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## You Have the Right to Be Silent ... Anything You Do Not Say May Be Used Against You. Is the Right to Silence in Great Britain Really a Protection?

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## COMMENTS

# You Have the Right to Be Silent . . . Anything You Do Not Say May Be Used Against You. Is The Right to Silence in Great Britain Really a Protection?

## I. Introduction

Like the *Miranda*<sup>1</sup> warnings so well recognized in the United States, Great Britain<sup>2</sup> has a caution that is familiar to its citizens.<sup>3</sup>

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1. *Miranda v. Arizona*, 384 U.S. 436 (1966)(holding *inter alia* that when an individual is taken into custody or is in some way deprived of his freedom by authorities, that individual must be warned prior to questioning that he has the right to remain silent and that anything he says may be used against him in a court of law).

2. This Comment only deals with the right to silence in Great Britain, which includes England, Wales, and Scotland. *THE STATESMAN'S YEARBOOK* 1318 (Brian Hunter ed., 1994). The United Kingdom consists of Great Britain and Northern Ireland. *Id.* Northern Ireland will not be considered for purposes of this Comment. The newly passed right to silence does not apply to Northern Ireland, as a similar law has existed there since 1988. See *The Criminal Evidence (N.I.) Order 1988*. For information on the right to silence in Northern Ireland see Richard Maloney, Note, *The Criminal Evidence (N.I.) Order 1988: A Radical Departure from the Common Law Right to Silence in the U.K.?*, 16 B.C. INT'L & COMP. L. REV. 425 (1993).

3. John Benyon, *Powers and Proprieties in the Police Station*, in *THE POLICE: POWERS, PROCEDURES AND PROPRIETIES* 118 (John Benyon & Colin Bourn eds., 1986). The caution states "You do not have to say anything unless you wish to do so, but what you say may be given in evidence." *Police and Criminal Evidence Act (s.66) Codes of Practice (1991)*[hereinafter *Codes of Practice*] Code C, ¶ 10.4.

This warning, referred to as the right to silence, has been used for three decades.<sup>4</sup> However, a debate has been brewing for years about whether the right to silence should be eliminated.<sup>5</sup> Parliament recently passed the Criminal Justice and Public Order Act<sup>6</sup> modifying the right to silence by lengthening the police caution.<sup>7</sup> The new caution could severely limit, if not eliminate, the right to silence.<sup>8</sup> Under the wording of the new caution, police officers will recite the following: "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence."<sup>9</sup>

This new caution and its suspected impact has aroused great public criticism towards the Home Secretary, Michael Howard.<sup>10</sup> Specifically, some people fear that the caution is too difficult to understand.<sup>11</sup> It is also argued that the caution will be too ambiguous for even a legal advisor to interpret.<sup>12</sup> If counsel is

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4. Richard Ford, *Length of Police Caution is Tripled*, THE TIMES (London), Aug. 19, 1994, at 1.

5. See generally Steven Greer, *The Right to Silence: A Review of the Current Debate*, 53 MOD. L. REV. 709 (1990) (giving an overview of the right to silence and issues surrounding the debate).

6. William E. Schmidt, *Silence May Speak Against the Accused in Britain*, N.Y. TIMES, Nov. 11, 1994, at B20. The right to silence under the Criminal Justice and Public Order Bill was narrowly passed by Parliament in October 1994 and received Royal Assent in November 1994. *Id.* It went into effect in April 1995.

Richard Ford, *First National DNA Database to Carry Details of 5m People*, THE TIMES (London), April 11, 1995.

7. Schmidt, *supra* note 6, at B20.

8. *Id.* Although the new caution warns that an individual does not have to answer the questions of officers, the new caution also warns that such silence could be used against him or her if the case goes to trial. *Id.*

9. Ford, *supra* note 6.

10. See Roger Ede, *Russian Roulette — A Criticism of the Clauses Abolishing the Right to Silence in the Criminal Justice and Public Order Bill*, LAW SOC'Y GAZETTE, May 11, 1994, at 12. The Home Office is responsible for the administration of justice. This includes the areas of criminal law, the treatment of adult and juvenile offenders, the police force, crime prevention, regulation of dangerous drugs, regulation of fire arms, fire service, emergency planning, licensing laws, electoral laws, and local legislation. CENTRAL OFFICE OF INFORMATION, BRITAIN 1995: AN OFFICIAL HANDBOOK 512 (1994).

11. Michael Zander, *Silence Isn't Just for Crooks*, THE TIMES (London), Aug. 20, 1994, at 14. Although research has not been done on the new caution, a study has been done on the present caution by Isabel Claire and Ghisli Gudjonsson. *Id.* One hundred adults with an IQ in the 60-128 range were tested. *Id.* Only 52% understood that the warning is given to inform the person being questioned that he has the right to remain silent. *Id.* Furthermore, only 42% fully understood the caution, also known as the Notice to Detained Persons. *Id.*

12. Ede, *supra* note 10, at 12.

unable to comprehend the limitations of the caution, there is a concern that the new right to silence may interfere with counsel's effectiveness, which then will interfere with the right to counsel<sup>13</sup> provided by the Police and Criminal Evidence Act of 1984 [hereinafter PACE].<sup>14</sup> One of the strongest arguments against the change is that courts may infer guilt from silence.<sup>15</sup>

Long before the Criminal Justice and Public Order Act of 1994 was enacted, Great Britain did not give suspects the right to silence in crimes prosecuted by the Serious Fraud Office [hereinafter SFO].<sup>16</sup> The SFO's most successful prosecution came against Ernest Saunders, the former Chief Executive Officer of Guinness plc.<sup>17</sup> Nonetheless, that major victory has suffered a major defeat. Saunders brought his case before the European Commission of Human Rights [hereinafter Commission].<sup>18</sup> In its 14-1 majority opinion, the Commission found that the manner in which Saunders was questioned violated the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>19</sup> [hereinafter Convention].<sup>20</sup> This case has been referred to the European Court of Human Rights [hereinafter Court].<sup>21</sup> Because the new

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13. *Id.* Roger Ede is the secretary to the Law Society's criminal law committee. *Id.* Ede's concern is that legal advisors will not know under what circumstances they should advise their clients to remain silent or to cooperate with the authorities. *See id.*

14. Police and Criminal Evidence Act 1984, s 58 (Eng.) [hereinafter PACE]. Section 58(1) states that "[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." *Id.*

15. Ede, *supra* note 10, at 12.

16. Criminal Justice Act 1987, s 2 (Eng.). The Criminal Justice Act created the Serious Fraud Office. *Id.* at s 1. The SFO is the primary body that prosecutes financial crime. Frank Kane, *DTI Discredited*, SUNDAY TIMES (London), Oct. 16, 1994. In the outline of the Director's Investigation Powers, the Director is given the power to require the person whose affairs are being investigated, or any person believed to have pertinent information, to answer questions and provide all relevant information. Criminal Justice Act 1987 s 2(2). A person who fails to comply with this requirement put forth by the Director is guilty of an offense and is subject to a fine and imprisonment for up to six months. *Id.* s 2(13).

17. *See Kane, supra* note 16.

18. Melvyn Marckus, *Guinness is Good for Whom?*, THE TIMES (London), Sept. 24, 1994, at 24.

19. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 1, 1950, 213 U.N.T.S. 221 [hereinafter Convention].

20. Marckus, *supra* note 18. The Commission found that the United Kingdom deprived Saunders of a fair trial. *See id.* This is a violation of article 6 which entitles everyone to a fair trial and public hearing when faced with a criminal charge. Convention, *supra* note 19.

21. Marckus, *supra* note 18.

caution will have an effect similar to that carried out by the SFO, the Commission decision raises serious questions as to whether or not the new right to silence caution will be challenged by the Commission.<sup>22</sup>

Part II of this Comment will examine the previous right to silence, which was not a statutory directive. In addition, both the effect and effectiveness of the previously used caution will be discussed. Part III then focuses on the newly passed right to silence and its likely impact on the rights of the suspect. Part III also considers the speculation of the manner in which detainees will have to react to police questioning. This Part further considers the concern among solicitors regarding the best way to advise their clients. Finally, Part IV focuses on several cases that already have been or are currently pending pursuant to the terms of the Convention. These cases will be used in analyzing how the new right to silence and its accompanying caution is likely to be treated with regard to the Convention.

## II. The Previous Right to Silence

In the beginning of the Twentieth Century, the Chief Constable of Birmingham asked the Lord Chief Justice Alverstone to formulate a set of rules the judges believed policemen should follow while investigating crimes.<sup>23</sup> The reply resulted in what is known as Judges' Rules<sup>24</sup> which consisted of four Rules when it was first announced in 1912.<sup>25</sup> Following bouts of criticism, these Rules were clarified in 1930 and revised in 1947 and 1948.<sup>26</sup> Then, in 1961, a question arose as to who had the power to review the scope and operation of the Rules.<sup>27</sup> This question was resolved in favor of the judges.<sup>28</sup> Once again, in 1964, the judges of the Queen's Bench revised the Rules which, in turn, were adopted by the Home Office.<sup>29</sup>

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22. Schmidt, *supra* note 6, at B20.

23. Tony Judge, *The Provisions in Practice*, in *THE POLICE: POWERS, PROCEDURES AND PROPRIETIES* 175, 176 (John Benyon & Colin Bourn eds. 1986).

24. DAVID FELLMAN, *THE DEFENDANT'S RIGHTS UNDER ENGLISH LAW* 35 (1966).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* The Home Secretary, Mr. R.A. Butler, in agreement with the Lord Chief Justice, announced to the House of Commons that the authority to review was vested in the judges. FELLMAN, *supra* note 24, at 35.

29. *Id.*

The 1964 Rules provided for the right to silence and the right to be advised of that right.<sup>30</sup> Rule II directed a police officer to caution a person, reasonably suspected of committing an offense, before putting forth any questions relating to that subject.<sup>31</sup> When a person was charged, Rule III(a) required that the suspect be warned that he was not obligated to say anything.<sup>32</sup>

Further, Rule III(b) solidified the right to silence by requiring the police officer to advise the suspect that he was not obligated to answer any of the questions about the offense.<sup>33</sup> However, any statements that were made were written down.<sup>34</sup> More importantly, the suspect was also required to sign his name or mark to a written version of the caution, signaling his understanding of the right to remain silent.<sup>35</sup> If the person making the statement chose to write the statement himself, that person would first be asked to write out the caution and sign a declaration of knowledge and understanding of his right not to say anything.<sup>36</sup>

Although the right to silence was made clear in the Judges' Rules, it should be emphasized that the Judges' Rules were not a legislative product, nor were they promulgated with any type of consultation.<sup>37</sup> The Court of Criminal Appeal specifically stated that the rules were intended only as a guide for police officers.<sup>38</sup>

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30. Home Office Circular No. 31/1964, reprinted in *The Judges' Rules and Administrative Directives to the Police* 1964 CRIM. L. REV. 161, 167-73 [hereinafter Home Office Circular No. 31/1964]. This latest version is somewhat longer and more defined than its predecessor. The 1947 version directly preceding the current version is reprinted in PATRICK DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 115-18 app. (1960). The original version, which is significantly shorter than the current set of Rules, is reprinted in *R. v. Voisin* 1 K.B. 531, 539 note 3 (1918).

31. Home Office Circular No. 31/1964, *supra* note 30, at 167.

32. *Id.* at 168.

33. *Id.*

34. *Id.* Rule III provides: "[a]ny questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interrogating officer." *Id.* Rule IV describes how all written statements made after the caution should be taken. See Home Office Circular No. 31/1964, *supra* note 30, at 168-69.

35. *Id.* at 168.

36. *Id.* at 169. The Judges' Rules were followed by the Administrative Directions on Interrogations and the Taking of Statements which makes clear, especially in sections two and six, that the police are to make sure that the suspect understands his right to silence. *Id.* at 170-72.

37. Michael Zander, *The Act in the Station*, in *THE POLICE: POWERS, PROCEDURES AND PROPRIETIES* 123 (John Benyon & Colin Bourn eds., 1986). Even police officers were not consulted in the formulation of the Rules. *Id.*

38. *Voisin*, 1 K.B. at 539.

As such, these Judges' Rules were not law.<sup>39</sup> They were merely administrative directives which police officers were strongly encouraged to follow to administer justice in the fairest manner possible.<sup>40</sup> Police officers were expected to follow them to ensure that statements gathered would be admissible.<sup>41</sup> However, absence of a caution did not make the evidence inadmissible *per se*.<sup>42</sup> Instead, the court first considered all of the circumstances in which the evidence was obtained to determine if the admission of that evidence would adversely affect the fairness of the proceedings.<sup>43</sup> If such a determination was made, the court would exclude the unfair evidence.<sup>44</sup>

#### A. Codification of the Right to Silence

PACE did not specifically require police officers to caution suspects before questioning.<sup>45</sup> However, the statute ordered the Secretary of State to issue four codes of practice for police officers.<sup>46</sup> The code most relevant to this discussion is Code C entitled *Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers*.<sup>47</sup> The intent of the Code of Practice was to "strike a balance between citizens' rights, including the right to silence, and police powers."<sup>48</sup>

The Code provided that if questions were asked for the purpose of obtaining evidence which may later be used at trial, the caution must be administered before questioning.<sup>49</sup> In contrast, if questions were asked for other purposes, such as determining a suspect's identity, the caution was not necessary.<sup>50</sup> When the caution was administered to a person not under arrest,<sup>51</sup> the

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39. *Id.*

40. *Id.*

41. *Id.* at 539-40.

42. *Id.* at 538.

43. *Voisin*, 1 K.B. at 538.

44. *Id.*

45. *See generally*, PACE, *supra* note 14.

46. *Id.* s 66. The four codes deal with (a) the exercise of police powers to search a person or vehicle before arresting the person; (b) the search of premises and the seizure of property found on persons or premises; (c) "the detention, treatment, and questioning of persons by police officers"; and (d) the identification of individuals by police officers. *Id.*

47. *See* Codes of Practice, *supra* note 3, Code C.

48. SUSAN M. EASTON, *THE RIGHT TO SILENCE* 5 (1991).

49. Codes of Practice, *supra* note 3, Code C, ¶ 10.1.

50. *Id.*

51. The police can question anyone, regardless of their procedural status. ZANDER, *CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM* 128 (6th ed.

person had to be informed that he was not under arrest, that he was free to leave at any time, and that he could obtain legal advice if he so desired.<sup>52</sup> When a suspect was arrested, the caution also had to be administered<sup>53</sup> unless to do so was impractical considering the suspect's behavior or condition.

The exact wording of the caution was set forth in paragraph 10.4 of the Code.<sup>54</sup> However, if the words recited by the officer were not precise, the requirement was not considered breached.<sup>55</sup> As long as the sense of the caution was preserved, it was considered valid, pursuant to paragraph 10.4 of Code C.<sup>56</sup>

The notes following this section of the Code provided guidance to those who did not understand the caution. The officer could explain the caution in his own words<sup>57</sup> or, if the suspect did not understand the significance of the caution, the officer was advised to explain the principle of the right to remain silent and the effect of doing so.<sup>58</sup> Nonetheless, it was essential that any explanation of the caution did not give the false impression that failure to cooperate would prompt automatic release from detention, especially if biographical information still had to be obtained by the police officers.<sup>59</sup>

This Code was considered to have replaced the vague and ambiguous Judges' Rules.<sup>60</sup> However, the general substance of the Rules was not changed by the Code. The principles of the Judges' Rules preamble were embodied throughout the Code.<sup>61</sup>

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1993).

52. Codes of Practice, *supra* note 3, Code C, ¶¶ 10.2, 3.15.

53. *Id.* ¶ 10.3. The caution also does not have to be administered upon arrest if the suspect had already been cautioned immediately prior to arrest in accordance with paragraph 10.1. *Id.* ¶¶ 10.3(a)-(b).

54. *Id.* ¶ 10.4.

55. *Id.*

56. Codes of Practice, *supra* note 3, Code C, ¶ 10.4.

57. *Id.* at Note 10C.

58. *Id.* at Note 10D. The officer would explain that "the caution is given in pursuance of the general principle of English law that a person need not answer any questions or provide any information which might tend to incriminate him, and that no adverse inferences from silence may be drawn at any trial that takes place." *Id.*

59. *Id.*

60. ZANDER, *supra* note 51, at 127.

61. Compare Home Office Circular No. 31/1964, *supra* note 30 with Codes of Practice, *supra* note 3, Code C, ¶ 10. Both the Rules and the Code share the underlying theme of placing both the officer and the suspect on equal ground. Citizens have a duty to help police officers, but in doing so they must be treated fairly. The rights to silence and to counsel protect the suspect from being taken advantage of by the police officers.



In contrast, the Code was much longer.<sup>62</sup> The Code explicitly detailed procedures to be followed in the station.<sup>63</sup> First, and foremost, the Code required that all persons in custody be dealt with expeditiously and released as soon as possible.<sup>64</sup> This Code also dealt with the keeping of detailed custody records,<sup>65</sup> initial procedures,<sup>66</sup> the property of a detained individual,<sup>67</sup> the right to contact someone who has an interest in the detainee's whereabouts,<sup>68</sup> the right to legal advice,<sup>69</sup> the conditions<sup>70</sup> and treatment of detained persons,<sup>71</sup> and the guidelines for interviews.<sup>72</sup>

The Code was a useful tool not only because it was extensive, but because it was drafted with input from many interested parties.<sup>73</sup> Its utility, however, should not completely overshadow the fact that the Code was not law.<sup>74</sup> Its existence was merely authorized by statute.<sup>75</sup>

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62. ZANDER, *supra* note 51, at 161. The 1947 version of the Judges Rules and Administrative Directives as reprinted by *Devlin* were about 4 pages, *see* DEVLIN, *supra* note 30, compared to the 38 pages of Code C, *see supra* note 3.

63. ZANDER, *supra* note 51, at 161.

64. Codes of Practice, *supra* note 3, Code C, ¶ 1.1.

65. *Id.* ¶ 2.1

66. *Id.* ¶ 3(a). This is also broken down into specific guidelines for people unable to understand English or who are hearing impaired (*id.* ¶ 3.6.), juveniles (*id.* ¶¶ 3.7-3.9), mentally handicapped persons or those suffering from a mental disease (Codes of Practice, *supra* note 3, Code C, ¶ 3.10.), individuals who are blind, visually handicapped, or unable to read (*id.* ¶ 3.14), and individuals who voluntarily go to the police station (*id.* ¶¶ 3.15-3.16.).

67. *Id.* ¶ 4.

68. *Id.* ¶ 5.1.

69. Codes of Practice, *supra* note 3, Code C, ¶ 6.

70. *Id.* ¶ 8.

71. *Id.* ¶¶ 9, 15-17.

72. *Id.* ¶¶ 11-12.

73. ZANDER, *supra* note 51, at 123. *See also* Leslie Curtis, *Policing the Street*, in *THE POLICE: POWERS, PROCEDURES AND PROPRIETIES* 95-102 (John Benyon & Colin Bourn eds., 1986) (providing recommendations made by the Police Federation to the Royal Commission on Criminal Procedure and criticisms of the resulting legislation and accompanying Codes).

74. ZANDER, *supra* note 51, at 123.

75. PACE, *supra*, note 14, at s 66. *But cf.* *R. v. McCay*, 1 All E.R. 232, 235-36 (C.A. 1991). The Criminal Division of the Court of Appeal gave great credence to the Codes of Practice. *Id.* It also stated that because both Houses of the Secretary of State had to approve the Codes before they became effective, the Codes had "the full authority of Parliament behind it." *Id.* The Court based its judgment on the fact that the procedures from Code D were followed explicitly. *Id.*

### B. Usage of the Right to Silence

The right to silence was understood as affecting two specific areas of the criminal process. First, no person was required to answer the questions of police officers or to give any statement.<sup>76</sup> Second, the right to silence ensured that a person charged with a criminal offense was not obligated to give evidence that could be used in court at any stage of the proceeding.<sup>77</sup> This second point is commonly referred to as the right against self-incrimination. Under the prior right to silence, a person who exercised that right was not subject to any automatic sanction during the trial.<sup>78</sup>

Refusing to respond to questioning by police officers was not considered willful obstruction of justice.<sup>79</sup> Chief Justice Lord Parker held that wilfulness, in this context, was something done without legal excuse.<sup>80</sup> He held, however, that "the whole basis of common law is the right of the individual to refuse to answer questions put to him by persons of authority."<sup>81</sup>

Even if a suspect remained silent during interrogation, police officers were not forbidden from continuing questioning.<sup>82</sup> One of the underlying goals of detention was to get the person to break down the wall of silence<sup>83</sup> and cooperate with the officers.<sup>84</sup> In

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76. ROGER LENG, THE ROYAL COMM'N ON CRIMINAL JUSTICE, THE RIGHT TO SILENCE IN POLICE INTERROGATION: A STUDY OF SOME OF THE ISSUES UNDERLYING THE DEBATE 1 (1993).

77. *Id.*

78. *Id.* at 2. It is argued by many that the new caution will greatly affect the right against self-incrimination because the prosecution will be able to ask that the court draw an inference of guilt during the prosecution's case in chief so that the inference can be added to other evidence that will make out the prima facie case. The other evidence can be as little as the officer's reasonable grounds for originally arresting the defendant. Ede, *supra* note 10, at 12.

79. *Rice v. Connolly*, 2 Q.B. 414, 418 (C.A. 1966).

80. *Id.* at 419.

81. *Id.*

82. See LENG, *supra* note 76, at 1.

83. To remain silent while continuously being questioned by police officers is considered to be a very difficult task. Benyon, *supra* note 3, at 116 [citation omitted]. Indeed, there have been cases where people have confessed to crimes which never took place. *Id.* at 116-17.

84. LENG, *supra* note 76, at 7. See also Home Office Circular No. 31/1964, *supra* note 30, at 166. The preamble to the Judges' Rules sets out principles which are not to be affected by the Rules. *Id.* In all situations, the overriding principle to be presumed is that answers given by a person in response to a police officer's questions are to be strictly voluntary. *Id.* at (e). Answers are not to be given in fear of incurring prejudice or as a result of some inducement exercised by a person in authority. *Id.*

Great Britain, there is a social obligation to aid the police in any type of investigation.<sup>85</sup>

Over the past twenty-five years, judges and prosecutors have been criticized for failing to instruct juries that a suspect's silence does not indicate guilt.<sup>86</sup> In 1972, the Criminal Law Revision Committee [hereinafter CLRC] recommended that juries be directed to draw an adverse inference if the accused used a defense at trial which he did not raise during police interrogation.<sup>87</sup> The report also recommended that the caution be modified and administered only when the suspect is actually charged.<sup>88</sup> These proposals were rejected in the 1981 Report by the Royal Commission on Criminal Procedure, which is a foundation of PACE.<sup>89</sup> According to the report, the proposals placed undue psychological pressure on the suspect, which might cause him to make incriminating statements.<sup>90</sup> Further, the Commission concluded that the CLRC recommendations were inconsistent with the placement of the burden of proof upon the prosecution.<sup>91</sup>

The Royal Commission on Criminal Justice Study of the Right to Silence in Police Interrogation is one of the latest reports among a myriad of studies.<sup>92</sup> The research sample used in this report is

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85. *Rice*, 2 Q.B. at 419. See also Home Office Circular No. 31/1964, *supra* note 30, at 166. The first principle in the preamble of the Judges' Rules states that "citizens have a duty to help a police officer to discover and apprehend offenders." *Id.* at (a).

86. LENG, *supra* note 76, at 2.

87. *Id.* See also Benyon, *supra* note 3, at 115. This recommendation was made based on the public perspective that criminals were undermining the law and that the law of evidence should be more harsh on criminals. *Id.*

88. LENG, *supra* note 76, at 3. The caution was administered at the time of arrest, prior to an interview, and when a person was charged with a criminal offense. *Id.*

89. *Id.* It should be noted that PACE neither directly nor indirectly speaks of the procedure to be used for warning suspects of the rights and consequences in answering police interrogatories. See generally PACE, *supra* note 14. The Commission, as evidenced by its criticism of the CLRC's proposals, considered changes in the right to silence and the caution providing for the right. See LENG, *supra* note 76, at 3. Unable to make any concrete determinations while constructing PACE, the right to silence was ignored in this statute. The Act merely authorized a code to be created in regards to this subject. PACE, *supra* note 14, at s 66(b). This Code, however, is not law.

90. LENG, *supra* note 76, at 3.

91. *Id.*

92. This report gives a synopsis of eleven different studies done since 1979. Many are criticized for their methods, for their failure to identify which factual situations qualify as those invoking the right to silence, and for their lack of recording certain statistics which Leng deems necessary for a thorough understanding of the debate. *Id.* at 10-15.

from 1986 to 1988 and consists of 1080 cases from six police stations.<sup>93</sup> Each case was followed from the point of arrest or record until the final disposition.<sup>94</sup> According to this report, the right to silence is exercised when "having been asked a relevant question, and having been given a reasonable opportunity to do so, [a suspect] fails to disclose a particular matter which he later raises or intends to raise in his [own]<sup>95</sup> defence."<sup>96</sup>

Of those cases studied by the Commission, 838 suspects were interviewed by police.<sup>97</sup> Of those, thirty-eight people exercised the right to silence (4.5%)<sup>98</sup> and eleven more (1.3%) refused to answer some questions, but not enough to qualify as an exercise of the right to silence.<sup>99</sup>

In addition, the findings of the Commission indicate that suspects who had a solicitor present for some or all of the interview, or who had some legal advice, were more likely to invoke the right to silence.<sup>100</sup> In cases where this information was available, ten percent of the suspects exercised the right to counsel<sup>101</sup> pursuant to PACE.<sup>102</sup> Of the thirty-eight people who exercised the right to silence, nine (24%) had a solicitor for all or some of the questioning,<sup>103</sup> and another seven (18%) received legal advice in person or on the telephone before questioning began.<sup>104</sup> These findings are considered to be consistent with those of other studies.<sup>105</sup>

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93. *Id.* at 6.

94. *Id.*

95. This study deems silence to be significant only when evidence not disclosed relates to the suspect's own involvement. Keeping silent about the involvement of someone else in a criminal offense is not considered to be in the same category as protection from self-incrimination. LENG, *supra* note 76, at 8-9.

96. *Id.* at 8.

97. *Id.* at 17.

98. *Id.*

99. *Id.*

100. LENG, *supra* note 76, at 18.

101. *Id.*

102. See PACE, *supra* note 14, s 58 and accompanying text.

103. LENG, *supra* note 76, at 18.

104. *Id.* These statistics seem to show that less than half of the people exercising the right to silence had legal assistance.

105. *Id.* A more thorough statistical discussion of the correlation between the right to counsel and the right to silence can be found in MIKE MCCONVILLE & JACQUELINE HODGSON, ROYAL COMMISSION ON CRIMINAL JUSTICE, CUSTODIAL LEGAL ADVICE AND THE RIGHT TO SILENCE (1993). See also *Custodial Legal Advice and the Right to Silence*, 1993 CRIM. L. REV. 477 (providing a review of the Commission Research Study by McConville and Hodgson).

A person invokes the right to remain silent to avoid self-incrimination in the event the case goes to trial. The Royal Commission Report authored by Roger Leng criticizes some studies for not following the cases through to the outcome of the case.<sup>106</sup> In his research, of the thirty-four cases in which the right to silence was invoked, outcomes are known for all but four.<sup>107</sup> Of those thirty-four cases, sixteen cases (47%) resulted in conviction,<sup>108</sup> three cases (9%) ended with not guilty verdicts,<sup>109</sup> six cases (18%) were dropped later on in proceedings,<sup>110</sup> and in nine cases (26%) no further action was taken beyond the questioning.<sup>111</sup> The number of people who exercised the right to silence was low. This does raise the question of whether or not there should even be a right to silence. From Leng's study, it is difficult to determine whether exercising the right to silence is more helpful or harmful.

### C. Arguments for Changing the Right to Silence

The ambush defense put forward by defendants was a major concern to police officers, and was the motivating factor behind the Home Secretary's proposal to legislate in this area.<sup>112</sup> An ambush defense is a defense that is brought at trial but is unknown prior to trial to the police and prosecution.<sup>113</sup> This tactic creates a disadvantage to the prosecution because the police are unable to investigate the defense. As a result, the prosecution is unable to prepare an effective counterattack to such a defense.<sup>114</sup>

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106. LENG, *supra* note 76, at 10-15.

107. *See id.* at 19.

108. *Id.* Of the sixteen convictions, nine were a result of a guilty plea and seven were a result of a guilty verdict after trial. *Id.*

109. *Id.*

110. LENG, *supra* note 76, at 19.

111. *Id.*

112. ZANDER, *supra* note 51, at 280. The frequent occurrence of ambush defenses was also the motivating factor behind Michael Howard's legislation. *See Howard Court Crackdown Condemned by Lawyers*, THE HERALD (Glasgow), May 17, 1995, at 6.

113. LENG, *supra* note 76, at 45. Ambush defenses often have the following characteristics: (1) they are raised for the first time at trial; (2) they take the prosecution by surprise; (3) the defense could have been given during interrogation; (4) the prosecution is inconvenienced or prejudiced by the late appearance of the defense; (5) the accused may be unfairly advantaged because of the time to perfect and boast his explanation; (6) the risk of acquittal is greater; and (7) the defense is false. *Id.* at 47.

114. *Id.*

Parliament attempted to curb this problem with the enactment of the Criminal Justice Act 1967.<sup>115</sup> Specifically, section 11 of that Act requires the accused to give the prosecution notice of any specific alibis and witnesses who will support the defense's case.<sup>116</sup> If a defendant fails to give notice, the trial judge may refuse to admit the alibi into evidence.<sup>117</sup> In the event the evidence is admitted, the judge may comment to the jury on the lack of notice.<sup>118</sup> The 1972 Criminal Law Revision Committee did not believe that the notice requirement was sufficiently effective,<sup>119</sup> and thus recommended that no caution be given before interrogation.<sup>120</sup>

Subsequently, the Home Office Working Group was formed in 1988 to examine the ambush defense problem.<sup>121</sup> It failed to find any evidence to support the claim of widespread usage of the defense.<sup>122</sup> The Working Group recommended that the caution be modified to warn suspects that the failure to answer questions would be recorded, and any failure to raise a defense which is later used at trial would be less believable to a jury.<sup>123</sup> Consistent with that recommendation, the Royal Commission on Criminal Justice found that ambush defenses occur with much less frequency than initially claimed by proponents of the elimination of the right to silence.<sup>124</sup>

Exactly what the judge can and cannot say, however, is not as clear as some assert. On one hand, a judge is permitted to suggest to the jury that it may question why a suspect would announce that he is reserving his statement for court, even though no charges have yet been imposed.<sup>125</sup> However, judges are unable to com-

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115. EASTON, *supra* note 48, at 11.

116. Criminal Justice Act 1967, s 11(1) (Eng.). The notice is to be given in accordance with s 144 of the Magistrates' Court Act 1980. *Id.* at s 11(3). This must be done either in court during or at the end of proceedings before the examining justices, or in writing to the solicitor. *Id.* at s 11(6).

117. LENG, *supra* note 76, at 45.

118. *Id.*

119. See generally EASTON, *supra* note 48, at 47-55.

120. See LENG, *supra* note 76, at 46. The Committee's recommendation was based on the theory that the caution would provide an excuse for not providing a false story until it becomes difficult for the prosecution to reveal the actual story. *Id.*

121. EASTON, *supra* note 48, at 24.

122. *Id.* at 49.

123. LENG, *supra* note 76, at 46.

124. See *id.* at 50-55.

125. See *R. v. Gerard*, 1 All. E.R. 205, 206 (Crim. App. 1948).

ment on a person's exercise of the right to silence.<sup>126</sup> Further, a judge cannot instruct the jury to use its common sense when considering a suspect's refusal to say anything.<sup>127</sup> This prevents juries from making adverse inferences based on the suspect's failure to provide an excuse or explanation.<sup>128</sup>

Another argument for a modification of the right to silence is that common sense dictates a response when faced with a serious accusation.<sup>129</sup> The rationale is that only those who have something to hide would not attempt to counter the accusation with some excuse or explanation.<sup>130</sup> Although juries cannot be instructed to use common sense,<sup>131</sup> and are often instructed not to consider such adverse inferences,<sup>132</sup> it is doubtful whether jurors truly put aside their common sense while contemplating a verdict.<sup>133</sup>

The modification in the right to silence, allowing juries to consider why silence is used by a suspect, would alleviate some problems for the jury. For example, an instruction to use common sense is problematic because common sense is not universal. While many people expect explanations when confronting people with a serious accusation,<sup>134</sup> there is no justification for applying ambiguous common sense in the lieu of laws. Common sense is a nebulous concept while laws provide concrete restrictions on what people can and cannot do. Thus, modifying the right to silence will help minimize jurors' struggles to put aside their feelings about what a reasonable person would do when accused of a crime.<sup>135</sup>

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126. See generally ZANDER, *supra* 51, at 135-36.

127. R. v. Davis, 43 Crim. App. Rep. 215, 218 (Crim. App. 1959).

128. ZANDER, *supra* note 51, at 135. There is one instance when a judge may suggest to a jury that an inference of guilt may be drawn from silence. This situation arises when two people are speaking on equal terms and the first accuses the second of a crime but the accused does not deny the accusation. *Id.* at 135-36.

129. See EASTON, *supra* note 48, at 62-65.

130. *Id.* at 62. See also Fiona Bawdon, "I'm Going to Lose it All", THE TIMES (London), Oct. 18, 1994. A solicitor being accused of assisting a suspect, felt that he was in a "no-comment" interview, but did not exercise his right to silence for fear that his failure to speak would impact the jury's decision. *Id.*

131. Davis, *supra* note 127, at 218.

132. See EASTON, *supra* note 48, at 62. The standard direction to the jury states that anyone suspected or charged with a criminal offence is not obligated to answer questions about it and that the jury must not hold the silence or refusal to answer questions against the person at trial. See ZANDER, *supra* note 51, at 135.

133. See EASTON, *supra* note 48, at 62.

134. *Id.* at 63-64.

135. *Id.*

### III. The New Right to Silence

Years of debate, reports by the Criminal Law Revision Committee,<sup>136</sup> the Home Office Working Group,<sup>137</sup> the Royal Commission on Criminal Justice,<sup>138</sup> Home Office Circulars,<sup>139</sup> and studies by both individuals<sup>140</sup> and organizations<sup>141</sup> have culminated into governmental action. In 1993, Michael Howard, the Home Secretary, announced his plan to crack down on crime.<sup>142</sup> This resulted in the passage of the Criminal Justice and Public Order Act.<sup>143</sup> The right to silence provisions of this Act were designed to secure more convictions of guilty individuals.<sup>144</sup> Even though the Act was slightly modified from its original version as a Bill, not all of the measures were well received by the public.<sup>145</sup>

#### A. *The Right to Silence in Interrogation*

Under the new law regarding the right to silence, a suspect experiences the impact of the changes as soon as the interrogation begins.<sup>146</sup> Since the newly worded caution is longer and more

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136. CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT, EVIDENCE (1972).

137. HOME OFFICE, REPORT OF THE WORKING GROUP ON THE RIGHT TO SILENCE (1989).

138. LENG, *supra* note 76.

139. See Caroline Ball, *Cautioning: A Radical Shift in Policy?*, 144 NEW L.J. 495 (1994)(discussing Home Office Circular 18/1994).

140. See generally LENG, *supra* note 76, at 10-15 (a quick review of a variety of studies by individuals).

141. See Curtis, *supra* note 73, at 95-102. This gives a brief examination of facts and analysis presented to the Royal Commission on Criminal Procedure by the Police Federation of England and Wales. The Federation, which represents the police, has the duty and the authority to make representations on all welfare and efficiency matters affecting the police. *Id.* at 102, note 1.

142. Richard Ford, *27-Point Plan has Yet to be Delivered*, THE TIMES (London), Oct. 13, 1994.

143. The Criminal Justice and Public Order Bill is not limited to the right to silence. It consists of many points including juvenile adjudication, cutting police paperwork, tougher community sentences, court procedures, the bail process, and sentencing. *Id.*

144. See Zander, *supra* note 11, at 14.

145. See Bawdon, *supra* note 130; Ede, *supra* note 10, at 12; Ford, *supra* note 4, at 1; Zander, *supra* note 11, at 14; Heather Mills & Terry Kir, *Ending the Right to Silence 'Is a Breach of Human Rights'*, THE INDEPENDENT (London), Oct. 7, 1993, at 4.

146. Ede, *supra* note 10, at 12.



ambiguous,<sup>147</sup> it is unlikely that people will understand their legal position when this caution is read.<sup>148</sup> Confusion is likely to result because the suspect is first told that he does not have to say anything.<sup>149</sup> However, he is then told that if he remains silent and does not put forth his defense or alibi during interrogation, the court may use that against him.<sup>150</sup>

Historically, there has been a slight contradiction between the rights and duties of an interviewee. The first principle of the preamble of the Judges' Rules states that citizens have a duty to assist police officers in discovering and apprehending offenders.<sup>151</sup> However, the actual Rule states that the suspect has the right to silence.<sup>152</sup> In the past this so-called right to silence was enforced. The proposed caution amplifies the tension between the right to silence and the duty to assist police by bringing it to the attention of both the police and the suspect. The question that remains unanswered is whether the right or the duty prevails.

The Home Office argues that the caution still allows a suspect to choose how to handle the interrogation.<sup>153</sup> It is the consequence of remaining silent that is not clear. If the suspect remains silent, the court will be allowed to make adverse inferences. This is contrary to the *Davis* holding that a judge cannot instruct the jury to use its common sense when considering a suspect's refusal to say anything.<sup>154</sup>

Nonetheless, Clause 33 of the Criminal Justice and Public Order Act specifically allows an adverse inference to be drawn when the accused, questioned or charged, unreasonably fails to mention a fact or excuse later relied upon in court.<sup>155</sup> However, the unreasonableness standard is not explained in the new caution.<sup>156</sup> Consequently, it is unclear whether the term "unreasonable" takes into account the many emotions that a suspect may experience during his interview.<sup>157</sup>

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147. See *supra* part I.

148. See Ede, *supra* note 10, at 12.

149. See *supra* part I.

150. *Id.*

151. Home Office Circular No. 31/1964, *supra* note 30, at 166.

152. *Id.*

153. See Ede, *supra* note 10, at 12.

154. *Davis*, *supra* note 127, at 218.

155. Home Office Circular No. 31/1964, *supra* note 30, at pmb.

156. See *supra* part I.

157. See, e.g., Bawdon, *supra* note 130. A criminal law solicitor who was questioned under the Police and Criminal Evidence Act described his experience as follows: "Everything flashes through your mind. I was convinced that they had

In addition, the new caution will result in: (1) drastic changes to section 10 of the Code of Practice for the Detention, Treatment and Questioning of Persons<sup>158</sup> or (2) police officers explaining the caution and the rights of the suspect, pursuant to the Code Notes of Guidance.<sup>159</sup> All of section 10 is based on the general English principle that suspects need not answer questions which may incriminate.<sup>160</sup> Ultimately section 10.4 will have to be altered to accommodate a newly worded caution.<sup>161</sup> Furthermore, the notes of guidance pertaining to that section<sup>162</sup> also will have to be changed to be consistent with the provisions in the Criminal Justice and Public Order Act. Otherwise, to preserve the intent of the Code Notes of Guidance, the police still will be required to explain the caution and its significance to those who do not understand it.<sup>163</sup> Considering that one half of the British citizens tested by researchers Claire and Gudjonsson did not understand the previous caution,<sup>164</sup> it is likely that the length and the complexity of the new caution<sup>165</sup> will result in police officers spending more time attempting to get information from detainees. Officers will be required to explain the consequences of the options granted by the new right to silence.

### *B. The New Caution and the Right to Counsel*

In the United States, *Miranda* warnings not only advise suspects of the right to remain silent, but also of the right to legal counsel.<sup>166</sup> These rights are embodied in the Sixth Amendment of the United States Constitution.<sup>167</sup> Although the British right

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already made the decision to charge me if they could. I thought, 'I'm going to lose everything my practice, my reputation, my home.'" *Id.*

158. Codes of Practice, *supra* note 3, Code C, ¶ 10.

159. *Id.* at Notes 10C and 10D.

160. *See generally id.*

161. *Id.* ¶ 10.4. For the language of the new caution *see supra* part I.

162. *Id.* at Notes 10C and 10D.

163. This would be consistent with the guidelines accompanying the caution instructions in ¶ 10.4 of Code C. Codes of Practice, *supra* note 3, Code C, ¶ 10.4

164. Zander, *supra* note 11, at 14. Of the 100 adults tested by Claire and Gudjonsson only 42% fully understood the old caution. Additionally, only 52% understood that the caution was designed to inform people of their right to remain silent. *Id.*

165. *See* Bawdon, *supra* note 130. Dr. Gudjonsson, a reader in forensic psychology, is noted in this article as stating that the new caution will lead to many legal battles because the caution deals not only with the option to speak, but also with the consequences of that decision. *Id.*

166. *See Miranda*, 384 U.S. at 473-74.

167. U.S. CONST. amend. VI.

to silence was only recently provided for by statute, the right to counsel has been embodied in PACE since 1984.<sup>168</sup> Section 58 of PACE grants the accused the right to consult a solicitor<sup>169</sup> at any time.<sup>170</sup>

Due to the complexity of the new caution, it is argued that there will be a greater demand for legal advice during the initial proceedings.<sup>171</sup> After PACE went into effect, only about twenty-five percent of the people arrested requested a solicitor.<sup>172</sup> In 1991, revisions were made to the Code of Practice<sup>173</sup> requiring that an arrested person be informed of his right to consult privately with a solicitor<sup>174</sup> and that legal advice is available free of charge.<sup>175</sup> In addition, the charging area must prominently display a poster advertising the right to legal advice.<sup>176</sup> These revisions appear to have had a significant effect. Specifically, in the first five months after enactment of the revisions,<sup>177</sup> there was a thirty-nine percent increase in the requests for Duty Solicitors.<sup>178</sup>

The new right to silence raises concerns that the right and access to counsel will be hindered.<sup>179</sup> Although police officers are forbidden from trying to dissuade a person from seeking legal counsel,<sup>180</sup> it is possible that the proposed caution may result in

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168. See PACE, *supra* note 14. Before PACE, the right to legal counsel was also governed by the Judges' Rules. See Home Office Circular No. 31/1964, *supra* note 30, at 166. The Preamble stated the principle "[t]hat every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor." *Id.* at 167. This should be permitted as long as it does not cause any unreasonable delay in the investigation process. *Id.*

169. For an extensive discussion of the differences between a solicitor and a barrister, and other aspects of the legal profession see ZANDER, *supra* note 51, at 628-89.

170. PACE, *supra* note 14, at s 58.

171. *Id.*

172. ZANDER, *supra* note 51, at 155. About twenty percent actually get a solicitor. *Id.*

173. *Id.* at 155-56.

174. Code of Practice, *supra* note 3, Code C, ¶ 3.1(ii).

175. *Id.* For information on the Duty Solicitor Scheme see ZANDER, *supra* note 51, at 155-56, 520-22.

176. Code of Practice, *supra* note 3, Code C, ¶ 6.3. The poster should be in English with translations into the principal European Community languages, the main ethnic minority languages, and Welsh. *Id.* at Code C, Note 6H. The poster should be displayed in places where such information is likely to be of assistance. *Id.*

177. The 1991 revisions went into effect April 1, 1991. Codes of Practice, *supra* note 3, at 1.

178. ZANDER, *supra* note 51, at 156.

179. See generally Ede, *supra* note 10, at 12.

180. Code of Practice, *supra* note 3, Code C, ¶ 6.4.

even *less* legal consultation. The caution is complex and the wording can be very intimidating, if not threatening. The language may speak for itself and even convince people to talk without recognizing the significant impact of the new wording. If this happens, there will be an influx of petitions claiming that the evidence gathered from the interview should be deemed inadmissible.<sup>181</sup> Petitions will also accumulate arguing that the exercise of the right to silence should not be used against the defendant. Both types of claims will be made on the basis that the defendant was unable to fully understand the consequences of the caution.<sup>182</sup>

Another concern is the method solicitors will use to advise clients.<sup>183</sup> Despite the police officers' belief that the solicitors will advise suspects to exercise their right to silence,<sup>184</sup> studies have shown that this advice is rarely given.<sup>185</sup> In the 1993 McConville-Hodgson study for The Commission on Criminal Justice, only seventeen percent of legal advisors gave unprompted advice to remain silent,<sup>186</sup> another 4.8% advised silence when asked.<sup>187</sup> The percentage of advisors who usually advised cooperating with the police is 47.3,<sup>188</sup> while another 30.9% generally gave no real guidance.<sup>189</sup>

Nonetheless, the rationale for giving any advice is case specific.<sup>190</sup> In general, cooperation is advised if the suspect admits the offense and there appears to be no reason to disbelieve the client.<sup>191</sup> Cooperation will also be advised if the suspect gives a defense or an explanation,<sup>192</sup> if the client denies any involve-

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181. See Ford, *supra* note 4, at 1.

182. *Id.*

183. See Ede, *supra* note 10, at 12. In deciding whether or not to advise the client to remain silent, the legal advisor is likely to find it difficult to determine whether the court will consider it reasonable under the circumstances for the accused to remain silent. *Id.*

184. MCCONVILLE & HODGSON, *supra* note 105, at 67.

185. See *id.* at 69, tbl. 5.1. This table gives advisors' broad strategies towards police questions used by advisors. For information on client strategies for confronting police questions, see tbl. 5.2. *Id.* at 70.

186. *Id.* at 69, tbl. 5.1.

187. *Id.*

188. MCCONVILLE & HODGSON, *supra* note 105, at 73-74.

189. *Id.*

190. *Id.* at 70.

191. *Id.* at 70-73. In this situation, despite the legalistic view that counsel should be certain that every element of the crime is met and that there is a factual basis to the admission, advisors rarely make such effort. *Id.* at 70.

192. See MCCONVILLE & HODGSON, *supra* note 105, at 73-74.

ment and has an alibi,<sup>193</sup> or if the advisor fears that exercising the right to silence will be viewed negatively by the police and the trier of fact.<sup>194</sup>

Advising cooperation because of fear of adverse inferences is consistent with one motivation behind advising silence — the counsel's opinion that the suspect may inadvertently make incriminating remarks.<sup>195</sup> It is this situation that will occur more frequently under a change in the right to silence caution.<sup>196</sup> It will be difficult for counsel to determine when it is or is not reasonable for a suspect to remain silent when faced with an accusation.<sup>197</sup>

One of the facts considered when deciding how to advise a client is how much evidence the police already have.<sup>198</sup> In some cases, cooperation will elicit information from the police that could help in the defense.<sup>199</sup> In other cases, silence would be more beneficial. For example, if the police have little or no evidence, total silence may be the better approach to a police interrogation. This is because clause 34 of the Criminal Justice and Public Order Act will not allow adverse inferences to be drawn until evidence is given against the accused of his failure to provide a defense during the interrogation.<sup>200</sup> As a result, "a person cannot be committed for trial or have a case to answer partly on an inference."<sup>201</sup>

Before advising the client, the solicitor must: (1) weigh the information given to him by the client; (2) determine whether or not the police even have any evidence; and (3) consider any statement made by the client before the legal advice was given. If statements were already made, the limitation in clause 34 is probably worthless to the client, and silence may be a disadvantage to him. Conversely, the advisor must determine *what* the police have against the client. Cooperation with the police may be helpful in gathering more information, but it is done at the risk of self-incrimination by the client.

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193. *See id.* at 74-75.

194. *See id.* at 75-77.

195. *See id.* at 93-95.

196. Ede, *supra* note 10, at 12.

197. *Id.*

198. *See* McCONVILLE & HODGSON, *supra* note 105.

199. *Id.*

200. Ede, *supra* note 10, at 12.

201. *Id.*

The solicitor may also advise silence and state his advice and rationale on the record<sup>202</sup> at the beginning of the interview.<sup>203</sup> At trial, the solicitor must then argue before the trier of fact that he advised silence and that adverse inferences should not be drawn.<sup>204</sup> However, the solicitor may not be called upon to explain *why* he advised his client to remain silent as it may be a violation of the advisor-client privilege.<sup>205</sup>

Due to the uncertain effects of the new caution, a suspect may question tactical advice given by a solicitor sometime in the future.<sup>206</sup> If a solicitor offers erroneous advice the suspect could change legal advisors and then claim in evidence that he should not be penalized for the first solicitor's error.<sup>207</sup> If this approach proves ineffective, the solicitor may be liable for misrepresentation.

### C. *The Judicial Effect*

The biggest concern over the new right to silence goes beyond the police station and focuses instead on the courtroom. The impact was of great enough concern to result in its inclusion in the caution,<sup>208</sup> as recommended by the Home Office Working Group.<sup>209</sup>

Under clause 34 of the Criminal Justice and Public Order Act, if the accused is questioned or charged with a criminal offense and unreasonably fails to mention something which he later relies upon in his defense, an adverse inference can be drawn.<sup>210</sup> The prosecutor may then ask the court to draw an adverse inference of guilt from the silence exercised during interrogation.<sup>211</sup> Furthermore, the prosecutor may ask the court to add the adverse inference "to

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202. An accurate and verbatim record of the interview must be made. Code of Practice, *supra* note 3, Code C, ¶¶ 11.5(a),(c). If a verbatim record cannot be made, an account summarizing the interview must be drafted. *Id.* ¶ 11.5(c):

203. Ede, *supra* note 10, at 12. The legal advisor is also entitled to the opportunity to read and sign the written record of the interview. Codes of Practice, *supra* note 3, Code C, ¶ 11.11

204. By advising silence, a solicitor may lose his credibility with the jury and ultimately cause the defendant's credibility to be harmed. Zander, *supra* note 11, at 14. Suspects who are solicitors by occupation are especially reluctant to exercise the right to silence for fear of how the jury would interpret a legal advisor's inability to give an explanation. See Bawdon, *supra* note 130.

205. EASTON, *supra* note 48, at 118.

206. *Id.*

207. *Id.*

208. See *supra* part I.

209. EASTON, *supra* note 48, at 27.

210. Criminal Justice and Public Order Act, 1994, ch. 33, § (1)(d).

211. *Id.*

other evidence in order to make out a prima facie case.”<sup>212</sup> Other evidence added to the inference can be as little as what was needed to create the reasonable grounds needed for arrest.<sup>213</sup> The judge may then comment to the jury that they can make an adverse inference.<sup>214</sup> Thus, the exercise of the right to silence may ultimately influence the jury’s determination of guilt or innocence.

The judge is required to summarize both the law and the facts.<sup>215</sup> The summation of facts can severely influence the jury’s decision,<sup>216</sup> rather than restating the facts in a clear, logical, and impartial fashion.<sup>217</sup> Mr. Justice Bridge, in his three day summary of the ‘Birmingham Six’ case,<sup>218</sup> gave innumerable indications of his opinion favoring the prosecution.<sup>219</sup> Further, he believed that a judge should be able to express his opinion to the jury “and not pretend to be a kind of Olympian detached observer.”<sup>220</sup> Viewpoints such as those expressed and acted upon by Mr. Justice Bridge, accompanied by the statutory permission to do so, could result in disaster. Such thinking and action will lead to interference with the jury’s duty and infringement of the defendant’s privilege against self-incrimination.

#### IV. Treatment of Britain’s Right to Silence by the European Court

A disgruntled defendant who has exhausted his domestic remedies<sup>221</sup> has one other option outside the English judicial system. That option is to file a petition to the Secretary General of the Council of Europe alleging that he is a victim of a violation of the Convention by a High Contracting Party.<sup>222</sup>

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212. *Id.*

213. *Id.*

214. *Contra Davis, supra* note 127, at 218.

215. ZANDER, *supra* note 51, at 454.

216. *Id.* at 457.

217. *Id.* at 456.

218. The Birmingham Six defendants were charged with IRA bombings of pubs that resulted in many injuries and deaths. *Id.* at 457.

219. *Id.*

220. ZANDER, *supra* note 51, at 457.

221. Convention, *supra* note 19, art. 26.

222. *Id.* art. 25 (1). The petition must be filed within six months from the date of final decision. *Id.* art. 26.

A. *European Convention for the Protection of Human Rights and Fundamental Freedoms*

The Council of Europe [hereinafter Council] was established in May 1949 and is still very active today.<sup>223</sup> The aim of the Council is "to achieve a greater unity between its Members."<sup>224</sup> Conditions of membership in this organization include the recognition and maintenance of human rights and respect for the rule of law within each member's jurisdiction.<sup>225</sup>

During 1949 and 1950, the Council drafted a convention on human rights.<sup>226</sup> The Council embraced the cause of human rights for two main reasons.<sup>227</sup> First, there was fear of a resurgence of a dictatorship in Western Europe.<sup>228</sup> The Members of the Council wanted to be able to detect the makings of a dictatorship early, to prevent disaster in that country and all of Europe, and to restore that land to a democratic society.<sup>229</sup> The Members sought to institute the rights and freedoms to be respected in democratic nations, and to establish an institution to monitor these rights.<sup>230</sup> Second, the growing tension between the East and the West prompted the Council to create the Convention.<sup>231</sup> The Council members were well aware of the Soviet threat of communism.<sup>232</sup> The Convention was a reaffirmation of their beliefs in the value of democracy.<sup>233</sup>

The Convention was signed in Rome on November 4, 1950.<sup>234</sup> It became effective on September 3, 1953<sup>235</sup> following its ratification by eight member countries,<sup>236</sup> the first being the

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223. A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN EUROPE* 2 (1993).

224. *Id.* at 3.

225. *Id.*

226. MARK W. JANIS & RICHARD S. KAY, *EUROPEAN HUMAN RIGHTS LAW* 1 (1990).

227. ROBERTSON & MERRILLS, *supra* note 223, at 3.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 4.

232. ROBERTSON & MERRILLS, *supra* note 223, at 4.

233. *Id.*

234. JANIS & KAY, *supra* note 226, at 1.

235. *Id.*

236. *Id.* The first eight ratifying countries were Denmark, the Federal Republic of Germany, Iceland, Ireland, Luxembourg, Norway, Sweden, and the United Kingdom. *Id.*



United Kingdom.<sup>237</sup> By signing the Convention, the members reiterated their belief in the fundamental freedoms which form the "foundation of justice and peace in the world and are best maintained, on the one hand, by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend."<sup>238</sup>

The Convention provided for the establishment of a judicial institution to oversee and enforce the Convention upon its signatories.<sup>239</sup> The Convention created a European Commission of Human Rights (Commission) and a European Court of Human Rights (Court).<sup>240</sup> The Commission is empowered to receive complaints from any individual, group of individuals, or non-governmental organization asserting itself as a victim of a violation by one of the High Contracting Parties to the Convention.<sup>241</sup> If the Commission is unsuccessful in crafting a favorable settlement between the victim and the High Contracting Party, the case may be brought before the Court<sup>242</sup> by either the Commission or the High Contracting Party.<sup>243</sup>

Both the United Kingdom and France opposed the proposition of creating a Commission and a Court.<sup>244</sup> These two nations actually drafted a proposal rejecting the recommendation of the Committee on Legal and Administrative Question to create a Commission and a Court.<sup>245</sup> After a two day debate, the proposal to reject the Committee recommendation was itself, rejected, and the concept of a judicial system was approved.<sup>246</sup>

The United Kingdom then proposed that individuals be forbidden from filing complaints with the Commission. This was motivated in part by the belief that there would be a myriad of applications from individuals imagining they have a complaint against the country.<sup>247</sup> The proposal was supported by Nor-

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237. The United Kingdom ratified the Convention in March 1951 and the First Protocol in November 1952. ROBERTSON & MERRILLS, *supra* note 223, at 13.

238. Convention, *supra* note 19, at pmb1.

239. *Id.* art. 19.

240. *Id.*

241. *Id.* art. 25.

242. *Id.* art. 47.

243. Convention, *supra* note 19, arts. 44 and 48.

244. JANIS & KAY, *supra* note 226, at 30.

245. *Id.*

246. *Id.*

247. *Id.* at 29.

way,<sup>248</sup> but rejected by the Council. The Council reasoned that allowing individual access was consistent with the principle of preserving human dignity.<sup>249</sup> As a result of so much debate, the Committee of Ministers made optional both the jurisdiction of the Court and the right of individuals to file a petition.<sup>250</sup> The United Kingdom did not consent to the optional clauses when it ratified the Convention.<sup>251</sup> Further, the United Kingdom did not consent when the Court was established in 1958.<sup>252</sup> It was not until after years of debate in Parliament that the United Kingdom finally consented to both optional provisions.<sup>253</sup>

### *B. The Convention's Treatment of the Right to Silence*

The Convention does not specifically provide that persons charged with a criminal offense have the right to remain silent. Instead, somewhat related freedoms are described in articles 5-8.<sup>254</sup> Specifically, article 5 ensures that everyone has liberty and security rights.<sup>255</sup> Article 6 provides for the entitlement of a fair and public hearing, the presumption of innocence, and some other minimum rights.<sup>256</sup> In accordance with article 7, individuals may only be charged with criminal offenses that exist at the time of the action and be penalized in accordance with the provisions at the time of the crime.<sup>257</sup> Last in this cluster of freedoms related to the right to silence, article 8 grants individuals the right "to respect for his private and family life, his home and his correspondence."<sup>258</sup>

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248. *See id.* at 29-30. (Norway's objection to allowing individuals to petition the Commission).

249. JANIS & KAY, *supra* note 226, at 30.

250. *Id.* at 32.

251. *See generally id.* at 34-37.

252. *See generally id.*

253. *See id.* at 34-35 (arguments made in Parliament).

254. *See generally* Convention, *supra* note 19, arts. 5-8.

255. *Id.* art. 5(1). Article 5 provides for the advisement of what charges a person is being arrested or the reasons for detainment. *Id.* art. 5(2). Additionally, every arrested or detained person is entitled to promptly be brought before a judge or other appropriate person with similar authority and receive a trial within a reasonable time. *Id.* art. 5(3).

256. *Id.* arts. 6(1), (2), and (3).

257. Convention, *supra* note 19, at art. 7.

258. *Id.* art. 8.

C. *Funke v. France*

Although it is not statutorily provided, the Court has upheld the right to remain silent to preserve the privilege against self-incrimination.<sup>259</sup> In *Funke v. France*, Funke's house was searched in January, 1980 by customs officers looking for information about his assets abroad.<sup>260</sup> Funke was a German national who lived in Strasbourg with his French wife.<sup>261</sup> He admitted having several accounts abroad, but insisted that the paperwork was not at home.<sup>262</sup> The Strasbourg police court imposed a 1200 FF fine on Funke and ordered him to produce certain documents.<sup>263</sup> Further, he was subject to a 20 FF penalty per day of delay.<sup>264</sup> The Colmar Court of Appeal upheld the lower court's order for production of all but one set of documents and increased the fine to 50 FF per day.<sup>265</sup> Funke's appeal on points of law was dismissed by the Court of Cassation (Criminal Division).<sup>266</sup> The customs authorities were unable to garnish Funke's bank account.<sup>267</sup> However, the Strasbourg District Court granted an attachment of Funke's property, to a value of over 100,000 FF for confiscation of undeclared funds and payment for the fine.<sup>268</sup> The Colmar Court of Appeal dismissed Funke's appeal of that judgment.<sup>269</sup>

In his February, 1984 application to the Commission, Funke claimed, among other things, that his criminal conviction for refusing to produce documents violated his right to a fair trial which is granted by article 6(1).<sup>270</sup> In October 1988, the Commission accepted his application.<sup>271</sup> In its opinion of October 8, 1991,

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259. See *Funke v. France*, 16 Eur. H.R. Rep. 297 (1993) (Court report).

260. *Id.* at 299.

261. *Id.*

262. *Id.* at 299-300.

263. *Id.* at 300.

264. *Funke*, *supra* note 259, at 300.

265. *Id.* at 301.

266. *Id.* at 302.

267. See *id.* at 303.

268. *Id.* at 303-304.

269. *Funke*, *supra* note 259, at 304.

270. *Id.* at 308. Article 6(1) states: "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." Convention, *supra* note 19, art. 6(1).

271. *Funke*, *supra* note 259, at 308.

the Commission held that France did not breach any part of the Convention.<sup>272</sup>

As such, the Court disagreed with the Commission's opinion. It found that the customs officials were trying to obtain certain documents which they believed, but did not know for certain, existed.<sup>273</sup> Because the officials did not believe that they could obtain the paperwork by another means, they attempted to compel Funke to produce evidence supporting a criminal case against himself.<sup>274</sup> The Court held that "[t]he 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 itself."<sup>275</sup> Accordingly, the Court held that the actions of the French authorities breached article 6(1) of the Convention thereby prohibiting a fair trial.<sup>276</sup>

As noted, article 6 does not specifically guarantee the right to silence. The Court's statement protecting the right to silence and the right against self-incrimination was a broad interpretation of article 6. Article 6(3) lists a minimum of rights given to anyone charged with a criminal offense.<sup>277</sup> However, the right to silence is not mentioned,<sup>278</sup> and the Court did not use article 6(3) as part of its decision.<sup>279</sup>

#### *D. Ernest Saunders v. United Kingdom*

In 1990, former Guinness plc chairman, Ernest Saunders was convicted on charges brought by the Serious Fraud Office.<sup>280</sup> As a result of participating in an illegal stock manipulation scheme

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272. *Id.* The full text of the Commission opinion is reprinted in the Court's opinion at 309-24.

273. *Id.* at 326.

274. *Id.*

275. *Id.*

276. *Funke*, *supra* note 259, at 330.

277. Convention, *supra* note 19, art. 6(3). The minimum rights include the following: (a) to be informed promptly and in a language which the accused can understand of the accusation; (b) adequate time for preparation of defense; (c) to have legal assistance present (and provided free of charge if deemed within the interests of justice); (d) to present and examine own witnesses and cross-examine witnesses against him; and (e) to have a free interpreter if he does not understand the language used in court. *Id.*

278. *See id.*

279. *Funke*, *supra* note 259, at 325-26.

280. Paul Wilkinson, *Four Guinness Fraud Plotters Found Guilty*, THE TIMES (London), Aug. 28, 1990, at 1.

during a takeover battle of Distillers Co.,<sup>281</sup> Saunders was found guilty of two counts of conspiracy, two counts of theft from his company, and eight counts of false accounting.<sup>282</sup> He was sentenced to five years for conspiracy and theft,<sup>283</sup> and a concurrent three and one half years for the charges of false accounting.<sup>284</sup> Because of his medical condition, Saunders' sentence was reduced<sup>285</sup> to two and one half years for the conspiracy and theft and a concurrent one and one half years for the false accounting.<sup>286</sup>

Saunders filed an application with the Commission charging the United Kingdom with denying him a fair hearing.<sup>287</sup> While being investigated by the Serious Fraud Office (SFO), Saunders was interrogated by the inspectors of the Department of Trade and Industry (DTI).<sup>288</sup> Any suspect refusing to answer questions posed by DTI inspectors is subject to imprisonment.<sup>289</sup> There is no right to silence for those suspected of city corruption.<sup>290</sup> The answers that Saunders was forced to give during those interrogations were directly quoted by SFO prosecutors in court.<sup>291</sup> The Commission, in a 14-1 majority opinion, found the manner in which DTI investigators questioned Ernest Saunders to be a violation of the European Convention.<sup>292</sup>

The Commission declared that the use of DTI's investigative powers had "oppressive" and "substantially impaired" Ernest Saunders' ability to defend the criminal charges against him.<sup>293</sup>

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281. Distillers Company was a gin and Scotch whiskey maker. *'Guinness Affair' Shakes British Financial Circles*, L.A. TIMES, May 13, 1988, pt. 4, at 5.

282. *Four Convicted in Guinness Case*, FACTS ON FILE WORLD NEWS DIGEST, Aug. 31, 1990, at 642, F2.

283. *Guinness Exec Gets 5 Years in Fraud Case*, CHI. TRIB., Aug. 29, 1990, Bus. at 3.

284. *Id.*

285. Medical evidence introduced to the court reported that Ernest Saunders was suffering from a form of pre-senile dementia and brain atrophy. *R. v. Saunders*, [1991] Court of Appeal, Crim. Div. transcript by THE INDEPENDENT.

286. *Id.*

287. See Marckus, *supra* note 18, at 24.

288. *Human Rights: Unconventional*, ECONOMIST, Sept. 24, 1994, at 56.

289. *Id.* at 61. DTI inspectors can demand almost any information or documentation from people being interviewed. Kane, *supra* note 16. DTI inspectors are not required to reveal why they are asking the questions or for what reasons the documents must be handed over. *Id.*

290. Michael Prescott, *European Ruling Hits City Corruption Fight*, SUNDAY TIMES (London), Sept. 18, 1994.

291. *Human Rights: Unconventional*, *supra* note 288, at 56.

292. Prescott, *supra* note 290.

293. Marckus, *supra* note 18, at 24.

The effect of the use of the evidence gathered by DTI inspectors deprived Saunders of his fair hearing,<sup>294</sup> as established by article 6 of the Convention.<sup>295</sup> In addition, the Commission expressed concern about the inconsistencies of prosecution based on different types of offenses.<sup>296</sup> The right to silence must be applied uniformly throughout the criminal justice system, and not applied according to various degrees of crimes.<sup>297</sup> The Commission stated that "[t]here can be no legitimate aim in depriving someone of the guarantees necessary in securing a fair trial."<sup>298</sup>

The Commission, consistent with article 44,<sup>299</sup> recommended *Ernest Saunders v. United Kingdom* to the Court.<sup>300</sup> If the Court rules in favor of Saunders, which it is predicted to do,<sup>301</sup> reports gathered under the compulsion of DTI inspectors will be inadmissible.<sup>302</sup>

The SFO also has the power to compel answers of suspects or anyone believed to hold relevant information.<sup>303</sup> However, unlike the powers of DTI, the SFO cannot use this evidence directly in court,<sup>304</sup> but can only use it for investigation purposes.<sup>305</sup> The ruling by the Commission is likely to bring forth a case in which a person was convicted by the SFO as an indirect result of the compulsory investigation.<sup>306</sup>

#### *E. Treatment of the New Right by the Strasbourg Judiciary*

With the implementation of the Criminal Justice and Public Order Act, suspects will be compelled to answer questions. Although the proposed caution says that a suspect does not have to say anything, if nothing is said at the first reasonable opportunity, the silence can be used against the defendant.<sup>307</sup> Application of the new law would allow police officers to warn suspects that if

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294. *Id.*

295. Convention, *supra* note 19, art. 6.

296. Marckus, *supra* note 18, at 24.

297. *Id.*

298. *Id.*

299. Convention, *supra* note 19, art. 44.

300. Marckus, *supra* note 18, at 24.

301. See William Rees-Mogg, *Through a Glass Darkly*, THE TIMES (London), Sept. 22, 1994, at 18.

302. *Human Rights: Unconventional*, *supra* note 288, at 56.

303. See Criminal Justice Act 1987, *supra* note 16, s 2(2).

304. *Id.* s 2(8). See also *Human Rights: Unconventional*, *supra* note 288, at 56.

305. *Human Rights: Unconventional*, *supra* note 288, at 56.

306. *Id.*

307. See generally Schmidt, *supra* note 6, at B20.

they do not cooperate it may adversely affect their case. This is extremely similar to the procedures used by the DTI that have been severely criticized by the Commission.<sup>308</sup>

If the Court rules that the investigatory procedures and subsequent admissions into evidence used in the Saunders case are a violation of the Convention, changes will have to be made in DTI procedures. If changes are not made, evidence gathered by the current DTI method will be inadmissible. The Court's decision could lead to changes in the SFO procedures, either by Parliament's own initiative, or as a result of an inevitable petition to Strasbourg. The procedures of regular police officers also could eventually be changed. With the implementation of the new caution, those new procedures could occur sooner than ever anticipated.

Under the new caution, if a suspect exercises the right to silence and it is subsequently used against him, an application to the Commission is likely to be filed.<sup>309</sup> Due to the implementation of the new law, the argument before Strasbourg will probably be based on articles 6(1), 6(3), and 7 of the Convention.

Consistent with the Court's ruling in *Funke v. France*, an applicant is likely to argue that the right to silence is embodied in the right to a fair trial.<sup>310</sup> Article 6 focuses on the entitlements of someone charged with a criminal offense.<sup>311</sup> The primary right contained in article 6 is that of a fair and public hearing.<sup>312</sup>

Two arguments against the new law could be made under article 6(3). First, this article states that "[e]veryone charged with a criminal offence has the following minimum rights . . .".<sup>313</sup> Although the rights specifically listed do not include the right to silence, the phrase "minimum rights" leaves this article open for interpretation and expansion. To include the right to silence here would be consistent with the *Funke* interpretation of the rights given to a person charged with a criminal offense.<sup>314</sup> Further-

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308. See *Human Rights: Unconventional*, *supra* note 288, at 61.

309. Petitions to the Commission can be made by any person, group of persons, or non-governmental organizations claiming to be a victim of a violation of the Convention by a High Contracting Party. Convention, *supra* note 19, art. 25.

310. *Funke*, *supra* note 259, at 326.

311. Convention, *supra* note 19, art. 6(1). See also note 270 and accompanying text.

312. *Id.*

313. *Id.* art. 6(3). See also note 277 and accompanying text.

314. See *Funke*, *supra* note 259, at 309-19.

more, the right to remain silent is consistent with the minimum rights specifically listed in article 6(3).<sup>315</sup>

With the proposed caution, the second assertion that a petitioner can make under article 6(3) is that the person charged with a criminal offense will not have "adequate time and facilities for the preparation of his defense."<sup>316</sup> The caution tells the suspect that if he wants to use something in his defense at trial he must first mention it during the questioning period.<sup>317</sup> Consequently, this does not leave time for the suspect and his advisor to speak at length to determine what defense will or should be put forth at trial. Without time and facilities to prepare a defense, as allowed by the Convention, the suspect may not be able to raise his defense during interrogation. Therefore, according to the new law, the failure to raise a defense during interrogation may be used against the defendant in court.<sup>318</sup> The result of this will be a violation of Convention article 6(3)(b) guaranteeing adequate time to prepare.<sup>319</sup> In some cases, this may also be a violation of article 6(3)(c) which guarantees the accused the right to defend himself or through legal assistance.<sup>320</sup>

The implementation of, and conviction under, the newly worded caution is also likely to raise an argument before the Commission under article 7.<sup>321</sup> Because the caution states that the suspect does not have to say anything, the suspect is told that the right to silence is legal and is not a criminal offense. However, if the suspect follows this law, his silence could be held against him. The judge can instruct the jury to make inferences about the accused's prior silence thus resulting in the suspect's conviction. Conviction of a criminal offense because the suspect exercised the right to silence during interrogation is a violation of article 7. Therefore, a person who is found guilty on account of his exercise of a legal right can then be considered a victim of a Convention violation. More than likely, nothing could be done under the British judicial system because the British judges cannot directly

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315. See *supra* note 277.

316. See *id.*

317. See *supra* part I.

318. See generally Schmidt, *supra* note 6; at B20.

319. Convention, *supra* note 19, art. 6(3)(b).

320. *Id.* art. 6(3)(c).

321. Article 7 of the European Convention states that "[n]o one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed . . .". *Id.* art. 7.



enforce the Convention in their courts.<sup>322</sup> Nonetheless, the victim can bring an action in Strasbourg.<sup>323</sup>

Since the United Kingdom has permanently adopted the Convention provision to allow individuals to bring grievances before the Commission,<sup>324</sup> the government will be subject to judgments against it for violations of the Convention. The United Kingdom will then be forced to make changes in the laws or face the humiliation of continuous scolding by the Strasbourg judges.<sup>325</sup>

## V. Conclusion

The right to silence in Great Britain has finally been codified.<sup>326</sup> However, it appears to provide less protection than the prior right to silence which was simply considered a general principle of common law. A person's right to not say anything is contradicted by two problems: (1) the social duty to assist in a police investigation<sup>327</sup> and (2) the negative inference that the trier of fact will be permitted to draw from the suspect's silence.<sup>328</sup>

Parliament's actions in this area will have sweeping effects on the rights of criminal suspects. The newly worded caution inhibits the right against self-incrimination, the right to counsel,<sup>329</sup> and the overriding right to a fair trial. The citizens of the United Kingdom will now have to rely upon the Convention to fight for their protection. However, this is a very lengthy process from the time of interrogation to a Court decision.<sup>330</sup> Until a British citizen goes through this entire process, the right to silence is certain to deprive many people of their right to be treated fairly by the criminal justice system.

*Diane Beckman*

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322. *Human Rights: Unconventional*, *supra* note 288, at 56. Currently, members of the European Union are considering incorporating the Human Rights Convention into European Union law. *Id.* Because England is bound by that law, judges would be able to directly refer to and enforce the Convention. *Id.*

323. *Id.*

324. *Id.* at 61.

325. *Human Rights: Unconventional*, *supra* note 288, at 61.

326. *See Schmidt*, *supra* note 6, at B20.

327. *Codes of Practice*, *supra* note 3, Code C, at Note D.

328. *Schmidt*, *supra* note 6, at B20.

329. *PACE*, *supra* note 14, at s 58.

330. The *Funke* affair lasted 13 years from the first search to the Court decision. *See Funke*, *supra* note 259, at 297, 299.