Criminal Law and Procedure

Miranda with an English Accent

*by Lauren J. Altdoerffer**

You live in England. You have dabbled in some illegal activities and now find yourself on trial for a violent crime. Your attorney asks if you want to testify. You say yes. Now you are sitting in the witness stand, answering your attorney's questions.

Your attorney asks, "Mr. Smith, where were you on the night of the crime?"

You tell him, "I was in Dumfries, visiting my brother."

"You were nowhere near London on the night of the incident then?" your attorney asks.

"No sir," you reply.

"No further questions, your honor."

Opposing counsel stands up for cross-examination. "Mr. Smith," he says, "You say you were in Dumfries on the night of the crime."

"Yes sir," you reply.

"With your brother?" he asks.

"Yes, sir, with my brother."

The attorney continues, "Now tell me, Mr. Smith, did you mention that you were in Dumfries with your brother to the officer that interrogated you?"

"No, sir," you say, fidgeting slightly.

"And can you tell me, Mr. Smith, did the officer tell you not to tell him that during the interrogation?"

You timidly reply, "Well, not exactly."

"What exactly did the officer tell you, Mr. Smith?"

You pause, knowing where this is going. You've been caught lying. "The officer told me that I did not have to say anything, but that it would harm my defense if I didn't mention straight-away something which I might later rely on in court."

Opposing counsel closes in, "So, Mr. Smith, if you had an alibi when you were questioned, why didn't you mention this to the officer when he interrogated you?"

"I don't know, sir."

Opposing counsel walks behind his desk, and you hear, "No further questions your honor."

With six questions, opposing counsel has presented the jury with a new piece of evidence to consider—your pre-trial silence has created an inference that you are lying.

Miranda's "right to remain silent" makes some Americans uneasy about this line of questioning, but it is standard in the United Kingdom. In 1994, the United Kingdom adopted a rule that if the accused failed to mention a fact during interrogation, only to rely on the fact later during trial, a judge or jury "may draw such inferences from the failure as appear proper[.]"[1]

For the past 15 years, the Criminal Justice and Public Order Act (CJPOA) has allowed the jury to draw an adverse inference from pre-trial silence. The jury is advised of its ability upon instruction from the judge, who may direct the jury that it may, if the jurors think right, make adverse inference from a "no comment" interview. But the jury is not required to make any inference.[2] The instruction usually sounds like this:

> You may draw such a conclusion against [the accused] only if you think it is a fair and proper conclusion and you are satisfied about three things: first, that when he was interviewed he could reasonably have been expected to mention the fact on which he now relies; secondly, that the only sensible explanation for his failure to do so is that he had no answer at the time or none that would stand up to scrutiny; third, that apart from his failure to mention those facts, the prosecution's case against him is so strong that it clearly calls for an answer.[3]

The instructions limit use of the adverse inference. Guilt cannot rest solely on an inference from the defendant's failure to testify,[4] the inference cannot satisfy an element of the prosecution's case,[5] and the jury must consider whether the defendant reasonably relied on counsel's advice to remain silent throughout the interview.[6] All of the safeguards protect a defendant from a false conviction.

While defense protections are important, possible benefits of this type of interrogation are also important. Law enforcement can begin its investigation of the suspect at the source, instead of speculating about a suspect's role in the investigation. This is not possible in the United States, where a suspect knows his silence can stop an investigation in its tracks.

I. United Kingdom Interview and Warnings

The United Kingdom readily accepted an adverse inference from silence as part of its constantly evolving system, which seeks to strike a balance between the accused's right to silence and the government's interest in convicting the guilty. The United Kingdom recognizes a social obligation to aid the police in any type of investigation,[7] and to consistently follow police interview protocol.[8] The protocol, outlined in the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers, requires police to administer a caution before questioning if officers intend to uncover evidence for trial.[9]

The caution is administered as an officer informs the suspect of the nature of the offense.[10] It must be given anytime the officer believes he has grounds to arrest a suspect for a criminal offense,[11] unless the accused has been previously cautioned, or his behavior makes an advisory impracticable.[12] The terms of the caution are the same regardless of the offense. Each time a person is arrested the officer cautions the arrestee, "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

* *Lauren J. Altdoerffer is an Associate Attorney at the Criminal Justice Legal Foundation.* *Lauren would like to thank Kent Scheidegger, Legal Director, for his comments and advice.*

evidence." The caution preserves silence as evidence and assures that the purpose of the caution has been maintained.[13]

II. The United States' Constitutional Right to Silence

Miranda has been the law of our land since 1966.[14] It is fairly recent, yet we treat it as if it were part of the Bill of Rights' gospel. Practices and laws that do not comport with its maxims are declared unconstitutional, yet the Constitution does not promise a right to remain silent. Only the privilege against compelled testimony at trial is included in its text. The Warren Court conceived *Miranda*'s warnings, and a right to remain silent, in order to prevent compelled testimony in a police station. At the same time, the Court left room for the states to create their own warnings. The states should take the Court up on its offer, and the United Kingdom has provided a model to follow.

Early on, only a defendant at trial enjoyed the benefits of a Fifth Amendment right against self-incrimination. Chief Justice Marshall once observed, "If, in such a case, he say upon his oath that his answer would incriminate himself, the *court* can demand no other testimony of the fact."[15] *Miranda v. Arizona* expanded Fifth Amendment protection beyond the courtroom and into custodial interrogation.[16] Every custodial suspect now has a constitutionally based right to be warned during interrogation,[17] and thus, this right cannot be overturned by an act of Congress.[18] But what about the warnings? The words chosen by the *Miranda* Court are advisory, adopted by the Court "to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[19] Alternative warnings are possible.[20]

To best understand how change is possible, it is necessary to go to the decision adopting *Miranda*'s warnings. After reviewing several examples of coercive custodial interrogations of suspects, the Court held that the best way to prevent compelled self-incrimination at trial was to prevent the prosecution's use of "statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[21] This left a few important questions unanswered, such as, what type of procedural safeguards would satisfy the Fifth Amendment? Does the privilege against self-incrimination also prevent revealing information that doesn't incriminate you? Could another warning prevent self-incrimination at trial and still allow questioning during interrogation? *Miranda* encourages states to experiment with their own procedures to incorporate the same protection;[22] therefore, the answer to the third question is "yes."

The standard *Miranda* warning was created by the Court, but can be altered slightly from jurisdiction to jurisdiction.[23] Modifications currently assure that the accused understands that he can remain silent. For example, in some jurisdictions each sentence may be followed by the question, "Do you understand?" This is just one more protection to insure that the accused voluntarily surrendered his silence. Each jurisdiction can reform the warning so long as warnings advise the accused "of [his] right to silence and to assure a continuous opportunity to exercise it[.]"[24] As the Court stated in *Miranda*, "Our decision in no way creates a constitutional straitjacket which will handicap efforts at reform, nor is it intended to have this effect."[25] The United States could reform its warnings to resemble the United Kingdom's warnings. These reformed warnings would still advise the accused of his right to silence while granting him the opportunity to exercise it.

Miranda's decision is really the means to an end. It insures that the accused has a "real understanding and intelligent exercise of the privilege" to remain silent.[26] Phrases "that anything said can and will be used against the individual," and the "right to have counsel present," are tools that prevent compulsory self-incrimination.[27] But before *Miranda*, a defendant had no reason to expect he was always entitled to silence. For a long time legal scholars proposed the judge be allowed to examine the accused.[28] *Griffin v. California*[29] silenced those arguments, but post-*Miranda*, new proposals have sought to correct the misconception that the Fifth Amendment created a blanket protection of a right to silence.[30]

One example of such a proposal was provided by Judge Friendly in an article that explains how *Miranda*'s warnings actually act as a police straitjacket during interrogation.[31] To Judge Friendly, extending the privilege to police investigation because silence would protect the "healthy and conservative goals" of a criminal trial was "like prohibiting graduate students from looking at secondary sources for fear this will tempt them from original research and thus corrupt their morals."[32] Judge Friendly found scarce logic to support *Miranda*'s protection pre-trial and proposed that the Fifth Amendment's protection from compulsion never prohibit

> [c]omment by the judge at any criminal trial on previous refusal by the defendant to answer inquiries relevant to the crime before a grand jury or similar investigating body, or before a judicial officer charged with the duty of presiding over his interrogation, provided that he shall have been afforded the assistance of counsel when being so questioned and shall have then been warned that he need not answer; that if he does answer, his answer may be used against him in court; and that if he does not answer, the judge may comment on his refusal.[33]

The proposal permitted judicial comment only when the defendant was afforded counsel, received warnings during questioning, and chose silence.[34]

The United Kingdom's version of the right to silence allows a judge to comment on the defendant's pre-trial silence, so long as the accused had the opportunity to have counsel present during his pre-trial interview, and the interrogating officers reasonably followed the standard outlined in the Code.[35] Arguably, if we adopted Judge Friendly's proposal to change *Miranda* warnings, we would attain the preferred results of the United Kingdom. The Supreme Court has cleared a path toward this result.[36]

Doyle v. Ohio was the high-water mark for excluding silence as evidence. *Doyle* barred disclosure of a defendant's pre-trial silence at trial once the defendant had received his *Miranda* warnings. The defendants in *Doyle* had been arrested and convicted for selling ten pounds of marijuana to a government

informant.[37] The defendants were given separate trials, and each defendant offered testimony claiming he had been framed.[38] The prosecution asserted that the defendants had sold the drugs to an informant, but both defendants claimed they had wanted to buy drugs from the informant and that the informant had set them up.[39] On cross-examination, the prosecutor questioned each defendant as to why they had not claimed they had been the victims of a "frame-up" upon arrest.[40] The defendants were convicted.

On appeal, the State argued "that the discrepancy between an exculpatory story at trial and silence at the time of arrest gives rise to an inference that the story was fabricated somewhere along the way."[41] Therefore, the Fifth Amendment allowed it to cross-examine defendants about their silence for the limited purpose of impeachment.[42] The Supreme Court rejected this argument.[43] According to the Court, cross-examination under these circumstances violated the Due Process Clause of the Fifth Amendment.[44] While the Court recognized that impeachment served an important purpose,[45] it held that "[s]ilence in the wake of [*Miranda*'s] warnings may be nothing more than the arrestee's exercise of these *Miranda* rights."[46] Without much explanation, the Court found that the *Miranda* warnings, and not the Fifth Amendment, implied a defendant's silence could carry no penalty.[47]

Doyle presumes a lot about the defendant's reliance on the warnings:

> If (a) the defendant is advised that he may remain silent, and (b) he does remain silent, then we (c) presume that his decision was made in reliance on the advice, and (d) conclude it is unfair in certain cases, though not others, to use his silence to impeach his trial testimony."[48]

This presumption extends beyond our understanding that the privilege of silence may be waived in matters to which the defendant testifies.[49] It would become irrelevant if the *Miranda* warnings were changed. If *Miranda*'s promised "right to remain silent" were altered to advise that any silence might be used to impeach the defendant later, the defendant's silence could be commented on at trial.[50]

The Supreme Court appears to have recognized this and has limited the reach of *Doyle*. *Portuondo v. Agard* hinted that given the right circumstances "there might be reason to reconsider *Doyle*."[51] The Court has also allowed a prosecutor to cross-examine an un-*Mirandized* defendant about his failure to offer his exculpatory testimony post-arrest because "*Doyle* [only] bars the use against a criminal defendant of silence maintained after receipt of governmental assurances."[52] *Doyle*'s dissent provides the basis for this argument.[53] If we assume that the government did not assure anything, but warned that failure to disclose an alibi now could harm claims of an alibi at trial, then the defendant did not rely on a government assurance that silence would protect him. Adoption of Britain's warnings would negate *Doyle*'s presumptions.

Once amended warnings remove the presumption that post-arrest silence is inadmissible, a judge may advise the jury that it may make inferences from contradictory testimony offered at trial. *Portuondo v. Agard* prohibits a prosecutor from urging the jury to infer something from the defendant's refusal to testify but allows the jury, "in evaluating the relative credibility of a defendant," to consider something that would be "natural and irresistible" for a juror to consider.[54] If a jury were told that a defendant had been accused of a crime, and informed that evidence showing his innocence would help him, yet he remained silent and offered an alibi at trial, it would be natural for the jury to conclude that the defendant lied on the stand. It is a comment "in accord with [the Court's] longstanding rule that when a defendant takes the stand" he may constitutionally have his credibility as a witness impeached.[55]

Silence should be evidence when a valid inference follows from it. There is nothing strange about treating silence as an incriminating act, providing evidence of guilt. In *Raffel v. United States*, a conspiracy suspect declined to testify in his own defense in the first trial, but took the stand in his second trial.[56] When he testified at his second trial, he denied making incriminating statements to the arresting prohibition agent who had testified against him at both trials.[57] The trial court questioned Raffel about his choice not to deny the statements at the first trial.[58] The questions caused Raffel to explain why he had remained silent at the first trial.[59] The U.S. Supreme Court found the questioning to be consistent with the Fifth Amendment prohibition against self-incrimination, reasoning that the government can consider a defendant's decision to testify as an all-or-nothing proposition exposing him to impeachment.[60] "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do."[61]

A similar situation arose in *Baxter v. Palmigiano*.[62] In *Baxter*, a prisoner in a disciplinary proceeding was advised that "he had a right to remain silent during the hearing but that if he remained silent his silence would be held against him."[63] Relying on *Miranda,* the lower court decided inmates are entitled to representation when charges involve conduct punishable as a state crime.[64] The Supreme Court declined to extend *Miranda* that far.[65] Instead, the Supreme Court found that where a prisoner had been advised of his right to remain silent, and advised that his silence could be used against him, there was not a Fifth Amendment violation[66]:

> [Palmigiano] remained silent at the hearing in the face of evidence that incriminated him; and, as far as this record reveals, his silence was given no more evidentiary value than was warranted by the facts surrounding his case. This does not smack of an invalid attempt by the state to compel testimony without granting immunity or to penalize exercise of the privilege.[67]

Baxter was again discussed in *McKune v. Lile*, a case upholding Kansas' rule that prisoners involved in the Sexual Abuse Treatment Program (SATP) admit responsibility for prior criminal acts, without promises of government immunity.[68] If a prisoner refused to admit responsibility, he could not participate; and his prison privilege status was negatively affected.[69] Lile claimed this was compulsion, but the Court found valid reasons for requiring admission, and denying immunity.[70] The Constitution does not require individuals to be left with the impression that society will not punish them for serious past offenses.[71] Instead, the "constitutional guarantee is

only that the witness not be *compelled* to give self-incriminating testimony."[72] "Determining what constitutes unconstitutional compulsion involves a question of judgment: Courts must decide whether the consequences of an inmate's choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the *de minimis* harms which it does not."[73] In Lile's case, loss of the privilege did not rise to the level of unconstitutional compulsion[74]: "Although a defendant may have a right, even of constitutional dimension, to follow whichever course he chooses, the constitution does not by that token always forbid requiring him to choose."[75]

The Fifth Amendment does not prohibit informed choice; rather, "it prohibits only the compulsion of such testimony."[76] Likewise, the Constitution does not always prohibit requiring a defendant to choose, as "[t]here is a difference between the sorts of penalties that would give a prisoner a reason not to violate prison disciplinary rules and what would compel him to expose himself to criminal liability."[77] The difference is clear if one acknowledges that revised warnings would not compel exposure of crime. They would simply relay the consequences of silence during interrogation when the accused acts as his own witness and offers exculpatory evidence at trial. Silence is not conclusive evidence of guilt. The jury may draw natural inferences from the defendant's silence. Silence correctly becomes one more item to be weighed in the evidentiary balance.[78]

III. Benefits of Revision

History shows that we can revise *Miranda*'s warnings, but why should we? That's easy. Revision will advance our justice system's search for the truth. Consider the benefits: a revised warning encourages the guilty to confess, instead of encouraging career criminals to remain silent; police can follow up on leads, collect more evidence, and arrest the guilty party; crimes will be solved faster, meaning fewer victims will have to wait for resolution; and juries will have more evidence to consider. These are good things, as they will help restore balance to the criminal justice system.

(1) Confessions

Interrogation is critical in police investigations. Without interrogation, "those who were innocent might be falsely accused, those who were guilty might wholly escape prosecution, and many crimes would go unsolved."[79] The criminal justice system should encourage freely given confessions instead of rewarding the criminal exploiting his privilege to remain silent—at the expense of public safety—during police interrogation.[80] A confession that does not create the specter that "adverse consequences can be visited upon the [defendant] by reason of further testimony" does not implicate the Fifth Amendment because "there is no further incrimination to be feared."[81] Asking the accused to give up exonerating evidence does not trigger adverse inferences unless the accused lies or contradicts himself on the stand.

This is consistent with our original understanding of what the Fifth Amendment protected. Historically, we sought to prevent compulsion, and even now,

> [t]he ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.[82]

If a confession met this test, it was considered reliable admissible evidence.[83] *Miranda* limited the use of confessions by informing the suspect that he had a right to remain silent, and if he was not so informed, his confession could not be used as evidence.[84] The warnings hindered the search for the truth. For example, after *Miranda*'s pronouncement, Baltimore reportedly saw the number of suspects willing to confess drop from 20%-25% to 2%.[85] The positive results observed in the United Kingdom after it adopted its revised warning demonstrates how the search for truth may be better served with different *Miranda* warnings.[86]

Before CJPOA, suspects enjoyed a broad right to silence, and studies attempted to estimate how often this right was invoked.[87] One study conducted before CJPOA went into effect interviewed police officers from ten different police stations and found that the accused offered "no comment" 10% of the time.[88] Suspects selectively answered questions 13% of the time.[89] A follow-up study found a decreased reliance on silence during police interviews.[90] The percentage of suspects who refused to answer every question fell from 10% to 6%, and the number of suspects who answered selective questions fell from 13% to 10%.[91] Within two years, the number of suspects who answered all questions during the police interviews increased 7%.[92]

Even those with legal advice were willing to talk after the warnings had been given.[93] Prior to 1994, 20% of suspects receiving legal advice had refused to answer questions.[94] In 2000, this number dropped to 13%.[95] The study's authors hypothesized that legal advisers must be counseling their clients to provide an account to police if they can,[96] as some defense lawyers view the warnings as a defensive tool[97]:

> In a way it's probably helped us because it's thrown the emphasis back onto the police in that we obviously require a disclosure before we advise clients. "We're not going to answer your questions, because it is on tape that you're not prepared to disclose what your evidence is. Therefore how can we advise the clients in the proper manner?" So that straight away throws the emphasis back on the officer.[98]

Officers may now be required to lay out evidence before the accused is required to answer questions, but the United Kingdom has found this tit-for-tat process beneficial, since the most frequent invokers of the right of silence, the serious offenders, are the ones who offer up statements post-CJPOA.[99] These statements aid law enforcement because even "cock and bull" information gives police "something concrete to check up on," and allows inferences to be drawn at trial if the suspect changes his story.[100] A good example was offered by one legal adviser:

> I can think of two or three particular villains that I regularly used to represent and they were always "no comment" pre the Act. Since the Act one of them has moved from being

a professional burglar to the drug scene and on the two occasions where he's been interviewed in my presence, he has given a limited interview, he has given an explanation for items being in his possession to avoid the special warning and he has given an explanation for his general conduct. But the [professional criminals] in this area tend to give a statement… on tape, rather than submit themselves to questions.[101]

United Kingdom studies have not found compulsion, but have demonstrated that police must establish a stronger case before they bring a suspect to the police station. The warning itself is designed to inform the accused of his rights during interrogation, and it allows the accused to choose how to proceed. He may request an attorney or choose to answer a limited number of questions, and if he chooses to speak, the danger of impeachment is minimized. Evidence does not support a conclusion that the warnings compel confessions.[102] A study shows that CJPOA caused the proportion of silent suspects to fall but did not increase the percentage of suspects making admissions.[103] Admissions remained consistently at 55%.[104]

Police may surrender more of their case evidence, but they obtain more in the process. This helps prosecutors decide whom to charge and meet evidentiary burdens. CJPOA's warnings help unravel the truth behind a crime.

(2) Restoring the balance

Critics will argue that an adverse inference from silence allows police to drum up false charges against a defendant. One study, however, found that the inference actually reduced the number of silent suspects eventually charged with an offense.[105] This makes sense, because silence will neither save an already weak case, nor alleviate the prosecution's burden of proving guilt beyond a reasonable doubt.[106] Choosing silence during interrogation may not hurt the defendant, and more often than not, will place heavy burdens on a prosecutor.[107] Justice—punishment of the guilty while the innocent walk free—cannot be achieved if law enforcement is unnecessarily saddled with heavy burdens, and the jury is prohibited from inferring anything. To lessen the burden, a jury should be permitted to draw natural inferences from a suspect's conduct during interrogation. If the accused chooses to remain silent, a judge should be permitted to instruct on this silence. It will provide a little more information to help determine who to believe.

This would prevent silence from allowing the defendant to engage in gamesmanship at trial. In areas without an "ambush" statute, a silent defendant could present a surprise alibi at trial. Before the United Kingdom adopted CJPOA's warnings, English courts saw defendants present defenses for the first time at trial in 7% to 10% of its cases.[108] The use of "ambush" defenses decreased after the warnings were implemented.[109] One observer noted: "If you've got a sophisticated criminal who's come up with a defence or explanation for his conduct very late in the day—in other words, a surprise defence—catching the prosecution completely unawares, I think that's where the provisions are really useful."[110]

The provisions are useful because they permit a jury to draw inferences from the defendant's new alibi and allow the prosecution to respond. A prosecutor may now tell a more complete story to the jury. It begins at the time of the alleged crime, goes through the physical evidence obtained by the prosecution, relates the facts of the defendant's interrogation, and concludes with the defendant's conduct at trial. A prosecutor cannot do this if the suspect's pre-trial silence is universally excluded. Revising *Miranda*'s warnings so that they no longer overprotect a defendant's right to silence,[111] and allow reliable evidence, will restore a "carefully crafted balance designed to fully protect *both* the defendant's and society's interests."[112]

Conclusion

The United Kingdom revised its "right to silence" warning 15 years ago. In the years since, it has seen little change in the rate of confession, but has observed that a suspect is willing to volunteer exonerating facts during interrogation. This is consistent with our understanding that the Fifth Amendment protects against self-incrimination. It is consistent with the understanding that our Supreme Court appears to be restoring. *Griffin, Doyle*, and *Mitchell* extended a pro-defendant stance, but *Portuondo v. Agard* advised that silence might be used to impeach a defendant who testifies at trial. The current *Miranda* warnings do not advise the defendant that he might be impeached. If we were to adopt the United Kingdom's warnings, this could further the truth-seeking function of trial. It is a win-win situation.

"The Fifth Amendment guarantees that no person shall be compelled to give evidence against himself, and so is violated whenever a truly coerced confession is introduced at trial, whether by way of impeachment or otherwise."[113] But the Fifth Amendment is not necessarily violated if voluntary silence is introduced for impeachment purposes.[114] Silence that is probative of the defendant's character, the plausibility of his story, or even his guilt should not be excluded when no reasonable person questions its reliability. Revising *Miranda*'s warnings to allow an adverse inference from silence will correct the presumption that any comment on pre-trial silence violates some Fifth Amendment "right to silence." Revision will promote an understanding that inadmissibility should not be automatic, but should be done only when the accused is truly compelled to self-incrimination.

Endnotes

1 Criminal Justice and Public Order Act 1994, s. 34 (d)(1) (available at: http://www.opsi.gov.uk/acts/acts1994/ukpga_19940033_en_1). Section 34 provides:

(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 the offence, on being questioned or cautioned 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 offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the

circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case by be, subsection (2) below applies.

(2) Where this subsection applies –

(a) a magistrates' court inquiring into the offence as examining justices;

(b) a judge, in deciding whether to grant an application made by the accused under—

(I) section 6 of the Criminal Justice Act of 1987,

(ii) paragraph 5 of Schedule 6 to the Criminal Justice Act 1991 (application for dismissal of charge of violent or sexual offence involving child in respect of which notice of transfer has been given under section 53 of that Act);

(c) the court, in determining whether there is a case to answer; and

(d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.

(2A) Where the accused was at an authorised place of detention at the time of the failure, subsection (1) and (2) 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) 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.

(3) Subject to any directions by the court, evidence tending to establish the failure may be given before or after evidence tending to establish the fact which the accused is alleged to have failed to mention.

(4) This section applies in relation to questioning by persons (other than constables) charged with the duty of investigating offences or charging offenders as it applies in relation to questioning by constables; and in subsection (1) above 'officially informed' means informed by a constable or any such person.

(5) This section does not—

(a) prejudice the admissibility in evidence of the silence or there 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 drawn apart from this section.

2 *See* R. v. Breen, [2003] EWCA Crim 3817, ¶ 34-40, 2003 WL 23014902; Regina v. Rae, [2006] EWCA Crim. 734, ¶ 23-24, 2006 WL 1457366; R. v. Steele, Whomes, Correy, [2006]EWCA Crim. 195, ¶ 56-67, 2006 WL 1732536.

3 R v. Steele, Whomes, Correy, ¶ 632.

4 *See* CJPOA §38(3); R. v. Cowan, (1996) Q.B. 373 (U.K.).

5 *See* CJPOA §34(2)(d); R v. Cowan, (1996) Q.B. 373, 373-374 (U.K.).

6 R v. Steel, Whomes, Correy, ¶ 63.

7 *See* Rice v. Connolly [1966] 2 Q.B. 414, 419.

8 *See* Police and Criminal Evidence Act of 1984, Codes of Practice For the Detention, Treatment and Questioning of Persons by Police Officers (1991) Code C, ¶ 10(a), 33-34.

9 Code C, ¶ 10.1, 33.

10 Code C, §11(a), ¶ 11.1A, 37.

11 *Id.* §10(a), ¶ 10.3, 34

12 *Id.* at §10(a), ¶ 10.4, 34.

13 *Id.* §10(b), ¶ 10.5, ¶ 10.7, Note 10D, 34-35, 37.

14 *See Miranda*, 384 U.S. 436 (1966); Dickerson v. United States, 530 U.S. 428 (2000).

15 United States v. Burr, 25 F. Cas. 38, 40 (No. 14,692e) (CC Va. 1807).

16 *Miranda*, 384 U.S. 436, 442-444 (1966).

17 *Dickerson,* 530 U.S., at 437-438.

18 *Id.* at 444.

19 *Miranda*, 384 U.S., at 441-442; *Dickerson* 530 U.S., at 439.

20 *Id.* at 444 (allowing alternative *Miranda* warnings so long as alternative "inform[s] accused persons of their right of silence and to assure a continuous opportunity to exercise it...").

21 *Id.*

22 *Id.* at 467.

23 *See id.*

24 *Id.* at 444.

25 *Id.* at 467.

26 *Id.* at 469.

27 *Id.*

28 *See, e.g.,* P. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 Mich. L. Rev. 1224 (1932).

29 380 U.S. 609 (1965).

30 *See* H.J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cin. L. Rev. 671 (1968).

31 *Id.* at 691.

32 *Id.* at 690-691.

33 *Id.* at 721-722.

34 *Id.*

35 *See* footnote 3, *supra*.

36 *See* Office of Legal Policy, *Report to Attorney General on Adverse Inferences From Silence*, 22 U. Mich. J. L. Reform 1005, 1007, 1013-1014 (1989) (arguing for broader disclosure of pretrial silence and advising that *Doyle v. Ohio* does not apply silence "if the defendant had been put on notice that his failure to talk could be used against him").

37 Doyle v. Ohio, 426 U.S. 610, 611 (1976).

38 *Id.* at 613.

39 *Id.*

40 *Id.* at 613-614.

41 *Id.* at 616.

42 *Id.*

43 *Id.* at 617.

44 *See id.* at 618.

45 *Id.* at 617 n. 7.

46 *Id.* at 617.

47 *See id.* at 618 n.9.

48 *Id.* at 620 (Stevens, J., *dissenting*) (footnote omitted).

49 *See* Brown v. United States, 356 U.S. 148, 154-155 (1958); Mitchell v. United States, 526 U.S. 314, 321 (1999).

50 For example, it might be treated as an inconsistent statement or an adoptive admission. *See Doyle*, 426 U.S. at 622 (Stevens, J., dissenting); F.R.E. 801(d)(2)(B); *see also* F.R.E. 801 (d)(1); L. McClelland, *Silence as an Admission in Criminal Trial in Pennsylvania*, 53 Dickinson L. Rev. 318 (1949); D. Barrett, *Admissibilty of Accusatory Statement as Adoptive Admissions when Defendant is Under Arrest,* 35 Cal. L. Rev. 128 (1947).

51 529 U.S. 61, 74 (2000).

52 Fletcher v. Weir, 455 U.S. 603, 606-607 (1982) (quoting Anderson v. Charles, 447 U.S. 404, 408 (1980)).

53 *See Doyle*, 426 U.S. at 620 (Stevens, J., dissenting).

54 Portuondo v. Agard, 529 U.S. at 67-68.

55 *Id.* at 69; *see also* Kansas v. Ventris, 555 U.S. ___, 129 S.Ct. 1841, 1846 (2009) (allowing "tainted evidence" for impeachment at trial); *cf.* Jenkins v. Anderson, 447 U.S. 231, 246 (1980) (Marshall, J., dissenting).

56 271 U.S. 494, 495 (1926).

57 *Id.*

58 *Id.* n.*.

59 *Id.*

60 *Id.* at 499.

61 *Id.*

62 425 U.S. 308 (1976).

63 *Id.* at 312.

64 *Id.* at 315.

65 *Id.*

66 *Id.* at 318.

67 *Id.*

68 536 U.S. 24, 34-35 (2002) (plurality).

69 *Id.* at 30-31.

70 *Id.* at 31-35.

71 *See id.* at 35-36.

72 *Id.* at 36 (quoting United States v. Washington, 431 U.S. 181, 188 (1977)) (emphasis in original).

73 *Id.* at 41.

74 *Id.*

75 *Id.* (quoting McGuatha v. California, 402 U.S. 183, 213 (1971)).

76 *Id.* at 49 (O'Connor, J., concurring).

77 *Id.* at 52 (O'Connor, J., concurring).

78 *See, e.g., Baxter,* 425 U.S., at 318.

79 Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973).

80 *See* Watts v. Indiana, 338 U.S. 49, 57-60 (1949) (Jackson, J., concurring).

81 Mitchell v. United States, 526 U.S. 314, 326 (1999).

82 *Schneckloth,* 412 U.S. at 225-226 (quoting Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).

83 *See* Oregon v. Elstad, 470 U.S. 298, 306-307 (1985).

84 *Id.* at n.1.

85 *See* M. O'Neill, *Undoing* Miranda, 2000 B.Y.U. L. Rev. 185, 210-233 (2000) (describing Senate Judiciary Committee hearings that uncovered *Miranda*'s harmful effects on law enforcement).

86 *See* T. Bucke, R. Street & D. Brown, *The Right of Silence: the Impact of the Criminal Justice and Public Order Act 1994*, Home Officer Research Study (2000).

87 *Id.* at 30 (comparing Leng 1993 and Association of Police Officers studies).

88 C. Phillips & D. Brown, with the assistance of Z. James and P. Goodrich, (1998), *Entry into the Criminal Justice System: a Survey of Police Arrests and Their Outcomes,* Home Office Research Study No. 185, at 75.

89 *Id.*

90 Bucke, Street & Brown, *supra* note 86, at 31.

91 *Id.*

92 *Id.*

93 *Id.* at 32.

94 *Id.* at 32-33.

95 *Id.*

96 *Id.* at 32.

97 *See id.* at 23.

98 *Id.* (quoting a legal adviser).

99 *Id.* at 36-37.

100 *Id.* at 35.

101 *Id.* at 37.

102 *Id.* at 34.

103 *Id.*

104 *Id.*

105 *Id.* at x.

106 *See id.*

107 *See* Gallup Poll, Public Opinion, 1993, at 231-232 (1994). A 1993 Gallup poll asked a randomly selected nationwide sample: "Do you believe the criminal justice system makes it too hard for the police and prosecutors to convict people accused of crimes, or not?" 70% of the sample agreed, and only 27% answered in the negative. (Cited in B. Ingraham, *The Right of Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O'Reilly*, 86 J. Crim. L. & Criminology 559, 560 n.4 (1996).

108 Bucke, Street & Brown, *supra* note 86, at 59 n.46 (citing M. Zander & P. Henderson, "Crown Court" study (1993)).

109 *Id.* at 59.

110 *Id.*

111 *See* Duckworth v. Eagan, 492 U.S. 195, 209 (1989) (O'Connor, J., concurring).

112 Moran v. Burbine, 475 U.S. 412, 433 n. 4 (1986) (emphasis in original).

113 Kansas v. Ventris, 555 U.S. ___, 129 S.Ct. 1841, 1845(2009).

114 *See id.* at 1846.