Catching the Fox:
Restricting the Right to Pre-trial Silence in Canada

by

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ABSTRACT

This thesis studies the right to silence and proposes restricting the right to pre-trial silence in Canadian criminal law in a manner similar to the way it has been curtailed in the United Kingdom, where the trier of fact may draw an adverse inference from an accused’s pre-trial silence in certain statutorily defined circumstances. The thesis is a comparative review of the historical development and current state of the law governing the right to pre-trial silence in Canada and the United Kingdom, and includes a discussion and analysis of the major philosophical and pragmatic arguments for and against the right to silence found in the academic and jurisprudential discourse. I argue that the right to pre-trial silence is contrary to the moral duty to respond to a well-founded accusation, as well as to simple common sense. Furthermore, I submit that the right to silence interferes with the truth-seeking function of the courts, is irrationally and arbitrarily applied, does not strike an appropriate balance between individual rights and the societal importance of effective law enforcement and the successful prosecution of the guilty, and is in reality quite ineffective in its goal of protecting an accused because of recent Supreme Court of Canada decisions that have essentially eviscerated the practical utility of the right to pre-trial silence for anyone facing police interrogation other than the most sophisticated or hardened criminal. Based on these suppositions, I propose that the Canada Evidence Act be amended to allow the trier of fact to draw an adverse inference, including an inference of guilt, when an accused remains silent during police questioning but later advances a defence that he or she could have reasonably mentioned when questioned.
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One of the most pernicious and irrational rules that ever found its way into the human mind ... If all criminals of every class had assembled and framed a system after their own wishes, is not this rule the very first they would have established for their security? Innocence never takes advantage of it; innocence claims the right of speaking as guilt invokes the privilege of silence.

Jeremy Bentham
19th century*

The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to everyone, and needs no illustration. It is plain to every person who gives the subject a moment’s thought.

A sense of personal degradation in being compelled to incriminate one’s self must create a feeling of abhorrence in the community at its attempted enforcement.

Justice S.J. Field

Brown v. Walker

1896*

* As cited in Ed Ratushny, Self-Incrimination in the Canadian Criminal Process (Toronto: Carswell, 1979) at 3.
CHAPTER I

INTRODUCTION AND METHODOLOGY

A. INTRODUCTION

Depending on one’s perspective, the right to silence is either an anachronistic remnant of a criminal justice system that long ago disappeared or an inalienable human right based on individual liberty, dignity and autonomy which is integral to any legitimate criminal justice system. I subscribe to the former view and concur with the indictment attributed to Jeremy Bentham\(^1\) that the right to silence is an irrational legal rule which does little for the innocent but a lot for the guilty. This thesis will propose a fundamental change to Canadian law governing the right to silence by recommending that Canada adopt a law similar to that of Great Britain,\(^2\) where the right to silence is restricted and an adverse inference based on an accused’s silence is allowed in certain prescribed situations.

The right to silence\(^3\) is a fundamental tenet of Canadian law.\(^4\) It is generally believed to have originated as a response to the forced interrogations and other inhumane tactics of the Court

\(^1\) Bentham scholar ADE Lewis asserts that Bentham did not write the quote set out at the beginning of this thesis even though it is often attributed to him. Lewis asserts the statement is from an English translation of Dumont’s *Treatise on Judicial Evidence* of 1524/25. However, while the quotation may not have actually been the words of Bentham, Lewis acknowledges that Bentham would have agreed with it. According to Lewis: “It needs very little urging to see that Bentham would agree to the abolition of the right to silence as he understood it, and there is no suggestion that his views have been essentially misrepresented in the modern debate.” Lewis also points out that various commissions and committees that have studied the right to silence in the United Kingdom, such as the Criminal Law Revision Committee, Philips Commission and Home Office Working Group (see Chapter III.C, below) have cited the quotation and attributed it to Bentham. See ADE Lewis, “Bentham’s View of the Right to Silence” (1990) 43 Curr Legal Probs 135 at 139 [Lewis].

\(^2\) Excluding Scotland, which has its own criminal law.

\(^3\) The terms “right to silence” and “right to remain silent” will be used interchangeably.

\(^4\) *R v Wooley* (1988), 40 CCC (3d) 531 (Ont CA) [*Wooley*].
of Star Chamber and ecclesiastical courts in seventeenth century England. The right to silence became part of Canadian law through colonization and the adoption of English common law as the basis of Canadian law. However, while the right to silence has long been considered an important principle of law in Canada and most other common law countries, its legitimacy has by no means been universally accepted. In some jurisdictions the debate over the philosophical justification for, and instrumental utility of, the right to silence has often been loud, emotional and divisive. And in some of those jurisdictions the debate has foreshadowed legislative change that has significantly restricted the right to silence. Singapore, for example, abolished the right to silence in 1976. In Australia, the right to silence has been restricted in some circumstances and it is currently the subject of public debate in New Zealand, where the government recently tabled a plan to restrict it. But the most notable jurisdiction where the right to silence has been restricted is its very birthplace – England (or more specifically, England, Wales and Northern

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6 Ibid at 155.
7 Ibid at 4.
10 See e.g. Derek Chang, “Govt concedes right to silence in law reforms” *New Zealand Herald* (16 May 2012), online: NZherald <http://www.nzherald.co.nz/politics/news/article.cfm?>.
Ireland), where the debate over the right to silence has been raging for at least four decades and where it has been significantly restricted since the late 1980s.

On the other hand, the right to silence is constitutionally protected under the Fifth Amendment to the United States Constitution, and the United States Supreme Court has robustly defended it as a fundamental legal principle woven into the fabric of American democracy. In India, the right to silence is implied in the constitutional protection of the privilege against self-incrimination, while in South Africa it is expressly listed as a right that attaches to anyone who is arrested. In Canada, the law governing the right to silence appears to be somewhat of a compromise, as the Canadian judiciary has developed what Supreme Court of Canada Justice Iacobucci once called, “a uniquely Canadian approach to the right to silence”. In *R. v. Hebert*, the Supreme Court of Canada unanimously held that the right to silence is a principle of fundamental justice constitutionally protected under section 7 of the *Canadian

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11 The terms “England”, “Britain”, “Great Britain” and the “United Kingdom” will be used interchangeably, as will the terms “English” and “British”; although, the most common nomenclature will be “Britain” and “British” to reflect the reality that most of the right to silence issues discussed in the thesis apply to England, Wales and Northern Ireland. The use of any of these terms is, of course, problematic because Scotland is part of the United Kingdom, but as it has its own criminal law it is not included in this thesis.

12 US Const amend V, online: Cornell University <http://www.law.cornell.edu/wex_fifthamendment>. The Fifth Amendment reads: “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”


16 *R v Broyles* (1992), 68 CCC (3d) 308 at 320 (SCC) [Broyles].

17 (1991), 57 CCC (3d) 1 (SCC) [Hebert].
Charter of Rights and Freedoms\(^{18}\) ("Charter of Rights" or "Charter"). However, the majority decision in *Hebert* also created several important restrictions to the right to silence at the investigative stage of the criminal process and later decisions of the same Court, most notably *R. v. Singh*\(^ {19}\) and *R. v. Sinclair*,\(^ {20}\) have applied some of those restrictions in a manner that has substantially impaired the practical utility of the right to silence for a person undergoing a custodial police interrogation.

Many advocates of the right to silence claim it is a self-evident and universal human right,\(^ {21}\) although such a view is by no means unanimous. Some critics of the right to silence have referred to it as the “so-called” or “alleged” right to silence,\(^ {22}\) suggesting a certain degree of scepticism about its legitimacy as either a human rights norm or a valid principle of law. Jeremy Bentham, who was one of the first opponents of the right to silence, once analogized it to a fox hunt where the concept of fairness requires the fox to be given a head start.\(^ {23}\) And Sir Rupert Cross once called the right to silence a “sacred cow.”\(^ {24}\)

Whether the right to silence is a “hunted fox” or a “sacred cow”, I suggest it should go the way of the dinosaur and the dodo bird because it has both outlived its time and defies common sense. In this thesis, I will argue that the right to silence is an anachronistic rule that owes its ongoing survival to dogmatic deference to ancient history which is no longer relevant in the social, political and legal environment of contemporary Canada. Moreover, from a pragmatic


\(^{19}\) 2007 SCC 48, [2007] 3 SCR 405 (available on lexUM) [Singh] [cited to online source].

\(^{20}\) 2010 SCC 35, [2010] 2 SCR 310 (available on lexUM) [Sinclair] [cited to online source].


\(^{24}\) Galligan, *supra* note 22 at 70.
perspective, I will argue that recent Supreme Court of Canada decisions have effectively placed the right to silence on life support anyway. Based on these suppositions, I will submit that the right to silence in Canada should be limited in a manner similar to the way it has been in Britain. More specifically, I will submit that the trier of fact should be allowed to draw an adverse inference when a person invokes his or her right to silence in circumstances where “common sense” calls for a response. In support of this proposition, the thesis will review the law governing the right to silence in the United Kingdom and compare it to Canadian law. I will then present my argument why the British right to silence model should be considered superior to the Canadian model.

The remainder of this chapter will identify four important caveats regarding the scope of the thesis, as well as briefly describe the methodological and theoretical framework upon which my proposition will be constructed. Chapter II will then review the major philosophical and pragmatic theories posited by those who support and those who oppose the right to silence. Chapter III will review the right to silence in Britain and Chapter IV will do the same for Canada. In Chapter V, the rationale underlying my proposition will be presented and, in Chapter VI, I will set out specific recommendations to introduce an adverse inference rule for pre-trial silence in Canada. The Appendix will set out the recommended adverse inference rule in statutory language as a possible amendment to the Canada Evidence Act.
B. CAVEATS

Before outlining the methodological and theoretical framework of the thesis, four caveats need to be stated. First, it is important to emphasize that I am not suggesting that a person suspected of having committed a crime who is being questioned by the police or other state agent should be forced to speak to the authorities. I agree that such a person should have the right to decide whether or not to speak or answer questions; in other words, he or she should have the right to remain silent. What I am suggesting, however, is that in certain circumstances prescribed by law, which will be identified in Chapter VI, a person who chooses to remain silent should pay a price for that silence, and that price should be a possible, although not mandatory, adverse inference. More specifically, when a person suspected of having committed a crime remains silent when confronted with a well-founded accusation or when asked reasonable questions regarding the suspected crime, an adverse inference up to and including an inference of guilt should be available to the trier of fact.

Second, while it is clear that the right to silence arises at both the pre-trial (investigative) and trial stages of the criminal process, this thesis will only deal with pre-trial silence. While I recognize that the two stages are intimately linked and that the normative and pragmatic issues relating to the right to silence before and at trial are similar, including a discussion of the right to silence at trial would clearly put this paper far beyond the mandate and scope of a Master of Laws thesis. Having said this, though, occasional reference will be made to the right to silence at

25 The terms “suspect”, “offender”, “defendant” and “accused” will be used interchangeably to describe a person who is the subject of the criminal process.
trial when the principle or issue to which such reference is made is relevant to the right to silence at the investigative stage of the criminal process.  

The third caveat is not so much a limitation as a clarification. It is important to recognize that the right to silence is a difficult concept to deal with in isolation because it is not necessarily a stand-alone right. Some academics have suggested that the right to silence is more of a manifestation of the privilege against self-incrimination than its own particularized right. Moreover, the Supreme Court of Canada and several legal scholars have emphasized the close connection between the right to silence and the presumption of innocence and right to counsel. Because these legal principles are so intertwined, this thesis will by necessity also discuss the privilege against self-incrimination and the right to counsel, and to a lesser extent the presumption of innocence, as well as other complimentary legal principles and rules. Having said this, though, the focus of the thesis will be on the right to silence at the pre-trial stage of the criminal process.

Finally, it is important to clarify that the thesis will be discussing the right to pre-trial silence as it relates to what might be described as ordinary criminal law; that is, the criminal law that applies to everyday life such as the law dealing with violent, property and public order offences. One area of special interest – and certainly one of significant importance to the right to silence

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28 It should also be noted that, in my view, enacting an adverse inference rule for pre-trial silence in Canada is only part of the solution. I suggest a more comprehensive overhaul of the right to silence is required. Other recommended changes to the law would be to clarify the confusion surrounding when and by whom an adverse inference may be drawn from the accused’s silence at trial after the Crown presents a “case to meet”. In this regard, I submit that Chief Justice Lamer’s dissenting judgement in R v Noble, [1997] 1 SCR 874 [Noble] is preferable to the majority decision written by Sopinka J. Another change to the law that I would propose would be to implement mandatory pre-trial disclosure by the defence similar to the model used in the United Kingdom, see discussion in Chapter III, C.9, below. However, justification for these propositions will have to wait for another day.


30 Ibid; Paciocco, Charter Principles, supra note 29; Hebert, supra note 17 at 33-35, per McLachlin J.
debate in contemporary western society – is the relationship between the right to silence and terrorism. Some unique and challenging social and political dynamics very likely arise when the right to silence is considered in relation to terrorism, and the right is probably viewed in a less sympathetic light by many when a suspected terrorist claims it (although, the same underlying principles should apply whenever the right to silence is at issue). Furthermore, history has demonstrated that restricting the right to silence as a strategy to combat terrorism can lead to a more general restriction of the right to silence within the ordinary criminal law, as happened in the United Kingdom where the initial restriction on the right to silence in response to domestic terrorism associated to Northern Ireland expanded to other areas of the criminal law in England and Wales.\(^\text{31}\) It is yet to be seen if a similar progression might occur in Canada, but the possibility certainly exists given some of the laws enacted after the September 11\(^{th}\) attacks, such as the investigative hearing process.\(^\text{32}\) The United States and Australia are two jurisdictions where advocates for the right to silence fear for its well-being due to the government’s response to terrorism.\(^\text{33}\) However, while the issue of the right to silence in the context of terrorism is


\(\text{\textsuperscript{32}}\) Part II.I of the \textit{Criminal Code}, RSC 1985, c C-46 was enacted after the September 11, 2001 attacks on the United States. Part II.I includes section 83.28, which establishes the “investigative hearing” process. If there are reasonable grounds to believe that a terrorism offence has been or will be committed and a person has information regarding the terrorism offence, a judge may order a warrant for the arrest of the person in order to compel the person to be examined by a judge. Subsection (8) states, in part, that during the investigative hearing: “a person… shall answer questions put to the person by the Attorney General or the Attorney General’s agent, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to privilege.” Subsection (10) states, in part: “No person shall be excused from answering a question or producing a thing under subsection (8) on the ground that the answer or thing may tend to incriminate the person or subject the person to any proceeding or penalty.” Subsection (10), however, also provides subsequent use immunity, including immunity from the use of any derivative evidence discovered through the compelled testimony, other than for perjury or giving contradictory evidence. A person who is the subject of an investigative hearing has the right to counsel at any stage of the hearing. Section 83.28 expired in February 2007 under a sunset clause provision, but was reinstated in 2011.

\(\text{\textsuperscript{33}}\) See e.g. Amos N Guiora, \textit{Creating an Exception to an Exception – Too Dangerous and Too Unwarranted}, JURIST – Forum (2 April 2011), online: <http://jurist.org/forum/2011/ April/article_url.php.> (discussing
important, it is beyond the scope of this thesis and therefore will not be discussed. Having set out these caveats, a brief discussion of the methodology and theoretical framework upon which my proposition is based is necessary.

C. METHODOLOGY AND THEORETICAL FRAMEWORK

The primary research methodology for this paper will be comparative and descriptive analysis. Through reviewing the history and evolution of the right to silence in Britain and Canada and comparing the current state of the law in the two jurisdictions, a platform will be built upon which the proposition will be constructed. In addition, the theoretical approach to the right to silence employed in the paper will be a combination of utilitarianism and legal pragmatism.

Utilitarianism has been defined as “the view that the morally right action is the action that produces the most good.” Utilitarianism is consequential and concerned with the maximization of the “overall good” by bringing about “the greatest amount of good for the greatest number”. In my view, introducing an adverse inference rule for pre-trial silence would achieve the utilitarian goal of achieving the maximum benefit for the maximum number of people. It is important, however, to stress that a utilitarian perspective of criminal justice does not dismiss the importance of placing reasonable constraints on government or police power; the government and its agents must be constrained in order to maximize utility. Furthermore, utilitarianism appreciates and respects individual liberty and human rights because they are imperative in achieving the greatest good for the greatest number. H.L.A. Hart has stated: “No one has ever

restrictions on the right to silence in terrorism cases in the United States); Brincat, supra note 9 (discussing restrictions on the right to silence in Australia implemented after September 11, 2001).
35 Ibid.
combined, with such even-minded sanity as the Utilitarians, the passion for reform with respect for law together with a due recognition of the need to control the abuse of power even when power is in the hands of the reformers.”

Hart has also asserted that while utilitarianism incorporates an “insistence on the separation of laws and morals”, it also includes an appreciation of, and respect for, individual rights and freedoms and moral standards. As Hart points out, utilitarians “never denied that, as a matter of historical fact, the development of legal systems had been powerfully influenced by moral opinion”, but they do emphasize “communal worth and net happiness”. As utilitarianism, in my view, is a reasonable and balanced orthodoxy in a democracy such as Canada, I suggest it is an appropriate philosophical foundation upon which to base my proposal to restrict the right to silence through an adverse inference rule. Much of my argument will be founded on the contention that the balance between the societal interest in effective law enforcement and prevention of crime versus the importance of individual rights and liberties needs to be re-calibrated, especially in the area of pre-trial silence, as the current state of Canadian law does not achieve the utilitarian goal of “the greatest amount of good for the greatest number.”

Bentham, of course, was an early classical utilitarian. According to Lewis, Bentham considered technical exclusionary rules, such as the right to silence, to be problematic because they interfere with the primary function of the law, which is rectitude of decision. Bentham thought such rules should be used sparingly, if at all, and he objected to the law that prohibited

37 Ibid at 102.
38 Ibid at 100.
40 Supra note 34.
41 Lewis, supra note 1 at 144.
an accused from testifying because, “justice is served not by such spurious balances but by rectitude of decision and this requires above all else the fullest possible disclosure compatible with minimising delay, vexation and expense.”

According to Lewis, Bentham was aware of the danger of false confessions and “false deductions from silence” and “was sensitive to the issue of oppression”, but believed such concerns “would not by [themselves] be a sufficient reason for excluding such self-related evidence though it would give grounds for treating it at least that degree of caution used in connection with evidence derived from sources hostile to the accused.”

Bentham’s solution was to “provide legislative guidelines, the Instructions to the Judges, which will assist decision makers in the task of making an accurate assessment of the truth of all admitted evidence, including confessional evidence.”

As Lewis states: “Having in this way provided against any risk of misdecision arising, Bentham can see no further objection to requiring accused persons to account for their conduct or, failing such an account, having their silence assessed by the adjudicator as relevant to a decision on their guilt.”

As will be discussed in Chapters II and III, Bentham’s utilitarian critique of the right to silence was a common feature of the right to silence debate in Britain in the 1970s and 1980s, and I will be leaning heavily on Bentham’s arguments to support my proposition that an adverse inference rule is needed in Canada.

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42 Ibid at 147-48.
43 Ibid at 149.
44 Ibid at 152. It is important to remember that Bentham was writing before the advent of modern policing.
46 Ibid at 151.
47 Ibid.
48 Ratushny, Self-Incrimination, supra note 5 at 5.
A second theoretical methodology upon which I will rest my argument is legal pragmatism. Citing Richard Posner, Susan Haack has defined pragmatism as, "a disposition to base action on facts and consequences rather than on conceptualisms, generalities, pieties, and slogans".\textsuperscript{49} According to Haack, pragmatism is concerned “with expediency rather than principle, with matters of fact often to the exclusion of intellectual or artistic matters; practical as opposed to idealistic”.\textsuperscript{50} Like utilitarianism, legal pragmatism is consequential. Furthermore, Posner submits, “[t]he consequences that concern the pragmatist are actual consequences”.\textsuperscript{51} Posner also argues that “pragmatists are forward-looking, antitraditionalists”\textsuperscript{52} and that legal pragmatism is closely connected to utilitarianism.\textsuperscript{53} I will be using legal pragmatism as the other philosophical pillar for my proposition, based on my argument that the “actual consequences” of the law governing pre-trial silence in Canada has been the contradictory application of the law, less effective law enforcement and the undermining of public confidence in the administration of justice. Moreover, I will submit that the pragmatic (actual) consequence of the majority judgements of the Supreme Court of Canada in Singh and Sinclair has been the effective evisceration of any practical benefit which the right to silence might provide to someone other than a sophisticated or hardened criminal undergoing a custodial interrogation with a skilled and persistent police interrogator.

Finally, in the spirit of full disclosure one final comment must be made. The arguments upon which I will construct my proposition will be informed by my practical experience. While this thesis is primarily an academic research paper, scholarly study is not my area of expertise either

\textsuperscript{50} Ibid at 74.
\textsuperscript{52} Ibid.
\textsuperscript{53} Ibid at 25.
by training or experience. While I received an LL.B. degree many decades ago, my career has not been in the practice or study of law, but rather in the field of policing and parole. I spent thirty-two years in policing; seventeen as a street level police officer, detective and supervisor in a large urban police department and fifteen as a Deputy Chief and later Chief of a moderate sized police department. Since retiring from policing, I have continued to work within the practical branch of the criminal justice system through an appointment to the Parole Board of Canada. It is important to acknowledge that my experience will undoubtedly inform my perspective and analysis of the right to silence issue, just as the scholarly reflection of the legal academic will inform his or her perspective on the subject. However, beyond simply informing my argument, I will on occasion also refer to my experience with the practical application of the criminal law and right to silence to provide support for the utilitarian philosophical approach which I suggest justifies the British adverse inference rule.

Having identified some important caveats as well as the methodological and theoretical framework of the thesis, the first order of business is to discuss the various normative arguments that have been debated within the right to silence discourse.
CHAPTER II

ARGUMENTS FOR AND AGAINST THE RIGHT TO SILENCE

A. INTRODUCTION

The right to silence has been defined as “a principle of common law and it means that normally courts or tribunals of fact should not be invited or encouraged to conclude, by parties or prosecutors, that a suspect or an accused is guilty merely because he has refused to respond to questions put to him by the police or by the Court.”54 Within the Canadian context, Martin J.A. of the Ontario Court of Appeal once described the right to silence as follows:

The right of a suspect or an accused to remain silent is deeply rooted in our legal tradition. The right operates at both the investigative stage of the criminal process and at the trial stage. In Canada, save in certain circumstances, a suspect is free to answer or not to answer questions by the police. We say he has the right to remain silent because there is no legal obligation on him to speak.55

While these descriptions of the right to silence are quite straightforward, other definitions are more complex. James Michael and Ben Emmerson, for example, have suggested that “[t]he right to silence is not a single right – it consists of a cluster of different procedural rules, each related in one way or another to the protection against self-incrimination.”56 And in R. v. Director of Serious Fraud Office: ex parte Smith57, Lord Mustill described the right to silence as “a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the

54 180th Report, supra note 9 at 3.
55 R v Esposito (1985), 49 CR (3d) 193 at 200 (Ont CA) [Esposito].
57 [1992] 3 All ER 456 [ex parte Smith].
extent to which they have already been encroached upon by statute.”

Susan Easton has summarized the immunities identified by Lord Mustill as:

(i) The immunity from being compelled on pain of punishment, to answer questions posed by other persons or bodies, (ii) the general immunity from being compelled to answer questions to which the answers may be incriminating, (iii) the immunity of persons suspected of criminal responsibility from being compelled to answer questions by police officers, (iv) the immunity from being compelled to answer questions in the dock, (vi) the immunity of persons charged with criminal offences from being asked questions by the police and (vii) the immunity of persons being tried from being subjected to adverse comment on their failure to answer questions before the trial or to give evidence at the trial.

However, whether the right to silence is a right on its own accord or part of a constellation of several inter-related rights, privileges and immunities, it has historically not only protected a person from being forced to answer questions put to him or her by the police or from having to testify, it has also immunized an accused from having to pay any price for his or her silence. Indeed, it is the prohibition from any use of the accused’s silence that has been one of the defining features of the right to silence debate. As Michael Zander has noted:

There is often a misunderstanding as to what is meant by proposals to abolish the right to silence. It has never in fact been suggested that that silence itself should be prohibited. Abolition of the right to silence means rather giving the prosecution and the judge the right to invite the jury to draw adverse inferences from the accused’s silence in the face of questioning by the police and at trial.

58 As cited in Easton, supra note 21 at 3.
59 Ibid.
The right to silence discourse encompasses many topics, which may be conveniently divided into two broad categories: philosophical and pragmatic. Within the philosophical category, the right to silence debate often focusses on the question of whether the right to silence is a self-evident and inalienable human right integral to individual autonomy, dignity and privacy, or whether it is a legal principle which, while important, is not innately superior to other legal principles. Within the pragmatic category, the discussion usually revolves around the instrumental function of the right to silence within the criminal process, such as its role in guarding against false confessions, controlling abusive police practices, or enhancing respect for the criminal justice system through re-enforcing due process. Some academics have described the pragmatic debate as being about how best to balance the competing interests of due process and crime control.\[^61\]

This chapter will discuss the major philosophical and pragmatic arguments falling within the right to silence debate. While the philosophical discourse will be reviewed first, it is important to recognize that there is a good deal of overlap between the various issues as many of them possess both metaphysical and pragmatic characteristics.

\[^61\] See e.g. IH Dennis, “Reconstructing the Law of Criminal Evidence” (1989) 42 Curr Legal Probs 21 at 28 [Dennis, “Reconstructing”].
B. THE PHILOSOPHICAL DEBATE

1. Introduction

Easton has defined the right to silence debate as a matter of “rights versus utility”.\(^6\)2 Certainly, one of the most fundamental questions posed in the debate is whether the right to silence it is an absolute right or whether it is a qualified legal privilege which must give way on occasion to competing legal rights or other social values. Many proponents of the right to silence (often referred to as “retentionists”) argue that the right to silence is an inalienable human right essential to human liberty, dignity and privacy.\(^6\)3 On the other hand, those who criticize the right to silence (often referred to as “abolitionists”) argue that other equally important social values, such as the right to be safe from crime, justify limiting the right to silence in certain circumstances. Some abolitionists also argue that the right to silence conflicts with another important moral imperative: the “moral duty of all persons to be accountable for their conduct.”\(^6\)4 Also important to the abolitionists’ argument is the claim, first made by Bentham, that the right to silence is contrary to “common sense” and interferes with the primary role of a criminal trial, which is rectitude of decision or accuracy of outcome.\(^6\)5 In addition, the discourse inevitably includes reference to the relationship, both philosophical and practical, between the right to silence and other historic legal principles, such as the privilege against self-incrimination, presumption of innocence and the burden of proof falling on the prosecution and being beyond a

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\(^6\)2 Easton, supra note 21 at 163.
\(^6\)3 See e.g. Easton, supra note 21 at 191-92 and Galligan, supra note 22.
\(^6\)4 Barton L Ingraham, “The Right to Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A reply to O’Reilly” (1996) 86 J Crim L & Criminology 559 at 568 (Lexis).
\(^6\)5 Easton, supra note 21 at 164-70.
reasonable doubt. All of these issues will be discussed in this chapter; however, before embarking on the discussion, a contextual comment regarding the relationship between the right to silence and the privilege against self-incrimination is necessary.

2. The Privilege Against Self-Incrimination

While many legal scholars have emphasized that the right to silence and the privilege against self-incrimination are not synonymous, it is generally acknowledged that the two doctrines are very closely related. Indeed, some academics and jurists seem to consider the right to silence and the privilege against self-incrimination to be almost interchangeable. Ian Dennis, for example, has suggested that, “[i]n its primary form the privilege against self-incrimination defines the scope of legal duties to co-operate in certain legal procedures” and, therefore, “[t]he privilege against self-incrimination is of course the principle that there is no legal obligation to answer questions from the police or to testify at trial.” Additionally, Hamish Stewart has described the privilege against self-incrimination as an “overarching principle” which covers the right to silence as well as other rights and evidentiary privileges. Other scholars, such as Mirfield, Zuckerman and Berger, have also equated the right to silence with the privilege

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66 The issue of the relationship between the right to silence and the presumption of innocence and burden of proof can arguably be discussed at either the philosophical or pragmatic level, but for the purposes of this paper it will be discussed within the philosophical category.

67 See e.g. Ed Ratushny, “Is There a Right Against Self-Incrimination in Canada” (1973) 19 McGill LJ 1 at 9, online: HeinOnline <http://heinonline.org> [Ratushny, “Is There a Right Against Self-Incrimination”]. Ratushny argues that the privilege against self-incrimination is fundamentally different than the right to silence and does not apply at the pre-trial stage at all.


69 Dennis, “Reconstructing”, supra note 61 at 41.

70 Hamish Stewart, “Confessions Rule and the Charter” (2009) 54 McGill LJ 517 at 522-23 (Lexis) [Stewart, “Confessions Rule”].


72 AAS Zuckerman, The Principles of Evidence (Oxford: Clarendon Press, 1989) at 305 [Zuckerman, Principles of Evidence]. Zuckerman states: “In addition to the right of the suspect not to be physically or mentally abused and the right of the innocent not to be convicted the law recognizes a further right in the form of a privilege against self-
against self-incrimination. On the other hand, some academics, such as Ratushny\textsuperscript{74} and Theophilopolous,\textsuperscript{75} have emphasized the theoretical and practical differences between the right to silence and the privilege against self-incrimination.

While it is certainly important to acknowledge that there are some distinct, albeit nuanced, differences between the right to silence and the privilege against self-incrimination, the two principles have a very similar lineage and purpose. Gordon Wall has asserted that the rationale for both legal principles comes from the same three sources: Wigmore’s “individual is sovereign” doctrine; the Latin maxim, “\textit{Nemo tenetur seipsum accusare; nemo tenetur seipsum prodere; nemo tenetur armare adversarium contra se}” or, in its English translation, “no one shall be required to accuse or betray or arm his enemy against himself”; and the doctrine of a “case to meet.”\textsuperscript{76}

A purist approach would no doubt constantly and diligently identify the differences between the right to silence and the privilege against self-incrimination. But this is not a purist paper. While every effort will be made not to conflate the two principles inappropriately, there will be some inevitable overlap between the two doctrines and some of the sources and references cited will refer to the privilege against self-incrimination rather than the right to silence specifically. However, in such cases I believe the principle or argument identified through the reference applies equally to the right to silence. Having made this preliminary point, each of the major

\textsuperscript{73} Mark Berger, “Reforming Confession Law British Style: A Decade of Experience with Adverse Inferences from Silence” (2000) 31 Colum HRL Rev 243 (QL) [Berger, “Reforming Confession Law”].

\textsuperscript{74} Ratushny, \textit{Self-Incrimination}, supra note 5.

\textsuperscript{75} Theophilopolous, supra note 39.

issues falling within the philosophical and pragmatic categories of the right to silence debate will now be reviewed.

3. Absolute or Qualified Right

As previously mentioned, one of the most fundamental questions raised in the right to silence debate is whether the right to silence is a universal and absolute human rights norm from which there can be no derogation, or whether it is a legal rule subject to reasonable restrictions. Both international and domestic law provide some support for the argument that the right to silence is a universal, although not an absolute, human right.

Within international law, although the right to silence is not specifically enumerated as a protected right, its cousins are. Article 11(1) of the Universal Declaration of Human Rights (UDHR), for example, states: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty in a public trial at which he has had all the guarantees necessary for his defence.” Furthermore, Article 14(3) (g) of the International Covenant on Civil and Political Rights (ICCPR) states that, in a criminal case, the accused “cannot be compelled to testify against himself or to confess guilt.” While the right to silence is not specifically listed in either document, its close association with the presumption of innocence, which is protected under the UDHR, and the privilege against self-incrimination, which is protected under the ICCPR, supports the conclusion that the right to silence is at least implicitly protected as a human rights norm under international law. Certainly Amnesty International believes the right to silence is protected by international law. See Amnesty International, “India: Report on the Malimath Committee on Reforms of the Criminal Justice System; Some Observations”, online: Amnesty International < http://asiapacific.amnesty.org/library/index/engasa200252003>.

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77 See e.g. Skinnider, supra note 9 at 3; Berger, “Reforming Confession Law”, supra note 73 at 244.
78 Universal Declaration of Human Rights, GA Res 217A (III), 10 December 1948 [UDHR].
79 International Covenant on Civil and Political Rights, GA Res 2200A (XXI), 16 December 1996 [ICCPR].
Article 6 of the *European Convention on Human Rights*,\(^{81}\) which expressly guarantees the right to a fair trial and implicitly protects the privilege against self-incrimination.\(^{82}\) In *Funke v. France*,\(^{83}\) the European Court of Human Rights held that Article 6 included “the right of anyone charged with a criminal offence … to remain silent and not to contribute to incriminating himself.”\(^{84}\) Furthermore, in *Saunders v. United Kingdom*,\(^{85}\) the same court concluded that the right not to be compelled to incriminate oneself is a “generally recognized international standard.”\(^{86}\)

As mentioned in Chapter I, the right to silence is also enshrined in the Fifth Amendment to the United States Constitution\(^{87}\) as part of the privilege against compelled self-incrimination, and the United States Supreme Court has put a good deal of meat on the constitutional bones of the right to silence through its decisions in *Miranda v. Arizona*,\(^{88}\) *Griffin v. California*\(^{89}\) and *Malloy v. Hogan*,\(^{90}\) amongst others.\(^{91}\) Additionally, the Supreme Court of Canada confirmed in 1990\(^{92}\)

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\(^{81}\) *European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950 [European Convention]*.


\(^{83}\) (1993), 16 EHRR 297 [*Funke*] (Eur Ct HR).


\(^{85}\) (1997), 23 EHRR 313 [*Saunders*] (Eur Ct HR).


\(^{87}\) *Supra* note 12.

\(^{88}\) 384 US 436 (1966) [*Miranda*]. In *Miranda*, the United States Supreme Court confirmed the right to silence exists at the investigative stage of the criminal process. The Court set out detailed requirements for the police to warn a detained suspect that he or she “has a right to remain silent, that anything he does say may be used in evidence against him, that he has a right to counsel, and if he cannot afford to hire one, a layer will be appointed to represent him.” See Craig M Bradley, “United States” in Bradley, *Worldwide Study, supra* note 15, 519 at 533 [Bradley, “United States”].

\(^{89}\) 380 US 609 (1965) [*Griffin*]. In *Griffin*, the United States Supreme Court held that the Fifth Amendment protected the accused from any adverse commentary at trial regarding his or her silence during a police interrogation or his or her refusal to testify. See Eben Mogen, “Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination” (1994) 92 Mich L Rev 1086 at 1086 (Lexis).

\(^{90}\) 378 US 1 (1964) [*Malloy*]. In *Malloy*, the Supreme Court held that the Fifth Amendment applied to the States. See Bradley, “United States” in Bradley, *Worldwide Study, supra* note 15 at 519.

that the right to silence in Canada is a constitutionally protected “principle of fundamental justice” under section 7 of the *Charter of Rights* and, in England, Lord Diplock’s confirmation in *R. v. Sang*\(^93\) that English law recognizes that “no one can be required to be his own betrayer or, in its popular English mistranslation, the right to silence”\(^94\) confirmed the fundamental nature of the right to silence as a principle of law in that country.\(^95\) Furthermore, Ian Dennis has suggested that the decision in *Funke v. France* has granted the equivalent of constitutional status to the right to silence in the United Kingdom. According to Dennis, “[i]n one sentence the court gave the privilege the status of an entrenched constitutional right which could not be removed by a legislative enactment in comprehensive terms.”\(^96\)

However, while the right to silence is generally recognized as an international human rights norm\(^97\) and is protected under both the Canadian and American constitutions, as well as being acknowledged as a fundamental principle of law in Britain,\(^98\) it does not necessarily follow that the right to silence is an absolute principle impenetrable to any restriction or derogation. Mark Berger, for example, has pointed out that the United States Supreme Court has limited the right to silence in some circumstances,\(^99\) such as where public safety requires questioning of a suspect by the police before a *Miranda* warning can be given\(^100\) or by upholding a statutory rule

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92 *Hebert, supra* note 17.
94 As cited in Galligan, *supra* note 22 at 82.
95 According to Easton, the Latin maxim was actually “*nemo debet prodere se ipsum*”, which means “no one can be required to be his own betrayer”. Easton asserts that the principle has been broadened over time from its initial restriction to the first allegation against an accused to its current state whereby it “prohibit[s] all questioning of the accused without his agreement to testify.” See Easton, *supra* note 21 at 2.
96 Dennis, “Instrumental Protection”, *supra* note 68 at 372. Dennis says the same thing about the impact of *Funke v France* on the status of the privilege against self-incrimination in England.
98 Dennis suggests that the right to silence may also be constitutionally enshrined in the United Kingdom through the decisions of the European Court of Human Rights.
99 Berger, “Reforming Confession Law”, *supra* note 73 at 245.
100 *New York v Quarles*, 467 US 649 (1984) [*Quarles*].
requiring advance notice of an alibi defence. In Canada, McLachlin J. (as she then was) suggested in Hebert that her approach to the right to silence needed to “be distinguished from an approach which assumes an absolute right to silence in the accused”. And in Britain, as Adrian Zuckerman has observed, “although the general right to silence is very important, it is, as a rule, overridden in the interests of the administration of justice.” Furthermore, as noted previously, while the European Court of Human Rights confirmed in Funke v. France that the right to silence is implicitly protected by section six of the European Convention on Human Rights, it also concluded in Murray v. United Kingdom that drawing an adverse inference “in situations which clearly call for an explanation” is acceptable because “the question whether the right [to silence] is absolute must be answered in the negative.”

However, while the judiciary in several jurisdictions has concluded that the right to silence is not absolute or insoluble, some legal scholars have suggested it should be. Mirko Bagaric, for example, has argued that the right to silence is part of the family of human rights which have prevailed since the end of the Second World War. According to Bagaric, such rights “are naturally associated with a deontological view of morality, in which case they are felt to apply with a large degree of absoluteness.” Furthermore, Jeffrey Bellin has noted the historic significance of the right to silence in the United States, commenting: “The right to remain silent in the face of accusation has been widely celebrated in American law, representing in the words of the Supreme Court ‘an important advance in the development of our liberty’ and ‘one of the

102 Hebert, supra note 17 at 40.
103 Zuckerman, Principles of Evidence, supra note 72 at 305.
104 Funke, supra note 83.
105 (1996), 22 EHRR 297 [Murray v UK].
106 As cited in Berger, “Reforming Confession Law”, supra note 73 at 272.
great landmarks in man’s struggle to make himself civilized.” 108  Within the Canadian context, Stewart has contended that “the idea of human dignity provides a normative benchmark for specific Charter rights” and “the principle against self-incrimination is a very basic norm for a system of criminal justice in a constitutional order that is committed to human dignity.” 109

D. J. Galligan has also argued that the right to silence is very close to being an absolute right. Galligan refers to Ronald Dworkin’s work and suggests that, if rights are to be taken seriously as Dworkin suggests they should be, they must be able to withstand competing principles even if those principles have some independent legitimacy. 110 Easton has also relied on Dworkin to support her contention that the right to silence should be considered a paramount legal principle. Easton asserts:

Individual rights are trumps which prevail over practical and majoritarian considerations. The most fundamental right from which other rights and liberties are derived, is the right to equal concern and respect.

The right to silence and the presumption of innocence may be construed in terms of this claim to equal respect for all citizens, so the loss of the privilege and the encouragement of inculpatory admissions and confessions would contradict these underlying moral principles. When these rights conflict with practical needs, says Dworkin, these conflicts ‘are not occasions for fair compromise, but rather, if the principle must be dishonoured, for shame and regret. 111

Although scholars like Easton and Bagaric argue that the right to silence is an absolute right which should not be expected to bend in the face of competing rights, other academics have argued that a balance is necessary. Indeed, even a strong retentionist like Clive Walker has been willing to allow some latitude for competing interests, acceding: “It does not follow that

108 Bellin, supra note 13 at 862, citing the United States Supreme Court in Ullman v United States, 350 US 422 (1956) at 426-28 [Ullman] and Murphy v Waterfront Commission, 378 US 52 (1964) at 55 [Murphy].
109 Stewart, “Confessions Rule”, supra note 70 at 520.
110 Galligan, supra note 22 at 73.
111 Easton, supra note 21 at 187.
individual, liberal rights must be always treated as absolute, for it is rationally coherent to accept limitations for the sake of preserving the rights of others or competing rights.”

Berger has also suggested that a balanced approach is necessary, stating:

Ultimately, the right to silence involves a sensitive balance of competing interests. The criminal justice system must be equally concerned with not only the state’s need to make use of available evidence, but also the defense objective that state power not be abused.

One of the main objectives of our system of evidence law is to insure that the factfinder is presented with all relevant and probative evidence and allowed to draw appropriate inferences in evaluating its weight. Because silence may logically be relevant to the issues in a criminal prosecution, the kind of adverse comment authorized by the legislation is, arguably, quite appropriate.

Dennis has also challenged the position that the right to silence is immutable, arguing that its decline in the United Kingdom can be attributed to “an official conception of the privilege which represents it in purely utilitarian terms.” Dennis acknowledges the difficulty in finding the appropriate balance “between the protagonists of crime control and the advocates of due process”, but suggests that “[t]he whole notion of achieving a ‘balance’ between competing claims … seems to me to be suspect” because it is premised on an “artificial opposition between public and private interests in the use of evidence law.” In Dennis’ view, the right to silence

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112 Clive Walker, “The Agenda of Miscarriages of Justice” in Walker & Starmer, supra note 21, 3 at 32-33 [Walker, “Agenda”]. Although, it is important to note that Walker tempers his position by also stating: “At the same time, it is wise to recognize that the responsibility on the State to treat its citizens justly is awesome. So if ‘the justifications offered for finding of guilt or not-guilt are seriously defective’ and their treatment is unwarranted by, or disproportionate to, the need to protect the rights of others, then serious damage will be inflicted not only on the individual but on society (all citizens) as a whole.”


114 Ibid at 424-25.

115 Dennis, “Instrumental Protection”, supra note 68 at 343.

116 Dennis, “Reconstructing”, supra note 61 at 27.
should not be characterized as a “human right”, but rather “as a functional device required in some contexts by the need of the criminal justice system to retain its internal coherence.”

Other legal scholars have also countered the claim that the right to silence is an absolute right by suggesting it is not easy to logically defend the right to silence and privilege against self-incrimination. Zuckerman, for example, has stated: “The weak support which has been given to the privilege reflects not only the exigencies of the criminal investigation but also the weakness of the justification for its existence.” And David Dolinko has commented that, “neither appeal to the goals of the criminal justice system nor invocation of broad notions of human rights can justify the privilege against self-incrimination.” Dolinko rejects the argument that the right to silence and privilege against self-incrimination are essential to individual autonomy because, in his view, individuals are not completely autonomous. According to Dolinko: “It is simply not true that a citizen is absolved of all duty ‘to cooperate with the government’ when his liberty is at stake”. Dolinko asserts that to suggest the right to silence is an absolute right because it is inherent to a person’s autonomy is to present a fallacious argument because, “autonomy, like most of the values animating our society and its legal system, is not invariably overriding. We are willing to sacrifice some degree of autonomy in situations in which preserving it unimpaired would exact too great a cost.”

117 Dennis, “Instrumental Protection”, supra note 68 at 376.
118 Zuckerman, The Principles of Evidence, supra note 72 at 314.
119 David Dolinko, “Is There a Rationale for the Privilege Against Self-Incrimination?” (1986) 33 UCLA L Rev 1068 (Lexis). Dolinko includes the right to silence within the discussion of the privilege against self-incrimination. 120 Ibid at 1139, emphasis in original. Dolinko notes, for example, that a citizen is not free to ignore a summons, flee to a foreign country or commit perjury when facing criminal charges. He also points out that immunity statutes prove the point that there are some occasions when the State can require “disclosure of one’s thoughts” without being “perceived as a threat to the freedom and autonomy of the individual.”
121 Ibid at 1140.
Therefore, based on a review of the literature, I suggest it is reasonable to conclude that despite some ardent retentionists who assert that the right to silence should be impenetrable to any intrusion, there is a strong contingent of legal scholars who believe the right to silence is not absolutely sacrosanct.

4. Moral Responsibility to Respond

Those who support restricting the right to silence often argue that counterbalancing the normative principle of respect for personal autonomy is an equally important moral responsibility placed on individuals to account for their actions when challenged with an allegation which has some substance to it. While discussing the English legislative restrictions on the right to silence, Berger has asserted: “Supporters of the legislation also believe that suspects and criminal defendants have at least a moral duty to answer official questions so that the criminal investigation process will not be impeded.”122 Michael Redmayne has also commented that the British curtailment of the right to silence is based on “the general assumption that the innocent will want to signal their innocence to the police”,123 and Glanville Williams has submitted that remaining silent in the face of an accusation is contrary to the normal moral reaction of people.124

123 Michael Redmayne, “The Future of Self-Incrimination: Fifth Amendment, Confessions, & Guilty Pleas: English Warnings” (2008) 30 Cardozo L Rev 1047 at 1055 (QL). Although Redmayne, citing Ken Greenawalt, cautions there must be a “well grounded” as opposed to “slender” suspicion, as silence is a morally justifiable response when the accusation is based on slender suspicion.
124 Williams, supra note 22 at 1107.
Moreover, American scholar Kent Greenawalt has posited that while there is no moral responsibility to respond to an allegation based on “slender suspicion”, there is an obligation when a person is confronted with a “solidly grounded suspicion”.\(^{125}\) Greenawalt asserts: “Everyone has a strong moral duty not to inflict undeserved harm to fellow members of the community, and to prevent harms others might commit when he can do so easily.”\(^{126}\) Based on this moral imperative, as well as for more pragmatic reasons, Greenawalt argues that “the moral right to silence should not be viewed as a right to be released from all the normal influences to respond to accusations.”\(^{127}\) Consequently, Greenawalt suggests that “adverse inferences are proper when a person refuses to respond to questions based on substantial evidence of his wrongdoing”.\(^{128}\) Another American, Judge Henry Friendly, has also proffered the moral responsibility argument, asserting:

…while the other privileges accord with notions of decent conduct generally accepted in life outside the court room, the privilege against self-incrimination defies them. No parent would teach such a doctrine to his children; the lesson parents preach is that while a misdeed, even a serious one, 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, employers and teachers. Those who are questioned consider themselves to be morally bound to respond, and the questioners believe it proper to take action if they do not.\(^{129}\)

And a third commentator from the United States, Barton Ingraham, has linked the principle of accountability to the right to silence by suggesting: “If a person is morally or legally accountable for his conduct, he owes a moral duty to answer questions relevant to that conduct to persons in authority”. However, like Greenawalt, Ingraham limits the moral responsibility to

\(^{126}\) Ibid at 36.
\(^{127}\) Ibid at 40.
\(^{128}\) Ibid at 43.
\(^{129}\) Friendly, supra note 60 at 680. While Friendly is specifically speaking of the privilege against self-incrimination, he includes the right to silence within the ambit of his critique.
respond “to situations where there is sufficient basis for suspicion (something less than probable cause but more than idle curiosity).”

On the other hand, retentionists have rejected the argument that there is a moral duty to respond to an allegation when it is made by an agent of the state. Easton, for example, distinguishes the argument advanced by Friendly and Williams that there is a moral obligation in everyday life to answer for one’s conduct by contending there is an important difference between everyday life and the citizen’s relationship with the state. As Easton states:

But everyday life is not comparable to the context of the police station and courtroom therefore common sense assumptions which equate silence with guilt, drawn from everyday life, cannot be legitimately applied to the latter contexts. The relationship between citizens is quite distinct from the position of the accused undergoing interrogation in the police station, or subject to examination and cross-examination in the formal structure of the courtroom. Private accusations cannot be compared to accusations by the police, given the inequalities between prosecution and defence.

Easton also points out that even if there is a moral duty to respond, it does not follow that there is a corresponding legal duty. In support of her position, Easton refers to *Rice v. Connolly*, which declared that “the duty to help the police with their inquiries has been seen as a moral rather than a legal duty.” Moreover, O’Reilly has countered the moral responsibility to account argument by refuting such “moral populism” as “a misunderstanding of democracy which still menaces individual liberty.”

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130 Ingraham, *supra* note 64 at 566.
131 Easton, *supra* note 21 at 156.
132 [1996] 2 QB 414 [*Rice v Connolly*].
133 Easton, *supra* note 21 at 6.
However, putting aside whether or not there is a moral obligation to respond to an allegation or questions based on reasonable suspicion, abolitionists have also suggested that, as a matter of the human condition, there is a natural inclination for a person to respond when confronted with a false allegation. Based on this hypothesis, abolitionists argue that the right to silence is contrary to common sense because it flies in the face of human nature. Furthermore, they submit that the right to silence interferes with the main goal of the criminal process, which is to ascertain the truth.

5. **Common Sense and Rectitude of Decision**

As mentioned briefly in Chapter I, nineteenth century English philosopher Jeremy Bentham was one of the first critics of the right to silence. Bentham’s criticism was two-fold: first, that the right to silence is contrary to common sense and, second, that it interferes with rectitude of decision. Bentham thought that the right to silence was “nonsense upon stilts” because it “lacks a rational foundation, appealing to emotions rather than logic” and “exaggerates its own self-importance and is removed from everyday life.” Bentham utilized two metaphors to illustrate the irrationality of the right to silence. First, he suggested that advocates for the right to silence use an “old woman’s reason” to support their position. According to Bentham: “The essence of this reason is contained in the word hard: ‘tis hard upon a man to be obliged to criminate himself. Hard it is upon a man, it must be confessed, to be obliged to do anything that he does not like.” In Bentham’s view, protecting a person’s right to silence so that he or she does not incriminate him or herself is similar to the old woman who says when a child is hurt, “[o]h the

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135 Easton, *supra* note 21 at 184-5.
136 Bowring, *supra* note 23 at 452.
poor dear child! How it will hurt the poor dear child! How hard it will be upon the poor dear child.”

Bentham also claimed that proponents of the right to silence justified their argument by utilizing a “fox hunter’s reason”, which Bentham described as:

The fox is to have a fair chance for his life: he must have (so close is the analogy) what is called law, -- leave to run a certain length of way for the express purpose of giving him a chance for escape. While under pursuit he must not be shot: it would be as unfair as convicting him of burglary on a hen-roost, in five minutes’ time, in a court of conscience.

Bentham considered the fox hunt to be similar to the criminal process, where “[e]very villain let loose one term, that he may bring custom the next, is a sort of a bag-fox, nursed by the common hunt in Westminster.”

Bentham asserted that both rationales for the right to silence – the misplaced sympathy of the old-woman and the concern for fairness of the fox-hunter – are fallacious because they both miss the point. The emotional overreaction of the old woman and the misguided sportsmanship of the fox-hunter are both irrelevant considerations because the goal of the law should not be misplaced compassion or fairness, but rather rectitude of decision. Lewis has summed up Bentham’s philosophy as follows:

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137 Ibid.
138 Ibid at 454.
139 Ibid.
Bentham’s principle aim was to achieve the fullest possible disclosure of relevant information consistent with the minimum of unnecessary inconvenience whether of time or money: avoiding in his oft-repeated words, “delay, vexation and expense.” The object in providing the fullest disclosure consistent with these limits was to promote accuracy of decision-making. Bentham believed – and it is difficult to fault him – that a more accurate decision was likely to result from a consideration of all the relevant evidence.  

Steven Greer has suggested that Bentham’s philosophy is the foundation of modern “utilitarian abolitionism”. Greer argues that evidence law is based on two founding principles: first, the importance of rectitude of decision; and second, the assertion that rectitude is “best achieved by a system of flexible guidelines rather than fixed rules.” According to Greer, utilitarian abolitionists believe that the right to silence has “no contribution to make to either the quest for the accurate outcome, or to the reduction or elimination of these extraneous considerations.”

Some scholars, judges and British government committees have relied on Bentham to support their criticism of the right to silence. For example, Glanville Williams has asserted that the right to silence:

…is contrary to common sense. It runs counter to our realization of how we ourselves would behave if we were faced with a criminal charge. If we were innocent, we would not stay mum – except perhaps in the most unusual circumstances. We would vigorously repel the accusation, bringing out any facts inconsistent with the allegation of guilt.

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140 Lewis, supra note 1 at 144. For a critique of Bentham’s rectitude of decision argument see Galligan, supra note 22 at 71-73.
142 Ibid.
143 Ibid. Greer notes that utilitarian abolitionists such as the Criminal Law Revision Committee have been criticized on the basis that their “key assumption is dubious at best”, and for their “failing to see the need to offer empirical evidence to support their contentious empirical claims.” The Criminal Law Revision Committee recommended restricting the right to silence in England in 1972. See Chapter III.C.2, below.
144 Mirfield, supra note 71 at 242.
145 Williams, supra note 22 at 1107.
Zuckerman has also suggested the right to silence is contrary to human nature because the normal reaction is to offer an explanation; although, he does recognize that “[e]xperience teaches us that it is extremely dangerous to infer guilt from silence on its own.”\textsuperscript{146} Moreover, Greenawalt has suggested: “Few innocent people would decline to explain away evidence of their wrongdoing, so a refusal to respond is strongly indicative of their guilt.”\textsuperscript{147} Finally, Dennis has echoed Bentham’s view that right to silence is contrary to common sense,\textsuperscript{148} stating:

…to imply a claim that it is necessarily improper to draw any inferences from a person’s failure to explain away incriminating evidence … is contrary both to common sense and to existing law. Common sense argues that if other evidence yields a prima facie inference of guilt a failure to provide an innocent explanation suggests that one does not exist.”\textsuperscript{149}

The judiciary has also referred to common sense when considering the issue of judicial comment to juries when an accused remains silent at trial. In the English case of \textit{R. v. Sullivan},\textsuperscript{150} Lord Justice Salmon observed: “It seems pretty plain that all the members of [the] jury, if they had any common sense at all, must have been saying to themselves precisely what the learned judge said to them.”\textsuperscript{151} Additionally, Ritchie J. of the Supreme Court of Canada once stated that “it would be ‘most naïve’ to ignore the fact that when an accused fails to testify after some evidence of guilt has been tendered against him by the Crown, there must be at least some

\textsuperscript{146} AAS Zuckerman, “Reports of Committees: Criminal Law Revision Committee 11\textsuperscript{th} Report, Right of Silence” (1973) 36 Mod L Rev 509 at 511, online: HeinOnline <http://heinonline.org> [Zuckerman, “Reports of Committees”].
\textsuperscript{147} Greenawalt, \textit{supra} note 125 at 32.
\textsuperscript{148} Dennis, however, disagrees with Bentham’s position that rectitude of decision is the only legitimate goal of the trial process. See text accompanying note 165, \textit{infra}.
\textsuperscript{149} Dennis, “Instrumental Protection”, \textit{supra} note 68 at 356.
\textsuperscript{150} (1966), 51 Cr App R 215 [\textit{Sullivan}].
\textsuperscript{151} Mirfield, \textit{supra} note 71 at 241. Mirfield notes that Lord Salmon did find the specific instruction to the jury by the trial judge to have fallen “clearly on the wrong side of the line”; although, according to Mirfield, Lord Salmon still concluded that he “found no unfairness in that comment.”
jurors who say to themselves, ‘If he didn’t do it, why didn’t he say so.’”

Furthermore, in the United Kingdom, both the Criminal Law Revision Committee and the Home Office Working Group referred approvingly to Bentham’s argument when they recommended restricting the right to silence.

Regarding the second prong of Bentham’s critique (i.e., that the right to silence interferes with rectitude of decision), Dolinko has asserted that, “if our goal is for truth to prevail, our means should be calculated to promote, rather than impede, full development of the facts.”

Similarly, Greenawalt has submitted that since, “[f]rom society’s broader perspective, the aim of the process is to clear the innocent and convict the guilty”, it is important to not “disregard the importance of that goal for the evaluation of rights in the criminal process.”

However, while Bentham’s claims that the right to silence defies common sense and interferes with rectitude of decision have been endorsed by many abolitionists, several retentionists have challenged Bentham’s assertions. Easton, for example, has refuted Bentham’s “common sense” critique by suggesting there are other valid reasons for a person to remain silent which override any natural inclination to respond to an allegation, such as “[f]ear, anxiety, the desire to protect someone else, embarrassment, outrage and anger”. In Easton’s view, all of these reasons for silence “are compatible with innocence.”

Furthermore, Easton suggests it is extremely difficult to define common sense since it is “untested, speculative and highly contentious.”

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154 Easton, supra note 21 at 133.
155 Dolinko, supra note 119 at 1077.
156 Greenawalt, supra 125 at 39.
157 Ibid at 19.
158 Easton, supra note 21 at 145.
159 Ibid at 155.
Easton therefore argues that, “[g]iven that common sense is unreliable, impressionable and unsystematic, it provides a poor model for the law of evidence to follow.”

Concerning Bentham’s assertion that the right to silence interferes with rectitude of decision, Easton suggests that the right to silence actually increases rectitude of decision. In her view, the “reliability principle”, which “sees truth finding as the prime goal of the criminal trial” and excludes evidence “only if it is unreliable”, is compatible with the right to silence because the right to silence promotes reliable evidence. Easton submits that eliminating the right to silence may lead to the admission of unreliable evidence because, “if the suspect speaks only under pressure, his testimony may be unreliable.” Furthermore, Easton suggests that it is futile to force a suspect to speak because “any attempt to encourage the individual to speak against his or her interests will lead to perjury.” Based on these suppositions, Easton concludes that the right to silence actually enhances rectitude of decision by reducing the risk of unreliable confessions and perjured evidence.

Dennis has also expressed disagreement with Bentham’s claim that the overriding goal of the criminal process should be rectitude of decision. According to Dennis, the public is not only interested in the “factual outcome of criminal proceedings” but also with “the quality of the proceedings.” Dennis posits a theory, which he calls “legitimacy of the verdict”, in which “factual accuracy” and “the moral integrity of the judgement” are both fundamentally important. For Dennis, the purpose of the law of criminal evidence is “not the discovery of some sort of historical truth about what the defendant did or did not do. The goal is rather the legitimacy of

\[160\] Ibid.
\[161\] Ibid at 177.
\[162\] Ibid at 168.
\[163\] Ibid at 168-69.
\[164\] Dennis, “Reconstructing”, supra note 61 at 30.
the verdict on whether the charge against him has been proved properly.”

Dennis suggests that a factually accurate decision may still not be legitimate if it lacks moral authority because of unfairness to the accused, which may “have the effect of devaluing the verdict.”

Dennis struggles to some extent with how his theory impacts on the right to silence, as he acknowledges that “we all know from our general experience that a person’s silence in argument, or when taxed with some allegation of misconduct, may well be an indication that he concedes the argument or has no answer to the claim.” However, at least with regard to silence at the pre-trial stage of the criminal process, Dennis concludes that the “core principle of respect for personal autonomy and dignity” which “underlies the modern conception of the criminal trial” and the further fundamental principle of natural justice which includes “equality of treatment at the hands of officials”, means that the right to pre-trial silence is important because the “defendant is not able to participate in a free and informed manner, hence he should not be required to do so.”

Galligan has also criticized Bentham’s preoccupation with rectitude of decision. Galligan submits there are other values which are equal or superior to the right to silence, such as the right of the accused to “not be wrongly convicted and punished [and] to procedures which protect against that outcome”. Moreover, Galligan submits that the right to silence is in the category of rules that “regulate the reception or use of evidence which, if freely admitted, would create a special risk of a wrong conviction.” Other rules in this category, according to Galligan, are

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165 Ibid at 35.  
166 Ibid at 39.  
167 Ibid at 40.  
168 Ibid at 42.  
169 Ibid.  
170 Ibid at 43.  
171 Galligan, supra note 22 at 72. Galligan does acknowledge that Bentham realized that punishing the innocent was wrong and did not advance utility; however, Galligan suggests Bentham did not adequately deal with the safeguards required to avoid such an outcome.  
172 Ibid.
the presumption of innocence, the burden of proof being placed on the prosecution, the requirement that guilt be proven beyond a reasonable doubt and several evidentiary rules, such as: those governing the admissibility of similar fact and character evidence; the need for corroboration; and restrictions placed on the cross examination of an accused in certain circumstances.\textsuperscript{173} Galligan suggests these rules are as important as rectitude of decision since they support values which “derive from ideas about how people should be treated by the state; such ideas are associated with liberty, autonomy, privacy and respect and they may provide a foundation for rights.”\textsuperscript{174} Referring to Dworkin, Galligan argues: “If there is a right to silence which can be justified independently of any possible contribution to rectitude, then it may require, in areas of conflict, that marginal benefits in terms of rectitude should be sacrificed in favour of the right.”\textsuperscript{175} Finally, Stewart has asserted that the issue of rectitude of decision is more pragmatic than philosophical, suggesting that “forcing the accused to provide testimony is unlikely to produce a verdict that is more accurate or just than it would be without his or her forced testimony.”\textsuperscript{176}

It is thus evident that the academic discourse has been divided over the validity of Bentham’s criticism of the right to silence. Another issue upon which legal scholars have not been able to agree is whether the right to silence is justified on the basis of respect for personal privacy.

\textsuperscript{173} Ibid.
\textsuperscript{174} Ibid at 72-73.
\textsuperscript{175} Ibid at 73.
\textsuperscript{176} Stewart, “Confessions Rule”, supra note 70 at 522.
6. Privacy

The discussion of the relationship between the right to silence and personal privacy is often quite opaque since privacy “is a notoriously difficult concept to use with precision and conviction”. Retentionists have asserted that individual privacy is an underlying rationale of the right to silence, while abolitionists have argued that privacy is not universal and is commonly overridden in a variety of circumstances.

Retentionist D. J. Galligan has suggested that privacy is a value that must be protected “because it protects personal identity and autonomy” and “a zone of privacy is essential to personality.” Galligan contends that since an individual has a right to his or her own personality, there is no duty to provide personal information to another person, especially a stranger, and therefore a person has “immunity from a stranger having access to it.” Galligan does acknowledge that there will be times when privacy must accede to competing values or interests, noting that “each of us is daily called on to provide information about ourselves – within our families, to the doctor, within the university and to the state.” However, with regard to the right to silence at the pre-trial stage of the criminal process, Galligan argues that the police are strangers to the accused and therefore the only competing social value to consider is crime control, which, he suggests, is insufficient to override the right to privacy. Galligan uses the metaphor of a mind reading machine that can painlessly and unobtrusively reveal “everything about the suspect – his history, actions, thoughts, and desires.” The use of such a machine, according to Galligan, would clearly be a serious intrusion into the individual’s privacy and

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177 Galligan, supra note 22 at 88.
178 Ibid.
179 Ibid.
180 Ibid at 89.
181 Ibid.
liberty, and “requiring the suspect to disclose the same information through speech” is no different. Galligan does, however, concede that the right to silence is not absolute as he acknowledges that the “extent of the right to silence would depend on the balance drawn in each case”; although, he does not extend this concession to the questioning of a suspect by the police because such questioning is too invasive of the suspect’s “consciousness”.  

Other retentionists have echoed Galligan’s view that privacy underlines the right to silence. Easton, for example, refers to Galligan and submits that “the appeal to privacy is especially pertinent when we consider the suspect who may wish to remain silent to avoid embarrassment to himself or his family, or to avoid giving details of his family life”. O’Reilly has also asserted that the right to silence is important for the protection of privacy, stating: “An accusatorial system protects people’s privacy by limiting the government’s power to pry into their thoughts and conscience; it offers ‘respect for the inviolability of the human personality’ and of the right of each individual ‘to a private enclave where they may lead a private life’.” And Michael Plaxton has referred to the work of Robert Gerstein in support of his contention that the right to silence is an important aspect of the fundamental right of privacy. Plaxton contends: “Under Gerstein’s theory, a forced confession is a blueprint to a person’s soul. In the confession lies one’s entire system of values, just waiting to be ‘decoded’ by an ambitious state agent.”

182 Ibid at 90. For example, Galligan suggests that genetic fingerprinting would be a justifiable intrusion into the right to silence. 
183 Ibid. 
184 Easton, supra note 21 at 192. While Easton agrees with Galligan she worries about his concession that privacy can be limited in some circumstances, stating: “The danger of such concessions is that one enters on a slippery slope in which a constitutional right is reduced to just one factor to take into account when making calculations”. 
185 O’Reilly, “England Limits the Right to Silence”, supra note 8 at 422. 
Finally, Paciocco has advanced a theory similar to that of Galligan’s mind-reading machine analogy. In Paciocco’s opinion, there is a “qualitative difference” between compelling “non-testimonial” evidence from a suspect, such as fingerprints or breath or bodily samples, and compelling “testimonial” evidence in the form of “compelling him to answer an unsubstantiated allegation made against him.”\textsuperscript{187} The difference, according to Paciocco, is that non-testimonial information is already in existence while testimonial evidence is not. So, while Paciocco admits that compelling a person to provide non-testimonial evidence “may be offensive in its own right”, the suspect or accused is “not being required to ‘produce’ in the sense of bringing into being, new information about his guilt.”\textsuperscript{188} However, when a suspect is questioned by the police, he or she is “being made to produce, or to bring into existence, or to originate information that was not available before the compulsion.”\textsuperscript{189} Paciocco argues that, in such a case, the suspect is not simply a “conduit for the delivery or pre-existing information or the physical receptacle from which samples are taken. The privacy of the mind is invaded; the one thing that persons can truly have privacy over is required to be laid bare.”\textsuperscript{190}

Other legal scholars, however, have challenged the argument that individual privacy is a legitimate metaphysical rationale for the right to silence. Dennis, for example, suggests Galligan’s proposition is “over-inclusive.”\textsuperscript{191} While Dennis acknowledges that privacy is important, he argues that Galligan’s analysis raises the “question of scope” and is “counter-intuitive.”\textsuperscript{192} Regarding scope, Dennis states: “If the purpose is to protect privacy, it is hard to see why the privilege does not protect the suspect from having his person and property searched,

\textsuperscript{187} Paciocco, \textit{Charter Principles, supra} note 29 at 547.
\textsuperscript{188} \textit{Ibid}.
\textsuperscript{189} \textit{Ibid} at 548.
\textsuperscript{190} \textit{Ibid}.
\textsuperscript{191} Dennis, “Instrumental Protection”, \textit{supra} note 68 at 357.
\textsuperscript{192} \textit{Ibid}.
or from having his fingerprints taken, or from having to provide samples of breath or other bodily substances.” 193 Moreover, Dennis submits that the suggestion that “mental privacy” is protected by the right to silence and privilege against self-incrimination results in anomalies. For example, he asks: “Is it really true that personal privacy is more deeply or significantly infringed by questions, say, about a person’s movements on a particular day, than by a strip search or the taking of a urine sample?” 194 Dennis also notes that the privilege against self-incrimination (and by extension, the right to silence) “protect[s] against compelled disclosures … [b]ut this limitation on the scope of the privilege does not make sense in the context of the protection of privacy.” 195 Dennis asserts, if “privacy is a substantive value it should be the nature of the disclosure which is important rather than its consequences.” 196 He concludes that the privacy theory should be viewed with suspicion because, “[i]nevitably the principle will protect substantive rights in a partial and somewhat arbitrary fashion”. 197

Friendly has also criticized the privacy justification for the right to silence and privilege against self-incrimination. Friendly raises a similar concern to the one stated by Dennis about the inherent anomalies in the privacy theory, commenting:

Surely, it is a far greater violation of privacy for a defendant in an annulment suit to be obliged to testify as to his inability or unwillingness to engage in sexual intercourse or insistence on the use of contraceptives, or for a mother to have to reveal her son’s possession of a murder weapon, than for a motorist to be required to admit he exceeded the speed limit. 198

193 Ibid.
194 Ibid.
195 Ibid at 357-8.
196 Ibid at 358, emphasis in original.
197 Ibid.
198 Friendly, supra note 60 at 689.
Friendly goes even further by asserting, “[f]ar from being a moral doctrine, the privacy justification is about as immoral as one could imagine.” According to Friendly, taken to its logical conclusion, “the privacy theory would seem to afford much greater basis for the ‘right to silence’ by a man avowedly innocent of crime and thus lead to the absurd conclusion that the state cannot compel evidence from anyone.”

Dolinko has also questioned the theory that the right to silence is justified by the need to protect privacy. Dolinko argues that the notion of “mental privacy”, which suggests that “compelling [a] person to reveal his thoughts, beliefs and feelings – the contents of his mind -- … is an especially grievous intrusion into the person’s privacy”, is problematic because “we can get information about a person’s thoughts, beliefs, and feelings by observing him, by examining physical evidence, and by questioning his acquaintances as well as by questioning the person himself.” Dolinko also points out that serious crimes contain a required mental element (mens rea), the existence of which the prosecution often proves “wholly by evidence of how defendant behaved and what he said to others.” Dolinko then asks the question: “If it is permissible (indeed, commonplace) to obtain information about a person’s state of mind – to intrude upon his ‘mental privacy’ – by questioning others, why should it be impermissible to obtain the same information by questioning the person himself?” Dolinko also suggests that privacy should not always outweigh other competing interests. According to Dolinko: “An individual’s interest in privacy is not automatically entitled to override any competing interests … [w]hen the

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199 Ibid.
200 Ibid at 690.
201 Dolinko, supra note 119 at 1109.
202 Ibid at 1110.
203 Ibid.
competing interests are stronger, the privacy claim must yield.” In support of this proposition, Dolinko states:

Our legal system … assumes that societal interests can be strong enough to warrant compelling an individual to supply information that could expose him to loss of property or reputation, to involuntary commitment, to disbarment or deportation, and even to death. How, then, could one plausibly insist that the harm to privacy entailed by compelling the individual to supply information that could expose him to a criminal conviction – of even the most minor offense – must automatically outweigh any competing societal interest in preventing, or punishing crime?

Finally, Canadian academic Ron Delisle has also questioned the notion that restricting the right to silence through allowing an adverse inference on silence unreasonably violates the right to privacy. While Delisle’s comments are in relation to the right to silence at trial, they are, I suggest, equally applicable to the right to pre-trial silence. According to Delisle, “our privacy has many limitations” and can be reasonably limited in certain situations. Delisle suggests the following analogy:

…the privacy in our home is protected against intrusion by governmental officials unless there are reasonable grounds and a judicial warrant is authorized. When those conditions are satisfied the citizen’s right to privacy must yield. The parallel is clear; under the supervision of a judicial officer it is fair to intrude on the accused’s privacy by drawing an inference when the prosecution has made out a case to answer.

The final metaphysical theme to be discussed before moving on to the pragmatic debate is the connection between the right to silence and the principles of the presumption of innocence and burden of proof.

\[204\] Ibid at 1118.
\[205\] Ibid at 1121. Dolinko’s reference to a person being forced to supply information which could expose him or her to death refers to a witness being compelled to testify in a case where the giving of such evidence may expose the witness to retaliation, including the possibility of his or her death.
\[206\] Delisle, supra note 152 at 319.
7. Presumption of Innocence and Burden of Proof

Some academics consider the burden of proof to be more of an instrumental legal tool to protect the accused and preserve the presumption of innocence than a fundamental principle of law.\(^{207}\) Others, however, argue that it is a doctrinal principle of law on the same level as the privilege against self-incrimination and the right to silence.\(^{208}\) In reality, it is probably a bit of both. As Easton has stated, “the burden of proof … constitutes the symbolic and practical expression of the principle of the presumption of innocence.”\(^{209}\) However, whether the burden of proof is a fundamental normative principle or an instrumental mechanism to support other more fundamental principles, or whether it is a hybrid, the question is the same: Does restricting the right to silence through allowing an adverse inference from pre-trial silence shift the burden of proof from the prosecution to the defence?

In her multi-faceted defence of the right to silence, Easton argues that restricting the right silence infringes the accused’s presumption of innocence “by focusing on the defence’s refusal rather than the strength of the prosecution’s case”.\(^{210}\) While Easton acknowledges that allowing an adverse inference to be drawn based on the accused’s silence may not “formally” shift the burden of proof, she claims it “does make it easier for the prosecution to discharge its burden if it is entitled to infer that the reason no explanation is given is because there is no innocent explanation”.\(^{211}\) Easton concedes, however, that the Woolmington principle\(^{212}\) has been diminished “by means of express and implied statutory exceptions” and she goes on to lament,

\(^{207}\) See e.g. Ingraham, supra note 64 at 562-5.
\(^{208}\) See e.g. Dennis, “Instrumental Protection”, supra note 68 at 344.
\(^{209}\) Easton, supra note 21 at 181.
\(^{210}\) Ibid at 96.
\(^{211}\) Ibid at 94.
\(^{212}\) Woolmington v DPP, [1935] AC 462 (HL) [Woolmington].
“we find that the right to silence had already been substantially eroded in a gradual piecemeal way.”

O’Reilly has studied the right to silence within the context of the American legal system. O’Reilly emphasizes the connection between the presumption of innocence, burden of proof and right to silence and uses this relationship as a basis to support the right to silence, stating: “Because the accused are presumed innocent and carry no burden, they may remain silent.”

Referring to the cultural and constitutional history of the United States, O’Reilly asserts, “the right to silence evinces Americans’ inherent distrust of authority”. In O’Reilly’s view, restricting the right to silence would undermine the presumption of innocence and reverse the burden of proof. To this end, he asserts: “The use of adverse inferences will erode or eliminate the right to silence and, in doing so, shift the burden of proof to the accused, in some cases reduce the prosecution’s burden, and weaken or remove the presumption of innocence.”

In discussing the right to silence in Great Britain, Galligan refers to the Royal Commission on Criminal Procedure, which studied the right to silence in the early 1980s and concluded that the “right to silence should be preserved because it helps to ensure that the burden of proof is on the prosecution.” Galligan suggests that the Royal Commission’s recommendation was consistent with the concept that, as the burden of proof lies on the state, the “discharge of that

213 Easton, supra note 21 at 236–7. Easton is referring to reverse onus or rebuttable presumption rules found in several statutes. For example, she cites the Prevention of Crime Act 1953 (UK), in which section 1(1) creates a “criminal offence for a person to carry an offensive weapon in a public place, without lawful authority or reasonable excuse, the proof whereof shall lie on him to show lawful authority or reasonable excuse.” Other examples cited by Easton are the Drug Trafficking Offences Act 1986 (UK), which “imposes a compulsion to answer questions by Customs and Excise officers”, and the Companies Act 1985 (UK) and the Criminal Justice Act 1987 (UK), both of which impose similar obligations for economic crimes.
215 Ibid at 421.
216 Ibid at 444.
217 See Chapter III.C.3, below.
218 Galligan, supra note 22 at 87.
burden is not to be achieved by requiring the accused to provide incriminating evidence.”  

However, while Galligan cites the Royal Commission’s conclusion, he does not necessarily agree with it, as he concludes: “The burden of proof is hardly reversed since the prosecution would still have to prove its case, the only argument being about which bits of evidence it may use.”

Dennis has taken a similar position to that of Galligan, challenging the claim that restricting the right to silence will “dilute the presumption of innocence” as “not just weak but … a non-starter.” Dennis agrees that the presumption of innocence places the burden of proof on the prosecution, but contends that the privilege does not “indicate anything about the methods by which the burden may be discharged.” In Dennis’ view, “no legal system could possibly entertain the notion that the defendant can never supply evidence of his own guilt.” While he admits that limiting the right to silence results in “de facto curtailment of the privilege against self-incrimination”, Dennis contends: “The legal burden of proof is not reversed by restriction of the right to silence; if the tribunal of fact is left with a reasonable doubt after consideration of all the evidence the accused must be given the benefit of it. It is not for the accused to ‘prove’ his innocence.”

Other legal scholars have joined the abolitionists’ chorus refuting the claim that curtailing the right to silence will weaken the burden of proof. Delisle, for example, has stated: “The defendant’s silence may be treated as a piece of evidence in assisting the discharge of the

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219 Ibid.
220 Ibid.
221 Dennis, “Reconstructing”, supra note 61 at 41.
222 Ibid, emphasis in original.
223 Ibid.
224 Ibid.
225 Dennis, “Instrumental Protection”, supra note 68 at 355.
Crown’s burden … but that does not mean the burden of proof has been shifted.” 226 Similarly, Ingraham has argued that an adverse inference rule, such as the one introduced in Britain, “does not shift the burden of proving all the essential elements of the crime from the prosecution to the defence.” Ingraham admits, however, that the British rule does “make the prosecutor’s burden of proof somewhat easier to satisfy”. 227 Moreover, Berger has noted that, in R. v. Cowan, 228 the English Court of Appeal held that allowing an adverse inference to be drawn from an accused’s failure to testify “created no inconsistency with the obligation of the prosecution to bear the burden of proof since no adverse inference could be drawn unless a prima facie case had already been established”. 229 And Glanville Williams has observed: “The rule as to burden of proof has nothing to say on what evidence shall be taken into account. It is illogical to argue that reasonable changes to the law of evidence to help the prosecution to discharge their burden of proof shift the burden of proof.” 230

It is thus evident that the philosophical discourse regarding the right to silence has been extensive and at times divisive, with both sides of the debate advancing reasoned arguments in support of their position. Paralleling and supplementing the philosophical debate has been an equally energetic discussion about the pragmatic or instrumental utility of the right to silence within the criminal justice system. It is to that segment of the right to silence debate that the thesis now turns.

226 Delisle, supra note 152 at 318.
227 Ingraham, supra note 64 at 590.
228 (1995) 3 WLR 818 (CA) [Cowan].
229 Berger, “Reforming Confession Law”, supra note 73 at 275.
230 Williams, supra note 22 at 108.
B. THE PRAGMATIC DEBATE

1. Introduction

Within the pragmatic category of the right to silence discourse, the discussion has focused on the instrumental role of the right within the broader context of the crime control versus due process dichotomy. The pragmatic debate includes many arguments and suppositions, with some of them proffered by retentionists and others by abolitionists. Retentionists submit that the main instrumental benefits of the right to silence include: deterring improper or oppressive police interrogations; guarding against false confessions and wrongful convictions; encouraging the police and prosecution to find independent evidence of the accused’s guilt; providing some leeway to recognize there are innocent reasons to remain silent; and freeing the accused from having to make “cruel choices”. On the other hand, abolitionists argue that the right to silence interferes with the important societal value of crime control because it allows sophisticated criminals to avoid conviction when they are in fact guilty. Furthermore, abolitionists assert that the right to silence results in “ambush defences” and prohibits the trier of fact from considering all relevant and probative evidence. Finally, abolitionists suggest that the right to silence is illusory because judges and juries draw adverse inferences from silence anyway as a matter of common sense.

It should be noted that some of the pragmatic issues closely parallel some of the philosophical issues already discussed, so there may be some unavoidable overlap between the two branches of the debate. However, before reviewing the major pragmatic issues, a brief discussion of the broader crime control versus due process question is necessary to place the instrumental value of the right to silence at the investigative stage of the criminal process into perspective.
2. **Balancing Due Process and Crime Control**

Similar to the philosophical discourse, the pragmatic debate regarding the right to silence is embedded within the “rights versus utility” framework. Clive Walker has described the debate as being between “due process and crime control”, both of which he recognizes as being “legitimate considerations within a Liberal democracy”. Moreover, Berger has emphasized the dynamic nature of the criminal justice system by observing:

> The criminal justice process is not a static system in which there is only one single variable whose changes can be measured. Instead, everything is changing over time, including crime rates, police interrogation techniques, protections available to the accused, and general attitudes towards the criminal justice system. All of these are significant influences on decisions to exercise or forego the right to silence…

The issue of where to draw the line between the *nemo debet* principle underlining the right to silence and society’s interest in public security through effective law enforcement and convicting the guilty is, of course, largely a subjective exercise. As stated by the Law Reform Commission of Canada: “The balance between effective law enforcement and effective protection of individual interests is, ultimately, a working definition of justice, and the prospect of agreement on this aspect of social policy is always elusive.” Critics of the right to silence propose moving the balance further towards crime control, while those who support the right to silence contend that retaining the right to silence in its unaltered form is necessary to protect individual liberties. As examples of these differing opinions, Abolitionist Henry Friendly has asserted: “The protection of one citizen should not be pushed beyond his reasonable needs in such a manner as to impair the state’s ability to perform its duty to protect all citizens against criminal

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231 Easton, supra note 21 at 163.
acts and to punish those who commit them.”

On the other hand, retentionist Susan Easton has suggested, “the essential purpose of the right to silence is to compensate for the inequality of resources between prosecution and defence”.

Peter Mirfield has characterized the balancing act as a “quid pro quo argument” in which protections offered to suspects counterbalance the danger of allowing an adverse inference to be drawn from silence. Greer has described the argument used by those who favour curtailing the right to silence in the name of crime control as “exchange abolitionism”, which he defines as the assumption that, if appropriate safeguards such as access to legal advice are given to the suspect, “only the guilty will seek to hide behind silence in the police station.” Additionally, both Galligan and Dennis have suggested that granting an absolute right to silence would have a deleterious impact on police efficiency and the legitimacy of the criminal justice system. Galligan, for example, claims that, “[i]f the principle were to be taken seriously, the impact on investigation could be momentous”, while Dennis has noted that the privilege against self-incrimination in the United Kingdom has been restricted when it has been considered necessary to do so to achieve the appropriate balance between crime control and due process. Two such examples cited by Dennis are the enhanced powers of interrogation given to commercial crime

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235 Friendly, supra note 60 at 723.

236 Easton, supra note 21 at 107.

237 Mirfield, supra note 71 at 244.

238 Greer, supra note 141 at 719-20. Greer posits a four-fold typology for the right to silence. Beyond “exchange abolitionism”, the other three typologies identified by Greer are: (1) “utilitarian abolitionism”, which is based on Bentham’s argument that rectitude of decision is the paramount objective of the criminal process and that it should not be interfered with simply to promote other social values; (2) “symbolic retentionism”, which is the argument that the right to silence is the “touchstone against which broader criminal justice commitments have been tested” and, therefore, is a necessary symbol against the political effort to increase police powers; and (3) “instrumental retentionism”, which argues that abolishing the right to silence will make establishing the suspect’s guilt easier and thereby “increase the chances of innocent people being wrongly convicted with no obvious gains for law enforcement.” See Greer at 718-29.

239 Galligan, supra note 22 at 75.
investigators and extended police powers to take fingerprints and obtain bodily samples for forensic testing.\(^{240}\)

However, while even the staunchest of retentionists, such as Walker and Easton, acknowledge that balancing effective law enforcement and respect for individual rights is necessary, finding the appropriate balance has indeed been “elusive”, to use the Law Reform of Canada’s terminology. The main pragmatic components of the right to silence debate will now be reviewed.

3. Controlling Police Interrogations

One of the most important strategies for investigating crime in the police arsenal since the establishment of modern policing has been the police interview or interrogation. As David Feldman has observed, “during the twentieth century, the police increasingly relied on interrogation”.\(^{241}\) In the Canadian context, Ratushny has noted: “Obtaining an admission of guilt is widely recognized as a regular and important police function.”\(^{242}\) And Dennis has commented that the police interview is an important investigative strategy because: “It uses limited resources efficiently and more often than not produces what from the police point of view is a clear and satisfactory result. Many studies have shown that the majority of suspects do make statements to the police and that the great majority of these are incriminating.”\(^{243}\)

\(^{240}\) Dennis, “Instrumental Protection”, supra note 68 at 369. The interrogation powers granted to commercial crime investigators are found in the Criminal Justice Act 1987 (UK), while the expanded police powers for obtaining fingerprints or DNA samples are in the Police and Criminal Evidence Act 1984 (UK). Canada has similar legislation authorizing fingerprinting and collection of DNA samples. See e.g. the Identification of Criminals Act, RSC 1985, c I-1, s 2 and the Criminal Code, RSC 1985, cC-46, ss 487.04 - 487.092.


\(^{242}\) Ratushny, Self-Incrimination, supra note 5 at 31.

\(^{243}\) Dennis, “Instrumental Protection”, supra note 68 at 349.
The success of interrogation as an investigative strategy has also been confirmed through empirical research in the United Kingdom. Studies conducted during the right to silence debate in the 1980s and early 1990s concluded that few suspects actually exercise their right to silence, choosing instead to speak to the police. Berger has cited research conducted by the Home Office, which concluded that “at most five percent of all suspects refuse to answer all police questions, with an additional six to fourteen percent partially exercising the right.”

Even in the United States, according to Ives and Sherrin, most suspects speak to the police despite an onerous obligation placed on the police to warn persons who are the subject of custodial interrogations that they are not required to answer questions and that they have the right to speak to a lawyer first and to have a lawyer present during the interrogation. Finally, while Easton acknowledges the limited use of the right to silence by suspects, she asserts that it needs to be retained as it does “provide one important weapon in the armoury of the citizen and consideration should be given by means of making it more effective rather than resigning ourselves to its loss.”

Certainly, my own experience as a police officer and investigator for many years was consistent with the academic findings. Personal experience and observation demonstrated to me that any police officer with a reasonable level of training and some ability to connect with a

244 Berger, “Policy, Politics & Parliament”, supra note 113 at 418. Unfortunately, there appears to be little research in Canada regarding how often a suspect remains silent during police questioning. See also Dale E Ives & Christopher Sherrin, “R. v. Singh – A Meaningless Right to Silence with Dangerous Consequences” (2007) 51 CR (6th) 250.
245 Berger, “Policy, Politics & Parliament”, supra note 113 at 418.
246 Ives & Sherrin, supra note 244 at 252.
247 Easton, supra note 21 at 256. Given the infrequency of suspects actually invoking their right to silence during police interrogations, one might wonder if the debate over pre-trial silence, at least in the context of the formal police interview, is even worth having. If the right to silence is exercised so infrequently, logical arguments may be advanced on both sides of the right to silence debate. Abolitionists might argue that the rarity of people actually seeking the protection of the right to silence means that nothing dramatic would result from its curtailment, if not outright abolition. On the other hand, retentionists could advance an equally logical argument that, if the right to silence is so rarely invoked, how can its continued existence be considered to be a major impediment to effective crime control?
person on a human level would very often obtain useful information, if not an outright confession, from the suspect by means of questioning. On the other hand, on many occasions I interviewed people alleged to have committed a crime who provided information which exonerated themselves or pointed me in another direction. Along the same lines, as a police chief I was required to develop policy requiring officers to provide suspects arrested in a domestic violence case with the opportunity to respond to the allegation through a formal interview when it became apparent that a practice had developed within the department of officers making arrests based solely on the complainant’s allegations under the guise of a provincial pro-arrest policy without obtaining a statement from the suspect. Therefore, from an experiential perspective, I suggest the pragmatic value of interviewing or interrogating a person suspected of having committed a crime is manifestly clear.

One of the main justifications for the existence of the right to silence at the investigative stage of the criminal justice process cited by retentionists is that it performs a vital role in counterbalancing the superior power of the police during a criminal investigation. Retentionists contend, with some justification given the empirical evidence, that the right to silence during police interviews is extremely important because it is at the police interview that the accused is in the most significant jeopardy. Ratushny has pounced on this point, commenting:
The widespread existence and acceptance of police custodial interrogation results in a fundamental incongruity in the whole process. A number of elaborate procedures are provided to the accused at his trial including a public hearing, the right to counsel, the right to test every aspect of the Crown’s case before being required to respond, the supervision of the trial by a Judge and many others. At the same time, there is a minimum of effective restraint upon police officers taking a suspect into custody and interrogating him in the circumstances and using methods which would never be tolerated in our courtrooms.248

Other legal scholars and jurists have echoed Ratushny’s concern. Easton, for example, has alleged that a common theme in British miscarriage of justice cases has been police misconduct during an interrogation.249 Furthermore, Chief Justice Warren of the United States Supreme Court spent considerable time in Miranda discussing police interrogation manuals and voicing his concern about “over-zealous police practices” and the impact of such tactics on the reliability of the confession, as well as on the dignity of the suspect.250 Moreover, two dissenting Supreme Court of Canada judges in R. v. McCrimmon251 took issue with the use of the benign term “investigative interview” used by the majority of the Court, arguing that a police interrogation “is an attempt by police officers, who have total physical control of a detainee, to obtain an incriminating statement by systematically disregarding the detainee’s express wish and declared intention not to speak to them.”252

The concerns voiced by academics and jurists do not, however, only apply to obviously improper or overly aggressive police interrogation strategies. Bullying, threatening or creating oppressive conditions during a police interrogation will normally render a confession given in such circumstances inadmissible under the Ibrahim rule.253 However, both Easton and Ratushny

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248 Ratushny, Self-Incrimination, supra note 5 at 31.
249 Easton, supra note 21 at 263.
250 For a discussion of Miranda, see Romantz, supra note 91.
251 2010 SCC 36, [2010] 2 SCR 402 (available on lexUM) [McCrimmon] [cited to online source].
252 Ibid at para 40.
253 See text accompanying note 415, infra.
have emphasized that the law governing confessions does not cover more subtle police strategies or “pressures inherent in an interrogation, or the use of techniques which are seen by interviewers as legitimate.”

Furthermore, Galligan contends that “police questioning of suspects occurs in an environment which militates against remaining silent and leads to the great majority of suspects breaking their silence and making incriminating disclosures.” And Mirfield has pointed out that in a police interview, “the suspect typically suffers from what has been aptly described as an ‘information deficit’, and this even when he has had the advantage of legal advice.” Moreover, Greer has raised the spectre that the police may use the interview not simply as a means to discover evidence of a crime, but to actually create an offence. Greer posits:

Criminal offences are not only capable of being discovered in police interviews. The interview process can itself create them. A crude conception of guilt or innocence, according to which the suspect either ‘did it’ or ‘didn’t do it’ has tended to underpin the debate about the right to silence. However, legal guilt or innocence can be considerably more complicated. Some offences are defined in ways which separate them by a hairsbreadth from innocent conduct. Police interviews can, therefore, construct offences out of otherwise innocent behaviour. The abolition of the right to silence is likely to increase the opportunities for this to occur.

It is within this inherently unbalanced environment of police interviews, argue the retentionists, that concerns arise not only in regard to the reliability of statements made by suspects but also as to what sort of inference, if any, might be reasonably assumed when the accused remains silent in the face of police questioning.

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254 Easton, supra note 21 at 253.
255 Galligan, supra note 22 at 74.
256 Mirfield, supra note 71 at 245.
257 Greer, supra note 141 at 727-28, emphasis in original.
On the other hand, some academics have expressed doubt about the prophylactic value of the right to silence in assisting the accused to resist police pressure to talk or answer questions. Zuckerman, for example, has argued:

However, it is difficult to see how the privilege affords the suspect protection against abuse. The suspect is still free to waive his privilege, submit to questioning, and make incriminating statements. Far from shielding the suspect from the more insistent investigator, the privilege against self-incrimination presents the investigator with the challenge of obtaining, in the first instance, a waiver of the privilege so as to clear the way to questioning.\(^{258}\)

Additionally, Berger and Redmayne have asserted that allowing an adverse inference to be drawn from the accused’s silence during interrogation would “lessen the likelihood that police will engage in improper tactics because they can secure some evidentiary benefit even if the suspect remains mute when questioned.”\(^{259}\)

An important secondary pragmatic issue relating to the right to silence during police interrogations relates to the actual role, if any, that defence counsel perform either before or during the interrogation. The availability of legal advice for a person about to be, or actually being, interviewed by the police is considered by many to be an essential strategy to level the unequal relationship between the police and the accused. Mirfield has recognized the value of legal advice by observing: “[T]he innocent suspect pressed to respond immediately to an unformulated or inadequately formulated charge, with little or no idea of what he is alleged to have done, might be very wise to keep his counsel.”\(^{260}\)

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\(^{258}\) Zuckerman, *Principles of Evidence*, *supra* note 72 at 318. Zuckerman appears to consider the right to silence and privilege against self-incrimination to be synonymous in the context of a police interrogation.

\(^{259}\) Berger, “Policy, Politics & Parliament”, *supra* note 113 at 425.

\(^{260}\) Mirfield, *supra* note 71 at 245.
Some scholars have argued that the availability of legal advice for the accused either before or during police questioning is sufficient protection, so the right to silence at the pre-trial stage is no longer needed, or at least not in its entirety.261 Such exchange abolitionists, as Greer labels them, suggest that providing the accused with access to a lawyer means that the right to silence is no longer “a right which the accused needs to have.”262 Greer has reviewed empirical studies in England regarding the use of silence by suspects during police interviews, concluding there is “a strong correlation between exercise of the right to silence and the presence of legal representatives.”263 Zuckerman, a leading exchange abolitionist, has also argued that as long as the police have “a sufficiently strong case against the suspect to necessitate a response”264 and provide the suspect with sufficient information regarding the case against him or her as well as legal advice, “[a]n inference from silence will be in order”.265 Zuckerman even argues that it should be permissible to draw an adverse inference from the silence of an accused who chooses to remain silent based on legal advice to do so. Zuckerman contends that silence in such circumstances may be based on reasons other than the accused simply relying on the legal advice which he or she has received. According to Zuckerman, “the majority of persons who exercise the privilege do so because they wish to avoid being convicted for a crime they have committed.

261 There are several technical issues relating to the issue of providing legal advice to a suspect being interrogated by the police in England because of the adverse inference rule. For example, solicitors in England are in a difficult situation because the North American norm of simply telling the suspect not to speak may not be the best advice, as an adverse inference may be drawn from that silence. A concern also arises with regard to solicitor client privilege. When a suspect remains silent on the advice of his or her lawyer and such advice does not, on its face, appear to satisfy the “good cause” exception to the adverse inference rule (i.e., a suspect who remains silent for “good cause” is immunized from having an adverse inference drawn on his or her silence), the solicitor who provided the advice may be called as a witness at the accused’s trial in order to give evidence as to the reason he or she advised the accused to remain silent. This of course raises the issue of solicitor client privilege. Given the specific nature of these issues, they will not be discussed in detail in this thesis. For a discussion of the issue of legal advice within the British adverse inference regime, see Andrew Sanders & Lee Bridges, “The Right to Legal Advice” in Walker & Starmer, supra note 21, 83 [Sanders & Bridges, “The Right to Legal Advice”]; Easton, supra note 21 at 111; Redmayne, supra note 123 at 1066-71; Mirfield, supra note 71 at 256. 262 Greer, supra note 141at 720. 263 Ibid at 721. 264 Zuckerman, Principles of Evidence, supra note 72 at 330. 265 Ibid.
There is therefore no reason in logic why the trier of fact should not, in appropriate cases, infer that the suspect exercised his right in order to conceal his guilt.\textsuperscript{266}

Access to legal advice is an important adjunct to the right to silence in the United Kingdom,\textsuperscript{267} the United States\textsuperscript{268} and Canada;\textsuperscript{269} although, the actual level of involvement of defence counsel differs between jurisdictions. In Britain, there is a statutory right to legal advice including the presence of a solicitor during the police interview, while in the United States, under the \textit{Miranda} rule, there is a generally unfettered right to consult a lawyer and to have a lawyer present during a custodial interrogation. The situation in Canada, however, is very different from Britain and the United States as the Supreme Court of Canada has declared, albeit it in sharply divided decisions, that an accused is not entitled to have his or her lawyer present at a police interrogation, nor is he or she normally allowed to stop an interrogation in order to obtain new or updated legal advice.\textsuperscript{270}

4. \textbf{False Confessions and Protecting the Innocent}

The debate in Britain which eventually resulted in to the curtailment of the right to silence in the late 1980s and early 1990s occurred during a time of significant public concern regarding several highly publicized wrongful convictions, most of which involved Irish Republican Army (IRA) members or supporters who were suspected of having committed bombings or other

\textsuperscript{266} \textit{Ibid} at 331.
\textsuperscript{267} In the United Kingdom, the \textit{Police and Criminal Evidence Act 1984} (UK) prescribes a system of free legal advice for all detained suspects. The statutory provisions are very detailed and allow for a solicitor to not only be consulted prior to the interview but to be present during the interview. See Chapter III.C.4, below.
\textsuperscript{268} In the United States, \textit{Miranda} requires the police to advise all detained suspects that they not only have the right to silence, they also have the right to speak to a lawyer and have the lawyer paid for by the government if they cannot afford one. Lawyers are also permitted in the police interview and the police are prohibited from questioning a detained suspect until the suspect has unequivocally waived his or he right to counsel. See Bradley, “United States” in Bradley, \textit{Worldwide Study, supra} note 15 at 533.
\textsuperscript{269} In Canada, section 10(b) of the \textit{Charter of Rights} provides the “right to retain and instruct counsel without delay” to all arrested and detained persons.
\textsuperscript{270} See Chapter IV.D.3, below, for further discussion.
violent acts in Northern Ireland and England. While the spectre of wrongful convictions may not have been as dramatic in Canada, there have certainly been several wrongful convictions and some of them have included questionable police investigative practices, so the issue is clearly relevant to the right to silence debate in Canada as well as in Britain. The Supreme Court of Canada also referred to the importance of the right to silence as a guardian against false confessions in *R. v. Oickle* and *R. v. Singh*.

Several legal scholars have argued that the right to silence performs an important instrumental role in providing some measure of protection against false confessions and hence the wrongful conviction of the innocent. Walker, for example, has submitted that restricting the right to pre-trial silence will increase the risk of false confessions because “there is a danger that suspects will be pressured to speak, leading to false confessions.” Furthermore, Easton has contended that while allowing an adverse inference to flow from silence gives suspects “a formal choice whether to speak or not”, in practice it places pressure on them to speak “because they are likely to believe it would be better to speak” once they are warned about the possible adverse inference of silence. Easton submits that, “in the stressful context of detention … trying to recall specific names of witnesses, times, places and events … will increase the strain on defendants and raise special difficulties for suspects with a poor command of English, increasing the risk of

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271 See chapter III.C.7, below, for a discussion of the impact of these cases on the right to silence debate in Britain.
274 Singh, supra note 19. See discussion at Chapter IV.D.2, below, for a discussion of *Singh*.
276 Easton, supra note 21 at 266.
unsafe confessions.”\textsuperscript{277} Easton goes on to emphasize that the “loss of the right to silence is most dangerous for vulnerable and younger suspects who may be more likely to make false confessions to escape the pressure of police questions.”\textsuperscript{278}

Greer has also argued that the accused’s decision to speak or remain silent is made in an environment where he or she will “at least be partially ignorant of the police case against him and thus open to manipulation”.\textsuperscript{279} Greer further asserts that “police assumptions about the guilt or innocence of any given suspect can be fundamentally mistaken”.\textsuperscript{280} In Greer’s opinion, such an environment raises the distinct possibility of a false confession because:

Instead of winking a crook out of his shell they [police] may instead inadvertently trick an innocent suspect into compromising his position by making remarks which are open to misrepresentation at trial. It is now widely recognized that under pressure people are capable of confessing to offences which it would have been impossible for them to have committed.\textsuperscript{281}

Stewart has similarly argued that forcing a suspect to speak will result in potential unreliable evidence being obtained. According to Stewart, “[t]he common law has long recognized that coercive police tactics are likely to produce statements from suspects that are designed to satisfy the police and alleviate the coercion rather than to be truthful and reliable.”\textsuperscript{282} Finally, Lee Stuesser has identified the infamous Canadian wrongful conviction cases of Thomas Sophonow,

\begin{itemize}
\item \textsuperscript{277} *Ibid.*
\item \textsuperscript{278} *Ibid.*
\item \textsuperscript{279} Greer, *supra* note 141 at 726.
\item \textsuperscript{280} *Ibid.*
\item \textsuperscript{281} *Ibid.*
\item \textsuperscript{282} Stewart, “The Confession Rule", *supra* note 70 at 522. Stewart also suggests that while modern police interrogation strategies are more subtle, they “may also have the kind of coercive effect that can produce unreliable confessions.”
\end{itemize}
Donald Marshall and Guy Paul Morin as examples of “a common theme in wrongful conviction cases that inappropriate police questioning is putting innocent people in jail.”

However, not surprisingly, Glanville Williams has taken a completely opposite position to those who suggest restricting the right to silence increases the chance of the innocent being wrongfully convicted. Based on his view of human nature, Williams claims that an innocent person “faced with a criminal charge … would not stay mum – except perhaps in the most unusual circumstances.” According to Williams, failing to respond to the allegation “would greatly increase the risk of being wrongly convicted.” Rupert Cross has also challenged the suggestion that suspects are in the dark when questioned by the police, asking the question: “[A]re there really many suspects who are unaware of the case against them by the time they are charged?” Moreover, Greenawalt, while acknowledging that “[t]he right to silence may prevent some convictions of innocent people”, argues that “[g]iven the very high incidence of convictions of defendants who decline to testify, we must doubt that silence helps many innocent persons.” Greenawalt suggests, “[s]tricter safeguards against police pressures would provide better protection against the kinds of tactics that might induce false confessions during interrogation.” Finally, Galligan has contended that, “even if there is significant risk of false confessions, that risk would be controlled and reduced more effectively and directly, not by the right to silence, but by stringent conditions on the interrogation.”

283 Stuesser, supra note 272 at paras 35–42.
284 Williams, supra note 22 at 1107.
285 Ibid.
287 Greenawalt, supra note 125 at 44.
288 Ibid.
289 Galligan, supra note 22 at 86.
5. Encouraging Other Investigative Strategies

Another instrumental benefit of the right to silence at the investigative stage of the criminal process, according to retentionists, is that the accused’s silence forces the police and prosecution to look for other evidence to prove guilt. Easton has referred to the issue as “the lazy prosecutor argument”, suggesting that if “the individual is relied on as the source of the prosecution’s case against him, this can only weaken the effectiveness of the prosecution in obtaining evidence and it may encourage improper police practices.”

To support her argument, Easton quotes Sir James Stephen’s famous recollection of an Indian police officer’s response to a question as to why the police sometimes use force. The officer is quoted as responding: “There is a good deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper in a poor devil’s eyes than to go about in the sun hunting up evidence.”

Stuesser has also gone to an historical source to back his claim that the right to silence protects against “tunnel vision” by the police and promotes other avenues of investigation. Stuesser cites Wigmore’s concern that a system which “permits the prosecution to trust habitually to compulsory self-disclosure as a source of proof” leads to “[t]he inclination … to rely mainly upon such evidence, and to be satisfied with an incomplete investigation from other sources”, the result of which is that “the innocent are jeopardized by the encroachments of a bad system.”

Greenawalt, however, has challenged Wigmore’s view. Greenawalt contends that, “[i]n many cases, methods of gathering facts that do not depend upon questioning of suspects will prove ineffective or too burdensome”. Furthermore, Greenawalt asserts that “many other

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290 Easton, supra note 21 at 183-4.
291 Ibid at 184.
293 Greenawalt, supra note 125 at 45.
techniques for establishing guilt are actually worse from a moral point of view.”\textsuperscript{294} Friendly has also suggested it is unrealistic to think there will always be discoverable independent evidence of the suspect’s guilt, asserting:

It is a curious principle that would prohibit investigators from beginning their investigation by seeking information from the person best qualified to give it and would require them to operate under the rules of blind man’s bluff. Furthermore, it assumes what is not always the case, namely, that other forms of evidence will be available without interrogation if the police are only bright enough to find them. What Mr. Justice Black so rightly said in a fourth amendment context applies equally to the fifth amendment: “It is always easy to hint at mysterious means available just around the corner to catch outlaws.”\textsuperscript{295}

Finally, Zuckerman has underlined the efficiency of the police interview as a means of collecting evidence, referring to the findings of the Royal Commission on Criminal Procedure\textsuperscript{296} which found that there was “no adequate substitute for police questioning in the investigation and, ultimately, in the prosecution of crime.”\textsuperscript{297}

\section*{6. Innocent Reasons for Silence}

Those who oppose the drawing of an adverse inference from the accused’s silence argue that to do so is risky because inaccurate deductions may result from such silence. Retentionists suggest there are many reasons for a person to remain silent other than a desire to avoid conviction.\textsuperscript{298} Easton, for example, claims it is extremely difficult to distinguish between “innocent and guilty silences” given that the “population of suspects and detainees is heterogeneous” and includes the spectrum from “professional criminals” to “vulnerable groups

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\textsuperscript{294} \textit{Ibid.} \\
\textsuperscript{295} Friendly, \textit{supra} note 60 at 691. \\
\textsuperscript{296} See Chapter III.C.3, below, for a discussion of the Royal Commission on Criminal Procedure. \\
\textsuperscript{297} Zuckerman, “Reports of Committees”, \textit{supra} note 146 at 318-19, citing The Royal Commission on Criminal Procedure, \textit{Report} (1981) para 4.1. \\
\textsuperscript{298} See e.g. Easton, \textit{supra} note 21 at 145.
\end{flushright}
such as those with learning disabilities and juveniles, who are at risk of making damaging or unreliable statements.”

Moreover, Starmer and Woolf assert that, since there are valid reasons to remain silent other than to avoid guilt, concluding “inferences can safely be drawn as a matter of common sense may be too simplistic in some cases.”

While it is generally accepted that there may be reasons other than avoiding guilt for a suspect to remain silent during police questioning, some scholars take the position that adverse inferences are still legitimate and safe. Dennis, for example, argues that to conclude it is unsafe to draw an adverse inference from silence simply because there may be reasons “other than consciousness of guilt” is questionable because: “Other evidence may be admitted against a defendant which may be mistaken or open to innocent explanation. It is doubtful whether the probative value of silence is generally so slight that we are justified in excluding it from consideration in all cases.”

Moreover, while Ingraham acknowledges there may be valid reasons for a suspect to remain silent other than to avoid conviction, he also believes “these situations would be sufficiently rare and exceptional as not to render the inference of guilt an unreasonable one; they would be possibilities, not probabilities.” Cross has also cast a sceptical eye on the assertion advanced by the retentionists that it would be improper to allow an adverse inference based on the silence of an accused who had an innocent reason to remain silent, declaring:

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299 Ibid.
301 Dennis, “Reconstructing”, supra note 61 at 40.
302 Ibid at 40-41.
303 Ingraham, supra note 64 at 568.
I am afraid, however, that I am left completely cold by horror stories about the innocent man advised not to give evidence because he would be such a bad witness, or the innocent husband who did not want his wife to know that he had been with a mistress at the material time. The law of evidence must cater for the comparatively normal, and such cases are highly abnormal.\(^{304}\)

Finally, Redmayne contends that the existence of innocent reasons for silence should not eliminate the possibility of an adverse inference being drawn from silence because:

The possible existence of an innocent explanation for not mentioning facts to the police does not necessarily block an inference from silence. An innocent person may have good reasons to run away from the scene of a crime, but that does not mean that flight is not evidence of guilt. The innocent may sometimes confess, but, even more obviously, that does not mean that we should exclude all confessions. In each of these examples, so long as guilt is a better explanation for the evidence than is innocence, then the evidence is probative of guilt, and we would need some countervailing reason to exclude it.\(^{305}\)

Redmayne does, however, concede that innocent explanations may “weaken the inference from silence” and further acknowledges that where innocent explanations “outweigh ‘guilty’ explanations, they may prevent the adverse inference from being drawn.”\(^{306}\)

7. Cruel Choices

A common argument advanced in support of the right to silence has been the assertion that requiring an accused to speak or face an adverse inference forces him or her onto the horns of a “cruel trilemma”, as the accused must choose between “self-accusation, perjury or contempt.”\(^{307}\)

The “trilemma” has, however, been downgraded by most observers to a “dilemma” because the

\(^{304}\) Cross, supra note 286 at 336.

\(^{305}\) Redmayne, supra note 123 at 1057.

\(^{306}\) Ibid at 1058.

\(^{307}\) Friendly, supra note 60 at 686, citing Murphy, supra note 108. It should be noted that the English law which creates an adverse inference of guilt based on the accused’s silence does not make silence a crime, as the law specifically states that an accused does not commit contempt by refusing to provide information to the police or testify. See Berger, “Reforming Confession Law”, supra note 73 at 264.
probability of being cited for contempt is remote.\textsuperscript{308} However, even if contempt is not a major concern, retentionists still argue that is cruel and morally wrong to force an accused to decide between self-incrimination and committing perjury.

The difficulty of the choice forced upon the accused was recognized by Bentham, who stated “’tis hard upon a man to be obliged to criminate himself”,\textsuperscript{309} although, he recognized the dilemma was “not so much in the making of an incriminating statement as in the likelihood of punishment created by the statement.”\textsuperscript{310} Easton has referred to the development of the privilege against self-incrimination in the United States and suggests that it “has been fashioned … by the dangers of perjury in forced testimony; confronted with the cruel trilemma of choosing self-incrimination, contempt or perjury, the accused may well prefer to lie.”\textsuperscript{311} Easton asserts that it is futile to force the accused to speak against his or her interests and, therefore, “if it is impossible to guarantee that the accused will speak the truth, given his desire for self-preservation, it is pointless to force the suspect to speak.”\textsuperscript{312}

Other academics, however, have refuted the retentionists’ “cruel choices” argument. Zuckerman, for example, has proffered a similar argument to the one advanced by Bentham, suggesting that the choice faced by the accused is actually “not that harsh” because other people, such as witnesses, are often also placed into positions of having to make difficult choices.\textsuperscript{313} Zuckerman asserts that “the law recognizes no general privilege not to be faced with such a

\textsuperscript{308} See e.g. Friendly, \textit{ supra} note 60 at 695; Zuckerman, \textit{The Principles of Evidence, supra} note 72 at 316.
\textsuperscript{309} \textit{Ibid} at 315, citing Rationale of Judicial Evidence (1827), vol. 5, p. 230.
\textsuperscript{310} \textit{Ibid}.
\textsuperscript{311} Easton, \textit{ supra} note 21 at 169.
\textsuperscript{312} \textit{Ibid}.
\textsuperscript{313} Zuckerman, \textit{Principles of Evidence, supra} note 72 at 316. Zuckerman uses the example of a father having to testify as a witness when he knows that his testimony will convict his son as a choice just as difficult as the choice facing an accused.
dilemma”. Furthermore, Dennis has described the “state of cruel choices” for the accused at the pre-trial stage as being the requirement to decide either to refuse to answer questions and by so doing to “prolong the interview as well as run the risk of silence being interpreted as an admission of guilt, or to answer truthfully and incriminate oneself.” In Dennis’ view, such a choice is neither cruel nor unreasonable. He states:

However, the weakness of the theory is that … its underlying premise assumes that the suspect is guilty. An innocent suspect would, at least in theory, have nothing to lose by answering questions truthfully. There is therefore no cruelty involved in requiring the innocent suspect to speak. Once the true nature of the premise is recognised the argument loses much of its claim to moral force. It becomes difficult to accept that the interest of a guilty person in escaping conviction by not disclosing evidence of the crime is worthy of official protection.

Dolinko has also challenged the cruel choices rationale for retaining the right to silence, asserting: “Typically, those who find compelled self-incrimination unacceptably cruel or inhumane give no reasons for this judgement save for an appeal to intuition.” Dolinko points out that the law often requires people to make difficult choices, such as “compelling an immunized witness to testify against hoodlums who threaten to kill him or his loved ones in retaliation” or requiring “a rape victim” to testify and thereby “either relive her trauma by testifying … or let her assailant go free, perhaps to find new targets.” According to Dolinko, “the practice of compelling a suspect or defendant to answer potentially incriminating questions would not aim at forcing the individual to harm himself or something he holds dear. It would aim simply at helping to establish the truth, whether that truth be exculpating or inculpating.”

Dolinko concludes that “compelled self-incrimination – the practice of compelling persons

314 Ibid.
315 Dennis, “Instrumental Protection”, supra note 68 at 358.
316 Ibid at 359.
317 Dolinko, supra note 119 at 1092.
318 Ibid at 1094.
319 Ibid at 1105.
suspected of crime to answer potentially incriminating questions – cannot be judged impermissibly cruel”.

Friendly has expressed a similar view to that of Dennis and Dolinko, stating: “It is not ‘plain’ or ‘obvious’ to me why it is more cruel to require a man to admit commission of a misdemeanor than to testify to his mother’s immorality or his partner’s peculations.” Finally, Greenawalt has rejected the claim that drawing an adverse inference from silence is unfair or cruel to the accused, asserting:

When substantial evidence exists against someone, allowing ordinary inferences from his silence and dismissing him if he refuses to speak about his performance of public duty hardly seem inhumane. These are, rather, natural consequences of his choice to remain silent. Undoubtedly, those practices may affect a suspect’s or a defendant’s choice to speak, but the moral right to silence should not be viewed as a right to be released from all the normal influences to respond to accusations. Rather, it should be viewed as a right to be free of the especially powerful compulsions that the state can bring to bear on witnesses.

Beyond rebutting the retentionists’ arguments, those who criticize the right to silence have also advanced their own reasons for claiming the right to silence undermines the legitimate role of the state to prevent and investigate crime. Those arguments will now be reviewed.

8. Professional Criminals Take Advantage of the Right to Silence

One of the major elements in the attack on the right to silence that occurred in the United Kingdom during the 1980s and early 1990s was the assertion that the right to silence was being exploited by professional criminals. However, this claim has been vigorously refuted by several academics. Greer has noted that the claim was a central theme of the abolitionists’

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320 Ibid at 1106.
321 Friendly, supra note 60 at 683.
322 Greenawalt, supra note 125 at 40. Greenawalt includes in his discussion of the moral and constitutional aspects of the right to silence in the United States not only the application of the right to silence to criminal law, but also to employment law in the civil service; hence, Greenawalt’s reference to “dismissing him if he refuses to speak about his performance of public duty”.
323 Easton, supra note 21 at 133.
criticism of the right to silence, although he suggests there was no empirical evidence to support it, and Mirfield has also expressed doubt about the validity of the claim. Moreover, Starmer and Woolf have rebutted the assertion that professional criminals avoid conviction because they remain silent as being an “unsubstantiated belief”, and Easton has suggested the claim rests “on mere speculation”. In addition, Easton argues that even if it is true that some professional criminals exploit the right to silence, the fact that “relatively few suspects exercise the right to silence” means “[t]he exercise of the right to silence is unlikely to have an impact on the number of acquittals or to adversely affect police work.” Easton also contends that the abolitionists’ argument “fails to take account of the principal aims of the law of evidence, to provide fairness to the accused, and to determine truth.” Finally, Easton refers to the principles underlining the right to silence by stressing that even if criminals are exploiting it, “[i]f a right exists, predicated on principles such as equal treatment and the presumption of innocence, then it should be available to everyone regardless of the reasons for exercising that right.”

Associated to the question of whether or not professional criminals take advantage of the right to silence to avoid conviction is the larger question of whether restricting the right to silence actually achieves its desired instrumental goal of increasing conviction rates, which would logically reduce crime. Such an instrumental goal has been an important piece of the abolitionists’ argument since the days of Bentham. However, retentionists claim that abolishing or restricting the right to silence has very little actual impact on crime. In support of their position, retentionists have referred to studies of the impact of laws which have restricted the

324 Greer, supra note 141 at 723.
325 Mirfield, supra note 71 at 243.
327 Easton, supra note 21 at 137.
328 Ibid.
329 Ibid.
330 Ibid at 143.
right to silence in Singapore and Northern Ireland. Easton refers to a Singaporean study by Meng Heong Yeo which determined that, at least initially, the impact of restricting the right to silence “was insubstantial because the majority of suspects were already speaking during interrogation”.

Furthermore, Easton asserts that empirical studies on the restrictions to the right to silence which were implemented in Northern Ireland produced similar results to the Singapore study. Similarly, O’Reilly has submitted that, “the evidence suggests that the use of adverse inferences will not reduce crime.” However, despite the apparent limited positive impact on the conviction rate, abolitionists have maintained their position that the right to silence is abused by criminals (and terrorists) and thereby reduces police effectiveness and endangers public safety.

9. Ambush Defences

One “recurring argument in the attack on the right to silence” has been the claim that the right to silence allows the accused to advance a defence at trial without having mentioned it to the police or prosecution earlier. Such a practice has been described as the “ambush defence”, which Easton defines as “defences ‘sprung’ at trial, which take the prosecution by surprise, allowing insufficient time for preparation of the prosecution’s case and, it is argued, lead to wrongful acquittals.” Indeed, as will be discussed in Chapter III, British judges and politicians who have criticized the right to silence have often referred to the ambush defence in their

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332 *Criminal Evidence (Northern Ireland) Order 1988* SI 1987 [Northern Ireland Order]. See Chapter III.C.6, below, for a discussion of the *Northern Ireland Order*.

333 Easton, *supra* note 21 at 85.


336 Easton, *supra* note 21 at 8.

337 *Ibid* at 135.
criticism, and some legal scholars have also identified the ambush defence as a serious pragmatic problem arising from the right to silence. Easton, however, suggests that the ambush defence problem has been exaggerated. To support her claim, Easton cites empirical research undertaken by the Royal Commission on Criminal Justice, which “found that late defences sprung on the prosecution occurred in no more than 10% of Crown court trials but they were more likely to end in convictions than acquittal.” Similarly, Mirfield has submitted that concerns regarding the ambush defence have been overstated, claiming that “the problem for the police and prosecution may well not be that the accused really did keep back his defence, but that the police had failed to realize that he was saying what was his defence or had brushed his exculpatory remarks to one side because interested only in admissions.”

John Craig has analyzed the issue of the ambush defence in Canada, where it is commonly referred to as the alibi exception to the right to silence. In Craig’s view, the accused’s silence to the police regarding an alibi should not be used against him or her because he or she has a right to remain silent and it cannot be assumed that such silence is simply due to the accused not wanting the police to test the alibi before trial. Craig also suggests that requiring advance notice of an alibi defence violates the right to silence and is unfair to the accused because, prior to the trial, the accused is essentially guessing about the Crown’s case. Ratushny, however,

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338 Ibid at 7, 8 & 135.
339 Dennis, for example, has simply asserted that “there is a problem with the ambush defence.” See Dennis, “Reconstructing”, supra note 61 at 43.
340 Easton, supra note 21 at 137.
341 The Royal Commission on Criminal Justice studied the right to silence in England in the early 1990s. See Chapter III.C.7, below, for a discussion of the Commission.
342 Easton, supra note 21 at 139.
343 Mirfield, supra note 71 at 243.
344 Craig, supra note 26 at 235.
345 Ibid at 246. Craig is, however, in the minority in Canada as the Supreme Court of Canada in R v Cleghorn, [1995] 42 CR (4th) 282 [Cleghorn] confirmed that the late introduction of an alibi defence by the accused might give rise to consideration of the accused’s silence regarding an alibi during the police investigation. See discussion in Chapter IV.B.4.c, below.
has argued that the jurisprudence restricting the right to silence in alibi cases is legitimate because it does not violate the privilege against self-incrimination, and “the rule with respect to alibi evidence, then, is not one of law but of logic in drawing inferences in respect of credibility.”

10. Denying the Trier of Fact Relevant and Probative Evidence

Another pragmatic criticism of the right to silence advanced by abolitionists is that it “deprives the factfinder of probative evidence without adequate justification.” This argument ties into Bentham’s criticism of the right to silence as interfering with rectitude of decision because, when a decision is based on incomplete information, it will be less likely to be accurate. In this regard, Berger, while referring to the legislative restrictions placed on the right to silence in Britain, contends:

One of the main objectives of our system of evidence law is to ensure that the factfinder is presented with all relevant and probative evidence and allowed to draw appropriate inferences in evaluating its weight. Because silence may logically be relevant to the issues in a criminal prosecution, the kind of adverse comment authorized by the legislation is, arguably, quite appropriate.

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347 Ratushny, Self-Incrimination, supra note 5 at 321-22. Ratushny takes issue with the state of Canadian law regarding the alibi defence and its relationship with the right to silence and proposes the elimination of the alibi rule with some prescribed statutory exceptions.
349 Dennis, “Instrumental Protection”, supra note 68 at 354.
Galligan has also criticized the right to silence on the basis that “silence may in certain circumstances be evidential”\textsuperscript{351} and Redmayne has asserted: “Silence, it can be claimed, is evidence of guilt, and should therefore be drawn to the fact-finder’s attention.”\textsuperscript{352} Furthermore, Zuckerman suggests, “experience has shown that the accused’s untruthful or evasive testimony will very often make a useful contribution to the ascertainment of the truth”,\textsuperscript{353} and Albert Alschuler has posited:

The virtues of an ‘accusatorial’ system in which defendants are privileged to remain passive are far from obvious. The person who knows the most about the guilt or innocence of a criminal defendant is ordinarily the defendant herself. Unless expecting her to respond to inquiry is immoral or inhuman … renouncing all claim to her evidence is costly and foolish.\textsuperscript{354}

In response to the abolitionists’ criticism, retentionists assert it is wrong to assume that silence is necessarily evidence of guilt.\textsuperscript{355} Proponents of the right to silence argue there may “be perfectly good reasons for maintaining silence which are consistent with innocence”,\textsuperscript{356} and there is a “risk … that coercive and manipulative questioning may lead the suspect to make incriminating statements which are false.”\textsuperscript{357} As Walker puts it, “there is the danger that mistakes will be made in the inferences drawn from silence, the evidential value of which is far from self-evident.”\textsuperscript{358}

\textsuperscript{351} Galligan, supra note 22 at 78.
\textsuperscript{352} Redmayne, supra note 123 at 1051.
\textsuperscript{353} Zuckerman, Principles of Evidence, supra note 72 at 319.
\textsuperscript{355} Berger, “Policy, Politics & Parliament”, supra note 113 at 425.
\textsuperscript{356} Mirfield, supra note 71 at 253. See also Berger, ibid; Easton, supra note 21 at 145.
\textsuperscript{357} Dennis, “Instrumental Protection", supra note 68 at 349.
\textsuperscript{358} Walker, “Agenda” in Walker & Starmer, supra note 21 at 12.
11. Judges and Juries Draw an Adverse Inference Anyway

Another instrumental issue falling within the pragmatic category of the right to silence debate relates to what many suggest is the practical reality that judges and juries draw adverse inferences from the accused’s silence whether or not they are actually allowed to do so under the law. Assuming that such a contention is true, abolitionists suggest it is better to acknowledge reality and develop guidelines to govern such a “natural and irresistible” tendency.\(^{359}\) Berger describes this position as “an intuitive belief that silence generally has probative value and that there is no adequate reason for keeping such evidence away from decisionmakers.”\(^{360}\)

Furthermore, the common law allows juries to draw inferences from silence in limited situations.\(^{361}\) And Williams has argued: “The law does not forbid the jury to take the defendant’s silence as confirming other evidence of guilt. What it does … is to stop the judge from telling them that they can do so.”\(^{362}\) Friendly has advanced a similar position, suggesting that “the jury draws the inference anyway, even – some think particularly when – instructed not to”;\(^{363}\) and Cross has emphasized that since juries actually do draw inferences from silence, “guidance as to what inferences are and are not proper in the case of a belated defence would be more helpful to an innocent accused than leaving the jurors to raise these questions by themselves.”\(^{364}\)

\(^{359}\) Alschuler, supra note 354 at 873, citing the United States Supreme Court in Griffin, supra note 89, where the Court stated: “the inference of guilt for failure to testify as to facts peculiarly within the accused’s knowledge is … natural and irresistible”.

\(^{360}\) Berger, "Policy, Politics & Parliament", supra note 113 at 428.

\(^{361}\) Zander, supra note 60 at 149; Williams, supra note 22 at 1107.

\(^{362}\) Williams, ibid.

\(^{363}\) Friendly, supra note 60 at 700.

\(^{364}\) Cross, supra note 286 at 335.
On the other hand, while acknowledging that juries very likely do consider the accused’s silence as evidence based on their “intuition” and “common sense”, retentionists have insisted that condoning such a practice is dangerous because of the unreliability of so-called “common sense”. Easton, for example, has asserted: “It is because of the weakness of common sense thinking that a firm judicial direction is so important.” Easton submits that silence may be either innocent or suspicious and therefore the “problem for the jury is how to reliably distinguish the ‘suspicious’ from the ‘innocent’ silence, to prevent innocent defendants from being prejudiced.” Easton further contends that allowing juries to draw “common sense” inferences of guilt from the accused’s silence is improper because the analogy advanced by abolitionists that silence during interrogation or at trial is similar to silence in everyday life is inappropriate, as “everyday life is not comparable to the context of the police station and courtroom … [o]nce the accuser is the state, then questions of fundamental rights come to the forefront of the discussion.”

It is therefore evident that those who support the right to silence are not willing to simply accept the inevitable conclusion that the trier of fact will draw adverse inferences anyway. While they are not naïve to the reality that juries, and probably some judges, do in fact draw inferences from silence, they argue that more, not less, control over the drawing of such inferences is needed.

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365 Easton, supra note 21 at 154.
366 Ibid at 155.
367 Ibid.
368 Ibid at 156.
D. CONCLUSION

The debate over the right to silence during the investigative, or pre-trial, stage of the criminal process has occurred at both a philosophical and pragmatic level. The fulcrum of the debate is the issue of where to draw the line between “rights versus utility” or, to use different terminology, due process versus crime control. On the philosophical level, those who support retaining the right to silence claim it is a universal human rights norm essential to personal autonomy, dignity and privacy, as well as an important complimentary rule to support other fundamental legal principles such as the privilege against self-incrimination, presumption of innocence and the burden of proof being placed on the prosecution. However, those who advocate limiting the right to silence argue it is contrary to other important moral principles, such as the moral obligation to respond to a well-founded accusation and the importance of truth finding within the criminal process. Abolitionists also view the right to silence as simply being contrary to “common sense” and the natural human inclination to respond when falsely accused. On the pragmatic level, several instrumental issues have been debated, with opposing sides of the debate offering competing arguments as to whether the right to silence helps or hinders the practical goals of the criminal justice system.

A definitive, unitary answer for many of the questions raised in the right to silence debate is very likely not achievable. As such, any resolution to the philosophical and pragmatic divide between the two sides of the debate will probably lie in the area of compromise, where a reasonable and appropriate balance between the importance of ensuring collective security through effective law enforcement and respect for individual autonomy might be achieved.
A question that has repeatedly surfaced within the right to silence debate is whether the right to silence protects the innocent from being wrongfully convicted or allows the guilty to be acquitted? It is, of course, very likely that the right to silence does both. If the right to silence does indeed protect some innocent people from being convicted but at the cost of allowing some guilty people to be acquitted, the final decision as to whether the right to silence deserves the “almost religious adulation”\(^\text{369}\) of its supporters or the caustic scorn of its detractors will be highly subjective. Moreover, as there is no self-evident moral answer, the final decision as to where to draw the line or set the balance will be a matter to be determined by the legislative and judicial branches of government. And in setting the balance, politicians and the judiciary will undoubtedly, and I suggest quite properly, consider the social and political environment in which the right to silence must operate. This was indeed the situation in the United Kingdom during the 1980s and 1990s when the British government significantly curtailed the right to silence through successive legislative enactments.

\(^{369}\) Friendly, supra note 60 at 681.
CHAPTER III
THE RIGHT TO SILENCE IN THE UNITED KINGDOM

A. INTRODUCTION

As mentioned in Chapter I, the right to silence is generally thought to have originated in England. Ironically, however, England is also where the right to silence has been the subject of intense scrutiny over the span of several decades and where it has been considerably curtailed since the late 1980s. This chapter will review the history of the right to silence in Britain from its birth in the seventeenth century to its near death experience in the late twentieth century.

B. THE DEVELOPMENT OF THE RIGHT TO SILENCE

1. The Origin of the Right to Silence

The most commonly accepted theory regarding the origin of the right silence appears to be that it grew out of opposition to the ex officio oath and inhumane tactics of the Star Chamber and ecclesiastical courts in seventeenth century England. Easton has suggested that the right

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370 To repeat the notation in Chapter I, the terms “England”, “Britain” ‘Great Britain” and the “United Kingdom” will be used interchangeably but it is important to note that Scotland has its own criminal law so it is not included in the discussion.
371 Mirfield, supra note 71 at 242.
372 As mentioned in Chapter I, Singapore actually led the way as it abolished the right to silence in 1976. See Yeo, supra note 331 and Keong, supra note 8 for a discussion of the Singaporean experience.
373 For a discussion of the ex officio oath, see Friendly, supra note 60 at 677. See also Langbein, supra note 27 at 1073 where he describes the ex officio oath as being a tool used by the ecclesiastical and prerogative courts of the High Commission and Star Chamber when conducting disciplinary proceedings often aimed at the Puritans who were resisting the imposition of Anglican worship in England. Langbein describes the ex officio oath procedure as “… the court instructed the accused at the outset of the inquiry that he should swear an oath to answer any questions that the court might subsequently put to him. A defendant who refused to take the oath could be imprisoned for contempt or subjected to other harsh sanctions.”
374 Easton, supra note 21 at 1. It should, however, be noted that there are other theories about the origins of the right to silence. Some scholars argue that the right to silence, as part of the overarching privilege against self-
to silence developed as a necessary component of the privilege against self-incrimination, which had gained acceptance “in response to the forced interrogations and arbitrary power of the Star Chamber, the prerogative Court of King Charles I, and to the ecclesiastical court of the High Commission.”

The prosecution of John Lilburne before the Star Chamber in 1639 “proved to be the turning point”, as two years later Parliament abolished the Star Chamber.

With the abolition of the Star Chamber and High Commission in 1641 and their replacement by the common law courts, the privilege against self-incrimination, including the right to silence, began to germinate as a common law principle.

According to Easton, while the right to silence originally arose as a “commitment to the principle that no one should be forced to incriminate himself on oath in the witness box”, it was extended over time to “all questioning of the accused without his agreement to testify.”

Berger has referred to the evolution of the right to silence as transforming over time from being solely “connected to abusive investigations undertaken by the state against political and religious dissidents” to a “right employable by all criminal defendants.”

Easton suggests that two important developments in nineteenth century England advanced the right to silence at both the pre-trial and trial stages of the criminal process. The first development was the creation of the London Metropolitan Police in 1829, followed by the establishment of other police forces throughout England. The new model of policing necessitated


Easton, supra note 21 at 1.

O’Reilly, “England Limits the Right to Silence”, supra note 8 at 417. John Lilburne was a seventeenth century political writer who was called before the Star Chamber to answer to an allegation that he published material without appropriate licensing. Lilburne refused to swear the ex officio oath on the ground that he was not required to incriminate himself. Lilburne was subsequently physically punished and imprisoned, but was later released and continued his political writings and activities.

Easton, supra note 21 at 2.

Ibid.

Berger, “Policy, Politics & Parliament”, supra note 113 at 396.
the development of rules regarding the right to silence in order “to strike a balance between the rights of individual citizen and the authority of the state in the ideological milieu of laissez-faire liberalism when aversion to strong state control was at its height.” 380 The second development was the enactment of the Criminal Evidence Act 1898, which significantly affected the right to silence as it made the accused a “competent witness for the defence, but not for the Crown.” 381

While the theory regarding the development of the right to silence posited by Easton appears to be the most widely accepted, it is not the only explanation as to how the right to silence developed. John Langbein, for example, has offered another theory in which he claims the right to silence did not arise from the elimination of the Star Chamber and ex officio oath, but rather from the “rise of adversary criminal procedure at the end of the eighteenth century” and the role of defence counsel. 382 Langbein asserts that, until the end of the eighteenth century, the “fundamental safeguard for the defendant in common law criminal procedure was not the right to remain silent, but rather the opportunity to speak. The essential purpose of the criminal trial was to afford the accused an opportunity to reply in person to the charges against him.” 383 Part of this approach, according to Langbein, was the exclusion of defence counsel from most criminal trials. 384 However, in the latter part of the eighteenth century and early part of the nineteenth century, “the criminal trial came to be seen as an opportunity for the defendant’s lawyer to test the prosecution case” and “[t]he privilege against self-incrimination entered common law procedure … as part of this profound reordering of the trial.” 385 Concerning pre-trial silence, Langbein contends that “pretrial procedure in the sixteenth, seventeenth, and eighteenth centuries

380 Easton, supra note 21 at 4.
381 Ibid at 20.
382 Langbein, supra note 27 at 1047.
383 Ibid.
384 Ibid.
385 Ibid at 1048.
was designed to induce the accused to bear witness against himself promptly."\(^{386}\) The Marian Committal Statute of 1555\(^{387}\) required a Justice of the Peace to undertake a pre-trial examination of the accused and send a transcript of the examination to the trial court, where it could be entered as evidence against the accused.\(^{388}\) Langbein notes, “[t]here was no thought of advising the accused that he need not answer or warning him that what he said might be used against him”,\(^{389}\) and it was not until 1848 that a “provision was made to advise the accused that he might decline to answer questions put to him in the pretrial inquiry and to caution him that his answers to pretrial interrogation might be used as evidence against him at trial.”\(^{390}\)

There are additional theories regarding the origin of the right to silence beyond those espoused by Easton and Langbein. Greer has summarized the major alternate theories as: (1) Maguire and Levy’s theory that the right to silence arose as part of the privilege against self-incrimination in the middle ages; (2) MacNair’s view that it originated in roman-canon law; (3) the Criminal Law Revision Committee’s belief that it developed in the nineteenth century as part of the courts’ attempt to protect the accused from several systemic problems; and (4) the Royal Commission on Criminal Procedure’s theory that it developed in the nineteenth century as a strategy to strike a balance between the power of the state and individual rights.\(^{391}\) However, whichever theory is accepted, it is clear that the right to silence gained prominence in Britain through the development of the common law and, as Michael Zander has observed, “there can be no doubt

\(^{386}\) Ibid at 1061.
\(^{387}\) 2 & 3 Phil & M, c 10, 2 (1555).
\(^{388}\) Langbein, supra note 27 at 1060.
\(^{389}\) Ibid at 1061, citing EM Morgan, “The Privilege Against Self-Incrimination” (1949) 34 Minn L Rev 1.
\(^{390}\) Ibid. Langbein states that the change was enacted by the Sir John Jervis’ Act, 11 & 12 Vict, c 42.
\(^{391}\) Greer, supra note 141 at 710-11.
that the suspect’s right to silence has for the whole of the modern period been an integral part of the system.”

2. Development of the Common Law

According to Langbein, prior to the development of professional policing in England in 1829, the questioning of a person suspected of having committed a crime was taken before a Magistrate or Justice of the Peace and the transcript of the interview was transmitted to the trial court, where it was admissible. However, in 1848 the Summary Jurisdictions Act 1848 formally separated the investigative and judicial functions, and the police took over the role of questioning suspects. Perhaps out of concerns inherent in the “milieu of laissez-faire liberalism”, the judiciary initially took a cautious approach towards police questioning persons suspected of having committed a crime. As Michael and Emmerson have observed, “[p]rior to the introduction of the Judges’ Rules in 1912, there was considerable doubt about whether the results of police interrogation could ever be admissible in court.” An example of this judicial concern was illustrated by Lord Sankey’s comments in R. v. Crowe and Myerscough that: “If a police officer has determined to arrest a person, or if a person is in fact in custody, then he

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392 Zander, supra note 60 at 133.
393 Langbein, supra note 27 at 1060.
394 Summary Jurisdictions Act 1848 (11 & 12 Vict).
396 Easton, supra note 21 at 4.
397 Michael & Emmerson, supra note 56 at 5. However, see also TE Johnston, “The Judges’ Rules and Police Interrogation in England Today” (1966) 57:1 J Crim Law Criminology & Police Sci 85. Johnston suggests the Judges’ Rules were in fact based on a common law principle that had been established since the mid-nineteenth century which allowed a confession to be admitted at trial as long as it was not obtained through inducements, threats, trickery or force.
should ask no question which will in any way tend to prove the guilt of the person in custody from his own mouth.***398

However, two pronouncements in the early twentieth century altered the judicial approach to police questioning of criminal suspects.399 The first was the Judges’ Rules in 1912 and the second was the 1914 House of Lords decision in *Ibrahim v. The Queen.*400 Although the Judges’ Rules and *Ibrahim* case confirmed that an accused could refuse to answer police questions, they also implicitly encouraged the police to question suspects because such questioning could lead to valuable evidence, such as an admission or confession or some other form of evidence discovered from information supplied by the accused.

The Judges of the King’s Bench issued the Judges’ Rules to bring a “form of control” to police questioning.401 According to Easton, the Judges’ Rules were the first conscious effort to balance the suspect’s rights with the needs of law enforcement.402 The Judges’ Rules were guidelines for the police to follow when questioning suspects which “were used to inform the application of the confessions rule”.403 According to Galligan, the Judges’ Rules were built on the foundation of the right to silence.404 The Judges’ Rules confirmed that it was legitimate practice for a police officer investigating a crime to speak to anyone, including a possible suspect, if the officer believed the person being questioned might have “useful information”.405 However, once the officer concluded there was sufficient evidence to charge the suspect the

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400 Easton, *supra* note 21 at 4.
401 Ibid.
402 Ibid.
404 Galligan, *supra* note 22 at 77.
405 Johnston, *supra* note 397 at 86. The Judges’ Rules went on to provide further direction to the police regarding questioning more than one suspect and reducing statements to writing.
officer was required to caution the suspect by giving a warning in the following terms: “You are
not obliged to say anything unless you wish to do so, but whatever you say will be taken down in
writing and may be given in evidence.”

The initial four Judges’ Rules of 1912 were supplemented by another five rules issued in
1918. The additional rules contained directives covering alternate scenarios of police
questioning. The Judges Rules were revised again in 1964, with the new rules superseding the
1912 and 1918 Rules. While the wording of some of the Rules changed, the substance
remained essentially the same. The Introduction to the 1964 Rules confirmed that “citizens have
a duty to help a police officer to discover and apprehend offenders”, but the Rules also
emphasized that a statement had to be voluntary to be admissible at trial. The Judges’ Rules
continued to allow police officers to question anyone without administering a caution while
“trying to discover whether, or by whom, an offence has been committed”, but required the
police to caution the person being questioned once they formed reasonable grounds to believe
that the person had committed an offence. When a suspect was charged with an offence, the
police were required to give another slightly different caution and they were prohibited from

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406 Ibid.
407 The alternate scenarios included: suspects volunteering statements; cautioning multiple suspects in the same
crime; prohibiting cross examining a suspect who gives a voluntary statement except for the purpose of removing
ambiguity; and encouraging the police to put any statement given to them down in writing and to have the person
giving the statement sign the written version. See Johnston, ibid at 87-88. Johnston also notes that the Judges
issued a statement clearing up some ambiguities in 1930, and in 1947 and 1948 the Home Secretary issued circulars
after consultation with the Lord Chief Justice.
408 Johnston, ibid at 88.
409 Ibid.
410 Ibid. Rule 1.
411 Ibid. Rule 2, which read:

“As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person
has committed an offense, he shall caution that person or cause him to be cautioned before putting to him any
questions, or further questions, relating to that offense. The caution shall be in the following terms: “You are
not obliged to say anything unless you wish to do so but what you say may be put into writing and given in
evidence.” When after being cautioned a person is being questioned, or elects to make a statement, a record
shall be kept of the time and place at which any such questioning or statement began and ended and of the
persons present.”
asking questions relating to the offence unless there were exceptional circumstances.\footnote{Ibid at 89. This was Rule 3, which read: (a) Where a person is charged with or informed that he may be prosecuted for an offense he shall be cautioned in the following terms: “Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down in writing and may be given in evidence.” (b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.”} The remainder of the 1964 Judge’s Rules were substantially the same as the 1912 and 1918 Rules.\footnote{Ibid at 90. The rest of the Rules dealt with matters such as how statements were to be taken down in writing and how police officers were to confront suspects with a statement of a co-accused or accomplice.} Zuckerman has noted that the Judges’ Rules also “conferred on suspects the right to see a solicitor but … the courts declined to exclude confessions obtained in violation of this right notwithstanding that denial of the right was common place.”\footnote{Zuckerman, Principles of Evidence, supra note 72 at 327. See also Sanders & Bridges, “the Right to Legal Advice” in Walker & Starmer, supra note 21 at 83, where it is noted that the provision in the Judges’ Rules regarding legal advice that was issued by the Home Office in 1978 only directed the police that “no unreasonable delay or hindrance be suffered by the police”, which gave the police considerable latitude “for which they were rarely called to account”.}  

Two years after the first set of Judges’ Rules was issued the House of Lords provided further guidance to the police when it developed a formula to determine the admissibility of statements made by an accused to the police. In \textit{Ibrahim v. The King},\footnote{[1914] AC 599 (PC) [Ibrahim].} Lord Sumner set out what became known as the “voluntariness rule” as follows:

\begin{quote}
It has long been established as a possible rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.\footnote{As cited in Don Stuart, Ronald J Delisle & Tim Quigley, Learning Canadian Criminal Procedure, 10th ed (Toronto: Thomson Reuters, 2010) at 372.}
\end{quote}
The transfer of pre-trial questioning to the police in 1848, along with the Judges’ Rules and Ibrahim case (which implicitly encouraged the police to question suspects by establishing guidelines for police questioning), resulted in police interrogation becoming a common investigative strategy in England. The inherent tension which exists in a police interview between the desire of the police to elicit information from the suspect and the suspect’s right to silence highlighted the importance of finding the “correct balance between the need to ensure that the police have adequate means to investigate crime, and the desirability of protecting the innocent and the liberty of the subject.”

The role of finding such a balance initially fell to the English courts, although Parliament later entered the arena and enacted legislation that severely restricted the right to silence. However, while the need to balance respect for individual liberty with the legitimate needs of law enforcement certainly created challenges for the courts in the context of admissions and confessions, another challenge arose when the suspect decided to remain silent during police questioning. While it was clear that a person had the right to remain silent, it was far less clear whether any inference could result from such a decision.

As briefly mentioned in Chapter II, the foundational principle underlying the right to pre-trial silence – that “the duty to help the police with their inquiries has been seen as a moral rather than a legal duty” – was emphasized by Lord Parker in Rice v. Connolly, where he stated:

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417 Supra note 395.
419 Johnston, supra note 399 at 85.
420 Easton, supra note 21 at 6.
421 Rice v Connolly, supra note 132.
It seems to me quite clear that though every citizen has a moral duty, or if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is that right of the individual to refuse to answer questions put to him by persons in authority. In my judgement there is still all the difference in the world between deliberately telling a false story, something which on no view a citizen has the right to do, and preserving silence or refusing to answer, something which he has every right to do.\(^{422}\)

In addition to establishing the principle that there is no legal duty to cooperate with the police, English courts also recognized that silence is, in and of itself, not necessarily indicative of guilt on the part of the person who remains silent. In \textit{R. v. Leckey},\(^{423}\) the Court of Appeal emphasized the danger of convicting the accused based on an inference of guilt arising from his silence, noting that “an innocent person might well, either from excessive caution or for some other reason, decline to say anything when charged and cautioned, and if it were possible to hold out to a jury as a ground on which they might find a man guilty, it is obvious that innocent persons might be in great peril.”\(^{424}\)

The rule prohibiting comment by a judge which might equate silence with guilt was confirmed in \textit{R. v. Sullivan}.\(^{425}\) Sullivan was jointly charged with an associate with smuggling Swiss watches into England. The watches had been found in the associate’s bag along with the associate’s phone number and a Swiss cable addressed to Sullivan which read, “Everything ready regards Rudi”.\(^{426}\) Sullivan refused to answer questions about the incriminating evidence when questioned by customs officers. The trial judge directed the jury in the following terms: “Sullivan refused to answer any questions. Of course bear in mind that he was fully entitled to refuse to answer questions, he has an absolute right to refuse to do just that. But you might well

\(^{422}\) As cited in Easton, \textit{supra} note 21 at 6.  
\(^{423}\) [1944] KB 80 (CCA) [\textit{Leckey}].  
\(^{424}\) As cited in Discussion Paper 41, \textit{supra} note 395 at para 2.5.  
\(^{425}\) \textit{Sullivan, supra} note 150.  
\(^{426}\) Easton, \textit{supra} note 21 at 7.
think that if a man is innocent he would be anxious to answer questions. Now, members of the jury that is what it really amounts to.”

On Sullivan’s appeal from his conviction, the Court of Appeal found that the trial judge had misdirected the jury. Speaking for the Court, Lord Salmon stated: “It has been established by a long line of authority culminating in DAVIS (1959) 43 Cr. App. R. 215, that a judge is not entitled in any circumstances to suggest to a jury, when a man refused to answer any questions after having been cautioned, that, if he were innocent, it is likely he would have answered the questions.”

_Sullivan_ was a case where the accused refused to answer any questions put to him by the customs officials. In _R. v. Henry_, the accused answered some but not all of the questions put to him by the police. The Court of Appeal saw no difference between complete and partial silence, concluding that when a suspect answers some but not all questions, silence in regard to the questions that are not answered cannot result in the drawing of an adverse inference of guilt.

However, while the courts made it clear that an inference of guilt could not arise from the simple exercise of silence, they did not suggest that absolutely nothing prejudicial to the accused could result from a decision to be silent. The courts recognized there were times when, “the failure to advance certain defences when first questioned was still admissible and the fact of

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427 *Ibid*. Although Mirfield has suggested that Lord Salmon’s support for the right to silence was actually quite lukewarm as he was not overly concerned with the trial judge’s indiscretion. Mirfield comments: “Judicial equivocality about the common law position came to the surface in a number of cases. For example, in _Sullivan_, Salmon LJ thought that the trial judge’s comment fell clearly on the wrong side of the line, yet found no unfairness in the comment. In his words, ‘[i]t seems pretty plain that all the members of [the] jury, if they had any common sense at all, must have been saying to themselves precisely what the learned judge said to them’.” See Mirfield, *supra* note 71 at 241.

428 Although the Court of Appeal concluded that despite the misdirection there was no miscarriage of justice, and the Court therefore dismissed Sullivan’s appeal under the provisions of the _Criminal Appeal Act 1907_ (UK); see _Sullivan, supra_ note 150 at 105-106.

429 *Ibid* at 105.

430 [1990] Crim LR 574 (CA) [Henry].

431 Easton, *supra* note 21 at 7.
initial silence was part of the whole picture of the case the jury was assessing.”\footnote{Ibid at 6.} Furthermore, as Zuckerman has noted, “both the prosecution and trial judge were free to comment about the suspect’s silence in the police station provided they were careful not to imply that silence was tantamount to guilt.”\footnote{Zuckerman, Principles of Evidence, supra note 72 at 329.} So, even in\textit{ Sullivan}, Lord Salmon emphasized that while silence in itself could not be equated with guilt, this did not mean the trial judge was completely barred from raising the issue of the accused’s silence. Lord Salmon stated:

What a judge may say to a jury when a man refused to answer is, perhaps, not so plain. There are cases in which the comment in the summing-up upon an accused’s silence is clearly unfair; LECKEY (1943) 29 Cr. App. R. 128; [1944] K.B. 80 was such a case and so was NAYLOR (1932) Cr. App. R. 177; [1933] K.B. 685. There are other cases, however, and this in one of them, in which the circumstances are such that it does not appear that there is any unfairness involved in the comment. The line dividing what may be said and what may not be said is a very fine one.\footnote{Sullivan, supra note 150 at 105.}

One specific type of silence that troubled the judiciary and provided good fodder for those who later sought to limit the right to silence related to the “ambush defence”.\footnote{See also discussion in Chapter II.C.9, above.} In\textit{ R. v. Ryan},\footnote{[1964] 50 Cr App R 144 (CCA) [Ryan].} the Court of Appeal concluded that it was improper for a judge to say to a jury, “[b]ecause the accused exercised what is undoubtedly his right, the privilege of remaining silent, you may draw an inference of guilt”; however, the Court went on to state, “it is quite a different matter to say, ‘This accused, as he is entitled to do, has not advanced at any earlier stage the explanation that has been offered to you today: you, the jury, may take that into account when you are assessing the weight that you think it right to attribute to the explanation’.”\footnote{Ibid at 148, as cited in\textit{ R. v. Gilbert}, [1977] 66 Cr App R 237 at 244 (CCA) [Gilbert].} However, while\textit{ Ryan} attempted to find an appropriate balance it has been criticized for being ambiguous. Cross, for example, has suggested that eliminating the\textit{ Ryan} distinction, “would spare the judge from
talking gibberish to the jury, the conscientious magistrate from directing himself in imbecile
terms and the writer on the law of evidence from drawing distinctions absurd enough to bring a
blush to the most hardened academic face.\textsuperscript{438}

The English Court of Appeal registered its concern with the ambiguity of the Ryan decision in
\textit{R. v. Gilbert}.\textsuperscript{439} The accused, Gilbert, had been charged with the murder of his business
associate with whom he was having a financial dispute. Upon his arrest a few weeks after the
murder Gilbert provided a statement to the police about his relationship with the victim, but
refused to answer questions regarding the actual confrontation that resulted in the victim’s death.
At trial, Gilbert asserted for the first time that he had acted in self-defence and had been
provoked by the victim.\textsuperscript{440} The trial judge directed the jury in the following manner:

\begin{quote}
Now, members of the jury, while as I say, he is perfectly entitled to maintain silence,
he is not required to make a statement. If he does elect to make a statement, you are
entitled to look at the statement to see if it helps you in the task you have to perform.
Bear in mind we have heard of this matter of self-defence for the first time. Ask
yourselves the question, if it is the real explanation of what happened, do you or do
you not think it remarkable that when making the statement, the accused says nothing
whatever about it. That may help you, applying your common sense, to test the
substance of the matter of self-defence, which he has now gone into in some detail in
the witness box.\textsuperscript{441}
\end{quote}

\textsuperscript{438} Cross, \textit{supra} note 286 at 333.
\textsuperscript{439} Gilbert, \textit{supra} note 437.
\textsuperscript{440} Easton, \textit{supra} note 21 at 8. One of the issues on appeal was the trial judge’s refusal to allow the provocation
defence to be considered by the jury. The Court of Appeal upheld the trial judge’s decision so the main issue
regarding the right to silence revolved around the accused’s claim that he acted in self-defence.
\textsuperscript{441} Gilbert, \textit{supra} note 437 at 243-44.
The Court of Appeal held that the trial judge’s comments amounted to misdirection but denied the accused’s appeal because there had been no miscarriage of justice. In rendering his judgment, Viscount Dilhorne queried the distinction identified in Ryan by observing that “the clear dividing line between the two courses” identified in Ryan was in fact not all that clear to him, as “the second of the statements quoted seems to us an invitation to the jury to draw an inference adverse to the accused on account of his exercise of the right to silence, though in a more oblique fashion.” However, while confirming “that to invite a jury to form an adverse opinion against the accused on account of his exercise of his right of silence is a misdirection”, Viscount Dilhorne also noted, “it may not be a misdirection to say simply ‘This defence was first put forward at this trial’ or words to that effect.” He then went on to state:

A right to silence is one thing. No accused can be compelled to speak before, or for that matter, at his trial. But it is another thing to say that if he chooses to exercise his right of silence, that must not be the subject of any comment adverse to the accused. A judge is entitled to comment on his failure to give evidence. As the law now stands, he must not comment adversely on the accused’s failure to make a statement.

While finding that the trial judge’s comments amounted to misdirection under the present state of the law, Viscount Dilhorne also expressed scepticism about the soundness of the substance of the law, declaring: “We regard the present position as unsatisfactory.”

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442 The Court applied the provisions of the Criminal Appeal Act 1968 (UK), which allowed the Court to dismiss an accused’s appeal despite his or her success on the legal point if the Court concluded that no miscarriage of justice had actually occurred. The provision is similar to Criminal Code s 686(1)(b)(iii).
443 The “two courses” to which Viscount Dilhorne referred were: (1) the judge must instruct the jury that it is improper to draw an inference of guilt based on the accused’s silence; but (2) the judge may tell the jury that they may consider the accused’s silence regarding the explanation that he or she is now offering in court when assessing what weight they should place on the explanation.
444 Gilbert, supra note 437 at 244.
445 Ibid.
446 Ibid.
447 Ibid at 245.
448 Ibid at 244.
is not within our competence sitting in this Court to change the law”, 449 Viscount Dilhorne concluded, “the law as it now is must be applied even though in some cases its application seems inconsistent with the exercise of common sense.” 450

The British courts also considered the right to silence in light of the requirement under the Judges’ Rules for the police to caution suspects. 451 On occasion suspects were not given the caution and, in those cases, the question arose as to whether or not their silence should be viewed differently than silence after a caution had been given. The courts determined there was no difference between the silent suspect who had been cautioned and the silent suspect who had not been cautioned. *Hall v. R* 452 was a Jamaican case, although the law in Jamaica at the time was essentially the same as the law of England. Hall was charged with possession of a controlled drug when he was found in possession of narcotics in a house that was being searched by the police. He did not reply when a police officer told him that his co-accused had said the drugs belonged to him. 453 The Privy Council found no difference between silence when an accused is cautioned and silence when he or she is not cautioned. Lord Diplock observed:

The caution merely serves to remind the accused of a right which he already possesses at common law. The fact that in a particular case he has not been reminded of it is not grounds for inferring that his silence was not in exercise of that right, but was an acknowledgement of the truth of the accusation.

………………..

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449 *Ibid* at 245.
450 *Ibid*.
451 The caution included an advisement that the suspect was not obliged to say anything but anything that was said might be used in evidence.
452 [1971] 1 WLR 298 (PC) [*Hall*].
It is a clear and widely-known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. *A fortiori* he is under no obligation to comment when he is informed that someone else has accused him of an offence. It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordship’s view silence alone on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation.\(^{454}\)

The courts also dealt with the situation where a suspect had legal representation during the police interview. The question to be determined was whether the presence of a solicitor at the interview affected judicial comment regarding the accused’s decision to remain silent. In *R. v. Chandler*,\(^ {455}\) the Court of Appeal acknowledged that the presence of the accused’s solicitor during a police interrogation might indeed affect the way in which the accused’s silence will be viewed. The accused, Chandler, was a suspected member of a criminal gang that obtained property fraudulently. He was questioned by a police officer in the presence of his solicitor before being cautioned. He answered some of the police officer’s questions but invoked his right to silence in response to other questions by making comments such as, “not prepared to say anything on that”, “no comment” and “don’t wish to comment”.\(^ {456}\) Chandler was then cautioned and the police questioning continued, with Chandler selectively answering some of the questions put to him. At his trial, the judge directed the jury in the following terms:

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\(^{454}\) *Ibid.*

\(^{455}\) [1976] 1 WLR 585 (CA) [*Chandler*].

\(^{456}\) *Ibid* at 587.
So, although it is absolutely true that even if a person has not been cautioned, if an accusation is made against him and he either says nothing at all or makes a comment to that effect, like ‘no comment,’ or ‘I am not saying,’ you must not automatically say that means he is guilty. That would be quite wrong. Nevertheless, it is for you – not for me or anybody else – to decide whether you think a series of answers like that do indicate in your view his guilt or innocence, or neither the one or the other but are completely neutral. In considering that of course you must bear in mind two matters: that where a man has been cautioned – which means being told that he need not say anything unless he wishes to do so, and if he does it will be taken down in writing and may be given in evidence – and thereafter he remains silent, that is absolutely within his right and he cannot be adversely criticised for so doing, because he accepts that part of the invitation in the caution to remain silent. Even if he is not cautioned, as Mr. Philips rightly said, it is part of what is known as his common law right to decline to answer questions. In those circumstances you must ask yourself whether he did so in the knowledge that he was exercising his common law right to remain silent, or whether he remained silent because he might have thought if he had answered he would in some way have incriminated himself.\footnote{\textit{Ibid} at 587-8.}

Chandler was convicted and appealed to the Court of Appeal. In issuing the Court’s decision, Lord Justice Lawton referred to \textit{Rex v. Christie},\footnote{\textit{Rex v. Christie}, [1914] AC 545 (HL) \textit{[Christie]}.} where Lord Atkinson had remarked, “a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement.”\footnote{\textit{Ibid} at 590.} Lawton L.J. also referred to \textit{R. v. Mitchell},\footnote{\textit{R. v. Mitchell}, (1892) 17 Cox CC 503 \textit{[Mitchell]}.} where Cave J. had held that silence on the part of a person “speaking on even terms” could be considered by the trier of fact.\footnote{\textit{Ibid} at 589.} Referring to Cross’ assessment of \textit{Mitchell} as being “a broad principle of common sense”, and finding that the presence of Chandler’s solicitor at the police interview meant the “defendant and the detective sergeant were speaking on equal terms,”\footnote{\textit{Ibid} at 589.} Lawton L.J. concluded:

\textit{Ibid} at 589.
Some comment on the defendant’s lack of frankness before he was cautioned was justified provided the jury’s attention was directed to the right issue, which was whether in the circumstances the defendant’s silence amounted to an acceptance by him of what the detective sergeant had said. If he accepted what had been said, then the next question should have been whether guilt could reasonably be inferred from what he had accepted.\(^{463}\)

However, despite his conclusion that the accused and police officer were on an equal footing, Lawton L.J. took issue with the trial judge’s specific instructions to the jury, stating: “To suggest, as the judge did, that the defendant’s silence could indicate guilt was to short-circuit the intellectual process which has to be followed.”\(^{464}\) Consequently, the appeal was allowed.

Easton has criticized *Chandler*, suggesting it is questionable that having a solicitor present during the police interview places the suspect and police officer on an equal footing “given the psychological effects of detention in the surroundings of a police station.”\(^{465}\) She further argues that, “as a fundamental principle of English law the right to silence should not be varied according to the presence or absence of a solicitor, any more than it should depend on the fact of being cautioned.”\(^{466}\)

In *R. v. Alladice*,\(^ {467}\) the Court of Appeal dealt with a situation where a person being questioned by the police decided to remain silent before being given the opportunity to consult a lawyer. The accused, Alladice, had been arrested for robbery but was denied access to a solicitor under the provisions of the *Police and Criminal Evidence Act 1984*.\(^ {468}\) The Court of Appeal

\(^{463}\) Ibid.

\(^{464}\) Ibid.


\(^{466}\) Ibid.

\(^{467}\) (1988), 87 Cr App R 380 (CA) [Alladice].

\(^{468}\) Section 58 (1) of the *Police and Criminal Evidence Act 1984* (UK) states in part: “A person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult a solicitor privately at any time….” Sections 58(6) and (8), however, allow a senior police officer to authorize a delay in allowing the accused access to legal advice if the senior officer has reasonable grounds to believe that allowing such access would: (a)
concluded that the police breached the accused’s statutory rights but denied his appeal on the basis that the breach was not so aggravating as to render the statements inadmissible. In making its decision, the Court expressed frustration with what it considered to be an irrational anomaly in the law, declaring:

Despite the fact that the explanation or defence could, if true, have been disclosed at the outset and despite the advantage which the defendant has gained by these tactics, no comment may be made to the jury to that effect. The jury may in some cases put two and two together, but it seems to us that the effect of section 58 is such that the balance of fairness between prosecution and defence cannot be maintained unless proper comment is permitted on the defendant’s silence in such circumstances. It is high time that such comment be permitted together with the necessary alteration to the words of the caution.\(^{469}\)

A related aspect of the right to silence was the question of how to handle the silence of a suspect who remains silent when confronted by a person other than a police officer or other type of state agent. The need to strike the appropriate balance between individual liberty and effective law enforcement would normally not arise if the person confronting or questioning the suspect is not acting in an official capacity. Recognizing this, the English courts were less protective of the suspect who remained silent “in response to questioning by persons other than police officers or those in authority.”\(^{470}\) As Greer has noted, “judges and the prosecution are entitled to invite juries to take into account the silence of an accused in the face of an accusation that would lead to interference with or harm to evidence connected to a serious crime, or to physical injury to a person; (b) lead to the alerting of other persons suspected of having committed the offence but who are not yet arrested; or (c) would hinder the recovery of property. The written authorization issued by the senior police officer in Alladice read: “Access refused on the following grounds: firstly, other man to be arrested; secondly, large amount of property to be [re]covered. Delay access until further notice”. See Chapter III.C.4, below, for a detailed discussion of the Police and Criminal Evidence Act 1984.

\(^{469}\) Alladice, supra note 467 at 385.
\(^{470}\) Easton, “Right to Silence”, supra note 453 at 29.
made by another member of the public, provided that the circumstances were such that it would have been reasonable to expect some response.\textsuperscript{471}

The legal test governing the admission of silence in such circumstances was set down by the Court of Appeal in \textit{R. v. Mitchell},\textsuperscript{472} which was mentioned previously. In \textit{Mitchell}, Cave J. stated: “Undoubtedly, when persons are speaking on even terms, and a charge is made, and the person charged says nothing and expresses no indignation, and does nothing to repel the charge, that is some evidence to show that he admits the charge to be true.”\textsuperscript{473} An example of the application of the law as set down in \textit{Mitchell} was \textit{R. v. Parkes}.\textsuperscript{474} The accused, Parkes, was charged with the murder of his girlfriend by stabbing her to death. When the victim’s mother accused Parkes of stabbing her daughter he remained silent and attempted to stab the mother. The trial judge told the jury “that the accused’s reactions, including silence, were matters they were entitled to take into account in determining his guilt.”\textsuperscript{475} Parkes was convicted of murder and appealed to the Privy Council. Lord Diplock applied the \textit{Mitchell} test and concluded that the trial judge had been correct in directing the jury that they could take Parkes’s silence into consideration because a reply could reasonably be expected in the circumstances.\textsuperscript{476}

\textsuperscript{471} Greer, supra note 141 at 712.
\textsuperscript{472} Mitchell, supra note 460.
\textsuperscript{473} As cited in Easton, supra note 21 at 29. The “even terms” concept was referred to in \textit{Chandler} when the Court of Appeal commented that the presence of a solicitor at a police interview placed the accused on “even terms”, which meant that the accused’s failure to respond to police questions in such circumstances could give rise to judicial comment at trial.
\textsuperscript{474} [1976] 1 WLR 1252 (PC) [Parkes].
\textsuperscript{475} Easton, supra note 21 at 30.
\textsuperscript{476} Ibid.
3. Summary

The development of the common law governing the right to pre-trial silence in the United Kingdom attempted to balance the British tradition of respect for individual autonomy with the legitimate needs of law enforcement and the importance of judges and juries being able to use common sense when considering and weighing the accused’s silence. While the law was quite nuanced and even ambiguous at times, the courts did attempt to strike a balance between ensuring that silence was not automatically equated to an admission of guilt and allowing “common sense” to be used when considering whether a response was called for in the circumstances. The law attempted to strike this balance by developing rules governing the interrogation of suspects by the police, allowing the accused to testify if he or she so wished, and allowing judges to direct juries, in limited terms, as to how they should consider and weigh the accused’s silence at either the pre-trial or trial stages of the criminal process.

However, while the law in Britain had developed in a manner which many thought provided a pragmatic and relatively balanced approach to the right to silence, others argued that the law failed the “common sense” test and resulted in the acquittal of guilty criminals. Beginning in the early 1970s and lasting for over twenty years, the right to silence was the subject of ongoing debate. It was also formally studied on several occasions. The debate would also move from the judiciary and legal academy to the political arena, primarily fueled by social and political change in England and the secular and political tension and violence associated with the crisis in Northern Ireland.
C. THE MOVE TO RESTRICT THE RIGHT TO SILENCE

1. Introduction

The debate over the right to silence that had been brewing in England since the days of Bentham began to percolate in the early 1970s and eventually boiled over in 1988 when the right to silence was significantly restricted in Northern Ireland, and again in 1994 when most of the Northern Ireland restrictions were extended to England and Wales. Spanning more than two decades, several government commissions studied the right to silence but came to differing conclusions. The debate also extended beyond the academic and judicial arenas, as it included a considerable and ultimately supreme political component.\textsuperscript{477} The conservative ideology of the governments of Margaret Thatcher and John Major, the violence and civil unrest in Northern Ireland (which included many incidents of public violence in England as well), and public concern over increasing crime rates combined to create an environment distinctly unfriendly to the right to silence.\textsuperscript{478} Within this social and political milieu, the government’s “crime control” agenda flourished and that agenda did not fit easily with the right to silence. In the end, arguments in favour of restricting the right to silence won the day despite opposition from many prominent jurists, legal scholars and two royal commissions. The right to silence, while perhaps not fatally wounded, was certainly severely injured and arguably permanently disabled through legislative enactments in the late 1980s and early 1990s which overrode years of common law.

\textsuperscript{477} Zander, \textit{supra} note 60 at 145.
2. Criminal Law Revision Committee

The right to silence debate in the United Kingdom was officially kicked off by the Eleventh Report of the Criminal Law Revision Committee (“CLRC”) in 1972. The CLRC was a standing advisory committee to the Home Secretary comprised of judges, lawyers and academics. The CLRC’s work was “aimed at reducing the exceptions to admissibility under the present law” based on the view that, “[s]ince the object of the criminal trial should be to find out if the accused is guilty, it follows that ideally all evidence should be admissible”. Adrian Zuckerman, who was a member of the CLRC, has pointed out that the Eleventh Report considered two aspects of the right to silence: first, the liberty not to answer questions when interrogated and not to testify; and second, the effect the right to silence has on a judge’s freedom to comment on the accused’s silence. The CLRC believed that the combined effect of section 1 of the Criminal Evidence Act 1898 (which prohibits comment by the prosecution on the accused’s failure to give evidence) and the Judges’ Rules had usurped a judicial approach which the CLRC thought “to have been based on logic and common sense.” As such, the CLRC concluded that the current law was “contrary to common sense and, without helping the innocent, gives an unnecessary advantage to the guilty.” According to Zuckerman, the CLRC believed the real issue was not whether an adverse inference could be drawn from an accused’s silence, but rather “the nature of the comment that the judge is permitted to make of the

479 Criminal Law Revision Committee, Eleventh Report – Evidence (General) 1972, Cmd 4991 [CLRC]. See also Berger, “Policy, Politics & Parliament”, supra note 113. Berger submits that the right to silence debate actually started with the recommendations of JUSTICE (i.e., the British section of the International Commission of Jurists), which had issued a report in 1967 recommending a scheme of pre-trial police interrogation before a Magistrate.
480 Zander, supra note 60 at 141.
482 Zuckerman, “Reports of Committees”, supra note 146 at 509.
483 Ibid at 510.
484 Michael & Emmerson, supra note 56 at 6.
accused’s silence.” 485 In the CLRC’s view, while a judge was allowed to indicate to the jury “the full probative significance of the accused’s silence either before or during trial”, 486 he or she was not allowed to suggest that the accused’s silence was tantamount to guilt or the admission of guilt. The CLRC summarized the law as follows:

Experience teaches us that it is extremely dangerous to infer guilt from silence on its own. On the other hand when circumstances point to the conclusion of guilt, the accused’s failure to rebut or explain these circumstances might strengthen the conclusion. In such a case it is proper for the judge to indicate this train of reasoning to the jury. If the accused keeps his explanation from the police and prosecution and raises it only at the trial, this might, in certain circumstances, weaken the credibility of his explanation. The judge is entitled to spell out this common-sense reasoning in his direction to the jury. 487

The CLRC therefore concluded that the “the accused’s right to silence did not impose legal restrictions on the judge’s ‘right to comment’”. 488

Based on its assessment of the law, the CLRC concluded that the law governing the right to silence needed to be clarified and legislative rules enacted to allow an accused’s silence to trigger an adverse inference. More specifically, the CLRC recommended the enactment of legislation which would allow an adverse inference to be drawn when the accused failed during police questioning to mention any fact later used by him or her at trial as long as the fact was one which, in the circumstances, the accused could reasonably have been expected to have mentioned. 489 In such circumstances, the judge or jury could draw “such inferences from the failure as appear proper.” 490 Furthermore, the CLRC recommended that the accused’s silence during police questioning should be capable of constituting corroboration and that judges and

485 Zuckerman, “Reports of Committees”, supra note 146 at 510.
486 Ibid.
487 Ibid at 511.
488 Ibid.
489 Berger, “Policy, Politics & Parliament”, supra note 113 at 401.
490 Zuckerman, “Reports of Committees”, supra note 146 at 512.
juries should be allowed to draw inferences from the accused’s failure to testify.\textsuperscript{491} According to Zuckerman, the CLRC did not consider their proposals to be an authorization of “automatic conclusion that silence is equal to guilt”,\textsuperscript{492} nor “by any means, create a presumption of law or fact. They only restate a simple rule of logic which has always been followed.”\textsuperscript{493} However, while the CLRC apparently did not see its recommendations as “proposing a revolutionary change in the law”,\textsuperscript{494} it did believe the changes were necessary to effectively deal with sophisticated criminals who “were escaping justice by remaining silent”.\textsuperscript{495} In stating its case, the CLRC observed:

To forbid it seems to us to be contrary to common sense and, without helping the innocent, to give an unnecessary advantage to the guilty. Hardened criminals often take advantage of the present rule to refuse to answer any questions at all, and this may greatly hamper the police and even bring their investigations to a halt. Therefore the abolition of the restriction would help justice.\textsuperscript{496}

The CLRC was not unanimous in its findings and recommendations. A minority of the CLRC supported the retention of the right to silence in its present form. (This difference of opinion would be repeated in subsequent royal commissions). The lack of unanimity within the CLRC foreshadowed the reception the CLRC’s recommendations were to receive. As noted by Greer, reaction to the CLRC’s recommendations was “both swift and hostile”\textsuperscript{497} and they were met with “such a storm of protest that the entire report had to be shelved at the time.”\textsuperscript{498} However, while the CLRC’s recommendations were not implemented in Great Britain for several years, Singapore did adopt them when it abolished the right to silence at both the pre-trial

\textsuperscript{491} Ibid at 512 & 515.
\textsuperscript{492} Ibid at 512.
\textsuperscript{493} Ibid.
\textsuperscript{494} Ibid.
\textsuperscript{496} Zander, supra note 60 at 141-42.
\textsuperscript{497} Greer, supra note 141 at 715.
\textsuperscript{498} Zander, supra note 60 at 142.
and trial stages in 1976. In addition, the Republic of Ireland adopted some of the CLRC’s recommendations in 1984 when it introduced changes to the law regarding the right to silence through the *Criminal Justice Act 1984*.500

3. Royal Commission on Criminal Procedure

In 1978, the British government established the Royal Commission on Criminal Procedure501 ("Philips Commission") “in the light of public concern over rising crime rates and the abuse of police powers".502 As noted by Easton: “The Commission surveyed criminal procedure from initial investigation to trial and it reported in 1981. Although it included a discussion of the right to silence it offered a broader analysis.”503 Dennis has observed that the Philips Commission had a different philosophy than its predecessor, the CLRC, as the Philips Commission “accepted the need to achieve a ‘fundamental balance’” and “were at pains to emphasize the value of a neutral stance.”504

The Philips Commission issued its report in 1981. As with the CLRC, the Philips Commission split on the issue of pre-trial right to silence, with the majority supporting the retention of the current state of the law and the minority favouring the CLRC position. The majority’s conclusion was based on a concern that allowing an adverse inference to be drawn from an accused’s decision to remain silent:

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499 Easton, *supra* note 21 at 38.
500 *Criminal Justice Act 1984* (UK), as cited in Easton, *ibid*.
502 Easton, *supra* note 21 at 39. A notorious case known as the *Confait* case was a leading reason for the establishment of the Philips Commission. Maxwell Confait was the victim of a murder for which three youths were convicted in 1972. Concerns regarding police abuse of the suspects led to an inquiry known as the Fisher Inquiry and raised considerable public concern over police interrogation strategies. See Walker, *supra* note 232 at 45.
503 Easton, *ibid*.
504 Dennis, “Reconstructing”, *supra* note 61 at 27.
…might ‘put strong (and additional) psychological pressure upon some suspects to answer questions without knowing precisely what was the substance of and evidence for the accusations against them… This in our view might well increase the risk of innocent people, particularly those under suspicion for the first time, making damaging statements…On the other hand, the guilty person who knew the system would be inclined to sit it out…If the police had sufficient evidence to mount a case without a statement from him, it would still be to the guilty suspect’s advantage to keep to himself as long as possible a false defence which was capable of being shown to be such by investigation. It might just be believed by the jury despite the fact that the prosecution and the judge would be able to comment.\textsuperscript{505}

The minority was more sympathetic to the CLRC’s position, noting “it is right for a person to be expected to answer reasonable questions during an investigation, that is before charge”.\textsuperscript{506} However, while the Philips Commission was divided on the issue of pre-trial silence, it was unanimous in the view that the right to silence at trial should be retained based on its conclusion that restricting the right would inappropriately weaken the prosecution’s burden of proof.\textsuperscript{507}

The conclusion of the Philips Commission was, therefore, to retain the \textit{status quo} in relation to the right to silence. It also recommended that a legislative scheme be enacted to control police conduct during criminal investigations, including the questioning of suspects. In addition, the Philips Commission recommended separating the investigation and prosecutorial functions through the creation of an independent prosecutorial service. As noted by Greer, the Philips Commission’s recommendations “held sway in the substantial codification of police powers which were enacted for England and Wales by the Police and Criminal Evidence Act 1984 (PACE). The right to remain silent in the police station and the courtroom were considered integral parts of the overall reform package which the Royal Commission had proposed.”\textsuperscript{508}
4. **Police and Criminal Evidence Act**

Based on the recommendations of the Philips Commission, the *Police and Criminal Evidence Act 1984*[^509] (“PACE”) was enacted in December 1985, although some of its sections were not immediately proclaimed.[^510] *PACE* created a statutory regime controlling the exercise of police powers in England and Wales,[^511] and was supplemented by detailed Codes of Practice governing specific police procedures.[^512] As *PACE* was enacted before the 1988 and 1994 legislative restrictions on the right to silence, it was subsequently amended to incorporate the new adverse inference rules. It should be noted that while *PACE* will be discussed at various stages of its evolution, for the purposes of clarity and simplicity any reference to specific sections of *PACE* or its Codes of Practice will refer to the present iteration of *PACE*.

*PACE* established a highly detailed prescriptive regime covering police investigations and interviewing of persons suspected of having committed a crime. While the provisions of *PACE* need not be reviewed in their entirety, a fairly extensive discussion of the statutory provisions applying to police interviews of suspects is necessary as *PACE* sets the tone and controls the environment in which an accused must decide whether or not to invoke his or her right to silence at the investigative stage of the criminal process.

[^509]: *Police and Criminal Evidence Act 1984* (UK) c 60 [*PACE*].
[^510]: Easton, *supra* note 21 at 108.
[^511]: Northern Ireland is governed by its own statute, the *Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007* and associated Codes of Practice, which came into operation in March 2007 and which supplemented the provisions of the *Police and Criminal Evidence (Northern Ireland) Order 1989*. See Northern Ireland Office, online: <http://www.nio.gov.uk/modernising_police_powers__your_pace__your_say.pdf>.
[^512]: Codes A through D were enacted in 1985 while the other Codes were enacted later. Some types of crimes, such as terrorism and immigration related offences, are exempt from *PACE* and its Codes of Practice; although, other legislation applies and that legislation as a general rule grants more powers to the police than *PACE* regarding the length of detention and denial of access to legal advice.
Berger has described PACE as being:

…designed to create a controlled environment in which police would be required to adhere to defined standards in conducting their criminal investigations. The emphasis of these reforms was to insure that suspects were protected against abuse; the reforms were not designed to deprive suspects of their historic right not to cooperate.\(^{513}\)

PACE and its Codes of Practice are highly detailed, with the Codes being particularly complex and technical. There are eight Codes of Practice under PACE, with Codes C, E, F and H most directly impacting pre-trial silence.\(^{514}\) Code C prescribes procedures for the police to follow regarding the detention, treatment and questioning of suspects other than in terrorism offences. In effect, Code C has replaced the Judges’ Rules.\(^{515}\) Code E deals with audio recording of police interviews, while Code F deals with videotaping of police interviews and Code H deals with the detention and questioning of suspects in terrorism cases.\(^{516}\)

Part IV of PACE sets out the conditions, time limits and obligations placed on the police when they arrest and detain a person at a police station. It therefore regulates the physical and psychological environment in which a person must decide whether to speak to the police or remain silent. PACE defines a police interview as, “the questioning of a person regarding their involvement or suspected involvement in a criminal offence or offences.”\(^{517}\)

Under section 11.1 of Code C, police interviews must be conducted at a police station or other designated facility.

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\(^{513}\) Berger, “Policy, Politics & Parliament”, supra note 113 at 405.

\(^{514}\) Code A covers police powers to stop and search people, Code B deals with search and seizure of property, Code D regulates the identification process and Code G deals with powers of arrest relating to organized crime. To review the Codes, see the United Kingdom Home Office, “Police and Criminal Evidence Act 1984 (PACE) and accompanying codes of practice”, online: <http://www.homeoffice.gov.uk/police/powers/pace-codes>.

\(^{515}\) Easton, supra note 21 at 4.

\(^{516}\) As noted in Chapter I, this thesis will not discuss the issue of the right to silence within the context of terrorism, but for a summary of the Prevention of Terrorism Act 1984 provisions and the Northern Ireland (Emergency Provisions) Act 1987 as they relate to the right to silence, see Easton, supra note 21 at 70-78.

\(^{517}\) PACE, Code C, s 11.1A.
unless exigent circumstances exist.\textsuperscript{518} The responsibility for ensuring that an arrested person is afforded his or her legal rights resides with a “custody officer”, who is a designated senior police officer at the police station.\textsuperscript{519} The custody officer determines if there is sufficient information to charge the suspect or refer the case to the Director of Public Prosecutions.\textsuperscript{520} Alternatively, the custody officer may release the suspect either unconditionally or on bail, with or without a charge being laid. The custody officer also has the discretion to detain a suspect prior to a charge being laid if the custody officer believes on reasonable grounds that detention is necessary to secure or preserve evidence, “or to obtain such evidence by questioning” the suspect.\textsuperscript{521}

Section 37 and other sections of \textit{PACE}, as well as Code C, make it clear that English law endorses the use of police questioning as a strategy to investigate crime, which should not be surprising given that the Judges’ Rules also encouraged police questioning and, prior to \textit{PACE}, the House of Lords confirmed that a police officer “who suspected a person of having committed an arrestable offence was empowered to arrest that person for the sole purpose of questioning him.”\textsuperscript{522} Feldman has emphasized the importance of interrogation in Britain, observing: “It is

\textsuperscript{518} \textit{PACE}, Code C, s 11.1. Exigent circumstances include interference with or harm to evidence, interference with or harm to a person, serious loss to or damage of property, risk of an accomplice being alerted, or the hindering of the recovery of stolen property.

\textsuperscript{519} \textit{PACE} section 36 states that a custody officer must be at least the rank of Sergeant and that at least one custody officer shall be appointed by the Chief Officer of the policing area for each designated police station. There are also provisions allowing for temporary custody officers if required. Section 35 requires the Chief Officer to designate certain police stations that have enough accommodation as stations to be used for detaining arrested persons.

\textsuperscript{520} \textit{PACE}, s 37B.

\textsuperscript{521} \textit{PACE}, s 37(2). See also \textit{PACE} s 36(7), which states that the suspect can also be held before being granted bail or otherwise released if detention is required for fingerprinting or to obtain other evidence such as impressions of footwear. In certain drug cases, the suspect can also be detained to obtain a urine sample or other type of “intimate” sample if the requisite grounds as set out in sections 61 to 63C are satisfied. In some cases, authorization for the taking of the samples must be from an officer of at least the rank of Inspector. If the person being detained is a juvenile, who is a person under the age of 18, then he or she may be detained for all of the reasons that apply to an adult, but detention can also be ordered if “the custody officer has reasonable grounds for believing that he ought to be detained in his own interests.” See \textit{PACE}, s 38(1)(b)(ii).

rare for the custody officer to release or charge the suspect immediately. Normally detention is required, and detention for that purpose [interrogation] is authorized.”

When an arrested person is detained at a police station, section 41 places time limits on how long the person may be detained. As a normal rule, detention cannot last longer than 24 hours from either the time of arrest or the time the detained person arrived at the police station, whichever is earlier (defined as the “relevant time”). During the period of detention, a “review officer”, who is a senior officer of at least the rank of Inspector, must periodically check on the status of the detention to ensure that it continues to comply with the PACE requirements. The suspect must be charged or released prior to the 24 hour period unless another senior police officer of at least the rank of Superintendent authorizes an extension of the detention, which can only be done if the authorizing officer is satisfied that the investigation is for an indictable offence, is “being conducted diligently and expeditiously”, and is necessary to “to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning.” If the police wish to detain the suspect for a longer period of time they must obtain authorization from a magistrate and the suspect has the right to receive legal advice and make representations to the magistrate.

524 Ibid at 158.
525 PACE, s 40.
526 PACE, s 42.
527 PACE, ss 43 & 44. If the magistrate is satisfied that the investigation is for an indictable offence and is being conducted diligently and expeditiously and, furthermore, that continued detention is necessary to secure or preserve evidence relating to an offence or to obtain evidence by questioning the suspect, a further detention order not exceeding 36 hours may be authorized. The total length of overall detention however cannot be for a period in excess of 96 hours from the “relevant time”.
Part V of *PACE* governs police questioning of suspects. Section 56 entitles a person who has been arrested to request that a friend, relative or other appropriate person be advised of the arrest and the police are required to advise the identified person that the suspect has been arrested. However, notification can be delayed on the authority of an officer of at least the rank of Inspector if the officer believes on reasonable grounds that such contact would either lead to interference with, or harm to, evidence associated to the offence for which the suspect has been arrested, cause physical injury to anyone, lead to the alerting of others believed to be involved in the crime for which the suspect has been arrested but who have not yet been arrested, or hinder the recovery of any property that was obtained by the commission of the crime for which the suspect was arrested. Additionally, notification can be delayed if the senior officer believes on reasonable grounds that delay is necessary to safeguard the proceeds of crime so that the police have sufficient time to take official action to seize the proceeds.

Under section 58 of *PACE*, a detained suspect has the right to request to “consult a solicitor privately at any time.” Code C requires the police to advise the suspect “at the earliest opportunity and immediately before the commencement of the interview” of his or her right to consult a solicitor and that legal advice is available free of charge. If the suspect asks to consult with a solicitor, the consultation must be permitted “as soon as practicable” unless it is

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528 *PACE* sets out specific rules regarding juveniles (under the age of 18) and mentally vulnerable people which entail additional protections; however, those provisions will not be discussed in this paper.

529 *PACE*, s 56(5).

530 *PACE*, s 56(5A). Section 56(5B) states that the issue of whether or not the suspect has benefited from his criminal conduct is to be decided on the basis of the *Proceeds of Crime Act 2002*, which is primarily directed at sophisticated criminal enterprises such as commercial crime and drug trafficking.

531 *PACE*, s 58(1).

532 Easton, *supra* note 21 at 111.

533 Code C, s 6.1. Code C, s 6.3 also requires the police to post a prominent notice in the police station advising of the right to counsel. Additionally, if someone else, such as the relative or friend who is notified under section 56, has called a solicitor on behalf of the suspect and the police are aware of this, the police are required to advise the suspect and ask if he or she wishes to speak to the solicitor.

534 *PACE*, s 58(4).
delayed under the authority of an officer of at least the rank of Superintendent. Delay must be justified on the same grounds as set out in section 56, which deals with the accused’s access to a support person, and any delay can only operate for a maximum of 36 hours beyond the “relevant time”. Code C also emphasizes the seriousness of a decision to delay access to legal advice, stating:

Authority to delay a detainee’s right to consult privately with a solicitor may be given only if the authorising officer has reasonable grounds to believe the solicitor the detainee wants to consult will, inadvertently or otherwise, pass on a message from the detainee or act in some other way which will have any of the consequences specified under paragraphs 1 or 2. In these circumstances the detainee must be allowed to choose another solicitor.

The importance of legal advice was confirmed by the Court of Appeal in R. v. Samuels. The Court set out a “stiff test” for preventing access to a solicitor, requiring the police to “believe and have reasonable grounds for doing so, that it is very probable that the solicitor will, if allowed to consult with a detained person, thereafter commit a criminal offence of interfering with the course of justice or inadvertently do something which will have the same effect.” Zuckerman has suggested that the Court of Appeal “appreciated that the real motive of the police delaying access to a solicitor was that they feared that the solicitor would counsel silence”.

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535 Code C, Annex B, s A, para (1) and (2).
537 Code C, Annex B, s A, para 3. The consequences listed in paragraphs 1 and 2 are that the police have reasonable grounds to believe that providing the suspect with access to a lawyer will: lead to interference with or harm to evidence; lead to interference with or harm to other people; lead to alerting other people who have not yet been arrested for an indictable offence; hinder the recovery of property related to an indictable offence; or allow a suspect who has been arrested for serious fraud or drug offences (offences designated under the Proceeds of Crime Act 2002) to hinder the recovery of proceeds of crime.
538 [1988] 2 All ER 135 (CA) [Samuels].
539 Zuckerman, Principles of Evidence, supra note 72 at 326.
540 Ibid.
Zuckerman emphasizes that “access to a solicitor may not be delayed on the grounds that he might advise the person not to answer any questions”.

*PACE* and Code C also set out detailed procedures governing the conduct of police interviews. Similar to the Judges’ Rules, interviews of suspects are generally restricted to the investigative stage, as once a suspect is charged with an offence or informed that he or she may be prosecuted for an offence, questioning is prohibited unless the questioning is necessary to prevent or minimize harm to another person or the public, clear up an ambiguity in an answer to a previous question or in a statement, or to give the suspect an opportunity to respond to new information which has surfaced since he or she was charged or informed that he or she might be prosecuted. Code C includes a very detailed set of procedures which the police must follow when interviewing suspects. As a general rule, interviews must occur at a police station or other authorized place after the suspect has been cautioned; although, a caution is not required if the questioning is only to establish the person’s identity, obtain information when the person is legally obligated to provide it (such as under the *Road Traffic Act 1988*), undertake an effective search or seek verification of a written record of a previous interview.

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542 The original *PACE* and Code C provisions were amended to be consistent with the *Criminal Justice and Public Order Act 1994*, and more specifically with the adverse inference resulting from an accused’s silence.
543 Code C, para 16.5.
545 Code C, para 11.1. An interview can be held at another location, such as the place of arrest, if delaying the interview would likely lead to the interference with or harming of evidence or people, serious loss or damage to property, the alerting of accomplices who have not yet been arrested, or the hindering of recovering property obtained through the commission of the offence.
546 *Road Traffic Act 1988* (UK) c 52. Section 164(2) requires a motorist who must produce his or her driver’s licence to a constable under subsection (1) to state his or her date of birth.
PACE also includes various cautions to be given to suspects depending on the circumstances of the interview. Code C, paragraph 10.5 sets out the wording of the normal caution as follows:

You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you say may be given in evidence.\(^{548}\)

The caution is consistent with the provisions of section 34 of the Criminal Justice and Public Order Act 1994,\(^{549}\) which allows for an adverse inference to be drawn when an accused brings up a defence or gives an explanation in court that he or she did not mention during the police interview.\(^{550}\) However, based on judicial interpretation of the adverse inference rules established by the Criminal Justice and Public Order Act, there are some situations when an adverse inference cannot be drawn from the suspect’s silence during a police interview and PACE prescribes detailed procedures for the police to follow in such circumstances. The most common restriction on drawing an adverse inference arises when the suspect has requested to consult a solicitor but has not had the opportunity to do so before the interview begins. In such a case, the adverse inference from silence is negated and the caution to be given to the suspect is simply: “You do not have to say anything, but anything you do say may be given in evidence.”\(^{551}\)

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\(^{548}\) Code C, para 10.5. Code C, para 10.7 states that minor deviations from the statutory wording of the caution is not a breach of the Code, which is similar to the approach taken by the Judges’ Rules.

\(^{549}\) Criminal Justice and Public Order Act 1994 (UK), c 33 [CJPOA].

\(^{550}\) See Chapter III.C.8, below, for a discussion of the CJPOA.

\(^{551}\) Code C, Annex C (b)(2). Annex C sets out other situations where the adverse inference is negated, however they are extremely detailed and technical and will not be discussed in this thesis.
When a person is found in circumstances which give rise to an inference under either section 36 or 37 of the Criminal Justice and Public Order Act, Code C sets out very specific rules to be followed by the police. The police must inform the suspect of the specific offence being investigated, what “fact” (i.e., a suspicious article, mark, clothing or area) the suspect is being asked to account for, why the fact is suspicious, that “a court may draw a proper inference if they fail or refuse to account for this fact”, and that the officer will be making a record of the interview which may be given in evidence at trial. Code C also requires the police to provide regular meal and refreshment breaks during the interview and at least eight hours of rest in a

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552 See Chapter III.C.8, below. To summarize, sections 36 and 37 of the CJPOA allow for the drawing of an adverse inference when a suspect is silent upon being arrested by the police in an area where a crime has occurred or while having some mark, item or object on his or her person. If the suspect remains silent when being questioned by a police officer about why he or she is in the area near where the crime occurred or why the item, object or mark is on his or her person, clothing or footwear, an adverse inference may be drawn from that silence.

553 Code C, para 10.11(d).

554 Code C, paras 10.10 and 10.11 read:

“10.10 When a suspect interviewed at a police station or authorised place of detention after arrest fails or refuses to answer certain questions, or to answer satisfactorily, after due warning, see Note 10F, a court or jury may draw such inferences as appear proper under the Criminal Justice and Public Order Act 1994, sections 36 and 37. Such inferences may only be drawn when:

(a) the restriction on drawing adverse inferences from silence, see Annex C, does not apply; and
(b) the suspect is arrested by a constable and fails or refuses to account for any objects, marks or substances, or marks on such objects found:
- on their person;
- in or on their clothing or footwear;
- otherwise in their possession; or
- in the place they were arrested;
(c) the arrested suspect was found by a constable at a place at or about the time the offence for which that officer has arrested them is alleged to have been committed, and the suspect fails or refuses to account for their presence there.

When the restriction on drawing adverse inferences from silence applies, the suspect may still be asked to account for any of the matters in (b) and (c) but the special warning described in paragraph 10.11 will not apply and must not be given.

10.11 For an inference to be drawn when a suspect fails or refuses to answer a question about one of these matters or to answer it satisfactorily, the suspect must first be told in ordinary language:
(a) what offence is being investigated;
(b) what fact they are being asked to account for;
(c) this fact may be due to them taking part in the commission of the offence;
(d) a court may draw a proper inference if they fail or refuse to account for this fact;
(e) a record is being made of the interview and it may be given in evidence if they are brought to trial.”
twenty-four hour period.\textsuperscript{555} In addition, if there is a break in the questioning of the suspect, when the interview re-commences the suspect must be advised that the original caution continues.\textsuperscript{556} Furthermore and as previously mentioned, once the suspect is charged all questioning must stop, other than routine questioning to clear up ambiguities.\textsuperscript{557}

When \textit{PACE} was enacted in 1984, it required the Secretary of State to “issue a code of practice connected with the tape-recording of interviews of persons suspected of the commission of criminal offences which are held by police officers at police stations”,\textsuperscript{558} and to make an order requiring mandatory tape recording of certain types of offences.\textsuperscript{559} In response, Codes E and F were developed, with Code E covering audio taping and Code F covering video recording of police interviews. Code E requires audio recording of all interviews for indictable offences\textsuperscript{560} unless the custody officer authorizes the interviewing officer not to record the interview because of impracticality or when “it is clear from the outset there will not be a prosecution.”\textsuperscript{561} When an interview is conducted without being audio recorded it must be recorded in writing.\textsuperscript{562} In addition, if the suspect refuses to attend the interview room the custody officer may authorize that the interview be conducted in the suspect’s cell with portable equipment or, if no such equipment is available, without being audio recorded but with the interview being recorded in writing.\textsuperscript{563} Code E also contains detailed procedures covering the interview and handling of the audio tape. Code F provides a similar regime for video recording of interviews.

\begin{itemize}
\item \textsuperscript{555} Code C, paras 8.6 & 12.2.
\item \textsuperscript{556} Code C, para 10.8.
\item \textsuperscript{557} Code C, para 11.
\item \textsuperscript{558} \textit{PACE}, s 60.
\item \textsuperscript{559} \textit{Ibid}.
\item \textsuperscript{560} Code E, para 3.1.
\item \textsuperscript{561} Code E, para 3.3. Impracticality may arise due to equipment failure or lack of an interview room or equipment. In such a case, the custody officer must also believe on reasonable grounds that the interview should not be delayed.
\item \textsuperscript{562} Code E, para 3.3.
\item \textsuperscript{563} Code E, para 3.4.
\end{itemize}
While video recording has generally been acknowledged as a good method to provide an accurate record of the interview, Easton has pointed out that the Royal Commission on Criminal Justice\(^\text{564}\) expressed some reservation with the practice, as it was concerned that “the suspect could be prejudiced if symptoms of anxiety or nervousness in interrogation are misread as signs of guilt.”\(^\text{565}\) Furthermore, the Royal Commission cautioned that the “visual impact is so powerful and immediate that it may have the effect of distracting the viewer from what is being actually said.”\(^\text{566}\)

In addition to creating a highly regulated system to control police investigative powers, including police interviews of suspects, \textit{PACE} also arms the judiciary with the authority to ensure police compliance by creating a discretionary exclusionary rule covering evidence obtained in an inappropriate manner or in a manner that raises a concern about the reliability of the evidence. Section 76(2)\(^\text{567}\) creates a statutory exclusionary rule for confessions, although the common law rule is also retained by virtue of section 76(7).\(^\text{568}\) Under section 76(2), confessions made in circumstances of oppression or where police conduct during the interview renders the confession unreliable are inadmissible, unless the “prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as

\(^{564}\) See Chapter III.C.7, below, for a discussion of the Royal Commission on Criminal Justice.

\(^{565}\) Easton, \textit{supra} note 21 at 118.


\(^{567}\) Section 76(2) reads:

“If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid.”

\(^{568}\) Galligan, \textit{supra} note 22 at 81.
Oppression is defined in section 76(8) as including: “torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).” Galligan has criticized section 76(2), claiming it has changed the law regarding the admissibility of confessions considerably by replacing the voluntariness rule with a strict reliability rule and by re-defining the meaning of oppression. However, Bradley has commented that a “tainted confession cannot generally be used to elicit a subsequent untainted one” and, therefore, “[f]ailures to caution the suspect or to provide counsel are serious breaches that will lead to exclusion under the ‘fairness’ requirement of the code.”

While a confession may be excluded if the police use oppressive methods towards the suspect or otherwise act in a manner that renders the confession unreliable, it is much less likely that derivative evidence will be excluded because of section 76(4) of PACE, which reads:

The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence –

(a) of any facts discovered as a result of the confession; or

(b) where the confession is relevant as showing that the accused speaks, writes or expresses himself in a particular way, of so much of the confession as is necessary to show that he does so.

PACE also establishes stringent rules for confessions made by “mentally handicapped” persons. Under section 77, if the prosecution’s case depends entirely or substantially on a confession made by a mentally handicapped person and the confession is not made in the

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569 PACE, s 76(2).
570 PACE, s 76(8).
571 Galligan, supra note 22 at 80.
573 PACE, s 76(4). See also Dennis, “Instrumental Protection”, supra note 68 at 359.
574 PACE, s 77. Section 77(3) defines the term mentally handicapped as, “in relation to a person, means that he is in a state of arrested or incomplete development of mind which includes significant impairment of intelligence and social functioning.”
presence of an “independent person”\textsuperscript{575} the trial judge is required to warn the jury about the “special need for caution before convicting the accused in reliance of the confession.”\textsuperscript{576} Furthermore, section 78 grants the judiciary a general exclusionary power to ensure fairness, which supplements the judiciary’s common law discretionary power;\textsuperscript{577} although, Feldman has suggested that the breach of \textit{PACE} or its Codes of Practice must be “significant and substantial for evidence to be excluded.”\textsuperscript{578} Finally, section 82 of \textit{PACE} explicitly retains the court’s discretion to control its own process by stating:

Nothing in this Part of this Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion.\textsuperscript{579}

\textsuperscript{575} \textit{PACE}, s 77(3) defines independent person in the negative by stating such a person “does not include a police officer or a person employed for, or engaged on, police purposes.”

\textsuperscript{576} \textit{PACE}, s 77.

\textsuperscript{577} Section 78 of \textit{PACE} reads:

“(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

(3) This section shall not apply in the case of proceedings before a magistrates’ court inquiring into an offence as examining justices.”

See also Feldman, “England and Wales” in Bradley, \textit{Worldwide Study, supra} note 15 at 149; Galligan, \textit{supra} note 22 at 82-84. Galligan suggests that the fairness criteria should include not only whether admitting the evidence would result in an unfair trial but also whether the accused was unfairly induced to waive his or her right to silence.

\textsuperscript{578} Feldman, “England and Wales” in Bradley, \textit{Worldwide Study, supra} note 15 at 171. Feldman notes, however, that while a breach of \textit{PACE} or its Codes of Practice does not automatically result in exclusion of evidence, evidence can be excluded even if \textit{PACE} or its Codes are not breached and the police were acting in good faith if “the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court not ought to admit it”, citing the language of \textit{PACE} s 78(1). Feldman notes that the underlying question would be, “whether it would make the proceedings unfair to admit the evidence, balancing the public interest in detecting offenders, maintaining civil liberties, and ensuring that we have a law-abiding police force.”

\textsuperscript{579} \textit{PACE}, s 82.
While *PACE* establishes “a rigorously controlled legislative regime”\(^{580}\) governing the “detention, treatment and questioning of persons by police officers and others charged with the duty of investigating offences”\(^{581}\) some legal scholars have questioned whether the legislative changes have actually resulted in changes to police interrogation strategies. Easton, for example, contends: “Despite the formal changes of *PACE*, police culture has adapted to use the formal procedures to preserve that culture.”\(^{582}\) David Dixon has also questioned the effectiveness of *PACE* in actually changing police practices, asserting: “PACE has served to facilitate and legitimate powers and practices adopted by the police in their culturally-driven commitment to crime control.”\(^{583}\)

One specific area of concern regarding *PACE* that has been raised by some academics is whether the statutory provisions granting suspects access to legal advice actually act as a guardian of the right to silence. Easton has asserted that, despite the greater access to legal advice provided by *PACE*, “the number of suspects receiving advice is still low.”\(^{584}\) She further submits that, despite a “duty solicitor scheme and increased legal aid”,\(^{585}\) the quality of the training of those who give legal advice at the police station, and the advice they give, is subject to criticism.\(^{586}\) Finally, Easton cautions that *PACE* does not cover all situations where the right to silence may arise, noting that in *R. v. Maguire*\(^{587}\) the Court of Appeal “held that the PACE Codes did not prohibit the police from asking questions at the scene of the crime and that the


\(^{581}\) Dennis, *ibid*.

\(^{582}\) Easton, *supra* note 21 at 178.


\(^{585}\) Easton, *supra* note 21 at 112.

\(^{586}\) *ibid*.

\(^{587}\) (1990) 90 Cr App R 115 [*Maguire*].
resulting admissions were admissible”. Sanders and Bridges have also studied the practical application of PACE and claim that, “commonly, the police often broke and ‘beat’ the law.” Sanders and Bridges allege that the police often use “ploy” to discourage suspects from requesting to speak to a solicitor or to actually deny the suspect the opportunity to speak to a solicitor. The Royal Commission on Criminal Justice also raised concerns regarding deficiencies in the legal advice system. Research studies conducted for the Commission found that legal advisors often failed to intervene during police interviews and the quality of their advice was poor, as “many advisers lacked adequate legal knowledge and confidence and that sometimes they seemed to identify more with the police than with the suspect.” In referring to the research findings, the Royal Commission stated:

Even if not necessarily applicable across the whole field of criminal legal advice, these findings are disturbing. Competent legal advice at this stage can help not only to avoid future miscarriages of justice but to lead the police, in looking into suspects’ explanations, to undertake further investigations which will result in innocent suspects being freed sooner and more fruitful lines of enquiry being pursued.

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588 Easton, supra note 21 at 116.
589 Sanders & Bridges, “The Right to Legal Advice” in Walker & Starmer, supra note 21 at 83.
590 Ibid at 88-90. The ploys used by the police, according to Sanders and Bridges, include strategies such as: suggesting the charge is not serious enough to warrant legal advice; using garbled language or a hurried delivery when telling suspects of their right to speak to a solicitor; telling suspects that the solicitor will not come to the police station; suggesting that the suspect will be held in custody longer if a solicitor is called; and pressuring suspects to sign official forms acknowledging that they were advised of their right to consult with a solicitor. Sanders and Bridges do note, however, that some of these ploys have been “outlawed” through revisions of the Codes of Practice which now require suspects’ rights to “be read clearly” and requiring the police to ensure that suspects know that legal advice is free.
592 Runciman Commission, supra note 566 at c 3, para 56.
593 Ibid at c 3, para 57.
594 Ibid at c 3, para 59.
Additionally, while the tape recording of interviews was certainly hailed as a positive move, the Royal Commission on Criminal Justice noted that the practice had its limitations and could not replace the importance of “adequate legal advice, protection against oppressive treatment both before and after the interview, and medical treatment or independent assistance from an appropriate adult where called for.”

Although some critics of PACE, such as Easton and Dixon, have argued that under PACE “formal police powers were extended but the accompanying safeguards have been of limited effect”, other academics have viewed PACE in a more benevolent light. Redmayne, for example, has claimed: “The courts took the most significant PACE provisions relatively seriously, and decisions to exclude confessions obtained in breach of PACE gave some of the PACE rights significant bite.” According to Redmayne, the bite provided by PACE resulted in some influential people concluding “that under PACE the balance of power has swung too far in favour of defendants.” Furthermore, some members of the judiciary held such a view, such as Lord Chief Justice Lane who, as mentioned previously, stated in R. v. Alladice:

… it seems to us that the effect of section 58 is such that the balance of fairness between prosecution and defence counsel cannot be maintained unless proper comment is permitted on the defendant’s silence in such circumstances. It is high time that such comment should be permitted together with the necessary alteration to the words of the caution.

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595 Easton, supra note 21 at 116.
597 Redmayne, supra note 123 at 1053. Dixon has also noted that PACE introduced substantive protections for suspects, such as the “substantial right of access to legal advice, electronic recording of custodial interrogation, and the custody officer’s role in regulating investigative detention”. See Dixon, ibid at 67.
598 Redmayne, supra noted 123 at 1053.
599 Alladice, supra note 467 at 385.
As noted in Chapter II, Lord Lane’s comments reflect an “exchange abolition” perspective toward the right to silence, which Greer has defined as the belief that providing safeguards such as the right to legal advice or mandatory audio or video recording of the interview provides sufficient protection for the accused to allow for an “exchange” of the accused’s right to silence.\textsuperscript{600}

While the academic community debated the advantages and disadvantages of \textit{PACE}, and some members of the judiciary expressed reservations about some of its provisions, the view of \textit{PACE} held by many politicians, especially those in the government, was primarily negative. As Starmer and Woolf have observed, \textit{PACE} was seen by those who had the power to do something about it as having created a situation where “the balance had swung in favour of the criminal”, and “[i]n spite of the long public debate which had resulted in the findings of the Philips Commission, the Government embarked on a concerted effort to render the right to silence impotent.”\textsuperscript{601}

5. Home Office Working Group

Although the Philips Commission’s recommendation to retain the right to silence and the statutory regime established by \textit{PACE} appeared to have muffled the right to silence debate, the “issue was unexpectedly resurrected”\textsuperscript{602} in July 1987 when then Home Secretary Douglas Hurd posed some rhetorical questions while delivering a speech at the Annual Police Foundation Lecture.\textsuperscript{603} The Home Secretary stated:

\begin{footnotesize}
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\item[\textsuperscript{600}] Greer, \textit{supra} note 141 at 719.
\item[\textsuperscript{601}] Starmer & Woolf, “The Right to Silence” in Walker & Starmer, \textit{supra} note 21 at 117.
\item[\textsuperscript{602}] Greer, \textit{supra} note 141 at 716
\item[\textsuperscript{603}] Zander, \textit{supra} note 60 at 142.
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However, in light of the changing circumstances, including the advent of tape recording and other safeguards, it is right to consider whether the right balance is being struck between the interests of a person suspected of crime and the interests of society as a whole in bringing criminals to justice ... Is it really in the interests of justice, for example, that experienced criminals should be able to refuse to answer all police questions secure in the knowledge that a jury will never hear of it? Does the present law really protect the innocent whose interests will generally lie in answering questions frankly? Is it really unthinkable that the jury should be allowed to know about the defendant’s silence and, in light of other facts brought to life during a trial, be able to draw its own conclusions?\(^{604}\)

The right to silence was once again being challenged and within a year the Home Secretary confirmed the government’s intention to change the law by stating in Parliament: “I am not convinced that the protection which the law now gives to the accused person who ambushes the prosecution can be justified. The case for change is strong”.\(^{605}\) Noting however that more study was required, the Home Secretary announced the creation of a Home Office Working Group (“HOWG”) “to consider, not whether the right to silence should be abolished, but ‘the precise form of the change in the law which would best achieve our purpose’.”\(^{606}\)

The HOWG issued its report in July 1989, making five major recommendations: (1) implement the CLRC’s proposals but with modifications to place greater emphasis on safeguards for suspects; (2) clarify that the “primary inference to be drawn from a defendant’s failure to answer police questions or to mention a fact subsequently relied upon in defence is that a subsequent line of defence is untrue”;\(^{607}\) (3) require greater prosecution and defence pre-trial disclosure;\(^{608}\) (4) allow the prosecution to comment upon an accused’s pre-trial and trial silence

\(^{604}\) Ibid at 142–43.
\(^{605}\) Ibid at 143.
\(^{606}\) Ibid.
\(^{607}\) Greer, supra note 141 at 717.
\(^{608}\) While compelled disclosure on the part of the accused definitely impacts the right to silence, the issue of disclosure will not be discussed in this thesis. However, for a discussion of the disclosure issue, see e.g., Easton, supra note 21 at 51; Ben Fitzpatrick, “Disclosure: Principles, Processes and Politics” in Walker & Starmer, supra note 21, 151 [Fitzpatrick “Disclosure”].
in the same way that a judge is allowed to comment; and (5) introduce a new caution “which would encourage suspects to mention any fact upon which they intend to rely in their defence at trial, and which would warn that failure to do so could result in them not being believed in court.” The HOWG’s recommendations were not as extreme as those of the CLRC, as it also suggested that silence should not be “capable of amounting to corroboration or constitute positive evidence of guilt.” The HOWG did, however, recommend that judges make more use of their common law discretion to comment on an accused’s failure to testify.

As had been the case with the CLRC, response to the HOWG’s recommendations was “overwhelming negative” and the recommendations were not immediately implemented in England and Wales. Greer suggests that one reason for the resistance to the HOWG’s recommendations was the public’s concern over several miscarriage of justice cases in which people had been wrongfully convicted, such as the “Guilford Four” case, and the scandal surrounding the work of the West Midlands Serious Crime Squad, which had been found to have committed several egregious violations of suspects’ rights during their investigations. According to Greer, these incidents “raised serious questions about police interview practice both before and after PACE.” Given the public reaction to the HOWG report, the government refrained from implementing its recommendations; although, it “made it clear that the right to

609 Greer, supra note 141 at 717.
610 Easton, supra note 21 at 43.
611 Ibid.
612 Greer, supra note 141 at 718.
613 The “Guilford Four” were four men convicted in 1975 of IRA bombings of pubs in Guildford and Woolwich England in 1974 that killed five people and injured many more. Their initial appeal was unsuccessful; however, after other IRA defendants awaiting trial in another case claimed responsibility for the bombings a further referral the Court of Appeal discovered that the police had fabricated statements and suppressed exculpatory evidence. The convictions of the “Guilford Four” were eventually quashed in 1989. See Walker, “Principles and Practice” in Walker & Starmer, supra note 21 at 46-47. The West Midlands Police Serious Crime Squad was disbanded in 1989 after many complaints were substantiated about the Squad assaulting suspects, fabricating evidence and denying suspects’ access to lawyers. See Walker (ibid at 49-50).
614 Greer, supra note 141 at 717.
silence was still under close scrutiny." However, even though there was unease over police misconduct and wrongful convictions, the civil unrest and violence occurring in Northern Ireland and England associated to the sectarian and political divide in Northern Ireland provided the political impetus for the British government to move ahead with its ideological agenda to restrict the right to silence.

6. **Criminal Evidence (Northern Ireland) Order**

Up until the 1980s, the debate over the right to silence had been “largely academic in character”, but the crisis in Northern Ireland “altered this state of affairs”. According to Berger, the situation in Northern Ireland generated a public mood of “concern that suspects in terrorist offenses were making prosecution difficult by frequently exercising their right to silence”. Although the Diplock Commission, which in the early 1970s had investigated legal options to deal with the Northern Ireland crisis, “did not refer to the right to silence as contributing to problems in convicting the guilty”, a later review by Viscount Colville in 1987 did recommend restricting the right to silence. By 1988, an increase in bombings in England and a highly publicized trial of several alleged IRA terrorists for plotting to kill the Secretary of State for Northern Ireland – a trial in which the suspects elected to remain silent – set the stage for a quick and decisive evisceration of the right to silence in Northern Ireland through the

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615 Easton, *supra* note 21 at 44.
618 The Diplock Commission was established to “consider what arrangements for the administration of justice in Northern Ireland could be made in order to deal more effectively with terrorist organisations by bringing to book, otherwise than by internment by the Executive, individuals involved in terrorist activities, particularly those who plan and direct, but do not necessarily take part in, terrorist acts; and to make recommendations”. The Commission issued its report in December 1972. See Report of the Commission to Consider Legal Procedures to deal with Terrorist Activities in Northern Ireland (London: HMSO, Cmnd 5185, 1972) online: CAIN Webservice <http://cain.ulst.ac.uk/hmso/diplock.htm>.
619 Easton, *supra* note 21 at 70.
enactment of the *Criminal Evidence (Northern Ireland) Order 1988*\(^{621}\) ("Northern Ireland Order" or "Order"). The *Order* continues in effect today.\(^{622}\)

While ostensibly directed at combating domestic terrorism, the *Northern Ireland Order* "amended the evidence in all criminal proceedings in Northern Ireland, and was not confined to terrorist offences."\(^{623}\) The *Order* was modelled on the CLRC’s recommendations and the Republic of Ireland’s *Criminal Justice Act 1984*.\(^{624}\) Easton has described its purpose as:

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...to enable the courts to draw whatever inferences would be proper from the fact that an accused remained silent in four situations: [i] the ambush defence, where an explanation of conduct is offered for the first time at trial but the accused could reasonably have been expected to mention it earlier; [ii] the failure to testify at trial; [iii] the failure or refusal to explain the presence of substances or marks on his clothing; and [iv] the failure or refusal to explain his presence at a particular place.\(^{625}\)
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The impact of the *Order* is limited by Article 2(4), which states that “a person shall not be committed for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in Article 3(2), 4(4), 5(2) or 6(2).”\(^{626}\) However, while a conviction cannot be based solely on the accused’s silence, the *Order* does allow the accused’s silence to be “capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure is material.”\(^{627}\) Article 3 of the *Order* deals

\(^{621}\) *Northern Ireland Order*, supra note 332. See also Easton, *supra* note 21 at 68-72.

\(^{622}\) The *Northern Ireland Order* has been supplemented by the *Police and Criminal Evidence (Northern Ireland) Order 1989* No. 1341 (NI 12) and the *Police and Criminal Evidence (Northern Ireland) Order 2007* No. 288 (NI 2), both of which prescribe police powers similar to those set out for England and Wales in *PACE*. For the purposes of this thesis, the focus will be on the *Criminal Evidence (Northern Ireland) Order 1988*.

\(^{623}\) Easton, *supra* note 21 at 61.

\(^{624}\) *Ibid*.

\(^{625}\) *Ibid*.

\(^{626}\) *Northern Ireland Order*, art 2(4).

\(^{627}\) *Northern Ireland Order*, art 3(2).
with ambush defences and expands the common law rule that allows for the drawing of an adverse inference when the parties are “on even terms” to any situation where:

… the accused on being questioned to see whether an offence has been committed, or when he has been charged with an offence or on being informed that he might be prosecuted, failed to mention any fact relied on in his defence which in the circumstances he could reasonably have been expected to mention.

Articles 5 and 6 apply to situations where the police encounter people in suspicious circumstances. Article 5 deals with situations where a person has an object, substance or mark on his or her person, clothing or footwear. If a police officer reasonably believes that the object, substance or mark relates to the commission of an offence and the officer informs the suspect of this belief and requests that he or she account for the presence of the item and the accused fails or refuses to do so, the judge or jury may “draw such inferences from the failure or refusal as appear proper.” Failure to account can also be corroboration of other evidence adduced against the accused. Article 6 applies the same rules to a situation where the suspect fails to account for his or her presence in a particular location where the police officer reasonably believes an offence has been committed. The Order also contains a police caution. As the original caution was criticized for being ambiguous it was replaced in 1995 by the same caution set out in the Criminal Justice and Public Order Act, which reads:

You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you say may be given in evidence.

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628 Easton, supra note 21 at 62.
629 Ibid.
630 Northern Ireland Order, art 5(2).
631 Easton, supra note 21 at 65.
632 Ibid at 68.
Finally, Article 4, which deals with silence at trial, allows for the drawing of an adverse inference if an accused fails to testify without good cause, as well as allowing the accused’s silence to be treated as corroborative evidence.633

The Northern Ireland Order caused considerable controversy and was criticized not only for its attack on the right to silence, but for its ambiguity. Easton has suggested that the Order resulted in the ironic unintended consequence of decreasing rectitude of decision as it forced judges and juries to make decisions regarding whether or not to draw an inference from the accused’s silence on the basis of “vague and ill-informed speculations”.634 Easton also contends that empirical research “suggests that the Order has not strengthened the fight against crime”, as “clear up and conviction rates in Northern Ireland have fallen since the Order was passed.”635 Berger has taken a similar position, referring to a report from JUSTICE (the British Section of the International Commission of Jurists) in 1994 which concluded that “the right to silence reforms had no impact on either detection or conviction rates.”636 The Northern Ireland Order was the subject of several judicial decisions within both the British domestic courts and the European Court of Human Rights. Those decisions will be discussed later in this chapter.637

633 Northern Ireland Order, art 4(4). Article 4(6) clarifies that an accused will only have “good cause” to refuse to testify or answer a question if: (a) he is entitled to refuse to answer the question by virtue of any statutory provision, or on the ground of privilege; or (b) the court in the exercise of its general discretion excuses him from answering it.
634 Easton, supra note 21 at 64.
635 Ibid at 85.
637 See Chapter III.D, below, for a discussion of the domestic and European court decisions.
7. Royal Commission on Criminal Justice

The violence associated with the Northern Ireland crisis resulted in significant pressure being placed on the police to solve a number of notorious incidents where British military personnel and members of the public had been killed through acts of violence, usually in the form of bombings in public places. Several major police investigations ended in the arrest and conviction of people associated to the IRA. However, in the late 1980s and early 1990s several of these convictions were overturned and many of the people who had been convicted were set free after many years of imprisonment. The most notorious cases were the “Guilford Four” in 1989, “Maguire Seven” in 1990 and “Birmingham Six” in 1991. Tactics used by the police to extract confessions, as well as other police and prosecutorial misconduct and the admission of untrustworthy forensic evidence, were identified as contributing to the wrongful convictions. Both the number of miscarriages of justice and the extreme nature of the police misconduct during the investigations shook public confidence in the police. And the problem was not confined to domestic terrorist cases. In the “Cardiff Three” case, convictions for the murder of a sex trade worker were overturned by the Court of Appeal based on police use of

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638 See supra note 613 for a brief description of the “Guildford Four” case.
639 Walker, supra note 232 at 46-47. The main evidence against the “Maguire Seven” was forensic evidence found by the police when they searched the home of a relative of one of the “Guilford Four”. The forensic evidence apparently showed traces of nitroglycerine in a house that was occupied by the seven accused. The convictions of the “Maguire Seven” were overturned in 1990 when the Court of Appeal concluded that third parties may have left the traces of the explosive in the house. A subsequent inquiry ordered by the government (the May Inquiry) also questioned whether the forensic tests could be considered to be conclusive proof that the suspects knew they were handling explosives.
640 Ibid at 47. The “Birmingham Six” were convicted of two 1974 IRA bombings in Birmingham, England which killed 21 people. The prosecution’s case consisted of confessions, forensic evidence and circumstantial evidence such as the suspects’ links to known Irish Republicans, as well as evidence of their movements and demeanour. The suspects claimed that the police had beaten them in order to extract confessions. On a referral to the Court of Appeal in 1988, concerns surfaced about possible police fabrication of statements and the quality of the forensic testing. The “Birmingham Six” were eventually released in 1991.
641 Ibid at 52-55.
642 Berger, “Policy, Politics & Parliament", supra note 113 at 413.
643 Walker, “Principles and Practice” in Walker & Starmer, supra note 21 at 49.
oppressive methods during their interrogation of the suspects. And, as mentioned previously, the questionable tactics of the West Midlands Police Serious Crime Squad resulted in the Squad being disbanded in 1989 after several convictions resulting from the Squad’s work were overturned.

At the same time the police were coming under scrutiny, the government of the day was implementing the doctrine of “managerialism” into police agencies. Managerialism was an approach to the provision of government services that placed a very high value on efficiency and effectiveness.” The concept of managerialism included identifying the “core business” of the particular government agency to which it was being applied. As Dixon has noted, “crime fighting” was identified as “the ‘core business’ of the police and success [was] measured by calculating arrest, clean-up, and crime rates.” According to Dixon, the “managerialism redefinition of policing … had a significant effect in shifting discourse about policing: managerialism dovetailed with the law and order politics in undermining the advances made during 1986 – 93.”

The dual drivers of public concern over police misconduct and the government’s policy of managerialism resulted in the establishment of yet another royal commission to study the criminal justice system. The Royal Commission on Criminal Justice (“Runciman

644 Ibid at 51. The “Cardiff Three” were convicted in 1990 of the murder of a sex trade worker, but on appeal to the Court of Appeal in 1992 the Court “expressed itself as horrified by evidence of oppression from the police interview tapes.” and overturned the convictions.
647 Ibid.
648 Ibid at 75.
649 Easton, supra note 21 at 44.
Commission”) was established in 1991 and issued its report in 1993. The Runciman Commission was mandated to:

[Examine the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent, having regard to the efficient use of resources, and in particular to consider whether changes are needed in ... the opportunities available for an accused person to state his position on the matters charged and the extent to which the courts might draw proper inferences from primary facts, the conduct of the accused, and any failure on his part to take advantage of an opportunity to state his position.]

Concerning the specific issue of pre-trial silence, the Runciman Commission described its jobs as two-fold. First, it was to examine:

…the extent to which the so-called right of silence – that is, in this context, the prohibition against adverse comment at trial on a defendant’s refusal to answer police questioning – is a crucial safeguard for the suspect or defendant or, on the other hand, the extent to which it may be an unacceptable obstacle to establishing the guilt of those who have committed criminal offences.

Second, it was to determine “the circumstances in which confessions should be admissible before magistrates or a jury”.

Similar to the Philips Commission, the Runciman Commission engaged researchers to study the actual exercise of the right to silence by criminal suspects. The studies concluded that the “right is only exercised in a minority of cases” and that it tended to be invoked in the more serious cases or when legal advice was given. The studies also concluded: “There is no

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650 Easton, ibid; Dixon, “Police Investigative Procedures” in Walker & Starmer, supra note 21 at 74.
651 Runciman Commission, supra note 566.
652 Berger, “Policy, Politics & Parliament”, supra note 113 at 413.
653 Runciman Commission, supra note 566 at 49, para 1.
654 Ibid.
655 Ibid at 53, para 23.
evidence which shows conclusively that silence is used disproportionately by professional criminals.”656

As had been the case with both the CLRC and Philips Commission, the Runciman Commission was divided on whether or not the law regarding the right to silence should be altered. Two Commissioners thought “it would be right for adverse comment … to be permitted at trial”,657 but the majority, citing the Philips Commission, concluded: “[T]he possibility of an increase in convictions of the guilty is outweighed by the risk that the extra pressure on suspects to talk in the police station and the adverse inferences invited if they do not may result in more convictions of the innocent.”658 The Runciman Commission also rejected the suggestion that restricting the right to silence would make a noticeable impact on the problem of professional criminals using the right to silence to their advantage. In this regard, the Commission stated:

The experienced professional criminals who wish to remain silent are likely to continue to do so and will justify their silence by stating at trial that their solicitors have advised them to say nothing at least until the allegations against them have been fully disclosed. It may be that some more defendants would be convicted whose refusal to answer police questions had been the subject of adverse comment; but the majority believe that their number would not be nearly as great as is popularly imagined.659

Moreover, reflecting the public’s concern over the many wrongful conviction cases that had preceded its formation, the Runciman Commission also stated:

656 Ibid.
657 Ibid at c 4, para 4.21.
658 Ibid at c 4, para 22.
659 Ibid.
It is the less experienced and more vulnerable suspects against whom the threat of adverse comment would be likely to be more damaging. There are too many cases of improper pressures being brought to bear on suspects in police custody, even where the safeguards of PACE and the codes of practice have been supposedly in force, for the majority to regard this with equanimity.660

However, while the majority of the Runciman Commission did not support the drawing of an adverse inference on the accused’s silence, all but one of the Commissioners believed the need for efficiency in the criminal justice system required a change to the law governing defence disclosure prior to trial.661 Noting that section 11 of the Criminal Justice Act 1967662 required an accused to give advance disclosure of an alibi defence and section 81 of PACE required advance notice of any expert evidence the accused intended to use at trial, the Runciman Commission concluded there were “powerful reasons for extending the obligations on the defence to provide advance disclosure.”663 The Runciman Commission also noted that defence disclosure would reduce “those cases where the defendant withholds his or her defence until the last possible moment in the hope of confusing the jury or evading investigation of fabricated evidence.”664

While the recommendation requiring defence disclosure appeared to be primarily based on improving the efficiency of the criminal process, thereby meeting the managerial expectations of the government, the Runciman Commission emphasized that it saw no conflict between mandatory defence disclosure and the right to silence or the presumption of innocence. In this regard, it stated:

660 Ibid at c 4, para 23.
661 Ibid at c 6, para 57-73. One Commissioner, Professor Michael Zander, dissented on the issue of defence disclosure.
662 Criminal Justice Act 1967 (UK), c 80.
663 Some of the benefits of defence disclosure identified by the Runciman Commission were better case preparation, early dropping of charges by the prosecution based on new details coming to light from the defence disclosure, earlier guilty pleas, and earlier trial dates. See Runciman Commission, supra note 566 at c 6, para 59.
664 Ibid at c 6, para 59.
We do not, as we have said, believe that a requirement on the defence to disclose the substance of their case sooner rather than later infringes the right of defendants not to incriminate themselves. Where defendants advance a defence at trial it does not amount to an infringement of their privilege not to incriminate themselves if advance warning of the substance of such a defence has to be given. The matter is simply one of timing. We emphasise that under our proposals defendants may, if they so choose, remain silent throughout the trial.  

In the view of the majority of the Runciman Commission, if after proper prosecution disclosure accused persons decide not to “offer an answer to the charges made against them”, they should face the possibility of an adverse inference being drawn at trial “on any new defence they then disclose or on any departure from the defence which they previously disclosed.” The Runciman Commission pointed out that the accused, knowing that an adverse comment is possible, could still:

…choose to run the risk of such comment, or indeed to remain silent throughout their trial. But if they do, it will be in the knowledge that their hope of an acquittal rests on the ability of defending counsel either to convince the jury that there is a reasonable explanation for the departure or, where silence is maintained throughout, to discredit the prosecution evidence in the jury’s eyes. As argued below, it should be open to the judge, as now in serious fraud cases, to comment on any new defence or any departure from an earlier line of defence.

The Runciman Commission also recommended retention of the rules that restricted an accused’s pre-trial silence in serious fraud cases under section 2 of the Criminal Justice Act 1987, and confirmed that “the safeguards under PACE against false confessions are comprehensive and, while not foolproof, are substantially sound.”

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665 Ibid at c 6, para 60.
666 Ibid at c 4, para 24.
667 Ibid.
668 Criminal Justice Act 1987, c 38. See also ibid at 56, para 28.
669 Ibid at 57, para 33.
Regarding silence at trial, the Runciman Commission concluded that the current rule whereby judges were required to caution juries that a “defendant’s failure to give evidence is not to be taken as an indication of guilt”\(^\text{670}\) was valid, but noted:

…it is surely proper for it to be pointed out to the jury at the same time that they have thereby been deprived of the opportunity of hearing any account which the defendant might have been able to give and that while his or her silence does nothing to corroborate the prosecution’s case it equally does nothing to qualify or undermine it.\(^\text{671}\)

As with the CLRC and HOWG, the recommendations of the Runciman Commission drew criticism. Dixon, for example, has criticized the Runciman Commission for being obsessed with efficiency in crime control, lacking an articulated theory and suffering from serious empirical deficiencies.\(^\text{672}\) Although retentionists acknowledged that the Runciman Commission had supported retaining the right to silence, they complained that it took away with one hand what it gave with the other, as the practical benefit of the right to silence for a suspect who decides to remain silent was substantially weakened by the requirement of advance defence disclosure.\(^\text{673}\) In addition, the Runciman Commission’s “desire to establish value for money and achieve cost-effectiveness in the criminal justice system” was seen by some critics as overriding matters of principle,\(^\text{674}\) while others concluded that the Commission’s “absence of principled argument” resulted in its recommendations being “suitably malleable” for the government to advance “the trend of subsequent legislation … towards crime control and away from due process.”\(^\text{675}\)

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\(^\text{670}\) Ibid at 56, para 26.
\(^\text{671}\) Ibid.
\(^\text{672}\) Dixon, “Police Investigative Procedures” in Walker & Starmer, supra note 21 at 71-72.
\(^\text{673}\) Easton, supra note 21 at 46.
\(^\text{674}\) Ibid.
8. **Criminal Justice and Public Order Act**

Despite the Runciman Commission’s recommendation to retain the right to silence, the political and social climate in Britain in the early 1990s was not conducive to accepting such a recommendation. The Conservative government’s position was aptly described by Home Secretary Michael Howard during a speech at the Conservative Party Conference in 1993, when he stated: “The so-called right to silence is ruthlessly exploited by terrorists. What fools they must think we are. It’s time to call a halt to this charade. The so-called right to silence will be abolished.”676 It was also evident that political, public and judicial opinion on the right to silence continued to be divided. As pointed out by Berger:

…the debate over reforming the right to silence in England and Wales was at something of a stalemate. On one hand, procedures in Northern Ireland had been changed and the Working Group had recommended significant revisions in the right to silence in England and Wales; on the other hand, the Royal Commission on Criminal Justice had called for the retention of the status quo.677

Given the government’s intransigent position on the right to silence it should not have been surprising when it ignored the Runciman Commission’s recommendation to retain the right to silence and instead opted for the recommendations of the CLRC, which over twenty years earlier had recommended restricting the right to silence. Consequently, in late 1994 the *Criminal Justice and Public Order Act 1994*678 (“CJPOA”) was enacted, with the right to silence provisions becoming effective in April, 1995.679

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677 Berger, “Policy, Politics & Parliament”, *supra* note 113 at 415.
678 CJPOA, *supra* note 549.
679 Berger, “Reforming Confession Law”, *supra* note 73 at 137.
The CJPOA mirrored the Northern Ireland Order, with the exception of using silence as corroboration.\textsuperscript{680} PACE was amended as necessary to comply with the provisions of the CJPOA\textsuperscript{681} and both statutes continue in force today. Section 34 of the CJPOA allows for an inference to be drawn from an accused’s pre-trial silence in certain circumstances. Section 34(1) reads:

(1) Where in any proceedings against a person for an offence, evidence is given that the accused –

(a) at any time before he was charged with an offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact,

being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when questioned, charged or informed, as the case may be, subsection (2) below applies.\textsuperscript{682}

Subsection (2) sets out four situations where an inference from silence may be drawn: (1) at a magistrates’ court deciding whether the case should be transferred for trial or dismissed; (2) in specialized trials under the Crime and Disorder Act 1988;\textsuperscript{683} (3) in determining whether or not there is a case to meet; and (4) in determining whether the accused is guilty of the offence charged. Subsection (2) also clarifies that the inference to be drawn is “such inferences from the failure as appear proper.”\textsuperscript{684} In response to the European Court of Human Rights decision in

\footnotesize{\textsuperscript{680} Easton, supra note 21 at 47.}

\footnotesize{\textsuperscript{681} See Chapter III.C.4, above, for a discussion of PACE.}

\footnotesize{\textsuperscript{682} CJPOA, s 34.}

\footnotesize{\textsuperscript{683} The original version of the CJPOA referred to the Criminal Justice Act 1967, which dealt with serious frauds and violent or sexual offences against children. The Crime and Disorder Act 1998 is a comprehensive criminal procedural statute that covers a variety of offences and categories of offenders. See Crime and Disorder Act 1998, c 37, online: UK Government < http://www.legislation.gov.uk/ukpga/1998/37/contents>.}

\footnotesize{\textsuperscript{684} CJPOA, s 34(2).}
Murray v. United Kingdom, section 34 was later amended to prohibit the drawing of an inference if the silence occurs when the suspect is at an “authorized place of detention” and the suspect has not been allowed an opportunity to “consult a solicitor prior to being questioned”. Subsection (5) also retains any common law adverse inferences from pre-trial silence or the reaction of a suspect when confronted with an allegation.

Sections 36 and 37 of the CJPOA also deal with pre-trial silence. Section 36 allows for the drawing of “such inferences … as appear proper” when a person remains silent after he or she is arrested by a police officer and asked to explain the presence of objects, substances or marks found on his or her person, clothing or footwear. A prerequisite for the legal duty to respond is that the police officer “reasonably believes that the presence of the object, substance or mark may be attributable to the participation of the person arrested in the commission of an offence specified by the constable”. Section 37 allows for a similar inference to be drawn if the arrested person fails to account for why he or she is at a particular place if the questioning officer or “another officer investigating the offence reasonably believes that the presence of the person at that place and at that time may be attributable to his participation in the commission of the

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685 Murray v UK, supra note 105.
686 CJPOA, s 38(2A) defines an “authorized place of detention” as a police station or any other place prescribed as such by the Secretary of State.
687 CJPOA, s 34(2A) reads: “Where the accused was at an authorised place of detention at the time of the failure, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to being questioned, charged or informed as mentioned in subsection (1) above.”
688 CJPOA, s 34(5) reads:
   “This section does not –
   (a) prejudice the admissibility in evidence of the silence or other reaction of the accused in the face of anything said in his presence relating to the conduct in respect of which he is charged, in so far as evidence thereof would be admissible apart from this section; or
   (b) preclude the drawing of any inference from any such silence or other reaction of the accused which could properly be drawn apart from this section.”
689 CJPOA, s 36(2).
690 CJPOA, s 36(1)(b).
offence” being investigated.\textsuperscript{691} As with section 34, a later subsection was added to both sections 36 and 37 to prohibit the inference being drawn if the silence or refusal to respond occurs at an authorized place of detention and the suspect has “not been allowed an opportunity to consult a solicitor prior to the request being made.”\textsuperscript{692} Moreover, as with section 34, both sections 36 and 37 maintain any common law rules which allow for the use of pre-trial silence.\textsuperscript{693}

Section 35 of the \textit{CJPOA} also restricts the accused right to silence at trial by requiring the accused to give evidence or face the consequence of an adverse inference being drawn from his or her silence, unless the accused has a “good cause” not to testify.\textsuperscript{694} And finally, as mentioned

\begin{itemize}
  \item \textsuperscript{691} \textit{CJPOA}, s 37(1) (b).
  \item \textsuperscript{692} \textit{CJPOA}, ss 36(4)(a) & 37(3)(a). Section 36(4A) reads: “Where the accused was at an authorised place of detention at the time of the failure or refusal, subsections (1) and (2) above do not apply if he had not been allowed an opportunity to consult a solicitor prior to the request being made.” Section 37(3A) reads: “Where the accused was at an authorised place of detention at the time of the failure or refusal, subsections (1) and (2) do not apply if he had not been allowed an opportunity to consult a solicitor prior to the request being made.”
  \item \textsuperscript{693} \textit{CJPOA}, ss 36(6) & 37(5). Section 36(6) reads: “This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for the presence of an object, substance or mark or from the condition of clothing or footwear which could properly be drawn apart from this section.” Section 37(5) reads: “This section does not preclude the drawing of any inference from a failure or refusal of the accused to account for his presence at a place which could properly be drawn apart from this section.”
  \item \textsuperscript{694} Easton, \textit{supra} note 21 at 151. While section 35 of the \textit{CJPOA} originally did not apply to persons under the age of fourteen, an amendment in 1998 eliminated the age restriction. The section does not however apply to persons who “suffer from a physical or mental condition that makes it undesirable for him to give evidence.”
\end{itemize}

Section 35 reads:

“(1) At the trial of any person for an offence, subsections (2) and (3) below apply unless—

(a) the accused’s guilt is not in issue; or

(b) it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence;

but subsection (2) below does not apply if, at the conclusion of the evidence for the prosecution, his legal representative informs the court that the accused will give evidence or, where he is unrepresented, the court ascertains from him that he will give evidence.

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

(3) Where this subsection applies, the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences as appear proper from the failure of the accused to give evidence or his refusal, without good cause, to answer any question.

(4) This section does not render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.
previously while discussing *PACE*, due to the change in the law a new police caution was implemented.\(^695\)

It is therefore evident that, similar to the *Northern Ireland Order*, the *CJPOA* significantly restricted and continues to restrict the right to silence in England and Wales at both the pre-trial and trial stages. With regard to pre-trial silence, while the accused cannot be forced to answer police questions, failing to do so in certain situations will be highly prejudicial to any defence or explanation he or she may offer at trial. While the accused’s silence cannot be the sole foundation of a conviction,\(^696\) there is no doubt the *CJPOA* has significantly raised the potential cost for an accused who invokes his or her right to silence either before or at trial. One critic of the *CJPOA*, Rosemary Pattenden, has commented that the *CJPOA* means that “[s]ilence becomes an evidential ply-filler for cracks in the wall of incriminating evidence which the prosecution has built around the accused.”\(^697\)

However, while the changes to the law governing the right to silence introduced by the *Northern Ireland Order* and *CJPOA* were substantial, the government was not yet done. Based on the Runciman Commission’s recommendation that the accused should be required to disclose his or her case before trial, the *Criminal Procedure and Investigations Act* was enacted in 1996.

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\(^5\) For the purposes of this section a person who, having been sworn, refuses to answer any question shall be taken to do so without good cause unless—

(a) he is entitled to refuse to answer the question by virtue of any enactment, whenever passed or made, or on the ground of privilege; or

(b) the court in the exercise of its general discretion excuses him from answering it.

\(^6\) This section applies—

(a) in relation to proceedings on indictment for an offence, only if the person charged with the offence is arraigned on or after the commencement of this section;

(b) in relation to proceedings in a magistrates’ court, only if the time when the court begins to receive evidence in the proceedings falls after the commencement of this section.”

\(^695\) See discussion accompanying note 548, *supra*.

\(^696\) Section 38(3) of the *CJPOA* reads: “A person shall not have the proceedings against him transferred to Crown Court for trial, have a case to answer or be convicted of an offence solely on an inference drawn from such a failure or refusal as is mentioned in section 34(2), 35(3), 36(2) or 37(2).”

9. **Criminal Procedure and Investigations Act**

Similar to the right to silence, the right for the accused to know the case against him or her is considered by many to be “an integral part of a right to a fair trial.”\(^{698}\) Fitzpatrick has commented that the “principle … that defendants should have the same access to documents, to records and to other evidence as the prosecution … derives strength from the presumption of innocence, and its conception of fairness.”\(^{699}\) Historically, disclosure in criminal trials in England was governed by the common law and administrative guidelines, and prosecutors had a considerable amount of discretion concerning the content and timing of information disclosed to the accused; although, guidelines issued by the Attorney General in 1981 created a presumption of disclosure from the prosecution to the defence subject to some exceptions where prosecutorial discretion could apply, such as when disclosure would have an “adverse effect on national security or the safety of an informant.”\(^{700}\) The prosecution’s obligation to disclose its case to the defence was emphasized in 1992 when, in the *Judith Ward* case,\(^{701}\) the “Court of Appeal … imposed, in no uncertain terms, particularly onerous duties on prosecutors”.\(^{702}\)

However, as a result of Ward and other cases, “there ensued a backlash. The police especially began to balk at this prospect of stronger and more enforceable rules”.\(^{703}\) Furthermore, the government’s agenda of managerialism and crime control resulted in a “rearrangement of the

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701 *R v Ward*, [1993] 1 WLR 619 (CA) [*Ward*]. Judith Ward was convicted in 1974 for her alleged involvement in the bombing of a British Army bus that killed twelve people. Ward was released in 1992 after the Court of Appeal determined her conviction had been based on unreliable forensic evidence and a confession that had been obtained in circumstances which raised doubt about its reliability because of Ward’s mental instability. The prosecution also failed to properly disclose important information to the defence. See Walker, “Principle and Practice” in Walker & Starmer, *supra* note 21 at 48.
criminal process more in the form of a truth-finding, inquisitorial endeavour.” The government’s ideology, coupled with the Runciman Commission’s recommendation for reciprocal prosecution and defence disclosure, resulted in the enactment of the *Criminal Procedure and Investigations Act 1996* ("CPIA"). The CPIA supplemented common law and legislative rules that required the prosecution to provide disclosure to the defence, including information which “in the prosecutor’s opinion might undermine the case for the prosecution against the accused”. However, the new legislation had another side. As Fitzgerald has noted, the “principle novelty of the CPIA 1996 resides in its launch of a scheme of mandatory defence disclosure.”

Section 5 of the CPIA requires the defence, once it has received the prosecution’s primary disclosure, to provide a written statement to the prosecutor and the court. Section 6A requires the statement to include the nature of the defence, any specific defences upon which the accused intends to rely, a list of any matters upon which the accused takes issue with the prosecution and the reasons why he or she takes issue, and any points of law that the accused will be raising at trial. If the defence statement advances an alibi defence, the statement must also include the

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706 CPIA, s 3(1)(a).
707 Fitzpatrick, “Disclosure” in Walker & Starmer, supra note 21 at 162. It should be noted that mandatory disclosure only arises in the more serious cases. In summary cases, the CPIA establishes a system of voluntary defence disclosure. See Fitzpatrick (ibid).
708 Section 6A reads in part:

"(1) For the purposes of this Part a defence statement is a written statement—
(a) setting out the nature of the accused’s defence, including any particular defences on which he intends to rely,
(b) indicating the matters of fact on which he takes issue with the prosecution,
(c) setting out, in the case of each such matter, why he takes issue with the prosecution, and
(d) indicating any point of law (including any point as to the admissibility of evidence or an abuse of process) which he wishes to take, and any authority on which he intends to rely for that purpose.

(2) A defence statement that discloses an alibi must give particulars of it, including—
(a) the name, address and date of birth of any witness the accused believes is able to give evidence in support of the alibi, or as many of those details as are known to the accused when the statement is given;"
particulars of the defence, including the particulars of any witness who the defence will be calling to support the alibi.\textsuperscript{709} Failure to provide a defence statement, setting out inconsistent defences in the statement or forwarding a “defence which is different from any defence set out in a defence statement” may result in the trier of fact drawing “such inferences as appear proper in deciding whether the accused is guilty of the offence in question.”\textsuperscript{710} Furthermore, the judge or “any party with leave of the court” may “make such comment as appears appropriate” if the accused fails to provide a defence statement or advances a defence at trial which is inconsistent with one mentioned in the statement.\textsuperscript{711} Section 7 of the \textit{CPIA} also states that, once the accused provides disclosure, the prosecutor must provide secondary disclosure to the defence “which might be reasonably expected to assist the accused’s defence as disclosed by the defence statement” or provide the accused with a written statement that there is no further information to disclose.\textsuperscript{712}

While some legal scholars have argued that the new model of disclosure should be viewed as an attempt to develop a “co-operative enterprise” and “move away from the \textit{competitive} trial and the theatrical \textit{faux}-truth of adversarialism”,\textsuperscript{713} critics of the \textit{CPIA} have described it as just another step in the destruction of the right to silence. Starmer and Woolf, for example, have suggested that, “[w]hatever view one takes of the 1988 Order and the 1994 Act, there can be

(b) any information in the accused’s possession which might be of material assistance in identifying or finding any such witness in whose case any of the details mentioned in paragraph (a) are not known to the accused when the statement is given.

(3) For the purposes of this section evidence in support of an alibi is evidence tending to show that by reason of the presence of the accused at a particular place or in a particular area at a particular time he was not, or was unlikely to have been, at the place where the offence is alleged to have been committed at the time of its alleged commission.”

\textsuperscript{710} Fitzpatrick, “Disclosure” in Walker & Starmer, \textit{supra} note 21 at 163-64, citing \textit{CPIA}, s 11(3).
\textsuperscript{711} \textit{Ibid} at 164.
\textsuperscript{712} \textit{Ibid}.
\textsuperscript{713} \textit{Ibid} at 165, 167.
little doubt that the Criminal Procedure and Investigations Act 1996 effectively marks the end of the so-called right to silence in England, Wales and Northern Ireland.\textsuperscript{714}

\section*{10. Other Legislation}

As already noted, the right to silence in Britain had been restricted for some specialized crimes prior to the more general restrictions imposed by the \textit{Northern Ireland Order} and \textit{CJPOA}. The \textit{Companies Act 1985}\textsuperscript{715} and \textit{Drug Trafficking Offences Act 1986}\textsuperscript{716}, for example, required suspects to answer questions from investigators.\textsuperscript{717} Failure to answer such questions could lead to imprisonment for contempt, although there was subsequent use immunity. Other statutes primarily directed at combating domestic or foreign terrorism also restricted and continue to restrict the right to silence. The \textit{Criminal Justice (Terrorism and Conspiracy) Act 1998}\textsuperscript{718}, for example, was passed in response to the Omagh bombing in Northern Ireland.\textsuperscript{719} As noted by Berger, the legislation is specifically applicable to Northern Ireland and “permits the factfinder evaluating alleged membership in a terrorist organization to draw adverse inferences from the accused’s failure to mention a fact material to a question which he would have reasonably been expected to answer.”\textsuperscript{720} Other statutes dealing with terrorism\textsuperscript{721} provide the police with greater investigative powers than those granted by \textit{PACE}, most notably in the areas of arrest, search and detention. The expanded powers of arrest and detention are obviously related to the right to

\begin{itemize}
\item \textsuperscript{714} Starmer & Woolf, “The Right to Silence” in Walker & Starmer, \textit{supra} note 21 at 108.
\item \textsuperscript{715} \textit{Companies Act 1985} (UK), c 6.
\item \textsuperscript{716} \textit{Drug Trafficking Offences Act 1986} (UK), c 32.
\item \textsuperscript{717} Easton, \textit{supra} note 21 at 238.
\item \textsuperscript{718} \textit{Criminal Justice (Terrorism and Conspiracy) Act 1998} (UK), c 40
\item \textsuperscript{719} Berger, “Reforming Confession Law”, \textit{supra} note 73 at 266. The Omagh bombing was a car bomb that killed 29 people and injured hundreds more in August 1998 in Omagh, Northern Ireland. The attack was alleged to have been committed by the Real Irish Republican Army in opposition to the Belfast Agreement, which had been signed in April 1998 and which was a significant event in ending most of the violence in Northern Ireland.
\item \textsuperscript{720} Ibid.
\item \textsuperscript{721} For example, the \textit{Terrorism Act 2000} (UK), c 11; \textit{Prevention of Terrorism Act 2005} (UK), c 2; and \textit{Terrorism Act 2006} (UK), c 11.
\end{itemize}
silence as they grant the police more time to interrogate a suspect, which increases the suspect’s jeopardy.\footnote{722}{See e.g. Stuesser, supra note 272 at 7. Stuesser points out that it takes time for the police to get a suspect to speak to them.} However, consistent with one of the caveats stated in Chapter I, these statutes will not be analyzed as they relate to issues beyond the scope of this thesis.

11. European Convention of Human Rights

One question that arose during the right to silence debate in Britain was whether legislation which restricted the right to silence – be it the Northern Ireland Order, CJPOA or CPIA – would be able to withstand scrutiny under the European Convention of Human Rights ("European Convention" or "Convention").\footnote{723}{European Convention, supra note 81. See e.g. Michael & Emmerson, supra note 46 at 4.} Although Britain had not incorporated the European Convention into its domestic law when the Order, CJPOA and CPIA were enacted, in 1998 Britain’s Parliament passed the Human Rights Act 1998\footnote{724}{Human Rights Act 1998 (UK), c 42 [HRA].} ("HRA"), which expressly requires the laws of the United Kingdom to be interpreted in a manner consistent with the European Convention. Section 2 of the HRA requires a court or tribunal to “take into account any … judgment, decision, declaration or advisory opinion of the European Court of Human Rights” when deciding an issue that “has arisen in connection with a Convention right”\footnote{725}{HRA, s 2(1).} Additionally, section 3 of the HRA states:

So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.\footnote{726}{HRA, s 3(1).}

The European Convention, however, does not dictate English law. As Lord Phillips declared in R. v. Horncastle:

\footnote{722}{See e.g. Stuesser, supra note 272 at 7. Stuesser points out that it takes time for the police to get a suspect to speak to them.} \footnote{723}{European Convention, supra note 81. See e.g. Michael & Emmerson, supra note 46 at 4.} \footnote{724}{Human Rights Act 1998 (UK), c 42 [HRA].} \footnote{725}{HRA, s 2(1).} \footnote{726}{HRA, s 3(1).}
The requirement to “take into account” the Strasbourg jurisprudence will normally result in the court applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions where this court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to this court to decline to follow the Strasbourg decision.\textsuperscript{727}

It is therefore clear that while the Convention does not completely bind British law, the HRA does require British laws to be consistent with the Convention. Consequently, several cases have challenged the restrictions to the right silence imposed by the Northern Ireland Order and CJPOA by arguing they violate the European Convention. Article 6(1) of the Convention states, in part:

\textit{In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.}\textsuperscript{728}

In addition, Article 6(2) specifically enshrines the presumption of innocence\textsuperscript{729} and Article 6(3) enshrines several other rights for a criminal defendant, such as: being informed promptly about the nature and source of the accusation; having adequate time and facilities to prepare a defence; being able to defend him or herself in person or through legal assistance; having free legal advice if unable to afford to pay a lawyer and justice requires such assistance; having the right to examine witnesses; and having the right to an interpreter.\textsuperscript{730}

\textsuperscript{727} R v Horncastle, [2009] EWCA Crim 964 (SC) at para 11 [Horncastle].
\textsuperscript{728} European Convention, supra note 81 at art 6(1).
\textsuperscript{729} Ibid art 6(2).
\textsuperscript{730} Ibid art 6(3).
Articles 5 and 7 of the Convention set out several other legal rights that attach to a person subjected to the criminal process, although most of the enumerated rights do not directly relate to pre-trial interrogation or trial so they are less likely to have an influence on the right to silence. While the Convention does not expressly identify the right to silence or the privilege against self-incrimination as protected rights, the European Court of Human Rights ("ECHR") has determined that both rights are implicit within the wording of Article 6. The leading cases, some of which were briefly mentioned in Chapter II, are Funke v. France and Saunders v. United Kingdom, where the ECHR held that the right to a fair hearing enshrined in Article 6(1) includes the privilege against self-incrimination. Additionally, in Murray v. United Kingdom and Condron v. United Kingdom, the ECHR held that Article 6(1) protected the right to silence. These cases will be discussed in more detail later in this chapter.

12. Summary

The discourse over the right to silence which began in Great Britain in the early 1970s was a long, tortuous and at times combative debate. The legal community, including the judiciary and academia, was often divided on the issue. Two royal commissions and two government advisory groups studied the right to silence over two decades, but a consensus could not be achieved. Police misconduct while investigating crimes and interrogating suspects in the 1970s and 1980s,
some of which resulted in notorious wrongful convictions, created a public concern over police malfeasance which resulted in the enactment of strict statutory controls on police investigations, such as the very prescriptive and highly technical PACE and its Codes of Practice. At the same time, concern over increasing crime throughout England and the violence associated with Northern Ireland set the stage for politicians to point to the right to silence as an obstacle to convicting sophisticated criminals and domestic terrorists.738 As well, the ideology of the Conservative government of the day, which included a crime control and managerialism agenda, set the stage for legislation that would significantly restrict the right to silence despite the concerns regarding miscarriages of justice.

In the end, the door to the sanctuary of the right to silence – a door that had withstood several earlier attempts to breach it – was finally rammed open and legislation severely curtailing the right to silence at both the pre-trial and trial stages of the criminal process was enacted. While, on its face, the right to silence was retained in Britain, as suspects and persons accused of committing a crime did not have to answer police questions or testify at trial, a decision to remain silent now extracted a potentially high price from the silent suspect or accused because the judge or jury could draw any inference they considered appropriate, including an inference of guilt, from that silence. Through the Northern Ireland Order, CJPOA and CPIA, Britain’s Parliament struck a serious blow to the right to silence and it would be up to the courts to determine just how significant a blow it would be.

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738 Starmer & Woolf, “The Right to Silence” in Walker & Starmer, supra note 21 at 116. Starmer and Woolf argue that the claim criminals “were escaping justice by remaining silent” was unsubstantiated and contrary to empirical evidence.
D. JUDICIAL RESPONSE TO THE LEGISLATIVE RESTRICTIONS ON THE RIGHT TO SILENCE

1. Introduction

Judicial response to the legislative enactments restricting the right to silence was mixed, reflecting a difference of opinion that mirrored the academic debate. The “most controversial of the reforms”, according to Dennis, was section 34 of the CJPOA, which received “widespread opposition within the legal profession.”739 Dennis has studied the judicial response to section 34 of the CJPOA, which allows the drawing of an adverse inference from pre-trial silence in prescribed circumstances, and its counterpart, Article 3 of the Northern Ireland Order, in both the domestic courts of Britain and the ECHR. In Dennis’s view, the approach adopted by both judicial jurisdictions, while not completely neutralizing the impact of the adverse inference rule, has significantly restricted its practical impact so that its effect has been “much less than it might have been had the courts had more sympathy for its objectives.”740 Redmayne has also suggested that the judicial response to both sections 34 and 35 of the CJPOA has been “mixed, with some decisions being more, and some less, cautious about their interpretation.”741 Redmayne has also pointed out that, while sections 36 and 37 are “apparently commonly used”, they have not been considered to any great extent by British courts. Redmayne’s explanation for this is the “relatively specific nature of the inferences, along with the triggering conditions which require clear notice to the suspect make them fairly uncontroversial.”742

739 Dennis, “Silence in the Police Station”, supra note 732 at 25.
740 Ibid at 26.
741 Redmayne, supra note 123 at 1054.
742 Ibid at 1049.
2. Domestic Courts

The move to restrict the right to silence in the 1980s and 1990s was due in no small part to the influence of some members of the judiciary. As previously mentioned, one striking example of the judiciary’s sceptical view of the right to silence was Lord Lane’s admonition in *R. v. Alladice* that: “It is high time that a proper comment was permitted on the silence of a detainee when interviewed by the police but who produced at his trial an explanation of or defence to the charge which the police had had no chance to verify.”\(^{743}\) As the *Northern Ireland Order* was the first piece of legislation to take direct aim at the right to silence,\(^ {744}\) it was the first to be considered by the courts.

a. Criminal Evidence (Northern Ireland) Order

Easton\(^ {745}\) and Redmayne\(^ {746}\) have both observed that judges in Northern Ireland and England were initially quite cautious in their approach to the restrictions placed on the right to silence found in the *Northern Ireland Order*. In an early case, *R. v. Smyth*,\(^ {747}\) Kelly L.J. dealt with the issue of whether or not an adverse inference could arise from the accused’s failure to testify. (While silence at trial is not a matter of specific study in this paper, some judicial decisions regarding the right to silence at trial are quite relevant to the issue of pre-trial silence as similar reasoning and principles apply to both stages of the criminal process). Kelly L.J. adopted a cautious approach, stating: “It seems to me that in some cases the failure of an accused to give

\(^{743}\) *Alladice*, *supra* note 467 at 381.

\(^{744}\) Other than a few pieces of targeted legislation dealing with, for example, corporate fraud or drug related crimes. See discussion at Chapter III.C.10, above, for a brief discussion of some of the legislation.

\(^{745}\) *Easton*, *supra* note 21 at 86.

\(^{746}\) *Redmayne*, *supra* note 123 at 1054.

\(^{747}\) *Belfast Crown Court* (20 October 1989), as cited in *Easton*, *supra* note 21 at 86.
evidence may justify a finding of guilt where the weight of the prosecution evidence just rests on the brink of the necessary standard of proof.”

However, as Starmer and Woolf have noted, “[w]ithin a relatively short period of time … the judiciary of Northern Ireland began to change tack.”

So, in R. v. Gamble, an adverse inference was drawn when the accused failed to testify even though he had spoken to the police and, in R. v. McLernon, the same judge who had taken such a cautious approach in Smyth (Kelly L.J.) retracted from his original position, emphasizing that “in certain cases, the refusal to give evidence may in itself, and without more, increase the weight of a prima facie case to the standard of proof beyond a reasonable doubt.” In upholding Kelly L.J.’s decision, the Northern Ireland Court of Appeal concluded that an adverse inference could be drawn when an accused fails to mention a fact upon which he or she later relies even when the accused does not specifically lead direct evidence. The Court stated:

…the accused can “rely on a fact in his defence” within the meaning of Article 3 even though neither he nor a witness called on his behalf has given evidence of that fact. One way in which this could happen (and there may be others which may fall to be considered in other cases) would be where defence Counsel suggested a fact, which assisted the accused, to a prosecution witness in the course of cross-examination and the witness accepted it. In that instance we consider that the fact would be one “relied on in his defence in those proceedings”, even if no evidence was called on behalf of the accused.

\[\text{\textsuperscript{748} Ibid.} \]
\[\text{\textsuperscript{749} Starmer & Woolf, “The Right to Silence” in Walker & Starmer, supra note 21 at 105.} \]
\[\text{\textsuperscript{750} [1989] NI 268 [Gamble].} \]
\[\text{\textsuperscript{751} [1990] 10 NIJB 91 [McLernon].} \]
\[\text{\textsuperscript{752} Michael & Emmerson, supra note 56 at 8.} \]
\[\text{\textsuperscript{753} [1992] 3 NIJB 41, as cited in Easton, supra note 21 at 86.} \]
In *R. v. Quinn*,\(^{754}\) the Northern Ireland Court of Appeal dealt with the issue of whether the absence of legal advice affects the drawing of an adverse inference when an accused remains silent. The accused, Quinn, had been questioned under the provisions of *Northern Ireland (Emergency Provisions Act) 1987*,\(^{755}\) which granted a suspect the right to speak to legal counsel. Quinn had been interviewed without his solicitor being present and invoked his right to silence. The Court of Appeal concluded that a “common sense” adverse inference could be drawn from silence and that such an inference “should not be stultified by the existence of the right to legal advice given by section 15 of the Northern Ireland (Emergency Provisions) Act.”\(^{756}\) Mirfield has suggested that the *Quinn* case “was a rather peculiar one”, as the Court concluded Quinn “had no need for legal advice.”\(^{757}\) Mirfield contends that a similar decision would not necessarily be automatic in other cases, asserting: “It does not at all follow that, under section 34, it will be held irrelevant, in all cases, to the decision whether or not the accused could reasonably have been expected to mention the fact in question, that he asked for but was (legitimately) denied legal advice.”\(^{758}\) Having made this point, though, Mirfield goes on to predict:

…given the statutory scheme and the way in which … the courts seem inclined to interpret it, it is very likely that, where no breach of the accused’s right to advice is made out, it will be held that the judge should leave it to a … jury to decide what, if any, adverse inference may be properly drawn, rather than rule out adverse inferences altogether.\(^{759}\)

\(^{754}\) [1993] NI 351 (NICA) [Quinn].


\(^{756}\) Easton, *supra* note 21 at 88. The issue of lack of availability of legal advice for a suspect before he or she makes a decision to invoke the right to silence was also canvassed by the ECHR in *Murray v UK*, *supra* note 105. The Court emphasized the importance of legal advice in a regime such as the one imposed by the *Northern Ireland Order*.

\(^{757}\) Mirfield, *supra* note 71 at 257.

\(^{758}\) *Ibid*, emphasis in original.

\(^{759}\) *Ibid*. It should also be noted that the *CJPOA* was amended to prohibit an adverse inference when the accused is questioned at an “authorized place of detention” and the accused is not provided an opportunity to seek legal advice before being questioned. See discussion accompanying note 687, *supra*. 

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In *Kevin Shawn Murray v. Director of Public Prosecutions*, the Northern Ireland Court of Appeal,\(^{760}\) and later the House of Lords,\(^{761}\) once again dealt with the issue of silence at trial. While acknowledging that a simple refusal of an accused to testify could not indicate guilt on its own, the Northern Ireland Court of Appeal did confirm that such silence might be considered as part of the overall case against the accused. In this regard, the Court stated:

… where common sense permits it, it is proper in an appropriate case for the court to draw the inference from the refusal of the accused to give evidence that there is no reasonable possibility of an innocent explanation to rebut the prima facie case established by the evidence adduced by the Crown, and for the drawing of this inference to lead on to the conclusion, after all the evidence has been considered, that the accused is guilty.\(^{762}\)

The House of Lords confirmed the approach taken by the Court of Appeal, but also emphasized that an inference could only be drawn after the prosecution established a *prima facie* case.\(^{763}\)

Lord Slynn remarked:

The accused cannot be compelled to give evidence but he must risk the consequences if he does not do so. Those consequences … include in a proper case the drawing of an inference that the accused is guilty of the events with which he is charged…. If parts of the prosecution had so little evidential value that they called for no answer, a failure to deal with those specific matters cannot justify an inference of guilt. On the other hand, if aspects of the evidence taken alone or in combination with other facts clearly call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no explanation and that the accused is guilty.\(^{764}\)

\(^{760}\) (1993), 97 Cr App R. 151 (NICA) [*Murray*].

\(^{761}\) *Murray v DPP*, [1994] 1 WLR 1 (HL) [*Murray v DPP*].

\(^{762}\) As cited in Easton, *supra* note 21 at 89.

\(^{763}\) *Ibid* at 91.

\(^{764}\) As cited in Michael & Emmerson, *supra* note 56 at 9.
b. **Criminal Justice and Public Order Act**

A few years after the *Northern Ireland Order* was enacted, British courts had to deal with the *CJPOA*. One of the first *CJPOA* cases to be heard by the English Court of Appeal dealt with silence at trial under section 35. In *R. v. Cowan*, the defendants argued that the adverse inference allowed by section 35 when an accused fails to testify violates the presumption of innocence and shifts the burden of proof to the accused. Counsel for Cowan argued that such a fundamental shift in the law should only be applied in exceptional cases. The Court of Appeal rejected Cowan’s submission, concluding that “the plain words of the section simply do not justify confining its operation to exceptional cases.”

Lord Chief Justice Taylor noted: “It should be clear that the right to silence remains. It is not abolished by the section; on the contrary, subsection (4) expressly preserves it. As to inhibitions affecting a defendant’s decision to testify or not, some existed before the 1994 Act.” Considering the question of whether the adverse inference rule shifted the burden of proof to the accused, the Lord Chief Justice commented:

> It is further argued that the section alters the burden of proof or “waters it down” to use Mr. Mansfield’s phrase….In our view that argument is misconceived. First, the prosecution have to establish a prima facie case before any question of the defendant testifying is raised. Secondly … the court or jury is prohibited from convicting solely because of an inference drawn from the defendant’s silence. Thirdly, the burden of proving guilt to the required standard remains on the prosecution throughout. The effect of section 35 is that the court or jury may regard the inference from failure to testify as, in effect, a further evidential factor in support of the prosecution case. It cannot be the only factor to justify a conviction and the totality of the evidence must prove guilt beyond a reasonable doubt.

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765 (1955) 3 WLR 818 (CA). Re-cited for convenience; original citation at supra note 228.  
766 *Ibid* at 822.  
767 *Ibid*.  
768 *Ibid*.  

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However, while the Court of Appeal upheld the validity of section 35, it emphasized that it “did not follow that an adverse inference must be drawn in every case.” The Court stated: “We accept that apart from the mandatory exceptions in section 35(1), it will be open to a court to decline to draw an adverse inference from silence at trial and for a judge to direct or advise a jury against drawing such inference if the circumstances of the case justify such a course.”

The approach taken in Cowan concerning section 35 was, according to Redmayne, mirrored in regard to section 34 in R. v. Webber, where the House of Lords stated that “the object of section 34 is to bring the law back into line with common sense.” However, while Cowan “rejected attempts to reduce or marginalize the impact” of section 35 and Webber suggested a similar philosophy towards section 34, this view was by no means universally held by the judiciary. So, for example, Lord Chief Justice Bingham raised a cautionary note in R. v. Bowden when he stated: “Proper effect must of course be given to these provisions [of CJPOA]. But since they restrict rights recognized at common law as appropriate to protect defendants against the risk of injustice, they should not be construed more widely than the statutory language requires.” This cautious approach was echoed by the Court of Appeal in R. v. Lancaster, where the Court warned against “the routine application” of the CJPOA restrictions on the right to silence.

769 Michael & Emmerson, supra note 56 at 10.
770 Cowan, supra note 765 at 823.
771 [2004] 1 Cr App R 40 (HL) [Webber].
772 As cited in Redmayne, supra note 123 at 1054.
773 Ibid.
774 [1999] 2 Cr App R 176 (CA) [Bowden].
775 Ibid at para 17. While the Court of Appeal was specifically dealing with silence at trial under CJPOA section 35, the same reluctance to wholeheartedly embrace the restrictions to the right to silence applied to pre-trial right to silence as well. See Redmayne, supra note 123 at 1054 and Dennis, “Silence in the Police Station”, supra note 732 at 30.
776 [2001] EWCA Crim 2836 [Lancaster].
777 Ibid at para 17. While the Court of Appeal was specifically dealing with silence at trial under CJPOA section 35, the same reluctance to wholeheartedly embrace the restrictions to the right to silence applied to pre-trial right to silence as well. See Redmayne, supra note 123 at 1054 and Dennis, “Silence in the Police Station”, supra note 732 at 30.
In *R. v. Argent,*\textsuperscript{778} the Court of Appeal clarified what was needed to draw an adverse inference under section 34 of the *CJPOA*. The accused, Argent, had been convicted of manslaughter by a jury after they had been directed by the trial judge to consider his silence during police questioning. Argent had been identified in a police identification parade but refused, on his solicitor’s advice, to reply to police questions in a subsequent interview. At Argent’s trial, the judge told the jury that it was open to them to draw an adverse inference from the accused’s silence during the police interview. The Court of Appeal dismissed Argent’s appeal and, in so doing, set down six conditions that must be satisfied before a jury may draw an adverse inference based on an accused’s silence under section 34. Starmer and Woolf have summarized the conditions as:

(a) the accused must be charged with a criminal offence;
(b) the accused’s silence occurred before he or she was charged;
(c) the silence occurred during questioning under caution by a constable or other person listed in the section;
(d) the questioning must have been directed at trying to discover whether or by whom the offence was committed;
(e) at trial the accused must rely on the fact which he or she did not mention; and
(f) the circumstances in which the accused remained silent must have been such that he or she could reasonably have been expected to have mentioned it when questioned.\textsuperscript{779}

Regarding the final condition, the Court of Appeal emphasized that the circumstances should not be construed restrictively and issues such as the accused’s “age, experience, mental capacity, state of health, sobriety, tiredness, knowledge, personality and legal advice are all part of the relevant circumstances”.\textsuperscript{780}

\textsuperscript{778} [1997] 2 Cr App R 27(CA) [Argent].
\textsuperscript{780} *Ibid* at 107.
In R. v. Betts and Hall, the English Court of Appeal concluded that an adverse inference could not be drawn when an accused simply admits to a fact asserted by the prosecution at trial. According to Dennis, the reasoning of the Court was based on the underlying policy of section 34 of the CJPOA, which he suggests “is to allow such positive assertions to be investigated and tested beforehand so that the jury can have the benefit of prosecution’s informed response to the assertion. The same consideration does not apply to a bare admission.”

However, in R. v. Milford, the Court of Appeal concluded that an adverse inference could be drawn when an accused responds at trial to a fact asserted by the prosecution by attempting to explain the asserted fact. Dennis has suggested that the distinction between the Milford and Betts and Hall cases appears to be whether or not the assertion that was not mentioned by the accused during police questioning, but upon which the accused relies at trial, is one that “could have been investigated had it been mentioned in interview.”

In R. v. Mountford and R. v. Gill, the Court of Appeal concluded that a section 34 inference could not arise “where the fact relied on by the defence is the central issue in the case.” In both the Mountford and Gill cases the accused were charged with drug trafficking after the police seized a quantity of drugs during raids on premises in which they were present. Both accused testified for the first time at trial that they were only using the drugs, claiming the drug trafficking was being committed by others on the property. Both accused also maintained they had not mentioned these facts to the police because they did not want to implicate other

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781 [2001] 2 Cr App R 257 (CA) [Betts].
782 Ibid.
783 Ibid.
784 [2001] Crim L R 330 (CA) [Milford].
785 Ibid.
786 Ibid.
787 [1999] Crim L R 575 (CA) [Mountford].
788 [2001] 1 C. App R 160 (CA) [Gill].
789 Ibid.
people. The Court of Appeal determined that, in such circumstances, a section 34 adverse inference was not available. Dennis has summarized the rationale underlying these decisions as follows:

The Court of Appeal held that section 34 inferences should not have been left to the jury. This was because the fact mentioned late was the central issue – who was dealing – and the jury could not reject the defendant’s explanation for the late mention of the identity of the dealer without rejecting the truth of that fact itself. In other words, if the accused’s explanation that he was protecting the other was not true, that could only be because he himself was the dealer. Once the jury had come to this conclusion, a section 34 inference could not logically help to decide whether the defendant was guilty – the point has already been concluded against him.790

The Gill case also confirmed the ECHR position, as stated in Condron v. United Kingdom,791 that an adverse inference from failure to mention facts later relied on in the accused’s defence can only arise after the judge or jury is satisfied that the prosecution has shown a prima facie case.792 Furthermore, in R. v. Nickolson,793 the Court of Appeal held that a section 34 inference could not be drawn when the “defendant produces at trial a hypothetical reason for some incriminating fact … and the reason does not have a foundation of fact known to the defendant at the time of the interview”, as it “was not a positive assertion about which the defendant could have been interviewed at the time.”794

Of obvious concern when deciding whether or not an adverse inference should be drawn based on the accused’s failure to mention a fact during an earlier police interview is the reason for the accused failing to mention the fact. Easton and others have pointed out that there may be innocent reasons why a suspect chooses to remain silent, such as timidity, personal

790 Ibid.
791 Condron v. UK, supra note 736.
792 Dennis, “Silence in the Police Station”, supra note 732 at 36.
793 [1999] Crim L R 61 (CA) [Nickolson].
794 Dennis, “Silence in the Police Station”, supra note 732 at 32.
embarrassment, distrust of the police or protecting others. While obviously not a domestic court, the ECHR dealt with the matter of possible innocent reasons lying behind a suspect’s decision to remain silent during police questioning in two important cases. In *Condron v. United Kingdom*, the ECHR stressed that the jury should be “directed that if it was satisfied that the applicants’ silence at the police interview could not sensibly be attributed to their having no answer or none that would stand up to cross-examination it should not draw an adverse inference.” Additionally, in *Beckles v. United Kingdom*, the ECHR emphasized that an adverse inference should only be drawn when “the accused’s silence ‘was in effect consistent only with his guilt.’” And, in *R. v. Chenia*, the English Court of Appeal “put the requirement in terms of the jury being ‘sure’ that there were no explanations for silence.”

As mentioned previously, *PACE* provides a statutory right to legal advice when a suspect is officially questioned by the police, including the right to have legal counsel present during the police interview. Consequently, British courts have had to deal with the relationship between the adverse inference rule established by section 34 of the *CJPOA* and the provisions of *PACE*, which allow the suspect to obtain and actively utilize a lawyer or other type of legal adviser when being questioned. Obviously, one of the main areas of concern for the accused and his or her lawyer is whether or not to exercise the right to silence. In the United States and Canada, the matter of providing legal advice is quite straightforward as an accused who decides to remain

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796 *Condron v UK*, *supra* note 736.
797 *Ibid* at 61-62, as cited in Redmayne *supra*, note 123 at 1059.
798 [2002] ECHR 661[@Beckles v UK].
800 [2003] 2 Cr App R 6 (CA) [@Chenia].
801 Redmayne, *supra* note 123 at 1059.
silent when questioned by the police, with rare exceptions such as an alibi defence, will not be prejudiced by his or her silence as an adverse inference will not arise (at least not theoretically). In Britain, however, the matter is much more complicated as the legal adviser must consider the very distinct possibility that silence on the part of his or her client during the police interview may result in an adverse inference at trial. As Redmayne has pointed out, “[d]espite section 34 and the new caution, some legal advisers still advise suspects to refuse to answer questions. Such advice is now likely to be qualified; suspects will be told that while silence is risky as inferences may be drawn against them at trial, it is still the best option.”

The case law dealing with the question of whether or not legal advice to remain silent will block an adverse inference has been contradictory. Redmayne has analyzed the cases and concludes, “[t]he courts…have not handled the problem of legal advice well.” In Condron, the ECHR “referred to the need for the fact of legal advice to be given ‘appropriate weight’ by the domestic courts”, but did not automatically prohibit an adverse inference from being drawn when the silence was allegedly the product of legal advice. However, in the English Court of Appeal case of Betts and Hall, Kay L.J. stated: “If it is a plausible explanation that the reasoning for not mentioning facts is that [defendant] acted on the advice of his solicitor and not because he had no, or no satisfactory, answer to give then no inference can be drawn.”

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802 See discussion at Chapter IV.B.4.d, below.
803 Redmayne, supra note 123 at 1067.
804 Ibid at 1070.
805 Condron v UK, supra note 736.
806 Dennis, “Silence in the Police Station”, supra note 732 at 34.
807 Betts, supra note 781.
808 Dennis, “Silence in the Police Station”, supra note 732 at 34.
Yet, a few years later the Court of Appeal took a different position in \textit{R. v. Howell},\footnote{[2005] 1 Cr App R 1 (CA) \textit{[Howell]}.} where it stated:

The public interest that inheres in reasonable disclosure by a suspected person of what he has to say when faced with a set of facts which accuse him, is thwarted if currency is given to the belief that if a suspect remains silent on legal advice he may systematically avoid adverse comment at his trial. And it may encourage solicitors to advise silence for other than good objective reasons….There must always be soundly based objective reasons for silence, sufficiently cogent and telling to weigh in the balance against the clear public interest in an account being given by the suspect to the police.\footnote{As cited in Redmayne, \textit{supra} note 123 at 1068.}

Moreover, in \textit{R. v. Beckles},\footnote{[2005] 1 WLR 2829 (CA) \textit{[Beckles]}.} the Court of Appeal set down a two stage test to determine whether or not an accused’s claim that he or she was simply relying on legal advice to remain silent is sufficient to negate the adverse inference: first, was the accused’s reliance on the legal advice genuine; and second, was the reliance reasonable in the circumstances?\footnote{Adverse Inferences: Legal Guidance: The Crown Prosecution Services, online: Crown Prosecution Service \textltt{http://www.cps.gov.uk/legal/a_to_c/adverse_inferences/}.}

Redmayne has concluded, “the courts have been reluctant to hold that legal advice blocks an inference from silence”\footnote{Redmayne, \textit{supra} note 123 at 1067.} because, as stated by the Court of Appeal in \textit{R. v Beckles}, they “have not unreasonably wanted to avoid defendants driving a coach and horses through section 34 and by so doing defeating the statutory objective.”\footnote{\textit{Beckles, supra} note 811, as cited in Redmayne, \textit{ibid}.} However, Redmayne considers the judiciary’s refusal to allow legal advice to remain silent to be considered a valid reason for the accused to remain silent to be a “deeply cynical”\footnote{\textit{Ibid}.} position for the courts to take. As Redmayne states: “It
seems reasonable to suppose that suspects trust the advice given to them by their lawyers, and not too unreasonable to suggest that the legal system should respect that assumption.”

One tactic developed by defence counsel to deal with the dilemma created by section 34 of the CJPOA is to have the accused present a prepared written statement to the police “accompanied by an oral declaration that the defendant will not answer questions about the written statement.” In R. v. Ali and others, one of the accused gave the police a written statement “which set out an alibi in similar terms to the defendant’s subsequent evidence” but refused to answer any questions about the alibi. The Court of Appeal rejected a section 34 inference since the accused had in fact mentioned the fact upon which he later relied at trial. Dennis has commented that the Court of Appeal “refused to do more than give it [section 34] its literal meaning.” According to Dennis, even when an accused refuses to answer questions about an alibi which he or she brings up during the police interview, as long as the defence presented at trial is consistent with the alibi mentioned to the police an adverse inference under section 34 cannot be drawn. Dennis has suggested that the Ali case is an important one as it “seems to give a green light to the use of prepared statements in all cases where the defendant has a story that he will stick to at trial.”

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816 Ibid. An offshoot of Beckles and its companion cases, which emphasize that legal advice to remain silent will not automatically negate an adverse inference being drawn from the accused’s silence, is the difficult question of whether an explanation that the accused’s decision to remain silent was based on legal advice waives solicitor client privilege. Redmayne has suggested that the privilege will not be waived by a simple assertion at trial that the accused’s silence was based on legal advice, nor will it be waived by the accused calling the solicitor as a witness to corroborate the fact that the legal advice given was to remain silent. Redmayne goes on to state that solicitor client privilege will even not be waived when the accused calls the solicitor as a witness to corroborate a claim that the accused mentioned a particular fact to the solicitor, but “going further, to give evidence about the reasons for advice, such as lack of disclosure, is likely to constitute waiver.”

817 Dennis, “Silence in the Police Station”, supra note 732 at 32.
818 [2001] EWCA Crim 863 (CA) [Ali].
819 Dennis, “Silence in the Police Station”, supra note 732 at 32.
820 Ibid.
821 Ibid.
Another issue that has arisen regarding section 34 of the *CJPOA* concerns an accused who claims that he or she remained silent during the police interview because of a lack of sufficient information upon which to make an informed decision whether to respond or remain silent. In *R. v. W.*, the police did not reveal the existence of DNA evidence that connected the suspect to the sexual assault for which he was being investigated. The accused denied intercourse with the victim and his apparent lie was put to the jury. In allowing the evidence to be put before the jury, the Court of Appeal stated, “there is simply no rule of law or practice requiring the police to disclose the full extent of their relevant evidence before questioning a suspect.”

Redmayne, however, has emphasized that *R. v. W.* was not a case where the accused remained silent, as he in fact spoke and offered an explanation which turned out to be false. Redmayne further suggests that “lack of disclosure may play a role in preventing adverse inference where it means that the defendant was never prompted to mention a particular fact.” Redmayne cites *R. v. Nickolson* to support his argument. In *Nickolson*, the accused was not told at the police interview that his semen had been found on the victim’s clothing. Consequently, the accused’s failure to mention an innocent explanation at the police interview as to how his semen ended up on the victim’s dress did not give rise to an adverse inference under section 34 of the *CJPOA* because “he could not have been expected to suggest an innocent explanation for its being there.”

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823 As cited in Redmayne, supra note 123 at 1062. Redmayne does however suggest there are some duties placed on the police, including: not to actively mislead the accused; tell the accused what offence he or she has been arrested for; and when the accused has been arrested for one offence but the police know his or her answers may be incriminating in relation to another more serious offence, tell the accused of this. If the police breach this final duty, Redmayne suggests the evidence may be excluded in the trial of the more serious offence.
824 Ibid at 1064.
825 Ibid at 1063.
826 *Nickolson*, supra note 793.
827 Redmayne, supra note 123 at 1064.
828 Ibid.
suspect’s silence, Redmayne asserts: “So long as a suspect knows the allegation against him, he is basically expected to respond with his defence even if there appears to be very little evidence against him.”

The British courts also confirmed that section 34 does not result in an automatic conclusion that an adverse inference must be drawn, even when the requisite conditions set out in the section are satisfied. In *R. v. Abdalla*, the Court of Appeal confirmed comments made in its earlier decision of *R. v. Cowan* that trial judges have discretion to decide whether or not to give a section 34 direction to the jury and how the direction should be worded. And finally, the British courts also made it clear that, in appropriate cases, judges can invoke their discretion under either sections 78(1) or 82(3) of PACE to exclude evidence of silence even when the statutory test under the CJPOA is met. Additionally, section 38(6) of PACE continues the common law residual discretionary power of the court to exclude evidence where admission of the evidence would be patently unfair or an abuse of process.

3. **European Court of Human Rights**

When the British government started to restrict the right to silence through the *Northern Ireland Order* and CJPOA, some critics of the move, such as Starmer and Woolf, suggested the notion of curtailing the right to silence would receive a rough ride when it reached the ECHR

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829 *Ibid* at 1064-65. Redmayne notes that there may not be universal agreement within the judiciary about this view, citing the ECHR in *Murray v. UK*, where the Court suggested that drawing an inference from silence was permissible “in situations which clearly call for an explanation”. He also advances a normative argument referring to Greenawalt’s theory that it is morally acceptable to remain silent when the questioning is based on slim evidence, as such silence “is an appropriately disdainful response to questioning in the absence of good reasons for suspicion”.

830 *R v Abdalla* [2007] EWCA Crim 2495 (CA) [Abdalla].

831 *Cowan*, *supra* note 765.

832 Mirfield, *supra* note 71 at 269.

and was tested under the *European Convention*.\(^{834}\) However, it appears the outcome has not been as predicted. While the ECHR has held that the right to silence is protected under Article 6 of the *Convention*, it has also concluded that the right to silence is not an absolute right and “can be qualified, but only by measures which strike a balance between the exercise of the right to silence and the drawing of an adverse inference from failure to mention facts relied on subsequently.”\(^{835}\)

As mentioned previously, in its 1993 landmark decision of *Funke v. France*,\(^{836}\) the ECHR affirmed that the “right to a fair trial under Article 6 includes the right of anyone charged with a criminal offence … to remain silent and not to contribute to incriminating himself.”\(^ {837}\) The accused, Funke, had refused to provide information to customs officers about some foreign bank accounts despite a French law that compelled him to do so. He was prosecuted and fined for failure to cooperate. Funke first appealed to the European Human Rights Commission\(^{838}\) and then to the ECHR, claiming “that there was a right not to give evidence against oneself both in the legal orders of the Contracting States, in the European Convention on Human Rights and in the ICCPR.”\(^{839}\) While the Human Rights Commission ruled in favour of France and found no violation of Article 6, the ECHR took the opposite position, concluding:

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\(^{835}\) Dennis, “Silence in the Police Station”, *supra* note 732 at 37.

\(^{836}\) *Funke, supra* note 83.


\(^{838}\) The European Human Rights Commission was the vetting body to determine if individual human rights cases should proceed to the ECHR, however the Commission was abolished in 1998.

\(^{839}\) Michael & Emmerson, *supra* note 56 at 11.
The special features of customs law … cannot justify such an infringement of the right of anyone charged with a criminal offence, within the autonomous meaning of this expression in Article 6, to remain silent and not to contribute to incriminating himself. There has accordingly been a breach of Article 6(1).  

Approximately one year after its decision in Funke, the ECHR once again considered the right to silence in Saunders v. United Kingdom. The accused, Saunders, was the chairman of a large British company. Saunders had been charged with criminal offences relating to a corporate takeover. At his criminal trial, the prosecution wished to use as part of its case statements Saunders had given to government inspectors under a statutory obligation imposed by the Companies Act 1985, which placed Saunders “under a legal duty to answer the inspectors’ questions enforceable by proceedings for contempt.” Saunders argued that the use of such compelled statements in his criminal trial violated Article 6 of the European Convention. The ECHR agreed with Saunders, finding that the use of the compelled statements violated Saunders’s right to silence. The Court noted that determining whether a statement given under compulsory or coerced questioning violated an accused’s right against self-incrimination “depended on the use made by the prosecution at the trial of the statement which he had been obliged to give”, not on whether the accused’s statement was in itself incriminating.

While Funke and Saunders confirmed that the right to silence and privilege against self-incrimination were implicit in Article 6 of the European Convention, they did not deal with the more subtle question raised by the British approach to the right to silence whereby the accused’s silence could lead to an adverse inference being drawn from that silence. However, in 1996 the

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840 Ibid at 12.
841 (1997), 23 EHRR 313. Re-cited for convenience; original citation at supra note 85.
842 Michael & Emmerson, supra note 56 at 12.
843 Companies Act, supra note 715.
844 Michael & Emmerson, supra note 56 at 12.
ECHR dealt with the adverse inference issue in *Murray v. the United Kingdom*, which involved the adverse inference provisions of the *Northern Ireland Order*. The accused, Murray, had been arrested by the police in a house in which an IRA informer had been held captive. Murray invoked his right to silence by refusing to explain his presence in the house to the police at the time of his arrest and by refusing to testify at his trial. The trial judge drew “very strong inferences against him following the presentation of a formidable case”, and Murray was convicted of conspiracy to commit murder and unlawful imprisonment. Murray took his case to the ECHR, which rejected an “absolutist position” and opted for a contextual analysis that considered the “totality of the circumstances.” Concerning his pre-trial silence, the majority of the EHCR concluded that Murray had not been compelled to incriminate himself as he had in fact maintained his silence. Moreover, the majority of the Court held that the adverse inferences flowing from Murray’s silence were not improper because they were “subject to legislative safeguards, including the requirement of a warning, the establishment of a prima facie case by the prosecutor, the limitation to cases calling for an explanation, and the ultimate discretion vested in the trial judge to determine whether or not to draw the adverse inference.” The ECHR therefore concluded that “the drawing of inferences from his refusal, at arrest, during police questioning and at trial, to provide an explanation for his presence in the house in which the informer was held was ‘a matter of common sense’ and could not be regarded as unfair or unreasonable in the circumstances.” However, while the ECHR rejected the substantive

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846 Michael & Emmerson, *supra* note 56 at 12.
850 *Ibid*.
851 *Ibid* at 375.
challenge to the *Northern Ireland Order*, it went on to conclude that delaying access to legal advice at the police station where Murray was being interviewed violated Article 6 of the *European Convention*.\textsuperscript{853}

Dennis has queried whether the ECHR’s decision might have been different had Murray been tried before a jury, since “Murray was a trial before a Diplock court, where the judge gave a reasoned judgment on fact.”\textsuperscript{854} However, Dennis’s query was answered by the ECHR in 2000 when it rendered its decision in *Condron v. United Kingdom*,\textsuperscript{855} which was briefly mentioned earlier in this chapter. In *Condron*, the two accused were married heroin addicts who had been arrested by the police for drug offences. At the police station their solicitor advised them not to speak to the police based on an assessment that they were unfit to be interviewed because they were withdrawing from drugs. The police physician, however, considered the Condrons to be fit to be interviewed. Both accused declined to make any statements in response to police questioning and, when asked during cross examination at their trial why they had remained silent, they referred to their solicitor’s advice. At their jury trial, the judge rejected a defence application that no adverse inference should be drawn under section 34 of the *CJPOA* since the Condrons had been advised by their solicitor to remain silent. The judge directed the jury that it was for them to decide whether or not any adverse inference should be drawn from the accused’s silence. The Condrons were convicted and the conviction was upheld by the English Court of Appeal. On the accused’s appeal to the ECHR, the Court rejected their argument that the *Murray* case should be distinguished on the basis that it was a decision of a judge, not a jury.

\textsuperscript{853} *Ibid.* As a result of the *Murray* case, *PACE* was amended to prohibit the drawing of an adverse inference under *CJPOA* sections 34, 36 or 37 if the silence occurs at a police station before the suspect is given access to a solicitor. See *CJPOA*, s 34(2A) and *PACE* Code C Annex C, and text accompanying note 687, *supra*.

\textsuperscript{854} Dennis, “Silence in the Police Station”, *supra* note 732 at 27. A “Diplock Court” was a special judge only court that heard terrorist cases in Northern Ireland after the right to jury trials for certain types of offences was suspended due to concerns over possible jury intimidation.

\textsuperscript{855} *Condron v UK*, *supra* note 736.
Although the Court stated that in a jury trial the “judge should give a particularly careful
direction about the conditions under which an adverse inference could be drawn”\(^\text{856}\), it concluded
that if the caution was sufficient “the fact that the jury’s reasoning could not be known and
therefore could not be reviewed was not a fatal objection.”\(^\text{857}\) The Court did however urge
cautions when applying the rule. Similarly, in *Averill v. The United Kingdom*,\(^\text{858}\) the ECHR
confirmed that “the extent to which adverse inferences can be drawn from an accused’s failure to
respond to police questioning must be necessarily limited.”\(^\text{859}\)

It is therefore clear that the ECHR has concluded that the adverse inference rule established
by section 34 of the *CJPOA*, if used with restraint and in a reasonable manner, is compatible
with the *European Convention*; although, the ECHR has also stressed the importance of
achieving an appropriate balance. Dennis has posited that to achieve the balance the following
four conditions must exist: (1) the accused must have been afforded access to legal advice
before being interviewed;\(^\text{860}\) (2) the jury must be directed by the judge to consider the accused’s
reason for silence and not to draw an adverse inference unless they are satisfied that the reason
for the silence was that the accused had “no story to give at the time of the interview or no story
that he was prepared to have questioned or investigated”;\(^\text{861}\) (3) the adverse inference must not be
the “sole or main evidence for conviction”; and (4) “the facts – as established by other evidence

\(^{856}\) Dennis, “Silence in the Police Station”, *supra* note 732 at 27. On the specific facts of the case the ECHR
concluded that the caution had been inadequate.

\(^{857}\) Ibid.


\(^{859}\) Skinnider, *supra* note 9 at 21.

\(^{860}\) Dennis, “Silence in the Police Station”, *supra* note 732 at 28.

\(^{861}\) Ibid at 33.
– must clearly call for an explanation from the accused, an explanation to be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.”

E. CONCLUSION

After a long and often divisive debate, the ideological dogma of the Conservative government in the late 1980s and early 1990s overcame years of common law and the right to silence was significantly curtailed in England, Wales and Northern Ireland through a combination of legislation which allowed for the drawing of an adverse inference based on an accused’s silence in certain situations and a relatively tepid judicial response to those legislative restrictions. Despite the recommendations of two royal commissions, the restrictions imposed on the right to silence in the Northern Ireland Order, CJPOA, CPIA and other statutes dealing with serious fraud and terrorism have placed significant pressure on suspects to talk to the police and testify at their trials because the cost of not doing so – a possible adverse inference, including an inference of guilt – may be too high.

It is, however, arguable that the curtailment of the right to silence was not as drastic or unprecedented as some have suggested, as the courts had long recognized that “common sense” often allowed the trier of fact to consider the accused’s silence in coming to its final decision. Indeed, even two of the most ardent retentionists have conceded that, “[i]n the sense of a right that can be freely exercised without sanction, it is questionable whether the ‘right’ to silence has ever really existed.” It should also be remembered that the right to silence still exists in

862 Ibid at 29.
863 Zuckerman, Principles of Evidence, supra note 72 at 307.
864 Easton, supra note 21 at 176, 181.
Britain, in the sense that “it is true that no one can be forced to speak.” However, as noted by many legal scholars, the concept of the right to silence as a fundamental human right reflective of the inherent value of individual liberty and human dignity no longer has the brilliant shine it once had in England. No longer is a person suspected of committing a crime granted immunity from having to respond to questions about that crime; the choice to remain silent now comes at a cost.

On the other hand, some academics have suggested that the present state of the law governing the right to silence in the United Kingdom has finally found a place where not only a reasonable balance between due process and crime control has been achieved but the law is consistent with common sense. As Theophilopolous has stated: “The English utilitarian model, as modified by recent dicta of the European Court of Human Rights, is a successful compromise between the need to protect the individual during the criminal process and the need to combat crime in the most efficient manner possible.”

Whichever perspective one takes, it is clear that Great Britain has developed a right to silence model that is quite distinct from the Canadian model despite the similarity of the two countries’ legal histories and justice systems. The history and current state of the law governing the right to pre-trial silence in Canada will be discussed next.

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866 Easton, supra note 21 at viii.
867 Theophilopolous, supra note 39 at 509-10.
CHAPTER IV

THE RIGHT TO SILENCE IN CANADA

A. INTRODUCTION

Similar to the development of the right to silence in Britain, Canadian law governing the right to silence evolved primarily within the common law rather than from legislative prescription; although, there are some statutory provisions which impact the right to silence at trial. The right to silence developed as a compatriot of the privilege against self-incrimination, although there has been some disagreement over the exact relationship between the two legal principles. Furthermore, after the proclamation of the Charter of Rights and Freedoms (“Charter of Rights” or “Charter”) in 1982, Canadian courts had to consider the doctrinal question of whether or not the right to silence is a principle of fundamental justice protected by the Charter, as well as the more pragmatic issue of the relationship between the right to silence and other Charter rights, such as the privilege against self-incrimination and the right to counsel.

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868 Section 5 of the Canada Evidence Act, RSC 1985, c C-5 requires witnesses, including an accused, to answer questions when testifying but provides subsequent use immunity. Section 5 reads:

“(1) No witness shall be excused from answering any question on the ground that the answer to the question may tend to crimate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.

(2) Where with respect to any question a witness objects to answer on the ground that his answer may tend to crimate him, or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person, and if but for this Act, or the Act of any provincial legislature, the witness would therefore have been excused from answering the question, then although the witness is by reason of this Act or the provincial Act compelled to answer, the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place, other than a prosecution for perjury in the giving of that evidence or for the giving of contradictory evidence.”

Furthermore, s. 4(6) prohibits the judge or prosecutor from commenting on the accused’s failure to testify. Section 4(6) reads: “The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.”

There are also regulatory and administrative laws that infringe on a person’s right to silence; however, as they do not apply to criminal law they will not be discussed in this thesis. For a discussion of this area of the law, see e.g. Christopher Sherrin, “The Privilege Against Self-Incrimination in Regulatory Proceedings: Beginnings (That Never Began)” (2004) 30 Man LJ 315 (QL).
That the right to silence is recognized as an important legal principle in Canada is without
doubt. Paciocco has noted that the right to silence “has been expressed to be a fundamental
principle on numerous occasions.” However, while the right to silence has been accepted as
an important principle of Canadian law, legal scholars and jurists have disagreed over its scope.
And while the Canadian discourse may have been less intense than the debate in Britain, it has
still had its moments. As Ratushny has commented:

The debate has tended to be recurring and emotional. One side views the concept of
a right against self-incrimination as an essential safeguard to the liberty of a potential
accused (and, therefore, a safeguard to the liberty of all persons). The other side
views it as an unnecessary and obstructive relic of the past which allows the guilty to
escape punishment.”

Two of the leading scholars on the right to silence in Canada are Professors Ratushny and
Paciocco. While their views differ in some significant respects, both have argued that the right
to silence is not a right in itself, but rather a manifestation of the rule of law. Ratushny has
posited a theory that the right to silence at trial is based on the principle of a case to meet, while
the right to silence at the pre-trial stage of the criminal process is based on the principle of an
absence of a legal obligation to cooperate. Paciocco, on the other hand, sees the case to meet
as the underlying rationale for the right to silence at both stages of the criminal process. Ratushny and Paciocco, as well as other Canadian legal scholars, have also argued that the right

869 David M Paciocco, “Self-Incrimination: Removing the Coffin Nails” (1989) 35 McGill LJ 73 at 103 [Paciocco,
“Removing the Coffin Nails”].
870 Ratushny, Self-Incrimination, supra note 5 at 4.
871 Ratushny, ibid at 266; Paciocco, “Removing the Coffin Nails”, supra note 869 at 103.
872 Wall, supra note 76 at 140.
873 Paciocco, Charter Principles, supra note 29 at 544.
to silence is neither a positive right nor an absolute one, and Canadian courts have also emphasized the qualified nature of the right to silence by carving out several exceptions to it.

This chapter will review the evolution of the law governing the right to pre-trial silence in Canada. The analysis will cover the relationship between the right to silence and the privilege against self-incrimination, the application of the Ibrahim rule in Canada, and the connection between the right to silence and right to counsel. Several recent Supreme Court of Canada decisions which have restricted the pragmatic utility of the right to silence at the investigative stage of the criminal process will also be reviewed. As with Chapters II and III, while the focus of the discussion will be on pre-trial silence, occasional reference may be made to the right to silence at trial as the same philosophical underpinnings apply at both stages of the criminal process and the rationale underlying silence at trial often informs the discussion of the right to silence before trial.

B. DEVELOPMENT OF THE RIGHT TO SILENCE IN CANADA

1. Introduction

The early history of the right to silence in Canada paralleled that of England. In Canada, as in England, people suspected or accused of having committed a crime had the right to remain silent based on the “courts’ historical solicitude for an accused’s silence”. It was “settled law that silence in the face of an accusation by or in the presence of the police cannot serve as

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875 See Chapter III.D, below.
876 R v Hebert (1991), 57 CCC (3d) 1 (SCC) [Hebert], per McLachlin J. Re-cited for convenience; original citation at supra note 17.
877 Ibid at 11, per Sopinka J.
evidence against an accused." As noted by Sopinka J. in *Hebert*, the Supreme Court of Canada consistently applied the law as enunciated in *R. v. Christie*, where the English Court of Appeal had affirmed the accused’s right to silence.

However, while it was clear that an accused could remain silent in the sense of not being compelled to make a statement or answer police questioning, the more discrete discussion revolved around whether any inference could be drawn from the accused’s silence in the face of an accusation or police questioning. Additionally, Canadian courts had to deal with the fairly common scenario of an accused who had given a statement to the police later claiming that the statement had been obtained in a manner which infringed his or her right to silence. Judges and legal scholars considering these issues struggled at times with clearly articulating the underlying principles supporting the right to silence, as the right to silence fought for its own independent standing but was often subsumed in a discussion of the privilege against self-incrimination or the voluntary confessions rule.

2. **Privilege Against Self-Incrimination**

While the relationship between the right to silence and privilege against self-incrimination was briefly discussed in Chapter II, as the linkage between the two legal principles has been a recurring theme within the right to silence debate in Canada, a further brief discussion of the issue is necessary in the context of the development of the Canadian law governing pre-trial silence. The debate regarding the extent, if any, to which the right to silence is embedded in the privilege against self-incrimination is quite technical and nuanced. While most academics and jurists recognize the close relationship between the right to silence and privilege against self-

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879 *Christie*, supra note 458.
incrimination, it appears that the general consensus is that the privilege against self-incrimination does not, by itself, grant a general right to silence.\textsuperscript{880}

Ratushny has posited an influential theory which most of the Canadian judiciary appears to have accepted.\textsuperscript{881} Under Ratushny’s thesis, while some self-incrimination principles, such as the voluntariness and adopted admission rules and some other specific statutory provisions,\textsuperscript{882} provide limited protection to suspects or accused persons from being compelled to incriminate themselves through their own mouths, these rules “do not reflect any broader, dynamic principle.”\textsuperscript{883} According to Ratushny, the privilege against self-incrimination has historically been “an extremely narrow concept” covering two “specific procedural and evidentiary rules: the non-compellability of an accused as a witness at his own trial and the section 5(2) protection of a witness not to have testimony used in future proceedings.”\textsuperscript{884} In Ratushny’s opinion, “the concept of a right against self-incrimination is of no relevance” to the right to silence.\textsuperscript{885} However, while Ratushny does not consider the protection against self-incrimination to be a principle upon which the right to pre-trial silence is based, he does assert that another principle – the absence of pre-trial obligation – is a foundational pillar supporting the right to silence at the investigative stage of the criminal process. In Ratushny’s view, the principle of absence of pre-trial obligation is based on the dual foundations of the rule of law and the accusatorial system.\textsuperscript{886}

\textsuperscript{880} Ratushny, “Nailing the Coffin Shut”, supra note 29 at 313.
\textsuperscript{881} Paciocco, “Removing the Coffin Nails”, supra note 869 at 103.
\textsuperscript{882} Ratushny, “Nailing the Coffin Shut”, supra note 29 at 313. For example, Canada Evidence Act s 5, supra note 868.
\textsuperscript{883} Ratushny, ibid.
\textsuperscript{884} Ratushny, Self-Incrimination, supra note 5 at 92.
\textsuperscript{885} Ratushny, “Nailing the Coffin Shut”, supra note 29 at 341.
\textsuperscript{886} Paciocco, “Removing the Coffin Nails”, supra note 869 at 80.
Ratushny argues that the right to silence and privilege against self-incrimination are distinct principles even though they often appear to be conflated because of imprecise terminology. In Ratushny’s opinion, the Supreme Court of Canada definitively rejected the notion that the privilege against self-incrimination is an underlying rationale for the right to silence in *Marcoux and Solomon v. The Queen*, where Dickson J. (as he then was) stated:

> The limit of the privilege against self-incrimination is clear. The privilege is the privilege of a witness not to answer a question which may incriminate him. That is all that is meant by the Latin maxim *nemo tenetur seipsum accusare*, often incorrectly advanced in support of a much broader proposition … In short, the privilege extends to the accused qua witness and not qua accused; it is concerned with testimonial compulsion specifically and not with compulsion generally.

Ratushny asserts that, in limiting the application of the privilege against self-incrimination to compelled testimony of an accused at his or her trial, *Marcoux* confirmed an earlier Supreme Court of Canada decision, *A.G. Que. v. Begin*, where the Court had “clearly establishe[d] that the rules relating to self-incrimination are distinct from those relating to the admissibility of pre-trial statements or admissions.”

On the other hand, Paciocco has asserted that the privilege against self-incrimination is “clearly relevant to the admission of evidence obtained during the investigatory stage.” In Paciocco’s view, the privilege against “testimonial self-incrimination” is an underlying

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887 Ratushny, *Self-Incrimination*, supra note 5 at 185.
888 (1975), 29 CR (NS) 211, as cited in Ratushny, *ibid* at 57. The *Marcoux* case did not deal with silence *per se* as the issue before the Court was the propriety of a direct identification of a suspect by a witness when the suspect refused to participate in an identification line-up.
889 Ratushny, *ibid*.
890 (1955), 112 CCC 209, as cited in Ratushny, “Nailing the Coffin Shut”, *supra* note 29 at 318.
891 Ratushny, *ibid*. It should be noted, however, that Paciocco has distinguished the *Begin* and *Marcoux* cases on the basis that they involved non-testimonial evidence. See Paciocco, *Charter Principles*, *supra* note 29 at 583.
892 Paciocco, “Removing the Coffin Nails”, *supra* note 869 at 81.
893 Paciocco describes testimonial self-incrimination as, “only a certain instance of communicative self-incrimination. In particular, it is intended to describe only those cases where the communication of a person is used as if it were the statement of a witness at a proceeding which is presented as an accurate account of what happened.
foundational principle supporting the right to silence. Moreover, Paciocco considers the privilege against self-incrimination to be “an indispensable corollary of the principle of a case to meet which helps define the accusatorial system which, in turn, exists in order to vindicate the rule of law.” While Paciocco acknowledges that “there is no positively protected right to silence, only the absence of a legal duty to speak”, he argues that the right to silence is an essential part of the privilege against self-incrimination and therefore the two principles are conceptually interchangeable. In support of his argument, Paciocco asserts, “[i]t is uncontested” that no adverse inference may be drawn from a suspect’s silence “maintained in the face of a person in authority” where a caution has been administered and, furthermore, that “the bulk of judicial authority holds that such inferences are absolutely prohibited even in the absence of a caution.” Paciocco submits that “the prohibition can be explained only on the basis of the principle against testimonial self-incrimination”. To further support his theory, Paciocco refers to the development of the operating mind doctrine under the voluntariness rule and the rule that allows the drawing of an adverse inference based on the accused’s silence if the “silence is maintained in the face of persons not in authority” or “the inference sought to be drawn does not involve using that silence as positive evidence of guilt.” In Paciocco’s view, such legal rules

Testimonial self-incrimination, as I use the term, then, describes the act of adducing as proof of the truth of its contents a communication made by an accused which communication may be taken to constitute positive evidence of the guilt of that person.” See Paciocco, Charter Principles, supra note 29 at 540.

894 Ibid at 535.
895 Ibid at 567.
896 Ibid at 551.
897 Ibid at 567.
898 Paciocco, “Removing the Coffin Nails”, supra note 869 at 84. Ratushny takes an opposite view, stating: “It is submitted that there is no rule of law to the effect that the silence of an accused following a caution is inadmissible. Rather, the ordinary rule with respect to ‘adoptive admissions’ by a party applies to the accused.” See Ratushny, “Nailing the Coffin Shut”, supra note 29 at 333. The difference of opinion appears to be based on which English case, Hall v R or R v Chandler, is considered the preferable statement of the law. See Paciocco, Charter Principles, supra note 29 at 560. For a discussion of the Hall and Chandler cases, see discussion accompanying notes 452 and 455, supra.
899 Paciocco, Charter Principles, supra note 29 at 560.
900 Ibid.
can only be logically explained by the privilege against testimonial self-incrimination. Paciocco does acknowledge that the Canadian judiciary has by and large accepted Ratushny’s thesis;\(^{901}\) however, he cautions: “The analysis is complicated because the authorities are inconsistent in their statements of the law”.\(^{902}\) However, despite the lack of clarity, Paciocco concludes that the Canadian judiciary has generally disavowed a direct relationship between the privilege against self-incrimination and the right to silence even though the courts have used imprecise language in which “the principle against compelled testimonial self-incrimination is habitually referred to by the misleading epithet of the right to silence.”\(^{903}\)

The Canadian judiciary has also considered the relationship between the privilege against self-incrimination and the right to silence, with most judges concluding that the doctrines are distinct. As noted by Ratushny, the *Marcoux* and *Begin* cases were the leading Supreme Court of Canada decisions that emphasized the limited scope of the privilege against self-incrimination. And since the advent of the *Charter*, Canadian courts have continued to reject the idea that the privilege against self-incrimination provides a doctrinal rationale for the right to silence. So, for example, in *R. v. Logan*\(^{904}\) the Ontario Court of Appeal stated: ‘It is now clearly established that, in Canada, the privilege against self-incrimination is not functionally operative at the pre-trial stage in the sense that it cannot operate to produce a result in a particular case.”\(^{905}\) Moreover, in the seminal case of *R. v. Hebert*, the Supreme Court of Canada, while declaring the right to silence to be a principle of fundamental justice under section seven of the *Charter*, resisted categorizing it as a discreet component of the privilege against self-incrimination; although, both McLachlin and Sopinka JJ., writing separate judgements, acknowledged the close relationship

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\(^{901}\) *Ibid* at 80.

\(^{902}\) Paciocco, *Charter Principles*, *supra* note 29 at 552.

\(^{903}\) *Ibid* at 589.

\(^{904}\) (1988) 57 DLR (4th) 58 (Ont CA), as cited in Paciocco, “Removing the Coffin Nails”, *supra* note 869 at 104.

\(^{905}\) Paciocco, *ibid*. 

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between the right to silence and the privilege against self-incrimination. McLachlin J., for example, commented that both principles share the common “notion that an accused person has no obligation to give evidence against himself, that he or she has the right to choose.”

Moreover, McLachlin J. identified a pragmatic connection between the privilege against self-incrimination and the right to silence at the investigative stage of the criminal process, stating:

From a practical point of view, the relationship between the privilege against self-incrimination and the right to silence at the investigational stage is equally clear. The protection conferred by a legal system which grants immunity from incriminating himself at trial but offers no protection with respect to pre-trial statements would be illusory.

Sopinka J. maintained the traditional view that the right to silence at the pre-trial stage was distinct from the privilege against self-incrimination, stating: “[I]t cannot be denied that, apart altogether from the privilege, the right to remain silent – the right not to incriminate oneself with one’s words – is an integral element of our accusatorial and adversarial system of justice.”

In *R. v. Grant*, the Supreme Court again referred to the connection between the right to silence and privilege against self-incrimination. While *Grant* dealt with the definition of “detention” under sections 9 and 10 of the *Charter of Rights* as well as the test to be used for the admissibility of evidence under section 24(2) of the *Charter*, McLachlin C.J. and Charron J., writing for the majority of the Court, pointed out the close connection between the privilege against self-incrimination and the right to silence. Noting that the purposive approach to *Charter* interpretation necessitated an examination of the underlying rationale for prohibiting arbitrary detentions under section 9 and the right to counsel under section 10(b) of the *Charter*, McLachlin

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906 Hebert, *supra* note 876 at 33.
908 *Ibid* at 10.
909 2009 SCC 32, [2009] 2 SCR (available on lexUM) [*Grant*] [cited to online source].
C.J. and Charron J. asserted: “Detention also identifies the point at which rights subsidiary to detention, such as the right to counsel, are triggered.”

McLachlin C.J. and Charron J. went on to state:

The rights are engaged by the vulnerable position of the person who has been taken into the effective control of the state authorities. They are principally concerned with addressing the imbalance of power between the state and the person under its control. More specifically, they are designed to ensure that the person whose liberty has been curtailed retains an informed and effective choice whether to speak to state authorities, consistent with the overarching principle against self-incrimination.

Furthermore, while discussing whether statements obtained in violation of the right to counsel under section 10(b) should be excluded under section 24(2) of the Charter, McLachlin C.J. and Charron J. once again referred to the connection between the right to silence and privilege against self-incrimination, noting: “The failure to advise of the right to counsel undermines the detainee’s right to make a meaningful and informed choice whether to speak, the related right to silence, and, most fundamentally, the protection against testimonial self-incrimination.”

It is therefore clear that both the historical and contemporary view in Canada acknowledges that while the right to silence and the privilege against self-incrimination do not have exactly the same legal DNA, they are certainly closely related. While under Canadian law the right to silence is not subsumed within the privilege against self-incrimination, the two principles are, as Paciocco has asserted, conceptually interchangeable as both are founded on the notion that a person cannot be compelled to provide evidence against him or herself unless he or she freely chooses to do so.

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910 Ibid at para 22.
911 Ibid, emphasis in original.
912 Ibid at para. 95.
Beyond the metaphysical discourse on the relationship between the privilege against self-incrimination and the right to silence, the Canadian judiciary have had to deal with the more practical problem of what to do with a statement provided by an accused to the police when the accused later claims that it was obtained in a manner which violated his or her right to silence. While, historically, the focus of the courts was on the reliability of such a statement, the judiciary expanded their analysis to include consideration of other factors more directly related to the right to silence at the investigative stage of the criminal process.

3. Voluntary Confessions Rule

a. Development of the Common Law Rule in Canada

Until the Supreme Court of Canada conferred an independent constitutional status on the right to silence in *Hebert*, the confessions rule was the primary mechanism used by Canadian courts to protect the right to silence at the investigative stage of the criminal process. As noted in Chapter III, the voluntary confessions rule was developed by the Privy Council in *Ibrahim v. R.*, when Lord Sumner set down the requirement that to be admitted in evidence, a statement made by an accused to a person in authority must not have been the product of either fear of prejudice or hope of advantage held out by a person in authority. The rule became known as the voluntary confessions rule, the voluntariness rule or the *Ibrahim* rule. The voluntariness rule became part of Canadian law, however, unlike Britain, the *Ibrahim* rule was not supplemented by the Judges’ Rules, as Canada neither adopted the Judges’ Rules nor developed its own rules.

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914 *Hebert*, *supra* note 876 at 27.
915 *Ibid* at 28.
Despite this, though, the normal practice of Canadian police was to caution suspects in a manner very similar to the caution set out in the Judges’ Rules.\footnote{Paciocco, Charter Principles, supra note 29 at 554.}

The importance of a police caution advising a suspect of the right to silence was emphasized by the Supreme Court of Canada in \textit{Gach v. The King},\footnote{[1943] SCR 250 [Gach].} where the Court held that, to be admissible, a statement given to a person in authority must have been preceded by a caution.\footnote{Ratushny, Self-Incrimination, supra note 5 at 100.} However, the \textit{Gach} decision was overruled a few years later when the Supreme Court decided \textit{Boudreau v. The King}.\footnote{[1949] SCR 262 [Boudreau].} In \textit{Boudreau}, the accused, Boudreau, was a suspect in a case where the victim’s lifeless body had been found lying near a highway. The police did not have enough evidence to form reasonable and probable grounds to arrest and charge Boudreau with murder, but they did detain him as a material witness under a coroner’s warrant. Without being given a caution, Boudreau provided a statement to the police that he had gone hunting with a shotgun and that he was having an affair with the victim’s wife. Boudreau later provided a dictated statement, which was written down verbatim on stationary that had a pre-printed official police caution on it. After dictating the statement, Boudreau read and signed it. Boudreau was again questioned by the police a few days later, although on that occasion he was cautioned that he “was not obliged to talk, but that if he wished to say anything, it could be used as evidence before the Court.”\footnote{Ibid at 265.} During the interview Boudreau spontaneously admitted to killing the victim.
The trial judge admitted all of Boudreau’s statements and the judge’s decision was upheld by a majority of the Quebec Court of Appeal. The accused appealed to the Supreme Court of Canada. The Court issued five separate judgements from a seven person bench. While the judgements differed in some respects, the majority of the Court determined that *Gach* was either distinguishable or simply not valid law. Kerwin J. (as then was), for example, emphasized that *Gach* had not changed the *Ibrahim* rule, stating:

The fundamental question is whether a confession of an accused offered in evidence is voluntary. The mere fact that a warning was given is not necessarily decisive in favour of admissibility but, on the other hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement. All of the surrounding circumstances must be investigated and, if upon their review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly, the presence or absence of a warning will be a factor and, in many cases, an important one.\(^{921}\)

Subsequent Supreme Court of Canada cases dealt with other aspects of the voluntariness rule. For example, in *Piche v. The Queen*\(^{922}\) the Court declared that exculpatory statements made by the accused must pass the *Ibrahim* test\(^{923}\) and, in *R. v. Gauthier*,\(^{924}\) the Court concluded that “the same rules apply with respect to the taking of evidence on a voire dire whether the trial is by Judge and jury or by Judge alone.”\(^{925}\)

Early Canadian judicial decisions tended to focus on the reliability of the impugned statement. As noted by Paciocco: “There is general agreement that the reliability rationale has played the most important role in the development of the voluntariness rule.”\(^{926}\) Although, in *Hebert*, McLachlin J. noted that until 1971 Canadian judges held some discretion to “reject

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\(^{921}\) *Ibid* at 267.

\(^{922}\) [1971] SCR 23 [*Piche*].

\(^{923}\) Ratushny, *Self-Incrimination*, *supra* note 5 at 100.

\(^{924}\) [1977] 1 SCR 441 [*Gauthier*].

\(^{925}\) Ratushny, *Self-Incrimination*, *supra* note 5 at 100.

\(^{926}\) Paciocco, *Charter Principles*, *supra* note 29 at 571.
statements which met the *Ibrahim* test, but which had been obtained unfairly.”

However, according to McLachlin J., in 1971 “Wray changed this” and “Canada was left with the narrow *Ibrahim* rule. Reliability was the only concern.”

In *R. v. Wray,* the Supreme Court of Canada dealt with the admissibility of a confession and piece of real evidence that had been obtained through aggressive police questioning of a murder suspect. The accused, Wray, had been arrested for murder. During a lengthy and oppressive police interrogation Wray admitted to throwing the murder weapon into a swamp. The police subsequently recovered the weapon with the assistance of Wray. At trial, the judge decided that Wray’s admission was involuntary and therefore inadmissible. The judge also refused to admit the weapon into evidence even though it was clearly reliable, as it was real evidence. In so doing, the trial judge refused to follow the normal practice of the day, which had been set down by the Ontario High Court in *Rex v. St. Lawrence.*

The *St. Lawrence* rule, as it was known, stated: “Where the discovery of the fact confirms the confession – that is, where the confession must be taken to be true by reason of the discovery of the fact – then that part of the confession that is confirmed by the discovery of the fact is admissible, but further than that no part of the confession is admissible.”

On the Crown’s appeal to the Supreme Court of Canada, the majority of the Court concluded the trial judge had erred by not following the *St. Lawrence* rule. Writing for the majority, Martland J. stated:

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927 Hebert, *supra* note 876 at 29.
929 [1971] SCR 272 (available on lexUM) [*Wray*] [cited to online source].
930 (1949), 93 CCC 376 (Ont HC) [*St. Lawrence*].
931 As cited by Martland J. in *Wray, supra* note 929 at 278.
In this appeal we are clearly faced with the question whether we should make new law and give a trial judge a discretion to exclude relevant and admissible evidence if he thinks that it will operate unfairly against the accused or, according to his opinion, bring the administration of justice into disrepute. The reason given for the unfairness here is that the weapon was discovered partly as a result of an inadmissible confession and partly as a result of the accused going with the police officers and pointing out the place where the weapon was concealed. In my opinion, there is no justification for recognizing the existence of this discretion in these circumstances. This type of evidence has been admissible for almost 200 years. There is no judicial discretion permitting the exclusion of relevant evidence, in this case highly relevant evidence, on the ground of unfairness to the accused.\footnote{Ibid at 299.}

Cartwright C.J.C. dissented, expressing “concern that to uphold established authority admitting real evidence discovered as a result of an involuntary confession would be inconsistent with the accused’s right to silence.”\footnote{Paciocco, Charter Principles, supra note 29 at 574.} However, despite Chief Justice Cartwright’s dissent, the majority decision in Wray meant that Canadian judges had no discretion to refuse to admit reliable evidence based on a determination that admitting such evidence would be unfair to the accused for some reason, such as an infringement of his or her right to silence. Confessions that met the Ibrahim test – even those obtained in circumstances of unfairness or where the accused’s choice to remain silent had been overridden by the police – were admissible as long as the statement was reliable.

The Wray rule was tempered to some extent by two legal doctrines developed by the Supreme Court of Canada: the “oppression doctrine”\footnote{Ibid at 578.} and the “operating mind doctrine”.\footnote{Ibid at 579.} The oppression doctrine served to “fill in the edges around the Ibrahim rule for those cases where there have been no direct inducements in the nature of express or implied threats or promises, but
where the accused has been mistreated and as a result confesses.” The operating mind doctrine was established in Horvath v. R. and Ward v. R., both of which dealt with statements provided by suspects who were affected by some sort of mental incapacity, such as “a disease of the mind, an accident, altered state of consciousness caused by that person’s own act or the act of another”. The Supreme Court concluded in Horvath and Ward that, in such cases, an assessment must be made as to whether “the accused, because of hypnosis in the one case and drunkenness in the other, was not possessed of the requisite mental capacity to make a voluntary decision about whether to speak to the authorities or not”. However, as emphasized by Spence J. in Ward, the “underlying and controlling question” continues to be “[i]s the statement freely and voluntarily made?” Paciocco has pointed out that there has been confusion over the rationale of the operating mind principle, but “[t]rue volition, and not truth, appears therefore to be the pivotal concern.”

It was within the legal framework of the “narrow Ibrahim rule”, augmented by the oppression and operating mind doctrines, that the Supreme Court of Canada decided Rothman v. The Queen, a decade after Wray. The issue in Rothman was the admissibility of a confession obtained through police trickery. Martland J., speaking for the majority of the Court, applied a strict Ibrahim analysis focussing on whether the accused subjectively thought he was speaking to

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936 Ibid.
937 [1979] 2 SCR 376 [Horvath].
938 [1979] 2 SCR 30 [Ward].
939 Paciocco, Charter Principles, supra note 29 at 579.
940 Hebert, supra note 876 at 31, per McLachlin J.
941 Paciocco, Charter Principles, supra note 29 at 579.
942 Ibid at 580. Paciocco bases his conclusion on the statements of McIntyre J.in R v Clarkson [1986] 1 SCR 383 [Clarkson], where McIntyre J. noted the close similarity between a person with a non-operative mind lacking not only an appreciation of his or her actual utterances, but also of their consequences.
943 Hebert, supra note 876 at 30, per McLachlin J.
944 Rothman v The Queen, [1981] 1 SCR 640 (available on lexUM) [Rothman] [cited to online source].
945 The facts of Rothman and Hebert are strikingly similar. In both cases an undercover police officer was placed in a jail cell with the accused after the accused had advised the police that he did not want to make a statement. In both cases the undercover police officer elicited a conversation and the accused made incriminating statements.
a person in authority and whether the statement had been obtained through fear of prejudice or hope of advantage. In Martland J.’s view, “[i]t was not … a sufficient basis for the refusal of the trial judge to receive the confession in evidence solely because he disapproved of the method by which it was obtained.” Applying the dual principles that the statement must be both voluntary under the *Ibrahim* test and the product of an operating mind under the *Ward* test, Martland J. concluded:

…the fundamental question is whether the statement is voluntary. No doubt arrest and the presence of officers tend to arouse apprehension which a warning may or may not suffice to remove, and the rule is directed against the danger of improperly instigated or induced or coerced admissions. It is the doubt cast on the truth of the statement arising from the circumstances in which it is made that gives rise to the rule. What the statement should be is that of a man free in volition from the compulsions or inducements of authority and what is sought is assurance that that is the case. The underlying and controlling question then remains: is the statement freely and voluntarily made?

While the majority decision in *Rothman* confirmed that the main issue to be determined regarding the admissibility of a statement is whether or not the statement is reliable based on it being freely and voluntary given, two judges strayed from the traditional view. Lamer J. (as he then was) noted that the voluntariness rule is also partly based on the need to protect the criminal justice system’s “respectability and, as a result, its very acceptance by its constituency” by “ensuring that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society.” And Estey J. asserted, “[the] basic reason for the rule is concern for the integrity of the criminal justice system.”

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946 *Rothman*, *supra* note 944 at 666.
948 *Ibid* at 689, as cited in *Paciocco*, *Charter Principles*, *supra* note 29 at 573.
949 *Ibid* at 658, as cited in *Paciocco*, *ibid.*
Despite the dissenting views of Lamer and Estey JJ., the majority judgement in *Rothman* continued the Canadian tradition of applying a strict *Ibrahim* test when judges were confronted with the question of whether or not to admit a confession taken in circumstances suggesting the accused’s right to silence had either been directly overridden (*Wray*) or circumvented through trickery (*Rothman*). However, the views expressed by Lamer and Estey JJ. foreshadowed a change in the law and a move away from relying on a narrow interpretation of the *Ibrahim* rule.\footnote{\textit{Hebert}, supra note 876.}

The move away from the narrow interpretation of the *Ibrahim* rule was affirmed by the Supreme Court of Canada in *Hebert*, where the Supreme Court of Canada considered the right to silence and confessions rule within the framework of the new legal paradigm introduced by the *Charter of Rights*. While *Hebert* will be discussed in detail later in this chapter, some discussion of McLachlin J.’s (as she then was) decision is necessary at this juncture, specifically with regard to the relationship between the voluntariness rule and the right to silence.\footnote{See Chapter IV.C.3, below for a more detailed discussion of *Hebert*.}

In *Hebert*, McLachlin J. emphasized the historic importance of the voluntariness rule as a manifestation of the underlying rationale of the right to silence as a mechanism to protect the individual from the superior power of the state. McLachlin J. suggested there were two versions of the confessions rule; one being narrow and the other broad, but both being based on the notion of individual choice. McLachlin J. stated:
Both versions of the confessions rule focus on voluntariness as the basic requirement for the admission of a statement made to the authorities by a detained person. The requirement of voluntariness, in turn, comports the idea that the detained person is entitled to choose whether to make a statement to the authorities or not. The difference between the two approaches to the confessions rule lies in the way they define voluntariness and choice.\footnote{189}

According to McLachlin J., the narrow version of the confessions rule was set out in \textit{Ibrahim}, where the accused’s choice to speak was described “negatively, in terms of the absence of threats or promises by the authorities inducing the statement, and objectively, in terms of the physical acts and words of the parties.”\footnote{952} Under this version, the “awareness of the detained person of his alternatives is irrelevant. He need not be told he has the right to remain silent.”\footnote{953} However, McLachlin J. considered the second version of the confessions rule to be much broader, as it “starts from the proposition that choice involves not only an act, but a mental element.”\footnote{954} In McLachlin J.’s opinion, under the second version, “the fact that the accused may not have realized he had the right to remain silent … or has been tricked into making the statement, are relevant to the question of whether the statement is voluntary.”\footnote{955} According to McLachlin J., the rationale for the broader approach “goes beyond the exclusion of unreliable statements and extends to considerations of whether reception of the statement will be unfair or tend to bring the administration of justice into disrepute.”\footnote{956}

After analyzing the two approaches, McLachlin J. concluded that Canadian law governing confessions involves aspects of both versions; although, she recognized that “the mainstream of contemporary Canadian confessions law has not, by and large, acknowledged the mental element\footnote{957}
involved in choice.”

According to McLachlin J., English law had reconciled the narrow limitations imposed by Ibrahim through its use of judicial discretion to exclude statements that meet the Ibrahim test but the admission of which would be unfair to the accused or bring the administration of justice into disrepute. However, Canadian law had not been able to achieve a similar reconciliation because of the Supreme Court’s decision in Wray, which had removed any such discretion from Canadian judges. In McLachlin J.’s view, the decision in Wray “was simple: a court did not have the power to exclude admissible and relevant evidence merely because its admission would bring the administration of justice into disrepute.” However, McLachlin J. emphasized that “[n]ot all judges found it easy to accept the strictures of Wray” and noted there was “an array of distinguished Canadian jurists who recognized the importance of the suspect’s freedom to choose whether to give a statement to the police or not, and emphasized the fairness and repute of the administration of justice as an underlying rationale for the confessions rule, both before and after Wray.” Based on her analysis of the history of the right to silence in Canada, McLachlin J. concluded:

The foregoing review suggests that one of the themes running through the jurisprudence on confessions is the idea that a person in the power of the state’s criminal process has the right to freely choose whether or not to make a statement to the police. The idea is accompanied by a correlative concern with the repute and integrity of the judicial process. This theme has not always been ascendant. Yet, its importance cannot be denied. It persists, both in Canadian jurisprudence and in the rules governing the rights of suspects in other countries. The question is whether, as Kaufman J.A. suggests, it should prevail in the post-Charter era.

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958 Ibid at 27.
959 Ibid at 28.
960 Ibid at 30.
961 Ibid.
962 Ibid.
963 Ibid at 31.
964 Ibid at 32.
Moreover, as briefly discussed earlier in this chapter, McLachlin J. also considered the relationship between the right to silence and privilege against self-incrimination. In her view, the privilege against self-incrimination is “distinct from the confessions rule, applying at trial rather than at the investigatorial phase of the criminal process … [y]et it is related to the confessions rule, both philosophically and practically.”\textsuperscript{965} McLachlin J. noted that, philosophically, the privilege against self-incrimination and the confessions rule have both been justified by reference to the \textit{nemo tenetur seipsum accusare} principle that no one can be compelled to give evidence against him or herself, which is “the conceptual core of the two rules fundamental to the more general right to silence.”\textsuperscript{966} And from a practical perspective, McLachlin J. emphasized the obvious connection between the privilege against self-incrimination and the right to silence at the investigative stage, as “[t]he protection conferred by a legal system which grants the accused the immunity from incriminating himself at trial but offers no protection with respect to pre-trial statements would be illusory.”\textsuperscript{967}

Based on her understanding of the rationale for the right to silence and its relationship with the confessions rule and privilege against self-incrimination, and recognizing the importance of “a person whose liberty is placed in jeopardy by the criminal process … [having] the right to choose whether to speak or remain silent”,\textsuperscript{968} McLachlin J. concluded: “[T]he scope of the right to silence prior to trial under s. 7 of the \textit{Charter} must extend past the narrow view of the confessions rule which formed the basis of the decision of the majority of this Court in \textit{Rothman}.”\textsuperscript{969}

\textsuperscript{965} \textit{Ibid} at 33.  
\textsuperscript{966} \textit{Ibid}.  
\textsuperscript{967} \textit{Ibid}.  
\textsuperscript{968} \textit{Ibid} at 34.  
\textsuperscript{969} \textit{Ibid}. 
The history of the confessions rule in Canada therefore underlined the importance of the rule in protecting the right to pre-trial silence. For many years, the *Ibrahim* test was the primary method for Canadian courts to determine whether or not an accused’s statement had been obtained in a manner that infringed his or her right to silence. The voluntariness rule was, however, an indirect and imprecise device to protect the right to silence. Until *Hebert*, the law was grounded in the reliability principle and most judges – and certainly the majority of the Supreme Court of Canada as illustrated by the *Wray* and *Rothman* decisions – were prepared to restrict their decisions to the issue of reliability and volition. A few judges, however, went beyond the *Ibrahim* fence and considered other issues, such as: the mental capacity of the accused to understand both the nature and consequences of his or her statements (operating mind doctrine); whether or not the accused’s will had been “sapped”\(^\text{970}\) (oppression doctrine); or the importance of ensuring police interrogation tactics did not undermine the integrity of the administration of justice (Lamer J.’s “system legitimacy” comments in *Rothman*).\(^\text{971}\) Furthermore, on rare occasions a judge would refer directly to the connection between the voluntariness rule and privilege against self-incrimination, such as Chief Justice Cartwright’s dissent in *Wray*, where he observed:

> It would indeed be a strange result if, it being the law that no accused is bound to incriminate himself and that he is to be protected from having to testify at an inquest, a preliminary hearing or a trial, he could none the less be forced by the police or others in authority to make a statement which could then be given in evidence against him.\(^\text{972}\)

\(^{970}\) Paciocco, *Charter Principles*, supra note 29 at 579.
\(^{971}\) *Ibid* at 572.
\(^{972}\) *Wray*, supra note 929 at 280, as cited in Paciocco, *ibid* at 578.
And in *Hebert*, McLachlin J. re-cast the voluntariness rule in light of the new legal orthodoxy established through the proclamation of the *Charter of Rights*. By 1990, as a result of the evolution of Canadian common law governing the admissibility of confessions and the heightened importance of the right to silence emphasized by the Supreme Court of Canada in *Hebert*, the law of confessions appeared to provide a practical rule of evidence capable of supporting the right to pre-trial silence. However, in 2000 the Supreme Court of Canada set out a revised confessions rule when it issued its decision in *R. v. Oickle*.973

b. Updating the Confessions Rule: *R. v. Oickle*

In *R. v. Oickle*, the Supreme Court took the “opportunity to set out the proper scope of the confessions rule.”974 The accused, Oickle, had been arrested as a suspect in a series of arsons. Oickle was advised of his right to silence and right to counsel and was then subjected to a polygraph test, after which he was interrogated for several hours by three different police officers. Oickle eventually confessed to the arsons and later participated in a re-enactment. The accused’s statements were admitted at trial and Oickle was convicted, but the Nova Scotia Court of Appeal overturned the conviction. On the Crown’s appeal to the Supreme Court of Canada, the majority of the Court, with Arbour J. dissenting, allowed the appeal and restored the conviction and, in so doing, “recast the law relating to the voluntariness of confessions.”975

Iacobucci J. wrote the majority decision. After reviewing the history of the voluntariness rule from *Ibrahim* to *Boudreau* to *Hebert*, Iacobucci J. confirmed that the common law voluntariness rule had not been subsumed by the *Charter* and, indeed, had a “broader scope than the

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974 *Ibid* at para. 23.
According to Iacobucci J., the law governing the admissibility of confessions in Canada had moved beyond the “narrow Ibrahim formulation” and was now “concerned with voluntariness, broadly understood.” Iacobucci J. highlighted three significant differences between the confessions rule and the Charter; distinctions which give the confessions rule a significant amount of clout. First, the confessions rule applies “whenever a person in authority questions a suspect”, whereas section 10 of the Charter, which guarantees the right to counsel, applies only on arrest or detention. Second, the confessions rule encompasses a more onerous test than the Charter in that the burden to prove that a confession is voluntary falls on the Crown on the basis of the “beyond a reasonable doubt” standard, while the burden to prove a Charter violation falls on the accused on a balance of probabilities. Third, a confession obtained by way of a Charter breach will only be excluded under section 24(2) of the Charter if its admission would bring the administration of justice into disrepute, whereas involuntary confessions are automatically excluded.

Iacobucci J. also considered the societal interest in providing the police reasonable investigative powers to perform their duties, endorsing Martin J.A.’s comments in R. v. Precourt that: “Properly conducted police questioning is a legitimate and effective aid to criminal investigation”. At the same time, though, Iacobucci J. raised the concern about the possibility of false confessions. Iacobucci J. found the voluntary confessions rule to be a useful and important guard against false confessions and wrongful convictions, stating: “The common law confessions rule is well-suited to protect against false confessions. While its overriding

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976 Oickle, supra note 973 at para. 30.
977 Ibid at para 27.
978 Ibid at para 30.
979 (1976), 18 OR (2d) 714 at 721 (Ont CA) [Precourt].
980 Oickle, supra note 973 at para 33.
concern is with voluntariness, this concept overlaps with reliability.” Iacobucci J. “rejected resort to fixed and narrow rules” to balance the competing interests of police effectiveness and protecting vulnerable suspects from giving false confessions, instead opting for a flexible rule. Iacobucci J. declared:

The application of the rule will by necessity be contextual. Hard and fast rules simply cannot account for the variety of circumstances that vitiate the voluntariness of a confession, and would inevitably result in a rule that would be both over- and under-inclusive. A trial judge should therefore consider all the relevant factors when reviewing a confession.

After laying the historical and doctrinal groundwork for the voluntariness rule, Iacobucci J. went on to discuss in detail the many practical components of the voluntary confessions rule in post-Charter Canada, concluding:

In summary, courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. This becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the subject has been overborne.

Paciocco and Stuesser have concisely summarized the reformulated Canadian confessions rule prescribed by Oickle as follows:

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981 Ibid at para 47.
982 Paciocco & Stuesser, supra note 975 at 290.
983 Oickle, supra note 973 at para 47.
984 Ibid at para 57.
Oickle holds that in order from most statements made to a person in authority to be admissible the Crown must establish beyond a reasonable doubt in light of all the circumstances that the will of the accused to choose whether to speak has not been overborne by inducements, oppressive circumstances, or the lack of an operating mind. In addition, there must not be police trickery that unfairly denies the accused’s right to silence.985

Arbour J. dissented in *Oickle*. In her opinion, when viewed cumulatively the tactics used by the police to extract Oickle’s confession overwhelmed his will and violated the voluntariness rule. Much of Arbour J.’s reasoning revolved around the relationship between the interrogation of the accused and the polygraph test which he had apparently failed. While she thought “the overall interrogation strategy was sound”, and further acknowledged that “the considerable deception on the part of the police” was “neither illegal nor sufficient to vitiate the voluntary nature of a confession”, Arbour J. concluded: “The line is crossed, and was crossed here in my view, when improper inducements are put forward by persons in authority in an oppressive atmosphere, undermining the interrogated person’s control over his mind and will.”986

In *R. v. Spencer*,987 the Supreme Court considered the application of the *Oickle* guidelines in the context of a police interrogation of a suspect who was well versed in the criminal justice system. While *Spencer* was a fact specific case, in upholding the voluntariness of the accused’s confession, which appeared to have been motivated by his desire that his girlfriend not be charged with some of the robberies he had committed, the majority of the Court indicated a willingness to consider the particular characteristics of the accused when deciding whether or not an overbearing *quid pro quo* had been offered by the interrogating police officer. Writing for the majority, Deschamps J. confirmed that in *Oickle* the Court had identified the presence or absence

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985 Paciocco & Stuesser, *supra* note 975 at 291.
986 *Oickle, supra* note 973 at para 124.
987 2007 SCC 11, [2007] 1 SCR 500 (available on lexUM) [*Spencer*] [cited to online source].
of a *quid pro quo* as “the most important consideration” when determining whether or not a promise, either explicit or implicit, made to the accused by a person in authority was sufficient to render the confession involuntary. Furthermore, Deschamps J. reinforced the Court’s decision in *Oickle* that the mere existence of a *quid pro quo* is insufficient to render a statement inadmissible. Deschamps J. stated:

> Therefore, while a *quid pro quo* is an important factor in establishing the existence of a threat or promise, it is the strength of the inducement, having regard to the particular individual and his or her circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused’s statement.

With specific reference to the accused in *Spencer*, Deschamps J. also noted:

> It was also relevant to the particularities of the respondent that, according to the trial judge, he was aggressive and a “mature and savvy participant” and that he unsuccessfully attempted many times to secure “deals” with the police. While none of these factors are determinative, it was not an error for the trial judge to consider them in his contextual analysis.

Fish J. dissented in *Spencer*, with Abella J. concurring. In Fish J.’s view, the interrogating police officer had exploited the accused’s relationship with his (the accused’s) girlfriend to the point where “there is a real likelihood that the respondent was induced to confess by the compound *quid pro quo* held out to him by Constable Parker.” Fish J. therefore concurred with the majority of the British Columbia Court of Appeal that, “[t]he intensity of the [respondent’s] feelings for Tanya, evident in the transcript, would provide a powerful motivation to say whatever was needed, true or false, to get Tanya lenient treatment.”

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991 *Ibid* at para 49.
992 *Ibid* at para 50.
Oickle therefore affirmed an important role for the common law voluntariness rule in post-
Charter Canada, as the Supreme Court of Canada declared the rule “extends to protect a broader
conception of voluntariness ‘that focuses on the protection of the accused’s rights and fairness in
the criminal process.” However, the contextual nature of the Oickle analysis perhaps crafted
a “two edged sword”, as evidenced by Spencer, where different perspectives of the same police
interrogation result in starkly different conclusions. Furthermore, Oickle and the voluntariness
rule obviously only apply when the accused actually makes a statement to a person in authority.
When the accused chooses to remain silent the voluntariness rule clearly does not apply, so the
question to be decided in those cases is whether any inference may be drawn from such silence
and, if so, what type of inference should be allowed.

4. Common Law Exceptions to the Right to Pre-trial Silence

a. Introduction

Canadian law regarding whether or not the silence of a suspect at the investigative stage can
be used as evidence against him or her has been unsettled and at times contradictory. Paciocco has described the issue as follows:

993 Oickle, supra note 973 at para 69.
994 Paciocco, Charter Principles, supra note 29 at 552; Ratushny, Self-Incrimination, supra note 5 at 122.
The Crown will quite often adduce, or attempt to adduce, evidence that an accused person remained silent under various circumstances. Such evidence may be called to support the inference that the accused has, by his silence, adopted as his own admission an allegation made against him that he could have been expected to challenge if untrue. Or, pretrial silence may be advanced to invite the inference that the accused acted as a guilty person by not protesting the charge, or to reduce the credibility of a defence or explanation that was not advanced by the accused until late in the day.\(^{995}\)

The Canadian judiciary developed rules to deal with a suspect’s silence in the situations described by Paciocco. The three categories in which pre-trial silence was admissible as evidence pointing to the accused’s possible guilt were adopted admissions, silence in circumstances that demonstrate consciousness of guilt, and recently fabricated defences.

b. **Adopted Admissions**

Ratushny has defined an adopted admission as:

… when a party is silent in such circumstances:

that the ordinary person in the party’s position would reasonably be expected to deny the statement if it were untrue. In other words, the only reasonable inference to be drawn from the party’s silence must be that he believed the statement to be true.\(^{996}\)

Paciocco suggests the adopted admission rule is based on an assumption that, “as a matter of common sense, persons will typically respond to unfounded allegations made against them by challenging the truth of such allegations or by otherwise manifesting disagreement.”\(^{997}\) Ratushny, however, identifies two concerns with the adopted admission rule. First, he points out that drawing an inference is a “highly subjective exercise”.\(^{998}\) Second, he asserts that the

\(^{995}\) Paciocco, *Charter Principles*, *supra* note 29 at 552.


\(^{997}\) Paciocco, *Charter Principles*, *supra* note 21 at 553.

\(^{998}\) Ratushny, *Self-Incrimination*, *supra* note 5 at 121.
adopted admission rule contradicts the voluntariness rule in that it suggests to a suspect that “he should speak out or risk an adverse inference being drawn against him for his silence”, while the voluntariness rule “would suggest that he need not say anything.”

Despite these concerns, however, Canadian law has provided some limited room for an adverse inference to be drawn when an accused invokes his or her right to remain silent at the pre-trial stage of the criminal process.

The law regarding adopted admissions was developed through several judicial decisions. When the accused’s silence was in response to allegations made by a police officer after the accused had been cautioned that he or she had the right to remain silent, the law was clear: the accused’s silence could not result in the drawing of an adverse inference.

In explaining the rationale for the rule prohibiting the drawing of an adverse inference when the accused has been cautioned, Paciocco contends it would be unfair to infer guilt from the accused’s silence as the accused may have simply accepted the offer provided by the caution to remain silent. Moreover, Paciocco recognizes the inherent difficulty in accurately determining the probative value of an accused’s silence, as “the assumption that the normal response would be a denial has been removed because the police caution expressly invites an alternative

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999 Ibid at 122.
1000 Paciocco, Charter Principles, supra note 29 at 554.
1001 (1975), 21 CCC (2d) 385 (Ont CA) [Robertson].
1002 Ibid at 418-19, as cited in Ratushny, “Nailing the Coffin Shut”, supra note 29 at 332.
response.” On the other side of the equation, however, the law was equally clear that when the accusation to which the suspect remained silent was made by a person who was not a police officer or agent of the state and no such authority figure was present at the time the accusation was made, an adverse inference could be drawn from the suspect’s silence. According to Paciocco, in such a situation a “person, even when charged with an offence, has no right to silence vis-à-vis persons who are not ‘in authority’ within the meaning of the voluntariness rule”.

The law was less clear when the suspect was not cautioned or warned by the police that he or she did not have to speak or respond. According to Paciocco, “[w]here an accused has not been cautioned, authority is divided as to whether and, if so, when the silence of an accused can be treated as the adoption of an allegation made in the presence of the police.” Paciocco cites several Canadian provincial appellate court decisions that followed the English case of Hall v. R., where the Privy Council held that “silence on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation” even if the accused was not cautioned.

On the other hand, Paciocco identifies other Canadian cases that followed the line of reasoning of the English Court of Appeal in R. v. Chandler, where the Court of Appeal stated: “The law has long accepted that an accused person is not bound to

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1003 Paciocco, Charter Principles, supra note 29 at 555.
1004 Ibid at 558.
1005 Ibid at 556.
1006 Ibid at 557, referring to R v Eden, supra note 996; Taggart v R (1980), 13 CR (3d) 179 (Ont CA); and R v Clarke (1979), 48 CCC (2d) 440 (NSCA) as examples of Canadian cases that followed Hall.
1007 Hall, supra note 452.
1008 Paciocco, Charter Principles, supra note 29 at 557. Ratushny also refers to the Nova Scotia Court of Appeal decision in R v Iwaru, [1970] 4 CCC 206 as a similar case to Hall, as the Court determined that “it did not matter whether the silence occurred before or after a warning.” See Ratushny, “Nailing the Coffin Shut”, supra note 29 at 330.
1009 Chandler, supra note 455.
incriminate himself; but it does not follow that a failure to answer an accusation or question when an answer could reasonably be expected may not provide some evidence in support of the accusation.”

An example of a case that followed the Chandler reasoning was R. v. Govedarov. In Govedarov, the accused remained silent when one of his co-accused made an admission to a police officer in his presence. The Ontario Court of Appeal concluded, “the jury should have been instructed that it was entitled to draw an adverse inference that [the accused] had adopted the statement, particularly in light of the evidence of his conduct and demeanour when the statement was made.” Both Ratushny and Paciocco have pointed out that Govedarov involved more than silence since the accused’s silence was accompanied by a certain demeanour. Indeed, Ratushny distinguishes Govedarov on that basis and suggests, “whenever the silence in question occurs in the presence of a ‘person in authority’ an inference of ‘adoption’ should not ordinarily be permitted.” And Paciocco takes the argument even further by asserting, “there appear to be no cases in Canada where simple silence in the face of allegations made by persons in authority grounded an inference of adopted admission”. Based on this conclusion, Paciocco asserts that there is “an absolute bar on the inference of adopted admissions based upon silence before persons in authority.” Supporting Paciocco’s argument is an observation offered by Sopinka J. in Hebert, where he stated:

\[1010\] Ibid at 589, as cited in Paciocco, Charter Principles, supra note 29 at 560 (referring to the decision as reported in [1976] 3 All ER 105 at 109).
\[1011\] (1974), 16 CCC (2d) 238 (Ont CA) [Govedarov].
\[1012\] Ratushny, “Nailing the Coffin Shut”, supra note 29 at 331.
\[1013\] Ibid.
\[1014\] Paciocco, Charter Principles, supra note 29 at 561.
\[1015\] Ratushny, “Nailing the Coffin Shut”, supra note 29 at 334.
\[1016\] Paciocco, Charter Principles, supra note 29 at 562.
\[1017\] Ibid at 563.
The essence of the Christie rule is that even if the circumstances of an accusation cry out for an explanation or denial, the accused’s silence, without more, is not evidence against him: there must be “word or conduct, action or demeanour” pointing to an adoption of the statement by the accused.\(^{1018}\)

c. **Consciousness of Guilt**

An analogous situation to an adopted admission arises when an accused’s silence occurs in circumstances which are consistent with guilt. Historically, such a situation was described as a matter of “consciousness of guilt”; although, in *R. v. White*\(^{1019}\) the Supreme Court of Canada stated its preference for the more neutral term “evidence of post-offence conduct” because, “the words ‘consciousness of guilt’ suggest a conclusion about the conduct in question which undermines the presumption of innocence and may prejudice the accused in the eyes of the jury”.\(^{1020}\)

Ratushny has analyzed the relationship between the right to silence and the accused’s post-offence conduct (or consciousness of guilt), noting that Wigmore explained the underlying rationale for the rule as follows:

The commission of a crime leaves usually upon the consciousness a moral impression which is characteristic. The innocent man is without it; the guilty man usually has it. Its evidential value has never been doubted. The inference from consciousness of guilt to “guilty” is a most powerful one.\(^{1021}\)

\(^{1018}\) Hebert, *supra* note 876 at 13, emphasis in original.

\(^{1019}\) [1998] 2 SCR 72 (available on lexUM) [*White* 1998] [cited to online source]. For the purposes of this discussion, both terms will be used interchangeably.

\(^{1020}\) *Ibid* at para 20.

\(^{1021}\) 1 Wigmore on Evidence (3d ed. 1940) § 173, as cited in Ratushny, *Self-Incrimination, supra* note 5 at 130.
Ratushny, however, argues that the “drawing of an inference…will often be a highly subjective exercise.”\textsuperscript{1022} For example, Ratushny asserts that the physical reaction of a suspect when confronted by a police officer, such as a reaction indicating that “the accused appeared ‘extremely agitated’ when approached by the police” or that the accused “might have ‘seemed to drop his eyes to the floor’ and ‘bowed his head slightly’ when reference was made to certain evidence”,\textsuperscript{1023} is open to differing interpretations, not all of which are consistent with guilt. Ratushny suggests that other explanations for the accused’s behaviour might be that he or she was intimidated by the police or was simply reacting “stubbornly towards authority.”\textsuperscript{1024} Stewart has also expressed concerns about admitting evidence of the accused’s post-offence conduct, stating:

\begin{quote}
… using conduct of uncertain meaning as evidence of guilt is analogous to the drawing of inferences from the accused’s silence or from the accused’s disbelieved testimony: all three types of inferences carry a high risk of reversing the burden of proof. In each case, the danger is that the trier of fact will presume guilt and look to the evidence for confirmation.\textsuperscript{1025}
\end{quote}

Furthermore, in \textit{White}, while the Supreme Court of Canada stated that the accused’s post-offence conduct is “not fundamentally different from other kinds of circumstantial evidence”,\textsuperscript{1026} it did recognize “that when evidence of post-offence conduct is introduced to support an inference of consciousness of guilt it is highly ambiguous and susceptible to jury error.”\textsuperscript{1027} However, despite raising the concern, the Supreme Court identified several situations where the accused’s conduct will be admissible as part of the prosecution’s case, including: fleeing from

\textsuperscript{1022} Ratushny, \textit{ibid} at 131.
\textsuperscript{1023} \textit{Ibid}.
\textsuperscript{1024} \textit{Ibid} at 132.
\textsuperscript{1025} Hamish Stewart, “Nothing Can Come of Nothing: Three Implications of Noble” (1999) 42 Crim LQ 286 at 315 [Stewart, “Three Implications of Noble”].
\textsuperscript{1026} \textit{White} 1998, \textit{supra} note 1019 at para 21.
\textsuperscript{1027} \textit{Ibid} at para 22.
the scene of the crime; resisting arrest; failing to appear at trial; lying; assuming a false name; changing appearance; or attempting “to hide or dispose of incriminating evidence.”

It is clear, however, that all of the circumstances identified by the Supreme Court entail something more than the accused simply remaining silent.

In *R. v. B. (S.C.)*, the Ontario Court of Appeal dealt with the question of whether evidence of an accused’s cooperation with the police could result in a favourable inference at his trial. The accused, knowing he was charged with sexual assault, offered to take a polygraph exam and voluntarily provided blood, other bodily samples and his clothing to the police. In concluding that, on the facts of the case, an inference favourable to the accused could be drawn from his post-offence conduct, the Court noted: “After-the-fact conduct by an accused which is reasonably capable of supporting an inference adverse to the accused is admissible as long as its probative value outweighs its prejudicial effect and there is no exclusionary rule requiring the exclusion of the evidence”. The Court saw no reason why the same logic should not be applied to exculpatory behaviour on the part of the accused, which would result in a favourable inference being drawn.

However, while confirming that evidence of an accused’s post-offence conduct may be admissible, the Court raised a concern regarding an inherent danger associated to admitting such evidence, be it favourable or unfavourable to the accused. The Court stated:

1028 *Ibid* at para 19.
1030 *Ibid* at para 34.
The admissibility of after-the-fact conduct is not without its risks. There is always the danger that the trier of fact will read too much into that behaviour. Conduct, which is no more than unusual, rash or thoughtless can take on an unwarranted significance when viewed in hindsight at trial. The danger that after-the-fact conduct will be over-emphasized by a trier of fact exists whether evidence of the conduct is offered by the Crown or the defence. That risk is best avoided by the judicious use of the power to exclude prejudicial evidence even though it has some probative value.1031

Apart from the pragmatic concern regarding the danger of erroneous or speculative conclusions being drawn from an accused’s post-offence conduct, the Court of Appeal also confirmed the rule that an accused’s silence or refusal to cooperate with the police could not by itself result in an adverse inference against the accused. To this end, the Court noted: “As a person is under no obligation to assist the police in most circumstances, a refusal to assist is nothing more than the exercise of a recognized liberty and, standing alone, says nothing about that person’s culpability.”1032 In explaining the underlying rationale for the evidentiary restriction, the Court stated:

There are policy concerns and fundamental constitutional principles at play where the Crown seeks to tender evidence of a refusal to cooperate which are not engaged when the defence tenders evidence of an accused’s cooperation with the police. Our criminal justice system accepts as a basic tenet the proposition that persons cannot be required to supply evidence which may assist in their ultimate conviction … The freedom to choose whether to assist the state in the investigation of an alleged crime would be illusory if the failure to render assistance could, standing alone, be used as evidence against a person at trial.1033

The judicial concern regarding the extent to which an accused’s post-offence conduct should be a factor in his or her trial has been echoed by Ratushny, who has pointed out that the courts have set limits as to what type of behaviour will be admitted as post-offence conduct. So, for

1031 Ibid at para 36.
1032 Ibid at para 43.
1033 Ibid at para 42.
example, an accused’s refusal to provide a breath sample, submit to physical impairment tests or participate in a physical line-up will not be admissible under the post-offence conduct rule.\textsuperscript{1034} On the other hand, an accused’s refusal to meet with the prosecution’s psychiatrist for a psychiatric examination was admitted in evidence as post-offence conduct because the accused’s refusal to participate in the examination “while putting forward a defence of insanity” was relevant to the credibility of the accused’s insanity defence.\textsuperscript{1035} As Ratushny explains:

The Court recognized that there is no duty upon an accused to speak and that, generally, no adverse inferences should be drawn from the fact that an accused is silent prior to trial. However, on the facts of the particular case, an analogy was found in the rule that pre-trial silence may be considered in weighing an explanation given by the accused at trial.”\textsuperscript{1036}

Stewart has questioned the probative value of allowing the prosecution to lead evidence describing the accused’s reaction or demeanour after the crime. Stewart identifies the Guy Paul Morin case as an example of the danger of admitting such evidence. In the Morin case, according to Stewart, the Crown was allowed to lead evidence of “a witness’s ‘observation of his [Morin’s] demeanour demonstrating an uncharacteristic lack of concern’ and a police officer’s evidence that when he interviewed Morin following the victim’s disappearance, Morin was ‘seemingly unconcerned’ and offered no assistance in the search.”\textsuperscript{1037} Morin was, of course, wrongfully convicted.\textsuperscript{1038}

\begin{itemize}
\item \textsuperscript{1034} Ratushny, \textit{Self-Incrimination}, \textit{supra} note 5 at 139.
\item \textsuperscript{1035} \textit{Ibid}, referring to \textit{R. v. Sweeney (No. 2)} (1977), 35 CCC (2d) 245 (Ont CA).
\item \textsuperscript{1036} Ratushny, \textit{ibid} at 140.
\item \textsuperscript{1037} Stewart, “Three Implications of Noble”, \textit{supra} note 1025 at 312.
\item \textsuperscript{1038} For a review of the Morin case and subsequent Royal Commission, see Botting, \textit{supra} note 272 at 145.
\end{itemize}
However, as made clear by the examples of admissible post-offence conduct identified in White and the Ontario Court of Appeal in decision R. v. B. (S.C.), silence by itself will not be considered to be post-offence conduct, other than in rare cases where it may be “admissible as an inextricable part of the narrative.” As Abella J. stated in R. v. Turcotte:

Conduct after a crime has been committed is only admissible as “post-offence conduct” when it provides circumstantial evidence of guilt. The necessary relevance is lost if there is no connection between the conduct and the guilt. The law imposes no duty to speak to or cooperate with the police. This fact alone severs any link between silence and guilt. Silence in the face of police questioning will, therefore, rarely be admissible as post-offence conduct because it is rarely probative of guilt. Refusing to do what one has the right to refuse to do reveals nothing. An inference of guilt cannot logically or morally emerge from the exercise of a protected right. Using silence as evidence of guilt artificially creates a duty, despite a right to the contrary, to answer all police questions.

However, while the accused’s silence in and of itself will not be admissible at his or her trial as part of the post-offence conduct rule, if the silence is embedded in the overall behavioural pattern of the accused and the accused’s behaviour is illustrative of post-offence conduct which is “consistent with guilt and inconsistent with any other rational conclusion”, the trier of fact may consider the accused’s behaviour “together with the rest of the evidence, in deciding whether the accused is guilty or innocent.”

d. Recent Fabrication

Canadian courts also created an exception to the right to silence in cases “of a failure by the accused to advance an explanation or defence at an early opportunity where, if it were true, one could reasonably have expected the accused to have offered an explanation or defence at the first

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1039 R v Turcotte, 2005 SCC 50, [2005] 2 SCR 519 at para 58 (available on lexUM) [Turcotte] [cited to online source].
1040 Ibid at para 55.
1042 Ibid at para 47.
available opportunity.”1043 However, the inference could not be that the accused was guilty; rather, it was limited to inferences regarding the “credibility of the explanation.”1044 As with other facets of the right to silence, though, the case law was at times contradictory. So, for example, in R. v. Cripps1045 the British Columbia Court of Appeal issued an inherently contradictory decision. In Cripps, the accused had been charged with possession of heroin for the purpose of trafficking. At his trial, the accused advanced for the first time an explanation that he had picked up a bag containing the heroin from a parking lot thinking it contained broken glass and that he simply disposed of it in a litter bag in his car. The trial judge instructed the jury as follows:

You will remember that he … was warned and then said nothing. It is for you to say whether the fact that he said nothing then is indicative of guilt or whether it is the reasonable action of a man who has had the experience with the police which is indicated by the accused’s record.1046

In deciding that the trial judge had misdirected the jury, the Court of Appeal made it clear that an inference of guilt could not be drawn from the accused’s silence in such circumstances, as “[t]he accused ‘was entitled to stand upon his rights and say nothing’”.1047 However, the Court also “specifically approved” the comments of the English Court of Appeal in R. v. Ryan, where the Court had stated:

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1043 Paciocco, Charter Principles, supra note 29 at 566.
1044 Ibid.
1045 (1968), 3 CR (NS) 367 (BCCA).
1046 Ratushny, Self-Incrimination, supra note 5 at 122.
1047 Ibid.
[I]t is wrong to say to a jury “Because the accused exercised what is undoubtedly his right, the privilege or remaining silent, you may draw an inference of guilt”; it is quite different matter to say “This accused, as he was entitled to do, has not advanced at any earlier stage the explanation that has been offered to you today; you, the jury, may take that into account when you are assessing the weight that you think it right to attribute to the explanation.”

Other provincial appellate courts added to the confusion. For example, Martin J.A. confirmed in R. v. Robertson that a person “faced with a criminal charge had the right to remain silent”, yet he also agreed with the trial judge’s decision to allow a police officer to give evidence before a jury stating that the accused had remained silent after being told by the police what sort of incriminating evidence they had and being asked for a response. Martin J.A. did, however, emphasize that the accused’s silence could not result in any adverse inference against him. A few years later, in R. v. Symonds, the same judge refused to allow the accused’s pre-trial silence to be admitted in evidence. Symonds was a stolen property case where the accused had failed to offer to the police an explanation which he later advanced at trial. The trial judge had allowed the Crown to lead evidence of the accused’s silence during the investigation, but the Ontario Court of Appeal overturned the trial judge’s decision, with Martin J.A. stating: “It is fundamental that a person charged with a criminal offence has the right to remain silent and a jury is not entitled to draw any inference against an accused because he chooses to exercise that right.”

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1048 Ibid at 126.
1049 See e.g. Ratushny, Self-Incarnation, supra note 5 at 126-29; Paciocco, Charter Principles, supra note 29 at 566-70.
1050 Robertson, supra note 1001.
1051 Paciocco, Charter Principles, supra note 29 at 558.
1052 Ratushny, Self-Incarnation, supra note 5 at 124.
1053 Ibid at 125.
1054 (1983), 38 CR (3d) 51 (Ont CA).
1055 As cited in Paciocco, Charter Principles, supra note 29 at 569, emphasis in original.
The contradictory nature of the cases has been explained by Paciocco as being the result of the “overbreadth of the descriptive phrase, ‘the right to silence’” and the important role of the police caution.\textsuperscript{1056} According to Paciocco, Martin J.A.’s comments in Symonds were premised on the accused having being cautioned by the police and, therefore, “Symonds supports the view that no adverse inferences can be drawn from silence where an accused has been cautioned”.\textsuperscript{1057} Furthermore, Paciocco suggests that if the right to silence is restricted to its proper role of prohibiting “the use of a person’s statements testimonial\textsuperscript{1058}ly against him as positive evidence that their contents represent true facts”, then “[i]t does not cover non-testimonial uses of statements, such as to cross-examine the speaker when subsequently testifying, about a contradictory statement made on the stand.”\textsuperscript{1059}

A common form of the “rule to the effect that an explanation will receive less weight if it is offered by the accused for the first time at trial”\textsuperscript{1060} is the alibi defence. As discussed in Chapter III, one of the leading arguments advanced by abolitionists is the need to effectively deal with “ambush defences”. Canadian courts dealt with the alibi defence issue by creating an exception to the right to silence where an adverse inference was allowed when the accused advanced a defence at the “eleventh hour”.\textsuperscript{1061} According to Craig, “[i]n Canada, a common law principle emerged that an alibi should be disclosed to the Crown prior to trial.”\textsuperscript{1062} The leading case was Russell v. The King,\textsuperscript{1063} where the Supreme Court of Canada dealt with a trial judge’s charge to

\textsuperscript{1056} Ibid at 567.  
\textsuperscript{1057} Ibid at 569, emphasis in original.  
\textsuperscript{1058} Ibid at 567.  
\textsuperscript{1059} Ibid.  
\textsuperscript{1060} Ratushny, Self-Incrimination, supra note 5 at 122.  
\textsuperscript{1061} Craig, supra note 26 at 229.  
\textsuperscript{1062} Ibid. Craig notes that in some jurisdictions, such as Australia and the United States, the judiciary has been reluctant to impose a common law alibi disclosure rule; although, several American State legislatures have.  
\textsuperscript{1063} (1936) 67 CCC 28 (SCC) [Russell].
the jury that an alibi defence “must be set up at the earliest possible moment”. Kerwin J. (as then was), while noting his concern with the specific wording used by the trial judge, concluded:

“What the learned trial judge was doing was indicating to the jury one way in which they might test the credibility of the story told by the accused at the trial; and this is permissible.”

According to Craig:

Since Russell, no Canadian appellate decision has questioned the principle that the failure of an accused to disclose an alibi defence to the Crown prior to trial is relevant to the weight, or credibility, to be attached to that alibi. Generally, the cases have focussed on clarifying the appropriate method of disclosure. Thus, according to Cory J.A. (as he then was) in R. v. Parrington, the “governing principle” is that an alibi should be disclosed “at a sufficient early time to permit it to be investigated by the police”. What is clear, then, is that Canadian law has placed an accused under a virtual obligation to disclose the nature and details of this alibi defence to the Crown prior to trial, as it is only through such disclosure that he can be certain of avoiding an adverse inference.

The “alibi notification rule” established by Russell was re-visited and upheld by the Supreme Court of Canada after the Charter was proclaimed. Speaking for the majority of the Court in R. v. Cleghorn, Iacobucci J. stated:

…the consequence of a failure to disclose properly an alibi is that the trier of fact may draw an adverse inference when weighing the alibi evidence heard at trial (R. v. Russell (1936), 67 C.C.C. 28 (S.C.C.), at p. 32). However, improper disclosure can only weaken alibi evidence; it cannot exclude the alibi. My colleague correctly notes that the rule governing disclosure of an alibi is a rule of expediency intended to guard against surprise alibis fabricated in the witness box which the prosecution is almost powerless to challenge.
However, while *Cleghorn* upheld the alibi notification rule as set out in *Russell*, Craig has submitted that the *Cleghorn* decision was limited to the “proper application of the common law alibi rule to the facts of the case”, and “[t]he question of whether the rule could co-exist with s. 7 of the Charter was not before the court.”

5. **Summary**

It is thus evident that while the law in Canada governing the right to silence at the investigative stage did not completely replicate the development of the law in Britain, it had many similarities to British law and it was certainly based on the same broad principles. Although the language used by Canadian judges to define the nature and scope of the right to silence was often imprecise, it was clear that there was an underlying premise that a person suspected or accused of having committed a criminal offence had the right to remain silent. The right to silence at the pre-trial stage was not, however, absolute. And, as Ratushny and Paciocco have both emphasized, the right to silence was more of a negative than a positive right. Canadian law, therefore, did not provide an impenetrable veil of protection to the accused, as the police were allowed to freely question and challenge the accused. If the accused had an “operating mind” and decided to answer questions or respond to allegations, and his or her decision to speak did not result from a promise or threat held out by a person in authority or from oppressive conditions, the statement was generally admissible. Furthermore, even when an accused maintained his or her silence, that silence could be used in a manner adverse to his or her interests if it fell within the adopted admission, consciousness of guilt or recent fabrication exceptions.

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1069 Craig, *supra* note 26 at 232.
However, while the development of Canadian common law governing pre-trial silence closely mirrored the law in Britain, the similarity ended when the two countries’ approach to individual rights took divergent paths. In Britain, events unfolding in Northern Ireland and England in the late 1970s and 1980s, as well as a political environment that extolled conservatism and a “crime and order” agenda, led to substantial legislative restrictions on the right to silence.\textsuperscript{1070} In contrast, Canada’s legal environment was about to undergo a radical paradigm shift with the proclamation of the \textit{Charter of Rights} in 1982, which signalled a new era governing the relationship between the individual and the state.

C. \textit{CHARTER OF RIGHTS AND FREEDOMS}

1. \textbf{Introduction}

The \textit{Charter of Rights}\textsuperscript{1071} was enacted one year after \textit{Rothman}. In \textit{Rothman}, the Supreme Court of Canada had reinforced a restrained approach to the right to silence and privilege against self-incrimination; however, with the advent of the \textit{Charter} the nature and extent of the right to silence in Canada needed to be reconsidered. While the \textit{Charter} did not explicitly identify the right to silence as a protected legal right, it did specifically enumerate several important complimentary rights, notably: the right for anyone arrested or detained to retain and instruct legal counsel without delay;\textsuperscript{1072} the right of a person charged with an offence not to be compelled

\textsuperscript{1070}See Chapter III.C, above.
\textsuperscript{1072}\textit{Ibid} s 10(b). Section 10 reads:

“Everyone has the right on arrest or detention
(a) to be informed promptly of the reasons therefor;
(b) to retain and instruct counsel without delay and to be informed of that right; and
(c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.”
to be a witness against him or herself;\textsuperscript{1073} and the right of a witness not to have incriminating evidence which he or she gives while testifying used against him or her in other proceedings, other than for perjury or perjury related offences.\textsuperscript{1074} Furthermore, section 7 of the Charter read:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.\textsuperscript{1075}

It would be up to Canada’s judiciary to decide what impact the newly enshrined constitutional rights would have on the common law right to silence.

Two early Charter decisions of the Supreme Court of Canada set the tone for how the Charter would be applied by the judiciary. In Hunter v. Southam Inc.,\textsuperscript{1076} Dickson J. (as he then was) emphasized that the task of “expounding a constitution is crucially different than that of construing a statute” because a constitution must be “capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.”\textsuperscript{1077} Affirming that the judiciary was “the guardian of the constitution”,\textsuperscript{1078} Dickson J. declared that a “large and liberal” interpretation of the Charter would be necessary and a purposive approach to interpreting the rights set out in the Charter should be employed by the judiciary. To this end, Dickson J. stated: “The Canadian Charter of Rights and Freedoms is a purposive document. Its

\textsuperscript{1073} Ibid s 11(c). Section 11(c) reads:

“A Any person charged with an offence has the right…
(d) not to be compelled to be a witness in proceedings against the person in respect of the offence ….”

\textsuperscript{1074} Ibid s 13. Section 13 reads:

“A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.”

\textsuperscript{1075} Ibid s 7.

\textsuperscript{1076} [1984] 2 SCR 145 (SCC) (available on lexUM) [Hunter v Southam] [cited to online source].

\textsuperscript{1077} Ibid at 155.

\textsuperscript{1078} Ibid.
purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms”. 1079

And one year after Hunter v. Southam Inc., the Supreme Court decided Reference Re Section 94(2) of the Motor Vehicle Act, 1080 where Lamer J. (as he then was) defined the term “principles of fundamental justice” in section 7 of the Charter as encompassing:

…principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the Charter, as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law.

Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system. 1081

Hunter v. Southam and Reference Re Section 94(2) of the Motor Vehicle Act therefore laid the foundation for the judiciary’s approach to interpreting the rights and freedoms either explicitly or implicitly enshrined in the Charter. And it was based on this approach that the provincial appellate courts, led by the Ontario Court of Appeal, took a first run at examining the common law right to silence in light of the new legal orthodoxy created by the Charter.

2. Early Appellate Cases

In R. v. Esposito, 1082 the Ontario Court of Appeal dealt with the issue of whether the accused’s “constitutional right to silence” 1083 had been violated when the police questioned the accused, Esposito, at his home regarding a fraud without arresting him or advising him of his right to remain silent and right to consult counsel. Regarding the right to silence, Martin J.A.

1079 Ibid at 156.
1080 [1985] 2 SCR 486 (SCC) (available on lexUM) [Reference Re: MVA] [cited to online source].
1081 Ibid at para 63.
1082 (1985) 49 CR (3d) 193 (Ont CA) [Esposito]. Re-cited for convenience; original citation at supra note 55.
1083 Ibid at 200.
stated: “The right of a suspect or an accused to remain silent is deeply rooted in our system… In Canada, save in certain circumstances, a suspect is free to answer or not to answer questions by the police.”

Martin J.A. went on to declare that under Canadian law:

A police officer, when he is endeavouring to discover whether or by whom an offence has been committed, is entitled to question any person, whether suspected or not, from whom he thinks that useful information can be obtained. Although a police officer is entitled to question any person in order to obtain information with respect to a suspected offence, he as a general rule has no power to compel the person to answer.

However, Martin J.A. also noted that, “[i]f, however, the suspect chooses to answer questions put to him by the police, his answers are admissible if the prosecution establishes that his statements are voluntary.”

Martin J.A. also considered the state of the law governing statements made by suspects who had not been cautioned, noting that the Judges’ Rules “did not have the force of law even in England and are merely administrative directions for the guidance of the police”. Martin J.A. concluded: “[I]t was well established in Canada prior to the enactment of the Charter that giving a caution was not a prerequisite to the admissibility of statements made by a person in response to police questioning.”

A few years after Esposito, the Ontario Court of Appeal again dealt with the issue of pre-trial silence in R. v. Wooley. Unlike Esposito, where the accused had neither been arrested nor cautioned, in Wooley, the accused, Wooley, had been arrested for possession of a stolen vehicle and upon his arrest had been advised that he had both the right to remain silent and the right to consult counsel. However, the police also told Wooley that if he did not provide the keys to the

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1084 Ibid.
1085 Ibid.
1086 Ibid at 201.
1087 Ibid at 202.
1088 Ibid at 203.
1089 (1988) 40 CCC (3d) 531 (Ont CA) [Wooley]. Re-cited for convenience; original citation at supra note 4.
stolen vehicle he would remain in custody indefinitely. Wooley took the police to a location where he recovered the keys and turned them over to the police. While the Crown did not seek to admit any of Wooley’s statements, conceding they were involuntary, it did argue that the keys and evidence relating to the circumstances surrounding their recovery should be admitted. The trial judge refused to admit the keys and any evidence regarding their retrieval. The Ontario Court of Appeal allowed the Crown’s appeal and ordered a new trial. The Court of Appeal’s decision was primarily based on its review of the trial judge’s decision to exclude evidence under section 24(2) of the Charter; however, it also discussed the right to silence and the trial judge’s conclusion that section 7 of the Charter encompasses the right to silence. Speaking for the majority of the Court, Cory J.A. (as he then was) noted that while the self-incrimination protections specifically included in Charter sections 11(c) and 13 “deal only with the testimonial right not to testify[,] … the right against self-incrimination cannot be limited to ss. 11 (c) and 13 of the Charter.” In Cory J.A.’s view, “[c]onsideration must still be given to the extent to which the same right, at least to the extent that is encompassed within the principle of the right to remain silent, is protected by s. 7 of the Charter.” In determining the extent to which the right to silence is protected by section 7 of the Charter, Cory J.A. recognized the expansive nature of the section and the significance of the phrase “principles of fundamental justice”, and concluded

1090 *Ibid* at 536.

1091 The Court of Appeal decided that, despite the police violating the accused’s Charter rights, the evidence obtained through the violation should still be admissible as to admit it would not bring the administration of justice into disrepute. In making its decision, the Court relied on Charter section 24(2), which establishes an exclusionary rule for evidence obtained in a manner that infringes or violates a Charter right. Section 24 reads:

“(1) Anyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.”

1092 *Wooley*, supra note 1089 at 538.

1093 *Ibid*. 

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that the principles of fundamental justice were “found in the basic tenets of our legal system”. Cory J.A. then declared:

It has always been a tenet of our legal system that a suspect or accused has a right to remain silent at the investigative stage of the criminal process and at the trial stage. At the very least, it is clear that an accused person is under no legal obligation to speak to police authorities and there is no legal power in the police to compel an accused to speak.

Cory J.A. concluded that, since the “right to remain silent is a well-settled principle that has for generations been part of the basic tenets of our law … [i]t follows that that the protection given by this principle must come within the purview of s. 7 of the Charter.”

Other provincial appellate courts came to similar conclusions to those of the Ontario Court of Appeal, although perhaps with less conviction. In British Columbia, for example, Hutcheon J.A. agreed with Cory J.A.’s conclusion that the right to silence is constitutionally protected; although, he also suggested there may be “very unusual circumstances [where] there may be exceptions such as in the case of alibi which may call for comment if it is not set up before trial”. Hutcheon J.A., however, also suggested that the scope of the accused’s right to silence extended to prohibiting the drawing of any negative inference from the accused’s pre-trial silence. In this regard, Hutcheon J.A. stated: “The right to remain silent carries with it the logical result that, subject to exceptional circumstances, no inference may be drawn by the jury

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1094 *Ibid* at 539.
1095 *Ibid*.
1096 *Ibid*.
1097 For a discussion of the various appellate decisions, see Patrick Healy, “The Value of Silence” (1990) 74 CR (3d) 176 (WL Can) 176 [Healy, “Value of Silence”].
from the failure of an accused to give an explanation to the police in an interview that follows the giving of a caution to the accused that he is not obliged to say anything.  

However, while it was clear that many judges held the view that the right to silence was a constitutionally protected right under the *Charter*, it did not necessarily follow that the right to silence was considered to be an absolute right. So, for example, in *R. v. Hicks* \(^{1100}\) the Ontario Court of Appeal dealt with a statement given to the police during an informal interview of the accused, Hicks, who was the owner of a vehicle that had been involved in a fatal motor vehicle hit and run collision. The trial judge ruled that Hicks’s statement to the effect that no one else had been driving the vehicle at the time of the fatal collision, which he had given in response to a question posed by a police officer, was inadmissible because he had earlier told the police he did not wish to make a statement and therefore had invoked his right to silence. \(^{1101}\) Lacourciere J.A., speaking for the Court of Appeal, did not wholeheartedly accept the idea that the right to silence was a constitutionally protected right under the *Charter*; \(^{1102}\) however, on the assumption that the right to silence did fall under section 7 of the *Charter*, Lacourciere J.A. noted:

The right to silence does not preclude appropriate police questions. The police have the right and duty to ask appropriate questions; provided constitutional rights have not been infringed, the answers given are admissible in a criminal prosecution if they are proven beyond a reasonable doubt to have been voluntary in the traditional sense defined by Lord Sumner in *Ibrahim v. The King*, [1914] A.C. 599. \(^{1103}\)

\(^{1099}\) *Ibid.*  
\(^{1100}\) (1988), 42 CCC (3d) 394 (Ont CA).  
\(^{1101}\) After indicating that no one else had been driving the vehicle the accused was charged, cautioned regarding his right to remain silent and advised of his right to counsel. The accused was re-interviewed later, at which time he provided a second statement regarding the incident. The trial judge excluded the second statement on the basis that it had been tainted by the initial response to the police question, which had been given in contravention of the accused’s right to remain silent. The Court of Appeal overturned the trial judge’s decision and admitted both statements. *Ibid* at 408.  
\(^{1102}\) *Ibid* at 406.  
\(^{1103}\) *Ibid.*
Lacourciere J.A. distinguished Wooley on the basis that the accused in Wooley had been arrested and the police conduct had been coercive, whereas the accused in Hicks had not been arrested when he gave his initial answer and the police questioning “was not intimidating or inducing.”¹¹⁰⁴ Based on these differences, Lacourciere J.A. concluded:

Even if the right to silence now said to be constitutionally enshrined by the application of s. 7 of the Charter goes beyond the traditional voluntariness rule, it is not violated by reason of an inculpatory pre-arrest or pre-detention admission obtained without a hint of official coercion or inducement. The right does not impose an obligation on the police to cease asking non-coercive questions as part of an investigation … simply because that person has indicated an unwillingness to make a statement.¹¹⁰⁵

It was therefore clear that while some judges were sceptical about the constitutional status of the right to silence, the general consensus of the judiciary appeared to “suggest the existence of a constitutional right to remain silent in s. 7 of the Charter.”¹¹⁰⁶ And, in 1990, the Supreme Court of Canada resolved any doubt about the constitutional status of the right to silence when it rendered its decision in R. v. Hebert.

3. R. v. Hebert

The seminal Supreme Court of Canada case of R. v. Hebert¹¹⁰⁷ has already been discussed in relation to the evolution of the law governing confessions and the privilege against self-incrimination, but a further analysis is required within the Charter of Rights rubric. The accused, Hebert, had been arrested for robbery and, after consulting with a lawyer, invoked his right to silence. The police did not question Hebert, choosing instead to place him into a cell at the local police detachment. Once he was in the cell, Hebert was befriended by an undercover police

¹¹⁰⁴ *Ibid* at 407.
¹¹⁰⁵ *Ibid*.
¹¹⁰⁷ *Hebert*, *supra* note 876.
officer posing as another prisoner; a virtually identical situation to that which occurred in
Rothman. Hebert eventually gave an incriminating statement to the undercover police officer. As Hebert was not aware that the person to whom he was speaking was a police officer the statement was voluntary under the Ibrahim rule. It was also clear that the accused had an operating mind at the time of the statement. Under the rules enunciated in Rothman, Hebert’s statement should have been admitted in evidence. The trial judge, however, refused to admit the statement on the basis that the accused’s right to silence and right to counsel had been infringed by the police. The judge distinguished Rothman on the basis that, in Rothman, the accused had not obtained counsel at the time of the police trickery and the fact that Rothman had been decided prior to the Charter. Hebert was subsequently acquitted.

The British Columbia Court of Appeal, sitting as the Court of Appeal for the Yukon Territories, overturned the trial judge’s decision. In the Court of Appeal’s opinion, the police had neither violated Hebert’s right to silence nor his right to counsel. Specifically dealing with the right to silence, the Court of Appeal “found the principles of fundamental justice upon which the right [to silence] must rest must be interpreted in the context of Rothman, where interrogation by a police officer posing as a fellow prisoner was held not to violate the principles of fundamental justice.” The accused appealed to the Supreme Court of Canada. In overturning the Court of Appeal decision and restoring the acquittal, the Supreme Court unanimously decided that the right to silence was a fundamental principle of justice constitutionally protected by section 7 of the Charter. There were three separate judgements in Hebert.

1108 Ibid at 22.
1109 Ibid at 23.
McLachlin J. (as she then was) wrote the majority judgement. In determining whether or not the right to silence is a fundamental tenet of the Canadian legal system, McLachlin J. noted that “rules such as the common law confessions rule, the privilege against self-incrimination and the right to counsel may assist in determining the scope of a detained person’s right to silence under s. 7.” Applying a purposive approach and recognizing that fundamental principles of justice are broader than strict legal rules, McLachlin J. noted that the right to silence “is rooted in two common law concepts”: the confessions rule and the privilege against self-incrimination.

As previously discussed, McLachlin J. reviewed the evolution of the confessions rule in Canada and confirmed its close relationship with the right to silence. Furthermore, she clearly asserted that applying the traditional narrow interpretation of the confessions rule would be incompatible with the underlying principles of section 7 of the Charter. Moreover and as also previously discussed, McLachlin J. noted that while the privilege against self-incrimination was limited to testimonial compulsion, it was philosophically and pragmatically consistent with the right to silence.

McLachlin J. also discussed the relationship between the right to silence and other Charter sections; specifically the right to counsel under section 10(b), the protection against self-incrimination at trial under sections 11(c) and 13, and the exclusion of improperly obtained evidence under section 24(2). Regarding the right to counsel, McLachlin J. concluded that the right to counsel provides the accused with the necessary knowledge and opportunity to make an informed decision whether or not to invoke his or her right to silence, observing: “The most important function of legal advice upon detention is to ensure that the accused understands his

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1110 Ibid at 24.
1111 Ibid at 26.
1112 See discussion accompanying and following note 951, above.
1113 See discussion accompanying note 967, above.
rights, chief among which is his right to silence.”

With regard to the privilege against self-incrimination at trial protected by sections 11(c) and 13 of the *Charter*, McLachlin J. noted, “if the *Charter* guarantees against self-incrimination at trial are to be given their full effect, an effective right of choice as to whether to make a statement must exist at the pre-trial stage.”

Finally, concerning section 24(2), McLachlin J. emphasized the inconsistency between the *Charter*, which “has made the rights of individuals and the fairness and integrity of the judicial system paramount”, and “the logic upon which Wray was based.” In McLachlin J.’s view, the inconsistency was unacceptable because the law governing the right to silence must be congruent with the new philosophy of the *Charter*.

After freeing the judiciary from the straightjacket of *Wray* and *Rothman* and clarifying that the right to silence in the post-*Charter* era is based on a person’s right to choose to speak or not, McLachlin J. went on to set out the scope of the right to silence, focussing on the importance of balancing individual liberty with the legitimate needs of the state. However, while she acknowledged that section 7 of the *Charter* guarantees a person’s life, liberty and security of the person, McLachlin J. also emphasized that the *Charter* “recognizes that these rights are not absolute.” Consequently, McLachlin J. concluded that the right to silence does not extend so far as to be only capable of being discharged by means of the accused waiving his or her right to silence. According to McLachlin J., nothing in the rationale for the right to silence and no *Charter* provisions require the scope of the right to silence to be extended to such a degree. McLachlin J. therefore identified four restrictions on the right to silence at the investigative

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1114 *Hebert, supra* note 876 at 35.
1115 *Ibid* at 36.
1116 *Ibid* at 37.
1117 *Ibid*.
1118 *Ibid*.
1119 *Ibid* at 40.
stage: (1) the police may continue to question the accused after he or she has retained counsel and may do so in the absence of his or her counsel; (2) the right to silence only applies after detention; (3) the right to silence is not contravened when the accused makes a statement to another prisoner; and (4) the police are not prohibited from recording comments from the accused as long as they do not elicit the conversation.1120

Wilson and Sopinka JJ. also wrote judgements. While both agreed that the right to silence was a principle of fundamental justice protected by section 7 of the Charter, they disagreed with McLachlin J. in some respects. Sopinka J. emphasized the long tradition of Canadian courts recognizing a common law right to silence and suggested the right to silence was “at least as broad under s. 7 as it is at common law.”1121 Sopinka J. disagreed with McLachlin J.’s perspective regarding the relationship between the right to silence and privilege against self-incrimination, as he saw no need to use the privilege against self-incrimination as a supportive principle for the right to silence. According to Sopinka J., “the privilege against self-incrimination has a very limited scope and applies only in the course of proceedings”, 1122 while the right to silence “is truly a right.”1123 Moreover, Sopinka J. differed with McLachlin J. on the question of when the right to silence arises. McLachlin J. had concluded that the right to silence only arises after detention, “when the state takes control and assumes the responsibility of ensuring that the detainee’s rights are respected.”1124 However, Sopinka J. thought the right to silence arose earlier, stating:

1120 Ibid at 41-43.
1121 Ibid at 13.
1122 Ibid at 10.
1123 Ibid at 11.
1124 Ibid at 41.
The right to remain silent, viewed purposively, must arise when the coercive power of the state is brought to bear against the individual – either formally (by arrest or charge) or informally (by detention or accusation) – on the basis that it is at this point that an adversary relationship comes to exist between the state and the individual. The right, from its earliest recognition, was designed to shield an accused from the unequal power of the prosecution, and it is only once the accused is pitted against the prosecution that the right can serve its purpose.1125

Finally, Sopinka J. also disagreed with McLachlin J. on the issue of waiver, suggesting that the Clarkson “awareness of consequences test”1126 is the appropriate standard to determine whether or not the accused has waived his or her right to silence.1127

Wilson J. cited three specific areas of disagreement with the judgements of both McLachlin and Sopinka JJ. First, with regard to the question of when the right to silence arises, Wilson J. observed: “[T]he right to silence, if it is to achieve the purpose that it was clearly intended to achieve, must arise whenever the coercive power of the state is brought to bear upon the citizen. I think this could well predate detention and extend to the police interrogation of a suspect.”1128
Second, Wilson J. disagreed with McLachlin J.’s assertion that consideration must be given to state interests, such as effective law enforcement or the repute of the justice system, when determining whether or not the right to silence has been breached. According to Wilson J., “[t]he repute of the justice system … has no bearing on whether the right to silence has been violated contrary to the principles of fundamental justice.”1129 Finally, Wilson J. asserted that the

1125 Ibid at 15.
1126 Clarkson, supra note 942. The awareness of consequence test that Wilson J. developed in Clarkson dealt with the specific issue of waiver of the right to counsel. The test requires the prosecution to demonstrate that the accused was fully aware of the consequences of his or her waiver of the right to consult counsel.
1127 Hebert, supra note 876 at 16-18.
1128 Ibid at 6.
1129 Ibid at 7.
doctrinal waiver should apply to the right to silence in the same manner as it applies to other Charter rights.\textsuperscript{1130}

Hebert clearly confirmed that the advent of the Charter of Rights had changed the law governing the right to silence in Canada. The constraints imposed by Wray and Rothman were removed and the inquiry moved from a narrow focus on reliability to a broader analysis of whether or not the accused’s decision to speak was truly a free one. But the majority decision in Hebert also introduced a number of restrictions on the practical application of the right to silence at the investigative stage of the criminal process. Perhaps not surprisingly, Hebert has been criticized by some legal scholars for unreasonably interfering with effective policing,\textsuperscript{1131} while others have criticized it for largely neutering the practical efficacy of the right to silence.\textsuperscript{1132} And just as there were differing opinions regarding the Hebert case within academia, the judiciary also struggled with the ambiguity of the decision.

4. **The Aftermath of Hebert: Clarifying the Confusion**

a. **Confirming the Right to Pre-trial Silence is Not Absolute**

While the Hebert decision anointed the right so silence with constitutional status, it tempered that status by acknowledging that the right to silence is not an absolute or unqualified right. The limitations to the right to pre-trial silence identified by McLachlin J. tended to muddy the water somewhat and it fell to provincial appellate courts, as well as subsequent Supreme Court of

\textsuperscript{1130} Ibid.


\textsuperscript{1132} See e.g. Wall, supra note 76; Healey, “Value Added”, supra note 874; Benissa Yau, “Making the Right to Choose to Remain Silent a Meaningful One” (2006) 38 CR (6th) 226 (WL Can).
Canada decisions, to clarify some of the confusion and fill in some of the gaps created by Hebert.

*R. v. Chambers*\(^{1133}\) was the first such opportunity. *Chambers* involved several legal issues, one of which was the accused’s pre-trial right to silence. The accused, Chambers, had been charged with conspiracy to import narcotics into Canada. At trial, Chambers took the stand and claimed he had no intention to import the drugs, stating he had only played along with the conspirators in order to recapture the affection of his former girlfriend, who was one of the conspirators. Crown counsel vigorously cross-examined Chambers as to why he had not given this explanation to the police when he was arrested. The trial judge failed to instruct the jury regarding Chambers’s right to pre-trial silence and the jury convicted him. On the accused’s appeal to the Supreme Court of Canada, the Court confirmed the existence of a pre-trial right to silence and concluded Chambers’s right to silence had been infringed. Speaking for the majority of the Court,\(^{1134}\) Cory J. stated: “It is now well recognized that there is a right to silence which can be properly exercised by an accused person in the investigative stages of the proceedings.”\(^{1135}\) Referring to comments made by Martin J.A. of the Ontario Court of Appeal in *Symonds* that, “[i]t is fundamental that a person charged with a criminal offence has the right to remain silent and a jury is not entitled to draw any inference against an accused because he chooses to exercise that right”,\(^{1136}\) Cory J. stated:

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\(^{1133}\) (1991), 59 CCC (3d) 321, [1990] 2 SCR 1293 [*Chambers*] [cited to CCC].

\(^{1134}\) L’Heureux-Dube J. dissented, preferring the reasoning of the Court of Appeal that the accused had not been unfairly prejudiced.

\(^{1135}\) *Chambers*, supra note 1133 at 340.

It has as well been recognized that since there is a right to silence, it would be a snare and delusion to caution the accused that he need not say anything in response to a police officer’s question but nonetheless put in evidence that the accused clearly exercised his right and remained silent in the face of a question that suggested his guilt.\footnote{Ibid.}

Moreover, Cory J. referred to Dubin J.A.’s comments in \textit{R. v. Robertson} that: “In the absence of any issue raised by the defence, the mere silence of an accused during police interrogation cannot be said to advance the case for the Crown. It cannot be a step on the way to the proof of the accused’s guilt. It, therefore, becomes, in my opinion, irrelevant to any issue at trial.”\footnote{Ibid, citing Robertson, supra note 1001 at 400.} In the case of Chambers, Cory J. concluded that the Crown had not established “a real relevance and a proper basis” for Chambers’ silence to be admitted.\footnote{Ibid at 342.} Cory J. did, however, acknowledge that, on occasion, “[t]he failure to disclose a defence of alibi in a timely manner may be considered in assessing the credibility of that defence”, but such a situation did not arise in the case at bar.\footnote{Ibid at 343.}

The issue of pre-trial silence was again considered by the Supreme Court of Canada in \textit{R v. Crawford}.\footnote{[1995] 1 SCR 858 (available on lexUM) [Crawford] [cited to online source].} The accused, Crawford, had been convicted of second degree murder along with his co-accused in a joint trial. Crawford and his co-accused, Creighton, had befriended the victim in a bar and later attacked him while robbing him. The victim died from the assault and at trial the two accused pointed fingers at each other. Creighton had given a videotaped statement to the police but Crawford had not made a statement. On the stand, Crawford for the first time claimed Creighton had been the one who had beaten the victim to death. Creighton’s lawyer cross-examined Crawford as to why he had not given this explanation earlier and “made much of
the fact that Crawford had declined to give a statement to the police on his arrest, contrasting unfavourably with Creighton’s full statement to the police at the earliest opportunity.”¹¹⁴² The issues before the Court were whether the cross-examination of Crawford regarding his pre-trial silence had violated his right to silence under section 7 of the Charter and whether the trial judge’s charge to the jury had been adequate.

Sopinka J. wrote the majority decision, with McLachlin J. (as she then was) writing her own concurring reasons. Sopinka J. identified the fundamental tension in the case as being the competing Charter rights of the two accused, notably Crawford’s right to silence and Creighton’s right to make full answer and defence which, in joint trials, includes the right to cross-examine the co-accused. In resolving the dilemma, Sopinka J. reviewed the right to pre-trial silence and confirmed it extended to prohibiting the drawing of an adverse inference when the accused invokes his or her right to silence. In this regard, Sopinka J. stated:

It is a corollary of the right to choose to remain silent during the pre-trial investigation that, if exercised, this fact is not to be used against the accused at a subsequent trial on a charge arising out of the investigation and no inference is to be drawn against an accused because he or she has exercised the right.¹¹⁴³

However, while Sopinka J. acknowledged that police interviews are substantively different than trials with less protections afforded to a suspect, he was “not prepared to accept that…the right to pre-trial silence is absolute.”¹¹⁴⁴ Moreover, Sopinka J. emphasized the right to silence did not trump a co-accused’s right to full answer and defence; although, neither did the right to make full answer and defence trump the right to silence. To resolve the impasse, Sopinka J. struck a balance by allowing cross-examination of a co-accused on the issue of his or her pre-

¹¹⁴² Ibid at para 7.
¹¹⁴³ Ibid at para 22.
¹¹⁴⁴ Ibid at para 26.
trial silence for the purpose of credibility, but not to demonstrate or infer guilt. While Sopinka J. acknowledged that the distinction between the two purposes is fine and nuanced and may be quite complex for juries, he believed a properly constructed jury charge could effectively protect both the right to silence and the right to make full answer and defence. In this regard, Sopinka J. stated: “The evidence of pre-trial silence is not to be used as positive evidence to infer guilt of the accused either as tending to show consciousness of guilt or otherwise. In a trial before a jury the trial judge must explain the respective rights involved how they are to approach the use of the evidence of silence and its limited purpose.”

McLachlin J. was more protective of the right to silence and would have simply not allowed the cross-examination of Crawford concerning his decision to remain silent during the police investigation. In McLachlin J.’s opinion, the right to cross-examine is confined to probing or challenging relevant, probative evidence. She noted, however, “[s]ince no valid inference can be drawn from exercise of the right silence, the evidence sought to be adduced should be excluded for lack of relevancy.” To support her conclusion, McLachlin J. underlined the importance of the right to silence, stating:

The co-accused has a constitutional right to silence. He therefore cannot be faulted for not giving his version to the police. If the right to silence is to be meaningful, no adverse inferences can be drawn from his failure to do so, either as to guilt or credibility. Pre-trial silence is either a right or it is not a right. If it is a right, the trier of fact should not be permitted to draw adverse inferences from its exercise. If adverse inferences are permitted, then the right to silence is effectively lost, for no accused who wishes to preserve the possibility of putting his story forth at trial can afford to exercise it. The right to silence, if it means anything, must mean that a suspect has the right to refuse to talk to the police and not be penalized for it. Further, since the accused has been informed by the police of the right not to speak,

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1145 Ibid at para 38.
1146 Ibid at para 44.
his exercise of it cannot logically found an inference as to his credibility when he later testifies.\textsuperscript{1147}

In \textit{R. v. G.A.O.},\textsuperscript{1148} the Alberta Court of Appeal dealt with an analogous situation to the one facing the Supreme Court of Canada in \textit{Crawford}, although the cross-examination of the accused in \textit{R. v. G.A.O.} was undertaken by the prosecutor. In \textit{R. v. G.A.O.}, the accused had been convicted of the sexual assault of his nephew. The allegation was that the accused had sexually assaulted the victim while the victim was staying at his home and after the victim had become intoxicated. After the assault, the victim left the accused’s house and went to the police station to report it. When the accused realized the victim had left the house he went to look for him but was intercepted by a police officer, who arrested him. At his trial, the accused testified in his examination-in-chief that he had immediately denied the victim’s allegations when he was confronted by the police. In rebuttal, the Crown called the police officer who had arrested the accused, Corporal McAllister, who testified that the accused “made no response when confronted with the accusations.”\textsuperscript{1149} Moreover, in closing arguments Crown Counsel “invited the jury” to accept the police officer’s testimony over that of the accused and to “consider the [accused’s] silence as evidence of guilt.”\textsuperscript{1150} In charging the jury, the trial judge instructed them that the police officer’s evidence was relevant to the accused’s credibility, but the judge “did not, however, caution the jury about the improper use of the evidence of silence. He did not warn them that they could not use it to found an inference of guilt.”\textsuperscript{1151} The accused was convicted and appealed to the Alberta Court of Appeal, claiming a violation of his right to pre-trial silence.

\textsuperscript{1147} \textit{Ibid} at para 43.
\textsuperscript{1148} (1997), 119 CCC (3d) 30 (Alta CA) \textit{[R v GAO]}.
\textsuperscript{1149} \textit{Ibid} at 34.
\textsuperscript{1150} \textit{Ibid} at 35.
\textsuperscript{1151} \textit{Ibid}. 
The Court of Appeal set aside the conviction and ordered a new trial. In so doing, the Court stated:

Section 7 of the *Canadian Charter of Rights and Freedoms* has been interpreted to include the right to silence as a principle of fundamental justice; however it is recognized that the right is not absolute. If an accused’s pre-trial silence is or becomes a fact-in-issue in the trial, that evidence can be received to prove that fact. However, evidence thus admitted is relevant only to the issue for which it was tendered; it cannot be used as the basis for an adverse inference of guilt when it was not admissible for that purpose.\textsuperscript{1152}

The Court of Appeal had no difficulty with the Crown calling the police officer to rebut the accused’s claims that he had denied the accusations because the accused had put his credibility in issue. However, the Court found that the prosecutor’s attempt to “effectively invite the jury to accept McAllister’s evidence as relevant to guilt, suggesting that an innocent person would have immediately proclaimed his innocence,”\textsuperscript{1153} and the inadequacy of the trial judge’s charge to the jury, “left open the conclusion that the Appellant’s failure to protest his innocence could be used to infer guilt.”\textsuperscript{1154} This was a serious violation of the accused’s right to silence which, in the Court of Appeal’s view, may well have prejudiced the accused. As such, the Court of Appeal refused to utilize the curative provisions of section 686(1)(b)(iii) of the *Criminal Code* and ordered a new trial.

The so-called “cut throat defence”, where one co-accused points a finger at the other co-accused (a situation similar to the one in *Crawford*), was again addressed by the Supreme Court of Canada in *R. v. Prokofiew*.\textsuperscript{1155} While the issue before the Supreme Court was the accused’s silence at trial as opposed to during the investigative stage, the decision once again demonstrated

\textsuperscript{1152} *Ibid* at 36.
\textsuperscript{1153} *Ibid* at 37.
\textsuperscript{1154} *Ibid* at 38.
\textsuperscript{1155} 2012 SCC 49 (available on lexUM) [*Prokofiew*] [cited to online source].
the judiciary’s respect for and deference to the accused’s right to silence; a judicial attitude that applies to pre-trial silence as well as silence at trial. The accused, Prokofiew, and a co-accused by the name of Solty were jointly charged with offences relating to an alleged fraudulent scheme in which they defrauded the federal government by not remitting harmonized sale tax receipts based on fictitious sales of heavy equipment. At trial, Solty took the stand and testified in a manner that professed his innocence and incriminated Prokofiew. Prokofiew did not testify. In his closing argument to the jury, Solty’s counsel referred to Prokofiew’s failure to testify and suggested his silence inferred guilt. While the trial Judge voiced serious concern with the comments of Solty’s lawyer and said he would instruct the jury accordingly at the appropriate time, he later decided that section 4(6) of the Canada Evidence Act (CEA)\(^{1156}\) prohibited him from making any comment on the accused’s failure to testify. Both Prokofiew and Solty were convicted.

While the Supreme Court issued a split decision in the case, all Justices agreed on the parameters governing judicial comment on an accused’s silence at trial. Moldaver J., writing for the majority, confirmed that section 4(6) of the CEA did not absolutely prohibit comment by the trial judge regarding the accused’s failure to testify. Moldaver J. emphasized that section 4(6) of the CEA “does not prohibit a trial judge from affirming an accused’s right to silence … where there is a realistic concern that the jury may place evidential value on an accused’s decision not to testify”.\(^{1157}\) Moreover, Moldaver J. stated:

\(^{1156}\) See supra note 868. Section 4(6) reads: “The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.”

\(^{1157}\) Prokofiew, supra note 1155 at para 3.
In cases where the jury is given an instruction on the accused’s right to remain silent at trial, the trial judge should, in explaining the right, make it clear to the jury that an accused’s silence is not evidence and that it cannot be used as a makeweight for the Crown in deciding whether the Crown has proved its case. In other words, if, after considering the whole of the evidence, the jury is not satisfied that the charge against the accused has been proven beyond a reasonable doubt, the jury cannot look to accused’s silence to remove the doubt and give the Crown’s case the boost it needs to push it over the line.\textsuperscript{1158}

Fish J., writing for the minority, agreed that section 4(6) of the \textit{CEA} did not bar a trial judge from ever commenting on an accused’s decision to remain silent at his or her trial. Fish J. reviewed the \textit{obiter} comments of Sopinka J. in \textit{R. v. Noble}\textsuperscript{1159} and \textit{R. v. Crawford}\textsuperscript{1160}, and concluded that they did not prohibit all comment from a judge regarding the accused’s silence. Fish J. confirmed that:

\textit{Noble} establishes that a trier of fact may not draw an adverse inference from the accused’s failure to testify and that the accused’s silence at trial may not be treated as evidence of guilt. To do so would violate the presumption of innocence and the right to silence. It would to that extent and for that reason shift the burden of proof to the accused, turning the accused’s constitutional right to silence into a “snare and delusion” (\textit{Noble}, at par. 72).\textsuperscript{1161}

Furthermore, Fish J. looked to other Supreme Court of Canada decisions which had applied a purposive approach to section 4(6) of the \textit{CEA} and concluded that, “trial judges may instruct the jury that, as a matter of law, no adverse inference may be drawn from the failure of the accused to testify.”\textsuperscript{1162}

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\textsuperscript{1158} \textit{Ibid} at para. 4. \\
\textsuperscript{1159} \textit{Noble}, supra note 28. \\
\textsuperscript{1160} \textit{Crawford}, supra note 1141. \\
\textsuperscript{1161} \textit{Prokofiew}, supra note 1155 at para 64. \\
\textsuperscript{1162} \textit{Ibid} at para 74. The cases to which Fish J. referred were \textit{McConnell v The Queen}, [1968] SCR 802; \textit{Avon v The Queen}, [1971] SCR 650; and \textit{R v Potvin}, [1989] 1 SCR 525.
\end{flushright}
The Supreme Court of Canada also considered the issue of pre-trial silence in light of the new orthodoxy established by Hebert in *R. v. White*. While *White* was primarily a privilege against self-incrimination case, it also involved the issue of pre-trial silence. The accused, White, was the driver of a vehicle that had struck and killed a man as he was changing a tire on the side of a highway. On the day following the collision, White called the police to report that she had been in an accident the previous evening and that she had “swerved to miss a deer on the road and had hit a jack and a man changing a tire.” She further stated that she had panicked and fled. After the phone conversation a police officer, Sergeant Tait, went to White’s residence. Sergeant Tait advised White of her right to consult counsel and “that she was not obliged to say anything but that anything she did say might be given in evidence.” White gave the Sergeant her driver’s licence at his request and then consulted a lawyer on the telephone and in private for approximately 45 minutes while Sergeant Tait waited. After speaking to the lawyer, White told the police officer that she would not be providing a statement on the advice of her lawyer. Sergeant Tait confirmed that White did not have to do provide a statement but then asked her if she had swerved to miss a deer, as she had previously stated, to which White replied: “Actually there were two. It was on the blind corner across from the mill at Galloway. I just swerved and I thought I hit the jack and I panicked. I’m sorry.”

White was charged with the criminal offence of failure to stop at the scene of an accident. At her trial, the Crown attempted to admit White’s statements and, in the *voie dire*, White testified that “she knew immediately upon being involved in the accident she was under a duty to report it” and, further, that when Sergeant Tait came to her residence “she was under a duty to speak to

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1163 [1999] 2 SCR 417 (available on lexUM) [*White* 1999] [cited to online source].
1165 *Ibid* at para 5.
him about the accident [and] she continued to feel obligated to speak to him after she had spoken to a lawyer.”\textsuperscript{1167} The trial judge found that White’s statements were voluntary and that no violation of the right to counsel under section 10(b) of the \textit{Charter} had occurred; however, he found that White’s section 7 right “not be compelled to incriminate herself” had been violated and excluded her statements under section 24(2) of the \textit{Charter}.\textsuperscript{1168} The accused was acquitted and the acquittal was upheld by the Court of Appeal. The Crown appealed to the Supreme Court of Canada.

The primary issue to be decided by the Supreme Court was whether a statutory duty under provincial motor vehicle legislation which requires a driver to make an accident report renders the driver’s statement to the police inadmissible in a criminal trial. The majority judgement was written by Iacobucci J., who based his decision on a finding of fact that White had made her statements under compulsion of the British Columbia \textit{Motor Vehicle Act}, which statutorily compelled her to report the accident to the police.\textsuperscript{1169} Iacobucci J. concluded that White’s statements were therefore inadmissible “because their admission would violate the principle against self-incrimination.”\textsuperscript{1170} To support his conclusion, Iacobucci J. observed: “It is now well-established that there exists, in Canadian law, a principle against self-incrimination that is a principle of fundamental justice under s. 7 of the \textit{Charter}.”\textsuperscript{1171} Expanding on this statement, Iacobucci J. further asserted: “The principle is that the accused is not required to respond to an

\textsuperscript{1167} Ibid at para 9.
\textsuperscript{1168} Ibid at paras 8, 10.
\textsuperscript{1169} RSBC 1979, c 288, s 61(1). Section 61(1) requires the driver of a vehicle involved in an accident that directly or indirectly causes injury or death to a person or damage to property apparently exceeding $1000 in the case of a vehicle other than a motorcycle, and $600 in the case of a motorcycle, to report the accident to a police officer or other designated official. Section 61(7) provides subsequent use immunity for provincial offences other than a charge for failing to make an accident report, but as Iacobucci J. noted, it does not provide subsequent use immunity for proceedings under the \textit{Criminal Code} (\textit{ibid} at para 13).
\textsuperscript{1170} Ibid at para 30.
\textsuperscript{1171} Ibid at para 40.
allegation of wrongdoing made by the state until the state has succeeded in making out a *prima facie* case against him or her.”  

Iacobucci J. noted that the “principle’s underlying rationale” is to “protect against unreliable confessions, and to protect against abuses or power by the state”, and that both purposes are “linked to the value placed by Canadian society upon individual privacy, personal autonomy and dignity”. In Iacobucci J.’s view, “the principle against self-incrimination is an over-arching principle within our criminal justice system, from which a number of specific common law and Charter rules emanate, such as the confessions rule, and the right to silence, among many others.” However, while Iacobucci J. affirmed the fundamental nature of the privilege against self-incrimination, he also acknowledged that it does not provide “absolute protection for an accused against all uses of information that has been compelled by the state or otherwise.” According to Iacobucci J., a balance is required since other Canadian values, such as “the principle which suggests that, in a search for truth, relevant evidence should be available to the trier of fact”, must also be considered. Iacobucci J. observed: “In some contexts, the factors that favour the importance of the search for the truth will outweigh the factors that favour protecting the individual against undue compulsion by the state.”

Recognizing that, unlike some regulated activity in which a person freely chooses to be part of a reporting regime such as the fisheries industry, driving is “often a necessity of life”, Iacobucci J. concluded that admitting a driver’s compelled statement violated the privilege against self-incrimination and, therefore, a driver providing such a statement “is entitled, at least,
to use immunity in criminal proceedings in relation to the content of that statement.”

Moreover, Iacobucci J. thought such compelled statements might be unreliable and might lead to abuse by the police. Iacobucci J. summed up the rationale for his decision as follows:

The spontaneous utterances of a driver, occurring very shortly after an accident, are exactly the type of communication that the privilege against self-incrimination is designed to protect. They are personal narrative of events, emotions, and decisions that are extremely revealing of the declarant’s personality, opinions, thoughts, and state of mind. The dignity of the declarant is clearly affected by the use of this narrative to incriminate.

L’Heureux-Dube J. dissented, finding that the accused’s final statement to the police was given after she had been advised of her right to counsel and right to silence and had received legal advice. L’Heureux-Dube J. emphasized that “[t]here is no blanket protection against self-incrimination by statutorily compelled statements under the Charter.” Based on her assessment of the facts, L’Heureux-Dube J. concluded the accused “could not have had ‘an honest and reasonably held belief’ that what she said to the police officer after being given the proper warnings, was related to the statutory duty to report the accident.” Consequently, L’Heureux-Dube J. would have admitted the final statement given by White to Sergeant Tait.

While the Supreme Court of Canada ratified in its decisions subsequent to Hebert that the right to silence and privilege against self-incrimination extended to the prohibition of an adverse inference arising from the accused’s decision to remain silent, subject to limited exceptions where the accused’s credibility might be challenged by reference to his or her previous silence, and that statutorily compelled statements were generally not admissible in criminal trials as they

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1179 Ibid at para 67.
1180 Ibid at para 66.
1181 Ibid at para 108.
1182 Ibid at para 109.
violated the privilege against self-incrimination, other judicial decisions grappled with trying to interpret some of the restrictions placed on the right to silence identified by McLachlin J. in Hebert. Two of those limitations – specifically that the right to silence only applies after detention and that it does not arise when the accused gives a statement to an undercover officer when the undercover officer does not elicit the statement – created some uncertainty.\textsuperscript{1183} Furthermore, the issue of how to assess an apparent waiver of the right to silence by an accused during a police interrogation, as well as the relationship between the right to silence and right to counsel, also required further judicial consideration.

b. Statements to Undercover Officers and Police Agents

In R. v. Broyles,\textsuperscript{1184} the Supreme Court of Canada dealt with the issue of the right to silence in the context of a statement given by an accused to a person who was not a police officer but who was acting on behalf of the police. The accused, Broyles, was a suspect in the murder of his grandmother. Broyles was initially arrested for fraud and was advised of his right to retain and instruct counsel without delay and his right to remain silent. Broyles was allowed to phone a lawyer but apparently did not speak to one, after which he was interrogated by three separate police officers, although no useful information was obtained. The police then solicited the assistance of a friend of Broyles, a man named Ritter, who agreed to meet with Broyles while surreptitiously wearing a recording device. During the meeting, which was held while Broyles was still in custody, Broyles made an incriminating statement that he knew his grandmother was “dead the day she went missing”.\textsuperscript{1185} The trial judge admitted Broyles’s statement to Ritter,

\textsuperscript{1183} See e.g. Wall, supra note 76; Healy, “Value Added”, supra note 874; Yau, supra note 1132.
\textsuperscript{1184} (1992), 68 CCC (3d) 308 (SCC) [Broyles]. Re-cited for convenience; original citation at supra note 16.
\textsuperscript{1185} Ibid at 313.
determining there had been no violation of section 7 of the Charter.\footnote{Ibid at 315.} The Alberta Court of Appeal dismissed Broyles’ appeal and he further appealed to the Supreme Court of Canada.

Writing for a unanimous court, Iacobucci J. found the statement given by Broyles to Ritter to have been obtained in a manner that violated Broyles’s right to silence. He therefore allowed the appeal and ordered a new trial. In rendering the Court’s decision, Iacobucci J. identified two questions that needed to be answered: first, was Ritter an agent of the state, which would place him within the ambit of Hebert; and second, assuming Ritter was a state agent, did he elicit the response from Broyles, as Hebert had expressly stated that “in the absence of eliciting behaviour on the part of the police, there is no violation of the accused’s right to choose whether or not to speak to the police.”\footnote{Hebert, supra note 876 at 41-42.}

To answer these questions, Iacobucci J. analyzed both the relationship between Ritter and the police and between Ritter and Broyles. Concerning the relationship between Ritter and the police, Iacobucci J. identified the pivotal question to be: “[W]ould the exchange between the accused and the informer have taken place, in the form and manner in which it did take place, but for the intervention of the state or its agents?”\footnote{Broyles, supra note 1184 at 319.} On the facts of the case, Iacobucci J. concluded that Ritter was acting as an agent of the state when he met with the accused. However, confirming that “[t]here will be a violation of the s. 7 right to silence only if the statement is elicited by the agent of the state”,\footnote{Ibid at 320.} Iacobucci J. went on to consider whether Ritter had actually elicited a statement from Broyles. In dealing with this issue, Iacobucci J. suggested the following question needed to be answered: “[I]s there a causal link between the conduct of

\footnote{1186 Ibid at 315.} \footnote{1187 Hebert, supra note 876 at 41-42.} \footnote{1188 Broyles, supra note 1184 at 319.} \footnote{1189 Ibid at 320.}
the state agent and the making of the statement by the accused?" On the facts of the case, Iacobucci J. concluded that Ritter had exploited his friendship with Broyles and the trust that Broyles had in him, and, in such circumstances, Ritter had elicited the statement.

Broyles therefore helped to clarify the law regarding two of the four limitations on the right to pre-trial silence identified by McLachlin J. in Hebert (i.e., the third limitation, which suggested that a voluntary statement from an accused to a cell mate is not a violation of the accused’s right to silence, and the fourth limitation, which held that a statement given to an undercover police officer or agent of the state is only a violation of the accused’s right to silence if the statement is the product of elicitation on the part of the state agent). However, Broyles was confined to statements made by the accused to the police or their agents when the accused is detained, as Iacobucci J. specifically pointed out, “[t]he question of what right to silence, if any, remains after a detainee is released is a question not raised by the facts of this case.”

In R. v. Liew, the Supreme Court of Canada once again dealt with the issue of police subterfuge to obtain a statement from a detained suspect. The accused, Liew, had made comments to an undercover police officer who had been placed in his jail cell. Liew was a very fact specific case. However, while Liew did not create any new law or rules, it did clarify some aspects of Hebert and Broyles regarding statements made by a detained suspect to an undercover police officer. In writing for the Court, Major J. confirmed that “Hebert … carefully distinguishes its formulation of the right to silence from that which assumes an ‘absolute right to

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1190 Ibid at 321.
1191 Iacobucci J. also noted that Ritter had undermined Broyles’ confidence in his lawyer’s advice to remain silent, which he considered to be highly problematic considering “the close connection between the right to counsel and the right to silence” (ibid at 324).
1192 Ibid at 317.
1193 [1999] 3 SCR 227 (available on lexUM) [Liew] [cited to online source].
1194 Ibid at para 36. Major J., who wrote the majority judgement in Liew, indeed stated: “No new law is involved.”
silence’ in the accused, capable of being discharged only by waiver”.  

Major J. emphasized that an atmosphere of oppression is not required for there to be a violation of an accused’s right to silence, nor is it necessary for the accused to explicitly declare his or her desire to remain silent since, “[i]t would be absurd to impose on the accused an obligation to speak in order to activate her right to silence.” Finally, Major J. emphasized the need to find an appropriate balance between the individual’s right to silence and the public’s interest in effective law enforcement and investigation of crime by providing a pragmatic assessment of the usefulness of police undercover strategies. Major J. observed:

In following the authority of Hebert and Broyles, we find nothing in the facts of this appeal to support the proposition that the exchange between the appellant and the undercover officer was the functional equivalent of an interrogation. It is of no consequence that the police officer was engaged in subterfuge, permitted himself to be misidentified, or lied, as long as the responses by the appellant were not actively elicited or the result of interrogation. In a more perfect world, police officers may not have to resort to subterfuge, but equally, in that more perfect world, there would be no crime. For the moment, in this space and time, the police can, within the limits imposed by law, engage in limited acts of subterfuge.

Based on an analysis of the conversation between Liew and the undercover officer, Major J. concluded that neither the nature of the exchange nor the nature of the relationship – the two factors identified in Broyles as being relevant to a determination of whether or not the accused’s statement was elicited – were such that a conclusion could be drawn that the undercover officer had elicited the statement. The bottom line for Major J. was that “[t]he appellant chose to speak. He was free to do that.”

1195 Ibid at para 39.
1196 Ibid at para 37.
1197 Ibid at para 44.
1198 Ibid at para 45.
1199 Ibid at para 56.
While *Liew* helped clarify one of the limitations imposed on the right to silence by *Hebert*, the question asked but not answered in *Broyles* concerning what, if any, right to silence remains when a detained suspect is released from custody was clarified by the Ontario Court of Appeal in *R. v. Osmar*.1200 *Osmar* involved the police undercover strategy known as the “Mr. Big” strategy, which Rosenberg J.A. described as follows:

In recent years, police forces in other parts of Canada have revived an investigative technique referred to as the “Mr. Big” strategy. The police resort to this technique when they have a suspect in a serious crime, usually murder, but they have been unable to obtain sufficient evidence against the suspect. While there are some variations, in general, in the Mr. Big scenario police officers posing as organized crime figures offer the suspect the opportunity to join their organization. The cost of entry to the organization is that the suspect demonstrate that he can be trusted and is capable of carrying out the kind of criminal acts required by the organization. The suspect is persuaded by inducements and other means to admit to a serious crime to demonstrate his trust in the organization and that he can be counted on to carry out the criminal orders of Mr. Big.1201

In *Osmar*, the accused was a suspect in the murder of two men. The police had interviewed the accused regarding the first murder but were unable to obtain sufficient evidence to charge him. When the second victim was killed approximately five weeks later in a manner very similar to the first murder, the police placed the accused under surveillance and focused their investigation on him. When they were unable to collect any evidence, the police initiated the “Mr. Big” strategy and the accused eventually gave incriminating statements to undercover police officers. The trial judge admitted the statements given to the undercover police officers and the accused was convicted. The accused appealed to the Ontario Court of Appeal, with one of his grounds of appeal being that the statements should not have been admitted as they had

1200 (2007), ONCA 50 (Ont CA), online: <http://www.ontariocourts.on.ca/decisions/search/en/OntarioCourtsSearch> [Osmar] [cited to online source].
been obtained through a violation of his privilege against self-incrimination and right to silence under section 7 of the Charter.

Writing for a unanimous court, Rosenberg J.A. decided the “Mr. Big” strategy did not violate the accused’s right to silence. Rosenberg J.A. referred to Abella J.’s comment in *R. v. Turcotte*,\(^\text{1202}\) where she had stated that the “common law right to silence ‘exists at all times against the state, whether or not the person asserting it is within its power or control.’”\(^\text{1203}\) However, Rosenberg J.A. distinguished *Turcotte*, noting that “context is all important.”\(^\text{1204}\) In Rosenberg J.A.’s view:

The context in *Turcotte* was that the accused exercised his right to silence by remaining silent. The appellant’s right to silence in that sense is not engaged in this case. The appellant gave up his right to silence by speaking to the undercover police officers. Only if the right to silence is absolute and capable of being discharged only by waiver can the appellant succeed by analogy to *Turcotte*. But that position was rejected by the majority of the court in *Hebert*, even where the suspect is detained by the police …

There is nothing in *Turcotte* to suggest the Court intended a fundamental re-evaluation of the relationship between the right to silence and waiver as explained in *Hebert*.\(^\text{1205}\)

Rosenberg J.A. also referred to the Supreme Court of Canada decision in *R. v. McIntyre*\(^\text{1206}\) to support his conclusion that the accused’s right to silence had not been violated. *McIntyre* had a fact pattern very similar to that of *Osmar*, in that the accused, McIntyre, also gave incriminating statements to an undercover police officer during a “Mr. Big” scenario after initially invoking his right to silence when he had been in custody. Noting that, in *McIntyre*, “[t]he issue of extending

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\(^{1202}\) *Turcotte*, *supra* note 1039. For a more detailed analysis of *Turcotte*, see discussion accompanying note 1220, *infra*.

\(^{1203}\) *Osmar*, *supra* note 1200 at para 38.

\(^{1204}\) *Ibid* at para 39.

\(^{1205}\) *Ibid* at paras 39, 40.

\(^{1206}\) [1994] 2 SCR 480.
the *Hebert* doctrine to cases not involving detention was clearly before the court”, Rosenberg J.A. pointed out that the Supreme Court dismissed McIntyre’s appeal from his conviction in one cryptic paragraph:

The appellant argues that his statements made to undercover police officers after he had been released but while he was still the subject of a murder charge are inadmissible under ss. 7 and 24(2) of the Canadian Charter of Rights and Freedoms. We share the view of the majority that the accused was not detained within the meaning of Hebert or Broyles. Furthermore, the tricks used by the police were not likely to shock the community or cause the accused’s statements not to be free and voluntary. The appeal is dismissed.\(^{1207}\)

Recognizing the similarity between the two cases, Rosenberg J.A. stated: “The facts are sufficiently similar to the facts of this case that the holding is, in my view, binding on this court.”\(^{1208}\) He therefore concluded: “I do not think it open to this court to reject the detention requirement for this aspect of the right to silence under s. 7.”\(^{1209}\)

A similar case to *Osmar* was the Supreme Court of Canada decision in *R. v. Grandinetti*.\(^{1210}\) In *Grandinetti*, the police did not use the “Mr. Big” scenario; rather, the undercover officers, posing as criminals, told the accused that they knew some corrupt police officials who could steer a murder investigation in which he was a suspect away from him. The police trickery eventually resulted in the accused, Grandinetti, giving a confession to the undercover officers. Grandinetti’s counsel argued at trial that the confession should not be admitted under the voluntary confessions rule because, “the undercover officers were ‘persons in authority’ because Mr. Grandinetti believed they could influence the investigation into the murder of his aunt

\(^{1207}\) As cited in *Osmar*, *supra* note 1200 at para 44.

\(^{1208}\) *Ibid* at para 45.

\(^{1209}\) *Ibid* at para 47.

\(^{1210}\) 2005 SCC 5, [2005] 1 SCR 27 (available on lexUM) [*Grandinetti*] [cited to online source].
through the corrupt police officers they claimed to know.”1211 The trial judge rejected the accused’s submission, the confession was admitted and the accused was convicted. The conviction was upheld by the Alberta Court of Appeal in a split decision. The Supreme Court of Canada dismissed the accused’s appeal, finding that the undercover police officers did not fall within the definition of “a person in authority”, thereby rendering the voluntariness issue irrelevant.

Abella J., writing for a unanimous Court, referred to comments made by Cory J. in R. v. Hodgson,1212 where Cory J. had noted that the confessions rule is based on “two fundamentally important concepts: the need to ensure the reliability of the statement and the need to ensure fairness by guarding against improper coercion by the state.”1213 Abella J., however, emphasized “the underlying rationale of the ‘person in authority’ analysis is to avoid the unfairness and unreliability of admitting statements made when the accused believes himself or herself to be under pressure from the uniquely coercive power of the state.”1214 Abella J. noted that “[a] ‘person in authority’ is generally someone engaged in the arrest, detention, interrogation or prosecution of the accused”,1215 however, she conceded the category may include others such as a parent, doctor, teacher or employer based on the “accused’s belief as to the ability of the receiver of the statement to influence the prosecution or investigation of the crime.”1216

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1211 Ibid at para 13.
1213 Grandinetti, supra note 1210 at para 35.
1214 Ibid.
1215 Ibid at para 37.
1216 Ibid at para 43, citing Cory J. in Hodgson, supra note 1212 at para 34.
After reviewing the circumstances surrounding Grandinetti’s confession to the undercover police officers, Abella J. found the accused had not discharged his evidentiary burden to show that he believed, based on a combined subjective and objective test, that the people to whom he was speaking were persons in authority. Abella J. concluded:

The appellant believed that the undercover officers were criminals, not police officers, albeit criminals with corrupt police contacts who could potentially influence the investigation against him. When, as in this case, the accused confesses to an undercover officer he thinks can influence his murder investigation by enlisting corrupt police officers, the state’s coercive power is not engaged. The statements, therefore, were not made to a person in authority.1217

Extrapolating the fact specific finding of the case to a broader principle, Abella J. concluded: “Although the person in authority test is not a categorical one, absent unusual circumstances an undercover officer will not be a person in authority since, from the accused’s viewpoint, he or she will not usually be so viewed.”1218

As a result of McIntyre, Osmar and Grandinetti, the law regarding police undercover operations appears to be settled. If the accused is not in custody, the Hebert rule does not apply and the police are free to use trickery to circumvent the accused’s initial decision to remain silent, as long as the police conduct does not shock the community or negate the voluntariness of the statement. Furthermore, as general rule, undercover officers do not fall within the category of “persons in authority”, so the voluntary confessions rule will not provide a protective shield for the accused. The only hope the accused might have to avoid the adverse consequences of being tricked into confessing might be the rare case where the coercive nature of the police undercover strategies are so extreme that the reliability of the confession obtained through the

1217 *Ibid* at para 44.
police subterfuge becomes questionable. In such a case, as noted by Abella J. in Grandinetti, a statement may be excluded under the abuse of process doctrine at common law or under the Charter of Rights if exclusion is necessary “to prevent the admission of statements that undermine the integrity of the judicial process.”\footnote{1219}

c. Silence Prior to a Formal Police Investigation

While Hebert, Broyles and Lieu dealt with the right to silence in the custodial setting and Osmar and McIntyre dealt with undercover police operations during a police investigation, R. v. Turcotte\footnote{1220} dealt with a situation where the accused’s pre-trial silence occurred before a police investigation had even begun. The accused, Turcotte, worked on a ranch. One morning Turcotte found three people either dead or grievously injured at the ranch. Two of the people discovered by Turcotte were ranch works and the third lived at the ranch. After discovering the victims, Turcotte drove several miles to a police station as there was no phone at the ranch. When he arrived at the police station Turcotte told the police to send a car to the ranch but refused to tell them why. He spoke to two police officers and when asked what the police would find at the ranch he simply repeated that they should send a car. When asked if the police or anyone else would be in danger, Turcotte responded that there was no danger. When police officers reached the ranch they located the victims, one of whom was dead and the other two who would die later. Turcotte was charged with the murders of all three victims.

At Turcotte’s jury trial, the Crown submitted that Turcotte’s silence and refusal to answer questions was “consciousness of guilt” from which an inference of guilt could be drawn.\footnote{1221} The trial judge described Turcotte’s silence as “post-offence” conduct, which he described as “simply

\footnote{1219}Ibid at para 36.  
\footnote{1220}2005 SCC 50, [2005] 2 SCR 519 [Turcotte]. Re-cited for convenience; original citation at supra note 1039.  
\footnote{1221}Ibid at para 30.
a piece of circumstantial evidence”. The trial judge also told the jury: “Turcotte’s refusal to tell the police what was at the ranch [was] the only post-offence conduct, and … they could decide that the only ‘substantial evidence’ of guilt was this post-offence conduct.” Turcotte was convicted of three counts of murder. Turcotte appealed to the British Columbia Court of Appeal, which upheld his appeal and ordered a new trial. The Court of Appeal based its decision on a determination that the accused’s silence could “not constitute affirmative evidence that he had committed the offences” because “there was no statutorily or common law rule requiring Mr. Turcotte to respond to the police’s questions, he had the right to remain silent.” The Crown appealed to the Supreme Court of Canada.

The Supreme Court dismissed the Crown’s appeal, with Abella J. writing the unanimous decision of the Court. Abella J. noted that the trial judge instructed the jury that while Turcotte had a constitutional right to remain silent and no inference could be drawn from the exercise of his right, “they could nonetheless use it to assess his state of mind”. Concerning the accused’s silence, the judge further instructed the jury: “If you determine it relates to the crime charged then you may weigh the evidence when deciding whether Mr. Turcotte is guilty or not guilty of the offences charged.” Noting that “[p]ost-offence conduct’ is a legal term of art” that includes “only that conduct which is probative of guilt” and which is, “by its very nature, circumstantial evidence”, Abella J. reinforced the Supreme Court’s preference for the term “post-offence conduct” over the more traditional “consciousness of guilt” terminology. She also re-affirmed the “non-exhaustive list of conduct typically admitted as post offence conduct” that

1222 Ibid at para 31.
1223 Ibid.
1224 Ibid at para 34.
1225 Ibid at para 29.
1226 Ibid at para 31.
1227 Ibid at para 37.
had been identified by Major J. in White.\textsuperscript{1228} Abella J. summarized the list as including: “flight from the scene of the crime or the jurisdiction in which the crime was committed; attempts to resist arrest; failure to appear at trial; and acts of concealment such as lying, assuming a false name, changing one’s appearance, and hiding or disposing of evidence.”\textsuperscript{1229}

In Abella J.’s opinion, the decision as to whether the accused’s silence in response to some of the police questions constituted post-offence conduct required a “determination of whether Mr. Turcotte had the right to refuse to answer the police’s questions.”\textsuperscript{1230} Confirming that “[u]nder the traditional common law rules, absent statutory compulsion, everyone has the right to be silent in the fact of police questioning”,\textsuperscript{1231} and referring to the Supreme Court’s decisions in Rothman, Hebert and Chambers, all of which confirmed the accused’s right to silence, Abella J. concluded: “It would be an illusory right if the decision not to speak to the police could be used by the Crown as evidence of guilt.”\textsuperscript{1232} While Abella J. recognized that, in Chambers, the accused’s silence occurred after he was cautioned while Turcotte’s silence was before any caution was given, she saw no substantive difference between the two situations. In this sense, Abella J. stated: “Although Chambers dealt specifically with silence after the accused had been cautioned, it would equally be a ‘snare and a delusion’ to allow evidence of any valid exercise of the right to be used as evidence of guilt.”\textsuperscript{1233}

\begin{footnotes}
\item[1228] Ibid at para 38, citing White 1998 supra note 1019.
\item[1229] Ibid.
\item[1230] Ibid at para 40.
\item[1231] Ibid at para 41.
\item[1232] Ibid at para 44.
\item[1233] Ibid at para 45.
\end{footnotes}
Abella J. did however acknowledge that, in limited circumstances, “evidence of silence can be admitted with an appropriate warning to the jury”\textsuperscript{1234} because “[t]here are circumstances where the right to silence must bend.”\textsuperscript{1235} One such example, according to Abella J., arises when “the Court is confronted with a conflict between the right to silence and the right to full answer and defence”, such as in \textit{R. v. Crawford}.\textsuperscript{1236} Abella J. also identified five other circumstances where the accused’s silence may be admissible: (1) when “the defence raises an issue that renders the accused’s silence relevant”, such as when the “defence seeks to emphasize the accused’s cooperation with the authorities”\textsuperscript{1237}; (2) where the “accused testifies that he had denied the charges against him at the time he was arrested”,\textsuperscript{1238} (3) “where silence is relevant to the defence theory of mistaken identity and a flawed police investigation”;\textsuperscript{1239} (4) in the case of a late alibi;\textsuperscript{1240} and (5) when “[s]ilence … is inextricably bound up with the narrative or other evidence and cannot be easily extricated.”\textsuperscript{1241}

Abella J. also dealt with two other Crown submissions; namely, that the right to silence had not been engaged because Turcotte had voluntarily approached the police and that, even if it had been engaged, Turcotte had waived his right to silence by being selective in his response to police questions. Dealing with the issue of whether the right to silence exists prior to the start of an official police investigation, Abella J. took the opportunity to clarify some of the confusion surrounding the second limitation placed on the right to silence in \textit{Hebert}, where McLachlin J.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{1234} \textit{Ibid} at para 47. \textsuperscript{1235} \textit{Ibid} at para 48. \textsuperscript{1236} \textit{Crawford, supra} note 1141. \textsuperscript{1237} \textit{Ibid} at para 49. \textsuperscript{1238} \textit{Ibid}. \textsuperscript{1239} \textit{Ibid}. \textsuperscript{1240} \textit{Ibid} at para 50. \textsuperscript{1241} \textit{Ibid}. 
\end{itemize}
\end{footnotesize}
had declared that the right to silence only applies after detention. Abella J. firmly rejected McLachlin J.’s position, stating:

The Crown has argued that any right to silence is engaged only when the accused comes within “the power of the state” and that the right has no relevance when the state has done nothing to use that power against the individual. This, with respect, makes the right’s borders too confining. In general, absent a statutory requirement to the contrary, individuals have the right to choose whether to speak to the police, even if they are not detained or arrested. The common law right to silence exists at all times against the state, whether or not the person asserting it is within its power or control. Like the confessions rule, an accused’s right to silence applies any time he or she interacts with a person in authority, whether detained or not. It is a right premised on an individual’s freedom to choose the extent of his or her cooperation with the police, and is animated by recognition of the potentially coercive impact of the state’s authority and a concern that individuals not be required to incriminate themselves. These policy considerations exist both before and after arrest or detention. There is, as a result, no principled basis for failing to extend the common law right to silence to both periods.

It should however be noted that, in Osmar, Rosenberg J.A. of the Ontario Court of Appeal concluded that Abella J.’s comments should not be considered to have significantly altered the Supreme Court’s decision in Hebert. Abella J. also dealt in short order with the Crown’s submission that Turcotte had waived his right to silence by deciding to answer only some of the police officers’ questions, declaring:

A willingness to impart some information to the police does not completely submerge an individual’s right not to respond to police questioning. He or she need not be mute to reflect an intention to invoke it. An individual can provide some, none, or all of the information that he or she has. A voluntary interaction with the

1242 Hebert, supra note 876 at 41.
1243 Turcotte, supra note 1220 at para 51.
1244 Supra note 1200.
police, even one initiated by the accused, does not constitute a waiver of the right to silence. The right to choose whether to speak is retained throughout the interaction. \(^{1245}\)

The *Turcotte* decision certainly appeared to deal an “ace” to the accused, as the Supreme Court of Canada not only unanimously affirmed the existence of a right to silence at all stages of a person’s interaction with the police, it declared that an accused’s pre-trial silence will “rarely be admissible … because it is rarely probative of guilt.”\(^{1246}\) However, the Court’s strong defence of the right to silence did not turn out to be an accurate predictor of its true level of support (or at least the support of the majority of the Supreme Court Justices), as the Court would soon retract from the position it took in *Turcotte*. The Supreme Court of Canada, albeit by way of sharply and closely divided judgements, would through its decisions in *Singh* and *Sinclair* essentially neutralize the power of *Hebert* and *Turcotte* by granting considerable latitude to the police to persuade and influence an accused to change his or her mind and speak to them, as long as they respected the accused’s right to counsel. However, before discussing the *Singh* and *Sinclair* cases, two other important Charter sections, specifically sections 10(b) and 24(2), need to be reviewed as they are closely aligned to the right to silence at both the front and back ends of the pragmatic application of the right to silence during the investigative stage of the criminal process.

5. **Right to Counsel**

The right of a detained or arrested person to consult counsel without delay is enshrined in section 10(b) of the *Charter*.\(^{1247}\) Paciocco has noted that “[t]he right to retain and instruct

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\(^{1245}\) *Turcotte*, supra note 1220 at para 52, emphasis in original.

\(^{1246}\) *Ibid* at para 55.

\(^{1247}\) See supra note 1072.
counsel without delay is not an end in itself”, but rather “is a procedure provided so as to vindicate underlying rights and privileges belonging to detainees, one of these being the entitlement to remain silent”. 1248  In Hebert, McLachlin J. made a similar observation when she stated: “The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence.” 1249  Similarly, Plaxton has emphasized the valuable contribution to the right to silence provided by section 10(b) of the Charter, noting it “imposes requirements on the police that make custodial interrogations less inherently coercive and that therefore place the suspect in a position where she is better able (at least in theory) to resist questioning.” 1250  And, as previously mentioned in Chapters II and III, the role of legal counsel has been an important part of the right to silence debate in the United Kingdom. 1251

Undoubtedly, the right to counsel and the right to silence are interrelated and closely connected; although, “individuals have the right to choose whether to speak to the police, even if they are not detained or arrested”, 1252  whereas the right to counsel only applies when the person is arrested or detained.  Arrest is a fairly straightforward concept.  The Supreme Court of Canada has defined an arrest as either “(i) the actual seizure or touching of a person’s body with a view to his detention, or (ii) the pronouncing of “words of arrest” to a person who submits to the arresting officer.” 1253  No formal words are required 1254  and a de facto arrest can arise even if the

1248 Paciocco, “Removing the Coffin Nails”, supra note 869 at 97.
1249 Hebert, supra note 876 at 35.
1251 See Chapters II.C.3 and III.C.4, above.
1252 Turcotte, supra note 1220 at para 51.
1253 R v Latimer, [1991] 1 SCR 869 at para 24 (available on lexUM) [Latimer] [cited to online source].
1254 R v Evans (1992) 63 CCC (3d) 289 at 303 (SCC) [Evans].
police did not officially place the accused under arrest. However, while the concept of arrest is relatively easy to define, the definition of detention is more elusive.

In *R. v. Therens*, Le Dain J. of the Supreme Court of Canada set down the test for determining whether a person is “detained” under section 10(b) of the *Charter*. Le Dain J. emphasized that section 10 of the *Charter* is directed at the restraint of liberty other than arrest in situations where the person dealing with the police “may reasonably require the assistance of counsel but might be prevented or impeded from retaining and instructing counsel without delay but for the constitutional guarantee.” Le Dain J. emphasized that a detention is not limited to physical custody or control of the suspect, noting it can also be triggered by a police officer or other agent of the state giving a “demand or direction which may have significant legal consequences and which prevents or impedes access to counsel.” Within this category of detention, Le Dain J. emphasized that “psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary”, thereby triggering section 10(b).

The *Therens* test survived for over two decades until the Supreme Court of Canada re-visited it in *R. v. Grant* in 2009. McLachlin C.J. and Charron J., who wrote the majority judgement in *Grant*, re-formulated the definition of detention under section 10 of the *Charter* by considering “the role it plays in conjunction with related protections in the Charter”, notably arbitrary detention under section 9 and “the broad right to liberty enjoyed by everyone in Canada

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1255 *Latimer, supra* note 1253 at para 25.
1256 *R v Therens* [1985] 1 SCR 613 (available on lexUM) [*Therens*] [cited to online source].
1257 *Ibid* at para 52.
1258 *Ibid* at para 53.
1260 2009 SCC 32, [2009] 2 SCR 353 [*Grant*]. Re-cited for convenience; original citation at *supra* note 909.
1261 *Ibid* at para 18.
at common law and by virtue of s. 7 of the Charter”.\textsuperscript{1262} Applying both a purposive and contextual interpretive strategy,\textsuperscript{1263} McLachlin C.J. and Charron J. suggested that, “[i]n most cases, it will be readily apparent whether or not an encounter between the police and an individual results in a detention.”\textsuperscript{1264} However, they also acknowledged there were situations “[a]t the other end of the spectrum … where it would be clear to a reasonable person that the individual is not being deprived of a meaningful choice whether or not to cooperate with a police demand or directive and hence is not detained.”\textsuperscript{1265} Similarly, they determined that a detention does not occur “where the police are acting in a non-adversarial role and assisting members of the public”.\textsuperscript{1266} It is between the two ends of the spectrum, and specifically in circumstances where “the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist”,\textsuperscript{1267} that McLachlin C.J. and Charron J. believed an alteration to the Therens test was required because, “[t]his … form of psychological detention – where no legal compulsion exists – has proven difficult to define consistently.”\textsuperscript{1268} The circumstances identified by McLachlin C.J. and Charron J. as being the most problematic to define would often cover the sort of situation where the accused’s right to pre-trial silence may be in significant jeopardy.

After analyzing the purpose of section 10(b) and considering the context in which the right to counsel arises, McLachlin C.J. and Charron J. concluded that detention will occur whenever there is “a suspension of the individual’s liberty interest by a significant physical or

\textsuperscript{1262} Ibid at para 19.
\textsuperscript{1263} Ibid at para 15.
\textsuperscript{1264} Ibid at para 33.
\textsuperscript{1265} Ibid at para 35.
\textsuperscript{1266} Ibid at para 36.
\textsuperscript{1267} Ibid at para 30, citing Le Dain J’s. definition in Therens.
\textsuperscript{1268} Ibid at para 31.
Regarding psychological restraint, McLachlin C.J. and Charron J. adopted the reasonable person test as the appropriate mechanism to determine whether or not the accused is detained. More specifically, McLachlin C.J. and Charron J. identified three factors to consider when determining whether or not a reasonable person would believe the accused is detained: (1) the circumstances giving rise to the encounter between the individual and the police; (2) the nature of the police conduct; and (3) the “particular characteristics or circumstances of the individual where relevant”.  

Binnie J. dissented in *Grant.* In Binnie J.’s opinion, the “obvious tension” between the fact that the “police have a duty and the authority to investigate and prevent crime in order to keep our community safe” and the reality that “ordinary citizens [have] the right to move freely about their community” necessitates an approach which recognizes that, “in the early stages of a criminal investigation the police must be afforded some flexibility before the lawyers get involved.” Consequently, Binnie J. preferred a broader definition of detention which would include an assessment of the objective facts relative to the encounter, as well as the subjective perception of both the police and the person being stopped or questioned by the police. 

While *Grant* reconsidered the traditional *Therens* definition of detention as it applies to section 10(b) of the *Charter*, the substance of the test to be applied to police-citizen encounters remained essentially the same. While the majority judgment, as well as Binnie J.’s dissent, developed a revised test focussing on the context of the encounter between the police or state agent and the citizen, the bottom line continued to be whether the situation gave rise to a

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1269 *Ibid* at para 44.  
1271 Deschamps J. also wrote a separate judgement.  
1272 *Grant, supra* note 1260 at para 159.  
reasonable conclusion on the part of the person being confronted by the police that he or she had no option but to comply with the police direction or demand. If such a conclusion reasonably arose and significant legal consequences might flow from the encounter, the person is considered to be detained and section 10(b) of the Charter applies.

*Therens* and *Grant* therefore establish the legal test to determine if a suspect or accused is detained under section 10 of the Charter. Specifically in relation to the right to silence, the most common situation where the determination as to whether or not a person is detained would be important is probably a police interview or interrogation of a suspect. Since the most fundamental piece of advice a lawyer would give to a person being interviewed by the police is to remain silent, requiring the police to advise the person being questioned that he or she has the right to retain and instruct counsel without delay would clearly be an important instrumental adjunct to the right to silence. Given the intersection between the two rights at this juncture, a brief review of the jurisprudence which set down the guidelines for the application of section 10(b) to police interviews of suspects is necessary.

*R. v. Esposito,* which was previously discussed in relation to the right to silence, also discussed the scope of the right to counsel under the Charter. In *Esposito,* the Ontario Court of Appeal dealt with a situation where the accused had been interviewed by a police officer in his (the accused) home without having been arrested or given the section 10(b) caution. Martin J.A., writing for a unanimous court, referred to American jurisprudence in which the right to counsel was confined to “custodial interrogation”, as well as Le Dain J.’s description of psychological restraint in *Therens.* Based on the non-coercive nature of the police officer’s

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1275 *Esposito,* *supra* note 1082.

1276 See discussion accompanying note 1082, *supra.*

1277 *Esposito,* *supra* note 1082 at 205.
questions and lack of evidence to suggest the accused “actually believed that his freedom was restrained”, as well as Martin J.A.’s assessment that “the circumstances would not lead him reasonably to believe that his freedom had been restrained”, Martin J.A. concluded that on the facts of the case the accused had not been detained and therefore section 10(b) of the Charter did not arise.\footnote{1278}{Ibid at 208.}

A few years after Esposito, Martin J.A. again dealt with the issue of the police interviewing a suspect without first advising him that he had the right to retain and instruct counsel. In \textit{R. v. Moran},\footnote{1279}{(1987), 36 (CCC) (3d) 225 (Ont CA), leave to appeal to SCC refused, [1988] 1 SCR xi.} the police interviewed the accused, Moran, at a police station on two occasions regarding the death of one of Moran’s friends. On both occasions Moran went to the police station on his own volition after the police asked if they could speak to him. Moran was not given the s. 10(b) warning that he could retain and instruct counsel without delay.\footnote{1280}{Ibid at 251-53.} The trial judge held that Moran had not been detained. In upholding the trial judge’s decision, Martin J.A. identified several factors to be considered when determining whether or not a person being questioned by the police is detained under section 10(b) of the Charter. According to Martin J.A., the factors to consider include: the stage of the investigation; whether the questioning is a general inquiry to determine if a crime has occurred or a focussed inquiry into a specific crime and the possible role of the accused in that crime; whether the police have reasonable and probable grounds to believe the accused committed the crime being investigated; and whether the accused reasonably believes he or she is being detained.\footnote{1281}{Ibid at 258-59.}
It is therefore clear that section 10(b) of the Charter applies at stages of the investigation other than formal arrest or actual physical detention, including a police interview of a suspect if, based on the Grant test, a reasonable person would conclude that the accused had no real choice but to comply. If a person is detained, the police are required to advise him or her of the right to retain and instruct counsel without delay. Moreover, the courts have imposed on the police additional “informational” duties, including advising the detained person of the right to access the legal aid and duty counsel systems. In addition, when an arrested or detained person may not understand the section 10(b) warning due to unusual circumstances, such as a language barrier, the police must take reasonable steps to ensure the suspect understands his or her rights. And in addition to the duty to provide the accused with information regarding the right to counsel, as a general rule the police will also advise the accused that he or she has the right to remain silent, as “such a warning is customary as part of non-constitutionally required warnings designed to facilitate proof that statements to persons in authority were voluntary.”

The police are also obligated to reasonably facilitate the accused’s access to counsel and to refrain from eliciting evidence until such time as the accused has been given a reasonable opportunity to consult counsel, has not been diligent in trying to contact counsel or has waived his or her right to counsel. The leading Supreme Court of Canada case dealing with the implementational duties placed upon the police under section 10(b) is R. v. Manninen. In Manninen, the accused, Manninen, had been arrested by police officers for robbery. Manninen told the police in explicit terms that he did not want to say anything and that he wanted to speak to a lawyer; however, the police officers ignored Manninen’s comment and asked him questions

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1282 Paciocco and Stuesser, supra note 975 at 314, referring to R v Bartle, [1994] 3 SCR 173.
1285 Ibid at 76-77.
to which he responded with an incriminating statement. In excluding the accused’s statements under section 24(2) of the Charter, Lamer J. (as he then was), writing for the Court, declared that section 10(b) places two implementational obligations on the police. First, “the police must provide the detainee with a reasonable opportunity to exercise the right to retain and instruct counsel without delay.” Second, “s. 10(b) imposes on the police the duty to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel.” In applying the purposive approach to section 10(b), Lamer J. stated:

The purpose of the right to counsel is to allow the detainee not only to be informed of his rights and obligations under the law but, equally if not more important, to obtain advice as to how to exercise those rights. In this case, the police officers correctly informed the respondent of his right to remain silent and the main function of counsel would be to confirm the existence of that right and then to advise him as to how to exercise it. For the right to counsel to be effective, the detainee must have access to this advice before he is questioned or otherwise required to provide evidence.

However, while the Supreme Court imposed an obligation on the police to not only advise a detained or arrested suspect of his or her right to counsel but to also provide a reasonable opportunity to actually consult counsel and to hold off questioning or otherwise attempting to elicit evidence until a reasonable time to contact a lawyer has passed, other cases clarified that the suspect also has an obligation under section 10(b); notably, to be diligent in his or her efforts to obtain legal advice. So, for example, in R. v. Tremblay, the Supreme Court of Canada declared:

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1287 Ibid at 391.
1288 Ibid at 392.
1289 Ibid.
1290 (1987), 37 CCC (3d) 565 (SCC), as cited in Manninen, ibid at 314.
Generally speaking, if a detainee is not being reasonably diligent in the exercise of his rights, the correlative duties set in this court’s decision in *R. v. Manninen* (1987), 34 C.C.C. (3d) 385, 41 D.L.R. (4th) 301, [1987] 1 S.C.R. 1233, imposed on the police in a situation where a detainee has requested the assistance of counsel are suspended and are not a bar to their continuing their investigation and calling upon him to give a sample of his breath.\(^{1291}\)

Moreover, in *R. v. Smith*,\(^{1292}\) the Supreme Court applied the requirement for the accused to be diligent to a case where the accused had allowed two hours to pass after being arrested prior to requesting to speak to a lawyer, and then deciding that “it was useless to try to contact his lawyer.”\(^{1293}\) Lamer J. (as he then was) noted, “the arrested or detained person who was not diligent in the exercise of his rights can always exercise his rights but cannot, in the process, require the police to suspend their investigation.”\(^{1294}\) To conclude differently, according to Lamer J., would “render meaningless the duty imposed on a detained or arrested person to be diligent in the exercise of his rights.”\(^{1295}\) On the facts of the case, Lamer J. found no violation of the accused’s right to counsel or right to silence when the police questioned him and he provided an “off the record” incriminating statement.\(^{1296}\) Patrick Healy has criticized *Smith* as being a “contraction of the right to remain silent”.\(^{1297}\) Healy submits:

> If the right to counsel is for practical purposes the right to be told by a lawyer of the right to remain silent, the right to remain silent lies in the shadow of the right to counsel. When the period of diligent action lapses, its protective value is only as strong as the suspect’s will to hold it. This conclusion, if it is correct, cannot easily be reconciled with claims that the Supreme Court’s constitutional scrutiny of

\(^{1291}\) *Ibid* at 568.

\(^{1292}\) *Ibid* at 314.

\(^{1293}\) *Ibid* at 315.

\(^{1294}\) *Ibid* at 315.

\(^{1295}\) *Ibid* at 316.

\(^{1296}\) *Ibid* at 311.

\(^{1297}\) Healy, “Value of Silence”, *supra* note 1097 at 182.
investigative conduct is animated by a coherent principle against self-incrimination.\textsuperscript{1298}

It is thus evident that, in the development of the law regarding the right to silence after the proclamation of the \textit{Charter}, Canadian courts have recognized a close relationship between the right to silence and the right to counsel. While, as noted by Paciocco, the right to counsel is more of an instrumental or procedural right to assist an arrested or detained person to engage other more fundamental rights, such as the right to silence,\textsuperscript{1299} it is an extremely important correlative protection for the accused’s right to silence and privilege against self-incrimination. However, before moving on to discuss recent Supreme Court of Canada decisions that have restricted the pragmatic value of both the right counsel and right to silence within the setting of a custodial police interrogation, one final \textit{Charter} section – the exclusionary rule under section 24(2) – should be reviewed as it is performs an important role in providing a powerful remedy when the accused’s right to silence is violated.

6. \textbf{The Exclusionary Rule and the Right to Silence}

Section 24(2) of the \textit{Charter of Rights} grants to the judiciary discretion to exclude evidence obtained in a manner that infringes the accused’s \textit{Charter} rights, such as his or her right to remain silent.\textsuperscript{1300} In \textit{Hebert}, McLachlin J. supported her conclusion that the right to silence is a fundamental principle of justice under section 7 of the \textit{Charter} in part by referring to other \textit{Charter} rights and their correlation with the right to silence, and one the \textit{Charter} sections to which she referred was section 24(2). Noting that the “\textit{Charter} introduced a marked change in

\begin{footnotes}
\item[1298] \textit{Ibid.}
\item[1299] Paciocco, “Removing the Coffin Nails”, \textit{supra} note 869 at 97.
\item[1300] See \textit{supra} note 1091 for the exact wording of section 24 of the \textit{Charter}.
\end{footnotes}
philosophy with respect to the reception of improperly or illegally obtained evidence”, \(^{1301}\)

McLachlin J. observed:

The logic upon which Wray was based, and which led the majority in Rothman to conclude that a confession obtained by a police trick could not be excluded, finds no place in the Charter. To say there is no discretion to exclude a statement on the grounds of unfairness to the suspect or integrity of the judicial system, as did the majority in Rothman, runs counter to the fundamental philosophy of the Charter. \(^{1302}\)

McLachlin J. applied section 24(2) and excluded Hebert’s statements to the undercover police officer. In so doing, McLachlin J. referred to Lamer J.’s comments in R. v. Collins, \(^{1303}\) where he had emphasized the difference between real and conscriptive evidence in the context of excluding evidence based on a Charter breach. Lamer J. had observed:

…the situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession or other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. \(^{1304}\)

Sopinka J. also invoked Lamer J.’s logic in his (Sopinka J.) decision in Hebert, when he held that the statements given by the accused in violation of his right to silence must be excluded. In referring to the issue of trial fairness, Sopinka J. stated:

In this respect, violations of the right to counsel and the right to remain silent generate an identical sort of evidence: self-incriminatory statements that would not have been made but for the violation. The admission of such evidence is unfair because it is representative of a model of criminal justice fundamentally at odds with that enshrined in the Charter. The accused is effectively stripped of the presumption of innocence (because he has damned himself in the eyes of the trier of fact), and he has thus relieved the Crown of the burden of proving the case. Furthermore, the

\(^{1301}\) Hebert, supra note 876 at 36.

\(^{1302}\) Ibid at 37.

\(^{1303}\) [1987] 1 SCR (available on lexUM [Collins] [cited to online source].

\(^{1304}\) Ibid at para 37.
accused is placed in the invidious position of having to take the stand, contrary to the privilege against self-incrimination, in order to disclaim the confession. All of these knock-on effects amply demonstrate the unfairness inherent in the admission of an unconstitutionally acquired confession.\textsuperscript{1305}

The use of section 24(2) of the Charter in Hebert to exclude the accused’s statement was based on the Court’s application of the “Collins test”, which was developed by the Supreme Court of Canada in \textit{R. v. Collins}.\textsuperscript{1306} The “Collins test” required judges to consider three sets of factors when deciding whether or not a Charter violation should result in the exclusion of the evidence obtained during, or as a result of, the violation. Sopinka J. summarized the relevant considerations in his decision in \textit{Hebert} as: (1) the effect that admitting the evidence would have on the fairness of the trial; (2) the seriousness of the Charter violation; and (3) the effect that either inclusion or exclusion of the evidence would have on the reputation of the administration of justice.\textsuperscript{1307} In \textit{Hebert}, McLachlin and Sopinka JJ. agreed that admitting the statement taken in violation of Hebert’s constitutionally protected right to silence would result in an unfair trial. Consequently, the confession was excluded.

In 1997, the Supreme Court of Canada modified the “Collins test” when it rendered its decision in \textit{R. v. Stillman}.\textsuperscript{1308} In \textit{Stillman}, the police had obtained bodily samples from a murder suspect without judicial authorization by using threats and applying force to obtain hair samples and a bite impression despite the suspect’s refusal to cooperate.\textsuperscript{1309} Furthermore, the police

\textsuperscript{1305} \textit{Hebert}, supra note 876 at 20.
\textsuperscript{1306} \textit{Collins}, supra note 1303. While the term “test” has been used to describe the three groups of factors set out by Lamer J. in \textit{Collins}, McLachlin has described Lamer J.’s comments as not suggesting a “test” \textit{per se}, but rather “a convenient way of considering the various ‘circumstances’ which may need to be considered in a particular case.” See \textit{Stillman}, infra note 1308 at para 242.
\textsuperscript{1307} \textit{Hebert}, supra note 876 at 19.
\textsuperscript{1308} [1997] 1 SCR 607 (available on lexUM) [\textit{Stillman}] [cited to online source].
\textsuperscript{1309} \textit{Stillman} preceded the introduction of the DNA warrant provisions in \textit{Criminal Code} ss 487.04-487.091. Consequently, one of the main issues to be decided was whether the common law power to search an accused
interrogated the accused contrary to his lawyer’s express objection. When the accused discarded a tissue containing some mucous which he had secreted into the tissue when he used it to blow his nose after crying during the interrogation, the police collected it for DNA testing. The majority of the Supreme Court concluded that the accused’s Charter rights had been blatantly violated by the police and excluded all of the evidence so obtained other than the discarded tissue. The Stillman case is primarily a search and seizure and exclusionary rule case. However, it addresses in some depth the relationship between conscriptive evidence and trial fairness in the context of the admissibility of such evidence under section 24(2) of the Charter, and since statements taken from an accused during the investigative stage are clearly conscriptive evidence, this aspect of Stillman requires some discussion.

Cory J. wrote the majority decision in Stillman, in which he emphasized the importance of categorizing the evidence when applying the first stage of the “Collins test” (i.e., trial fairness). In Cory J.’s opinion, the first and most important question to be answered is whether the impugned evidence is conscriptive or non-conscriptive. According to Cory J., conscriptive evidence exists when “an accused, in violation of his Charter rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples.”

Furthermore, Cory J. noted: “The traditional and most frequently encountered example of this type of evidence is a self-incriminating statement made by an accused following a violation of his right to counsel as guaranteed by s. 10(b) of the Charter.”

Cory J. continued by stating: “It has, for a great many years, been considered unfair and indeed unjust to seek to convict on the basis of a compelled statement or confession.

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1310 Stillman, supra note 1308 at para 80.
1311 Ibid.
If it was obtained as a result of a breach of the Charter its admission would generally tend to render the trial unfair.”

According to Cory J., admitting conscriptive evidence – be it a compelled statement or a bodily sample – that was obtained through a Charter breach and which is not otherwise discoverable would “as a general rule, be found to render the trial unfair.”

Moreover, Cory J. asserted that convicting an accused on the basis of an unfair trial “is contrary to our concept of justice.”

In such a case, according to Cory J., “it is not necessary to consider the seriousness of the violation or the repute of the administration of justice since a finding that the administration of justice would render the trial unfair indicates that the administration of justice would necessarily be brought into disrepute if the evidence were not be excluded under s. 24(2).”

In essence, the majority decision in Stillman established a virtual automatic exclusionary rule for conscriptive evidence obtained by means of a violation of the accused’s Charter rights unless the Crown could prove on a balance of probabilities that the evidence was otherwise discoverable.

McLachlin J. (as she then was) wrote a dissenting judgment in Stillman in which she advocated for a “flexible multi-factored approach” to the issue of admitting or excluding evidence under section 24(2) of the Charter. In her view, the almost automatic exclusionary rule for conscriptive evidence proposed by the majority is inconsistent with the balanced approach envisioned by the framers of the Charter, who sought a compromise between the “automatic exclusionary rule” found in the United States and the “no exclusion” rule that

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1312 Ibid at para 86.
1313 Ibid at para 98.
1314 Ibid at para 72.
1315 Ibid at para 110.
1316 Ibid at para 119.
1317 Ibid at para 234.
prevailed in Canada prior to the advent of the *Charter*. McLachlin J. also criticized the majority decision by suggesting that Cory J. improperly included compelled real evidence within the “notion of self-incrimination”. In McLachlin J.’s opinion, the concept of self-incrimination was limited to testimonial self-incrimination. In this regard, McLachlin J. stated: “The common law and post-*Charter* cases up to and beyond *Collins* drew a sharp distinction between testimonial and real evidence when it came to questions of admissibility. As has been seen, the principle against self-incrimination applied only to testimonial evidence, that is, to statements given to the police or the court.” Finally, McLachlin J. suggested that Cory J. was applying a far too expansive definition of trial fairness. In her view, the trial fairness arm of the “Collins test” should be limited to trials which are “fundamentally unfair”. Emphasizing that “[e]ven the best-run trials may have aspects of unfairness”, McLachlin J. asserted that the proper test for the trial fairness component of the section 24(2) analysis should be whether the trial is “fundamentally unfair”, in the sense that “a reasonable person viewing the trial proceedings as a whole would conclude that there is a danger that an innocent person may have been convicted.”

In 2009, the Supreme Court of Canada re-visited the tests established by *Collins* and *Stillman* when it decided *R. v. Grant*. In *Grant*, the Court re-formulated the test for determining whether or not evidence should be excluded under section 24(2) of the *Charter*. The new test consisted of three factors, which the Court categorized as:

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1318 *Ibid* at para 236.
1320 *Ibid*.
1321 *Ibid* at para 257.
1322 *Ibid*.
1323 *Ibid*.
1324 *Grant, supra* note 1260.
(1) the seriousness of the Charter-infringing state conduct (admission may send the message the criminal justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights may count for little), and (3) society’s interest in the adjudication of the case on its merits.\textsuperscript{1325}

McLachlin C.J. and Charron J., who wrote the majority judgement in Grant, discussed in some detail how the new test should be applied to various forms of evidence, including statements given by an accused. Emphasizing that “[s]tatements by the accused engage the principle against self-incrimination, ‘one of the cornerstones of our criminal law’”,\textsuperscript{1326} McLachlin C.J. and Charron J. pointed out that section 24(2) only arises when statements made by an accused have not been excluded under the automatic exclusionary rule applicable to statements found to be involuntary under the common law.\textsuperscript{1327} However, if a statement is voluntary but has been obtained in a manner that violated a Charter right, such as the right to silence or right to counsel, McLachlin C.J. and Charron J. noted there will be a presumption of exclusion. The Justices stated:

There is no absolute rule of exclusion of Charter-infringing statements under s. 24(2), as there is for involuntary statements at common law. However, as a matter of practice, courts have tended to exclude statements obtained in breach of the Charter, on the ground that admission on balance would bring the administration of justice into disrepute.\textsuperscript{1328}

McLachlin C.J. and Charron J. went on to apply the three criteria of the newly constructed test to statements made by an accused. Regarding the first set of factors (i.e., the seriousness of the Charter-infringing conduct), McLachlin C.J. and Charron J. acknowledged, “[p]olice conduct in obtaining statements has long been strongly constrained” and “the preservation of

\begin{footnotesize}
\textsuperscript{1325} Ibid at para 80.
\textsuperscript{1326} Ibid at para 89.
\textsuperscript{1327} Ibid at para 90.
\textsuperscript{1328} Ibid at paras 91-93.
\end{footnotesize}
public confidence in the justice system requires that the police adhere to the Charter in obtaining statements from a detained accused."\(^{1329}\) Concerning the second set of factors (i.e., the impact on the accused’s Charter-protected rights), the Justices recognized that the most likely right to be violated would be the accused’s right to counsel under section 10(b). In categorizing a situation where the police obtain a statement from an accused through a violation of his or her right to counsel as a very serious infringement on the accused’s Charter-protected interests, McLachlin C.J. and Charron J. stated:

The failure to advise of the right to counsel undermines the detainee’s right to make a meaningful and informed choice whether to speak, the related right to silence, and, most fundamentally, the protection against testimonial self-incrimination. These rights protect the individual’s interest in liberty and autonomy. Violation of these fundamental rights tend to militate in favour of excluding the statement.\(^{1330}\)

However, recognizing that “[t]here is no absolute rule of exclusion of Charter-infringing statements under s. 24(2)”,\(^ {1331}\) McLachlin C.J. and Charron J. issued a caveat that “particular circumstances may attenuate the impact of a Charter breach on the protected interests of the accused from whom a statement is obtained in breach of the Charter.”\(^ {1332}\) Two such examples suggested by McLachlin C.J. and Charron J. would be “technically defective” compliance with section 10(b) or “when a statement is made spontaneously following a Charter breach”.\(^ {1333}\) Finally, regarding the third set of factors (i.e., the societal interest in having the case tried on its merits), McLachlin C.J. and Charron J. noted that, similar to involuntary confessions, the

\(^{1329}\) Ibid at para 93.
\(^{1330}\) Ibid at para 95.
\(^{1331}\) Ibid at para 94.
\(^{1332}\) Ibid at para 96.
\(^{1333}\) Ibid.
reliability of a confession taken in contravention of the accused’s Charter rights would be suspect, which would mean that the case would not be tried on its merits.1334

7. Summary

The introduction of the Charter of Rights dramatically changed the paradigm of criminal law in Canada. In R. v. Hebert, the Supreme Court of Canada unanimously endorsed earlier decisions of provincial appellate courts when it confirmed that the right to silence is a constitutionally protected principle of fundamental justice under section 7 of the Charter. Subsequent Supreme Court decisions, notably Chambers and Turcotte, suggested the right to pre-trial silence would be expansively and purposively applied. However, the explicit recognition in Hebert that the right to silence is not absolute combined with the four significant limitations placed on the right to silence by McLachlin J. certainly set the stage for the judiciary to interpret the right to silence much more restrictively if it so decided. And indeed a slim majority of the Supreme Court of Canada appears to have embraced such an approach. While Hebert undoubtedly breathed new life into the right to silence and shone a bright light upon it by virtue of enshrining it within section 7 of the Charter, subsequent decisions from a sharply divided Supreme Court of Canada have dimmed much of the bright promise intimated by Hebert.

1334 Ibid at para 97.
D. RETREATING FROM *HEBERT*: WAIVER AND POLICE PERSUASION

1. **Introduction**

*Hebert* definitively declared that the right to silence is a fundamental principle of justice in Canada. As a statement of principle, *Hebert* is obviously a very important decision, but as a pragmatic instrument for protecting the right to silence at the investigative stage of the criminal process, its efficacy is questionable. For one thing, *Turcotte* confirmed that the common law exceptions to the right to pre-trial silence survived *Hebert*. However, much more problematic than the survival of the common law exceptions to the right to silence in post-*Charter* Canada was the upshot from two of the limitations placed upon the right to silence imposed by McLachlin J. in *Hebert*: first, that the “Clarkson test” for waiver does not apply to the right to silence; ¹³³⁵ and second, that the police are allowed to question the accused without his or her lawyer being present as long as they comply with section 10(b) of the *Charter*. These restrictions on the scope of the right to silence have been applied by the Supreme Court of Canada in subsequent decisions in a manner that has seriously impaired the practical value of the right to pre-trial silence for many suspects being questioned by the police in custodial interrogations.

2. **Waiver**

As with all legal and constitutional rights, a person can of course waive his or her right to silence. In fact, as noted in Chapter III, empirical studies in Britain and the United States have suggested that many suspects actually do waive their right to silence and give statements to the

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¹³³⁵ The “Clarkson test” was established by the Supreme Court of Canada in *Clarkson, supra* 942. The test was developed to deal with waiver of the right to counsel under section 10(b) of the *Charter* and requires the Crown to demonstrate that the accused was aware of the consequences of his or her waiver.
The notion that a person can waive his or her right to silence is obviously consistent with the right’s underlying rationale of personal autonomy and individual choice. If a person has the right to choose not to speak to the police then he or she must surely have the right to decide to speak as well. In many cases, it will be clear that the accused wilfully, knowingly and on his or her own volition decided to make a statement after being advised that he or she had the right to remain silent. In such cases, the accused’s statement will still have to pass the common law voluntariness test and the police will have had to comply with the duties placed upon them under section 10(b) of the Charter, assuming the accused was arrested or detained. However, as long as no concerns arise in relation to voluntariness or the right to counsel, admitting the accused’s statement should not cause too much concern for advocates of the right to silence. The issue is, however, much more challenging when a person suspected of having committed a crime initially decides to invoke his or her right to silence while being questioned by the police, but for some reason later changes his or her mind and gives a statement. The issue is even more contentious when the suspect changes his or her mind in an environment of persistent police questioning within a custodial police interrogation.

R. v. Clarkson is the leading Supreme Court of Canada case dealing with waiver of constitutional rights, although it specifically dealt with the waiver of the right to counsel under section 10(b) of the Charter. In Clarkson, the Supreme Court held that a waiver of the right to counsel will only be valid if it is the result of an informed decision, in the sense that the accused is aware of the consequences of waiving the right. One of the issues decided in Hebert was whether the Clarkson test governing waiver should apply to the right to silence. Both dissenting

1336 See e.g. Roger Leng, The Right to Silence in Police Interrogation: A Study of Some of the Issues Underlying the Debate, Royal Commission on Criminal Justice Study No. 10 (London: HMSO, 1993); Ives & Sherrin, supra note 244 at 252.
1337 Clarkson, supra note 942 at para 20.
judges, Sopinka and Wilson JJ., were of the view that the Clarkson “awareness of consequences” test was the appropriate one to use to determine whether or not a suspect has waived his or her right to silence. However, writing for the majority, McLachlin J. concluded that a less onerous test should prevail. McLachlin J. considered the “Clarkson test” to be inappropriate because of the significant differences between the right to counsel and the right to silence. In McLachlin J.’s view:

The guarantee of the right to counsel confirms that the essence of the right is the accused’s freedom to choose whether to make a statement or not. The state is not obliged to protect the suspect against making a statement; indeed, it is open to the state to use legitimate means of persuasion to encourage the suspect to do so. The state is, however, obliged to allow the suspect to make an informed choice about whether or not he will speak to the authorities. To assist in that choice, the suspect is given the right to counsel.1338

Based on her conclusion that the right to silence and the right to counsel are substantively different, although complimentary, McLachlin J. rejected the “Clarkson test” as the standard to be applied when determining whether or not an accused has waived his or her right to silence. To this end, McLachlin J. stated:

This approach may be distinguished from an approach which assumes an absolute right to silence, capable of being discharged only by waiver. On that approach, all statements made by a suspect to the authorities after detention would be excluded unless the accused waived his right to silence…There is nothing in the rules underpinning the s. 7 right to silence or other provisions of the Charter that suggests that the scope of the right to silence be extended this far.1339

Based on the qualified nature of the right to silence in Canada, McLachlin J. also rejected the American model established by the United States Supreme Court in Miranda, where the Court held: “If the individual indicates in any manner, at any time prior to or during questioning, that

1338 Hebert, supra note 876 at 35.
1339 Ibid at 40.
he wishes to remain silent, the interrogation must cease." McLachlin J. adopted a much softer approach, declaring:

First, there is nothing in the rule to prohibit the police from questioning the accused in the absence of counsel after the accused has retained counsel. Presumably, counsel will inform the accused of the right to remain silent. If the police are not posing as undercover officers and the accused chooses to volunteer information, there will be no violation of the Charter. Police persuasion, short of denying the suspect the right to choose or depriving him of an operating mind, does not breach the right to silence.

The open ended nature of McLachlin J.’s comments, especially in light of the “highly fact specific” quality of cases involving waiver, created a dilemma for judges. Just how much “persuasion” is acceptable when the police try to convince an accused who initially invokes the right to silence to change his or her mind and answer some questions? The rules were clear in the case of the right to counsel: the police had to stop questioning or otherwise attempting to elicit evidence until the accused had been given a reasonable opportunity to consult counsel. However, once the accused actually consulted counsel or was not diligent in his or her attempts to consult counsel, the majority decision in Hebert allowed the police to re-engage the accused. Indeed, the majority judgement in Hebert arguably encouraged the police to do so through its declaration that: “The state is not obliged to protect the suspect against making a statement; indeed, it is open to the state to use legitimate means of persuasion to encourage the suspect to do so.”

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1340 Miranda, supra note 88 at 473-74.
1341 Hebert, supra note 876 at 41.
1342 Singh, supra note 19 at para 14.
1343 Manninen, supra note 1286.
1344 Smith, supra note 1292.
1345 Hebert, supra note 876 at 35.
The combination of the Supreme Court’s rejection of the “Clarkson test” and its endorsement of the use of “legitimate means of persuasion”\textsuperscript{1346} by the police after they have met their informational and implementation duties under section 10(b) of the \textit{Charter} resulted in some inconsistency in lower court decisions. Benissa Yau,\textsuperscript{1347} Kelly Enright\textsuperscript{1348} and Lee Stuesser\textsuperscript{1349} have reviewed trial and appellate court cases dealing with the waiver of the right to pre-trial silence and commented on the inconsistency of those decisions. In \textit{R. v. Wood},\textsuperscript{1350} the accused asserted on fifty-three occasions that he wished to remain silent but eventually capitulated to persistent police questioning and gave an incriminating statement. The Nova Scotia Court of Appeal concluded that the accused waived his right to silence and the statement was admitted.\textsuperscript{1351} Similarly, in \textit{R. v. Gormley},\textsuperscript{1352} the Prince Edward Island Court of Appeal rewarded police persistence when it decided that the accused’s repeated assertions to remain silent did not mean that his eventual confession was the result of a violation of his right to silence.\textsuperscript{1353} On the other hand, in \textit{R. v. Otis},\textsuperscript{1354} the Quebec Court of Appeal concluded that persistent police questioning of an accused who had limited intellectual and cognitive skills, as well as difficulty expressing himself, violated his right to silence.\textsuperscript{1355} Similarly, in \textit{R. v. Chamberlain}\textsuperscript{1356} and \textit{R. v. Ingram},\textsuperscript{1357} the Manitoba Queen’s Bench and British Columbia Supreme Court, respectively, concluded that non-oppressive but very persistent and skilled

\textsuperscript{1346} \textit{Ibid}.
\textsuperscript{1347} Yau, supra note 1132.
\textsuperscript{1349} Stuesser, supra note 272.
\textsuperscript{1350} (1994), 94 CCC (3d) 193 (NSCA).
\textsuperscript{1351} Stuesser, supra note 272 at para 31.
\textsuperscript{1352} (1999), 140 CCC (3d) 110 (PEICA).
\textsuperscript{1353} Stuesser, supra note 272 at para 32.
\textsuperscript{1354} (2000), 151 CCC (3d) 416 (Qc CA).
\textsuperscript{1355} Stuesser, supra note 272 at para. 33
\textsuperscript{1357} [2002] BCJ no 1141, CarswellBC 1191 (WL Can) (BCSC).
police questioning of an accused after he had indicated a desire to remain silent violated his right to silence.\textsuperscript{1358}

The conflicting decisions of trial and appellate courts came to a head in 2007 when the Supreme Court of Canada issued its decision in \textit{R. v. Singh}.\textsuperscript{1359} In \textit{Singh}, the accused, Singh, had been arrested as a suspect in a murder. Upon his arrest, Singh was advised of his right to counsel and right to silence. Singh consulted a lawyer and told the police he did not want to talk to them. Despite Singh’s repeated denial of any knowledge of the murder, repetitive admonitions that he had nothing to say and continuous requests to return to his cell (Singh was found to have asserted his right to silence eighteen times in total),\textsuperscript{1360} the lead police interrogator continued to question him. The police strategy included placing evidence in front of Singh in an effort to extract a confession.\textsuperscript{1361} Singh eventually gave an inculpatory admission placing him at the location where the murder had occurred. The trial judge, upheld by the B.C. Court of Appeal, concluded that the police had not violated the accused’s right to silence and that Singh’s statement was voluntary. The statement was admitted in evidence and Singh was convicted. Singh appealed to the Supreme Court of Canada, arguing “that the law in Canada provides inadequate protection during custodial interrogations. Police officers … should be required to inform the detainee of his or her right to silence and, absent a signed waiver, to refrain from questioning any detainee who states that he or she does not wish to speak to the police.”\textsuperscript{1362} In a five to four decision, the Supreme Court upheld the trial judge’s decision and rejected the accused’s exhortation that Canadian law should follow the American model, where the invoking of the right to silence by the accused prohibits continued police questioning.

\begin{footnotes}
\item\textsuperscript{1358} Yau, \textit{supra} note 1132 at 235-238.
\item\textsuperscript{1359} 2007 SCC 48, [2007] 3 SCR 405 [\textit{Singh}]. Re-cited for convenience; original citation at \textit{supra} note 19.
\item\textsuperscript{1360} \textit{Ibid} at para 13.
\item\textsuperscript{1361} \textit{Ibid} at para 15.
\item\textsuperscript{1362} \textit{Ibid} at para 42.
\end{footnotes}
Charron J. wrote the majority judgment. Charron J. rejected the accused’s submission that the police should be required to obtain a signed waiver before questioning a detained suspect, stating: “The new approach advocated by the appellant ignores the critical balancing of state and individual interests which lies at the heart of this Court’s decision in Hebert and of subsequent s. 7 decisions.”1363 Charron J. reviewed the close relationship between the common law confessions rule and the right to silence, emphasizing that both the confessions rule and the right to silence were “manifestations of the principle against self-incrimination.”1364 Charron J. also noted the historic nature of the right to silence, observing: “First, the right to silence is not a concept that was newly born with the advent of the Charter. The right long pre-dated the Charter and was embraced by the common law confessions rule.”1365 According to Charron J., the two doctrines have “considerable overlap”.1366 Charron J. stated:

Indeed … in the context of a police interrogation of a person in detention, where the detainee knows he or she is speaking to a person in authority, the two tests for determining whether the suspect’s right to silence was respected are functionally equivalent.

In addition, because the Crown bears the burden of establishing voluntariness beyond a reasonable doubt and exclusion is automatic if the test is not met, the common law affords greater protection to the accused and there is no point in conducting a distinct s. 7 inquiry.1367

In Charron J.’s view, the linkage between the two doctrines is especially evident in the context of formal interrogation, where “the confessions rule effectively subsumes the constitutional right to silence in circumstances where an obvious person in authority is interrogating a person who is in detention because, in such circumstances, the two tests are

1363 Ibid at para 7.
1364 Ibid at para 21.
1365 Ibid at para 24.
1366 Ibid at para 25.
1367 Ibid.
functionally equivalent.”  However, Charron J. still saw an independent and supplemental role for the right to silence, as “the residual protection afforded to the right to silence under section 7 of the Charter will be of added value to the accused in other contexts.” In this regard, Charron J. referred to Iacobucci J.’s decision in Oickle where he identified some examples of the value of section 7, such as: prohibiting cross-examination of an accused as to why he or she did not give a statement to the police; prohibiting the circumvention of a detained suspect’s decision to remain silent by the use of an undercover police officer or state agent actively eliciting a statement; excluding statements given to police officers under statutory compulsion; and excluding derivative evidence.

After reviewing the close and complimentary relationship between the right to silence and the confessions rule, Charron J. went on to deal with the real crux of the accused’s appeal: the scope of the right to silence under section 7 of the Charter. Charron J. considered the accused’s assertion that the police should not be allowed to question a suspect who has initially exercised his or her right to silence without a signed waiver to be comparable to the Manninen rule governing the right to counsel. In rejecting the Manninen model, Charron J. emphasized the difference between the right to counsel and the right to silence, observing: “Under the Charter, the right to counsel, including an informational and implementational component, is provided for expressly. No such provision appears in respect of the right to silence.” Charron J. buttressed her argument by referring to R. v. C.G., where Hackett J. had stated:

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1368 Ibid at para 39.
1369 Ibid at para 25.
1370 Ibid at para 39.
1371 Ibid at para 42.
1372 [2004] OJ no 229 (QL) (Ont Ct J) at para 93, as cited by Charron J., ibid at para 43.

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The right to silence, by its very nature, is exercised differently than the right to counsel and in this respect, the right to silence and the right to counsel are not the same. The exercise of the right to silence is within the control of the accused who has an operating mind and is fully informed of his or her rights, provided the conduct of the authorities do not take away his or her ability to choose. In contrast, the exercise of the right to counsel is not within the control of the accused in detention. Rather, it is dependent upon police facilitating the exercise of that right. Consequently, it is clear that the police cannot continue to question an accused who asserts his or her right to counsel until they have helped him or her exercise that right. The “holding off” requirement in the case of the right to counsel is therefore not necessary in the case of the right to silence because the law recognizes an accused’s free will and the ability of an accused to change his or her mind about whether or not to speak to the police. This change of mind can occur either as a result of personal reasons, or police persuasion that does not violate the principles of fundamental justice or deprive the accused of choice.\footnote{1373 Singh, supra note 1359 at para 43.}

Charron J. was not unmindful of the need to control police interrogation strategies, as she agreed with the trial judge’s concerns regarding some of the strategies used by Singh’s interrogator\footnote{1374 Ibid at para 50.} and also readily acknowledged the danger of false confessions.\footnote{1375 Ibid at para 29.} However, despite these concerns, Charron J. emphasized the “critical balance that must be maintained between individual and societal interests.”\footnote{1376 Ibid at para 47.} The balance, according to Charron J., includes a recognition that the right to silence “does not mean … that a person has the right \textit{not to be spoken to} by state authorities.”\footnote{1377 Ibid at para 28, emphasis in original.} Furthermore, Charron J. confirmed the importance of interrogation as a police strategy by observing:

The importance of police questioning in the fulfillment of their investigative role cannot be doubted. One can readily appreciate that the police could hardly investigate crime without putting questions to persons from whom it is thought that useful information may be obtained. The person suspected of having committed the
crime being investigated is no exception. Indeed, if the suspect in fact committed the crime, he or she is likely the person who has the most information to offer about the incident. The common law also recognizes the importance of police interrogation in the investigation of crime. \footnote{1378} 

In asserting that “the use of legitimate means of persuasion is indeed permitted under the present rule”, \footnote{1379} Charron J. concluded:

The Court in \textit{Hebert} stressed the importance of achieving a proper balance between the individual’s right to choose whether to speak to the authorities and society’s interest in uncovering the truth in crime investigations. As I stated earlier, the suspect may be the most fruitful source of information. While the fact of detention unquestionably triggers the need for additional checks on police interrogation techniques because of the greater vulnerability of the detainee, the moment of detention does nothing to reduce the suspect’s value as an important source of information. Provided that the detainee’s rights are adequately protected, including the freedom to choose whether to speak or not, it is in society’s interests that the police attempt to tap this valuable source. \footnote{1380}

However, while Charron J. ultimately concluded that on the facts of the case the police did not violate Singh’s right to silence, she emphasized that the police are not allowed to simply “\textit{ignore} the detainee’s freedom to choose whether to speak or not”. \footnote{1381} Charron J. therefore cautioned: “Under both common law and \textit{Charter} rules, police persistence in continuing the interview, despite repeated assertions by the detainee that he wishes to remain silent, may well raise a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities.” \footnote{1382} Finally, Charron J. noted that cases like \textit{Singh} are “highly

\footnotetext{1378}{\textit{Ibid}.} \footnotetext{1379}{\textit{Ibid} at para 47.} \footnotetext{1380}{\textit{Ibid} at para 45.} \footnotetext{1381}{\textit{Ibid} at para 47, emphasis in original.} \footnotetext{1382}{\textit{Ibid}.}
“fact specific” and “[t]he number of times the accused asserts his or her right to silence is part of the assessment of all of the circumstances, but is not in itself determinative.”1383

Fish J. wrote the dissenting judgement,1384 identifying the pivotal issues in simple terms: “The question on this appeal is whether ‘no’ means ‘yes’ where a police interrogator refuses to take ‘no’ for an answer from a detainee under his control.”1385 After emphasizing that the right to pre-trial silence “was not new constitutional ground”,1386 Fish J. stated: “What is at stake…is the Court’s duty to ensure that a detainee’s right to silence will be respected by interrogators once it has been unequivocally asserted, and not discarded or insidiously undermined as an investigative stratagem.”1387

Fish J. identified four primary areas where he disagreed with the majority decision. First, he took issue with the tactics used by the police officer who interrogated Singh. Indeed, Fish J. found the constant pressure placed by the interrogator on Singh to answer questions despite the interrogator knowing Singh had received legal advice not to speak to the police to be “particularly disturbing.”1388 In Fish J.’s opinion, such a strategy “deprived [Singh] not only of his right to silence, but also, collaterally, of the intended benefit of his right to counsel. These rights are close companions, like glove and hand.”1389 Fish J. concluded that the interrogator’s frustration of Singh’s free choice to decide whether or not to follow the legal advice which he had received resulted in the admission being obtained in a manner that infringed the accused’s

1383 Ibid at para 53.
1384 Binnie, LeBel and Abella JJ. concurred with Fish J.
1385 Singh, supra note 1359 at para 55.
1386 Ibid at para 56.
1387 Ibid at para 57, emphasis in original.
1388 Ibid at para 60.
1389 Ibid at para 62.
constitutional right to silence and thereby triggered the provisions of the exclusionary rule under section 24(2) of the Charter.  

Second, Fish J. disagreed with the conclusion drawn by the trial judge, Court of Appeal and the majority of the Supreme Court that the accused’s assertion on eighteen occasions that he wanted to remain silent was in fact an indication that “Singh successfully invoked his right to silence”. In Fish J.’s view, “[t]he judge’s reasoning in this regard is superficially attractive but blind to reality.” Noting that at all times the accused was “totally under the control of the police”, Fish J. stated:

Where continued resistance has been made to appear futile to one person under the dominance or control of another, as it was in this case, ultimate submission proves neither true consent nor valid waiver. It proves the failure, not the success, of the disregarded assertions of the right of the powerless and the vulnerable to say “no”.

The third area of concern raised by Fish J. related to the relationship between the right to silence and the “enhanced confessions rule adopted by R. v. Oickle”. While Fish J. recognized that the application of the common law confessions rule to the accused’s statement was not before the Court, he took the opportunity to emphasize the different purposes of the confessions rule and right to silence. According to Fish J., “[g]iven their different purposes … they should remain distinct doctrines: To overlap is not to overtake.” In this regard, Fish J. asserted that a confession “where the detainee had an operating mind and the confession did not

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1390 Ibid at para 63.
1391 Ibid at para 64.
1392 Ibid at para 65.
1393 Ibid.
1394 Ibid at para 66.
1395 Ibid at para 73.
1396 Ibid at para 74.
1397 Ibid at para 75, emphasis in original.
result from inducements, oppression, or police trickery that would shock the community … does not invariably represent a ‘free and meaningful choice’ for the purposes of the Charter.”1398 Referring to the Supreme Court’s decision in Manninen, where Lamer J. had observed that police disregard for a detained suspect’s assertion of the right to counsel would likely lead the suspect to believe that “his right has no effect and that he must answer”,1399 Fish J. observed:

Detainees are in the custody of the state and subject to total control by its agents. This heightens the power imbalance between the individual and the state. Detainees left alone to face interrogators who persistently ignore their assertions of the right to silence and their pleas for respite are bound to feel that their constitutional right to silence has no practical effect and they have no choice but to answer.1400

Finally, Fish J. disagreed with Charron J.’s suggestion that the “ability of the police to investigate crime would be unduly impaired by the effective exercise of the pre-trial right to silence.”1401 Fish J. defended his position by referring to principle and practicality. On a principled basis, he pointed out that no one was suggesting the police should not be allowed to “put questions to persons from whom it is thought that useful information may be obtained”,1402 nor was there any suggestion that witnesses should not cooperate with the police. However, Fish J. noted that witnesses, while “expected, as a matter of civic duty, to assist the police by answering their questions … may refuse to answer, and go home.”1403 On the other hand, “[p]risoners and detainees … are by definition not free to leave as they please.”1404 It is to such people that the right to silence accrues, as “[t]hey are powerless to end their interrogation. As explained in Hebert, this is why they have been given their right to counsel and its close relative,

1398 Ibid at para 79.
1399 Manninen, supra note 1286 at 393, as cited by Fish J., ibid at para 81.
1400 Singh, supra note 1332 at para 81.
1401 Ibid at para 82.
1402 Ibid at para 84.
1403 Ibid at para 86.
1404 Ibid.
the right to silence.” From a practical perspective, Fish J. argued there was no empirical evidence to suggest that the *Miranda* decision had seriously undermined the ability of American police to investigate crime or obtain statements. On this issue, Fish J. asserted: “*Miranda* can hardly be said to have paralyzed criminal investigations in the United States. And there is no evidentiary basis for suggesting that it would do so in Canada.” However, Fish J. took care to clarify that he was not endorsing the *Miranda* model, stating: “And I take care not to be misunderstood to suggest that *Miranda* either is now, or ought to be made, the law in Canada.”

The majority and minority decisions in *Singh* dramatically demonstrate a sharp division of judicial opinion about where to strike the balance between the importance of interrogation as a police strategy to investigate crime and the accused’s right to remain silent. Indeed, the only thing the majority and minority could seem to agree on was that there is no specific numeric formula regarding the number of times an accused must assert his or her right to silence before the police will be deemed to have crossed the line and violated the accused’s right to silence. As noted previously, Charron J. cautioned that police persistence in questioning an accused in the face of repeated assertions of the right to silence might result in a finding that the police have overridden the accused free will, and Fish J. observed:

Before leaving this branch of the matter, I take care not to be understood to have held that eighteen (a significant number in other contexts) is of any importance at all in determining whether a detainee’s right to silence has been effectively undermined. On the contrary, I favour a purposive approach and find it unnecessary to decide whether eighteen times is too many or once is too few. Constitutional rights do not

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1405 *Ibid* at para 86.
1406 *Ibid* at para. 89.
1407 *Ibid* at para. 93.
1408 *Ibid* at para. 94.
have to be asserted or invoked a pre-determined number of times before the state and its agents are bound to permit them to be exercised freely and effectively. A right that need not be respected after it has been firmly and unequivocally asserted any number of times is a constitutional promise that has not been kept.\textsuperscript{1409}

Dale Ives and Christopher Sherrin have criticized the \textit{Singh} decision, arguing that the majority decision “largely strips the right to silence of any real meaning.”\textsuperscript{1410} According to Ives and Sherrin, the majority decision in \textit{Singh} “makes it very clear that, in the situation where a detained suspect knows that he or she is speaking to a person in authority, the right to silence adds nothing to the voluntariness rule.”\textsuperscript{1411} But, in their view, “the voluntariness rule does \textit{not} operate as an adequate safeguard against false confessions.”\textsuperscript{1412} On the other hand, Michael Plaxton has come to the defence of Charron J. and her colleagues. Plaxton argues that the dissenting judgement in \textit{Singh} did not supply sufficient justification for moving away from the voluntariness rule as the primary protection of the right to silence during police interrogations.\textsuperscript{1413} In his view, the majority judgement properly recognizes that the confessions rule is capable of doing the “sort of heavy lifting” needed to protect the accused from the “coercive effects of custodial interrogations”.\textsuperscript{1414}

The \textit{Singh} decision, while admittedly decided on the specific fact pattern of the case, illuminated a sharp divide in the Supreme Court of Canada regarding the scope of the right to silence and the proper balance between individual liberty and society’s interest in effective law

\begin{itemize}
\item \textsuperscript{1409} \textit{Ibid} at para. 70.
\item \textsuperscript{1410} Ives & Sherrin, \textit{supra} note 244 at 255.
\item \textsuperscript{1411} \textit{Ibid} at 257.
\item \textsuperscript{1412} \textit{Ibid} at 258, emphasis in original.
\item \textsuperscript{1413} Plaxton, “Singh”, \textit{supra} note 403 at para 21.
\item \textsuperscript{1414} \textit{Ibid} at para 10.
\end{itemize}
enforcement. The difference of opinion within the Court became evident once again when the Court issued its judgement in *R. v. Sinclair*.  

3. Police Persuasion

In *Sinclair*, the accused, Sinclair, was a suspect in a murder. After being arrested, Sinclair was advised of his right to counsel, including the availability of a legal aid lawyer free of charge. Sinclair declined calling a lawyer and was taken to the police detachment where he was booked into cells and asked again if he wanted to speak to a lawyer. Sinclair then indicated that he wanted to speak to a specific lawyer who was representing him on another charge and, in fact, he spoke to his chosen lawyer on the telephone in private for approximately three minutes. Upon completing the call, Sinclair told the police that the lawyer had agreed to take his case. Approximately three hours later a police officer called the lawyer to see if he was coming to the police station to see Sinclair, but the lawyer said he had not yet received a Legal Aid retainer so he would not be attending. The lawyer did, however, once again speak to Sinclair on the phone for approximately three minutes. Sometime later, another police officer who was a trained interrogator began a five hour interview of Sinclair. Sinclair initially told the officer that he did not want to make a statement “until my lawyer is around and he tells me what’s goin *(sic)* on and stuff”.  

The police officer confirmed that Sinclair did not have to speak to him but continued the interrogation, using a strategy of building trust.  

According to McLachlin C.J. and Charron J.: “Altogether, Mr. Sinclair alternately expressed his desire to speak with his lawyer and his intention to remain silent on matters touching on his involvement in the killing four or 

1417 *Ibid*. 
While the interrogating police officer told Sinclair that he had the right to remain silent, he also continued to speak to Sinclair and eventually turned the neutral conversation into a fact finding interrogation during which Sinclair admitted to stabbing the victim during a struggle while both were intoxicated. Sinclair also admitted to disposing of the victim’s body and some other evidence in a dumpster. The police later placed an undercover officer in Sinclair’s cell and Sinclair made an incriminating statement to that officer.

The trial judge held that Sinclair’s statements were voluntary and that he had been provided a reasonable opportunity to consult counsel under section 10(b) of the Charter. The judge also concluded that the police were entitled to continue to question Sinclair after he had exercised his right to counsel. Sinclair’s statements were admitted and he was convicted of manslaughter. A unanimous British Columbia Court of Appeal dismissed the accused’s appeal, stating:

As discussed in Hebert and Singh, once a detainee has exercised his or her right to counsel, the police are entitled to use legitimate means to persuade him or her to speak. I see no policy reason for providing a detainee, who does not have the right to terminate an interview by stating “I wish to remain silent”, the peremptory right to do so by stating, “I want to talk to my lawyer again.”

Sinclair appealed to the Supreme Court of Canada, arguing that section 10(b) of the Charter required the police to stop questioning a detained suspect who has exercised the right to counsel when the suspect indicates he or she wants to consult counsel again. Furthermore, Sinclair submitted that section 10(b) requires the police to allow counsel to be present during an

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1418 Ibid at para 10.
1419 Ibid at para 11.
interrogation if the suspect so requests.\textsuperscript{1421} Once again the Supreme Court of Canada was sharply divided, with a narrow majority of five to four dismissing the accused’s appeal.

McLachlin C.J. and Charron J. wrote the majority decision, as they had done in \textit{Singh}.\textsuperscript{1422} McLachlin C.J. and Charron J. first considered the issue of whether section 10(b) of the \textit{Charter} grants a continuing right to consult counsel. In dealing with this issue, McLachlin C.J. and Charron J. determined that the wording of section 10(b) was too ambiguous to be of much assistance, so they elected to use the purposive approach to determine the extent of section 10(b). Noting that both \textit{Hebert} and \textit{Manninen} underline the importance of legal advice to ensure “the accused understands his rights, chief among which is his right to silence”, McLachlin C.J. and Charron J. concluded: “The purpose of s. 10(b) is to provide a detainee with the opportunity to obtain legal advice relevant to his legal situation. In the context of a custodial interrogation, chief among the rights that must be understood by the detainee is the right under s. 7 of the \textit{Charter} to choose whether to cooperate with the police or not.”\textsuperscript{1423} McLachlin C.J. and Charron J. reiterated that the informational and implementational duties placed on the police under section 10(b) include the “duty on the police to hold off questioning until the detainee has had a reasonable opportunity to consult counsel.”\textsuperscript{1424} However, while McLachlin C.J. and Charron J. acknowledged that the right to counsel “supports the broader s. 7 right to silence”, they also cautioned that “it is not to be confused with the right to silence.”\textsuperscript{1425} More specifically, they stated:

\begin{enumerate}
\item\textit{Ibid} at para 18.
\item Deschanmps, Rothstein and Cromwell JJ. concurred.
\item \textit{Sinclair, supra} note 1415 at para 24.
\item \textit{Ibid} at para 27.
\item \textit{Ibid} at para 29.
\end{enumerate}
Section 10(b) is a specific right directed at one aspect of protecting the right to silence – the opportunity to secure legal assistance. A given case may raise both s. 10(b) and s. 7 issues. Where it is alleged under s. 7 and the confessions rule that a statement is involuntary because of denial of right to consult counsel, the factual underpinning of the two inquiries may overlap: Singh. Yet they remain distinct inquiries. The fact that the police complied with s. 10(b) does not mean that a statement is voluntary under the confessions rule. Conversely, the fact that a statement is made voluntarily does not rule out breach of s. 10(b).

After concluding that the purpose of section 10(b) “in the context of a custodial interrogation” is to “support the detainee’s right to choose whether to cooperate with the police investigation or not, by giving him access to legal advice on the situation he is facing”, McLachlin C.J. and Charron J. rejected the accused’s assertion that the right is an ongoing or continual one. In their opinion, such a view would mean “the purpose of the right is not so much informational as protective.”

Concerning Sinclair’s second submission that the police must allow the accused’s counsel to be present at the interrogation if the accused so requests, McLachlin C.J. and Charron J. concluded that neither precedent nor the language of section 10(b) support such an interpretation. Furthermore, McLachlin C.J. and Charron J. rejected the Miranda rule, which allows the accused to have a lawyer present during an interrogation, on the basis that: “Adopting procedural protections from other jurisdictions in a piecemeal fashion risks upsetting the balance that has been struck by Canadian courts and legislatures.”

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1426 Ibid.
1427 Ibid at para 32.
1428 Ibid at para 30.
1429 Ibid at paras 34-35.
1430 Ibid at para 38.
While concluding that section 10(b) of the Charter does not provide a continuing right to counsel or a right to have counsel present during an interrogation unless the police agree to such an arrangement, McLachlin C.J. and Charron J. did recognize that there will be certain situations where, to achieve the purpose of section 10(b), the accused will have to be allowed to re-consult counsel. Identifying the underlying principle for allowing a further consultation with counsel as being “changed circumstances”, which means “the initial advice may no longer be adequate”, McLachlin C.J. and Charron J. identified four situations where the Supreme Court of Canada has determined a new consultation with counsel will be required: (1) if the accused is required to undertake “[n]on-routine procedures, like participation in a line-up or submitting to a polygraph test; (2) if there is a change in the jeopardy which the accused is facing, such as the investigation “takes a new and more serious turn as events unfold”; (3) if events indicate that a suspect who has waived his or her right to counsel may not have understood his or her right to counsel; and (4) if the police effectively nullify the advice given by counsel by undermining that advice. McLachlin C.J. and Charron J. pointed out, however, that the list of situations where the police will be required to facilitate another consultation with counsel is not exhaustive. The fundamental issue to consider regarding a change in circumstances, according to McLachlin C.J. and Charron J., “is whether a further opportunity to consult a lawyer is necessary to fulfill s. 10(b)’s purpose of providing the detainee with advice in the new

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1431 Ibid at para 42.
1432 Ibid at para 48.
1437 Ibid at para 54.
or emergent situation.” In addition, the change in circumstances necessitating a new opportunity to consult with counsel must be “objectively observable”.

In setting out their argument, McLachlin C.J. and Charron J. referred to the importance of striking an appropriate balance between individual rights and effective law enforcement. In this regard, they stressed that “consideration must be given not only to the protection of rights of the accused but also to the societal interest in the investigation and solving of crimes.”

McLachlin C.J. and Charron J. stated:

The police are charged with the duty to investigate alleged crimes and, in performing this duty, they necessarily have to make inquiries from relevant sources of information, including persons suspected of, or even charged with, committing the alleged crime. While the police must be respectful of an individual’s Charter rights, a rule that would require the police to automatically retreat upon a detainee stating that he or she has nothing to say, in our respectful view, would not strike the proper balance between the public interest in the investigation of crimes and the suspect’s interest in being left alone.

Applying their view of the law to the facts of the case, McLachlin C.J. and Charron J. concluded Sinclair’s rights under section 10(b) of the Charter had not been infringed, as he did “not fall into any of the categories where thus far a right to re-consultation has been recognized as necessary to fulfill the purpose of s. 10(b) of giving the detainee access to legal advice with respect to his right to choose whether to cooperate with the police or not.”

There were two separate dissenting opinions in Sinclair. LeBel and Fish JJ. wrote one set of reasons, with Abella J. concurring, while Binnie J. wrote a sole dissenting judgement. Identical to Fish J.’s comment in Singh, LeBel and Fish JJ. described the “core” issue to be decided in

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1438 Ibid.
1439 Ibid at para 55.
1440 Ibid at para 63.
1441 Ibid.
1442 Ibid at para 66.
Sinclair as “whether ‘no’ means ‘yes’, where a police interrogator refuses to take ‘no’ for an answer from a detainee under his total control.”

Although they obviously focused on the right to counsel under section 10(b) of the Charter, as that was the issue before the Court, LeBel and Fish JJ. reiterated the close relationship between the right to counsel and the right to silence, noting that “the right to silence is inextricably bound up with, although not subsumed by, the right to silence”. Moreover, LeBel J. and Fish J. stated: “Both rights are constitutionally guaranteed. We know from experience that, in the context of custodial interrogations, you can’t have one without the other.”

LeBel and Fish JJ. did not agree with the majority’s view that the right to counsel under section 10(b) of the Charter is restricted to an initial one-time consultation unless there is a material change in the circumstances. LeBel and Fish JJ. considered the wording of section 10(b) and found that, in either its English or French versions, the wording of the section “supports a broad application of the right to counsel, which includes an ongoing right to consult with counsel.” In their view: “Section 10(b) does not create for the detainee a black hole between the time of arrest or detention, and the detainee’s first appearance before a judge.”

In addition to concluding that the actual wording of section 10(b) supports a continuing right to counsel, LeBel and Fish JJ. found that applying the purposive approach to section 10(b) resulted in the same conclusion. Noting that the right to counsel is part of an overall criminal law that is “premised on several animating, normative principles, including the presumption of

1443 Ibid at para 123.
1444 Ibid at para 124.
1445 Ibid, emphasis in original.
1446 Ibid at para 154.
1447 Ibid at para 149.
innocence, the protection against self-incrimination and the right to silence”,^{1448} LeBel and Fish JJ. asserted:

The right to silence, the right against self-incrimination, and the presumption of innocence are interrelated principles and the core values that animate the administration of criminal justice in Canada. They work together to ensure that suspects are never obligated to participate in building a case against them. As this Court has noted time and again, the ability of an accused to exercise these fundamental rights is dependent upon the assistance of counsel.^{1449}

LeBel and Fish JJ. also recognized the important role legal counsel plays in the “protection of the rule of law and, particularly, in the administration of criminal justice”.^{1450} In their opinion, defence counsel perform a vital role in the pragmatic application of the “bedrock principle” that “the accused in a criminal investigation enjoys a constitutionally protected right to silence and has absolutely no obligation to assist the state with its prosecution.”^{1451} Defence lawyers, according to LeBel and Fish JJ., perform a legitimate and important role at the investigative stage of the criminal justice process because they “ensure the integrity of the criminal process from start to finish” by providing advice to the suspect which “is not simply a matter of reiterating the detainee’s right to silence, but also to explain why and how that right should be, and can be, effectively exercised.”^{1452} While LeBel and Fish JJ. acknowledged that “[t]he assistance of lawyers might be disruptive to interrogations”, they also emphasized that because “the accused in a criminal investigation enjoys a constitutionally protected right to silence and has absolutely no obligation to assist the state with its prosecution”, the presence of defence counsel at a police interrogation should be considered no more disruptive to a criminal

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^{1448} Ibid at para 155.
^{1449} Ibid at para 159.
^{1450} Ibid at para 125.
^{1451} Ibid at para 173.
^{1452} Ibid at para 167.
investigation than “the presence of lawyers at trial, the right to silence, the presumption of innocence, and the *Canadian Charter of Rights and Freedoms*.”\textsuperscript{1453}

LeBel and Fish JJ. also discounted concerns raised by McLachlin C.J. and Charron J. that giving a detained suspect the ability to stop an interrogation in order to further consult with counsel would unduly interfere with the ability of the police to effectively investigate crime. In rebuttal, LeBel and Fish JJ. declared:

> In our respectful view, the right against self-incrimination and the right to silence cannot be eroded by an approach to criminal investigations, and in particular to custodial interrogation, that would favour perceived police efficiency at the expense of constitutionally protected rights. It is certain that police interrogation is not of itself a breach of the *Charter*, but the needs of police efficacy do not rank higher than the requirements of the *Charter*.\textsuperscript{1454}

LeBel and Fish JJ. also referred to the American experience under *Miranda*, where an initial concern had arisen that allowing a suspect to not only stop a custodial interrogation but to demand that his or her lawyer be present during the interrogation would interfere with the ability of the police to obtain confessions. After claiming that “[f]ive decades of empirical research have determined that those early fears were unfounded”,\textsuperscript{1455} LeBel and Fish JJ. concluded: “The consensus, save a few dissenting voices, is that Miranda’s effect on both the rates of confession and conviction has been negligible.”\textsuperscript{1456} However, while LeBel and Fish JJ. had little concern with the *Miranda* approach, they did not go so far as to endorse incorporating the *Miranda* rule

\textsuperscript{1453} *Ibid* at para 173.
\textsuperscript{1454} *Ibid* at para 202.
\textsuperscript{1455} *Ibid* at para 199.
\textsuperscript{1456} *Ibid* at para 200.
into Canadian law, stating: “[W]e take care to make perfectly clear that we are not advocating the adoption of the American rules under *Miranda*.”

LeBel and Fish JJ. also expressed concern regarding the combined effect of the Supreme Court’s decisions in *Oickle*, *Singh* and *Sinclair*. From their perspective, the trilogy of cases “carries significant and unacceptable consequences for the administration of criminal justice and the constitutional rights of detainees in this country.” More specifically, they rejected the approach adopted by McLachlin C.J. and Charron J. that the voluntary confessions rule is the proper mechanism to determine “any residual concerns regarding the detainee’s inability to consult counsel during a custodial interrogation”. LeBel and Fish JJ. asserted that such an approach places “an over-reliance on the ability of the confessions rule to provide this residual but essential protection.” In their opinion, “[t]he common law requirement of voluntariness set out in *Oickle* … was never intended to serve as a substitute for the constitutional guarantees that concern us here.” Consequently, LeBel and Fish JJ. declared:

More broadly, however, the majority opinions in both *Singh* and this case project a view of the right to silence that hinges too closely on the voluntariness of a detainee’s inculpatory statement. This approach ignores the fact that the right to silence can be breached in a manner other than the taking by the police of an involuntary statement. As Professor Stewart has observed, “[t]he right to silence can be violated when the police improperly persuade the accused to speak, but without any inducement or other factor that would make the ensuing statement involuntary” (p. 539).

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1457 Ibid at para 201.
1458 Ibid at para 180.
1459 Ibid at para 181.
1460 Ibid at para 182.
1461 Ibid at para 183.
In our view, a denial of the right to consult counsel, which has the effect of forcing a detainee to participate in the interrogation until confession, coupled with the explicit belief on the part of the police that they are entitled to that confession, has precisely that effect.\textsuperscript{1462}

Finally, in \textit{obiter} comments, LeBel and Fish JJ. registered their concern with what they perceive to be a troubling trend of Canadian courts using the common law to expand police powers.\textsuperscript{1463} Referring specifically to the facts of \textit{Sinclair}, LeBel and Fish JJ. suggested the majority judgment in effect granted “a new right on the part of the police to the unfettered and continuing access to the detainee, for the purpose of conducting a custodial interview to the point of confession.”\textsuperscript{1464} Pointing out that “this expansion of police powers occurs at the expense of \\textit{Charter} rights”, LeBel and Fish JJ. lamented that “it is being accomplished without subjecting the potential police power to the rigours of the s. 1 justification process”, or at least “the Waterfield/Dedman test for the recognition of police powers at common law.”\textsuperscript{1465}

Based on their assessment of the purpose of section 10(b) and its close connection to the right to silence, LeBel and Fish JJ. concluded:

Under our Constitution the right to counsel enshrined in s. 10(b) is not “spent” upon its initial exercise following arrest or detention. Nor is its further exercise subject to the permission of the police officers who deliberately ignore the detainee’s requests to consult counsel. By persisting instead with their relentless custodial interrogation, despite the detainee’s clearly expressed choice not to speak with them, the police flout another constitutional right – the detainee’s right to silence.\textsuperscript{1466}

\textsuperscript{1462} \textit{Ibid} at paras 185-86.
\textsuperscript{1463} \textit{Ibid} at paras 187-97.
\textsuperscript{1464} \textit{Ibid} at para 190.
\textsuperscript{1465} \textit{Ibid} at para 191.
\textsuperscript{1466} \textit{Ibid} at para 177.
Applying their view of the law to the facts, LeBel and Fish JJ. concluded that, despite acting in good faith, the interrogating police officer violated Sinclair’s right to counsel\(^\text{1467}\) and right to silence.\(^\text{1468}\) They also found that the admission given to the undercover police officer was tainted by the earlier Charter breaches committed during the interrogation.\(^\text{1469}\) Applying the principles enunciated in Grant, LeBel and Fish JJ. excluded the statements under section 24(2) of the Charter.\(^\text{1470}\)

Binnie J. took the middle road. Emphasizing that “[t]he essential fairness of our system of justice is at stake in police interrogations”,\(^\text{1471}\) and noting that access to legal advice in the context of police interrogation is important “because the law is a complicated place, and the stakes are high … [and] the detainee is isolated and in a position of vulnerability”,\(^\text{1472}\) Binnie J. proposed a compromise position between the full adoption of the Miranda rule and the approach taken by McLachlin C.J. and Charron J.. In Binnie J.’s view, the “interrogation trilogy” of Oickle, Singh and Sinclair created “three trump cards”\(^\text{1473}\) for the police which have disrupted the crime control versus due process balance.

According to Binnie J., the first trump card was created by Oickle, which “is rightly seen as setting a high barrier to exclusion”\(^\text{1474}\) of a confession because “in the absence of egregious circumstances the Crown will be able to establish ‘voluntariness’ without great difficulty”.\(^\text{1475}\) The “second trump card” was Singh, which, according to Binnie J., essentially conflated the right

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\(^\text{1467}\) Ibid at para 213.  
\(^\text{1468}\) Ibid at para 211.  
\(^\text{1469}\) Ibid at para 216.  
\(^\text{1470}\) Ibid at para 226.  
\(^\text{1471}\) Ibid at para 115.  
\(^\text{1472}\) Ibid at para 85.  
\(^\text{1473}\) Ibid at para 92.  
\(^\text{1474}\) Ibid at para 93.  
\(^\text{1475}\) Ibid at para 95.
to silence with the voluntariness of the accused’s statement so that a determination that the statement is voluntary means “the accused’s Charter application alleging that the statement was obtained in violation of the pre-trial right to silence under s. 7 cannot succeed”. Finally, in Binnie J.’s view, *Sinclair* was creating a third trump card for the police by restricting legal advice for the suspect to “preliminary advice … unless there are changed circumstances”. In summing up the impact of the three cases, Binnie J. stated:

What now appears to be licenced as a result of the “interrogation trilogy” is that an individual (presumed innocent) may be detained and isolated for questioning by the police for at least five or six hours without reasonable recourse to a lawyer, during which time the officers can brush aside assertions of the right to silence or demands to be returned to his or her cell, in an endurance contest in which the police interrogators, taking turns with one another, hold all the important legal cards.

While Binnie J. acknowledged that “the important societal interest in resolving crimes … is a very valid consideration”, he also asserted that “society also intends crimes to be solved in a framework that respects civil liberties and fairness of the justice system”. Cautioning that “[m]any confessions obtained by extended police interrogations are true, but too many are not”, and emphasizing that section 10(b) of the Charter is “designed to ensure that persons who are arrested or detained are treated fairly in the criminal process”, Binnie J. declared:

In my view, the detainee is entitled to a further opportunity or opportunities to receive advice from counsel during a custodial interview where the detainee’s request falls within the purpose of the s. 10(b) right, *(i.e. to satisfy a need for legal*

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1476 *Ibid* at para 96, emphasis in original.
1477 *Ibid* at para 97, emphasis in original.
1478 *Ibid* at para 98.
1480 *Ibid* at para 78.
1481 *Ibid* at para 79, emphasis in original.
assistance rather than delay or distraction) and such request is reasonably justified by
the objective circumstances, which were or ought to have been apparent to the police
during the interrogation…. 1482

Binnie J. went on to discuss the concerns about his approach expressed by both the majority
and other dissenting judgment. (McLachlin C.J. and Charron J. had criticized his approach as
being too vague and LeBel and Fish JJ. had disagreed with his suggestion that the police should
be the ones to decide whether or not the accused’s request to re-consult counsel is reasonable).
In response to the criticism of vagueness, Binnie J. contended that a process which allows the
police to initially determine whether a request by a detained person to re-consult counsel is
reasonable is consistent with many other situations where the police have to make an initial
decision regarding the extent of a suspect’s Charter rights. Noting that “‘[r]easonableness’ is a
constitutional standard that is widely employed and familiar to the police”, 1483 Binnie J.
identified several common situations where police are required to apply the reasonableness
standard, such as: searches under section 8 of the Charter; random vehicle stops; detaining
someone on the street to question him or her about possible criminal activity; or blockading an
area in response to a gun call. 1484 In response to the concerns raised by LeBel and Fish JJ. that
the police should not be allowed to make the decision whether or not the accused’s request to re-
consult counsel is based on a legitimate need to obtain further advice because of a change in
circumstances as opposed to an attempt to delay or interfere with the interrogation, Binnie J.
suggested that acceding to the LeBel and Fish JJ.’s position would “make the detainee the sole
judge of further consultations with counsel even if, viewed objectively, such demands are made

1482 Ibid at para 80.
1483 Ibid at para 108.
1484 Ibid at para 110.
whimsically or capriciously”; a situation which Binnie J. found to be unpalatable as being an inappropriate intrusion into the important function of the police.

Based on his belief that the appropriate resolution to the issue lies in the middle ground, Binnie J. stated: “What gives grounds for a further consultation will depend on evolving circumstances.” While acknowledging that the “police are not … required to shut down their interrogation simply because the detainee expresses a desire to consult again”, and recognizing that the accused’s request to re-consult counsel cannot be “simply to delay or distract from the sort of police interrogation approved in Oickle and Singh”, Binnie J. suggested the “reasonableness” of the accused’s request for another opportunity to consult counsel should be assessed by referring to certain objective factors, including: the extent of the prior consultation with counsel; the length of the interrogation at the time of the request; the nature and extent of the information being provided to the accused by the police; any exigent or urgent circumstances; whether any new legal issue has surfaced during the interrogation; and the mental and physical condition of the accused. In Binnie J.’s opinion, these factors, while not exhaustive, would be important considerations in determining the overall reasonableness of the request based on the underlying rationale of the right to counsel, which is to ensure fairness to the accused and allow him or her to make an informed choice.

However, while Binnie J. acknowledged there will be occasions where the accused must be able to demand the opportunity to speak to his or her counsel again during an interrogation, he rejected Sinclair’s other submission that a detained suspect should be allowed to have his or her counsel present during the interrogation. According to Binnie J., “adoption of the Miranda rule

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1485 Ibid at para 112.
1486 Ibid at para 106.
1487 Ibid.
1488 Ibid.
would seriously overshoot the purpose of s. 10(b) in the Canadian context, with its different structure of checks and balances.”

In coming to his conclusion, Binnie J. referred to Lamer J.’s comments in *R. v. Smith*, where he stated: “The rights set out in the Charter, and in particular the right to retain and instruct counsel, are not absolute and unlimited rights. They must be exercised in a way that is reconcilable with the needs of society.”

While Binnie J. did not suggest that lawyers would purposively derail a police interrogation, he did recognize that “the potential to ‘delay needlessly and with impunity’ cannot be doubted”.

Given this concern and his preference for an “intermediate position”, Binnie J. came to the conclusion that “inviting [defence counsel] into the interrogation would, in my view, interpret s. 10(b) rights in a way that would excessively undermine the ability of the police to ‘adequately carry out their tasks’.”

Applying his interpretation of the law to the facts of the case, Binnie J. concluded that, while Sinclair’s right to counsel under section 10(b) of the *Charter* was not breached when his first request to re-contact his lawyer was denied, it was breached several hours later when the interviewing police officer confronted Sinclair with what the officer called “overwhelming” evidence linking him to the crime and then denied Sinclair’s renewed request to re-consult counsel. In Binnie J.’s assessment, Sinclair’s request was reasonable and therefore its denial was a violation of his section 10(b) rights.

Binnie J. further concluded that the later admission to the undercover officer was “tainted” by the initial *Charter* breach, as “[w]ithout the initial

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1490 *Ibid*, emphasis added by Binnie J.
1491 *Ibid*.
1492 *Ibid* at para 105.
1493 *Ibid* at para 102.
1494 *Ibid* at para 118.
statement to Sgt. Skrine, it would not have taken place.”

Based on the criteria set out in Grant, Binnie J. excluded the statements under section 24(2) of the Charter.

On the same day it rendered its decision in Sinclair, the Supreme Court issued its decisions in two companion cases: R. v. Willier and R. v. McCrimmon. The facts of the two cases were strikingly similar, as both accused were arrested and detained for a serious crime and later provided incriminating statements to the police despite not being able to speak to the lawyer of their choice.

In Willier, the accused, Willier, was arrested for murder. He was advised of his right to counsel and right to silence, and spoke on the telephone with a Legal Aid lawyer. The next day Willier was offered the opportunity to speak to counsel again and opted to try to speak to a specific lawyer; however, as it was Sunday the lawyer was not in his office and it was doubtful that he would return the message that Willier had left on his answering machine. When this was brought to Willier’s attention by a police officer, Willier decided to speak to a Legal Aid lawyer again, which he did for approximately one minute. Willier later provided a statement regarding his involvement in the victim’s death.

In McCrimmon, the accused, McCrimmon, was arrested as a suspect in a series of sexual assaults. After being advised of his right to counsel and right to silence McCrimmon indicated he wanted to speak to a particular lawyer. The police unsuccessfully attempted to contact the lawyer and left a message on the lawyer’s answering machine. After being unable to contact the lawyer of his choice McCrimmon accepted the police suggestion that he speak with a Legal Aid lawyer, which he did for approximately five minutes. After talking to the Legal Aid lawyer

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1495 Ibid at para 119.
1496 2010 SCC 37, [2010] 2 SCR 429 (available on lexUM) [Willier] [cited to online source].
McCrimmon indicated he was satisfied with the consultation. He then underwent an intensive (over three hours in length) police interrogation conducted by a trained interrogator. McCrimmon indicated on several occasions during the interview that he was not willing to discuss the incidents under investigation without first talking to his lawyer, and he also asked to be returned to his cell. The interrogating police officer continued to press McCrimmon, including showing him photographs of some of the victims, and McCrimmon eventually provided incriminating statements.

In dismissing the appeals of both accused, the Supreme Court of Canada confirmed the positions taken by both sides in *Sinclair*. Although the *Willier* decision was unanimous, LeBel and Fish JJ.\(^{1498}\) emphasized that their agreement with the majority was based on the specific facts of the case (i.e., that Willier had been “given ample opportunity to exercise the rights under s. 10(b)”\(^ {1499}\) and therefore did not detract from their reasons in *Sinclair*. Binnie J. also pointed out that his agreement with the majority judgement was based on the factual differences between *Willier* and *Sinclair*.\(^ {1500}\)

The majority decision in *Willier* was written by McLachlin C.J. and Charron J.,\(^ {1501}\) who noted that “the focal point in this appeal is the right to counsel of choice under s. 10(b) of the *Charter* and the corresponding obligations on the police to facilitate that choice.”\(^ {1502}\) After reviewing the purpose of s. 10(b) in a manner similar to their analysis in *Sinclair*, McLachlin C.J. and Charron J. stated:

\(^{1498}\) Abella J. concurring.
\(^{1499}\) *Willier*, supra note 1496 at para 48.
\(^{1500}\) *Ibid* at para 46.
\(^{1501}\) Deschamps, Rothstein and Cromwell JJ. concurring.
\(^{1502}\) *Willier*, supra note 1496 at para 24.
Should detainees opt to exercise the right to counsel by speaking with a specific lawyer, s. 10(b) entitles them to a reasonable opportunity to contact their chosen counsel prior to police questioning. If the chosen lawyer is not immediately available, detainees have the right to refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond. What amounts to a reasonable period of time depends on the circumstances as a whole, and may include factors such as the seriousness of the charge and the urgency of the investigation: Black. If the chosen lawyer cannot be available within a reasonable period of time, detainees are expected to exercise their right to counsel by calling another lawyer or the police duty to hold off will be suspended…

Reasonable diligence in the exercise of the right to choose one’s counsel depends upon the context facing the accused or detained person. On being arrested, for example, the detained person is faced with an immediate need for legal advice and must exercise diligence accordingly.1503

The unanimity demonstrated by the Supreme Court in Willier was not carried through to McCrimmon, as the Court divided along the same lines as in Sinclair. McLachlin C.J. and Charron J. again wrote the majority judgement in McCrimmon1504 dealing with two main issues in their decision: first, did the police violate the accused’s right to counsel of choice; and second, did the police violate the accused’s section 10(b) rights by denying his requests to re-consult counsel.

Regarding the first issue, McLachlin C.J. and Charron J. simply re-stated the rule enunciated in Willier that an accused who decides to speak to a specific lawyer is entitled to a reasonable period of time to contact that lawyer and the police have a corresponding duty to refrain from questioning or otherwise eliciting evidence from the accused during that period of time, provided the accused is reasonably diligent in trying to contact the selected lawyer. With regard to the second issue of whether an accused has a right of re-consultation with legal counsel, McLachlin C.J. and Charron J. confirmed their decision in Sinclair that section 10(b) of the Charter does not

1503 Ibid at para 35.
1504 Deschamps, Rothstein and Cromwell JJ. concurring.
provide a continuing right to consult counsel. They did, however, note that “a single-occasion rule for consulting counsel will not always fulfill the purpose of s. 10(b).”\textsuperscript{1505} To trigger the right to further consult counsel, though, there must be an “objectively discernible change in circumstances”\textsuperscript{1506} which necessitates the need for further legal consultation, such as new procedures involving the accused, a change in the accused’s jeopardy, or “a reason to believe the first information provided was deficient.”\textsuperscript{1507} McLachlin C.J. and Charron J. also confirmed the view they expressed in \textit{Sinclair}, where they had indicated that “gradual revelation to the detainee of the evidence that incriminates him does not, without more, give rise under s. 10(b) to a renewed right to consult counsel.”\textsuperscript{1508} McLachlin C.J. and Charron J. did however issue a caution that “where developments in the investigation suggest that the detainee may be confused about his choices and right to remain silent, this may trigger the right to a renewed consultation with a lawyer under s. 10(b).”\textsuperscript{1509} Applying the law to the facts, McLachlin C.J. and Charron J. found no violation of the accused’s right to counsel in the circumstances.

LeBel and Fish JJ. once again wrote a dissenting judgement in \textit{McCrimmon} and, as with the majority judgement, their decision was essentially a repeat of their reasons in \textit{Sinclair}. Applying a purposive approach to the interpretation of Charter rights, LeBel and Fish JJ. stressed: “It is the \textit{limitation} on the right to counsel, not the \textit{exercise} of that right, that must be constitutionally justified.”\textsuperscript{1510} LeBel and Fish JJ. also reiterated: “The right to counsel is both fundamental and necessarily broad in scope. While the initial advice simply to keep quiet may suffice at the outset of an interrogation, more substantive advice and assistance may be required as the

\textsuperscript{1505} \textit{McCrimmon}, supra note 1497 at para 21.
\textsuperscript{1506} \textit{Ibid} at para 22.
\textsuperscript{1507} \textit{Ibid} at para 21.
\textsuperscript{1508} \textit{Ibid} at para 23.
\textsuperscript{1509} \textit{Ibid}.
\textsuperscript{1510} \textit{Ibid} at para 39, emphasis in original.
interrogation progresses.”

LeBel and Fish JJ. also took issue with the majority’s description of the interaction between McCrimmon and the police interrogator as an “investigative interview”.

In their view:

An ‘interview’ is a conversation between two or more consenting participants who are free to choose to leave as they choose. A relentless custodial interrogation, on the other hand, is an attempt by police officers, who have total physical control of a detainee, to obtain an incriminating statement by systematically disregarding the detainee’s express wish and declared intention not to speak to them.

Noting that, “[t]here is no police right, under the common law or the Constitution, to the unfettered access to a detainee, for interrogation to the point of confession”, LeBel and Fish JJ. concluded: “The decisive issue is whether the police can refuse to allow a detainee to consult counsel and, by pursing their custodial interrogation, render ineffective the detainee’s assertion of the right to silence. Our firm answer to that question is, “no, they cannot”.

Applying their view of the law to the facts of the case, LeBel and Fish JJ. found that McCrimmon’s right to counsel and “constitutionally-entrenched right to silence” were violated when his “repeated requests to speak with his lawyer, that the interrogation be terminated, and that he be returned to his cell were consistently rebuffed by a police interrogator, intent on extracting a confession, notwithstanding Mr. McCrimmon’s unequivocal and repeated assertion of his right to silence.”

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1511 Ibid at para 37.
1512 Ibid at para 40.
1513 Ibid.
1514 Ibid at para 42.
1515 Ibid at para 41.
1516 Ibid at para 59.
1517 Ibid at para 55.
Binnie J. wrote a short decision in which he re-affirmed his comments in *Sinclair* but agreed with the majority decision in *McCrnimmon* that, on the facts before the Court, the accused’s section 10(b) right to counsel had not been violated. Binnie J. emphasized that “Mr. McCrimmon’s s. 10(b) right was not exhausted when he received the ‘one size fits all’ advice from Legal Aid duty counsel”.1518 Binnie J. also re-affirmed the position he took in *Sinclair* that “a detainee is entitled to a further opportunity or opportunities to receive advice from counsel during a custodial interview” when the request “falls within the purpose of the s. 10(b) right … and such request is reasonably justified by the objective circumstances, which were or ought to have been apparent to the police during the interrogation.”1519 However, based on the facts of the case, Binnie J. concluded that “Mr. McCrimmon meets the first branch of the test, but fails at the second.”1520

*Sinclair* and its companion cases have drawn criticism along the same lines as the criticism levelled at the majority decision in *Singh*. Indeed, even before these decisions, legal academics had voiced concerns with what they perceived to be inadequate protections afforded an accused during a custodial police interview. Stuesser, for example, has suggested that the laws governing the right to silence in Canada are inadequate to protect a suspect from coercive police pressure to speak,1521 and Yau has asserted that once a suspect indicates a desire to remain silent the police should only be allowed to state the facts and ask the suspect if he or she wants to respond.1522 Furthermore, even before the advent of the *Charter*, Ratushny had suggested it is unrealistic to place too much faith in the good will of the police within an adversarial system.1523 Moreover,

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1519 *Ibid*.
1520 *Ibid*.
1521 Stuesser, supra note 272 at para 35.
1522 Yau, supra note 1132 at 235-39.
1523 Ratushny, *Self-Incrimination*, supra note 5 at 28.
Healy has questioned whether simply providing a suspect with his or her section 10(b) right to counsel sufficiently protects the right to silence,1524 and Yau has suggested it is highly ironic for the judiciary to, on the one hand, support a strong right to counsel at the outset of the police investigation but, on the other hand, allow the right to counsel to be watered down during a police interrogation by permitting the police to apply pressure on the accused to waive his or her right to silence without the assistance of counsel.1525 And specifically with regard to the majority judgement in Sinclair, Benjamin Goold has asserted, “the judgment can be seen as yet another example of the court’s apparent reluctance to use Charter rights as a basis for limiting the exercise of police discretion.”1526 In Goold’s view, the majority decision in Sinclair focuses too much on the individual’s right to be “left alone” instead of “the need to protect suspects from overzealous police officers or a commitment to the presumption of innocence.”1527

E. CONCLUSION

It is evident from reviewing the history and evolution of the right to pre-trial silence in Canada that there was a definite similarity between the development of the right to silence in Canada and Britain up until the 1980s, when the two jurisdictions took sharply divergent paths. While the right to silence in Britain suffered a direct attack which eventually resulted in its curtailment, in Canada the right to silence was granted constitutional status as a principle of fundamental justice under section 7 of the Charter. While the right to silence had been “deeply

1524 Healy, “Value Added”, supra note 874 at 205-06.
1525 Yau, supra note 1132 at 233.
1527 Ibid.
rooted” in Canadian law before the Charter, the Supreme Court’s decision in Hebert clearly elevated the status of the right to silence.

However, while at first blush Hebert, Chambers, Broyles and Turcotte suggest that the Supreme Court of Canada was fully committed to preserving and indeed strengthening the right to silence, later decisions of the Court, most notably the trilogy of Oickle, Singh and Sinclair, signalled a pragmatic retreat, at least on the part of the majority of the Supreme Court. The result, I suggest, is that in Canada today there is a theoretical right to silence which includes the veneer of constitutional entrenchment but which, from a practical perspective, provides little benefit to most suspects, other than the most hardened and sophisticated criminals, who are undergoing police interrogation while in custody or subjected to police trickery when not in custody. Moreover, in the very common situation of a custodial police interrogation, unless there is an exceptional and observable change in the circumstances, a suspect facing police questioning is left on his or her own after an initial consultation with a lawyer. While the lawyer will undoubtedly “inform the accused to ‘keep his mouth shut’”\(^\text{1529}\) the Singh, Sinclair, Willier and McCrimmon cases all demonstrate that skilled and persistent interrogation by the police will very often be successful in overcoming an initial decision to remain silent.

Determining whether the current state of the law regarding pre-trial silence in Canada is good or bad depends, of course, on the perspective of the observer, and the final assessment will very likely be coloured by his or her view of where the appropriate balance should lie between collective security through effective law enforcement and respect for individual liberty and autonomy; or to put it another way, between the crime control and due process models of the

\(^{1528}\) Esposito, supra note 1082 at 200.
\(^{1529}\) Stuesser, supra note 272 at para 12.
criminal justice system. Those who favour the crime control model would likely find the comments of Monin C.J.M. in *R. v. J. (J.T.*) to be attractive, where he stated:

Some maintain that it is an illusory right if police officers, moments after counsel has left the detention cell interview room, can immediately continue their interrogation. I must confess that this argument has no appeal for me and holds no sway. The right to remain silent is there; it has existed for many centuries under English law. The accused can choose to remain mute or to talk. If he is a rather weak-willed individual who, after being told to keep his mouth shut, succumbs to the temptation to answer questions and gives a full account of the events – whether the statement is exculpatory or inculpatory – that is his right and his responsibility alone. The task of law enforcement is arduous and difficult enough without asking police officers to act as babysitters.”

On the other hand, those who place greater emphasis on due process and individual liberties would likely endorse Goold’s indictment of the Supreme Court’s decision in *Sinclair*, in which he asserted the majority decision “marks a low point in the history of the court and the protection of Charter rights.”

It is very likely that, as in Britain, it will be impossible to come to a consensus on the nature and extent of the right to silence at the pre-trial stage of the criminal process. However, while there is likely no chance of agreement, perhaps there is the possibility to craft a more rational and less hypocritical law. If the current reality in Canada is that the police can essentially ignore an accused’s pre-trial silence during custodial interrogations, or, alternatively, use subterfuge and trickery, such as Mr. Big scenarios, to obtain incriminating statements from an accused as long as he or she is not detained, then is not the rhetoric surrounding the fundamental nature of the right to silence a bit of a mirage? Would it not be better for all, including the accused, to simply allow the trier of fact to apply its common sense and weigh the silence of the accused as it does

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1531 Goold, *supra* note 1526.
other pieces of evidence? And would it not be more rational to more closely align the theoretical and practical sides of the right to silence debate? In the final two chapters of this thesis I will propose such an alternative.
CHAPTER V

THE PROPOSITION

A. INTRODUCTION

Legal order without the mechanism of change is without the means of its own preservation.

Edmund Burke

The right to silence has been a part of the common law for centuries and, as mentioned previously, has attracted “almost religious adulation”. It is expressly enumerated in the South African constitution and implicitly included within the privilege against self-incrimination in the Fifth Amendment to the United States Constitution, the Indian Constitution, the International Covenant on Civil and Political Rights and the European Convention of Human Rights. The right to silence in Canada is also constitutionally protected as a principle of fundamental justice under section 7 of the Charter of Rights. The right to silence is undoubtedly an historic and cherished principle of law in many jurisdictions and, therefore, any suggestion that it should be curtailed or restricted faces an uphill battle against history and tradition.

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1533 Friendly, supra note 60 at 681.
1535 Bellin, supra note 13 at 862.
1536 Malimath, supra note 14 at s 3.
1537 Skinnider, supra note 9 at 4.
As Theophilopoulos has observed:

Once the silence principle is elevated into a human and constitutional right it becomes sensible to prohibit the drawing of adverse inferences, otherwise the right to silence is diminished. It also becomes unnecessary to refer to rational justifications for the right. A right to silence becomes self-sustaining by virtue of its elevated status.\footnote{1539}

Similar to Theophilopoulos, Ratushny has stated: “There is a suggestion that great consequences flow from the [right to silence], yet its precise significance is not explained. Rather, the significance is assumed…. With every reference and tacit concurrence the difficulty of challenging the assumptions increases.”\footnote{1540}

It is, I suggest, fair to suggest that the often repeated refrain of retentionists that the right to silence arose from the “days of torture and the rack”\footnote{1541} tends to evoke emotion rather than logic, which deflects the conversation from the utilitarian needs and pragmatic reality of modern Canada to a battle “between the forces of good and the forces of evil, despotism, and tyranny.”\footnote{1542} So, even though the criminal process in Canada bears little, if any, resemblance to the days of the Star Chamber and ecclesiastical courts, those who support retaining the right to silence in its unaltered form continue to point to ancient history as one of the primary reasons to maintain the\textit{ status quo}. Yet, as Ingraham has commented, “[m]ost of this ancient history … like a great amount of ancient history, is legendary and mythical – the kind of propaganda and mythology necessary to maintain and preserve existing ways of doing things.”\footnote{1543} So, as Sir Rupert Cross has argued, in the early days of the right to silence debate in the United Kingdom

\footnote{1539}{Theophilopoulos, \textit{supra} note 39 at 50.}
\footnote{1540}{Ratushny, “Is There a Right Against Self-Incrimination”, \textit{supra} note 67 at 2.}
\footnote{1541}{Hebert, \textit{supra} note 876 at 31, per McLachlin J.}
\footnote{1542}{Ingraham, \textit{supra} note 64 at 589.}
\footnote{1543}{\textit{Ibid}.}
the state of the law regarding the right to silence was “in many respects more appropriate to the early nineteenth century than to the second half of the twentieth”.\textsuperscript{1544}

I submit that the law governing the right to silence in Canada today reflects a society that no longer exists. It therefore needs to change in order to comport with the reality of modern Canada, not the ancient days from which it came. While history and tradition undoubtedly deserve due deference and respect, they should not be slavishly and blindly followed when the legal, social and political environment has evolved and changed. As Mr. Justice Haines pointed out several decades ago, the right to silence was created in a “medieval time when illiterate prisoners often were subject to torture to extract confessions … [and] the accused could not testify, call witnesses or be defended by a lawyer’; however, in modern Canada:

Adequate safeguards usually exist to prevent the extortion of statements which are false. Our society is literate. The accused is defended by a lawyer … capital punishment has been abolished substantially. The accused can testify, cross-examine, call witnesses and make the fullest defence. His guilt must be proven beyond all reasonable doubt. Trials are in public.\textsuperscript{1545}

Furthermore, the protections afforded an accused identified by Haines J. several decades ago have increased considerably. Today, the Canadian criminal justice system includes several additional safeguards for the accused at the investigative stage of the criminal process, including: an updated law of confessions which includes consideration of fairness to the accused and respect for the administration of justice, as well as the reliability of the statement; a professional police component which includes improved technology and training directed at ensuring accurate evidence collection; the *Charter of Rights*, which provides a constitutionally protected right to

\textsuperscript{1544} Cross, *supra* note 286 at 340.
\textsuperscript{1545} Haines in Salhany & Carter, *supra* note 1532 at 323.
counsel and privilege against self-incrimination; and the availability of defence counsel, including free legal advice for suspects who are detained and being questioned by the police.

While it is probably trite to say that the criminal justice system in Canada, and more specifically the investigative and interrogation process within the criminal justice system, has evolved from the days of the Star Chamber and ecclesiastical courts, it is necessary to make the point because retentionists constantly refer to the origins of the right to silence as part of their argument to retain the rule in its unaltered form. However, as previously stated, times have changed and the right to silence needs to change with them. Oliver Wendell Holmes once said of contract law: “It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds on which it was laid down have vanished long since”. I believe that Holmes’s comments are equally applicable to the law governing the right to silence.

My proposition is founded, in part, on the normative arguments espoused by the abolitionists that were discussed in Chapter II. However, I am also basing it on a more pragmatic foundation, recognizing the Supreme Court’s whittling down of the right to silence since Hebert. The proposition to curtail the right to pre-trial silence is based on eight suppositions: (1) the right to silence is not absolute; (2) the current state of the law regarding pre-trial silence does not strike an appropriate balance between individual autonomy and society’s interest in effective law enforcement; (3) the right to silence interferes with rectitude of decision, which should be the primary function of criminal law and the law of evidence; (4) the right to silence defies common sense; (5) the application of the right to silence is arbitrary and irrational, which undermines its credibility; (6) there is a moral responsibility to account which should be transposed into a legal

1546 Haack, supra note 49 at 83.
duty to reply or respond in certain defined circumstances; (7) the current state of Canadian law has resulted in the unintended consequence of the police regularly frustrating or overriding the accused’s initial decision to remain silent; and (8) the voluntariness rule, right to counsel and current technology provide adequate safeguards against police abuse and the danger of false confessions.

Finally, before expanding on the eight suppositions, it is important to emphasize once again that the proposition is constrained. I am not advocating the abolition of the right to silence at the investigative stage of the criminal process. I am simply suggesting that a person suspected of having committed a crime who decides to remain silent in the face of police questioning, assuming the police have sufficient grounds to ask questions, should pay a price for that silence should he or she later advance a defence which is inconsistent with his or her pre-trial silence.

**B. THE RATIONALE FOR THE PROPOSITION**

1. **The Right to Silence is Not Absolute**

   It is clearly evident that the right to silence is not absolute. Even ardent retentionists such as Easton and Supreme Court of Canada Justices LeBel and Fish concede as much. The restrictions placed on the right to silence in Britain have been upheld by the European Court of Human Rights as being consistent with the *European Convention on Human Rights*, the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*. Even in the United States, where the right to silence is perhaps the most revered, the United States’ Supreme Court has “significantly constrained” the practical application of *Miranda*.1547

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1547 Tom Stacy, “The Search for the Truth in Constitutional Criminal Procedure” (1991) 91 Colum L Rev 1369 at 1379 (Lexis). Stacy identifies several decisions of the United States Supreme Court where the Court limited the application of the *Miranda* rule, including: *Colorado v Connelly*, 479 US 157 (1986) (the State need only prove the
In Canada, McLachlin J., clearly stated in *Hebert* that the right to silence is not absolute and the Supreme Court of Canada has consistently upheld her opinion in subsequent decisions. Moreover, several Canadian legal scholars have agreed that the right to silence is not absolute.\(^{1548}\) If the right to silence is not absolute, then the right to silence debate is one of degree and gradation.

Furthermore, from a philosophical perspective, I submit that Dolinko is correct when he asserts that, even if the right to silence is based on the inalienable human right of autonomy and dignity, neither of those rights is absolute. As Dolinko states, “autonomy, like most of the values animating our society and legal system, is not invariably overriding. We are willing to sacrifice some degree of autonomy in situations in which preserving it unimpaired would extract too great a cost.”\(^{1549}\) Moreover, if the right to silence is also grounded in personal privacy, I agree with Dolinko when he asserts that other societal interests may legitimately override individual privacy. As Dolinko contends, it is unreasonable to “insist that the harm to privacy entailed by compelling the individual to supply information that could expose him to a criminal conviction … must automatically outweigh any competing societal interest in preventing, or punishing crime.”\(^{1550}\)

\(^{1548}\) See text accompanying note 874 *supra* and Chapter II.B.3, above.

\(^{1549}\) Dolinko, *supra* note 119 at 1140.

\(^{1550}\) *Ibid* at 1121.
If the right to silence and indeed its underlying normative foundations of personal autonomy and privacy are not absolute rights, then, as McLachlin J. said in Hebert, “[t]he balance is critical.”1551 In striking the appropriate balance, I suggest that those who argue for the retention of the right to silence in its pristine and unaltered state with constant reference to it originating from the “abhorrence of the interrogation practiced by the old ecclesiastical court and the Star Chamber”1552 need to move on. To apply the thinking of Oliver Wendell Holmes mentioned earlier in this chapter, if the grounds for retaining the right to silence “have vanished long since”,1553 then it is time to strike a new balance and develop a new law.

With regard to the constitutional status granted to the right to silence under section 7 of the Charter, it seems apparent that at least the majority of the Supreme Court of Canada is quite prepared to limit the pragmatic scope of the right to silence despite its constitutional status. The majority decisions of the Supreme Court in Singh and Sinclair, in my view, demonstrate a judicial willingness to limit the scope of the right to silence during pre-trial police interrogations. I submit my proposition is not all that substantively different from the position adopted by the majority of the Supreme Court of Canada.

Moreover, as Lord Sankey once enunciated, the Canadian constitution is “a living tree capable of growth and expansion”.1554 To carry on with the metaphor, I suggest that, as a “living tree”, the Canadian constitution needs to be pruned on occasion if it is to flourish. Restricting the right to silence through an adverse inference rule would be the kind of strategic pruning necessary to ensure that individual rights protected by the Charter, such as the right to silence, continue to be

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1551 Hebert, supra note 876 at 38.
1552 Ibid at 33.
1553 Hack, supra note 49 at 83.
1554 Hunter v Southam, supra note 1076 at 156, citing Viscount Sankey in Edwards v AG Can, [1830] AC 124 at 136 (PC).
respected by the public because they see those rights being applied in a sensible and rational manner.

Based on these arguments, I submit the right to silence is not an absolute, immutable right. It has historically been overridden when it has come into conflict with other competing rights, such as the right to make full answer and defence as in Crawford.\textsuperscript{1555} Since the right to silence is not an absolute right, I further submit there is no singular morally correct philosophical position supporting its legitimacy as a legal doctrine. Moreover, since the right to silence is not absolute it should be open to alteration and revision as the society in which it operates evolves and changes. Modern Canada is far different than seventeenth century England, and to stubbornly cling to the right to silence based on arguments steeped in ancient history is, I suggest, indefensibly dogmatic.

2. \textbf{The Need for an Appropriate Balance}

There is, of course, no easy answer to the dilemma facing any society regarding where to draw the line between protecting its citizens from unreasonable state intrusion into their liberty and protecting those same citizens from being victimized by crime, either individually or collectively. However, a basic premise upon which my proposition is based is that it is legitimate for a criminal justice system to provide sufficient mechanisms to its enforcement arm to successfully investigate crime. As Dolinko has stated, “[h]aving a criminal justice system at all presupposes a belief that it is desirable and proper to convict and punish criminals.”\textsuperscript{1556}

\textsuperscript{1555} Crawford, supra note 1141 and accompanying text.
\textsuperscript{1556} Dolinko, supra note 119 at 13.
Furthermore, since the essence of criminal law is to restrict people’s autonomy for the greater good, it is logical and consistent to restrict the right to silence.\footnote{Ibid at 28.}

It is generally accepted that the police act on behalf of the public, although it must be recognized that on occasion there is inadvertent and even malevolent police misconduct. It is also generally understood by most people, including those who strongly support the right to silence, that the police require legal authority and reasonable powers to achieve their mandate of protecting the public by preventing and effectively investigating crime. However, as with other elements of the right to silence debate, the rub comes with the details. Where exactly should the balance between individual liberty and police effectiveness lie? At what point does the collective interest in public safety outweigh individual autonomy and privacy? The answer to these questions is by necessity mired in the subjective, “and reasonable men will thus differ as to its proper scope.”\footnote{Friendly, supra note 60 at 723.} As Ratushny has noted, “a jagged line” separates “the power of the state and the liberty of individuals”.\footnote{Ratushny, Self-Incrimination, supra note 5 at 11.}

When surveying where the “jagged line” should be drawn, I suggest one of the markers should be the recognition of the important role that criminal law performs in underlining Canadian values. The Law Reform Commission of Canada once stated:

\begin{quote}
Criminal law operates at three different stages. At the law-making stage it denounces and prohibits certain actions. At the trial stage it condemns in solemn ritual those who commit them. And at the punishment stage it penalizes the offenders. This, not mere deterrence and rehabilitation, is what we get from criminal law – an indirect protection through bolstering our basic values.\footnote{Ibid at 15, citing the Law Reform Commission of Canada, Our Criminal Law (Ottawa: Ministry of Supply and Services Canada, 1976).}
\end{quote}
The point being made by the Law Reform Commission of Canada appears to be that while the criminal law prohibits and punishes, it does so in order to underline society’s fundamental values. Certainly, underlining those values cannot be accomplished at the cost of trampling on other important Canadian values such as individual rights and freedoms; however, the preventive and prohibitive characteristics of the criminal law should not be undervalued. The criminal law, including its investigative component, needs to be provided sufficient latitude to achieve its goal of protecting the public and underlining one of Canada’s most important societal values: peace, order and good government manifested in safety and security. To accomplish this goal, the police, as the primary agency at the front end of the criminal justice system, must be provided with sufficient power to effectively, yet fairly, enforce the criminal law. One important strategy used by the police to enforce the criminal law is the questioning of people and the interviewing or interrogating of persons suspected of having committed crimes.

One of the arguments advanced by Easton\textsuperscript{1561} and other retentionists is that the right to silence forces the police to seek other evidence. However, I suggest that such a claim is at best naive. As Haines J. has pointed out:

\textit{Proceeding on the false premise that whenever a crime is committed if the police would only look carefully at the crime scene they would almost always find some clue that would lead them to the offender and at the same time establish his guilt. This is pure fiction. In real life the situation is entirely different. In many circumstances physical clues are entirely absent. The only approach to a possible solution is the interrogation of the suspect and others who may possess useful information. Furthermore, the suspect and his associates are often men of considerable criminal sophistication, and interrogation must be conducted with skill and persistence.}

\textit{………..}

\textsuperscript{1561} Easton, supra note 21 at 183.
It would seem obvious that the simplest and most effective way of discovering the truth is, under proper safeguards, to ask the person most likely to know all about the incident, namely, the suspect.\textsuperscript{1562}

Interrogation is an important police strategy and its practice should not be unreasonably constricted. In the \textit{Oickle, Singh} and \textit{Sinclair} trilogy the majority of the Supreme Court of Canada confirmed the legitimacy of police interrogation, and in \textit{Spencer}\textsuperscript{1563} the Court recognized that the context of the interrogation and the level of criminal sophistication of the suspect are important factors to consider when determining the voluntariness of a statement. The Supreme Court has also clearly rejected the \textit{Miranda} rule. Canadian criminal law therefore recognizes the value of police interrogation to the point that it actually encourages the police to use “legitimate means of persuasion”\textsuperscript{1564} to overcome a suspect’s initial decision to remain silent. And, as the debate over the right to silence is one of increments not absolutes, I suggest it is not too much of a stretch from either a pragmatic or principled perspective to allow the trier of fact to consider the silence of an accused who is able to withstand such police persuasion, not just the statements made by the more “weak willed”\textsuperscript{1565} suspect who caves into the persuasion.

Furthermore, I suggest that an adverse inference rule would reduce the danger that the interrogation room becomes a place of gamesmanship between the accused and the police. Such gamesmanship undermines the public’s confidence in the administration of justice, as noted by Justice White of the United States’ Supreme Court when he stated: “The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right

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\textsuperscript{1562} Haines in Salhany & Carter, supra note 1532 at 330.
\textsuperscript{1563} Spencer, supra note 987.
\textsuperscript{1564} Hebert, supra note 876 at 35, per McLachlin J.
\textsuperscript{1565} R v J (JT), supra note 1530.
\end{flushleft}
always to conceal their cards until they are played.\textsuperscript{1566} It is evident that the majority of the Supreme Court of Canada does not view the right to silence as a “trump card”, to use Binnie J.’s description, or an “ace of spades” to use Justice White’s poker analogy, in the hands of the accused whereby he or she can unilaterally end an interrogation. The police are allowed to use persistence and persuasion to have the accused change his or her mind and decide to speak or answer questions. The Supreme Court’s decision in \textit{Sinclair} grants the police considerable leeway to push the boundaries so that a person undergoing police questioning will change his or her mind and rescind the initial decision to remain silent. Although it would certainly be quite ironic, implementing an adverse inference rule might in fact reduce the inequity between the police and the accused, especially considering the inability of the accused to demand that his or her lawyer sit in on the interrogation. The accused may still choose to remain silent, but instead of the police essentially ignoring his or her stated intention and persistently and skilfully carrying on with the interrogation “to the point of confession”,\textsuperscript{1567} they could walk away with the potential for an adverse inference being drawn from the accused’s silence and the accused could be freed from the persistent, yet lawful, attempts by the police to persuade him or her to have a change of heart or mind.

In addition, I suggest the decision as to where the proper balance between effective law enforcement and protecting individual rights lies must be considerate of the social and political context in which the law operates. As discussed in Chapter III, the British experience is a good (or bad, depending on one’s perspective) example of how social and political considerations of the day set the stage for changes in the law governing the right to silence at both the pre-trial and trial stages of the criminal process. I submit that Canada is undergoing a somewhat similar,

\textsuperscript{1566} Craig, \textit{supra} note 26 at 242, citing \textit{Williams v Florida}, 90 S Ct 1893 (1970).
\textsuperscript{1567} \textit{Sinclair}, \textit{supra} note 1415 at para 90.
although less extreme, political transition to that which occurred in Britain during the 1980s and early 1990s. The ruling Conservative government has unabashedly advanced a “law and order agenda”, with its focus on increasing the severity of punishment and the powers of the police. Moreover, while the crime rate in Canada has fallen steadily for several years and the public has begun to recognize this trend, there appears to be an ongoing concern held by a significant segment of the Canadian public that criminals are treated too leniently and the criminal justice system is weak and ineffective. It is within this political and social climate that the right to silence needs to be assessed.

Moreover, some members of the judiciary appear to have adjusted their views to be more in line with the general mood of the country. For example, the Supreme Court of Canada has recently retracted to a considerable degree from its previous philosophy of using the Charter to robustly protect, and indeed enhance, individual liberties and legal rights and constrain the power of the state (although many of the Court's decisions have been by a slim majority, clearly illustrating a sharply divided Court). However, the majority of the Supreme Court, while ostensibly applying a “generous, purposive and contextual approach” to the interpretation of

1568 For example, Bill C-10 in 2011 contained several “law and order” items, including inter alia: mandatory minimum sentences for offences involving sexual exploitation of children and certain drug offences; restricting the use of conditional sentence orders; and eliminating pardons for certain types of offences. See CBC News (21 September 2011), online: CBC <http://www.cbc.ca/news/canada/story/2011/09/21/federal-crime-legislation.html>. Furthermore, the Conservative Party’s official website boasts of achieving the following: increasing sentences and bail restrictions for gun crimes; strengthening the sentencing and monitoring of high risk offenders; abolishing the “faint hope” clause; eliminating old age security payments for prisoners; ending the two for one credit on sentencing for pre-trial custody; and eliminating accelerated parole for non-violent offences. See Conservative Party of Canada Platform, online: Conservative Party of Canada <http://www.conservative.ca/media/2012/06/ConservativePlatform2011_ENs.pdf>.


1571 Ibid.

1572 Grant, supra note 1260 at para 15.
the Charter, have pulled back noticeably from the Court’s historic approach and, in so doing, have demonstrated a much more constrained judicial attitude towards limiting police and state power.1573

Furthermore, the Oickle, Singh and Sinclair trilogy reveals an evident reluctance on the part of the majority of the Supreme Court of Canada to hamper the police too much in their investigative function, including custodial interrogations and even more intrusive strategies such as the Mr. Big tactic.1574 Illustrative of this view is the comment proffered by McLachlin C.J. and Charron J. in Sinclair that, “a rule that would require the police to automatically retreat upon a detainee stating that he or she has nothing to say … would not strike the proper balance between the public interest in the investigation of crimes and the suspect’s interest in being left alone.1575

While there is no doubt that the Supreme Court is sharply divided on the issue of how far the police should be allowed to go in persuading a suspect to change his or her mind and answer questions after initially invoking the right to silence, the bottom line of the Court’s decisions is that a new balance, if not a new orthodoxy, has been stuck in the “rights versus utility” debate. And within this new paradigm, I suggest it is reasonable, consistent and not too overbroad to move to the next stage and allow an adverse inference to be drawn from an accused’s pre-trial silence.

1573 See Grant, Singh and Sinclair.
1574 Osmar, supra note 1200.
1575 Sinclair, supra note 1415 at para 63.
3. The Right to Silence Interferes with Rectitude of Decision

As discussed in Chapter II, one of Bentham’s primary criticisms of the right to silence was that it interfered with the primary role of evidence law, which he believed to be rectitude of decision or accuracy of outcome. Bentham’s criticism may be conceptualized on either a philosophical or pragmatic level, but either way the underlying issue is essentially how best to balance respect for individual autonomy and privacy against the important societal value of obtaining all relevant and probative evidence in order to ascertain the truth.

At the philosophical level of the right to silence debate, I suggest “utilitarian abolitionism” is a valid argument. And at the pragmatic level of the debate, I submit “exchange abolitionism” is an equally valid position to adopt.1576 From a utilitarian perspective, I submit it is patently obvious that the person who is in the best position to supply relevant and reliable evidence is the accused, whether he or she is guilty or not. The guilty accused clearly knows something about the crime under investigation, while “[t]he innocent accused would have nothing to lose by answering questions truthfully.”1577 If the major goal of the criminal law is to seek the truth and make accurate decisions on the guilt or innocence of a person charged with having committed a crime, surely a flexible set of evidence rules, such as the common law confessions rule, is the best way to ascertain the truth and render an accurate decision. Furthermore, at a pragmatic level and as mentioned previously, I suggest that the many protections afforded the accused under Canadian law adequately guard against wrongful convictions, so limiting the right to silence through an adverse inference rule is a reasonable exchange for those protections.

1576 See discussion accompanying notes 143 & 238, supra.
1577 Theophilopolous, supra note 39 at 520.
To support my argument, I contend the Supreme Court of Canada has, through some of its relatively recent decisions, altered its traditional approach to place more emphasis on the truth-seeking function of the courts and the law. For example, in *Grant*\(^{1578}\) the Court amended the “Collins” and “Stillman” tests for determining the admissibility of evidence under section 24(2) of the *Charter* by formulating a new standard which concentrates less on trial fairness and more on the “truth-seeking” role of the courts, as well as on society’s expectation that “a criminal allegation will be adjudicated on its merits.”\(^{1579}\) In writing the majority decision, McLachlin C.J. and Charron J. referred approvingly to comments made by McLachlin J. (as she then was) in *R. v. Harrer*,\(^{1580}\) where she stated:

> At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused’s point of view … [n]or must it be conflated with a perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving procedural fairness to the accused.\(^{1581}\)

While McLachlin C.J. and Charron J. acknowledged that statements taken from an accused in violation of his or her right to silence would still face an uphill battle to be admitted,\(^{1582}\) they underscored a heightened concern with setting too inflexible a test for the admission of evidence under section 24(2) of the *Charter*.\(^{1583}\)

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\(^{1578}\) *Grant, supra* note 1260.

\(^{1579}\) *Ibid* at para 79.

\(^{1580}\) [1995] 3 SCR 562 (available on lexUM) [*Harrer*] [cited to online source].

\(^{1581}\) *Ibid* at para 45.

\(^{1582}\) *Grant, supra* note 1260 at paras 89-98.

\(^{1583}\) *Ibid* at para 86.
Based on these observations, I assert that both philosophically and pragmatically the idea that the criminal process is primarily about truth seeking is a valid foundational principle upon which to base, at least in part, my proposition that an adverse inference rule is preferable to the traditional Canadian approach to the right to silence.

4. The Right to Silence is Contrary to Common Sense

The other major prong of Bentham’s opposition to the right to silence was that the right to silence is contrary to simple common sense. In my view, in order to maintain public confidence the law needs to avoid, as best it can, the criticism levelled by Mr. Bumble in Oliver Twist that, “the law is a ass – a idiot”. While there is, without doubt, unfair criticism directed towards the law and the judiciary by people who are either ill-informed or simply unreasonable, there are also many credible and distinguished legal scholars who have criticized the right to silence on the basis of a very simple notion: it defies common sense and, therefore, “is a ass”. The list of critics includes Jeremy Bentham, Sir Rupert Cross, Professors Glanville Williams and Ian Dennis, Lord Justice Salmon of the English Court of Appeal and Mr. Justice Ritchie of the Supreme Court of Canada. To put it simply, I agree with these critics. I agree that the right to silence “runs counter to our realization of how we ourselves would behave if we were faced with a criminal charge”, and that “[c]ommon sense argues that if other evidence yields a prima facie inference of guilt a failure to provide an innocent explanation suggests that one does not exist.” Furthermore, I concur with Sir Rupert Cross and the Criminal Law Revision

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1585 Delisle, supra note 152 at 315.
1586 Williams, supra note 22 at 1107.
1587 Dennis, “Instrumental Protection”, supra note 68 at 356.
1588 Cross, supra note 286 at 333.
Committee\textsuperscript{1589} that it is important for the law to be consistent with the everyday human experience of the “reasonable person” and, therefore, rules such as the right to silence, which run contrary to the everyday experience of the average citizen, do the law a disservice. Imposing an adverse inference when a person remains silent in circumstances where common sense calls for a response will help to ensure, and perhaps in some cases restore, a level of respect for the law in the eyes of the general public.

One rebuttal to Bentham’s argument that the right to silence defies common sense often advanced by retentionists is that it is impossible to define “common sense”. Easton, for example, has suggested that common sense is too nebulous a concept for “the law of evidence to follow.”\textsuperscript{1590} However, while it is certainly true that the term is subjective and general, it is not a new or novel concept within the law. The time honoured “reasonable person” is accepted within common law jurisdictions as an appropriate test to be applied in many areas of the law. Common sense is simply the barometer or litmus paper used by the “reasonable person” to come to his or her conclusion. It is based on human nature and experience, and, as emphasized by Zuckerman, it is consistent with human nature that, “[w]hen we have offended some moral or legal law and we are taxed with it our natural moral reaction is to offer an explanation”.\textsuperscript{1591} Additionally, from a less intuitive and more pragmatic point of view, common sense leads to the conclusion drawn by “the average lay person that one may best arrive at fully informed decisions by hearing from the defendant, no matter who ultimately has the burden of persuasion as to any element of the crime or tort or allegation made in the complaint.”\textsuperscript{1592}

\textsuperscript{1589} Zuckerman, “Reports of Committees”, supra note 146 at 515.
\textsuperscript{1590} Easton, supra note 21 at 155.
\textsuperscript{1591} Zuckerman, Principles of Evidence, supra note 72 at 306.
\textsuperscript{1592} Ingraham, supra note 64 at 565.
While the persuasiveness of the “defies common sense” criticism of the right to silence is certainly weakened by the imprecise nature of the concept, the criticism continues to be an arrow carried in the abolitionists’ quiver. It also resonated with politicians in Britain in the 1980s and, I suggest, it would be similarly fondly received by the current Canadian government and the majority of the Canadian public.

5. The Right to Silence is Arbitrarily and Irrationally Applied

As Theophilopolous has pointed out, “[t]here is a degree of arbitrariness in the way Anglo-American jurisprudence defines the right to silence in theory and the way the courts treat the right in practice.” It is understandable that there will be some inconsistency between theory and practice because the right to silence is not an absolute right and it must give way on occasion to other pressing societal needs or competing rights. However, I agree with the basic criticism levelled by Theophilopolous and others that there is a degree of arbitrariness, and indeed irrationality, in the application of the principle. Such logical inconsistency, in my view, undermines the credibility of the principle itself.

Prior to the advent of the Charter, as noted by Ratushny and Paciocco, Canadian courts were inconsistent in their application of the adopted admission rule and other exceptions to the right to silence and privilege against self-incrimination. One example that Paciocco has cited is the questionable substantive difference between forcing an accused to provide a breath or blood sample and forcing him or her to provide a statement. As Paciocco has queried, what is the substantive difference between the two situations other than a historic deference to testimonial silence being somehow sacrosanct? And, as Dolinko has asked, is it more rational to allow a

1593 Theophilopolous, supra note 39 at 508.
guilty person to remain silent but force his or her mother to give evidence incriminating him or her?\textsuperscript{1594} Moreover, what is the logical and rational distinction between silence alone not being allowed to result in an adverse inference but silence accompanied by some sort of physical gesture being allowed to result in such an inference, as was the case in Govedarov\textsuperscript{1595} There is, I suggest, no substantive difference; to admit one form of evidence but not the other is arbitrary and irrational. The irrationality and arbitrariness of the right to silence is clearly illustrated by the many limitations to the right to silence carved out by the American courts despite the reverence shown to the right to silence in that country.\textsuperscript{1596}

Consequently, I submit that the right to pre-trial silence suffers from a credibility problem because the application of the theoretical rule is fraught with irrational and arbitrary distinctions and anomalies. The law should, I suggest, be as logical and consistent as possible, recognizing that there will always be some divergence between the theoretically perfect world and the pragmatic realities of applying the law in the real world. However, when the inconsistencies between theory and practice become common place and the contradictions between the two so marked as to lead to a reasonable conclusion that the law is either arbitrary or irrational, then the underlying health of the theory or principle becomes suspect. This, I suggest, is the current state of health of the right to pre-trial silence in Canada. The right to silence at the investigative stage of the criminal process has both acute and chronic health problems which require surgical intervention.

\textsuperscript{1594} Dolinko, supra note 119 at 1094.  
\textsuperscript{1595} Govedarov, supra note 1011.  
\textsuperscript{1596} See supra note 1547 for a brief description of some of the major exceptions to the right to silence created by the United States Supreme Court.
6. **The Moral Responsibility to Respond**

Beyond the pragmatic issue of striking an appropriate balance between individual liberty and collective security through effective policing and the irrationality and arbitrariness of the application of the right to silence rule, I suggest the right to silence has a corrosive effect on the moral and civic responsibility of citizens to take personal responsibility for their behaviour. While many academics and jurists, such as Ratushny, have argued that there is “no duty to cooperate with the police by speaking, by submitting to tests, or in any other way”,\(^{1597}\) and *Rice v. Connolly*\(^{1598}\) certainly provides strong legal precedent for such a conclusion, I submit there is a moral duty to take responsibility and I further submit that such a moral duty should be extended to a legal duty. In this regard, I adopt the arguments advanced by Ingraham, Friendly and Theophilopoulos that, assuming there is sufficient reason for suspicion, a person “owes a moral duty to answer questions relevant to that conduct to persons in authority.”\(^{1599}\)

In discussing the divergence between the law’s view of morality and that of the average person, Ingraham has commented:

> The moral position that American lawyers take in determining criminal responsibility – and in a similar manner, civil tort responsibility – is taught in law schools and becomes part of virtually every American lawyer’s moral outlook. The moral stance, I believe, is alien to the average lay person’s approach to the same issues and problems. It takes a considerable amount of sophisticated exegesis and constant repetition to convince the ordinary lay person of the rationality and morality of these viewpoints. However, these arguments, boiled down to their essence, often are little more than appeals to tradition (“This is the way we have always done things in this country”; “This way is hallowed in tradition, was instituted by our Founding Fathers in our Constitution”; etc.); by appeals to authority (“This way has been decreed by

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\(^{1597}\) Ratushny, *Self-Incrimination*, supra note 5 at185.
\(^{1598}\) *Rice v Connolly*, supra note 132.
\(^{1599}\) Ingraham, *supra* note 64 at 566.
the Supreme Court of the United States”); or by bogus appeals to our xenophobia (“Our way stands in stark contrast to foreign methods of procedure and we all know what despots they are”). Perhaps the lay person’s perception that many of these doctrines make no moral or practical sense is right and American lawyers are wrong.1600

While Ingraham’s comments were directed at American law and American lawyers, I suggest the denunciation applies equally to Canadian law. Most of the public, I submit, see the right to silence as being contrary to what should be an important value of accepting responsibility for one’s behaviour. If a goal of the criminal law is, as suggested by the Law Reform Commission of Canada, to underline society’s values, then I believe an inflexible right to silence rule is inconsistent with this important foundational principle of criminal law.

However, even if Ratushny is right and there is no personal moral obligation to account for one’s conduct, I assert there should still be a legal responsibility to respond to a well-founded allegation or question because such a duty is inherent in, and vital to, the underlying rationale of the criminal law and criminal justice system. As Dolinko has stated:

One large goal of the whole institution of criminal law is to compel those persons who have not developed or accepted principles of their own against harming their fellows to nevertheless conform to such principles. Criminal laws, and the penalties annexed to them, testify precisely to our reluctance to give free play to each individual’s notions of what is right and wrong, permissible or improper. If the existence of this institution – requiring some individuals either to stifle and repress their desires or to risk societal condemnation and punishment – does not unduly thwart a person’s potential for achieving moral autonomy, why should requiring violators of the rules either to supply accurate information or risk punishment for silence or perjury be thought to do so?1601

1600 Ibid at 560-61.
1601 Dolinko, supra note 119 at 1144.
I agree with Dolinko that it is a logical extension of the criminal law to require a person to account for his or her actions. While the criminal justice system must certainly protect individuals from potential and actual exercise of arbitrary or abusive state power, surely some form of reciprocity by the individual towards the state or the collective is appropriate and indeed necessary for the criminal process to function in a rational way. If the criminal law is to be administered in a manner that not only protects individuals from criminal behaviour but also insulates them from state incursion into their zones of personal autonomy and privacy, I submit a corresponding legal duty should be placed on the individual to respond to a well-founded allegation or question posed by the police when it is reasonably believed that the person to whom the allegation or question is being directed has committed a crime. Beyond the claim that it is consistent with human nature to protest a false allegation (i.e., the common sense argument), I suggest it is the morally right thing to do and should also be the legally required thing to do.

7. Mitigating the Unintended Consequences of Hebert

As discussed in Chapter IV, while, in Hebert, the Supreme Court of Canada affirmed that the right to silence is a principle of fundamental justice under section 7 of the Charter, the restrictions placed on the right to pre-trial silence by the majority judgement and the manner in which those limitations have been applied in subsequent Supreme Court of Canada decisions has resulted in the current state of the law governing pre-trial silence being substantially different than what retentionists had likely hoped for when Hebert was decided.\footnote{See e.g. Stuesser, supra note 272; Yau, supra note 1132; Goold, supra note 1526.} Oickle, Spencer, Singh, Sinclair, Willier and McCrimmon all demonstrate the Supreme Court’s pragmatic approach to pre-trial silence, as the majority of the Court has recognized the importance of police interrogation and gone to some lengths to ensure that the right to silence and complimentary
right to counsel do not interfere too much with the effectiveness of police interrogation as a law enforcement strategy. The result has been, as already noted, the effective granting of a fiat to the police to use “legitimate means of persuasion to encourage the suspect”1603 who initially decides to remain silent to change his or her mind.

Of course, the police must follow the guidelines set out in Oickle regarding voluntariness, but, as was made abundantly clear by the majority of the Supreme Court in Singh, Sinclair, Willier and McCrimmon, the police still have a good deal of latitude when interviewing a suspect. They are also not hampered by the presence of defence counsel during the interview, nor do they have to stop an interview to allow the accused to seek further legal advice unless there is an observable change in the circumstances which gives rise to a reasonable belief that the previous legal advice is no longer sufficient. The result of the cases certainly appears to heavily favour the police and, if this is true, there is undoubtedly a high level of irony in the outcome, as noted by Fish and LeBel JJ.

It is perhaps medicine that retentionists will not want to take, but allowing an adverse inference to be drawn based on an accused’s pre-trial silence may arguably relieve the accused from the persistent tactics presently employed by the police during interrogations. Redmayne, for example, has suggested that “once silence has evidentiary value, the police might be less interested in persuading suspects to waive their Miranda rights.”1604 I suggest that Redmayne’s observation is equally applicable to Canada. If the police could walk away from an interview with the knowledge that the judge or jury might draw an adverse inference, there would arguably be less need for them to continue with the interrogation in an attempt to persuade the suspect to

1603 Hebert, supra note 876 at 35, per McLachlin J.
1604 Redmayne, supra note 123 at 1048.
change his or her mind and make a statement or answer questions. Furthermore, a judge, knowing that the police could have walked away with the consolation prize but instead continued an aggressive interrogation of the accused, could consider the police conduct as a factor when deciding whether or not the *Oickle* guidelines were breached or, even if they were not breached, whether the conduct was such that it brought the administration of justice into disrepute so as to render evidence of the accused’s silence inadmissible under section 24(2) of the *Charter*.

Ironic as it may be, an adverse inference rule might counteract the current state of the law regarding police interrogations in Canada, which has placed the police into a powerful position *vis a vis* the accused. Retentionists may prefer to wait to see if the Supreme Court of Canada, which as noted previously has been sharply and narrowly divided on the right to silence issue, will change its course. However, given the current state of federal politics I suggest it would be reasonable to assume that any new appointments to the Supreme Court of Canada would most likely be philosophically pre-disposed to the current majority’s view. So, the best case scenario for retentionists may be to grudgingly accept an adverse inference rule.

Some may suggest that the police will not in fact back off simply because there is a “consolation prize” of a possible adverse inference being drawn from the accused’s silence during a police interrogation. Such cynicism is probably quite legitimate in some circumstances, especially when the interrogating officer is utilizing the Reid model\textsuperscript{1605} or his or her agency has a

\textsuperscript{1605} Lesley King and Brent Snook have summarized the Reid model of interrogation as being a coercive interrogation strategy that uses maximization and minimization tactics to obtain a confession. According to King and Snook, the model consists of several core components, including: directly confronting the suspect with the interrogator’s belief in the suspect’s guilt, followed by a pause; developing a theme or explanation for the crime; categorically rejecting all denials of the suspect; considering the suspect’s objections to the way the interrogator is proceeding as indicators of guilt; using physical proximity or visual aids to place pressure on the suspect; giving the suspect two alternative explanations to the crime, one of which is often face saving and the other morally damming; if the suspect offers an admission, showing signs of sharing the suspect’s relief; and turning an oral confession into a formal recitation of the crime either in writing or on camera. See Leslie King & Brent Snook, “Peering Inside a Canadian Interrogation Room: An Examination of the Reid Model of Interrogation, Influence Tactics, and Coercive
policy of aggressive interrogation. However, appropriate restraint focused police policy backed up by judicial oversight through the exclusion of statements obtained in a manner that unreasonably discounts the value of the adverse inference option would, I suggest, be sufficient to guard against police abuse. And in any event, given the current licence given to the police by the Supreme Court of Canada which allows them to be very aggressive and persistent in their questioning of suspects, I fail to see how an adverse inference rule could make matters all that more difficult for a person facing police questioning than the current practice of unending and relentless interrogation. Furthermore, and reflecting on my experience as a police officer and police chief, I suggest that most police officers are pragmatic and prudent practitioners of their craft who would often make a calculated decision to forego an often lengthy and difficult interrogation in an effort to extract a confession for the more certain benefit of an adverse inference likely being drawn by the trier of fact should the accused lead evidence at trial which he or she could have reasonably raised at the interview.

8. **Adequate Safeguards Exist to Prevent Wrongful Convictions**

The final component of my argument in support of an adverse inference rule is that there are sufficient protections, both in law and practice, to protect against one of the most troubling dangers associated to restricting the right to silence; namely, a wrongful conviction based on a false confession or on an inaccurate deduction from the accused’s silence. There is no doubt that there have been a number of disturbing wrongful convictions in Canada, and thoughtful consideration must be given to Iacobucci J.’s observation in *Oickle* that: “A large body of literature has developed documenting hundreds of cases where confessions have been proven

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false by DNA evidence, subsequent confessions by the true perpetrator, and other such independent sources of evidence”.  

However, while the apprehension over false confessions is certainly legitimate and the problem has been the subject of comment by the Supreme Court of Canada, it by no means follows that introducing an adverse inference rule would increase the risk of false confessions. The assumption that such would be the case is, I believe, the product of conjecture and speculation. The wrongful convictions that have marred the Canadian criminal justice system occurred under a legal regime which includes the right to pre-trial silence. So, it is manifestly evident that the right to silence by itself does not protect against wrongful convictions.

In Oickle, Iacobucci J. noted that “false confessions are rarely the product of proper police techniques … false confession cases almost always involve ‘shoddy police practice and/or police criminality’.” Ironically, the present system of police interrogation that has been endorsed by the majority of the Supreme Court of Canada very likely elevates the risk of “shoddy police practice and/or police criminality”. Under the current state of the law, the police are allowed if not encouraged to not take “no” for an answer and to use “legitimate means of persuasion” to encourage a suspect who initially invokes the right to silence to change his or her mind. And Singh and Sinclair make it very clear that the police can be quite aggressive and very persistent in their quest to obtain a statement. It is hard to see how this state of affairs either gives the right to silence the respect its advocates think it deserves or cultivates an environment in which there is any real measure of inoculation to protect the accused from the police applying an unreasonable amount of pressure to speak or answer questions. As Goold has pointed out, police

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1606 Oickle, supra note 973 at para 35.
1607 See e.g. Sherrin, “False Confessions”, supra note 272.
1608 Oickle, supra note 973 at para 45.
interrogation consists of “messy realities” and police interrogators are under “very real pressures … particularly when it comes to the investigation of serious violent and sexual crimes”.  

Given the pressures on the police to obtain a confession and the current almost carte blanche licence they have been given by the Supreme Court of Canada to achieve their goal, the right to silence in its current incarnation is a rather weak protection for the accused, especially the “weak willed” suspect referred to by Monin C.J.M.  

It is however obvious that the Miranda approach is not seen as an acceptable alternative by the Supreme Court (including, it would appear, the minority in Singh and Sinclair), so I agree with Zuckerman that “given that a good protection of the privilege is unattainable in practice, it is better to abandon it and concentrate on a protection of the suspect’s other rights.”

Those other protections, I submit, are technology and the adverse inference rule.

As stated earlier, virtually all involved in the right to silence debate acknowledge that police interrogation is an important and legitimate investigative strategy and the Supreme Court of Canada has endorsed its use, so focussing on ways to ensure that police interrogation produces reliable and probative evidence in a fair manner might be a more constructive approach. While it is beyond the scope of this thesis to delve into the intricacies of police interrogation strategies, I suggest that requiring a certain level of police training and certification for police interrogators (in serious cases at least) and imposing a legal requirement for police custodial interviews to be videotaped would be far more protective in terms of guarding against false confessions, or more relevant to this thesis, improper inferences being drawn from silence during police questioning.

Stuesser has recommended that videotaping of police custodial interviews be made  

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1609 Goold, supra note 1526.  
1610 See text accompanying note 1530, supra.  
1611 Zuckerman, Principles of Evidence, supra note 72 at 307.  
1612 Ratushny, however, has suggested that one option to deal with the pre-trial silence issue is to enact a law that makes no statement given to the police admissible. See Ratushny, Self-Incrimination, supra note 5 at 273.
mandatory\textsuperscript{1613} and, in \textit{Oickle}, the Supreme Court of Canada endorsed the practice, noting that videotaping provides four important benefits:

First, it provides a means by which courts can monitor interrogation practices and thereby enforce the other safeguards. Second, it deters the police from employing interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed judgements about whether interrogation practices were likely to lead to an untrustworthy confession. Finally, mandating this safeguard accords with sound public policy because the safeguard will have additional salutary effects besides reducing untrustworthy confessions, including more net benefits for law enforcement.\textsuperscript{1614}

Gary Trotter has also emphasized the value of videotaping or at least audiotaping police interrogations, although he has cautioned against developing a presumption of exclusion in the absence of a tape recording because such a rule “may lead to an unwarranted windfall for the accused in the litigation process.”\textsuperscript{1615} And in Britain, the Runciman Commission also acknowledged the important role of technology such as videotaping of interviews, and \textit{PACE} mandates and regulates audio and video taping of police interviews. Similar statutory provisions, although I suggest less detailed than those outlined in \textit{PACE}, could be implemented in Canada to establish minimum standards and procedural safeguards to protect the accused from unreasonable police pressure to answer questions.

Finally, as enunciated in \textit{Oickle} and \textit{Sinclair}, I suggest the common law confessions rule continues to be an effective mechanism to protect an accused’s right to silence at the investigative stage of the criminal process.\textsuperscript{1616} I submit that the revised confessions rule established in \textit{Oickle} provides sufficient protection for a suspect being interrogated by the police

\textsuperscript{1613} Steusser, \textit{supra} note 272 at para 57.
\textsuperscript{1615} Trotter, \textit{supra} note 272 at para 68.
\textsuperscript{1616} For an argument that the confessions rule is an inadequate protection against false confessions, see Sherrin, “False Confessions”, \textit{supra} note 272.
and, as well, that it strikes the proper balance between due process and crime control. The police cannot use oppressive tactics or establish a *quid pro quo* relationship with the accused in exchange for an admission or confession, and while they can use some trickery and subterfuge, their conduct cannot be such that it would shock the community. In my view, the *Oickle* guidelines and mandatory videotaping of all police interviews for indictable offences\(^{16} \text{17}\) would adequately protect the accused from the possibility of a wrongful conviction based on either his or her statement, or silence.

C. CONCLUSION

Based on these eight suppositions, I submit that it is time to restrict the right to pre-trial silence in Canada. In my view, the utilitarian benefits resulting from a partial curtailment of the right to silence through allowing an adverse inference to be drawn from the accused silence in limited and defined circumstances would best serve the interests of the Canadian public and would preserve, if not enhance, the public’s faith in and respect for the criminal process and the criminal justice system. In the final chapter, I will sum up my argument and present specific recommendations to amend the law governing the right to pre-trial silence in Canada.

\(^{16} \text{17}\) The restriction to indictable offences is simply due a recognition that videotaping is timely and costly, especially the creation of transcriptions, so some reasonable limitation on when it must be used will likely be necessary.
CHAPTER VI

RECOMMENDATIONS AND CONCLUSION

A. INTRODUCTION

It is clear that the right to silence debate embraces many issues and the right itself intersects several complimentary legal principles, such as the privilege against self-incrimination, presumption of innocence, burden of proof and right to counsel. This thesis has endeavoured to review the right to silence from various theoretical, normative and instrumental perspectives, and has compared the history and current state of the law regarding the right to pre-trial silence in Britain and Canada. All of this has been done in an attempt to formulate a reasoned argument to support my proposition that the law governing the right to pre-trial silence in Canada should be changed. Despite its impressive heritage and current constitutional status, I believe the right to silence no longer serves the utilitarian needs of Canadian society.

As discussed in Chapter I and the previous chapter, the criminal justice system in twenty-first century Canada is far removed from the days of the Star Chamber and ecclesiastical courts of sixteenth and seventeenth century England. The Canadian criminal justice system includes a professional police service and an independent prosecution and court system, as well as many legal protections for an accused which did not exist when the right to silence was created and developed as a common law principle.\textsuperscript{1618} Moreover, the liberalism that lay beneath the evolution of the right to silence,\textsuperscript{1619} while certainly a traditional Canadian value, has been tempered by a belief held by a significant segment of the Canadian population – and certainly found within the

\textsuperscript{1618} See discussion at Chapter V.B.8, above.
\textsuperscript{1619} Easton, \textit{supra} note 21 at 4.
ideology of the current federal government – that respect for the law has deteriorated and the criminal justice system is often ineffective. It is within this legal, social and political environment that I believe the right to silence must be rationalized and justified, just as it was when the right was created in response to the torture and inhumane tactics exercised by the Star Chamber and ecclesiastical courts.

The rationale for proposing that the trier of fact should be allowed to draw an adverse inference from the accused’s pre-trial silence in limited circumstances is built on a theoretical foundation of utilitarianism and pragmatism. The rationale is not, however, devoid of normative qualities as it also incorporates the view that, while respect for individual rights is certainly an important value in Canadian society, other Canadian values are of equal importance and should not be overlooked or discounted. Two of those values are the moral obligation to account for one’s conduct and society’s legitimate interest in public safety and security through effective law enforcement (i.e., peace, order and good government).

I submit that those who support the right to silence base much of their argument on “vague sentimentality” rather than “realism and common sense”.1620 I also believe that the criticisms levelled against the right to silence by Jeremy Bentham in the nineteenth century are still valid today, as the right to silence continues to defy common sense and remains incompatible with the truth seeking function of the criminal law. The right to silence removes one of the most cogent sources of information regarding a suspected crime (i.e., the accused) from the equation, and it can be used by sophisticated criminals to avoid conviction. In essence, the right to silence “is no longer a protection for the innocent, but rather a safe sanctuary for those who break society’s

1620 Theophilopolous, supra note 39 at 517.
Yet, ironically, it may not provide all that much protection for the unsophisticated or “weak willed” suspect, as the Supreme Court’s decisions in Singh, Sinclair, Willier and McCrimmon have effectively given the police “unfettered and continuing access to the detainee, for the purpose of conducting a custodial interview to the point of confession.”

Based on these philosophical and pragmatic arguments, and positioning them within the social and political context of modern Canada, I believe it is time to reform the law governing the right to silence at the investigative stage of the criminal process by adopting the British adverse inference rule.

B. RECOMMENDATIONS

The proposition to restrict the right to silence in Canada is a limited one. As already mentioned, I am not advocating that a person accused or suspected of having committed a crime should be forced to speak or answer questions posed by the police or other agent of the state. In that sense, the accused should retain his or her right to pre-trial silence. I am, however, proposing that, in circumstances which will be described below, the accused should pay a possible, although not mandatory, price for his or her silence. The price would be any reasonable inference drawn by the trier of fact. The accused’s silence, however, would only be relevant if he or she relies on a fact at trial that could have been reasonably mentioned to the police earlier. In such circumstances, the trier of fact should be able to draw a common sense deduction from the accused’s silence which would form part of its overall assessment of the strength of the prosecution’s case. The accused’s silence, however, could not be the only evidence upon which the accused is found guilty.

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1621 Ibid at 518.
1622 Sinclair, supra note 1415 at para 190.
1623 Redmayne, supra note 123 at 1049.
I am mindful of the point raised by Greenawalt, Ratushny, Paciocco and others that from both a moral and common sense perspective a person should not be expected to respond to an unfounded or flimsy allegation of wrongdoing. To address this concern, I propose that an adverse inference would only be available when a threshold standard is met. More specifically, the accused would only be required to respond to an allegation or question posed by the police (or other agent of the state) when he or she is arrested or detained as those terms are defined in Latimer and Grant respectively, or when the questioning police officer has reasonable grounds to suspect the person being questioned is or has been involved in criminal activity.

Arrest and detention are quite straightforward, as they have been defined by the Supreme Court of Canada in Latimer\textsuperscript{1624} and Grant\textsuperscript{1625} However, the more nebulous “reasonable grounds to suspect” standard requires further clarification. I suggest that the same test developed by the Supreme Court of Canada in R. v. Mann\textsuperscript{1626} for investigative detention should apply to the questioning of suspects by the police in circumstances short of an arrest or Grant detention. In Mann, Iacobucci J. defined the “reasonable grounds to suspect” standard as: “[P]olice officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and such a detention is necessary.”\textsuperscript{1627} Furthermore, in R. v. Simpson,\textsuperscript{1628} Doherty J.A. described the necessary grounds for an investigative detention to be “a constellation of objectively discernible facts which give the detaining officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation.”\textsuperscript{1629} Altering the Mann and Simpson language to apply to the

\begin{footnotesize}
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\item \textsuperscript{1624} Latimer, supra note 1253.
\item \textsuperscript{1625} Grant, supra note 1260.
\item \textsuperscript{1626} R v Mann, 2004 SCC 52, [2004] 3 SCR 59 (available on lexUM) [Mann] [cited to online source].
\item \textsuperscript{1627} Ibid at para 45.
\item \textsuperscript{1628} (1993) 79 CCC (3d) 482 (Ont CA) [Simpson].
\item \textsuperscript{1629} Ibid at 501.
\end{enumerate}
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application of an adverse inference on pre-trial silence, I suggest the minimum requirement for imposing a legal obligation on a person to respond to police questions would be that the police officer has reasonable grounds, based on objectively discernible facts, to suspect that the person being questioned is or has been involved in the criminal activity which the officer is investigating. Therefore, I propose that an adverse inference based on the accused’s silence in response to police questions regarding a suspected crime would arise in three situations: (1) where the accused is arrested, as defined in *Latimer*; (2) where the accused is detained, as defined in *Grant*; and (3) where a police officer has reasonable grounds to suspect in all the circumstances that the person being questioned (i.e., the accused) is connected to a particular crime and that questioning of the accused is necessary to determine whether a crime has occurred and what, if any, role in the crime is attributable to the accused.

Furthermore, as with the British rule, I propose that an adverse inference from pre-trial silence should arise in two additional sets of circumstances, namely: (4) where the accused is arrested or detained by a police officer and fails to explain or account for the presence of any item, substance or mark found on his or her person, on his or her clothing or footwear, or otherwise in his or her possession,\(^\text{1630}\) or at any place where he or she is arrested or detained, when the police officer has reasonable grounds to suspect that the presence of the item, substance or mark is attributable to the accused’s participation in the crime being investigated; and (5) where the accused is arrested or detained by a police officer at a place at or around the time a

\(^{1630}\) Possession is defined in s. 4(3) of the *Criminal Code* as follows:

For the purposes of this Act,

(a) a person has anything in possession when he has it in his personal possession or knowingly,
   (i) has it in the actual possession or custody of another person, or
   (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.
crime is believed to have been committed, and the police officer has reasonable grounds to suspect that the presence of the accused at the place is attributable to his or her participation in the crime being investigated or some other offence.

In any of these scenarios, the accused would be under a legal obligation to: respond to questions posed by a police officer; account for why he or she has any item, substance or mark on him or her or in his or her possession; or explain why he or she is in a particular place. Failure to respond or offer an explanation would raise the possibility of an adverse inference being drawn by the trier of fact. The police officer would be required to first advise the accused of his or her right to remain silent, but would also warn the accused that silence may lead to an adverse inference being drawn in court. The warning should be in language similar to the British warning, and might be: “You do not have to say anything, but it may harm your defence if you do not mention something now which you later rely on in court. Anything you do say may be given in evidence.” The section 10(b) right to counsel warning would also be required if the accused was arrested or detained as defined by Grant, but short of a Grant detention the police would not have to advise the accused of his or her right to consult counsel.

As previously mentioned, an adverse inference would only arise if, at his or her trial, the accused elicits a fact which he or she had not mentioned when questioned by the police and the circumstances at the time of the questioning were such that it would have been reasonable for the accused to have mentioned the fact at that time. The accused could elicit the fact at trial either through his or her direct testimony, calling witnesses or cross-examining witnesses.

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1631 PACE, Code C, para 10.5, supra note 548.
Assuming that the circumstances meet the criteria for the adverse inference rule to apply, the inference drawn by the trier of fact would be, to use the British language, “such inferences from the failure or refusal as appear proper”. The inference could be considered by the trier of fact for the purpose of corroboration, determining if there is sufficient evidence submitted at a preliminary inquiry to commit the accused to trial, determining if the prosecution has presented a “case to meet”, and determining if the accused is guilty of the offence or any included offence.

C. CONCLUSION

The right to silence is an historic and in some circles highly cherished principle of law. There is no doubt that many well respected jurists and legal scholars consider it to be a fundamental human right integral to personal autonomy, liberty and privacy. However, other equally respected and knowledgeable jurists and academics have argued that the right to silence lacks a logical underpinning and should not be as revered at it has been historically.

The right to silence developed as a common law rule to counter the abuse of the Star Chamber and ecclesiastic courts, but the Star Chamber and ecclesiastical courts vanished long ago. Yet the right to silence has remained. Indeed, in some jurisdictions it has attracted “almost religious adulation”. I submit, however, that the devout loyalty shown to the right to silence by retentionists is based more on sentimentality than logic or practicality. In my view, the right to silence lacks philosophical credibility, is contrary to human nature and common sense, is unevenly and irrationally applied, and causes considerable practical difficulty for the police while they are carrying out their important role of protecting society through investigating criminal activity.

1632 CJPOA, ss 34(2), 36(2) & 37(2).
1633 Friendly, supra note 60 at 681.
I believe the right to silence should revert to its original role as a common law rule of evidence law. Some countries have recognized the fallacy of the right to silence and done something about it through legislative abrogation or curtailment of the right. Canada has taken a more subtle and, I suggest, less honest approach whereby lip service has been given to the constitutional status of the right to silence while, at the same time, its practical utility for most people subjected to a custodial police interrogation or police subterfuge has been essentially eviscerated through judicially imposed limits on its application during the investigative stage of the criminal process.

Frankly, the right to silence in Canada is not what it appears to be and it is time to stop the charade. It is also time to align the law governing the right to silence with common sense and to recognize the importance of the truth-seeking function of the criminal law. It is time to re-survey the “jagged line” between individual rights and the legitimate societal interest in effective law enforcement and the prosecution and conviction of those who break the law. It is time to implement an adverse inference rule in Canada. It is time to catch the fox!

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1634 Theophilopolous, supra note 39 at 507.
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APPENDIX

Proposed Amendments to the *Canada Evidence Act*

Section 5.1  Failure to mention facts when questioned

(1) Where in any proceedings against a person for an offence, evidence is given that the accused

(a) was questioned by a peace officer after being arrested or detained; or

(b) was questioned by a peace officer who had at the time reasonable grounds to suspect
that, in all the circumstances, the accused was connected to an offence the officer was
investigating, and the questioning related to discovering whether and by whom the
offence had been committed

failed to mention any fact which the accused later relies on in those proceedings, being a fact
which in the circumstances existing at the time of the questioning the accused could reasonably
have been expected to mention when so questioned, subsection (2) applies.

(2) The trier of fact in the proceedings may, if the circumstances set out in subsection (1) are
satisfied, draw any inferences from the accused’s failure to mention the fact as appear proper,
and may consider any such inferences when it is

(a) determining at a preliminary inquiry whether there is sufficient evidence to put the
accused on trial for the offence charged or any other indictable offence in respect of the
same transaction;

(b) determining whether the prosecution has presented a case to meet; or

(c) determining whether the accused is guilty of the offence charged or any included
offence.

Section 5.2  Failure or refusal to account for items, substances or marks

(1) Where in any proceedings against a person for an offence, evidence is given that the accused

(a) was arrested or detained by a peace officer and there was

(i) on the accused’s person; or

(ii) in or on the accused’s clothing or footwear; or

(iii) otherwise in the accused’s possession; or

(iv) in any place where the accused was when arrested or detained;
any article, substance or mark; and

(b) the police officer has reasonable grounds to suspect that the presence of the article, substance or mark may be attributable to the accused’s participation in the offence being investigated; and

(c) the police officer informs the accused of what the police officer believes and requests the accused to account for the presence of the article, substance or mark; and

(d) the accused fails or refuses to do so;

then if, in any proceedings against the accused, evidence of the matters specified in this section is given, subsection (2) applies.

(2) The trier of fact in the proceedings may, if the circumstances set out in subsection (1) are satisfied, draw any inferences from the accused’s refusal or failure to account as appear proper, and may consider any such inferences when it is

(a) determining at a preliminary inquiry whether there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction;

(b) determining whether the prosecution has presented a case to meet; or

(c) determining whether the accused is guilty of the offence charged or any included offence.

Section 5.3: Failure or refusal to account for presence at a particular place

(1) Where in any proceedings against a person for an offence, evidence is given that the accused

(a) was arrested or detained by a police officer and when so arrested or detained was found in a place at or about the time the offence being investigated by the police officer was believed to have been committed; and

(b) the police officer has reasonable grounds to suspect that the presence of the accused at that place and at that time may be attributable to the accused’s participation in the offence being investigated or some other offence; and

(c) the police officer informs the accused of what the police officer believes and requests the accused to account for his presence; and

(d) the accused fails or refuses to do so;
then if, in any proceedings against the accused, evidence of the matters specified in this section is given, subsection (2) applies.

(2) The trier of fact in the proceedings may, if the circumstances set out in subsection (1) are satisfied, draw any inferences from the accused's refusal or failure to account as appear proper, and may consider any such inferences when it is

(a) determining at a preliminary inquiry whether there is sufficient evidence to put the accused on trial for the offence charged or any other indictable offence in respect of the same transaction;

(b) determining whether the prosecution has presented a case to meet; or

(c) determining whether the accused is guilty of the offence charged or any included offence.

Section 5.4 Silence as Corroboration

(1) The accused’s failure or refusal as set out in sections 5.1(1), 5.2(1) or 5.3(1) may be used by the trier of fact as corroboration of any evidence given against the accused in the proceedings in relation to which the failure or refusal is material.

Section 5.5 Silence alone is insufficient

(1) An accused shall not be committed to trial at a preliminary inquiry or be convicted of an offence solely on the inference drawn from his failure or refusal as mentioned in sections 5.1, 5.2 or 5.3.

Section 5.6 Videotaping of Custodial Interview

(1) Where, in any proceedings against a person for an indictable offence, the prosecution seeks to admit evidence that the accused failed to mention a fact, or failed or refused to account for the presence of an item, substance or mark or for his presence at a particular place at a particular time as outlined in sections 5.1., 5.2 and 5.3, and the failure or refusal occurred during a custodial police interview, the trier of fact shall consider the absence of a video tape recording of the interview when considering whether to draw an inference from the failure or refusal and how much weight, if any, will be given to the failure or refusal.