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Reconstruction of the English Criminal Justice System and Its Reinvigorated Exclusionary Rules

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INTRODUCTION

The United States' mandatory exclusionary rules are often criticized as being "peculiar."[1] The criticism stems from the fact that the evidence rules of other common law and civil law countries do not contain similar provisions. Additionally, support for the exclusionary rules is not unanimous. A U.S. Department of Justice report attacked the exclusionary rules of the Fourth, Fifth and Sixth Amendments and urged the U.S. Supreme Court to overrule them.[2] The report argued that the United States' exclusionary rules have no basis in the traditional common law.[3]

Until recently, the English courts adhered to the traditional common law "reliability" and "voluntariness" tests for exclusion of illegally obtained evidence. The U.S. Supreme Court discarded these tests in the "criminal procedure revolution" of the 1960s. Under the traditional common law, unlawfully obtained physical evidence was "basically admissible subject to a rarely exercised judicial discretion to exclude it"[4] and "involuntary" confessions were always excluded.

After 1984, however, the English criminal justice system began a process of reconstruction. Following lengthy debates on the criminal justice system and its traditional exclusionary rules, it enacted the Police and Criminal Evidence Act (PACE) in 1984. Under this new system of regulating the entire criminal process, the English courts rigorously exercise their discretion to exclude tainted evidence. Simultaneously, the law and order lobby successfully abolished the right to silence via the Criminal Justice and Public Order Act of 1994 (CJPOA). These two new legal frameworks of criminal process created a new stage in the history of English criminal procedure.

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1. John H. Langbein stated: "The constitutional exclusionary rules are for the most part an American peculiarity. Illegally obtained evidence is generally admitted not only in Germany and other continental legal systems, but also in England and the Commonwealth Systems." JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 69 (1977).

2. OFFICE OF LEGAL POLICY, U.S. DEPARTMENT OF JUSTICE, 'TRUTH IN CRIMINAL JUSTICE' SERIES REPORT (1986), *reprinted in* 22 U. MICH. J.L. REFORM 437, 535–36, 618 (1989) [hereinafter DOJ REPORT].

3. *See id.*

4. MICHAEL ZANDER, THE POLICE AND CRIMINAL EVIDENCE ACT 1984 197 (2d ed. 1990).

This Article discusses the remolded structure of the English criminal justice system and the English courts' vigorous exercise of exclusionary rules after PACE. Furthermore, this Article will show that the English criminal justice system's pursuit of substantial and procedural justice has encountered the same tension since the 1960s. Additionally, this Article will show that the English courts have finally accepted the "un-British" concept of "deterrence." On the other hand, the surprising abolition of the right to silence demonstrates the necessity of an explicit guarantee to criminal procedural rights similar to those found in the U.S. Bill of Rights.

This Article begins with a background of the traditional common law exclusionary rules. It briefly examines two competing perspectives on law reform and two main pre-PACE proposals to reconstruct the traditional rules. Next, it explores the new framework of criminal process under PACE and its associated Codes of Practices. Moreover, it discusses the English courts' main decisions to vigorously exclude tainted evidence under the new system. Finally, this Article discusses the debate on the abolition of the right to silence and reviews the provisions of CJPOA.

I. TRADITIONAL COMMON LAW EXCLUSIONARY RULES

A. Inclusion of Non-Confessional Physical Evidence Subject to Rarely Exercised Judicial Discretion

The traditional common law rule of unlawfully obtained non-confession evidence is known as the "reliability" test."[5] It states that "relevant and reliable evidence is admissible irrespective of its provenance."[6] As Justice Crompton's famous statement in *Regina v. Leatham*[7] summarized, "It matters not how you get it; if you steal it even, it would be admissible in evidence."[8] Although the rule recognizes that the judge has discretion to exclude otherwise admissible evidence, "the discretion has been actually exercised so rarely that the basis of the power and the circumstances in which it

5. ADRIANA S. ZUCKERMAN, THE PRINCIPLES OF CRIMINAL EVIDENCE 343 (1989).
6. *Id.*
7. *See* Regina v. Leatham, 8 Cox. C.C. 498 (1861).
8. *Id.* at 501.

will be exercised cannot be stated with confidence."[9]

Two leading cases characterize the English courts' position on the exclusion of unlawfully obtained physical evidence. The first is *Kuruma, Son of Kaniu v. Regina.*[10] The court upheld the conviction of a Kenyan for unlawful possession of ammunition even though the ammunition was discovered by a lower ranking police officer who was not authorized to conduct such searches. Lord Goddard C. J. for the Privy Council stated:

> The test to be applied in considering whether evidence is admissible is *whether it is relevant to the matter at issue.* If it is, it is admissible and *the court is not concerned with how the evidence was obtained* . . . . No doubt in criminal cases the judge always has discretion to disallow evidence if the strict rules of admissibility would operate unfairly against the accused . . . . If, for instance, some admission of some piece of evidence, e.g. a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out.[11]

Once the court deemed the illegally obtained evidence relevant, it was admitted unless the court found under the "fairness test," that it was unfair to prosecute the accused based on such evidence. Although obtaining evidence by a trick was considered unfair,[12] "[b]eing convicted on the basis of illegally obtained evidence [was] not, in and of itself, . . . 'unfair' to the accused."[13]

The second leading case, *Regina v. Sang,*[14] explains the "fairness test." Although there were some cases where the judge exercised discretion by expanding the "fairness" test,[15] the House of Lords in *Sang* strictly limited the sphere of the judge's discretion. The issue raised in *Sang* was whether the judge had

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9. DAVID FELDMAN, THE LAW RELATING TO ENTRY, SEARCH AND SEIZURE 419 (1986).

10. *See* Kuruma, Son of Kaniu v. Regina, App. Cas. 197 (1955).

11. *Id.* at 203–04 (emphasis added).

12. *See id.* at 204.

13. Barry F. Shanks, Comment, *Comparative Analysis of the Exclusionary Rule and Its Alternative*, 57 TUL. L. REV. 648, 662 (1983).

14. *See* Regina v. Sang, 2 All E.R. 1222, 1223 (1979).

15. For instance, in *Regina v. Payne*, 1 All E.R. 848 (1963), the judge exercised his discretion and admitted reliable evidence of the defendant's blood alcohol content while in police custody. The police told the accused that upon his agreement, a doctor would examine him for any illness or disability. The accused consented. At trial, the doctor gave evidence that the accused had been drunk and a conviction followed.

discretion to exclude evidence obtained by an *agent provocateur* who induced the accused to commit the crime. The Court of Appeal affirmed the lower court's decision that the judge does not have discretion to exclude evidence procured from a police instigated crime.

In affirming the Court of Appeal's decision, the House of Lords unanimously stated that (i) the trial judge's discretion operates only to avoid unfairness to the accused at trial;[16] (ii) the decision to exercise judicial discretion is based upon the probative value of the evidence balanced against any unfair prejudicial effect of the evidence upon the accused;[17] (iii) only "evidence obtained from the accused after the commission of the offense"[18] might be excluded; and (iv) the judge does not have discretion to exclude evidence merely because it was obtained by improper or unfair means.[19] For example, evidence gathered from illegal entrapment is not within the judge's discretion to exclude.[20] Additionally, Lord Diplock's often quoted dictum rejected the deterrence rationale for excluding illegally obtained evidence:

> It is no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them. If it is obtained illegally there will be a remedy in civil law; if it was obtained legally but in breach of the rules of conduct for the police, this is a matter for the appropriate disciplinary authority to deal with. What the judge at the trial is concerned with is not how the evidence sought to be adduced by the prosecution has been obtained but with how it is used by the prosecution at the trial.[21]

B. Rigorous Exclusion of Confessions Based on the Voluntariness Test

Under common law, the "voluntariness" test is the standard for admitting confessions into evidence.[22] The test was originally

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16. *See id.* at 1222.
17. *See id.*
18. *Id.*
19. *See id.*
20. *See id.*
21. *Id.* at 1230.
22. *See generally* PETER MIRFIELD, CONFESSIONS 42–60 (1985); DAVID WOLCHVER, THE EXCLUSION OF IMPROPERLY OBTAINED EVIDENCE 23–30 (1986) (regarding the

recognized in 1783 in *The King v. Warickshall.*[23] In *Warickshall,* a woman was charged as an accessory to theft and with possession of stolen property. She confessed her guilt and disclosed the location of the stolen property. Afterwards, she contended that her confession and evidence of the property should be excluded because it was obtained by promises of favors. In rejecting her contention, Judges Nares J. and Eyre B. formulated the classic principle underlying the exclusion of confessions:

> Confessions are received in evidence, or rejected as inadmissible, under a consideration of whether they are or are not entitled to credit. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected.[24]

Consequently, *Warickshall* established the "voluntariness" standard and emphasized the requirement of reliable evidence. After *Warickshall,* however, the English courts' review of confessions only focused on whether any threats or promises were made in exchange for confessions, and simply paid "lip-service to the unreliability requirement."[25]

The courts took a strict position against confessions obtained by threat or promise. Even the mildest threat or inducement made a resulting confession inadmissible. Thus, the voluntariness test retains a very strong bite. For example, in *Regina v. Cass,*[26] the court, in an added footnote, stated that "the slightest hopes of mercy held out to a prisoner to induce him to disclose the fact, was sufficient to invalidate a confession."[27] Furthermore, in *Regina v. Moore,*[28] the court stated that "a rule has been laid down in the different precedents by which we are bound, and that is, if the threat or inducement is held out, actually or constructively by a

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history of common law confession rules).

23. *See* The King v. Warickshall, 1 Leach C.C. 263 (1783).
24. *See* WOLCHVER, *supra* note 22, at 24–25.
25. MIRFIELD, *supra* note 22, at 49.
26. *See* Regina v. Cass, 1 Leach C.C. 293n (1784).
27. MIRFIELD, *supra* note 22, at 49.
28. *See* Regina v. Moore, 2 Den. 522 (1852).

person in authority, it [the confession] cannot be received, *however slight the threat or inducement.*"[29]

In 1914, this trend was confirmed in a famous leading case, *Ibrahim v. The King.*[30] Ibrahim, a private in the Indian Army, was arrested and charged with the murder of a superior officer immediately after the officer was found shot dead. After his commanding officer asked why he had done such a senseless act, Ibrahim confessed. Although there was no evidence that Ibrahim was pressured by fear or hope to confess, Lord Sumner stated that:

> It has long been established as a positive principle of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority.[31]

Mark Berger observed that "by the early part of the twentieth century the voluntariness standard had become firmly grounded in English common law, but with a focus that de-emphasized the issue of reliability in favor of an apparent objective of regulating police tactics."[32] The reliability principle "remained extant, buried deep, neither exclusively nor conclusively having its way, but alive nevertheless."[33]

Callis v. Gunn[34] added another requirement to Lord Sumner's formulation in *Ibrahim.* Lord Goddard C. J., in his *ex tempre* judgment, suggested the exclusion of confessions obtained in an oppressive manner by force or against the wishes of the

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29. *See* WOLCHVER, *supra* note 22, at 26.

30. *See* Ibrahim v. The King, App. Cas. 599 (1914). More recent cases advocating the voluntariness test also exist. In *Northam*, the defendant, before confessing, asked whether a different offense might be taken into consideration at his trial rather than being the subject of a separate trial. Because of the police officer's acceptance of the defendant's suggestion, the conviction was quashed. *See* Northam v. King, 52 Crim. App. 97 (1967). In *Zaveckas*, the defendant asked whether he could have bail if he made a statement and confessed. The conviction was quashed because of the judge's admission of the confession. *See* Regina v. Zaveckas, 53 Crim. App. 202 (1969); *see also* ZANDER, *supra* note 4, at 186.

31. Mark Berger, *Legislating Confession Law in Great Britain: A Statutory Approach to Police Interrogation*, 24 U. MICH. J.L. REFORM 1, 11 (1990). Lord Summer's definition of voluntariness became part of the Judges' Rules discussed *infra* Part I.C.

32. *Id.* at 11.

33. WOLCHVER, *supra* note 22, at 30.

34. *See* Callis v. Gunn, 1 Q.B. 494 (1964).

accused person.[35] The Court of Appeal in *Regina v. Prager*[36] and *Regina v. Hudson*[37] subsequently recognized this requirement. Accordingly, the two requirements of *Ibrahim* and *Gunn* became known as the "voluntariness" standard which the police are required to follow.[38]

C. *Nominal Right to Legal Advice and Right to Silence under the Judges' Rules*

The Judges' Rules originated in 1906 from Lord Chief Justice Alverstone's reply letter to the Chief Constable of Birmingham.[39] The Rules gave an accused the right to silence, the right to legal advice and the right to be advised of these rights.[40] The Rules proclaimed that "police officers, otherwise than by arrest, cannot compel any person against his will to come to or remain in any police station . . . ."[41] Furthermore,

> [E]very person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody, provided that in such a case no reasonable delay or hindrance is caused to the process of investigation or the administration of justice by his doing so.[42]

Thus, "when a police officer who is making inquiries of any person about an offense has enough to prefer a charge against that person

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35. *See id.* at 501.

36. *See* Regina v. Prager, 1 All E.R. 1114 (1972).

37. *See* Regina v. Hudson, 72 Crim. App. 163 (1981).

38. The standard:

> [I]t is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that is shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression.

Judges' Rules and Administrative Directions to the Police, Home Office Circular No. 89/1978 [hereinafter *Judges' Rules*], *reprinted in* ROYAL COMMISSION ON CRIMINAL PROCEDURE, THE INVESTIGATION AND PROSECUTION OFFENSES IN ENGLAND AND WALES: THE LAW AND PROCEDURE, 1981, Cmnd. N. 8092-1, app. 12, at 154 [hereinafter INVESTIGATION AND PROSECUTION OFFENSES IN ENGLAND AND WALES].

39. *See id. See also Origin and History of the Judges' Rules, in* INVESTIGATION AND PROSECUTION OFFENSES IN ENGLAND AND WALES, app. 13, at 162–65.

40. H. Richard Uviller imagined that Chief Justice Warren had run across the British *Judges' Rules* when he wrote *Miranda.* H. RICHARD UVILLER, VIRTUAL JUSTICE 123 (1996).

41. *Judges' Rules, supra* note 38, app. 12, at 153–54.

42. *Id.*

for the offense, he should without delay caution that person to be charged or informed that he may be prosecuted for the offense."[43]

Additionally, Rule I directed a police officer to state the following caution before questioning a suspect, "You are not obliged to say anything unless you wish to do so, but what you say may be put into writing and given in evidence."[44] Rule III(a) required that the suspect, when charged, be warned in the same form as Rule I.[45]

These Judges' Rules, however, were not rules of law but merely administrative directives to help police officers administer justice in the fairest manner possible. The evidence, however, was not inadmissible per se for lack of conformity with the Rules. Instead, the judge had discretion to include or exclude a statement obtained in breach of the Rules.[46] John Baldwin and Michael McConville observed:

> It is clear, then, that even in principle the "right" of access to a solicitor during a police interrogation is far from absolute; it is qualified by the provisions as to "unreasonable delay or hindrance," and the courts have shown themselves reluctant to exclude evidence merely because it has been obtained in breach of the Rules.[47]

To summarize Part 1, the traditional rule in England regarding unlawfully obtained physical evidence was "inclusion," with a few exceptions, except the rigorous exclusion of involuntary confession, the traditional English exclusionary rules were quite limited. J.B. Dawson observed in 1982:

> The English judiciary are to exercise no control over the police and the ability of the alternative remedies to deter in fact is not even discussed .... For the fact that the English judge does not

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43. *Id.*

44. *Id.* app. 12, at 154.

45. The warning was, "Do you wish to say anything? You are not obliged to say anything unless you wish to do so but whatever you say will be taken down into writing and may be given in evidence." *Id.*

46. *See* INVESTIGATION AND PROSECUTION OFFENSES IN ENGLAND AND WALES, *supra* note 38, at 26–27. *See also* Regina v. Voisin, 13 Crim. App. 89 (1918); Regina v. Wattam, 36 Crim. App. 72 (1952); Regina v. Prager, 1 W.L.R. 260 (1972).

47. John Baldwin & Michael McConville, *Police Interrogation and the Right to See a Solicitor*, 1979 CRIM. L. REV. 145, 147. Disciplinary action against officers for breaching the Rules was virtually unknown. *See* Laurence Koffman, *Safeguarding the Rights of the Citizen, in* POLICE: THE CONSTITUTION AND THE COMMUNITY 27 (John Baxter & Laurence Koffman eds., 1985).

> even retain the option of excluding evidence obtained by illegal search and seizure means such conduct will seldom be scrutinized for the illegality of the police conduct, will not be a live issue in criminal trials, there will be no *voir dire* at which police officers may be cross-examined with regard to the propriety of their actions and no incentive for defense counsel to even raise such issues.[48]

II. TWO RIVAL PERSPECTIVES FOR LAW REFORM: UTILITARIAN V. LIBERTARIAN

The law and order lobby and the civil libertarian lobby[49] are two different perspectives regarding the reconstruction of traditional law in England. The debate between the two philosophies mirrors the U.S. exclusionary rules debate.

The law and order lobby makes an argument based on the Benthamite-utilitarianism theory.[50] England has a long tradition of law reform "stretching back to Bentham."[51] This is "fundamentally subversive to the underlying assumptions of the native tradition of English common law as it exists."[52] The law and order lobby believes the adversary system turns "trial into a 'cricket game' in which the ultimate purpose of getting at the truth

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48. J. B. Dawson, *The Exclusion of Unlawfully Obtained Evidence: A Comparative Study*, 31 INT'L & COMP. L.Q. 513, 536-37 (1982).

49. *See* Koffman, *supra* note 47, at 14.

50. *See* JEREMY BENTHAM, *Rationale of Judicial Evidence, in* 7 THE WORKS OF JEREMY BENTHAM 454 (John Bowring ed., 1843) (emphasis in original). Bentham ridiculed the idea of procedural fairness in criminal procedure in his famous "fox-hunter's reason":

> This consists in introducing upon the carpet of legal procedure the idea of *fairness*, in the sense in which the word is used by sportsman. The fox is to have a fair chance for his life; he must have (so close is the analogy) what is called *law*—leave to run a certain length of way for the express purpose of giving him a chance for escape. While under pursuit, he must not be shot; it would be as *unfair* as convicting him of burglary on a hen-roost in five minutes time, in a court conscience. In the sporting code, these laws are rational. Amusement is that end; a certain quantity of delay is essential to it; dispatch, a degree of dispatch reducing the quantity of delay below the allowed minimum, would be fatal to it.

Id. Bentham's fundamental rule of evidence is plain: "Let in the light of evidence. The end it leads to is the direct end of justice . . . . Evidence is the basis of justice; and to *exclude evidence is to exclude justice.*" *Id.* at 336, 338 (emphasis added).

51. *Id.*

52. Robert S. Gerstein, *The Self-Incrimination Debate in Great Britain*, 27 AM. J. COMP. L. 81, 82 (1979).

[is] entirely lost."[53] The right to silence, in particular, is considered "one of the very things which turn law into cricket."[54] Michael King summarized the law and order argument as "a system whereby the rules obstruct the police and protect the guilty."[55]

The argument continues with the belief that adversary concepts are not to be given a legitimate role in the pre-trial stage.[56] Exclusionary rules are obstacles to truth-finding, therefore, they should be abolished or at least kept to a minimum.

Although the law and order lobby is concerned with abuse of power, their approach focuses on the "practical measures" to prevent it, while "still allowing the police as much freedom as possible to carry on their efforts at crime control efficiently."[57] The growth of the crime rate and the emergence of more professional criminals lend persuasive evidence to this argument.

The law and order lobby criticizes criminal procedure as mainly concerned with "hardened criminals" and "a large and increasing class of sophisticated professional criminals," who are "well aware of their legal rights and use every possible means to avoid a conviction if caught."[58] Although the crime rate in the English criminal justice system is not as severe as that in the United States, it is steadily increasing. Since 1980 however, the U.S. crime rate has declined, while the British crime rate has continued to rise.[59]

Contrary to the law and order lobby, the civil libertarians take a completely different position. In discussing "the inherent conflict between prosecution and accused," they argue that "[t]he criminal law . . . is not designed to facilitate crime control but to prevent abuse of power and to protect the liberty of the individual."[60]

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53. *Id.* at 98. Police spokesmen, notably the then Chief Constable of Leicester Robert Mark, succinctly summarized the perspective of the "law and order" lobby stating: "[T]rial has come to be regarded as a game of skill and chance in which the rules are binding on one side only." ROBERT REINER, *The Politics of the Act, in* PUBLIC LAW 394, 396 (1985).

54. *Id.*

55. MICHAEL KING, THE FRAMEWORK OF CRIMINAL JUSTICE 127 (1981).

56. *See* Gerstein, *supra* note 52, at 98.

57. *Id.* at 102.

58. CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT, EVIDENCE (GENERAL) 1972, Cmnd. 4991, at para. 21 [hereinafter CLRC REPORT].

59. *See* Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 8–9 (1986).

60. Gerstein, *supra* note 52, at 102.

The utilitarian concept that truth-finding is fundamental to the criminal process is criticized as "a disturbing misunderstanding of what the legal system in this country is all about."[61] Michael McConville argues that:

> [T]he trial is not a search for the "truth." It is an arena in which different versions of reality compete. Legal truth is not a discoverable entity existing outside the trial process; it is, and only is, a product of the trial process itself . . . . The failure in question is not failure of justice; the failure was a failure of the prosecution to adequately prove guilt unaided by the defendant.[62]

The civil libertarians contend that the purpose of a trial is to determine whether the prosecution can prove a specific allegation against a person. Therefore, the adversary concepts must operate throughout the criminal justice system.[63]

Civil libertarians focus on the increasing number of "miscarriages of justice,"[64] "rough justice,"[65] and police corruption. There are many notorious cases in which the police elicited false confessions and, more alarmingly, deliberately forged evidence.[66] Similarly, instances exist where police officers systematically took bribes when working in specialist squads that dealt with lucrative crimes such as gaming, obscene publications

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61. *Remarks of Clinton Davis, Commons Debates, quoted in* Gerstein, *supra* note 52, at 99.

62. Michael McConville, *Silence in Court*, NEW L.J. 1169, 1170 (1987).

63. *See* Gerstein, *supra* note 52, at 99.

64. Clive Walker, *Introduction, in* JUSTICE IN ERROR 2 (Clive Walker & Keir Starmer eds., 1993). Walker states that a miscarriage occurs

> [W]henever individuals are treated by the State in breach of their rights; whenever individuals are reacted adversely by the State to a disproportionate extent in comparison with the need to protect the rights of others; or whenever the rights of others are not properly protected or vindicated by State action against wrongdoers.

Id. at 4.

65. *See generally* PETER HILL & MARTIN YOUNG, ROUGH JUSTICE (1985); PETER HILL ET AL., MORE ROUGH JUSTICE (1985).

66. The *Guilford Four* case, the *Maguire Seven* case, the *Birmingham Six* case, and the *Armagh Four* case (discussing other wrongful convictions of Irish terrorist cases). The *Guilford Four* were the subject of a popular 1994 film, *"In the Name of the Father."* There are also many recognized miscarriages which do not relate to terrorism, for instance, the *Tottemham Three* case, the *Kiszko* case, the *Darvell brothers* case, and the *Cardiff Three* case. *See* Joshua Rozenberg, *Miscarriage of Justice, in* CRIMINAL JUSTICE UNDER STRESS (Eric Stockdale & Silvia Casale eds., 1992); *see also* Walker, *supra* note 64, at 6–13.

and drugs.[67] After the 1960s, a "Golden Age" of public acceptance for the role of the police broke down and the police image transformed "from plod to pig."[68]

Next, the civil libertarians strongly appeal to the "take rights seriously"[69] attitude, stating:

> [W]e liberal reformists tended to accept at face value the rhetoric of rationality and due process which pervades the formal rules of evidence and procedure. If the system is supposed to be fair and just, then the existing rules must be enforced and new rules introduced to combat police abuses, help and protect defendants and restrain the excess of some magistrates.[70]

Pointing out the hollowness of the civil litigation, and criminal prosecution against an officer who breaks the rules, civil libertarians argue that exclusion is "really only one possible sanction which would ensure compliance with the rules." Another deterrent is that if you break the rules you fail to achieve your objective because you are likely to lose your case.[71] Civil libertarians recognize that the abuse of individual liberty by authority is "not something which depends upon the actual extent of abuse at any particular time."[72] Rather, its importance is "a

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67. *See* David Feldman, *Introduction: The Developing Debate on Policing Law and Management*, 20 ANGLO-AM. L. REV. 1, 5 (1991). *See also* ROBERT REINER, THE POLITICS OF THE POLICE 78–81 (2d ed., 1992).

68. John Beynon, *Policing in the Limelight: Citizens, Constables and Controversy*, *in* THE POLICE: POWER, PROCEDURES AND PROPRIETIES 7 (John Benyon & Colin Bourn eds., 1986); *see also* REINER, *supra* note 67, at 72–77.

69. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977). Dworkin argues that "[t]he institution of rights . . . represents the majority's promise to the minorities that their dignity and equality will be respected." *Id.* at 205. Thus individual rights are "*political trumps*" to "do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done." *Id.* at 194 (emphasis added).

70. KING, *supra* note 55, at 126–27. Thus, they criticize the gap between legal theory and police practice:

> A wide range of prosecution evidence can be legally produced and presented, despite the rhetoric of a system geared overwhelmingly to safeguards for the accused, precisely because legal structure, legal procedure, legal rulings, not legal rhetoric, govern the legitimate practice of criminal justice, and there is quite simply a distinct gap between the substance and the ideology of the law.

D.J. MACBARNET, CONVICTION 155 (1981).

71. *See* Paul Sieghart, *Reliable Evidence, Fairly Obtained*, *in* THE POLICE: POWER, PROCEDURES AND PROPRIETIES, 272 (1992).

72. Gerstein, *supra* note 52, at 103.

matter of principle."[73]

Each perspective has a coherent system in its different way, yet, a fundamental disagreement has been maintained for a long time. The confrontation between the perspectives has been reproduced in every debate for reconstruction of the English criminal justice system.

III. MAJOR ATTEMPTS TO REORIENT THE TRADITIONAL RULES

This section reviews two important governmental reports that played crucial roles in reorienting the traditional rules and providing a theoretical basis for the current English criminal justice system.

A. The Eleventh Report of the Criminal Law Revision Committee of 1972

The Eleventh Report of the Criminal Law Revision Committee (CLRC) was the first committee to reconstruct the traditional exclusionary rules based on the law and order perspective. The CLRC, created in 1959 by the Conservative Home Secretary, submitted several important recommendations to revise exclusionary rules in 1972.

The CLRC began with a familiar Benthamite-utilitarian philosophy:

> Since the object of a criminal trial should be to find out if the accused is guilty, it follows that ideally all evidence should be admissible which is relevant in the sense that it tends to render probable the existence or non-existence of any fact on which the question of guilt or innocence depends . . . . We have throughout aimed at reducing the exceptions to admissibility under the present law . . . . We need hardly say that we have no wish to lessen the fairness of criminal trials. But it must be clear what fairness means in this connection. It means, or ought to mean, that the law should be such as will secure as far as possible that the result of the trial is the right one.[74]

The CLRC argued that traditional "strict and formal" evidence rules for the protection of the accused were the product of a time when "scales used to be loaded against the defense in

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73. *Id.*

74. CLRC REPORT, *supra* note 58, at paras. 14, 20, 27.

ways which it is difficult now to remember."[75] The rules no longer served justice, but had become a hindrance because the general quality of the criminal justice system had improved.[76] The committee observed that in the English criminal justice system "fairness seem[ed] often to be thought of as something which is due to the defence only."[77]

The CLRC proposed many fundamental changes to the traditional evidence law. First, they critically reviewed the traditional rule of strict exclusion for "involuntary" statements.[78] Based on the "reliability principle,"[79] the CLRC recommended that only threats or inducements likely to render a confession unreliable or a confession acquired through oppression be excluded.[80] The CLRC also recommended that the "fruit" of inadmissible confessions be admissible.[81]

Second, the CLRC proposed the most controversial recommendation in English criminal law history—abolition of the right to silence:

> To forbid it [drawing adverse inferences for the silence of the accused] seems to us to be contrary sense and, without helping the innocent, to give an unnecessary advantage to the guilty. Hardened criminals often take advantage of the present rule to refuse to answer any questions at all, and this may greatly hamper the police and even bring their investigations to halt.

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75. *Id.* at para. 21.4.

76. *See id.* at para. 21(i)–(v).

77. *Id.* at para. 27.

78. *See id.* at paras. 53–63. After the CLRC's report, the case law on confessions moved in the direction of the CLRC's recommendation. In *Director of Public Prosecutor v. Ping Lin*, 3 All E.R. 175 (1975), the suspect, a drug dealer, sought to gain favorable treatment by offering to identify his supplier. The police refused to make a deal, but informed the suspect that he was sure the judge would remember the suspect's help at the time of sentencing. Stating that the prosecution was required to show "as a matter of fact" that the threat or promise had not induced the confession, the House of Lords ruled the voluntariness test had not been violated. *Id.* at 180. In *Regina v. Rennie*, 1 All E.R. 385 (1982), the Lord Chief Justice stated: "Even if . . . the appellant had decided to admit his guilt because he hoped that if he did so the police would cease their investigation of the part played by his mother, it does not follow that the confession should have been excluded." *Id.* at 388.

79. *See* CLRC REPORT, *supra* note 58, at paras. 62–64. The CLRC limitedly accepted the deterrent justification when they rejected the suggestion that all confessions should go to the jury. *See id.*

80. *See id.* at para. 61.

81. *See id.* at para. 68.

Therefore, the abolition of the restriction would help justice.[82]

The CLRC recommended that the judge and jury be allowed to draw an adverse inference of guilt against an accused person who failed to state a fact during police questioning that was later relied upon in his defense[83] or if the accused person failed to give evidence.[84]

Third, the CLRC recommended that the caution be modified and administered only after the suspect was charged or officially informed that he would be prosecuted.[85] Although this recommendation was first rejected by the Police and Criminal Evidence Act of 1984, it was eventually accepted in the Criminal Justice and Public Order Act of 1994.

The CLRC's proposals were "a part of Britain's move to join Europe,"[86] although the Report denied any intention to replace the English adversary system with the Continental inquisitorial system.[87] Although the Report received support from the police and prosecutor groups, it attracted a storm of criticism from the civil libertarians and was denounced by almost all commentators.[88] The report's proposal to abolish the right to silence provoked particularly strong resistance.[89]

B. The Report of the Royal Commission on Criminal Procedure of 1981

Just before the Labour government left office in 1979, it set up the Royal Commission on Criminal Procedure (Royal Commission).[90] The outcry following the Confait case,[91] which

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82. *Id.* at para. 30.

83. *See id.* at para. 32.

84. *See id.* at paras. 108–13.

85. *See id.* at para. 44.

86. Gerstein, *supra* note 52, at 82–83. JUSTICE (the British Section of the International Commission of Jurists) made a more radical proposal to reject the current common law process and to adopt the Continental alternative. *See id.* at 92–95.

87. *See* CLRC REPORT, *supra* note 58, at para. 13.

88. *See* Gerstein, *supra* note 52, at 84–87; Mark Berger, *Rethinking Self-Incrimination in Great Britain*, 61 DENV. U. L. REV. 507, 516–17 (1984).

89. *See* Michael Zander, *The CLRC Report - A Survey of Reactions*, 1974 LAW SOC. GAZETTE 954.

90. *See* THE ROYAL COMMISSION ON CRIMINAL PROCEDURE, 1981, Cmnd. 8092, at para. 1.11 [hereinafter ROYAL COMMISSION REPORT].

91. *See* Regina v. Lattimore, 62 Crim. App. 53 (1975). On April 22, 1972, Maxwell Confait was found dead in his blazing home. Three teenage boys, Ronald Leighton, Colin Lattimore and Ahmet Salih confessed and were convicted of murder, manslaughter and

sentenced three teenagers convicted of murder, manslaughter and arson to three years detention, prompted formation of the commission that led to substantial changes in the police powers.[92] Although the Royal Commission, like the CLRC, sought to reduce the sphere of the traditional exclusionary rule, the Royal Commission took a more moderate position. Facing a challenge to strike "a fundamental balance" between state and individual interests,[93] the Royal Commission presented its Report of 1981 as "part of a package which aimed to strengthen both police powers and suspects' rights without shifting the balance one way or the other."[94]

First, the Royal Commission, referring to the United States' experience that automatic exclusionary rules significantly deter improper police conduct, rejected the automatic rules as a means of securing compliance.[95] The Royal Commission recommended police supervision and internal discipline or civil actions for damages as a better way to inhibit police misconduct.[96] It chose to combine the "reliability principle" and the "protective principle" as rationales for the exclusionary rule regarding the "protective principle." The Royal Commission stated:

> Where certain standards are set for the conduct of criminal investigations, citizens can expect, indeed they have a right, to be treated in accordance with those standards. If they are not so treated, then they should not be put at risk nor should the investigator gain an advantage. The courts have the responsibility for protecting the citizen's rights. The most appropriate way to do so in these circumstances is to remove

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arson. Lattimore was mentally retarded with a mental age of approximately eight. After a lengthy campaign to re-open the case, the Court of Appeal in October 1975, quashed the verdicts. The three boys spent three years in detention. The official inquiry into the case by Sir Henry Fisher, reported in 1977, revealed that the Judges' Rules were routinely ignored. Fisher's suggestion that reform of the Rules should be conducted triggered the establishment of the Royal Commission. *See* J. Baxter & L. Koffman, *The Confait Inheritance - Forgotten Lesson*, 14 CAMBRIAN L. REV. 11, 11–12 (1983) [hereinafter Baxter].

92. *See* Baxter, *supra* note 91, at 11–12.

93. *See* ROYAL COMMISSION REPORT, *supra* note 90, at para. 1.11.

94. *See* Andrew Sanders, *Rights, Remedies, and the Police and Criminal Evidence Act*, CRIM. L. REV. 802 (1988). *See also* ROYAL COMMISSION REPORT, *supra* note 90, at paras. 1.32–1.35.

95. *See* ROYAL COMMISSION REPORT, *supra* note 90, at paras. 4.123–4.128. They also paid attention to the difference between the British and American criminal justice systems. *Id.* at paras. 4.126–4.127.

96. *See id.* at paras. 4.118–4.122.

> from the investigator his source of advantage and from the accused the cause of risk, that is to exclude the evidence .... In contrast to the disciplinary principle this approach can leave it to the court to exercise a discretion not to exclude evidence when the breach of the rules is trivial or does not infringe the suspect's right ....[97]

The Royal Commission proposed that Parliament make rules based on the reliability and protective principles to control police conduct,[98] stating that, "[I]t is not satisfactory to leave the content and enforcement of these rules to the courts .... Parliament should take responsibility for deciding what the rules should be."[99]

Second, the Royal Commission concluded that the "voluntariness" test was too imprecise and vague to offer guidance to police and judges.[100] It proposed changing the rules to automatically exclude a confession if the suspect was subject to "violence, threats of violence, torture or inhuman or degrading treatment."[101] Any other statements obtained through a lesser breach of the rules, even if involuntary under the traditional law, would be included or excluded based on the "reliability principle."[102]

Third, the Royal Commission rejected the CLRC's proposal to abolish the right to silence. It was concerned that the proposal "put strong (and additional) psychological pressure upon some suspects to answer questions without knowing precisely what was the substance of and evidence for the accusations against them."[103]

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97. *Id.* at para. 4.130. *See also* A.J. Ashworth, *Excluding Evidence as Protective Rights*, CRIM. L. REV. 723, 725 (1977).

98. *See* ROYAL COMMISSION REPORT, *supra* note 90, at para. 4.131.

99. *Id.*

100. *See id.* at paras. 4.70–4.73. The Royal Commission stated:

> What this amounts to is that a police officer is required under the confusion and pressures of an investigation to make some assessment of the character, susceptibilities and mental state of the suspect whom he is interviewing and then to try to adapt his questioning to that assessment. He may then find that the judge, having heard witnesses often months after the event and in the entirely different environment of a court, makes his own assessment of the character, susceptibilities and mental state of the suspect at the time of the interrogation and of the conditions of that interrogation, and decides, that, he, the police officer, behaved 'oppressively,' that is that he broke the rule. This cannot be satisfactory.

Id. at 4.72.

101. *Id.* at para. 4.132.

102. *See* ROYAL COMMISSION REPORT, *supra* note 90, at para. 4.133.

103. *Id.* at para. 4.50.

Furthermore, the proposal "might well increase the risk of innocent people, particularly those who are under suspicion for the first time, making damaging statements."[104] The Royal Commission was also concerned that the CLRC's proposal was inconsistent with the principle requiring the prosecution to have the burden of proof.[105]

Fourth, while the Royal Commission supported an enhancement in police powers of stop, entry, and search-and-seizure,[106] they also recommended the "*obligatory* exclusion" of the evidence obtained in violation of their proposed search-and-seizure rules.[107] Although the Royal Commission disfavored a compulsory exclusionary rule, they were also unsatisfied with relying on judicial discretion. The Royal Commission believed that increased police power needed to be balanced.[108]

Although criticized by most radical and liberal opinions as "a triumph for the police over their civil libertarian critics,"[109] the Report was widely approved by the mainstream professional legal organizations with only minimal reservations.[110] By and large, PACE and the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers (Interrogation Code)[111] are a direct result of the Royal Commission. Several parts of the Report were rejected or modified, however, and the CLRC's proposals were also widely omitted in PACE. Thus, PACE was born without blessing from either side of the two contending lobbies.

IV. NEW FRAMEWORK OF CRIMINAL PROCESS UNDER THE POLICE AND CRIMINAL EVIDENCE ACT 1984

PACE is the first nation-wide legislation to regulate the entire criminal process and provide a "framework for police

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104. *Id.*
105. *See id.* at para. 4.52.
106. *See id.* at paras. 3.20–3.41.
107. *See id.* at para. 3.49 (emphasis added).
108. *See* FELDMAN, *supra* note 9, at 427.
109. *Introduction, in* POLICE: THE CONSTITUTION AND THE COMMUNITY, *supra* note 47, at 1.
110. *See* REINER, *supra* note 53, at 398.
111. *See* CODE OF PRACTICE FOR THE DETENTION, TREATMENT AND QUESTIONING OF PERSONS BY POLICE OFFICERS [hereinafter INTERROGATION CODE]. The Interrogation Code was authorized by PACE, 1984, ch. 60, § 66, and revised in 1990.

professionalism."[112] Although it is not part of the legislation itself,[113] the Interrogation Code is considered "the bible for the officer in the police station."[114] This section reviews the new framework of the entry, search-and-seizure, detention and interrogation power under PACE and the Code.

A. Extended Police Powers to Stop, Entry, and Search-and-Seizure

PACE embraces the Royal Commission's recommendation that stop and search powers should be uniform throughout the country and should extend to offensive weapons.[115] It gives police extended power of stop, entry, and search-and-seizure, thereby legitimizing existing police practice.[116]

Section 1 of PACE provides that upon "reasonable ground of suspicion,"[117] police may search "any person or vehicle" and "anything which is in or on a vehicle" for "stolen or prohibited articles,"[118] including weapons and illegal drugs. Police may detain a person or a vehicle for such searches.[119] These powers apply in public places and publicly accessible areas, but not in

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112. Barrie Irving, *The Interrogation Process, in* THE POLICE: POWERS, PROCEDURES AND PROPRIETIES 7, at 148 (John Benyon & Colin Bourn eds., 1986).

113. A breach of the Code does not necessarily make the evidence inadmissible and cannot be made the basis of either criminal or civil proceedings. Prior to April 1995, a breach of the Code was automatically a breach of police disciplinary rules and could in theory result in disciplinary proceedings being brought. PACE, art. 67(8) (Eng.). But in fact such proceedings were brought extremely rarely and now, under the Police and Magistrates' Courts Act 1994, section 37(a), such a breach is no longer automatically a disciplinary offense. Michael Zander, *You Have No Right to Remain Silent: Abolition of the Privilege Against Self-Incrimination in England*, 40 ST. LOUIS U. L.J. 659, 661 (1996).

114. Michael Zander, *The Act in the Station, in* THE POLICE: POWERS, PROCEDURES AND PROPRIETIES 7, at 123 (John Benyon & Colin Bourn eds., 1986).

115. *See* ROYAL COMMISSION REPORT, *supra* note 90, at para. 3.20.

116. *See id.* at paras. 3.14–3.15.

117. PACE, art. 1(3) (Eng.).

118. *Id.* art. 1(2)(a) (Eng.). Bradley pointed out the difference between the English search and the U.S. search:

> The English 'search' is . . . broader than the U.S. 'frisk,' which requires a suspicion that the subject be armed and dangerous, but narrower than the U.S. 'search,' which requires probable cause but may be for any evidence. Moreover, the English search of the person does not flow automatically from an arrest, as in the United States. Rather, it is limited, both as to its inception and its scope, by 'reasonable grounds for suspicion.' However, once the suspect is actually taken to the police station, the custody officer must undertake a full inventory search, as is the practice in the United States.

Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L L. 171, 178 (1993) (footnotes omitted).

119. *See* PACE, art. 1(2)(b).

dwellings.[120]

Section 8 of PACE provides that, on application from a constable, a justice of peace may issue warrants to enter and search premises for evidence of "serious arrestable offenses."[121] Warrants for entry and search, however, are not always necessary. Section 17 provides that a constable may enter and search any premises without a search warrant for the purpose of (i) executing an arrest warrant; (ii) arresting a person for an arrestable offense; (iii) recapturing a person who is unlawfully at large and whom he is pursuing; and (iv) saving life or limb or preventing serious damage to property, and so forth.[122] Under Section 18, a constable may also enter and search "any premises occupied or controlled" by the arrestee if reasonable grounds exist for suspecting that evidence of the instant, or connected, offenses are inside.[123] Under Codes of Practice, consent searches are available if an occupant gives written consent after a constable informs the occupant that consent is not required and that anything seized may be used as evidence.[124]

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120. *See id.* art. 1(1). "Search in public" is similar to the U.S. "frisk." *Id.*

121. *Id.* art. 116. "Serious arrestable offenses" cover the most serious felonies, such as murder, rape, kidnapping, drug crimes, and other offenses leading to "serious injury to any person" or "serious financial loss." *Id.* The warrant requirement is that a magistrate is satisfied when:

> there are reasonable grounds for believing (a) that a serious arrestable offence has been committed; (b) that there is material on premises specified in the application which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offense; (c) that the material is likely to be relevant evidence; (d) that it does not consist of or include items subject to legal privilege . . . and (e) that any of the conditions specified in subsection (3) below applies.

Id. art. 8(1). The conditions mentioned in subsection (1)(e) above are:

> (a) that it is not practicable to communicate with any person entitled to grant entry to the premises . . . (c) that entry to the premises will not be granted unless a warrant is produced; (d) that the purpose of a search may be frustrated or seriously prejudiced unless a constable arriving at the premises can secure immediate entry to them.

Id. art. 8(3).

122. *See id.* art. 17(1)(a)–(e).

123. *Id.* art. 18(1). Contrary to the U.S. law, PACE allows a search of premises incident to arrest, even when the suspect is not arrested on the premises. *See* Vale v. Louisiana, 399 U.S. 30 (1970); Bradley, *supra* note 118, at 181.

124. *See* CODE OF PRACTICE FOR THE SEARCHING OF PREMISES BY POLICE OFFICERS AND SEIZURE OF PROPERTY FOUND BY POLICE OFFICERS ON PERSONS OR PREMISES, art. 4.

Section 25 provides police the power to arrest, without a warrant, if there are "reasonable grounds for suspicion."[125] Constables may search arrested persons if they have "reasonable grounds for believing that the arrested person may present a danger to himself or others."[126] Constables also possess power to "search the arrested person for anything (i) which he might use to assist him to escape from lawful custody; or (ii) which might be evidence relating to an offence."[127] Finally, constables may "enter and search any premises in which the accused was when arrested or immediately before he was arrested for evidence relating to the arresting offence."[128]

The criterion of "reasonable suspicion" is "aimed at inhibiting the police from stopping and searching indiscriminately or, in discriminatory ways without unduly fettering their ability to detect crime."[129] The Royal Commission itself, however, admitted that "reasonable suspicion" could be construed to give unbridled latitude with respect to searches.[130]

The record-keeping requirement serves as the primary safeguard against such abuses. Officers that conduct a stop and search must make a detailed written record of the event, unless it is not practicable,[131] and inform the person searched that he or she is entitled to ask for a copy of the record within twelve months.[132] This safeguard, however, is simply "internal" and "self-accountable" and independent of judicial control. Commentators suggest "external" review if critics attack this safeguard as ineffective.[133]

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125. PACE, art. 25(1).
126. *Id.* art. 32(1).
127. *Id.* art. 32 (2)(a).
128. *Id.* art. 32 (2)(b).
129. ANDREW SANDERS & RICHARD YOUNG, CRIMINAL JUSTICE 38 (1994).
130. *See* ROYAL COMMISSION REPORT, *supra* note 90, at para. 3.25.
131. *See id.* art. 3(1) (Eng.); *See also* HOME OFFICE, CODE OF PRACTICE FOR THE EXERCISE BY POLICE OFFICERS OF STATUTORY POWERS OF STOP AND SEARCH, at para. 4.1.
132. *See id.* art. 3(7)–(9) (Eng.).
133. Vaugahn Bevan & Ken Lindstone, *The New Law of Search and Seizure: Castle Built with Air?*, 1985 PUBLIC LAW 423, 437; *see also* Gabrielle Cox, *Openness and Accountability, in* THE POLICE: POWER, PROCEDURES AND PROPRIETIES 7, at 167–68 (John Benyon & Colin Bourn eds., 1986). The Policy Studies Institute's study showed that records of stops and searches were made in only about a half of all cases. *See also* DAVID J. SMITH & JEREMY GRAY, POLICE AND PEOPLE IN LONDON, VOL. IV, THE POLICE IN ACTION 236 (1982).

B. Duration and Conditions of Detention

Following the Royal Commission's recommendation,[134] PACE established a new framework for detention.[135] Police can detain a suspect for twenty-four hours without formally charging him.[136] Officers of the rank of superintendent or above may extend detention to thirty-six hours.[137] Magistrates may extend detention to a maximum of ninety-six hours.[138] In addition, authorities may hold suspects *incommunicado* for up to thirty-six hours for serious offenses.[139] This surprisingly long extension of the detention period draws criticism as "an affront in a democratic society."[140]

Several new detention requirements serve to curb the power afforded by three extensions.[141] First, PACE created the position of "custody officer."[142] Custody officers ensure that police observe PACE requirements and the Interrogation Code.[143] Second, the initial detention review must take place after six hours by a "review officer," which includes the "custody officer," and thereafter at nine hour intervals.[144] Third, authorities must afford detained persons a continuous period of at least eight hours to rest free from questioning,[145] a break from interviewing every two hours, and a break for meals at reasonable times.[146]

Law enforcement authorities criticize this new system as providing professional criminals with an opportunity "not only to discover the strength of the police's case at an early stage, but also

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134. The frame was made following the Royal Commission's recommendation. *See* ROYAL COMMISSION REPORT, *supra* note 90, at para. 3.10(5).

135. In the United States, if a suspect is arrested without a warrant, he is entitled to a "prompt" post-arrest probable cause hearing. *See* Gernstein v. Pugh, 420 U.S. 103 (1975). The "promptness" ordinarily means forty-eight hours. *See* County of Riverside v. McLaughlin, 500 U.S. 44 (1991) (Scalia, J., dissenting).

136. *See* PACE, art. 41(1).

137. *See id.* art. 42(1).

138. *See id.* art. 44 (3)(b).

139. *Id.* art. 56 (2)(a),(3).

140. David Ashby, *Safeguarding the Suspect, in* THE POLICE: POWERS, PROCEDURES, AND PROPRIETIES 7, at 188.

141. In addition, bail may be set just after or simultaneously with arrest. *See* MAGISTRATES' COURTS ACT 1980, art. 117.

142. PACE, art. 36(1).

143. *See id.*

144. *See id.* art. 40.

145. *See* INTERROGATION CODE, *supra* note 111, at para. 12.2.

146. *See id.* at para. 12.7.

during any subsequent proceedings to make fallacious attacks upon the officer responsible for the investigation in an effort to escape conviction."[147]

C. Right to Counsel and Caution

1. Access to Legal Advice

PACE and the Interrogation Code, which are both based on the Royal Commission's approach,[148] provide the statutory basis for the accused's right to counsel. The provision "aims to counterbalance increased powers of detention."[149]

Section 58 of PACE provides that a suspect enjoys an absolute right to counsel "privately at any time."[150] "Duty solicitor schemes" were provided for financially challenged suspects.[151] If a suspect makes such a request, police must allow consultation "as soon as practical except to the extent that delay is permitted."[152] Authorities must record the request on the custody record.[153] Conversely, the Interrogation Code allows the suspect to waive the right "provided that the person has given his agreement, in writing or on tape, to be interviewed without receiving legal advice."[154]

Under the Code, if a solicitor arrives at the police station to see an accused, the accused must be informed of this. In addition, the accused must be asked whether he wishes to see the solicitor. This applies even if the accused has already declined legal

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147. Kenneth Oxford, *The Power to Police Effectively, in* THE POLICE: POWERS, PROCEDURES AND PROPRIETIES 7, at 71 (John Beynon & Colin Bourn eds., 1986).

148. *See* ROYAL COMMISSION REPORT, *supra* note 90, at paras. 4.87, 4.91, 3.107.

149. Sanders, *supra* note 94, at 805.

150. PACE, art. 58 (1).

151. The duty solicitor schemes were originally provided for in section 59 of PACE, which enabled the Law Society to establish such schemes. From April 1989, the scheme has been governed by the Duty Solicitor Arrangements 1989 that replaced the Legal Aid (Duty Solicitor) Scheme 1988. *See* ZANDER, *supra* note 4, at 107–08.

152. PACE, art. 58 (4).

153. *See id.* art. 58 (2).

154. INTERROGATION CODE, *supra* note 111, at para. 6.6. Under Annex D, a suspect who wishes to decline a lawyer and dictate a statement to a police officer shall:

> be asked to read it and to make any correction, alterations or additions he wishes. When he has finished certificate at the end of the statement: 'I have read the above statement, and I have been able to correct, alter or add anything I wish. This statement is true. I have made it my own free will.'

Id. Annex D, para. 6.

service.[155] The right to legal advice encompasses the actual presence of the solicitor during interrogation and,[156] not merely the opportunity to consult before questioning begins. In addition, the Code ensures that "[n]o attempt should be made to dissuade the suspect from obtaining legal advice."[157] If a specific solicitor is unavailable, the duty solicitor is provided.[158]

Under PACE, only an officer of superintendent rank or higher may authorize a delay in access to counsel, but they may only do so for suspects detained for "serious arrestable offense[s]."[159] The maximum period of delay is thirty-six hours.[160]

Section 58(8) outlines circumstances that authorize a delay of access to legal advice. A delay can only be authorized where the authorizing officer has reasonable grounds to believe that exercising the right to access counsel at that time

> (a) will lead to interference with or harm to evidence connected with a serious arrestable offence or interference with; or (b) [will] physical[ly] injur[e] other persons; or will lead to the alerting of other persons suspected of having committed such an offence but not yet arrested for it; or (c) will hinder the recovery of any property obtained as a result of such an offence.[161]

2. Caution

As recommended by the Royal Commission,[162] the Interrogation Code provides that suspects must be cautioned that questions asked "for the purpose of obtaining evidence may be given to a court in prosecution." The caution must be

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155. *See id.* at para. 6.15.

156. *See id.* at para. 6.8. "Where a person has been permitted to consult a solicitor and the solicitor is available (i.e., present at the station or on his way to the station or easily accessible by telephone) at the time the interview begins or is in progress, he must be allowed to have his solicitor present while he is interviewed." *Id.*

157. *Id.* at para. 6.4.

158. *See id.* at para. 6B.

159. PACE, art. 58 (6).

160. *See id.* art. 58 (5).

161. *Id.* art. 58(8). More recently, section 58 (8)(A) was added to authorize a delay of access to legal advice in case of "drug trafficking offence" where "the officer has reasonable grounds for believing that the detained person has benighted from drug trafficking, and that the recovery of the value of that person's proceeds of drug trafficking will be hindered by the exercise of the right." *Id.* art 58(8)(A); *see also* INTERROGATION CODE, *supra* note 111, at para. 6.6.

162. *See* ROYAL COMMISSION REPORT, *supra* note 90, at para. 4.110.

administered before questioning.[163] Prior to April 1995, the caution was similar to the United States' *Miranda* warning which states that, "[y]ou do not have to say anything unless you wish to do so, but what you say may be given in evidence."[164] The Criminal Justice and Public Order Act of 1994, however, replaced this statement with a new provision. It states, "You do not have to say anything. But it may harm your defense if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence."[165]

When a person is not under arrest, the questioner must inform that person that (i) he is not under arrest, (ii) he has no duty to remain with the police, and (iii) he is free to leave at any time.[166] When arrested, suspects must receive the caution unless doing so is impractical by reason of the suspect's condition or behavior.[167] Unlike *Miranda*, the Code only requires that the caution be given by the time the suspect arrives at the police station. Additionally, the Code requires questioning to cease entirely when a suspect invokes the right to counsel or the right to silence.

D. Tape Recording

To prevent disputes over the admissibility and accuracy of statements, the Interrogation Code requires police to record each interview with a suspect.[168] This is true whether or not the interview takes place at a police station. Thus, the tape recording of interviews created significant debates.

Initially, the police strongly opposed the idea, even though both the CLRC and the Royal Commission recommended limited tape recording.[169] After a series of successful field trials,[170]

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163. *See* INTERROGATION CODE, *supra* note 111, at para. 10.1. If questions are asked for other purposes, such as determining a suspect's identity or his ownership of any vehicle or the need to search him in the exercise of powers of stop and search, the caution is not necessary. *See id.*

164. INTERROGATION CODE, *supra* note 111, at para. 10.4 (prior to Apr. 1995). Minor deviations from this wording do not constitute a breach of this requirement. *See id.* The following Notes provide that the officer should explain the caution in his own words if the suspect does not understand the meaning of the caution. *See id.* at n.10C. If the suspect is unclear about the caution's significance, the officer should explain the principle of the right to remain silent and the effect of doing so. *See id.* at n.10D.

165. *Id.* at para. 10.4 (revised from Apr. 10, 1995). *See infra* notes 300–03.

166. *See id.* at para. 10.2.

167. *See id.* at para. 10.3.

168. *See* INTERROGATION CODE, *supra* note 111, at para. 11.5(a).

169. *See* CLRC REPORT, *supra* note 58, at para. 51; ROYAL COMMISSION REPORT,

however, the police attitude toward tape recording rapidly changed. The police realized that tape recording reduces the complaints about the reliability, or truth, of alleged confessions. Tape recording also allowed officers to return to what they regarded as real interviewing, where suspects could be put under pressure by persistent and incisive questioning.[171]

This change is reminiscent of the "vanishingly small cost"[172] of *Miranda* and the shift of the police's attitude on *Miranda* in the United States.[173] Home Office research showed that "[t]here appears to be no evidence to suggest that tape-recording inhibits suspects from confessing or making damaging admissions; nor do the results suggest any decrease in the amount of information about other offences obtained during interview."[174]

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supra note 90, at paras. 4.26–4.27.

170. *See* John Baldwin, *The Police and Tape Recorders*, CRIM. L. REV. 695, 698–703 (1985).

171. *See* Colin Bourn, *Conclusion: the Police and the Acts and the Public, in* THE POLICE: POWER, PROCEDURES AND PROPRIETIES 7, at 288; Maurice Buck, *Questioning the Suspect, in* THE POLICE: POWERS, PROCEDURES AND PROPRIETIES 7, at 161; David Dixon, *Politics, Research and Symbolism in Criminal Justice: The Right of Silence and the Police and Criminal Evidence Act*, 20 ANGLO-AM. L. REV. 27, 46 (1991).

172. *See* Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 516–47 (1996). *But see* Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 437–38 (1996).

173. *See* Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 645 (1996). As Richard A. Leo concluded, the majority of *Miranda* impact studies share two propositions:

> [F]irst, that the requirement of pre-interrogation Miranda warnings has exercised only a negligible effect on the ability of police to elicit confessions, solve crimes, and secure convictions, and; second, that the Miranda decision did not achieve its goal of lessening the psychological pressures of police interrogations or reducing police reliance on confession evidence.

Id. He observed that *Miranda* has become endurable to police gradually and the resistance of the law enforcement authorities against *Miranda* has decreased. He analyzes that the law enforcement community has successfully adapted itself to *Miranda*'s requirement "by fashioning strategies—such as the use of conditioning, de-emphasizing, and persuasion—to predispose suspects to voluntarily waive their rights, thus minimizing the potential obstacle that *Miranda* presents to their custodial questioning practices." *Id.* at 665. Then the *Miranda* warnings to the suspect became a formal thing like "a warning from a cigarette label." *Id.* at 659. Then, neither the International Association of Chiefs of Police nor the National District Attorneys Association joined Attorney General Meese's call to overturn *Miranda*, and rather many police chiefs hail the virtues of *Miranda* and no longer question its legitimacy. *Id.* at 666.

174. *See* CAROLE F. WILLIS, THE TAPE-RECORDING OF POLICE INTERVIEWS WITH SUSPECTS: AN INTERIM REPORT, London: HMSO, 1984 (Home Office Research Study No. 82), at 32.

Parliament proposed a full-scale system of tape recording the entire interrogation procedure. This was embodied in section 60 of PACE.[175] In 1988, the Secretary of State issued the Code of Practice on Tape Recording which governs the tape recording of interrogations.[176]

E. Conclusion—PACE as a Compromise and Its Impact

With regard to police power to stop, arrest, search-and-seize, and detain, PACE provides a number of "enabling rules." These rules effectuate policies the police desire. PACE also includes the "legitimizing rules" which bring the rules in line with pre-existing police practice.[177] As a result, the libertarians saw PACE as a new legal scheme biased towards "policing by coercion."[178]

On the other hand, PACE also provides many "inhibitory rules" that address suspects' rights to legal advice, silence, and entitlement detention review. These rules restrain the police from following their previous working practices.[179] Thus, the law and order lobbyists complained that the rules were anomalous, and an "over-provision of 'safeguards,' which could be exploited by the criminal."[180]

It is hard to find "the fulcrum between police powers and citizens' rights."[181] PACE serves as a compromise between crime control and due process values. As a result, PACE received "the

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175. *See* HOME OFFICE, THE CODE OF TAPE RECORDING (1988).

176. *See id.*

177. *See* SANDERS & YOUNG, *supra* note 129, at 21.

178. *See generally* LOUISE CHRISTIAN, POLICING BY COERCION (1983); Mike Brogden, *Stopping the People—Crime Control Versus Social Control, in* POLICE: THE CONSTITUTION AND THE COMMUNITY, *supra* note 47. Ole Hansen stated:

> [T]he Act does add a new element which is that it makes it easier for the police to carry out practices which were previously not enshrined in statute. The legislation gives the go ahead—the green light—to police practices and behaviours which are likely to prove counter-productive in terms of good policing and tackling crime. The safeguards . . . seem likely to prove largely illusory. They are mainly bureaucratic form-filling and will prove irksome to police officers but they are not real controls or real safeguards for the general public.

Ole Hansen, *A Balanced Approach?, in* THE POLICE: THE POWERS, PROCEDURES AND PROPRIETIES 7, at 111 (John Benyin & Colin Bourn eds. 1986).

179. SANDERS & YOUNG, *supra* note 129, at 21.

180. Buck, *supra* note 171, at 163.

181. John Beyon, *Powers and Proprieties in the Police Station, in* THE POLICE: POWERS, PROCEDURES AND PROPRIETIES 7, at 120 (John Benyon & Colin Bourn eds. 1986).

apparently irreconcilable complaints from civil libertarians about the *extension* of police powers and from police officers about their *limitation*."[182] Michael Zander discussed:

> Theoretically it is possible that either the police or the civil liberties lobby might recognise that the criminal justice system was so unbalanced in favour of their own interests that it required radical redress in the opposite direction. But such a situation is in practice pure fantasy. Each has for a long time been firmly convinced that the balance is seriously wrong and requires redress in the direction of its own preferred values. In order for each to feel that the package is fair, it must be brought to accept that there are a large number of changes that are being made which adopt the values to which it subscribes. If the number is sufficiently large it may then be able to swallow the notion that there are also a substantial number of changes that assist the 'opposing side.'[183]

PACE, however, resulted in important changes to pre-PACE practice. Studies reported that after PACE, most suspects are read their rights, virtually no suspects are overtly denied access to legal advice when requested, and the number of requests for legal advice have dramatically increased.[184] Both police and suspects acknowledge and accept the new system enacted by PACE.

Nonetheless, problems still remain. First, most officers do not record the stops and the searches, and they generally treat records as mere paperwork. Some forms are completed tautologically.[185]

Second, despite the guaranteed right to legal advice and silence,[186] a great majority of suspects fail to exercise those rights.[187]

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182. Dixon, *supra* note 171, at 32 (emphasis in original).

183. Michael Zander, *Determining Whether the Act Achieves the Right Balance*, 1985 PUBLIC LAW 402, 404–05.

184. *See* D. BROWN, DETENTION AT THE POLICE STATION UNDER THE PACE ACT (Home Office Research Study No. 104, 1989), at 21; A. SANDERS ET AL., ADVICE AND ASSISTANCE AT POLICE STATIONS AND THE 24-HOUR DUTY SOLICITOR SCHEME ch. 3 (Lord Chancellor's Department, 1989); A. K. BOTTOMLEY ET AL., THE IMPACT OF ASPECTS OF THE POLICE AND CRIMINAL EVIDENCE ACT ON POLICING IN A FORCE IN THE NORTH OF ENGLAND 114–20 (Centre for Criminology and Criminal Justice, University of Hull, 1989).

185. *See* DAVID J. SMITH & JEREMY GRAY, POLICE AND PEOPLE IN LONDON, VOL. IV, THE POLICE IN ACTION 236 (1983); D. Dixon, et al., *Reality and Rules in the Construction and Regulation of Police Suspicion*, 17 INT'L J. SOC. L. 185, 200–01 (1989); D. Dixon et al., *Consent and the Legal Regulating of Policing*, 17 J.L. & SOC. 345, 348–49 (1990); SANDERS & YOUNG, *supra* note 129, at 51–55.

186. *See infra* text accompanying notes 286–87.

187. *See* SANDERS & YOUNG, *supra* note 129, at 38–39. *See* D. Dixon et al.,

The availability, promptness and quality of legal advice by solicitors remain lacking.[188]

Third, police behavior in interrogation changed, but not in the way intended by PACE. Andrew Sanders and Lee Bridges observe:

> Instead of habitually breaking the law by failing to read rights . . . they now habitually bend it by reading rights incoherently and by failing to inform suspects that legal advice is free. And instead of simply refusing access outright they have a graded response: from incoherent reading of rights (bending) to other ploys aimed at discouragement (bending), failing to record requests and make calls (breaking), persuasion to cancel requests (bending) and dubious informal interrogation practices (bending and breaking).[189]

Sanders and Bridges conclude that "[o]nly the *manner* in which the police secure their goals—putting maximum pressure on the suspects who matter most to them—has changed. Police misconduct has probably not been reduced. Most likely, it has been made less overt, and hence more difficult to detect and control."[190]

This phenomenon demonstrates that, similar to *Miranda* in the United States, the "inhibitory rules" in PACE often turn out to be the "presentational rules."[191] The expectation that police and suspects would automatically change their practices as a result of reformation is misplaced. Furthermore, reliance on this "legalistic notion"[192] is unfounded.

Criminal justice is a social as well as a legal institution. "Negotiated justice"[193] oriented toward obtaining guilty pleas[194]

Safeguarding the Rights of Suspects in Police Custody, in 1 POLICING AND SOCIETY 115–40 (1990); Dixon, *supra* note 171, at 45; A. SANDERS ET AL., *supra* note 184, at ch. 4; D. BROWN, *supra* note 184, at 21.

188. *See* Dixon, *supra* note 171, at 43–45; A. SANDERS ET AL., *supra* note 184, at ch. 4; Sanders & Bridges, *The Right to Legal Advice, in* JUSTICE IN ERROR, *supra* note 64, at 46–52.

189. Andrew Sanders & Lee Bridges, *Access to Legal Advice and Police Malpractice*, CRIM. L. REV. 494, 506 (1990).

190. *Id.*

191. *See* SANDERS & YOUNG, *supra* note 129, at 21.

192. David Dixon, *Common Sense, Legal Advice and the Right to Silence*, 1991 PUB. L. 233, 253 (1991).

193. *See* JOHN BALDWIN & MICHAEL MCCONVILLE, NEGOTIATED JUSTICE: PRESSURE TO PLEAD GUILTY (C.M. Campbell & P.N. P. Wiles eds. 1977). David Dixon stated: "[C]riminal justice should rather be conceived as a fluid process whose currency is

and police practice based on the "cop culture"[195] do not easily change. Therefore, PACE's "instrumental value in either controlling crime or controlling the police" is still in controversy.[196]

The meaningful contribution of PACE and the Codes of Practice, however, should not be overlooked. As Robert Reiner states, the crucial significance of PACE is that "it introduces a greater (if imperfect) degree of *rationalisation* in an area where as the Home Secretary has rightly said 'the present state of the law is unclear and contains many indefensible anomalies.'"[197] A Conservative MP also stated "[t]he basis of the Act [PACE] is said to be founded on compromise, . . . this legislation seeks to codify and control an area which lacked clarity and was becoming an increasing scandal. *In that respect* it is successful."[198]

Although the police cannot explicitly reject the new system, they can tacitly distort it. Although the new system alone cannot enhance the guarantee of an individual's procedural rights, it does provide legal grounds for individual suspects to challenge police misconduct. PACE and the Codes of Practice certainly opened a new stage of the English criminal justice system.

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negotiation, compromise and arrangement in the administration of cases within a system, the essential point of which is not the contested trial but the guilty plea . . . ." More generally, the failure to consider how rules actually operate entailed not properly considering a crucial, continuing practice in policing the achievement of objectives by obtaining "consent" rather than by using legal power. *See* Dixon, *supra* note 192, at 253.

194. According to the official statistics, approximately two-thirds of all Crown Court defendants give up their rights to trial by jury. The statistics treat a case as disposed of by guilty plea only if guilty pleas are entered by *all* co-defendants, if any. *See* JUDICIAL STATISTICS: ANNUAL REPORT 1996 (Lord Chancellor's Department), Cmnd. 3716, at 64, Tbl. 6.7. Thus, the rate of guilty pleas will be higher if cases where not all co-defendants entered guilty pleas are included.

195. *See* REINER, *supra* note 67, at ch. 3.

196. *See* REINER, *supra* note 53, at 402.

197. *Id.* (emphasis added).

198. David Ashby, *Safeguarding the Suspect, in* THE POLICE: POWERS, PROCEDURES AND PROPRIETIES 7, at 183, 188 (John Benyon & Colin Bourn eds., 1986) (emphasis added).

V. THE ENGLISH COURTS' VOLTE-FACE TOWARD ROBUST EXCLUSION AFTER PACE

PACE provides prosecutors with "three hurdles"[199] for exclusion of illegally obtained evidence: (1) the oppression hurdle, (2) the unreliability hurdle in section 76(2), and (3) the fairness hurdle in section 78. Post-PACE, English courts abandoned their past reluctance to exercise their discretion to exclude unlawfully obtained evidence, either confessional or non-confessional evidence.

A. Mandatory Exclusion of Confession by Section 76(2)— Unreliability Test

Section 76(2) of PACE provides the oppression hurdle and the unreliability hurdle. It provides for mandatory exclusion of confessions obtained (a) "by oppression" or (b) "in consequence of anything said or done which was likely" to render a confession "unreliable."[200] When subsection (a) or (b) is alleged, the prosecution has the burden to rebut the charge beyond a reasonable doubt.[201] Section 76(2) rejects the Royal Commission's proposal that the traditional voluntariness test be abandoned altogether. Rather, it accepts the "reliability principle" of the CLRC Report.

An overlap between the two hurdles exists. Oppression likely consists of something said or done that renders a confession unreliable. According to Di Birch, "some basic minimum standards are not negotiable, and courts cannot entertain arguments based on the reliability of evidence obtained in an oppressive way without descending to the level of the oppressor."[202]

Section 76(2)(a) defines oppression to include "torture, inhuman or degrading treatment, and the use or threat of violence

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199. *See* Di Birch, *The Pace Hots Up: Confessions and Confusions Under the 1984 Act*, CRIM. L. REV. 95, 99 (1989). Besides the three hurdles, article 82(3) "saves pre-existing common law powers . . . to exclude evidence whose prejudicial effect outweighed its probative value." PACE, art. 82(3).

200. PACE, art. 76 (2)

201. *See id.*

202. Birch, *supra* note 199.

(whether or not amounting to torture)."[203] English courts maintained a restrictive interpretation of the terms and held "oppression" to its ordinary dictionary meaning.[204] In *Regina v. Miller*,[205] for instance, the defendant, a paranoid schizophrenic, initially confessed to killing his girlfriend and later tried to retract his confession. The defendant argued that he confessed during an oppressive interview that caused him to suffer an episode of schizophrenic terror. The Court of Appeal, however, held that although the questions were asked deliberately with the intention of producing a disordered state of mind, the mere fact that the questions triggered hallucinations in the defendant does not provide evidence of oppression "within the ordinary meaning of that word."[206]

In section 76(2)(b), PACE uses the language "in consequence of anything said or done which was likely . . . to render unreliable confession" instead of the words "threat or inducement" as in the CLRC Report. As Peter Mirfield points out, section 76(2)(b) is "capable of being far more revolutionary in its effect"[207] because "[t]he police, during investigation, may say to or do to the suspect many things which do not amount to threats or inducements."[208] In such a case, the judge should consider whether the reliability test is satisfied. Mark Berger stated:

> The most logical reading of the standard is that it asks the court to make an objective assessment of what consequences would be expected from the circumstances surrounding the questioning, regardless of whether the particular confession is itself reliable. If the statement is *likely* to be unreliable because of the condition which led to the suspect to make it, it should be

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203. PACE, art. 76(8).

204. *See* Regina v. Miller, 1 W.L.R. 1191, 1200–01 (1986).

205. *See id.*

206. *Id.* at 1201. In *Regina v. Fulling*, 2 W.L.R. 923 (C.A. 1987), the defendant initially refused to answer police questions, but she confessed after being told that her lover had been having an affair with another woman held in the next cell. Although the defendant challenged the admissibility of her confession claiming that she had been the victim of oppressive conduct by the police, the Court of Appeal rejected the claim, ruling that the word "oppression" should be given in its dictionary definition as the "[e]xercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc.; the imposition of unreasonable or unjust burdens." *Id.* at 928 (quoting the Oxford English Dictionary).

207. MIRFIELD, *supra* note 22, at 111.

208. *Id.*

excluded even if corroboration of its content is available.[209]

After PACE, the courts, in several cases, ruled confessions to be inadmissible due to their unreliability. In *Regina v. Phillips*,[210] the Court of Appeal excluded the defendant's confession because it was made as a result of the police's explicit inducement.[211] In *Regina v. Harvey*,[212] the Court excluded the defendant's confession to a murder in the presence of her lesbian lover. The defendant possessed a low I.Q. and suffered from a psychopathic disorder. The other woman confessed first but later retracted the confession. The judge said that the prosecution had not met the burden of proof regarding the reliability of the confession.[213]

In *Regina v. Delaney*,[214] the Court of Appeal quashed a conviction of an indecent assault of a three-year old girl based on the defendant's psychologically weak admissions. The court emphasized that the police violated the Interrogation Code by failing to make a contemporaneous note of the conversation with the defendant, thereby depriving the court of information as to exactly what transpired.[215] The court concluded that the trial judge did not consider the impact of the defendant's long-term treatment on the reliability of his statement.[216] In *Regina v. Trussler*,[217] the judge in Crown Court excluded the confession of a drug addict because he had been in police custody for eighteen hours without any rest. The trial judge excluded the confession as unreliable, emphasizing that extended questioning without rest breached the provision of the Interrogation Code that requires the suspect to be

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209. Mark Berger, *The Exclusionary Rule and Confession Evidence: Some Perspectives on Evolving Practices and Policies in the United States and England and Wales*, 20 ANGLO-AM. L. REV. 63, 72 (1991) (emphasis in original).

210. *See* Regina v. Phillips, 86 Crim. App. 18 (1987). In *Director of Public Prosecutions v. Blake*, 89 Crim. App. 179 (Q.B. Div'l Ct 1988), the Court of Appeal excluded a juvenile defendant's confession to a fire at the hostel. Although the defendant initially refused to locate her estranged father at the interview and sought a social worker, the police eventually secured the presence of her father. Given the earlier steadfast resistance of the child to the presence of her father, and out of concern that an estranged parent would not be able to fulfill the goal of ensuring a fair interview of the child, the court concluded that the spirit of the Interrogation Code had been violated. *See id.* at 186.

211. *See id.* at 23.

212. *See* Regina v. Harvey, Crim. App. 241 (1988).

213. *Id.*

214. *See* Regina v. Delaney, 88 Crim. App. 338 (1988).

215. *See id.* at 341–42.

216. *See id.* at 343.

217. *See* Regina v. Trussler, Crim. App. 446 (1988).

given at least eight hours rest in any twenty-four hour period.[218]

B. Rigorous Exercise of Discretion for Exclusion by Section 78(1)—Unfairness Test

In addition to the double hurdle in section 76(2), section 78(1) grants judges the ability to exercise a fairness-based discretion.[219] Based on the "protective principle," the section provides that "the court may refuse to allow evidence . . . if it appears to the court that . . . the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."[220] Although there is an argument that section 78 is intended to apply only to non-confessional evidence, there is nothing in section 78 to suggest such a restrictive interpretation. As a result, it is interpreted to provide a general discretion to exclude *all* unreliable evidence.[221]

The new statutory discretion resembled the old common law discretion. While it was possible that the judges might interpret the section as narrowly as before PACE, the consequence of section 78(1) has been quite different.[222]

1. Physical Evidence Obtained from Unlawful Search-and-Seizure

Although the Royal Commission recommended an "obligatory exclusion" of evidence from an illegal search and seizure,[223] the Conservative government rejected the recommendation. Subsequently, Lord Scarman, although he was part of the majority in *Sang*, initiated an amendment that introduced "a Scottish-style reverse onus exclusionary rule."[224] The amendment gave the courts discretion to exclude illegally obtained evidence unless the prosecution could prove beyond a reasonable doubt that it was lawfully obtained, or that the illegality was of no material significance, or that the overriding interest of justice required that it be allowed in as evidence.[225]

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218. *See id.* at 448.
219. PACE, art. 78(1).
220. *Id.* art. 78.
221. *See* Peter Mirfield, *The Future of the Law of Confession*, CRIM. L. REV. 63, 71 (1984); Birch, *supra* note 199, at 97.
222. *See* FELDMAN, *supra* note 9, at 429; ZANDER, *supra* note 4, at 201.
223. *See* ROYAL COMMISSION REPORT, *supra* note 90, at para. 3.49.
224. FELDMAN, *supra* note 9, at 427.
225. The final form of the Scarman amendment was as follows:

The government rejected Lord Scarman's amendment and replaced it with Lord Chancellor's and Lord Hailsham's amendment designed to return to the common law position before *Sang*.[226] Section 78(1) was then adopted, "open to further development by the courts—who in their turn may yet come to regret the absence of the specifics of the Scarman clause."[227]

English courts readily exercise their Section 78 power and exclude evidence for various reasons. For example, in *Matto v. D.P.P.*,[228] the Division Court suppressed the breath specimen of a suspect and quashed a conviction for driving with excess alcohol because the police, in their efforts to administer the breath test, engaged in misconduct (*mala fides*) on the defendant's property.[229] Similarly, in *Chapman v. D.P.P.*,[230] the court quashed a conviction for assaulting a police officer because the police entered the defendant's apartment in pursuit of a fleeing suspect without reasonable suspicion that the suspect had committed any arrestable offense.[231] Likewise, in *The Queen v. Fennelley*,[232] a trial for possession of narcotics with intent to distribute, the trial judge suppressed evidence of the narcotics because the police violated PACE section 2(3) by not informing the suspect as to why he was stopped and about to be searched.[233]

> If it appears to the court in any proceedings that any evidence (other than a confession) proposed to be given by the prosecution that may have been obtained improperly, the court shall not allow the evidence to be given unless– the prosecution proves to the court beyond a reasonable doubt that it was obtained lawfully . . . or the court is satisfied that anything improperly done in obtaining it was of no material significance in all the circumstances of the case and ought, therefore, to be disregarded; or the court is satisfied that the probative value of the evidence, the gravity of the offence charged, and the circumstances in which the evidence was obtained are such that the public interest in the fair administration of the criminal law requires the evidence to be given, notwithstanding that it was obtained improperly.

4 PARL. DEB., H.L. 430 (1984).

226. *See id.* at 427–28; ZANDER, *supra* note 4, at 199–200.

227. Paul Sieghart, *Sanctions Against Abuse of Police Powers*, 1985 PUB. L. 440, 446.

228. *See* Matto v. D.P.P., Crim. L. Rev. 641 (1987).

229. *See id.*

230. *See* Chapman v. D.P.P., Crim. L. Rev. 843 (1988).

231. *See id.*

232. *See* The Queen v. Fennelley, Crim. L. Rev. 142 (1989).

233. *See id.*

In *Regina v. Taylor*,[234] a case involving financial improprieties, the trial judge suppressed documentary evidence due to police misconduct, irrespective of any concerns about reliability. The police, in their application for a subpoena, had misled the judge into believing that the investigation concerned drug trafficking.[235]

2. Confessions Obtained from Breach of the Right to Legal Advice

The main issue in cases regarding the right to legal advice is whether any delay in obtaining a solicitor for the accused is justified as being reasonable. The English courts have routinely exercised their fairness-based discretion under section 78(1) of PACE to exclude confessions obtained as a result of breaching section 58 of PACE.

The leading case is *Regina v. Samuel*,[236] which "showed that the courts were prepared to enforce the provisions of section 58 with an unexpected degree of vigour."[237] The defendant in *Samuel*, after waiving his right to counsel, denied his involvement in an armed robbery. After a search of the defendant's home uncovered stolen items, he asked for his solicitor. Additionally, upon learning of the charges, the defendant's solicitor sought access to his client. A superintendent at the police station, however, denied the access because serious arrestable offenses were involved and there was a likelihood of inadvertent warning of accomplices.[238] The defendant, subsequently, confessed. Only after the defendant confessed was the solicitor allowed to see his client. The Court quashed the conviction because the police unjustifiably delayed the defendant's right to legal advice.

The court's analysis in *Samuel* begins with referring to paragraph one of Annex B to the Interrogation Code. First, the court pointed out that the police were unjustified in denying a suspect access to a solicitor after he was charged, even though other charges were still being investigated.[239] Second, emphasizing that

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234. *See* Manchester Crown Court, Ex P. Taylor, 1 W.L.R. 705 (D.C. 1988); Barclay Bank plc v. Taylor, 1 W.L.R. 1066 (C.A. 1989).

235. *See id.*

236. *See* Regina v. Samuel, 1 Q.B. 615 (C.A. 1987).

237. ZANDER, *supra* note 4, at 115.

238. *See* Samuel, 1 Q.B. at 618.

239. INTERROGATION CODE, *supra* note 112, parcel Annex B.

the right of access to a solicitor is "one of the most important and fundamental rights of a citizen,"[240] the court stated that denying access to a solicitor because accomplices may be alerted was an insufficient reason for denial. The court concluded that the more probable reason for the denial was to give the police one last chance to interview the defendant without a solicitor present. The court observed that the defendant's solicitor would have advised silence because his client had already strenuously denied involvement and because the police had filed two serious charges. Therefore, the court concluded that in all probability the police would not have obtained incriminating information from the defendant if he had consulted with the solicitor.[241] The court quashed the conviction because the trial judge should have exercised his discretion to exclude the confession.[242]

The trial judge in *Regina v. Davidson*[243] and the Court of Appeal in *Regina v. Parris*[244] and *Regina v. Mary Quayson*[245] followed *Samuel*, and excluded confessions based on breach of section 58.[246] The case law is now summarized in two new guidance notes to Annex B of the Interrogation Code which state:

> [T]he officer may authorize delaying access to a solicitor only if he has reasonable grounds to believe that that specific solicitor will, inadvertently or otherwise, pass on a message from the detained person which lead to an any of the three results in paragraph 1 coming out. In these circumstances the officer should offer the detained person access to a solicitor on the

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> The right set out in section 5 or 6 or both in the Code or both may be delayed *if* the person is in police detention in connection with a serious arrestable offence, *has not yet been charged* with an offence and an officer of the rank of superintendent or above has reasonable grounds for believing that . . . .

Id. (emphasis added).

240. *See* Samuel, 1 Q.B. at 630.

241. *See id.*

242. *See id.*

243. *See* Regina v. Davidson, Crim. L. Rev. 442 (1988).

244. *See* Regina v. Parris, Crim. L. Rev. 214 (1989).

245. *See* Regina v. Mary Quayson, Crim. L. Rev. 218 (1989).

246. The exclusion, however, is not automatic but discretionary. In *Regina v. Alladice*, 87 Crim. App. 380 (1988), the Court of Appeal did not exclude the suspect's confession although it found the breach of section 58. Given the fact the suspect had been cautioned, his statement that he could cope with the interview and his comment that he only wanted a solicitor to check the conduct of the police, the court concluded that the presence of the solicitor would not have made any difference to the suspect's knowledge of his rights and there was no link between the absence of the solicitor and the admission.

Duty Solicitor Scheme.[247]

The fact that the ground for delaying notification of arrest under paragraph 1 above may be satisfied does not automatically mean that the grounds for delaying access to legal access will also be satisfied.[248]

Similar to the U.S. Burger-Rehnquist Supreme Courts revival of the *Massiah* rule,[249] the English courts actively protect a suspect's right to counsel. It is argued that "[t]he burden of authority is such that other than in certain categories of offences it is now virtually impossible for the police to justify the prevention of access at any stage."[250]

3. Confessions Obtained without a Caution

The English courts have also exercised their discretion to exclude confessions obtained when the defendant was not informed of his or her rights. There are several leading cases.[251]

In *Regina v. Absolam*,[252] the Court of Appeal quashed a conviction for supplying cannabis because the defendant was not informed of his right to have a solicitor present and the interview was not recorded. The trial judge held that the suspect was only entitled to legal advice "as soon as practicable," as required by section 58(4), and that the series of questions and answers did not amount to an interview. The Court of Appeal, however, held that section 58(4) did not relate to the suspect's right to be advised of

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247. INTERROGATION CODE, *supra* note 111, Annex B, n.B4.

248. *Id.* at n.B5.

249. *See* Massiah v. United States, 377 U.S. 201 (1964). The *Massiah* rule "not only survived, but flourished" in the "conservative" Courts. Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2475 (1996). In *Brewer v. Williams*, 430 U.S. 387 (1977), the Court not only reaffirmed but also significantly expanded the *Massiah* rule, that is, it broadened the definition of "deliberate elicitation" of incriminating statements, then the "Christian burial speech" constituted the elicitation. In *United States v. Henry*, 447 U.S. 264 (1980), the Cout held that the use of a paid informant who engaged in conversations with the incarcerated defendant violated the Sixth Amendment and the defendant's incriminating statements were "deliberately elicited" even though the informant had been instructed "not to initiate any conversation with or question" the defendant. *See also* Maine v. Moulton, 474 U.S. 159 (1985).

250. David Wolchover & Anthony Heaton-Armstrong, *The Questioning Code Revamped*, CRIM. L. REV. 232, 234 (1991).

251. In *Regina v. Hughes*, however, the Court of Appeal sustained the admission of confession after the police had mistakenly told a suspect, after the suspect's request, that a duty solicitor was not available. *See* Crim. L. Rev. 519 (1991).

252. *See* Regina v. Absolam, 88 Crim. App. 332 (1989).

his right to legal advice immediately upon detention. Furthermore, the interrogation constituted an interview within the meaning of the Code because it was conducted by the police to obtain an admission upon which criminal proceedings could commence.

In *Regina v. Vernon*,[253] the defendant signed the custody form requesting a solicitor. When a solicitor was not available, the defendant agreed to be interviewed, during which time she made admissions. The trial judge at Inner London Crown Court excluded the interview because the defendant was not advised of the duty solicitor scheme.

C. Conclusion—"Revolution" Based on Legislation

As the Royal Commission pointed out, the English criminal justice system retains features distinct from those of the United States. For example, "the police are less fragmented than in the United States; there is a common discipline code for all forces; there are national representative bodies and a single Minister with responsibilities for the police service at national level; and there is a central inspectorate."[254] In comparison to the U.S. adversary system, the English system is far less party-influenced and more hierarchically-controlled.[255] The difference in the legal culture is also observed. Inga Markovits states:

> Americans view the state with suspicion and the law as their shield against official transgressions. They expect "total justice": compensation for every harm suffered, observance of due process when their rights are at stake .... The English, on the other hand, do not yet seem to define themselves as holders of rights nor do they view their interactions with others as legal relationships .... If Americans want "total justice," expectations of justice in Britain, according to one English observer, are at best "patchy." "Due process" is not a term which features in an English lawyer's daily vocabulary, nor is it part of a layman's demands upon life.[256]

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253. *See* Regina v. Vernon, Crim. L. Rev. 445 (1988).

254. ROYAL COMMISSION REPORT, *supra* note 90, at paras. 4.126–4.127. *See also* Van Kessel, *supra* note 59, at 130–31.

255. *See* Robert A. Kagan, *American Lawyers, Legal Culture, and Adversary Legalism*, *in* LEGAL CULTURE AND THE LEGAL PROFESSION 9 (Lawrence M. Friedman & Harry N. Scheiber eds., 1996).

256. *See* The King v. Warckshall, 1 Leach C.C., at 1324–25 (footnotes omitted).

These differences caused PACE not to adopt the "disciplinary principle," although the "reliability principle" and the "protective principle" are explicitly expressed as grounds for the exclusionary rule in section 76(2) and 78(1). Since the 1960s, however, "the traditional equanimity with which the British have viewed their system of justice has been undermined by declining public confidence in the police and worsening police-community relations."[257] Furthermore, "English courts now confront many of the same tensions between 'law and order' and personal liberty which [Americans] have faced for decades."[258] At the same time, remedies for police misconduct, such as civil and criminal actions, are ineffective.[259]

After PACE, the English courts have tacitly accepted the "disciplinary principle" in their initiative. David Feldman stated:

> The judges in the Crown Courts and the Court of Appeal seem to have moved away from the traditional notion that it is not the judiciary's job to discipline the police. They treat the regulation of police practices as being at least as important an objective as procedural fairness in the criminal process . . . . It shows that the judges now see themselves as having a disciplinary and regulatory role in maintaining the balance between the powers of the police and the protection of suspects. This balance was one of the fundamental elements in the deliberations of the Phillips Commission and of parliamentarians debating the various versions of the Police and Criminal Evidence Bill. In order to maintain this balance, judge appear to feel that they must impress on the police the importance of the protective provisions in PACE and the Codes.[260]

The English courts' use of their discretionary exclusion after PACE is extraordinary.[261] According to Michael Zander's

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257. Van Kessel, *supra* note 59, at 9.

258. *Id.*

259. *See* SANDERS & YOUNG, *supra* note 129, at 395–413.

260. David Feldman, *Regulating Treatment of Suspects in Police Stations: Judicial Interpretation of Detention Provisions in the Police and Criminal Evidence Act 1984*, CRIM. L. REV. 452, 468–70 (1990) (footnotes omitted).

261. In 1981, McConville and Baldwin observed that: "The situation [with respect to police interrogation] is . . . more favorable to the accused in the United States where the courts have strived in recent years to give meanings to his rights. In the absence of corresponding efforts on the part of English courts . . . ." MICHAEL MCCONVILLE & JOHN BALDWIN, COURTS, PROSECUTION AND CONVICTIONS 5, 6 (1981).

research, between January 1986 and June 1990, forty-six of the seventy-two reported decisions that excluded evidence resulted in victory for the defendant.[262] At trial level, twenty-six out of twenty-eight decisions favored the defendant.[263] At the appellate level, twenty out of forty-four were decided in favor of the defendant.[264] Zander stated, "This *is* striking. Few, one imagine, would have predicted a 'batting average' of almost fifty per cent for the defence in the appellate cases."[265] An American law professor called this shift a "British criminal procedure revolution."[266]

VI. DEBATE ON RIGHT TO SILENCE AND PENALIZATION OF ITS EXERCISE BY THE CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994

English courts robustly exercised the discretionary exclusion rule under PACE until it was halted by the law and order lobby. In 1994, as a result of the lobby efforts to abolish the right to silence, the English Parliament passed the CJPOA. By April 1995, the right to silence was finally "extinguished in the nation which invented it."[267] Great Britain, following the Republic of Singapore, became the second nation to adopt the CLRC's recommendation.[268]

A. Brief Review of the Debate on the Right to Silence

The right to silence is a common law principle that "normally tribunals of fact (juries and magistrates) should not be invited or encouraged to conclude, either by judges or prosecutors, that a defendant is guilty merely because he has refused to respond to allegations, particularly from the police, or has refused to testify in court in his own defence."[269] It has been the "golden thread

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262. *See* ZANDER, *supra* note 4, at 201.
263. *See id.*
264. *See id.*
265. *Id.* (emphasis in original).
266. Bradley, *supra* note 118, at 190.
267. RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN 9 (1990).
268. In 1976, the Republic of Singapore adopted the CLRC proposal. *See* Meng Heong Yeo, *Diminishing the Right to Silence: The Singapore Experience*, CRIM. L.REV. 89 (1983).
269. Steven Greer, *The Right to Silence: A Review of the Current Debate*, 53 MOD. L. REV. 709, 710 (1990). In *Regina v. Sang*, Lord Diplock stated:

The underlying rationale of this branch of the criminal law, though it may

running through the web of English law."[270]

Like the *Miranda* debate in the United States, the right to silence in Great Britain "has come to symbolize the contest over criminal justice."[271] The criticism on the right to silence can be traced to Bentham's famous dictum: "innocence claims the right of speaking, as guilt invokes the privilege of silence."[272] Opponents criticize the right to silence as "contrary to common sense,"[273] "a sacred cow," and an unjustifiable relic of the past.[274]

Roger Leng summarized the main arguments of "abolitionism"[275] as follows: (i) investigating crime and law enforcement benefits the community as a whole; thus the state should require citizens to cooperate and answer questions; (ii) there is no point in preserving a right that only aids criminals in evading justice; (iii) guilt is the only real reason for silence, thus it is illogical to bar judges from directing juries that guilt may be inferred from silence; (iv) protection of the right to silence may pervert justice because it withholds cogent evidence from the jury; and (v) the right to silence hampers investigations by precluding the police from collecting evidence from the best source, the suspect.[276]

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originally have been based on ensuring the reliability of confessions is, in my view, now to be found in the maxim, *nemo debet prodere se ipsum*, no one can be required to be his own betrayer, or in its popular English misinterpretation 'the right to silence.'

2 All E.R. 1222, 1230 (1979).

270. Woolmington v. D.P.P., A.C. 462 (1935).

271. Dixon, *supra* note 171, at 32.

272. BENTHAM, A TREATISE ON JUDICIAL EVIDENCE 241 (M. Dumont ed., 1825).

273. Glanville Williams, *The Tactics of Silence*, 137 NEW L.J. 1107 (1987). He stated: "the so-called right to silence . . . is contrary to common sense. It runs counter to our realisation of how we ourselves would behave if we were faced with a criminal charge. If we were innocent, we would not stay mum—except perhaps in the most unusual circumstances." *Id.*

274. Sir Rupert Cross, *Right to Silence and the Presumption of Liberty—Sacred Cow or Safeguard of Liberty*, 11 J. SOC'Y. PUB. TCHRS. L. 66 (1970).

> The right to silence has been seen as an anachronistic because in the past such measures were vital to protect the accused from excesses of torture and inquisition, associated with institutions such as the Star Chamber, but with the procedural protections put in place since that period, its significance has declined.

SUSAN M. EASTON, THE RIGHT TO SILENCE 31 (1991).

275. Abolitionism is the term used to describe the movement encouraging abolition of the right to silence.

276. *See* Roger Leng, *The Right-to-Silence Debate*, *in* SUSPICION AND SILENCE: THE RIGHT TO SILENCE IN CRIMINAL INVESTIGATIONS 20 (1994).

The alleged benefits of abolitionism are summarized as follows:

> Abolishing the right to silence would increase pressure on individuals to speak, and encourage admissions and guilty pleas. This would lead to shorter sentences and relieve pressure on prisons, although of course this might be offset by the overall increase in conviction of the guilty. Also, the number of non-jury trials would probably increase, which cost the public significantly less than a jury trial .... Additionally, abolitionists contend that additional convictions, regardless of how few in number, will prove significant to victims and to police morale. Finally, abolitionists argue that the most important benefit of mandating an accused's testimony is the testimony's contribution to the truth.[277]

Conversely, "retentionism"[278] regards the right to silence as a fundamental legal shield that protects the presumption of innocence. Retentionists criticize abolitionism as "the tyranny of convenience."[279] They claim that: (i) the traditional common law does not require a citizen to incriminate him or herself; (ii) using a suspect's silence as evidence against them effectively reduces the prosecutions burden of proof and thereby undermines the principle that citizens retain a presumption of innocence unless proven guilty beyond a reasonable doubt; (iii) forcing suspects to participate in pre-trial interviews usurps the role of a trial court as the proper place for determining the fact; and (iv) the coercive atmosphere of police interviews may induce vulnerable and easily influenced suspects to incriminate themselves falsely.[280] Susan Easton stated:

> The privilege is built into the edifice of the adversarial system. If the right to silence was lost and the defendant encouraged to answer at risk of adverse inferences, this would shift the trial process from an adversarial system to an inquisitorial one .... Once comment is permitted on silence, whether in police interrogation or at trial, then the whole focus of the trial shifts onto the defence and assessment of its arguments, rather than

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277. *See* EASTON, *supra* note 274, at 94.

278. Retentionism is the term used to describe the movement to retain the right to silence.

279. DWORKIN, *supra* note 267, at 9. He stated: "Measured case-by-case against the immediate aims of ordinary politics, the value of liberty will always seem speculative and marginal; it will always seem academic, abstract, and dispensable." *Id.* at 12.

280. *See* Leng, *supra* note 276, at 20.

> on the prosecution's case against the accused so it is hard to sustain the view that the burden of proof would not be affected. The defendant becomes the focus of attention and his account, or failure to supply an explanation of his conduct, becomes the centre of the trial, rather than the strength of the prosecution's case .... Once the burden is effectively shifted by abolishing or diluting the right to silence, then the incentive to the prosecution to search for independent evidence is weakened considerably.[281]

A number of empirical studies, before and after PACE, argue against Ms. Easton's position on the right to silence.[282] Michael Zander summarized the results of the studies as follows:

> (i) The great majority of suspects in police stations do not exercise their right to silence. All studies agree on this; (ii) Suspects charged with serious offenses are silent in the police station more often than suspects charged with less serious cases; (iii) Suspects who have legal advice are more likely to be silent in the police station than suspects who do not have legal advice; (iv) Suspects with previous convictions are more likely to be silent in the police station than those with no prior record; (v) What determines whether a suspect is charged is mainly the strength of the prosecution's evidence; (vi) Insofar as silence in the police station has any impact on the police decision to charge, it makes a charge more likely rather than less likely; (v) the great majority of defendants in both the Crown Court (over 70%) and the magistrates' courts (over 90%) plead guilty, which from this point of view makes it academic whether they were silent in the police station; (vii) Suspects who are silent in the police station and who plead not guilty are found about as often as suspects who were not silent in the police station.[283]

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281. EASTON, *supra* note 274, at 109–11.

282. Major pre-PACE studies are as follows: Zander, *The Investigation of Crime*, 9 CRIM. L. REV. 203 (1979); B. IRVING, POLICE INTERROGATION: A CASE STUDY OF CURRENT PRACTICE (RCCP RESEARCH STUDY NO. 2, 1980); MCCONVILLE & BALDWIN, *supra* note 261; B. Mitchell, *Confession and Police Interrogation of Suspects*, CRIM. L. REV. 596 (1986). Major post PACE studies are as follows: J. WALKEY, POLICE INTERROGATION (1987); A. SANDERS ET AL., *Advice and Assistance at Police Stations* (1989); B. IRVING & I. MCKENZIE, POLICE INTERROGATION (1989); S. Moston et al., *The Effects of Case Characteristics on Suspect Behavior During Questioning*, 32 BRIT J. CRIMINOLOGY 23 (1992); S. Moston et al., *The Incidence, Antecedents and Consequences of the Use of the Right to Silence during Police Questioning*, 3 CRIM. BEHAV. & MENTAL HEALTH 30 (1993).

283. Michael Zander, *Abolition of the Right to Silence, in* SUSPICION AND SILENCE: THE RIGHT TO SILENCE IN CRIMINAL INVESTIGATIONS 147–48 (David Morgan &

Additionally, the Royal Commission report indicates that, contrary to common sense, lawyers rarely advise silence because most suspects experience difficulties remaining silent.[284] Also, in practice, exercising the right to silence results in negative consequences for suspects because juries, regardless of their instructions, draw adverse inferences from the silence.[285] When clients are advised to remain silent, it is "a temporary, negotiating or sanctioning tactic rather than an entrenched position."[286] Lawyers give such instructions "to protect a particularly vulnerable client, to sanction police malpractice, or to bargain tactically with officers in exchanges of information."[287]

Retentionists suggest that no support exists for the abolitionist argument that allowing criminals to rely on their right to silence sacrifices convictions. D.J. Galligan pointed out that the research on this subject yields two different conclusions. First, since suspects usually waive the right to silence, it has little importance and should be abolished. Second, the public has no reason to regard the right to silence as an obstacle to investigation.[288]

Critics of the first interpretation argue that the waivers result from the enormous pressure exerted by the methods and organization of the investigation. Therefore, fundamental reform must occur to ensure that suspects make informed and voluntary decisions. Critics of the second argument suggest that the right to silence substantially delays the investigation. In addition, if suspects know that the court might draw adverse inferences from the suspect's silence, they would likely make incriminating statements more quickly and easily.[289] "The numbers game" does not affect the position of either lobby.[290]

Geoffrey M. Stephenson eds., 1994).

284. *See* ROYAL COMMISSION REPORT, *supra* note 90.

285. *See id.* at paras. 4.39, 4.48; M. ZANDER & P. HENDERSON, THE CROWN COURT STUDY (Royal Commission on Criminal Justice Research Study No. 19, 1993).

286. Dixon, *supra* note 192, at 234.

287. Dixon, *supra* note 171, at 45.

288. *See* D.J. Galligan, *The Right to Silence Reconsidered*, 41 CURRENT LEGAL PROBS. 69, 75 (1988).

289. *See id.*

290. Leng, *supra* note 276, at 22.

B. Victory of "Exchange Abolitionism"

As indicated above, the first round of the debate led to the retentionist's victory. Both the Royal Commission and PACE rejected the CLRC's 1972 proposal to abolish the right to silence. In July 1987, however, the Home Secretary, Douglas Hurd, reopened the debate at the annual Police Foundation Lecture. While affirming his belief in the appropriateness of giving suspects the right to legal advice at police stations, Hurd revived the CLRC's proposal, stating that:

> [I]n the light of changing circumstances, including the advent of tape recording and other safeguards, it is right to consider whether the right balance is being struck between the interests of a person suspected of crime and the interest of society as a whole in bringing criminals to justice . . . . Is it really in the interests of justice, for example, that experienced criminals should be able to refuse to answer all police questions secure in the knowledge that a jury will never hear of it? Does the present law really protect the innocent whose interests will generally lie in answering questions frankly? Is it really unthinkable that the jury should be allowed to know about the defendant's silence and, in the light of the other facts brought to light during a trial, be able to draw its own conclusion?[291]

Hurd's announcement responded to police pressure arising from PACE. Although PACE clarified, consolidated, extended and balanced police power against additional suspects' rights, "most of these police powers were already being exercised de facto."[292] Therefore, police saw PACE, particularly the section expounding the right to legal advice before and during interrogation, as a constraint.[293] Additionally, the right to silence was "politically symbolic as the territory upon which the police seeks to regain the political ground lost in PACE."[294] Thus, the right to silence was "crucial as an issue which symbolizes police autonomy and professionalism."[295]

Hurd's statement became what Steven Greer called "exchange abolitionism,"[296] which argues for the abolishment of

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291. *Recited in* Zander, *supra* note 283, at 142–43.
292. Dixon, *supra* note 171, at 32–33.
293. *See id.*
294. *See id.* at 234.
295. *Id.*
296. Greer, *supra* note 269, at 719. Adrian A. Zuckerman, a leading exchange

the right to silence in exchange for other rights, principally the right to legal advice during a police interview. The exchange abolitionists argue that, unlike pre-PACE, other suspects' rights during police interrogation are sufficiently guaranteed under PACE.[297] Therefore, only the guilty seek to hide behind silence at the police station.[298] Their conclusion is that PACE renders the right to silence "superfluous."[299] Internal police research supported this theory by noting the increased rate of suspects invoking the right to legal representation and the right to silence after PACE.[300]

The criticism of exchange abolitionism that "PACE was *intended* to change policing practice by increasing suspects' rights as the price for formalizing and increasing certain police power"[301] did not prevail. In 1988, the Criminal Evidence (Northern Ireland) Order abolished the right to silence for all suspects arrested in Northern Ireland. In July 1989, the Home Office Working Group published their report recommending implementation of the CLRC's right to silence proposal and a new caution.[302] Reaching the same conclusion in 1993, an eight-to-three majority of the Royal Commission on Criminal Justice advised maintaining the right to silence, as its predecessor, the Royal Commission on Criminal Procedure, did in 1981. Nevertheless, the conservative government rejected the advice and enacted the CJPOA in 1994, thus making the right to silence

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abolitionist, however, maintains that the abolishment of the right to silence without adequate countervailing measures is excessive although he has long argued that there is little to support the privilege against self-incrimination and its offshoot, the right to silence. *See* A.A.S. ZUCKERMAN, THE PRINCIPLES OF CRIMINAL EVIDENCE, ch. 15 (1989).

297. *See id.*

298. *See id.*

299. *See id.* at 719–20; EASTON, *supra* note 274, at 33.

300. *See 'Enormous' Increase in Use of Right to Silence*, POLICE REVIEW, at 285 (1988); HOME OFFICE, REPORT OF THE WORKING GROUP ON THE RIGHT OF SILENCE, at 60–62 (1989).

301. Dixon, *supra* note 171, at 41 (emphasis in original).

302. *See* HOME OFFICE, REPORT OF THE WORKING GROUP ON THE RIGHT OF SILENCE, paras. 65, 86, 114. The proposed new caution states:

> You do not have to say anything. A record will be made of anything you do say and it may be given in evidence. So may your refusal to answer any question. If there is any fact on which you intend to rely in your defence in court it would be best to mention it now. If you hold it back until you go to court you may be less likely to be believed.

Id. at para. 71.

nominal in England.[303] Some of the results of the CJPOA are discussed below.

First, as of April 1995, both the prosecution and the judge are permitted to comment unfavorably about a defendant's silence or failure to mention a relevant fact during police questioning.[304] Second, the court and the prosecution may comment unfavorably on a defendant's failure to testify and provide evidence in the courtroom.[305] Third, the court and the prosecution may invite the jury to draw adverse inferences from the defendant's failure, during police interrogation, to give a satisfactory explanation for marks or substances (such as scuff marks on his shoes or blood on his shirt).[306] Lastly, the court or prosecution may invite the jury to draw adverse inferences from a suspect's failure to give a satisfactory explanation to police questions about his presence at the crime scene.[307] As a result, the Interrogation Code adopts a new caution: "You do not have to say anything. *But it may harm your defense if you do not mention when questioned something which you later rely on in court.* Anything you do say may be given in evidence."[308]

Even with academic arguments and empirical studies against abolitionism, retentionism could not get effective political support. The perspective was not a popular "vote-catcher."[309] Lawrence Koffman stated:

> The general public, fed on a remorseless diet of sensationalised accounts of the growing rate of violence, 'mugging' and burglaries, expects to hear more belligerent noises from ambitious politicians. Quite simply there are far more votes to be won by law and order policies than by support for civil liberties. The latter can thus be comfortably dismissed as the

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303. In 1996, there was another change in the Police Procedure and Investigations Bill. The Bill requires a defendant tried in the crown court to give the prosecutor a "defence statement" if the prosecutor has complied with the duty of prosecution disclosure. Clause 5 of the Bill says that the defense must disclose before the trial the nature of the defence, the matters on which the defendant takes issue with the prosecution and the reasons. *See* Zander, *supra* note 113, at 664–65.

304. *See* CRIMINAL JUSTICE AND PUBLIC ORDER ACT, art. 34.

305. *See id.* art. 35.

306. *See id.* art. 36.

307. *See id.* art. 37.

308. INTERROGATION CODE, *supra* note 111, at para. 10.4 (revised from Apr. 10, 1995) (emphasis added).

309. Koffman, *supra* note 47, at 15.

rantings of extremists and intellectuals . . . .[310]

C. The Court's Response

The strict restriction on the right to silence increased the value of crime control value, but at the expense of due process. The restriction indicates that the English criminal justice system is shifting "from its accusatorial focus on proof by witnesses and extrinsic evidence, to an inquisitorial focus on the interrogation of suspects to gain evidence of their guilt."[311] The restriction on the right to silence shows that a utilitarian cost-benefit analysis can destroy a common law right when a constitutional guarantee, such as the United States Bill of Rights, does not exist to protect that right.[312]

Hence, how have the English courts reacted to the legislation? First, unlike the American courts, the English courts do not have authority to declare an act of Parliament unconstitutional because of the supremacy of Parliament. Because the United Kingdom is a signatory of the European Convention on Human Rights, judicial review of CJPOA is available through the European Court of Human Rights. This judicial review is limited, however, because neither the Convention nor the machinery of adjudication are incorporated into the domestic United Kingdom law. Therefore, judicial review of the CJPOA is unavailable to the British people through proceedings brought in the United Kingdom's ordinary courts.[313]

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310. *Id.*

311. Gregory W. O'Reilly, *England Limits the Rights to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402, 405 (1994).

312. In the United States, there have been proposals to allow adverse inferences from silence. *See* DOJ REPORT NO. 8, *supra* note 2, at 1005; Charles Maechling, Jr., *Truth in Prosecuting, Borrowing From Europe's Civil Law Tradition*, A.B.A.J. 59, 60 (Jan. 1991). The Supreme Court, however, has prohibited the inferences. *See* Griffin v. California, 380 U.S. 609 (1965); Doyle v. Ohio, 426 U.S. 610 (1976).

313. *See* Lord Browne-Wilkinson, *A Bill of Rights for the United Kingdom—The Case Against*, 32 TEX. INT'L L.J. 435, 436 (1997); John Mahoney, *Suing the State: A Comparison of Remedies Provided for Individual Rights Violations in Great Britain and the United States*, 56 UMKC L. REV. 435, 449–53 (1988). For a discussion of relevant cases from the European Commission on Human Rights and European Court on Human Rights, *see* MIRFIELD, *supra* note 22, at 108–10. Regarding the debates on incorporating the Convention into the statute law of the United Kingdom, *see also* MICHAEL ZANDER, A BILL OF RIGHTS? (1997); Michael Zander, *A Bill of Rights for the United Kingdom—Now*, 32 TEX. INT'L L. J. 441 (1997).

In 1996, the European Court of Human Rights issued an important decision that may affect the provisions of CJPOA. In *Murray v. United Kingdom*,[314] the Court considered the validity of the Criminal Evidence (Northern Ireland) Order, CJPOA's close relative. The Northern Ireland Order allows a trial court to draw adverse inferences from an accused's silence during interrogation and at trial. In *Murray*, the defendant was arrested under the 1989 Prevention of Terrorism (Temporary Provisions) Act. At trial, the judge drew inferences from the defendant's failure to answer police questions and failure to testify at trial. The Court of Appeal held that drawing adverse inferences from the defendant's silence was a matter of common sense and could not be regarded as unfair or unreasonable under the circumstances.[315] The European Court of Human Rights held that a breach of Article 6 of the European Convention, which guarantees those facing criminal charges "a fair and public hearing," did not occur. Although the Court held that the defendant's right to counsel had been violated for the first forty-eight hours of his detention, in violation of Articles 6(3)(c) and 6(1) of the Convention, it concluded that "reasonable inferences" drawn from silence were permissible provided that the national court did not base a conviction solely upon that silence.[316]

Currently, two main English cases interpreted the provisions of the CJPOA.[317] In the first case, *Regina v. Argent*, the Court of Appeal prescribed six formal conditions that must be met before the adverse inferences under Section 34 of CJPOA can be drawn. The conditions are: (1) there must be a criminal proceeding against the accused; (2) the accused must fail to mention a fact when questioned but before he is charged; (3) the accused must be questioned only after a caution is given by a constable or any other person empowered by Section 34(4); (4) the questioning must attempt to ascertain whether, or by whom, the alleged offense was committed; (5) at trial, the accused must rely on the fact not mentioned during the police questioning; and (6) in light of the circumstances at the time of questioning, it must be reasonable to

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314. *See* Murray v. United Kingdom, 97 Crim. App. 151, No. 41/1994/488/570 (1993); *see also Inferences from Silence and European Human Rights Law*, CRIM. L. REV. 370 (1996).

315. *See* Murray, 97 Crim. App. 151 (1993).

316. *Id.*

317. Kevin Browne, *An Inference of Guilt?*, SOLICITORS J., (1997); Jonathan S.W. Black, *Inference from Silence: Redressing the Balance?*, SOLICITORS J., Aug. 1, 1997.

expect the accused to have mentioned the fact.[318]

In the second case, *Regina v. Cowan*,[319] the Court of Appeal highlighted five essential instructions a judge must give a jury under Section 35 of the CJPOA. They are: (1) the prosecution always has the burden of proof; (2) the defendant is entitled to remain silent; (3) an inference drawn from the accused's failure to provide evidence cannot alone prove guilt; (4) the jury must be satisfied that the prosecution established a case before drawing any inferences from silence; and (5) the jury may draw an adverse inference if, despite any evidence provided by the accused to explain his silence or in the absence of such evidence, the jury concludes the silence can only sensibly be attributed to the accused having no answer or none that would survive cross-examination.[320]

Despite these guidelines, defendants who exercise a right to silence and attorneys who advise their clients to exercise the right still encounter difficulties. The new provision in the Interrogation Code is a very complicated enigma for defendants. One concern is that "[t]he new law [CJPOA] could prompt false confession by weak suspects and erroneous convictions of those who, although innocent, failed to offer a cogent explanation for their behavior or who became confused."[321] At the same time, Michael Zander predicts that more sophisticated lawyers will advise their clients to mention some facts which they previously may not have mentioned.[322]

CONCLUSION

The modern development of the English exclusionary rules demonstrates that the English criminal justice system developed independent of the European or American system. As in the United States, however, the confrontation and compromise between the crime control and due process values are inevitable in England.

PACE gives the police an extended stop and search-and-seizure power and provides suspects with crucial rights during police interrogations. PACE provides a national legislation to

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318. THE TIMES, Dec. 19, 1996.
319. *See* Regina v. Cowan, 3 W.L.R. 818 (1995).
320. *See id.*
321. O'Reilly, *supra* note 311, at 405.
322. *See* Zander, *supra* note 113, at 671; *see also* Browne, *supra* note 317, at 203.

regulate the entire criminal process. The British Parliament accomplished the very task that the United States Supreme Court and numerous scholars requested of the United States Congress. Although enactment of PACE did not automatically lead to a behavioral change in police and suspects, it did provide a statutory basis for the English courts to regulate police misconduct. Furthermore, the English courts now frequently exercise their discretionary power under PACE to exclude either confessional or non-confessional physical evidence, obtained in violation of PACE or the Codes of Practice.

In light of this trend, the "conservative" proposal[323] in the United States to eliminate *Mapp* and *Massiah*, according to the pre-PACE English rule, overlooks the recent dynamic change in England. The ramifications of the three American exclusionary rules are no longer alien to England. The official and explicit abolition of the right to silence in Great Britain provides eye-opening comparative support in favor of the "conservative" arguments. It would be extremely difficult, however, to propose the abolishment of exclusionary rules in the United States because of the Bill of Rights.

The British solution seems attractive to many American scholars, although the serious impairment by the CJPOA of the right to silence is troublesome. It is ironic that the American experience inspired the exclusionary rules in the English criminal justice system and now the English experience provides a potential solution to the United States system. The question remains, however, whether the United States Congress can adopt the English solution.[324]

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323. *See* DOJ REPORT NO. 1, *supra* note 2, at 535–36; NO. 2, at 618.

324. It is argued that, in an era in which "virtually all politicians vie to out-posture one another at law-and-order fear mongering." Thomas Y. Davies, *Book Review: Craig M. Bradley, The Failure of the Criminal Procedure Revolution*, 46 J. LEGAL EDUC. 279, 283 (1996), the legislation of the alternatives to remedy police misconduct are "*technically* feasible" but "*politically* unfeasible." Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again,"* 74 N.C. L. REV. 1559, 1618 (1996) (emphasis in original). Anthony G. Amsterdam also stated:

> Legislatures have not been, are not now, and not likely to become sensitive to the concern of protecting persons under investigation by the police. Even if our growing crime rate and its attendant mounting hysteria should level off, there will remain more than enough crime and fear of it in America society to keep our legislatures from the politically suicidal undertaking of police control.

Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 378–79 (1974).