

**THE RIGHT TO SILENCE; UNNECESSARY  
OBSTACLE OR FUNDAMENTAL RIGHT?**

by

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submitted in part fulfilment of the requirements for the degree of

**MASTER OF LAWS**

at the

**UNIVERSITY OF SOUTH AFRICA**

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**DECEMBER 1994**

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## 1. INTRODUCTION

The doctrine of silence is a subsumation of a number of different rules with various antecedents. The criminal defendant cannot be compelled to speak thereby exposing himself to the possible risk of criminal sanction ie. to be a witness against himself.<sup>1</sup> Moreover no adverse inference may usually be drawn from such silence.<sup>2</sup> A subsidiary rule, the privilege against self-incrimination, is a logical development from the original right of the accused to remain silent and allows the uninhibited flow of testimony by immunizing the reluctant witness against possible criminal liability. Silence is often generically and confusingly referred to simply as the privilege against self-incrimination. However a distinction should be drawn between the silence available to the accused and the immunizing rule available to the witness in criminal proceedings.<sup>3</sup> American theorists for example make no allowance for the distinction and indiscriminately label both forms of silence simply as the privilege against self-incrimination, whereas the South African privilege against self-incrimination has a narrow statutory meaning referring specifically to the technical rules of witness immunity. To avoid confusion the term "silence privilege" is used inclusively in this paper to refer to the so called "right" of silence possessed by the accused and which is entrenched within Section 25 of the Constitution of the Republic of South Africa.

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<sup>1</sup> "[Our law] will not force any man to accuse himself, and in this we do certainly follow the law of nature, which commands every man to endeavour his own protection" Gilbert *Law of Evidence* (1754 reprinted N.Y. Garland 1979) 99.

<sup>2</sup> In English and Scot's law, an adverse inference can only be drawn which goes to credibility but not to corroboration - *Woolmington v D.P.P.* AC 462 HL (1963). Silence can never be conclusive of guilt - *R v Bathurst* (1968) 2 Q.B. 107. Although there appears to be a trend developing in English law which allows a guilty inference to be drawn in certain circumstances, see *infra* note 157-159 and accompanying text. In *Griffin v California* 380 U.S. 609 (1965) the U.S. Supreme Court decided that an adverse inference from silence was incompatible with the Fifth Amendment privilege.

<sup>3</sup> Glanville Williams *The Proof of Guilt* (1963) 23.

## 2. HISTORY

According to J.H. Wigmore,<sup>4</sup> the origin of a silence privilege may be traced to the Tudor era. It was the invention of those guilty of religious and later of political crimes. In the broadest sense the doctrine was a protection not of the criminally guilty or innocent, but of freedom of expression, of political liberty and the right to worship.<sup>5</sup> The objection to compulsory self-incrimination grew out of early Protestantism via the works of Tyndale<sup>6</sup> and Foxe. Opponents began a concerted attack upon the inquisitorial procedure of the Ecclesiastical and High Commission Courts. By making use of the canon-law maxim, *nemo tenetur seipsum prodere*,<sup>7</sup> dissident groups sought to sidestep the compulsory *ex officio* oath. In the late 1630's the Stuart radical John Lilburne extended the attack to the Star Chamber arguing, "no man's conscience ought to be racked by oaths imposed to answer questions concerning himself in matters criminal".<sup>8</sup> The Puritan victory during the 1640's led to the abolition of the Star Chamber, High Commission Court and included a statutory prohibition on the *ex officio* oath.<sup>9</sup> Thereafter the silence privilege spread by an association of ideas to the common-law criminal trial and later to civil proceedings. The privilege fell into abeyance<sup>10</sup> during the eighteenth century and was only revived in its present form by the American Federal Courts in 1878 and twenty years later in England through the

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<sup>4</sup> Wigmore *A Treatise on Evidence* (McNaughton revision 1961) para 2250.

<sup>5</sup> Levy *Origins of the Fifth Amendment; The Right Against Self-Incrimination* (1968) 332.

<sup>6</sup> Tyndale *The Obedience of a Christian Man; Doctrinal Treatise* (Walters edition 1968) 127. Tyndale warned that judges should evaluate evidence on the basis of witnesses and not "break up into the consciences of men".

<sup>7</sup> The full maxim is: *Licet nemo tenetur seipsum prodere, tamen proditus perfaman tenetur seipsum ostendere utrum possit suam innocentiam ostendere et seipsum purgare.*

<sup>8</sup> Cited in *Miranda v Arizona* 384 U.S. 548 (1966) and *Ullman v U.S.* 380 U.S. 428 (1956). See also Haller and Davies *The Leveller Tracts 1647-1653* (1944) 454.

<sup>9</sup> The fundamental evil of the *ex officio* oath was its denial of the individual's exclusive control over his own conscience, a control which was instead placed in the hands of the court. Cartwright, the Puritan leader, refused to take the oath because, "I account it as unnatural a thing for me to answer against myself, as to thrust a knife into my thigh".

<sup>10</sup> As a result of the now defunct rule - the accused was not a competent witness at his own trial.

Criminal Procedure Act of 1898.<sup>11</sup> The modern doctrine is grounded on the notion of public abhorrence to enforced self-incrimination. Silence, therefore, involves withholding reliable relevant testimony from the court at the expense of abstract justice. The crucial question is whether the interests sheltered by the doctrine are significant enough to justify the impediment placed in the path of legal truth.<sup>12</sup>

The benefit outweighs the cost, proponents argue, because there is a need to keep state officials in line, to limit police power and to ensure the prosecutorial burden remains firmly fixed upon the state's shoulders. These interests are considered to be important in maintaining a balance of fairness essential to the adversarial system. The doctrine also protects against unhealthy infringement of personal autonomy and prevents the imposition of unnecessary cruel choices. The explanatory theories of silence generally imply a normative "right" on the part of the defendant. The protection silence affords is thus often construed as a "basic human right". Opposition to the concept of silence may be found amongst detractors who consider the dispassionate search for truth, unimpeded by artificial exclusionary rules as the sole criterion for efficient judicial administration. J. Bentham the vociferous critic of a silence principle argues, "only the guilty claim and are protected by the rule. A court is inevitably deprived of the most serviceable evidence. The recognition of silence is based merely on idle sentimentality and a confusion of interrogation with torture".<sup>13</sup> In effect silence should be regarded as an irrational obstacle without moral justification.

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<sup>11</sup> McNair "The Early Development of the Privilege Against Self-Incrimination" *Oxford Journal of Legal Studies* (1990) 10. See also Langbein "Shaping the Eighteenth Century Criminal Trial" *U. Chi. L. Rev.* 132 (1983).

<sup>12</sup> Tapper *Cross on Evidence* (1990) 264. McCormick *Evidence* (1954) 248. Keane *The Modern Law of Evidence* (1989) 321.

<sup>13</sup> Bentham, founder of the utilitarian school of jurisprudence, objected to all artificial exclusionary rules which impede truth in his *Rationale of Judicial Evidence*. See also Postema "Bentham's Theory of Adjudication" 11 *Georgia. L. Rev.* 1393 (1977) and Twining *Theories of Evidence* (1985) 68.

Notwithstanding widespread criticism, the doctrine of silence is common amongst all Western legal systems. England, U.S.A., France, Germany and even Japan,<sup>14</sup> to name but a few, protect the defendant who wishes to say nothing in the face of official questioning. The South African doctrine of silence was until recently virtually indistinguishable from its English common law counterpart.<sup>15</sup> However, the entrenchment of silence in Sec 25 of the South African Constitution will substantially affect the present position. A strongly worded Sec 25, particularly subsection 3(d), "... and not to be a compellable witness against himself or herself",<sup>16</sup> bears a remarkably close similarity, to the United States Fifth Amendment right to silence namely, "... shall not be compelled in any criminal case to be a witness against himself".<sup>17</sup> Comparative American opinion is therefore important to any future debate upon the legal implications of a South African constitutional "right" to silence. For this reason the majority of authorities cited in this paper are American.

During the late nineteenth century, the United States Supreme Court in *Boyd v U.S.*,<sup>18</sup> referred to the absence of a principle of silence as, "abhorrent to the instincts of an Englishman and American. It may suit the purpose of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom". In *Murphy v Waterfront Commission of New York harbor*,<sup>19</sup> silence was held to be, "one of the great landmarks in man's struggle to make himself civilized. It reflects many of our

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<sup>14</sup> For example: France; Code De Procedure Penal Article 114. Germany; Strafprozeßordnung Sec 136 and 243. Japan; Kenpo, Chapter 3, Article 38, (which is a simple recapitulation of the U.S. Fifth Amendment).

<sup>15</sup> *S v Evans* 1981 (4)SA 52(C) and *R v Camane* 1925 570 AD at 575, "The principle comes to us through the English law, what the law forbids is compelling a man to give evidence which incriminates himself". See also *S v Govender* 1967 (2)SA 121(N) and *S v Lwane* 1966 (2)SA 433(A).

<sup>16</sup> The Bill of Rights; Constitution of the Republic of South Africa Act 200 1993, hereafter referred to as the South African Constitution. The pertinent Sec 25(3)(c) reads, "Every accused person shall have the right to a fair trial, which shall include the right to be presumed innocent and to remain silent during plea proceedings or trial and not to testify during trial".

<sup>17</sup> United States Constitution (1791) cited in Tribe *American Constitutional Law* (1988) preface 12.

<sup>18</sup> 116 U.S. 616 (1886) at 631-2. See also *Entick v Carrington* 19 State Trials 1029 (1765) upon which judgment *Boyd* is partly based. Also *The King v Parnell* 16 Eng Rep 20 K.B. (1748).

<sup>19</sup> 378 U.S. 55 (1964) at 59.

fundamental values and most noble aspirations".<sup>20</sup> According to the U.S. Supreme Court, the "right" to silence has become an ultimate article of faith in respect to which compromise is impossible because "the right" embodies principles which go, "to the nature of a free man and his relation to the state".<sup>21</sup> It taps, "the basic stream of religious and political principle".<sup>22</sup> Equally strident views were expressed by the majority opinion in *Ullman v U.S.*,<sup>23</sup> "the guarantee against self-incrimination is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity". In *Miranda v Arizona*,<sup>24</sup> the Supreme Court found silence to be essential to the maintenance of a fair state-individual balance. Yet during the 1930's Justice Cordozo in *Polko v Connecticut*<sup>25</sup> made the incisive remark, "justice would not perish if the accused were subject to a duty to respond to orderly inquiry". C. McCormick considered silence to be an antiquated relic of revolutionary times, "a survival which has outlived the context which gave it meaning".<sup>26</sup> Wigmore defended silence but felt that it should be kept within strict limits.<sup>27</sup> Ever since Bentham aimed his utilitarian guns at silence, it has been the subject of continuous controversy.

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<sup>20</sup> Cited also in Griswold *The Fifth Amendment Today* (1955) 7.

<sup>21</sup> *U.S. v Wade* 388 U.S. 261 (1967) - Fortas J's dissenting opinion.

<sup>22</sup> *In re Gault* 387 U.S. 1 (1967) at 47.

<sup>23</sup> 380 U.S. 428 (1956) at 501.

<sup>24</sup> 384 U.S. 436 (1966) at 443.

<sup>25</sup> 302 U.S. 319 (1937) at 329. Prior to the *Miranda* case decided in 1966, the right to silence was amongst a distinctly second class group of American constitutional safeguards.

<sup>26</sup> McCormick "Some Problems and Developments in the Admissibility of Confessions" 24 *Texas. L. Rev.* 227 (1946).

<sup>27</sup> Wigmore op cit (n4) para 2251 at 3102.

### 3. MORALITY AND RATIONALITY

In the light of South Africa's apartheid legacy, the constitutional entrenchment of a "right" to silence comes as no surprise. The stirring emotive language used by its proponents has often reached heights of near religious adulation.<sup>28</sup> It is no wonder 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 enforced self-incrimination is obvious and needs no illustration. Its cruelty is plain to any person who gives the subject a moment's thought". The use of the words "obvious" and "plain" are usually the refuge of those who cannot articulate a satisfactory reason. A basic question, lost sight of in 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 and dignity" which everyone so readily assumes or are these merely pretty sounds without substance?

Evaluations of the so called "right" to silence begin from the premise that a suspect's silence in the face of incriminatory questioning is permissible and in some hard to define sense morally and socially acceptable. In order to understand the privilege, one must determine whether it is philosophically correct to characterize silence as an affirmative legal right. A legal right derived from a normative and autonomous system must be internally and transparently rational. It becomes internally rational when it generates a consistent set of reasons which are sufficient to justify the standard it articulates and the obligation it creates. It becomes transparently rational when these consistent reasons are a sufficiently moral justification of the standard and obligation. A legal right necessarily and contingently possesses the elements of rationality and morality.<sup>29</sup> The purpose of this paper is to determine whether or not these elements are possessed by a silence principle.

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<sup>28</sup> See Warren J's reference to Jewish Talmud Law (Halakhah) as the source of a right to silence in *Miranda*, a point disputed by Mazabow "The Jewish Law" (1987) 10 *SALJ* 710.

<sup>29</sup> Bickenbach "Law and Morality" *Law and Philosophy* 29 (1989) 300.

Conventional explanations are generally divided into two distinct categories.<sup>30</sup> The first category and presently the most fashionable amongst academic writers is the *Human rights rationale* which seeks to explain the silence principle in terms of the inviolability of human dignity. The second category or *Procedural rationale*, strives to establish silence as a fundamental bulwark of the criminal justice system. Despite the distinction, those who defend the silence privilege share a common but vaguely articulated idea that compelled self-incrimination is morally harsh. On the other hand, those who attack the privilege agree that any system which labels silence as a right or proper choice in the face of accusation is morally skewed. While other legal privileges possess social value and accord with societal notions of decent conduct, the silence privilege seems to defy them.<sup>31</sup> Judge Friendly expresses the criticism most succinctly, "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, employers, etc. Those who are questioned consider themselves morally bound to respond and the questioners believe it proper to take action if they do not".<sup>32</sup> K. Greenawalt<sup>33</sup> has challenged Friendly's assertion by suggesting a moral underpinning to the silence privilege. In all relationships between private individuals, there is no general moral obligation for the individual to explain his conduct and a refusal does not always justify an adverse inference. 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 impersonal one.

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<sup>30</sup> The author is indebted to D Dolinko for suggesting the distinction.

<sup>31</sup> Professional legal privilege and marital privilege promote relationships possessing real social value, whereas the silence privilege protects only persons who have broken the law or are suspected as such.

<sup>32</sup> Friendly "The Fifth Amendment Tomorrow, The Case for Constitutional Change" 37 *U. Cin. L. Rev.* 671 (1968) 680. A similar view is expressed by Bentham in *R.J.E.* chapter 3 book IX.

<sup>33</sup> Greenawalt "Silence as a Moral and Constitutional Right" 23 *Wm and Mary L. Rev.* (1981) 15. See also Louisell "Criminal Discovery and Self-Incrimination" 53 *Cal. L. Rev.* (1965) 96, who accepts the notion that silence in the face of accusation is wrong but finds justification for the privilege in the scepticism about the value of criminal law enforcement in relation to the human suffering it causes.

Greenawalt's argument contains two distinct flaws. Firstly, authorities usually arrest a suspect on more substantial grounds than mere suspicion. Certainly once the individual has been formally charged and compelled to stand trial, the state should possess a *prima facie* case against him. Secondly, it is illogical to characterize the relationship between accused and the state accuser as a close personal one which renders accusatory questions morally impermissible.

Greenawalt's theory which attempts a sustainable moral basis for a silence privilege is inherently deficient. It is this inability to confront the moral dilemma which erodes the silence privilege of its utility and ethical soundness. Protagonists find themselves unable to explain the privilege in terms which take into account the basic common sense observation - truth, not silence is the right choice in the face of accusation. It forces the eminent jurists, Lord's Salmon<sup>34</sup> and Devlin,<sup>35</sup> to resort to enigmatic orations, "[the right to silence] is a sense of instinct for what is just which is innate in our people. It is the natural thought of England." A similar sentiment is echoed by their fraternal brother the American Justice Brennan, "[the Fifth Amendment] is an expression of our common conscience, a symbol of the America, which stirs our hearts".<sup>36</sup> All three jurists seem to rely on historic and opaque notions of morality based on national spirit which are ludicrously unpersuasive. The protagonists concede not only the moral high ground to their antagonists but also the realm of logic. Again in the words of Lord Salmon, in reference to silence, "our law has never been built on logic alone, still less on abstract theory". Justice W.V. Schaefer, one of America's distinguished jurists has characterized the privilege as a doctrine in search of a reason. The modern privilege is invoked in circumstances which create the public impression that it is no longer a protection for the innocent but rather a safe sanctuary for those who break society's rules.

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<sup>34</sup> House of Lords debate on the Criminal Law Revision Committee, 11th Report, Cmnd 4991 (1972); Royal Commission on Criminal Procedure, Cmnd 8092 (1981).

<sup>35</sup> In *R v Bodkin Adams* unreported (1957) referred to in the House of Lords debate.

<sup>36</sup> *Malloy v Hogan* 378 U.S. 19 (1964) n7.

#### 4. HUMAN RIGHTS RATIONALE

The difficulty in developing a moral foundation for the silence privilege is therefore compounded by an inability to formulate a coherent rationale. A number of endeavours have been made. Proponents of the Human rights rationale seek to justify the privilege by clothing it in the rhetorical garb of human dignity and individuality. Sec 10 and Sec 13 of the South African Constitution entrench the right to human dignity and privacy respectively. Could the protection of dignity and privacy serve as a sufficient rational justification for the existence of a fundamental right to silence? Two distinct arguments may be deduced here-from: the concept of cruelty<sup>37</sup> which justifies the privilege by holding compelled self-incrimination to be inherently cruel; the concept of privacy gives substance to the privilege because compelling self-incrimination unacceptably infringes the privacy sphere surrounding each individual.

##### a) THE CRUELTY DEFENCE

The cruelty defence, one of the oldest arguments,<sup>38</sup> 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 criminal sanction. The defence has some direct emotive appeal but emotion is insufficient. No rational explanation is advanced as to why compelled self-incrimination should be unacceptably cruel. Proponents have consistently appealed to intuition rather than reason. According to D. Ellis, "We cannot demonstrate why it is cruel. We feel it is cruel, beyond this we cannot go".<sup>39</sup> Is it possible to see behind the emotive diction and to isolate a logical basis for the privilege of silence? Perhaps compelled self-incrimination is cruel because it imposes an unacceptably cruel *trilemma*. The accused must either produce evidence of a crime (and thus

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<sup>37</sup> *Murphy v Waterfront Commission* 378 U.S. 55 (1964) per Goldberg J, "It reflects our unwillingness to subject those suspected of crimes to the cruel trilemma of self accusation, perjury or contempt". See also *Brown v Walker* 161 U.S. 591 (1896).

<sup>38</sup> Bentham criticises the argument as the "old woman's reasoning" *R.J.E.* Bk IX, Chap 3 Sec 3.

<sup>39</sup> "Vox Populi v Suprema Lex, A Comment on the Testimonial Privilege of the Fifth Amendment" 55 *Iowa. L. Rev.* (1970) 829.

subject himself to a criminal penalty) or remain silent (and expose himself to contempt) or lie (and subject himself to perjury).<sup>40</sup> The *trilemma* justification has garnered support from the U.S. Supreme Court as well as American academics.<sup>41</sup> Unfortunately the *trilemma* cannot be logically substantiated. The question worth asking is how much weight should be given to the accused's possible experience of cruelty, in view of 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 are regularly inflicted upon those who commit crimes, the idea of a *trilemma* as disproportionately cruel is logically absurd. Furthermore, as Bentham observed almost one hundred and seventy years ago, "it is mistaken to think it more cruel to be condemned by one's own admission than by evidence of some third party".<sup>42</sup> 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 evidence in situations which force upon them other kinds of so called cruelly difficult choices. To cite L. Mayers, "requiring a mother to testify against her own son on trial for his life, is surely a greater cruelty than requiring the son to testify against himself and an infinitely greater cruelty than requiring an ordinary witness to disclose some minor penal infraction".<sup>43</sup> Why do South African courts which unhesitatingly impose a harsh choice upon the innocent witness, find it so unacceptably cruel to impose the *trilemma* choice upon the accused?

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<sup>40</sup> The *trilemma* applies only to the guilty accused who has no truthful exculpatory story to tell.

<sup>41</sup> Western and Mandell "To Talk, To Balk, To Lie: The Emerging Fifth Amendment Doctrine of the Preferred Response" 19 *Am. Crim. L. Rev.* (1982) 521. Greenawalt op cit (n 33) 259. McNaughton "The Privilege Against Self-Incrimination" 51 *J. Crim. L. C and P.S* (1960) 154, refers to the choice as one amongst the three horns of the triceratops. See also *Murphy v Waterfront Commission* op cit (n37) 55.

<sup>42</sup> The supposed cruelty is to Bentham, "A mere metaphorical quantity, except in the mind of the rhetorician it has no existence, allowing it sacrifices truth and utility".

<sup>43</sup> Quoted in Friendly op cit (n32) 683.

An alternative hypothesis or *hypocrisy* argument holds compelled 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.<sup>44</sup> Is it not 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. Notwithstanding the charge of hypocrisy our law does sometimes punish the accused for behaving as most other human beings would. South African criminal law does not exonerate a defendant who culpably brings about the condition of his own excuse. It is not *contra bonos mores* for the law to punish a drug addict for possession of illegal narcotics or an alcoholic for public drunkenness, even though most persons would have broken the same laws were they similarly addicted. Necessity 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.<sup>45</sup> 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. It cannot be cruelly hypocritical to punish the accused for withholding self-incriminating evidence because the accused by his own voluntary and blameworthy act placed himself in the circumstance requiring self-incrimination.

The final argument favouring a cruelty defence brushes aside notions of *trilemma* and *hypocrisy*. According to the *value* argument, the crucial factor

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<sup>44</sup> The idea of self-incrimination as running counter to the natural instinct of self-preservation is found in McCormick op cit (n12) 174.

<sup>45</sup> *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", per Holmes JA at 404. The American Model Penal Code, Sec 3.02(2) is also to the same effect. See also Burchell and Hunt *South African Criminal Law and Procedure* (1983) vol 1 340-1. Authority for the contrary view is found in *R v Mohamed* (1938) AD 30 and Snyman *Criminal Law* (1993) 115, who considers Holmes JA's decision to be an application of the discarded doctrine of *Versari in re illicita*.

in making compelled self-incrimination unnaturally cruel is that the accused is forced to inflict harm on something he most dearly cherishes namely, honour, reputation, happiness or simply 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. D. 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 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".<sup>46</sup> As a consequence, enforced self-incrimination resulting in loss of honour or reputation would inflict an unnaturally intense suffering and unhappiness upon the accused.

Is it reasonable to 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. The process of convicting and punishing the accused is not inherently cruel.<sup>47</sup> Forcing the accused to participate in this process by compelling self-incrimination is logically defensible. If punishment is a desired goal of our legal system despite the loss of honour or happiness which it visits, 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 accused is justifiable because the

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<sup>46</sup> Dolinko "Is there a Rationale for the Privilege Against Self-Incrimination" 33 *UCLA. L. Rev.* (1986) 1102.

<sup>47</sup> It cannot be denied that certain features of the legal system may be perceived as cruel, ie. the death penalty may be considered cruel by some, but this does not negate the overall view that punishment is inherently non-cruel.

determination of truth and the punishment of wrongdoing can never be considered aggravatingly cruel.<sup>48</sup>

b) THE PRIVACY DEFENCE

The cruelty defence in its three ramifications is not a desirable nor a logically defensible justification for the silence privilege. Advocates of the privilege have instead turned to the various defenses embraced by the concept of *privacy*. The U.S. Supreme Court has on numerous occasions endorsed privacy protection as the mainstay of silence.<sup>49</sup> Superficially the privacy defence as the underpinning rationale for a silence privilege appears ideally attractive. The nature of the privilege is intimate and personal. It proscribes state intrusion by respecting a private inner sanctum of feeling and thought.<sup>50</sup> However the privacy theorist is faced with three immediate objections. Firstly, the privilege protects only against self-incrimination and not against third party disclosure. The accused is privileged from producing evidence but not from its production by others. Why should only one special type of privacy infringement be ruled out? Secondly, the privilege offers no protection against compelled disclosure of non-incriminating evidence. Why does a privilege rooted in the concern for personal privacy prevent only an extremely narrow range of privacy intrusions? Finally, the privilege is much too rigid. No allowance is made for interest-balancing.

*Why only self-incrimination?* Privacy theorists have appealed to the notion of mental privacy. Compelled self-incrimination inflicts a privacy loss greater

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<sup>48</sup> The Cruelty theorist cannot produce lucid reasons as to why the *particular way* in which compelled self-incrimination forces persons to harm themselves may be considered cruel.

<sup>49</sup> *Fisher v U.S.* 425 (1976) at 399; *Couch v U.S.* 409 U.S. 327 (1973) at 328. See also *Miranda v Arizona* 384 U.S. 460 (1960) at 463 refers to, "the right of each individual to a private enclave", and *U.S. v Grünwald* 233 F2D (1974) at 566.

<sup>50</sup> Fried "Privacy" 89 *Yale LJ* (1980) 435-36, sees privacy as our control over the quantity and quality of information about us in the minds of others. Gravison "Privilege and the Limits of the Law" 89 *Yale LJ* (1980) 435-436, views privacy as "a limitation of another's access to the individual".

and different from the loss inflicted by third party disclosure. The privilege 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.<sup>51</sup> 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 an 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.<sup>52</sup> By observation, examination of physical evidence and questioning of witnesses, the court builds up an indirect image of the accused's mind. The establishment of 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?<sup>53</sup> 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 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.

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<sup>51</sup> Arenella "Schmerber and the Privilege Against Self-Incrimination" 20 *Am. Crim. L. Rev.* (1982) 41, sees mental privacy as a primary value in the support of a right to silence.

<sup>52</sup> The essential elements of crime include the establishment of *mental capacity* as well as *dolus* or *culpa*.

<sup>53</sup> 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) 214.

*Why not non-incriminating information?* The silence privilege protects only against the disclosure of self-incriminating information. The privilege is inoperative when there is no risk of self-incrimination. The individual will be compelled to disclose non-incriminating information. Why so narrow a construction? Privacy as a reason for a privilege of silence 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 privilege of silence, 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. Privacy as a justification for a silence privilege 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 interest is stronger.<sup>54</sup> If the concept of privacy underscores the silence privilege 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

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<sup>54</sup> *Roe v Wade* 410 U.S. 153 (1973). In *Doyle v State Bar* 32 CAL 3D P2D (1982) it was said "a client's privacy interest is not absolute but must be balanced against the public interest".

and seizures. It reflects a balance of privacy and enforcement interests.<sup>55</sup> No doubt the South African sister Sec 13 of the Constitution will be similarly interpreted.<sup>56</sup> However, the silence privilege has never been interpreted to include interest balancing.<sup>57</sup> Silence does not bend under the weight of competing interests and no court in South Africa, the U.S.A. or Britain has indicated otherwise. The silence privilege is simply a straight forward rigid prohibition against self-incrimination. The U.S. Supreme Court has unequivocally stated, "Interest balancing is not only unnecessary, it is impermissible".<sup>58</sup> Surely an incomprehensible statement since it implies the privilege will always outweigh the state interest in all situations, including circumstances where disclosure would be more beneficial than harmful. It is irrational to presume that when a heinous crime is committed, the accused is morally and rationally justified in withholding self-incriminating evidence because he prefers to remain in a private enclave, an enclave from which the state is reasonably sure, he departed in order to do violence to another.<sup>59</sup>

c) AUTONOMY

Protagonists of the privacy defence cannot develop cogent reasons to explain away these three major objections. Few it appears have really attempted to do

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<sup>55</sup> 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 *U.S. 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".

<sup>56</sup> Sec 13 reads, "every person shall have the right to his or her privacy, which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications".

<sup>57</sup> '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.

<sup>58</sup> *Fisher v U.S.* 425 U.S. 400 (1976) at 403, "the Fifth Amendment strictures, unlike the Fourth, are not removed by showing reasonableness".

<sup>59</sup> Friendly op cit (n32) 689.

so. The exception is R. Gerstein,<sup>60</sup> a strong adherent of privacy whose work has been labelled the fullest philosophical defence of the privilege against self-incrimination.<sup>61</sup> Gerstein bases his reasoning on the foundation of C. Fried's control theory of privacy.<sup>62</sup> 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".<sup>63</sup> Gerstein's argument thus revolves around two assumptions - compelled self-incrimination degrades those subjected to it by interfering with autonomous moral development and denies exclusive individual control of such 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 the three major objections levelled 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

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<sup>60</sup> 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.

<sup>61</sup> Greenawalt op cit (n33) 21.

<sup>62</sup> "The privilege against self-incrimination is the affirmation by society of the extreme value of the individual control over personal information", Fried op cit (n50) 437.

<sup>63</sup> *Fisher v U.S.* 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. U.S.* 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). Gerstein's notion of enforced self-incrimination as 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* note 38.

nature a peculiarly immoral revelation of remorse and self-condemnation. Interest balancing is absolutely prohibited even in beneficial situations because a person is rightfully entitled to absolute control over all personal revelations.

The conception of moral autonomy in Gerstein's opinion, may be extended to form the platform 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.<sup>64</sup> 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 whole establish the framework within which the accused operates as a morally autonomous agent.<sup>65</sup>

Gerstein's argument, despite its cogency, fails to address a number of supplementary objections. The major objection is an obvious one. 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 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

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<sup>64</sup> See *supra* note 38-50 and accompanying text.

<sup>65</sup> Gerstein *op cit* (n 60) 350-1. For a criticism of the role of the privilege in the adversarial system, see *infra* note 93-96 and accompanying text. Also Gerstein "The Self-Incrimination Debate in Gt. Britain" 27 *Am. J. Comp. L.* (1979) 98.

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 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 social values.

Secondly, criminal punishment serves an important rehabilitative function apart from its usual retributive effect.<sup>66</sup> 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. Thirdly, undoubtedly a majority of criminals will undertake the painful process of autonomous self-examination in order 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 outlaws 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.

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<sup>66</sup> Snyman *Criminal Law* (1993) 16-22.

Fourthly, 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.<sup>67</sup> 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 cognisance of a third alternative recently advocated by the English Criminal Law Revision Committee (1971)<sup>68</sup> and the Royal Commission in Criminal Procedure (1981).<sup>69</sup> 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.<sup>70</sup> 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".<sup>71</sup> The silence privilege enhances autonomy by protecting the individual's ability to take responsibility for his own deeds.<sup>72</sup> The essential

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<sup>67</sup> Menlowe "Bentham and the Law of Evidence" *L.Q. Rev.* (1988) 300.

<sup>68</sup> 11<sup>th</sup> Report, Evidence (General) Cmnd 4991 (1972).

<sup>69</sup> Cmnd 8092 (1981). See also Hart "Bentham and the Demystification of the Law" 36 *Modern L. Rev.* (1973) 13; Zuckerman "Criminal Law Revision Committee 11<sup>th</sup> Report; Right to Silence" 36 *Modern L. Rev.* (1973) 509.

<sup>70</sup> Menlowe op cit (n67) 301.

<sup>71</sup> Babcock "Fair play; Evidence Favourable to an Accused" 34 *Stan. L. Rev.* (1982) 1138.

<sup>72</sup> Schrock, Welsh and Collins "Interrogation Rights; Reflections on *Miranda v Arizona*" *Cal. L. Rev.* (1978) 49.

concept deduced herefrom is a kind of absolute personal autonomy. The South African legal system recognises personal autonomy by punishing conduct only after the individual has freely chosen to commit a wrongful act.<sup>73</sup> 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 cooperate with the state. 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 punishment. 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 sheer fanaticism 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 particular Sec 65 of the Insolvency Act 1936 and Sec 415 (2) of the Companies Act 1973, specifically exclude silence because it is in the interest of effective and practical justice to do so. In other words the benefit to society outweighs the collateral damage which accrues to the individual.<sup>74</sup> The author doubts whether a future Constitutional Court would strike down these exceptions. A negative interpretation by the Constitutional Court would undoubtedly undermine the efficiency of the law enforcement system. Certainly 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.<sup>75</sup>

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<sup>73</sup> 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.

<sup>74</sup> For an analysis of interest balancing, see *supra* note 54-59 and accompanying text.

<sup>75</sup> Since 1990, government statistics have shown a 150% increase in white collar crime.

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.<sup>76</sup> *Boyd v U.S.*<sup>77</sup> which prevents compulsory process against business records based on Fourth and Fifth Amendment protection has been largely undermined by a spate of judgments which remove the privilege from a wide category of required records.<sup>78</sup> In England, a large 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.<sup>79</sup> Unlike the case in North America, the English privilege can be claimed by an entity possessing legal personality.<sup>80</sup> Whether or not a corporate officer may claim the privilege has been left open in *Rio Tinto Zinc Corp'n' v Westinghouse Electric Corp'n'*.<sup>81</sup> The wide range of exceptions to the silence privilege suggests that it may not be so fundamental a principle after all.<sup>82</sup> The Human rights rationale in the form of cruelty, privacy or autonomy cannot in the final analysis present a sufficiently credible basis for a rational justification of the silence principle. Attention is now switched to the arguments categorised by the Procedural rationale.

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<sup>76</sup> *U.S. v White* 322 U.S. 361 (1911) at 364, "the privilege is a personal one applying only to natural persons".

<sup>77</sup> 116 U.S. 616 (1886).

<sup>78</sup> *Warden v Hayden* 387 U.S. 294 (1967); *Fisher v U.S.* 425 U.S. 399 (1976); *Couch v U.S.* 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" op cit (n60).

<sup>79</sup> Heyden "The Privilege Against Self-Incrimination" *L.Q. Rev.* 87 (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* (1992) 351.

<sup>80</sup> *Triplex Safety Glass Co Ltd. v Lanceqaye Safety Glass Co Ltd* (1937) 2 ALL ER 613.

<sup>81</sup> (1978) 1 ALL ER 434.

<sup>82</sup> Tapper *Cross on Evidence* (1990) 427.

## 5. PROCEDURAL RATIONALE

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 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 maximise the probability of convicting the guilty by minimising the chance of mistaken conviction. A second 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 coercive state power.<sup>83</sup> Indeed this has been an important concern amongst American authors. In *McNabb v U.S.*,<sup>84</sup> Frankfurter J, advanced the consensual opinion - "the history of liberty has been the history of observance of procedural safeguards".

The third goal 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 justice system engenders cynicism, distrust and undermines the efficiency of the entire law enforcement establishment. For this reason 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 a future government. The goals served by a legitimate criminal system, it is argued, are sustained and promoted by an effective right to silence. Arguments realised on this basis are commonly labelled Procedural rationales.

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<sup>83</sup> 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.

<sup>84</sup> 318 U.S. 332 (1943) at 347.

a) 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*'.<sup>85</sup> By contrast R. 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".<sup>86</sup> 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".<sup>87</sup> 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. The privilege may also benefit the accused by limiting the prosecutorial ability to adduce evidence of previous convictions.

The former argument is contrary to common sense and human nature. In the words of D.B. Ayer, "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 silent, in the majority of cases, even a hardened criminal when wrongly accused would want to have his say".<sup>88</sup> M. Menlowe discoursing

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<sup>85</sup> 378 U.S. 52 (1964) at 55. See also *Baxter v Palmigiano* 425 U.S. 308 (1976) 319.

<sup>86</sup> Pound "Legal Interrogation of Person's Accused or Suspected of Crime" 24 *J. Crim. L.C. and P.S.* 1014 (1934) 1015.

<sup>87</sup> Book IV *Treatise* 240-45.

<sup>88</sup> Ayer "The Fifth Amendment and the Inference of Guilt from Silence" *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.

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.<sup>89</sup> A poor demeanour may always be counteracted by defence counsel through further explanation and evidence. 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.<sup>90</sup> Exclusion of prior convictions is thus amply provided for and renders redundant the protection offered by a silence privilege. 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 G. Williams,<sup>91</sup> 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*,<sup>92</sup> has now been repudiated by a majority of American scholars.<sup>92</sup> 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

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<sup>89</sup> Menlowe op cit (n67) 298.

<sup>90</sup> S.F.E. is only admissible once a sufficiently relevant nexus has been established between the *probans* and the *probandum*. See *D.P.P. v Boardman* (1975) AC 421 HL 1974 3 ALL ER 887. Statutory 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).

<sup>91</sup> "The Tactics of Silence" *N.L.J.* No. 27 (1987) 1107.

<sup>92</sup> Dolinko op cit (n46) 1075.

would be expected to reach a truthful verdict without being influenced either by poor demeanour or prior convictions.

b) STATE EXPLOITATION

The silence privilege is also understood to assist in avoiding mistaken conviction by making the trial process a fair contest between equals.<sup>93</sup> The 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. 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.<sup>94</sup> 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 system is thus illegitimate and morally reprehensible. The notion of an unassailable individual sovereignty is reminiscent of the previously discussed moral autonomy argument and is similarly flawed.<sup>95</sup> 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.

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<sup>93</sup> Gerstein "The Self-Incrimination Debate in Gt. Britain" *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.

<sup>94</sup> Locke *An Essay Concerning The True Original Extent and End of Civil Government, in Two Treatises on Government* (Penguin 1986) 196.

<sup>95</sup> See *supra* note 63-65 and accompanying text.

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 conceptually misleading. 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". 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 recreation, so that fairness in the sporting sense should not reasonably apply.<sup>96</sup> The determination of truth, however it is defined,<sup>97</sup> 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 *U.S. v Garson*, 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".<sup>98</sup> Judge Hand is being overzealous. The accused does not possess every advantage, although he has a good many. According to the fair play argument

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<sup>96</sup> Book VII *R.J.E.* 454 (Bowering Ed 1843) cited in Wigmore para 2251 at 297 n2.

<sup>97</sup> The Utilitarian viewpoint is that LEGAL TRUTH is discoverable by empirical means. The Libertarian view expressed by McConville "Silence in Court" *N.L.J.* No 11 (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.

<sup>98</sup> *U.S. v Garson* 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 presumption of innocence is said in *Woolmington v D.P.P.* to run, "like a golden thread through the fabric of the Criminal law".<sup>99</sup> Presumption and silence privilege taken together require the prosecution to prove its case unaided by the accused.<sup>100</sup> 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.<sup>101</sup> 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. To compel speech or to allow an adverse inference from silence would represent a significant shift within the prosecutorial burden, "effectively legitimising the conversion of the lowest threshold in evidence, a bare *prima facie* case, into the highest, proof beyond a reasonable doubt".<sup>102</sup> In essence the silence privilege reinforces the presumption of innocence<sup>103</sup> and preserves the integrity of adversarial procedure by forcing the prosecution to shoulder the entire load. To adduce relevant evidence and establish

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<sup>99</sup> *Woolmington v D.P.P.* (1935) AC 462 at 481 (HL).

<sup>100</sup> *Miranda v Arizona* 384 U.S. 436 (1966) 415. *Murphy v Waterfront Commission* 378 U.S. 55 (1964). Also Wigmore para 2251 at 317.

<sup>101</sup> Gerstein op cit (n93) 110.

<sup>102</sup> McConville op cit (n97) 1169.

<sup>103</sup> According to McConville op cit (n97) 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".

guilt by its own independent labours, Lord Devlin in *R v Bodkins Adams*<sup>104</sup> 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".

The argument is speculative and unconvincing. There is no logic in the assumption that the integrity of the adversarial system will be impaired if the prosecution shoulders less than its due burden. 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 confessions<sup>105</sup> 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.<sup>106</sup> The state may compel the accused to appear in an identification parade.<sup>107</sup>

The U.S. Supreme Court in *Schmerber v California*,<sup>108</sup> has admitted blood samples taken without consent. The English Court of Appeal in *R v Apicella*<sup>109</sup> allowed a specimen of bodily fluid to prove rape. The Police and Criminal Evidence Act 1984, Sec 62 (10) permits an adverse inference from

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<sup>104</sup> Unreported, cited in the House of Lords debate on the Criminal Law Revision Committee 11th Report.

<sup>105</sup> Sec 217 and 219A of the C.P.A. (1977).

<sup>106</sup> Sec 228 C.P.A. (Handwriting). Sec 212 (4) and (6) C.P.A. (Fingerprints).

<sup>107</sup> *Rassol v R* 1932 N.P.D. 112 and *R v Gericke* 1941 C.P.D. 211 (voice identification).

<sup>108</sup> 384 U.S. 757 (1966). See also *U.S. v Dionisio* 410 U.S. 1 (1973) (voice exemplar), *Gilbert v California* 388 U.S. 263 (1967) (handwriting exemplar).

<sup>109</sup> (1986) 82 Cr. App. R.295 (CA).

failure to give consent to the taking of an intimate sample.<sup>110</sup> A Scots court has admitted evidence of teeth impressions.<sup>111</sup> New Zealand and Scotland allow evidence of a suspect's aroma.<sup>112</sup> It is erroneous therefore to assume that the prosecution can never meet the burden of proof by relying on compelled testimony. 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.<sup>113</sup> 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 privilege 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,<sup>114</sup> the use of torture

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<sup>110</sup> If 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).

<sup>111</sup> *Hay v H.M.A.* 1968 J.C. 40.

<sup>112</sup> *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).

<sup>113</sup> Colman *Cross-Examination: A Practical Handbook* (1990) 169.

<sup>114</sup> Langbein "Shaping the Eighteenth Century Criminal Trial" *U. Chicago L. Rev.* (1983) 168.

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 comment or controversy. 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 sorely 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.<sup>115</sup> The silence privilege prevents official lassitude and acts as an additional incentive for effective police-work. According to D.B. Ayer, "the privilege is a prophylactic which deters not only the commission of inhumane acts, but also the manufacture and reliance on unreliable testimony".<sup>116</sup> 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".<sup>117</sup> 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.

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<sup>115</sup> Stephen *A History of the Criminal Law in England* (1883) 442 cited in Dolinko op cit (n46) 1078.

<sup>116</sup> Ayers op cit (n88) 850.

<sup>117</sup> Wigmore para 2281 at 296 n2. Although it could be said that Wigmore was referring only to judicial conduct and not to police practice.

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".<sup>118</sup> 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 treatment of Black detainees, despite the existence of a right to silence, during the Apartheid decades is sufficient proof of this. Safeguards against inhumane interrogation are best sought in the technical rules which render coerced confessions inadmissible.<sup>119</sup> 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 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 minimise 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.<sup>120</sup> Similarly in America, torturing a suspect into providing self-incriminating information violates the constitutional requirements of due process.<sup>121</sup>

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<sup>118</sup> Friendly *op cit* (n32) 691.

<sup>119</sup> Sec 217A and 219 of the C.P.A. (1977).

<sup>120</sup> Menlowe *op cit* (n67) 293. See also Zuckerman "The inevitable demise of the Right to Silence" *N.L.J* August (1994).

<sup>121</sup> *Brown v Mississippi* 297 U.S. 278 (1936).

Additional protective measures could include the use of compulsory tape and video recordings of police interrogations supported by practical adjunct safeguards preventing the illegal tampering and editing of such recordings. 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 presence of a magistrate, or perhaps for practical reasons<sup>122</sup> before an impartial third party observer specially appointed to oversee pre-trial interrogation. Alternatively the judge's rules could be given teeth by being upgraded from mere guidelines into compulsory requirements. Essentially a balance must be found between police efficiency in crime control and the protection of individuals 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. An appropriate compromise in South African given its abysmal human rights legacy would be to maintain a silence privilege during pre-trial interrogation (as a possible additional protection against abuse) but to allow adverse inferences to be drawn in court from such silence where the circumstances warrant it (thus not unduly hampering effective criminal prosecution).<sup>123</sup>

Proponents also advance the plausible argument that a silence privilege protects unpopular minority opinion against potential persecution 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. Senator

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<sup>122</sup> It is impractical and costly to maintain a supply of magistrates on a 24 hour basis. See also Friendly *op cit* (n32) 714-5.

<sup>123</sup> As is the case in Singapore, which through the Singapore Criminal Procedure Code (Amendment) Act 2 of 1980, allows adverse inferences to be drawn from silence both at pre-trial and during trial.

McCarthy's anti-communist witchhunt during the 1950's immediately springs to mind. Targeted individuals who took refuge behind the silence privilege were instantly and disapprovingly characterised as Fifth Amendment Communists. Ironically the proposed South African Truth Commission comes perilously close to being classified as a belief probe, a witchhunt of apartheid collaborators. 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.

The argument however, confuses the antiquated historical role of a silence privilege with its narrowly defined modern function. Firstly, it is doubtful whether a silence privilege offers an adequate protection against 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) compounded by possible state exposure to charges of illegal arrest and malicious prosecution are thus far more efficient tools in frustrating criminal fishing expeditions. Secondly, 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.<sup>124</sup> Other constitutional shields, in particular the rights to equality (Sec 8), freedom of person (Sec 11), of religion, belief and opinion (Sec 14), of speech and expression (Sec 15), of association (Sec 17), of assembly, demonstration and petition (Sec 16), and reasonable access to unrestricted information

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<sup>124</sup> According to Wigmore para 2251 at 314 - "The theory that the privilege nullifies laws infringing freedom of belief or speech, has no application in the normal day to day criminal investigation or prosecution".

held by the state (Sec 23) 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 organizations illegal. Citizenry protection against such exploitative state action is best found in constitutional safeguards and not in a principle of silence. State action which seeks to create new oppressive crimes contrary to constitutional provisions would undoubtedly be struck down by the Constitutional Court. The only kind of belief probe which justifies the existence of a silence privilege is the unique and improbable situation wherein a belief not contrary to the Constitution is legislatively declared illegal ie, the declaration of racism as a crime. This exceptional situation would warrant the existence of a silence privilege. However even here the silence privilege should be ameliorated by allowing the court to draw an unfavourable inference from silence once a *prima facie* case has been established.

c) STATE LEGITIMACY

The state ability to regulate ordered group existence, *consensu populi*, would be severely undermined without a strong belief in the legitimacy of the criminal justice system. The silence privilege has traditionally illuminated 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 privilege is variously referred to as an important advance in the development of liberty,<sup>125</sup> a safeguard of human conscience,<sup>126</sup> and the hallmark of democratic values.<sup>127</sup> The attempt to compel self-incriminatory evidence is distasteful to the citizenry because compelling evidence infringes human dignity and weakens the democratic lynchpin cementing society. This argument is particularly influential in South Africa. A cynical manipulation

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<sup>125</sup> per Frankfurter J in *Ullman v U.S.* 350 U.S. 422 (1956) at 426.

<sup>126</sup> per Douglas J in *Ullman v U.S.* at 631.

<sup>127</sup> per Warren J in *Miranda v Arizona* 384 U.S. 436 (1966) at 660.

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. 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.<sup>128</sup> Courts in these countries are obliged to instruct laymen juries to ignore the inference. Moreover, in the words of W.V. Schaefer, "Those who advocate a right to silence bear the burden of justifying its divergence from everyday morality".<sup>129</sup> According to Judge Friendly, "a right to silence is generally perceived to be contrary to normal moral behaviour".<sup>130</sup> S. Hook sees the privilege as an insult to the average man's common sense.<sup>131</sup> D. Louisell, a strong supporter of the silence privilege is forced to admit in the field of criminal procedure, "the rule is

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<sup>128</sup> 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" - *U.S. v Grünwald* 233 F2d 578 (1956).

<sup>129</sup> Federalism and State Criminal Procedure 70 *Harv. L. Rev.* 1 (1956) 26.

<sup>130</sup> Friendly op cit (n32).

<sup>131</sup> "Let any sensible person ask himself - Whether he would hire a baby sitter 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", *Common Sense and the Fifth Amendment* (1957) 121.

psychologically and morally unacceptable as a general principle in human relationships".<sup>132</sup> There exists a chaotic ambivalence about the so called "right" to silence. On one hand the privilege 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 an 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. The inescapable conclusion must be - a right to silence does not justify nor operates as a device for achieving any of the objectives imputed to a criminal system.<sup>133</sup> The arguments advanced by the Procedural rationale are as inherently flawed in this respect as are those proposed by the Human rights rationale.

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<sup>132</sup> "Criminal Discovery and Self-Incrimination" *Cal. L. Rev.* 89 (1965) 94.

<sup>133</sup> Except, possibly in the limited area of pre-trial interrogation and the improbable belief probe which is not in conflict with the Constitution.

## 6. SITUATIONAL EXCUSE THEORY

The standard theories supporting a silence privilege are unable to explain, either from a moral or a rational perspective, why the silence privilege is considered fundamentally necessary to a law abiding community. W.J. Stuntz recognising the serious defects in these standard arguments has proposed an alternative and radical solution based upon the substantive criminal law concept of situational excuse.<sup>134</sup> The term excuse covers a number of theoretically distinct ideas. In the sense used by Stuntz it excuses a provisionally wrongful act by the accused because in certain situations a person should not be punished for making the wrong choice. 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.<sup>135</sup> Firstly, routine court excusal of perjury would strip away the potential cost attached to lying and thus undermine witness credibility. Secondly, immunising 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 immunising silence rather than perjury itself. A privilege which immunises silence and reduces the pressure to lie is an elegant solution 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

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<sup>134</sup> Stuntz "Self-Incrimination and Excuse" 86 *Columbia L. Rev.* 1227 (1988).

<sup>135</sup> Stuntz op cit (n134) 1229.

to do so".<sup>136</sup> Situation excuse theory is thus an attractive medium through which to view the silence privilege.

The excuse argument depends upon the key notions 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. 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.<sup>137</sup> The relative cost factor explains why the privilege protects only self-incrimination and not non-incriminating testimonial evidence. 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.<sup>138</sup>

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 immunises 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.<sup>139</sup> The manageable cost of an excuse based privilege helps explain why the privilege is so widespread in all Western legal systems. The most significant advantage of an

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<sup>136</sup> Stuntz op cit (n134) 1242.

<sup>137</sup> Stuntz op cit (n134) 1260. For a comprehensive analysis of the three legal elements of a silence privilege, namely - compulsion, incrimination and testimony in the light of the excuse model, see 1263-87.

<sup>138</sup> Stuntz op cit (n134) 1295. Although it could be argued that the application of a silence privilege in the area of interrogation is based more on deterrence rather than excuse, see 1264-72.

<sup>139</sup> For a criticism of the reliable testimony argument see *supra* note 116 - 119 and accompanying text.

excuse theory<sup>140</sup> is that it reduces the importance and scope 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 ie, 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 can be levelled against situational excuse theory. Firstly, the South African criminal law defines necessity by means of a justification theory. Unlawfulness is never excused but is excluded by the presence of a ground of justification.<sup>141</sup> Adopting the Stuntz definition would require a reappraisal of conventional South African doctrine, a readjustment which is unnecessary and wasteful. Secondly and more importantly, the parameters of the traditional necessity plea are 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. Thirdly, a number of American jurists have analyzed the excuse argument in some detail and have found it to be contrary to conventional doctrine.<sup>142</sup> 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. The South African position in this regard is somewhat ambiguous. South African courts normally display an attitude of scepticism towards the defence of necessity. The trend is towards restricting the parameter and

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<sup>140</sup> Stuntz op cit (n134) 1295.

<sup>141</sup> Snyman *Criminal Law* (1993) 109.

<sup>142</sup> See *supra* note 45 and accompanying text.

sphere of application rather than broadening it. A reluctant A.D. is therefore unlikely to allow the extension of a plea of necessity in this particular circumstance. Fourthly, Stuntz views the modern Fifth Amendment doctrine as being based on theories of choice and balancing. The plurality opinion in *California v Byers*<sup>143</sup> 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.<sup>144</sup> At best interest balancing applies in peripheral issues involving government practices aimed at ensuring regulatory efficiency.<sup>145</sup> When the government aim is to secure criminal convictions, interest balancing is absolutely forbidden. Fifthly, a credible excuse argument is dependent on the actual existence of a punishment for perjury. If there is no threat of punishment there is proportionally no need for excuse. In South Africa perjury prosecutions are far and few between. In effect no real threat exists and the value of an excuse argument is correspondingly diminished. Finally 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.<sup>146</sup> Additional inroads are undesirable. The confusion which may result from the acceptance of an excuse based privilege far outweighs any practical benefit.

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<sup>143</sup> 402 U.S. 424 (1971) - It is constitutional to require a driver involved in an accident to stop and identify himself.

<sup>144</sup> See *supra* note 55 - 59 and accompanying text.

<sup>145</sup> See Dolinko *op cit* (n46) 1120.

<sup>146</sup> Irrebuttable Presumptions of Law, Estoppel and Parol Evidence Rule.

## 7. UTILITARIANISM

Most of Bentham's famous commentary about the right to silence stems from the now discarded rule which rendered the accused an incompetent witness.<sup>147</sup> Various polemical and obsolete objections to silence appear in his *Rationale of Judicial Evidence, Book IX*.<sup>148</sup> Two exceptional arguments have survived the rigours of time - the old woman's and the fox hunter's reasoning - and these arguments are analyzed in some detail above.<sup>149</sup> The most challenging critics of Bentham's theory are to be found amidst the ranks of those who not only support a right to silence but are generally inimical to the philosophy of Utilitarianism itself. Human rights critics argue that a utilitarian law of evidence infringes basic human dignities and erodes individual moral autonomy. Supporters of the Procedural rationale make much of Bentham's failure to exclude oppressively obtained evidence and evidence of prior convictions,<sup>150</sup> objections which have also been analyzed in some detail above and conclusively refuted.<sup>151</sup> Moreover despite its impressive antiquity, a refreshingly contemporary and persuasive reasoning can be deduced from Bentham's eclectic theory of law,<sup>152</sup> which serves as the foundation for much critical argument opposed to the silence privilege.

Bentham is the very first jurist to make the crucial taxonomical distinction between substantive and adjective law. The utilitarian function of substantive law requires a maximisation of overall community happiness by limiting socially harmful behaviour. The adjective law in turn gives effect to substantive law by maximising its execution

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<sup>147</sup> Discarded by the Criminal Procedure Act of 1898.

<sup>148</sup> *R.J.E.* as cited in Twining *Theories of Evidence* (1985) 84.

<sup>149</sup> See *supra* notes 38 and 96 - 97 and accompanying text.

<sup>150</sup> Hearsay evidence is not excluded by Bentham's theory. Yet this is not incompatible with modern developments which have seen the statutory streamlining of Hearsay.

<sup>151</sup> See *supra* note 88 - 90 and accompanying text.

<sup>152</sup> Bentham's general model is - 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.

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. The primary purpose of Bentham's adjective or natural system<sup>153</sup> is thus the need to maximise execution of substantive law by minimising the collateral hardships involved. There are two recognisable kinds of hardships, those involving inevitable vexation, expense or delay and those involving the possible danger of misdecision. A balance must be found between the primary and collateral ends of natural 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 to the mere expedient execution of the law. The principles of utility and rectitude of decision contained within Bentham's natural system also 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 essential to the adversarial system. Three important notions may be deduced from Bentham's theory. Firstly, a natural system is proposed which contains no mandatory and artificial exclusionary rules - the very antithesis of our modern law of evidence. Secondly, questions about admissibility of evidence are clearly questions of empirical fact and never simply questions of law. Finally, it follows logically that all evidence is *prima facie* admissible, unless its production involves preponderant vexation, delay or risk of misdecision.<sup>154</sup>

The critical importance of utilitarian theory is that it offers a practical and rational methodology by which the influence of a silence privilege can be ameliorated or removed entirely without distorting key elements of adversarial procedure. In terms

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<sup>153</sup> "Natural" as contrasted with the technical system which has distorted the fact finding process with its "Byzantine collection of exclusions, privileges, presumptions, rules of competence and formulae for weighing testimony" - *R.J.E.* 99 - 100 fn45.

<sup>154</sup> The fundamental guideline of evidence is, "let in the light of evidence except where letting in of such light is attended by preponderant collateral inconveniences" - *R.J.E.* 67 - 69.

of utilitarian theory the prosecution is obliged to establish a *prima facie*<sup>155</sup> case on the commencement of trial. This point is implicitly recognised in South African criminal procedure by allowing for discharge of the accused at the close of the state's case.<sup>156</sup> The evidence led by the state must be such that a reasonable person would find in favour of the state before the defence is called upon to assume the evidentiary burden in rebuttal. According to utilitarian theory a weak circumstantial case intentionally built-up of self-incriminatory admissions induced by rigorous cross-examination will not suffice to establish the *prima facie* standard required of the prosecution. Something more is required in the way of sufficient evidence. Therefore the absence of a silence privilege during the course of a trial will not seriously serve to strengthen the prosecution's burden or distort the adversarial process. Alternatively, in a system which does possess a right to silence, utilitarian theory ameliorates the influence of such a privilege 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. The recent *ratio decidendi* in *Murray and Director of Public Prosecutions*,<sup>157</sup> unequivocally supports utilitarian theory. A proper inference may be drawn from the accused's failure to testify. In certain circumstances this may even include an inference of guilt. Lord Diplock remarks in *Haw Tau Tau v Public Prosecutor*,<sup>158</sup> "what inferences are proper to be drawn from the accused's silence depend upon the circumstances and is a question of common sense". If there is no *prima facie* case to answer then no proper common sense inference can be reasonably drawn from the accused's silence. On the other

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<sup>155</sup> According to Lord Mustill in *Murray and Director of Public Prosecutions* (1994) 1 WLR 1 (HL) at 3 the precise meaning of *prima facie* is, "a case consisting of direct evidence which (combined with legitimate inferences based upon it) could lead a properly directed jury [judge] to be satisfied beyond reasonable doubt that each of the essential elements of the offence have been proved".

<sup>156</sup> Sec 174 of C.P.A. (1977). See also *S v Mpetha and others* 1983 in (4)SA 262 (C) at 263 H and *S v Khanzapo* 1979 (1) SA 824 (A) at 838 F. Similar provisions exist in Scots law, Criminal Procedure Act, Sec 140 A and 345 A.

<sup>157</sup> (1994) 1 WLR 1 (HL) per Lord Slynn of Hadley at 11.

<sup>158</sup> (1982) AC 136 at 153.

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.<sup>159</sup>

The utilitarian process inspires confidence in the criminal justice system because it gives the impression that suspects are being convicted on the basis of sufficient evidence. A system which lacks artificial exclusionary rules and which 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 the claim that the prosecution must establish a *prima facie* case in order to initiate criminal proceedings. The obligation to produce sufficient evidence thus renders it highly probable that the court is getting to the truth. A process which removes all obstacles barring the path to legal truth can only serve to strengthen the presumption of innocence.

The silence privilege is treated as self-obvious and not in need of justification. Advocates of a right to silence regard it as sacred. Yet in terms of utilitarian theory, to exclude self-incriminatory testimony is to exclude the best sort of evidence which consequently leads to greater reliance on inferior kinds of evidence, increasing the risk of vexation, delay, expense and misdecision. *Such an exclusion needs to be justified, it is not self-evident.* An exclusionary rule if it is to be elevated to the exalted heights of a legal right must contain within itself the essential criteria of transparent morality and rationality. In the course of this discussion an attempt has been made to show that the so called normative "right" to silence possesses neither a moral nor a rational component. 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.

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<sup>159</sup> In earlier English and South African decisions, a failure to testify was a factor which could be taken into account but could not by itself prove guilt. See *supra* note 2 and also *S v Letsoko* (1964 (4)SA 768 (A)). The present trend in English law is to allow a guilty inference in certain circumstances, whereas the constitutional entrenchment of a silence privilege in South Africa will probably mean that no inferences at all may be drawn from the accused's failure to testify. A trend away from English law and a convergence towards the American position reflected in *Griffen v California*.

## 8. CONCLUSION

The theory surrounding the silence privilege exhibits a disturbing degree of ambivalence. On the one extreme the vast majority of American jurists consider silence to be a fundamental right but are unable to advance a sufficiently persuasive *raison d'être* to substantiate a view based primarily on an uncritical *stare decisis*. In particular the Human rights rationale which attempts to justify the silence privilege on the grounds of cruelty, privacy and autonomy has been shown to be inherently flawed. Gerstein, the main protagonist of this rationale, is unable to provide a justification which is both theoretically and practically consistent. The Procedural rationale which seeks to promote the silence privilege as an essential instrument for the protection of the innocent, in avoiding exploitation and bolstering state legitimacy has also proved to be either irrelevant or functionally ineffectual. The sole exception to this general malaise is the isolated instance of pre-trial interrogation,<sup>160</sup> although it must be noted that silence has been of little *practical value* to suspects in the police station. The large number of statutory exceptions to the silence principle in most Western Legal systems is also a pragmatic indication of the undeniable truth that silence should not be viewed as a fundamental right but merely as a legal rule amongst other legal rules. It does not possess any particularly unique *auctoritas*.

The middle ground is occupied by those theorists who are extremely critical of the silence privilege yet hesitate to call for its abolition. Friendly, despite a wide-ranging attack on the privilege, concedes the usefulness of silence at least until alternative protections for First Amendment rights are in place.<sup>161</sup> Dolinko, the most persuasive of modern American critics, also draws back from advocating the negation of the silence privilege on the rather flimsy ground that a rule whose existence lacks any principled justification nevertheless is functionally important because its repeal may do violence to the legal system as a whole.<sup>162</sup> A reasoning which is both tenuous and

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<sup>160</sup> For example the U.S. Supreme Court has made the silence privilege a primary basis for constitutional limitations on police interrogation methods in *Miranda v Arizona* 384 U.S. 436 (1966).

<sup>161</sup> Friendly op cit (n32) 696-97.

<sup>162</sup> Dolinko op cit (n46) 1064-5.



In the Anglo-American legal tradition therefore, two major trends may be identified. The pragmatic British approach which substantially limits the scope of the privilege and allows an adverse inference to be drawn from silence in certain circumstances. The contrary trend in some other jurisdictions is to upgrade the silence privilege beyond the ambit of an evidentiary rule into the status of a constitutional right. This trend is in harmony with the American approach and is illustrated by recent developments in South Africa. //

It is submitted that the trend towards constitutional entrenchment is conceptually misguided. The term "right" to silence is a misnomer. A right must contain the crucial elements of morality and rationality. It has been conclusively demonstrated above that the silence privilege contains neither of these exacting criteria. The elevation of silence to a fundamental right within the South African Constitution is therefore based on antiquated belief devoid of common-sense reasoning. Perhaps it is worth remembering that the final version of the American Fifth Amendment was drafted in 1791. What was valid some two hundred years ago is not necessarily valid today and an uncritical adherence to the American approach is absurd. Furthermore, the American Constitution is drafted in rather general terms allowing the U.S. Supreme Court much latitude in the interpretation of constitutional rights. The contrary is true of the South African Constitution, which is more specifically detailed and consequently less flexible. Not only is the South African "right" to silence conceptually flawed but its rigidity affords the Constitutional Court limited interpretational scope. The practical consequence of so lethal a combination will be to retard the efficient administration of justice and erode the legitimacy of the legal establishment.

Proper legal reasoning therefore suggests that the silence privilege as represented by the relevant passages in Sec 25 of the South African Constitution be amended. The author proposes the incorporation of the following guideline principles. Firstly, the accused should be formally called upon to take the stand once the prosecution has established a *prima facie* case against him. The "right" to silence in this context is only important in the sense that the accused cannot be compelled to speak. Secondly,

the judge should be allowed to draw any reasonable inference of guilt from the accused's silence before or during trial. The current restrictions on such inferences should be swept away and replaced by common-sense inferences determined by the particular circumstances of each individual case. Finally, as a side note, the statutory rule immunizing third party witness testimony from subsequent criminal prosecution is logically defensible because it enhances the judicial ability to arrive at the equitable truth. These revisions parallel the modern British approach and are accordingly heavily influenced by utilitarian theory. After all Bentham's forceful maxim, "Evidence is the basis of justice, exclude evidence and you exclude justice", is basic common-sense and should appeal to the conscientious South African legal reformer.

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