388 U.S 218 (1967).

⁶⁵ 388 U.S 263 (1967).

⁶⁶ *Ibid* at 266-267.

⁶⁷ 425 U.S 391 (1976).

⁶⁸ 465 U.S 605 (1984).

writing exemplars are non-testimonial in themselves, the state coerced act of producing them, forces the defendant to make a testimonial communication of his ability to speak or write the words.⁶⁹ Such an act of production is testimonial evidence attracting a use immunity.⁷⁰ Despite this inconsistency, in *United States v Dionisio*,⁷¹ a voice recording was held to be non-testimonial and in *California v Byers*,⁷² a Californian stop and report law requiring the individual to stop at the scene of an accident, was held to be non-testimonial.⁷³ By contrast in Germany, a secretly tape-recorded voice exemplar made for comparison purposes was held to be inadmissible as an infringement of basic human dignity.

In terms of the "implied consent" test developed in *South Dakota v Neville*,⁷⁴ a refusal by the defendant to submit to the taking of a blood sample is admissible evidence and may be commented upon at trial. *Neville* ignores the debate over the testimonial, non-testimonial divide and develops its argument along the lines of a *Miranda* type custodial interrogation. A request to submit to a blood test is normal police procedure (and not of the kind *Miranda* was designed to protect against). The test is also painless, non-intrusive, safe, and does not induce the suspect to incriminate himself rather than submit to the pain of the testing procedure. The choice to take or refuse the test is therefore made voluntarily.⁷⁵ The evidentiary admission of the suspect's refusal to take the test does not constitute a violation of the fifth amendment, because the request to take the test does not constitute an interrogation which compels the suspect to incriminate himself. The *Neville* decision may be an overly complicated judgement. A refusal creates a presumption which is easily accommodated by the ordinary rules of evidence. A refusal to take a blood test is normally defined as circumstantial evidence from which an appropriate inference may be drawn. In

⁶⁹ *Fisher* at 411 acknowledges the criticism, "the act of producing exemplars is communicative, but these kinds of communication are not sufficiently testimonial to meet fifth amendment requirements".

⁷⁰ *Doe* at 616. The court also decided that immunity can only be granted on a statutory request and cannot be imposed judicially. In terms of 18 U.S.C. sec 6002 (1994), the state may make non-evidentiary use of the subpoenaed documents but may not make any evidentiary use of them at a criminal proceeding against the accused.

⁷¹ 410 U.S 1, 18 (1973).

⁷² 402 U.S 424 (1970).

⁷³ *Ibid* at 431-432. The act of stopping (at the scene of the accident) is no more testimonial than requiring a person in custody to stand and walk in a police line-up. But (Brennan, Douglas and Marshall J, dissenting) suggest that the act of stopping and giving a name and address are testimonial because of what the act reveals about the actor's belief (i.e. he has been in an accident).

⁷⁴ 459 U.S 553 (1983). The defendant refused to take the test, on the ground that he was too drunk and would not pass.

⁷⁵ But on the other hand at 562, 563-64, it was noted that a defendant's silence or refusal to submit to the test is a tacit communication of his thoughts. To this extent the refusal may be characterized as communicative.

this evidential sense, it is similar to other forms of guilty conduct, particularly escape from custody and flight from the crime scene. The admissibility of these kinds of presumptions is determined by relevancy and should not trigger the fifth amendment protection.⁷⁶

The *Schmerber* "assertive communicative" test has been qualified by a "sufficiency" test developed in *United States v Fisher*.⁷⁷ The sufficiency test focuses on a state compelled production of incriminating testimony. The fifth amendment privilege is triggered when the state subpoenas (compels) the production of incriminatory testimony (in the form of documents), even though the act of production does not involve the actual creation of the incriminatory documents.⁷⁸ In both *United States v Fisher* and *United States v Doe*,⁷⁹ the court reasons that a state compelled act of production may arise to the level of a protected testimonial communication whenever the act amounts to a sufficient admission of the existence, possession or authentication of the subpoenaed documents.⁸⁰ The sufficiency test determines whether or not the act of production passes beyond the threshold of a mere passive production of physical evidence and becomes an implied assertion of fact amounting to a testimonial communication.⁸¹ The *Fisher* doctrine has met with a number of criticisms. First, the defendant's state compelled act of production must rise to a sufficient level of testimony in order to trigger the fifth amendment privilege. But the court has failed to set out the exact standard and threshold level of the "sufficiency" required. Second, the act of production must amount to a "substantial" threat of self-incrimination. Again, the court has failed to delineate the degree and value of the quality of self-incrimination required.

An examination of the case law reveals that the Supreme Court's focus has shifted from a singular inquiry into "whether or not state compulsion extorts a communication from the defendant" (*Holt v United States*) to a sophisticated assertive conduct test (*Schmerber v*

⁷⁶ But critics have pointed out a number of differences between refusal and flight evidence. (i) a refusal to take a test is an unwilling, intentional communication to another (usually the police), whereas escaping or fleeing from the crime scene is not an intentional communication to another. (ii) In a *Neville*-type situation the suspect must respond to the police request, whereas fleeing does not compel the suspect to communicate a response.

⁷⁷ 425 U.S 391 (1976). See also De Marco et al "Confusion Amongst The Courts, Should The Contents Of Personal Papers Be Privileged" (9) *St. John. J. Legal. Comm.*(1993) 219. Melelli "Act Of Production Immunity" (52) *Ohio St. L. J* (1991) 223.

⁷⁸ The court must ask itself two questions : (i) did the state compel incriminating evidence? If the state has not forced the individual to write the document, the contents are voluntary and unprotected; (ii) Is the evidence testimonial in nature? The inquiry here is whether the state compelled act of production (not the contents) is testimonial or not.

⁷⁹ 465 U.S 605 (1988).

⁸⁰ *Fisher* *ibid* at 409-410, *Doe* *ibid* at 613. The compelled act of production must communicate the following : (i) the document exists; (ii) the document is in the control of the defendant; (iii) the defendant believes that the documents compelled are described in the subpoena.

⁸¹ *Fisher* *ibid* at 410-411.

California) and presently to a sufficiency test based on a compelled act of production doctrine (*United States v Fisher* and *United States v Doe*). Emerging from these cases is the idea that the fifth amendment should be influenced by a balancing of state and individual interest. The privilege only becomes effective once the identification evidence compelled from the defendant is sufficiently testimonial. The fundamental problem with the Supreme Court's reasoning is that it is difficult to determine which choices and interests (state or individual) trigger the privilege and which do not. The Supreme Court has failed to reach a consensus as to the purpose, value and policies supporting the privilege. The Supreme Court is balancing on an *ad hoc* basis against a scale which changes from case to case. As a result, the court is unable to provide a clear definition of what qualifies as a testimonial act or properly define the ambiguous distinction between testimonial and non-testimonial physical evidence.⁸² For example, is the physiological response from a lie detector a testimonial or a non-testimonial act? Does a non-verbal gesture always signify a non-testimonial act or may body language in the form of demeanour and posture which provide visual clues as to mental disposition, indicate a testimonial communication? The attempt to analyse testimonial and non-testimonial evidence in the language of constitutional rights appears to result in an endless chain of conceptual problems. Certainly, were the privilege against self-incrimination to be abolished, these conceptual problems would fall away and self-incriminatory evidence would then be admissible or inadmissible purely on the basis of its relevancy.

7.1.5 "Against Himself" : The Nexus

The privilege is identified with a compelled disclosure of testimony which exposes the witness to a risk of a state imposed punishment.⁸³ A relevancy test is applied to the notion of self-incrimination.⁸⁴ The privilege does not attach to a compelled testimony which subjects the witness to mere infamy, disgrace⁸⁵ or the fear of reprisal.⁸⁶ The self-incrimination must be relevant to the risk of a formal criminal conviction. *Hoffman v United States*⁸⁷ holds that a witness response will only be considered incriminatory when it furnishes "a link in the chain of evidence needed to prosecute".⁸⁸ The establishment of a link or nexus in the chain of evidence is assessed both qualitatively (does the causal connection extend to all or only

⁸² Easton *The Case For The Right To Silence* 2nd Ed (1998) 207-35, criticizes the testimonial/physical evidence distinction as fundamentally flawed as a rationale for the privilege. The non-physical (communicative) and the physical (non-communicative) dualism is based on a discredited and philosophically artificial distinction between the "mind" and the "body".

⁸³ *Doe v United States* 487 U.S 201, 212 (1988).

⁸⁴ *Ibid* at 212.

⁸⁵ *Brown v Walker* 161 U.S 591, 598 (1896).

⁸⁶ *Peimonte v United States* 367 U.S 556, 559 n2 (1961).

⁸⁷ 341 U.S 479 (1951).

⁸⁸ *Ibid* at 486.

certain kinds of testimony which places the witness in danger?) and quantitatively (how close must the causal connection be?). First, there must exist a real⁸⁹ and reasonable danger⁹⁰ of a criminal prosecution. The danger must be practical, substantial and realistic. Second, the judge is normally sympathetic to the witness and will accept the witness claim, unless it lacks a reasonable foundation,⁹¹ and is impossible or incredible.⁹² Procedurally the witness will be favoured over the state. Third, the privilege may only be claimed for testimony which tends to prove guilt or would lead to evidence that tends to prove the guilt of a criminal act.⁹³ *Hoffman v United States*⁹⁴ defines the witness's genuine fear as the possibility (going beyond a mere fanciful possibility) of a criminal prosecution. To be privileged the compelled testimony need not amount to a *prima facie* case but one which merely furnishes a probable link in the chain of evidence. According to *Emspak v United States*,⁹⁵ "it is enough that the trial court be shown by argument how a prosecutor may conceivably by building on a seemingly harmless answer, proceed step by step to link the witness to the crime". (Note : it may be argued that the American test is more flexible and less severe than the English test).⁹⁶

When there is no possibility of a conviction or the threat of direct incrimination is not present the witness cannot claim the privilege. However, once successfully claimed, the privilege continues to apply, even when the witness has been convicted but not yet sentenced. Once the witness's various appeals have been exhausted, the privilege falls away. An acquittal or a presidential pardon conferred in advance of trial obviates the need for the privilege. The court has a discretion whether or not to grant or deny the privilege. *Hoffman v United States*⁹⁷ recognizes that the ultimate determination must be made by the court and not by the witness. The witness may not claim the privilege when immunity from prosecution has been granted. The privilege is also not available where the statute of limitations has run its course. *Hale v Henkel*⁹⁸ suggests "if the testimony relates to criminal acts long since past and against the prosecution of which the statute of limitations has run ... the amendment does not apply". The privilege applies only to the danger of personal incrimination and does

⁸⁹ *Heike v United States* 227 U.S 131, 144 (1913).

⁹⁰ *Rogers v United States* 340 U.S 479, 488 (1951).

⁹¹ *Hoffman v United States* 341 U.S 479, 488 (1951).

⁹² *Emspak v United States* 349 U.S. 190, 198-199 n18 (1955).

⁹³ *McCarthy v Arndstein* 254 U.S 71, 72 (1920). *United States v Johnson* 488 F.2d 1206 (1st Cir) (1972) incorrectly defines the nexus as an unlikelihood of further prosecution.

⁹⁴ *Ibid* at 486.

⁹⁵ *Ibid* at 199.

⁹⁶ *R v Boyes* (1861) 121 E. Rep. 730, 738 and Morrison "Commentary" *Antitrust Law Journal* (1980) 421-26. See *infra* chapter 10.

⁹⁷ *Ibid* at 479.

⁹⁸ 201 U.S 43 (1906).

not attach to the incrimination of spouse, child, parent, neighbour, church, partnership or company.⁹⁹ In *Roberts v United States*,¹⁰⁰ the Supreme Court noted that the duty to report the criminal behaviour of others remains a badge of responsible citizenship.

7.2 Documentary Evidence

The question of a state coerced compulsory production of documents is a difficult one to answer, as documentary evidence often straddles the grey line between communicative – testimonial and passive physical non-testimonial evidence. It is important to separate the issue of seizure from the issue of compelled production and disclosure. The *seizure* of pre-existing evidence which exists independently of the defendant cannot be defined as a compelled self-incrimination to which the privilege attaches. Seizure of pre-existing documents may violate both the fourth amendment right and the right to privacy. It may also have other adverse evidential consequences, but it does not trigger the fifth amendment. Documents, although containing “communications” from their maker, do not become compulsorily produced communicative evidence when they are merely seized. According to *United States v Fisher*,¹⁰¹ and *United States v Doe*,¹⁰² the compelled production of incriminating pre-existing documents, known by the state to be in existence, should also not by itself violate the privilege against self-incrimination. The one exception to this general rule is *Boyd v United States*,¹⁰³ in which a reliance upon the fifth amendment coupled with the fourth amendment led the court to declare all compulsory production of documents to be a violation of the privilege.¹⁰⁴ This aspect of the *Boyd* judgement has been tacitly overruled by the decision in *United States v Fisher*. On the other hand, the *disclosure* of documents which then leads to a state compelled seizure or production of the documents in question, clearly creates a self-incrimination problem. Self-incrimination arises because the act of

⁹⁹ *United States v Murdock* 284 U.S 141 (1931).

¹⁰⁰ 291 U.S 121 (1883).

¹⁰¹ 425 U.S 391 (1976). See also King “Note : The Fifth Amendment Privilege For Producing Corporate Documents” (84) *Mich. L. Rev* (1986) 1544. Heidt “The Fifth Amendment Privilege : Cutting Fisher’s Tangled line” (49) *Miss. L. Rev* (1984) 339.

¹⁰² 465 U.S 605 (1984). See also Gerena *et al* “Comment : U.S. v Doe And Its Progeny” (40) *Miami L. Rev* (1986) 793. Webb *et al* “U.S. v Doe : The Supreme Court And The Fifth Amendment” (16) *Loyola Un. Ch. L. J* (1985) 729. Greenspan “In re Doe : Required Records And The Fifth Amendment” (16) *Conn. L. Rev* (1984) 1021.

¹⁰³ 116 U.S 616 (1886).

¹⁰⁴ The running together of the fourth and fifth amendment is conceptually flawed. (i) A fourth amendment search or seizure focuses on inanimate objects and does not require the co-operation of the defendant. A fifth amendment subpoena is directed at a person and seeks to compel cooperation. (ii) The fourth amendment is broad but its prohibition is not absolute. It forbids only unreasonable searches and seizures. The fifth amendment is narrow and applies only to compelled self-incrimination. But within this sphere its prohibition is absolute, it forbids all kinds of state coerced compulsion of evidence. *Boyd’s* reasoning is impractical because it denies these differences. The problem of immunity serves to illustrate the confused blending of two different constitutional rights.

disclosure may be used by the state as an admission against the accused. The documents so disclosed constitute compelled testimony which the state may use against the defendant. Especially when the state subpoenas the defendant to produce documents the existence of which is unknown to the state or is in dispute.

Traditionally the fifth amendment was intended to protect only oral incriminatory testimony. In *Boyd v United States*,¹⁰⁵ the Supreme Court, in a fit of liberal excess, developed a "contents-based" privilege and advanced the scope of the fifth amendment to include documentary testimony. According to *Boyd*, in compelling private documents the privacy rights of the witness are superior to the state interest. The *Boyd* judgement is founded on the idea that a private document is private property, "an indefeasible right of personal security ... and private property".¹⁰⁶ The privacy-property rationale prevents the state from compelling the production of records over which its proprietary right is inferior to that of the witness.¹⁰⁷ Consequently the witness may withhold all incriminatory personal papers from state scrutiny.¹⁰⁸ The privacy rationale is limited to private documents and does not extend to partnership, corporate or other organizational business papers.¹⁰⁹ *Boyd's* privacy reasoning is based on the notion that a witness's written thoughts are closely connected and an extension of the innermost thoughts of the individual personality. Organisational papers do not lie within the sanctum of individual thought because they are always open for inspection by other organization members.¹¹⁰ The *Boyd* privacy rationale has now been superceded¹¹¹ by an alternative model based on a compelled "act of production" doctrine developed in *United States v Fisher*.¹¹² The new test does not focus on the contents of the document but

¹⁰⁵ 116 U.S. 616 (1886) *Boyd* is one of the high water marks of the privilege as it protects private papers and private business papers of the defendant in both criminal and civil actions. Note the criticism of Gerstein "The Demise Of *Boyd* : Self-Incrimination And Private Papers In The Burger Court" (27) *U.C.L.A. L. Rev* (1979) 344, under the influence of *Boyd*, the sharp outlines of the fifth amendment have been overlain with an undifferentiated concern for allowing people to maintain the privacy of all their papers.

¹⁰⁶ *Ibid* at 624. For the relationship between the privilege and privacy see *supra* chapter 4 p.118-129.

¹⁰⁷ See Heidt "The Fifth Amendment Privilege And Documents : Cutting Fisher's Tangled Line" (49) *M. L. Rev* (1984) 439, 447. Mosteller "Simplifying Subpoena Law, Taking The Fifth Amendment Seriously" (73) *Virginia L. Rev* (1987) 1.

¹⁰⁸ Bradley J "any forcible extortion of a man's private papers [is] contrary to the principles of a free government" (at 630, 632).

¹⁰⁹ *Bellis v United States* 417 U.S. 85,87 (1974). Documents belonging to a partnership are not privileged, but documents belonging to a sole proprietorship are privileged.

¹¹⁰ *United States v White* 322 U.S. 694 (1944). Company papers fall outside the privacy domain because "individuals lack control over their contents, location and the right to keep them from the view of others" (at 699-700).

¹¹¹ *Boyd's* demise is attributable to abandonment of the mere evidentiary rule, and the acceptance that non-testimonial evidence may be compelled. Since *Boyd*, society has made several fundamental changes to the rules of privacy and proprietary interests. See Gerstein *ibid* note 105 at 361.

¹¹² 425 U.S. 391 (1976). *Fisher* appears to set fifth amendment jurisprudence on a new course. While appearing to reject the entire framework on which *Boyd* rests, *Fisher* stops short of expressly overruling *Boyd*.

instead, concentrates on the testimonial and communicative nature of a state compelled act of production. The switch from a privacy based rationale to an act of production rationale is a fundamental change, the ramifications of which have yet to be properly settled. In effect, the fifth amendment no longer provides a protection for the contents of private papers. The *Fisher* test focuses on a compelled testimony standard previously developed in the context of oral and non-documentary evidence.¹¹³ According to the *Fisher* standard, the private nature of the document is irrelevant and the document falls within the scope of the privilege, only if the state compelled act of production rises to a "sufficiently" communicative and testimonial level.¹¹⁴ When the element of state compulsion is absent, documents created voluntarily and containing self-incriminatory communications, are not covered by the privilege. The essence of the *Fisher* test is that the state compulsion need not relate to the creation of the document, but merely to its production and disclosure. In this sense, the act of production must rise to a sufficiently testimonial and communicative self-incriminatory level in order to trigger the fifth amendment protection. The witness's act of production is deemed to be testimonial when he is forced to attest to the existence, control and authenticity of the document. The act of production is also sufficiently testimonial when the state necessarily relies on the compelled document as an important element of the charge against the witness.¹¹⁵ Of course, if the prosecution were to establish the existence, control and authenticity of the document independently of the witness's communicative act of production, then the act of production (no matter how incriminating the contents), would not by itself involve testimonial self-incrimination.¹¹⁶ The ability of the prosecution to establish an alternative means of proving existence, control and authenticity of the document, effectively prohibits the witness from asserting the privilege in the face of a government subpoena. The *Fisher* test lays out the following guidelines for the interpretation of a fifth amendment claim on a document subpoenaed by the state.¹¹⁷

- i) The privilege does not apply when the document is voluntarily created in the absence of state compulsion;

¹¹³ *Fisher* establishes a three element test based on (a) a compulsion element, (b) a testimonial-communicative element, and (c) a self-incrimination element.

¹¹⁴ The abandonment of the privacy rationale is in conflict with the common law which generally adheres to a privacy rationale.

¹¹⁵ A sufficiently testimonial communication must assert a fact of evidentiary significance. An act of production has evidentiary significance if it adds to the sum of the state's knowledge. An act of production will trigger the privilege when the state has no means of verifying the accuracy of the communication, other than relying on the fact that the defendant made it.

¹¹⁶ *Fisher* *ibid* at 411.

¹¹⁷ The act of production test is not unique to *Fisher*. Wigmore uses much the same reasoning in his criticism of *Boyd* (Sec 2264, McNaughton Ed 1961 at 380).

- ii) The privilege applies only when the elements of compulsion, testimonial communication and self-incrimination are present;
- iii) The act of production is testimonial when it implicitly communicates the existence, possession and authenticity of the document;
- iv) In order to trigger the privilege the act of production must rise to the level which is sufficiently testimonial and self-incriminatory;
- v) A "sufficiency" level is reached when the state prepares to use the compelled document as an important element of the charge against the witness;
- vi) In this standard analysis the private nature of the document content is irrelevant.

It may be said therefore, that an act of production is considered testimonial (and communicative) when the act constitutes an implied assertion or disclosure of fact,¹¹⁸ and results in the individual revealing his knowledge of the facts connecting him to the offence. The doctrine is designed to protect the individuals' subjective knowledge (i.e. his knowledge about the existence, possession and authenticity of the document) and not the underlying facts which may be revealed by the compelled act of production.¹¹⁹ An act of production will not be privileged if it amounts only to a *Schmerber* type production of real or physical evidence. It only becomes privileged if it infers relevant incriminating facts. *United States v Doe*¹²⁰ describes the difference most succinctly. The compelled act of production may be similar to "being forced to surrender a key to a strongbox containing incriminating documents", or it may be similar to "being compelled to reveal the combination to [one's] wall safe".¹²¹ When the state is merely demanding the surrender of the key, there is no violation of the fifth amendment (because obliging the individual merely to produce documents does not require him to disclose the contents of his mind).¹²² But when the state demands a disclosure of the safe combination, there is a violation of the fifth amendment (because the individual is being compelled to make either a factual assertion or a disclosure of the contents of his mind).¹²³

The *Fisher* doctrine leaves unresolved a number of important issues. First, although the act of production must be sufficiently testimonial in order to trigger the privilege, no clear threshold level of "sufficiency" has been set out.¹²⁴ Second, the *Fisher* court has failed to

¹¹⁸ *Fisher* *ibid* at 410-11.

¹¹⁹ *Fisher* *ibid* at 409-10.

¹²⁰ 465 U.S 605 (1984).

¹²¹ *Ibid* at 210 n9.

¹²² *Fisher* *ibid* at 411.

¹²³ The same explanation is used in *United States v Hubbel* 120 S. Ct 2037 (2000) at 2046-48.

¹²⁴ Geyh "The Testimonial Component Of The Right Against Self-Incrimination" (36) *Cath. U. L. Rev* (1987) 611, 634, criticizes the idea of "sufficiency" as a testimonial standard. The court's inability to

resolve the question of whether the act of production doctrine applies to private business records. While *Fisher* does not expressly overrule *Boyd*, it has specifically rejected the *Boyd* concept of personal privacy,¹²⁵ without discussing the application of the privilege to private business records. Third, the act of production doctrine has a number of practical flaws. The doctrine is inordinately abstract and may not be clearly understood by the busy run of the mill attorney or public prosecutor. It is also out of touch with the practicalities of subpoena practice. Both the prosecutor who serves and the witness who receives a document subpoena are more likely to concentrate on the contents of the document instead of on the testimonial component of an abstract act of production test.¹²⁶ A number of unresolved issues raised by the *Fisher* decision have been settled in *United States v Doe*,¹²⁷ which reinforces the spirit of the *Fisher* rationale. In particular, the contents of voluntarily prepared business records are not shielded by the privilege.¹²⁸ Compelled production of business records may only trigger the privilege if the state subpoena induces the witness to implicitly testify as to the existence, possession and authenticity of the business document under his personal control.¹²⁹ In this circumstance the state is required to make a formal offer of immunity. The immunity is granted only on a proper statutory request and may not be imposed judicially.¹³⁰ Under the use immunity provided for in 18 U.S.C sec 6002 (1994), the state may use the subpoenaed documents, but it may not use any information derived from the act of production of these documents in a criminal proceeding (except in a prosecution for perjury, for giving a false statement or for failing to comply with the document production order). While a majority of academic commentators have endorsed the content-neutral

differentiate between what constitutes sufficient testimony and what constitutes insufficient testimony, makes the judgement rather arbitrary (at 635). As a purely semantic matter, the existence of a testimonial communication is a yes or no proposition. The phrase "not sufficiently" testimonial is a nonsensical juxtaposition of terms (at 638).

¹²⁵ See Melilli "Act Of Production Immunity" (52) *Ohio St. L. J* (1991) 234-244. The framers of the Constitution did not seek in the fifth amendment to achieve a general protection of privacy but to deal with a specific issue of compelled incrimination.

¹²⁶ A witness served with a documentary subpoena has a number of realistic options : (i) to comply with the order, (ii) to claim the privilege, (iii) to deny the existence of, or destroy, the document. Common sense dictates that when the state cannot independently verify the document's existence, the untrustworthy witness will simply destroy or turn over only those documents which are not incriminatory.

¹²⁷ 465 U.S 605 (1984).

¹²⁸ The *Doe* minority (per Marshal J) conclude that there are certain documents no person ought to be compelled to produce at the state request. For example, subpoenas which infringe the first amendment and attempt to probe a person's religious, political beliefs and associations (at 619). See also McKenna "The Constitutional Protection Of Private Papers" (53) *Ind. L. J* (1977) 55, 67.

¹²⁹ See Rothman "Life After Doe : Self-Incrimination And Business Documents" (56) *Un. Cinn. L. Rev* (1987) 387. Ong "Fifth Amendment Privilege And Compelled Production Of Corporate Papers After Fisher And Doe" (54) *Fordham L. Rev* (1986) 935. King "Corporate Document Production" (84) *Mich. L. Rev* (1986) 1544.

¹³⁰ *Ibid* at 614-617. *Doe* regards an "act of production" immunity as different from the usual full use immunity. An act of production immunity immunizes the testimonial component of the act of producing the document but not the document's contents. See *infra* note 171.

rationale of both *Fisher* and *Doe*, the lower courts have not strayed from the content-based rationale formulated in *Boyd*.¹³¹ The First, Sixth, Eighth and Eleventh circuits have reserved judgement.¹³² Only the Second, Fourth, Ninth and the Columbia circuits have adopted an act of production based privilege.¹³³ In common with all fundamental changes in constitutional jurisprudence, the *Fisher* rationale will have far ranging effects. Fortunately, the new analysis will only necessitate minor amendments to the artificial entity doctrine and to the well-established rule which denies the privilege to public corporate documents. In order to minimize a conflict between the act of production doctrine and the artificial entity doctrine, the suggestion is made that a subpoena for corporate documents be directed to the artificial entity itself and not to a particular corporate official. The entity may then select the person who will hand over the documents. The choice should fall on someone who will not be incriminated by the act of production.

In *United States v Hubbel*,¹³⁴ the most recent case to apply the act of production doctrine, the state subpoenaed the defendant to produce a number of unspecified documents. The defendant invoked the privilege against self-incrimination, but the state (although unable to describe the subpoenaed documents with any reasonable particularity) obtained an order forcing the defendant to produce the documents subject to a "use immunity".¹³⁵ The state then used these documents in tax and fraud charges against the defendant. The defendant argued that the charges be dismissed because they were substantially based on immunized testimony derived from his production of the documents.¹³⁶ The prosecution relying on the *Fisher* doctrine, argued that a taxpayer's act of production response to a subpoena did not represent a substantial threat of self-incrimination because the taxpayer did not prepare the papers and could not vouch for their accuracy. Stevens J (for the majority) in rejecting the state's interpretation of *Fisher*, states, "the assembly of hundreds of pages of material in response to a [state] request for any and all documents reflecting, referring or relating to any direct or indirect sources of money is the functional equivalent of the preparation of an answer to either a detailed written interrogatory or a series of oral questions at a discovery deposition".¹³⁷ Stevens J separates *Hubbel* from *Fisher* on the following basis; "while in *Fisher* the [state] already knew that the documents

¹³¹ For example, *United States v Davis* 636 F.2d 1023 (5th Cir) 1981. *United States v Van Artsdalen* 632 F.2d (3rd Cir) 1980.

¹³² *In re Steinberg* 837 F.2d. 527, 530 (1st Cir) 1988. *Butcher v Bailey* 753 F.2d 465, 469 (6th Cir) 1985.

¹³³ *United States v Wujkowski* 929 F.2d, 981, 983 (4th Cir) 1991. *United States v Lacoste* 800 F.2d 981, 984 (9th Cir) 1986. *in re Sealed Case* 877 F.2d 83, 84 (D.C. Cir) 1989.

¹³⁴ 120 S. Ct. 2037 (2000).

¹³⁵ *Ibid* at 2040.

¹³⁶ *Ibid* at 2041.

¹³⁷ *Ibid* at 2046-48.

were in the attorney's possession and could independently confirm their existence and authenticity through the accountants who created them, here the [state] has not shown any prior knowledge of either the existence or the whereabouts of the ... documents produced by the respondent".¹³⁸ In following the logic of the court, the following conclusion may be reached. *Fisher's* act of production is "insufficiently" testimonial and therefore unprotected by the privilege against self-incrimination, because the documents were known to exist. The act of production coerced from *Hubbel* however, was "sufficiently" testimonial and therefore protected by the privilege because the state had no prior knowledge of these documents. What criterion should be used to distinguish between an insufficiently and sufficiently testimonial act of production? *Hubbel* apparently supplies the answer. In *Hubbel* the state relies on the *truth telling* of the person forced to produce the documents,¹³⁹ but in *Fisher*, it does not.¹⁴⁰ The person's ability to choose between truth and falsehood distinguishes the two cases and determines the boundary between a protected and an unprotected act of production.

7.3 The Required Records Doctrine

In certain circumstances the individual may be required by statutory law to communicate in writing with the state, even though such a communication is self-incriminating. The purpose of these regulatory statutes is to ensure a continuing supply of information necessary for effective governance in today's increasingly complex society. The "required records" rule mandates each citizen to maintain certain obligatory records which the state may subpoena.¹⁴¹ In *Shapiro v United States*,¹⁴² the defendant was directed by state subpoena to produce all relevant records relating to commodity sales regulated by the Emergency Price Control Act (1942). The state subsequently prosecuted Shapiro on the basis of information extracted from the subpoenaed records. The Supreme Court noted that the privilege against self-incrimination did not apply to records required by law.¹⁴³ In the majority opinion (per Vinson J) a record with public aspects falls within the same exception which permits the state

¹³⁸ Ibid at 2046.

¹³⁹ Ibid at 2047.

¹⁴⁰ Ibid at 2047.

¹⁴¹ Saltzburg "The Required Records Doctrine, Its Lessons For The Privilege" (53) *Un. Ch. L. Rev* (1986) 11-24.

¹⁴² 335 U.S 1 (1948).

¹⁴³ Although *Shapiro* does not expressly refer to the *Boyd* privacy rationale, it may be inferred that *Shapiro* distinguishes between public and private records. Records required in terms of a regulatory regime are public documents and public documents are not protected by the privilege (at 16-19). In this regard *Shapiro* relies on the decision in *Wilson v United States* 221 U.S 361 (1911).

to compel production of corporate organizational papers.¹⁴⁴ The court found a clear congressional intent to use the statutory record-keeping requirement as a means of obtaining crucial information in the public interest. The *Shapiro* decision has been criticized because it gives the state an almost unlimited licence to strip away the fifth amendment protection from private documents simply by enacting a statute which converts private papers into public and discoverable documents.¹⁴⁵ The minority (per Frankfurter J) noted that virtually every major public law enactment contains some kind of record-keeping requirement giving the state unbounded powers of trespass.¹⁴⁶

In *Albertson v Subversive Activities Control Board*,¹⁴⁷ the Supreme Court effectively ignored the *Shapiro* doctrine, by developing a new test which in theory limits state access to regulatory required records. The court accepted the defendant's contention that the Subversive Activities Control Act (1964),¹⁴⁸ which required communist sympathizers to register their party affiliations, was a direct infringement of the fifth amendment right against self-incrimination. The court, in analyzing statutory compelled disclosures of this nature, developed a three step test : (i) Is the statute aimed at a selective group? (ii) Is the identified group likely to be linked to criminal activity? (iii) Are there other criminal statutes which serve the same regulatory function as the identified statute? The *Albertson* judgement, while sidestepping the *Shapiro* doctrine, also shifts the focus of fifth amendment analysis away from the traditional emphasis on individual self-incrimination to a self-incrimination centred upon a selective group. The judgement in essence, would strike down a statute which compels individuals to register with the government purely by reason of membership in a political party. An obvious infringement of the fifth amendment especially in an area of law already well permeated and controlled by other criminal statutes. In a trilogy of cases decided on the same day, the Supreme Court attempted to reconcile the *Shapiro* doctrine with the *Albertson* test. In *Marchetti v United States*,¹⁴⁹ a federal wagering tax statute compelling professional gamblers to register and pay occupational tax, was held to be a direct infringement of the petitioners' fifth amendment right. The court reasoned that gamblers were by definition a selective group, often suspected of criminal activity and operated in an area which was already sufficiently regulated by other criminal statutes.

¹⁴⁴ Vinson J at 32-35, "no serious misgivings that [constitutional] bounds have been overstepped would appear to be evoked when there is a sufficient relationship between the activity sought to be regulated and the public concern, so that government can constitutionally regulate or forbid the basic activity concerned and can constitutionally require the keeping of particular records".

¹⁴⁵ Jackson J dissenting at 70-71.

¹⁴⁶ Frankfurter J dissenting at 51, "if records merely because required to be kept by law, *ipso facto*, became public records, we are indeed living in glass houses".

¹⁴⁷ 382 U.S 70 (1965).

¹⁴⁸ The McCarran Act codified at 50 U.S (sec 783(f))(1982).

¹⁴⁹ 390 U.S 39 (1968).

Gamblers may reasonably expect any information handed to the state in terms of the statute to provide the evidence for possible future prosecutions, thereby infringing the privilege against self-incrimination.¹⁵⁰ In *Grosso v United States*,¹⁵¹ a requirement to submit monthly forms detailing wagering activity in terms of treasury regulations, was held to be a violation of fifth amendment rights. State access to information contained in the monthly forms would constitute a substantial risk of self-incrimination. Similarly, in *Haynes v United States*,¹⁵² the court held that compelling the registration of firearms in terms of the National Firearms Act, violates the defendant's fifth amendment privilege. The Supreme Court has distinguished *Marchetti*, *Grosso* and *Haynes* from *Shapiro* on the practical basis of the differing functions and purposes intended by the various regulatory statutes.¹⁵³ The regulatory systems inherent in registration, wagering or firearm statutes (*Marchetti*, *Grosso* and *Haynes*) were significantly different to the regulatory mechanism inherent in an ordinary price administration statute (*Shapiro*). Records customarily mandated by pure administration statutes were more likely to be defined as public documents than personal records required by political, wagering and firearm statutes. Price administration records were less likely to entail the risk of a future criminal prosecution as these business-type records are essentially non-criminal in nature. The Supreme Court has over the years and in various dicta suggested a number of alternative reasons for the existence of a required records doctrine: (i) Statutory requirements obliging the keeping of records and which deny the fifth amendment are a reflection of the will of Congress. (ii) The fifth amendment is suspended by reason of an implied waiver. Individuals who wish to engage in regulated activity must accept the conditions attached thereto and impliedly waive the fifth amendment right. (iii) Statutory registration requirements may necessarily (in the state interest) oblige the suspension of the privilege by individuals engaged in peripheral unlawful civil activities. A required records doctrine exists simply because important government regulatory interests urgently outweigh the individual right to fifth amendment protection.¹⁵⁴

¹⁵⁰ Ibid at 40-42 and 52-54 (per Harlan J).

¹⁵¹ 390 U.S 62 (1968).

¹⁵² 390 U.S 85 (1968).

¹⁵³ Although this practical analysis helps to explain logically why *Shapiro* differs from the *Alberston* doctrine, it fails to establish a unifying philosophical rationale which explains why the privilege is available in one type of regulatory circumstance and not the other. For example, in *United States v Sullivan* 274 U.S 259 (1927), the court held that the privilege applied to the refusal to answer questions about the failure to file a tax return. Yet tax returns are public records and part of the required records regulatory regime. If a taxpayer in terms of *Sullivan* may refuse to answer questions, why is it that *Shapiro* could not refuse to keep or produce records (Saltzburg ibid not 141 at 24).

¹⁵⁴ Saltzburg ibid note 141 at 24-25 suggests a remodeled doctrine which reconciles *Shapiro*, *Albertson* and *Marchetti* and is based on the following guidelines : (a) the government has a valid regulatory authority over all recorded activity; (b) the records should be rationally related to the government's regulatory purpose; (c) the government must clearly specify both the records required to be kept and the rules that govern the activity; (d) a person who chooses to engage in a regulated activity tacitly admits that a required records doctrine is the condition for doing business.

The required records doctrine needs to be re-evaluated in the light of the act of production doctrine developed in *Fisher* and *Doe*. The typical required records statute compels three different acts concerning the contents of a document by directing the individual to : (a) preserve the record; (b) organize existing records; and (c) where necessary, create new records. In line with the *Fisher* doctrine, each of these compelled acts must be analysed to determine whether or not they are sufficiently testimonial and self-incriminatory. Preservation of records as a compelled act may be readily ignored as the individual's failure to preserve documents has insufficient or trivial testimonial value. But the compulsory organization and creation of records is clearly testimonial in nature and sometimes the act of producing these records is sufficiently self-incriminatory. Clearly, in terms of the *Fisher* doctrine, an individual may properly claim the privilege in the face of a state subpoena to produce, organize or create records. The state would be obliged, in line with *Doe*, to grant an immunity against the use of all information derived from the compelled act. The individual should be allowed to make a contemporaneous objection and claim of privilege to the act of organization or creation of documents compelled by the regulatory statute. If no such claim is made, the fifth amendment would not protect the contents of the document when they are subsequently subpoenaed by the state.

The *Shapiro* doctrine illustrates a practical reality in today's information driven society. The government's need for regulatory information is sometimes more important than the individual's fifth amendment rights. The Supreme Court recognizes the necessity for finding ways to sustain a flow of information in order to maintain effective governance. The Supreme Court finds it legally acceptable to place restrictions on the fifth amendment and to enforce compliance with regulatory regimes. While the *Fisher* act of production rule has done much to ameliorate the stringency of the required records doctrine, there is the tacit assumption that government interests are sometimes sufficiently important to curtail individual fifth amendment rights. Nevertheless, the existing jurisprudence concerning the role of the fifth amendment privilege in statutory regulatory record-keeping is open to several possible analyses. The inability of the Supreme Court to rationalize why it sometimes chooses one and sometimes another reasoning has left the law in a state of confusion. This is further compounded by the Supreme Court's inability to justify the policy reasons for extending the scope of the privilege far beyond its historical context. From being a privilege which traditionally applied to the "witness in a criminal case", the privilege now extends to questions of private or public business papers, to the act of producing these papers and to modern regulatory statutes. The Supreme Court has been unable to justify this extraordinary expansion.

*Baltimore City Department of Social Services v Bouknight*¹⁵⁵ highlights the Supreme Court's struggle to establish a consistent fifth amendment jurisprudence. Unfortunately, the *Bouknight* decision serves only to underline the Court's inability to provide a rational and conceptual foundation for the right against self-incrimination. In straining to apply current fifth amendment jurisprudence to new and different circumstances, the traditional reasoning simply breaks down. This jurisprudential incoherence is once again illustrative of the irrational and empty rhetorical sentimentality of libertarian philosophy which supports the Supreme Court's twentieth century attempt to expand the nature, meaning and scope of the fifth amendment into areas outside of its historical context.¹⁵⁶ The *Bouknight* court confronts the moral dilemma of whether or not a mother, suspected of child abuse but nevertheless given protective custody of her child in terms of an original court order, is protected by the fifth amendment from being compelled to produce the child by a subsequent court order. The circumstance is such that the state fears the child may have been murdered by his parent. The defendant claimed the fifth amendment protection on the ground that she was being compelled to "verbally or physically produce statements or evidence that may tend to be incriminatory". The court cites the act of production principle of *Fisher* and *Doe* in denying the fifth amendment protection to the defendant. *Bouknight's* production of the child was not sufficiently testimonial to trigger the fifth amendment. The order to produce the child does not compel the defendant to concede the existence, possession or control of the infant. In terms of the custody order, the defendant has already conceded her control over the child and has never denied his existence. The act of producing the child is therefore insufficiently testimonial as the defendant adds little or nothing to the sum total of the government's information. In addition, the defendant cannot invoke her fifth amendment privilege because she has assumed a custodial role¹⁵⁷ and production is required as part of her custodial duty

¹⁵⁵ 493 U.S. 549 (1991). See Ruffing "Fifth Amendment : Preventing An Abusive Parent From Hiding Behind The Self-Incrimination Privilege" (81) *J. Crim. L. and Criminology* (1991) 925. Rosenberg "Bouknight : Of Abused Children And The Parental Privilege" (76) *Iowa L. Rev* (1991) 535. Rowe "Constitutional Law : Bouknight" (25) *Wake. Forest. L. Rev* (1990) 885. Patton "The World Where Parallel Lines Converge : Civil And Criminal Child Abuse Proceedings" (24) *Georgia L. Rev* (1990) 473.

¹⁵⁶ In refusing to extend the privilege to *Bouknight*, the court is essentially forcing the defendant to aid the state in a possible subsequent criminal prosecution. The fair *state-individual* balance rationale is infringed. The court also places *Bouknight* in a *cruel trilemma* situation, in which she must choose between self-accusation, perjury or contempt. By refusing the privilege to the parent, the court is denying that the parent is presumed innocent until proven guilty, a principle which underlines the accusatorial system and upholds the parent's right to silence. The right to privacy is also infringed. See *Murphy v Waterfront Commission*, *supra* chapter 4 p.112.

¹⁵⁷ It is difficult to define the parent as a corporate representative who assumes a custodian's role. Corporate representatives hold their positions by choice. Here the parent signs the custody order out of fear of losing her child.

in a non-criminal regulatory regime.¹⁵⁸ The fifth amendment has no application against a regulatory regime constructed to serve the public purpose unrelated to the state's enforcement of its criminal laws. When the individual assumes control over "items" which are within the legislative scope of the government's non-criminal regulatory powers, the ability to invoke the privilege is greatly reduced. The custody order granted to the mother creates a relationship between her and the state. As an agent of the state, the mother must comply with a court order.¹⁵⁹ Implicit in the mother's acceptance of the custodial order is a waiver of her ability to invoke the privilege and to avoid state inspection. The court therefore reasons that the state's regulatory power over custodians of children in need of care renders the act of producing the child no more privileged than the production of corporate or public documents. In reaching its complicated and somewhat artificial conclusion, the court makes use of *Fisher's* act of production doctrine, *Shapiro's* required regulatory records doctrine and, for good measure, throws in the collective entities doctrine.¹⁶⁰ *Bouknight* has been criticized for distorting legal logic in applying both an act of production and a required records doctrine to the production of a human being and equating the production of a child to the production of a document.

The application of current fifth amendment jurisprudence to new situations falling outside of traditional fifth amendment categories, necessitates a certain degree of artificial reasoning on the part of the Supreme Court. In order to justify reasonable state compelled disclosures of self-incriminatory information, the Court has produced judgements, which because of their artificial logic, are difficult to reconcile. A rationale which reconciles conflicting cases and provides for a consistent and logical framework against which to assess the fifth amendment should be based on a reasonable balance of interest approach. Yet the Supreme Court is reluctant to give recognition to a balancing approach and has in *New Jersey v Portash*¹⁶¹ even gone to the extreme of rejecting a balance of interest analysis. The

¹⁵⁸ The juvenile system is interpreted to be a non-criminal, regulatory regime in which the state may compel production without targeting a specific group inherently suspected of criminal activity. See *California v Byers* 402 U.S. 424 (1971). But as critics have noted, violations of the juvenile code may well lead to criminal prosecution.

¹⁵⁹ Children are subject to the control of their parents, but if parental control falters, the state must take over as *parens patriae*. See *Schall v Martin* 467 U.S. 253, 265 (1984).

¹⁶⁰ *Bouknight* cites *Wilson v United States*, *Braswell v United States*, *supra* note 6 and 14 and the collective entity doctrine as authority. In terms of the doctrine, corporate records (the child) held by a representative custodian (the parent) are subject to inspection. But it seems illogical to regard the parent as the custodian of a corporate document (the child). The doctrine is not only illogically applied, it is also a misapplication outside of its historical purpose. *Bouknight* also misapplies the *Braswell* decision, by failing to grant the parent immunity from personal self-incrimination.

¹⁶¹ 440 U.S. 450, 459 (1979). See *Lefkowitz v Cunningham* 431 U.S. 801 (1977) where the court rejected the idea that "the state's overriding interest in preserving public confidence in the integrity of its political process justifies the [individual's] constitutional infringement (at 808). The court rejects a balancing of interests approach. See also Alito "Documents And The Privilege Against Self-

Bouknight judgement is just another example of the Supreme Court's ambivalence. In *Bouknight*, the Supreme Court has chosen to apply a narrow, artificial and customized balance of interest analysis. Instead of addressing the broad issues of state interest versus the individual's privilege and thereby establishing a rationale which would form a logical framework for a future fifth amendment jurisprudence, the Supreme Court continues the practice of dealing with large questions in the most narrow way.¹⁶² Common sense dictates that in some circumstances reasonable state compulsion of incriminating evidence serves a legitimate goal and should take precedence over the individual's fifth amendment right.

Several fundamental problems about the Supreme Court's approach to the privilege against self-incrimination may now be identified and illustrated. First, despite having used a balancing approach in peripheral non-criminal areas since *California v Byers*,¹⁶³ and *Braswell v United States*,¹⁶⁴ the Supreme Court has rarely been explicit in its balancing reasoning and has produced no logical or sustainable standard. The Supreme Court's insistence on applying a tacit but practical balancing test on a case-by-case basis while publicly and rhetorically confirming the absolute nature of the fifth amendment, is a practice unique to American jurisprudence. In other Anglo-American jurisdictions, particularly South Africa and Canada, the privilege against self-incrimination is a relative right and subject to a coherent well reasoned balancing of interest principle. According to Arenella,¹⁶⁵ "what is missing in the Supreme Court's approach is the development of a coherent normative theory explaining why some fifth amendment purposes are more important than others, and why some of these values, but not others, might justify restrictions on the state's capacity to promote valid societal interests". Second, there is no philosophical reason why state compelled disclosure of incriminatory personal documents (non-financial or financial) cannot be regulated by non-constitutional means. The law of evidence recognizes a host of non-constitutional privileges.

incrimination" (48) *Un. Pitt. L. Rev* (1986) 27, 36 "within the limited sphere of self-compulsion, the fifth amendment prohibition is absolute. It does not merely regulate procedures, it forbids any compulsion of self-incrimination".

¹⁶² *Youngstown Sheet and Tube Co v Sawyer* 343 U.S 579, 635 (1952).

¹⁶³ *California v Byers* 402 U.S 424 (1971). A Californian "hit and run" statute (requiring the driver at the scene of an accident to stop and give police his name and address) was held not to be an infringement of the fifth amendment. *Byers* reasoned that the statute was essentially regulatory, non-criminal and dependent on self-reporting. The policy in favour of the statute outweighed the incremental infringement on the defendant's constitutional right (at 430-432). Reference is made to *Schmerber* where it was suggested that the fifth amendment must be interpreted against two factors : (a) the history and purpose of the privilege, and b) the urgency of other public interests involved (at 449).

¹⁶⁴ 487 U.S 96 (1988).

¹⁶⁵ Arenella "Schmerber And The Privilege Against Self-Incrimination : A Reappraisal" (20) *Am. Crim. L. Rev* (1982) 31, 38.

The problem of regulating and assessing incriminatory documents may be logically solved by reducing the admissibility of documents to the level of an evidentiary rule. The solution does not lie in the testimonial component of an artificially defined "act of production" nor even in the language, history or policies of the fifth amendment privilege. Instead, what is required is a sensitive balancing of individual privacy interests against the needs of state law enforcement. The problem is then reduceable to an objective weighing of extra-constitutional values. In the words of Alito,¹⁶⁶ "it becomes a problem of balancing, of picking and choosing, of drawing fine lines. Legislative and rule-making bodies are well equipped for this task; court's are not".

7.4 Immunized Testimony

The maintenance of a silence privilege entails a heavy cost to society because it deprives the state of vital evidence needed to convict the guilty defendant. Often the best source of evidence is the accused or his co-conspirators. Since all the participants in a crime may claim the privilege, there is an obvious need to substitute or at least to supplement the privilege.¹⁶⁷ As a result, different kinds of common law and statutory immunities have developed which are nearly as old as the privilege itself.¹⁶⁸ Historically the lack of an organized police force made it difficult to prosecute criminals. Prosecutors of those early days often immunized lesser crime accomplices by promising pardons in exchange for testimony against the main perpetrators. Early immunity agreements were consensual in that the witness bargained away the privilege in exchange for leniency. Modern grants of immunity are more complex and usually result from the operation of a statute or sometimes from informal agreements between the prosecutor and the prospective witness. The state may sometimes compel testimony from a reluctant witness in exchange for immunity. An immunity grant forced on a reluctant witness in terms of a formal immunity statute must be approved by the State Attorney-General acting in the interest of both the witness and the state. Informal immunity grants have none of the procedural safeguards of a formal immunity and it is often unclear to what extent a prosecutor has the authority to grant immunity, or to what extent the immunity applies across jurisdictional boundaries. The immunity grant is

¹⁶⁶ See Alito *supra* note 161 at 81.

¹⁶⁷ "The idea of immunity is to seek a rational accommodation between the imperatives of the [fifth amendment] privilege and the legitimate demands of government to compel citizens to testify" *Kastigar v United States* 406 U.S 441, 447, n15 (1972).

¹⁶⁸ Immunity developed alongside the privilege and served to limit the adverse effect of the privilege on law enforcement, Gordon "Right To Immunity For Defence Witnesses" (20) *Conn. L. Rev* (1987) 153, 157. One of the earliest forms of immunity was the *approvement*, a common law practice which allowed a felony accused to point out his accomplice in exchange for a pardon, Hughes "Agreements For Cooperation In Criminal Cases" (45) *Vand. L. Rev* (1992) 1,7. See also Wigmore, sec 2281 at 491 McNaughton Ed (1961).

designed to be a part of a comprehensive scheme of law enforcement.¹⁶⁹ The essential question in considering immunity is to determine whether the public need for a particular testimony is great enough to override the social cost of granting immunity to a known criminal. Unlike the privilege against self-incrimination, the determination of immunity is fundamentally a question of a balance of interests. Apart from this difference, immunity has the same legal effect as the privilege. A formal statutory¹⁷⁰ immunity is the most generally used instrument and is traditionally based on either simple use immunity, derivative use immunity or transactional immunity. Simple use and derivative use immunity are somewhat limited in scope. These merely protect the witness against the use of the immunized testimony by the state as evidence in a subsequent prosecution. Transactional immunity is broader and it prohibits all subsequent prosecutions of the immunized witness. The witness is protected against the use of the entire criminal transaction about which he has testified or produced evidence. Transactional immunity prevents a prosecution entirely. Mere use and derivative use immunity prevents only the subsequent use of the immunized testimony, but it does not prevent a future prosecution founded on an independent source of evidence outside the immunized testimony. The development in *United States v Fisher*¹⁷¹ of an act of production immunity has added a new category of immunity. The act of production immunity operates in a similar fashion to use and derivative immunity. It is a narrow and more specialized immunity which protects only the testimonial component of the act of producing a document but not the document's contents.

Immunity procedure operates in a fairly straightforward manner. The witness is lawfully subpoenaed and required to present himself at trial, to take the oath,¹⁷² and to claim the privilege against self-incrimination on a question-by-question basis. If the prosecutor wants a question answered, an application for a grant of immunity is made to the court.¹⁷³ Only the criminal prosecutor is empowered to apply for immunity (a civil litigant has no such power). Once granted, the immunity order compels the witness to testify in spite of the privilege against self-incrimination. The immunity order prohibits the use of testimony and the use of

¹⁶⁹ See Bloch "Police Officers Accused Of Crime : Prosecutorial And Fifth Amendment Risks Posed By Police-Elicited Use Immunized Statements" (3) *Un. Illinois L. Rev* (1992) 625. Sherman "Informal Immunity, Don't You Let The Deal Go Down" (21) *Loyola Los Angeles. L. Rev* (1987) 1. Feldman et al "Compelling Testimony In Alaska : The Coming Rejection Of Use And Derivative Use Immunity (3) *Alaska L. Rev* (1986) 229. Lushing "Testimonial Immunity And The Privilege Against Self-Incrimination" (73) *J. Crim. L and Criminology* (1982) 1690. Hoffmann "The Privilege Against Self-Incrimination And Immunity Statutes (16) *Crim. L. Bull* (1980) 421.

¹⁷⁰ The present federal immunity statute is 18 U.S.C., Title II, sec 6002-5 (1988).

¹⁷¹ 425 U.S 391 (1976).

¹⁷² 18 U.S.C sec 1623 (1976) penalty for false testimony. 28 U.S.C sec 1826 (1976) penalty for failure to testify.

¹⁷³ In terms of sec 6001 of the Federal Immunity Statute (1982, 1985, 1988).

information derived from the testimony by the prosecutor in a subsequent criminal proceeding, except in the case of a perjury prosecution.¹⁷⁴ If the immunized witness refuses to testify, he faces a contempt citation and if he testifies falsely, he faces a perjury charge.¹⁷⁵ In *Councilman v Hitchcock*,¹⁷⁶ it was accepted that transactional immunity was the bare minimum constitutional substitution for the privilege against self-incrimination. The court argued that a constitutionally valid immunity statute must provide a broad spectrum of protection, "in view of the Constitution, [for] a statutory enactment to be valid, it must provide an absolute immunity against future prosecution".¹⁷⁷ Transactional immunity remained the settled constitutional substitute for some eighty years,¹⁷⁸ endorsed in *Brown v Walker*,¹⁷⁹ and later in *United States v Ullmann*.¹⁸⁰

Immunity in general presents a number of problems. Despite the wide scope of a criminal immunity the witness is still exposed to a plethora of non-criminal sanctions including civil liability, termination of employment as a result of testifying and exposure to personal or professional humiliation.¹⁸¹ In *United States v Ullmann*, Douglas J (dissenting) exposed a number of important flaws in the immunity concept. First, immunity is frequently a lesser protection than an absolute silence privilege.¹⁸² The witness is not immunized against an attempted prosecution. Even though an attempt at prosecution is likely to fail, the witness is forced to incur legal and other collateral expenses. This inconvenience is absent if the witness instead selects the protection of a silence privilege. When the witness chooses immunity, he is in effect exchanging the absolute silence privilege for a partial and somewhat vague immunity. The state in this sense gives far less than it takes away.¹⁸³ Second, immunity is a weak, while the silence privilege is a strong, protection of the witness's privacy, conscience, dignity and freedom of expression.¹⁸⁴ Third, an immunity grant cannot shield the

¹⁷⁴ In terms of sec 6002 (1988).

¹⁷⁵ *United States v Apfelbaum* 445 U.S 115 (1980).

¹⁷⁶ 142 U.S 547 (1892). The privilege could only be supplanted by a grant of statutory immunity "as broad as the mischief against which it seeks to guard" (at 562). Simple use immunity fails this test (at 586).

¹⁷⁷ *Ibid* at 586.

¹⁷⁸ The state rarely granted a transactional immunity because of its absolute nature – essentially a full pardon. Sugar "Federal Immunity Problems And Practices Under 18 U.S.C Sec 6002-3" (14) *Am. Crim. L. Rev* (1976) 1568, Between 1893 and 1970, Congress enacted some fifty transactional immunity statutes. *Shapiro v United States* 335 U.S 1, 6 n4 (1948) sets out an abridged list of these statutes.

¹⁷⁹ 161 U.S 591 (1896).

¹⁸⁰ 350 U.S 422 (1956).

¹⁸¹ *Brown* *ibid* at 605-06, "the design of the privilege [and its supplement the immunity grant] is not to aid the witness in vindicating his character, but to protect him against furnishing evidence which will convict him".

¹⁸² *Ullmann* *ibid* at 445-449.

¹⁸³ *Ibid* at 445. Although fear of a prosecution should not be a legally protected harm.

¹⁸⁴ *Ibid* at 445-6. This is a weak criticism, as the sixth amendment specifically allows for a person to be compelled as a witness even if his conscience tells him not to testify.

witness against exposure to infamy and disgrace.¹⁸⁵ Douglas J amplified this particular argument in *Kastigar v United States*.¹⁸⁶ The privilege protects against the defendant being compelled to admit guilt, but the immunity grant does not offer this type of protection. The immunized witness is compelled to admit guilt and he is merely protected against the consequence of the admission. Immunity is therefore not co-extensive with the privilege, its protective sphere is weaker and more ambivalent. Fourth, transactional immunity, in particular, is a risky strategy for the prosecution. If the prosecutor makes an incorrect assessment of the crime, the result may well be an immunity for the principal perpetrator rather than a minor accomplice.

In the seminal case *Murphy v Waterfront Commission*,¹⁸⁷ the reasoning behind immunity changed significantly. The Supreme Court suggested that a form of immunity narrower than transactional immunity would pass federal constitutional scrutiny, "once a defendant demonstrates that he has testified, under a state grant of immunity, to matters relating to a federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent legitimate source for the disputed evidence".¹⁸⁸ *Murphy* signals judicial approval for a derivative use immunity the goal of which is: (i) a protection of the witness's fifth amendment right, (ii) securing trustworthy information from the witness, and (iii) preserving accountability in the criminal system.¹⁸⁹ In exchange for the witness's testimony, the prosecution will not use the testimony or its fruits against the witness in any criminal proceeding.¹⁹⁰ Derivative use immunity conceptually and practically favours the prosecution over the witness. The witness may be compelled to testify and be prosecuted as well, provided the state establishes an independent, legitimate source for the disputed immunized testimony. The prosecution's principal problem in this regard is to clearly prove that there is no derivative use being made of the compelled testimony.¹⁹¹ The *Murphy* judgement served as the catalyst for the enactment of the Organized Crime Control Act of 1970, which empowers the state to compel testimony and in exchange to offer an

¹⁸⁵ Ibid at 449. Another weak criticism. A witness who associates with criminal elements brings disgrace upon himself, why should an immunity grant shield him from his own disgraceful action.

¹⁸⁶ 406 U.S 441, 467 (1972).

¹⁸⁷ 378 U.S 52 (1964).

¹⁸⁸ Ibid at 79 n 18.

¹⁸⁹ In theory derivative use immunity, by allowing for the possibility of a future prosecution on independent evidence preserves the witness's accountability in the criminal justice system.

¹⁹⁰ Derivative use immunity is similar to the fruits of the poisonous tree doctrine in criminal procedure. If the original evidence (the tree) is illegally obtained, then all subsequent evidence derived from it (the fruits) is also inadmissible. Both immunity and the poisonous tree doctrine allow for evidence derived from an independent source. By contrast, in England, although illegally obtained evidence is usually inadmissible, this is not the absolute sanction of the American version, some kinds of illegal evidence may be admissible.

¹⁹¹ *Murphy* develops an *independent source* doctrine.

immunity significantly narrower in scope than the traditional transactional immunity. The Crime Act creates a comprehensive uniform federal immunity *standard* based on a use and derivative use immunity.¹⁹² The new standard guarantees that across all federal jurisdictions, no compelled testimony (either directly or indirectly derived) may be used against the witness in a criminal case.¹⁹³ The act also provides procedural safeguards to insure that immunity is not granted carelessly.¹⁹⁴ In *Kastigar v United States*,¹⁹⁵ the court examined and upheld the constitutionality of the Organised Crime Act. In order to displace the silence privilege, an immunity statute must be co-extensive with the scope of the privilege.¹⁹⁶ By contrast, England has no uniform immunity statute, in many English immunity statutes the grant of immunity is often not as co-extensive as the original silence privilege which it supplants. This is also true of South African immunity statutes. Unlike the flexible English approach, libertarian American constitutional law demands an immunity which is exactly co-extensive with the scope of the fifth amendment. According to *Kastigar*, transactional immunity is a protection unnecessarily broader than the privilege itself,¹⁹⁷ whereas derivative use immunity is an exact match and therefore constitutionally sufficient.¹⁹⁸ *Kastigar* also imposes a heavy burden on the state to prove direct independent sources of evidence in any subsequent prosecution.¹⁹⁹ The burden amounts to an affirmative duty on the prosecution to prove a legitimate and wholly independent source of evidence outside of the immunized testimony.²⁰⁰ The main problem with the *Kastigar* decision is that it offers insufficient guidelines on defining the boundary and scope of use immunity. The decision merely implies a broad and comprehensive scope²⁰¹ in which no evidentiary use may be made of immunized testimony.

¹⁹² Codified at 18 U.S.C. sec 6001-05 (1988). The constitutional validity of the immunity statute was judicially confirmed by *Kastigar v United States* 406 U.S 441 (1972). See Erickson "Pronouncements Of The United States Supreme Court Relating To Criminal Law" (5) *Nat. J. Crim. Def.* (1979) 37-39. Mykkeltvedt "To Supplant The Fifth Amendment's Right Against Compulsory Self-Incrimination : The Supreme Court And Witness Immunity" (30) *Mercer. L. Rev* (1979) 633-34.

¹⁹³ Sec 6002 (1988). The statute is broadly drafted, leaving much scope for judicial interpretation. It applies in all criminal proceedings including grand jury hearings : It is intended to be co-extensive with the fifth amendment. The scope and boundaries of immunity are therefore determined by the scope of the privilege itself.

¹⁹⁴ The decision to grant immunity is only made after a cost balance of interest analysis. The immunized evidence must be worth more to society than the reduced chance of the witness's conviction.

¹⁹⁵ 406 U.S 441 (1972).

¹⁹⁶ *Ibid* at 453.

¹⁹⁷ *Ibid* at 453.

¹⁹⁸ *Ibid* at 455.

¹⁹⁹ *Ibid* at 460. the court does not give a definition of "heavy burden". It has been given a beyond reasonable doubt meaning and is not limited to a mere negation of the poisonous taint, but requires evidence to be sourced wholly independently.

²⁰⁰ *Ibid* at 460.

²⁰¹ In several parts of the *Kastigar* judgement, there is an extravagant use of language which suggests a broad scope indistinguishable from transactional immunity. "This total prohibition on use provides a comprehensive safeguard" and "the prosecutorial authorities [are barred] from using the compelled testimony in any respect" (at 460, 461-62). See Strachan "Self-Incrimination, Immunity And Watergate" (56) *Texas L. Rev* (1978) 807.

The court repeatedly emphasizes that an immunity grant excludes the use of the witness's testimony in all respects. The state and the witness must be in the same position before and after the testimony is immunized. Immunity simply mirrors the protection offered by the privilege. *Kastigar* is ambivalent about the non-evidentiary use of compelled testimony.²⁰² This uncertainty has created a degree of confusion amongst the lower courts. The Eighth Circuit expressly forbids all prosecutorial use of compelled testimony including non-evidentiary use.²⁰³ The First, Second and Eleventh Circuits suggest that some kinds of non-evidentiary use of compelled testimony do not necessarily violate the fifth amendment.²⁰⁴

When may the state make use of the witness's immunized testimony as evidence in a subsequent proceeding? The question arises in two circumstances : (i) may the state make use of the witness's immunized testimony to prove perjury, and (ii) may the immunized testimony be used as an inconsistent statement to impeach the witness's credibility. *New Jersey v Portash*,²⁰⁵ relying on *Kastigar's* broad definition of immunity,²⁰⁶ held that immunized testimony could not be introduced to impeach the witness's credibility even in the face of his inconsistent statements at a subsequent trial.²⁰⁷ The court reasoned that compelled testimony is similar to an involuntary statement. Because compelled testimony is involuntary (like a coerced confession) the state's act of compelling the immunized testimony effects the fifth amendment in its most pristine form.²⁰⁸ Consequently the court may not balance a violation of the witness's constitutional right against the competing interest of the state's need for truthful disclosures in judicial proceedings.²⁰⁹ *United States v Apfelbaum*²¹⁰ is somewhat contrary to *Portash*. The prosecution may make direct evidentiary use of truthful compelled

²⁰² Although *Kastigar* rejects non-evidentiary use of immunized testimony (at 459), its language is ambivalent. It constantly refers only to the immunity of compelled *evidence* (at 443). To the state use of *evidence* gained independently (at 460). It compares immunity to a confession illegally coerced by the police (at 461). Cases after *Kastigar* are also silent on the state's non-evidentiary use of the witness's immunized testimony.

²⁰³ *United States v McDaniel* 482 F.2d 305 (8th Cir) 1973. *United States v Semkiw* 712 F.2d 891, 895 (3rd Cir) 1983. See Rosenblatt "Immunised Testimony And Subsequent Tax Prosecutions : What's The Use Of Use Immunity" (69) *Taxes* (1991) 67, 72.

²⁰⁴ *United States v Byrd* 765 F.2d 1524 (11th Cir) 1985. *United States v Helmsley* 941 F.2d 71 (2nd Cir) 1991. See Hoffman *ibid* note 169 at 450. Non-evidentiary use of immunized testimony includes the state's ability to re-plan its cross-examination strategy, a re-evaluation of which witnesses to call and a significant re-interpretation of the evidence.

²⁰⁵ 440 U.S 450 (1976).

²⁰⁶ *Ibid* at 458.

²⁰⁷ *Ibid* at 459-60.

²⁰⁸ *Ibid* at 459.

²⁰⁹ *Ibid* at 459.

²¹⁰ 445 U.S 115 (1980). *Portash* may be distinguished from *Apfelbaum* on the facts. In *Portash* immunised testimony cannot be used against the defendant who perjures himself by offering inconsistent testimony at his *later* criminal trial. In *Apfelbaum* immunized testimony could be used to prove perjury against the defendant *contemporaneously* while giving testimony at the same trial. The inconsistency arises because *Apfelbaum* goes further and states that immunized testimony may be used against a defendant at a subsequent trial.

testimony to help prove that the witness perjured himself before the grand jury.²¹¹ *Apfelbaum* refused to follow either *Kastigar's* or *Portash's* wide interpretation of the immunity statute to mean "any criminal trial use against the defendant of his involuntary statement".²¹² Instead, *Apfelbaum* found that neither the Constitution nor the immunity statute (18 U.S.C. sec 6002 (1988)), requires that a witness compelled to testify be left in exactly the same position as if he had remained silent.²¹³ Although the fifth amendment protects a witness against self-incrimination,²¹⁴ silence is only one means of achieving that goal. *Kastigar* and *Portash* are partially incorrect insofar as "they focus on the *effect* of the assertion of the privilege rather than on the *protection* the privilege is designed to confer".²¹⁵ Immunity does not extend to a perjury prosecution because the witness does not possess a constitutional right or privilege to commit perjury. The witness is immunized only against the use of his truthful testimony.

The grant of immunity and the exclusionary rule of coerced confessions : *Kastigar* suggests that in some ways the inability to use immunized testimony in trial may be compared to the pre-trial prohibition on the evidentiary use of a coerced confession.²¹⁶ This kind of comparison recognizes that the fifth amendment provides a broad protection against the use of all compelled testimony in criminal trials.²¹⁷ In essence, immunity means that no evidentiary use may be made by the state of the witness's compelled testimony, and its effect is to prohibit a subsequent criminal prosecution. The coerced confession rule has a similar evidentiary effect but a more limited application. It prevents the admission at trial of an involuntarily compelled confession, but it does not prohibit the prosecution from continuing with the trial. Both the immunity and the coerced confession rule serve to justify two fundamental aspects of the criminal process : (i) the deterrence of improper police and prosecutorial conduct, and (ii) the fifth amendment which prohibits compelling the individual to be a witness against himself.

Voluntariness and involuntariness : *Portash* reasons that the legally compelled testimony which arises as a consequence of a grant of immunity may be likened to an involuntary statement (involuntary statements may not be put to any testimonial use). A state grant of immunity compels the witness's involuntary testimony, and like an involuntary coerced

²¹¹ *Ibid* at 122-123. The immunity statute expressly excludes from its protection the use of compelled testimony in a prosecution against the witness for perjury (sec 6002). Such a prosecution is constitutional as long as the truthful part of the compelled testimony is used (at 121).

²¹² *Ibid* at 120 n.6. The court dilutes the scope of the *Kastigar* definition.

²¹³ *Ibid* at 124-127 and 129-30.

²¹⁴ *Ibid* at 127.

²¹⁵ *Ibid* at 124, 126.

²¹⁶ See *supra* chapter 5 and the discussion on the *Miranda* safeguards.

²¹⁷ *Kastigar* *ibid* note 195 at 461-462.

confession, infringes the fifth amendment in its most pristine form. Consequently the court may not apply a balance of interest test and the prosecution is prohibited from impeaching the defendant with his prior compelled testimony. *Portash* cannot be meaningfully reconciled with earlier Supreme Court decisions such as *Harris v New York*,²¹⁸ and *Oregon v Hass*,²¹⁹ which allow the evidentiary use of a coerced confession in certain limited circumstances. In terms of the *Harris* public safety exception, a confession taken in technical violation of the *Miranda* standard may be admitted to impeach trial testimony. A *Harris* type public safety exception is justified by balancing society's interest in preventing perjury against the *Miranda* interest in deterring unlawful police conduct. The *Portash* decision is incorrect in a number of fundamental respects. (i) It characterizes immunized testimony as untrustworthy, whereas logically speaking, untrustworthiness is simply not a characteristic of inculpatory immunized testimony,²²⁰ (ii) it refuses to apply a balance of interest analysis, after all if an immunized testimony rule is similar to a coerced confession rule, then a *Harris* type balancing test should equally apply to the immunized testimony rule, and (iii) there is a conceptual clash between *Apfelbaum* which allows the evidentiary use of immunized testimony against the witness in a perjury prosecution (the preferred position) and *Portash* which totally immunizes the witness even from a perjury charge (the incorrect position).

Grants of informal immunity²²¹ generally arise in two kinds of situations. First, where the state is involved in an ongoing investigation and uncovers the existence of a witness whose testimony would facilitate a successful conclusion to the investigation. Second, where an informant who has been involved in a completed crime decides to turn "state's evidence". The second situation differs from the first because the informant is giving the state information about a crime which the state would otherwise not know.²²² Informal immunity usually arises where the prosecution is trying to obtain much more than mere testimony. The

²¹⁸ 401 U.S. 222 (1971). See *supra* chapter 5 p.179 and p.189-191.

²¹⁹ 402 U.S. 717 (1975). See *supra* chapter 5 p.179.

²²⁰ See Lushing "Testimonial Immunity And The Privilege Against Self-Incrimination : A Study In Isomorphism" (73) *Crim. L and Criminology* (1982) 1695. *Portash* holds that immunized testimony is the "essence of coerced testimony". But immunized testimony hardly seems coerced in the way it is defined in *Harris*. *Harris* speaks of coercion as the pressure to speak, to suffer a penalty, unlawfulness and overbearing behaviour. By contrast, an immunized witness may not like the idea of having to speak, but as he faces no instant reprisal or penalty, it is hardly coercive. When *Harris* speaks of a coerced confession, it is referring primarily to untrustworthiness but untrustworthiness is simply not a characteristic of immunized testimony.

²²¹ Informal immunity is made possible because the United States Attorney has a broad discretion in choosing whom to prosecute. On the other hand, formal immunity is made possible by a statute designed to supplant the fifth amendment (See *Kastigar* at 459-62). Informal immunity has been defined as "letter" or "hip-pocket" immunity, a product of prosecutorial discretion, and a contractual agreement not to prosecute. *United States v Quartermain* 613 F.2d 38 (3rd Cir) 1980.

²²² There is some confusion over the effectiveness of an informal immunity grant. These grants are often attached to agreements of non-prosecution or plea-bargains. The court will usually analyse the entire package without specifically concentrating on the value of the immunity.

prosecution is trying to obtain information and co-operation from the witness. Each immunity agreement could then be individually tailored to the particular witness needs.

There are important procedural differences between an informal and a formal statutory grant of immunity. When the prosecutor confers informal immunity, no approval need be obtained from the Attorney-General, other state officials or from a supervising court.²²³ In effect informal immunity by-passes all the mandated procedures by which formal immunity is conferred on a witness. The great danger of informal immunity is that it cuts out the institutional safeguard mechanisms which protect both the witness and the state. The main advantage of informal immunity is its flexibility. It is dependent on the witness's willingness to testify and it may incorporate either elements of transactional or derivative use immunity. It applies to in-court, out of court testimony²²⁴ and to informal discussions with the state attorney's office. Informal immunity by its very nature is somewhat ambiguous. Sometimes it is unclear whether the prosecutor has the necessary power to grant immunity and whether it applies outside of the granting court's jurisdiction, across state lines and in federal jurisdictions. Informal immunity is likely to be negotiated by the witness without counsel and the language of the agreement struck may be vague. An unscrupulous prosecutor may promise more than he is practically prepared to concede. In the zeal to obtain a conviction the prosecutor may make certain promises and then ignore, withdraw or limit the initial promise. Nevertheless, informal immunity grants are quick fix solutions, which cut through beaurocratic red tape, are tailored to the immediate urgency of the circumstance and facilitate cost-effective convictions. Informal immunity should however be limited to minor crimes and not to serious offences.

In theory, at least, it has been suggested that the accused should be entitled to demand immunization of defence witnesses who are likely to claim the fifth amendment when called by the defence to testify. The reasoning behind such a suggestion is that a defence grant of immunity would fairly counterbalance the prosecutorial power to grant immunity to state witnesses. The idea of a defence immunity has been rejected by most circuit courts,²²⁵ although the Supreme Court is silent on the matter. The circuit courts agree that the power to confer immunity is a legislative power and a judicial ability to grant defence immunity

²²³ A formal grant of immunity must follow the proper procedure. (i) The attorney seeking the grant must be satisfied that it is in the public interest (sec 6003). (ii) The approval of the Attorney-General must be obtained (sec 6003(b)). (iii) When a grant is ordered, the judge has no discretion to deny it.

²²⁴ By contrast formal immunity is limited to grand jury, legislative and judicial proceedings (sec 6002).

²²⁵ *United Sates v Turkish* 623 F.2d 769, 772 (2nd Cir) 1980. *United States v Praetorius* 622 F.2d 1054 (2nd Cir) 1980).

would constitute an unacceptable infringement of the separation of powers principle.²²⁶ The argument in favour of a defence immunity is based on the notion of due process inherent in the fifth, sixth and fourteenth amendments. It suggests that a fair balance must be achieved between the powers granted to the state and the powers granted to the defence.²²⁷ A defence immunity may offer a fair solution in two unique situations.²²⁸ First, where a refusal to grant a defence immunity results in a deliberate distortion of the judicial process.²²⁹ Second, where a defence immunity is essential to an effective defence and will prevent the accused from being denied access to important evidence.²³⁰ Especially when the defence can demonstrate the relevant exculpatory nature of the testimony to be immunized. However, where the prosecution can rebut or show a substantial risk to the public interest, no order requesting defence immunization of witnesses may be granted.

Two general philosophical concepts, the *gratuity* and the *exchange* theory, are advanced as justifications for the nature of immunity. The gratuity (or gift) theory is based on the idea that Congress, as the highest legislative body in the land, may enact immunity statutes in the national interest as an amnesty and for the purpose of facilitating truth-finding in the criminal process. The gratuity theory²³¹ permits immunity to be granted automatically, without an examination of the merits, as a gratuitous award to all those summoned/subpoenaed to give evidence, if it is in the state interest. Since *Councilman v Hitchcock*,²³² however, the exchange theory has been favoured. In terms of the exchange theory a statute should not automatically grant immunity. In order to obtain the testimony of a reluctant witness, the state has to make an exchange for the testimony which it would not otherwise have

²²⁶ *Earl v United States* 361 F.2d 531, 534 (D.C. Cir) 1966.

²²⁷ Some courts have raised the sixth amendment compulsory process clause as a justification for asserting a claim for defence witness immunity. *United States v Herman* 589 F.2d 1191 (3rd Cir) 1978, "due process may require court-ordered statutory immunity or judicially crafted immunity for defence witnesses. *United States v La Duca* 447 F.Supp 779 (D.N.J.) 1979. Although *United States v Turkish* has rejected the sixth amendment justification (at 770-71).

²²⁸ *United States v Herman* *ibid* at 1204, sets out two theoretical bases for granting an immunity to a defence witness.

²²⁹ There is some support for the first situation in *Government of the Virgin Islands v Smith* 615 F.2d 964, 968 (3rd Cir) 1980.

²³⁰ The second situation finds no direct support in case law.

²³¹ Since self-incriminatory testimony cannot be compelled by the state, unless an immunity is granted, this kind of immunity may well be regarded as a "gratuity to crime", *Heike v United States* 227 U.S 131, 142 (1913) and *United States v Monia* 317 U.S 424, 441, 424 (1943) Frankfurter J dissenting.

²³² The exchange theory is preferred because a valid immunity grant must be co-extensive with the privilege which it supplants. For example, in *Pillsbury Co v Conboy* 459 U.S 248 (1983), the court attempts to define the scope of the immunity by examining the scope of the privilege on an isomorphic or one-to-one correspondence test. See Lushing *ibid* note 220 at 1694.

obtained.²³³ The state cannot give nothing for something. To facilitate the investigation or the trial process, immunity is exchanged for the witness's privilege against self-incrimination.

It is argued that a grant of immunity favours the state more than it does the witness. But, in practice, an immunity grant often makes a subsequent prosecution extremely difficult. The heavy burden cast on the prosecution to show an independent source of evidence outside of the immunized testimony means that derivative use immunity is rarely awarded. For example, if the witness is under investigation for armed robbery, but his immunized testimony suggests an additional involvement in a drug offence, the state is precluded from launching a derivative prosecution on the drug offence. If the state subsequently wishes to charge the witness with a drug offence, it bears a heavy onus of showing that none of the evidence adduced is attributable to the immunized information. A burden which is extremely difficult to overcome in practice. However, where the prosecution does anticipate a future criminal action, it may select one of two alternative procedures. First, the state must meticulously identify and label all the evidence already in its possession. All evidence gathered prior to the immunity grant and all independent evidence received after the immunity grant must be carefully recorded and stored. This alternative is the preferred one when most of the evidence has already been collected prior to the immunity grant. The second alternative calls for the complete withdrawal of all the state attorneys concerned with the initial process of granting immunity to the witness. A subsequent prosecution is continued with an entirely new prosecution team. This alternative is disruptive, expensive and cannot be used on a regular basis. In theory, derivative use immunity (unlike transactional immunity) allows the state freedom to follow up future prosecutions, but in reality subsequent prosecutions are difficult and rare. In practice a grant of immunity tends to favour the witness and disadvantage the state.

7.5 Foreign Prosecution

In order to claim the privilege against self-incrimination, the witness must show a real or substantial danger of a future criminal prosecution. May the witness in a domestic forum refuse to give testimony on the ground that the testimony would subject him to the risk of foreign prosecution?²³⁴ The principal issue to be addressed is whether or not a danger of

²³³ Since a witness may refuse to testify in terms of the fifth amendment, Congress in order to obtain the witness's testimony, must make an exchange (Frankfurter J in *United States v Monia* *ibid* at 432, 433).

²³⁴ American courts are guided by English precedent in this respect. The result has been the formulation of a two part test : (i) a threshold inquiry into the reasonable risk of foreign prosecution, coupled with (ii) the question whether or not the fifth amendment privilege needs to be extended to

extra-territorial prosecution is sufficient to trigger the fifth amendment privilege within the domestic court.²³⁵ While the privilege serves to protect the witness in the domestic forum, in practice it can have no effect within the foreign jurisdiction. Similarly, a grant of immunity within the domestic forum does not prevent a foreign sovereignty from using the immunized and compelled testimony to incriminate the witness. In the seminal decision *Murphy v Waterfront Commission*,²³⁶ per Goldberg J, it was held that the fifth amendment privilege had no internal jurisdictional limitation. The privilege protected both the state witness at the federal level and the federal witness at the state level.²³⁷ The privilege could be triggered by the fear of a possible prosecution in another jurisdiction within the United States.²³⁸ While not directly addressing the issue of foreign prosecution, *Murphy* does refer with approval to the rule set out in the English case, *United States v McRae*.²³⁹ *McRae* involved a United States' government suit in an English court against the defendant for money deposited in English banks during the American Civil War. The defendant claimed that a law had been passed in the United States allowing for the confiscation of property belonging to ex-Confederate representatives, like himself, and, if compelled to answer, he would be subjected to the confiscation proceedings in the United States.²⁴⁰ The English court upheld the privilege claim against fear of a foreign prosecution. The *Murphy* court also refers to a much earlier Chancery decision, *King of Two Sicilies v Willcox* which contradicts the *McRae* decision and notes the factual difference between the two cases.²⁴¹ In the *King of Two Sicilies v Willcox*,²⁴² the right against self-incrimination was found to be part of British municipal law and could not be applied to protect a defendant when he feared prosecution in another country. At the same time the *Murphy* court cited with approval the substantial fear

immunize against the risk. Extensive use has been made of *King of Two Sicilies v Willcox* 61 Eng. Rep. 1126 (1851) "denying the privilege in the fact of foreign prosecution". *United States v McRae* 3 Ch. App 79 (L.R. Ch. 1867) "awarding the privilege in the face of foreign prosecution" *R v Boyes* 121 Eng. Rep. (K.B) 1861 "defining the meaning of a reasonable risk". See also Capra "The Fifth Amendment And The Risk Of Foreign Prosecution" *Nw. York. L.J* (1991) 3, Reimann "Fencing The Fifth Amendment In Our Own Backyard" (7) *Pace. Int'. L. Rev* (1995) 177-193.

²³⁵ See Bovino "A Systematic Approach To Privilege Against Self-Incrimination Claims When Foreign Prosecution Is Feared" (60) *Un. Chi. L. Rev* (1993) 903; Ciardiello "Note : Seeking Refuge In The Fifth Amendment" (15) *Fordham Int. L. J* (1992) 722. Fausett "Extending The Self-Incrimination Clause To Persons In Fear Of Foreign Prosecution" (20) *Vanderbilt J. Transnat. L* (1987) 699. Rotsztain "The Fifth Amendment Privilege Against Self-Incrimination And The Fear Of Foreign Prosecution" *Col. L. Rev* (1996) 1940.

²³⁶ 378 U.S 52 (1964).

²³⁷ *Ibid* at 78.

²³⁸ *Ibid* at 60-63.

²³⁹ 3 Ch. App 79 (L.R. ch. 1867). *Murphy* refers to *McRae* as the real English rule at 63.

²⁴⁰ *Ibid* at 83.

²⁴¹ *McRae* at 85. *The King of Two Sicilies* was distinguishable on the facts because the defendants had not shown a substantial risk of prosecution in Sicily.

²⁴² 61 Eng. Rep. 116 (Ch 1851) at 128. See also *East India v Campbell* 27 Eng. Rep 1010 (Ex 1749) a privilege could be claimed in the face of a prosecution in British India. *Brownswold V Edwards* 28 Eng. Rep. 157 (Ex 1750) privilege claimed in the face of a prosecution in another English court.

or risk of a future prosecution test as set out in *R v Boyes*.²⁴³ In *Zicarelli v New Jersey State Commission*,²⁴⁴ the Supreme Court was for the first time faced with the question of fifth amendment applicability within a foreign jurisdiction. The court found it unnecessary to decide the question because, on the facts, the danger of such a prosecution in the foreign jurisdiction was remote. Instead, the court stated that the privilege protects against real dangers and not remote or speculative possibilities.²⁴⁵ The court concluded that as the defendant did not face a real danger of a foreign prosecution, it was unnecessary to decide the constitutionality and reach of the fifth amendment in this respect.

As a result of Supreme Court ambivalence, the lower courts differ in their interpretation of the extra-territorial reach of the fifth amendment. Some lower courts have extended the fifth amendment by emphasizing the underlying policies of the privilege²⁴⁶ and relying on the precedent set by *Murphy v Waterfront Commission*. Other courts have refused to extend the privilege on the ground that it may erode the effectiveness of domestic law enforcement without really giving the witness a tangible protection within the foreign forum.²⁴⁷ Often the witness is unable to demonstrate how the foreign government might prosecute, obtain custody of, or gain access to their testimony in the domestic forum. Lower courts which refuse to extend the privilege rely on the immunity reasoning adopted by *Kastigar v United States*.²⁴⁸ *Kastigar* explains derivative use immunity as a “rational accommodation between the imperatives of the privilege and the legitimate demand of a government to compel citizens to testify”. Extending the privilege to a fear of foreign prosecution, would in terms of the *Kastigar* reasoning, destabilize the rational accommodation between the witness’s interest and the government’s legitimate demand. Immunising the witness against the mere fear of a foreign prosecution within the domestic forum would mean a loss of vital evidence, but would not simultaneously prevent a foreign sovereignty from using the compelled testimony against the witness. The resultant loss of relevant information within the domestic forum based on a factor outside of the domestic government’s control would deal a heavy

²⁴³ 121 Eng. Rep. 730 (KB 1861).

²⁴⁴ 406 U.S 472 (1972).

²⁴⁵ *Ibid* at 478. In *United States v Flanagan* 691 F.2d 116, 121 (2nd Cir) 1982 the test was strengthened by adding additional factors : (i) either an existing or potential foreign prosecution; (ii) the kind of foreign charge likely to be faced by the witness; (iii) will the compelled testimony trigger a prosecution; (iv) whether an extradition request is likely; (v) is the compelled testimony likely to come to the attention of the foreign government. The standard should be based on objective factors, not speculative belief.

²⁴⁶ For example, *Moses v Allard* 779 F.Supp. 857, 882-883 (E.D. Mich.) 1991 *In re Cardassi* 351 F. Sup. 1081, 1086 (D. Conn) 1972.

²⁴⁷ *Phoenix Assurance Co. of Canada v Runck* 317 N.W. 2d. 402, 413 (N.D.) 1982, *United States v (Under Seal) Araneta* 794 F.2d 920, 923-926 (4th Cir) 1986 *United States v Gecas* 120 F.3d 1419, 1457 (11th Cir) 1997, *United States v Lileikis* 899 F. Supp 802, 809 (D. Mass) 1995.

²⁴⁸ 406 U.S 441, 453 (1972).

blow to domestic law enforcement.²⁴⁹ In addition, a grant of immunity is only as co-extensive as the scope of the privilege within the domestic jurisdiction. Extending the scope of the privilege outside the domestic jurisdiction, without being able to similarly extend the scope of immunity would break down the spatial inter-relationship between privilege and immunity.²⁵⁰ The privilege may only be extended to a foreign prosecution in the rare circumstance where the domestic government is using a foreign government as cover to institute a prosecution against its own nationals.²⁵¹

Adopting the *Kastigar* reasoning, the eleventh circuit in *United States v Gecas*²⁵² has held that the fifth amendment may not be invoked by a witness in a civil domestic court, even in the face of a substantive fear of foreign prosecution. On the facts, Gecas faced deportation to Lithuania as a Nazi war criminal and almost certain prosecution for war crimes. The court argued that the Constitution makes no mention of, nor places a restraint on a foreign government's treatment of U.S. citizens who have committed offences abroad.²⁵³ The fifth amendment privilege is therefore not a constitutional right enforceable against the whole world but only a limitation on the abuse of the domestic government's power.²⁵⁴ Foreign governments do not violate the fifth amendment when they prosecute a defendant based on compelled evidence produced in the United States.²⁵⁵ A legal proceeding only becomes a "criminal case" in the language of the constitution when there exists the possibility of a conviction in a jurisdiction subject to the fifth amendment.²⁵⁶ Basing its judgement on a review of the history of the fifth amendment the court also rejected the defendant's claim that the privilege was meant to protect individual privacy and dignity.²⁵⁷ Instead, the court concluded that the purpose of the privilege was to limit the investigative practices of an

²⁴⁹ *United States v (Under Seal) Araneta* 794 F.2d 920 (4th Cir) 1986.

²⁵⁰ Wigmore favours the co-extensive immunity argument. "[A] rule which recognizes incrimination under foreign law as a basis for the privilege, denies the forum sovereignty to grant immunity as broad as its privilege and therefore denies it the power by any means to compel such testimony" para 2269 McNaughton Ed (1961).

²⁵¹ *Araneta* Ibid at 923, "the privilege may be invoked if there is extensive American participation in the foreign prosecution".

²⁵² *Gecas* ibid note 247 at 1422. See Lindsay "Tied Up By A Gordian Knot : U.S v Gecas' Rejection Of The Privilege Against Self-Incrimination" (82) *Minn. L. Rev* (1998) 1297. Packer "U.S v Gecas" (6) *Tulane J. Int. and Comp. L* (1998) 651. Haygood "United States v Gecas" (21) *N. Carolina J. Int. L. and Commercial Reg* (1996) 467.

²⁵³ *Gecas* ibid at 1430.

²⁵⁴ Ibid at 1454, 1456.

²⁵⁵ Ibid at 1430-1431.

²⁵⁶ Ibid at 1463. See also *Phoenix Assurance Co of Canada v Runk* ibid note 247 at 411, "since the language of the fifth amendment is silent on the subject of non-U.S. criminal cases, the authors did not intend it to protect against fear of foreign prosecution". In contrast *Moses v Allard* ibid note 246 at 874, "the language of the fifth amendment "any criminal case" supports extension of [the privilege] to fear of non-U.S. prosecution".

²⁵⁷ Ibid at 1456. The authors viewed the privilege narrowly as a bulwark against arbitrary and intrusive criminal investigations.

overreaching government.²⁵⁸ The minority (per Birch J) strongly criticized the majority conclusion. Denying the privilege to a witness who has a reasonable fear of foreign prosecution defeats the policies underlying the privilege.²⁵⁹ The dissent argued that *Murphy v Waterfront Commission* expressly identified two fundamental policies behind the privilege. The privilege is meant to ensure the integrity of the criminal justice system by placing the full burden upon the state and it also protects the accused's privacy and freedom.²⁶⁰ The dissent criticized the majority's assertion that the privilege only protects against the actual use of compelled testimony and not against potential or actual compulsion, arguing that a prohibition against use alone defeats the human rights reasoning underlying the fifth amendment.²⁶¹ While recognizing that one of the primary rationales of the privilege is to protect against government abuse of process, the dissent argued that a human rights-reasoning is consistent and complements the due process rationale.²⁶² The majority therefore ignore one of the key elements of the privilege, namely its origin in natural law. The clash between the majority decision and the minority dissent is another illustration of the philosophical divide between a utilitarian and a libertarian based privilege.

An alternative reason for not extending the privilege to a fear of foreign prosecution is drawn from an interpretation of the federal rules of criminal procedure. Federal rule 6(e) "the sealing rule" prohibits the disclosure of grand jury testimony. The secrecy of a grand jury sealing order would then provide a sufficient protection against the witness's fear of foreign prosecution as the foreign court could not gain access to the domestic forum's testimony. Since access to sealed testimony requires a court order, it is highly unlikely that a foreign sovereignty would succeed in acquiring the witness testimony. Extending the privilege is unnecessary as rule 6(e) provides an adequate immunity against the fear of a foreign prosecution. However, criticism of rule 6(e) suggests that the protective shield it offers may not be leak proof. In a practical sense there is always the possibility of an inadvertent leaking of confidential information by grand jurors. Once an unauthorized disclosure has been made there is no *expost facto* mechanism in rule 6(e) by which to restore secrecy. Also, the numerous statutory exceptions which allow disclosure of sealed testimony suggests that rule 6(e) is not really a strong enough shield against the fear of a foreign prosecution. Rule 6(e) might reduce the risk of foreign prosecution, just as it may reduce the danger of

²⁵⁸ Ibid at 1456. The court suggests that individual dignity is indirectly secured by limiting the nature of the federal government's prosecutorial techniques. In any event, the domestic court cannot secure the dignity of the witness in a foreign court.

²⁵⁹ Ibid at 1458-1459.

²⁶⁰ Ibid at 1460-1461.

²⁶¹ Ibid at 1461. The majority argue that "the [privilege] protects against conviction based on self-incrimination, it does not protect against the mere compulsion of testimony by a court" (at 1429 n13).

²⁶² Ibid at 1472-73.

domestic prosecution, but because of the high potential for authorized and unauthorized disclosure, the rule is not an adequate substitute for the fifth amendment privilege. Moreover, it is limited to grand jury proceedings only. A more comprehensive substitute for a witness immunity against foreign prosecution is desirable.

The question of whether the privilege should have extra-territorial application must turn on the purpose of the policies underlying the fifth amendment. Support for the extra-territorial application of the privilege has been sought in the protection which it offers to the individual. The privilege is said to be a shield against interference with the individual's human rights by both the domestic and the foreign sovereignty (a personality rationale).²⁶³ It also protects the individual by regulating the overreach of government (an instrumental rationale). However, the personality or human rights based rationale contains a number of fundamental flaws in the context of a foreign prosecution. In terms of a human rights privilege, the domestic court would be constitutionally obliged to extend the fifth amendment protection to the witness who can prove a substantial and reasonable risk of foreign prosecution. A privilege defined in terms of human rights would always place the individual interest above the government interest. The government's ability to enforce domestic law would then be dependent on an issue of foreign law outside of its control. Defining the privilege in human rights terminology also undermines the fifth amendment's purpose in maintaining a fair state individual balance. If the privilege is extended to a fear of foreign prosecution, no domestic court could possibly guarantee or grant to the witness an immunity against prosecution within the foreign jurisdiction. The government could not grant an immunity co-extensive with the extended privilege and the state-individual balance would be seriously impaired. Dressing the privilege up as a human right might protect the individual in the domestic forum but it does not give the witness a stronger or additional protection in a foreign court. A foreign court has no legal obligation to respect the domestic witness's claim to silence. The effect would be to give the witness an unfair advantage in the domestic court but no benefit in the foreign court.

²⁶³ Libertarian commentators suggest that the fifth amendment is permeated by a natural rights and/or a social contract theory, Hunter "The Extraterritorial Application Of The Constitution – Unalienable Rights" (72) *Va. L. Rev* (1986) 649. In terms of the *natural rights theory*, the higher law of the constitution should apply to all government actions, regardless of the location in which they occur, Lobel "The Constitution Abroad" (83) *Am. J. Int. L* (1989) 871, 875. The natural rights theory supports the extension of the privilege to the risk of non-U.S. prosecution. The rights of the Constitution should apply in both domestic and foreign jurisdictions. *In re Cardassi* 351 F. Supp. 1080, 1086 (D. Conn) 1972. In terms of the *social contract theory*, the Constitution is a contract which binds the government and the U.S. citizen. Accordingly, when a U.S. citizen is faced with a foreign prosecution, the Constitution should protect him by extending the privilege. Nicholas "Comment : U.S v Verdugo-Urquidez" (14) *Fordham Int. L. J* (1990) 267, 270.

Several practical procedural problems mitigate against extending the privilege to a foreign prosecution. The domestic court has no realistic test by which to assess the witness's claim. The "real and substantial danger" test developed in the domestic forum has no suitable application in the international context. How is a domestic court to assess the risk of danger, if the court is unable to identify or even understand the applicable foreign laws. The domestic court is unlikely to develop a functional understanding of the foreign law, especially when the foreign law is complex and derives from principles alien to the Anglo-American accusatorial system. The domestic court is also unlikely to predict a foreign government's behaviour. Is the foreign government particularly interested in prosecuting the witness? Has it previously prosecuted individuals for the same crime? Attempting to predict a foreign government's behaviour by examining its past, present and future actions is likely to be highly suspect. Therefore the mistake of construing the privilege in terms of a human rights rationale, one which takes precedence over the government's interest, is likely to have a severe impact on domestic criminal enforcement procedures. It would permit a foreign sovereignty to infringe on the domestic law and disturb the proper state-individual balance without providing an additional protection for the witness. The human rights definition of a privilege against self-incrimination should be rejected. A narrow interpretation of the privilege as a proper restraint to overreach by the domestic government within its own jurisdiction is thus by far the preferred alternative.

Immunity from extradition may possibly serve as a substitute for a refusal to extend the privilege to a fear of a foreign prosecution.²⁶⁴ Immunity from extradition would prevent the seizure of a witness and his delivery to a foreign country for trial. It does not however protect the witness against seizure of his foreign assets, nor would it protect against a trial and conviction *in absentia*, a common practice in many foreign jurisdictions. Extradition is usually an executive-political decision and it is unlikely that the courts would have the constitutional authority to prevent the government from responding to extradition requests.²⁶⁵ Immunity from extradition is not sufficiently protective. An appropriate and flexible solution to the question of foreign prosecutions is suggested by the balance of interest test. When the witness has demonstrated a real and substantial fear of foreign prosecution, his claim to the

²⁶⁴ Most U.S. extradition treaties only allow extraditions if the crime is punishable under the laws of both signatories. It is argued that extending the privilege to foreign prosecutions would not cause the privilege to protect acts that do not constitute U.S. crimes. See Sukenik "Note : Testimonial Incrimination Under The Law Of A Foreign Country" (11) *N.Y.U.J. and Pol* (1978) 369-70.

²⁶⁵ *Phoenix Assurance Co of Canada v Runck* *ibid* note 247 at 414, "the extradition process is basically an executive function and we doubt if the judiciary could unilaterally command the executive not to honour a request for extradition".

privilege would not be automatic. His claim to the privilege would be determined by a weighing of the individual right against the societal interest. If the interests of society or the government's need for information are found to outweigh the individual interest, then the witness's claim of privilege is defeated. If the legal issue is highly technical and the foreign law difficult to analyse, no privilege should lie. However, in the circumstance in which the foreign law is clear, predictable and the risk of prosecution substantial, there should be no reason for disallowing the privilege. In the balancing of the individual's fear of foreign prosecutions against the government's need for information, several other factors should also be considered. A balanced assessment should include : (i) the nature and type of the foreign proceeding, the role of the witness and the importance of his testimony; (ii) the severity of the punishment facing the witness in the foreign jurisdiction.

The Supreme Court, in *United States v Balsys*,²⁶⁶ has finally resolved the question, by holding that a witness may not invoke the fifth amendment privilege with regard to a prosecution taking place outside of the United States.²⁶⁷ The court commences by recognizing the fifth amendment as a wide protection offering a guarantee with regard to grand jury proceedings, a defence against double jeopardy, a due process guarantee, and compensation for governmental taking.²⁶⁸ The court notes that none of these guarantees has ever been interpreted to bind a government other than the United States. It would now be inconsistent to take a broader view of the fifth amendment protection absent a legislative direction to do so. Because there is no legislative history and no common law principle to the contrary, it cannot remove the privilege from the "same-sovereign" context of the amendment's language.²⁶⁹ The Constitution applies only to the government which created it and cannot be used to bind those sovereigns that do not fall under its command.²⁷⁰ The *Balsys* judgement is redolent with utilitarian meaning, reflecting a utilitarian philosophy rather than a libertarian human rights rationale. While the United States Supreme Court has finally resolved the question of the privilege and foreign prosecution, case precedent in other Anglo-American jurisdictions, Australia, South Africa, New Zealand and Canada is still hesitant and

²⁶⁶ 118 S. Ct. 2218 (1998) cert granted 524 U.S. 666 (1998). On the facts, similar to *Gecas*, accused of Nazi war crimes in Lithuania. The court recognized that the fifth amendment domestically applied to *Balsys* because its language applies to "persons" not citizens. *Balsys* being only a resident alien and not a naturalized citizen (at 2222). See also *Belisle* "Note : U.S v *Balsys*" (77) *Un. Detroit. Mercy. L. Rev* (2000) 341. *Blackman* "U.S v *Balsys*" (53) *Oklahoma. L. Rev*(2000) 127. *Lloyd* "Fifth Amendment Rights Of A Resident Alien After *Balsys*" (6) *Tulsa. J. Comp. It. L.* (1999) 163. *Regan* "U.S v *Balsys*" (73) *St. John's L. Rev* (1999) 589.

²⁶⁷ *Ibid* S. Ct. at 2222. The court also referred to the misinterpretation of the *Murphy* decision, holding that *Murphy* was intended to apply only to different jurisdictions under the same sovereign government (at 2227).

²⁶⁸ *Ibid* S. Ct. at 2223.

²⁶⁹ *Ibid* S. Ct. at 2223-24.

²⁷⁰ *Ibid* S. Ct. at 2223-24.

ambiguous. England has settled the issue by statutory means. Sec 14 of the Civil Evidence Act (1968) limits the privilege against self-incrimination to domestic court proceedings.

6.6 The Civil Litigation Process

The privilege may be used in a wide range of civil matters.²⁷¹ It may be used whenever information sufficiently relevant to civil liability and discoverable by the other party provides a causal link which points towards evidence of criminal conduct. Most commonly the privilege is used in those civil actions where the conduct giving rise to the civil liability also constitutes an element of a crime. A party in a civil litigation may limit the extent of his depositions and pleadings in accordance with the privilege. The application for discovery, on paper or during an interrogatory, may be countered with a fifth amendment privilege plea. The privilege claim must be clearly expressed and the documents which fall within the privilege must be described with sufficient particularity in order to allow the party seeking discovery to reasonably evaluate the merits of the claimed privilege.²⁷² The privilege may only be invoked where the information tends to incriminate, as long as it constitutes a link in a chain of circumstantial evidence proving criminal conduct. The privilege prohibits the court from requiring a revealing response. In practice, the claimant need only sketch a scenario of how a possible but still unknown response might provide direct or circumstantial evidence of criminal conduct or clues leading to evidence of criminal conduct. The court may refuse privilege "when it is perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken and that the answer cannot possibly have such a tendency to incriminate."²⁷³ The privilege cannot be invoked when the claimant has already been criminally prosecuted (double jeopardy), or the criminal danger is extinguished by prescription or a statute of limitations. A reasonable claim of privilege and a reasonable refusal to depose completely to the plaintiff's pleading will not cause the court to strike out the defendant's plea or result in judgement against him. However, the court will not permit the defendant to improperly misuse the privilege as a weapon for unfairly prejudicing the plaintiff. In such a circumstance the court may allow adverse inferences to be drawn from a

²⁷¹ Heidt "The Conjuror's Circle : The Fifth Amendment Privilege In Civil Cases" (91) *Yale L. J* (1982) 1062. Kaminsky "Preventing Unfair Use Of The Privilege Against Self-Incrimination In Private Litigation" (39) *Brooklyn L. Rev* (1972) 121.

²⁷² Discovery of privileged documents is now incorporated in the Federal rules on civil litigation; FED. R. CIV 26(a) (1), 26(b)(1) and 26(e). Also in the Federal rules of evidence; FED. R. EVID 501 (1993). See also Cochrain "Evaluating Federal Rule Of Civil Procedure (26) As A Response To Silence And Functionally Silent Claims " (13) *Rev. Litigation* (1994) 219. *Wehling v Columbia Broadcast Systems* 608 F.2d 1084 (5th Cir) 1979, "a party has no right to discover evidence protected by the privilege, regardless of whether it is asserted by a party or witness or serves to impair the litigant's ability to prove or defend its case".

²⁷³ *Hoffman v United States* 341 U.S 479, 486 (1951).

prejudicial claim of privilege and may strike the pleading entirely or enter judgement against the irregular defendant.²⁷⁴ On the other hand, the court will not permit the plaintiff seeking affirmative relief (or the defendant in reconvention) to hide behind the privilege as to matters which he himself has placed in issue. The defendant's strategy of invoking privilege has several advantages. By forcing the plaintiff to seek evidence from other sources, it increases the plaintiff's expenses and delays his progress. Such delay enables the defendant to buy time in which to decide whether or not to waive the privilege, to testify and submit to a deposition. The delay will allow the defendant to see what other evidence the plaintiff has gathered and to tailor his version accordingly. The delay will also put the plaintiff in a poor position to negotiate a favourable settlement or prepare for trial.

In *Baxter v Palmigiano*,²⁷⁵ the court held that the fifth amendment does not forbid, "adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."²⁷⁶ This constitutional licence, known as the *Baxter* principle, has been applied widely.²⁷⁷ The reasoning behind the *Baxter* principle is due largely to a irrelevance of the privilege in civil proceedings. The privilege in civil proceedings does not engage the policy justifications which are said to underlie the privilege in a criminal proceeding. Government abuse of process and the compulsion of incriminating testimony has no application in a civil process between private litigants. The "foxhunter"²⁷⁸ policy of maintaining a proper state-individual balance in which the state must bear the entire burden of proof has no relevance in the civil context. The policy that applies with the most force in private cases is the "old woman's reasoning".²⁷⁹ A civil defendant may face the cruel trilemma of exposing himself to a possible criminal sanction, of perjury or of contempt. Accordingly, the cruel trilemma may apply with as much force in a civil as in a criminal case. It does not apply when the plaintiff is able to establish that the defendant does not face a practical danger of criminal prosecution.

A civil proceeding does not place an innocent defendant in danger of a criminal conviction. The harm which the privilege guards against does not exist in a civil or other non-criminal proceeding. Where a civil party claims the privilege and declines to testify, the failure to

²⁷⁴ *Ikeda v Curtiss* 43 Wash 2d 449, 261 P.2d 684 (1953), "the court may allow the plaintiff to call the defendant to the stand and compel him to repeat his refusal in front of the jury. This is done only exceptionally. See also FED. R. CIV 32.

²⁷⁵ 425 U.S 308 (1976).

²⁷⁶ *Ibid* at 318.

²⁷⁷ *LiButti v United States* 107 F.3d 110, 124 (2nd Cir) 1997, *FDIC v Fid. and Deposit Co of Md* 45 F.3d 969, 977 (5th Cir) 1995, *Koester v Am. Republic Investment Inc* 11 F.3d 818, 823-24 (8th Cir) 1993.

²⁷⁸ See *supra* chapter 3 p.102-103.

²⁷⁹ See *supra* chapter 3 p.101-102.

come forward is a proper subject for comment and may provide the basis for an adverse inference.²⁸⁰ An adverse inference is not a reaction to the privilege itself, but to the defendant's silence about the civil accusation which he would normally be expected to refute.²⁸¹ It would be unfair to allow the private civil defendant to plead the privilege on paper or at deposition without paying some price.²⁸² Especially since the plaintiff's only source of evidence in civil proceedings is usually the defendant himself.²⁸³ However, under the *Baxter* principle, civil liability cannot rest solely on adverse inferences drawn from the defendant's fifth amendment silence. Adverse inferences do not constitute independent evidence. They can merely corroborate other evidence that already implicates the defendant.²⁸⁴ The *Baxter* principle also settles the converse issue, whether or not the defendant who waives the privilege in order to avoid a non-criminal sanction may later prevent the use of his response at a criminal trial. The defendant would argue that the non-criminal sanction and the drawing of adverse inferences in the civil proceedings are so severe as to compel a waiver of the privilege (in violation of his fifth amendment right). However, a long line of cases has held that no testimony given in a civil proceeding by a party who may have invoked the privilege, will be considered compelled, even though the invoking would have led to an adverse inference in the civil case.²⁸⁵ It should also be noted that a grant of immunity is valid only in the criminal and not in the civil context.²⁸⁶ The immunized witness who voluntarily repeats his testimony in a civil proceeding cannot use prior criminal immunization to protect the civil revelation. Regardless of the conditions surrounding the original testimony, a witness who is asked to repeat a statement must either invoke the fifth amendment privilege or waive it. Once a witness has voluntarily waived the privilege by repeating the testimony in a civil proceeding, the state may use that testimony in a subsequent criminal proceeding without

²⁸⁰ The *Baxter* principle does not apply in those states which have adopted uniform rule of evidence 512 (the claim or assertion of a privilege is not a proper subject of comment by judge or counsel. No inference may be drawn therefrom). See Bartel "Drawing Negative Inferences Upon A Claim Of Attorney-Client Privilege" (60) *Brooklyn L. Rev* (1995) 1355. Mansfield "Evidential Use Of Litigation Activity Of The Parties" (43) *Syracuse L. Rev* (1992) 695.

²⁸¹ Ratner "Consequences Of Exercising The Privilege Against Self-Incrimination" (24) *Un. Ch. L. Rev* (1957) 472.

²⁸² *Molloy v Molloy* 46 Wis. 2d 683, 176 N.W. 2d 292 (1972) "[we] do not believe it is unjust to draw a prejudicial inference against one asserting the fifth amendment in a civil action, whether as a shield or as a sword. In a civil action the defendant usually does not invoke the privilege unless he has something to hide".

²⁸³ According to Wigmore, "the inference seems to be allowed with the least reluctance in cases where the party claiming the privilege has an affirmative burden, where he has exclusive access to information". Sec 2272 *McNaughton* 1961.

²⁸⁴ *S.E.C. v Colello* 139 F.3d 674, 678 (9th Cir) 1998. *Lasalle Bank Lake View v Seguban* 54 F.3d, 387, 390 (7th Cir) 1995.

²⁸⁵ See *McGautha v California* 402 U.S 183, 213 (1971) per Harlan J, "it is not contended, nor could it be successfully, that a mere force of evidence is compulsion of the sort forbidden by the privilege". *Lefkowitz v Cunningham* 431 U.S 801, 808 n5 (1977) "similar reasoning".

²⁸⁶ Swartz "Recent Developments : Disclosure And Civil Use Of Immunised Testimony" (35) *Vanderbilt L. Rev* (1982) 1211.

fear of taint.²⁸⁷ An immunized witness seeking to preserve his fifth amendment protection is well advised to refuse to repeat the contents of his immunized testimony. A civil plaintiff has no power to confer a second grant of immunity upon the witness. The presiding civil court cannot initiate an immunity grant since the immunity statute (sec 6003) expressly reserves the right for the federal prosecutor. Therefore, the witness or the defendant may evoke his right and refuse to be deposed or to testify. Commenting upon the effect of a witness's invocation of the privilege in the civil discovery process, Stapelton J in *In re Corrugated Container Antitrust litigation*²⁸⁸ declared, "I find the whole defence tactic of trying to hide in a civil case behind a non-existent threat of criminal prosecution, to be one of the most nauseous developments in complex litigation cases ... And I don't find any derogation of the fifth amendment in saying that the fifth amendment wasn't devised to permit people to hide information in civil lawsuits".

6.7 Formal Restrictions On The Witness Privilege

The scope of the fifth amendment has waxed and waned according to prevailing societal interests. Traditionally the fifth amendment has always been interpreted broadly and flexibly. Unfortunately, case precedent is inconsistent and fifth amendment jurisprudence cannot be reduced to any single purpose or policy. In the twentieth century the Supreme Court has remade the witness privilege into a wide but ephemeral concept which eludes a clear summation. Although limited only to criminal matters, the privilege against self-incrimination may be invoked by a witness against a government induced compulsion in any legal, investigatory or adjudicatory proceeding. In the words of *Councilman v Hitchcock*,²⁸⁹ the fifth amendment privilege is "as broad as the mischief against which it seeks to guard". The witness may invoke the fifth amendment in all kinds of interrogatories before a court, grand jury, coroners inquest, administrative agency or legislative body. In the early part of the twentieth century the fifth amendment (the Federal Bill of Rights) applied only to federal proceedings but was subsequently extended internally to all state proceedings through the mechanism of the fourteenth amendment due process clause (*Malloy v Hogan*).²⁹⁰ The high water mark of the witness fifth amendment protection is the judgement in *Boyd v United*

²⁸⁷ *United States v Kuehn* 562 F.2d 427, 430 (7th Cir) 1977, holds that the immunized witness who voluntarily repeats his testimony cannot use prior immunization to protect the subsequent civil revelation.

²⁸⁸ 1981-2 *Trade Cas* (C.C.H) 64, 339 (5th Cir) 1981 at 74, 300.

²⁸⁹ 142 U.S 547, 562 (1892).

²⁹⁰ 378 U.S 1 (1964).

States,²⁹¹ which affords an absolute protection to the individual's private papers. The *Boyd* decision, basing its judgement on both the fourth and fifth amendments, establishes a solid sphere of privacy around the individual. *Boyd's* privacy interest privilege is founded on the idea that a witness's oral and written thoughts are an extension of the innermost personality core of the individual and creates a sanctum which the state cannot infringe.

Although *Boyd* has been cited as one of the greatest constitutional decisions of the Supreme Court,²⁹² *Hale v Henkel*²⁹³ begins a deliberate policy of limiting the scope and nature of the *Boyd* protection. *Hale* distinguishes between the natural and juristic corporate nature of private papers. Corporate and other organizational documents cannot be defined as private papers and fall outside the protective sphere of the fifth amendment. Furthermore, a corporate officer is not protected by the fifth amendment against the compulsory production of corporate papers even if the documents are personally incriminating (*Wilson v United States*).²⁹⁴ The corporate entity doctrine developed in *United States v White*,²⁹⁵ *Wilson v United States* and *Bellis v United States*,²⁹⁶ denies the fifth amendment not only to corporations, but also to other juristic entities including non-profit organizations, charities, churches, political parties, social clubs, etc. The next significant erosion of the scope of the fifth amendment begins with the required records doctrine first mooted in *Shapiro v United States*.²⁹⁷ The privilege is denied to the witness's private papers where such papers are required in terms of governmental regulatory statutes. The aim of these regulatory statutes is to provide the government with essential information necessary for the running of a modern and efficient state. The state interest in compelling such records, takes precedent over the individual's constitutional right.

Couch v United States,²⁹⁸ and *Andresen v Maryland*,²⁹⁹ illustrate the personal nature of the privilege. A witness must personally claim the privilege and cannot do so on behalf of an agent or a third party. Private papers may well be stripped of their fifth amendment protection when not in the actual possession of the witness/owner. The fifth amendment remains a protection only against a state compulsion of oral testimonial communications and

²⁹¹ 116 U.S 616 (1886).

²⁹² In *Schmerber v California* 384 U.S 757, 776 (1966).

²⁹³ 201 U.S 43, 69-70 (1906).

²⁹⁴ 221 U.S 361, 384 (1911).

²⁹⁵ 322 U.S 694 (1944).

²⁹⁶ 417 U.S 85 (1974).

²⁹⁷ 335 U.S 1 (1948).

²⁹⁸ 409 U.S 322 (1973).

²⁹⁹ 427 U.S 463 (1976).

personal written papers. In *Holt v United States*³⁰⁰ and *Schmerber v California*,³⁰¹ the Supreme Court reinforces the idea of a mind-body duality and the functional distinction between non-testimonial passive forms of physical evidence (to which the privilege does not attach) and testimonial communicative evidence (to which the privilege does attach). In *California v Byers*,³⁰² the Supreme Court for the first time expressly applies a balance of interest test measuring the public-state interest against the private-individual constitutional protection. In theory the Supreme Court pays lip service to the idea of an absolute fifth amendment right, while in practice it tacitly applies a balance of interest test. An authoritarian and absolute right to silence is rigidly described in *New Jersey v Portash*,³⁰³ but *Byers* begins the process of hedging and ameliorating the absolute nature of the fifth amendment. At present, the position is as follows; A regulatory statute (in the public interest) which demands the compulsion of incriminatory information from a witness does not violate the fifth amendment where the statute is a civil regulatory scheme designed to promote a civil process and not to facilitate a criminal conviction. A compulsory regulatory system directed only at enhancing the state's criminal investigatory powers is a direct infringement of the fifth amendment (*Albertson v Subversive Activities Control Board*).³⁰⁴

The decision in *United States v Fisher*³⁰⁵ is a radical reappraisal of fifth amendment methodology and the witness privilege. In respect to written self-incriminatory documents it is a shift from a privacy standard (and thus a tacit but not express rejection of the *Boyd* doctrine) to a compelled act of production standard. The *Fisher* doctrine is a contents-neutral principle which ignores the conventional distinction between private and public papers. The "act of production" doctrine concentrates on the testimonial or communicative nature of the state compelled act, usually a subpoena, which seeks to induce private documents from the individual. Both *Fisher* and *Doe v United States*³⁰⁶ set out a modern testimonial standard which limits the scope of the fifth amendment. A compelled "state of production" is sufficiently testimonial to trigger the fifth amendment when the witness is compelled to concede the existence, possession or authenticity of documents thereby relaying information to the state which it could not have obtained independently through its own resources. In turn, *Braswell v United States*³⁰⁷ holds that an individual acting in the capacity of a custodian of corporate documents cannot invoke the privilege and refuse the

³⁰⁰ 218 U.S 245, 252 (1910).

³⁰¹ 384 U.S 767 (1966).

³⁰² 402 U.S 424 (1971).

³⁰³ 440 U.S 450, 459 (1979).

³⁰⁴ 382 U.S 70 (1965) and *Marchetti v United States* 390 U.S 39 (1968).

³⁰⁵ 425 U.S 391 (1976).

³⁰⁶ 465 U.S 605 (1983).

³⁰⁷ 487 U.S 96 (1988).

production of the documents even if his “act of production” is personally incriminating. The act of production doctrine does not only apply to documents, but it may also apply to the production of certain human beings. In *Baltimore City Department Of Social Services v Bouknight*,³⁰⁸ the Supreme Court in a rather artificial judgement, extends the required records and the act of production doctrines to the production of a minor child by the custodial parent. The regulatory power of the state over officially appointed custodians of children in need of care renders the compelled act of producing such children no more privileged than the production of public records or documents. Where the witness/custodian assumes control over items/children within the legislative scope of the state’s non-criminal regulatory powers, the ability of the witness/custodian to invoke the privilege is greatly diminished.

Traditionally different kinds of informal common law and formal statutory immunities have developed as a constitutional substitute in the circumstance where the witness privilege is forcibly taken away. Early immunity grants in *Brown v Walker*,³⁰⁹ reaffirmed some sixty years later in *Ullmann v United States*,³¹⁰ were always interpreted in the broad expansive terms of a transactional immunity. The first indication that a transactional immunity was wastefully expansive and broader than the fifth amendment itself, because the privilege protects only against compelled testimony while transactional immunity prohibits prosecution altogether, comes in *Murphy v Waterfront Commission*.³¹¹ In *Kastigar v United States*,³¹² the Supreme Court abandons a broad based transactional immunity in favour of a narrowly defined use and derivative immunity. Transactional immunity previously considered the bare minimum, is now replaced by an immunity whose scope must be co-extensive with the scope of the fifth amendment. The ambit of the fifth amendment or its substitute derivative immunity is limited to the domestic jurisdiction. A grant of immunity protects the witness from domestic prosecution only. No domestic court has the legal power to bar prosecution of the witness in a foreign forum. Consequently, the fifth amendment in the domestic forum cannot be invoked even when there is a reasonable risk of a foreign criminal prosecution (*United States v Balsys*).³¹³

When analysed together these formal restrictions on the scope of the fifth amendment reflect the Supreme Court’s concern with practical reality. The Supreme Court pays mere lip service to the ideal of the fifth amendment as a fundamental right entrenched within a

³⁰⁸ 493 U.S 96 (1988).

³⁰⁹ 161 U.S 591 (1896).

³¹⁰ 350 U.S 422 (1955).

³¹¹ 378 U.S 52 (1963).

³¹² 406 U.S 441 (1972).

³¹³ 524 U.S 666 (1998).

supreme constitution. Most of its decisions reflect a pragmatic understanding of the real nature of the witness privilege against self-incrimination. Far from being a fundamental right, the fifth amendment witness privilege may be bypassed or curtailed whenever the public or government interest demands such a limitation. Although never directly approving of a balance of interest analysis (except significantly in *Byers*), the Supreme Court has nevertheless applied a tacit balance of interests rationale in most of its seminal decisions concerning the fifth amendment. But, because of its tacit nature, the balancing is done on an *ad hoc* basis which varies from case to case. In the many instances in which the fifth amendment privilege has been limited, the state interest has always been rampantly dominant over the witness's constitutional right. The Supreme Court's pragmatism begs the question. Is the fifth amendment a fundamental right, or is it merely a convenient device shrouded in the most bombastic rhetoric, to be shrugged aside whenever practical convenience demands it? Why is the fifth amendment sometimes construed as an absolute right and at other times as a relative right? Why is the Supreme Court unable to develop a consistent, uniform umbrella of policies which justify the jurisprudential meaning of the fifth amendment? Could it be because there is no rational, logical or moral reason for the existence of a privilege against self-incrimination, especially a privilege which has been elevated to the status of an absolute constitutional right. The words of two respected commentators bear repeating,³¹⁴ "the self-incriminatory clause of the fifth amendment is an unsolved riddle of vast proportions, a Gordian knot in the middle of our Bill of Rights. From the beginning it lacked an easily identifiable rationale. Today things are no better, the clause continues to confound and confuse."

³¹⁴ Amar and Lettow "Fifth Amendment Principles : The Self-Incrimination Clause" (93) *Mich. L. Rev* (1995) 857-858.

CHAPTER 8

THE ENGLISH TRADITION

8.1 The Unwritten Constitution

Unlike the United States where silence is constitutionally entrenched, English jurisprudence has no single foundation for the silence principle and depends on common law, judicial precedent and statute for its various definitions. These sources, often contradictory, make up a bundle of rules and guidelines which English jurisprudence categorises as the "right" to silence including its corollary the "privilege" against self-incrimination. Lord Mustill in *Smith v Director of the Serious Fraud Squad*,¹ gives the following seminal explanation, "[the right to silence] raises strong but unfocused feelings. In truth it does not denote any single right but rather refers to a disparate group of immunities which differ in nature, origin, incidence and importance". In American jurisprudence the silence principle is an absolute constitutional entrenchment. Quite a different legal environment prevails in England which is presently engaged in a fundamental reappraisal of the silence principle.² Fundamental reform is possible because the English silence principle is ambiguous, its meaning and scope is uncertain and it has always been subject to inherent limitation which would be unacceptable to American jurisprudence. English silence is sometimes defined as a fundamental right rooted in tradition and at other times as a mere procedural or evidentiary device susceptible to substantial erosion.³ The ambiguity surrounding the English silence principle is due to a number of unique institutional influences. First, the silence principle is a relatively modern manifestation. The modern definition and scope of the silence principle has little or no connection to the definition and purpose of its historical ancestor. It does not possess, as Lord Devlin would put it, "the hoary antiquity and unbreakable crust of tradition which bedevils the British criminal justice system". Despite attempts by human rights proponents of the silence principle to disguise it as a fundamental tenet of medieval and renaissance

¹ (1992) 3 ALL E.R 456, at 463-64.

² See Zander "You Have No Right To Remain Silent : Abolition Of The Privilege Against Self-Incrimination In England" (40) *Saint-Louis Un. L. J.* (1996), 659; Dennis "Instrumental Protection, Human Right Or Functional Necessity? Reassessing The Privilege Against Self-Incrimination" (54) *Cambridge L.J* (1995) 342; Berger "Of Policy, Politics, And Parliament : The Legislative Rewriting Of The British Right To Silence" (22) *Am. J. Crim. Law* (1995) 391. Dixon "Common Sense, Legal Advice And The Right Of Silence" *Public Law* (1991) 233. Williams "The Right Of Silence And The Mental Element" *Crim. L. Rev* (1988) 97.

³ See also May *Criminal Evidence* Sweet and Maxwell (1999), Uglow *Evidence* Sweet and Maxwell London (1997); Easton *The Case For The Right To Silence* Aldershot Avesbury 2nd ed (1996); Tapper *Cross and Tapper On Evidence* Butterworth 8th ed (1995); Morgan and Stephenson *Introduction, The Right To Silence In Criminal Investigations, Suspicion And Silence* Blackstone Press (1994); Zuckerman *The Principles Of Criminal Evidence* Clarendon Press (1989).

common law, it has but shallow attachments to the common law. It gained its modern format with the passing of the Criminal Evidence Act of 1898. Before 1898 the accused was neither a competent nor a compellable witness in his own defence. Second, the British legal establishment has always been heavily influenced by a utilitarian philosophy. English reform of criminal evidentiary law has always been predicated on the essential Benthamite requirement that rectitude in the judicial trial may only be achieved through a flexible system of guidelines and rules which do not inhibit the search for legal truth. Rectitude or accuracy of outcome should only be diminished in exceptional circumstances and a process of reform should be hesitant in protecting values such as the silence principle which fall outside the parameters of relevant proof.⁴ The silence principle has always been regarded with suspicion ever since Bentham's famous attack on it as a misguided concession to the guilty, "If all criminals of every class had assembled and framed a system after their own wishes, is not this rule the very first they would have established for their security? Innocence never takes advantage of it. Innocence claims the right of speaking as guilt invokes the privilege of silence".⁵ In the words of the prominent jurist Glanville Williams, "the so-called right of silence ... is contrary to common sense. It runs counter to our realization of how we ourselves would behave if we were faced with a criminal charge".⁶ Prevailing opinion within the English legal fraternity holds that the silence principle should be negotiable because it is only one amongst a number of other possible and more effective protective devices. Many of these other protective devices do not carry the heavy costs associated with the silence principle. The cost in losing reliable evidence of guilt⁷ and the difficulty of proving commercial fraud may legitimately permit the removal of the silence principle. The passage of the Criminal Justice and Public Order Act 1994, despite fierce criticism, is a manifest symbol of the prevailing Benthamite atmosphere and the heavy emphasis placed on crime control techniques within the English legal environment.

⁴ Twining *Bentham And Wigmore : Theories Of Evidence* London (1985). See also *supra* chapter 3 p.96-102.

⁵ This passage is commonly attributable to Bentham, but may also be from an English translation of Dumont's *Traité Des Preuves Judiciaires* Paris (1823).

⁶ Williams "The Tactics Of Silence" (137) N.L.J. (1987) 1107.

⁷ See *A.T and T.Istel v Tully* (1993) A.C 45 at 53 (per Lord Templeman), and sec 2(8) of the Criminal Justice Act 1987.

Third, until fairly recently, the English judge has had to work within the loosely defined and sometimes contrary common law when interpreting basic civil rights. The English judge does not, unlike his American cousin, have the luxury of a written constitution. For this reason the English process has always been to give immediate relief to specific individual grievances on an *ad hoc* basis, whereas the American judge has had the benefit of building a broad and consistent framework of consensus around formally entrenched rights. In the past there has never been a comprehensive English constitutional code on which the courts could rely in order to protect basic individual civil liberties. The civil rights of the English citizen has traditionally been derived from the historical and almost deified concept of an unwritten constitution. In such an unwritten constitution the rights of the citizen are residual and there are no guarantees or absolutes. What civil safeguards exist are to be found in the mechanism of a Westminster type system of government in which parliament, as the representative of the people, is a supreme governor and protector of civil liberties, and to which the common law definition of civil rights is subordinate. English constitutional law embodies a number of disparate statutes, born during periods of social upheaval but without any consistency of purpose. The history and development of English constitutional law is the infrequent production of unconnected statutes such as Magna Carta (1215), the Petition of Rights (1629), the Bill of Rights (1689 and promptly forgotten), the Act of Settlement (1701) and the European Communities Act of 1972. English law gives the impression that the unwritten constitution of the common law only peripherally protects basic human rights.⁸ It is within this context that the criticism and limitation of the silence principle must be viewed. Fourth, the introduction in August 2000 of a British Human Rights Act (1998) which incorporates the European Convention on Human Rights into domestic English law, will have a substantial impact on the rules of evidence and criminal procedure. The utilitarian substructure of current statutory enactments is likely to be eroded. A universally popular Human Rights philosophy will gradually supercede the present utilitarian doctrine. The three main justifications usually advanced in support of the silence principle, the presumption of innocence and the burden of proof, the right to privacy and the right to a fair trial are now domestically incorporated fundamental human rights and are likely to influence future attempts to limit silence. The Convention on Human Rights does not define the silence principle in absolute terms, but it does regard it as one that lies at the heart of a fair trial. Due caution will now have to be exercised by English courts in limiting the accused's right to silence and in the drawing of unnecessary adverse inferences. Once the silence principle is elevated above its present utilitarian and instrumental function, it gains an immense legal

⁸ Despite the unwritten nature of English constitutional law, some foreign cases do sometimes refer to the English experience. *Miranda v Arizona*, per Warren C J refers to John Lilburne and his struggle for civil liberty.

force. It begins to influence a wide range of other criminal procedural rules and there are very few circumstances in which it can be overridden by legislation or judicial decision.

In the common law tradition the silence principle has benefited the suspect by providing him with the ability to withstand coercive interrogation at the pre-trial stage and it has protected the accused against the rigours of prosecutorial comment and cross-examination at trial. The English common law identifies six immunities which protect the defendant within the criminal justice system. These immunities are⁹ :

- a) A general immunity, possessed by both natural and juristic persons, from being compelled on pain of punishment to answer questions posed by other persons or bodies.
- b) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions, the answers to which may incriminate them.
- c) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.
- d) A specific immunity, possessed by criminal defendants undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.
- e) A specific immunity, possessed by persons who are charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.
- f) A specific immunity, possessed by criminal defendants undergoing trial from having adverse inferences made on any failure (i) to answer questions before trial, or (ii) to give evidence at trial.

The modern common law silence principle is a substantially reworked combination of the specific immunity against answering questions during the investigatory interview (*immunity (c)*) and the specific immunity against giving evidence, testifying or answering questions at trial (*immunity (d)*). Interlinked to these two specific immunities is the immunity against the drawing of adverse inferences (*immunity (f)*). The silence principle as embodied by *immunity*

⁹ *Smith v Director Of The Serious Fraud Squad*, *ibid* note 1.

(c) and *immunity (d)* may be historically justified¹⁰ and has been traditionally underpinned by the need to protect the individual from “oppressive state inspired methods of obtaining evidence”¹¹ and to protect the truth-finding process from “the unreliability of a coerced confession”.¹² *Immunity (f)* is a recent twentieth century development¹³ which has no underpinning historical rationale to justify it. In order to justify an immunity from adverse inferences, the silence principle has had to be elevated from a mere protective procedural and evidentiary rule into a broad procedural right. At the beginning of the twentieth century the silence principle consisted of a bare procedural rule against the answering of questions and the giving of evidence. Adverse inferences could logically and were properly drawn from this procedural rule.¹⁴ However, once the silence principle is elevated to the rank of a constitutional right, it becomes morally improper to draw adverse inferences. To draw an adverse inference would infringe and diminish the value of a human right. *The modern common law silence principle consists of a right to silence of which the prohibition against the drawing of an adverse inference is an incidental but essential component.*¹⁵ The present debate in English jurisprudence centers around the question of whether or not to abolish or to limit the state prosecutorial ability to draw adverse inferences from the suspect’s/accused’s invocation of silence.

Once silence has been invoked by the suspect or the accused, it has the following evidentiary consequences.¹⁶ First, silence may constitute an implied admission. In *R v Christie*,¹⁷ a denial of an allegation made to the face of the accused in certain circumstances is capable of being interpreted as an implied acceptance of the allegation. Adverse inferences may also be drawn where the suspect exhibits a guilty reaction either as an act of violence or an act of flight. In theory he remains silent but his action may constitute a silent confession. Second, silence in the face of a direct accusation may be treated as direct evidence of guilt predicated on the common sense notion that an innocent person would

¹⁰ *Supra* chapter 2.

¹¹ This rationale no longer justifies immunity (d) as the courts will never condone the use of oppressively obtained evidence. Nevertheless, the immunity and rationale is preserved in Sec 1 of the Criminal Evidence Act, 1898.

¹² *Pyneboard (Pty) Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335 and *Environmental Protection Authority v Caltex Refinery Co (Pty) Ltd* (1973) 178 CLR, 427, 508 and 544. *Istel Ltd v Tully* at 45, per Templeman at 53, *ibid* note 7.

¹³ See *supra* chapter 2.

¹⁴ It is illogical to waive an immunity from compulsion but it is sensible to speak of waiving a right to silence.

¹⁵ *Hall v R (the Queen)* (1971) 1 WLR 298 at 301.

¹⁶ Heydon “Silence As Evidence” (1) *Monash L. Rev* (1974) 53, 55.

¹⁷ (1914), A.C. 545, subject to the limitation that post-caution silence can never amount to an implied admission. See also *Hall v R* (1971) 1 WLR 298, but see the contradiction in *R v Chandler* (1976) 1 WLR 585. The common law position appears to have been adopted unaltered by the Criminal Justice and Public Order Act 1994. See also *R v Norton* (1910) 2 KB 496..

speak up and rebut the accusation. His failure to do so adversely infers a consciousness of guilt. This consequence is distinct from an implied admission because it does not amount to an agreement but rather to an unintended display of consciousness of the correctness of the case against him.¹⁸ This consequence is also sometimes referred to as the extended force theory. Third, silence may be used to evaluate other extraneous evidence. Silence may be taken into account to determine whether to accept extraneous evidence or to draw appropriate inferences from an already established *prima facie* case. This consequence is also sometimes referred to as the limited force theory. In some circumstances the accused's silence or failure to mention a relevant fact (particularly an alibi-defence) during the initial police interview and the unexpected subsequent introduction of such a fact during trial may be taken as an adverse inference on the accused's credibility. These are all the common sense consequences and inferences which may but not necessarily must be drawn from silence. Furthermore, none of these consequences or inferences may be drawn unless a denial, explanation or answer is reasonably to be expected in a particular circumstance. Regard must be had to the nature of the question or accusation and the reasons for the absence of a denial or explanation.

An analysis of English case precedent will reveal : (i) none of the adverse inference consequences (1), (2) and (3)) may be drawn from pre-trial silence, except in the even term circumstance; (ii) an adverse inference from consequence (1) or (2) may not be drawn from silence at trial. But consequence (3) is proper and readily admissible at trial.

The evidentiary consequences of an invocation of silence are generally dependent upon a number of factors. Primarily, no adverse inference may be drawn once the suspect has been cautioned and his silence is conditioned by that caution. Most important is the strength of the state case against the accused. The stronger the case the more readily an adverse inference may be drawn from the accused's silence. The desirability of drawing an adverse inference from an implied admission (consequence (1)) or an inference of guilt (consequence (2)) is allowed in civil law but only exceptionally in criminal law and only when the accuser and the accused are on even terms.¹⁹ A guilty inference (consequence (2)) is also conditional on the extent to which the facts (which call for a denial, explanation or answer) are within the personal knowledge of the accused.²⁰ Do the facts reasonably call for an

¹⁸ *R v Christie* *ibid* at 554, 565-566 per Atkinson and Reading J. *R v Martinez-Tobon* (1994) 2 ALL E.R 90 at 98.

¹⁹ *R v Mitchell* (1892) 17 Cox C.C 503 at 508, *Parkes v R* (1976) 64 Cr App Rep. 25, *Hall v R* (1971) 1 WLR 298.

²⁰ *R v Voisin* (1918) 1 KB 531 at 537.

explanation if the accused is innocent?²¹ The drawing of an inference which corroborates other extraneous evidence (*consequence (3)*) is allowed without limitation in both civil and criminal cases. At trial none of the above adverse inferences may be drawn until the prosecution has established a *prima facie* case calling for a reply. At pre-trial the silence of the accused is dependent upon the reasonable opportunity given to the suspect to deny, explain or answer the interrogator's questions. The case against the suspect must have been succinctly outlined before he is expected to answer.²² Did the suspect rely on legal advice, was he afforded the opportunity to obtain legal advice and the nature of the legal advice advanced.²³

A number of inconsistencies surround the modern interpretation of the silence principle. First, while the immunity against interrogatory questioning by a person in authority (*immunity (c)*) is logically defensible, there appears to be no modern justification for maintaining an immunity against the answering of questions or the giving of evidence at trial (*immunity (d)*). Second, there is no historical reason (see chapter 2), no moral or logical reason (see chapter 3) for the elevation of a bare procedural immunity rule into a fundamental human right. There is also no independent historical or logical reason for an immunity against the drawing of reasonable adverse inferences (*immunity (f)*). Third, both *immunity (c)* and *(d)* are based on the protection they offer against state inspired compulsion, inducement and coercion. Yet the drawing of an adverse inference (*immunity (f)*) from an invocation of silence does not logically amount to a compulsion and cannot be sustained on that basis alone. Nevertheless, English case law often prohibits the drawing of adverse inferences even in the absence of a compulsion, without suggesting alternative grounds for the prohibition. Fourth, the argument has been advanced that no reasonable adverse inferences may be drawn until the prosecution has established a case capable of supporting an inference of guilt.²⁴ However, if the prosecution's case is incapable of supporting an inference of guilt, it is unlikely to proceed to the stage where the accused is called upon to answer. In such a situation no adverse inference can be drawn. Conversely if the prosecution's case is capable of supporting an inference of guilt, then the additional adverse inference from silence simply becomes superfluous. Fifth, case precedent reveals an absolute prohibition against the admission of evidence based on pre-trial silence, whereas

²¹ There are a significant number of innocent explanations, ignorance, confusion, hostility to police, etc., but these should be stated by the accused if he wishes to rebut an adverse inference.

²² A minimum of procedural fairness must be allowed for. The extent and nature of pre-trial procedural fairness is a significant factor in determining a reasonable adverse inference, but its absence must not always preclude the drawing of an adverse inference.

²³ The basis of the legal advice received is important. The mere fact that it is not in the accused's interest to answer questions is not sufficient to prevent the drawing of adverse inferences.

²⁴ *Murray v D.P.P.* (1994) 1 WLR 1 at 11.

adverse inferences from silence at trial are readily admissible (except when based on guilt or a consciousness of guilt). Sixth, an artificial distinction has been created between ordinary or mere silence, the silence induced by some kinds of questions, and credibility, conduct or demeanour as a result of silence. Seventh, there is also an artificial distinction between silence which calls for an answer, explanation or denial and silence when in the possession of stolen goods.²⁵ Finally, no reasonable explanation has been advanced on how to prevent the ordinary layperson juror from consciously or subconsciously drawing an adverse inference from the accused's failure to testify.

Apart from the common law, the English silence principle is indirectly described in the judges' rules (now superceded)²⁶ and the police code of conduct (the caution – revised in 1995 and 1998). The common law rule has also been extensively codified by a number of recent statutes. Amongst these are the Police and Criminal Evidence Act 1984 (amended 1991) (PACE), the Criminal Justice Act 1987 (amended 1991), the Criminal Justice and Public Order Act 1994 (CRIMPO) and the Criminal Procedure and Investigations Act 1996. The Youth Justice and Criminal Evidence Act 1999 proposes to prohibit inferences from silence where a suspect has been denied a reasonable opportunity to obtain legal advice. The cumulative effect of these statutes is to accelerate the trend towards formal limitation of the right to silence. As mentioned previously, English reform is conceived of in terms of utilitarian principles or on the notion that the silence principle may be supplemented or supplanted by any number of equally cost-effective alternative protective mechanisms. The Criminal Justice and Public Order Act 1994 is based on the pure utilitarian view that silence is simply an instrumental protection which, in certain defined circumstances, is an unwarranted obstruction to the efficient investigation and prosecution of crime.²⁷ Similarly, the Criminal Procedure and Investigation Act 1996 provides a comprehensive statutory scheme for the disclosure of relevant evidence by both the prosecution and the defence. The Criminal Justice Act 1987 supplements silence with other alternative protection mechanisms which are more cost efficient than the silence principle.²⁸ These supplementary mechanisms are particularly effective in the context of highly complicated and technical crimes such as commercial fraud, corruption, and the recovery of company assets. Ultimately, the statutory definitions of the silence principle will have to be judged against the

²⁵ *R v Raviraj* (1987) 55 Cr App Rep 93 at 103.

²⁶ In particular rule 3, 5 and rule 8.

²⁷ *A. T and T. Istel v Tully* (1993) AC 45 at 51-53 (per Lord Templeman).

²⁸ *R v Alladice* (1988) 87 Cr. App. Rep. 380 at 385 (per Lord Lane).

principles inherent in the European Convention on Human Rights.

8.2 The Caution, The Code and PACE

English jurisprudence, as a result of the unwritten nature of its civil liberties code (and unlike the constitutionally derived *Miranda*-type safeguards of American jurisprudence) has taken a somewhat disjointed approach to the administration of its police service and the protection of the suspect within the pre-trial investigatory process. For most of the twentieth century, the Judges Rules (first formulated in 1912, revised in 1930, 1957 and 1964) were the only set of reference guidelines applicable to police during the investigatory procedure.²⁹ The Judges Rules were administrative in nature, without legal force, intended to separate voluntary from involuntary statements³⁰ and designed as a protection for the suspect against the use of inducements by the police investigator. The rules provided for the administration of a caution on arrest, required a warning to the arrestee that he need not say anything and advised him of his right to silence. The caution did not create the right to silence but merely reminded the arrestee of the right.³¹ These guidelines were difficult to implement and were often ignored by the police. A violation of the rules did not automatically make a subsequent statement inadmissible as evidence.³² The arbitrary application of the Judges Rules resulted in pressure for structural reform of the pre-trial procedure. One of the key issues addressed was the importance, place and scope of the silence principle within the criminal justice system. The nature of the silence principle is somewhat equivocal because it exists in an uneasy symbiotic relationship with other often mutually exclusive interests. On the one hand a strong right to silence, while protecting the individual, is sometimes an obstacle to efficient policing. The stronger the right, the least willing the suspect will be to submit himself to police interrogation. On the other hand, the interests of society requires an effective administration of justice which necessitates a weakening of the suspect's procedural rights. The focus of English reform has always been on how to maintain a reasonable balance between these conflicting interests. One of the results of the reform process was the

²⁹ The rules are judicial guidelines issued to the police by the Home Office in terms of Circular no. 31/1964 (revised).

³⁰ The common law definition of a voluntary confession as stated in *Ibrahim v R* (1914) A.C 599 is incorporated into the rules as, "a voluntary statement ... has not been obtained by fear of prejudice or hope of advantage held out by a person in authority or by oppression". See also *D.P.P. v Ping Ling* (1976) A.C 574.

³¹ *R v Hall* (1977) 1 ALL ER 322, 324.

³² *R v Prager* (1971) 56 Cr. App. Rep. 151, 160, "if the judges rules were applied strictly, they would have the effect of rendering inadmissible all statements made by the accused after his arrest, unless voluntarily given without pressure. Guilty men do not usually do this, left to themselves, they prefer silence". See Gudjonsson *The Psychology Of Interrogations, Confessions And Testimony* (1992) 323.

introduction of the Police And Criminal Evidence Act 1984 (hereinafter referred to as PACE).³³

PACE is simply an acknowledgement that on a practical level the right to silence by itself does not provide an adequate protection for the suspect during the police interview. In reality, silence presents the interrogator with the challenge of breaking down the suspect's initial reluctance to co-operate. In the majority of cases, the police do succeed in coercing statements from the suspect. PACE provides supplementary protection by mandating the presence of a solicitor during interrogation. PACE has sharpened the debate around the silence principle. Pre-PACE police were able to brush aside the suspect's right to silence. Post-PACE it is more difficult to do so when the suspect has a solicitor by his side. PACE has added a new dimension to the question of procedural fairness. This aspect of a fair trial procedure has been further enhanced by the Human Rights Act (1998) which now makes fairness at trial into a fundamental civil right.³⁴ In terms of sec. 66 and as an adjunct to the statute, a new Code Of Police Practice³⁵ replaces the now defunct Judges Rules. The new code does not change the substance of the Judges Rules, but it does set out more detailed procedures to be followed in the police station. The code is not law and a breach cannot technically be made the basis of either criminal or civil proceedings (sec. 67(10)). Code C, in particular, sets out a detailed rule of caution, provides for reasonable interrogation practices, reasonable interview time limits and reasonable conditions of treatment.³⁶ Code E provides for the keeping of detailed records, including the tape-recording of interviews. Sec. 67(1) empowers the court to take the codes of practice into account in assessing the admissibility of evidence. Evidence taken in breach of the Code may be excluded in terms of a judicial discretion set out in Sec. 78(1). In addition, Sec. 82(3) preserves the narrow common law judicial discretion to exclude involuntary statements, which now operates in tandem with the much wider statutory discretion.³⁷

³³ PACE is described in *R v Bailey and Smith* (1993) 97 Crim. App. Rep. 365, 375 as a rigorously controlled legislative regime.

³⁴ The connection between fairness in the police station and fairness at trial is recognised in *R v Keenan* (1989) 3 ALL ER 598, 609 and in *R v Delaney* (1989) 88 Cr. App. Rep. 338, 341-42. See also Zuckerman "Procedural Fairness During Police Interrogations And The Right To Silence" *J. Crim. L.* (1990) 499.

³⁵ The code deals with (a) the exercise of police powers of search, (b) the seizure of property, (c) detention, treatment and questioning of suspects, (d) identification of individuals, (e) tape-recording of interviews.

³⁶ PACE recognises that juveniles and the mentally handicapped are especially vulnerable to coercive police tactics, and therefore makes provision for an appropriate social worker to be present during the interview.

³⁷ The common law discretion is cogently described in *R v Sang* (1980) A.C 402.

Historically, the common law voluntariness rule governing confessions and admissions has always been regarded as one of the most important bulwarks of the right to silence. The last quarter of the twentieth century has seen significant changes to the law of confession. The United States (*Miranda* safeguards),³⁸ England (PACE) and Australia (Evidence Acts (1995) Cth and NSW) have discarded the old common law voluntariness standard and replaced it with new rules of admissibility based on the conduct of the enforcing authority.³⁹ The requirement that the suspect's admission be voluntary, in the sense that it is a conscious and free choice, no longer finds a place in the new English and Australian confessional regimes. Instead, new rules are created based on the exclusion of admissions obtained by oppressive, inhuman, degrading or unreliable conduct on the part of the investigating authority. One of the more important developments is that in terms of PACE, it makes no difference whether the confession is true or not. Sec. 76(2) states [in parentheses] that a confession procured by prohibited means is always inadmissible, "notwithstanding that it may be true". Even if the suspect admits in a later police interview that the earlier coerced confession was true, the first confession remains inadmissible. The new confessional regime is focused on the methods used to obtain the admission (a legitimacy issue) and not on the truth of the admission. In terms of PACE, the question of truth is an issue of weight to be determined by the jury. In essence, the message which the PACE statutory scheme conveys is that police should not abuse their powers to oppress a suspect into making a confession, nor adopt questioning techniques which result in unreliable confessions. PACE is intended to defend the legitimacy of the criminal court judgement. The "oppression rule" (Sec. 76(2)(a)) is intended to safeguard the moral authority of the court's verdict and the "reliability rule" (Sec. 76(2)(b)) is intended to promote the factual accuracy of the court's verdict. While rejecting the old voluntariness standard, both the English and Australian regulatory regimes expressly preserve the common law judicial discretion which may be used to exclude evidence of improper confessions.⁴⁰ The judge is empowered to exclude a confession if it is unfair to the accused, improperly or illegally obtained, unless the desirability of admitting the confession outweighs its undesirability (Sec. 82(3) PACE and Sec. 90 Evidence Act 1995 Cth).

Sec. 76(2)(a) "oppression" : The common law meaning of oppression has not survived the enactment of PACE.⁴¹ PACE gives the term "oppression" a new statutory definition which

³⁸ See *supra* chapter 5 p.163-193.

³⁹ South Africa has persisted with the common law voluntariness standard which is codified in Sec. 217(1) of the C.P.A.

⁴⁰ See *R v Voisin* (1918) 1 KB 531; *Wong Kam-ming v R* (1980) AC 247, 261; *R v Hudson* (1980) 72 Cr. App. Rep. 163, 170.

⁴¹ *R v Prager* *ibid* 32, "Oppressive questioning which by its nature, duration excites hopes and fears, or so affects the mind of the suspect that his will crumbles and he speaks when otherwise he would

includes the use of violence, inhuman or degrading treatment. The authoritative definition of oppression is given in *R v Fulling*⁴² as the "exercise of authority in a burdensome, harsh, wrongful manner, involving cruel treatment or the imposition of unjust or unreasonable burdens". The oppressive conduct must go above and beyond the standard generally inherent within police custody and must amount to a significant harshness and intimidation.⁴³ In assessing oppression, the court must take into account police impropriety in the wrongful exercise of their authority.⁴⁴ Police impropriety is defined as the deliberate and frequent infringement of both PACE and the associated police practice codes.⁴⁵ Oppression is also assessed by weighing the physical and other transient circumstances in which the interrogation is conducted.⁴⁶ The suspect's physical characteristics, youth, age, intellect, criminal inexperience may be potentially aggravating factors.⁴⁷ Sec. 76 oppression also contains the usual definition of torture and the infliction of severe physical or mental pain.⁴⁸ Nevertheless, the new statutory definition of oppression is a fairly narrow one, and any broader inquiry into police conduct during the interrogation must be undertaken in terms of Sec. 76(2)(b). Lord Lane stated in *R v Fulling* that paragraph (b) now covers some of the ground which was formerly covered by the much wider definition of oppression at common law.

Sec. 76(2)(b) "unreliability" : The state prosecution must prove that the confession was not obtained as a result of anything "said" or "done" by the police during the interrogation which is likely to render a confession unreliable. The new rule dispenses with the old common law principle that the source of the unreliability must be either a threat or an inducement (note the difference with the American *Miranda* standard which depends on the element of state

have remained silent. See also McDermott, "The Interrogation Of Suspects In Custody" (21) *Current Legal Problems* (1968) 1, 10.

⁴² (1987) 2 ALL ER 65 and QB 427. The artificially wide interpretation of the common law definition in *Prager* is specifically rejected.

⁴³ *R v Emmerson* (1990) 92 Cr. App. Rep. 284, "an interview of 25 minutes involving raised voices and bad language could not be construed as oppressive". In comparison, in *R v Paris, Abdullahi and Miller* (1992) 97 Cr. App. Rep. 99, "the interviewing officers adopted menacing, hostile and intimidating techniques". *R v Beales* (1991) Crim. L. Rev. 492, "the police officer bullied the suspect and then fabricated his statement".

⁴⁴ *R v Parker* (1995) Crim. L. Rev. 233, "wrongfulness must be interpreted by taking into account the words 'burdensome', 'harsh', 'unjust' and 'cruel'".

⁴⁵ *R v Heron* (1992) Crim. L. Rev. 104, Mitchell J, excluded a confession because the initial and repetitive questioning of the suspect was designed to break his resolve.

⁴⁶ *R v L* (1994) Crim. L. Rev. 839, the manner and content of the questioning was so oppressive as to brainwash the suspect.

⁴⁷ *R v Seelig and Spens* (1992) 1 WLR 148, "a mature professional criminal (as opposed to an inexperienced first timer) must expect vigorous, long, repeated questioning without the interview becoming oppressive".

⁴⁸ The specific crime of torture is defined in Sec. 134 Criminal Justice Act (1988). See also Art. 3 European Convention on Human Rights and *Denmark v Greece* (1969) 12 Yearbook E. Conv. H.R

compulsion or coercion). The judge must place himself in the position of a fly on the wall. He must observe the progress of the interview and determine whether the suspect's confession is likely to be unreliable as a result of something "said" or "done" by the police interrogator. According to *R v Crompton*,⁴⁹ the interrogator's "words" or "acts" should have the tendency, at the time the confession was voiced, to lead to an unreliable confession.⁵⁰ Sec 76 and the police codes are infringed not only by clear acts of commission, but also by police acts of omission.⁵¹ Unlike the statutory definition of oppression in paragraph (a), police impropriety plays a very limited role in the analysis of paragraph (b) unreliability.⁵² A confession may still be excluded in terms of paragraph (b), even when there is no evidence of impropriety. While deliberate impropriety is a key element of oppression, it does not necessarily invalidate a confession in terms of paragraph (b). This follows from the purpose of paragraph (b) which is designed to promote the factual accuracy of the court's verdict. A confession may still be rendered unreliable, even in the face of police good faith. The determination of unreliability is dependent on the accuracy of the interview record.⁵³ Code C and E of the practice manual are carefully designed to ensure the reliability of the interview proceeding. Unreliability usually occurs when the police interrogator intentionally or negligently makes no contemporaneous record of the interview. A failure to rectify the omission at the earliest practical opportunity or a refusal to give the suspect access to the interview record are also possible indications of unreliability. In *R v Canale*⁵⁴ it was stated, "the importance of rules relating to contemporaneous noting of interviews can scarcely be over-emphasised. The object is twofold, it ensures that the suspect's remarks are accurately recorded and allows him the opportunity of checking his answers. Likewise, it is a protection for the police against suggestions of improper approaches or promises".

Causation : Both paragraph (a) and (b) of Sec. 76 require evidence of causation. A confession is either "obtained", "caused" by oppression or it is made in "consequence" or as a "result of" a thing said or done. The exclusion of a confession therefore depends on the establishment of a causal nexus between the police act of infringement and the making of

186, *Rep. Of Ireland v U.K* (1978) 2 EHRR 25, "torture includes intense and cruel forms of inhuman or degrading treatment".

⁴⁹ (1990) 92 Cr. App. Rep. 369, "in principle not only the police but any third party words or acts fall within the provision.

⁵⁰ In *R v Trussler* (1988) Crim. L. Rev. 446, a drug addict's statement induced after long periods of questioning without adequate rest periods or medication was held to be unreliable.

⁵¹ *R v Delaney* (1988) 88 Cr. App. Rep. 388; *R v Joseph* (1993) Crim. L. Rev. 206 suggest that an act of omission in complying with code C provisions is a significant factor.

⁵² *D.P.P. v Blake* (1988) 89 Cr. App. Rep. 179, the practice codes are imported but not conclusive, other facts and matters may be taken into account.

⁵³ *R v Delaney* *ibid* note 51, at 341, "by failing to make a contemporaneous note ... the officers deprived the court of what is the most cogent evidence as to what happened during these interviews".

⁵⁴ (1989) 91 Cr. App. R 1, 5.

the confession. *R v Rennie*,⁵⁵ per Lord Lane C.J, defines the general test of causation as a simple application of common sense and not a refined pseudo-scientific exposition. Causation is a question of fact to be approached in a no-nonsense fashion.

Sec. 60(1)(b) "tape-recordings" : One of the major advantages of PACE is the procedure which mandates the tape-recording of all police interviews. The possibility of including video-taping has also been mooted. Sec. 60 and the complementing Code E rule provides the court with a reliable means of analysing statements recorded during the police interrogation. Incriminating statements made during unrecorded interviews are suspicious but not automatically excluded. Untaped admissions may still be admissible if made spontaneously.⁵⁶ Generally, untaped admissions are not admissible unless reduced to writing at the earliest opportunity and verified by the suspect.⁵⁷ The statutory requirement may be waived altogether in a number of exceptional circumstances. In terms of the Prevention Of Terrorism Act and the Official Secrets Act, tape-recordings of interviews are specifically excluded. Unrecorded admissions are also excusable when made as a result of unavoidable equipment failure and interview room unavailability. The court must also assess the flaws inherent in the tape-recording of an interview. Tampering, cutting, splicing and other covert fabrications of the tape are easily possible.

Sec. 78(1) "judicial discretion". The court may exclude evidence which has an adverse effect on the "fairness" of the proceeding. The statutory discretion does not supplant the common law discretion which is expressly preserved in Sec. 82(3).⁵⁸ However, the statutory discretion has a significantly wider ambit.⁵⁹ Sec. 78(1) encompasses a discretion based on "unreliability" and "unfairness" which mirrors the distinction between the paragraph (a) oppression and paragraph (b) unreliability of Sec. 76(1). It was previously noted that police impropriety plays a central role in the definition of oppression, but only a minor role in the definition of reliability. Similarly, police impropriety plays a significant role in the definition of Sec. 78(1) "fairness" but only a peripheral role in the definition of Sec. 78(1) "unreliability". To trigger the discretion it is necessary to establish a causal nexus between the admissibility of the confession and the resultant unfairness at trial. A necessary pre-condition for the exercise of the discretion is the existence of a casual relationship between the confession,

⁵⁵ (1995) 2 A.C 579, and *R v Barry* (1991) 95 Cr. App. Rep. 384.

⁵⁶ *R v Cox* (1992) 96 Crim. App. Rep. 464; *R v Weekes* (1992) 97 Cr. App. Rep. 222. See also Fenwick "Legal Advice, Videotaping And The Right To Silence" *J. Crim. Law* (1993) 385.

⁵⁷ Code C para 11.5-13. See also *R v Chung* (1990) 92 Cr. App. Rep. 314.

⁵⁸ See *R v Sang* (1980) A.C 402 and *ibid* note 40.

⁵⁹ The main problem with the common law definition of discretion was that at the time the judge was supposed to exercise the discretion, he did not necessarily know how the trial would develop and was

the improper police conduct and the consequential unfair trial.⁶⁰ The court has preferred to concentrate not on the trial proceeding itself, but on the improper police conduct during the investigatory interview proceeding. How improper police conduct adversely and unfairly effects the trial proceeding is an issue as yet imprecisely understood. Hodgson J in *R v Keenan*⁶¹ notes, "exclusionary discretion is justified where a breach [of the statute or the code] would have a serious effect on the criminal process as a whole". The question of "seriousness" is further qualified in *R v Walsh*,⁶² which holds that the breach must be *prima facie* significant and substantial, clearly indicating an infringement of the fairness standard.⁶³ A breach does not automatically result in an exclusion of a confession. The breach must be shown to infringe the fairness trial standard to a degree which justly demands exclusion. *R v Samuels*⁶⁴ adopts a breach of rights approach. The suspect's rights are protected in a fair trial by placing him in the position he would have been in had his rights been properly observed. Reference is also made to deliberate and bad faith infringements.⁶⁵ In evaluating fairness, the court must take into account both the interests of the state and the defence. A trial proceeding can only be fair when both adversarial parties have equal access to evidence. Unfairness results when the one side is allowed to adduce evidence which the other side cannot properly challenge. A deliberate breach of police procedure or abuse of the practice code may well result in this kind of unequal access to evidence.⁶⁶ It should also be noted that the court's judicial discretion is not an appropriate tool for disciplining or punishing the police. The courtroom is not the proper venue for police disciplinary actions and neither should Sec. 78(1) be interpreted to include a disciplinary purpose.⁶⁷ (By contrast, the U.S. Supreme Court has interpreted the *Miranda* pre-trial prophylactic rule as including a disciplinary police code of practice).

unable to assess the impact of the disputed evidence on the fairness of the trial. PACE has solved this problem.

⁶⁰ The establishment of a causal element is a necessary but by itself not a sufficient precondition for the exclusion of a confession in terms of Sec. 78(1).

⁶¹ (1989) 90 Cr. App. Rep. 1.

⁶² (1989) 91 Cr. App. Rep. 161, 163.

⁶³ The notion of "significant" and "substantial" are key concepts heavily relied upon by the seminal cases. See *R v Dunford* (1990) 91 Cr. App. Rep. 150; *R v Quinn* (1990) Crim. L. Rev. 581; *R v Oliphant* (1992) Crim. L. Rev. 40.

⁶⁴ (1988) 2 ALL ER 135.

⁶⁵ "Bad faith" or "deliberate breach" is often the central question when unfairness is analysed. See *Matto v Wolverhampton Crown Court* (1987) R.T.C. 337; *R v Alladice* (1988) 87 Cr. App. Rep. 386.

⁶⁶ When the police are allowed to refresh their memories from a defective record, the suspect is unfairly disadvantaged, having made no personal record himself, he cannot disprove the defective record. See *R v Quinn* *ibid* note 63.

⁶⁷ In terms of the Police and Magistrate's Court Act 1994, a police breach of the code is no longer automatically a disciplinary offence. See *R v Oliphant* *ibid* note 63, "the judge's job is not to educate or discipline police officers". *R v Hughes* (1994) 1 WLR 876, 879.

An all too overlooked problem is that PACE does not provide the aggrieved suspect with sufficient remedies once the police have been proved to have misused their powers. The existing complaint procedure is unsatisfactory and does not provide an adequate criminal sanction or civil compensation. The alternative common law remedies of wrongful arrest and illegal detention are time-consuming and expensive. When compensatory remedies are unsatisfactory, the rights embodied in PACE may simply become empty rhetoric.⁶⁸ Nevertheless, despite this flaw and a compulsive focus on police discipline, the PACE provisions do provide a comprehensive protective shield for the suspect exposed to the harsh disorientating environment of the police station.

The Police Practice Code : The police administered cautionary warning and the right to legal advice are statutorily defined in Sec. 58,⁶⁹ and are given a practical dimension in the police code manual. In terms of Code C (para 3.1) the arrested and detained suspect must be clearly informed of his rights,⁷⁰ given the opportunity of consulting the Code and a copy of the police custody record must be made available to him. The suspect must be informed of his right to remain silent (para 10.4) and his right to consult with a solicitor (para 6). A police infringement or abuse of the Code C and Sec. 58 procedural rights invariably triggers the unfairness element of the Sec. 78(1) discretion. Statements made by the suspect in the absence of a solicitor or on the failure to warn the suspect of his right to silence are not automatically excluded as these may be mere technical infringements. The plea for exclusion should be supported by further materiality in the form of unreliability, bad faith or substantial infringement resulting in procedural unfairness. In *R v Walsh*,⁷¹ a police cell interview had not been contemporaneously recorded nor was legal advice offered to the detainee. The detainee's statement was excluded because the breach was significant and substantial despite the good faith conduct of the police officers. However, in *R v Dunford*,⁷² a confession was admitted on the ground that the absent solicitor would not have added to the suspect's understanding of his legal rights. Absence of a solicitor was not held to be significant in *R v Chahal*,⁷³ where the suspect was a mature businessman who knew his

⁶⁸ Sanders "Rights, Remedies and PACE" *Crim. L. Rev.* (1988) 802, "the balance between police and suspect has changed since the implementation of PACE. What is required is a strengthening of punitive and compensatory remedies on behalf of the wronged suspect".

⁶⁹ The most important bundle of statutory safeguards are (a) Sec. 56, "the right to be informed of the fact of arrest", (b) Sec. 58 "the right to legal advice", (c) Sec. 59 "establishes the right to a duty solicitor".

⁷⁰ The right to legal advice (code C para 6) has also been acknowledged in the common law, *R v Chief Constable South Wales* (1994) 2 ALL ER 560.

⁷¹ *Ibid* note 62.

⁷² *Ibid* note 63.

⁷³ (1992) *Crim. L. Rev* 124.

rights and suffered no prejudice. But in *R v Franklin*,⁷⁴ a failure to provide legal advice was held to be significant where the suspect was a young unemployed man who had never been in a police station. In *R v Alladice*,⁷⁵ the suspect was accustomed to police interviews and the court felt that a solicitor's presence would not have made a substantial difference. In *R v Samuels*,⁷⁶ although the initial police refusal of access to a solicitor was acceptable, the refusal could not be justified after charging the suspect, as legal advice is a fundamental right. In *R v Oliphant*,⁷⁷ Woolf J said, "It is clear that the failure of the defendant to receive legal advice [...] amounts to a serious inroad on his rights". Where the suspect's rights are flouted materially, deliberately or in bad faith, the significant and substantial test is easily met.

Police interrogatory techniques are sometimes based on trickery in order to discourage the suspect from seeking legal advice.⁷⁸ In *R v Beycan*,⁷⁹ the court rejected an attempt by the police to sidestep its duty to notify the suspect of his right to legal advice. The police obliquely asked the suspect, "are you happy to be interviewed in the normal way we conduct interviews, without a solicitor, friend or representative?". Unethical police behaviour does not always lead to exclusion. In *R v Fulling*,⁸⁰ the police informed the suspect of her lover's infidelity with another woman which induced the suspect to make an incriminating statement. The statement was not excluded since it could not be defined as either oppressive in terms of Sec. 76(1)(a), nor as unreliable in terms of Sec. 76(1)(b). The deliberate undermining of the suspect's willpower in this manner did not also adversely affect the fairness of the trial proceedings as defined in Sec. 78(1). It would appear that when the police employ trickery or unethical behaviour, the court needs to balance the seriousness of the offence, the public interest, the suspect's circumstance and the nature of the police illegality. The police may refuse access to legal advice on the ground that the suspect's solicitor might warn others involved in the crime. Failure to provide legal advice may be based on oversight, negligence or lack of communication between investigating officers. All these factors need to be analysed to determine whether to exclude evidence either in terms of Sec. 76 or more commonly, in terms of Sec. 78. In real terms, however, access to a solicitor is still the

⁷⁴ (1993) Crim. L. Rev 36.

⁷⁵ *Ibid* note 65.

⁷⁶ *Ibid* note 64.

⁷⁷ *Ibid* note 63.

⁷⁸ Sec. 78 may be criticised because it punishes police trickery and police deception only after the suspect has been arrested. The definition of trickery is narrowly confined to express acts of trickery. It ignores tacit acts of trickery and excludes modern acts of covert eavesdropping, covert undercover police tactics and other modern pre-trial investigatory techniques.

⁷⁹ (1990) Crim. L. Rev 185. *R v Mason* (1987) 3 ALL ER 451, "false fingerprint information was given to both the suspect and his solicitor in an attempt to deceive the suspect into confessing. A significant breach

⁸⁰ *Ibid* note 42.

exception rather than the rule.⁸¹ The police remain hostile to the solicitor's intervention which is regarded as increasing the suspect's resistance to questioning and reducing the police ability to control the suspect.⁸² Often the quality of advice given by the solicitor or legal representative is inferior. The police are not obliged to reveal the nature of the case against the suspect and the solicitor sometimes bases his advice on an incomplete understanding of the issues.

The police room interview forms only a part of the investigatory process. Suspects are often questioned prior to arrest at the crime scene or at home. The initial Code C and E rules were held to apply only to the limited circumstance of the interview room. The police were under a strong temptation to coerce incriminating statements prior to the formal interview and untaped and unwritten exchanges outside the police station were fairly common.⁸³ Once the court allows statements made outside the interview room to be admitted, the Code and statutory safeguards are easily by-passed. In the past, a verbal or informal statement made to the police prior to caution and then subsequently denied during the formal recorded interview was a time-consuming problem unnecessarily complicating the trial process. This problem has now been partially addressed in the revised 1995 Code of Practice. The new Code C applies not only to the formal interview, but also to all other exchanges between the suspect and the police. The term "interview" is now defined as the process of questioning a suspect regarding his involvement in a criminal offence.⁸⁴ Exploratory questioning during the early stages of the inquiry, or questions directed at obtaining information or explanations do not constitute an interview. The revised Code C (para 11.2(a)) mandates the police officer to inform the suspect at the beginning of the formal interview, of any incriminating statements or silences which were made prior to the suspect's arrival at the police station. The outside exchanges must be formally confirmed or denied by the suspect (para 11.10). The suspect is therefore given an early warning of incriminating remarks (or silences) and his response will form part of the contemporaneously taped record.⁸⁵ The revised 1995 practice code now allow for a private consultation with a solicitor. A free legal service and the

⁸¹ Maquire "Effect Of The PACE Provisions On Detentions" *Brit. J. Crime* (1988), "at least 80% of suspects do not exercise their right to legal advice".

⁸² McConville, Hodgson, "Custodial Legal Advice And The Right To Silence" Royal Commission on Criminal Justice Research Study No. 16 (1993); Baldwin, McConville "Police Interrogation And The Right To See A Solicitor" *Crim. L. Rev* (1979) 145.

⁸³ *R v Maguire* (1989) *Crim. L. Rev* 125 "the police are not prohibited by PACE from asking questions at the crime scene. PACE applies only in the station and not at the crime scene". See also *R v Brezeau and Francis* (1989) *Crim. L. Rev* 650.

⁸⁴ *R v Goddard* (1994) *Crim. L. Rev* 46; *R v Chung* (1991) *Crim. L. Rev* 622; *R v Park* (1994) *Crim. L. Rev* 285; *R v Menard* (1995) 1 *Cr. App. Rep.* 306, 315, "the code defines the interview as one necessarily involving a form of questioning".

⁸⁵ Spontaneous statements made outside the police station are admissible but subject to para 11.2(b), para 11.10 of the Code C rule. See also *R v Parchment* (1989) *Crim. L. Rev* 290.

establishment of an on-duty solicitor scheme. The police charge office must prominently display a poster advertising the right to legal advice. Future revisions of the code will build upon these levels of protection. Measures have also been instituted to improve the complaint procedure against improper police arrest, including the provision of adequate compensatory remedies. The suggestion has been made that evidence obtained in breach of the code or statute should be automatically inadmissible, thus replacing the present Sec. 78(1) judicially-driven discretionary power. Enhanced police interrogation skills, ethical awareness lessons, and some form of psychological training has also been mooted as part of a future police training schedule.⁸⁶ In many of its aspects, PACE is designed to protect the suspect against the intimidating environment of the police station. It is designed to dissipate the coercive atmosphere and the psychological pressures to speak inherent in the formal police interview. PACE, to some degree, neutralises the anxiety, fear, stress and other contributory factors which erode the suspect's ability to make informed choices.⁸⁷ In this regard, PACE is similar to the *Miranda* type safeguards (*Miranda v Arizona*) developed by the Warren Supreme Court to protect the custodial interests of the American suspect.⁸⁸ PACE may well be said to go beyond the level of protection offered by *Miranda*. Opponents of the silence principle, in particular the substitution abolitionists, have argued for the abolition of a right to silence on the grounds that the PACE requirements and other associated statutes (for example Sec. 2(8) of the Criminal Justice Act 1987) provide adequate safeguards for the suspect during the pre-trial stage of the criminal process. Sufficient procedural protections are now available which do not carry the costs associated with the silence principle, especially the potential loss of reliable evidence and the ability of professional criminals to frustrate the investigatory process by hiding behind the right to silence.⁸⁹

Zuckerman,⁹⁰ one of the chief protagonists of substitution abolition theory suggests that a properly regulated system of "procedural fairness" provides a sufficient justification for dispensing with the silence principle. Procedural fairness should include : a compulsion to

⁸⁶ Wolchover, Heaton-Armstrong "The Questioning Code Revamped" *Crim. L. Rev* (1991) 232.

⁸⁷ Softley *Police Interrogation* Royal Commission On Criminal Procedure Research Study No. 4 (1980).

⁸⁸ See *supra* chapter 5.

⁸⁹ In the civil context, *A.T and T. Istel v Tully* (1993) AC 45, where the House of Lords accepted a contractual undertaking by the Crown Prosecution Service not to make criminal use of material compulsorily obtained from the suspect in terms of a corporate fraud immunity statute.

⁹⁰ Zuckerman *The Principles Of Criminal Procedure* Clarendon Press, Oxford (1989) chp. 4; "The Right Against Self-Incrimination, An Obstacle To The Supervision Of Interrogation" (102) *L.Q.R* (1986) 56-68; Bias And Suggestibility, Is There An Alternative To The Right To Silence" in *Suspicion And Silence*, Blackstone Press (1994) chp. 8, 117. Greer "The Right To Silence, Defence Disclosure" *J. Law. Society* (1994) 103. Galligan "The Right To Silence Reconsidered" (41) *Current Legal Problems* (1988) 69.

attend a police interview only once the evidence points to the suspect having committed the offence; minimum standards of police conduct in the treatment of suspects; an adequate opportunity for the suspect to answer the case against him; and free access to legal advice. Zuckerman claims that since the introduction of PACE, the courts have strengthened the suspect's procedural rights and therefore as a *quid pro quo* should be allowed a greater freedom to draw adverse inferences from the suspect's refusal to answer police questions.

8.3 The Essential Codes of Practice

The paragraphs of the code which are relevant to the silence principle and which give the suspect a complete understanding of his pre-trial rights and the legal effect of the strategic choices he makes, including the choice of silence, are as follows :

Code C para 10.4 (the new caution) : 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.⁹¹

Code C para 2.4 (custody record) : The suspect's solicitor must be shown the custody record on arrival at the police station.

Code C para 3.4 (comments) : The custodial officer must note on the custody record any comment the suspect makes in relation to the police account and decision to detain.

Code C para 6 (legal advice) : The police must inform the suspect of his right to legal advice and are under a duty to alert the suspect to the solicitor's arrival.

Code C para 11.1(a) (interview) : An interview is defined as the questioning of a person regarding his involvement or suspected involvement in a crime.

Code C para 11.2A (significant statement) : At the beginning of the taped interview, the interrogating officer must put to the suspect any significant statement or silence which occurred before arrival at the police station. The suspect must confirm or deny the statement or silence. A significant statement is one capable of being used in evidence.

Code C para 11.4 (sufficient evidence) : As soon as there is sufficient evidence to lay a charge, the police should cease questioning unless the suspect has anything further to say.

⁹¹ Although the English caution is similar to the American *Miranda* caution, there is a significant difference. The *Miranda* caution is given immediately on arrest and specifically refers to legal advice. The American suspect has notice of his rights, even before reaching the police station. In England the suspect is only informed of his right to silence, and the possible inferences to be drawn from his silence, on arrest. His other rights must await explanation on his arrival at the police station. A significant time interval. See Zander "You Have The Right To Remain Silent" *St. Louis. Un. Law. J.* (1996) 661. The wording of the caution may also amount to an infringement of Article 6(1), 6(3) and 7 of the European Convention on Human Rights.

Code C para 11.5(a)(c) (accurate and contemporaneous) : The police have a duty to make an accurate record which is also contemporaneous, unless this is unpractical or would interfere in the conduct of the interview.

Code C para 11.7 and 11.9 (non-contemporaneous): If not contemporaneous, the record must be made as soon as is practical after the completion of the interview and the reasons for doing so recorded in the police officer's pocketbook.

Code E para 11 (tape-recording): A tape-recording must be made of every formal interview undertaken, the date, time, and length of the interview must be recorded.

8.4 The Common Law Position

The 1898 Act,⁹² which established the accused's right to testify at his own trial, also made it clear that he could not be compelled to do so. The accused may be a competent witness for the defence but never one for the Crown.⁹³ An important element of the 1898 Act was the restriction placed on the prosecutor's ability to draw an adverse inference from the accused's silence or failure to testify.⁹⁴ Sec. 35 of the Criminal Justice And Public Order Act 1994 has now largely removed this historic curb and the accused who elects to exercise the right to silence is now faced with a pointed state attack in which adverse inferences from silence may be drawn in specific circumstances. Unlike the restriction placed on prosecutorial comment, the judiciary has historically reserved for itself the right to comment and to instruct the jury on the accused's silence.⁹⁵ The reach of judicial comment and the extent to which the accused's silence may be used against him has never been clearly articulated and is subject to some confusion at the Appellate level. Nevertheless, over the years a number of guidelines (one can hardly call them specific rules) have developed which determine the parameters of judicial commentary and the limits of judicial adverse inference usage. These are as follows :

⁹² Criminal Evidence Act, Sec. 1, 61, 62, Vict. C. 36, 9 Statutes 613 (1898). Prior to this act, the maxim *nemo debet esse testis in propria causa* (no man shall be a witness in his own cause) had applied for at least 600 years.

⁹³ Sec. 1 reads, "Every person charged with an offence shall be a competent witness for the defence [...] provided :

- a) A person so charged shall not be called [...] except on his own application.
- b) The failure of any person charged to give evidence shall not be made the subject of prosecutorial comment.

Article 14(3)(a) of the International Covenant on Civil Political Rights is similarly worded.

⁹⁴ Exceptionally only the counsel for the co-accused could comment on the other co-accused's failure to testify, *R v Wickham* (1971) Cr. App. Rep 199.

⁹⁵ See *R v Rhodes* (1899) 1 QB 77, 83 and *R v Littleboy* (1934) 2 KB 408, 413-414, "we do not think that it was ever intended to lay down the proposition that a judge may not, in a proper case, comment".

- (a) Did the investigating officer caution and inform the accused of his right to silence? A distinction is drawn between pre-caution silence and post-caution silence.
- (b) The even term principle. Was the accuser a person in authority?
- (c) The presence of a solicitor during the pre-trial police interrogation.
- (d) The stage at which the accused invokes the right to silence, either at the pre-trial or the trial stage. Judicial precedent has clearly established that no adverse inferences may be drawn from pre-trial silence. At trial no direct adverse inference of guilt may be drawn from the accused's failure to testify.
- (e) Has the prosecution established a *prima facie* case which necessitates rebuttal?

These five guidelines have over most of the twentieth century determined the extent and kind of adverse inference commentary which an English judge is permitted to draw. The unalterable rule has always been that no adverse inference may be drawn when the accused is properly cautioned. It is a clear misdirection when judicial commentary draws a direct adverse inference between the accused's silence and an acknowledgement of guilt,⁹⁶ or suggests that the only way in which the accused may give his interpretation of the facts-in-issue is by testifying.⁹⁷ The more direct the adverse inference, the more likely the ground for a misdirection.⁹⁸ Where the nature of the adverse inference is more remote, the ambit for a proper judicial comment is somewhat wider.⁹⁹ There are a number of exceptions to this general rule which allow a direct comment as both reasonable and proper. For example, where the accused fails to give a legitimate explanation for his suspicious behaviour in the appropriate circumstance, the judge may instruct the jury to draw an adverse inference. An adverse inference may properly be drawn from the silence of the accused who is unable to explain the possession of stolen property.¹⁰⁰ The accused's inability to explain his presence on someone else's property may be used to reinforce an inference of breaking and entering.¹⁰¹ These distinctions are somewhat artificial and the English courts have been unable to explain logically why commentary is permitted in some circumstances but not in others. The common law has generally waxed and waned between the extensive force theory and the limited force application of silence. In the first quarter of the twentieth century the courts regularly drew direct adverse inferences of guilt.¹⁰² It was only in 1934 that the

⁹⁶ *R v Sparrow* (1973) 1 WLR 488, 492-93 and *R v Gilbert* (1977) 66 Cr. App. Rep 237.

⁹⁷ *R v Bathurst* (1968) 2 QB 99, 106-8.

⁹⁸ *R v Sullivan* (1966) 51 Cr. App. Rep 102, 105. *R v Davis* (1959) 43 Crim. App. Rep 212, 215-6 and *R v Naylor* (1933) 1 KB 685.

⁹⁹ *R v Raviraj* (1987) 85 Crim. App. Rep 93, 103.

¹⁰⁰ *R v Seymour* (1954) 1 ALL ER 1006, "A refusal to offer a credible explanation for the possession of stolen property remains a permissible inference specifically based on a particular type of circumstantial evidence. The only burden on the defence is a forensic one".

¹⁰¹ *R v Wood* (1911) 7 Crim. App. Rep 93, 103.

¹⁰² *R v Cramp* (1880) 14 Cox C C 390, and *R v Tate* (1908) 2 KB 680.

extensive force theory was authoritatively rejected in *R v Littleboy*.¹⁰³ Several attempts were made to draw direct adverse inferences going to credibility,¹⁰⁴ rather than directly to guilt but this application was rejected in *R v Gilbert*,¹⁰⁵ on the ground that no clear dividing line existed between a guilty adverse inference and a credibility adverse inference. The one being no more than an oblique version of the other. By contrast, while the common law permits no adverse inferences to be drawn from the accused's exercise of pre-trial silence, the American courts are not so inflexible. An adverse inference going to credibility may be drawn in certain circumstances. According to *Jenkins v Anderson*,¹⁰⁶ an adverse inference from pre-trial silence is admissible for the narrow purpose of impeaching the accused's credibility once he has voluntarily elected to testify.

The general consensus amongst Appellate cases appears to favour a limited use of trial silence dependent upon whether the prosecution has established a *prima facie* case. Trial silence may never amount to probative evidence of guilt,¹⁰⁷ neither may an adverse inference from silence be used to convert a weak prosecutorial case into a strong one. Where the prosecution's case is weak, no adverse inference may logically be drawn from the accused's silence. Where the prosecution's case is strong an adverse inference is far more likely.¹⁰⁸ An adverse inference is a common sense deduction predicated on the notion that in certain circumstances an innocent person, if falsely accused, would welcome the opportunity of expressing his innocence.¹⁰⁹ It is also predicated on the notion that where the facts in issue are within the innocent accused's personal knowledge, he or she would have denied, explained or answered the evidence. While the nature of the silence principle in American jurisprudence is inflexibly conditioned by the idea of state compulsion, the English common law silence principle is flexible and influenced by other factors, apart from state compulsion. The English common law definitions of silence have now been codified and replaced by the seminal Criminal Justice And Public Order Act 1994. A difference now prevails between England and the rest of the Commonwealth. The common law definition of silence remains unaltered in Australia, as the Australian Federal Constitution makes no mention of a right to silence. The New Zealand Bill of Rights Act (1990) merely codifies the common law without altering it.

¹⁰³ (1934) 2 KB 408, 414. Although in *R v Ryan* (1964) 50 Cr. App. Rep 144, 148, "it was held permissible to allow silence to be taken into account when assessing the weight to be attached to the accused's failure to advance a reasonable explanation during pre-trial interrogation".

¹⁰⁴ *Ibid R v Ryan* at 144.

¹⁰⁵ (1977) 66 Crim. App. Rep 237, 244.

¹⁰⁶ 447 U.S 231 (1980). See *supra* chapter 6 p.210-212.

¹⁰⁷ *R v Bathurst* (1968) 2 QB 99; *R v Sparrow* (1973) 1 WLR 489.

¹⁰⁸ *Ibid R v Sparrow* at 499; *R v Voisin* (1918) 1 KB 531.

The common law principle has travelled a convoluted evolutionary path. At the beginning of the twentieth century, silence is a bare combination of two immunities which protect the defendant against pre-trial and trial questioning. Adverse inferences may be drawn from the accused's silence whenever it is reasonably appropriate to do so. The initial unlimited nature of judicial commentary on silence is illustrated in *R v Rhodes*,¹¹⁰ where it is stated that in terms of the 1898 Act, "judges have a right to comment. The nature and degree of which rests entirely within the judicial discretion". Similarly in America, the fifth amendment is judged to be amongst a decidedly second-class group of constitutional rights (*Polkov v Connecticut*).¹¹¹ In the first half of the twentieth century the silence principle is interpreted in pure utilitarian terms. The so-called right to silence is derivative, dependent on the likelihood of a maximising net utility. It is a relative utilitarian right subject to limitation and the drawing of adverse inferences. In the balance between the state and the individual interest, sometimes the state interest prevails and at other times, the individual interest. In the last half of the twentieth century, as a reaction to the Second World War, the silence principle undergoes a metamorphosis. In the post-war common law, there is an increasing tendency to advance moral and legal arguments in the form of deontological rights. A deontological interpretation means that common law rights become foundational and apply with a large degree of absoluteness. It then becomes illogical to state that a right to silence may be infringed in order to achieve more important goals. The mere prospect of a utilitarian gain or the general good cannot justify or prevent, "a man from doing what he has a right to do".¹¹² The general good is never an adequate basis for limiting rights. In a long line of cases beginning with *R v Naylor*,¹¹³ and *R v Leckey*,¹¹⁴ there is a gradual tightening of the constraints on judicial comment, and a gradual limitation on the drawing of adverse inferences. Lord Oaksey in *Waugh v R*¹¹⁵ notes, "the very fact that the prosecution are not permitted to comment on the fact that the accused did not give evidence, shows how careful a judge should be in making such comment". By the late 1960s judges have become reluctant to comment on the absence of the accused from the witness stand. In *R v*

¹⁰⁹ *Ibid R v Bathurst* at 107; *R v Sparrow* at 496; *R v Gilbert* at 238.

¹¹⁰ (1899) 1 QB 77, 83 and *R v Sparrow* (1973) 1 WLR 488, 494, "it was the practice of judges, when justice required them to do so, to comment in robust terms on a defendant's absence from the witness box".

¹¹¹ 302 U.S. 319, 325-26 (1937) per Cardozo J. See *supra* chapter 5 p.154, and *Twining v New Jersey* 211 US 78, 79 (1908), "[...] it has been the opinion of constitution makers that the privilege [of silence], if fundamental in any sense, is not fundamental in the due process of law, nor an essential part of it". "It would be going too far to rate [the privilege] as an immutable principle of justice. [There is no reason] for straining the meaning of due process to include this privilege within it".

¹¹² Dworkin "Taking Rights Seriously" in Simpson ed, *Oxford Essays In Jurisprudence* (1973) 202, 213. See *supra* chapter 3 p.87.

¹¹³ (1933) 1 KB 685, 687.

¹¹⁴ (1944) 1 KB 80, 86.

¹¹⁵ (1950) AC 203, 211.

Bathurst,¹¹⁶ Lord Parker recommends, “the accepted form of comment is to inform the jury that the accused is not bound to give evidence ... and that while the jury has been deprived of the opportunity of hearing his side of the 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”. A similar trend is noticeable in America, as a social human rights reaction to the Vietnam War. In 1965 the Warren Court in *Griffin v California*,¹¹⁷ holds that “the accused cannot be compelled to take the witness stand, neither may the judge or prosecution comment on the failure to testify”, and in *New Jersey v Portash*,¹¹⁸ a balancing of interests is thought of as unnecessary. According to the Supreme Court, the fifth amendment right to silence is absolute and in the courtroom where the constitutional privilege operates in its most pristine form, no comment limiting the accused’s right is permissible. The deontological influence on the Australian common law is equally profound. The Australian High Court in *Environment Protection Authority v Caltex Refining Co Pty Ltd*¹¹⁹ has redefined the old common law silence principle in terms of a foundational right. The right to silence is now a fundamental human right protecting the dignity of the accused. The nature and scope of the deontological conceptualisation of the silence principle is succinctly illustrated by the Australian High Court in *Petty and Maiden v The Queen*,¹²⁰ “an incidence of the right to silence [pre-trial silence] is that no adverse inference can be drawn against an accused person by reason of his or her failure to answer questions or provide information. To draw such an inference would be to *erode the right of silence or to render it valueless*” [emphasis added].

Pre-trial interrogatory silence : Until 1994 it was a well-established common law doctrine that a suspect enjoyed a substantive right to silence while under interrogation by the state authority. The police were obliged to caution the suspect and to warn him of his right to silence. Once cautioned, no inference based on the suspect’s silence could be lawfully drawn. The Royal Commission on Criminal Procedure 1981 noted, “once the accused has

¹¹⁶ (1968) 2 QB 99, 107-108.

¹¹⁷ 380 US 609, 614 (1965).

¹¹⁸ 440 US 450, 459 (1979).

¹¹⁹ (1933) 178 CLR 477, per Mason CJ and Toohey J at 404-405, per Deane, Dawson and Gaudron JJ at 430-431. The silence principle is also regarded as an essential element of the accusatorial system and a fundamental bulwark of liberty and privacy in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 57 ALJR 236, 240.

¹²⁰ (1991) 173 CLR 95, 99 per Mason CJ, Deane and Toohey JJ. At 101 the judges noted, “and what is of more importance, the denial of the credibility of the late defence or explanation ... is just another way of drawing an adverse inference. *Such an erosion of a fundamental right should not be permitted.*” See also *R v Beljajev* (1984) VR 657, 662; *Glennon v R* (1994) 179 CLR 1, 8 “the right to silence is a fundamental principle of the criminal law and not to be overridden”. *Sorby v Commonwealth* (1983) 57 ALJR 248, 261, per Murphy J, “the privilege against self-incrimination is part of the common law of human rights”.

been cautioned, it is unsafe to use his silence against him". In *R v Gilbert*,¹²¹ the Appeal Court explained further, "the words of the caution make it clear that the [suspect] was entitled to keep silent ... [the jury] must be told that they may not draw the inference of guilt from his silence". Although, in theory, the judge is obliged to instruct the jury not to make any adverse inferences from post-caution silence, in practice there is no method by which to prevent a lay person jury from drawing common sense adverse inferences.¹²² The Royal Commission specifically observed, "whatever instruction a judge may issue to a jury about post-caution silence, it does not, indeed cannot, prevent a jury or bench of magistrates from consciously drawing an adverse inference".¹²³ An important element of the common law doctrine is that the suspect is empowered to refuse all co-operation with the police.¹²⁴ The duty to aid the police is a moral, but not a legal one.¹²⁵ Silence cannot therefore be construed as a willful obstruction of justice, but when the suspect does remain stubbornly unco-operative, the police are entitled to continue the interrogation within reasonable time constraints.¹²⁶ The legal position in respect to pre-caution silence is less than certain. In *R v Feigenbaum*,¹²⁷ the accused's silence, where no caution had been administered, was held to be capable of corroborating evidence against him. However, in *R v Hall*,¹²⁸ Lord Diplock pointed out that, "the right to silence is a clear and widely known principle of the common law which exists independently of the caution and serves to protect the accused except in certain limited circumstances".¹²⁹ The judicial construction of silence and its relationship to the caution administered in the station house obviously reflects a precarious balancing which seeks to protect the procedural rights of the individual while also attempting to further the societal interest in securing efficient, legitimate and low-cost convictions.

The Even Term Principle and the presence of a Solicitor during the police interrogation : Exceptionally, an invocation of silence by the suspect may be subject to judicial comment when the accuser and the accused are speaking on even terms. An

¹²¹ (1977) 66 Crim. App. Rep 237, 243.

¹²² Van Kessel "The Suspect As A Source Of Testimonial Evidence" (38) *Hastings L. Rev* (1986) 1, 11.

¹²³ The Royal Commission on Criminal Procedure 1981, Cmnd 8092 also suggested that rather than barring judicial comment, the judge should be allowed to explain to the jury why silence in certain circumstances is consistent with innocence. See Greer "The Right To Silence" (53) *M. L. Rev* (1990) 709, 729-30.

¹²⁴ Benyon "Powers And Propriety In The Police Station" in *Police Powers and Procedures* (1989) 118.

¹²⁵ *Rice v Connolly* (1966) 2 QB 414.

¹²⁶ *Ibid* Van Kessel at 419.

¹²⁷ (1919) 1 KB 431.

¹²⁸ (1971) 1 WLR 298, 301.

¹²⁹ Lord Diplock at 301, "it may be that in exceptional circumstances an inference may be drawn from a failure to give an explanation [...] but silence alone on being informed by a police officer that someone has made an accusation against him cannot give rise to an inference".

accusation made to the face of the accused and which reasonably calls for a denial may draw an adverse inference. However, before an inference may be drawn from the failure to deny an accusation, the natural advantage of the accuser over the accused must have been neutralized. Case precedent does not make clear why this should be so. It must be assumed that where the questioner is a person in authority, there is a risk of the suspect's willpower being weakened and a confession may be induced by some form of authoritarian conduct. But it seems more likely that speaking, rather than silence, would be the product of officious conduct. Silence is more likely to be in defiance of such conduct and the suspect is logically more likely to refute an accusation by a person in authority rather than one by an ordinary bystander. In *R v Cramp*,¹³⁰ the father of a young woman accused the suspect of giving his pregnant daughter a poisonous liquid in order to induce a miscarriage. The suspect remained silent and the absence of a denial when one would reasonably be expected was properly commented upon by the trial judge. In *R v Mitchell*,¹³¹ Cave J remarked, "if a charge is made against a person in the person's presence, it is reasonable to expect that he will immediately deny it and that an absence of such a denial is some evidence of an admission". When private persons are speaking on even terms and an accusation is made, to which the accused says nothing, expresses no indignation nor does anything to deny the accusation, the judge may comment and draw a reasonable adverse inference.¹³² *Mitchell* was approved of in *R v Parkes*,¹³³ where a young girl's mother, observing a knife in the hands of the suspect, twice accused him of stabbing her daughter. To these accusations the suspect said nothing and attempted to stab the mother when she moved to detain him. The trial judge properly directed the jury to take account of the suspect's silence and to infer an acceptance of the truth of the accusation. The common factor in these dicta is that the accuser and the accused are on even terms as defined by the surrounding circumstances. It must be reasonable to expect some reaction in the way of indignation or refutation¹³⁴ before the jury may properly consider the accused's silence. Clearly, the drawing of an adverse inference is also conditional upon other factors such as anxiety, embarrassment, surprise, status, intelligence, mental integrity and the information available to the accused at the relevant time. In *R v Chandler*,¹³⁵ the suspect was confronted by a police officer in the usual interview and in the presence of his solicitor. According to the court, the presence of the legal advisor at the interrogation places the suspect and the police

¹³⁰ (1880) 14 Cox CC 390. See also *R v Tate* (1908) 2 KB 680, and *R v Feigenbaum* (1919) 1 KB 431. These early attempts to use the accused's silence as a corroboration of the witness's statement was rejected in *R v Littleboy* (1934) 2 KB 404, 414.

¹³¹ (1892) 17 Cox CC 503, 508.

¹³² *Ibid* at 509.

¹³³ (1976) 1 WLR 1251.

¹³⁴ *R v Chandler* (1976) 1 WLR 583 and *Bessela v Stein* (CA) 1877.2.CPD 265.

¹³⁵ *Ibid*, but see Lord Atkinsons' dictum in *R v Christie* (1914) AC 545, 554-555.

on even terms. The suspect's silence in this circumstance may readily be the subject of judicial comment. Lawton J argued, "we do not accept that a police officer always has an advantage over someone he is questioning. A young detective questioning a local dignitary on alleged local government corruption may be very much at a disadvantage. This must be contrasted with that of a tearful housewife accused of shoplifting or a parent questioned about his delinquent son".¹³⁶ *Chandler* was followed by *R v Horne*,¹³⁷ where the suspect remained silent when directly confronted by his victim in the presence of a police officer. The Appeal Court held that notwithstanding the authority of the police officer, both parties were on equal terms. With the introduction of the Police and Criminal Evidence Act 1984 (PACE), Sec. 58 codifies the right to legal advice. The even term circumstance defined in *Chandler* between the suspect, the police and a solicitor has now become the statutory norm. The effect of Sec. 58 is to prevent the drawing of adverse inferences from the accused's silence in the presence of his solicitor. Lord Lane in *R v Alladice*,¹³⁸ has argued that Sec. 58 unbalances the relationship between prosecution and defence in favour of the defence. It was partly on the basis of such judicial pressure that the Criminal Justice and Public Order Act 1994 amending the accused's right to silence was enacted.

Judicial Commentary : At the turn of the twentieth century in *R v Rhodes*,¹³⁹ it is noted *unius est exclusio alterius* "there are some cases in which it would be unwise to make any comment at all, there are others in which it would be absolutely necessary in the interests of justice that such commentary should be made. That is a question entirely for the discretion of the judge". However, with the passage of time, the parameters of judicial commentary has narrowed and the nature of such commentary has become inflexible. The Court of Appeals in *R v Lewis*¹⁴⁰ recently suggested, "that the limits on proper commentary are so unclear, trial judges should be advised not to make any comment at all". The general but vague common law guideline appears to be that a trial judge may not comment on the accused's pre-trial silence at all. He may not encourage or persuade the jury to link the

¹³⁶ Easton *The Right To Silence* Avesbury Ed, at 14 criticises the *Chandler* decision. It is incorrect to assume that the inequalities between the suspect and the police are eradicated simply by the presence of a solicitor, given the psychological effects of detention and the surrounds of the police station. *Moreover the right to silence as a fundamental right should not be varied by the presence or absence of a solicitor.* Easton's criticism reflects an increasingly deontological and human rights explanation for the silence principle popular amongst some English academics. See also Dennis "Reconstructing The Law Of Criminal Evidence" *Current Legal Problems* (1989) 21.

¹³⁷ (1990) *Crim. L. Rev* 188.

¹³⁸ (1988) 87 *Crim. App. Rep* 380, 384-85. See Zuckerman "Evidence in 1988" in *Annual Review, English Law Reports* (1988) 146-147.

¹³⁹ (1898) 1 *QB* 77, 83.

¹⁴⁰ (1973) 57 *Crim. App. Rep* 860, 869.

accused's trial silence directly to guilt.¹⁴¹ If the accused has answered certain questions during the police interrogation but refused to answer others, the judge is not entitled to draw an adverse inference from such a lapse.¹⁴² In *R v Leckey*¹⁴³ and *R v Hoare*,¹⁴⁴ both trial judges drew the jury's attention to the accused's failure to deny the charge on being cautioned. In *Leckey* the judge used the pointed language "if he was innocent he should have denied the charge" and in *Hoare* the equally direct "members of the jury, what would you have done if you were innocent?". On appeal, Their Lordships held that any judicial comment which pointedly made silence conclusive of guilt was improper and prejudicial to the fair trial interests of the accused. Similarly, in *R v Sullivan*,¹⁴⁵ the Court of Appeals held the following trial commentary to be improper, "bear in mind that he [the accused] was fully entitled to refuse to answer questions, he has an absolute right to refuse But you might well think that if a man is innocent he will be anxious to answer questions". Realistically, this is exactly the kind of inference that a common sense jury person would draw. Solomon L J (dissenting)¹⁴⁶ notes, "it seems pretty plain that all the members of the jury, if they had any common sense at all, must have been saying to themselves precisely what the learned [trial] judge said to them". In the American case, *Griffin v California*,¹⁴⁷ Stewart J (dissenting) states, "how can it be said that the inference drawn by the jury will be more detrimental to the defendant under the limiting and controlled language of judicial instruction than would result if the jury were left to roam at large with only its untutored instinct to guide it". Nevertheless, it is established judicial precedent that a trial comment which so obviously links the accused's silence to normal innocent behaviour and then draws an inference of guilt, will always be a ground for a misjudgement.

The nature of the *ambush defence* and the unsatisfactory solutions adopted by the common law precedents in respect to this vexing question has solicited much argument. The advantage given to the accused by the use of the ambush tactic is one of the primary reasons for the enactment of the Criminal Justice And Public Order Act 1994. The ambush defence is a calculated manipulation of the right to silence by the accused during the pre-trial investigatory interview, whereby the accused refuses to disclose a defence or alibi. Later at trial, the accused deliberately adduces evidence of a detailed defence which catches the

¹⁴¹ *R v Littleboy* (1934) 2 KB 408, 414; *R v Whitehead* (1929) 1 KB 99; *R v Keeling* (1942) 1 ALL ER 507. See also the British Law Society Memorandum (1973) at 14 and the Bar Council Memorandum (1973) at 25-26.

¹⁴² *R v Henry* (1990) Crim. L. Rev 574.

¹⁴³ (1994) 1 KB 80.

¹⁴⁴ (1965) 50 Cr. App. Rep 50.

¹⁴⁵ (1966) 51 Cr. App. Rep 102, 104-105. See also *R v Davis* (1959) 43 Crim. App. Rep 215.

¹⁴⁶ *ibid Sullivan* per Solomon J at 105.

¹⁴⁷ 380 US 609 (1965) particularly at 621. See also Greer "The Right To Silence" (53) *M.L.R.* (1990) 709, 729.

prosecution by surprise and effectively prevents the state from investigating the defence and developing arguments against it.¹⁴⁸ In these ambush situations, judicial commentary which draws an adverse inference of fabrication or invented defence after the fact, is usually a common sense inference. In *R v Littleboy*,¹⁴⁹ judicial comment which invited the jury to evaluate the accused's previous silence and his failure to reveal a defence to the police on the basis that it prevented the police from investigating the merits of the defence, was held to be proper. In *R v Ryan*,¹⁵⁰ the trial judge goes further and expressly holds that if the accused remains silent during interrogation and subsequently uses a new defence to surprise the prosecution during trial, the prosecution is entitled to undermine the credibility of the accused by making evidentiary use of the accused's prior silence. However, in *R v Gilbert*,¹⁵¹ Lord Dilhorne critically states, "it may not be a misdirection to say simply, 'this defence was first put at trial'... but if more is said, it may give rise to an inference that a jury is being invited to disregard the defence being put forward because the accused exercised his right of silence". His Lordship's opinion illustrates the contradictory and confused nature of the common law interpretations of the silence principle. On the one hand his opinion serves as an indirect invitation to the jury to take the accused's silence into account in assessing credibility. On the other hand, his Lordship's words suggest that no inferences may be drawn from the accused's silence. The dictum encourages an underhand kind of adverse inference commentary shrouded in the half-light of innuendo and ambiguity. In an attempt to combat ambush defences and to cut through judicial confusion, Sec. 11 of the Criminal Justice Act 1967 disallowed surprise alibi defences at trial.¹⁵² In terms of the act, the defence had to give reasonable time prescribed notice to the prosecution of the intention to adduce alibi evidence at trial. The Criminal Justice Act 1967 (Sec. 11) is now replaced by the evidentiary disclosure requirements of Part I of the Criminal Procedure And Investigations Act 1996.¹⁵³

¹⁴⁸ An ambush defence may be characterised as follows :

- a) the accused unexpectedly raises the defence at trial;
- b) the prosecution is taken by surprise;
- c) the defence should have been raised at the police interview;
- d) the prosecution is prejudiced because it is unable to rebut the defence due to its late submission;
- e) the accused is unfairly advantaged;
- f) the defence is usually false.

¹⁴⁹ *R v Littleboy* (1934) 2 KB 408, 413-414; *Hinton v Trotter* (1931) SASR 123, 124 (per Napier J).

¹⁵⁰ (1966) 50 Cr. App. Rep 144.

¹⁵¹ (1977) 66 Cr. App. Rep 237, 244. *R v Raviraj* (1986) 85 Crim. App. Rep 93; *R v Gerard* (1948) 1 ALL ER 205, 206.

¹⁵² Criminal Justice Act (1967), Sec. 11. An obligation is placed on the accused to give notice of the particulars of his alibi before the trial, if he does not he cannot adduce the alibi into court save with the permission of the judge. Sec. 11 allows the court to draw a number of inferences from the absence of key facts from the accused's disclosure : (a) the judge may make such comment as appears reasonable on the failure to disclose; (b) the jury may draw such inferences as appear reasonable. (Sec. 11 repealed by schedule 5 of the new 1996 Act).

¹⁵³ Criminal Procedure And Investigations Act (1996) Part I, Sec. 3(1). Compulsory disclosure by the prosecution of all the prosecutorial evidentiary material. Once the prosecution has complied, the accused also has the duty of disclosure in terms of Sec. 1(2) and Sec. 5(1)(a). The accused must

Chief Justice Lord Lane in *R v Alladice*¹⁵⁴ noted that a change in the permitted parameters of judicial commentary was necessary to combat the frequency of alibi defences. It was such influential pressure which was to lead to the enactment of the Criminal Justice And Public Order Act 1994.

In *R v Rhodes*,¹⁵⁵ *R v Waugh*¹⁵⁶ and *R v Jackson*¹⁵⁷ a distinction is drawn between a "fair" judicial comment and one which is "excessive" or "unjustified". A problem with this kind of distinction is that it is very difficult to define the exact boundaries of the word "fair" as well as the word "excessive". It is also difficult to determine whether a strong comment or only an indirect mention is called for. Two factors guide the ability of the trial judge to comment. First, a judge is given no discretion to comment on pre-trial silence but a much wider latitude to comment on the accused's failure to testify.¹⁵⁸ This is so because the accused's trial silence is less open to misunderstanding by the jury. The accused is also supported by defence counsel, properly informed, adequately prepared and less likely to make the wrong choice under pressure. Second, judicial comment is usually triggered when the facts-in-issue are peculiarly within the accused's personal knowledge or where the accused's state of mind¹⁵⁹ is a vital fact-in-issue and the accused fails to testify. Third, judicial commentary is dependent on whether or not the prosecution has established a *prima facie* case which calls for rebuttal by the accused, and the accused fails to rebut the *prima facie* case against him. The authoritative guideline in this regard is laid out in *R v Bathurst*,¹⁶⁰ per Lord Parker, and in *R v Mutch*,¹⁶¹ "the judge cannot direct that silence in court be used as corroboration or to reinforce a weak prosecutorial case, or to suggest that the defence may not succeed without the accused's testimony". In the interests of justice a stronger comment may be warranted in exceptional circumstances. Lawton J in *R v Sparrow*¹⁶² notes, "a colourless reading out of the evidence as recorded by the judge in his notebook, is often of no aid to the jury".

within a prescribed period provide the prosecution with a defence statement setting out the general nature of his defence and the facts-in-issue. See Card and Ward *The Criminal Procedure And Investigations Act 1996* chapters 2 and 6.

¹⁵⁴ (1988) 57 Crim. App. Rep 380.

¹⁵⁵ (1899) 1 QB 177, 178.

¹⁵⁶ (1950) A.C 203.

¹⁵⁷ (1955) 1 WLR 591.

¹⁵⁸ The Criminal Law Revision Committee, Eleventh Report (1972) Crmnd 4991. See also *Haw Tau Tau v Public Prosecutor* (1982) 3 ALL ER 14, 18, per Lord Diplock, "English law has always recognised the right of the [jury] in a criminal case to draw inferences from a failure of a defendant to exercise his right to give evidence and thereby submit himself to cross-examination".

¹⁵⁹ Williams "The Right To Silence And The Mental Element" *Crim. L. Rev*(1988) 97-102, but see *R v Kanaveilomani* (1994) 72 Crim. App Rep 492, 509 where it was held incorrectly that the accused's state of mind is not peculiarly within his own knowledge.

¹⁶⁰ (1968) 2 QB 107, 108.

¹⁶¹ (1973) 1 ALL ER 178.

¹⁶² (1973) 1 WLR 488, at 495.

According to Lawton, the judge's duty to the jury requires "the benefit of his knowledge of the law and advice in the light of his experience and the significance of the evidence before them. The judge should explain to the jury what the consequence of the accused's absence from the witness stand signifies". The judge may not bolster a weak prosecution case by making repeated comments on the accused's failure to testify. In *R v Martinez-Tobon*,¹⁶³ judicial comment was reserved only for the exceptional circumstance in which the accused's silence appears remarkable and the nature of the case against him overwhelmingly strong. Although the right to silence is firmly rooted in the common law, it does not come with a cost-free guarantee and is sometimes evoked to the accused's peril. In the words of Lord Devlin, "while the English common law undoubtedly does give the accused man the right to be silent, it does nothing to urge him to take advantage of his right or even to make the course invariably the attractive one ... This dilemma in which the law puts the suspect ... seems a perfectly fair one".¹⁶⁴ Lord Devlin's words echo a utilitarian logic which unfortunately has all but been eroded by the influence of a fashionable human rights "sentimentality".

8.5 Common Law Silence in the Commonwealth

The English common law silence principle has been exported to all foreign jurisdictions previously under British colonial administration. It is to be found, in one form or another, in the procedural law of Scotland,¹⁶⁵ Northern Ireland, Ireland, Australia, New Zealand, South Africa, Canada, India, Israel,¹⁶⁶ Sri-Lanka, Burma, Nigeria, Kenya, Tanzania, Uganda, Malawi, Zambia, Zimbabwe, Botswana, Swaziland, Lesotho, Gambia, Ghana, Sierra-Leone, Guinea, Guyana, and the West Indies. It co-exists and competes in an attenuated degree with Sharia law in Egypt, Pakistan, Bangladesh and is statutorily modified along the lines of the English Criminal Justice And Public Order Act 1994 in Singapore and Malaysia. In the majority of Commonwealth jurisdictions, the silence principle is mostly defined in terms of the common law. For example, all Anglophone African jurisdictions, with the exception of South

¹⁶³ (1994) 98 Cr. App. Rep 375, per Lord Taylor, "silence does nothing to establish guilt. On the other hand, it means that there is no evidence from the defendant which explains the evidence by the prosecution". See also *R v Hubbard* (1991) Crim. L. Rev 449; *R v Hook* (1994) T.L.R. 375.

¹⁶⁴ See Maloney "The Criminal Evidence (N.I.) Order 1988" *Boston College Int. Comp. L. Rev*(1993) 425-429. Van Kessel *ibid* note 122 at 31.

¹⁶⁵ Scotland possesses a unique and hybrid inquisitorial legal system with accusatorial elements, one of which is a common law silence principle. See further *infra* chapter 11.

¹⁶⁶ The Israeli silence principle is based on English common law precedents and not on Talmudic religious law.

Africa, depend on a common law interpretation of silence.¹⁶⁷ A significant minority rely on statutory codifications; Northern Ireland (Criminal Evidence : Northern Ireland Order 1988); Singapore (Criminal Procedure Code (revised) 1985); Malaysia (Criminal Procedure Act 1996); Ireland (Criminal Justice Act 1984); Sri-Lanka (Criminal Procedure Act 1979) and New Zealand (Bill of Rights Act 1990).¹⁶⁸ Both the Irish Bunreacht na hEireann (1936)¹⁶⁹ and the recent Australian Federal Constitution make no mention of a silence principle. The South African silence principle is a relative right defined in sec 35(1)(a) and Sec 35(1)(b). A right against self-incrimination is set out in Sec 35(3)(i). Canada has only partly entrenched the privilege against self-incrimination in the Charter of Rights and Freedoms (Constitution Act 1982, Part I).¹⁷⁰

A number of general principles which define the international character of the common law silence principle are isolated and encapsulated in the following brief summary. In the Commonwealth trial process the accused has three basic choices¹⁷¹ :

- (a) He may refuse to answer any questions by claiming the right to silence;
- (b) He may elect to give sworn evidence. The right to silence falls away and the accused is subject to cross-examination in which incriminating questions may be put to him.
- (c) A third choice, now statutorily repealed¹⁷² in most Commonwealth jurisdictions, is the entitlement to give an unsworn statement which does not expose the accused to cross-examination and indirectly preserves the right to silence.

¹⁶⁷ The Nigerian, Kenyan, Ugandan and Malawian Constitutions make no reference to a silence principle. Namibia possesses a fairly detailed constitutional silence principle similar to the South African constitutional right to silence. (Namibia, although administered by South Africa as a Trust territory was never a member of the Commonwealth).

¹⁶⁸ The wording of the American fifth amendment is almost identically repeated in Sec. 25(d) of the New Zealand Bill of Rights Act 1990. See also Sec. 23(4) of the same Act and Sec. 366(1) Crimes Act 1961.

¹⁶⁹ The Irish Constitution (1936) and various amendments (1984) only indirectly and by implication refer to a silence principle in Art 38.1 and Art 40.3 and 4. See *D.P.P v Quilligan* (1992) S.C, 21-22, "there is no Irish constitutional privilege" and no "constitutional pre-trial right to silence", *D.P.P v Pringle* (1982) 2 Frewen 57; *D.P.P v Farrel* (1978) I.R. 13.

¹⁷⁰ Charter of Rights and Freedoms, Sec. 11(c), Sec. 13 and Sec. 7. See also the Canadian Bill of Rights (1960) Sec. 2(a). The Canadian constitutional right is heavily influenced by the jurisprudence of the American fifth amendment. See further *infra* chapter 11 note 3-7 and accompanying text.

¹⁷¹ McNicol *Evidence* Butterworths (1998); Henchcliffe "The Silent Accused At Trial" *Un. Queensland L.J* (1996) 137; Harvey "The Right To Silence And The Presumption Of Innocence" *New Zealand L.J* (1995) 181; Palmer "Silence In Court – The Evidential Significance Of An Accused Person's Failure To Testify" *N.S.W. L.J* (1995) 131; Williams "Silence In Australia" *L.Q.R.* (1994) 629; Cato "Petty And Maiden : The Privilege Against Self-Incrimination And Its Progeny" *Crim. L.J* (1992) 311; Pereis "An Accused Person's Privilege Against Self-Incrimination : A Comparative Analysis Of The English, New Zealand And South Asian Legal Systems" *LAWAS/A.N.S* (1982) 50.

¹⁷² Statutorily repealed in England by Sec. 2 Criminal Justice Act (1982). In South Africa by Sec. 196(3) Criminal Procedure Act 1977.

Where the accused elects to exercise his right to silence, the court is faced with a number of evidentiary alternatives :

- (a) Silence may be used as evidence in its own right.
- (b) Silence may be used as part of the total evidentiary material.
- (c) Silence may be used in a limited manner to evaluate other types of evidentiary material.

Conditioned upon the evidentiary usage of silence, four kinds of inferences (usually adverse, but sometimes positive) based on logic and common sense may be derived from the accused's invocation of silence. These have been mentioned previously, but bear repeating :

- (a) Silence may be used to infer an implied consent. The accused's silence or failure to deny an accusation put to him is capable of amounting in law to an acceptance of the terms of the accusation. It must be a reasonable inference in the circumstance, that the accused accepted the accusation, making it wholly or partially his own. This type of adverse inference is subject to the administration of a caution (in which case it can never be drawn) and to the even term principle (it may only be drawn if both the accuser and accused are on an equal footing).
- (b) Silence may be used as evidence to infer a general consciousness or knowledge of guilt. This possibility is without exception rejected in all Commonwealth jurisdictions.
- (c) Silence may be used to evaluate other evidence. Silence is taken into account to determine whether or not to accept other evidence or to draw inferences arising from other evidence. The effect of the accused's silence is that it adds weight or strengthens the prosecution's evidence or any inferences arising from the prosecution's evidence. This is the preferred evidentiary usage of silence in the Commonwealth.
- (d) Following logically from point (c), silence by itself cannot convert an insufficient state case into a sufficient state case.¹⁷³ Before silence may have any probative value, the state must by means of other evidence establish a *prima facie* case against the

¹⁷³ For an uncompromising perspective on the trial silence principle in South Africa, see Geldenhuys and Joubert *Criminal Procedural Handbook* (1994) 6, "the 'nothingness' of the accused's silence cannot logically fill the gap in the state case". For the Australian perspective, see *Weissensteiner v R* (1993) 178 CLR 217 per Mason CJ, Deane, Dawson JJ at 227-229 and Brennan, Toohey JJ at 235-6.

accused.¹⁷⁴ An inference from silence means that an evidentiary burden has been cast upon the accused to rebut the state's *prima facie* case and the accused through his silence has failed to do so.

Pre-trial Silence : In Commonwealth jurisprudence a suspect is empowered not to answer questions during the police interrogation nor may the suspect's silence be used as evidence in any subsequent criminal proceeding. Pre-trial silence in the face of authoritative questioning has no probative value.¹⁷⁵ In most, but not all, Commonwealth jurisdictions cautionary guidelines oblige the police to inform the suspect of his rights.¹⁷⁶ The right to silence is further reinforced by the rules governing the admissibility of confessions and admissions. In most jurisdictions confessions are regulated by the usual common law voluntariness rule but in some jurisdictions, particularly in England, Singapore and Australia, new statutory rules have been developed.¹⁷⁷ Where the suspect has been confronted and questioned by someone other than a person in authority, silence in the face of the accusation may give rise to an adverse inference.¹⁷⁸ Especially when the suspect adopts or acknowledges the truth of the statement or allegation.¹⁷⁹ Silence may also have probative value when the suspect answers questions in a selective or evasive manner. The adverse inference is derived not only from silence, but also from the manner in which the questions are evaded.¹⁸⁰ The possession of stolen goods for which no reasonable explanation is forthcoming may infer a guilty knowledge.¹⁸¹ In some jurisdictions, ambush defences or the failure to reveal alibi evidence during police interrogation may give rise to adverse inferences which strengthen the state's case. England has statutorily amended the common law rules

¹⁷⁴ (Australia) *Weissensteiner* *ibid*; *Petty and Maiden* (1991) 173 CLR 95. (New Zealand) *Nicolls* (1951) NZLR 91. (Canada) *Boss* (1988) 46 C.C.C. (3d) 523 (Ont C.A.). (South Africa) *Letsoko* 1964 (4) SA 768 (A), *Theron* 1968 (4) SA 61 (T).

¹⁷⁵ (Australia) *Bruce* (1987) 61 ALJR 603. (New Zealand) *Duffy* (1979) 2 NZLR 432. (Canada) *Herbert* (1990) 2 SCR 151, 157 C.C.C. (3d) 145. (South Africa) *Patel* 1946 AD 903, *Maritz* 1974 (1) SA 266 (NC).

¹⁷⁶ (Australia) the caution is statutorily defined in all Federal States, ie Sec. 464(A)(3) Crimes Act (1988). (Canada) *Itwaru* (1970) 4 C.C.C. 206, 10 CRNS 184, *Robertson* (1975) 21 C.C.C. (2d) 385, 29 CRNS 141. (New Zealand) *Convery* (1968) NZLR 426, *Kirifi* (1992) 2 NZLR 8. (South Africa) the caution is constitutionally defined in Sec. 35 of the 1996 Constitution.

¹⁷⁷ (Australia) The Evidence Act (1995) Cth and NSW. (Singapore) Criminal Procedure Code (Rev) 1985. (Malaysia) Criminal Procedure Act (Rev) 1996. (Canada) the common law voluntariness standard applies, *Proskov* (1922) 32. C.C.C. 199, 66, DLR 346, *Pitcher* (1970) 4 C.C.C. 27, 12 CRNS 222. (South Africa) the voluntariness standard is statutorily defined in the Criminal Procedure Act 1977, *Yolelo* 1981 1 SA 1002 (A), *Mpetha* 1983 (1) SA 576 (C), *Blom* 1992 (1) SACR 649 (E)

¹⁷⁸ (Australia) *Salahattin* (1983) 1 VR 521. (New Zealand) *Duffy* (1979) 2 NZLR 432-435, *Reddy* (1994) NZLR 457, 460. (South Africa) *Patel* 1946 AD 903, 907.

¹⁷⁹ (Australia) *Ireland* (1970) 126 CLR 321, *Salahattin* *ibid*. (South Africa) *Mogotsi* 1982 (1) SA 190 (B).

¹⁸⁰ (Australia) *Woon* (1964) 109 C.L.R. 529, *McNamara* (1987) 1 VR 855, *Bey* (1994) (1) WLR39, *Sharpe* (1994) 2 WLR 84. (Canada) *Mannion* (1986) 53 CR (3d) 193 C.C.C.

¹⁸¹ (Australia) *Beljajev* (1984) VR 657, *Bruce* (1987) 74 ALR 219. (South Africa) *Osman* 1998 (11) BCLR 1362 (C.C.), *Skweyiya* 1984 (4) SA 712 (A).

governing admissibility of ambush defences and both prosecutorial and judicial commentary is now freely allowed. The Canadian Supreme Court has held the alibi defence to be an exception to the right to silence. When the Canadian accused springs a surprise alibi defence at trial, the state may draw an adverse inference from the accused's failure to admit the alibi timeously and in a manner sufficient to permit a full investigation into its merits.¹⁸² In South Africa, the failure to disclose an alibi defence timeously weakens the defence case and strengthens the state's *prima facie* case.¹⁸³ In Australia and New Zealand an alibi defence may be disclosed at any stage of the proceeding and no direct or indirect inference going to the suspect's credibility may be drawn.¹⁸⁴

Silence at trial : In all Commonwealth jurisdictions the accused is a competent but not a compellable witness.¹⁸⁵ The accused's silence cannot be used to draw a direct inference of guilt. If the accused's silence could be used as evidence of guilt, then the accused would have no real choice but to give evidence. He would then become compellable and open to compulsory interrogation.¹⁸⁶ Silence has only a limited evidentiary value and is dependent on whether or not the state has established a case which requires an answer.¹⁸⁷ A failure to testify adversely affects the accused by strengthening the state's case, leaving it uncontradicted or unexplained on vital facts-in-issue.¹⁸⁸ The state must first establish a *prima facie* case based on other sources of evidence. If the state case standing alone is unable to raise an inference of guilt, then the accused's silence is irrelevant. Only once the state case has reached a certain threshold of sufficiency may silence be used to strengthen other inferences arising from the *prima facie* case.¹⁸⁹ A threshold of sufficiency means a case which is sufficient to support a finding of guilt according to the standard of proof beyond

¹⁸² *Parrington* (1985) 20 C.C.C. 2d, 194, *Chambers* (1990) 59 C.C.C. (3d) 321 (S.C.C.), *Cleghorn* (1995) 35 C.R. 175, 100 C.C.C. (3d) 393. This rule is unique to Canada. It has been suggested that the rule is an infringement of Sec. 7 of the Charter of Rights and Freedoms, Craig "The Alibi Exceptions To The Right Of Silence" *Crim. L. Q.* (1996) 227-49. See also *P. (M.B.)* (1994) 29 C.R. (4th) 209 (S.C.C.).

¹⁸³ *Mashelele* 1944 AD 571, 585.

¹⁸⁴ The "artificial" distinction between an inference of guilt and an inference against credibility was rejected in *Petty and Maiden* (1991) 173 CLR 95 and in *Coombs* (1983) NZLR 748.

¹⁸⁵ (Australia) A.C.T, Sec. 66 Evidence Ordinance Act 1971, N.S.W., Sec. 405 Crime Act 1900 (New Zealand) Indictable Offences Summary Jurisdiction Act 1894. (Canada) Sec. 4 Canada Evidence Act 1893, Sec. 11(c) Charter of Rights and Freedoms, *Curr* (1972) 7 C.C.C. (2d) 181 (S.C.C.). (South Africa) Sec. 196(1) C.P.A., and Sec. 35 Constitution 1996.

¹⁸⁶ (Australia) *Tumhole Bereng* (1949) AC 235, 270, *Weissensteiner* *ibid.* (Canada) *Noble* (1997) 14 DLR (4th) 385, 43 C.R.R. (2nd) 233. (South Africa) *Letsoko* 1964 (4) SA 768 A.D.

¹⁸⁷ (Australia) *Weissensteiner* (1993) 178 CLR 217. (Canada) *Noble* *ibid.*

¹⁸⁸ (Australia) *Weissensteiner* *ibid.* (New Zealand) *McCarthy* (1992) 8 CRNZ 58. (Canada) *McConneK* (1968) 4 C.C.C. 257, 263 (S.C.C.), *Corbett* (1973) 42 DLR (3d) 142 (S.C.C.). (South Africa) *Nkombani* 1963 (4) SA 877 (AD), *Lesoko* 1964 (4) SA 768 (AD), *Theron* 1968 (4) SA 61 (T).

¹⁸⁹ (Australia) *Corrie and Watson* (1904) 20 TLR 365, *Kops* (1893) 14 NSWLR 150, 178. (New Zealand) *Dolling v Bird* (1924) 43 NZLR 545, *Trompert* (1985) 1 NZLR 359. (Canada) *Lepage* (1995) 1 SCR 654, 36 CR (4th) 145 (S.C.C.), *Johnson* (1993) 120 R (3d) 340 21 CR (4th) 336 (CA).

a reasonable doubt. If the state case falls below the threshold, there is a danger that the trier-of-fact may use the accused's silence to add weight to the state case rather than using silence simply to resolve an already existing doubt. The probative weight of a silence inference is therefore dependent on the strength of the state *prima facie* case. The accused is less likely to invoke silence when the *prima facie* case is strong and more likely to do so when the case is weak. The state ability to build a *prima facie* case on either direct or circumstantial evidence will also influence the probative value of the accused's silence.¹⁹⁰ Silence in the face of a *prima facie* case built on direct evidence serves to strengthen the state case when there is nothing to contradict it. When the state case is built on circumstantial evidence, the probative value of the accused's silence is dependent on whether there is a reasonable possibility of an innocent explanation,¹⁹¹ or whether the facts-in-issue are peculiarly within the accused's knowledge. When the accused alone is in possession of knowledge peculiar to the facts-in-issue, then silence will have a high probative value.¹⁹² It must also be reasonable, in the circumstance, to expect the accused to speak up. It must be reasonable to expect that if the truth is consistent with innocence, then a denial or explanation would be forthcoming from the accused.

Most Commonwealth jurisdictions allow the judge a limited ability to comment on the accused's silence.¹⁹³ (Except in South Africa, a no-trial jury system, judicial comment is a moot point. The South African judge is expected to explain his evidentiary use of silence in his judgement). Judicial commentary has the inherent danger of focusing the jury's attention on the accused's silence. The jury may then draw an unreasonable adverse inference from the accused's failure to testify. However, the opposite is not always true and it cannot be said that a total ban on judicial commentary will automatically serve to prevent the jury from drawing unreasonable adverse inferences. A legal rule can do little to prevent the juror who deliberately, negligently, ignorantly or subconsciously draws an adverse inference from the

¹⁹⁰ (Australia) *Kanaveiloman* (1994) 72 A. Crim. R 492, *Khoosal and Singh* (1994) 71 A. Crim. R 127, 123. (Canada) *Jenkins* (1908) 14 C.C.C. 221, 230. (South Africa) *Mthetwa* 1972 (3) SA 766 (A); *Francis* 1991 (1) SACR 198 (A).

¹⁹¹ (Australia) *Gordon* (1991) 57 A. Crim. R 413. (New Zealand) *Accused* (1988) 2 NZLR 385, *Nicolls* (1951) NZLR 91. (Canada) *Robertson* (1975) 21 C.C.C. (2d) 385, 29 CNRS 141 (148) (C.C.C.).

¹⁹² (Australia) *Nielan* (1992) 1 VR 57, *Weissensteiner* *ibid.* (South Africa) *Union Gov v Sykes* 1913 AD 156, *Kola* 1966 (4) SA 322 (A).

¹⁹³ (Australia) most states, except NSW, Victoria and the Northern Territories, allow judicial comment, *Lander* (1989) 52 SASR 424. No prosecutorial comment is allowed in all states except Queensland, *Waugh* (1950) AC 203. (New Zealand) judicial comment is allowed, *Butcher* (1992) 2 NZLR 257, 258, Prosecutorial comment is not permitted, Sec. 366 Crimes Act 1961, *McRae* (1993) CRN 261. (Canada) judicial and prosecutorial comment at jury trial is barred, Sec. 4(6) Canada Evidence Act, *Binder* (1948) 92 C.C.C. 20 (Ont. C.A), *Creighton* (1995) 1 SCR 858. A distinction is drawn between a comment and a statement, *Avon* (1971) 21 DLR (3d) 422 (S.C.C.). (South Africa) judicial commentary is a moot

accused's silence.¹⁹⁴ Commonwealth jurisdictions mostly adopt a compromise position. One where the judge in a carefully worded controlled and objective commentary, which neither over or under-emphasises silence, explains to the jury the permissible inferences which may be drawn in the particular circumstances. By contrast, the United States Supreme Court has developed a rigid no-comment rule which basically leaves the jury to make its own unsupervised choices.¹⁹⁵ The Commonwealth judge must make it clear to the jury that the accused is not obliged to give evidence. The accused's silence may not amount to an admission of guilt nor may it constitute a corroboration of guilt. Judicial commentary is susceptible to the following guidelines. Where the accused is suffering from a physical or mental disability, no comment may be made. Where the accused has given an innocent explanation before trial, the explanation is adduced into evidence and the accused subsequently fails to testify, no judicial comment may be made. Where the defence has adequately prepared and presented its case through other witness evidence, no comment may be made. Where the state case is weak, the accused is justified in remaining silent. Where the state case has not clearly established the accused's participation in a crime or one which calls for an innocent explanation, no comment may be made. On the other hand, a strong judicial comment is warranted where the accused alleges an innocent explanation and then fails to testify.¹⁹⁶ On the whole, judicial commentary is an exercise in balance. It should not be repetitive or unnecessarily disparaging. The judge should never over-emphasise the accused's silence in a way which gives it an undue importance not warranted on the facts.

The distinction between pre-trial and trial silence : The inference drawn from the suspect's silence during a police interrogation is not logically different from the inference drawn from the accused's silence at trial. Yet, in all Commonwealth jurisdictions, pre-trial silence is afforded a greater degree of protection than trial silence. It is also assumed that both pre-trial and trial silence are equal manifestations of the core fundamental privilege

point, prosecutorial commentary is allowed on close of trial and at appeal, *Letsoko* 1964 (4) SA 768 (AD), 776 C-E. See also Van der Merwe "The Constitutional Passive Defence" *Obiter* (1994) 1-21.

¹⁹⁴ *R v Steinberg* (1931) QR 222, 236, (C.A) Canada, although no judicial comment may be made in a jury trial, "the law does not forbid jurors from using their own intelligence and considering the absence of the accused's explanation".

¹⁹⁵ *Griffin v California* 380 US 609 (1965) per Stewart J (dissenting) at 623. The judge may make no adverse inference comment, *Lakeside v Oregon* 43 US 333 (1978). The judge is obliged to make a no adverse inference comment on request by the accused, *Carter v Kennedy* 450 US 288 (1981). See *supra* chapter 6.

¹⁹⁶ "Although the burden is on the prosecution to prove *mens rea*, the accused is usually the best source of evidence on this issue. Yet, by claiming silence, he can avoid giving an explanation and prevent cross-examination as to state-of-mind. By not testifying and denying the mental element, the accused presents the state with an insoluble problem, just how to prove the accused's state of mind. Comment by the judge in this circumstance is surely appropriate, Williams (1988) *Crim. L. Rev* 97.

against self-incrimination, but this is not strictly true. As has been noted in Chapter Two, pre-trial silence has its historical origin in the *ius commune* and the common law reaction to the oppressive inquisitorial procedure of the seventeenth century prerogative courts. The trial silence principle or the right not to testify has its origin in the rise of defence counsel and in the nineteenth century procedural reforms which made the accused for the first time a competent but not compellable witness at his own trial. Apart from the historical reason, there are a number of other considerations which explain why pre-trial and trial silence are treated so differently. These considerations are based on the view that the suspect is at a procedural and substantive disadvantage during the pre-trial investigation stage, but the accused is at a procedural advantage during the trial. Fairness is recognised as a critical adjunct to the drawing of an adverse inference from silence. During the pre-trial interrogation stage, the suspect is confronted by coercive and intimidating influences which make it unfair to ascribe a particular voluntary action to the accused or to draw an adverse inference from his silence. However, at trial, fairness is an integral safeguard and any interpretation of silence is bound to be fair. It may be fair to draw adverse inferences from the accused's silence at trial, because by this stage the accused is aware of the case to be answered, is provided with legal counsel, and there is no danger of state induced compulsion or oppression. The perceived unfairness of the suspect's pre-trial circumstance is behind statutory reform of the silence principle in England (Police And Criminal Evidence Act 1984 PACE), in Australia (Evidence Act 1995 (Cth) and (NSW)), in Singapore (Criminal Procedure Code (Chapter 68) 1985) and Malaysia (Criminal Procedure Act 1996). Common sense is sometimes advanced as an underlying rationale for the differing degree of protection afforded by the silence principle at pre-trial and at trial. Common sense dictates that an innocent accused would at the very least assert his innocence before a jury of his peers but may understandably refrain from speaking during intimidating and authoritative police questioning.

A third reason advanced for the differential treatment of the silence principle is based on the practical consideration of unavoidability. At trial it is practically impossible to prevent the jury from taking cognisance of the accused's failure to testify, especially when he ought to be expected to deny, explain or answer the case against him. At a very practical level, lay jurors may be tempted to draw adverse inferences from the accused's silence. One of the reasons for the existence of a judicial comment is to prevent misunderstanding and to instruct the jury as to the permissible or impermissible usage of silence. It is assumed that it is easier to protect the accused from the consequences of his pre-trial silence by the simple expediency of barring the jury from ever finding out about it. A number of variables based on the purpose and time of the criminal proceeding may justify the drawing of adverse inferences

from silence at trial but not at pre-trial. The pre-trial investigatory stage of the criminal proceeding (an executive function) is uniquely different from the trial adjudicatory stage (a judicial function). During the investigatory inquisitorial process the police are still building the evidentiary case against the suspect. The police need not reveal any information and may easily manipulate the ignorant suspect, trick him into lying or persuade him of a particular version of the facts. In short, anything which the suspect does or says (or does not do or say) may form part of the prosecution's case against him. The silence principle is regarded as a crucial protection in this circumstance. In the adjudicatory adversarial stage, the prosecution case is well known to the accused. There is little possibility of the accused being tricked or caught out in a lie. Adverse inferences from silence are also dependent on the time element which assumes a gradually increasing importance as the criminal process matures. Initially, when the state case is as yet unformed, there is nothing for the suspect to rebut and no legal duty (except a moral one) on the suspect to co-operate in building the case against him. However, once the prosecution's case has reached the critical threshold level of a *prima facie* case at trial, silence inferences may add to the probative strength of the case against the accused. There is also an imperative evidentiary duty to answer. Unless rebutted, the *prima facie* proof may well harden into conclusive proof and a possible guilty verdict. *A fairly consistent principle of Commonwealth jurisprudence therefore is that no adverse inferences may be drawn from pre-trial silence, but a number of limited adverse inferences may be drawn from silence at trial.*

CHAPTER 9

STATUTORY SILENCE

9.1 Codification Of The Silence Principle

The Criminal Justice And Public Order Act 1994 (CRIMPO) is a unique and controversial piece of legislation.¹ Its goal is to modify the common law silence principle by codifying the types of adverse inferences which may be drawn from the criminal defendant's invocation of silence at both the pre-trial and the trial stage.² It is born an orphan, with the exception of Singapore,³ no other Commonwealth jurisdiction has seen fit to follow its example. It is also an unfashionable legislative act, for it seeks to curtail the right to silence at a time when the international legal cultural trend is towards the upgrading and the constitutionalisation of the right. (In 1990, New Zealand entrenched a silence principle in its Bill of Rights Act, in 1993 and 1996 the South African Constitution elevated silence into a fundamental human right, in 1993 the European Court in *Funke v France* re-interpreted Sec. 6(1) of the European Convention on Human Rights to include a right to silence). Even in England the enactment of CRIMPO, almost by an arbitrary governmental fiat,⁴ is the cause of a polarization within the ranks of the legal fraternity. Opponents who favour the statutory curtailment of the silence principle suggest that it has become a refuge for the hardened criminal. The invocation of silence hampers police investigations and is the perfect foil in the hands of

¹ Birch "Suffering In Silence : A Cost-Benefit Analysis Of Sec. 34 Criminal Justice And Public Order Act 1994" *Crim. L. Rev* (1999) 769; Branston "The Drawing Of An Adverse Committal From Silence" *Crim. L. Rev* (1998) 189; Dennis "The Criminal Justice And Public Order Act 1994" *Crim. L. Rev* (1995) 4; Pattenden "Inferences From Silence" *Crim. L. Rev* (1995) 602; Jennings "Resounding Silence" *New. L. J* (1996) 725; Mirfield "Two Side-Effects Of Sec. 34 to 37 Of The Criminal Justice And Public Order Act 1994" *Crim. L. Rev* (1995) 612; O'May "The Criminal Justice And Public Order Act 1994" *Legal Action* (1995) 10.

² Keane *The Modern Law Of Evidence* Butterworths (2000); *Phipson On Evidence* Sweet and Maxwell 2000; Jason-Lloyd *The Criminal Justice And Public Order Act 1994* Frank Cass and Co, (1996); Mirfield *Silence, Confessions And Improperly Obtained Evidence* Clarendon Press, (1997).

³ Khee-Jin Tan "Adverse Inferences And The Right To Silence : Re-examining The Singapore Experience" *Crim. L. Rev* (1997) 471; Hor "The Privilege Against Self-Incrimination And Fairness To The Accused" *Singapore J. Legal. Studies* (1993) 35; Meng Heong Yeo "Diminishing The Right To Silence : The Singapore Experience" *Crim. L. Rev* (1983) 89. The Singapore Criminal Procedure Code (amendment) Act of 1976 is the direct result of the recommendations of the English Criminal Law Revision Committee, 11th Report 1972, Cmnd 4991 (para 28-45). See in particular Sec. 122(b), 123(1), 189(2) and 196(2) of the Criminal Procedure Code. In Singapore the constitutionality of the pre-trial and trial silence was upheld by the Privy Council in *Haw Tau Tau v P.P* (1981) 3 ALL ER 14, 20, per Lord Diplock, "the provision for adverse inferences in sec. 196(2) makes no change to the existing law of Singapore", and in *Sundran Jaykumal v P.P* (1981) 2 Malayan L.J. 297. Although *Haw Tau Tau* was recently criticised by the Malaysian Federal Court in *Arulpragasam Sandaraju*. S.C.Cr.A. No. 05-237-92.

⁴ The Royal Commission On Criminal Justice (1993) strongly recommended the retention of the common law right to silence and rejected the limiting amendments proposed by the CLRC report (1972). The government's arbitrary disregard for the findings of the Royal Commission was one of the controversial aspects of the 1994 legislation.

obstructive defence solicitors. Proponents argue the exact opposite. The silence principle provides a natural protection for the vulnerable and the weak in police detention. Curtailing the silence principle would result in a serious miscarriage of justice and weaken the ability of defence solicitors to aid their clients. It would also constitute an infringement of England's obligations under the European Convention on Human Rights as defined in the Human Rights Act of 1998.

The most important and controversial clause in CRIMPO⁵ are Sec. 34, 35, 36, 37 and Sec. 38. These clauses are grouped into three distinct categories.⁶ Sec. 34, Sec. 36 and Sec. 37 are designed to account for the use of pre-trial silence by a suspect during the police interrogatory phase. (Note, at the pre-trial stage PACE provides the suspect with certain procedural safeguards,⁷ and CRIMPO is specifically designed to limit the effect of these safeguards). Sec. 35 covers silence usage during the actual trial proceeding and Sec. 38 supports the other sections by defining the nature of the adverse inferences which may be drawn from the accused's silence. In particular, **Sec. 34** seeks to limit the intentional withholding of exculpatory facts by the accused during the initial police interview (on being cautioned in terms of Code C para 10.4) and the belated introduction of these exculpatory facts during the trial proceeding (the so-called ambush defence). Sec. 34 permits the prosecution to draw two adverse inferences from the accused's failure to mention defensive facts during the police interrogation, namely that the defensive fact was withheld because it would not withstand police scrutiny, or it is a subsequent fabrication made during the course of the trial, either by the accused or his witnesses. **Sec. 36** permits adverse inferences to be drawn from the accused's failure (after arrest and a caution in terms of Code C para 10.5) to account for objects, substances or marks on his person, clothing or in his premises which the arresting officer reasonably believes may be attributable to a specific offence (the officer must specify the offence and Sec. 36 applies only to that limited instance). **Sec. 37** is similar to Sec. 36 and allows for an adverse inference to be drawn from the accused's presence in a particular case, at or about the time of the offence and the accused is unable to explain his presence. The arresting officer must reasonably believe that the accused's presence at or about the place where the offence occurred is reasonably attributable to the accused's participation therein. **Sec. 35** applies to the accused who fails or refuses to testify during the

⁵ CRIMPO is entirely derived from the CLRC (1972) Cmnd 4991 report, partly from Sec. 18 and 19 of the Irish Justice Act 1984 and is almost identical to articles 3 and 6 of the Northern Ireland Order (1988) Act.

⁶ See in particular Birch "Suffering In Silence : A Cost-Benefit Analysis Of Sec. 34" *Crim. L. Rev* (1999) 769; Pattenden "Inferences From Silence" *Crim. L. Rev* (1995) 602; Mirfield "Two Side Effects Of Sec. 34 to 37" *Crim. L. Rev* (1995) 612.

⁷ *Supra* chapter 8 p.289-290.

trial. Both the judge and the prosecution, depending on the factual circumstance, may draw reasonable adverse inferences from the failure to testify. **Sec. 38(3)** underpins the abovementioned clauses by giving substance and definition to the meaning of a permitted and reasonable adverse inference. All the clauses, Sec. 34 through to Sec. 37, apply either separately or collectively, depending on the factual circumstance. In theory it is possible for a collective adverse inference to be drawn simultaneously from all four sections. For example, if the accused fails to account for his presence at the scene of the crime, or for the bloodstains on his clothing, raises defensive facts at trial never previously mentioned and subsequently declines to testify, it is possible for a collective inference to be drawn from all four sections by both the judge and the prosecution. However, a cardinal rule, as defined in Sec. 38, is that no *prima facie* case may be established against the accused on the basis of silence inferences alone. Silence by itself cannot be evidence of guilt. There must exist a threshold minimum of other extraneous evidence. In summary, the overall effect of the CRIMPO provisions will be to place pressure on the suspect to co-operate with the police investigation, to disclose alibi-defences at the earliest opportunity, and at trial, to respond urgently to a *prima facie* case by taking the stand. It will not become an offence or a contempt of court to fail to do any of these things, because CRIMPO has not eroded the basic common law purpose of the silence principle. There is no direct statutory duty on the accused to make an incriminating disclosure. However, CRIMPO does generate an indirect obligation or pressure on the accused through the threat that his evidentiary use of silence is likely to make his conviction more probable rather than less probable.

A number of unique and salient evidentiary principles may be derived from CRIMPO. First, Sec. 34 applies only to evidentiary facts which the accused fails to mention during the pre-trial interrogation and subsequently relies on as part of his defence at trial. If the accused does not rely on the defensive fact at trial, no adverse inference may be drawn by the prosecution. The mere contention by the accused that the prosecution has not established a *prima facie* case, a failure to rely on any defensive evidence at all or a reliance on an evidentiary fact which would not reasonably be expected to be mentioned at the police interrogation will not draw a Sec. 34 adverse inference. Second, the evidentiary fact must be reasonable. An adverse inference may only be drawn from an evidentiary fact, which in the circumstance, the accused should reasonably have been expected to mention. Sec. 34 obliges the court to draw only such inferences as appear "proper". The natural and proper inference to be drawn from a failure to mention defensive facts at the pre-trial stage is that the defence is fabricated. This inference is weakened or extinguished when there are other credible explanations for the accused's failure to mention the defensive fact. Third, a Sec. 34 pre-trial silence cannot logically on its own establish a *prima facie* case. However, a Sec. 34

pre-trial adverse inference may contribute to the establishment of a *prima facie* case. By contrast, a Sec. 35 trial inference may only be drawn once a *prima facie* case has already been established and cannot contribute to its establishment. Fourth, the inferences permissible in terms of Sec. 34 are in addition to any other reasonable inferences which may be drawn from the accused's silence. Sec. 34 does not prejudice the admissibility of any other evidence. Fifth, Sec. 34 through to Sec. 37 only apply once the accused has been cautioned in terms of Code C para 10.4 and para 10.5. Sixth, Sec. 36 and Sec. 37 are similar to Sec. 34 in that they permit reasonable inferences to be drawn from the accused's silence out of court. Unlike Sec. 34, they are more specific and narrow in their application. Sec. 36 and 37 are concerned with facts which point to the accused's involvement with the offence rather than the defence. It is not a failure to mention defensive facts which are in issue, but the failure to explain facts already known to the police. However, Sec. 36 and 37 cannot on their own establish a *prima facie* case. Seventh, although not mentioned in Sec. 35 (trial silence), the prosecution is now permitted to comment on the accused's failure to testify. Sec. 168(3) schedule 11 of CRIMPO repeals Sec 1(b) of the Criminal Evidence Act 1898. The prosecution may draw such inferences as appear proper from the accused's failure to give evidence or his refusal, without good cause, to answer any questions. Eighth, no inference of direct guilt may be drawn from the accused's failure to rebut a *prima facie* case established by the prosecution. An adverse inference from a failure to testify is only conclusive because the prosecutorial case is already on the threshold of conclusive proof. The inference together with the other extraneous evidence cumulatively produces the weight of evidence necessary to convict.

9.2 The Effect Of CRIMPO On The Common Law

Without a doubt, CRIMPO has exerted a major influence on the common law right to silence. Some commentators⁸ are of the opinion that the impact has been limited, but others⁹ speak of a substantial attenuation of the common law silence principle. A reasonably objective view would be to adopt the middle ground. It is true that for certain evidentiary purposes the bundle of disjointed rules which make up the common law silence principle have been significantly limited. Yet, for other purposes, the changes have been minor. After all, CRIMPO does not formally abolish any of the common law rules of silence. It simply

⁸ See Uglow *Evidence Sweet and Maxwell* (1997).

⁹ See Andrew and Hirst *Criminal Evidence* (1997), Dennis "The Criminal Justice And Public Order Act 1994" *Crim. L. Rev* (1995) 4, 11; Pattenden "Inferences From Silence" *Crim. L. Rev* (1995) 602; Keane *The Modern Law of Evidence* (2000), "CRIMPO is a major curtailment of the right to silence".

imposes certain restrictions¹⁰ and makes it easier for the state to draw adverse inferences. (Note : the limitation on the drawing of adverse inferences is a modern and not a traditional historical application of the common law silence principle). In *R v Cowan*,¹¹ Lord Taylor CJ specifically denies that the right to silence at trial has been abolished, "Sec. 35(4) clearly holds that the accused remains a non-compellable witness and that a mere failure to testify does not result in contempt or in any other legal sanction". Nevertheless CRIMPO does present the accused with certain active inducements to testify. The various changes to the common law brought about by CRIMPO are to be found in the following areas :

The Caution : The old common law caution has been substantially modified by the CRIMPO provisions. The new caution must be administered once the investigating officer reasonably believes that the suspect is guilty of the offence (Code C para 10.1) and begins to direct his questioning with the deliberate intent of acquiring trial admissible evidence. The caution must be re-administered upon arrest (Code C para 10.3) and during all subsequent interrogations. The accused must, at regular intervals, be reminded of the caution. The caution is again repeated at the formal charge. The repetitive emphasis on the caution is crucial as Sec. 34 may only be triggered once the accused is charged and cautioned. The 1995 caution as set out in Code C para 10.4 reads, "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". The immediate problem with the new caution is that it is much too long (37 words) and much too complicated. By contrast, the American version, "you have a right to remain silent and anything you say may be taken down and used as evidence against you" [or words to that effect] is shorter (21 words) and easier to understand. Research has shown that only about 50% of suspects understood the old caution which was only 22 words. How many will understand the more complex caution is anyone's guess.¹² The arresting officer is not required to give a word for word formal recitation of the caution as long as the sense and meaning of the caution is communicated to the accused. The arresting officer may even, in certain circumstances, explain the caution in his own words. The caution administered in terms of the Sec. 36 and 37 provisions differs substantially from the everyday Sec. 34 caution and is a rather unique

¹⁰ In *R v Birch* (1999) Crim. L. R 651, it was stated, "the act does not formally abolish any one common law principle relating to the evidentiary effect of silence, it simply imposes restrictions".

¹¹ (1995) 4 ALL ER 939 (1996) QB 373, 378.

¹² Gudjonsson et al "The Royal Commission On Criminal Justice, Persons At Risk During Interviews In Police Custody" *Research Report No. 12* (1993), "Practice Direction, Crown Court : Evidence Advice To Defendant" 1 *W.L.R.* 657 (1995), *The Psychology Of Interrogations, Confessions And Testimony* Chichester Wiley (1992). Munday "Inferences From Silence And European Human Rights Law" *Crim. L. Rev* (1996) 370, 389, "the attempt to avoid making use of the exact statutory wording of the caution is a desire to make the caution more intelligible to the suspect".

specialisation.¹³ Code C para 10.5B does not set out a specific model caution in words and instead, substitutes a checklist of essential warnings which must be communicated to the suspect immediately on arrest. The arresting officer acting in terms of Sec. 36 or Sec. 37, must inform the accused in ordinary language of the following : (i) the nature of the offence being investigated, (ii) the incriminating fact(s) for which the suspect must make an account, (iii) the arresting officer's belief that the fact(s) may be due to the suspect's participation in the commission of the offence, (iv) if the suspect fails or refuses to account for the fact, a court may draw the appropriate inference, (v) a record is being made of the interview and may be given in evidence. The effect of CRIMPO is to make the English caution into a highly complex administrative warning, unlike any other in the Anglo-American criminal system.

Pre-trial Silence : The common law did not permit either the judge or the prosecution to comment or to draw adverse inferences from the accused's invocation of silence during the pre-trial investigation (*R v Hall*).¹⁴ Silence during the pre-trial stage was inadmissible as evidence except in certain limited circumstances.¹⁵ The accused's silence was only admissible as an implied admission in reaction to an accusation made by the victim (*R v Horne*)¹⁶ or a parent (*R v Parkes*), and only when the accused or the accuser were on even terms (*R v Christie* and *R v Chandler*)¹⁷. CRIMPO has significantly altered some of the common law principles in this regard. Sec. 34(5) expressly preserves the common law *Christie* principle. Accordingly, Sec. 34(5)(a) does not "prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged". The general common law silence principle continues to apply prior to the administration of the caution, as Sec. 34 is only triggered once the suspect has been cautioned. Case precedent such as *R v Parkes* will continue to be good law and the common law principles which fall outside of the scope of Sec. 34, 36 and 37 will remain unaltered. Indeed, Sec. 34(5)(b) specifically does not "preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section".

The common law doctrine of recent possession will also remain unaltered. In fact, Sec. 36 and 37 merely add a new kind of inference to the other permissible common law circumstantial inferences that the court is entitled to draw. In terms of the possession

¹³ The Sec. 36 and Sec. 37 special caution is set out in PACE Code 10.5B and E4.3D. See also *R v McNamara* (1998) Crim. L. R 278 and *R v Sykes* (1997) Crim. L. R 752.

¹⁴ *Supra* chapter 8 note 128 and accompanying text.

¹⁵ *Supra* chapter 8 note 16-18 and accompanying text.

¹⁶ *Supra* chapter 8 note 137 and accompanying text.

¹⁷ *Supra* chapter 8 note 133-135 and accompanying text.

doctrine, the court is entitled to infer that the accused is guilty of stealing or dishonestly handling stolen goods found in his possession. The accused's failure to offer a credible explanation means that there is nothing to prevent a circumstantial inference from being drawn but an explanation belatedly given at a later stage, even at the trial itself, is as valid as one offered when the suspect is first questioned. Sec. 36 and Sec. 37 permit a different inference which enables the court to draw a direct (not a circumstantial) inference from the suspect's failure to offer an explanation when first questioned. A delayed explanation may in turn be open to attack as a fabrication in terms of Sec. 34. The general effect of Sec. 34, 36 and 37 is to make it easier for the prosecution to draw adverse inferences, in certain circumstances, from the accused's use of pre-trial silence. A prosecutorial power which was not previously permitted in terms of the common law silence principle.

Trial Silence : In terms of the common law, the judge (but not the prosecution) was entitled to comment on the accused's silence at trial (*R v Rhodes*, *R v Sparrow* and *R v Martinez-Tobon*),¹⁸ but only within certain limited parameters (*R v Bathurst*, *Waugh v R* and *R v Martinez-Tobon*).¹⁹ The judge was directed to warn the jury that no inference of guilt could be drawn from the accused's silence (*R v Gilbert*). CRIMPO substantially reverses these common law precedents. In terms of Sec. 34, both the judge and the prosecution are now entitled to draw adverse inferences from the accused's silence. Sec. 35 permits the court and the jury to draw proper or reasonable inferences from the accused's failure to testify. Nevertheless, a trial inference drawn from the accused's silence is dependent on the establishment by the prosecution of a *prima facie* case. In this regard the common law has not been altered.

Presumption Of Innocence : The silence principle is said to reinforce the presumption of innocence (the cardinal rule of an accusatorial legal system) by obliging the state to produce sufficient evidence to convict the accused. The state is obliged to shoulder the entire burden of proof. It has been argued by libertarian theorists that the statutory erosion of the silence principle weakens the presumption of innocence and incrementally shifts the burden of proof from the prosecution to the accused. Part I of the Criminal Procedure And Investigation Act 1996 and Sec. 34 through to Sec. 37 seem to place an unfair burden of proof on the

¹⁸ *Supra* chapter 8 note 139 and 162 and 163.

¹⁹ See also *Waugh v R* (1950) A.C 203, 212, where it was held wrong for the judge to bolster a weak prosecution case by making repeated comments about the accused's failure to testify. Strong judicial comment is reserved for cases where the accused's silence is remarkable and the case against him strong (*R v Martinez-Tobon*). It is necessary for the judge to avoid any suggestion that silence by itself proves guilt (*R v Sparrow* and *R v Gilbert*).

accused, which is inconsistent with *Woolmington's* golden rule principle.²⁰ (Note : This argument has been conclusively refuted in Chapter 4).²¹ It is also argued that CRIMPO is contrary to Article 6(1) "trial fairness" and Article 6(2) "presumption of innocence" of the European Convention Of Human Rights.²² By contrast, utilitarian theorists suggest that CRIMPO is merely a statutory reinforcement and a reasonable limitation of the common law silence principle. The CRIMPO adverse inferences are merely one type of circumstantial evidence which the prosecution may or may not use in evidence once it has otherwise established a *prima facie* case. This view is reinforced by Lord Taylor's comment in *R v Cowan*,²³ "the effect of Sec. 35 is that the court or jury may regard the inference from a failure to testify as ... a further evidential factor in support of the prosecution's case. It cannot be the only factor to justify a conviction and the totality of the evidence must prove guilt beyond a reasonable doubt". Furthermore, the European Court Of Human Rights has rejected the argument that the Criminal Evidence (N.I) Order 1988 (an earlier Northern Ireland equivalent of CRIMPO)²⁴ deprives the accused of a fair trial. In *Murray v U.K*, the European Court noted that the right to silence is not an absolute or unconditional guarantee. In certain appropriate circumstances common sense inferences may be drawn from the accused's silence, while in others no adverse inferences may be drawn.²⁵

9.3 Pre-Trial Silence

9.3.1 Section 34 (Ambush Defences)

Sec 34(1) reads :

Where in any proceedings against a person for an offence, evidence is given that the accused :

²⁰ The golden rule, *Woolmington v D.P.P* (1935) A.C 462.

²¹ *Supra* chapter 4 p.141-144. The nexus between the right to silence and the presumption of innocence is assumed as a *sine qua non* without explanation or proof of the exact relationship. This is another example of the blurred libertarian sentimentality which relies on emotion rather than logic for its arguments.

²² *Infra* chapter 10.

²³ (1994) 4 ALL ER 939 at 943.

²⁴ CRIMPO is largely modelled on the Northern Ireland Order (1988) articles 3 to 6. The N.I Order (1988) has been used as a test case before the European Court of Human Rights. See in particular *Murray v U.K* (1996) 22 EHRR, 29. For an analysis of the Northern Ireland Act see Jackson "Curtailling The Right To Silence : Lessons From Northern Ireland" *Crim. L. Rev* (1991) 404, "Inferences From Silence : From Common Law To Common Sense" *Northern Ireland Legal Quarterly* (1993) 103, "Interpreting The Silence Provisions : The Northern Ireland Cases" *Crim. L. Rev* (1995) 587.

²⁵ *Infra* chapter 10.

- (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
- (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,²⁶

Sec 34(2) reads :

- (c) the court in determining whether there is a case to be answered, and
- (d) the court or jury in determining whether the accused is guilty of the offence charged *may draw such inferences from the failure as appears proper.*

In terms of Sec. 34, the court may draw an adverse inference from the accused's failure to mention a defensive fact during the police investigatory stage and which the accused at his subsequent trial introduces as part of his defence.²⁷ The intention behind Sec. 34 is to create an evidentiary balance between the prosecution and the accused, especially when the accused gains an evidentiary advantage at trial by adducing previously undisclosed and untested facts. The section specifically makes use of the word "may", meaning that the drawing of an adverse inference is not automatic nor compulsory. The court may decline to draw an adverse inference. Silence at the police interview has no intrinsic evidentiary weight of itself and is dependent on what the accused was silent about and the statements expected from the accused based on the evidence called against him.²⁸ The court may draw an adverse inference in the following circumstances : (a) when the accused fails to mention a

²⁶ Sec. 34, 36 and Sec. 37 have been amended as a result of the European Court of Human Rights decision in *Murray v U.K* (1996) 22 E.H.R.R., "a denial of access to legal advice at the police station violates article 6 of the European Convention. Sec. 58(2) of the Youth Justice and Criminal Evidence Act (1999) inserts a new section 2(A) which reads, "where the accused is at an authorised place of detention at the time of a failure to mention facts, no adverse inference is allowed where the accused has not been allowed an opportunity to consult a solicitor prior to being questioned or charged" [paraphrased].

²⁷ Birch "Suffering In Silence : A Cost-Benefit Analysis Of Sec. 34" *Crim. L. Rev* (1999) 769, 772, argues that Sec. 34 is a radical departure from the common law and is an extremely expensive procedure which (a) consumes too much judicial time at trial and appeal, (b) it is a tool by which an unscrupulous jury may wreak injustice, and (c) its evidentiary cogency will mostly be outweighed by its prejudicial effect.

²⁸ Sec. 38(3) which prevents the accused's conviction on an adverse inference drawn from Sec. 34 alone, is a reaffirmation of the evidentiary unreliability of a Sec. 34 pre-trial inference. See *R v Abdullah* (1999) 3 Archbold News 3.

fact,²⁹ (b) when the accused fails to mention a defensive fact later relied upon by his trial defence, and (c) when the accused is reasonably expected to mention a particular fact. The adverse inference must be a reasonable or "proper one" and may only be drawn once the accused has been cautioned. (Note : It is possible that Sec. 34 has been rendered superfluous, at least in theory, by the Criminal Procedure And Investigation Act 1996 which creates a complementary and parallel statutory framework for advance disclosure by both the prosecution and the defence. In particular, Sec. 11 enables adverse inferences to be made by the court, when the accused has failed to disclose his defence.³⁰ However, the 1996 Act does not specifically repeal Sec. 34).

"Silence" : In Sec. 34 silence is simply defined as a failure to mention a fact.³¹ The definition is broad enough to encompass not only the silent accused, but also the verbose accused who says much during the police interview, but who fails to reveal relevant defensive facts which he will later rely upon in court. The police interrogator is expected to make a correct interpretation of the accused's language and answers. The accused who cannot articulate his answers clearly may be faced with the problem of proving that he did mention facts to the police but which the police failed to interpret correctly.³²

"The defensive action" : The concept of a defensive fact is central to an analysis of Sec. 34. Where the accused does not rely on a defensive fact at this trial, then Sec. 34 cannot be triggered and no adverse inference may be drawn.³³ What exactly is meant by the word "fact"? A fact may be defined in two ways. It may be defined empirically (in the technical sense) as an adducible fact of evidence or it may be simply defined as a mere suggestion. Some commentators are of the opinion that the mere suggestion of say an innocent

²⁹ Sec. 34(3) permits evidence of the accused's failure to mention facts to be given in trial, even before evidence of the fact itself. Early disclosure by the accused is therefore a strong feature of Sec. 34.

³⁰ Part I of the Criminal Procedure And Evidence Act (1996) imposes a general obligation upon the accused to set out the general nature of his defence (Sec. 5(6)), and to disclose details of his alibi defence (Sec. 11), a failure to do so will result in an adverse comment at trial (Sec 11(3)). Adverse inferences may be made where (a) the defence is made out of time, (b) the accused has laid out an inconsistent defence, (c) and has developed a trial defence which is inconsistent with this previous statement, and (d) has adduced an alibi defence during trial without making an advance disclosure.

³¹ If the police uncover new evidence after the suspect has been interviewed and questioned, no proper or reasonable inference may be drawn. The time element is of crucial importance.

³² A significant minority of English suspects suffer from a severe language problem. This type of suspect is unable to understand the caution, nor realize that certain information is exculpatory. Gudjonsson et al "Persons At Risk During Interviews In Police Custody" *RCCI Research Study No. 12* (1993) 23-26.

³³ If no defensive fact is advanced at trial, Sec. 34 has no application, no matter how incriminating the accused's silence may have been during the police interview. *R v Moshaid* (1998) Crim L. R 420; *R v Bansal* (1999) Crim. L. R 484.

explanation by the accused is sufficient to trigger Sec. 34.³⁴ The problem with defining a defensive fact as a mere suggestion is that it gives the prosecution an unfair advantage. The word "suggestion" is somewhat vague and obviously something less than a hard fact. If the prosecution could use the accused's trial suggestions to trigger a Sec. 34 adverse inference, it would make it very difficult for the defence to rebut in cross-examination. The better argument (*R v Nickolson*)³⁵ is to define a fact not as a suggestion but as a "fact in evidence". Sec. 34 is triggered once the evidentiary fact relied upon by the defence is adduced either by the accused himself or by a defence witness. This would also include fact(s) obtained from a prosecution witness which is of assistance to the accused's defence.³⁶

"Reasonable expectation": There are many good reasons for remaining silent which are consistent with innocence.³⁷ An inference may only be drawn from a defensive evidentiary fact which in the circumstance should reasonably have been mentioned by the accused. The test of "reasonableness" is partially objective and partially subjective. It is objective because it assesses the accused's silence in the particular circumstance against the standard of a reasonable person (would a reasonable person in the accused's shoes also have remained silent). It is partially subjective, because it involves an inquiry into the accused's state of mind.³⁸ A measure of judicial control is also implicit in Sec. 34 as the judge is allowed to comment on the accused's silence and to determine the manner in which notice of the accused's silence should be brought to the jury's attention.³⁹ The important factors in assessing reasonableness are the accused's actual quantum of knowledge and level of understanding.⁴⁰ Knowledge of the alleged crime determines the extent of any disclosures the accused might make. The accused's disclosure of defensive facts is also dependent

³⁴ Jackson "Interpreting The Silence Provisions : The Northern Ireland Cases" *Crim. L. Rev* (1995) 590-591, notes "all that would seem to be necessary to bring Sec. 34 into play is for the defence to suggest a fact of assistance to the accused". In *R v McLernon* (1992) N.I.J.B. 41 it was held, "the accused can rely on a fact in his defence, even though neither he nor a defence witness has given evidence of the fact. A mere suggestion by defence counsel is sufficient".

³⁵ (1999) *Crim. L. R* 61, "the comment advanced by the accused in evidence was more in the way of a theory or speculation than a fact, when Sec. 34 clearly required the latter".

³⁶ *R v Bowers* (1998) *Crim. L. R.* 817, "a fact relied upon may be established by the accused himself, a defence witness or by a prosecution witness. This includes any central and important fact relied on in examination-in-chief or cross-examination".

³⁷ "Report Of The Working Group On The Right To Silence" London (1989) para 65, appendix D, sets out a list of factors consistent with an innocent explanation.

³⁸ Relevant factors are character, age, experience, sobriety, tiredness, fear, embarrassment, ignorance, etc., *R v Argent* (1997) *Crim. L. R* 346.

³⁹ *R v McGarry* (1998) 3 *ALL ER* 805, "the judge is obliged to give an old style common law directive when the requirements of Sec. 34 are not met. The common law survives to the extent that it fills in the gaps left by Sec. 34".

⁴⁰ *R v Argent* *ibid* "a deficiency of information is a factor the judge must take into account in making his comment".

upon the amount of information the police are willing to reveal during the interrogation.⁴¹ The accused's level of understanding is a critical factor as a confession is easily induced from vulnerable (including young and mentally handicapped) suspects. The accused is also invariably shocked, confused and intimidated by the harsh psychological environment of the police station. A Sec. 34 adverse inference should be avoided where the accused is unable to formulate cogent answers to interrogatory questions because of a physical or mental deterioration which results in a real inability to understand the legal consequence of a particular act or omission. The court has two options when the prosecution deliberately relies on evidence of the accused's silence obtained by the police in breach of PACE and the Practice Code. It may decline to draw a Sec. 34 adverse inference or it may decide to make use of its discretionary power to exclude the evidence in terms of Sec. 78(1) PACE.⁴² One of the primary problems with a Sec. 34 interpretation is the contentious issue of legal advice.⁴³ Should the accused be reasonably expected to disclose a defensive fact during the police interview when his legal advisor has instructed him to remain silent and the accused at trial relies upon such legal advice as a justification for his silence? On the one hand it may be unreasonable to expect the accused to disregard his legal advisor, but on the other hand, an acceptance by the court of such a justification would render Sec. 34 valueless.⁴⁴ In *R v Condrón and Condrón*,⁴⁵ *R v Argent*,⁴⁶ and *R v Roble*,⁴⁷ the Appeal Court has held that a pre-trial legal instruction to remain silent is but one factor to be taken into account by the jury in assessing the accused's reliance on a defensive fact at trial. Legal advisors are well aware that they may be called upon at trial to justify the advice given to the accused during the pre-trial stage. To protect themselves, legal advisors should take detailed notes of the police interview and ensure that the reasons given for advising the accused to remain silent are satisfactorily recorded as part of the police record.⁴⁸ The legal advisor should also inform his

⁴¹ Where the police undertake speculative questioning in the absence of real suspicion in the hope of triggering Sec. 34, then such evidence should be excluded. This also applies to persistent questioning which goes beyond what is necessary to achieve the required purpose.

⁴² A judicial exclusionary discretion applies because (a) the positive use of evidence by Sec. 34 is subject to Sec. 78(1), PACE (b) although silence is logically the opposite of a confession, since the prosecution is using it to establish positive incriminating evidence, the PACE rules should apply.

⁴³ Cape "Sideline Defence Lawyers : Police Station Advice After Condrón" (1) *International J. Evidence and Proof* (1997) 386, "to permit an inference to be drawn from silence based upon legal advice invites the suspect to second guess his advisor who is now side-lined and ineffective". Dixon "Common Sense, Legal Advice And The Right To Silence" *Public Law* (1991) 233, "the legal advisor's ability to use silence as a bargaining tool has been completely eroded". Fenwick "Curtailling The Right To Silence : Access To Legal Advice And Sec. 78" *Crim. L. Rev* (1995) 132; Wright "The Solicitor In The Witness Box" *Crim. L. Rev* (1998) 44.

⁴⁴ *R v Kinsella* (1992) N.I.J.B., 5 "it is not reasonable for a person being interviewed to fail to mention facts, simply because he had been advised by his solicitor to remain silent".

⁴⁵ (1997) 1 Cr. App. R 185.

⁴⁶ (1997) 2 Cr. App. R 27.

⁴⁷ (1997) Crim. L R 449.

⁴⁸ Provided the explanation is detailed and clear, the prosecution will find it difficult to motivate a request for the witness box appearance of the legal advisor.

client that the court may well waive professional-client privilege in this regard.⁴⁹ In *R v Condrón and Condrón*,⁵⁰ it was held that a mere statement or recapitulation by the accused of his legal advisor's instructions on silence will not be sufficient to waive professional privilege. However, if the accused goes further and raises the legal advice as a reason for his silence, then he will have effectively waived professional privilege.⁵¹ A court ordered waiver of privilege is a tactical disadvantage for the defence, because it focuses the jury's attention on the cross-examination of the legal advisor in a way which may be out of proportion to the evidentiary value of such an examination. Nevertheless, in many circumstances it may well be reasonable for a legal advisor to give a silence instruction to his client, especially where the police have a weak or evidentiary insufficient case. Certainly in terms of the Human Rights Act 1998, the solicitor's advice to his client will greatly influence the type of inference which may be drawn against the accused.⁵²

"A proper inference" : Sec. 34(2) permits the jury to draw "such inferences as appear proper from the accused's failure to mention a defensive fact during the pre-trial interrogation". The section does not specifically define the nature or the parameters of the word "inference". It obviously contemplates an "adverse inference" but this must be deduced from the meaning of the section. Since Sec. 34 is concerned with the credibility of a defence belatedly advanced, common sense suggests that the defensive fact when raised at trial is either a fabrication,⁵³ or is kept a secret in order to avoid police and prosecutorial scrutiny. In *R v Argent*⁵⁴ and *R v Daniel*,⁵⁵ the judicial guideline holds "the jury may only draw an adverse inference if no other rational explanation for the accused's silence presents itself". Judicial precedent is itself lacking in clarity as it does not expressly define the meaning of the words "adverse", "inference" or "rational". Apparently the stronger the prosecution case and the more implausible the accused's excuse for his pre-trial silence, the more likely that an adverse inference will be drawn. There are any number of plausible and rational explanations for the accused's silence. The accused may well remain silent because of a

⁴⁹ The legal advisor should inform his client (a) that professional privilege may be waived, and (b) it may be waived partially or fully". Once privilege is waived, the legal advisor may be cross-examined in order to explore the nature of the advice and the reasoning behind it", *R v Bowen* (1999) 1 W.L.R. 823.

⁵⁰ (1997) 1 Cr. App R 185.

⁵¹ *R v Condrón and Condrón* *ibid* at 197, when the accused goes into the reason for the advice, "it may amount to waiver of privilege, so the accused or his solicitor can be asked whether there are any other reasons for the advice".

⁵² In terms of the European Convention of Human Rights as interpreted in *Murray v U.K* (1996) 22 EHRR 29, it is likely that the nature of the advice given by the solicitor to his client will greatly influence the type of adverse inference which may be drawn.

⁵³ *R v Taylor* (1999) Crim. L. R 77, "the accused's defensive fact may be fabricated even if it is disclosed to a third party but not to the police or prosecution".

⁵⁴ (1997) 2 Cr. App. R 27.

⁵⁵ (1998) Crim. L. R 818.

guilty conscience, but other factors such as distrust of police, ignorance of the law, immaturity or mental inability also play a role. Even amongst legal theorists there is no consensus on the nature of the contemplated adverse inference. Some commentators favour a common law or limited force theory. An adverse inference may only be drawn if it goes to the credibility of the defensive explanation or one which supports the prosecution's *prima facie* case. Other commentators favour the extensive force theory in which an adverse inference amounting to a direct inference of guilt or which corroborates other evidence of guilty may be drawn. In theory, the interpretation which best fits the sense and meaning of Sec. 34(2) appears to be a circumscribed form of the extensive force argument. Implicit in the words of the section is the use of adverse inferences either as direct evidence of guilt or in support of other extraneous evidence adverse to the accused. Naturally, the prosecution case cannot be built up solely on the basis of the accused's pre-trial silence. Sec. 38(3) specifically prevents the prosecution from proving its case exclusively on the accused's silence. There must be other extraneous evidence which establishes a prosecutorial *prima facie* case. In *R v Condrón and Condrón*,⁵⁶ the Appeal Court noted that a Sec. 35 interpretation of an adverse inference (i.e. silence may amount to positive evidence of guilt in the appropriate circumstance) could by analogy also be applied to a Sec. 34 interpretation of an adverse inference. In theory, the extensive force argument works well when the prosecution case is a strong one. Once a strong *prima facie* case is established, an adverse inference drawn from a belated defence will logically and reasonably be one of guilt. However, the extensive force argument does not work well when the prosecution case is a weak one. If a Sec. 34 inference amounts to positive evidence of guilt, it will have the effect of altering a weak prosecution case into a strong one. The European Court in *Murray v U.K.*,⁵⁷ has clearly indicated that such an evidentiary use of the extensive force argument is an infringement of Sec. 6(1) of the European Convention on Human Rights.

In practice, the nature of an adverse inference will depend on the factual circumstance, the court's notion of "common sense" and will entail a balanced appreciation of the weight of the prosecution's case versus the probative plausibility of the accused's defensive explanation. In his summation, the judge should draw the jury's attention to the following factors :

- (a) whether the accused's previous failure to mention a fact is capable of an innocent explanation;
- (b) whether the accused knew of the fact in question;

⁵⁶ (1997) 1 Cr. App. R 185, 197.

⁵⁷ (1996) 22 EHRR 29.

- (c) whether it was reasonable to have expected him to disclose it, in the light of all the circumstances;
- (d) whether the Code of Practice requirements for detention and questioning by the police have been complied with.

Case precedent often utilises the catch-all term “common sense” when describing an adverse inference. This is perhaps a dangerous symptom of the court's inability to give a simple and lucid explanation of the nature, use and ambit of an adverse inference. (Similarly, the American Supreme Court is also unable to provide reasonable guidelines as to the nature of an adverse inference). The jury is not necessarily endowed with common sense and the term becomes an excuse for unreliable and illogical speculation on the part of an undisciplined jury. Indeed, adverse inferences may well, in some circumstances, simply amount to an *ex post facto* rationalisation of what the jury already knows. In its search for extraneous reasons upon which to base a common sense inference, the jury may sometimes render a Sec. 34 inference superfluous. “The jury is in a position to draw the proper inference only when it knows the reason for silence. Without these reasons the jury can only safely draw an inference when it is already *ex post facto* convinced of guilt”.⁵⁸ For example, X and Y are arrested together for the possession of drugs. During the pre-trial police interview X offers no defensive explanation. At trial X excuses himself by saying that he was merely buying drugs from Y for his personal use. He also belatedly explains that he remained silent during the police investigation because he did not want to get Y into trouble, until informed by his solicitor that Y intended to lay all the blame at his feet. If the jury accepts X's explanation, then logically Y is guilty. If the jury rejects X's explanation, then obviously Y is not guilty. Before the jury can use a Sec. 34 inference from X's initial silence, it must have already decided *ex post facto* which of the two men is guilty. Sec. 34 then becomes redundant.⁵⁹ The probative value of an adverse inference is also dependent on the time when the accused exercises his right to silence. When there is a complete failure by the accused to mention defensive facts during the pre-trial interrogatory stage, the adverse inference may have a strong probative value. When the accused does not mention a defensive fact during the initial police interview and only raises it at a second or other subsequent interview, the adverse inference will be strong, but not as strong as when the fact is not mentioned at all. The degree of probative value attached to each adverse inference will depend on the time and the stage in the criminal process at which the accused's invocation of silence occurs.⁶⁰

⁵⁸ Jackson “Interpreting The Silence Provision : The Northern Ireland Cases” *Crim. L. Rev* (1995) 600.

⁵⁹ *R v Mountford* (1999) *Crim. L. Rev* 575, “in these circumstances the jury may adopt a provisional inference of guilt, use such a provisional inference as part of the assessment of guilt and then ignore it”.

⁶⁰ *R v Condon and Condon* (1997) 1 *Cr. App. R*, 185, 197.

9.3.2 Sec. 36 (possession of incriminatory material) and Sec. 37 (presence at the crime scene)

Possession of incriminating material : Sec. 36 concerns the failure or refusal of the accused to account for on arrest, the presence of objects, substances or marks on his body or in his possession.⁶¹ Sec. 36(2) permits the drawing of adverse inferences in these narrow circumstances. The investigating officer must specify the offence and note his suspicion of a causal connection between the incriminating material, the specific offence, and the accused.⁶² A proper inference may only be drawn from the offence so specified by the investigating officer and no inferences may be drawn from other offences which have not been specified or made known to the accused.⁶³ The adverse inference which the prosecution will usually seek to draw at trial will be one of a guilty knowledge. The accused's knowledge of the substances on his person or the articles in his possession and his failure to provide a reasonable explanation will constitute evidence of a guilty knowledge.⁶⁴

"Presence at the scene" : Sec. 37 has the same structure and intent as Sec. 36. An adverse inference may be drawn on the failure or the refusal of the accused to account for his presence on or about the crime scene. Sec. 37(2) permits the drawing of an adverse inference from mere presence at the crime scene, absent a reasonable explanation. Both Sec. 36 and Sec. 37 are only triggered once the accused is arrested. No adverse inferences may be drawn from any other offence not specified by the investigating officer and for which the accused is not arrested.⁶⁵ A Sec. 37 adverse inference has a different probative value to that of a Sec. 36 adverse inference. A failure to provide an innocent explanation for presence at the crime scene is evidence capable of being incorporated into the prosecution's

⁶¹ Sec. 36(1) refers to objects, substances and marks which are on the accused's person, on his clothing and footwear, in his possession and in his home at the time of arrest.

⁶² An investigating officer is either a police officer or an officer of customs and excise. Note that Sec. 34 gives a much wider definition of officer to include any person charged with an investigatory duty.

⁶³ The specificity requirement may present a problem. If the investigating officer specifies an offence of common assault and the prosecution proceeds with aggravated assault, Sec. 36 will not apply. The investigating officer would be wise to charge the suspect with a wide range of related and competent offences if he intends to rely on a Sec. 36 inference.

⁶⁴ Sec. 36 is somewhat arbitrary. If the suspect fails to explain why the jacket he is wearing on arrest is bloodstained, an adverse inference may be drawn. But if the suspect abandons his bloodstained jacket at the scene of the crime and is arrested on his way home, and fails to explain away the bloodstains on his jacket, no adverse inferences may be drawn. There is also nothing to prevent a belated innocent explanation by the suspect put forward at trial from being dismissed as fabrication in terms of Sec. 34. Thus Sec. 34 operates hand in hand with Sec. 36 (and Sec. 37).

⁶⁵ Specificity is a Sec. 37 problem. The investigating officer may arrest the accused for murder but the prosecutor may decide to proceed with culpable homicide. Since the accused was not arrested for culpable homicide, no Sec. 37 adverse inference may be drawn. Note, Sec. 34 requires no such specificity.

prima facie case, but can never, unlike a Sec. 36 inference, amount to a guilty knowledge. Sec. 36 and Sec. 37 adverse inferences depend on the particular facts of each case, the inferences may carry more weight in some cases and less in others. These types of inferences are usually used to support the building of a prosecution *prima facie* case. (Note : The use of a Sec. 34 inference is quite different. It cannot build a prosecution case and may only add value to an already established *prima facie* case). Sec. 36 and Sec 37 adverse inferences depend on the strength of the prosecution's circumstantial case against the accused. When the accused is arrested, while wearing bloodstained clothing holding a bloodstained knife and standing over the victim's body, his failure to offer an innocent explanation (and the adverse inferences to be drawn from such a failure) adds nothing to an already strong circumstantial case. On the other hand, when the accused is arrested at home, a few days after the murder and a bloodstained knife is found in his possession, a failure to offer an innocent explanation is highly incriminating and an adverse inference from such a failure may well bolster an initially weak circumstantial case. Sec. 36 and Sec. 37 adverse inferences (like Sec. 34 inferences) are conditional on the accused's level of understanding, the amount of information at his disposal, his intelligence, experience and mental ability.

A number of significant evidentiary differences exist between a Sec. 34 "inference" and a Sec. 36 or Sec. 37 "inference".⁶⁶ First, a Sec. 34 inference may only be drawn upon the accused's failure to mention a defensive fact which is then relied upon at the trial. By contrast, it is the incriminating fact brought forward by the investigating officer and the subsequent failure of the accused to provide an innocent explanation which triggers a Sec. 36 or Sec. 37 adverse inference. Sec. 36 and Sec. 37 exert a strong positive pressure upon the accused to specifically explain the suspicious circumstance, whereas the pressure exerted by Sec. 34 is more negative than positive. Second, Sec. 34 requires the accused to "reasonably mention a fact when questioned by the police". A reasonable response requirement is not written into either Sec. 36 or Sec. 37. Third, a Sec. 34 inference may only be triggered once the accused has been cautioned. By contrast, a Sec. 36 or Sec. 37 inference is triggered on the accused's arrest (Code C para 10.5A) in tandem with the ordinary caution (para 10.4) and coupled to a special caution (para 10.5B). Fourth, if either the special caution or the other requirements are infringed, Sec. 36 or Sec. 37 cannot be triggered and no adverse inferences may be drawn. As an alternative "backup", Sec. 36(6) and Sec. 37(5) expressly preserve the common law (particularly the doctrine of recent

⁶⁶ In terms of Sec. 36 and 37, the jury has to answer difficult questions because these sections seem to indirectly assume that it will always be reasonable to account for suspicious circumstances. Unlike Sec. 34, these sections do not directly concern themselves with the question of reasonableness.

possession) and where the statutory inferences are disallowed, common law inferences may be drawn. Sec. 34(5) also preserves the common law, but in more limited circumstances. Fifth, the investigating officer must have a reasonable belief that the Sec. 36 incriminating material is attributable to the accused's participation in the offence. Sec. 37 requires a similar reasonable belief based on the accused's presence at the crime scene. By contrast, Sec. 34 does not require the investigating officer to reasonably believe that the accused is withholding a defensive fact or that the accused intends to use the withheld fact at a later stage. Sixth, the same judicial directive to the jury applies to both Sec. 34 and Sec. 36 or Sec. 37 adverse inferences. The judicial study directive approved of by the Appeal Court in *R v Condrón and Condrón*⁶⁷ reads, "the law is that you [the jury] may draw such inferences as appear proper from the accused's failure to mention it [the fact] at the time. You do not have to hold it against him. It is for you to decide whether it is proper to do so. Failure to mention such a fact at that time cannot, on its own, prove guilt, but depending on the circumstances, you may hold that failure against him when deciding whether he is guilty, that is, take it into account as some additional support for the prosecution's case. It is for you to decide whether it is fair to do so". Seventh, Sec. 36 and Sec. 37 treat the legal advisor's instructions to the accused in much the same way as Sec. 34. Tactically, the legal advisor should instruct his client to offer an immediate explanation for apparently incriminating material, unless the advisor is convinced that there is no innocent explanation, in which case silence is the better option and the accused may take his chances on the adverse inferences to follow. Generally, the legal advisor's instructions is merely one of many factors which the jury must consider before drawing a proper inference. Professional privilege may sometimes be waived by the court when the accused relies on his legal advisor's instruction as a reason for failing to give an innocent explanation. The legal advisor may be obliged to take the stand and justify his instruction.

9.4 **Trial Silence (Sec. 35)**

Sec. 35⁶⁸ applies at trial once the prosecution has established a *prima facie* case and the accused declines to testify in rebuttal.⁶⁹ When the accused chooses not to give evidence, or once having been sworn, decides without reasonable cause not to answer any questions, the court and the jury may draw such inferences as appear proper. Sec. 35 will apply to the accused who fails to support a positive defence from the witness box or the accused who

⁶⁷ (1997) 1 Cr. App. R 185.

⁶⁸ Sec. 35 expressly preserves the common law right to silence and the choice not to testify. *R v Cowan* (1996) QB 373, 378; *Re B* (1996) 1 FLR 239.

⁶⁹ *R v Napper* (1996) Crim. L. R 591; *R v Price* (1996) Crim. L. R 758.

puts the prosecution to proof by challenging the credibility of the state witnesses. However, the mere decision by the accused not to testify cannot by itself trigger Sec. 35. Sec. 35 requires the court to determine whether the prosecution's case calls for an answer and whether the accused is the proper person to give it.⁷⁰ Sec. 35(2) read together with Sec. 35(3) and Sec. 38(3) clearly proposes that the prosecution must first establish a *prima facie* case before the question of the evidentiary value of the accused's silence can be decided.⁷¹ Both the judge and the prosecutor may comment to the jury on the accused's silence. Schedule 11 of CRIMPO has repealed Sec. 1(b) of the Criminal Evidence Act 1898 (which previously prevented prosecutorial commentary). The prosecution may positively invite the jury to draw the proper inference from the accused's trial silence. Indeed, the general presumption is that the jury is more likely to draw proper inferences from the accused's silence at trial than from the accused's silence at the pre-trial stage. Sec. 35 has adopted the common law reasoning in this regard. Since all the legal safeguards provided by the doctrine of natural justice are in place during the formal trial, the accused cushioned as he is by the doctrine, should be obliged to participate in the proceeding investigating his criminal liability. The wording of Sec. 35 suggests that the accused's silence is to be regarded as just another item of evidence amongst many other items of evidence adduced at trial. Sec. 35 does not alter or shift the accused's primary burden of proof. The evidentiary question of whether or not the prosecution has discharged its burden will continue to be decided at the end of the trial once all the evidence (including the accused's silence) has been adduced, and cogently assessed.

Sec. 35 may only be triggered once certain essential preconditions have been met. In terms of Sec. 35(1)(a)(b) the accused must be fourteen years or older. The accused's physical and mental ability must be normal.⁷² No testimony will be expected from an accused whose defence is one of insanity or diminished responsibility.⁷³ No testimony will be required from the accused who, following the correct evidentiary practice, has claimed a lawful privilege. The court is empowered to excuse the accused in certain circumstances from answering

⁷⁰ This point is carefully stressed in *Murray v D.P.P* (1994) 1 WLR 5, 11, in regard to the equivalent Northern Ireland articles.

⁷¹ *R v El-Hannachi* (1998) 2 Cr. App. R 226; *R v Birchall* (1999) Crim. L. R 311.

⁷² The common law in this respect remains unaltered. *R v Bathurst* (1968) QB 99 in this respect remains good law.

⁷³ Exceptions may be made for physical and mental conditions, *R v Friend* (1997) 2 ALL ER 1012, 1020. A *voire dire*, *R v A* (1997) Crim. L. R 883, may be held to determine mental capacity. Sec. 35 does not arise when the handicap is so great that the accused is unfit to plead. This is a judicial discretion dependent on the factual circumstance.

specific incriminating questions.⁷⁴ The usual practice requires the defence counsel, at the end of the prosecution's case, to advise the court on whether or not the accused intends to testify⁷⁵ (Sec. 35(1)). If the accused chooses not to testify, the judge must satisfy himself that the accused is aware of the evidentiary consequences of his choice (Sec. 35(2)).⁷⁶ The judge must ask the defence counsel in the presence of the jury, "have you advised your client that the stage has now been reached at which he may give evidence and, if he chooses not to do so, or, having been sworn, without good cause refuses to answer any questions, the jury may draw such inferences as appear proper from his failure to do so".

"Proper inferences from trial silence" : The core provision Sec. 35(3) reads, "the court or jury in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence, or his refusal without good cause to answer any question". Sec. 35(3) applies to most cases⁷⁷ and is not limited only to exceptional cases (as were the original common law trial exceptions).⁷⁸ In essence, the prosecution must first establish a strong *prima facie* case before the possibility of an adverse inference from the accused's silence arises.⁷⁹ Lord Slynn, in *Murray v D.P.P.*⁸⁰ points out that there is an obligation only to respond to a clear *prima facie* case. The judge must inform the jury not to draw an adverse inference unless fully satisfied that the accused has a case to answer. The jury is obliged to draw an adverse inference only "where aspects of the prosecution's evidence taken alone or in conjunction with other facts, clearly calls for an explanation which the accused ought to be in a position to give, if an explanation exists,

⁷⁴ See Sec. 35(5). The accused must show good cause why he is not testifying. Good cause may be an abnormal medical condition, nervous disposition, duress, fear, desire to protect others, intimidation by a co-accused, but not fear of exposing a previous criminal record. *R v Cowan* (1996) QB 373.

⁷⁵ When the accused does testify, there is no need for the jury's attention to be drawn to the fact that the accused risked an adverse inference.

⁷⁶ At the close of the state case, the judge must warn the accused of the danger of an adverse inference from a failure to testify, *R v Price* (1996) Crim. L. R. 738; *R v Ackinclose* (1996) Crim. L. R. 74.

⁷⁷ *R v Cowan* (1996) QB 373 rejected the exceptional case argument because a plain reading of Sec. 35 did not justify confining the operation of the section to exceptional cases only. Sec. 34 is also regarded as being of general application, although it is narrower in scope than Sec. 35 and contains the qualifying provision of reasonableness.

⁷⁸ If Sec. 35 was to apply exceptionally, it would then be a simple watered down codification of the common law. Common law inferences are only exceptionally allowed where there is no possible innocent explanation for the accused's silence.

⁷⁹ Where the prosecution's *prima facie* case is not a strong one, the accused is not obliged to answer. Jackson "The Right To Silence : Judicial Responses To Parliamentary Encroachment" (57) *M.L.R.* (1994) 277.

⁸⁰ *Murray v D.P.P.* (1993) 97 Cr. App. R 151.

then a failure to give an 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".⁸¹

Judicial interpretations of Sec. 35 speak of a "common sense" inference, yet neither Sec. 35 nor Sec. 34 give an adequate explanation, guideline or analysis as to the nature and meaning of "common sense". A proper inference is said to depend on the accused's ability to deny, explain or answer from within his own knowledge, the prosecution's case against him. It is also clear that in the appropriate combination of circumstances a Sec. 35(3) inference is capable of amounting to direct evidence of guilt. However, in the run of the mill cases, a Sec. 35(3) inference is normally used to bolster the prosecution's case or to undermine a specific defence relied upon by the accused. (Note : The Human Rights Act 1998 will probably have the effect of abolishing adverse inferences which go directly to guilt). The essential elements of a Sec. 35 adverse inference may be summarised as follows⁸² :

- (a) Silence is adverse evidence against the accused. (Innocence cannot logically be inferred from silence).⁸³
- (b) A proper inference depends on a clear or a strong *prima facie* case.
- (c) The inference to be drawn is not necessarily an inference from a specific fact, it may be a general inference from a combination of specific facts.
- (d) The inference to be drawn depends upon the nature of the issue(s), the weight of the evidence and the extent to which the accused is able to give his own account of the matter.
- (e) Following from above, a proper inference depends on whether the accused is in a position to deny, explain or answer from within his own knowledge the prosecution case against him.

"The judicial direction": The judge possesses a broad discretion to advise the jury on the nature, extent or degree of the adverse inference to be drawn from the accused's failure to testify. In *R v Cowan*,⁸⁴ the following judicial directive is proposed :

⁸¹ The prosecution's case must be a *clear* one (*Murray v D.P.P*) or a *strong* one (*R v Murphy*). The reference in *R v Byrne* (1996) 2 WLR 24, to a *bare prima facie* case is incorrect. The European Convention on Human Rights precedent also calls for a clear or strong case.

⁸² Per Lord Slynn and Lord Mustill in *Murray v D.P.P* (1993) 97 Cr. App. R 151 at 155, 160, 161.

⁸³ See in particular, Justice : Response to Home Office's Working Group Consultation Paper on the Right to Silence (1988) 3.

⁸⁴ (1995) 4 ALL ER 942, per Lord Taylor CJ.

- (a) The jury must be reminded that the burden of proof remains upon the prosecution throughout the trial.
- (b) It must be clearly explained to the jury that the accused is entitled to remain silent as a matter of law. Silence is the accused's right and his choice. The right to silence has not been statutorily abrogated and mere silence, by itself, does not attract contempt or other procedural sanctions.
- (c) An inference from a failure to give evidence cannot by itself prove guilt.
- (d) The jury must be satisfied that the prosecution has established a *prima facie* case before drawing an adverse inference from the accused's silence.
- (e) Where the jury finds the accused's exculpatory evidence satisfactory, it may not draw an inference. If the defence evidence presents no adequate or innocent explanation, the jury is properly empowered to hold the accused's silence against him.
- (f) The judge must also make known to the jury all the various circumstances in which the drawing of an adverse inference would be improper, i.e. where the accused is unrepresented by counsel, where the accused fails to testify out of fear that his record or bad character may be exposed, or out of fear for his safety, etc.

9.5 The Role of an Adverse Inference (Sec. 38)

Sec. 38 explains the role of an adverse inference and is the evidentiary foundation of Sections 34 through to 37. The cardinal rule established by Sec. 38 is that no *prima facie* case may be established against the accused on the basis of silence alone. In principle an adverse inference may only be drawn against the accused once the prosecution has adduced sufficient evidence connecting the accused to the offence and upon which evidence a reasonable jury could convict. Sec. 38(3) reads, "a person shall not have the proceedings against him transferred to the Crown Court for trial, have a case to answer or be convicted of an offence solely on the inferences drawn from such a refusal or failure as is mentioned in Sec. 34(2), 35(3), 36(2) or 37(2)." In this sense, an adverse inference from silence operates in a supporting role and is only triggered once the accused fails to respond to other extraneous evidence of guilt. Sec. 35 is specific in this regard and an adverse inference may only be drawn once the state has established a sufficient case capable of discharging the prosecutorial burden of proof. Sec. 38(4) permits the accused to apply for discharge where the state case is based solely on adverse inferences. Sec. 38(5) ensures that the general evidentiary exclusionary rules (i.e. bad character rule, hearsay rule, etc) apply equally to the accused's silence testimony. The judge possesses a discretionary power in terms of Sec.

38(6) and may exclude state evidence which inhibits a fair trial process.⁸⁵ The effect of Sec. 38(3) is somewhat arbitrary. When the prosecution has a strong *prima facie* case based on non-silence evidence, an inference drawn from silence adds only an unnecessary additional probative value to the prosecution case. The prosecution is likely to proceed without evidence of silence, in which case Sec. 38(3) is largely superfluous. However, where the prosecution case is a weak one which requires shoring up by the addition of silence inferences, Sec. 38(3) comes into its own. In other words, there may be no case to answer without silence, but one to answer with silence. The crux of the debate between utilitarian proponents and libertarian opponents of CRIMPO is whether it is "fair" to permit an adverse inference from silence to alter a weak *prima facie* case into a strong *prima facie* case. An interpretation of Sec. 38(3) presents two immediate problems. First, the section gives no guideline on whether the prosecution is entitled to combine Sec. 34 to Sec. 37 inferences and to use all four inferences cumulatively to establish a *prima facie* case without recourse to extraneous evidence. Must there always be some extraneous evidence (as most case precedent presumes) or is the prosecution entitled to mix and match Sec. 34, Sec. 35, Sec. 36 and Sec. 37 inferences in order to build up a *prima facie* case capable of clearing the evidentiary hurdle?⁸⁶ Second, in theory, Sec. 38(3) provides that the accused shall not be convicted solely on the basis of an adverse inference from silence. In practice, though, it is left to the jury to decide the effect of a proper inference. The practical problem is how to prevent a jury from ignoring judicial directives and convicting purely on the basis of the accused's silence.

9.5.1 Problems, Criticisms and Solutions

One of the immediate problems presented by CRIMPO is the highly technical nature of the flaws inherent in the wording of the various sections. Since 1995 the Court of Appeals has found itself preoccupied with the laying down of correct evidentiary directives, particularly in regard to Sec. 34. Parliament will also be occupied in future with the redefining of some of the CRIMPO sections in order to conform with the new Human Rights Act (1998). Other criticisms from within the English legal fraternity go to the philosophical nature of the CRIMPO limitations on the silence principle and offer no easy solutions. At a cursory glance, CRIMPO appears to be a radical departure from the common law. However, a measured

⁸⁵ There is no judicial discretion to exclude an adverse comment made by the co-accused against his partner in crime.

⁸⁶ In *R v McKinley* (1993) 4 N.I.J.B 42 (Northern Ireland) presence at the scene of a crime coupled with a failure to explain away such presence (Sec. 37) combined with a refusal to testify at trial (Sec. 35) was held to amount to an overwhelming case. Andrew and Hurst *Criminal Evidence* 3rd Ed (1997)

analysis of CRIMPO reveals no radical departure from the common law definitions. In many aspects, CRIMPO merely codifies the existing common law and gives a new authority to a range of common law exceptions already in existence. CRIMPO does not abolish the right to silence (Sec. 35(4) specifically preserves it) and there is no directly enforceable duty on the accused to make an incriminating disclosure. Silence in the face of police or prosecutorial questioning has no formal procedural sanction attached to it. Most, but not all, of the common law limitations on the silence principle have been duplicated in the wording of the act. Sec. 34(5) expressly preserves the common law limitation on silence when the accused and the accuser are on even terms, which means that both the *Christie* and *Chandler* precedents will continue to apply unaltered. Sec. 36 and Sec. 37 have also not changed the common law doctrine of recent possession in any significant manner. In particular, the wide common law silence principle (including the privilege against self-incrimination) remains unchanged outside the narrow ambit of CRIMPO.⁸⁷ CRIMPO has no effect on the traditional and core definitions of the silence principle and is entirely directed at the mid to late-twentieth century developments around the issue of adverse inferences. CRIMPO specifically deals with the nature of an adverse inference and provides a framework for the admissibility of the different types of permissible adverse inferences. A framework which the common law precedents were unable to provide with any sufficient degree of clarity. The most radical departure from the common law is found in three limited areas. First, the police caution (Code C para 10.4) has been revised to take into account the various adverse inference effects of CRIMPO. The new caution is a wordy paragraph and may not be easily understood by the average criminal. To allow for this, the new Practice Code permits the arresting officer a certain flexibility in explaining the caution in easily understood words. Second, Sec. 34 is deliberately designed with the intention of blocking the use of a surprise trial ambush defence by the accused. However, Sec. 34 is badly drafted, confusing and in its current format, presents more technical evidentiary problems that it will solve. Fortunately, Sec. 34 has been supplemented if not neutralized by the full disclosure regime established in the Criminal Procedure and Investigations act 1996. Third, Sec. 35 (trial inference) is the most controversial section of CRIMPO and has aroused the most hostile criticism because it radically reverses the common law precedent as set out in *R v Gilbert*.⁸⁸

suggest that it would be improper for a jury to convict on such a cumulative collection of adverse inferences, but advance no reasons for their opinion.

⁸⁷ Outside of the ambit of CRIMPO, the common law applies (as defined in *R v Gilbert* (1978) 66 Cr. App. R. 237 and *R v Raviraj* (1987) 85 Cr. App. R 93), and the judge must give a clear instruction to the jury not to draw an adverse inference (*R v McGurry* (1999) Crim. L. R. 316), but a failure to do so does not necessarily render the conviction appealable (*R v Bowers* (1998) Crim. L. R 817).

⁸⁸ Sec. 35 as supplemented by Sec. 34 (both sections may be applied independently of each other) allows a wide range of adverse inferences to be drawn at trial, thus reversing the narrow exception set out in *R v Gilbert* (1977) 66 Crim. App. R 237, a court cannot assume that a defence is untrue simply because it went unmentioned until the trial.

Many commentators have criticised the intention and direction of CRIMPO. The English Act was originally based on the Northern Ireland Order Act 1988. The Northern Ireland Act targets professional terrorist organizations such as the I.R.A. and Protestant militia groups. These organizations deliberately train their members in counter-interrogation techniques and in the cynical manipulation of the trial procedures, notably the right to silence, of the special Diplock court (a non-jury emergency tribunal established for the purpose of trying political terrorist cases).⁸⁹ By contrast the English CRIMPO act applies not only to the professional terrorist, but targets all criminals in general. The most obvious effect of CRIMPO will be felt by those petty, badly educated criminals who through ignorance and the inability to secure legal advice, are the most vulnerable. Commentators have suggested that CRIMPO should be strictly construed to apply only to a narrow class of hardened professional criminals. Such a proposal has some theoretical merit, but it is practically and obtrusively much too discriminatory. It would be an infringement of the Human Rights Act (1998) to distinguish between different types of criminals solely on the basis of their professionalism or lack of it. It will also defeat the purpose of CRIMPO which is utilitarian in design and based on a crime control philosophy. The purpose of CRIMPO is to make the task of the police easier (CRIMPO is meant to counter-balance the procedural advantages awarded to the accused by the Police And Criminal Evidence Act 1984, PACE) and generally, to reduce crime levels across the whole spectrum of English criminality.

Sec. 34 is described as being technically flawed and unnecessarily expensive, by consuming valuable time at trial and on appeal. It also presents the danger that an otherwise good prosecution case may be overturned on appeal because of a technical Sec. 34 infringement.⁹⁰ The section has necessitated the development of a number of special judicial directives and represents a conceptual hurdle to the average lay person jury. A conscientious jury will find it difficult to grapple with the evidentiary challenges offered by Sec. 34, while the unconscientious jury may simply give up and use a Sec. 34 adverse inference without understanding its evidentiary purpose. Commentators have noted that a Sec. 34 analysis generates a high degree of collateral inconvenience⁹¹ which is contrary to the utilitarian spirit of CRIMPO. These commentators advance the Benthamite argument that

⁸⁹ A comprehensive analysis of the Diplock courts is found in Jackson and Doran *Judge Without Jury: Diplock Trials In The Adversary System*, Sheldon (1995); Greer *Abolishing The Diplock Courts* (1986); Doran "The Symbolic Function Of The Summing Up: Can The Diplock Judgement Compensate" (42) *Northern Ireland. L. Q* (1991) 385.

⁹⁰ See *R v Bansal* (1999) Crim. L. R 484, and *R v Moshaid* (1998) Crim. L. R 420, "although the evidence available to the Crown was powerful, [a misapplication of Sec. 34] renders the conviction unsafe".

⁹¹ Rejecting evidence on the grounds of collateral inconvenience is an established (if implicit) common law principle, *R v Butler* (1999) Crim. L. R 835.

evidence should be automatically excluded when receiving it would amount to unnecessary vexation, expense and delay. Adverse inferences from Sec. 34 certainly fall within this category. The probative value of a Sec. 34 inference is also open to question. The evidentiary relevance of a Sec. 34 inference is all too often outweighed by the prejudicial effect of its reception. Many prosecutors tend to ignore Sec. 34 inferences as it is an expensive and time-consuming exercise to establish the requisite threshold level of "logical relevancy". One of the more valid criticisms of Sec. 34 suggests that when it is coupled to Code C procedural safeguards (para 10.1, 10.3 and 11.3), it results in a procedural loophole which the police deliberately exploit. Sec. 34 is presently triggered only by the administration of the caution and not by arrest. Yet it is only upon arrest that the formal Code C and E safeguards become operative. The failure to include arrest as a triggering mechanism for Sec. 34 is a loophole which permits the police to question the suspect outside the police station, thus avoiding the tape-recording and other safeguard requirements of the formal police interview. A badly worded Sec. 34 is likely to result in the re-emergence of the old "verbal" problem which so bedevilled the common law. The courts may well become entangled in disputes between the accused and the police as to what was said or not said by whom and when.⁹² This problem is solvable by fine tuning the wording of Sec. 34 to include caution and arrest.

One of the major problems with CRIMPO is the vague definition of the word "inference" and its qualification by the equally vague word "proper". The court is empowered to draw a proper inference from the accused's silence, yet CRIMPO offers no guidelines on how a proper inference is to be interpreted. The English courts both at common law and in analysing CRIMPO, have defined a proper inference as one based on common sense reasoning. Common sense is not a legal term but a description with a rather wide and ambiguous meaning. The jury may well be encouraged to indulge in all kinds of speculation under the disguise of common sense.⁹³ (In the words of Winston Churchill – common sense is really not so common). In answer to this criticism, it must be pointed out that the evaluation of all evidentiary material (admissibility, relevance, probative weight, prejudice, etc) is essentially based on a common sense reasoning. The glue of relevancy between evidentiary facts (*facta probantia*) and the principle facts-in-issue (*facta probanda*) is

⁹² The court must now instruct the jury not to draw an adverse inference from the suspect's silence during an improper interview outside the police station, *R v Pointer* (1997) Crim. L. R 676.

⁹³ Easton "Legal Advice, Common Sense And The Right To Silence" *Int. J. Evidence and Proof* (1998) 2 suggests "that a common sense inference from a jury is likely to be unreliable, impressionistic and unsystematic".

established by a blend of common sense logic and experience.⁹⁴ As long as the rules of logic are adhered to,⁹⁵ there can be no objection to the drawing of common sense reasonable inferences from indirect circumstantial evidence, so why should the drawing of common sense adverse inferences from Sec. 34, 35, 36 and 37 be treated any differently?⁹⁶ Another criticism advanced is that the jury is likely to ignore these cardinal rules of inferential logic and to focus exclusively on the accused's pre-trial or trial silence. It is argued that CRIMPO has the unfortunate influence of immediately directing the jury's attention to the accused's silence thereby ignoring other probative evidence. The jury may well base a conviction solely on the accused's failure to speak. However, this essential problem is not of CRIMPO's making, but is a structural problem of the English jury trial system. As long as a trial conviction is dependent on the opinion of lay person juries, the judge will be unable to regulate the juror's state of mind. This is a structural problem and is not due to reasonable limitations on the silence principle.

CRIMPO does not offer a guideline on the role of a cumulative combination of the various sectional adverse inferences. In theory, it may be possible in a particular circumstance, to admit Sec. 34 through to Sec. 37 adverse inferences either individually, but also cumulatively, as the facts warrant. The question is whether the prosecution may combine all the statutory inferences together and thereby establish a *prima facie* case. Is extraneous evidence always essential to the establishment of a *prima facie* case or may the prosecution mix and match the various sectional adverse inferences together, in order to build up a case capable of meeting the required evidentiary burden. Certainly, if Sec. 36 and Sec. 37 are part of the mixture, there will be a quantity of circumstantial evidence available to form a minimum threshold level of extraneous evidence (as required by Sec. 38(3)). Case law from Northern Ireland does suggest that it would not be unreasonable, in the right circumstance, to convict primarily on the cumulative weight of the accused's silence on arrest and a later failure to testify, as long as there is also a minimum amount of real evidence drawn from a Sec. 36 (possession of incriminating materials) or a Sec. 37 (presence at the crime scene) analysis. However, it may well be that the Human Rights Act (1998) will inhibit the

⁹⁴ *R v Mathews* 1960 (1) SA 752 (A) per Schreiner J at 758, "relevancy is based on a blend of logic and experience outside the law. The law starts with this practical or *common sense* relevancy and then adds material to it, or more commonly exclude material from it" See also *Hollingham v Head* (1858) 4 CB (NS) 388, 391.

⁹⁵ *R v Blom* 1939 AD 188, per Watermeyer JA at 202-3, "there are two cardinal rules of logic when reasoning by inference : (a) the inference must be consistent with all the proved facts, (b) the proven facts should be such that they exclude every reasonable inference save the one sought to be drawn". The same cardinal rules of logic may well be applied to statutory adverse inferences from silence.

⁹⁶ *Hau Tau Tau v P.P* (1982) A.C 136, 153, per Lord Diplock, "what inferences are proper to be drawn from an accused's refusal to give evidence depends upon the circumstances of the particular case, and is a question to be decided by applying *ordinary common sense*".

prosecution's ability to build a *prima facie* case solely on these sectional adverse inferences. Opponents of CRIMPO have also pointed out that statutory adverse inferences from the accused's silence may well become superfluous once the case reaches the trial stage. If the Director of Public Prosecutions is confident enough to allow a matter to proceed to trial, it means that the state case is strong enough, and subsequent statutory inferences will add very little evidentiary substance to the case.⁹⁷ On the other hand, the director may be hesitant to allow a weak prosecution case to proceed to trial, especially when the case is dependent on the unpredictability of statutory adverse inferences to push it past the requisite evidentiary threshold hurdle.

It is said that a statutory adverse inference disturbs the traditional adversarial trial balance by making the prosecution's task easier and a conviction more likely. The combined effect of Sec. 34 through to Sec. 37 is said to place an indirect and tacit pressure on the criminal defendant to co-operate during the police investigation, to disclose alibi defences at the earliest opportunity, to give reasonable explanations for the possession of incriminating facts, and to involuntarily respond to a *prima facie* case at trial by submitting to cross-examination. The effect of CRIMPO is to shift the primary evidential burden of proof away from the prosecution and on to the accused's shoulders. The shift in the primary burden causes a domino effect in which the presumption of innocence is eroded, the accused is forced to be an instrument in his own conviction and the fair trial nature of the adversarial procedure is compromised. There is a widely held assumption that somehow the burden of proof and the presumption of innocence are inextricably linked to a right to silence. The nexus is always assumed by both the English and American courts but is rarely if ever rationally explained.⁹⁸ A careful analysis of CRIMPO does not suggest a shifting of the evidentiary burden of proof. On the contrary, CRIMPO treats the accused's silence as no more than an item of circumstantial evidence from which adverse inferences may be drawn according to the cardinal rules of logic. As a mere item of circumstantial evidence the adverse inference drawn from CRIMPO cannot as a matter of procedural logic have any effect on the presumption of innocence or the fairness of the trial. Indeed, the European court in *Murray v U.K.*⁹⁹ did not find the jurisprudential reasoning for statutorily limiting the common law silence principle to be an infringement of the European Convention on Human Rights. The end result of the English reform process is the Criminal Justice and Public Order Act (1994) which gives a meaningful interpretation of the silence principle by taking into account both its

⁹⁷ In many of the appeal cases, the prosecution had a strong case without silence. See *R v Argent* (1997) 2 Cr. App. R 27, *R v Bowers* (1998) Crim. L. R 817, *R v Daniel* (1998) Crim. L. R 818 and *R v Taylor* (1999) Crim. L R 77.

⁹⁸ See *supra* chapter 4 p.141-144.

⁹⁹ (1996) 22 EHRR 29. See *infra* chapter 10.

practical and logical flaws. In contrast to the pragmatic English approach, the interpretation of the silence principle as an absolute constitutional right by the Supreme Court of the United States is a confusing and contradictory process. The English statute is a successful compromise between the need to protect the individual during the criminal process and the need to combat crime in the most efficient manner possible. The American model excludes a reasonable balance of interests analysis, but the pragmatic English model allows for the efficient and controlled limitation of the silence principle in the combating of crime.

CHAPTER 10

THE ENGLISH PRIVILEGE AGAINST SELF-INCRIMINATION

10.1 Statement of the Rule

The English privilege is defined both in common and in statutory law.¹ "During a criminal or a civil proceeding an individual may refuse to answer any question or to produce any document, if the answer or the production has the tendency to expose the individual, directly or indirectly, to the risk of a criminal conviction, the imposition of a penalty or the forfeiture of an estate".² In this sense the privilege is sometimes said to be an obstacle in the search for legal truth and sometimes an aid or an inducement which encourages freedom of testation. As an inducement it shields the non-party witness from being forced to choose between lying on the witness stand (perjury), refusing to answer questions (contempt) or exposure to a criminal charge. It is also presumed to increase the reliability factor of the non-party witness evidence. In the common law tradition the privilege generally applies to both oral and documentary evidence. No special distinction is drawn between the spoken or the written word. By contrast, American jurisprudence pays particular attention to written evidence and has developed an act of production and required records doctrine which curtails the privilege's application to documents.³ Unlike the accused's right to silence which is a fairly recent nineteenth and twentieth century development, the witness privilege against self-incrimination has a long history and an unbroken tradition going back to the sixteenth and seventeenth centuries.⁴

In this historical sense the privilege may be invoked whenever an individual (citizen, non-party witness or accused) is required to answer self-incriminatory questions under a legal compulsion or due process of law.⁵ The common law privilege has been statutorily subsumed by sec 14 of the Civil Evidence Act (1968) as, 'the right of a person in any legal proceeding, other than a criminal proceeding, 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

¹ *Phipson On Evidence* Sweet and Maxwell (2000); Keane *The Modern Law of Evidence* Butterworths (2000); Passmore *Privilege* C.L.T. (1998) Chp.11; Uglow *Evidence* Sweet and Maxwell (1997) 239; Andrew and Hirst *Criminal Evidence* Sweet and Maxwell (1997) para12.210; Cross and Tapper *On Evidence* Butterworths (1995) 453; Murphy *on Evidence* Blackstone (1995) 388; Ligertwood *Australian Evidence* Butterworths (1993) para 5.68; McNicol *Law of Privilege* (1992) 140.

² The seminal restatement of the common law rule is to be found in *Blunt v Park Lane Hotel Ltd* (1942) 2K.B. 235, 257 per Goddard L.J. See also *Redfern v Redfern* (1891) Pp139, 147; *Lamb v Munster* (1882) 10 Q.B. 100, 111 and *Spokes v Grosvenor Hotel Co* (1897) 2 Q.B. 124.

³ See *supra* chapter 7 p.241-254.

⁴ See *supra* chapter 2

⁵ *Rio Tinto Zinc Corp v Westinghouse Electric Corp* (1978) AC 636 (1978) 1 ALL ER 434, 464, per Diplock L.J.

penalty." The privilege applies only to the risk of a criminal proceeding⁶ and does not apply to questions which would tend to expose the witness to the risk of a civil proceeding.⁷ In England, South Africa, Australia and New Zealand, the privilege applies not only in judicial (and quasi-judicial) proceedings but may be extended to non-judicial proceedings including commissions and boards of inquiry.⁸ The Australian privilege is liberally defined as extending into "every circumstance where incriminating evidence is lawfully sought".⁹ The same flexible criteria apply in most other Commonwealth jurisdictions. Traditionally the privilege has always been regarded as an ordinary procedural and evidentiary rule, but in line with the constitutional elevation of the right to silence, the privilege is currently regarded as a bastion of human rights.

Jurisprudentially the privilege is now deemed to be a protection for the witness' personal freedom, dignity, privacy and the inviolability of human personality.¹⁰ The twentieth century view that the privilege is not merely a procedural rule but a fundamental right is exemplified by the constitutional entrenchment of the privilege in the United States (the Fifth Amendment), Canada (sec 11, Charter of Rights and Freedoms) and South Africa (sec 35 of the 1996 Constitution). There is a recent tendency in both Australia and New Zealand (a statutory codification of the privilege in the Bill of Rights Act 1990) to translate the privilege into a first-class fundamental right.¹¹ The position in England is generally static and the privilege is sometimes regarded as an "archaic and unjustifiable survival from the past",¹² but the position is likely to change with the introduction of the Human Rights Act 1998. The modern privilege against self-incrimination is now much wider than the historical privilege and protects a wider range of legal persons over a greater spectrum of legal subject matters. The libertarian rationales advanced to justify the

⁶ *Lamb v Munster* *ibid*, "[a person may refuse information] which may tend to bring him into the peril and possibility of being convicted as a criminal".

⁷ There is no privilege in civil proceedings even when the state sues (Witness Act 1806), except in the rare instance of a civil penalty proceeding. The privilege may not be invoked in bankruptcy proceeding, per sec 16(5) Civil Evidence Act 1968, or in professional disciplinary proceedings, *Re XY, exp Haes* (1902) 1 K.B. 98. In *A.T. and T. Istel Ltd v Tully* (1993) A.C. 45, 55, the privilege's application in civil cases is limited to the extent that the state can use the discovered material against the witness in a future criminal proceeding.

⁸ **(Australia)** *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 57 A.L.J.R. 236; *Sorby v Commonwealth* (1983) 57 A.L.J.R. 248. **(New Zealand)** *Taylor v New Zealand Poultry Board* (1984) I.N.Z.L.R. 394. **(Canada)** *R v Spyker* (1990) 63 CCC (3d) 125. **(South Africa)** *Waddel v Eyles NO and Welsh NO* (1939) TPD 138 and *R v Diedericks* (1957) (3) SA 661 (E).

⁹ Ligertwood *Australian Evidence* (1993) n 5, 66.

¹⁰ See *supra* chapter 4 p.112 per Murphy J in *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 57 A.L.J.R. 236, 243.

¹¹ **(Australia)** *Sorby v Commonwealth* (1983) 152 CLR 281; *E.P.A. v Caltex Refining Co.* (1993) 178 CLR 477. **(New Zealand)** *Apple and Pear Marketing Board v Masters and Sons Ltd* (1986) 1 NZLR 191. **(Canada)** *Solonsky v R* (1980) 1 SCR 821, 836.

¹² *A.T. and T. Istel Ltd v Tully* (1993) *ibid* at 53, per Lord Templeman. See also the Australian case *Spedley Securities Ltd (in liq) v Bond Brewing Investments Pty Ltd* (1991) 9 ACLC 522, per Cole J at 535-6, "the privilege is a mere procedural rule from a time when defendants were less able to protect themselves: and *Spratt v Hermes* (1965) 114 CLR 226, per Barwick CJ at 244-245.

accused's right to silence have been uniformly extended to the witness privilege against self-incrimination. This may be a mistake for a number of reasons. First, the accused's right to silence and the witness privilege against self-incrimination have historically taken different evolutionary paths. Second, the accused in a criminal proceeding is not legally or logically in the same position as the witness in a criminal or civil proceeding. Third, the liberal rationales developed to account for the accused's right to silence have been found to be without a moral or rational justification (see chapter 3 and chapter 4). Fourth, the jurisprudential foundations of these rationales have become even more confusing due to the large number of statutes which expressly or impliedly abrogate or modify the scope of the privilege. No consistency of purpose is exhibited by these sometimes arbitrary statutory modifications or abrogations. Fifth, the confusion is compounded by the traditional distinction drawn between communicative non-physical evidence (to which the privilege attaches) and non-communicative physical evidence (to which the privilege does not attach). Sixth, following from the above, the confusion is multiplied by the unexplained ease in which passive body sample (blood, tissue and DNA) evidence is excluded from the scope of the privilege despite the proven communicative and incriminatory nature of some types of this form of evidence. Seventh, it is difficult to pinpoint a specific justification for the privilege when much the same reasoning is applied in some jurisdictions to deny the privilege to the corporation and in others to extend the privilege to the corporation. How can any consistent rationale be developed when, for example, the privilege is sometimes extended to the foreign forum and at other times denied to the foreign forum.

10.2 The Application of the Privilege

The privilege applies not only to self-incriminatory evidence during the trial stage but may be also claimed at the pre-trial stage during discovery, inspections of all kinds, interlocutory processes including Anton Pillar¹³ and Mareva injunction applications. The privilege may be claimed by any person whether a witness, party or ordinary citizen.¹⁴ The claim must be

¹³ (England) *Rank Film Distributors Ltd v Video Information Centre* (1982) AC 380. Anton Pillar orders and self incrimination is regulated by sec 72(1) Supreme Court Act 1981, "abrogating the privilege but substituting a limited use immunity". Garnham "Sec 72 of the Supreme Court Act 1981" (132) *N.L.J.* (1982) 983. (New Zealand) The relationship between Anton Pillar orders and the privilege is regulated by common law, *Thorn EMI Video Ltd v Kitching and Busby* (1984) FSR 342. (Australia) *Warman International Ltd v Envirotech (Aust) Pty Ltd* (1986) 67 A.L.R. 253, per Wilcox J at 264-5, *Authors Workshop v Bileru Pty Ltd* (1989) 88 A.L.R. 211, per Lockhart J at 215-216. (South Africa) *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A), per Corbett JA at 754. In effect the privilege has destroyed the Anton Pillar Order at common law.

¹⁴ In *Rio Tinto Zinc Corp v Westinghouse Electronic Corp* (1978) AC 547, Lord Denning at 573 attempted to draw a distinction between a witness and a party to a civil suit, but the present position is that both a witness and a party are entitled to the privilege.

expressly invoked either by the individual or his legal representative. The privilege is invoked for each specific question asked or document requested. There is no blanket privilege which covers all possible questions or documents. The invocation must be timely and may only be made at the point at which the risk of actual incrimination arises.¹⁵ (Note the accused's right to silence may be claimed at any stage of the criminal proceeding.) The privilege may not be invoked by a witness who has already been convicted of the offence, where the crime has prescribed or where the witness is no longer at risk of prosecution. The trial judge may, as a matter of choice (there is no legal obligation to do so), warn the ignorant witness of the privilege's existence.¹⁶ (Note, the accused must be specifically warned of his right to silence.)

Generally, in most Commonwealth jurisdictions, any evidence given in ignorance of the privilege may be utilised in a subsequent criminal proceeding. The ignorant witness must suffer the consequences as there is no retrospectivity of protection.¹⁷ If no invocation is made at the relevant time, the privilege is considered to be tacitly waived and the answers are deemed to have been made voluntarily. (Note, in contrast, the accused's waiver of his right to silence must be obvious and express.) The privilege does not prevent the question from being asked, it merely immunises the witness from answering.¹⁸ (Note, the accused's trial right to silence is a blanket one which blocks both the question and the answer.) When the witness is wrongfully forced or tricked into giving incriminating evidence, such testimony will not be admissible against him.¹⁹ The *bona fide* witness must establish from the circumstance and nature of the evidence that there is a reasonable expectation or risk of danger. An unsubstantiated claim of privilege, even under oath, is not sufficient. The court must be in a position to test the validity and substance of such a claim. *R v Boyes*²⁰ establishes the principle as follows, "a merely remote and naked possibility of legal peril to a witness is not sufficient to entitle him to the privilege of not answering". The court sets out the test as, "the danger to be apprehended must be real and appreciable with reference to the ordinary course of the law...not a danger of an imaginary or

¹⁵ *AJ Bekhor and Co v Bilton* (1981) 2 ALL ER 565; *re O* (1992) 2 WLR 487, "the proper time for raising an objection and claim for privilege is not when an order for discovery is made but when it is answered". *Spokes v Grosvenor Hotel Co* (1897) 2 QB 124, "the privilege may be claimed only at the point at which the risk of actual incrimination arises".

¹⁶ In South Africa there is an established practice at criminal proceedings to warn the witness of the privilege. A failure to do so may render the witness testimony inadmissible at a future criminal trial. *S v Lwane* 1966 (2) SA 433 (A) per Holmes JA at 444B. There is no reason why such an obligatory warning should not also apply in civil proceedings. See also *Dunne v Connolly Ltd* (1963) A.R. (N.S.W.) 873 and *R v Bateman and Cooper* (1989) Crim.L.R. 590.

¹⁷ *Riddick v Thames Board Mills* (1977) Q.B. 881, "the incriminating answers may be admissible at criminal proceedings".

¹⁸ *Alhusen v La Boucher* (1878) 3 Q.B. 654, 660; *R v Ntshangela* 1961 (4) SA 592(A).

¹⁹ *R v Garbett* (1847) 1 Den 236. But see Sec 76 of PACE *supra* chapter 8 p.296.

²⁰ (1861) 121 E.R. 730, 738; *Renworth v Stephansen* (1996) 3 ALL ER 244, "a mere possibility is insufficient. It must be a reasonable likelihood of a charge being brought against the witness".

unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct". (Note, although the United States Supreme Court uses much the same language and the same test, American precedent is more flexible in granting the privilege than is English precedent.)²¹

Whether the claim of privilege should be allowed or not is usually a two step test. First, the presiding officer, in the absence of the jury, must determine if the witness's fear of a possible criminal prosecution is justified. Second, the real and appreciable danger test is applied taking into account the ordinary operation of the law.²² The court will dismiss a claim based on fear of exposure to minor, trifling or petty crimes and where the risk is unlikely, remote or ridiculous. When the witness is aware of the unlikelihood of his claim, a rebuttable *mala fide* inference may well arise.²³ In *Rank Film Ltd v Video Information Centre*,²⁴ the privilege was allowed on the ground that the defendants were exposed to a real and appreciable risk of conspiracy and fraud criminal charges. In *Triplex Safety Glass Co v Lancegaye Safety Glass Ltd*²⁵ the court emphasised the idea of *bona fides*. A witness need not be compelled to answer a question which placed him at risk merely because it was unlikely to lead to a criminal prosecution. "If a claim is made in good faith, it should not be rejected outright simply because the chances of a prosecution is minor." The inquiry must make an obvious contrast between a real and appreciable risk and a remote or unsubstantial one. If the risk is real then there is a reasonable ground to apprehend danger and the privilege may be invoked. Nevertheless, even if the danger of prosecution is unlikely, a good faith claim should not be rejected out of hand.

The privilege encompasses answers which directly incriminate the witness but it also applies to initially innocent answers which by a causal chain of reasoning may eventually lead to incriminating evidence and the risk of a criminal charge.²⁶ The privilege will protect the witness from potentially incriminating disclosures which, through derivative use, may lead to direct and actual incriminating evidence. Derivative evidence of this type is defined as incriminating evidence obtained by the use of deceptively innocent answers based on a cause and effect

²¹ See *supra* chapter 7 p.240.

²² *Rio Tinto Zinc Corp v Westinghouse Electronic Corp* (1978) AC 547 per Lord Denning at 574.

²³ *Adams v Lloyd* (1858) 3 H and N 351, 157 ER 506, "the judge should compel an answer if the witness is trifling with the court".

²⁴ (1982) AC 380. See also *Sociedade Nacional De Combustiveis De Angola V.E.E. v Lundquist* (1992) 2 WLR 280; *A. T. and T. Istel Ltd v Tully* (1992) 2 WLR 112.

²⁵ (1939) 2 K.B. 395.

²⁶ *Wigmore Evidence* McNaughton Ed (1961) para 2260. See also the South African case *S v Heyman* 1966 (4) SA 598(A).

investigation. *R v Slaney*,²⁷ per Tenterden CJ, “[a party] would go from one question to another, and though no question might be asked the answer of which would directly incriminate the witness, yet they would get enough from him whereon to found a charge against him”. The burden of proving a real, direct, indirect or derivative appreciable risk rests on the witness invoking the privilege. The burden of proof on the witness is a difficult one. There is no proper test of causation which distinguishes between derivative and non-derivative type evidence. Obviously the more remote the derivative evidence is from the initially innocent answer the less likely the possibility of the witness being at risk. Nevertheless the test is vague and unsubstantial.²⁸ To avoid the problem the court is well advised to adopt a reasonableness criterion which properly determines the limit between statements which directly incriminate and those which may only have a tendency to do so. Otherwise the definition of self-incriminatory statements is likely to be absurdly diluted as the court circularly explores the nature of a witness’s answer which may or may not eventually lead to the danger of self-incrimination.²⁹ The privilege is not a general privilege against *all* incriminatory questioning, it is a specific privilege directed at *self*-incrimination. The witness may not rely on the privilege to protect disclosures which tend to incriminate a third party. Neither may the privilege be claimed by a non-witness or stranger.³⁰ The privilege does not extend to disclosures which tend to incriminate the witness’s spouse.³¹ *Rio Tinto Zinc Corp v Westinghouse Electrical Corp*³² holds that no special privilege may be claimed in criminal proceedings. Similarly the Court of Appeal in *R v Pitt*³³ states, “the spouse of an accused who chooses to testify, should be treated no differently to any other witness and may also be treated as a hostile witness if the circumstance warrants it”. The privilege is therefore a purely personal one, emphasising privacy, autonomy and presupposing that the evidence necessary to convict should not be forced from the individual’s own lips.³⁴ A privilege against self-incrimination based on a privacy rationale cannot support its extension to

²⁷ (1832) 5 C and P 213, 172 ER 944. See also *R v Boyes* (1861) 121 ER 730; *Lamb v Munster* (1882) 10 QB 110, “the privilege covers answers which may tend to incriminate the witness”.

²⁸ There are three problems with the extension of the privilege to derivative evidence. (i) a heavy onus is placed on the claimant to show that the answer may by derivative use lead to incrimination; (ii) it is difficult for the court to test the validity of the claim. *Sorby v Commonwealth* (1983) 57 ALJR 248 per Murphy J at 251-252 states, “where a witness claims that an answer might lead to investigations which in turn might provide evidence, which together with the evidence already available, would form a chain of evidence sufficient to support a criminal charge against the witness, is difficult to verify by the court”; (iii) such a wide extension of the privilege will rarely be invoked in practice.

²⁹ To extend the privilege to such an absurd length, means that it is no longer a fundamental principle of liberty or privacy and bears little resemblance to its original purpose.

³⁰ *R v Minihane* (1921) 16 Cr. App. R. 38.

³¹ Although Sec 14(1)(b) of the Civil Evidence Act 1968 (U.K.) has extended the privilege to questions tending to incriminate a spouse at civil proceedings.

³² (1978) AC 547.

³³ (1983) QB 25.

³⁴ Blackstones *Commentaries* Vol IV 293.

spouses or even other family members.³⁵

One of the crucial questions in the Anglo-American legal system is whether the privilege applies to both the natural and the juristic person. The tendency in most Commonwealth jurisdictions is to give the privilege its widest possible meaning. In England,³⁶ New Zealand³⁷ and in South Africa³⁸ the privilege is extended to the corporation. The privilege is limited to the juristic corporation and does not cover its employees. The employee is of course entitled to claim an individual privilege in his own right.³⁹ The extension of the privilege to the corporation is not followed in Australia⁴⁰ which has been heavily influenced by American jurisprudence. *Environmental Protection Authority v Caltex Refining Co Pty Ltd*⁴¹ reverses lower court precedent and holds that the privilege does not extend to the corporation. In the United States⁴² and Canada,⁴³ the American fifth amendment and the Canadian Charter of Rights and Freedoms restrict the privilege to the natural person. The United States prohibition is rigid, while the Canadian approach is more flexible. In terms of sec 7, Charter of Rights and Freedoms, the privilege may be extended to the corporation, in the circumstance, where denying it may also have the consequential effect of preventing individual officers of the corporation from claiming the privilege. The privilege is denied to the corporation except where its denial may cause grave injustice to individual members of the corporation. The limited scope of the privilege in America, Australia and Canada is predicated on a human rights rationale, especially the right to dignity, freedom and privacy. Ironically the concept of a fair state-individual balance has been used by both Australian and English courts in justifying their mutually conflicting decisions.⁴⁴

³⁵ See *supra* chapter 7 p.240-241.

³⁶ *Triplex Safety Glass Co Ltd v Lancegaye Safety Glass Ltd* (1934) 2 KB 395; *Rio Tinto Zinc Corp v Westinghouse Electrical Corp* (1978) AC 547. A corporation is subject to severe penalties and prosecution which could have a serious consequence for its, and its members reputations.

³⁷ *New Zealand Apple and Pear Marketing Board v Master and Sons Pty Ltd* (1986) 1 NZLR 191.

³⁸ There is no case precedent in South Africa, but the 1996 Constitution does include the juristic person and it is likely that a privilege will also be extended to the corporation.

³⁹ *Sociedade Nacional De Combustiveis De Angola v Lundquist* *ibid*; *Tate Access Floors Inc v Boswell* (1990) 2 WLR 280, "officers of a company cannot invoke the privilege so as to protect other officers".

⁴⁰ *State Pollution Control Commission v Caltex Refining Co Pty Ltd* (1991) 72 LGRA 212 per Stein J at 219, "to my mind there is no satisfactory policy rationale to extend the privilege beyond the natural person to entities which are the invention of the state and cannot be punished by the deprivation of liberty". See also McDonald "No body to be kicked or soul to be damned: The corporate privilege" (5) *Bond L.R.* (1993) 179.

⁴¹ (1993) 178 CLR 477, "the privilege is a human right based on the protection of personal freedom and dignity. On the other hand the corporation is a creature of statute and state, limited by law".

⁴² See *supra* chapter 7 p.229-230.

⁴³ In Canadian common law the privilege was available to the corporation, *R v Bank of Montreal* (1962) 36 DLR (2d) 45 but as a result of the Charter the position has been reversed, *R v Amway Corporation* (1989) 65 DLR (4th) 309.

⁴⁴ Ansell "Self-Incrimination Privilege in Australia: The United State Influence" (24) *Queensland S.L.J.* (1994) 545; McNicol "The High Court Rules" (68) *L.I.J.* (1994) 1058; Hill "Corporate Rights and Accountability" (2) *Corporate Business L.J.* (1994) 127; Santow "The Trial of Complex Corporate

On the one hand, the Australian courts argue that a corporation is usually in a strong position relative to the state, possesses greater resources than the private individual and the advantages of incorporation gives it a more than adequate compensation for the lack of a privilege.⁴⁵ On the other hand, the English courts argue that the vast majority of corporations are small and identical to their proprietors. The privilege is a natural advantage for the small family-run business. The extension of the privilege to the juristic person in most jurisdictions⁴⁶ but not in others highlights the ambiguity of the privilege and its lack of a defining jurisprudential rationale. It may be said that the primary libertarian and human rights justification for the privilege has always rested on the respect and protection owed by the law to the natural and autonomous person. The privilege has always been regarded as an integral constitutional protection for the individual. The corporation has no need of such a protection, nor may it claim the respect due to an autonomous individual. Corporations are a mere creation of the law, endowed with an artificial personality which cannot be confused with a natural human personality. There is no logical reason to protect the corporation against a legal process which requires the disclosure of self-incriminatory evidence. In fact, legal entities should necessarily be subject to a proper state inquiry.

10.3 The Range of the Privilege

The privilege applies not only to the risk of a criminal prosecution, but as a rule, extends to the risk of a possible penalty, forfeiture or ecclesiastical sanction. The application of the privilege to a penalty developed in the common law through a judicial hostility against the public informer who sued for penalties in the common law courts.⁴⁷ Penalties and forfeitures survived the reforming Judicature Acts, although forfeitures are a somewhat anachronistic remnant of land protection.⁴⁸ The modern English court has an extensive array of sophisticated procedural remedies against forfeitures, making a forfeiture privilege largely redundant. (For this reason

Transgressions" (67) *Australian L.J.* (1993) 265; Ross "Corporations and the Privilege Against Self-Incrimination" (15) *Un. N.S.W.L.J.* (1992) 297.

⁴⁵ Australian statutory law limits the privilege to the natural person. Sec 8, Sec 1316A, Corporations (Evidence) Amendment Act 1992 (Cth) "Corporations cannot claim the privilege in criminal proceedings".

⁴⁶ Case law of the European Convention on Human Rights and case law of the Court of Justice make no distinction between natural persons and juristic persons, *Dombo Beheer B.V. v The Netherlands* (1994) 18 EHRR 213. There is no reason why the privilege cannot be extended to the European corporation. The only limitation on a juristic person is that it cannot invoke the International Covenant on Civil and Political Rights.

⁴⁷ *Earl of Mexborough v Whitwood Urban District Council* (1897) 2 Q.B. 111, 115, per Lord Esher, "rules of procedure to protect people in respect of their property against common informers".

⁴⁸ *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 57 ALJR 236, per Murphy J at 242, "the privilege against a forfeiture arose [in England] out of special regard for land rights, originally secured by feudal tenures and later by entailing and other devices. It never had any justification in Australia". Nor does it have any justification in South Africa, Hoffman *The SA Law of Evidence* (1970) 180.

sec 16(1)(a) of the Civil Evidence Act 1968 abolishes the forfeiture privilege in civil cases.) Penalties, unlike forfeitures, have a potentially more important effect.⁴⁹ A penalty in a civil proceeding is very similar to a punishment in a criminal proceeding, hence the need for a privilege.⁵⁰ A defendant may claim a penalty privilege in a civil proceeding if his answers tend to expose him to a civil penalty.⁵¹ Where the civil proceeding does involve a penalty sanction, the court will usually award the privilege to the defendant in the form of an immunity against *in limine* discovery or the production of documents. The defendant must make a specific privilege claim to each interrogatory or to each document as the matter arises.

The number of penalties to which the privilege applies has been increased by England's accession to the European Community and now includes breaches of E.C. treaty law and infringements of E.C. council regulations.⁵² The penalty privilege is best summed up by the Australian case *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Livestock Corp*,⁵³ "it is a well established principle that a defendant in proceedings for the recovery of a pecuniary penalty should not be ordered to disclose information or produce documents which may assist in establishing his liability [but] where the proceedings are not for the recovery of a penalty, there is no general rule precluding the making of an order for discovery, or interrogatories and there will ordinarily be no proper ground for objecting to an order for production of documents or provision of information."⁵⁴ Although the equity courts have held the penalty privilege to be distinct from the privilege against self-incrimination, both are in theory and practice indistinguishable. The only difference is the extent to which legislative acts abrogate or modify each privilege. (Note the ecclesiastical privilege which has its origins in English church practice is now obsolete in England, Australia, New Zealand and South Africa.)⁵⁵

⁴⁹ The penalty privilege applies to discovery, interrogatories and is available in common law as well as in equity, *Pyneboard Pty Ltd v Trade Practices Commission* *ibid* at 239, "a penalty is a common law rule well established".

⁵⁰ *Rv Associated Northern Collieries* (1910) 11 CLR 738, "a penalty is something which will penalise in a penal proceeding but does not fall under the heads of criminal law.

⁵¹ Civil actions for penalties must be distinguished from criminal actions and also from other types of civil actions for compensation, damages or punitive damages. The purpose of a penalty proceeding is to punish the defendant for alleged wrongdoing, not to provide a means for civil compensation. For example, the privilege is excluded from actions for debt and other civil suits by the Witness Act 1806 (U.K.) *Bhimji v Chatwani* (1992) 4 ALL ER 912; *Garvin v Domus Publishing Ltd* (1989) 2 ALL ER 344. The penalty privilege is obsolete in South Africa, Hoffman *The SA Law of Evidence* (1970) 179.

⁵² *Rio Tinto Zinc Corp v Westinghouse Electric Corp* (1978) 1 ALL ER 434.

⁵³ (1979) 42 FLR 204, 207-8. See also *Pyneboard Pty Ltd v Trade Practices Commission* *ibid* at 242.

⁵⁴ Ecclesiastical censure and privilege was held to be restricted to divorce proceedings based on adultery, *Blunt v Park Lane Hotel Pty Ltd* (1942) 2 K.B. 253. Ecclesiastical privilege in adultery actions was abolished by sec 16(5) Civil Evidence Act (1968), *Nast v Nast and Walker* (1972) 1 ALL ER 1171; *Khan v Khan* (1982) 2 ALL ER 60. Ecclesiastical privilege has been abolished by statute in Australia, New Zealand and has fallen into disuse in South Africa, although never formally abolished.

⁵⁵ See *supra* chapter 2.

Whether the privilege against self-incrimination may be claimed by a witness who fears the risk of a criminal conviction in a foreign jurisdiction is uncertain in most Commonwealth jurisdictions. (Note in America, the constitutional privilege does not extend to fear of a foreign prosecution.)⁵⁶ Despite several nineteenth century cases which extended the privilege to fear of a foreign prosecution, the majority of recent precedent in England, Australia,⁵⁷ New Zealand and Canada is to deny the witness such a privilege. In the seminal cases *King of the Two Sicilies v Willcox* and *Re Atherton*⁵⁸ it was held that the privilege does not extend to witness testimony which may incriminate under foreign law. The English courts have been influenced in their decision by the kind of reasoning so eloquently summarised by Wigmore,⁵⁹ "the privilege should not apply no matter how incriminating is the disclosure under foreign law and no matter how probable is a prosecution by a foreign sovereignty...[a] rule which recognises incrimination under foreign law as a basis for privilege denies the forum sovereignty the power to grant immunity as broad as its privilege and thus denies it the power by any means to compel such testimony".

However, it has been suggested in a minority of cases that where the risk is real, in the sense of being immediate and certain, it is common sense to allow the privilege. In *USA v McRae*⁶⁰ it was held that where the possibility of incrimination under foreign law is proved as a fact and the content of the foreign law is clearly laid out by expert evidence, there should be no reason not to grant the privilege. In the words of Lord Chelmsford, "[the privilege should apply] where the presumed ignorance of the judge as to foreign law is completely removed by the admitted statements on the pleadings, in which the nature of the penalty incurred by the party objecting to answer is precisely stated".⁶¹ In terms of a libertarian philosophy if the privilege is regarded as a fundamental human right and a right to privacy, then the place of the prosecution is irrelevant and a *bona fide* claim of privilege should apply equally in the domestic and the foreign jurisdiction. The fact that there is uncertainty in this aspect of privilege jurisprudence and that the U.S.A., England and Canada have rejected the extension of the privilege outside of the domestic forum, illustrates the ambiguity and confusion surrounding a libertarian interpretation of the silence principle. In England sec 14 (1)(a) Civil Evidence Act 1968 expressly confines the

⁵⁶ Recent decisions in Australia tend to leave the matter open, but the extension of the privilege to a foreign jurisdiction is only supported where the possible incrimination is a fact and the content of the foreign law is proved and uncontradicted, *Medina v Copenhagen Handelsbank International S.A.* (1989) ACLD 35, 314, and *FF Seeley Nominees Pty Ltd v El Ar Initiations (U.K.) Ltd* (1990) 96 A.L.R. 468.

⁵⁷ (1851) 1 Sim N.S. 301, 61 ER 116, per Lord Cranworth.

⁵⁸ (1912) 2 K.B. 251, 255-256, "crimes committed abroad are not crimes committed at home...I know of no principle which will enable a man to protect himself on the ground that he fears criminal proceedings in some other country".

⁵⁹ Wigmore *Evidence* McNaughton Ed (1961) para 2269

⁶⁰ (1868) L.R. 3 Ch. App. 79. See also *Sharif v Azid* (1967) 1 Q.B. 605, 616.

⁶¹ *U.S.A. v McRae* *ibid* at 85.

privilege to, "criminal offences under the law of any part of the United Kingdom and penalties provided for by such law (which also includes E.C. law)".⁶² *Arab Monetary Fund v Hashim*,⁶³ per Morritt J, is a flexible interpretation of sec 14(1)(a) and holds that there is no privilege in relation to a possible criminal offence under foreign law but the court does retain a discretion in respect to interlocutory injunctions and may well be influenced by a real possibility of incrimination under foreign law.⁶⁴ Canada has adopted a similar position and South Africa is also likely to follow the English approach.⁶⁵ The position is still uncertain in Australia but in *F.F. Seeley Nominees Pty Ltd v EL Ar Initiations (U.K.)*,⁶⁶ Zelling A.J. cast doubt on the existence of a foreign law privilege stating, "no amount of *ad hoc* tuition can put me in the position of [say] the Greek magistrate who tries the case, no one can predict with certainty the twists and turns of evidence, no one can judge who is not *peritus* in the law of Greece". However, in practice there is no reason to adopt a rigid or hard-and-fast rule. It is suggested that the question of extending the privilege to a foreign forum should be evaluated on a case-by-case basis, where the criminal consequence in the foreign law is clear and there is a real and appreciable risk that the witness's answer will lead to self-incrimination in the forum, then the privilege should be extended, but where the foreign law is unclear then the privilege should not be extended.

10.4 Statutory Modification or Abrogation

It is accepted legal practice in England, Australia and New Zealand that a legislative act may, on the basis of parliamentary sovereignty,⁶⁷ limit the privilege against self-incrimination.⁶⁸ Parliament has made full use of its legislative power, largely under the influence of the judiciary which in recent years has called for a radical re-appraisal of the privilege. In one of the more important cases, *AT and T. Istel Ltd v Tully and Another*,⁶⁹ Templeman LJ summarises the modern tendency, "Parliament has recognised in a piecemeal fashion that the privilege against self-incrimination is profoundly unsatisfactory when no question of ill-treatment or dubious

⁶² In accordance with the European Communities Act 1972.

⁶³ (1989) I.W.L.R. 565.

⁶⁴ See also *Levi Strauss and Co v Barclays Trading Corp Inc* (1993) FSR 179.

⁶⁵ There is no South African case precedent in this regard. However, there is no reason why the privilege should not be extended to a foreign jurisdiction if the law is clear, proved and the crime is recognised in South Africa, Hoffmann and Zeffertt *The SA Law of Evidence* (1996) 242. For the Canadian position see *Spenser v R* (1985) 21 DLR (4th) 756.

⁶⁶ (1990) 96 ALR 468, 473. See also *Jackson v Gamble* (1983) VR 552; *Comdr Australian Federal Poilice v Cox* (1989) 87 ALR 163, 167.

⁶⁷ In the context of a parliamentary sovereignty (a Westminster system) the silence principle is viewed as just another common law rule.

⁶⁸ South Africa was previously a parliamentary sovereignty (the privilege was merely an evidentiary rule) but is now a constitutional state (the privilege is now elevated into a fundamental right as part of a supreme constitution).

⁶⁹ (1993) AC 45, 53.

confession is involved".⁷⁰ In practice the number of statutes which amend the privilege has increased substantially over the last thirty years. In the words of Heydon,⁷¹ "the frequency and implication of such parliamentary interventions must be a matter of concern for those who still subscribe to the view that the privilege is a fundamental and firmly entrenched common law right". The English privilege has been subject to a varying degree of statutory modification or abrogation with the specific intent of reducing obstacles in the path of increased extra-curial investigatory efficiency. However, there has never been a consistent pattern or plan behind those statutes which abrogate the privilege and those which don't. Some statutes expressly ratify the privilege,⁷² while others fail to mention the privilege at all. There are statutes which partially or totally abrogate the privilege.⁷³ These partial and total abrogations are either directly expressed or must be indirectly deduced from the statutory meaning.⁷⁴ Statutes which abrogate the privilege usually operate in one of three ways. First, the statute abrogating the privilege may allow incriminating evidence to be admissible against the witness in a subsequent criminal proceeding.⁷⁵ Second, the statute may abrogate the privilege and remain silent about the use to be made of the incriminating material.⁷⁶ Third, the statute may abrogate the privilege but as a substitute protection provide for various degrees of personal use immunity, including transactional or derivative use immunity.⁷⁷ These immunity provisions are sometimes co-extensive with the abrogated privilege and sometimes the restored immunity protection may be less than the original privilege.⁷⁸ The statutory immunity may cover only directly incriminating statements or indirect and derivative use testimony. England, Australia and South Africa favour

⁷⁰ *Ibid* at 74. The law Lords held that there was no reason to award the privilege to a defendant when the prosecuting authority has agreed not to make use of the material disclosed at a subsequent criminal proceeding.

⁷¹ Heydon "Statutory Restrictions on the Privilege against Self-Incrimination" (87) *L.Q.R.* (1971) 214, 239. See also Passmore *Privilege* (1998) chp.11; Uglow; Tapper *Cross on Evidence* (1995) 453; and *Phipson on Evidence* (2000) 271.

⁷² The Consumer Protection Act (1987) sec 47(2). Sec 110(7) Social Security Administrative Act (1992).

⁷³ Sec 31 Theft Act (1968); sec 98(1) Children's Act (1989); sec 72(1) Supreme Court Act (1981); sec 2 Criminal Justice Act (1987).

⁷⁴ Sec 42 Banking Act (1987); sec 434 Companies Act (1985); sec 290 Insolvency Act (1986); sec 8 Drug Trafficking Offence Act (1986); sec 71 Environmental Protection Act (1990).

⁷⁵ In particular sec 431, 432, 442, 446 of the Companies Act (1985).

⁷⁶ Sec 24(b) Purchase Tax Act (1963). The courts have generally interpreted these statutes as allowing the admissibility of incriminating evidence, *George v Coombes* (1978) *Crim.L.R.* 234; *R v Savundra and Walker* (1968) 52 *Crim. App.R* 637.

⁷⁷ Sec 9 Criminal Damages Act (1971); sec 72 Supreme Court Act (1981); sec 31 Theft Act (1968) expressly abrogate the privilege and any incriminatory evidence obtained is inadmissible in subsequent legal proceedings.

⁷⁸ Sec 2(2) Criminal Justice Act (1987) provides for the compulsory questioning and production of documents in fraud cases. The statements obtained are freely admissible in a subsequent criminal trial except where there is a defective compliance by investigators with the act.

the derivative-use form of immunity.⁷⁹ In contrast, the American immunity statute which seeks to substitute the fifth amendment privilege must provide a protection which is co-extensive and an exact match with the abrogated privilege.⁸⁰ In Canada, sec 5 of the Canadian Evidence Act makes a specific provision for a use form of immunity.⁸¹

Most of the statutory abrogations of the privilege are concentrated in the field of corporate activity, banking, taxation, property protection, creditor rights, serious fraud, bankruptcy and insolvency. Statutory interference with the privilege is considered necessary for the efficient functioning of various extra-curial governmental bodies such as royal commissions, inquiry boards, police investigatory units, taxation and corporate fraud investigatory boards, company inspectors and other quasi-governmental and regulatory organs. The greatest erosion of the common law privilege has occurred in the commercial and financial arena.⁸² Wigmore⁸³ is of the opinion that the nature of a fiduciary duty and other public policy consideration make inroads into the privilege necessary. Brokers, trustees, company officers and other agents must be compelled to render self-incriminatory accounts to the persons (including the state) to whom the fiduciary duty is owed. The English do not hesitate in protecting fiduciary duties and other proprietary interests. With increasing commercial globalisation the modern trend is to sacrifice the privilege on the altar of expediency, efficiency, practicality and competition-driven commercial self-interest. On a more fundamental level abrogating statutes are essential if the state is to have a reasonable chance of successfully prosecuting white collar corporate crime.⁸⁴ As a matter of common sense, the defendant's claim of privilege should be refused when it becomes an obstacle to the plaintiff's search and seizure of his own documents which are in the fiduciary possession of the defendant, especially where fraud is alleged.⁸⁵ An example of this common sense approach to the privilege is the existence of a common law judicial discretion which permits the court to order discovery of incriminating material on the basis that a failure

⁷⁹ *Rank Film Video Ltd v Video Information Centre* (1982) A.C.380, 443 (U.K.) and *E.P.A. v Caltex Refining Co Ltd* (1994) 118 A.L.R., 392, 404 (Australia). See also Findlay "International Rights and Australian Adaptation" (2) *Sydney L.R.* (1995) 278; Aitken "Before the High Court" (16) *Sydney L.R.* (1994) 394. In South Africa, sec 204(2) and (4) of the CPA allow for a transactional and use immunity, *Nel v Le Roux No 1996* (3) SA 562 (CC) and *Dabelstein and others v Hildebrandt and Others* 1996 (3) SA 42 (C).

⁸⁰ See *supra* chapter 7 p.258-259. In particular *Kastigar v United States* 406 U.S.441 (1972)

⁸¹ See also *Haywood Securities v Inter-Tech Resources* (1987) 24 DLR (4th) 724 noting the decision in *Kastigar v United States* with approval. See *infra* note 98.

⁸² Polonsky "Self-Incrimination in Insolvency Investigations". *De Rebus Feb* (1995) 112; Mercer "Right to Silence in Liquidations" *J. Crim. L.* (1992) 379; Tomkins and Bix "The Sounds of Silence: A Duty to Incriminate Oneself" *Public Law* (1992) 363; Porter "The Right to Silence in Serious Fraud" *Cambridge L.J.* (1992) 446.

⁸³ Wigmore *Evidence* McNaughton Ed (1961) par 2269.

⁸⁴ Corporate fraud operates behind a veil of secrecy (which is difficult to penetrate) and involves complex commercial technicalities (which are difficult to prove). By manipulating the privilege against self-incrimination, the defendant makes it extremely difficult for the prosecutor to achieve a conviction.

⁸⁵ *O'Rourke v Darbishire* (1920) AC 581, 626-627.

to do so will place the plaintiff at a serious disadvantage while not placing the defendant at any real risk of a criminal charge.⁸⁶

As a result of the weighty pressures of proprietary and fiduciary interests, public policy and fairness considerations, the privilege has never played more than a vestigial role in company fraud or investigations initiated in terms of the Companies Act 1985, the Financial Services Act 1986, the Bank Act 1987 or the Insolvency Act 1986. *Re Jeffrey S. Levitt Ltd*⁸⁷ states "the officer of an insolvent company may not claim the privilege against self-incrimination and is moreover under a statutory duty [sec 236 of the Insolvency Act] to assist in the insolvency investigation". The court is merely re-interpreting the declaratory rule of insolvency which goes back to at least the middle of the nineteenth century. The defendant under questioning by liquidation investigators cannot refuse to provide evidence which may turn out to be self-incriminatory. In *re Arrows (4) v Naviede*⁸⁸ it is held that the Serious Fraud Office (S.F.O.) is entitled to the disclosure of all material obtained by liquidators in the course of their investigations.⁸⁹ *R v Kansal*⁹⁰ unequivocally holds that self-incriminatory statements made by a bankrupt at his insolvency examination may be used in evidence in any other legal proceeding including a criminal proceeding.⁹¹ By virtue of sec 2(2) of the Criminal Justice Act 1987, all persons under investigation for serious fraud are obliged to answer self-incriminatory questions.⁹² According to *R v Kansal*, parliament intended that the sec 2 investigatory powers should override the common law privilege. (Note the wide-ranging powers awarded to the Director of the S.F.O. are likely to be curtailed by the introduction of the Human Rights Act 1998.) Although the privilege has been modified in many civil investigatory inquiries and civil trial proceedings, the privilege still exerts a substantial influence over criminal proceedings. A statutory discretion (in terms of sec 76 and 78 of PACE)⁹³ permits the judge to exclude self-incriminatory material, the use of which may unfairly disadvantage the defence. The cumulative weight and effect of company, insurance, banking and insolvency legislation is to demand a duty of co-operation by the witness

⁸⁶ *Blunt v Park Lane Hotel Ltd* (1942) 2KB 253, 257.

⁸⁷ (1992) Ch 457 (1992) 2 ALL ER 509. See also *Bishopgate Investment Management Ltd v Maxwell* (1993) Ch 1 (1992) 2 ALL ER 856 and *R v Harz* (1967) 1 A.C. 760, 816.

⁸⁸ (1995) 2 AC 75. The combined effect of the Insolvency Act and the Criminal Justice Act is to abrogate the privilege. Cumulatively there is no express restriction on the disclosure of compulsory evidence nor any indemnity as to the evidentiary usage of testimony.

⁸⁹ Even when the defendant has been charged with a criminal offence, the S.F.O. may continue to undertake further investigations, *R v Serious Fraud Office, ex parte Smith* (1991) AC 1. In South Africa see *Park-Ross v Director: Office for Serious Economic Offences* (1995) (2) SA 148(C).

⁹⁰ (1993) QB 244 (1993) 3 ALL ER 844.

⁹¹ The express and strongly worded abrogation of the privilege in sec 433 and sec 290 of the Insolvency Act (1986) overrides the partial abrogation of the privilege in sec 31 of the Theft Act 1968.

⁹² Sec 2(2) provides for a compulsory questioning. Sec 2(3) provides for a compulsory production of documents. Sec 2(8) for the admission of these transcripts at a subsequent trial.

⁹³ *R v Seelig* (1992) 94 Cr. App. R 17 and *R v Saunders* (1996) 1 Cr. App. R 463.

or defendant with the investigatory organ. The effect is to remove the privilege in private and public inquiries, to allow the admission of incriminating material in subsequent civil and criminal proceedings limited only by specific statutory immunity safeguards. The majority of state criminal prosecutions in the area of corporate and other serious fraud are dependant on the outcome of these civil investigatory processes, especially those which exclude the privilege against self-incrimination.

However, with the elevation of the silence principle into a fundamental human right, as a consequence of the European Court of Human Rights ruling in *Funke v France*⁹⁴ read together with the Human Rights Act (1998), it is likely that all English statutes which abrogate the privilege will require a re-evaluation and a fundamentally different application. This change has already manifested itself in the partial reversal of the Court of Appeals decision in *R v Saunders*,⁹⁵ in which the court allowed the admission of a self-incriminatory transcript originally obtained from the defendant by a department of trade and industry investigation (i.e. in terms of sec 434(5) of the Companies Act 1985, any answer compulsorily obtained by a company investigation may be used in a subsequent criminal or civil proceeding). The Court of Appeal ruled that there was no unfairness in the trial use of such incriminating material as the Companies Act 1985 expressly abrogates the privilege without providing for a substitute use immunity.⁹⁶ The European Court of Human Rights in *Saunders v U.K.*⁹⁷ declared the government's use of the transcript to be an infringement of Saunders' sec 6(1) right to a fair trial. The effect of the European Court's decision is to prevent the subsequent use of the defendant's self-incriminating statements in a criminal proceeding. Consequently, while a statute may abrogate the privilege in a pre-trial investigatory inquiry, no use may be made of the incriminating testimony in a criminal trial. Future English statutes which abrogate or modify the privilege are now obliged to provide specific use immunity guarantees. In contrast to the present English position, Australian statutes give wide investigatory powers to Federal, National and State Crime Commissions. In terms of the Evidence Act 1995 (Cth) and (NSW) the Australian courts will only uphold the witness' claim of privilege in non-curial investigations on reasonable grounds (sec 128(2)) and may in the interest of justice override such a claim (sec 128(5)). The courts have a statutory discretion to resolve the conflict between the witness interest and the state interest, and often do so in favour of crime control and law enforcement. Similarly in Canada, the Director of Investigation, Restrictive Trade Practices Commission may compel the

⁹⁴ (1993) 16 EHRR 297, 326.

⁹⁵ (1996) 1 Cr. App. R 463.

⁹⁶ *Re London Investment PLC* (1992) Ch 578.

⁹⁷ (1997) 23 EHRR 313, 340, "the public interest cannot be invoked to justify the use of answers compulsorily obtained in non-judicial investigations to incriminate the accused during the trial proceeding."

witness to give evidence at a non-curial investigation. Such compulsion does not violate the right to be protected against unreasonable searches (sec 8 of the Charter of Rights and Freedoms) nor the due process right (sec 7). The Canadian courts have a discretion to exclude the use of such witness evidence at a subsequent criminal proceeding.⁹⁸

10.5 Non-testimonial Physical Evidence

Historically the silence principle has its origin in a limited testimonial privilege and was designed to protect oral and documentary disclosures. All other forms of incriminating evidence, such as physical and real evidence, were not covered by the privilege. A distinction has developed between testimonial evidence (communicative evidence sourced from the individual's own lips) and physical bodily evidence (evidence which does not have a communicative function). Wigmore lends his considerable authority to this traditional distinction. "Unless some attempt is made to secure a communication, written, oral or otherwise, upon which reliance is to be placed involving [the defendant's] consciousness of the facts and the operation of [the defendant's] mind in expressing it, the demand made upon him is not a testimonial one."⁹⁹ According to Wigmore it is not any and every compulsion which forms the core of the privilege, "the history of the privilege suggests that the privilege is limited to testimonial disclosures. It is directed at the employment of legal process to extract from the person's own lips an admission of his guilt which will take the place of other evidence."¹⁰⁰ In essence an incriminating statement forced from the defendant's own lips creates adverse evidence which has had no previous existence. Wigmore's reasoning is neatly summarised in *R v McLellan*,¹⁰¹ "the making of an incriminating statement brings into being adverse evidence which previously did not exist. If forced from a prisoner it requires him to create evidence against himself, possibly in circumstances where he makes the statement not in accordance with the facts. On the other hand, a fingerprint or some physical feature is already in existence, it exists as a physical fact

⁹⁸ The Australian Evidence statutes provide the witness with a derivative-use immunity issued by the court at its discretion (sec 128(2) Evidence Act 1995). See Corns "The Big Four: Privileges and Immunities" *A.N.Z. J. Criminology* (1994) 133. The Canadian common law, *Thompson Newspapers Ltd v Canada* (1990) 54 CCC (3d) 417, and statute law, Combined Investigation Act 1970 RSC, sec 20, provide only a use immunity and not a derivative-use immunity, but the immunity provision, sec 13 of the Charter, has added a derivative-use immunity. See also *R v S (R.J.)* (1995) 1 SCR 451. For the position in South Africa see *Bernstein and others v Bester and others NNO* 1996 (2) SA 751 (CC) and *Park-Ross v Director: Office for Serious Economic Offences* 1995 (2) SA 148 (C).

⁹⁹ Wigmore *Evidence* McNaughton Ed (1961) para 2265.

¹⁰⁰ Wigmore *ibid* at para 2263. In the case of conventional body evidence, fingerprints, footprints, facial features, height, colouring, tattoo's, physical abnormalities and deformities, the defendant is not being asked to disclose his *knowledge*. The privilege may only be invoked when the state intends to compel testimony based on the accused's own knowledge (para 2265).

¹⁰¹ (1974) VR 773, 777, per Gowans, Nelson and Anderson JJ.

and is not subject to misrepresentation. If it is to be excluded as evidence, it is only on the basis of accompanying circumstances of unfairness”.

Physical evidence is not manufactured from the witness, it is real evidence of a high probative value and a low level of prejudice. On the other hand, testimonial evidence is manufactured from the witness and may be rendered undesirable by a multitude of coercive influences. Physical sampling requires only a low level of intrusive co-operation from the witness, while a self-incriminatory communication must be wrenched from the lips of a suitably manipulated and co-operative witness. The privilege does not cover the human body as a passive, real source of identification evidence because the use of body samples as evidence cannot be equated with co-operative self-incriminatory testimonial evidence. Wigmore also classifies the pronunciation and spelling of words, the witness' submission to a medical examination, as non-testimonial sources of evidence falling outside the scope of the privilege. However, the traditional distinction becomes blurred when the question is one of advanced technology, the use of modern lie detector tests and a truth serum pharmacology. Lie detectors which test for a physiological reaction to emotionally-charged questions and truth serums, which reduce psychological barriers to suggestive questions lie in the grey area between non-testimonial and testimonial evidence. Evidence gathered from the use of these new methods may well be defined as an enforced disclosure of incriminating communicative knowledge.¹⁰² For example, in Germany, court dicta has held that lie detector tests are inadmissible on the basis that the involuntary physiological responses of blood pressure and respiration are communicative testimonial forms of evidence, which fall within the scope of the privilege. Acknowledging that the physical-non-physical dichotomy is somewhat arbitrary, other rationales have been advanced to justify the exclusion or inclusion of evidence from the ambit of the privilege. The justifications for the extension of the privilege are based on evidence obtained as a result of a violation of lawful procedure, unreasonable search and seizures, violation of privacy, involuntariness, illegally obtained evidence and a general theory based on the violation of physical integrity in the form of assault.¹⁰³ A doctrine of implied waiver or implied consent is sometimes used to justify excluding the privilege from some type of evidence. For example, in all Commonwealth jurisdictions, the drunk driver in a traffic violation is deemed to have automatically consented to the taking of a

¹⁰² Wigmore acknowledges that there may be problems at the boundary in regard to these types of evidence, “not only is the person's affirmative participation essential (at least in the form of physical responses) but his knowledge, despite his will to the contrary, is being extracted” (para 2265).

¹⁰³ In England objections to the taking of blood samples are sometimes based on unreasonable searches and seizures, violation of due process, etc., and not on the privilege against self-incrimination. For example, the statutory PACE consent requirement for the taking of an intimate sample is designed to avoid allegations of police assault and not to avoid the invocation of the privilege. See *infra* note 123 to 125.

blood sample.¹⁰⁴

Currently, two schools of interpretation may be distinguished. The majority school, exemplified by Wigmore and supported by case law from England, America,¹⁰⁵ Australia, New Zealand, Canada and South Africa, maintains an often inflexible distinction between testimonial communicative evidence (to which the privilege attaches) and physical non-communicative evidence (to which the privilege does not attach),¹⁰⁶ a distinction which is philosophically based on a Cartesian conception of the mind-body duality.¹⁰⁷ According to Cartesian reasoning the mind (a cognitive process) and the body (a conative process) are two unique functions which should be separated. An interaction between these two functions, which gives rise to a legal consequence, occurs only when the mind neurologically activates the body in a process which produces a verifiable communication of knowledge (for example, where the mind activates the musculature of the speech organ to produce an oral communication which has legal consequences).¹⁰⁸ Only such a voluntarily-activated process is covered by the privilege against self-incrimination. A purely biological process which does not involve a neurological interaction between the mind and the body cannot fall within the ambit of the privilege. The minority view suggests that there can be no rigid dichotomy between a human mental and physical function. Even Wigmore recognised that all human conduct exists in a continuum in which every act is separated from another only by a matter of degree. On the one extreme of this continuum are to be found the passive forms of physical body evidence (real evidence), including non-verbal gestures and body language, to which the privilege does not apply. In the middle of the continuum are polygraphs, lie detector tests, truth serums which induce evidence, to which it is unclear whether the privilege should apply. On the other extreme of the continuum are the traditional incriminating testimonial communications to which the privilege does apply. Where is the line to be drawn in this complex human interactive continuum? The artificiality of a rigid Cartesian dualism is illustrated by the modern day emphasis placed on the use of body language. Non-verbal gestures, whether voluntary or involuntary, can consciously or subconsciously communicate information. Visual signs from the body, such as demeanour, posture, shape and position, often give clues as to mental disposition. This kind of body

¹⁰⁴ In America the same position is held. *South Dakota v Neville* 459 US 533 (1983), "a refusal to take a blood test did not form part of the fifth amendment and the refusal could be used in evidence against the accused". The majority of American courts have construed a refusal to take a blood test as a physical act and not a communicative act. See *supra* chapter 7 p.237-238.

¹⁰⁵ See *supra* chapter 7 p.234-239. In particular *Schmerber v California* 384 US 757, 764 (1965)

¹⁰⁶ (England) *R v Smith* (1985) 81 Cr. App. R 286, *S v S* (1972) AC 24. (Australia) *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 57 ALJR 248. (Canada) *R v Collins* 1 SCR 265. (South Africa) *Msoni v Attorney-General of Natal* 1996 (8) BCLR 1109 (N).

¹⁰⁷ Descartes *Meditations and Passions of the Soul* Philosophy Series 4 Ed, Cambridge (1992) 368-450.

¹⁰⁸ When the mind activates the musculature of the hand to produce a written document.

language often communicates vital information of a high probative value to the trained observer.¹⁰⁹ In criminal practice, knowledge of the accused's state of mind (intention) is derived from the accused's awareness of his conduct. Adverse inferences may be drawn by an implied admission from the accused's silence in the face of an accusation made by the accuser speaking on equal terms. In the law of evidence, the hearsay rule covers not only oral or written statements, but has been extended to include gestures and certain periods of silence.¹¹⁰ The traditional distinction which excludes the privilege from physical body evidence because such evidence does not communicate knowledge is clearly incorrect. In *Schmerber v California*,¹¹¹ Black J (dissenting) indicated that the taking of blood samples must have some communicative effect, "it is a strange hierarchy of values that allows the state to extract a human beings' blood to convict him of a crime because of the blood's content but proscribes compelled production of his lifeless papers".¹¹² The words "testimonial" and "communicative" are ambiguous and lack precision. For example, although a blood sample test is not comparable to oral testimony, it still serves to communicate to the jury the defendant's guilt. By analogy it constitutes the equivalent of testimony and is so regarded by the jury. Clearly the rigid and formalistic classification between testimonial and physical evidence is logically flawed. The arbitrary boundaries drawn between what types of evidence fall within or without the scope of the privilege demonstrates the absence of a fundamental jurisprudential justification for the privilege.

In the Commonwealth and in America, therefore, at common law the privilege cannot be invoked by the witness to justify the withholding of a blood or other body sample. However, in England the taking of blood and fluid samples is based on a different type of reasoning, as an objectionable intrusion upon the witness' bodily integrity. The English common law permits the witness to refuse to provide body samples, not on the basis of a privilege against self-incrimination, but as a protection of personal liberty. In the words of Tapper, "it involves what some regard as a peculiarly objectionable intrusion upon their bodily integrity".¹¹³ The common law is now codified and governed by the Police and Criminal Evidence Act 1984 (PACE). The PACE provisions reaffirm the seminal decision in *R v Smith*¹¹⁴ in which the Court of Appeals

¹⁰⁹ Professional police investigators and prosecutors tend to keep a sharp lookout for this type of body language.

¹¹⁰ A "pointing out" may also be highly communicative. *S v Sheehama* 1991 (2) SA 860(A) at 879, "a pointing out is essentially a communication by conduct".

¹¹¹ 384 US 757, 775 (1965).

¹¹² Black J at 775 criticises the majority for its literal interpretation of the privilege and for moving away from the liberal interpretation in *Boyd v United States* 116 US 616 (1886), see *supra* chapter 7 p.242. The US Supreme Court has rejected *Boyd* in *Fisher v United States* 425 US 391 (1976), see *supra* chapter 7 p.242-243.

¹¹³ Tapper *Cross on Evidence* Butterworths (1995) 42.

¹¹⁴ (1985) 81 Cr. App. R 286. See also *R v Cooke* (1995) 1 Cr. App. R 318.

declined to extend the privilege against self-incrimination to body samples¹¹⁵ and held that the right to co-operate with the police by supplying samples is not comparable to a refusal to speak. In Australia the common law position is also regulated by legislation. For example, the Victoria Crimes (Blood Samples) Act 1989¹¹⁶ permits the taking of a blood specimen either by the suspect's informed consent, or forcibly in terms of a magistrate's order.¹¹⁷ The Victoria Act reaffirms the common law position that body samples do not fall within the ambit of the privilege. Canadian common law adopts the same position. In *Marcoux v R*,¹¹⁸ the Supreme Court holds, "an accused cannot be forced to disclose any knowledge...and thereby supply proof against himself but bodily conditions and bodily samples do not violate this principle". The European Court of Human Rights has also reaffirmed the Wigmore-Cartesian dichotomy between testimonial evidence and non-testimonial real body samples. In *Saunders v U.K*¹¹⁹ the court states, "[the right not to incriminate oneself] does not extend to the use in criminal proceedings of material that may be obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect, such as samples and body tissues for the purpose of DNA testing". The common law in South Africa and New Zealand is also based on a Wigmore-Cartesian dichotomy in which the privilege against self-incrimination does not apply to non-testimonial physical evidence. (Note, in New Zealand, the refusal of a blood sample for DNA analysis has been held to be a basic human right and no adverse inferences may be drawn from it, *R v Martin*.)¹²⁰ The South African common law distinction is approved of in *S v Binta*¹²¹ and in *S v Maphumulo*¹²² it is held that the common law position has not been affected by sec 35 of the Constitution.

¹¹⁵ The gathering of body samples does not attract the privilege, *R v Apicella* (185) 82 Cr. App. R 295, nor do other non-intimate samples such as speech, *R v Deenik* (1992) Crim. L.R 578.

¹¹⁶ See also the Crimes (Fingerprinting) Act 1988 (Vict).

¹¹⁷ These statutory powers are subject to the judge's discretion to exclude evidence improperly or unfairly obtained.

¹¹⁸ *Stillman v R* (1987) 113 CCC (3d) 321; *R v Le Clair* (1989) 67 Cr (3d) 209; *R v Therens* (1985) 1 SCR 613; *R v Altseimer* (1982) 38 OR (2d) 783 (CA); *R v Dersch* (1993) 3 SCR 768.

¹¹⁹ (1992) 23 EHRR 313, 337-338 and *Funke v France* (1997) 23 EHRR 313, 338 (para 69).

¹²⁰ (1992) 1 NZLR 313.

¹²¹ 1993 (2) SACR 553(C), per Ackermann J at 562 D-E, "the common law principle *nemo tenetur* does not apply to the ascertaining of bodily features nor the taking of blood samples...A distinction is drawn between being obliged to make a statement and furnishing real evidence". See also *S v Duna* 1984 (2) SA 591 (C) at 595 G-H; *Seetal v Pravitha* 1983 (3) SA 827 (3), where Didcot J at 846 H-C cited *Schmerber* with approval.

¹²² 1996 (2) SACR 84 (N) and *S v Huma* 1995 (2) SACR 411 (W) 417E-419E. Note, sec 37 (body evidence) of the C.P.A. is generally interpreted in line with the common law and excludes the privilege from evidence of the accused's body and physical features or conditions (sec 37 is read together with sec 225 (2)).

In England the extraction and evidentiary use of intimate and non-intimate body samples is regulated by sec 62 through to sec 65 of PACE (as amended).¹²³ Sec 61(4) and sec 63(4) give the police a wide range of powers in the taking of non-intimate samples (hair, nail scrapes, skin cell samples, fingerprints, etc.) from a suspect without consent. The investigating officer must have a reasonable cause for suspicion and the non-intimate sample must confirm or disprove the suspect's involvement in the alleged crime. Intimate sec 65 samples (internal soft tissue, blood, stomach, breath, sperm and other fluid samples) may only be taken with the suspect's consent. The doctrine of consent illustrates the importance of properly protecting the suspect's bodily integrity against unwarranted police intrusion or assault. Where the suspect refuses to give consent, sec 62(10) permits the court to draw an adverse inference from such a refusal. The adverse inference may not be construed as direct evidence of guilt, but it does add to the prosecution's *prima facie* case. Sec 62(10) has been amended by the Criminal Justice and Public Order Act (CRIMPO) 1994 so as to reflect the general import of sections 34 through to sec 37. Only a proper inference (as defined by CRIMPO) may be drawn at any of the relevant pre-trial or trial stages of the criminal process. A proper inference may be an adverse one if the suspect's refusal is made without good cause. No adverse inference may be drawn in the face of good cause shown, such as embarrassment, ignorance, fear, superstition or any other factor as may be appropriate in the individual circumstances.¹²⁴ In addition to the PACE provisions, other supplementary and ancillary legislation also exclude the privilege against self-incrimination from certain types of body evidence. The Road Traffic Act 1988 (sec 6 through to sec 9), obliges an alleged drunk motorist to produce blood or urine samples. A failure to do so will permit the court to draw the necessary adverse inference.¹²⁵

At first glance DNA genetic profiling fits neatly into the traditional category distinction between testimonial and non-testimonial evidence. The scientific validity and high probative value of the DNA test makes it the ideal example of physical body evidence falling outside the scope of the privilege.¹²⁶ Because of its high degree of specificity (a 99.9% indication of physical identity) and scientific verifiability (it cannot be faked and it is not dependant on the mental disposition of the

¹²³ Sec 62 of PACE 1984 has been amended by sec 54 of CRIMPO 1994, (i) by inserting a new subsection (1A) which permits the police to take non-intimate samples from a person not in police detention subject to the person's consent; (ii) sec 54 and sec 58 CRIMPO amend sec 62 and sec 65 PACE by removing dental impressions and saliva mouth swabs from the list of intimate samples and placing them in the list of non-intimate samples. See also *R v Cooke* (1995) 1 Cr. App. R 318 "DNA testing can now take place even on head hair without the suspects consent".

¹²⁴ Good cause may also be a refusal by members of a religious sect to give blood samples, Keane *The Modern Law of Evidence* 4th Ed (1996) 381.

¹²⁵ See also the Family Law Reform Act 1987, sec 23, permits the court to draw an adverse inference from the individual's refusal to submit a blood sample in a paternity suit, *McVeigh v Beattie* (1988) 2 ALL ER 500.

¹²⁶ See *ReF* (1993) 3 ALL ER 596; *JPD v MG* (1991) IR 47.

suspect), a refusal by the suspect to supply a DNA sample makes it easy for the court to draw a straight forward adverse inference of guilt.¹²⁷ Nevertheless, DNA testing does exhibit a number of flaws. First, a refusal to supply a DNA sample may be based on a variety of factors such as fear, anxiety, ignorance, etc. Similar factors to those which account for the suspect's genuine silence in the face of police interrogation. Second, although its scientific validity is unquestioned there is a practical problem about the standards of the various testing procedures. Different laboratories often apply widely varying techniques with differing standards of control. Expert evidence problems may arise from the way band sizes are calculated and the different sized data pools¹²⁸ against which the sample is randomly matched¹²⁹ (the smaller the band size and the data pool, the more imprecise the identification match). Third, while DNA evidence is of obvious evidentiary use to the prosecution, its use by the defence is hindered by a limited access to expensive forensic services (in South Africa a semen DNA test can cost between R500 to R1,000 per sample); small sample sizes which prevent the defence from re-analysing the sample; inadequacy of quality controls to prevent sample contamination; and the necessity for expensive expert witnesses. Fourth, during the trial the popular appeal of DNA evidence may unfairly focus the jury's attention on a small part of the prosecution's evidentiary material while the rest of a possibly weak *prima facie* case is ignored. The exclusion of DNA and other body evidence from the scope of the privilege against self-incrimination has made the erosion of the silence principle by the English courts much easier. In one sense it has given parliament the opportunity to legislate and regulate the infringement and limitation of the silence principle. In the words of Easton,¹³⁰ "the fact that the two category types of evidence [testimonial and non-testimonial evidence] lie on a continuum and are closely related to each other (separated only by a matter of degree) means that once one grants concessions in the case of samples, one is on a slippery slope". Nevertheless, the ease by which DNA and other bodily evidence are excluded from the scope of the privilege in almost all Commonwealth jurisdictions, is perhaps indicative of the reality that the privilege is merely a utilitarian rule of evidence (one without a rational foundation) and not a libertarian fundamental human right.

¹²⁷ As per sec 62 (10) PACE, but note the New Zealand objection to DNA evidence in *R v Martin* *ibid* note 120.

¹²⁸ Sec 63 (3A) PACE now gives the police the ability to build up a large and uniform DNA data base by taking representative non-intimate samples from arrested individuals. South African police do not possess this power.

¹²⁹ Other testing problems include: (i) band shifting, band distortion and strand mobility, all of which depend on the density of the protein gel used during testing; (ii) no uniform international statistics exist as to band concentrations in different nationalities and in small sub-populations; (iii) incorrect storage may also result in band distortion. See Evett, Foreman, Jackson and Lambert "DNA Profiling" *Crim L.R.* (2000) 341.

¹³⁰ Easton "Body Samples and the Privilege Against Self-Incrimination" *Crim. L.R.* (1991) 18. See also Walker and Cram "DNA Profiling and Police Science" *Crim L.R.* (1990) 479; Joyce "High Profile: DNA in Court Again" *New Scientist* (July) 1990.

10.6 The European Convention on Human Rights

The European Convention on Human Rights¹³¹ was originally established with the aim of promoting greater unity amongst members of the European Community (EC) and other European states. Its purpose is to cultivate a European culture of human rights and a respect for European law.¹³² The Convention is enforced by a European Court of Human Rights, which sits in Strasbourg and has jurisdiction over all the signatory states of the EC. The Human Rights Court should not be confused with the European Court of Justice, which sits in Luxembourg. The former court is narrowly concerned with the protection of basic European liberties, while the latter court is taxed with upholding the European legal administrative system in general. The European Convention on Human Rights does not expressly mention the terms "the right to silence", "the right not to give evidence against oneself" or the "privilege against self-incrimination". Indeed, before 1993 it was thought that the Convention did not provide a protection against infringements of the silence principle. In its 1989 decision *Orkem v Commission*¹³³ the European Court of Justice stated, "as far as article 6(1) of the European Convention is concerned...neither the wording of the article nor the decisions of the Court of Human Rights indicate that it upholds the right not to give evidence against oneself". It was only in the 1993 seminal decision *Funke v France*¹³⁴ that the European Court suddenly discovered an implied privilege against self-incrimination in the wording and meaning of article 6(1), "a right to a fair hearing".¹³⁵ Article 6(1) of the European Convention should be read against the background of Article 14(3) of the United Nations International Covenant on Civil and Political Rights (which specifically recognises a right not to give incriminatory evidence). According to *Funke v France* the European silence principle consists of two essential elements. First, the right of the individual to remain silent and not to assist the prosecution in obtaining evidence of a criminal offence. Second, neither the investigating authority nor the prosecution may compel

¹³¹ The European Convention for the protection of Human Rights and Fundamental Freedoms (1953) in Cmnd 8969. See also Robertson and Merrills *Human Rights in Europe* (1993) 3rd Ed 303-340. Jacobs and White *The European Convention on Human Rights* (1996) 2nd Ed. Munday "Inferences from Silence and European Human Rights Law" *Crim. L. R* (1996) 370; Frommel "The European Court of Human Rights and the Right of the Accused to Remain Silent" *British Tax Review* (1994) 598; Buxton "The Human Rights Act and the Substantive Criminal Law" *Crim L. Rev* (2000) 331..

¹³² The European Convention is the indigenous counterpart of the UN's International Covenant on Civil and Political Rights (1968).

¹³³ (1989) ECR 3283. But see *Otto B.V. v Postbank* (1993) ECR 5683 in which the European Court refused to allow the *Orkem* rejection of a silence principle to be invoked by the prosecutorial services of its national signatories.

¹³⁴ (1993) 16 EHRR 297, 326, "[national law] cannot justify the infringement of the right of anyone 'charged with a criminal offence' within the autonomous meaning of article 6, to remain silent and not to incriminate himself". See also *Bendenoun v France* case 3/1993/338/476 (serie A) vol 284, "taxpayers are entitled to invoke the right to silence".

¹³⁵ Article 6(1), "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time, by an independent tribunal established by law".

the defendant to provide incriminating evidence. The European silence principle is a fundamental part of the European *communis opinio* which puts the burden of proof (*chargé de la preuve*) on the prosecution as a specific and unvarying onus (*onus probandi incumbit actor*). In this sense, the European silence principle consists of a nexus between a right to a fair trial (art 6(1)) and the presumption of innocence (art 6(2)).¹³⁶ The silence principle is an extension of the fundamental notion that where the prosecution fails to meet its burden then the accused must be discharged (*in dubio pro reo*). Although the link between a privilege against self-incrimination and the presumption of innocence was never alluded to in *Funke v France*,¹³⁷ it was found to be an essential relationship in *Saunders v U.K.*¹³⁸

The surprise finding of the Human Rights Court in *Funke v France* was criticised as being unmotivated and without a rational basis in the *ius commune* of European law. Since the *Funke* decision the usual array of libertarian philosophical rationales have been advanced to justify a European silence principle.¹³⁹ *Murray v U.K.*¹⁴⁰ vaguely refers to the principle as a "generally recognised international standard", "while the right to silence is not an absolute right,¹⁴¹ it nevertheless lies at the heart of the notion of a fair trial".¹⁴² The protection against an unfair conviction rationale is restated in *Saunders v U.K.*¹⁴³ which also draws support from the supposed historic origin of the silence principle.¹⁴⁴ In the dissent to *Saunders v U.K.*, Martens J assumes that the majority judgement is based on the proposition "that respect for *human dignity and autonomy* requires that every suspect should be completely free to decide which attitude he will adopt with respect to the criminal charges against him", but it is doubtful whether the majority judgement does indeed embrace a human dignity rationale. Martens J also points out that the qualification of the right to silence by the *Murray* Court as "lying at the heart of a fair trial" gives the silence principle certain absolute overtones which may eventually make it an inflexible principle. In respect to the witness privilege against self-incrimination, case precedent from the Court of Justice and the Court of Human Rights seems to favour a rationale based on the prohibition against fishing expeditions. Case precedent suggests that it is the state's responsibility to collect evidence. The state may rely on the co-operation of the witness in

¹³⁶ Article 6(2), "everyone charged with a criminal offence shall be presumed innocent until proven guilty according to the law".

¹³⁷ *Funke* held it unnecessary to decide whether the national law also infringed article 6(2) the presumption of innocence.

¹³⁸ (1996) 23 EHRR 313.

¹³⁹ See *Human Rights Cases A.N. Brown Edinburgh* (2000) 92.

¹⁴⁰ (1996) 22 EHRR 29.

¹⁴¹ *Ibid* para 29.

¹⁴² *Ibid* para 56.

¹⁴³ *Ibid* para 67. This is an instrumental function of the right which excludes unreliable evidence and is restricted to the pre-trial police interrogation.

¹⁴⁴ See *supra* chapter 2.

gathering certain types of evidence, but it may not compel or “fish” for evidence. To do so, would undermine the fairness of the criminal process by undermining the burden of proof and the presumption of innocence. In its intent to establish a justification for the silence principle, the Court of Human Rights has canvassed the entire spectrum of libertarian rationales. (The philosophical nature of these *personality* and *instrumental* rationales has been analysed and found wanting in chapter 4.) The inclusion of a silence principle in the European Convention, where one did not previously exist, is the consequence of a prevailing and influential human rights culture, to which the judges of the European Court are obviously not immune. The creation of a European right to silence is one based more on libertarian sentimentality than on utilitarian reason.

The European silence principle as it has developed over recent years may be identified as follows. First, the right to silence is protected by article 6(1) and may be claimed by both the natural and the juristic person. Second, it may be invoked by the suspect during the preliminary investigation or by the accused after being charged with a criminal offence. Third, the right to silence and the privilege against self-incrimination may be claimed during a criminal process or at any other proceeding which leads to the risk of a penalty or a fine. This would include competition and anti-trust investigations, tax, customs and company proceedings. Fourth, the privilege may be claimed by the witness personally in order to avoid self-incrimination but also to avoid the incrimination of a third party. In this respect the scope of the European privilege is far wider than its equivalent in America and the Commonwealth. The American and the English privilege cannot be claimed on behalf of a spouse, relative or friend. Fifth, the right applies to both oral testimony and the discovery or production of documents. Sixth, a distinction is drawn between non-testimonial evidence and physical (real) body evidence. Seventh, the right is extended to both the natural, as well as the juristic, person. Eighth, in a criminal proceeding the accused or the witness may voluntarily choose to remain silent or he may voluntarily and intentionally waive the right. Ninth, no presumption of guilt, nor an adverse inference of culpability, may arise from the accused's exercise of a right to silence. Tenth, the suspect or accused in a criminal process must be cautioned at the earliest possible opportunity and advised of his right to silence. Eleventh, the European Court has not yet ruled on whether the right to silence may be claimed by a defendant in the domestic forum who fears the risk of a foreign prosecution.

The jurisdictional relationship between the European Court of Human Rights and each signatory state is a rather sensitive one.¹⁴⁵ The function of the European Court is not to question the validity or the constitutionality of a signatory state's domestic legislative law. The European Court cannot dismiss or demand the redrafting of a national statute. In *Klaus v Germany*¹⁴⁶ it was stressed that the Convention does not provide the aggrieved party with a kind of *actio popularis*. It does not permit the individual to complain about a national law *in abstracto*. The individual must first exhaust all possible domestic avenues of legal redress before approaching the European Court. The individual is obliged to show how the domestic law unreasonably and detrimentally infringes the human rights contained in the Convention.¹⁴⁷ The European Court emphasises that it confines its attention narrowly to the legal dispute by examining the domestic law against the aggrieved party's personal circumstance. When there is a degree of incompatibility about Convention rights between domestic case precedent and the case precedent of the European Court, the domestic court is obliged to seek its compromise solutions in the European Court's jurisprudence.¹⁴⁸ In particular, the English court is obliged to pay close attention to the spirit of flexibility inherent in European Convention jurisprudence (as imposed by sec 2(1) of the Human Rights Act 1998) and it should not easily find that a provision of the English common law is necessarily incompatible with Convention law.

Two popular and antagonistic visions of the silence principle have emerged in England and on the European continent. The English vision is of a silence principle analysed in pure utilitarian terms, as an instrumental procedural rule which gives the accused and the witness only a limited degree of protection during the criminal process. The crime control limitations placed on the silence principle by the Criminal Justice and Public Order Act 1994 (CRIMPO) are justified on the ground that an unlimited silence principle is an unnecessary obstruction to the efficient investigation and conviction of criminals (*a rule-utilitarian reductionist vision*).¹⁴⁹ Restrictions

¹⁴⁵ The Convention on Human Rights is part of the domestic law of the following EC countries: Australia, Belgium, Denmark, Greece, Germany, Italy, Luxembourg, Netherlands, Portugal, Spain and recently, in the United Kingdom, through the Human Rights Act 1998. Other non-EC members are: Cyprus, Finland, Switzerland, Malta and Turkey. The Convention is not part of the domestic law of Ireland, Iceland, Norway and Sweden. The status of the ex-Soviet bloc Eastern European countries who wish to join the Convention is as yet unclear.

¹⁴⁶ (1978) 2 EHRR 214, para 33.

¹⁴⁷ *McCann v U.K.* (1996) 21 EHRR 97, para 52, "it is not the role of the European Court to examine in *abstracto* the compatibility of the national legislation with the requirements of the Convention".

¹⁴⁸ The national judge when asked to apply a Convention right to a situation not specifically addressed by Convention law, should recognise that *generality* and *flexibility* is the nature of Convention jurisprudence. *Z v Finland* (1997) EHRLR 439, 442-443. *R v D.P.P. ex p. Kebilene* (1999) 3 WLR 972, 993h, "in the hands of the national court the Convention is an expression of fundamental principles rather than a set of rules. The application of these principles involves questions of balance between competing interests and issues of proportionality". See also Van Dijk and Van Hoof *Theory and Practice of the European Convention on Human Rights* Boston 3rd Ed (1998).

¹⁴⁹ See *supra* chapter 3 p.106.

placed on the silence principle are sometimes justified on the basis that a silence procedural rule is only one amongst a number of possible alternative protective devices available to the accused. Once the costs associated with the silence principle become too high, these cost-effective alternatives are preferable and the silence principle may be legitimately restricted (*a substitution-abolitionist vision*). In contrast to an English utilitarian and crime control jurisprudence, various European legal institutions view the silence principle as a due process human right, inherent in a fair criminal proceeding and founded on a fundamental presumption of innocence (*a libertarian-retentionist vision*).¹⁵⁰ The elevation of the silence principle to the status of a fundamental adjectival right in European Convention law calls into question the recent English developments. In particular, the statutory powers granted to the court permitting the drawing of adverse inferences from the accused's pre-trial and trial silence. The sharp edge of the clash between English and European Convention jurisprudence has been over the issue of "adverse silence inferences". May an adverse inference be drawn from the accused's silence, especially when he acts on the advice of his solicitor? The question of abrogating statutes which remove the witness' privilege against self-incrimination during non-curial inquiries and then permit the incriminating testimony to be used in a subsequent criminal trial, has also brought into focus the differences between the English and the European jurisprudential vision. The solution to these differences has become urgent since the incorporation of the European Convention of Human Rights into English domestic law by the Human Rights Act (1998) (effective from August 2000).¹⁵¹

English case precedent must conform to Convention law and legislative acts must be re-interpreted in a manner compatible with Convention rights, especially the procedural right to a fair trial. Two recent cases *Saunders v U.K.*¹⁵² (concerning incriminating testimony gathered in terms of the Companies Act 1985) and *Murray v U.K.*¹⁵³ (concerning adverse inferences from the accused's silence) illustrates the differences between these two rival legal cultures and demonstrates the European Convention's strong commitment to a fundamental right of silence.

The Influence of *Saunders v U.K.* upon English law: The Court of Human Rights' decision in *Saunders v U.K.* is the end result of a lengthy litigation process. The process begins with an inquiry by department of trade inspectors (acting in terms of a statutory power granted by part

¹⁵⁰ See *supra* chapter 3 p.107.

¹⁵¹ The Human Rights Act (HRA) creates in domestic English law a system of convention rights. These are the rights and freedoms set out in the articles and protocols of the European Convention on Human Rights listed in sec 1(1) and schedule 1 of the Human Rights Act. It is now unlawful for the English courts to act in a way which is contrary to a convention right (HRA, sec 6(1) and 3(a)).

¹⁵² (1996) 23 EHRR 313, particularly para 61, 67-69.

¹⁵³ (1996) 22 EHRR 29, particularly at para 45-47, 50-51 and 66-68.

XIV of the Companies Act 1985) into an illegal corporate conspiracy involving a share manipulation and hostile takeover of Distillers Co by Guinness PLC. The purpose of the inquiry was to analyse the mechanics of the conspiracy and not to apportion blame. In this type of inquiry inspectors have the statutory power to compel oral evidence and documents. Sec 432(2) and 434(5) of the Companies Act 1985 permits the state to use evidence gathered by such an inquiry against an identified individual in a subsequent criminal or civil trial. In turn sec 2 of the Criminal Justice Act 1987 obliges the individual under investigation to answer all questions and to produce relevant documentation as required by the state investigation organ (in this case the Serious Fraud Squad). Evidence transcripts made during the department of trade inquiry were admitted in the criminal proceeding and the defendant was convicted of fraud largely on the basis of these compelled self-incriminatory transcripts. The defendant appealed his conviction to the European Court. The Court of Human Rights concluded that the prosecutorial use of self-incriminating transcripts was an infringement of the defendant's privilege against self-incrimination and a breach of article 6(1) "trial fairness" and article 6(2) "presumption of innocence". "The right not to incriminate oneself presupposes that the prosecution...seek to prove their case...without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused."¹⁵⁴ In this sense the right is closely linked to the presumption of innocence. *Saunders* re-establishes the supremacy of the silence principle in the face of statutory compelled state questioning. "The right not to incriminate oneself does not extend to the use in criminal proceedings of material obtained from the accused through the use of compulsory powers."¹⁵⁵ However, the Court of Human Rights was careful in refraining from declaring the defendant's conviction before the English Court of Appeals to be wrongful. The judgement circumspectively condemns the use of self-incriminatory testimony in a criminal proceeding when such testimony is the fruit of a compulsory civil inquiry or investigation. The European Convention's privilege against self-incrimination does not operate to prevent the compulsory *obtaining* of evidence by inspectors, it merely *prohibits* the use of such evidence at a subsequent criminal proceeding. (In this sense the privilege is defined as a use-immunity.) Future English statutes which seek to abrogate the privilege in non-criminal regulatory inquiries must now simultaneously provide a use (or use-derivative) immunity protection for the witness in any subsequent criminal proceeding.¹⁵⁶

¹⁵⁴ *Saunders* (1996) 23 EHRR 313 at 338, para 68.

¹⁵⁵ *Ibid* at 338 para 68, 69.

¹⁵⁶ The statutes in need of immediate revision are: the Companies Act 1986; Financial Services Act 1986; Banking Act 1987; Criminal Justice Act 1987. In particular sec 236 and 366 of the Insolvency Act 1986, sec 342 and 345 of the Companies Act 1985, and sec 2 of the Criminal Justice Act 1987.

The Influence of *Murray v U.K.* upon English law: The decision in *Murray v U.K.*¹⁵⁷ is important because it is regarded as being a test case for the validity of the Criminal Justice and Public Order Act 1994 (CRIMPO).¹⁵⁸ In this judgement it was held that adverse inferences drawn from the accused's failure to answer police questions and his failure to testify at trial was not an infringement of article 6 of the European Convention. As long as the inference drawn is reasonable in the circumstances there is no infringement of article 6(1) or article 6(2). Whether the drawing of an adverse inference breaches article 6 of the Convention is to be determined, "in the light of all the circumstances, having regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation".¹⁵⁹ However, a failure to allow the accused access to a solicitor during the early stages of questioning (within 48 hours) is a violation of article 6(1) and 6(3).¹⁶⁰ English commentators regard the European Court's decision as a vindication of CRIMPO. The major point made by the European Court is that a reasonable adverse inference may be drawn in the appropriate circumstance but the inference may not directly infer guilt. Silence in itself has no evidentiary value and may only serve to resolve doubt or add weight to a prosecution case which has already reached the threshold level of a sufficient *prima facie* case.¹⁶¹ Silence cannot convert a weak *prima facie* case into a stronger one or lift it above the required threshold level. "The accused's silence, in situations which clearly calls for an explanation, may be taken into account *in assessing the persuasiveness of the evidence adduced by the prosecution*".¹⁶²

A number of essential points may be distilled from the Court of Human Rights case precedent. First, a European silence principle is fundamentally conditioned upon the fairness of the pre-trial

¹⁵⁷ (1996) 22 EHRR 29. See also *Quinn v U.K.* (1997) 23 EHRR. CD 41. See Jennings, Ashworth, Emmerson "Silence and Safety: The Impact of Human Rights Law" *Crim. L. Review* (2000) 879.

¹⁵⁸ The *Murray* judgement is argued in the context of the anti-terrorist provisions of the Criminal Evidence (Northern Ireland) Order 1988 the precursor of CRIMPO particularly article 4 (the equivalent of sec 35 CRIMPO) and article 6 (the equivalent of sec 37 CRIMPO). See Maloney "The Criminal Evidence (N.I.) Order 1988: A Radical Departure from the Common Law Right to Silence in the U.K." (16) *Boston College Int. Comp. L. Rev* (1993) 425.

¹⁵⁹ *Ibid* para 47.

¹⁶⁰ Sec 6(3) "a minimum requirement of access to legal advice".

¹⁶¹ On the facts a strong direct and circumstantial case had been made against Murray (an alleged IRA terrorist). He had been caught in the same house as the kidnapped victim. The victim identified Murray as one of his captors and Murray was arrested while attempting to destroy a tape recording of the victim's coerced confession. In addition to its strong *prima facie* case, the prosecution had also relied on adverse inferences from Murray's silence at pre-trial and at trial.

¹⁶² The European Court found it incompatible with the Convention for a prosecution "to base a conviction solely or mainly on the accused's silence", *Murray* *ibid* at para 47. It may be necessary to re-interpret CRIMPO in this regard, as sec 34 through to sec 37 does allow the construction of a prosecution case built mainly from silent inferences. The European Court's requirement is more strict than the test in sec 38(3) of CRIMPO.

and trial process in which a presumption of innocence operates to place the burden of proof firmly upon the shoulders of the state. Second, one of the primary elements of a European silence principle is access to legal advice before being questioned, especially when there is a possibility of an adverse inference. *Magee v U.K.*¹⁶³ and *Averill v U.K.*¹⁶⁴ suggest that a failure to allow access to legal advice will amount to a breach of article 6(3). Sec 58 of the Youth and Criminal Evidence Act 1999 was hastily enacted to ensure that English law does not give rise to such a violation in future. An important question not yet answered by the European Court is whether an adverse inference may be drawn when the accused remains silent on the advice of his solicitor. The English courts permit reasonable adverse inferences to be drawn from this type of silence (to hold otherwise would negate the intent of sec 34 CRIMPO). Third, an adverse inference may not be drawn when the accused's silence is based on good cause shown. Although most innocent suspects will co-operate with the police, there may be good reasons for non co-operation.¹⁶⁵ However, a reasonable inference may be drawn when the accused's silence is based on a policy of non co-operation with the police instead of fear, ignorance or embarrassment. Fourth, the European Court has made it clear that an adverse inference may be drawn once the prosecution has established a *prima facie* case and where the circumstance clearly calls for an explanation.¹⁶⁶ Usually it will be easier to draw a sec 36 or sec 37 adverse inference and more difficult to do so from sec 34 or sec 35 (CRIMPO). For example, in *Averill v U.K.*¹⁶⁷ the European Court noted that the accused's failure to give an explanation of his presence near the scene (sec 37) and his failure to explain the presence of fibres from the victim on his clothing and his hair (sec 36) were factors easily justifying an adverse inference.

A major criticism of the European Convention is its failure to include a written legal definition of the silence principle. It is instructive to note that article 6(1) makes no specific direct or indirect reference to silence or self-incrimination. The obvious assumption must be that the original authors of the European Convention thought the silence principle to be jurisprudentially insignificant. The Convention was drafted in the middle of the twentieth century, in a period

¹⁶³ (2000) Crim. L. R. 520.

¹⁶⁴ (2000) Crim. L.R 680.

¹⁶⁵ *Murray* *ibid* at para 47. Although the court does not provide any reasons, factors such as the desire to shield a friend or relative, *R v Mountford* (1999) Crim. L. R 575, or suspicion of police motives, *R v Argent* (1997) 2 Cr. App. R 27, 33, may play a role.

¹⁶⁶ See *ibid* note 162. A prosecution case built mainly on a combination of adverse inferences from sec 34, 35, 36 and sec 37 is no longer permitted. This means that sec 38(3) of CRIMPO will have to be revised to bring it in line with the stricter test set out in the *Murray* judgement. The prosecution must establish a clear *prima facie* case. Also the judge is obliged to comment to the jury on the types of adverse inferences to be drawn and the weight to be attached to these inferences, *Murray* at para 62, 63 and 66.

¹⁶⁷ *Averill* *ibid* at 680.

before the ascendancy of an internationally pervasive culture of human rights.¹⁶⁸ It was left to the European Court of Human Rights in *Funke v France*, *Saunders v U.K.* and *Murray v U.K.* to extend and re-interpret the meaning of article 6 to include a right to silence and a privilege against self-incrimination. In 'magically' conjuring up a right to silence the European Court has failed to provide sufficient rationales for the jurisprudential existence of such a principle. European case precedent has not seen fit to explain the causal connection between a silence principle, the presumption of innocence and a fair trial. This is a recurring criticism and one which is noted throughout the thesis. The European Court, national courts (including the American Supreme Court) have simply assumed a causal nexus but the how and why of such causality has never been satisfactorily explained.

10.7 The Corporate Privilege

The corporation is described as an artificial association of individuals possessing the attributes of continuous existence, separate legal personae, limited liability and subject to the same rights and duties, where appropriate, as a natural person.¹⁶⁹ Historically the corporation was interpreted in terms of a *concessional* theory. The state exerted considerable influence over the corporation which was regarded as a mere extension of the state. As the use of corporations became common place in the nineteenth century business world, the corporate-state concession theory was discarded and replaced by a *contractual* theory in which the corporation was regarded as an independent entity owing its existence to the members who contractually created it and defined by the rights of the subscribers to the memorandum and articles of association. With the increasing sophistication of twentieth century business activity and the rise of a professional managerial class, who usurped control of the corporation from its members, the contractual theory gave way to a modern *realism* theory. The realism concept defines the corporation as a separate legal structure characterised by a juristic personality and based on a business ethic which includes the idea of continuous existence and limited liability. The corporation begins its original existence as a creation of the state but has evolved into an independent entity and in some cases the rival of government. The state has abandoned attempts to regulate the corporation through its charter and now seeks such regulation through

¹⁶⁸ The Convention was drafted in the 1950s before the rise of an international culture of human rights. In contrast, the International Covenant on Civil and Political Rights expressly provides for a right to silence and was drafted after the rise of a culture of human rights in the 1960s. A modern example of the "culture" is the International Criminal Tribunal for the former Yugoslavia (1996) (rules and procedures) which expressly provides the suspect with a right to remain silent.

¹⁶⁹ Marks "The Personification of the Business Corporation on American Law" (54) *Un. Ch. L. Rev* (1987) 1441; Bratton "The New Economic Theory of the Firm, Critical Perspectives from History" (41) *Stanford L. Rev* (1989) 1471; Note "Constitutional Rights of a Corporate Person" (91) *Yale L. Rev* (1982) 1641.

legislative and other curbs on corporate activity. One of the regulatory curbs employed by the United States and Australia is to refuse an extension of the silence principle to the corporate personality.

In England a privilege against self-incrimination was extended to the corporation in *Triplex Safety Glass Co v Lancegaye Safety Glass Co*.¹⁷⁰ The court reasoned that although a corporation could not suffer physical or mental pain, it was capable of punishment and criminal conviction. The harm caused to its corporate reputation by a criminal conviction could ruin its trading ability.¹⁷¹ Subsequent English courts have accepted the *Triplex* judgement without serious criticism.¹⁷² The European Union has also developed a unique European-type corporate privilege in line with its interstate competition policy.¹⁷³ In terms of this policy a European Commission regulates competition between member states and has the power to prevent abuse of dominant market share position by European companies. Certain procedural defences have been awarded to the corporation as a result of the wide investigatory powers of the European Regulatory Commission.¹⁷⁴ These defences include the right to a fair trial,¹⁷⁵ the right to the discovery of all documents held by the Commission¹⁷⁶ and a privilege against self-incrimination recognised in *Orkem SA v Commission*.¹⁷⁷ Collectively these defensive rights apply to all administrative inquiries and criminal proceedings against corporations subpoenaed to appear before the Commission or the European Court of Justice. The applicability of the privilege is determined by a balance of interests test.¹⁷⁸ In deciding whether to extend the privilege to the corporation, the European Court must balance the regulatory interests of the Union against the corporation's fundamental right to defence. When the Union's legitimate goal of curbing corporate crime outweighs the corporation's defensive interests then a privilege against self-incrimination will not be extended.¹⁷⁹ Case precedent suggests that there are few circumstances in which the privilege will be denied to the corporation.

¹⁷⁰ (1939) 2K.B. 395.

¹⁷¹ *Ibid* at 409, "the corporation may be harassed, its existence threatened by the use of illegal state methods in acquiring information".

¹⁷² *Rio Tinto Zinc Corp v Westinghouse Electrical Corp* (1978) AC 547. Although Lord Templeman in *A. T. and T. Istel Ltd v Tully* (1993) AC 45, at 53 suggests that the only justification for a silence principle is to limit police interrogation abuse and involuntary confessions, justifications which do not apply to the corporation. The question whether a South African corporation possesses the privilege was avoided in *Seapoint Computer Bureau (Pty) Ltd v McLoughlin and Another NNO* 1996 (8) BCLR 1071 (W).

¹⁷³ Treaty Convention establishing the European Community (1992), articles 85 and 86, CMLR 573.

¹⁷⁴ The European Commission, article 155, Council Regulation No.17, 13 J.O, 204.

¹⁷⁵ *Mustique Diffusion Francaise SA v Commission* (1983) ECR 1825, 1880 (1993) 3 CMLR 221, 315.

¹⁷⁶ *Hoffman-La Roche v Commission* (1979) ECR 461, 512 (1979) 3 CMLR 21, 268.

¹⁷⁷ (1991) 4 CMLR 502, 556.

¹⁷⁸ *Ibid* at 502 and 555-6. See also *N.V. NederLansche Banden-Industrie Michelin v Commission* (1983) ECR 3461 (1983) ICMLR 282, 318.

¹⁷⁹ The European Commission allows the corporation a balanced right of defence against prosecutorial questioning deliberately designed to solicit incriminatory answers.

In contrast, the United States, Australia and Canada deny the privilege to the corporate entity.¹⁸⁰ American precedent¹⁸¹ has consistently emphasised the social and contractual nature of the state-corporate relationship. The state is empowered to enforce a certain degree of accountability on the corporation because the corporate entity exists for the public benefit. Its juristic existence is conditioned upon the employment and service benefits which it brings to society. The refusal to extend the privilege to the corporation is partially based on the historical antecedents and evolution of the silence principle.¹⁸² According to the Supreme Court the silence principle evolved as a protection against abuse of personal liberty rights, including the prevention of torture and a respect for individual privacy.¹⁸³ None of these founding rationales may be logically extended to the corporation.¹⁸⁴ In turn, the Australian High Court in *Environment Protection Authority v Caltex Refining Co*¹⁸⁵ has based its refusal of a corporate privilege on a fair state-corporation balance rationale. A fair balance between the state and the corporation excludes a corporate privilege on the following grounds. First, the complex nature of the corporate structure with its bureaucratic compartmentalisation inhibits access to information and provides a defensive shield against state investigations.¹⁸⁶ Second, corporations conduct their business activities via the medium of written or electronic documentation. Granting a privilege to documentary evidence held by the corporation would effectively immunise it against a state investigation.¹⁸⁷ Third, corporate financial resources are considerably more than that of the individual. The ability to pay for legal services places the corporation on a more equitable footing with the state.¹⁸⁸ Fourth, the rules against unreasonable searches and seizures in American and Australian law provides the corporation with a substitute and efficient protection which renders the privilege unnecessary. In addition, American and Australian law provide adequate safeguards against unnecessary state probes, harassment or fishing expeditions.¹⁸⁹ Fifth, illegal corporate activity has the potential to harm large sections of the population. Illegal labour practices may endanger the health, safety and well-being of employees. Corporate crime places a burden on the national economy resulting in increased taxes and other social problems. In

¹⁸⁰ See *supra* note 36 to 46 and accompanying text.

¹⁸¹ *Hale v Henkel* 201 U.S. 43, 74 (1906); *United States v White* 322 U.S. 694, 700 (1944). See *supra* chapter 7 p.229-230.

¹⁸² *First National Bank v Bellotti* 435 US 765, 779, n14 (1978), "...purely personal guarantees such as the privilege...are unavailable to the corporation...because the historic function of that particular guarantee has been limited to the protection of individuals".

¹⁸³ *Murphy v Waterfront Commission* 378 US 52, 55 (1964). See also the Australian case *Pyneboard (Pty) Ltd v Trade Practice Commission* (1983) 152 CLR 328, 346. *Supra* chapter 4, p.112.

¹⁸⁴ The central premise of *Henkel* has been expanded into a collective entity doctrine which denies the privilege to corporations, unions, political organisations, etc.

¹⁸⁵ (1993) 178 CLR 477, 500-03.

¹⁸⁶ *Ibid* at 498-506.

¹⁸⁷ *Ibid* at 500. See also Wigmore *Evidence* McNaughton Ed (1961) sec 2259.

¹⁸⁸ *Ibid* at 500.

¹⁸⁹ *Ibid* *Hale v Henkel* at 71-72.

these circumstances the state should be free to hold the corporation accountable for illegal activities. Extending the privilege to the corporation will hinder civil claims for damages by former employees. A corporate privilege may make adequate discovery of documents more difficult resulting in a costly litigation process.

An argument sometimes advanced by libertarians is that a failure to provide for a corporate privilege will undermine the accusational nature of the Anglo-American justice system. The American and the Australian courts have denied that such a fundamental erosion of the accusational system is possible. Quite the converse, the frequency by which legislation has interfered with and abrogated the corporate privilege indicates that such a privilege is not a fundamental aspect of the accusatorial system.¹⁹⁰ The purpose of many of these statutory abrogations of the corporate privilege is to ensure that the state has all the necessary information to function efficiently in today's complex world. For example, the United States Supreme Court has developed two unique doctrines to assist the government in the acquisition of documents and private business records. *Fisher's* "act of production"¹⁹¹ and *Shapiro's* "required records"¹⁹² doctrine are deliberately designed to give the state the ability to sidestep the privilege against self-incrimination. The Australian High Court and the European Court of Justice apply a balance of interest analysis to the corporate privilege and yet both courts arrive at opposite conclusions. The High Court denies the privilege to the corporation on the ground that the state interest supercedes the corporate interest and the European Court finds the privilege to be an important factor in the equitable distribution of power between the state and the corporation.

Although the United States Supreme Court does not expressly recognise a balance of interest analysis, the act of production and the required records doctrines tacitly measure the public interest against the corporate interest. Similar tests!, similar factors!, yet differing conclusions! What is the nature and purpose of the silence privilege? Why is it subject to such conflicting variation? Is it perhaps only an evidentiary utilitarian rule and not a fundamental human right?

¹⁹⁰ *Ibid Caltex Refining Co* at 407-409, "indeed the extent to which statute has interfered with the privilege in relationship to corporations indicates that the privilege, at least in so far as it relates to the production of documents, is not a fundamental aspect of the accusational system".

¹⁹¹ See *supra* chapter 7 p.241-247.

¹⁹² See *supra* chapter 7 p.247-254.

CHAPTER 11

A COMPARATIVE INTERNATIONAL REVIEW

11.1 The South African Constitutional Divide

The South African silence principle is delicately poised between the English and the American experience.¹ Its past is inseparably linked to English common law, but its future will be influenced by American constitutional jurisprudence. The South African right to silence and the privilege against self-incrimination, prior to the introduction of the 1993 Constitution, was a mere slavish imitation of English precedent devoid of sovereign judicial originality. Judicial interpretation of the accused's right to silence was a reaction to, and a repetition of prevailing English opinion. The statutory definitions of the witness privilege against self-incrimination (i.e. sec 203 C.P.A and sec 14 C.P.E.A) were influenced by, and indeed still are largely modelled on the English template originals. The primary break with the English tradition begins in 1993 with the constitutional entrenchment of the silence principle. The wording and meaning of sec 25(3) of the Interim Constitution (1993) is inspired by its American fifth amendment cousin.² The subsequent and further refinement of the accused's right to silence in sec 35 of the Final Constitution (1996) serves to reinforce the gradual rift from English precedent. The break with the English experience will widen as a result of the introduction in England of the Criminal Justice and Public Order Act 1994 (CRIMPO). The statutory limitations on the silence principle presently shaping English law are no longer possible in a South African jurisprudence dominated by a supreme constitution. South African jurisprudence is increasingly influenced by a human rights philosophy while the English law is pre-occupied with reforms based on utilitarian concerns. Future constitutional interpretations of the silence principle are likely to find a fresh inspiration in American precedent which already possesses a well-developed constitutional jurisprudence. These interpretations will be practical ones involving only the scope and breadth of the silence principle. Fundamental questions bearing on the nature and essence of the silence principle which continue to excite the English legal fraternity are now of mere academic interest to the South African commentator. The irony is that South Africa should have adopted the English approach of statutorily limiting the accused's right to silence in the interest of crime control and the efficient administration of justice. Instead, South Africa has chosen to follow an American type constitutional due process approach which elevates the silence principle into a

¹ See Venter *Constitutional Comparison* Juta and Co (2000); Licht et al *South Africa's Crises of Constitutional Democracy* Juta and Co (1994).

² Sec 25 I.C (1993), "every accused person shall have a right to a fair trial which shall include the right...to remain silent during the trial and not to testify during the trial (sec 25(3)(c)) and not to be a compellable witness against himself or herself (sec 25(3)(d)).

human right and places one more obstacle in the path of the prosecution. In my opinion this is a luxury which South Africa can ill afford.

The formation of the South African Constitution has been influenced by Canadian precedent and the Constitutional Court has sometimes sought its definitions in Canadian constitutional law. However, Canadian constitutional law is unlikely to have any influence over the specific development of the South African silence principle as the Canadian principle is itself somewhat ambiguous.³ Canada's silence principle is similarly caught in a cultural divide between its English common law heritage and the powerful influence of its American neighbour. The Charter of Rights and Freedoms (1982) illustrates the weakening of the English tradition and the increasing influence of American constitutional jurisprudence. For example, sec 11(c), Sec 11(d) and sec 13 of the Charter entrench a privilege against self-incrimination but make no mention of the accused's right to silence.⁴ The wording of sec 11(c), "any person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence [paraphrased]",⁵ is remarkably similar to the fifth amendment. According to the Canadian Supreme Court, the common law English style right to silence is only indirectly guaranteed by sec 7.⁶ Sec 7 contains the residual elements of a silence principle and supplements sec 11(c) and sec 13.⁷ The Canadian silence principle is unclear and has very little to offer by way of a developed jurisprudence.

³ The Canadian Charter does not contain an express right to silence. Sec 11(c) and sec 13 prevent self-incrimination but only during formal proceedings, not at the pre-trial stage. Similarly, the Namibian Constitution contains a circumscribed silence principle which protects the accused against self-incrimination at the trial stage only (article 12(1)(f)).

⁴ See Hogg *Constitutional Law of Canada* Caswell 4th Ed (1998); Beaudoin and Mendes *The Canadian Charter of Right and Freedoms* Caswell 3rd Ed (1996). Before the enactment of the Charter there was no specific principle against self-incrimination in Canadian common law, Ratushny "Is There a Right Against Self-Incrimination in Canada" (19) *McGill L.J.* (1973) 1.

⁵ Sec 11(c) is declaratory of the pre-existing common law and prohibits only those common law rules which create a legal obligation to testify, *R v Boss* (1988) 46 CCC (3d) Ont (CA). Sec 11(c) does not apply to rules of trial which merely create a tactical obligation to testify. Sec 11(c) does not prevent the jury from drawing adverse inferences, *R v Francois* (1994) 2 SCR 872; *R v Crawford* (1995) 1 SCR 858; but see the opposite in *R v Noble* (1997) 43 CRR 233 (SC).

⁶ *R v Herbert* (1990) 1 SCR 425, holds that the common law right to silence before trial is indirectly guaranteed by sec 7, despite the express failure to include such a right in sec 11(c) and sec 13. See also *R v Broyles* (1991) 3 SCR 595 and *R v Jones* (1994) 2 SCR 229.

⁷ Sec 11(c) read with sec 7 makes the witness non-compellable at trial. Sec 13 read with sec 7 prevents the use of a witness' incriminating evidence in other legal proceedings (*Dubois v R* (1985) 2 SCR 350, 360) as well as establishing a derivative use immunity, *R v S (R.J.)* (1995) 36 CR (4th) 1 (S.C.C.). Sec 11(d) protects the silence principle at trial in the form of a presumption of innocence. The silence principle is further supplemented by sec 4(b) of the Canada Evidence Act which prohibits judicial or prosecutorial comment on the accused's silence. The judge also cannot warn the jury against drawing an adverse inference, *R v Noble* *ibid*.

The South African silence principle will be strongly influenced and may in some aspects develop along the lines of the American fifth amendment. There are several reasons for suggesting such an influence.⁸ First, the South African silence principle is no longer a utilitarian-based common law rule. It has been elevated into a libertarian constitutional human right. The American fifth amendment is the only well-developed jurisprudence which concerns itself with the nature and purpose of a constitutional right to silence.⁹ Second, constitutional rights are interpreted against a unique set of rules which differ from the ordinary rules of common law and statutory interpretation.¹⁰ Over time the common law interpretation of the silence principle will become less influential and utilitarian definitions are likely to give way to human rights-based meanings. The Constitutional Court has already indicated its reluctance to make use of the sec 36 limitation clause. There is a real danger that the South African constitutional silence principle will take on the same absolute overtones which presently characterise the fifth amendment. In time the South African silence principle may well become inflexible and difficult to negotiate. Third, sec 25 of the Interim Constitution (1993) and the American fifth amendment are similarly worded. Sec 35 of the Final Constitution (1996) also contains a number of semantic and conceptual similarities.¹¹ Fourth, it is possible to reconcile the American Constitution which is fundamentally based on a seventeenth century first generation liberty right with a South African Constitution based on a twentieth century third generation right of human dignity. Modern American interpretations of the fifth amendment are primarily predicated upon the protection of human dignity. The modern fifth amendment is equated with, "our high regard for human dignity",¹² "the inviolability of the human personality",¹³ and is said to protect, "the conscience and dignity of man".¹⁴ According to American precedent, the relationship between the silence principle, the presumption of innocence and a fair trial is best understood not only as a protection of the

⁸ The influence of foreign law on a South African constitutional right must be read against the following caution, "different constitutions are drafted in different contexts, different social structures and different historical backgrounds exist between those countries and South Africa", *Park-Ross v Director, Office of Serious Economic Offences* 1995 (2) SA 148 (C) 160 H; *Qozeleni v Minister of Law and Order* 1994 (3) SA 625 (E) 633 F-G.

⁹ The jurisprudence of other constitutionalised silence principles are relatively underdeveloped. These constitutional rights have only come into existence in the last quarter of the twentieth century. The International Covenant on Civil and Political Rights (1968), the Canadian Charter of Rights and Freedoms (1982) and the European Convention on Human Rights (1993). The American fifth amendment has been recognised since 1791.

¹⁰ Sec 38(1) the interpretation of the Bill of Rights. "When interpreting the Bill of Rights, a court...must promote the values that underlie an open, democratic society based on human dignity, equality and freedom (sec 39(1)(a))". See also *S v Zuma* 1995 (2) SA 642 (CC) para 14 and 17; *S v Makwanyane* 1995 (3) SA 391 (CC) para 9, 10, 15-18, 36-7 and para 88.

¹¹ Sec 39(1) "a court...must consider international law (sec 39(1)(b)) and may consider foreign law (sec 39(1)(c))". See *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) para 26. Dugard "The Role of International Law in Interpreting the Bill of Rights" (101) SAJHR (1994) 208.

¹² *Cohen v Hurley* 378 US 1 (1964).

¹³ *Murphy v Waterfront Commission* 378 US 62 (1964).

¹⁴ *Miranda v Arizona* 384 US 436 (1966).

individual's liberty within the criminal process, but also as a guarantee of human dignity. South African courts have sometimes described the silence principle and the presumption of innocence as a basket of protections based on a liberty principle. In the words of *S v Zuma and Others*,¹⁵ the silence principle is part of a "seamless web" of criminal justice rights concerned with the individual's liberty in the criminal justice system. The link between liberty and a presumption of innocence is specifically referred to in *Uncedo Taxi Service Association v Maninjwa and Others*.¹⁶ Finally, most South African text books on evidence and constitutional law make repeated reference to the conclusions reached in *Miranda v Arizona* (pre-trial silence) and *Griffin v California* (trial silence).¹⁷ Recent case law about the silence principle tend to emphasise fifth amendment jurisprudence over English common law precedent. This tendency is the result of South Africa's apartheid legacy. A human rights philosophy presently dominates intellectual debate and overshadows alternative moral and legal doctrines.

The South African Common Law Silence Principle: The South African common law silence principle is indistinguishable from those in other Commonwealth jurisdictions.¹⁸ The silence principle is an essential element of an accusatorial-adversarial trial system and the bastion of a presumption of innocence. The prosecution bears the full burden of proof and cannot rely on the defendant for its inculpatory evidence. The prosecutorial *prima facie* case must be established from extrinsic evidentiary sources. The failure of a defendant to give evidence, either at the pre-trial or trial stage may have evidentiary value only in certain well-defined circumstances.¹⁹ An adverse inference may be drawn from the suspect's silence in a circumstance where an innocent person would reasonably be expected to speak up and deny the charge.²⁰ Silence may also give rise to an adverse inference when the suspect is unable to explain a suspicious circumstance²¹ or to explain away the possession of stolen goods.²² The court is obliged to take into account a surprise alibi-defence or any other fact which is first disclosed at trial. The failure to disclose an alibi-defence timeously may weaken the defence and

¹⁵ 1995 (2) SA 642 (CC), 1995 (4) BCLR 401 (CC).

¹⁶ 1998 (3) SA 417 (E), 1998 (6) BCLR 683 (E).

¹⁷ See Schwikkard et al *Principles of Evidence* Juta (1997) 109, 112-115. Du Toit et al *Commentary on the Criminal Procedure Act* Juta (1997) 22-24B.

¹⁸ *S v Lwane* 1996 (2) SA 433 (A), "it is a [silence] principle firmly rooted in our common law and other Anglo-American jurisdictions". See also *R v Camane* 1925 AD 570 and *S v Evans* 1961 (4) SA 52 (K).

¹⁹ *R v Dube* 1915 AD 557, *S v Saaiman* 1967 (4) SA 440 (A), *S v Van Wyk* 1992 (1) SACR 147 (N).

²⁰ *S v Mogotsi* 1982 (1) SA 190(B), "whether an inference from silence may be drawn in the face of a direct accusation depends on: (i) did the suspect consider it worth replying to the accusation; (ii) was the suspect simply reserving his defence for later use; (iii) fear, intimidation, anxiety, shyness, ignorance, etc. are all factors which influence silence; (iv) was the accusation made by a person in authority (unequal situation) or by a private individual (even term principle).

²¹ *R v Barlin* 1926 AD 459.

²² *S v Skweyiya* 1984 (4) SA 712 (A), *R v Du Plessis* 1924 TPD 103, *S v Parrow* 1973 (1) SA 603 (A).

strengthen the prosecution's *prima facie* case.²³ Once a suspect has been arrested, a failure to deny a charge or to indicate a defence cannot amount to evidence and no adverse inference may be drawn.²⁴ At trial, silence has evidentiary relevance only once the state has established a *prima facie* case.²⁵ The accused's mere failure to testify cannot convert a weak prosecution case into a strong *prima facie* case.²⁶ But a failure to rebut an uncontroverted *prima facie* case may have an adverse consequence. The failure to rebut a *prima facie* case, "becomes a factor to be considered with other factors, and from that totality the court may draw the inference of guilt. The weight to be given to the factor in question depends upon the circumstance in each case."²⁷ Geldenhuys and Joubert give a more libertarian analysis of the silence principle.²⁸ While the accused's silence in the face of an uncontroverted state case may have certain damaging procedural consequences, it can never amount to evidence against the accused. A silence adverse inference by itself cannot add something positive to the state case. Silence is merely a reasonable observation that the accused has failed to rebut a *prima facie* state case which, by remaining uncontroverted, may eventually harden into conclusive proof beyond a reasonable doubt.²⁹

The South African silence principle at common law may be summarised by drawing the following conclusions:

- (a) The silence of the criminal defendant at the pre-trial or the trial stage may never amount to a direct inference or admission of guilt.
- (b) It is difficult to draw an adverse inference from the suspect's pre-trial silence and much easier to do so from the accused's trial silence because:
 - (i) the suspect at the police station is in a vulnerable position in a hostile environment and may be ignorant of his procedural rights. There are any number of reasons why the

²³ *R v Mashelale* 1944 AD 571.

²⁴ *R v Patel* 1946 AD 903; *S v Maritz* 1974 (1) SA 266 (NC); *R v Innes-Grant* 1949 (1) SA 753 (A) at 764, "during the preparatory examination the accused need not reveal a defence and no adverse inference may be drawn from a failure to do so".

²⁵ A failure to rebut a prosecution case based on *direct* evidence will strengthen the prosecution case and result in conclusive proof, *S v Mthetwa* 1972 (3) SA 766 (A) 769 A-E, *S v Francis* 1991 (1) SACR 198 (A). When the prosecution case is based on *circumstantial* evidence, an adverse inference from the accused's failure to testify may be added to all the other factors to be considered, *S v Letsoko* 1964 (4) SA 769 (A) at 776 A, *S v Mtsweni* 1985 (1) SA 590 (A) at 594 E-H.

²⁶ *S v Miles* 1978 (3) SA 407 (N); *S v Pamensky* 978 (3) SA 932 (E).

²⁷ *S v Letsoko* *ibid* at 776 C-E, made in reference to a prosecution *prima facie* case based on circumstantial evidence.

²⁸ Geldenhuys and Joubert *Criminal Procedure Handbook* (1994) 6-7. There are several reasons why silence cannot raise an adverse inference against the accused: (i) the nothingness of the accused's silence cannot logically fill in any gaps in the prosecution case; (ii) it is contrary to the principle of legality to punish the accused for the exercise of a right which he has been told he may exercise; (iii) a multitude of other reasons present themselves, the accused may think the prosecution case weak and not worth rebutting, he may not trust the court or be ignorant of strategy.

²⁹ Van der Merwe *Obiter* (1) 1994 at 21.

suspect refuses to co-operate with the police.

- (ii) the accused at trial is no longer vulnerable. He has been warned about his procedural rights and is usually represented by a legal adviser.
- (c) The evidentiary value of silence is dependent on the following considerations:
- (i) whether the defendant has been warned about his right to silence by the police at the interrogation stage; by a magistrate at the preliminary hearing; or by the judge at the trial proceeding.³⁰
 - (ii) whether the defendant has voluntarily waived his right to silence.
- (d) The suspect's pre-trial silence may give rise to adverse inferences only in certain limited circumstances (i.e., a reasonable or suspicious circumstance, an implied admission).³¹
- (e) The accused's silence only becomes a relevant evidentiary factor once the prosecution has established a *prima facie* case built on extrinsic sources of evidence.
- (f) The accused's failure to testify or to rebut the prosecution case may strengthen the prosecution case by leaving it uncontroverted in vital respects, but silence by itself cannot be used to remedy a deficiency in the prosecution case.³²
- (g) The evidentiary weight to be attached to a failure to testify depends on the circumstances including:
- (i) whether the evidence against the accused is direct or circumstantial or a mixture of both,³³
 - (ii) whether the essential elements of the crime are ascertainable by the prosecution or are peculiarly within the accused's personal knowledge;
 - (iii) whether in the circumstance, a reasonable or unreasonable explanation for the accused's silence has been given.

Finally, it must be borne in mind that South Africa possesses a non-jury trial system. The modern Anglo-American silence principle is largely directed at protecting the accused against the effect of unreasonable adverse inferences drawn by an inexperienced lay person jury. American and British trial jurisprudence is concerned with the practical need to give guidance to the inexperienced jury. It does so by imposing artificial limitations (i.e., a no-comment and no-inference rule) on the judicial and prosecutorial ability to conduct a trial. South Africa has no need of such artificial limitations as the professional judge is unlikely to be unreasonably influenced by the accused's pre-trial or trial silence. Current South African jurisprudence

³⁰ *R v Patel* 1946 AD 903.

³¹ See *ibid* note 19.

³² *S v Francis* 1991 (1) SA 198 (A).

³³ *S v Mthetwa* 1972 (3) SA 766 (A), *S v Theron* 1968 (4) SA 61 (T) and *S v Letsoko* 1964 (4) SA 768 (A). See *ibid* note 25.

requires the judge to warn himself against being influenced by the accused's failure to testify. An obviously absurd cautionary rule. The elevation of the silence principle into a constitutional right may be regarded as unnecessarily excessive. Does the South African accused need a constitutional protection against the judge who in reaching his judgement may want to draw an adverse inference from the accused's silence?

The South African Constitutional Silence Principle: The criminal defendant's procedural right to silence is constitutionally entrenched within sec 35 (Chapter 2, Bill of Rights) of the South African Constitution 1996. Everyone *arrested* (sec 35(1)) has the right to remain *silent* (sec 35(1)(a)); to be *informed* promptly of the right (sec 35(1)(b)(i)) and of the *consequences* of not remaining silent (sec 35(1)(b)(ii)). (At this stage the arrested person is not awarded a right against self-incrimination which is exclusively reserved for the accused person.) After arrest the *accused* person has the right to a *fair trial* (sec 35(3)), the *right to be presumed innocent, not to testify* (sec 35(3)(h)) and *cannot be compelled* to give self-incriminating evidence (sec 35(3)(j)). The position of a *detained* person is somewhat anomalous. He is afforded a right to consult with a legal practitioner (sec 35(2) (b) and (c)) but not the right to remain silent or the right against self-incrimination. The language of sec 35 therefore gives the criminal defendant different rights at different stages, depending on his criminal status. The question is whether the semantic distinction between an "arrested", "accused" or "detained" person has any significant legal effect. A generalist or fair trial approach suggests that these distinctions should have no practical legal effect at all.³⁴ The right to silence, the right against self-incrimination and the right to legal advice are triggered at the commencement of the criminal proceeding and apply uniformly to the arrested, detained or accused person. It has also been suggested that these rights should, as a matter of principle, be extended to the suspect who is not yet either an arrested, detained or accused person.³⁵

A contrary or specific-interpretative approach holds that sec 35 and its subsections should be given their literal meaning. Accordingly, the right to silence is triggered only once the person is arrested.³⁶ Suspects and other not yet arrested need not be warned nor may they invoke a right

³⁴ A generalist approach finds its support in the Judges Rules, the fair trial principle (sec 35(3)) and *S v Zuma* (2) SACR 568 (CC) where it was held that a right to a fair trial is broader than the specific list of rights set out in sec 25 IC (sec 35 F.C) and embraces a wide concept of substantive fairness.

³⁵ Authority for the view that the right to a fair trial does not begin in court but at the inception of the criminal process, *S v Melani* 1996 (1) SACR 335 (E); *S v Agnew* 1996 (2) SACR 120 (E); *S v Mathebula* 1997 (1) SACR 10 (W); *S v Sebejan* 1997 (1) SACR 626 (W), per Satchwell J at 635D, "the right to a fair trial operates at the investigative stage of the criminal process" and at 636B, "the suspect is entitled to the same warning as the arrested person", but see the opposite view in *S v Langa* 1998 (1) SACR 21 (T) and *S v Van der Merwe* 1998 (1) SACR 194 (O).

³⁶ *S v Agnew* *ibid* and *S v Nombewu* 1996 (12) BCLR 1635 (E).

to silence. If incriminating admissions are made to the police at a stage when the individual is not detained or arrested there is no reason why the admissions may not be used at trial.³⁷ Awarding the right to silence to a suspect not yet arrested is inappropriate for several reasons. The right to be brought before the court within 48 hours does not apply to the non-arrested suspect. The right to silence is designed to be triggered by detention, confinement or when the individual is under some kind of direct control by the state. A non-arrested suspect is not under the supervision of the state and at this stage a right to silence is superfluous. A suspect's voluntary statements, which have not been compelled by the state, may be admissible as evidence against the suspect at trial. (This kind of interpretation is similar to the American definition. The fifth amendment is only triggered once the defendant is under the coercive control of the state.) Extending sec 35 rights to the non-arrested suspect would make the investigation of crime difficult and irretrievably upset the fine balance between the defendant's procedural interests and the public interest in effective crime enforcement. Once the suspect has been arrested, the semantic difference between an arrested or a detained person has no practical consequence. Logically arrest is always followed by a period of detention and usually culminates in some form of accusation.³⁸ Sec 35(1) is triggered together with sec 35(2) when detention follows upon arrest. Once the arrested person has been released from detention, only the sec 35(1) rights continue to exist, while the sec 35(2) rights fall away.³⁹

Access to legal advice at any stage of the criminal process is a central element of the defendant's criminal procedural rights. When the defendant is able to afford legal representation no problem arises, but legal representation for the indigent defendant is subject to an internal modifier. Sec 35(2)(c) and sec 35(3)(g) read, "every detained and accused person has the right to a legal practitioner, assigned by the state and at state expense, when substantial injustice would otherwise result". In theory, the right to silence and the right to a fair trial cannot be compromised by the defendant's indigence. If the state is unable to provide legal representation to the indigent defendant at the pre-trial state, the police must be circumspect and restrained in their interrogation and investigation methods. In practice, the state does not have the economic resources to provide every indigent defendant with legal representation. A substantive and absolute right to legal advice would paralyse law enforcement, hence the modifier

³⁷ *S v Van der Merwe* 1998 (1) SACR 194 (O).

³⁸ In a bail proceeding, if the accused fails to give evidence, he may be refused bail. Any evidence given at a bail proceeding may be used in a subsequent trial, *S v Schietekat* 1998 (2) SACR 707 (C) 714 G-H, *S v Nomzaza* 1996 (2) SACR 14 (A) 18 F-G. See the opposite view in *S v Botha and Another* (2) 1995 (2) SACR 605 (W).

³⁹ Not all detained persons are also arrested persons (an already sentenced person is detained but no longer arrested), therefore only sec 35(2) rights apply and sec 35(1) rights fall away. An accused person is not necessarily also an arrested or detained person, therefore only 35(3) rights apply and sec 35(1) and (2) rights fall away.

qualification, "if substantial justice would otherwise result". A balance of interest analysis is applied in which the defendant's constitutional rights are weighed against the state's economic ability to provide an effective justice system.⁴⁰ The right to silence and the right to legal representation are integral elements of sec 35, especially at the pre-trial interrogation stage. (Similarly, the right to counsel during the interrogation process arises indirectly from the American fifth amendment. According to *Miranda v Arizona*, the right to have a legal advisor present is an indispensable adjunct of the fifth amendment.)⁴¹ Since the right to silence and the right to legal representation are constitutionally mandated, no adverse inferences from silence may be drawn once the arrested or accused defendant has been advised of his constitutional rights. A state infringement of the sec 35 constitutional rights (unless justified in terms of the limitation clause, sec 36) automatically triggers the sec 35(5) exclusionary clause and all evidence obtained as a result of the infringement is inadmissible at trial.⁴²

Sec 35(3) protects the accused's silence and right against self-incrimination during the trial proceeding. The accused's right to remain silent and not to testify, together with the right to be presumed innocent (sec 35(3)(b)) are integral elements of a fair trial principle. (The South African constitutional trial right, coupled with the right not to be compelled to give self-incriminatory evidence (sec 35(3)(j)) is similar in nature to the American trial fifth amendment.) The fundamental core concept of the constitutional right is that the court cannot draw an adverse inference from the accused's failure to testify at trial. Silence cannot make a case for the prosecution where none existed before. In this sense, silence at trial has no evidentiary value and is not indicative of guilt. (Sec 35 is similar to the interpretation of the fifth amendment in *Griffin v California* which reinforces the constitutional notion that the accused cannot be penalised for his refusal to testify).⁴³ The constitutional silence principle has not amended the common law in this respect. Nevertheless, a failure to testify may well have adverse consequences for the accused. The prosecution's *prima facie* case may ripen into conclusive proof if it remains uncontroverted by the defence. This kind of constitutional reasoning is based

⁴⁰ Balancing factors are: (i) the complexity of the legal issue; (ii) nature of the charge and sentence; (iii) ignorance and poverty of the accused. Note, in theory, if the state is unable to provide legal representation to the indigent defendant then the police must immediately refrain from interrogation, *S v Marx* 1996 (2) SACR 140 (N), *S v Agnew* *ibid* at 542 D. In practice, the court tends to balance the state's limited economic ability to provide legal assistance against the indigent's interest and to proceed with the trial.

⁴¹ See *supra* chapter 5 p.170. By contrast, the common law does not regard the right to legal representation as integral to a fair trial process, especially for those who could not afford a lawyer, *S v Rudman* 1992 (1) SA 343 (A).

⁴² Sec 35(5) reads, "evidence obtained in a manner that violates any right in the Bill of Rights is excluded if the admission of that evidence would render the trial unfair or otherwise detrimental to the administration of justice".

⁴³ See *supra* chapter 6 p.217-227. The *Griffin* no-comment and no-inference rule is based on an impermissible burden test prohibiting all comment on the accused's failure to testify.

on a common sense evaluation of the ordinary procedural mechanisms of the trial process according to the Northern Cape Division in *S v Brown and Another*⁴⁴ and *S v Scholtz and Another*.⁴⁵ *Scholtz* refers with approval to the Canadian case *R v Boss*⁴⁶ where it is suggested that no rule of law (constitutional or otherwise) may effectively curtail the drawing of tactical and common sense adverse inferences from the accused's failure to testify in the face of a strong prosecutorial *prima facie* case.⁴⁷ Also cited with approval is the dissenting judgement of Stewart J in *Griffin v California*.⁴⁸ Whenever the accused chooses to rely on the constitutional right to silence, adverse inferences are bound to be drawn by the jury, "no constitutional rule can prevent the operation of the human mind".⁴⁹ The question whether adverse inferences are constitutionally permissible, the circumstances and extent of such adverse inferences has not authoritatively been decided by the Constitutional Court and was expressly left open in *Osman and Another v Attorney-General Transvaal*.⁵⁰

The South African constitutional right to silence may be summarised as follows:⁵¹

- (a) The constitutional silence principle is primarily a shield against the coercive influences of the criminal justice system. It is meant to protect the arrested, detained or accused person during the pre-trial and the trial stage.
- (b) In conjunction with the silence principle, the arrested, detained or accused person has a right to legal advice and to be informed of that right. The voluntary waiver of either the right

⁴⁴ 1996 (2) SACR 49 (NC) endorsed by *S v Khomunala and Another* 1998 (1) SACR 362(V) at 365E - 366A.

⁴⁵ 1996 (2) SACR 40 (NC), "silence after the close of *prima facie* state case allows for the drawing of adverse inferences", *S v Sidziya* 1995 (12) BCLR 1626 (TK), "the drawing of an adverse inference from the accused's failure to testify does not amount to an unconstitutional compulsion to testify". See also *S v Lavhengwa* 1996 (2) SACR 453 (W).

⁴⁶ (1988) 46(3d) 523 C.C.C. See also *R v Noble* (1997) 146 DLR (4th) 385, "it is not permissible to use the accused's failure to testify as an adverse inference of guilt".

⁴⁷ A mere tactical pressure arising from the weight of the prosecution case cannot be described as a compulsion violating the accused's constitutional passive defence right. See *Van der Merwe Obiter* (1994) 19.

⁴⁸ 380 US 609 (1965) Stewart J dissenting at 621-623.

⁴⁹ The opinion expressed in *S v Brown and Another*, *ibid*, that a *Griffin* type no-inference rule should not apply outside the context of a jury trial, ignores the fact that a judge hardened by a continual exposure to guilty criminals, may find it difficult not to make adverse inferences. Doran et al "Rethinking Adversariness in Non-Jury Criminal Trials" (23) *Am. J. Crim. L.* (1995) 1.

⁵⁰ Although the Constitutional Court refrained from making a direct ruling it did refer with approval to the judgement in *Attorney-General v Moagi* (1982) II BLR 124 (C.A.) at 131 and 175, "an adverse inference is permissible once a *prima facie* case has been established, and does not offend against the accused's constitutional rights".

⁵¹ These constitutional conclusions are primarily drawn from *S v Brown and Another* *ibid*, *S v Scholtz* *ibid*, *S v Disziya* *ibid* and *S v Lavhengwa* *ibid*. Persuasive foreign judgements are *R v Boss* *ibid*, *Griffin v California* *ibid*, *Miranda v Arizona* *ibid* and *Jenkins v Anderson* 447 US 231 (1980). See also *Van der Merwe Obiter* *ibid* and *Du Toit et al Commentary on the Criminal Procedure Act* (1996) 22-4C. See also the contrary view in *S v Langa* 1998 (1) SACR 1 (SCA) 5G-H, "the accused's silence in the face of compelling evidence proves the case against him".

to silence or the right to legal advice must be based on the principal of an "informed consent".⁵²

- (c) No adverse inference may be drawn from the accused's post-arrest and pre-trial interrogation silence. However, the suspect's pre-arrest silence may have some evidential value. (It may be possible to apply a *Jenkins v Anderson*⁵³ approach and to allow the impeachment of the accused's credibility during cross-examination through the use of his pre-arrest silence, subject to a sec 36 balance of interest analysis.)
- (d) All testimony gathered by the state in violation of the defendant's constitutional sec 35 rights is automatically inadmissible, unless the state can justify the infringement in terms of the limitation clause, sec 36.
- (e) During the trial proceeding, no adverse inferences may be drawn against the accused on the mere exercise of the constitutional right to silence or a refusal to testify.⁵⁴ The right to silence is also protected by a "passivity rule" and the accused need not disclose his defence in advance but may tactically and strategically await developments in the trial before deciding whether to remain silent or to lead evidence.
- (f) Unless otherwise decided by the Constitutional Court, the constitution is presently interpreted as abolishing the common law rule that silence strengthens a prosecutorial *prima facie* case based on direct or strong circumstantial evidence. The common law rule which identifies silence as an evidentiary fact with some probative value no longer applies.⁵⁵
- (g) The only permissible inference to be drawn from silence depends on the accused's tactical use of the mechanics of the adversarial trial system. The state's *prima facie* case when left uncontroverted may well have adverse consequences for the accused. An unrebutted *prima facie* case may harden into conclusive proof at the trial's end. This may happen not because the accused's failure to testify has any evidential value, but simply because in the absence of contradictory evidence, the prosecutorial *prima facie* case is logically strong enough to become conclusive proof.⁵⁶
- (h) The evidentiary burden placed on the accused to rebut the prosecution's *prima facie* case and other evidentiary pressures which may arise during the course of the trial, which sometimes force the accused to testify, do not amount to compulsion and do not infringe

⁵² *S v Mphala and Another* 1998 (4) BCLR 494 (W).

⁵³ 447 US 231 (1980). See *supra* chapter 6 p.210-211.

⁵⁴ *S v Brown and Another* *ibid* at 60 F-G and 63 B-C, per Buys J.

⁵⁵ The common law interpretations developed in *S v Mthetwa* 1972 (3) SA 766 (A) at 769 A-E, in *S v Snyman* 1968 (2) SA 582 (A) at 588 F and *S v Letsoko* 1964 (4) SA 768 (A) at 776 A-F, appear to be in conflict with the present constitutional interpretations especially in *S v Brown and Another* *ibid*.

⁵⁶ *Van der Merwe Obiter* (1994) at 18, "the logical inferences which inevitably flow from uncontroverted *prima facie* proof cannot violate the constitutional passive defence right of the accused". This happens not because silence has any evidential value but simply because the accusatorial process follows its natural course, *Geldenhuys and Joubert Criminal Procedure Handbook* (1994) at 6-7. See *supra* note 28.

the accused's right to be a non-compellable witness.⁵⁷

- (i) In American constitutional law (the *Griffin* no-comment rule) and Canadian constitutional law (sec 11, Canadian Charter 1982)⁵⁸ the prosecution is prohibited from making adverse comments on the accused's trial silence. Prosecutorial comment may influence the jury into drawing unconstitutional inferences. South Africa is a non-jury criminal system and the no-comment rule prevalent in other constitutional jurisdictions has no relevance.⁵⁹

According to Van der Merwe, prosecutorial comment on trial silence should not amount to a constitutional infringement. The prosecution should be free to identify and emphasise those logical inferences flowing from the available facts. The Constitution prohibits the prosecutorial use of compelled evidence, it does not prohibit argument. "Argument is mere persuasive comment on the interpretation of evidence. Argument is not evidence and in the South African system the trier-of-fact will not confuse the two."⁶⁰

- (j) The common law warning, "you have the right to remain silent but a failure to give evidence is a factor which may be taken into account and used against you", is unconstitutional in two respects. First, it gives silence an evidentiary value no longer permitted by sec 35. Second, the meaning indirectly compels the accused to take the stand and testify contrary to sec 35(3)(h).⁶¹ The preferred constitutional warning should read, "[you] have a constitutional right to silence and no adverse inference can be drawn from the fact that [you] have opted for silence."⁶²
- (k) A number of ancillary points about the constitution need to be noted:
- (i) the proper constitutional interpretation of a bail proceeding is that incriminating evidence given during the bail hearing is inadmissible at a subsequent trial, especially when a failure to supply evidence will result in a refusal to grant bail.⁶³

⁵⁷ *R v Boss* 1988 46 (3d) 523 CCC (Canada), "constitutionally permissible evidentiary pressure is a natural consequence of the accusatorial trial system". But see *supra* chapter 6 p.220-222 and the criticism of the *Griffin* impermissible burden test. See also *S v Brown and Another* *ibid* at 64I - 65G.

⁵⁸ English statutory law, sec 1(b) Criminal Evidence Act 1898, which prohibits commentary by the prosecution has been repealed by the Criminal Justice and Public Order Act (1994) (CRIMPO). In England both the judge and the prosecution are empowered to comment on the accused's silence.

⁵⁹ In the South African non-jury trial system, where the judge is both the controller and trier of fact, it is illogical to apply a strict *Griffin* no-comment rule. To do so would mean that in his capacity as the jury, the judge could draw conscious adverse inferences from the accused's silence, but in his capacity as judge-controller he must refrain from commenting on the accused's silence. In Canada, the no-comment rule is confined to jury trials, Sopinka et al *Law of Evidence in Canada* (1992) 760, 764-765.

⁶⁰ Van der Merwe *Obiter* (1994) at 20.

⁶¹ *S v Hlongwane* 1992 (2) SACR 484 (N), 487 H-I, "the way in which the common law warning is worded virtually compels the accused to enter the witness stand".

⁶² *S v Brown and Another* *ibid* at 65F; *S v Makhubo* 1990 (2) SACR 320 (O) at 322 G. The accused should be warned of the adverse consequences of leaving a *prima facie* case uncontrolled.

⁶³ See *supra* note 38.

- (ii) the accused may exercise a right to silence during the plea proceeding (sec 112 to sec 115 of the C.P.A.). The court must inform the accused of his constitutional right to silence during both the sec 112(1)(b)⁶⁴ or sec 115 (1) and (2)(b)⁶⁵ proceedings.

The constitutional prohibition against adverse inferences from silence (as interpreted by *S v Brown and Another*)⁶⁶ is significantly different to the common law principle (as illustrated by *S v Mthetwa*),⁶⁷ which permits certain adverse inferences in limited circumstances. This inflexible interpretation of the constitution is a natural consequence of a pervasive international human rights and libertarian culture. In the light of South Africa's apartheid legacy, it is understandable why a human rights philosophy has so seductive an influence over the interpretation of the silence principle.

Nevertheless, there are a number of pertinent reasons for rejecting an absolute adverse inference prohibition. First, the historical silence principle was limited to a narrow testimonial immunity based on the necessity to preserve the truth-seeking function of the trial process. The traditional silence principle was intended to protect the defendant against coercive state practices and to prevent the admission of compelled and unreliable confessions. Neither of these two rationales justifies a modern constitutionally-imposed prohibition against adverse inferences. Second, the Constitutional Court has not yet issued a definitive opinion on the ability of the court to draw adverse inferences. Attention is drawn to the highly persuasive judgement in *Attorney-General v Moagi*,⁶⁸ a Botswana Appeal Court case in which Maisels J⁶⁹ argues that an unfavourable inference is permissible and does not offend the constitutional right of the accused, "not to be compelled to give evidence". There is, "an evident distinction between the possession of a right and its exercise which may, in the appropriate circumstance, be highly questionable, and indeed warrant the drawing of inferences adverse to the possessor".⁷⁰ Third, on the ground of utilitarian common sense (and ignoring the sentimentality of libertarian human rights rhetoric), the drawing of an adverse inference in the appropriate circumstance is simply

⁶⁴ "Plea of guilty", *S v Maseko* 1996 (2) SACR 91 (W) at 97B-C, "sec 112(1)(b) is not in conflict with the constitution". But see the opposite in *S v Damons* 1997 (2) SACR 218 (W) at 224 H - 225 D.

⁶⁵ "Plea of guilty", *S v Evans* 1981 (4) SA 52 (C), *S v Daniels* 1983 (3) SA 275 (A) and *S v Mabaso* 1990 (3) SA 185 (A), "no conflict between sec 115 and the constitution".

⁶⁶ See *supra* note 44, 49 and 51.

⁶⁷ See *supra* note 25, 26, 27 and 55.

⁶⁸ (1982) II BLR 124 (C.A.) per Maisels J, Dendy-Yong JA and Aguda JA, but see the dissenting judgement by Kentridge AJ at 189 who expresses a libertarian objection to the drawing of adverse inferences. Under the common law rule the accused takes the additional risk that his silence will be used as positive evidence against him which may have the effect of strengthening and completing an otherwise inadequate prosecution case. If the exercise of a [constitutional] privilege has these consequences, its value is diminished. Our [constitutional] right to remain silent is a no-right if silence can be construed as evidence, even slight evidence, of guilt.

⁶⁹ Maisels J at 131.

⁷⁰ *Ibid* at 131.

not contrary to legal logic. As a matter of logic an adverse inference is permissible when the accused fails to give evidence, when an innocent accused would have refuted the evidence against him, and there is no other explanation for the accused's failure to do so. Fourth, even if an adverse inference infringes upon the accused's constitutional right to silence, it may be a justifiable limitation in terms of the limitation clause sec 36: The South African constitutional silence principle is a relative and not an absolute right. As a relative right it is subject to a balance of interest and to a justifiable limitation. In certain circumstances, adverse inferences from silence amount to a justifiable limitation. Fifth, taking into account all the other procedural safeguards available to the accused in terms of sec 35(1) through to sec 35(5) and in the rest of Chapter 2, there is no reason why an adverse inference from the accused's silence would erode the accused's fair trial right nor risk the truth-seeking function of the accusatorial trial system. Finally, the primary problem with a constitutional right to silence is the inability to negotiate rational compromises. Once the silence principle is elevated into a constitutional right it becomes unnecessary to provide rational justifications for its existence. A constitutional right to silence becomes self-sustaining by virtue of its elevated status. This means that a criminal defendant may claim the right automatically, even in the absence of a state compulsion. The result is a legal system in which costs increase while the conviction rate decreases.

The Privilege Against Self-Incrimination: The privilege against self-incrimination has developed through the common law,⁷¹ through statutory law,⁷² and partly by entrenchment within the constitution. Sec 35(3)(j) refers to the accused's right, "not to be compelled to give self-incriminatory evidence". The wording of sec 35 awards a right against self-incrimination to the accused but not to the non-party witness's. The non-party witness' right against self-incrimination has not been constitutionally entrenched and it is arguable that a witness privilege against self-incrimination continues to be governed by common law rules.⁷³ The privilege is said to flow naturally from an accusatorial type system predicated upon a presumption of innocence and a fair trial principle. The nexus between the suspect's pre-trial right against self-incrimination and the accused's trial right against self-incrimination was established by the Constitutional Court in *Ferriera v Levin NO*,⁷⁴ *Bernstein v Bester NO*⁷⁵ and *Nel v Le Roux NO*.⁷⁶ The right

⁷¹ *S v Lwane* 1996 (2) SA 433 (A); *R v Comane* 1925 AD 570, 575.

⁷² Sec 200, 203-5, 217, 219A of the C.P.A. Sec 14 read with sec 42 of the C.P.E.A.

⁷³ If the non-party witness privilege against self-incrimination is still governed by the common law, it should be subject to statutory erosion.

⁷⁴ 1996 (1) SA 984 (CC) (1) BCLR 1 (CC).

⁷⁵ 1996 (2) SA 751 (CC) (4) BCLR 449 (CC).

⁷⁶ 1996 (3) SA 562 (CC) (4) BCLR 592 (CC).

against self-incrimination is a use and derivative use immunity⁷⁷ which operates at any legal proceeding wherein incrimination may occur. The defendant may be compelled to provide self-incriminatory testimony at public inquiries or state investigations but no use or derivative use may be made of the incriminatory evidence at a subsequent criminal trial. The constitutional right against self-incrimination exists to protect the fair trial principle. When the right to a fair trial is not threatened the constitutional protection against self-incrimination does not apply.⁷⁸ It's justification lies in a public revulsion against state compelled or coerced self-incrimination⁷⁹ and the jurisprudential necessity to encourage the witness to testify freely.⁸⁰ This is essentially a personal privilege preventing the disclosure of relevant oral or written incriminating testimony.⁸¹ The privilege may only be claimed by the witness and does not extend to a co-defendant, spouse or relative. (By contrast, the inquisitorial system extends the privilege to spouses, family and relatives in certain circumstances.) A witness may refuse to answer a question which exposes him to a criminal charge (or penalty or forfeiture).⁸² The privilege does not apply to the fear of a future civil claim.⁸³ The privilege may be claimed in a criminal, civil, administrative, quasi-judicial, coroner's and inquest proceedings, whenever there is a risk of a possible criminal charge.⁸⁴ The court is obliged to warn the witness of the privilege and a failure to do so may well render the incriminating testimony inadmissible in any future prosecution against the witness.⁸⁵

The South African privilege closely mirrors the English, American, Australian, New Zealand and Canadian privilege.⁸⁶ The privilege is not a blanket immunity against all types of questioning, but

⁷⁷ In *Ferreira v Levin NO* *ibid*, Ackermann J at para 145, cited with approval the Canadian case *R v S (RJ)* (1995) 1 SCR 451, which holds, "while derivative evidence is not created by the accused *per se*, it is self-incriminating because it would not otherwise be part of the crown case". See also the use immunity provisions in sec 204 (2) and (4) of the C.P.A which also provides for a transactional immunity.

⁷⁸ *Ferreira v Levin NO* *ibid* at para 159, *Davis v Tip NO* 1996 (6) BCLR 807 (W); *Seapoint Computer Bureau v McLoughlin NO* 1996 (8) BCLR 1071 (W).

⁷⁹ In *Davis v Tip* *ibid*, and *Seapoint Computer Bureau v McLoughlin* *ibid*, it was held that only a positive state "coercive compulsion" as opposed to the exercise of free choice in answering questions amounted to a violation of the privilege. See also *S v Mbolombo* 1995 (5) BCLR 614 (C) (in the context of bail) and *S v Zuma and Others* 1995 (2) SA 642 (CC) (4) BCLR 401 (CC) at para 30, "the privilege is based on an abhorrence of coercive methods to extract confessions". But see Langbein's criticism of the supposed link between the privilege and torture, *supra* chapter 3.

⁸⁰ *S v Botha* (2) 1995 (2) SACR 605 (W) at 609 C-D; *S v Lwane* *ibid* per Ogilvie Thomson JA at 438G.

⁸¹ *Magmoed v Janse van Rensburg and Another* 1993 (1) SACR 67 (A) at 104 B-C.

⁸² A penalty or forfeiture privilege has an obsolete meaning inappropriate to South African procedure; Hoffmann and Zeffertt *SA Law of Evidence* (1966) 238.

⁸³ See sec 200 C.P.A read with sec 42 C.P.E.A.

⁸⁴ *Waddell v Eyles NO and Welsh NO* 1939 TPD 198; *S v Ramaligela* 1983 (2) SA 424 (V); *R v Diedericks* 1957 (3) SA 661 (E).

⁸⁵ See sec 203 C.P.A, and *Magmoed v Janse van Rensburg* *ibid*, where it was held that the warning was not absolute but merely a general rule of practice dependant on the circumstances (*S v Lwane*, *ibid*, at 440 H - 441A). Case precedent is inconsistent with the constitutional right and the better view is that a failure to warn the witness will render his subsequent testimony inadmissible.

⁸⁶ See *supra* chapter 7 p.228-240. Also chapter 10.

must be claimed on a question to question basis,⁸⁷ whenever there is a reasonable apprehension of danger to the witness. The risk of self-incrimination must be real, appreciable and not imaginary or unsubstantial.⁸⁸ Whether the risk is real is a matter of judicial discretion.⁸⁹ The privilege applies to answers which directly incriminate but also to answers, though innocent in themselves, which may indirectly form a material link in the chain of causal proof resulting in a possible criminal charge against the witness.⁹⁰ The witness is obliged to answer frankly and honestly and will be discharged from future prosecutions.⁹¹ A witness who has been immunized or statutorily indemnified against a future prosecution has no claim on the privilege.⁹² As in other Anglo-American jurisdictions, South African statutes which abrogate the privilege are concentrated in the area of taxation, corporate activities, banking, property, bankruptcy and insolvency.⁹³ Many of these abrogating statutes have been re-interpreted or amended in the light of a constitutionalised right against self-incrimination. The Constitutional Court in *Ferreira v Levin NO*⁹⁴ has invalidated a part of sec 417(2) of the Companies Act 1973, which permitted the criminal evidentiary use of incriminating testimony compelled during a liquidation inquiry. Sec 417(2)(b) was found to be a violation of sec 35(3) and the constitutional right to a fair trial.⁹⁵ Consequently, while an abrogating statute may compel incriminating evidence from an examinee, such evidence is automatically inadmissible in future criminal proceedings.⁹⁶ Taken together, the constitutional right against self-incrimination (sec 35(3)(j)) and the right to silence (sec 35(1)(a)(b)) prohibit the admission of evidence induced under statutory compulsion. Similarly in Canada, sec 13 of the Canadian Charter of Rights and Freedoms expressly prohibits the use of statutorily compelled testimony at a criminal trial.

The question whether the constitutional right against self-incrimination, as opposed to the common law privilege, is possessed by the corporation was avoided in *Seapoint Computer*

⁸⁷ *R v Kuper* 1915 TPD 308 at 316, *Waddell v Eyles NO and Walsh NO*, *ibid. R v Ntshangela* 1961 (4) SA 592 (A), "the choice to answer is not left to the witness".

⁸⁸ *S v Carneson* 1962 (3) SA 437 (T) at 439 H.

⁸⁹ *Triplex Safety Glass Co Ltd v Lancegay Safety Glass Ltd* (1939) 2 ALL ER 613.

⁹⁰ *S v Heyman and Another* 1966 (4) SA 598 (A) at 608 C. *Rademeyer v Attorney-General* 1955 (1) SA 444 (T), "the judge is not obliged to accept the witness' opinion that an answer will be incriminating. The witness may have to reveal some damaging evidence to support his claim".

⁹¹ See sec 204 (1) (2) (3) (4) including sec 205(1) of the CPA.

⁹² For example, the sec 204 "indemnity clause" C.P.A is intended to encourage accomplices to testify against their co-defendants.

⁹³ Sec 65 Insolvency Act 24 (1936); sec 415, 417 Companies Act 61 (1973); sec 66(1) Close Corporation Act 69 (1984); sec (4) (6) (8) (9) Inspection of Financial Institutions Act 38 (1984); sec (7) (9) (17) Competitions Act 96 (1979); sec 6 Bank Act 94 (1990); sec 5(8) Investigations of Serious Economic Offences Act 117 (1991).

⁹⁴ *Ibid* note 74 at para 153, 159.

⁹⁵ *Parbhoo v Getz NO* 1997 (4) SA 1095 (CC) invalidated sec 415(5) of the Companies Act on the same constitutional ground.

⁹⁶ *Park-Ross v Director Office for Serious Economic Offences* 1995 (1) SACR 530 (C) at 546 J, 548 C-F.

Bureau (Pty) Ltd v McLoughlin and Others NNO.⁹⁷ A dichotomy exists between English common law which extends the privilege to the corporate person⁹⁸ and American constitutional law which limits the privilege to the natural person.⁹⁹ In America and Canada the constitutional elevation of the privilege into a human right precludes its extension to the corporation.¹⁰⁰ The limitation of the privilege to the natural person because of its human right status has also been recognised by the Australian High Court (despite the lack of an Australian Bill of Rights).¹⁰¹ The better view is that the South African Constitutional Court will move to limit the privilege to the natural person in terms of an entrenched right against self-incrimination. There is some residual uncertainty in English, Australian and South African case precedent as to whether the privilege may be extended to the witness who fears the risk of incrimination under foreign law. The weight of English¹⁰² and American¹⁰³ authority suggests that the privilege is limited to the domestic forum and does not extend to the foreign forum. The American Supreme Court in *United States v Balsys*¹⁰⁴ and sec 14(1) of the English Civil Evidence Act 1968 expressly limit the privilege to the domestic forum, and this is probably the better approach.

In line with other Anglo-American jurisdictions,¹⁰⁵ South African courts make a careful distinction between testimonial communicative acts (to which the privilege attaches) and non-communicative physical acts (to which the privilege does not attach).¹⁰⁶ A number of statutory provisions permit the compulsory taking of non-communicative passive forms of physical (real) evidence. Sec 37(1) of the Criminal Procedure Act 1977 permits the evidentiary use of fingerprints, palm prints, foot prints and other distinguishing body marks. Sec 37(1)(c) permits the taking of blood samples. A refusal to give a blood sample raises a presumption against the accused at trial.¹⁰⁷ It is suggested that the compulsory taking of non-intimate and intimate body samples will survive a constitutional challenge. Although the taking of an intimate sample is an infringement of the individual's physical integrity, the state interest is likely to outweigh the

⁹⁷ 1996 (8) BCLR 1071 (W).

⁹⁸ See *supra* chapter 10.

⁹⁹ See *supra* chapter 7 p.229-230.

¹⁰⁰ See *supra* chapter 10 note 181 to 189 and accompanying text.

¹⁰¹ See *supra* chapter 10 note 40 to 41 and accompanying text.

¹⁰² See *supra* chapter 10.

¹⁰³ See *supra* chapter 7.

¹⁰⁴ 524 US 666 (1998).

¹⁰⁵ See *supra* chapter 10 note 106, 121, 122 and 128.

¹⁰⁶ See *R v Camane* 1925 AD 570 at 575; *Ex parte Minister of Justice In re R v Matemba* 1941 AD 75 at 82-3; *S v Binta* 1993 (2) SACR 553(C); *S v Huma* (2) 1995 (2) SACR 411 (W) per Classen J at 419 G, "the taking of a fingerprint does not constitute testimonial evidence against the accused and is not in conflict with the privilege". See also *Seetal v Pravitha* 1983 (3) SA 827 (D); *S v Maphumulo* 1996 (2) SACR 84 (N) at 88 F - 89 B; *Msoni v Attorney-General of Natal and Others* 1996 (8) BCLR 1109 (N).

¹⁰⁷ *S v Binta* 1993 (2) SACR 553 (C); *S v Kiti* 1994 (1) SACR 14 (E); but in contrast see the American case *South Dakota v Neville* 459 US 553 (1983).

individual's right to dignity and privacy.¹⁰⁸ Compulsory physical sampling, even in the face of a refusal, may well be justifiable in terms of the limitation clause (sec 36). For example, DNA sampling is an indispensable forensic investigatory tool and is unlikely to be constitutionally challenged, as long as reliable DNA data banks and proper test protocols are maintained. State medical personnel are now permitted to take compulsory fluid samples from a suspected rapist at the request of the victim in order to determine HIV status. The evidentiary use of external body samples (fingerprints, hair, nails, breath) and internal body samples (blood, fluids, semen, DNA) are essential tools in the investigation of crime. The neutralisation of these tools in the interest of the accused would adversely affect the administration of justice.

The English common law witness privilege generally covers both incriminatory oral and documentary forms of evidence. No special distinction is made between the written or the spoken word. On the other hand, the United States Supreme Court draws a fine line between oral testimony and documents. Several unique doctrines (the act of production and required records doctrine) have been developed, under the influence of fifth amendment constitutional requirements, to account for the state compulsion of documentary evidence. According to the United States Supreme Court it is critical to distinguish between the *seizure* of documents and their *compelled production* by the state. The reason for such a distinction is that documentary evidence falls into the grey area between a communication (to which the privilege attaches) and real evidence (to which the privilege does not attach). The privilege does not apply to the seizure of documents which exist independently of their maker. Although documents contain the written communications of their maker, they do not become compulsory produced communicative evidence on seizure. Seizure may violate the constitutional right to privacy but it does not violate the constitutional right against self-incrimination (per *United States v Fisher* and *United States v Doe*).¹⁰⁹ In *Bernstein v Bester NO*¹¹⁰ Ackermann J distinguishes questions of privacy infringement from questions of compelled self-incrimination. By contrast, the production and disclosure of the existence of documents creates self-incrimination problems. The compelled disclosure may be used by the state as an admission against the accused (*United States v Fisher*)¹¹¹ or the disclosure may lead, through derivative use, to other evidence incriminating the accused (*Dabelstein v Hildebrandt and Others*).¹¹² The order to produce documents, the existence of which is unknown to the state or in dispute, will also lead to self-incrimination

¹⁰⁸ See Du Toit et al *Commentary on the Criminal Procedure Act (1997)*, at 3 - 1.

¹⁰⁹ See *supra* chapter 7 p.241.

¹¹⁰ Ibid note 75 at para 64.

¹¹¹ 425 US 391 (1976) at 410.

¹¹² 1996 (3) SA 42 (C) at 66-7.

(*United States v Hubbel*).¹¹³ The suggestion is made that these versatile American doctrines (the act of production and the required records doctrine) may be of use in the South African context and may guide the future development of the South African constitutional law on document admissibility and the state compulsion of private or public documents.

11.2 The Scottish Philosophical Divide

Historically, Scotland has had a close relationship with continental Europe and that strong influence is illustrated in the unique Scottish legal system. The Scottish legal system is a hybrid system and like all other common and civil law jurisdictions recognises that the accused should not be compelled to convict himself from his own mouth. The Scottish criminal process is essentially accusatorial in nature but with certain unique inquisitorial elements. While the trial procedure is adversarial, there is an inquisitorial emphasis on the pre-trial investigatory stage. Once arrested¹¹⁴ a suspect may be detained. The suspect must be informed of the offence and the reasons for detention.¹¹⁵ A caution on the right to silence and the right to legal advice is issued.¹¹⁶ After the caution the suspect's reliance on silence during interrogation may not give rise to adverse inferences at trial.¹¹⁷ A failure to caution the suspect at reasonable intervals during the police inquiry will render any confession inadmissible at trial. The unique inquisitorial feature of the Scottish criminal process is the re-introduction of a pre-trial judicial examination. A feature similar to the continental preparatory investigation before a *juge d'instruction*. In terms of the Criminal Justice (Scotland) Act 1980,¹¹⁸ the *procurator fiscal*¹¹⁹ or prosecutor may cause the accused to be brought before the sheriff for judicial examination,¹²⁰ either before or after bail. This judicial examination is a formal public procedure in which the accused is not put under oath. The sheriff begins by notifying the accused of his right to silence and right to legal advice. The sheriff conducts the examination by directing his questioning towards the elicitation of a denial, explanation, comment or justification of the criminal charge. Strict limitations are placed on

¹¹³ 120 S.Ct 2037 (2000). See *supra* chapter 7 p.246-247.

¹¹⁴ In terms of sec 1 and sec 2 of the Criminal Justice Act (1980), "the constable must inform the individual of the nature of the offence and that a failure to comply with the arrest is an offence".

¹¹⁵ *Ibid* sec 2(4).

¹¹⁶ *Ibid* sec 2(7). The Scottish statutory warning is only a partial one by comparison to the English warning. It does not require the police to warn the suspect that any answers given will be taken down and used in evidence. See *Tonge v H.M. Advocate* 1982 SLT 506, (1982) SCCR 313

¹¹⁷ The right to silence at the police investigation is entirely judge made and it arises only as an indirect consequence of the primary silence right at trial. *Chalmers v H.M. Advocate* 1954 JC 66 at 79 and *Twycross v H.M. Advocate* 1973 SLT 85, "at common law there is no duty on the individual to answer police questions."

¹¹⁸ See in particular sec 20 A(5) of the Criminal Procedure Act (Scotland) 1975. The judicial examination is similar to the arraignment process in the United States.

¹¹⁹ The procurator fiscal is the principal prosecuting crown officer in the sheriff's court.

¹²⁰ Scotland is divided into a number of sheriff court districts. The role of the sheriff in a district court is similar to that of a judge in the Scottish High Court, except his legal status is inferior.

prosecutorial questioning which may only be directed at clarifying the accused's defence and no attempt may be made to incriminate him. The prosecutor may not cross-examine or ask leading questions and the accused's solicitor is limited to questions which resolve ambiguity and clarify the nature of the charge. One of the important differences with English law is that Scots law prevents the state from being ambushed by unexpected lines of defence which were not made at the judicial examination. If the accused raises a defence at trial which could have been given at the judicial examination this failure may be commented upon by the judge and the prosecutor.¹²¹ The same applies to questions at trial which could have been answered at the judicial examination but were not.

The accused who consistently says nothing at the judicial examination and refuses to testify at trial does not expose himself to adverse commentary.¹²² Significantly, the judicial examination prevents the accused from recanting voluntary confessions made either to the police or the sheriff. It also bars ambush defences¹²³ and prevents the prosecution from being taken by surprise, by new witnesses or unexpected lines of defence, at trial.¹²⁴ Adverse inferences may be drawn and commented upon by the court, but the adverse inference may not amount to a corroboration of guilt. The examination is tape recorded, reduced to shorthand, and made available at any subsequent trial. The unique nature of the Scottish pre-trial investigatory process allows it to escape the recent and major statutory amendments to the English silence principle. The Scots have managed to avoid the rigid technicalities of the exclusionary confessional rules statutorily developed in the English Police and Criminal Evidence Act 1984 (PACE).¹²⁵ Scottish confessional law is still primarily based on common law voluntariness principles and a common law judicial discretion. The nature of the Scottish pre-trial judicial examination precludes the English necessity to enact special legislation to curb ambush

¹²¹ An adverse inference may be drawn in the appropriate circumstance even when the accused has remained silent on legal advice. *McEwan v H.M. Advocate* 1990 SCCR 401 and *McGee v H.M. Advocate* 1991 SCCR 510. This kind of judicial precedent may be in conflict with the European Convention on Human Rights. A similar problem with the English CRIMPO Act and the European Convention remains as yet unresolved.

¹²² *Walker v H.M Advocate* 1985 SCCR 150, "adverse commentary can only be invoked where the accused gives or leads evidence, and if he does neither, no comment may be made on the failure to answer at judicial examination".

¹²³ See *supra* chapter 9 p.327-334.

¹²⁴ See in particular sec 20, 20A, 20B of the Criminal Procedure Act. In practice the judicial examination has not had a major effect on the Scottish criminal process, as it is entirely at the discretion of the procurator fiscal whether an examination is held at all, McPhail "Safeguards in the Scottish Criminal Justice System" *Crim. L. Rev* (1992) 144, 147.

¹²⁵ See *supra* chapter 8.

defences.¹²⁶ There is no procedural need for an English type Criminal Justice and Public Order Act 1994.¹²⁷ Scotland has therefore avoided the jurisdictional and procedural conflict between English domestic law and the European Convention on Human Rights.¹²⁸

The accused's competency to stand trial is defined in sec 141 through to sec 346 of the Criminal Procedure Act (Scotland) (1975).¹²⁹ Specific provision is made prohibiting the prosecution from commenting on the accused's failure to give evidence.¹³⁰ However, the trial judge is empowered to comment in the appropriate circumstances and even to direct the jury's attention to the accused's failure to testify. *Scott v H.M. Advocate*¹³¹ holds, "although a comment of the [judicial kind] is...competent, it should be made with restraint and only where there are special circumstances which require it". More recently, *McClean and Canning v H.M Advocate*¹³² suggests that judicial comment may be directed to the nature of the unanswered or un rebutted crown case, "what they [the jury] were being invited to do was to see what inferences could be drawn from the basic facts, taking account...of the absence of an innocent explanation". When the accused has been warned about his rights, no adverse inference may be drawn from his silence in the face of police questioning. *Robertson v Maxwell*¹³³ clearly states, "no legitimate inference in favour of a prosecutor can be drawn from the fact that a person when charged with a crime says nothing...He is entitled to reserve his defence."¹³⁴

The Scottish non-party witness privilege against self-incrimination is largely drawn from the English privilege and there are no significant differences. For example, the Scottish courts draw the familiar bright line distinction between communicative non-physical evidence and physical non-communicative forms of evidence. Consequently blood, semen and DNA body samples are

¹²⁶ Scottish procedural law avoids ambush defences by requiring all special defences (i.e., alibi, insanity, self-defence) to be lodged with the court at least ten days before the trial date. A list of witnesses and exhibits must be lodged at least three days before trial. In addition, the prosecutor may ask for an adjournment to examine the new evidence.

¹²⁷ See *supra* chapter 9.

¹²⁸ See *supra* chapter 10.

¹²⁹ These sections are direct descendants of the English sec 1 Criminal Evidence Act 1898 and the emphasis is on competence rather than compellability.

¹³⁰ Despite the prohibition on prosecutorial comment, if such a comment is made in court, the conviction is unlikely to be set aside, *McHugh v H.M. Advocate* 1978 JC 12 and *Upton v H.M. Advocate* 1986 SCCR 188.

¹³¹ 1946 SLT 140.

¹³² 1993 SCCR 605.

¹³³ 1951 SLT 46, per Coope JC. See also *Whightman v H.M. Advocate* 1959 JC 44 and *White v H.M. Advocate* 1991 SCCR 555.

¹³⁴ The accused is not entitled to reserve a defence when faced with a presumption of the possession of stolen property (*Fox v Patterson* 1948 JC 104). The implied confession rule also allows a limited inference from silence (*Glover v Tudhope* 1986 SCCR 49; *Buchan v H.M. Advocate* 1993 SCCR 1076).

admissible evidence which do not attract the privilege against self-incrimination.¹³⁵ Other standard admissible types of physical evidence are fingerprints, identification of external features, handwriting specimens, evidence of body smell or odour,¹³⁶ rubbings from the suspect's hands, and impressions of the suspects teeth. The Scottish witness privilege is a personal one and may only be claimed on a question to question basis. It is subject to statutory abrogation although provision is made for a derivative use immunity. The privilege extends to the corporation and is limited to the greater domestic jurisdiction of the United Kingdom. Scottish jurisprudence on the silence principle, as in other Anglo-American systems, reflects a dynamic compromise and need to balance the protective interests of the individual against the public interest in law enforcement. The Scottish compromise is exactly the same as those reached in other Commonwealth jurisdictions.

11.3 The Accusatorial-Inquisitorial Divide

Apart from the common law, a number of other legal systems, civil, religious and customary have evolved a silence principle. The universality of a right to silence and a privilege against self-incrimination is illustrated by the International Covenant on Civil and Political Rights (United Nations General Assembly Resolution 2200 (A)XXI, 1996) article 14(2)(g), which gives the individual the right, "not to be compelled to testify against himself or to confess guilt". The essential notion of a protection against "compelled testimony" and a protection against "involuntary confessions" is also fundamental to the civil-inquisitorial legal systems of continental Europe. The civil-inquisitorial silence principle has its ancient roots in the *ius commune* of Roman-canonical jurisprudence particularly the legal maxim, "*nemo debet prodere seipsum*" (no one may be compelled to be his own betrayer).¹³⁷ It should be noted that the strong common law distinction between the accused's right to silence and the non-party witness' privilege against self-incrimination is blurred in the civil-inquisitorial system. Civil jurisprudence has no separate or defining set of rules for a witness privilege. Where a witness privilege does exist it

¹³⁵ Sec 50(1) of the Criminal Justice (Scotland) Act 1987; sec 28(4) of the Prisoners and Criminal Proceedings (Scotland) Act 1993.

¹³⁶ *Patterson v Nixon* 1960 JC 42, "a tracker dog's identification of the suspect by odour and by barking is admissible evidence. In contrast the South African court rejects this kind of evidence as prejudicial, *R v Trupedo* 1920 AD 58 and *S v Shabalala* 1986 (4) SA 734 (A).

¹³⁷ Note, the civil-inquisitorial system will for convenience henceforth be referred to as the "civilian" system. The "civilian" silence principle evolved from a bundle of Roman-canonical rules (*ius commune*) which were basic to all criminal procedure manuals of the 15th, 16th and 17th centuries. For example, Panormitanus (1453) *Commentaria in Libros Decretalium ad X 2.18.2 no 16* (1555); *Videtur enim quod non tenebur respondere interrogationi seu positioni criminosa quia non debet seipsum prodere*. Mysinger (1588) *Singalurium observationum iudicii imperialis Cent VI, Obs 92* (1599); *quia nemo se ipsum prodere tenetur*. Other jurists who refer to the silence principle are Damhouder (1581) *Praxis rerum civilium*, ch 154, no 22 (1646); Mascardus (1588) *De probationibus*, vol 3, Concl 1177, no 59-60 (1593). De Oriano (1536) *Practica aurea de responsionibus*, no 17 (1541); and many more.

is an indirect and weak extension of the accused's right to silence. One of the intrinsic features of the civilian criminal procedure is that the defendant is not obliged to give evidence against himself (a protection against compelled testimony) nor may a confession be extracted by the use of torture, violence, trickery, deception or any other stratagem inconsistent with a fair trial (a protection against an involuntary confession). Modern inquisitorial criminal law is the result of fundamental reforms carried out in post-revolutionary (1791) and Napoleonic (1808) France. The outstanding features of the 1808 reforms were the abolition of torture, increased procedural protections for the accused (including a reorganised silence principle) and an independent judiciary.

There are a number of essential differences in the *modus operandi* between the modern civilian and the modern common law silence principle. The civilian principle is fundamentally designed to protect the defendant against physical and psychological abuse by the state. In contrast, the common law principle is primarily orientated at producing trustworthy testimony and only secondarily directed against state compulsion. The historical reason for this difference in emphasis is to be found in the institutional use of torture. Torture was never a systematic tool of the English criminal investigation. It was limited to major political crimes, treason, heresy, sedition and was abolished entirely by 1640.¹³⁸ Judicial torture was an integral part of the European criminal investigation and was only abolished in 1789 (France), 1801 (Russia), surviving in some German and Eastern European states until 1831. Although the English silence principle was designed throughout the sixteenth and seventeenth centuries as a protection against state compulsion, with the early abolition of torture, the emphasis shifted to a protection against the admissibility of an involuntary confession. The modern common law silence principle is concerned with securing the truth-finding integrity of the trial by excluding the confession altogether. The accused is not a central, but only an incidental, feature of the adversarial trial. (Note the emphasis of the American *Miranda* safeguards and the English statutory PACE safeguards is on a protection against the involuntary confession.)

The inquisitorial trial process works differently, its purpose is to secure the inclusion, rather than the exclusion, of the confession. The accused is a central feature of the inquisitorial trial

¹³⁸ Before 1640 torture was mainly used to extract confessions from religious heretics who committed treason by refusing to accept the state religion. Between 1550 and 1640 some eighty warrants for torture were issued despite the acknowledgement by the twelfth century that coerced confession was *prima facie* unreliable. See Stephens *History of the Criminal Law* (1883) 446, 447; Heath *Torture and the English Law* (1982) 31, 74-166; Langbein *Torture and the Law of Proof* (1977) 9, 66-69, 134-5. By early 1628 the use of torture to extract confessions was abhorrent to the legal fraternity. The Chief Justice in 1628 advised King Charles I that the law did not permit political prisoners being put to the "rack" [tortured]. "Proceedings against J. Felton for the murder of the Duke of Buckingham", 3 How St. tr 367 (1628).

process, which means that a civilian silence principle is purposefully designed as a guarantee against state coercion and only secondarily as a protection against the involuntariness of a confession. Until the middle of the twentieth century the involuntary, but otherwise reliable, confession was readily admissible at trial. The striking difference lies in the centralisation of an inquisition philosophy in the civilian trial system and its prohibition in the common law system. The civilian focus is on the gathering of evidence through the interrogation of the accused. The common law focus is on extrinsic evidence and witnesses.¹³⁹ As a result, the common law trial is based on a neutral trier-of-fact who relies largely on extrinsic sources of evidence presented to the court by adversarial parties. *Jones v N.C.B.*¹⁴⁰ notes, "in the system of trial which we have evolved in this country, the judge sits to hear and determine the issues, not to conduct an investigation or examination on behalf of society at large". In the civilian trial process the judge is not neutral and relies on a *dossier*, prepared before trial by an investigatory judge assessor. The civilian accused usually has no choice but to testify. Once on the witness stand he has the right to refuse to answer some or all of the questions put to him. The inquisitorial trial mechanism places a strong psychological pressure on the accused to testify and immediate adverse inferences may be drawn from his refusal to do so. The civilian silence principle is limited to verbal testimony only and does not protect against the production of written documents or records. The common law distinction between a testimonial communicative act and a non-communicative physical act does not exist in civilian law. The witness immunity grant which acts as a substitute for the privilege against self-incrimination in the common law finds no parallel in most civilian jurisdictions (except Germany and Italy), though the non-party witness privilege may be extended to spouses and other close relatives. The result is that the standards of a coerced testimony are much looser and wider in civilian jurisdictions than the American *Miranda* and the English PACE standards.¹⁴¹

The common law accused, if he chooses to testify, must do so under oath thereby exposing himself to the dilemma of self-incrimination or perjury. (Note, this type of dilemma argument is one of the rationales advanced to justify the silence principle but the argument falls away in an inquisitorial trial system which routinely permits the accused to testify without swearing an oath.)¹⁴² The civilian law is more pragmatic. There is the realisation that untruthful statements are often part and parcel of the accused's attempt to exculpate himself. Accordingly civilian

¹³⁹ Damaska 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure; A Comparative Study' (121) *Un. Penn. L. Rev* (1973) 506, 578-587; Goldstein "Reflection on Two Models, Inquisitorial Themes in American Criminal Procedure" (26) *Stan. L. Rev* (1974) 1015-25.

¹⁴⁰ (1957) 2 WLR 760.

¹⁴¹ Damanska *ibid* at 527-530.

¹⁴² See *supra* chapter 4 p.114-116.

jurisdictions do not insist on the oath as it places unrealistic expectations on the accused. The civilian accused is examined before all other witnesses. The mechanism of a civilian-inquisitorial trial is based squarely on the accused as the best evidentiary source. Consequently, civilian commentators regard the technical rules protecting the common law accused in an adversarial system as historically and logically antiquated. The adversarial system is said to be mired in a morass of exclusionary rules which detracts from the pursuit of truth as the primary purpose of the trial. Continental jurists are surprised at the depth and complexity of evidentiary rules with which the accusatorial criminal court surrounds itself. In contrast, virtually all probative evidence is admissible in the civilian-inquisitorial criminal trial. Civilians regard the artificial exclusionary rules of the accusatorial system as ideal for keeping facts out of the courtroom, thereby limiting the trier-of-fact's ability to arrive at the truth.

The inquisitorial system provides a number of safeguards not found in the accusatorial system. For example, there is no similar fact rule and evidence of other crimes, however relevant, is always inadmissible. There is no legal sanction for false testimony.¹⁴³ The central aim of the inquisitorial procedure is to ensure that all the facts-in-issue (*facta probanda*) are placed before the trial court. To achieve this aim the inquisitorial system places a premium on an exhaustive pre-trial inquiry and the gathering of evidence by a properly designated investigatory judge. The common law system has nothing comparable to the inquisitorial pre-trial judicial preparatory investigation process. (Note, in this regard the Scottish pre-trial judicial examination takes the best from both the common law and civilian worlds.) The common law accused's first opportunity to present his version to an independent judge occurs only at the trial stage. The common law accused therefore has no real opportunity to avail himself of the substantial investigatory resources of the state. (Note, one of the important justifications for a silence principle is based on levelling the material inequality between the resources available to the accused and the resources available to the state. This argument is weakened in an inquisitorial type process because the accused has access to the investigatory resources of the state.)¹⁴⁴ The problem with the judicial pre-trial examination is that the issues are determined before the trial and the actual trial becomes a mere formality in which a presumption of innocence and a right to silence may become a mere fiction. The advantage of the pre-trial examination is that all evidence, both for and against the accused, is revealed. The issues between the parties are clearly defined and the risk of evidence manipulation is reduced. The accusatorial trial process, by placing the presentation of evidence in the hands of interested parties, allows for the suppression of

¹⁴³ By contrast, in the accusatorial system the accused must be sworn in before taking the stand and the untruthful witness is faced with either a perjury or an obstruction of justice charge.

¹⁴⁴ See *supra* chapter 3 p.102 (Bentham's fox hunting rationale) and chapter 4 p.139.

evidence (each party will emphasise only those facts in its favour) and the surprise production of new evidence (ambush alibi defences, etc.) and may sometimes lead to the distortion of the truth-finding integrity of the trial. In the inquisitorial trial this type of manipulation is impossible because the judge is actively involved in the trial process and may positively balance the state and defence views. Unlike the neutral common law judge, the inquisitorial judge actively guides the unfolding development of the trial process.

The principal problem with the inquisitorial system is that by focusing on the accused as the primary source of evidence, certain individual legal rights are necessarily weakened. In an accusatorial system which focuses on extrinsic sources of evidence, individual procedural rights are correspondingly better protected. In theory a silence principle should logically be stronger in a pure accusatorial system and weaker in a pure inquisitorial system. Similarly, the confessional standard should enjoy stronger procedural safeguards in an accusatorial system and weaker safeguards in an inquisitorial system. It is ironic therefore that England, an accusatorial system, has statutorily moved to limit the right to silence and Germany, an inquisitorial system, has moved to strengthen the right to silence in line with the spirit of the European Convention. The irony is strengthened by the United States Supreme Court's attempts over the past thirty years to limit the interrogatory and confessional safeguards enunciated in *Miranda v Arizona*.

Despite these theoretically significant procedural differences, both the common law and the civilian systems, in practice, rely heavily on the confession as the primary source of criminal convictions. However, the civilian procedure is more honest, and is openly designed around the interrogation of the accused and the elicitation of a confession. In the civilian system almost 95% of all convictions are confessionally based. The common law maintains a rather unbalanced subterfuge, over 80% of all convictions arise from either a pre-trial confession or a plea-bargain and a guilty plea. What the civil system does honestly and with the proper safeguards in place, the common law does hypocritically via the backroom negotiated plea-bargain. In practice the common law accusatorial system is purchasing cost-effective confessions through the use of the plea-bargain and guilty plea.¹⁴⁵ Frankel, an American commentator, aptly remarks, "the [common law] court has already cut off almost totally the opportunity to question an accused in a civilised fashion or even to comment upon his silence

¹⁴⁵ Kasimar "Equal Justice in the Gatehouse and Mansions of American Criminal Procedure" *Police Interrogation and Confessions* (1980) 27, "contrasting the few rights of the suspect in the police station (gatehouse) with the full array of protections at trial (mansion)". The prosecutor will concentrate his efforts at the gatehouse (police station) where the suspect is vulnerable in order to lessen his workload in the mansion (at trial).

at trial. So it [is] driven to stultify itself by leaving an opening which predictably means that the defendant who is naive, confused, unintelligent or careless will [confess] to the police while others will not."¹⁴⁶

Proposals to reform the common law procedural system along the lines of a civil-inquisitorial process are dismissed as attempts to undermine the accused's protection, to increase the likelihood of humiliation and abuse at the hands of the state.¹⁴⁷ The attempt to re-organise and limit the silence principle is often criticised as the threat to impose inquisitorial practices and to undermine fundamental values of the accusatorial system. In *Murphy v Waterfront Commission* the United States Supreme Court, per Goldberg J, speaks of "our preference for an accusatorial rather than an inquisitorial system of criminal justice", which is associated with "our fear that self-incrimination statements will be elicited by inhumane treatment and abuses".¹⁴⁸ *Miranda v Arizona* also uses the familiar language of an inquisitorial-accusatorial dichotomy. The fifth amendment is the "essential mainstay of our adversarial system" and "our accusatory system...demands that the government in seeking to punish an individual, produce the evidence against him by its own independent labours, rather than by the cruel simple expedient of compelling it from their own mouths".¹⁴⁹ The United States Supreme Court regards the procedural protections given to the suspect during the police custodial interrogation as unique to an accusatory system, "it is at this point that our adversary system commences, distinguishing itself from the inquisitorial system recognised in some countries".¹⁵⁰ *Griffin v California* is harsh in its condemnation, "comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice which the fifth amendment outlaws".¹⁵¹ The accusatorial-adversarial criminal system is somehow regarded as being innately superior to the inquisitorial system although no logical reasons are advanced for this notion. It is also argued that a presumption of innocence, the burden of proof and the right to a fair trial is a golden thread of English jurisprudence solidly entrenched within the accusatorial system and likely to be unravelled within the inquisitorial. This common law English prejudice is patently untrue. A knowledgeable analysis of the inquisitorial system reveals a strong attachment to the principle of innocence and a fair trial. For example, the principle of *indubio pro reo* is strongly adhered to. Doubt over a relevant admissible fact is

¹⁴⁶ Frankel "From Private Fights Towards Public Justice" (51) *N.Y. Un. L. Rev* (1975) 516, 530. See also Kasimar "Judicial Examination of the Accused; Forty Years Later" (73) *Mich. L. Rev* (1974) 15; Mendelson "Self-Incrimination in American and French Law" (19) *Crim. L. Bulletin* (1983) 34-36, 42-43.

¹⁴⁷ O'Reilly "England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice" (85) *J. Crim. L. Criminology* (1994) 402, 444-451. But see Ingraham "The Right to Silence, A Reply to O'Reilly" (86) *J. Crim. L. Criminology* (1996) 559, 588-95.

¹⁴⁸ *Murphy* 378 US 52, 55 (1964)

¹⁴⁹ *Miranda* 384 US 436, 460, 477 (1996).

¹⁵⁰ *Miranda* *ibid* at 477.

¹⁵¹ *Griffin* 380 US 609, 614 (1965).

always resolved in the accused's favour. Cases built on insufficient evidence, or where the accused is factually innocent, are weeded out during the judicial investigatory stage. The accused is not exposed to a public trial unless the state possesses a *prima facie* case against him. At all stages in the inquisitorial criminal process the burden of proof remains on the prosecution. Proponents of a silence principle who point to the inquisitorial system and argue that a limitation of a right to silence shifts the burden of proof away from the prosecution and infringes the presumption of innocence are truly ignorant of the nature of an inquisitorial trial process. The inquisitorial criminal system is a living example that a limited silence principle may safely cohabit with a strong presumption of innocence and without diluting the prosecutorial burden.

In truth, there is no such thing as a pure accusatorial or inquisitorial system. A cross-fertilization of legal ideas between England and the Continent has been a constant over the last 200 years.¹⁵² Indeed, according to the Helmholtz-McNair theories, the silence principle does not originate in common law, but was incorporated through a process of absorption from the *ius commune* of Roman-canonical and English ecclesiastical law.¹⁵³ Furthermore, the absorption of inquisitorial procedures into English law is likely to intensify with the incorporation of the European Convention on Human Rights (Human Rights Act 1998) into domestic law. As England moves closer to the European Union so too does the inquisitorial system. In other respects Anglo-American criminal procedure has become less accusatorial in form than is generally admitted. For example, it is inquisitorial to require the defendant to stand in an identification line-up, to yield blood samples and to provide a pre-trial discovery of an intended trial defence. The common law has developed strong inquisitorial tendencies which are rarely acknowledged because of the irrational sentimentality of equating an inquisitorial system with an excessive crime control philosophy.¹⁵⁴ Such an excess is no more integral to the inquisitorial system than it is to other criminal systems, including an accusatorial one. It is perhaps worthwhile noticing that the English adversarial trial, in which the main protagonists are the defence counsel and the prosecution, is only some 150 years old. The inquisitorial trial, in which the main protagonists are the judge and the accused, is at least 1,000 years old.

¹⁵² Ingraham *The Structure of Criminal Procedure* (1987) 30-32, "adversarial and inquisitorial systems no longer stand in sharp contrast. They are now mixed systems, in the sense that they contain elements of both in different proportions".

¹⁵³ See *supra* chapter 2.

¹⁵⁴ Packer "Two Models of Criminal Process" (113) *Un. Penn. L. Rev* (1964) 1, 9-23. The inquisitorial system does tend towards a crime control model. The civilian system exerts a subtle pressure on the accused to testify. It does so because of its inherent focus on the confession and its preference for a free evaluation of evidence. In contrast, the accusatorial system tends to emphasise the interests of the accused. It is a due process model because of the elaborate artificial rules (hearsay, privilege, etc.) which place obstacles between the state, the suspect and the successful completion of the criminal process.

The French Civil System: Modern French criminal procedure is the descendent of the Code d'Instruction Criminelle of 1808, itself a revolutionary reform of the older Ordonnance Criminelle 1670.¹⁵⁵ At the pre-trial stage the police or the prosecutor (*procurer*) may question the suspect without notification of his rights or a "caution" so fundamental to the accusatory system. Although the suspect does not possess a right to silence during interrogation, the police interrogator has no legal ability to compel an answer.¹⁵⁶ The French police have broad powers of seizure and interrogation without the need to show probable cause. The suspect may be held in detention for up to 48 hours (*gardé avue*) without charge.¹⁵⁷ In the United States suspects may not be held this long unless police have probable cause to arrest. If the police investigation justifies a charge against the suspect, he is brought before an examining judge (*juge d'instruction*) at a formal preparatory examination (*instruction judiciaire*).¹⁵⁸ The preparatory examination is the rough equivalent of the common law preliminary inquiry before a magistrate, but is not open to the public and the judge takes a controlling role in the examination of the accused. Article 114 of the modern Code de Procéderé Penalé states, "at [the accused's] first appearance, the examining magistrate shall advise him that he may freely decline to make a statement. Mention of the warning shall also be included in the official dossier". Article 114 and the associated right to legal counsel are only triggered once the accused is formally arraigned before the *juge d'instruction*.¹⁵⁹ The accused may not be charged unless there is a *prima facie* case against him. The purpose of the preparatory examination is to actively involve the accused in the criminal investigation and the judge may question in such a way as to solicit a confession. At this stage, the accused's legal representative has only a limited authority. His primary function is to prevent a procedural abuse of his client's rights.¹⁶⁰ The French "silence warning"

¹⁵⁵ The Code d'Instruction Criminelle (1808) represents an inquisitorial system with an overlay of English adversarial procedures. The modern Code de Procéderé Penalé is also partly based on a recognised 1897 code DP IV 119. The silence principle is generally contained in articles 105, 114, 118(3), 279 and 406 of the Code de Procéderé Penalé.

¹⁵⁶ Pieck "The Accused's Privilege Against Self-Incrimination in Civil Law" *Am. J. Com.L* (1962) 588-89; Sheehan *Criminal Procedure in Scotland and France* Edinburgh (1975); Frase "Comparative Criminal Justice as a Guide to Law Reform, How Do the French Do It?" (78) *Cal L. Rev* (1990) 581-582; Weston *An English Readers Guide to the French Legal System* New York (1991).

¹⁵⁷ Code de Procéderé Penalé article 63, 64, 64(2), 65 and article 77. See also Ingraham *The Structure of Criminal Procedure* New York (1987) 62.

¹⁵⁸ The victim or injured party may initiate a preparatory examination. The victim (*parté civile*) may participate in the examination and is entitled to press for damages. The preparatory examination has a dual function of both a criminal and civil-damages hearing. A separate claim for damages need not be lodged and the *juge d'instruction* will assess the victim's claim for compensation along with all the other evidence, thereby sparing the victim additional legal expenses.

¹⁵⁹ The article 114 silence principle is a weak one as it is triggered only at the judicial examination. The warning comes too late as the suspect has already been questioned by police who are under no obligation to issue a warning.

¹⁶⁰ The suspect does not have an automatic right to counsel at the *garde avue* (article 63, 77). The right to counsel only becomes a part of the process at the preparatory examination stage (article 114(3), 116). Counsel has a right to be present at the examination and to examine the dossier (article 118(3)).

differs from the United States *Miranda* and the English PACE warning in several respects. First, the warning need not be administered to a suspect during the preliminary interrogation. Second, even during the preparatory examination the juge d'instruction or the judicial police need not administer a silence warning unless there is a *prima facie* case against the suspect.¹⁶¹ Third, once the warning is administered it constitutes a decisive break and statements following the warning cannot be admitted into evidence.

The juge d'instruction compiles an unbiased record (*dossier*) of the available evidence. The dossier must reflect an impartial balance without favour either to the accused or to the state. (During the preparatory examination the accused is entitled to harness state resources in making his case. This type of process sidesteps the accusatorial problem of unequal access to resources.) There is a complete evidentiary disclosure between the accused and the prosecution. (The accused cannot surprise the prosecution with a tactical last minute evidentiary disclosure.) The juge d'instruction has the power to call witnesses, to order searches and seizures and to request a further police investigation. The accused is encouraged to participate in the process by giving evidence or by submitting to questioning, but cannot be compelled to do so. A refusal to answer questions has evidentiary weight and will be noted in the official dossier. The accused is usually advised to remain silent when no *prima facie* case emerges from the examination. When it appears that a clear *prima facie* case is emerging the pressure to speak becomes stronger. Demeanour, attitude and credibility are commented upon and noted in the dossier. The accused is not expected to make sworn statements under oath and he is not subject to a legal sanction for lying.¹⁶² This courtesy is extended to spouses, parents and relatives to the fourth degree. The completed dossier forms the substantial basis for all further judicial proceedings.¹⁶³ The dossier is handed over to a court of arraignment (*Court d'Assise*) which makes the decision whether to continue with the prosecution.¹⁶⁴ The Assise decision is subject to appeal (*Chambre d'Accusation*). According to French jurists, the pre-trial judicial examination is one of the noblest provisions of civil criminal law, designed to protect the accused and to familiarise the judge with the evidence against the accused.

¹⁶¹ Article 105, "the judge in charge of the preliminary investigation, as well as magistrate and judicial police, may not with the intention of frustrating defence rights, hear as witnesses, persons against whom there exists serious evidence indicating guilt".

¹⁶² Article 105 and article 361 (suspect commits no perjury).

¹⁶³ The completed dossier contains all relevant evidence including physical evidence such as fingerprints, identification line-up evidence, and body samples (DNA, saliva, blood, fluid, breath, etc.).

¹⁶⁴ Article 177 to 181.

Before the main trial begins the Assise juge-president is obliged to conduct an interview with the accused in order to familiarise himself with the preparatory dossier.¹⁶⁵ The juge-president may even attempt to extract a confession from the accused or, if unsatisfied by the dossier, order a further police investigation. The main trial consists of the juge-president, two assessor judges and a jury (a procedural idea adopted in 1808 from the English accusatorial system). The dominant characteristic of the main trial is judicial control rather than party control. The inquisitorial trial, unlike the accusatorial, places little emphasis on oral presentation of evidence or on cross-examination by counsel. The trial is generally a recapitulation, with variations, of the written dossier compiled by the preparatory juge d'instruction. The French civil trial process is unique in that a combination of both judge and jury is responsible for the end verdict. The juge-president may add to the dossier by direct questioning. He may examine differences between the accused's testimony in court and at the preparatory examination. The assessor judges, the defence counsel and even the jury are free to direct questions to the accused with the juge-president's permission.¹⁶⁶ The accused gives unsworn testimony and is warned about his right to silence (Art 114). He cannot be compelled to answer and does not waive his right if he chooses to answer some questions but not others. His selectiveness in answering questions, his evasiveness, demeanour and credibility may be commented upon and may form the basis of adverse inferences. Traditionally, silence in the face of an accusation [*j'accuse*] could exceptionally amount to an inference of guilt. However, article 6(1) of the European Convention on Human Rights prohibits the drawing of a direct guilty adverse inference from silence alone. Silence by itself does not amount to a tacit confession. In the civil system, unlike the accusatorial system, a voluntary confession of guilt does not amount to conclusive proof against the accused. The inquisitorial confession amounts only to additional evidence and is added to the state *prima facie* case. It must be evaluated together with all the other evidence. The adverse inferences drawn from the accused's silence may strengthen the state *prima facie* case. The cumulative result of the inquisitorial criminal process is that the majority of defendants confess, either at the preparatory examination or at the assise trial before the juge-president. By far the majority of guilty convictions are based on the confession extracted from the accused in a carefully designed and controlled legal environment subject to stringent procedural safeguards.

¹⁶⁵ The juge-president interviews the accused privately, without counsel present. He must assure himself that the evidence has not been tampered with, that the accused understands the nature of the procedure and is properly represented.

¹⁶⁶ Defence counsel is prevented from cross-examining a witness directly. Questioning occurs through the medium of the judge. In practice only the presiding judge can cross-examine directly (article 312).

The French civil-inquisitorial system contains a number of unique factors. First, the right to silence and the right to legal advice are not triggered upon arrest and have no place in the police interrogation. The civil system has not developed an American type *Miranda* caution, nor an English type PACE caution. This gives the police a window of opportunity before the preparatory examination in which to solicit a confession. These rights are only triggered during the preparatory examination before the juge d'instruction. (Note, there is no procedural reason why these rights should not be extended to the police interrogation and the European Convention on Human Rights (article 6) will probably be a catalyst in this regard.) The police are obliged to maintain a written record of arrest date, interrogation times and duration, periods of rest, release times, medical examinations and sleep periods. The record must be signed by the accused. The accused also has the right, in theory, to withdraw any pre-trial confession made to the police or examining juge d'instruction before the main trial.

Second, the distinctive character of the civil trial process is the central and controlling role played by the juge d'instruction at the preparatory examination and the juge-president at the assise trial. The juge-president in particular directs the trial and draws evidence from the accused and other witnesses by personal questioning. In order to carry out this central role, the French judge must possess a complete knowledge of all the evidence for and against the accused. In contrast, the common law judge is a neutral umpire and the less he knows about the evidence the better prepared and the more free he is of potential prejudice.

Third, the civil criminal process is specifically designed to elicit admissions (preferably in the form of a confession) from the accused. The accused is regarded as the best source of evidence. As a result the silence principle is somewhat weaker in the typical inquisitorial system and stronger in the accusatorial system. In many European criminal systems the right to silence and the privilege against self-incrimination amount to no more than simple positive safeguards against abuse by state authorities or an absence of administrative and legal powers to compel an answer. The adoption into French domestic law of the European Convention of Human Rights is likely to substantially increase the accused's ability to resist the compulsion of answers at the police interrogation as well as fleshing out his right to silence at the preparatory examination and the assise trial. For example, the German criminal code largely modelled on the French code, has recently prohibited the drawing of adverse inferences and the evidentiary use of the accused's trial silence.

The German Civil System: German criminal procedure has been strongly influenced by the French Code d'Instruction Crimennele of 1808¹⁶⁷ and the German criminal process is remarkably similar to the French model.¹⁶⁸ As a reaction to the distorted legal policies of the Nazi era, the Anglo-American system of criminal procedure has had a profound effect on German post-war jurisprudence. German definitions of the silence principle have also looked for inspiration to the International Covenant on Civil and Political Rights, article 14(g) and the European Convention on Human Rights, article 6(1). The German criminal code has also been shaped by the constitutional concepts of human dignity and the individual's right to privacy.¹⁶⁹ These influences are reflected in sec 136 of the Criminal Procedure Code which reads, "the accused in a trial is not bound to incriminate himself and has the right [at his discretion] to either answer or refuse to answer the charge brought against him".¹⁷⁰ Sec 136(1) holds, "at the beginning of the first [judicial] hearing, the accused is to be informed of the charge. He must be warned that he is free to respond or to remain silent. At any time during and even before the initial hearing he may consult with defence counsel of his choice." A right to silence which was previously only available at the judicial stage of the criminal process, has been extended to the police interrogation stage.¹⁷¹ (Note, in extending the silence principle to the police interrogation phase, the Germans have shown a greater flexibility than their French counterparts.) The suspect, once detained, must be warned of his right to silence and the right to legal advice.¹⁷² Generally no adverse inferences may be drawn from the accused's exercise of silence at the pre-trial or the trial stage. In essence, the accused's silence, after notification, has no evidentiary value at other subsequent proceedings.¹⁷³ A refusal to speak or a refusal to testify has no substantive

¹⁶⁷ French procedures were adopted in Bavaria (1848), Prussia (1849), Saxony (1868). The modern German Criminal Code is based on the *Strafprozessordnung* of 1879 and the Judicature Act of 1877.

¹⁶⁸ The French model is followed closely. First stage, an investigation by police and the public prosecutor. Second stage, a preparatory examination by a special investigating judge. Third stage, the actual trial before a judge and judicial assessors.

¹⁶⁹ The German constitutional principle of *Rechtsstaat* is an important influence on the right to silence. To achieve a fair procedure, a right to silence must be compulsory although subject to certain exclusions and exceptions. The result is that the accused is no longer obliged to make a confession, which must now be voluntary and cannot be induced contrary to the accused's free will (STPO sec 136(a)(3)).

¹⁷⁰ German criminal code STPO sec 136(1) (modified Dec 19, 1964, BGBII 1067).

¹⁷¹ STPO sec 163(a) IV(1), also BGHSt Wes Ger 325, 327 (1975) and BGHSt 38, 214 (1992). These rules are based on the notion of a *rechtsstaatlichen fairen verfahrens*. Restricting the silence warning to the trial stage is unfair, because once the police ignore their duty to warn the suspect of his right to silence, a subsequent judicial warning comes too late and is a meaningless formality.

¹⁷² The accused may consult with counsel, but counsel may not be present during interrogation.

¹⁷³ Germany, like France, allows for the free evaluation of all relevant evidence (*beweiswürdigung*). This means that all evidence, including adverse inferences from silence are admissible. Previously the accused's silence could be used against him at trial and adverse inferences could amount to a direct inference of guilt. This is now no longer permissible both in terms of the constitution and the criminal code. However, as in France, the majority of accused tend to confess because the criminal inquisitorial process is subtly biased in favour of the confession as the best evidentiary source. A confession (unlike the accusatory confession) is not conclusive proof and does not relieve the German court of the duty to continue.

evidentiary value and no adverse inferences may be drawn.¹⁷⁴ When the accused waives his right to silence or has implicitly consented to the admission of his statement, adverse inferences may be drawn. The German Court (as is the Anglo-American practice) makes a distinction between physical and communicative evidence. Sec 81(a) of the criminal code allows for the taking of blood samples, particularly in the case of drunk driving. Sec 81(e) permits the evidentiary use of DNA blood and semen samples. The silence principle applies not only to the accused but also to the non-party witness.¹⁷⁵ The parameters of the German silence principle are dependant on a balance of interest analysis. The state interest in obtaining evidence to be used against the accused must be balanced against the accused's constitutional rights to physical integrity, dignity and privacy.

11.4 The Eastern Japanese Divide

The Silence principle is entrenched within the modern Japanese constitution (*Kenpo*) and the criminal procedure code (*Keiji Soshoho*) law No.131 of 1948. Despite these constitutional and statutory provisions, the silence principle is often a theoretical right rather than a practical protection for the defendant. Japan has no historical precedent or cultural affinity to what is essentially an artificially imposed Western-style privilege against self-incrimination.¹⁷⁶ Japanese law enforcement officials (in common with law enforcement authorities in other legal systems) have developed an unswerving hostility to the right of silence. To many Japanese prosecutors the silence principle is an obstacle which requires a degree of perseverance in order to overcome. Police and public prosecutors possess wide-ranging powers of arrest, detention and interrogation (to a degree which is unacceptable in both the Anglo-American and the European systems). The Japanese legal system is a melting pot of both Western and Eastern moral and ethical-legal rules sometimes in conflict with each other. On the one hand, the Japanese criminal process, as modified by the American Occupational Administration after World War II, contains recognisable Western legal principles including interrogation safeguards, a right to silence and legal counsel, and confession rules based on the notion of voluntariness and reliability. On the other hand, honour-based cultural mores require the defendant to co-operate fully with public authorities. The confession is regarded as the best source of proof and as the

¹⁷⁴ No adverse inference may be drawn, even in the circumstance where the innocent person would have spoken up if confronted by an accusation; BGH StrV (1983) 321, BGH StrV (1988) 239 and 383.

¹⁷⁵ Criminal code sec 55, there is no blanket right of the witness to decline to answer. As in the Anglo-American system, the witness may refuse to answer individual questions as they arise.

¹⁷⁶ See Walker "A Comparative Discussion of the Privilege Against Self-Incrimination" (14) *N. Y.L. Sch. J. Int. L. Comp. L* (1993) 25-27. For a history of the early Japanese criminal code see Dando *Japanese Criminal Procedure* B. George Translation 1965; Gadsby "Some Notes on th History of the Japanese Code of Criminal Procedure" (30) *L. Q. Rev* (1914); Abe "Self-Incrimination; Japan and the US" (46) *J. Crim. L. Criminology Pol. Sci.* (1960) 613.

only honourable path by which the defendant may redeem and rehabilitate himself. It would be misleading to believe that the silence principle is alien to Japanese jurisprudence. As in other legal systems, the Japanese criminal process is motivated by a truth-seeking rationale. However, the Japanese truth rationale is fundamentally and inextricably linked to the concept of the confession as a primary evidentiary source of a conviction. The Japanese principle must be viewed against the extra-ordinary importance placed on the confession. The Japanese silence principle is shaped by the dynamic interaction and balance between the legal and ethical need to extract truthful confessions and the need to protect individual rights. (Unlike modern Western jurisprudence which places the individual interest above the state interest, traditional balance of interests in Japanese society tends to favour the state over the individual.)

There are three major periods in the development of the Japanese legal system. An organised state criminal procedure has its origin in the *Takugawa Shogunate* (1600-1868) and was heavily influenced by contemporary Chinese criminal codes. The confession, usually coerced through torture and other physical and psychological pressures, was central to the criminal prosecution. A formal and ritual confession, drafted according to traditional Chinese abstract and stereotype norms, was a requirement before conviction and punishment. Authoritative texts on confessional law included an instructional manual on the methodology and degree of torture to be applied for each designated criminal offence. The *Meiji Restoration* (1868-1944) swept away all but the fundamental core values of the old procedure and replaced it with a Western-style criminal jurisprudence.¹⁷⁷ However, the traditional confession principle and associated standards of torture survived and were incorporated in all subsequent criminal codes.¹⁷⁸ It was only in 1879 that the old confession by torture standard was replaced by a confession by evidence standard. The influential criminal codes of 1890 (law no.96) and 1922 (law no.75) were largely based on French and German models. Japanese criminal procedure was modelled on inquisitorial procedure because of the central role placed on the confession by both the civilian and traditional Japanese legal systems. The modern Japanese criminal process is inquisitorial in nature and provides for an initial investigation by police (with much greater powers than their European counterparts), followed by a secret (non-public) judicial examination before an investigatory judge (*yoshin hanji*) and ending in a public trial. At all these stages the police, prosecutors and judges have wide discretionary powers to question and to induce confessions, although the accused is legally empowered to refuse to answer, and may not be punished for

¹⁷⁷ Chen "The Formation of the Early Meiji Legal Order" (35) *London Oriental Series* (1981) 31, 65, 79.

¹⁷⁸ The Meiji regime continued the use of torture as a confessional tool but placed restrictions on its use. No one under the age of 15 or over the age of 70 could be tortured. Torture as an officially-sanctioned criminal tool was only abandoned on the advice of the respected French jurist B. de Fontarabie (1879).

lying or perjury.¹⁷⁹ Each stage of the criminal process is purposely designed to elicit a confession and the public trial is often no more than a narrow examination of the admissibility and reliability of the accused's confession.

In the legal environment prevalent before the Second World War, the silence principle was practically non-existent. Defeat and a forcibly imposed *post-war Constitution* (1945-1948) resulted in the restructuring of the Japanese legal system. A legal system primary based on traditional and inquisitorial elements, now acquired an overlay of American-style accusatorial and adversarial influences. The present day Japanese criminal process is therefore a hybrid mixture of indigenous rules (Chinese influenced), inquisitorial rules (German influenced) and accusatorial rules (American influenced). Elaborate protective safeguards (modelled on American constitutional principles) were entrenched within the post-war Constitution and the Criminal Procedure Code of 1948. Article 36 of the Constitution forbids, "the infliction of torture by any public or state authority". Article 38 simply incorporates the wording of the American fifth amendment in verbatim, "no person shall be compelled to testify against himself", and "a confession made under torture or threat or after prolonged arrest or detention shall not be admitted into evidence". The Criminal Procedure Code, article 198(2) holds, "in the case of questioning, the suspect shall be notified that he need not answer any question against his will". Article 291 read with article 311 notes, "after the indictment has been read, the presiding judge must notify the accused that he may remain silent at all times and refuse to answer any questions". These legal provisions were an attempt by the American Occupational Administration to reshape the Japanese legal system from one focused narrowly on the confession, to one which included elaborate safeguards against state abuse of individual rights. Although moderately successful, the reforms of 1948 have failed to establish a meaningful right to silence. In an extra-ordinary conformist society, Japanese jurisprudence is still locked into the confession as the central medium of conviction. The present Criminal Procedure Code (amended six times since 1948) grants police and prosecutors astonishingly wide powers of arrest and interrogation. Although the right to silence is constitutionally mandated it is often ignored, sidestepped or phrased in ambiguous language. The Japanese public, by contrast to the American public, are still largely ignorant of their right to silence.

¹⁷⁹ George "The Right to Silence in Japanese Law" (43) *Wash. L. Rev* (1968) 1148; Abe "Japan Criminal Procedure" in *Police Power and Individual Freedom* Claude, R Soule Ed (1962) 269.

Police may arrest,¹⁸⁰ detain and interrogate the suspect for up to 48 hours without probable cause.¹⁸¹ Upon the showing of probable cause before a magistrate the suspect may be detained for a further 10 days.¹⁸² Additional periods of detention may be requested.¹⁸³ In total the police and prosecutorial service may detain a suspect for a period of 22 days before filing a formal charge.¹⁸⁴ The suspect is given only the most tenuous contact with legal counsel and is subject to continuous and arbitrary periods of interrogation. Although the suspect is informed of his right to silence and his ability not to answer questions, this protection may be illusory, as the police question at any time and for indefinite lengths during the 22 day detention period. At the arrest stage the police are expected to inform the suspect of his right to counsel,¹⁸⁵ but state-assisted legal representation is only obligatory at trial.¹⁸⁶ The suspect's ability to meet with counsel is limited and entirely at the whim of the prosecution.¹⁸⁷ Counsel is not permitted to be present during the actual interrogation session and the refusal of access to legal representation will not render the confession inadmissible at trial.¹⁸⁸ The right to silence warning, although constitutionally mandated, is only administered once after arrest and before questioning. It is often issued in an ambiguous manner and the warning need not be repeated during subsequent interviews.¹⁸⁹ The interrogator is entitled to continue questioning even in the face of repeated invocations of the right to silence. (Note in the accusatorial American and English interrogation, the invocation of silence immediately terminates the interview.) In practice the Japanese interrogator may continue to question until the suspect breaks down and answers. A failure to

¹⁸⁰ The police may use a number of procedural powers on arrest and detention. For example, the *Bekken Taiho*, which allows the police to arrest the suspect on a minor charge and to detain him for 24 hours, even though there is insufficient evidence to proceed on the main charge. The *Nin'i Dōkō*, a request by the police for the suspect to voluntarily accompany them to the police station for questioning.

¹⁸¹ See criminal code article 199(1) and (2). Rule 143 of the rules to the criminal code and Superior Court rules no.32.

¹⁸² See criminal code article 205(1). See also George "Rights of the Criminally Accused" (53) *Law and Contemporary Problems* (1990) 88-89.

¹⁸³ Criminal code sec 207(2). Although a judge may deny such a request, almost 99% of such requests are granted.

¹⁸⁴ During this period the suspect is held in a temporary substitute prison (*Daiyo Kangoku*), where he may be readily available for interrogation.

¹⁸⁵ Constitution article 34, clause (1). Criminal code article 203.

¹⁸⁶ Criminal code article 272. Indigents are forced to wait until after the indictment before receiving state-assisted legal aid.

¹⁸⁷ Criminal code article 39(3). The prosecution at its own discretion determines a time, date and place for such meetings. Despite the Supreme Court's instruction to use such a power sparingly, prosecutors continue to limit access to counsel. Note, a judge may also limit access by family to the accused, article 81.

¹⁸⁸ The Supreme Court has issued a set of discretionary guidelines to the prosecution on access to the accused by counsel, *Sugiyama v Osaka Prefecture* 32 Minshu 820 (Saikosai) Sp CrT (1978).

¹⁸⁹ Criminal code article 198(2) obliges the police to inform the accused of his right to silence, but sec 203(1) also obliges the police to ask the accused for an explanation of the facts. These two provisions cancel each other out and police often merge the two provisions into one sentence, further confusing the suspect. In effect the police say, "you don't have to say anything" and then immediately demand, "now talk".

notify the suspect of his right to silence does not necessarily render the confession involuntary and therefore inadmissible at trial.¹⁹⁰ (Note, a failure to administer the *Miranda* safeguards to the American accused is a material breach. A confession obtained as a result of a material breach of due process is inadmissible in the Anglo-American trial.) The evidentiary admissibility of a confession is determined by the usual standards of voluntariness and reliability. The Japanese standard of voluntariness is somewhat looser and broader than the equivalent Western standard.¹⁹¹

Japanese statutory definitions of a threat, inducement, compulsion, trickery and deception are much broader than the Western definitions.¹⁹² Questioning during a procedurally illegal detention or a failure to warn the suspect of his right to silence do not necessarily affect the voluntariness of a confession.¹⁹³ As long as the confession adheres to the wide statutory-defined standard of voluntariness, it will be automatically admissible at trial. The Japanese court may sometimes admit an involuntary confession when it is coupled with other extraneous evidence suggesting guilt, but it will always exclude a confession which has little evidentiary weight. Reliability is a more likely ground on which to base the inadmissibility of a confession. The Japanese court traditionally pays more attention to the contents of the confession rather than the circumstances in which it was obtained. The reliability standard requires an analysis of the inconsistencies between the confession and known objective facts. A confession is unreliable and inadmissible when it fails to reconcile or explain facts revealed by extraneous evidence. (Note, the Japanese confession standard is an unusual mix of both pre-*Miranda* type voluntary requirements as well as *Miranda*-like safeguards. The importance attached to the reliability rather than the voluntariness of a confession parallels the emphasis placed by the English court on the reliability standard of sec 76(2)A of PACE (1984)).

The Japanese court is no different to its English and American counterparts when it tends to interpret procedural rules and the violation of these rules in a manner which is favourable to the interests of law enforcement. However, the Japanese court takes this favourable bias one step further by incorporating the cultural principle of *torshirabe junin gimu*, "the duty of an arrestee or detainee to submit to questioning throughout the period of detention". Prevailing standards in the courtroom reflects the widely held cultural belief of Japanese society that it is natural and expected for the accused to testify. The accused's silence at trial heightens suspicion and

¹⁹⁰ *Shirogane v Japan* 4 Keishu 2359 (Saikosai) Sp Crt (1988).

¹⁹¹ Criminal code article 198(4), the confession is read to the accused who must verify its truthfulness by signing and sealing the document, although he has no duty to do so. See also article 233.

¹⁹² Constitution article 38(2). Criminal code article 319(1).

¹⁹³ *Tsukahara v Japan* Keishu 1245 (Saikosai) (Sp Crt) (1990).

justifies an intensification of prosecutorial and judicial commentary.¹⁹⁴ At the commencement of the trial the judge is obliged to warn the accused of his right to silence.¹⁹⁵ The effect of this warning is usually neutralised because it is immediately followed by a judicial request for an explanation from the accused. The judge may also intervene during the course of the trial and directly question the accused.¹⁹⁶ Silence in the face of judicial questioning may be used against the accused. The psychology of a Japanese trial demands a confession as the first step on the process of redemption and rehabilitation. A failure to confess and an insistence on silence is often perceived by the court as a sign of guilty stubbornness and the accused who refuses to testify runs the risk of a disproportionately higher punishment. As a result, very few Japanese defendants assert the right to silence or refuse to testify. Some 98% of all criminal convictions are confession-based. The Western notion of a silence principle as a protection of individual self-worth, dignity and privacy is not one shared by Japanese jurisprudence. Neither is the idea that the silence principle guarantees the presumption of innocence and a state-shouldered burden of proof. On the contrary, there is a strong emphasis on the individual's duty to co-operate with the state even to the detriment of self. The Japanese silence principle serves primarily to give the accused some measure of protection from abuse at the hands of state interrogators. Even here the Japanese understanding of the degree of compulsion required to infringe the accused's right to silence is significantly higher and different to Western standards. (Note, the *Griffin* impermissible burden standard would find no place in a Japanese court room.) In essence the Japanese silence principle must be understood against the background of a culture in which the defendant's co-operation with the state is expected and where the confession plays a central evidentiary role.

There are a number of significant differences between the Japanese and the Western perception of a silence principle which also serves to illustrate the cultural-legal divide between East and West. First, Japanese society has no strong expectation of autonomy and personal privacy. A substantial state intrusion into personal autonomy is not necessarily regarded by the Japanese legal system as a constitutionally impermissible infringement of human rights. In the West the protection of personal privacy is regarded as a fundamental justification for the silence principle. The importance of a silence principle is diminished in a society which places a lesser value on personal autonomy. Second, Japanese society exerts a strong pressure on the individual to conform and to co-operate with the state. A high level of trust exists between the individual and the authorities. Japanese society cultivates the duty of co-operation as a moral

¹⁹⁴ *Sakai v Japan* 32 Keishu 670 (Saikosai) Sp Crt (1978).

¹⁹⁵ Constitutional article 38(1). Criminal code article 311(1).

¹⁹⁶ Criminal code article 311(2) expressly provides for a judicial power of intervention.

value. The silence principle become irrelevant when co-operation with the state is regarded as a moral value. No such high level of co-operation between individual and state is expected or demanded in a Western legal system. On the contrary, the Western criminal justice system is often regarded with suspicion and one of the purposes of a silence principle is to curb government overreach.

Third, the Japanese understanding of "compulsion" and "voluntariness" is different to Western definitions. The Japanese interrogator is allowed a latitude and freedom to question which does not exist in the West. Intrusive questioning, prolonged periods of detention, high levels of psychological intimidation, limited access to legal counsel and the cultural pressure to cooperate gives the Japanese prosecutor an edge which is not available to the Western law enforcer. In the West extended custodial interrogation over several days or even several hours will render a confession inadmissible. In Japan interrogation over several days is the norm and condoned by the courts. The Japanese silence principle is regarded as a protection only against excessively high levels of psychological or physical compulsion, levels much higher than would be considered reasonable in the West.

Fourth, the exclusive focus on the confession as the principal Japanese tool for conviction means that the silence principle is correspondingly diminished. For this reason academic commentary on, and public knowledge of, the silence principle is limited. The central focus on the confession also means that law enforcement officials rarely examine or weigh independent extrinsic sources of evidence. There is no Western style distinction between communicative evidence and real physical evidence. All relevant evidence is admissible. Intrusive forms of physical evidence (blood, fluid, semen, DNA)¹⁹⁷ are as easily admissible as non-intrusive physical evidence (fingerprints, identification features, foot prints, etc.).¹⁹⁸ There is also no prohibition on the admissibility of documentary evidence, even when the contents are private or incriminatory.

Fifth, an extreme illustration of the Western-Eastern cultural-legal divide is the example set by the People's Republic of China. There is a complete absence of a constructive silence principle in the Chinese criminal procedure code. The Chinese legal system is based primarily on the confession and there is nothing in Chinese jurisprudence remotely resembling a presumption of innocence or the burden of proof as developed in Western procedural law. To avoid obvious physical coercion of confessions, the Chinese code (article 32) reads, "the use of torture to

¹⁹⁷ Criminal code article 167.

¹⁹⁸ Criminal code article 128, 218(2).

coerce statements and the gathering of evidence by threat, enticement, deceit or other unlawful methods is strictly prohibited".¹⁹⁹ However, the code (article 64) also states that, "the defendant *shall answer* the questions put by the investigation personnel, according to the facts".²⁰⁰ The defendant may refuse to answer irrelevant facts and the prosecutor must allow the defendant the opportunity and time to explain the facts at his own pace, without demanding or pressuring an explanation. At best the defendant finds some protection in the refusal to answer at interrogation or in a refusal to testify at trial. This type of refusal does not attract a legal sanction. But if the defendant chooses silence, an adverse inference amounting to a silent confession of guilt may be drawn against him. A recent reform movement in China is urging the government to introduce a limited Western-style silence principle. The reform movement is based in Hong Kong, which has an English-style accusatorial legal system.

In summary, the Japanese right to silence is constitutionally entrenched and statutorily codified. On paper it is the legal equivalent of the American fifth amendment, but in practice the Japanese silence principle is a mere shadow of its American cousin. It is an emasculated foreign importation trapped in a legal system designed by history, tradition and culture, not for the protection of the individual, but for the efficient compulsion of a confession. The Japanese silence principle is a second class constitutional right.²⁰¹ It has escaped the influence of an international libertarian philosophy and the post-World War II elevation of the silence principle into a fundamental and absolute human right.

11.5 Other Legal Systems

Eastern Europe: Countries previously part of the Soviet bloc recognise varying degrees of a silence principle in their criminal codes. Historically all Eastern European countries possessed some form of an inquisitorial legal system. Now that the veneer of socialist-ideological laws have been stripped from the traditional indigenous criminal codes of these countries, the silence principle is beginning to emerge as an important procedural protection for the defendant.

A good example is Russia, which statutorily recognises both the suspect's pre-trial and the accused's trial right to silence. The suspect's refusal to answer questions and the accused's refusal to testify cannot amount to a corroboration of guilt. Article 76 read with article 77 of the Russian criminal code reads, "an acknowledgement of guilt by the accused may become the

¹⁹⁹ See Ingraham *The Structure of Criminal Procedure* (1987) 81.

²⁰⁰ *Ibid* at 81.

²⁰¹ The modern Japanese silence principle resembles the pre-World War II American silence principle which was also defined as a second class constitutional right in *Palkov v Connecticut* 302 US 319, 325-326 (1937) per Cardoso J. See *supra* chapter 5 note 19 and accompanying text.

basis for an accusation only if the acknowledgement is confirmed by the totality of the evidence in the case". Silence may in some circumstances be evaluated together with all other extraneous evidence and be added to the state case-in-chief. The Russian silence principle is a narrow construction and applies only to the criminal defendant. The silence principle does not extend to the non-party witness who is obliged to give evidence from the stand even at the risk of self-incrimination. The Russian silence principle, as in many other inquisitorial systems, recognises only an accused's right to silence and not a non-party witness privilege against self-incrimination. The developing silence principle in Eastern Europe reflects the dynamic tension common to all inquisitorial-based legal systems. A balance of interests must be found between state law enforcement interests and the protection interests of the individual. How the balance of interests will be struck and what the scope of the silence principle will be depends on the differing socio-cultural nuances of each country.

South Asia: Criminal procedure statutes in India, Pakistan, Sri Lanka, Singapore, Hong Kong and Malaysia are generally imprinted with a Western-style silence principle.²⁰² The legal systems in these jurisdictions are a legacy of British colonial rule. The various definitions of the silence principle reflect values similar to those of the English common law. For example, in *de Mel v Haniffa* (Sri Lanka),²⁰³ Gratiaen J states, "to my mind...here as in England once proceedings have been initiated against an accused person, he is placed in a special category. The precarious position in which he stands entitles him [to certain protections]...He cannot be compelled or legally required to contribute to the proof of his alleged guilt by giving or providing even indirectly, evidence against himself." The silence principle has been statutorily codified in all South Asian jurisdictions and there is a remarkable uniformity between these codifications and the English silence principle. The only major difference is that most Asian jurisdictions abrogate or limit the silence principle at the pre-trial interrogatory stage of the criminal process. The Asian suspect (except in Hong Kong, India and Singapore) is usually under a statutory obligation to answer all relevant police questions. Police enforcement officials in Asian jurisdictions have wide statutory powers of investigation and detention and are sometimes not obliged to administer the silence warning or caution. The obligation to notify the suspect of his right to silence and right to legal advice upon arrest are based on internal administrative policy rules which are often flouted in practice.

²⁰² The very first South Asian Evidence and Criminal Code was prepared in 1872 for India. The Indian Evidence Act (1872) incorporated all of the English common law principles on evidence. The Indian Evidence Act also served as a model for the subsequent criminal codes of all other South Asian jurisdictions under British colonial control.

²⁰³ (1952) 53 NLR 433, 438.

The silence principle at trial is a strong protection and does not differ appreciably from the English trial right to silence. The accused's silence may never amount to a direct inference of guilt. Prosecutorial comment on the accused's failure to testify is prohibited but judicial comment is allowed within the recognised parameters set by the English common law. The accused's silence by itself cannot convert a weak prosecution case into a strong one or raise it above the threshold of proof or beyond a reasonable doubt. Silence may be evaluated together with other evidence and is generally added to an already established *prima facie* case. The accused's silence may only give rise to an adverse inference once the prosecution has established a *prima facie* case and the accused through his silence has failed to rebut it. There must be no other extraneous reason for the accused's silence except his obvious reluctance to answer the case against him. Asian jurisdictions regard the presumption of innocence and the prosecutorial burden of proof as fundamental elements of a fair trial process. The silence principle is generally regarded as a reinforcement and justification of these due process elements. The witness privilege against self-incrimination in all the South Asian jurisdictions is a carbon copy of the English privilege. The Asian witness may invoke the privilege of self-incrimination on a question by question basis whenever there is a reasonable risk of self-incrimination and exposure to a possible criminal charge. In all other ancillary aspects (admissibility of physical evidence, documents, immunity statutes, etc.) the Asian silence principle does not differ from those in Western jurisdictions.

The Republic of Singapore serves as an example of the continuing and pervasive influence of English jurisprudence.²⁰⁴ In 1976 Singapore became the only Commonwealth jurisdiction to codify *mutatis mutandis* the draft proposals of the controversial U.K. Criminal Law Revision Committee's Eleventh Report on Evidence.²⁰⁵ The Criminal Law and Procedure Code (Amendment) Act 10 (1977) contains similar limitations on the accused's right to silence as are presently found in the English Criminal Justice and Public Order Act (1994) (CRIMPO). Sec 121 read with sec 122(6) of the Singapore Criminal Code provides for an obligatory police caution (one of the few South Asian jurisdictions to do so). The suspect is warned that he is obliged to mention all facts which will assist him in his defence. The court may draw adverse inferences from the suspect's failure to mention facts which should have reasonably been mentioned during the pre-trial police interview.²⁰⁶ Sec 123(3) expressly preserves the common law right to silence.

²⁰⁴ See Khee-Jin Tan "Adverse Inferences and the Right to Silence; Re-examining the Singapore Experience" *Crim. L. Rev* (1997) 471; Hor "Privilege Against Self-Incrimination and Fairness to the Accused" *Singapore J.L. Studies* (1993) 35; Yeo "Diminishing the Right to Silence; The Singapore Experience" *Crim. L. Rev* (1983) 89.

²⁰⁵ HMSQ Commd 4991 (1972)

²⁰⁶ (Pre-trial silence): *Ng Chong Teck v PP* (1992) 1 SLR 664 HC and *Thongbai Naklangdon v P.P.* (1996) 1 SLR 497 CA. (Trial silence): *Nathan Tse v P.P.* (1992) 1 SLR 870 HC.

A constitutional challenge to the Criminal Law and Procedure Act 10 (1977) was rejected in *Jaykumal v P.P.*²⁰⁷ on the grounds that the statute allows only for the drawing of adverse inferences as appear “proper” in the circumstances. The statute is not an infringement of the defendant’s constitutional rights nor does it unreasonably limit or alter the common law, according to *Mazlan Maidun v P.P.*²⁰⁸ Sec 189 warns the accused of the consequences of not testifying at trial particularly once a *prima facie* case has been established against him.

According to sec 196(2) if the accused refuses to testify or refuses to answer any question without good cause shown, reasonable adverse inferences may be drawn. The tendency in Singapore, as it is in all other South Asian jurisdictions, is to favour a jurisprudence based on crime prevention values rather than one based on due process values. *Mazlan Maidun v P.P.* is thought to mirror public opinion in South Asia which favours the maintenance of law and social order, a tough stance on crime and the continued emphasis on deterrence as the basis of punishment. In the words of Yong Pung How, Chief Justice (Singapore),²⁰⁹ “in English doctrine, the rights of the individual are of paramount consideration. We shook ourselves free from the confines of English norms which do not accord with the customs and values of Singapore society. Our priority is the security of law-abiding citizens rather than the rights of the criminals to be protected from incriminating evidence.”

Middle East: All the legal systems of the Middle East are to some extent the legacies of previous French (inquisitorial) and British (accusatorial) colonial administrations. These Western-style criminal codes exist in an uneasy symbiotic relationship with religious law which often takes precedence over them. In Israel (an English-style accusatorial system) the accused’s English style right to silence exists in parallel with a religious law right to silence. Although the religious silence principle is not constitutionally or statutorily entrenched, it forms part of a fundamental Judaic religious code and has been traced back to the fourth century before Christ. The body of Jewish religious law is set out in the Five Books of Moses (*Torah*) and subsequent traditional rules in the *Mishnah* (219 AD) and the *Talmud* (500 AD).²¹⁰

²⁰⁷ (1981) 3 WLR 408, following on *Haw Tua Tau v P.P.* (1981) 2 MLJ 49; (1981) 3 ALL ER 14.

²⁰⁸ The seminal case *Mazlan Maidun v P.P.* (1993) 1 SLR 512 CA per Yong Pung How C.J, denies that the silence “privilege” has any constitutional significance.

²⁰⁹ Keynote address before the Conference on Review of Judicial and Legal Reforms, Buttersworth (1996) p.VI.

²¹⁰ Horowitz “The Privilege Against Self-Incrimination, How Did It Originate” (31) *Temp. L.Q.* (1958) 121; Lamm “The Fifth Amendment and its Equivalent in Jewish Law” (17) *Decalogue J* (1967) 1; Rosenberg “In the Beginning; The Talmudic Rule Against Self-Incrimination” (63) *N.Y. Uni. L. Rev* (1988) 955. See also Mazabow “The Origin of the Privilege Against Self-Incrimination; Jewish Law” (104) *SALJ* (1987) 710.

In the *Babylonian Talmud, Bava Kamma 74b*, a commentary by Rashi reads, "upon his own testimony he may not be condemned, for indeed, the Torah disqualifies a relative as a witness, and a man is a relative unto himself. Just as a relative is an incompetent witness because of his presumed bias in favour of the accused, so the accused himself is deemed biased in his own favour." The great Jewish philosopher Maimonides in his masterly restatement of the Torah (Book Fourteen, Judges)²¹¹ summarises the Talmudic principle against self-incrimination as, "no man is to be declared guilty on his own admission. This is a divine decree."

An Islamic religious code (*Sharia*)²¹² is entrenched within the criminal codes of Saudi Arabia, Afghanistan, Iran, Sudan, Oman, Yemen and Northern Nigeria. The Sharia code has a significant influence on the criminal law of Egypt, Iraq, Libya, Tunisia, Algeria, Morocco, Lebanon, Malaysia, Indonesia, Pakistan, Niger, Chad and Mali. Islamic criminal law is derived from the *Quran*, the acts and words of the prophet Mohammed (*Hadith*), traditional pre-Islamic law and a kind of common law, specific to each country, composed of scholarly interpretations and commentaries. The Sharia code is similar to Judaic religious law and provides the criminal defendant with an absolute right to silence. Both Judaic and Sharia law exclude confessions induced by coercion, deception or torture. A confession is only admissible in a court if the accused is able to exercise his free will. "Free will" is the accused's unequivocal acknowledgement of all the elements of the crime. A confession may only be made to a judicial forum. Police-induced confessions are automatically inadmissible. The confession must also be corroborated by extrinsic sources of evidence. In its pure form a Sharia-based criminal process must maintain an absolute right to silence, permit the complete exclusion of all non-judicially obtained confessions, apply stringent controls to the accused's waiver of silence and allow for the voluntary withdrawal of a confession at any stage of the criminal proceeding.

²¹¹ Code of Maimonides, Book of Judges 14th, 52-53, Penguin Ed (1984).

²¹² Walker "The Rights of the Accused in Saudi Criminal Procedure" (15) *Loy. L.A. Int and Comp. L.J* (1993) 863; Souryal "The Role of Sharia Law in Determining Criminality in Saudi Arabia" (12) *Int. J. Comp and Ap Crim Justice* (1985) 1, 5.

CHAPTER 12

THE SO-CALLED RIGHT TO SILENCE

"the so-called right to silence... is contrary to common sense. It runs counter to our realisation of how we ourselves would behave if we were faced with a criminal charge."¹

Proponents have sought to justify the silence principle by elevating it into a fundamental² and sometimes absolute right.³ They have done so not on the basis of reason but by an appeal to the emotional and sentimental language of a human rights doctrine. There are, however, a number of rational and practical arguments which mitigate against amending and elevating an ordinary rule of evidence to the rank of a fundamental human right. It is axiomatic that a legal rule if it is to be elevated above other rules of evidence must be both morally and rationally coherent. It is illogical to qualify a fundamental right, especially one which seeks to exclude rather than include relevant evidence, with generous praise which cannot be translated into consistent applications of a clearly understood moral and rational purpose.⁴ American fifth amendment jurisprudence is a good example of this confusion and the South African constitutional right is in danger of following the same inconstant path. When a legal rule fails to satisfy the test of reason it must be revised or abandoned, otherwise it serves only to distort the adjectival procedures by which the criminal process seeks to arrive at legal truth.

A fundamental right has the power to intrude across the whole spectrum of statutory and common law. If a fundamental right is not reinforced by moral principles, sustained by reason and susceptible to logical analysis it becomes inflexible and difficult to negotiate. A typical illustration of this inflexibility is the American fifth amendment which, despite its noble origin, has been allowed to distort the criminal process because it is justifiable only in terms of

¹ Williams "The Tactic of Silence" (137) *N.L.J* (1987) 1107.

² *R v Beljajev* (1984) V.R. 657 per Starke J at 662, "silence is a fundamental principle of the criminal law and is not to be overridden by any other so-called doctrine or other principle". In contrast see Cross "The Right to Silence and the Presumption of Innocence: Sacred Cows or Safeguards of Liberty" (11) *J. Society Public Teachers of Law* (1970) 66 at 75 "...let us stop mouthing platitudes about a non-existent fundamental right to silence...", and at 72, "...the right to silence is a sacred cow obstructing the operation of common sense". See also *Twinning v New Jersey* 211 US 78, 79 (1908) "[...]it has been the opinion of constitution makers that the privilege [of silence], if fundamental in any sense, is not fundamental in the due process of law, nor an essential part of it." "There is no reason for straining the meaning of due process to include this privilege within it."

³ Berger "Burdening the Fifth Amendment: Towards a Presumptive Barrier Theory" (70) *J. Crim. L. Criminology* (1979) 27, 31, "the compulsion requirement of the privilege and its interpretation by the court, provides some support for the view that the fifth amendment is an absolute barrier to state imposed burdens on the right to remain silent".

⁴ Mewitt "Law Enforcement and the Conflict of Values" (16) *McGill L.J* (1970) 1, 6-7, "like all legal clichés, the [silence principle] tends to be highly misleading... perhaps no phrase has been bandied about with more imprecision and with more unawareness of its legal and social significance...".

sentimentality and not in terms of reason. On the one extreme, by limiting the government's ability to use the suspect as a testimonial source, the fifth amendment has driven interrogation techniques underground. Substitute methods such as trickery, deception, wiretaps, sting operations and an over-reliance on informers have now become commonplace in law enforcement organs. On the other extreme, the majority of convictions are obtained by means of a plea-bargaining process and not by the normal trial process. The trial process, hedged in by sophisticated defence safeguards, has simply become too expensive, while the plea-bargain is user-friendly and cost-effective. The legitimacy of the justice system becomes compromised when convictions are negotiated privately in the state attorney's office instead of being debated publically in open court. The silence principle as an inflexible constitutional safeguard for the defendant contributes to this distortion of the criminal process.

The Historical Dilemma: Proponents of a modern right of silence seek to justify it by reference to the pivotal historical role it has played in the struggle between state and citizen for first generation rights. However, the modern rights-based silence principle is very different from its immediate utilitarian ancestor. The historical silence principle was a limited evidentiary rule based on the utilitarian necessity to preserve the truth-seeking function of the criminal justice system. The traditional silence principle was narrowly intended to protect the defendant against coercive state practices and to prevent the admission of compelled and unreliable confessions. Neither of these two rationales justifies the elevation of the twentieth century silence principle into a fundamental human right, nor its extension to include a prohibition against the drawing of adverse inferences. The original silence principle was never intended to be an entitlement to conceal or exclude relevant evidence. Silence was meant to be an immunity awarded to both the innocent and guilty alike, in order to preserve the integrity of proof and the person within the criminal system. The traditional silence principle was not jeopardised when adverse inferences were drawn from the accused's silence and until the early 1930s Anglo-American courts unhesitatingly drew such adverse inferences from the defendant's pre-trial and trial silence. However, once the silence principle is elevated into a constitutional right and is construed to include a prohibition against adverse inferences, then the principle is severed from its historical roots and becomes nothing more than an active inducement to conceal guilt. When there is no risk that the truth-seeking function of the criminal process is being compromised there can be no legitimate reason for prohibiting the drawing of an adverse inference.

The traditional utilitarian common law silence principle has been redesigned in the twentieth century as a constitutional right and widened into an immunity not to answer interrogatory questions (a pre-trial right) or to give evidence (a right not to testify). The difference between

the traditional silence “rule” and the modern silence “right” is significant. It would be absurd to speak of waiving the historical immunity against state compulsion. No person would logically waive such an immunity, but it is sensible to speak of waiving a right to silence. Once the silence principle is elevated into a constitutional right it becomes sensible to prohibit the drawing of adverse inferences, otherwise the right to silence is diminished. It also becomes unnecessary to refer to rational justifications for the right. A right to silence becomes self-sustaining by virtue of its elevated status. This means that the criminal defendant may claim the right automatically even in the absence of a state compulsion. The inability to distinguish between the original evidentiary common law immunity from compulsion and the modern constitutional immunity to withhold testimony has become a source of much confusion for the proponents of the silence principle.

On the ground of utilitarian common sense, and ignoring the sentimentality of libertarian human rights rhetoric, the drawing of an adverse inference in the appropriate circumstance is simply not contrary to legal logic. The cogency of this argument finds support in the opinions of leading English jurists. According to Lord Mansfield,⁵ “all evidence is to be weighed according to the proof which it is in the power of one side to have produced and in the power of the other to have contradicted”. In the words of Lord Goddard CJ,⁶ “everybody knows that absence from the witness box requires a very considerable amount of explanation from the defence”. Lord Abbott CJ is quite specific,⁷ “...if the conclusion to which the *prima facie* case tends to be true, and the accused offers no explanation or contradiction, can human reason do otherwise than adopt the conclusion to which the proof tends”. Lord Devlin, a prominent supporter of the silence principle, makes the comment,⁸ “when the prisoner, who is given the right to answer the question chooses not to do so, the court must not be deterred by the incompleteness of the tale from drawing inferences that properly flow from the evidence it has got nor dissuaded from reaching a firm conclusion by speculation upon what the accused might have said if he had testified”. Perhaps the most telling opinion is that of Lamar CJ in the Canadian case *R v Noble*,⁹ “why has this court commented so frequently on the effect of the accused’s silence? Why has it arisen so often as an issue before this court? The reason is simple, silence can be very probative...under the right circumstances...silence can form the basis for natural, reasonable and fair inferences.” The influential commentator Mc Cormick succinctly notes, “[the courts] as they become conversant with the history of the privilege [of silence] will see that it is a survival that has outlived the

⁵ *Blatch v Archer* (1774) 1 Cowp 64 at 65.

⁶ *R v Jackson* (1953) 37 Cr. App. R 43 at 50.

⁷ *R v Burdett* (1820) 4 B and Ald 95 at 161.

⁸ *R v Sharnpal Singh* (1962) A.C 188 at 244-45.

⁹ (1997) 1 SCR 874, per Lamar CJ at 887-88.

context that gave it meaning and that *its application today is not to be extended under the influence of a vague sentimentality but is to be kept within the limits of realism and common sense.*"¹⁰

The Confusion between a "Right" and a "Privilege": Proponents of a libertarian silence principle make indiscriminate and interchangeable use of the words "right" and "privilege" without regard to the conceptual differences between the two. Invariably the right to silence is confused with the privilege against self-incrimination and this confusion is symptomatic of the vague sentimentality of a human rights philosophy. This is particularly true of American fifth amendment jurisprudence.¹¹ The fifth amendment refers only to a compulsion which must not induce the individual to be a witness against himself. Within this witness compulsion paradigm there is no mention of silence. Fifth amendment jurisprudence focuses entirely on the meaning of "compulsion", "coercion" or the "burden" which induces self-incrimination from the witness. The concept of silence within this paradigm is subsumed by an analysis of compulsion¹² and self-incrimination. As the right to silence has no independent existence of its own, it is easy to blur the philosophical distinction between a right and a privilege. The first ten amendments of the United States Constitution (1791) are collectively referred to as the Bill of Rights. Yet of all these rights only the silence principle of the fifth amendment has been labelled a "privilege". In fifth amendment jurisprudence there appears to be a semantical and conceptual confusion between the use of the word "right" and the word "privilege". By contrast, utilitarian jurisprudence is meticulous in maintaining a proper semantic and conceptual distinction between the various terms it employs to define the silence principle.

English jurisprudence draws a sharp distinction between the privilege against self-incrimination (usually claimed by a witness *to* the criminal proceeding) and a right to silence (usually claimed by the accused *in* a criminal proceeding). English jurisprudence suggests that it is conceptually mistaken to describe the compellable witness as possessing a right to silence, for the witness is obliged to take the stand and may only refuse to answer on a question-to-question basis. Once immunised against a future criminal charge the witness is forced to give evidence. On the

¹⁰ "Some Problems and Developments in the Admissibility of Confessions" (24) *Texas L. Rev* (1946) 277.

¹¹ The fifth amendment has proved to be a difficult provision to interpret. The language used by its authors is both ambiguous and misleading, thereby making textual analysis unconvincing. Similarly the historical background and intentions of the authors are unclear. The policies that the fifth amendment is designed to further are seriously disputed, leaving the fifth amendment without an agreed upon rationale.

¹² Just how heavily the state may burden the fifth amendment is unclear. The Supreme Court has until now failed to establish a standard. The court decisions from the Warren era suggest that all burdens on the fifth amendment are forbidden; while more recent decisions have barred only those burdens automatically imposed by the state on the exercise of the fifth amendment.

other hand, the right to silence, as a right to speak, belongs only to the accused who is under no obligation to take the stand or to give evidence. A "right" is an expression of a fundamental human value which, by its very nature, demands an almost absolute degree of legal protection. A "privilege", however, is considerably less valuable than a "right". A "privilege" has no essential human value and is merely a concession or special treatment awarded by the state as a favour. While an intrinsic human right is inalienable and irrevocable, a privilege may be revoked or withdrawn by the state at any time. The state cannot arbitrarily create a right in the way it can create, amend or abrogate a privilege. A right is the creation of a higher natural law, above state law, and an unalterable consensus which imposes limitations upon the exercise of government power. A privilege is created by the state as a voluntary and unilateral limitation upon its own powers, but the privilege may be withdrawn whenever it conflicts with other more important state interests.

There is a certain degree of illogicality in the way Anglo-American jurisprudence defines the right to silence in theory and the way the courts treat the right in practice. The silence principle is invariably referred to as a near absolute right in theory. The fifth amendment has always been defined as an absolute "liberty" type right, imposing limitations on the exercise of government powers. It is set forth in absolute terms, neither conditioned nor qualified and therefore not subject to judicial inventiveness (*New Jersey v Portash*). The fifth amendment is also absolute because it protects the substantive dignity and integrity of the individual. It makes the procedural demand that the state, in seeking to punish the accused, must do so through its own independent labours (*Miranda v Arizona*). However, in practice the courts treat the silence principle as a privilege by seeking to limit it or to balance it against other law enforcement interests. The result is a confusion about the exact nature and purpose of the silence principle. This contradiction becomes obvious when the silence principle is elevated into a constitutional right but it is less obvious when the silence principle is simply defined in traditional terms as a mere utilitarian evidentiary rule. The American fifth amendment makes no conceptual distinction between the "right" and the "privilege" and both are constitutionally entrenched. The logical confusion in fifth amendment jurisprudence becomes apparent when the Supreme Court, on the one hand, reinforces the absolute nature of a trial right to silence (the *Griffin* no-inference rule)¹³, and on the other, reduces the pre-trial silence safeguards to a prophylactic protection riddled

¹³ In selected cases the US Supreme Court has used absolutist language to reject a state burden imposed upon the accused's exercise of his fifth amendment trial right to silence. *Griffin v California* 380 US 609 (1965), "the fifth amendment absolutely bars comment upon a defendant's failure to testify". *United States v Jackson* 390 US 570, 583 (1968), "Congress cannot impose a penalty in a manner that needlessly penalises the assertion of a constitutional right". *Brooks v Tennessee* 406 US 605 (1972), "the defendant is entitled to the unfettered exercise of his own will, and to suffer no penalty for such silence". See also *Malloy v Hogan* 378 US 1, 8 (1964).

with artificial exceptions (the erosion of the *Miranda* standard).¹⁴ The accused's trial silence is treated as a near absolute "right" (at a stage when the accused is least vulnerable), but his pre-trial silence is treated as a "privilege" (at a stage when the accused is at his most vulnerable). Similarly, the non-party witness "privilege" while defined as near absolute in theory, is in practice limited by numerous exceptions.

The Canadian silence principle, under the influence of American fifth amendment jurisprudence, also exhibits the same kind of logical inconsistency. The Charter of Rights and Freedoms elevates the accused's and the witness' privilege against self-incrimination into a constitutional right (sec 11 and sec 13) but does not specifically mention a right to silence. The assumption made by the Canadian Federal Constitution is that the "right" and the "privilege" are one and the same thing. In the South African Constitution the accused's right to silence (sec 35(1)(a)) and his right against self-incrimination (sec 35(3)(j)) are specifically entrenched but no mention is made of the witness privilege against self-incrimination. Is the non-party witness privilege still defined in terms of the common law (in which case it remains an ordinary evidentiary rule) or has it, by association, also been elevated to the status of a constitutional right? The American fifth amendment is sometimes construed as an absolute right and at other times as a relative right. The same right in the Canadian and the South African Constitutions is always a relative right subject to reasonable limitation. The danger exists that a relative and flexible South African right to silence may in time become an American-style inflexible and absolute right. The Constitutional Court has, in recent decisions, exhibited a strange reluctance to make use of its powers in terms of the sec 36 limitation clause. In contrast to the American, Canadian and South African approach, English jurisprudence has never deviated from the traditional utilitarian definition of the silence principle as an ordinary common law rule. Neither the accused's "right" to silence or the "privilege" against self-incrimination are constitutionally defined. The English common law silence principle is subject to severe statutory limitation and in some circumstances may be totally abrogated.

Both the Australian and the New Zealand silence principle are closely modelled on the traditional English common law approach. Similarly the Singapore High Court has demonstrated, in a number of cases, that the silence principle is not a constitutional right but remains an ordinary evidentiary rule subject to statutory limitation. The Singapore High Court goes further by stating that the silence principle is not even a fundamental element of Singapore legal culture. The Anglo-American silence principle is inconsistent and incoherent. It has been variously defined

¹⁴ *Michigan v Tucker* 417 US 433, 444 (1974) has declared the *Miranda* safeguards to be mere prophylactic measures without constitutional authority.

as a “right”, a “privilege” or as an ordinary evidentiary “rule”. Depending on the circumstance it is sometimes an “absolute” right and at other times a “relative” right. It is said to be immutable and unalienable in some jurisdictions but in others it is subject to limitation or abrogation. In some circumstances it permits the drawing of adverse inferences, but in other circumstances it does not. Yet, when it should count the most it is unable to prevent the juror from drawing whatever proper or improper inferences the juror deems personally appropriate.

The Moral Dilemma: The central question is whether the silence principle should be defined in terms of a human rights or a utilitarian morality. A human rights morality is founded upon natural exhortatory law. A supernatural source of law which imposes conditions on human existence that cannot be transgressed or amended by a human law maker. A silence principle becomes a divinely inspired human right and an immutable protection for the human personality. Within this kind of morality all other legal rules would have to give way before the silence principle, and the balance of interests would always weigh in favour of the individual and never in favour of the state. According to Dworkins’ reasoning, a right to silence would always “trump” mere state interests. The alternative is a utilitarian morality founded upon positivist law which seeks to increase the net well-being of society. A silence principle is simply a legal rule sourced from an accountable sovereign and susceptible to a balance of interests. A “utilitarian-positivist” morality is the great opponent of a “human rights-naturalist” morality and would reduce the silence principle to a flexible evidentiary rule. An evidentiary rule which usually protects the defendant in the criminal process, but which may well allow the state interest to supercede the individual interest in some circumstances.

A human rights-based silence principle cannot be justified in terms of reason and is forced to rely on the sentimentality of a “natural” morality. In the words of Lord Salmon,¹⁵ “the right to silence is a sense of instinct for what is just and is innate in our people” and “our law has never been built on logic alone, still less on abstract theory”. The American commentator Horowitz¹⁶ glibly lays claim to a Judeo-Christian religious justification, “the [fifth amendment] privilege is not good legal logic, but it is a religious principle of humaneness and mercy grafted upon the common law”. These types of sentimental statements make no legal sense and it may also be argued that their appeal to morality is just as misguided.¹⁷ The silence principle is normally

¹⁵ House of Lord’s debate on the Criminal Law Revision Committee 11th Report, Cmnd, 4991 (1972) 1608-1609.

¹⁶ Horowitz “The Privilege Against Self-Incrimination: How Did It Originate” (31) *Temp. L.Q.* (1958) 121, 143.

¹⁷ Zuckerman “The Right Against Self-Incrimination: An Obstacle to the Supervision of Interrogation” (102) *L.Q. Rev* (1986) 68, “hardly any of the justifications of the privilege seem to rest on a moral argument. While it is sometimes said that it is wrong to ask a man to dig his own grave, we have seen that

invoked in circumstances which create the impression that it is not a protection for the innocent but rather a protection for the guilty and a safe sanctuary for those who break society's rules. The silence principle is of importance only to the arrested person, someone who has broken the law or is suspected of doing so. Where is the morality in such a protection? The moral value of the silence principle in the criminal process defies ordinary common sense notions of decent conduct. In the words of Judge Friendly,¹⁸ "no parent would teach such a doctrine to his children. The lesson parents teach is that while a misdeed will generally be forgiven, a failure to make a clean breast of it will not be."

The silence principle is psychologically and morally unacceptable as a social principle in human relationships. Hook regards the privilege against self-incrimination as an insult to the average person's intelligence,¹⁹ "let any sensible person ask himself whether he would hire a babysitter for his children if she refused to reply to a question bearing upon the proper execution of her duty with a response equivalent to the privilege against self-incrimination". A human rights-based silence principle cannot appeal to morality when it helps the defendant avoid personal responsibility for his wrongdoing, stands in the way of a conviction, impedes the state in providing fully for the security of society and sometimes prevents the giving of restitution to the victims of crime. A silence principle may well erode the social and moral legitimacy of the criminal justice system. In South Africa there is a widely held belief that the criminal justice system fosters a culture of criminal rights while ignoring victim rights. The South African silence principle is regarded as being part and parcel of criminal rights, a procedure which operates to the advantage of the alleged wrongdoer. In the real world personal accountability is the societal norm. The wrongdoer is expected to personally account for his transgression of social rules and is under intense social pressure to make an honest and revealing disclosure. For example, in Christian ideology the healing process only begins once the "sinner" confesses and takes personal responsibility for his actions.

Certainly in the interrogation room the police questioner will attempt to manipulate these social pressures in order to extract an admission from the suspect. Yet in the artificial environment of the courtroom the very opposite prevails. There is no legal duty to co-operate with the court. Instead America, Canada and South Africa have chosen to entrench the non co-operative

the hardship involved is not morally objectionable. Nor do we intuitively feel that there is something wrong in having to offer an explanation for wrongs we have committed. Given this weak moral support it is not surprising that the privilege should give way to the interests of combating crime."

¹⁸ Friendly "The Fifth Amendment Tomorrow: The Case for Constitutional Change" (37) *Uni. Cinn. L. Rev* (1968) 671, 680.

¹⁹ Hook *Common Sense and the Fifth Amendment* (1957) 121.

aspect of the silence principle as a constitutional right. The non co-operative, non-accountable nature of the silence principle, coupled with the adversarial combativeness of the accusatorial trial process, stimulates a defensive resistance. The criminal comes to believe that true guilt or innocence is determined not by the facts, but by the prosecution's ability to prove guilt in accordance with the rules of adversarial procedure, which favour the defence and not the prosecution. The guilty criminal is thus able to excuse his wrongdoing and to justify his immorality simply because the prosecution is unable to prove his guilt beyond a reasonable doubt. A whole generation of South African criminals have used this kind of reasoning to justify their criminality both to themselves and to their peer group. An accusatorial trial system which incorporates a human rights-based silence principle emphasises the negative elements of nonco-operation and the refusal by the defence to accept responsibility or accountability. In contrast, the civil-inquisitorial trial system seeks the active co-operation of the accused and places importance on personal accountability.

The Rational Dilemma: The main obstacle to a rational analysis of the silence principle has been the acceptance of a certain lyricism and eloquent phraseology as a justifiable substitute for critical thought. Proponents frequently invoke the silence principle as a "fundamental tenet of the constitutional fabric", a reflection of "fundamental values" and most "notable aspirations". These ringing, but vacuous, pronouncements common across the entire Anglo-American world explain everything except "why"! In the words of a leading Canadian scholar,²⁰ "there is the suggestion that great consequences flow from the [silence principle], yet its precise significance is not explained. Rather, the significance is assumed. Such assumptions seem to have been made so often that the references take on the character of generalities spoken without understanding, but without fear of contradiction, because of the absence of any clearer understanding on the part of the [true believer].²¹ With every reference and tacit concurrence the difficulty of challenging the assumptions increases." Bentham²² some 200 years ago characterised the main obstacle to a rational discussion of the silence principle as the "assumption of the propriety of the rule as a proposition too plainly true to admit of dispute. By assuming it to be true, you represent all reasonable men as joining in the opinion. By this means...you present...the fear of incurring the indignation...of all reasonable men, by presuming to disbelieve or doubt what all such reasonable men are assured of."

Despite the endowment of the silence principle with a near religious fervour, a number of human

²⁰ Ratushny "Is There a Right Against Self-Incrimination in Canada" (19) *McGill L.J.* (1973) 1, 2.

²¹ The thesis author's addition and emphasis.

²² Bentham *Rationale of Judicial Evidence* Bowring Ed (1843) 446 and 451.

rights-based rationales, derived from Packer's due process model²³ have been advanced to justify the principle. Personality rationales are said to safeguard human dignity (the core element of the South African Constitution), liberty (the core element of the American Constitution), privacy and personal autonomy.²⁴ The silence principle, by guarding against organised state compulsions, prevents the trauma of psychologically cruel choices, blocks the infringement of human dignity and the invasion of individual privacy. The instrumental rationales provide the defendant with a number of procedural safeguards. The silence principle prohibits the authoritarian temptation to employ investigative shortcuts, prevents the coercion of testimony and encourages the search for extraneous sources of evidence. It is said to be an essential guarantee of a fair trial process by turning the criminal forum into a fair playing field, in which the prosecution has no procedural or material advantages over the accused. Within the courtroom the silence principle is a bulwark of the presumption of innocence and ensures that the state shoulders the entire burden of proof.

This libertarian vision of the silence principle as a protection of personal human values, and as a guarantee of a fair relationship between state and citizen has great symbolic value. Unfortunately it is a symbol without valid substance. As has been amply demonstrated in the course of this thesis, all the rationales advanced to justify a human rights-based silence principle have been refuted or found to contain rational and practical flaws. The irrationality of the American fifth amendment is illustrated by the influential academic Dolinko, who suggests,²⁵ "although possessing no rational justification the silence principle is nevertheless functionally important; and its repeal would do violence to the legal system as a whole". An argument which is testimony to the omnipotence of the constitution in American jurisprudence. There is nothing morally or rationally intrinsic about the personality rationales which would logically explain why dignity or privacy should always "trump" the retributive and deterrence functions of a well-balanced criminal justice system. Why should a right to silence protect the accused's privacy when other constitutional rights allow reasonable privacy infringements? Why is a prosecutorial intrusive questioning at trial considered to be an unreasonable infringement of the accused's human dignity when conviction and incarceration are far worse indignities?

²³ Packer "Two Models of the Criminal Process" (113) *Un. Penn. L. Rev* (1964) 1-68.

²⁴ Gerstein "Privacy and Self-Incrimination" (80) *Ethics* (1970) 87, 89-96, argues that the individual should have absolute control over his personal autonomy (another justification of the silence principle using absolutist language) including the ability to exclude all state-compelled self-incrimination. However, in order to secure the core of personal autonomy, one must secure the peripheral areas as well. Personal autonomy becomes absolutist and inflexible.

²⁵ Dolinko "Is There a Rationale for the Privilege Against Self-Incrimination" (33) *U.C.L.A. L. Rev* (1986) 1063-1148.

It is a common sense observation that silence is an effective shield for the knowledgeable and guilty accused, but not for the innocent accused. When faced by an accusation the natural instinct of the guilty person is to remain silent or to obfuscate the facts whereas the innocent person is more likely to speak up in an attempt to explain the facts. The guilty accused, but not the innocent accused, is faced with a dilemma between disclosing evidence of guilt or suffering an adverse inference through saying nothing. The silence principle calls upon the criminal justice system to dispense with the dilemma and to allow the accused to conceal knowledge of guilt. Undoubtedly the choice forced upon the guilty accused is psychologically unenviable, but why should it be a function of the law to shield the guilty accused from making it? Furthermore, silence is not a strong shield against the psychological pressures of the police station. It does not offer an adequate protection against physical or psychological abuse at the hands of the police interrogator. Silence does not reduce the risk of a false confession nor does it enhance the truth-seeking ability of the trial process. Instead it serves to inhibit the criminal process which should be better designed to expose, rather than suppress, relevant evidence in the pursuit of legal certainty. The silence principle, unlike professional, marital or public privilege, is unable to provide a pressing social, moral or legal reason for its exclusion of relevant evidence.

Why should the courtroom be reduced to a level playing field? There is no logic to the argument that the state should be curtailed from using all its resources in the investigation and conviction of criminals.²⁶ Why should the prosecution be prevented from adducing relevant evidence simply because it enjoys an "unfair" advantage? Proponents of the silence principle are once again forced to resort to vaguely articulated feelings. Ellis exemplifies the libertarian blind faith in the silence principle. In his own words,²⁷ "[silence] is not an issue which is amenable to empirical investigation nor can answers be derived by reasoning" and "we are...dealing with value judgements, with an issue of conscience, with a 'feeling' of justice which is [not] rationally explicable". These sentiments may have great rhetorical force, but as an explanation for an important legal principle they are without logical substance.

Reform of the criminal justice system demands, not an extension of the silence principle, but its limitation. A limited and narrowly interpreted silence principle (defined in utilitarian terms as an

²⁶ "Why is it automatically assumed that men as government are less logical than men as men? Why when the state is the actor, do we tip the scales in favour of values other than accuracy in fact ascertainment? Does the silence principle practically protect the individual against the power of the state and its capacity for tyranny or cruelty? Perhaps the silence principle illustrates society's deep scepticism of the value of criminal law enforcement." Louisell "Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma" (53) *Cal. L. Rev* (1965) 89, 96.

²⁷ Ellis "A Comment on the Testimonial Privilege of the Fifth Amendment" (55) *Iowa L. Rev* (1970) 838-39, 843, "...irrational feelings play a valid role in justifying the privilege".

ordinary evidentiary rule) would make the criminal process practically more efficient and excuse the court from having to draw absurdly fine distinctions about the effect and scope of silence. Rationally the silence principle is not an essential component of a fair trial system. The recent statutory amendments to the silence principle in England amply demonstrates that the silence principle may be safely modified without damaging the relationship between the presumption of innocence and the prosecutorial duty of shouldering the entire burden of proof. In fact, there is no logical connection between the silence principle and the prosecution's primary onus of proof. The primary burden of proof concerns itself with the total sufficiency of evidence and not with the way in which evidence is gathered. Logically a silence principle designed to exclude self-incriminating evidence (a source of evidence) cannot conceptually influence the fixed burden of proof which is designed only to account for the cogency and quantum of evidence and is not designed to acknowledge the various sources of evidence. Limiting the silence principle cannot logically shift the burden of proof away from the prosecution and onto the accused's shoulders. A fair trial process is not fundamentally impaired when the silence principle is abrogated. The civil-inquisitorial trial system, as an alternative to the accusatorial trial system, provides for a fair trial despite its fundamental concentration on the accused and a system of proof which emphasises the confession above other sources of evidence.

A Right in Theory But Not One in Practice: The right to silence is a legal principle much talked about in theory, but not observed in practice. The nature of the accusatorial-adversarial trial process makes a strong theoretical commitment to the silence principle unrealistic in practice. The average suspect, unlike the hardened professional criminal, feels a strong social pressure to co-operate with the investigating authority. The suspect's natural anxiety to explain his innocence coupled with the intimidating atmosphere of the interview room and the well-honed interrogation skills of the police weakens the suspect's willpower and the psychological ability to invoke the right to silence. The accusatorial system is designed to exert the strongest possible pressure on the accused during the police interrogation when he is at his most vulnerable, but once in the courtroom when the accused is least vulnerable, the reverse happens and every effort is made to insure that the accused does not co-operate with the prosecution. In the hostile police environment the right to silence is an ineffective protection, more likely to be manipulated as a shield by the experienced criminal than be the intimidated average suspect. South African prisons are filled, not with professional criminals, but by the naive and the ignorant, who are easily persuaded to waive their procedural rights. English

empirical studies²⁸ confirm that the average suspect does not exercise his right to silence when questioned by the police. If the right to silence was invoked more regularly, the conviction rate would drop drastically and the costs of the criminal justice system would increase substantially. (If the South African courts were to apply in practice what they so easily uphold in theory, the South African justice system would simply collapse.)

In practice the criminal justice system is specifically organised around the interrogation of the accused, the extraction of an admission or confession and the inducement of a guilty plea. An effective and consistently exercised right to silence would seriously disrupt this well-oiled process. For this reason the caution, which upon arrest is supposed to warn the defendant of his procedural rights, is often administered in a perfunctory manner and is always submerged or overwhelmed by the hostile environment of the police station. The duty of administering the caution falls to the investigating officer who is placed in an unenviable moral dilemma. On the one hand, it is the training and instinct of a good policeman to break down the unco-operative suspect in order to obtain relevant evidence (the suspect is usually the best source of evidence). On the other hand, the policeman is also charged with the duty of informing the suspect of his right to silence, the aim of which is to ensure that the suspect does not co-operate with the police. The policeman is placed in a moral and practical dilemma, caught between his professional responsibility as a law enforcer and the artificial duty imposed upon him by the right to silence. The result is that the police officer stretches and breaks the law in order to carry out his duty efficiently. The courts collude in this process by ignoring police trickery or deception which induce admissions and impose weak sanctions against obvious infringements of the accused's procedural rights. For example, as a result of *Miranda v Arizona* the focus of the American pre-trial confession safeguard has shifted from a common law voluntariness standard to an analysis of an effective and knowing waiver of a right. In practice it is now easier for the unscrupulous police officer to fabricate a simple waiver of rights rather than to counterfeit convincing indications of voluntariness. *Miranda* has made it easier for police to obtain a waiver of rights and consequently an admissible confession.

It cannot be said that the silence principle is applied by the Anglo-American courts as befits a fundamental right. The noble pre-trial safeguards institutionalised by the Warren Court in

²⁸ Moston et al "The Incidence, Antecedents and Consequences of the Use of the Right to Silence during Police Questioning" (3) *Criminal Behaviour and Mental Health* (1993) 30-47; Moston et al "The Effects of Case Characteristics on Suspect Behaviour during Questioning" (32) *British J. Criminology* (1992) 23-40; Mitchell "Confessions and Police Interrogation of Suspects" *Crim. L. Rev* (1983) 596, 598; McConville et al "The Role of Interrogation in Crime Discovery and Conviction" (22) *British J. Criminology* (1982) 165, 166; Zander "The Investigation of Crime: A Study of Cases Tried at the Old Bailey" *Crim L. Rev* (1979) 203, 213.

Miranda v Arizona have been consistently eroded over the past thirty years. What was supposed to be a constitutional safeguard is now no more than a prophylactic protection riddled with technical exceptions. Even in a culture dominated by a human rights philosophy, the American courts have been reluctant in practice to give the suspect's pre-trial right to silence its full constitutional meaning. In the course of this thesis it has been demonstrated that there is quite a difference in what American courts say in theory and do in practice. In England there is an equal reluctance to unconditionally protect the silence principle. Admissions obtained in breach of the Police Criminal and Evidence Act (1984) (PACE) are often admitted by a judge in the exercise of his discretionary power. In practice the exercise of the judicial discretion tends to favour the police officer more than it does the criminal defendant. The difference in theory and practice is the result of an influential but fallacious libertarian assumption that crime is capable of being solved by the independent labour of the state unassisted by the accused. A regularly voiced libertarian criticism is that it is easier to sit in the shade and coerce admissions from a suspect instead of going out into the sun and hunting down clues.²⁹ In theory this may sound very well, but in practice a criminal act is often carried out outside the public eye and with the deliberate intention to avoid leaving clues. Quite often only the perpetrator has relevant knowledge of the crime. The silence principle which so effectively excludes reliable evidence may markedly impair the truth-seeking function of the trial, forcing the police and courts to scramble around in finding alternative ways of admitting evidence extracted from the accused.

In theory the silence principle is part of the adversarial process in which the prosecution and the defence square up against each other and fight over the body of the accused before a neutral judge-umpire. The accused's conviction is supposedly obtained in a public trial in which justice is seen to be done. In practice the majority of criminal convictions are obtained either by the plea-bargain, the voluntary confession or through an arraigned guilty plea. For example, the Americans have made plea-bargaining into a fine art of negotiated compromise completely removed from the notion of justice. These kind of convictions by-pass the trial process altogether and are mediated in the prosecutor's office. Ironically, the accusatorial trial process elaborately protects the accused through his right to silence in an open and public court where the danger of state abuse is minimal. But behind the scenes where the accused's right to silence is weak, police interrogators psychologically induce confessions and prosecutors negotiate these confessions into guilty pleas.

²⁹ Stephen *History of the Criminal Law of England* London (1883) Vol 1, 42.

As a result of these extra-curial methods, the noble "due process" protections of the accusatorial trial, including the right to silence, become practically irrelevant. To a degree the accusatorial criminal process has been cynically redesigned to exploit cost-efficient guilty pleas without the need for recourse to a time-consuming and expensive trial. Kasimar³⁰ criticises the excessive and unbalanced "due process" protections of the American trial system by noting the contrast between the weak procedural rights of the suspect in the police station (the gatehouse) and the strong array of protections for the accused at trial (the mansion). As a matter of practical strategy, the prosecutor will concentrate his efforts at the gatehouse (the police station) where the suspect is vulnerable, in order to lessen his workload at the mansion (in the trial), where the accused is strong. The attempt to obtain a trial conviction in which the accused is elaborately shielded by a sophisticated right to silence, is now so difficult that state prosecutors are practically forced to rely on extra-curial devices for a significant number of their convictions. Recognising this problem there is a movement in South Africa to introduce a formal plea-bargaining system. Parliament's Justice Committee has endorsed a plea-bargaining system which closely resembles the American system.³¹

This solution may be criticised on the ground that it address the symptoms, without curing the disease. Rather than adding one more extra-curial administrative layer to an already overburdened criminal process,³² it would have been more logical to reform the actual trial procedures. By streamlining the accused's procedural protections at trial (for example, by limiting the right to silence) a trial conviction can be made as cost-effective as a plea-bargain conviction. The subterfuge employed by the accusatorial system must be compared to the inquisitorial system which is openly designed around the interrogation of the accused and the inducement of a confession. Both the accusatorial and the inquisitorial systems rely heavily on the cost-effective confession. But what the inquisitorial system does publically and with the proper safeguards in place, the accusatorial system does furtively via the backroom and often in the absence of proper procedural safeguards. South Africa is a good illustration of the difference between a theoretical right to silence and the diminished role it plays in practice. The South African criminal justice system is distorted by a theoretical adherence to First World procedural standards and frustrated by a Third World's practical lack of resources. In order to cope with the gradual breakdown of the criminal justice system, the South African courts must be prepared to adopt a less aggressive adversarial trial process in which elaborately technical

³⁰ Kasimar "Equal Justice in the Gatehouse and Mansions of the American Criminal Procedure" *Police Interrogations and Confessions* (1980) 27.

³¹ Criminal Procedure Amendment Bill, Justice Committee Report, 2 November 2001.

³² The problem with plea-bargaining is that it creates a new opportunity for the bribery and corruption of badly paid state prosecutors.

and artificial safeguards (including the right to silence) are reformed or abolished altogether.

In theory the silence principle is also purposely designed to protect the accused against mistakes by the lay person jury. The silence principle is meant to be a guideline and instruction to the jury on how to prevent the drawing of unreasonable or improper inferences from the accused's failure to testify. In practice the silence principle has no such effect and there is no practical manner by which to control the working of a juror's mind. Surely a judge should be saved from having to perform linguistic acrobats in defence of a right which is not real. In the words of the late Professor Cross,³³ "spare the judge from talking gibberish to the jury, the conscientious magistrate from directing himself in imbecilic terms and the writer of the law of evidence from drawing distinctions absurd enough to bring a blush to the most hardened academic face". It has been argued that the absolute no-comment rule established by *Griffin v California* is a perfect illustration of the theoretical and practical dichotomy of the silence principle. On the one hand, the *Griffin* rule necessitates an almost automatic reversal when there is an improper prosecutorial comment on the accused's trial silence, irrespective of the strength of the prosecution's *prima facie* case. On the other hand, the no-comment rule fails to counteract the natural inference of guilt which arises in the minds of a layperson jury when confronted by a non-testifying accused.

The South African trial system also illustrates the practical absurdity of the silence principle. It could be argued that a silence principle is redundant in a non-jury type criminal trial. Does the South African accused really need a constitutionally entrenched right to silence as a protection against the professional judge, who in the course of evaluating the probative evidence may want to draw an adverse inference from the accused's silence? Surely in this regard the elevation of the silence principle into a constitutional right is an unnecessary and excessive protection. Is it not another example of the sentimentality of a libertarian philosophy out of touch with practical reality. An absurd introduction of one more obstacle in the South African justice system already teetering on the brink of collapse.

A Balance of Interests: Unlike other common law principles, the silence principle by placing an artificial constraint on the state's ability to collect evidence, creates an obvious conflict between the policy of combating crime and the policy of protecting individual procedural rights. Each Anglo-American jurisdiction, within its respective legal-cultural nuances, must adopt some kind of balance of interest analysis. The accusatorial criminal process provides two possible

³³ Cross "The Evidence Report: Sense or Nonsense" *Crim L. Rev* (1973) 329 at 333.

methods of solving this inherent tension. It may adopt a crime control model in which the balance of interests weighs heavily in favour of the cost-efficient combating of crime or a due process model in which the balance of interest swings in favour of the individual and a procedural protection against intrusive state infringements. The American and the South African constitutional silence principles are the result of a due process philosophy whereas the modern English statutory silence principle is the consequence of a crime control philosophy. The crime control model is utilitarian in nature and necessitates the curtailment of the silence principle in the interest of increased managerial efficiency. The due process model is based on a human rights philosophy which emphasises human value over managerial efficiency and is prepared to sacrifice a degree of efficiency in the interests of increasing individual procedural protections.

The English Criminal Justice and Public Order Act 1994 and to some extent the Police and Criminal Evidence Act 1984, are affirmative utilitarian statutes which place limitations on the accused's right to silence. America and South Africa have chosen a due process model which elevates the silence principle into a constitutional right and which places procedural limitations on the state's investigatory and trial powers. Within a due process philosophy the Americans have interpreted the fifth amendment right to silence in near absolute terms.³⁴ The critical point according to Douglas J (dissenting) in *Ullmann v United States*³⁵ is that the constitution places, "the right to silence beyond the reach of government". The fifth amendment stands between the citizen and his government. The American balance of interest standard is an unsophisticated test which applies only on the periphery of fifth amendment jurisprudence.³⁶ By contrast the South African right to silence is a relative right subject to a complex balancing test incorporated in sec 36 of the Constitution. The South African limitation clause is probably the most sophisticated balance of interest test in the entire Anglo-American world.

³⁴ According to *New Jersey v Portash* 440 US 450, 459 (1979) and *Fisher v United States* 425 US 391, 400 (1976), when the constitutional privilege arises in its most pristine form, interest balancing is unnecessary and impermissible. The fifth amendment, unlike the fourth, does not give way before "reasonableness". Lushing "Testimonial Immunity and the Privilege Against Self-Incrimination: A Study in Isomorphism" (73) *J. Crim L and Criminology* (1982) 1690, 1697, "no language in the Court's self-incrimination opinions...indicates that the privilege ever bends under the weight of competing interests".

³⁵ 350 US 422, 454 (1956).

³⁶ The Supreme Court holds fast to a single defining standard. Whenever the state seeks to induce self-incrimination in order to secure a criminal conviction, the privilege is absolute, but on the periphery in non-criminal regulatory practices a balance of interest is permissible. *California v Byers* 402 US 424 (1971), "this balancing inevitably results in the dilution of constitutional guarantees". *Crampton v Ohio* 402 US 183, 213 (1971), "the balance will only be judged once the penalty has impaired fifth amendment interests to an appreciable extent". *Simmons v United States* 390 US 377 (1968) "it is intolerable that one constitutional right should be surrendered in order to assert another (a constitutional tension theory)". Nevertheless, because of the untouchable status of the fifth amendment, the balancing test is weak and permits only a superficial assessment of the effect of a penalty on self-incriminatory interests.

Unfortunately the silence principle, by its nature, does not lend itself easily to a balance of interest analysis. The right to silence, unlike other constitutional rights, has a certain element of absoluteness about it. Silence cannot be upheld in halves, nor granted for some offences and denied to others. It is essentially an "all" or "nothing" kind of right. This makes it conceptually difficult for the courts to apply a reasonable balance of interest analysis. The American courts are particularly prone to treating the right to silence in an unbalanced manner. On the one hand, the accused's "right" against self-incrimination and a refusal to testify at trial is protected as a near-absolute right against all possible state infringements and from which no adverse inferences may be drawn. On the other hand, the non-party witness "privilege" against self-incrimination may be circumvented whenever the public or government interest so demands. Although never directly approving of a balance of interests, except in periphery non-criminal matters, the US Supreme Court has nevertheless applied a tacit balancing of interests standard in most of the seminal cases dealing with the self-incrimination clause. The balancing is done on an *ad-hoc* basis, because of the pervasive influence of the fifth amendment, and varies from case to case depending on the circumstance and the urgency of the government interest.

One of the idiosyncrasies of the American and the English experience as highlighted in this thesis, is to honour the silence principle in theory, but to limit its practical application. In the battle between the individual's procedural interests and the need for efficient investigatory processes the silence principle is a clear loser. For example, in the many instances in which the witness silence privilege has been limited by the US Supreme Court the government interest has always dominated over the witness' constitutional right. The inconsistent, uneven and unbalanced treatment of the silence principle by both the American and English courts serves to illustrate that perhaps the silence principle is not a fundamental right but merely a sentimental legal device shrouded in bombastic rhetoric and shrugged aside whenever practical convenience demands it.

The Ideal Silence Principle Model: Rule-utilitarianism offers a rational and practical methodology by which to define the silence principle without disturbing key elements of the accusatorial criminal process. The silence principle does have a place in adjectival law, not as a constitutional right (the American, Canadian and South African model), but as an ordinary evidentiary rule capable of rational judicial evaluation (the English statutory model). The defendant who refuses to respond to police questioning in a properly constituted interview or to testify in court, must do so in the full knowledge, *quid pro quo*, that his defensive use of silence may draw a reasonable adverse inference. A "reasonable" inference depends largely on the strength of the prosecution's case and will usually amount to no more than additional

circumstantial evidence against the accused. However, logic suggests that in certain limited situations it may be possible to draw a reasonable adverse inference from the defendant's silence which amounts to a direct inference of guilt. What reasonable inferences are to be drawn from the defendant's pre-trial or trial silence depends on the circumstances and is a question of utilitarian common sense. Generally, if there is no *prima facie* case to answer to, then no logical adverse inference may be drawn from the accused's silence. If the evidence against the defendant taken as a whole calls for an explanation and no such explanation is forthcoming, a reasonable adverse inference may be drawn.

Such a utilitarian construction inspires confidence in the criminal justice system because it allows the defendant to be convicted on the basis of all the relevant evidence. The ideal silence principle is modelled on the example set by the English Criminal Justice and Public Order Act (CRIMPO) 1994, an excellently crafted statutory compromise which awards the accused a limited, but well-defined, procedural immunity without unnecessarily inhibiting effective law enforcement. The defensive use of silence by the defendant offers certain pre-trial and trial advantages, but is also entails certain disadvantages. The defendant and his legal adviser must strategically balance the defensive evidentiary use made of the defendant's silence against the known adverse inferences which the prosecution is entitled to draw from such a defensive strategy.

The nature and purpose of a silence principle lends itself to the following ideal model:

- (a) The silence principle is awarded to the arrested suspect during the pre-trial police investigation and interrogation stage and consists of a specific immunity against being compelled to answer questions by a duly appointed authority. It is also a specific immunity for the accused at the trial stage and protects against being compelled to give evidence or to answer questions from the witness stand.
- (b) The silence principle must be invoked unequivocally and personally by the criminal defendant. The principle may also be waived voluntarily.
- (c) Three kinds of reasonable adverse inferences may be drawn from the defendant's evidentiary use of silence during the criminal process:
 - (i) Silence may be reasonably construed as an implied admission of all or part of a statement made to the face of the defendant.

- (ii) Silence alone or together with other evidence may reasonably amount to a general consciousness of guilt (note, adverse inference (i) is an implied acknowledgement of a specific statement, whereas adverse inference (ii) is an unintended acknowledgement of the value of all the probative evidence against the defendant).
 - (iii) Silence may be reasonably used to evaluate other extraneous evidence by permitting inferences from such extraneous evidence to be more easily drawn.
 - (iv) Adverse inferences (i), (ii) and (iii) may be properly drawn from the arrested suspect's pre-trial silence. Adverse inferences (ii) and (iii) may be properly drawn from the accused's failure to testify at trial.
- (d) The evidentiary use of silence will depend on whether or not a cautionary warning has been administered to the criminal defendant:
- (i) A cautionary warning must be administered to the suspect immediately upon arrest and at each subsequent police interrogation or interview. The warning should include the key words, "a failure to answer an accusation or question which an innocent person would be reasonably expected to deny, explain or answer, may result in an adverse inference against you at trial".
 - (ii) At the end of the prosecution's case, the judge must warn the accused that a failure to deny, explain or answer the evidence given against him may result in an adverse inference being drawn.
- (e) What constitutes a "reasonable" adverse inference in the "appropriate circumstance" depends on the following factors:
- (i) An adverse inference may not be drawn unless a denial, explanation or answer is reasonably expected, taking into account the nature of the question, evidence or accusation.
 - (ii) A reasonable inference will depend on:
 - the evidentiary strength of the prosecution's case;
 - the extent to which the evidentiary facts are within the defendant's personal knowledge;
 - whether the evidentiary facts are capable of amounting to an innocent explanation;
 - whether the defendant has already given an explanation on some other occasion.
 - (iii) Other factors which may influence the drawing of adverse inferences from the suspect's pre-trial silence are:
 - whether the interrogation was written down or electronically recorded by the interviewer. If not, why not?

- the extent to which the suspect was given the opportunity to deny, explain or answer the interrogatory questions;
- the extent of the knowledge and understanding possessed by the suspect enabling an informed denial, explanation or answer;
- was the suspect given access to legal advice. To what extent does the suspect's failure to deny, explain or answer flow from the nature of the legal advice given?

The jurisprudence surrounding the silence principle exhibits a disturbing degree of ambivalence.³⁷ None of the proponents of the silence principle are able to provide a sufficiently persuasive *raison d'être* to justify a principle which has proved to be both theoretically and practically inconsistent. The large number of statutory and other exceptions to the non-party witness privilege against self-incrimination is a pragmatic indication that silence, far from being a fundamental right, is in reality merely an ordinary legal rule amongst other legal rules. It does not possess a particularly unique *auctoritas*. In the Anglo-American legal tradition two major trends may be identified. Amongst American theorists, the silence principle enshrined within the fifth amendment as a sort of "holy grail", has been safe from radical attack. Debate has centred more on an analysis of the periodic waxing and waning of its protective sphere without touching on the sensitive issue of its abolition. Amongst English theorists the common law silence principle (unburdened by a written constitution) has been the subject of a number of plausible attacks against its very nature and existence.

It has been argued that the trend towards the constitutional entrenchment of a silence principle is conceptually misguided. The term "right" to silence is a misnomer. A right must contain the crucial elements of morality and rationality. As has been amply demonstrated in the course of this thesis the silence principle contains neither of these exacting criteria. The practical consequence of elevating a silence principle devoid of rational meaning into a constitutional right serves only to inhibit the efficient administration of justice and to undermine the legitimacy of the criminal justice system. The ideal model for a silence principle suggested above would sweep away all current restrictions on adverse inferences and allow logical inferences, determined by the particular circumstance, to be drawn from the defendant's silence. The judge (especially in a non-jury type trial system) should be given the freedom to draw any reasonable inference from the evidentiary material. These revisions parallel the modern English approach and are heavily influenced by a utilitarian philosophy. After all, Bentham's forceful maxim, "evidence is the basis

³⁷ Louisell *supra* note 25 at 94, "Why this ambivalence, this schizophrenia about the fifth amendment? If the principle is so solid, valuable and significant, why so many accepted encroachments? If the fifth amendment is such an old friend, why do we depart its company so readily?"

of justice, exclude evidence and you exclude justice" is persuasive common sense and should appeal to the conscientious South African legal reformer.

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