ENGLISH WARNINGS

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INTRODUCTION

The Criminal Justice and Public Order Act 1994 (CJPOA) introduced significant changes to the right to silence in England and Wales. In brief, the Act permitted adverse inferences to be drawn from an accused's silence at trial or during police interview. These provisions were controversial, and few other common law jurisdictions have been attracted by them.[1] Recently, however, Craig Bradley has suggested that U.S. interrogation law adopt the "English warning," that is, that suspects at police interviews should be warned that their failure to mention exculpatory facts may be held against them at trial.[2] In light of the *Miranda* debates,[3] this proposal might, at first sight, seem attractive to U.S. lawyers. Suspects in England and Wales still have a right to legal advice before police questioning; they are also told that

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[1] Singapore had changed its law in 1985 to allow inferences from silence. *See* Keng Heong Yeo, *Diminishing the Right to Silence: The Singapore Experience*, 1987 CRIM. L. REV. 89. For negative reactions by Australian law reform bodies, see NEW SOUTH WALES LAW REFORM COMM., THE RIGHT TO SILENCE, REPORT NO. 95 (2000), *available at* http://www.austlii.edu.au/au/other/nswlrc/reports/95/; N. TERRITORY LAW REFORM COMM'N, REPORT ON THE RIGHT TO SILENCE, REPORT NO. 25 (2002), *available at* http://www.austlii.edu.au/au/other/ntlrc/reports/25.html; PARLIAMENT OF VICTORIA, SCRUTINY OF ACTS AND REGULATIONS COMM., THE RIGHT TO SILENCE, FINAL REPORT (1999), *available at* http://www.parliament.vic.gov.au/SARC/Right_to_Silence/Final_Report/RTStoc.html. The Republic of Ireland, however, has recently introduced a provision very similar to Section 34 of the CJPOA, allowing inferences from a failure to mention facts during police questioning: Criminal Justice Act, 2007, § 30 (Act No. 29/2007) (Ir.). For the background to this reform, see BALANCE IN THE CRIMINAL LAW REVIEW GROUP, FINAL REPORT, 17-99 (2007), *available at* http://www.justice.ie/en/JELR/BalanceRpt.pdf/Files/BalanceRpt.pdf. Significantly, the group rejected a change to the law that would have allowed inferences to be drawn from silence at trial.

[2] Craig Bradley, *The English Warning* (Ind. Univ. Sch. of Law-Bloomington Legal Studies Research Paper Series, Research Paper No. 90, 2007). For the argument that Miranda should be modified in the opposite direction—to make it clear to suspects that inferences cannot be drawn from silence—see Mark A. Godsey, *Reformulating the Miranda Warnings in Light of Contemporary Law and Understandings*, 90 MINN. L. REV. 781 (2006).

[3] Miranda v. Arizona, 384 U.S. 436 (1966). For an overview of the controversy surrounding *Miranda*, see, for example, JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE, ch. 24 (4th ed. 2006).

they do not have to say anything. Critics of *Miranda* are concerned that in the U.S. these rights make it too easy for suspects to stymie legitimate police questioning, that they over-protect the guilty. Potentially, the English approach would make complete refusal to answer police questions a less attractive option to suspects. Even if it does not lead to an increase in the confession rate, police questioning would at least be more productive, and would tend to tie the suspect down to a particular exculpatory account at an early stage of the process. Supporters of *Miranda* might also see some merit in this approach. The basic protection of legal advice would still be in place, and, even if silence became a less attractive option, the suspect would still be told that he did not have to speak. Further, once silence has evidentiary value, the police might be less interested in persuading suspects to waive their *Miranda* rights. The legally advised suspect who refuses to answer questions is still potentially producing inculpatory evidence.

It would, however, be rash to proclaim that the English approach to silence is the best of all possible worlds. Few evidence scholars have kind words to say about the post 1994 regime—at least, that is, when it comes to silence at police interview. The practice of drawing inferences from failure to testify at trial has been far less controversial. The aim of this paper is to explore the English law on silence at interview and at trial. While one purpose of the analysis is to address the question just posed—should U.S. lawyers think seriously about English warnings?—the paper has two further objectives. One is to provide a critical assessment of the principal elements of the case law that has emerged on the 1994 provisions, something which will help to answer the question about the wisdom of importing English warnings but which is also of interest in its own right. Another is to explore the links between immunity from adverse inferences and the privilege against self-incrimination.

I. THE PROVISIONS

It will be helpful to set out the CJPOA provisions in broad outline, before moving on to explore them individually and in detail. We will be concentrating on the provisions allowing inferences from silence at interview and at trial, but it is worth briefly noting the two other silence provisions in the CJPOA. Under section 36, an inference can be drawn from an arrested person's failure to account to the police for suspicious objects, substances and marks. Section 37 permits an adverse inference to be drawn from an arrested person's failure to account for suspicious

presence at a particular place around the time the crime was committed. Under either section, for the inference to be triggered, a police officer must explain to the suspect why the object, substance, mark or presence is thought to be suspicious, and specify the crime it is thought to point to involvement in.[4] He must also warn the suspect of the possible adverse inference.[5] Although these provisions are apparently commonly used,[6] they have generated little case law.[7] This may be because the relatively specific nature of the inferences, along with the triggering conditions which require clear notice to the suspect, make them fairly uncontroversial.

Section 34 allows an adverse inference to be drawn from failure to mention facts when questioned under caution. Importantly, the section does not license an inference from silence alone; it is still possible to answer "no comment" to every question asked in interview and escape section 34 inferences at trial. An inference can be drawn at trial only if the defendant relies on a fact which was not mentioned during the earlier questioning.[8] While it is quite common for trial courts to fail to heed this important triggering condition,[9] the law is clear: an inference cannot be drawn if the accused puts forward no positive defense at trial.[10] There are further triggering conditions: the defendant must have been offered access to legal advice before questioning,[11] and the fact must be one that "in the circumstances existing at the time [he] could reasonably have been expected to mention."[12] The adverse inference can be drawn by a court when considering whether there is a case to answer[13] and, more commonly, by a jury when determining guilt.[14]

[4] Criminal Justice and Public Order Act, 1994, c. 33, §§ 36(1)(c), 37(1)(c) (Eng.).

[5] *Id.* §§ 36(4), 37(3).

[6] *See* Tom Bucke, Robert Street & David Brown, *The Right of Silence: The Impact of the Criminal Justice and Public Order Act 1994*, at 39 (Home Office, Research Study No. 199, 2000) (39% of suspects exercising the right to silence, or 5% of all suspects, were given a warning under § 36 or § 37).

[7] *But see* R v. Compton [2002] EWCA (Crim) 2835.

[8] C. 33, § 34(1).

[9] *See, e.g.*, T v. Dir. of Pub. Prosecutions [2007] EWHC (Admin) 1793; Riley v. Dir. of Pub. Prosecutions [2006] EWHC (Admin) 1796; R v. Broadhead [2006] EWCA (Crim) 1705; R v. Sheppard [2006] EWCA (Crim) 1599. These are all recent cases; given that the CJPOA has been in force for over a decade, the persistence of this basic error is striking.

[10] In some cases it may be difficult to say whether there is a positive defense, but it has been held that assertions put forward in cross-examination can constitute a fact relied on by the defendant, and thus trigger an inference. R v. Webber [2004] UKHL 1.

[11] C. 33, § 34(2A).

[12] *Id.* § 34(1).

[13] *Id.* § 34(2)(c). For this to occur, the defendant would have had to have put forward a positive case on cross-examination. *See, e.g.*, *Webber*, [2004] UKHL 1; *see also Broadhead* [2006] EWCA (Crim) 1705, [20] (noting that the defense would have to go beyond merely testing and probing the prosecution case).

[14] C. 33, § 34(2)(d).

Section 34 refers to "such inferences . . . as appear proper."[15] The effect of the section is reflected in the words of the caution which must be given to a suspect before questioning: "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in Court. Anything you do say may be given in evidence."[16]

Section 35 relates to silence at trial. It allows the fact-finder to draw an inference from a defendant's failure to testify. On the face of the legislation, there is no triggering condition beyond failure to testify. In other words, under section 35 silence alone is treated as suspicious, as opposed to a failure to mention facts later relied on, or silence in the face of suspicious circumstances. While the legislation originally provided that section 35 only applied to those over the age of 14, this restriction was removed in 1998.[17] Now the only significant legislative barrier to a direction under section 35 is that an inference should not be drawn where "it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence."[18] The suspicious nature of the failure to testify is highlighted by the procedural requirement in section 35: at the end of the prosecution case, and in the presence of the jury, the judge should ensure that the defendant has been informed that he can give evidence and that, if he does not, the jury may "draw such inferences as appear proper."[19] This serves as a formal warning to the defendant about section 35 inferences.

All of the silence provisions in the 1994 Act are subject to section 38, which provides that "[a] person shall not . . . have a case to answer or be convicted of an offence solely on an inference drawn from [silence]."[20]

The sections just described introduced significant changes to the right to silence. Now that we have a decent idea of their content, it is worth asking why they were introduced. Answering such a question is, of course, rarely straightforward. A single legislative provision may be introduced for a number of different reasons and among a legislative body no one reason may be dominant. When it comes to the CJPOA,

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15 *Id.* § 34(2).

16 Code of Practice for the Detention, Treatment, & Questioning of Persons by Police Officers, Code C, § 10.5 (authorized by the Police and Criminal Evidence Act, 1984, c. 60, § 66 (Eng.)).

17 Crime and Disorder Act, 1998, c. 37, § 35 (Eng.).

18 C. 33, § 35(1)(b).

19 *Id.* § 35(2). For the exact procedure, see Criminal Procedure Rules, Consolidated Criminal Practice Direction, § IV.44, *available at* http://www.justice.gov.uk/criminal/procrules_fin/contents/practice_direction/pd_consolidated.htm.

20 C. 33, § 38(3).

questions about the purposes behind the silence provisions are both simplified and complicated by the fact that reforms to the right to silence had been long debated. This debate gives us a good public record of the thinking behind the reforms, but complicates things by introducing multiple motives, not all of which may have been important to the actual legislators. The reform history has been well described elsewhere,[21] so here we will only highlight some of the principal reasons that were, at various times, put forward in order to justify reform.[22]

One reason for making silence admissible evidence against an accused is purely evidential. Silence, it can be claimed, is evidence of guilt, and should therefore be drawn to the fact-finder's attention. This reason for reform was the principal one relied upon by the Criminal Law Revision Committee in its 1972 report.[23] We will refer to this as the "evidential argument." Other reasons for the reforms might be said to be incentivizing; the intention was to produce changes in the behavior of suspects which would be helpful to the prosecution. Most obviously, the threat of adverse inferences may encourage defendants to testify, and this will provide fact-finders with more information than they would otherwise get.[24] Suspects in the police station will also be encouraged to talk. The record of interview will then provide more information both to fact-finders, and to the police who may then be able to investigate the defense account. In particular, it was argued that the section 34 inference would help to avoid ambush defenses, defenses put forward for the first time at trial which may catch the prosecution off-guard.[25] Of course, these incentive-based reasons for reform are also evidential in a sense: the intention is that they will produce more evidence that will be useful to fact-finders. Still, the

[21] *E.g.*, Mark Berger, *Reforming Confession Law British Style: A Decade of Experience with Adverse Inferences from Silence*, 31 COLUM. HUM. RTS. L. REV. 243, 248-66 (2000); Michael Zander, *Abolition of the Right to Silence, 1972-1994*, *in* SUSPICION AND SILENCE: THE RIGHT TO SILENCE IN CRIMINAL INVESTIGATIONS 141 (David Morgan & Geoffrey M. Stephenson eds., 1994). For an account which emphasizes the security context which first bred the reforms, see Oren Gross, *"Control Systems" and the Migration of Anomalies*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 403 (Sujit Choudhry ed., 2006).

[22] For a good overview of the arguments, see Roger Leng, *The Right to Silence in Police Interrogation: A Study of Some of the Issues Underlying the Debate* (Royal Commission on Criminal Justice, Research Study No. 10, 1993).

[23] CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT, EVIDENCE: GENERAL, Cm. 4991 (1972).

[24] How useful the information is is another matter. *Compare* Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430 (2000), *with* PAUL ROBERTS & ADRIAN ZUCKERMAN, CRIMINAL EVIDENCE 422-25 (2004).

[25] For this, and other arguments for reform, see Peter Neyroud, *Wrongs About a Right*, POLICE REV., Apr. 8, 1994, at 17.

evidential/incentivizing distinction is worth making, because when it comes to drawing adverse inferences at trial, it is only the evidential argument that is relevant. The courts may be keen to have more defendants talk, or have early notice of their defenses, but this does not justify drawing an adverse inference in an individual case. An adverse inference can only be drawn if silence is suspicious. Put another way, adverse inferences should not be drawn purely instrumentally, in order to encourage a change in behavior.[26] The distinction is quite subtle because, so long as silence is sometimes suspicious, the incentivizing reasons may be good reasons for allowing adverse inferences in general, just as the exclusion of hearsay evidence might be justified as a way of incentivizing production of the best (non-hearsay) evidence.[27] But in the individual case, the incentivizing reasons have to be put to one side if adverse inferences are to be drawn.

As we noted earlier, the CJPOA reforms were controversial. Many of the arguments against changes to the right to silence simply challenged the reform arguments put forward above. Thus, it was argued that silence is not always suspicious because the innocent may have good reasons not to answer police questions or to testify.[28] It was also suggested that ambush defenses do not in practice cause significant problems, and that there are other ways of addressing the problem.[29] Other arguments were independent. There were, of course, the arguments of principle surrounding the privilege against self-incrimination, which we will assess later. A further concern was that the new caution associated with section 34 would place too much pressure on some suspects, and might lead to false confessions.[30]

In the background to these arguments for and against changes to the right to silence was a broader debate about the appropriate balance of power in the police station. Ten years prior to the CJPOA, the Police

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[26] This is not necessarily because there is anything wrong with treating defendants instrumentally. As the text goes on to note, instrumental reasons may justify the exclusion of defense hearsay evidence. The argument is simply that instrumental reasons afford no rational basis for an inference in the individual case.

[27] Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227 (1988).

[28] *See, e.g.*, Steven Greer, *The Right to Silence: A Review of the Current Debate*, 53 M.L.R. 709, 727 (1990).

[29] *See* Leng, *supra* note 22, at 58. In 1996, the Criminal Procedure and Investigations Act was introduced which brought in a scheme of pre-trial defense disclosure, which is a more general, and arguably more appropriate, way of alerting the prosecution to the defense case. For an assessment, see Mike Redmayne, *Criminal Justice Act 2003: (1) Disclosure and its Discontents*, 2004 CRIM. L.R. 441. The section 34 case law holds that disclosure of a defense in a defense statement does not prevent adverse inferences if the defense was not revealed at interview. *See* R v. Lowe [2003] EWCA (Crim) 3182.

[30] This was the principal reason why the Royal Commission on Criminal Justice decided against recommending reform of the right to silence. *See* ROYAL COMMISSION ON CRIMINAL JUSTICE, REPORT, Cm. 2263, ch. 4, para. 23 (1993).

and Criminal Evidence Act 1984 (PACE) introduced substantial changes to police investigatory powers. In particular, it regulated the conditions of detention of suspects in the police station.[31] The PACE regime gave suspects a right to free legal advice at interview, and a scheme of "duty solicitors," on call 24 hours a day, was set up to implement this. Under PACE, interviews should take place in the police station and should be recorded, and suspects should be cautioned before questioning. The courts took the most significant PACE provisions relatively seriously, and decisions to exclude confessions obtained in breach of PACE gave some of the PACE rights significant bite.[32] Just as critics of *Miranda* argue that Miranda warnings significantly handicap police investigations, so it was argued that under PACE the balance of power had swung too far in favor of defendants. It was often claimed that PACE led to a marked increase in the number of suspects refusing to answer police questions.[33] The mood is well summed up in the comments of Lord Lane, then Lord Chief Justice, in his judgment in *Alladice*:

> [I]t seems to us that the effect of section 58 [of PACE, guaranteeing the right to legal advice] is such that the balance of fairness between prosecution and defense cannot be maintained unless proper comment is permitted on the defendant's silence in such circumstances. It is high time that such comment should be permitted together with the necessary alteration to the words of the caution.[34]

Arguments of this sort became known as "exchange abolition."[35] Exchange abolition raises numerous issues. For example, it is difficult to say just how much PACE has changed things in favor of suspects. The empirical research leaves room for some skepticism about the effectiveness of the reforms.[36] Even a simple question, such as "did

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[31] *See generally* MICHAEL ZANDER, THE POLICE AND CRIMINAL EVIDENCE ACT 1984 (5th ed. 2005); ANDREW ASHWORTH & MIKE REDMAYNE, THE CRIMINAL PROCESS, ch. 4 (3d. ed. 2005).

[32] *See, e.g.*, David Feldman, *Regulating Treatment of Suspects in Police Stations: Judicial Interpretation of Detention Provisions in the Police and Criminal Evidence Act 1984*, 1990 CRIM. L. REV. 452.

[33] *See, e.g.*, Neyroud, *supra* note 25, at 20.

[34] R v. Alladice (1988) 87 Cr. App. R. 380, 385.

[35] The term was introduced in Greer, *supra* note 28, at 719-25.

[36] For an overview of the debate, see Mike McConville & Andrew Sanders, *The Case for the Prosecution and Administrative Criminology*, *in* CONTEMPORARY ISSUES IN CRIMINOLOGY 191 (Lesley Noaks, Mike Maguire & Michael Levi eds.,1995); Roger Leng, *Pessimism or Professionalism? Legal Regulation of Investigations After PACE*, *in* CONTEMPORARY ISSUES IN CRIMINOLOGY 206 (Lesley Noaks, Mike Maguire & Michael Levi eds.,1995); David Dixon, *New Left Pessimism*, *in* CONTEMPORARY ISSUES IN CRIMINOLOGY 216 (Lesley Noaks, Mike Maguire & Michael Levi eds.,1995); Rod Morgan, *Authors Meet Critics: The Case for the Prosecution*, *in* CONTEMPORARY ISSUES IN CRIMINOLOGY 224 (Lesley Noaks, Mike Maguire & Michael Levi eds.,1995); Robert Reiner, *The Case for the Prosecution: Police Suspects and the Construction of*

more suspects assert the right to silence after the introduction of PACE?" has not been easy to answer owing to the absence of reliable figures on the pre-PACE situation.[37] Whatever the empirical realities, it may be questioned whether the exchange abolition argument is sound. Should we really be thinking in terms of achieving a fair balance between two sides in the police station as opposed to according suspects appropriate rights, but not giving them protections that do not have a sound justification? The exchange abolition debate should generally be viewed skeptically.

Having sketched the relevant provisions, and provided some of the background to their introduction, we can now proceed to look at how the provisions have worked in practice. We will start by looking at the case law,[38] taking section 34 first.

II. SECTION 34

More so than section 35, section 34 has generated a complex case law. It is worth saying at the outset that the judicial reaction to both sections has been mixed, with some decisions being more, and some less, cautious about their interpretation. In *Cowan*, one of the very early decisions on section 35, Lord Taylor CJ rejected attempts to reduce or marginalize the impact of the section, and stressed that the Court of Appeal would not lightly interfere with a judge's exercise of discretion when instructing the jury on adverse inferences.[39] Lord Taylor's successor as Lord Chief Justice, Lord Bingham, however, was more cautious, commenting in *Bowden* that since the CJPOA provisions "restrict rights recognized at common law as appropriate to protect defendants against the risk of injustice, they should not be construed more widely than the statutory language requires."[40] Ian Dennis has referred to this as the "Bowden principle," and has suggested that it has played a role in later cases.[41] But in *Webber*—a decision on section 34 in which the House of Lords (with Lord Bingham part of the

Criminality, *in* CONTEMPORARY ISSUES IN CRIMINOLOGY 231 (Lesley Noaks, Mike Maguire & Michael Levi eds.,1995); David Brown, *PACE Ten Years On: A Review of the Research* (Home Office Research Study No. 155, 1997).

37 *See* BROWN, *supra* note 36, at 171-72.

38 This is not intended to be a complete review of the case law. For more detailed coverage, see DAVID WOLCHOVER, SILENCE AND GUILT: AN ASSESSMENT OF THE CASE LAW ON THE CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994 (2001) (with updates at http://www.davidwolchover.co.uk/docs/S&GNoterup.doc).

39 R v. Cowan [1995] 4 All E.R. 939, 943.

40 R v. Bowden [1999] 2 Cr. App. R. 176, 181.

41 Ian Dennis, *Silence in the Police Station: The Marginalization of Section 34*, 2002 CRIM. L. REV. 25, 32.

committee) reviewed much of the case law on the provision—it was stated that "the object of section 34 is to bring the law back into line with common sense," and that this justified a broad approach to the question at issue.[42] The House quoted the *Bowden* passage, and cautioned against interpreting it too widely. While *Cowan* suggested that section 35 should be used widely, hinting that it would be an exceptional case where it would not come into play,[43] in *Lancaster* the Court of Appeal was more critical, commenting that:

> It has been the experience of the members of his court that the routine application of [section 35] without individual consideration of the circumstances of the particular case can lead to unnecessary problems, whilst not necessarily contributing to the achievement of justice. This is a matter which we think that trial judges may be wise to bear in mind . . .[44]

It seems fair to say, then, that there are mixed feelings among the judiciary about the CJPOA provisions. This is reflected in the case law, with the courts taking a sometimes expansive, and sometimes more restrictive, approach to the silence provisions.

A. *The Inference*

With section 34, an important initial question concerns the nature of the inference that can be drawn. The section itself refers to "such inferences . . . as appear proper,"[45] but what exactly can one infer from a defendant's failure to mention facts later relied on in his defense? The obvious inference is that the fact relied on at trial is false. The presuppositions of this inference seem to be that if the fact was true the defendant would have mentioned it at interview, whereas if it was false he would not have done so because he did not want it exposed to investigation or because he had not thought of a plausible defense, or was waiting to tailor his defense to the prosecution evidence. Note that while section 34 is unlike section 35 in that it does not license a general

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[42] R v. Webber [2004] UKHL 1, [2004] 1 Cr. App. R. 40, [33]. Significantly, the language of common sense is echoed in a recent speech by Lord Phillips. *See* Lord Phillips of Worth Matravers, Criminal Bar Association Kalisher Lecture: Trusting the Jury (Oct. 23, 2007), *available at* http://www.judiciary.gov.uk/docs/speeches/lcj_trusting_juries_231007.pdf. At the time of the speech, Lord Phillips was Lord Chief Justice, i.e. head of the judiciary in England and Wales, a position giving him considerable influence over the criminal courts. Lord Phillips has since become the senior Law Lord.

[43] R v. Cowan [1995] 4 All E.R. 939, 944; *see also* R. (on the Application of the DPP) v. Kavanagh [2005] EWHC (Admin) 820 (where the High Court went so far as to hold that justices were wrong *not* to draw an inference under section 35).

[44] R v. Lancaster [2001] EWCA (Crim) 2836, [17].

[45] Criminal Justice and Public Order Act, 1994, c. 33, § 34(2) (Eng.).

inference from silence—it is only triggered by a failure to mention facts later relied on—the section 34 inference does depend on the general assumption that the innocent will want to signal their innocence to the police. Unless one agrees with that assumption, one cannot draw an adverse inference from failure to mention a defense at interview. Note also that when we think about the plausibility of the inference, we have to bear in mind that suspects are warned that failure to mention facts at interview can be damaging; as we saw earlier, the CJPOA regime provides incentives to suspects to talk. This may affect the strength of the inference.[46] It is easiest to appreciate this by imagining an extreme case, where we threaten automatically to convict the suspect if he later relies on facts which he does not mention now. In that situation, we would expect nearly everyone to mention their trial defense at interview, even if that meant thinking up a defense on the spot and sticking to it. If a new defense was suddenly provided at trial, it would be difficult to draw an inference of falsity. We would just think there was something very odd about the defendant. Obviously, the new police caution—"it may harm your defense"—is nowhere near as extreme as this. The incentive probably reduces the number of section 34 inferences we can draw: some of the guilty will now provide their false defense to the police at interview, and so avoid a section 34 adverse inference. But where a new fact is mentioned at trial, the inference can still probably be drawn; the threat is not strong enough to swamp the inference, though it may weaken it slightly.

If an inference that the fact later relied on is false can be drawn, the fact-finder may be able to discount that fact, and not take it to support the defense case. But can the inference go further: can the fact-finder take the fact that the defendant has put forward a false defense to be evidence of guilt? This further inference is a little tenuous. It is only in the stronger cases—those that result in trial, where the defendant thinks not only that he risks conviction without putting on a positive case but also that it is worth chancing an adverse inference—that a defendant will be tempted to put forward a false defense at trial.[47] It may be that, when there is a genuine threat of conviction, both the innocent and the guilty will be tempted to fabricate defenses to escape it. The main difference between the innocent and the guilty here may be that they all expect that the truth will come out,[48] in which case, on the same

[46] This point has been made in relation to section 35 in David Hamer, *The Privilege of Silence and the Persistent Risk of Self-Incrimination*, 28 CRIM. L.J. 160, 168 (2004).

[47] However, the disclosure provisions in the Criminal Procedure and Investigations Act 1996 put pressure on defendants to disclose and commit to a defense before trial, when they will have a less clear idea of how strong the prosecution case will be at trial. *See supra* note 29.

[48] It may also be that the guilty have less compunction about lying. *See* Richard D. Friedman, *Character Impeachment Evidence: Psycho-Bayesian [!?] Analysis and a Proposed Overhaul*, 38

evidence the guilty will perceive the threat of conviction as greater than the innocent. That may justify an inference from fabrication to guilt, but the inference does look to be weak.

So far then, at a very general level it does seem reasonable to draw an adverse inference from failure to mention facts later relied on. The Judicial Studies Board (JSB) standard directions[49] on inferences from silence roughly reflect the foregoing. The jury can be told:

> you may draw the conclusion . . . from his failure that he [had no answer then/had no answer that he then believed would stand up to scrutiny/has since invented his account/has since tailored his account to fit the prosecution's case . . . .]. If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it . . . ; but you may take it into account as some additional support for the prosecution's case . . . and when deciding whether his [evidence/case] about these facts is true.[50]

The main criticism here would be that some caution might be needed when it comes to using the failure as support for the prosecution case. However, so far the analysis has been very general. As has been mentioned, critics of the silence provisions often make the point that there may be innocent reasons for silence. We should be wary of making too much of this point. The possible existence of an innocent explanation for not mentioning facts to the police does not necessarily block an inference from silence. An innocent person may have good reasons to run away from the scene of the crime, but that does not mean that flight is not evidence of guilt. The innocent may sometimes confess, but, even more obviously, that does not mean that we should

UCLA L. REV. 637 (1991).

[49] The JSB standard jury directions ("bench book") are compiled by judges who are members of the JSB's criminal committee and are approved by the Lord Chief Justice. They play a similar role to the pattern jury instructions used in many jurisdictions in the United States. Following the instructions will usually safeguard against a successful appeal on the issue of jury misdirection. Thus, while following the JSB directions is not mandatory, they provide a reasonably summary of the law and are a good guide to how the silence provisions of the CJPOA are in practice presented to juries. On the directions, see Roderick Munday, *The Bench Books: Can the Judiciary Keep a Secret*, 1996 CRIM. L. REV. 296; Roderick Munday, *Judicial Studies Board Specimen Directions and the Enforcement of Orthodoxy: A Modest Case Study*, 66 J. CRIM. L. 158 (2002). Note, though, Lord Phillips LCJ's, somewhat critical comments on the development of the directions in *R* v. *Campbell* [2007] EWCA (Crim) 1472, [24].

[50] JUDICIAL STUDIES BOARD, CROWN COURT BENCH BOOK: SPECIMEN DIRECTIONS § 40.2 (2007), *available at* http://www.jsboard.co.uk/downloads/specimendirections_june07%202.doc. What does not seem to be envisaged here is an inference that, while the fact mentioned at trial is true, the failure to mention it earlier is suspicious. The case law does appear to rule out an inference in this situation. *See* R v. Wheeler [2008] EWCA (Crim) 608; R v. Betts [2001] 2 Cr. App. R. 16, [33] ("A bare admission cannot be said to be the assertion of a fact."). While this seems reasonable in *Wheeler*—there is little reason to think that the guilty would be slower than the innocent to point to reasons why the complainant might have made false allegations of rape—it is arguable that the defendant's evasiveness in *Betts* was suspicious, as it might have suggested that he did not want the police to know that he had a motive for the crime.

exclude all confessions. In each of these examples, so long as guilt is a better explanation for the evidence than is innocence, then the evidence is probative of guilt, and we would need some countervailing reason to exclude it. Still, possible "innocent" explanations for silence are important, for they weaken the inference from silence and, where they outweigh "guilty" explanations, they may prevent the adverse inference from being drawn. To understand how innocent explanations for silence are dealt with, however, we need to set the topic within the wider framework of the European Court of Human Rights jurisprudence on silence.

B. *The European Court of Human Rights Context and Innocent Silence*

Article 6 of the European Convention on Human Rights, which guarantees the right to a fair trial, does not explicitly mention the right to silence or the privilege against self-incrimination. Nevertheless, the European Court of Human Rights (ECtHR) has held that "the right to remain silent under police questioning and the privilege against self-incrimination are generally recognized international standards which lie at the heart of the notion of a fair procedure under Article 6,"[51] and it has found that various provisions which compel suspects to provide information to prosecuting authorities infringe Article 6.[52] In *Murray v. United Kingdom*, the Court examined inferences from silence and concluded that Northern Ireland provisions very similar to those in the CJPOA were not necessarily incompatible with the right to a fair trial.[53] The fact that the right to silence and the privilege are part of Article 6, it held, "cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution."[54] However, it allowed that in some situations inferences might infringe the Convention:

> Whether the drawing of adverse inferences from an accused's silence infringes Article 6 is a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the

[51] Murray v. United Kingdom, 22 Eur. Ct. H.R. 29, [45] (1996).

[52] *See generally* Andrew Ashworth, *Self-Incrimination in European Human Rights Law—A Pregnant Pragmatism?*, 30 CARDOZO L. REV. 751 (2008); BEN EMMERSON, ANDREW ASHWORTH & ALISON MACDONALD, HUMAN RIGHTS AND CRIMINAL JUSTICE 615-39 (2d ed. 2007).

[53] *Murray*, 22 Eur. Ct. H.R. 29.

[54] *Id.* at [47].

> national courts in their assessment of the evidence and the degree of compulsion inherent in the situation.[55]

In *Murray* the accused was tried by a judge sitting without a jury, and the court put some emphasis on the fact that the "experienced judge"[56] gave a reasoned judgment which could be reviewed on appeal. In later cases the ECtHR has considered the use of the CJPOA provisions in jury trials and, while finding no necessary incompatibility, has been a little more circumspect about them.[57] The basic position is that an invitation to the jury to draw adverse inferences from silence at police interview or at trial is compatible with Article 6 so long as the jury is instructed carefully; jury instructions effectively play the role that provision of reasons does in a non-jury court.

The importance of careful jury instructions has been particularly emphasized where "innocent" explanations for silence are concerned. In *Condron v. United Kingdom*, the Court found that while the judge drew the jury's attention to the defendant's explanation for his silence at interview:

> he did so in terms which left the jury at liberty to draw an adverse inference notwithstanding that it may have been satisfied as to the plausibility of the explanation. . . . In the Court's opinion, as a matter of fairness, the jury should have been directed that if it was satisfied that the applicants' silence at the police interview could not sensibly be attributed to their having no answer or none that would stand up to cross-examination it should not draw an adverse inference. . . . Unlike the Court of Appeal, the Court considers that a direction to that effect was more than merely "desirable."[58]

In *Beckles v. United Kingdom*, the ECtHR repeated these observations and also explained the requirement in terms of whether the defendant's silence "was in effect consistent only with his guilt."[59] This position is now reflected in the Judicial Studies Board directions, which suggest that the jury should be instructed that they can draw an adverse inference against a defendant:

> only if you think it is a fair and proper conclusion, and you are satisfied . . . that when he was interviewed he could reasonably have been expected to mention the facts on which he now relies; [and] that the only sensible explanation for his failure to do so is that he had no answer at the time or none that would stand up to scrutiny . . . .[60]

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[55] *Id.*

[56] *Id.* at [51].

[57] Condron v. United Kingdom, 31 Eur. Ct. H.R. 1 (2001); Beckles v. United Kingdom, 36 Eur. Ct. H.R. 13 (2003).

[58] *Condron*, 31 Eur. Ct. H.R. 1, [61]-[62].

[59] *Beckles*, 36 Eur. Ct. H.R. 13, [62].

[60] JUDICIAL STUDIES BOARD, *supra* note 50, at § 40.3. There is also a third requirement: "that apart from his failure to mention those facts, the prosecution's case against him is so strong

In *Chenia*, the Court of Appeal put the requirement in terms of the jury being "sure" that there were no innocent explanations for silence.[61] This looks to be overly protective of defendants. As noted above, as a matter of logic an inference can be drawn so long as guilty explanations for silence are more plausible than innocent ones; there is no need to be able to exclude innocent explanations.[62] That, however, is not an issue in the present analysis. If the concern of some critics is that silence is a problematic type of evidence, because there may be innocent reasons for silence, the requirement that the jury exclude innocent explanations goes a long way towards meeting that concern.

There may still be some doubts, however, as to whether this requirement is sufficient to inform juries of the ambiguity of silence at police interview. In the case law on both sections 34 and 35 one finds that the courts have generally been loath to identify factual situations where an inference should not be drawn. The JSB directions operate rather like a magic formula; so long as they are given by the judge, the jury can be left to draw an inference. The ECtHR has taken a similar approach. In *Beckles* there were various reasons why an inference from silence at interview was, at best, extremely tenuous,[63] and Beckles' conviction was ultimately quashed by the Court of Appeal on a reference from the Criminal Cases Review Commission.[64] But the ECtHR's only concern was with whether proper jury instructions were given. Of course, we trust juries to draw all sorts of inferences at trial, and we should generally be circumspect about arguments that juries cannot be trusted to accord appropriate weight to particular types of evidence.[65] There might, though, be particular reasons to worry about inferences drawn from silence at the police station. If few jurors have experienced arrest, detention and questioning by the police, they may not appreciate the factors that could persuade innocent suspects to stay silent.

How realistic is this concern? The case law suggests that, before the jury can consider an "innocent" explanation for silence, there must

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that it clearly calls for an answer by him." *Id.*

[61] R v. Chenia [2003] 2 Cr. App. R. 6, [55], [92].

[62] *See* Mike Redmayne, *Analyzing Evidence Case Law*, *in* INNOVATIONS IN EVIDENCE AND PROOF: INTEGRATING THEORY, RESEARCH AND TEACHING 119 (Paul Roberts & Mike Redmayne eds., 2007) [hereinafter Redmayne, *Analyzing Evidence*]; Mike Redmayne, *Rationality, Naturalism, and Evidence Law*, 2003 MICH. ST. L. REV. 849, 868-76.

[63] Beckles was questioned about involvement in murder, but if he had admitted presence at the scene of crime (as he did at trial), he would have incriminated himself in relation to robbery and kidnapping. See also the various points made by the Court of Appeal in *R v. Beckles* [2005] 1 W.L.R. 2829.

[64] *Id.*

[65] *See generally* Richard D. Friedman, *Minimizing the Jury Over-Valuation Concern*, 2003 MICH. ST. L. REV. 967.

be evidence for it, which would usually need to be provided by the defendant in testimony at trial. Counsel should not suggest reasons to the jury unless there is evidence to back them up, and there is no need for the judge to say anything to the jury about the ambiguity of silence or to suggest to it generic reasons for silence.[66] Given that the defendant is in the best position to explain why he did not mention facts which he later relied on, on the face of it this is a reasonable approach to take.[67] All the same, there might still be concerns about the non-transparency of innocent motivations for silence. We know something about the reasons for silence at police interview from research conducted prior to the introduction of the CJPOA. A common reason may be that suspects are silent in order to protect other people.[68] Given that this may be the most common reason for false confessions, it is quite plausible that it should explain why the innocent may take the far less damaging decision to stay silent.[69] Research on silence also suggested that silence might be used as a bargaining chip by suspects and their legal advisers, as a means of encouraging full disclosure of the evidence against them: "I'll tell you what I know if you tell me what you know."[70] It also seems that silence was sometimes used as a strategy by legal advisers to cover their own incompetence.[71] Reflecting on the introduction of the CJPOA, Ian Dennis suggested that

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[66] R v. Cowan [1995] 4 All E.R. 939, 946-47, 949. While this is a case on section 35, it has been held to apply to section 34 as well. *See, e.g.*, R v. Barnes [2003] EWCA (Crim) 2138.

[67] Pattenden is critical of this aspect of the case law, suggesting that it places a new and unprincipled evidential burden on the accused. Rosemary Pattenden, *Silence: Lord Taylor's Legacy*, 2 INT'L J. EVIDENCE & PROOF 141, 153-54 (1998). She contrasts it with the *Lucas* direction on lies. *See* R v. Lucas [1981] Q.B. 720. The JSB specimen direction on lies, which reflects *Lucas*, contains the following:

> A defendant may lie for many reasons, and they may possibly be 'innocent' ones in the sense that they do not denote guilt, for example, (add as appropriate) lies to bolster a true defence, to protect somebody else, to conceal some disgraceful conduct [other than] [short of] the commission of the offence, or out of panic, distress or confusion.

See JUDICIAL STUDIES BOARD, *supra* note 50, at § 27.2. The difference, though, is that with lies the defendant will often not have admitted the lie, and thus is not in a position to put forward his own explanation. A better analogy is with cases where the defendant is on trial for drug dealing, and the prosecution relies on evidence of money found in his possession, or on his extravagant lifestyle. Here, the JSB direction simply asks the jury to consider the defendant's explanation, and the judge seems to be under no duty to suggest generic explanations. *Id.* § 36.

[68] Mike McConville & Jacqueline Hodgson, *Custodial Legal Advice and the Right to Silence* 183-84 (Royal Commission on Criminal Justice, Research Study No. 16, 1993); Leng, *supra* note 22, at 19-20.

[69] GISLI H. GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS AND CONFESSIONS: A HANDBOOK 176-77 (2003).

[70] *See* David Dixon, *Common Sense, Legal Advice and the Right of Silence*, 1999 Pub. L. 233; DAVID DIXON, LAW IN POLICING: LEGAL REGULATION AND POLICE PRACTICES 228-66 (1997).

[71] *See* McConville & Hodgson, *supra* note 68, at 95-96. McConville and Hodgson also suggest that silence was sometimes a perfectly appropriate response to an unjustified police investigation. *Id.* at 97-98, 100-02, 185-88.

insofar as reasons for silence are, like these latter two, "structural," there was good reason not to draw inferences from silence at police interview.[72]

There are complex issues here, and we will say more about the significance of disclosure and legal advice shortly. In terms of our immediate concerns, these are factors which the defendant can draw to the attention of the jury, and their structural nature does not seem relevant. Only if we thought that juries could not appreciate the significance of non-disclosure or legal advice to stay silent as reasons for not revealing pertinent facts to the police would we have real concerns. As for the protection of others, this may well be something that defendants do not want to reveal at trial—though sometimes they do.[73] But it might be felt that it is a concern that the courts cannot realistically take into account.[74] A desire to protect someone else might be an explanation for all sorts of incriminating evidence—as we have just noted, even a confession—but if the defendant is really not prepared to reveal this, why should the court invite speculation?

The immediate conclusion, then, is that a scheme of adverse inferences can operate fairly, in that juries can be made aware of innocent explanations for silence and take them into account. But, as just noted, disclosure and legal advice also raise more complex problems, and we now need to examine them in more detail.

C. *Silence and Disclosure*

The police are not under any obligation to disclose their evidence to a suspect at interview. In *R v. W*, for example, the police did not reveal at interview that they had DNA evidence connecting W to the alleged rape.[75] He initially denied intercourse with the complainant, only admitting it when the DNA evidence was disclosed to him. The

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72 Ian Dennis, *The Criminal Justice and Public Order Act 1994: The Evidence Provisions*, 1995 CRIM. L. REV. 4, 12-13.

73 R v. Mountford [1999] Crim. L.R. 575.

74 Note also that, to the extent that the inference is that the fact relied on at trial is untrue, this inference will be sound if the defendant is lying in order to protect someone else. As suggested earlier, it is the inference from falsity to guilt that is more tenuous.

75 R v. W [2006] EWCA (Crim) 1292. This may be becoming a common practice: for police concern that disclosing DNA evidence before interview makes it too easy for suspects to concoct false accounts, see DAVID BLAKEY, UNDER THE MICROSCOPE REFOCUSED: A REVISIT TO THE THEMATIC INSPECTION REPORT ON SCIENTIFIC AND TECHNICAL SUPPORT (2002). For another example of withholding DNA evidence, see *R v. Beedall* [2007] EWCA (Crim) 23 and, on the general disclosure issue, *Director of Public Prosecutions v. Ara* [2002] 1 Cr. App. R. 16. For the argument that withholding evidence is an effective way of detecting lies, see Maria Hartwig, Pär Anders Granhag, Leif A Strömwall & Aldert Vrij, *Detecting Deception Via Strategic Disclosure of Evidence*, 29 LAW & HUM. BEHAV. 469 (2005).

fact that W had initially lied was put to the jury as evidence against him. As the Court of Appeal put it, "[t]here is simply no rule of law or practice requiring the police to disclose the full extent of their relevant evidence before questioning a suspect."[76] There is a duty on the police not to actively mislead a suspect,[77] however, and a suspect does have to be told what offence he has been arrested for.[78] In particular, if he has been arrested for one crime but the police know that any answers will incriminate him in relation to a more serious crime, evidence from the interview is likely to be excluded on grounds of fairness at a trial for the more serious crime. The Court of Appeal in *Kirk* explained that this is so that the suspect can make an informed decision about whether to answer questions and whether to consult a lawyer.[79]

After the introduction of the CJPOA, the question of the relationship between silence and disclosure quickly came before the courts. *Argent* shows the Court of Appeal following the trend of many of its silence decisions of the time; it did not want to be seen to be disrupting the scheme of the new legislation.[80] Argent was arrested on suspicion of murder; the initial basis of his arrest was an anonymous telephone call, and he refused to answer questions. The trial judge did not allow adverse inferences to be drawn from Argent's failure to mention, at this interview, his defense at trial, which was that he left the scene before the victim was attacked. The Court of Appeal commented that in so ruling, the trial judge "may have overstepped the bounds of his judicial function."[81] The trial judge, however, allowed inferences to be drawn from silence at a later interview, which followed Argent's identification at an identification parade. At this interview, "the police may have made more limited disclosure than is normal,"[82] but, given that this was not a case such as fraud or conspiracy, depending "on a complex web of interlocking facts,"[83] it would have been easy for the defendant to have given his defense at interview if it were true. The Court of Appeal thought that a direction on adverse inferences had been proper. The jury could, of course, have been invited to take into account the disclosure issue when considering what inferences to draw. The disclosure point never seems to have been successful in the Court of Appeal, though it is worth noting that, in *Beckles*, Lord Woolf CJ

[76] R v. W [2006] EWCA (Crim) 1292, [8]; *see also* R v. Seddon [2002] EWCA (Crim) 2797.
[77] R v. Imran and Hussain [1997] Crim. L.R. 754.
[78] Police and Criminal Evidence Act, 1984, c. 60, § 28(2) (Eng.); Code of Practice for the Detention, Treatment, & Questioning of Persons by Police Officers, Code C, § 10.3; European Convention on Human Rights, art. 5, para. 2, Nov. 4, 1950, 213 U.N.T.S. 221.
[79] R v. Kirk [2000] 1 W.L.R. 567.
[80] R v. Argent [1997] 2 Cr. App. R. 27.
[81] *Id.* at 29.
[82] *Id.* at 35.
[83] *Id.*

commented that the lawyer's advice to Beckles to refuse to answer questions "might have been justified because the defendant was unaware of the evidence on which the prosecution were relying."[84] However, this seems to have played little, if any, role in the decision to overturn the conviction.

Lack of disclosure may play a role in preventing an adverse inference where it means that the defendant was never prompted to mention a particular fact. In *Nickolson*,[85] for example, the defendant was not told at interview that his semen was found on his stepdaughter's nightdress, so he could not have been expected to suggest an innocent explanation for its being there. But suspects are expected to mention a defense which, if true, would be an obvious way to respond to the allegations at interview, even if they are not asked a question which directly prompts them about it.[86] *R v. W* was not an inferences from silence case: given that an inference could be drawn from W's lie, an inference from failure to mention the defense would have been superfluous. But it seems unlikely that, had W simply said nothing until the DNA was revealed, the Court of Appeal would have found fault with a section 34 direction. So long as a suspect knows the allegation against him, he is basically expected to respond with his defense even if there appears to be very little evidence against him. There are hints of a different approach in the ECtHR case law. In *Murray* the Court noted that drawing inferences from silence was permissible "in situations which clearly call for an explanation from" the suspect,[87] but this point has never been developed.

It might be thought that this aspect of the section 34 case law is problematic, because lack of disclosure undermines the inference from silence. One reason for this is that, as we saw above, the inference depends on the assumption that the innocent will reveal their defenses to the police at interview. One motivation for this would be, broadly speaking, self-preservation.[88] The innocent will want to rebut suspicion and gain release from police detention as soon as possible, and revealing the truth will often be the best way of doing this. But if an innocent suspect thinks that the evidence against him is weak, he may think that he will soon be released anyway, even if he does not put forward a defense. The cost-benefit analysis is particularly likely to tilt

[84] R v. Beckles [2005] 1 W.L.R. 2829, [51]; *see also* R v. Roble [1997] Crim. L.R. 449; R v. Nottle [2004] EWCA (Crim) 599.

[85] R v. Nickolson [1999] Crim. L.R. 61.

[86] R v. Barnes [2003] EWCA (Crim) 2138.

[87] Murray v. United Kingdom (1996) 22 E.H.R.R. 29 [47]; *see also id.* at [51].

[88] David Hamer has made a similar point in respect of inferences from silence at trial. *See* Hamer, *supra* note 46, at 169-71.

in favor of silence if the defense is in some way compromising.[89] The caution does warn suspects that not mentioning facts relied on at trial can have a cost,[90] but if the suspect thinks the police have little evidence the trial may not seem a realistic possibility.

There is another reason why it may be more difficult to draw an inference when the prosecution's case at interview appears weak. Kent Greenawalt has argued that when questioning about wrongdoing is based on slender, rather than well-grounded, suspicion, silence is a perfectly appropriate response.[91] Greenawalt's argument does not seem to rely on the points about self-preservation made above. The idea, rather, is that silence is an appropriately disdainful response to questioning in the absence of good reasons for suspicion. In the context of questioning about criminal offences, Greenawalt suggests that this means that silence should not be accorded any probative weight unless the suspect was confronted with well-grounded suspicion.[92] To return to the example of *R v. W*, if W had been arrested on the basis of the DNA match, and this evidence was not disclosed to him, then silence would have been an appropriate response. It would have been appropriate at the first interview in *Argent*, as well.[93] A slight complication here is that the "Greenawalt principle" is normative, whereas our current concern is inferential. That silence is a morally appropriate response to slender suspicion does not mean that silence is not suspicious, because people's behavior may not always follow the norm. But this distinction between the inferential and the normative

[89] An example would be the facts of *Beckles*, where if Beckles admitted presence at the scene of crime but denied taking part in murder, he would have incriminated himself in relation to false imprisonment. R v. Beckles [2005] 1 W.L.R. 2829. For a defense lawyer's view, see ED CAPE, DEFENDING SUSPECTS AT POLICE STATIONS 201-02, 217-18 (2006). Cape notes that the decision whether or not to answer questions in a weak case can be a difficult one, because there is the risk of bolstering a prosecution which could not otherwise go ahead.

[90] Code of Practice for the Detention, Treatment, & Questioning of Persons by Police Officers, Code C, § 10.5 (authorized by the Police and Criminal Evidence Act, 1984, c. 60, § 66 (Eng.)).

[91] R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15 (1981); *see also* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective*, *in* R. H. HELMHOLZ ET AL., THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 181 (1997). The argument that allowing inferences from silence at interview is unfair in the absence of disclosure obligations on the police was made repeatedly by Adrian Zuckerman. *See, e.g.*, Adrian A.S. Zuckerman, *Trial by Unfair Means—The Report of the Working Group on the Right of Silence*, 1989 CRIM. L. REV. 855; *see also* ROYAL COMMISSION ON CRIMINAL PROCEDURE: THE INVESTIGATION AND PROSECUTION OF CRIMINAL OFFENCES IN ENGLAND AND WALES, REPORT, Cmnd. 8092, para. 4.52 (1981).

[92] *Id.* at 42-43.

[93] The rules on arrest and detention for questioning in England and Wales are so loose that one cannot infer that, because the police were able to arrest and detain the suspect, they must have had well-grounded suspicion. *See* McConville & Hodgson, *supra* note 68, at 198 (authors go so far as to suggest that we should talk about "detainees" as opposed to suspects); ASHWORTH & REDMAYNE, *supra* note 31, 84-86.

does point to what may be a further problem with section 34. The distinction just made is subtle, and when the state, as it does through the caution, informs suspects that silence may count against them, it does seem to be sending a message about how suspects *should* respond to police questioning: they should give their account of things to the police, even if the police do not appear to have well-grounded suspicion.[94] Before the change to the law suspects could use silence as a bargaining chip, in order to get effective disclosure from the police,[95] but now that silence is risky this strategy may be far less effective.

It is not surprising that English courts have not taken the disclosure point. If they were to hold that lack of disclosure, or the absence of well-grounded suspicion, was a bar to a section 34 direction, they would be inviting argument about appropriate disclosure in every case. It would be difficult to lay down guidelines on what is appropriate. And the courts are, of course, able to shift the problem onto the jury. The defendant can argue that he was silent because of lack of disclosure, and the jury can be left to take this into account. Despite this, there does seem to be a problem here. There may be reason to doubt whether the jury will give sufficient weight to non-disclosure as a reason for silence. Its significance may not be transparent to jurors because it depends on the dynamics of what will, to many, be the unfamiliar environment of arrest, detention and questioning. There is also the normative point: if the Greenawalt principle is thought to be sound, then English law is in tension with it, because it suggests that suspects should answer questions on slender suspicion. Finally, as we saw above, in *Kirk* the Court of Appeal held that suspects should know what crime their answers may put them in jeopardy of conviction for, and justified this on the ground that suspects should be able to make informed decisions about whether to answer questions or consult a lawyer. It rejected a similar principle about disclosure of evidence before interview in *R v. W*. In *W*, of course, the suspect lied, and it does not seem reasonable to ask the police to take steps to prevent the suspect from damaging his case through lies.[96] But might silence be different? If the police had not been able to connect W to the complainant, a silent response would not have been damaging. If *Kirk* is right about the significance of the nature of the crime,[97] then there does seem to be a parallel argument that the defendant needs disclosure of evidence to be able to make informed decisions about silence.

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[94] A different argument would be that the state, through the case law on section 34, should shield suspects from inferences that, while rational, are morally inappropriate. I am completely unsure what to make of this argument in this context.

[95] *See supra* note 70 and accompanying text.

[96] R v. Imran and Hussain [1997] Crim. L.R. 754.

[97] *Cf.* R v. Dunlop [2007] 1 W.L.R. 1657.

D. *Silence and Legal Advice*

One of the most problematic areas of the section 34 regime concerns legally advised silence. Despite section 34 and the new caution, some legal advisers still advise suspects to refuse to answer questions. Such advice is now likely to be qualified; suspects will be told that while silence is risky in that inferences may be drawn against them at trial, it is still the best option.[98] As with disclosure, the courts have been reluctant to hold that legal advice blocks an inference from silence. As the Court of Appeal put it in *Beckles*, "the courts have not unreasonably wanted to avoid defendants driving a coach and horses through section 34 and by so doing defeating the statutory objective."[99]

A major complication here is that if the defendant argues that he was silent on the basis of legal advice, he risks being taken to have waived legal professional privilege as to his consultations with the adviser at the police station.[100] In *Wishart* this led to the defendant's solicitor being cross-examined at trial and stating that the defendant did not reveal to her the defense he claimed to have done—a very damaging disclosure.[101] The current position seems to be that if the defendant merely claims to have stayed silent on the basis of advice, then privilege is not waived.[102] The same goes if he calls his solicitor to corroborate the fact that he was advised to stay silent.[103] If he claims to have mentioned a particular fact to his solicitor, the solicitor can again corroborate this without opening up privilege.[104] But going further, to give evidence about the reasons for advice, such as lack of disclosure, is likely to constitute waiver.[105] Whatever the position on waiver, if the defendant has raised legal advice as an explanation for silence then the jury should be told to take this into account. In line with the general

[98] *See* CAPE, *supra* note 89, at 200-01.

[99] R v. Beckles [2005] 1 W.L.R. 2829, [43].

[100] *See generally* Michael Stockdale & Natalie Wortley, "*A Singularly Delicate Relationship": Silence and the Waiver of Legal Professional Privilege*, 166 CRIM. LAW. 3 (2006).

[101] R v. Wishart [2005] EWCA (Crim) 1337.

[102] *See id.*; R v. Condron [1997] 1 Cr. App. R. 185; R v. Bowden [1999] 2 Cr. App. R. 176.

[103] *See Wishart* [2005] EWCA (Crim) 1337; *Condron* [1997] 1 Cr. App. R. 185.

[104] *Wishart* [2005] EWCA (Crim) 1337; *Condron* [1997] 1 Cr. App. R. 185. If he does not call the solicitor to back up the story, then this will look suspicious, and can be the subject of comment at trial. *See* R v. Bui [2001] EWCA (Crim) 1752. In *Roble*, the Court of Appeal suggested that the defendant would find it hard to resist an inference unless he did waive privilege and explain the reasons for his advice. R v. Roble [1997] Crim. L.R. 449; *see also Condron* [1997] 1 Cr. App. R. 185. But later case law has not echoed this line. *Cf.* R v. P [2002] EWCA Crim (1388).

[105] It also seems that if the solicitor gives his reasons for advising silence to the police at interview, then this will be taken to constitute waiver. R v. Hall-Chung [2007] EWCA (Crim) 3429.

approach to "innocent" explanations, the jury has to be able to rule out legal advice as an explanation and be sure that the real reason for silence was that the defendant had no answer or none that would stand up to questioning.

Early cases simply left the question of legal advice to the jury,[106] but in later cases the courts have felt the need to say more. In *Betts*,[107] the Court of Appeal took the position that, if the defendant genuinely relied on legal advice, then no inference could be drawn. In *Howell* a differently constituted Court of Appeal shifted away from this position:

> [T]he public interest that inheres in reasonable disclosure by a suspected person of what he has to say when faced with a set of facts which accuse him, is thwarted if currency is given to the belief that if a suspect remains silent on legal advice he may systematically avoid adverse comment at his trial. And it may encourage solicitors to advise silence for other than good objective reasons. We do not consider, *pace* the reasoning in *Betts* . . . , that once it is shown that the advice (of whatever quality) has genuinely been relied on as the reason for the suspect's remaining silent, adverse comment is thereby disallowed. The premise of such a position is that in such circumstances it is in principle not reasonable to expect the suspect to mention the facts in question. We do not believe that is so. . . . There must always be soundly based objective reasons for silence, sufficiently cogent and telling to weigh in the balance against the clear public interest in an account being given by the suspect to the police.[108]

The suggestion in *Howell*, then, is that the jury should assess whether the suspect's decision to stay silent on the basis of legal advice was not just genuine but also reasonable. In *Hoare*,[109] Auld LJ tried to reconcile the two different approaches. In holding that there was no conflict in the case law, he made the following general comments:

> [I]t is plain from Kay LJ's judgment [in *Betts*] that, even where a solicitor has in good faith advised silence and a defendant has genuinely relied on it in the sense that he accepted it and believed that he was entitled to follow it, a jury may still draw an adverse inference if it is sure that the *true* reason for his silence is that he had no or no satisfactory explanation consistent with innocence to give. That is of piece with Laws LJ's reasoning in *R v Howell* and *R v Knight* that genuine reliance by a defendant on his solicitor's advice to remain silent is not in itself enough to preclude adverse comment. . . .

[106] *See Condron* [1997] 1 Cr. App. R. 185; R v. Argent [1997] 2 Cr. App. R. 27.
[107] R v. Betts [2001] 2 Cr. App. R. 16.
[108] R v. Howell [2005] 1 Cr. App. R. 1, [24].
[109] R v. Hoare [2004] EWCA (Crim) 784.

> The whole basis of section 34 of the 1994 Act, in its qualification of the otherwise general right of an accused to remain silent and to require the prosecution to prove its case, is an assumption that an innocent defendant . . . would give an early explanation to demonstrate his innocence. If such a defendant is advised by a solicitor to remain silent, why on earth should he do so, unless because of circumstances of the sort aired by the court in *R v Roble* [1997] Crim LR 449, *R v Argent* [1997] 2 Cr App R 27 and *R v Howell* [2003] Crim LR 405, he might wrongly inculpate himself?
>
> It is not the purpose of section 34 of the 1994 Act to exclude a jury from drawing an adverse inference against a defendant because he genuinely or reasonably believes that, regardless of his guilt or innocence, he is entitled to take advantage of that advice to impede the prosecution case against him. In such a case the advice is not *truly* the reason for not mentioning the facts. The section 34 inference is concerned with flushing out innocence at an early stage or supporting other evidence of guilt at a later stage, not simply with whether a guilty defendant is entitled, or genuinely or reasonably believes that he is entitled, to rely on legal rights of which his solicitor has advised him. Legal entitlement is one thing. An accused's reason for exercising it is another. His belief in his entitlement may be genuine, but it does not follow that his reason for exercising it is . . . .[110]

There is an awful lot of muddle in these passages. Both judgments confuse two issues we distinguished earlier: the evidential value of silence and the reasons for the change in the law. The latter may have been partly incentivizing, i.e. to encourage suspects to talk to the police. Encouraging talk is a completely irrelevant concern when it comes to deciding whether to draw an inference: policy factors may justify the change in the law, but they cannot ground an inference. Beyond this, there are a number of problems with Auld's analysis. His first point is correct; if the real reason for silence was that the defendant had no answer to give, an inference can be drawn. But the claim that follows—that genuine reliance on advice does not preclude an inference—is more problematic. Auld goes on to justify his position by noting that a belief that one is legally entitled to stay silent is not the same thing as one's reason for staying silent. That is correct. If X tells me that I am legally entitled to hit Y, I may believe X, but still hit Y simply because I do not like him. In fact, it would be very odd if "I am entitled to" was my only reason for hitting Y. But it is not clear why entitlement is thought to be significant in the silence scenario. The words of the caution make it plain to the suspect that he is entitled to stay silent: "you do not have to

[110] *Id.* at [51], [53]-[54].

say anything."[111] If legal advisers simply confine themselves to repeating that message, then Auld's point is reasonable. But when silence is advised, the lawyer surely goes beyond that. She will presumably explain that, while silence carries certain risks, she thinks that silence is in the suspect's best interests.[112] If the suspect trusts this advice, and stays silent on the basis of it, can an inference be drawn? If we do not go behind the advice, then it appears that an inference will be very hard to draw. If X tells me that it is in my best interests to hit Y because Y is a threat to me, and I believe X, it is possible that my real motivation for hitting Y is still dislike of him. But given that I have a respectable rational motivation for the blow, it will be very difficult to infer that dislike was its real reason. It seems reasonable to suppose that suspects trust the advice given to them by their lawyers, and not too unreasonable to suggest that the legal system should respect that assumption. Auld's question, "[i]f . . . a defendant is advised by a solicitor to remain silent, why on earth should he do so . . . ?" is a deeply cynical one for a judge to ask.

There are complications. If we go behind the lawyer's advice, it may be that the reason for advising silence is that the suspect has no answer to give; there may be a strong correlation between guilt and advice to say nothing. A suspect may have decided to say nothing and then get the same advice from his solicitor. But the fundamental point is that for a fact-finder these issues are fairly inscrutable. Indeed, in the latter case it may not even make sense to ask "what was the real reason for silence?" If I have decided to hit Y, and then realize that I have a reason to hit him in self-defense, is there any information that would allow someone—including me—to attribute my blow to one or other cause? It is true that the problem here is in part legal professional privilege; the jury can only really evaluate silence if it knows the reasons why silence was advised. At one point the Court of Appeal looked to be prepared to put pressure on suspects to waive privilege so that these reasons could be explored,[113] but it now seems to have taken a step back from this.[114] Privilege may be frustrating here, in that it creates a shield from valid inferences, but given its independent value

[111] Code of Practice for the Detention, Treatment, & Questioning of Persons by Police Officers, Code C, § 10.5 (authorized by the Police and Criminal Evidence Act, 1984, c. 60, § 66 (Eng.)).

[112] *See* CAPE, *supra* note 89, at 201 ("the lawyer's professional obligation is to advise a client on their best interests"); ROGER EDE, ADVISING A SUSPECT IN THE POLICE STATION: GUIDELINES FOR SOLICITORS 1-4, 26 (5th ed. 2003); *see also* Ed Cape, *The Rise (and Fall?) of a Criminal Defence Profession*, 2004 CRIM. L. REV. 401, 414 ("[T]he courts have recently appeared to disapprove of legal advice that directly serves the adversarial interests of the accused.").

[113] *See* R v. Roble [1997] Crim. L.R. 449.

[114] R v. Loizou [2006] EWCA (Crim) 1719; Stockdale & Wortley, *supra* note 100.

this seems inevitable.[115]

The courts, then, have not handled the problem of legal advice well. Arguably, this does not matter too much. In the Crown Court it is still up to the jury to decide whether to draw an adverse inference, and the jury may well draw no inference if there is evidence that silence was based on legal advice; legal advice looks to be a far more transparent factor than lack of disclosure in this respect. Indeed, given that the jury is told that it can only draw an adverse inference if the sole sensible explanation for silence is that the defendant had no answer, or none that would stand up to questioning, then it looks to be more or less impossible for the jury to draw an adverse inference in a legal advice case, because "he was relying on his solicitor's advice" will always be a sensible explanation.[116] The problem, though, is that there is an element of hypocrisy in the courts' approach to this issue. Juries cannot rationally draw the inference, but they are nevertheless told that they can. Worse, the jury can be told to take into account the sort of irrelevant factors mentioned by Laws and Auld. This area of the section 34 case law is a sad mess.

Two further points are worth mentioning briefly. If a suspect did not mention a fact relied on in his defense at interview, but did mention it to his lawyer, then he can point this out and it will block the inference that he did not have an answer to give at the time of interview. It will not, however, prevent the inference that he did not want the fact to be tested by the police. This seems right, but unfortunately there is authority for the opposite conclusion: a suspect's failure to mention a fact to his lawyer can be used as the basis for an adverse inference. Defendants can be cross-examined about whether they mentioned the fact to their lawyer.[117] The problem here is that the terms of the caution do not warn suspects that they should reveal their defense to their lawyers, and this must undermine the inference.

A second point is that legal advisers have developed a strategy that does insulate suspects from adverse inferences. This is the prepared statement. At interview a suspect can present the police with a written statement of his defense, and then refuse to answer questions. So long as his defense at trial does not depart from the statement[118] it seems that

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[115] *See generally* Hock Lai Ho, *Legal Professional Privilege and the Integrity of Legal Representation*, 9 LEGAL ETHICS 163 (2006); Ronald J. Allen, Mark F. Grady, Daniel D. Polsby & Michael S. Yashko, *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359 (1990).

[116] *See* Dennis, *supra* note 41 (suggesting that such decisions effectively "marginalize" section 34).

[117] *Loizou* [2006] EWCA (Crim) 1719.

[118] R v. Ali [2001] EWCA (Crim) 863.

no inference will be drawn. In *Knight*,[119] the Court of Appeal toyed with the idea that an inference that the defendant did not think his defense would stand up to questioning could be drawn, but decided against this approach, partly on the grounds that the inference risked overlapping with an inference drawn under section 35. It is to this section that we now turn.

III. SECTION 35

A. *The Inference and the Common Law*

Section 35 relates to silence at trial. As we saw earlier, there is no trigger for the inference: an inference can be drawn simply on the basis that the defendant did not testify at trial. To understand the nature of the section 35 inference, it is helpful to contrast the current position with that under the common law.

The Court of Appeal decided *Martinez-Tobon*[120] shortly before the CJPOA came into force; its judgment provides a good statement of the common law position on inferences from failure to testify. Martinez-Tobon was tried for being involved in the importation of cocaine. His defense was that he though it was emeralds that were being smuggled, not cocaine. He did not testify at trial, and the judge directed the jury that they could put some weight on this. The Court of Appeal noted that "the dividing line between permissible and impermissible comment is, under the present law, not easily discernible,"[121] but noted two principles. Where a defendant does not testify, the jury should be given a "*Bathurst*" direction.[122] The JSB guidelines suggest the following:

> The defendant does not have to give evidence. He is entitled to sit in the dock and require the prosecution to prove its case. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing, one way or the other. It does nothing to establish his guilt. On the other hand, it means that there is no evidence from the defendant to undermine, contradict or explain the evidence put before you by the prosecution.[123]

The final sentence is notoriously opaque. The court in *Martinez-Tobon* also held that in certain cases comment could go beyond this:

> [T]he judge may think it appropriate to make a stronger comment

[119] R v. Knight [2004] 1 Cr. App. R. 9.
[120] R v. Martinez-Tobon [1994] 98 Cr. App. R. 375.
[121] *Id.* at 382.
[122] R v Bathurst [1968] 2 Q.B. 99.
[123] JUDICIAL STUDIES BOARD, *supra* note 50, § 43.

> where the defence case involves alleged facts which (a) are at variance with prosecution evidence or additional to it and exculpatory, and (b) must, if true, be within the knowledge of the defendant. . . . The nature and strength of the comment must be a matter for the discretion of the judge and will depend upon the circumstances of the individual case. However, it must not be such as to contradict or nullify the essentials of the conventional direction.[124]

It was held that the trial judge was entitled to comment that if the defendant really thought it was emeralds that were being smuggled "he would be very anxious to say so."[125] It therefore seems that comment could invite an inference to the falsity of the defense case,[126] though the final words of the Court of Appeal leave things a little unclear, for they do not really go any further than the *Bathurst* "there is no evidence" comment: "the jury were entitled, in considering whether the suggestion concerning emeralds might possibly be true, to take into account the fact that there was no evidence from the defendant to support what therefore remained a bare assertion."[127]

A provision very similar to section 35 of the CJPOA was introduced in Northern Ireland in 1988.[128] In *Murray* the House of Lords considered its effects.[129] What is particularly interesting about *Murray* is that, if one reads *Martinez-Tobon* as permitting an inference to falsity of a defense which, if true, would be in the defendant's knowledge, then *Murray* does not seem to envisage inferences under the new regime going beyond what was permitted under common law. According to Lord Slynn, an inference of the defendant's guilt is permissible, but:

> There must thus be some basis derived from the circumstances which justify the inference. . . . [I]f parts of the prosecution case had so little evidential value that they called for no answer, a failure to deal with those specific matters cannot justify an inference of guilt. . . . [I]f aspects of the evidence . . . call for an explanation which the accused ought to be in a position to give, if an explanation exists, then a failure to give any explanation may as a matter of common sense allow the drawing of an inference that there is no

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124 *Martinez-Tobon* [1994] 98 Cr. App. R. 375, 383.

125 *Id.*

126 The empirical evidence suggests that such instructions were given rarely, in 7 percent or fewer cases. Michael Zander & Paul Henderson, *Crown Court Study 116* (Royal Commission on Criminal Justice, Research Study No. 19, 1993).

127 *Martinez-Tobon* [1994] 98 Cr. App. R. at 383.

128 Criminal Evidence (Northern Ireland) Order, 1988, SI 1988/1987, art. 4 (N. Ir. 20).

129 Murray v. Dir. of Pub. Prosecutions [1994] 1 W.L.R. 1 (N. Ir.). For commentary, see John Jackson, *Inferences From Silence: From Common Law to Common Sense*, 44 N.I.L.Q. 103 (1993).

> explanation and that the accused is guilty.[130]

For Lord Mustill:

> It is . . . a matter of common sense that even where the prosecution has established a prima facie case . . . it is not in every situation that an adverse inference can be drawn from silence. . . . Everything depends on the nature of the issue, the weight of the evidence adduced by the prosecution upon it . . . and the extent to which the defendant should in the nature of things be able to give his own account of the particular matter in question.[131]

Consciously or not, the case law on section 35 of the CJPOA has not followed this approach. The JSB direction provides:

> [Y]ou may draw the conclusion . . . that [the defendant] has not given evidence because he has no answer to the prosecution's case, or none that would bear examination. If you do draw that conclusion, you must not convict him wholly or mainly on the strength of it . . . , but you may treat it as some additional support for the prosecution's case . . . .[132]

What is missing here is the idea that an inference can only be drawn where the defendant has not testified to support an explanation which, if true, he ought to be able to give. Examples from the case law make this clear. In *Noonan*[133] and *Riley*,[134] for example, the defendants did no more than put the prosecution to proof on the issue of identity. In both cases the Court of Appeal held that the trial judge was wrong to give a section 34 direction at trial, because the defendant was not relying on any facts at trial. But section 35 directions were given at both trials, and the issue of their appropriateness was not even raised on appeal. There are cases where defendants simply challenge DNA or other forensic identification evidence, and a section 35 direction is given.[135] In *Whitehead*,[136] a section 35 direction was explicitly held to be appropriate when the essence of the defense case was that the complainant was lying about sexual abuse alleged to have taken place some ten years previously. The defendant did admit to sharing a room with the complainant on some occasions, and an account of events on these occasions might just come within the idea of a defense within his knowledge, but the case is at least hard to reconcile with the principles in *Murray*. In *Noonan*, *Riley* and *Whitehead*, all that the defendant can really say in his defense is "I did not do it." We need to bear this in

130 *Murray* [1994] 1 W.L.R. at 11.
131 *Id.* at 5.
132 JUDICIAL STUDIES BOARD, *supra* note 50, § 39.3.
133 R v. Noonan [2003] EWCA (Crim) 3869.
134 Riley v. Dir. of Pub. Prosecutions [2006] EWCA (Admin) 1796.
135 R v. Hookway [1999] EWCA (Crim) 212; R v. Lashley [2000] EWCA (Crim) 88.
136 R v. Whitehead [2006] EWCA (Crim) 1486.

mind as we turn to examine the thinking behind the section 35 inference.

As we have seen, an important point about section 34 is that adverse inferences have to be triggered; the inference can only be drawn when the defendant relies at trial on a fact not put forward at interview. This helps to mould the inference that can be drawn: the inference focuses on the falsity of the fact relied on. Section 35 is not like that. The inference is a general one. It is simple failure to testify that is regarded as suspicious. The underlying assumption is that the guilty have more to lose from testifying than the innocent. As with section 34, there must also be an assumption that the innocent will want to testify on grounds of self-preservation: they must have something to gain from giving evidence. The soundness of these assumptions depends heavily on assumptions about the effectiveness of cross-examination. If cross-examination is good at separating the innocent from the guilty, then the guilty will be more disinclined to testify than the innocent. Cross-examination is often lauded as the great truth-finding tool, but even Wigmore tempered his praise by noting the "abuses . . . and the puerilities" it was subject to.[137] Today, we are probably more skeptical about cross-examination.[138] More will be said below about specific problems, such as cases involving the inarticulate and the mentally disordered. In the more general case, the effectiveness of cross-examination is still likely to depend on particular factors. In cases such as *Martinez-Tobon*, where the defendant can be probed about the details of his story, cross-examination is probably at its most useful. But we have reason to be more skeptical about its value in cases such as *Noonan*, where the defendant can only say "I did not do it." As for self-preservation, there are again a number of relevant variables. As we noted with section 34, those who face only a weak prosecution case may not think the risk of conviction is sufficiently great for them to need to speak to save themselves. But at trial, once the case goes to the jury, this is probably not much of an issue. What may be more relevant is the extent to which a defendant can present his case without testifying. If he can call several witnesses to support his story, his own testimony may seem to be an insignificant means of self-preservation. Again, a *Noonan*-type case raises special difficulties; repeatedly saying "I did not do it" is probably not a very effective means of securing an acquittal.

As with section 34, when thinking about the inference we have to bear in mind how the legislation changes things. All defendants are

[137] JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (James H. Chadbourn rev. ed., 1974).

[138] *See, e.g.*, Louise Ellison, *The Mosaic Art?: Cross-Examination and the Vulnerable Witness*, 21 LEGAL STUD. 353 (2001).

warned that if they do not testify they risk having inferences drawn against them.[139] This makes both the innocent and the guilty more likely to testify. As David Hamer notes, the greater the perceived pressure from the warning, the more likely it is that silent defendants are silent for reasons unconnected with guilt, such as inarticulacy.[140] To draw an inference, then, one has to think that the guilty fear cross-examination more than an adverse inference. This may not be too problematic, given that in cases where an inference is likely to be strongest—a consent defense rape case, for example—so too will be the guilty defendant's fear of cross-examination.

In summary, the section 35 inference is quite complex. In some cases, such as those where the defendant is not putting forward a positive defense, it appears to be extremely tenuous. As with section 34, there may be innocent explanations for silence. An innocent defendant may worry that he will perform particularly poorly on cross-examination owing to being inarticulate or nervous.[141] The courts approach this issue in the same way that they do the analogous issue under section 34: these factors are for the jury to take into account, but they should not be put to the jury unless there is evidence to support them.[142] It will obviously be difficult to adduce evidence of inarticulacy or nervousness, which might lead to the jury being asked to draw an inference on a misleading basis. We will look at the treatment of two other innocent explanations for silence in more detail below, but first it is worth saying something about another feature of the section 35 case law.

B. *A Case to Answer*

The JSB direction, quoted above, provides that the jury should not draw an inference against a defendant unless it finds that "the prosecution's case is so strong that it clearly calls for an answer by him."[143] The Court of Appeal has held this requirement to be a matter

[139] *See supra* note 19 and accompanying text.

[140] *See supra* note 46 and accompanying text.

[141] The U.S. Supreme Court was concerned about this in *Griffin v. California*, 380 U.S. 609 (1965). In a study of whether or not defendants testified in cases where convictions were later overturned by DNA evidence, Blume found that "some of the defendants [who did not testify] were slow or even mentally retarded, in others, the defense believed the case was weak." John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record – Lessons from the Wrongfully Convicted* 3 (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 83) (2007); *see also* Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 330-33 (1991).

[142] R v. Cowan [1995] 4 All E.R. 939.

[143] JUDICIAL STUDIES BOARD, *supra* note 50, § 39.4.

of "inescapable logic,"[144] but it is not clear what its significance is. Indeed, the need for this direction has been questioned.[145] It appears to be a different requirement than the one in *Martinez-Tobon* and *Murray*. No mention is made of matters within the defendant's knowledge, and one would expect more to be made of the direction in the case law if it served this function.[146] The direction might be thought to be directed at the self-preservation point explored above, ensuring that the case is strong enough that an innocent defendant would be motivated to testify to secure an acquittal.[147] But if the case was particularly weak, the defendant would succeed on a motion of no case to answer; he knows he is in jeopardy once the case has gone to the jury and one would expect that to be sufficient to make self-preservation a reality. There is of course the Greenawalt principle, but the principle presumably does not apply at trial, especially once the case has gone to the jury.

The Court of Appeal's latest take on the case to answer requirement is to deprive it of any independent significance.[148] In *Whitehead* the Court said that the requirement "is the necessary and logical consequence" of, and "amplifies and spells out" the rule that the defendant should not be convicted on silence alone.[149] This requirement is found in section 38(3) of the CJPOA, and is specifically mentioned in the JSB direction. This is all very odd. The uncertain status of the case to answer requirement hints at the normative ambiguity of silence in court. It also points us back to one of the concerns we raised about section 34. We noted that the courts have been unwilling to lay down any strict rules on the amount of evidence the police should disclose to the suspect at interview, and that this is problematic both in terms of the role that self-preservation plays in securing the inference and in terms of the Greenawalt principle. If the courts do think that the case to answer requirement is a logical prerequisite to drawing an inference at trial for reasons other than that the defendant should not be convicted on silence alone—and this was a plausible reading of the case law prior to *Whitehead*—then it is very strange that something like a case to answer *at interview*[150] has not been made a prerequisite of the section 34 inference.

144 R v. Birchall [1999] Crim L.R. 311.

145 See Birch's commentary on *R v. Birchall* [1999] Crim L.R. at 313.

146 The Court of Appeal now seems to regard it as desirable, rather than essential, to give this direction. R v. Whitehead [2006] EWCA (Crim) 1486.

147 R v. Johnson [2004] EWCA (Crim) 2520, [39] ("You cannot infer something against somebody for not answering a case that does not require an answer in the first place.").

148 *Whitehead*, [2006] EWCA (Crim) 1486.

149 *Id.* at [48].

150 There is, oddly, a requirement that there be a case to answer *at trial* before an inference is drawn under section 34. *See* JUDICIAL STUDIES BOARD, *supra* note 50, at § 40.3; *cf.* R v. Doldur [2000] Crim. L.R. 178; R v. Benn [2004] EWCA (Crim) 2100.

C. *Mental Condition*

Section 35 of the CJPOA specifically states that an inference may not be drawn if "it appears to the court that the physical or mental condition of the accused makes it undesirable for him to give evidence."[151] This provision was first examined in detail in *Friend*.[152] The 14-year-old defendant was assessed as having an IQ of 63 and thus a "mental age" of around 10. However, he was found not to be especially suggestible and the judge thought that at police interview he showed an ability to concentrate and respond coherently. He did not give evidence at trial, though there was expert evidence before the jury as to his mental state, and the judge gave an adverse inferences direction. The Court of Appeal found that the judge was within his discretion in doing so. It suggested that there was "no right test" for deciding the undesirability question, but commented that "[a] physical condition might include a risk of an epileptic attack; a mental condition, latent schizophrenia where the experience of giving evidence might trigger a florid state."[153] Here it seems as though "undesirable" is interpreted in terms of an impact on the physical or mental health of the accused, not in terms of whether an innocent defendant might fear that he would damage his case by testifying and being subjected to cross-examination. Seven years later Friend's conviction was quashed on a referral to the Court of Appeal by the Criminal Cases Review Commission.[154] He had been diagnosed as suffering from Attention Deficit Hyperactivity Disorder. On the desirability question, the expert psychologist suggested that Friend would have had difficulty concentrating in the witness box, and may have given inconsistent and conflicting evidence.[155] The Court of Appeal found that, had this evidence been before the trial judge, he would not have given a section 35 direction.[156]

The undesirability case law is—and this seems to be a deliberate strategy on the part of the Court of Appeal—vague. The test is sometimes thought about in terms of whether the accused would be able to do himself justice.[157] But the interpretation of "undesirable" in the

[151] Criminal Justice and Public Order Act, 1994, c. 33, § 35(1)(b).
[152] R v. Friend [1997] 2 Cr. App. R. 231.
[153] *Id*. at 242.
[154] R v. Friend [2004] EWCA (Crim) 2661.
[155] *Id.* at [26].
[156] *Id.* at [30]. The Court did not quite feel able to say that there should have been no section 34 inference on this evidence, but merely that the judge would have directed the jury in different terms on section 34. *Id.* at [31].
[157] *E.g.*, R (on the Application of DPP) v. Kavanagh [2005] EWHC (Admin) 820; R v. G

first *Friend* appeal is also influential. In *R v. LH* the Court of Appeal does not criticize a section 35 direction when the trial judge's focus appears to have been on the impact on the defendant: "I do not think it would have a substantial impact in a deterioration in her mental health."[158] This case also hints at the procedural complexities; there may need to be a voir dire on the question of section 35 inferences, with competing experts giving their views. Ideally, one would have thought, if a direction is given the experts should also address the jury on the section 35 question[159] (though in *LH* the Court of Appeal thought the fact that the jury heard expert evidence on the issue of diminished responsibility was sufficient). While in one sense expert evidence is the ideal, its use on the section 35 question certainly highlights the rather bizarre situation the CJPOA has led us to: we might have to confront the jury with a battle of the experts on the question whether or not to draw an adverse inference from failure to testify.

D. *Previous Convictions*

The nadir of the section 35 case law concerns the situation of the defendant with previous convictions.[160] Until the Criminal Justice Act 2003 came into force, a defendant's previous convictions could be put before the jury on the question of credibility if a) he attacked the character of another witness (by, for example, suggesting that they were lying or impeaching their credibility with previous convictions), and b) he testified.[161] The thinking was that if a defendant did not testify, his credibility was not in issue.[162] For the non-testifying defendant, previous convictions could only be admitted on the question of propensity, and here admissibility was subject to stricter rules.[163] The problem this created for section 35 is obvious: a defendant with previous convictions whose defense involved attacking another witness would have a strong incentive not to testify.[164] This is plainly a consideration to be taken into account when deciding whether "the only

[2001] EWCA (Crim) 2961.

158 R v. LH [2001] EWCA (Crim) 1344, [12].

159 *See* R v. Anwoir [2008] EWCA (Crim) 1354, where the trial judge is criticized for not allowing the defense to call experts to address the jury on the reasons for D not testifying.

160 *See* Redmayne, *Analyzing Evidence*, *supra* note 62, at 136-67.

161 *See, e.g.*, COLIN TAPPER, CROSS AND TAPPER ON EVIDENCE 388-419 (9th ed. 1999).

162 R v. Butterwasser [1948] 1 K.B. 4.

163 The leading authority was *Director of Public Prosecutions v. P* [1991] 2 A.C. 447 (H.L.).

164 Support for this is found in a large study of Crown Court cases, which suggested that defendants with previous convictions testified in about 10 percent fewer cases than those without. Zander & Henderson, *supra* note 126, at 114; *see also id.* at 120-21. For similar evidence from the U.S., see Blume, *supra* note 141.

sensible explanation for his silence is that he has no answer, or none that would bear examination."[165] Yet the jury cannot be alerted to this possibility because this would involve revealing that the defendant has previous convictions.

The courts chose simply to ignore this problem. In its very first decision on section 35, the Court of Appeal held that to allow the fear of character impeachment to block a section 35 direction would be to "drive a coach and horses through the statutory provisions."[166] The question was reconsidered by the House of Lords in *Becouarn*.[167] The defendant's case included the claim that prosecution witnesses deliberately identified him falsely, a claim that would have led to his being cross-examined on his previous convictions had he testified. He chose not to testify, and the jury was invited to draw an adverse inference. The House of Lords rejected the claim that the combined effect of section 35 and the character evidence rules placed Becouarn in an unfair position. To protect a defendant in his position would be "misleading to the jury" and it would be "wrong if he could stay out of the witness box but still avoid having legitimate comment made about his failure to give evidence. It would also create [a] quite unjustifiable distinction between defendants."[168] There may be some truth in the first and third of these propositions, but they do not confront the real question: is drawing an inference against Becouarn warranted? The closest the judgment comes to addressing this point is the claim that "fear of allowing in his [previous] convictions may be one element in his decision not to give evidence, but reluctance to face cross-examination may be another and much more predominant element."[169] The question, of course, is: how is the jury to decide which factor predominates in the decision not to testify when it cannot be alerted to one of them? As with the question of legal advice under section 34, there is a certain hypocrisy here. The directions to juries make much of the need to exclude innocent explanations for silence, a position which, if anything, over-protects defendants. This is then completely undermined by the decision to permit an inference in a situation where the jury cannot be alerted to a plausible reason for silence, and this dramatically under-protects defendants.

The provisions on character evidence in the Criminal Justice Act 2003 now make the *Becouarn* situation less likely to arise because they expand the admissibility of bad character.[170] Previous convictions are

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165 JUDICIAL STUDIES BOARD, *supra* note 50, § 39.4.
166 R v. Cowan [1996] Q.B. 373, 380.
167 R v. Becouarn [2005] UKHL 55.
168 *Id.* at [23].
169 *Id.* at [24].
170 *See generally* J.R. SPENCER, EVIDENCE OF BAD CHARACTER (2006).

admissible if the defendant attacks another person's character, and the defendant's decision to testify does not now seem to be relevant to admissibility under this limb.[171] Previous convictions are also admissible if they are relevant to the question of whether the defendant has a propensity to be untruthful,[172] a question that might be said to arise whenever the defendant testifies. However, the Court of Appeal currently takes the line that simply testifying will not make the defendant's truthfulness a sufficiently important issue to trigger admissibility.[173] It may be then that much of the sting has now inadvertently been taken out of one of the major difficulties posed by section 35.

IV. THE IMPACT OF THE CJPOA

There has been some empirical research on the impact of the Criminal Justice and Public Order Act provisions, as well as on the similar provisions introduced in Northern Ireland in 1988.[174] We have to be a little cautious about putting too much weight on the research as regards the position in England and Wales today. The fieldwork for the CJPOA study was conducted between mid 1995 and early 1996,[175] when it is likely that the legislation was still bedding in, and indeed before the early Court of Appeal decisions, which promoted inferences, would have had an effect. The Northern Ireland research does suggest that some changes emerged only after the provisions had been in force for some time.[176] We therefore lack a clear picture of the current state of play in England and Wales.

A principal conclusion of the research in both jurisdictions was that the silence provisions did not have a major impact, because there

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[171] Criminal Justice Act, 2003, c. 44, § 101(1)(g). Under § 106(1)(c), the defendant attacks another person's character if evidence is given about imputations made during police interview. Thus, in *R v. Renda* [2005] EWCA (Crim) 2826, the defendant's previous convictions became admissible when evidence was given that he had referred to the complainant as a "slag" during police interview. This adds a further possible complication to the section 34 inference: a suspect might stay silent at interview because of concerns that his defense will trigger admissibility of his criminal record at trial.

[172] Criminal Justice Act, 2003, c. 44, §§ 101(d), 103(1)(b) (Eng.).

[173] R v. Campbell [2007] EWCA (Crim) 1472.

[174] Bucke, Street & Brown, *supra* note 6; JOHN JACKSON, MARTIN WOLFE & KATIE QUINN, LEGISLATING AGAINST SILENCE: THE NORTHERN IRELAND EXPERIENCE (2000).

[175] Bucke, Street & Brown, *supra* note 6, at 9.

[176] JACKSON, WOLFE & QUINN, *supra* note 174, at 82. This was also the pattern in Singapore. *See* Alan Khee-Jin Tan, *Adverse Inferences and the Right to Silence: Re-examining the Singapore Experience*, 1997 CRIM. L. REV. 471.

was no discernible increase in the conviction rate or the rate of guilty pleas.[177] Since the English research was published the conviction rate for contested trials in the Crown Court has, according to one set of figures, stayed more or less the same: it was 57 percent in 1998, and 59 percent in 2007. However, the situation is a little more complex than that, because by 2006 the conviction rate had risen to 64 percent; the drop back to 59 percent the following year might be partly due to a 3 percent rise in the proportion of cases in which the defendant pleaded guilty. If defendants are more likely to plead guilty where the prosecution case is strong, then this could have led to the cases reaching trial being, on average, weaker, and thus more likely to result in acquittal. Thus if one ignores the 2007 figure, the picture is one of a gradual rise in the conviction rate.[178] However, a different set of figures shows a slow decline in the conviction rate, from 77 percent in 2000 to 69 percent in 2007.[179] The rate of guilty pleas may have increased over the same period,[180] but it is very difficult to know what either change can be attributed to.[181] Given the uncertainty associated with the figures for trial outcomes, then, no claims can safely be made about the impact of the silence provisions on this basis.

The researchers also canvassed the opinions of practitioners, who

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[177] *See* Bucke, Street & Brown, *supra* note 6, at 65; JACKSON, WOLFE & QUINN, *supra* note 174, at ch. 9.

[178] *See* CROWN PROSECUTION SERVICE, ANNUAL REPORT AND RESOURCE ACCOUNTS 2007/08, at 90 (2008) (59% conviction rate for contested trials); CROWN PROSECUTION SERVICE, ANNUAL REPORT AND RESOURCE ACCOUNTS 2006-07, at 88 (2007) (64%); CROWN PROSECUTION SERVICE, ANNUAL REPORT 2003-2004, at 31 (2004) (66%); CROWN PROSECUTION SERVICE, ANNUAL REPORT 2000-2001, at 29 (2001) (56% in 2000, 57% in 1998). Bucke, Street and Brown used Crown Prosecution Service figures and their figures tally with those given here, so we can presume that they are calculated on the same basis, i.e. ignoring judge ordered and directed acquittals. Given that inferences from silence are unlikely to play a role in acquittals by the judge, this basis for calculation makes sense. For the recent increase in the guilty plea rate, see the 2007/08 report at 90.

[179] *See* MINISTRY OF JUSTICE, JUDICIAL AND COURT STATISTICS 2007, 123-25 (2008). The figures in the text again exclude judge ordered and directed acquittals; it is worth noting that the decline in conviction rate tracks an increase in the guilty plea rate reasonably well. One reason for the difference in figures is likely to be that there are differences in dealing with the situation where the defendant pleads guilty to some counts but not others.

[180] According to the Criminal Statistics, in 2000 the guilty plea rate at the Crown Court was 60%; it rose to 62% in 2001 and then increased more significantly to 66% in 2002, and has remained at about that level until 2006 (the latest year for which figures are available). *See* CRIMINAL STATISTICS ENGLAND AND WALES 2000, at 141 (2001); CRIMINAL STATISTICS 2005, ENGLAND AND WALES 28 (2006) (figures for 2001-2005); CRIMINAL STATISTICS 2006, ENGLAND AND WALES 34 (2007). The small surge in the guilty plea rate in 2002 is not reflected in the Crown Prosecution Service Figures. *See* CROWN PROSECUTION SERVICE, ANNUAL REPORT 2002-2003, at 32 (2003) (giving figures for the three preceding years). But the Ministry of Justice figures show a 12 percent increase in guilty pleas from 2000 to 2007. MINISTRY OF JUSTICE, at 123.

[181] The increasing promotion of the sentence discount for guilty pleas is a possible explanation for a rise in the plea rate, though not for any rise in the conviction rate.

suggested that silence did not play a major role in gaining convictions.[182] But we should not dismiss the possibility that it is valuable in a small number of cases. In Northern Ireland, where some trials are conducted by a judge sitting alone who gives reasons, the researchers found one judgment where the judge was explicit that an inference from failure to testify made the difference between acquittal and conviction.[183] And while a study of judgments usually found that silence was used to support a case which would almost certainly have resulted in conviction anyway, the researchers did find a small number of cases involving "strong use" of silence, where an inference may have made a difference.[184]

It is not only through inferences from silence that the new provisions might play a role. As we noted earlier, the provisions have an incentivizing function, for they encourage suspects and defendants to talk. And here the provisions do seem to have had an effect. The impression in Northern Ireland was that more suspects were talking to the police,[185] and the evidence in England and Wales is that the proportion of suspects refusing to answer all questions fell from ten to six percent.[186] It is perhaps not surprising that the confession rate has not been thought to have increased; more talk may simply mean more lies, but lies are useful if they can be proved, because the fact-finder can be asked to draw an inference from them.[187] As for giving evidence at trial, the data from Northern Ireland suggest that, gradually, more defendants have been testifying.[188] This was also the impression of practitioners in England and Wales.[189]

Now that we have a fairly detailed picture of how the CJPOA provisions work, and the effects they have had, we can move towards drawing some conclusions. We will first look at the question of whether the provisions might be said to infringe the privilege against self-incrimination, before moving on to a more wide-ranging evaluation.

V. INFERENCES FROM SILENCE AND THE PRIVILEGE AGAINST SELF-

[182] *See* Bucke, Street & Brown, *supra* note 6, at 43-68. Note also the claim by police officers that courts are reluctant to allow inferences from silence. *See* HOME OFFICE AND CABINET OFFICE, PACE REVIEW: REPORT OF THE JOINT HOME OFFICE/CABINET OFFICE REVIEW OF POLICE AND CRIMINAL EVIDENCE ACT 1984, at 36 (2002).

[183] JACKSON, WOLFE & QUINN, *supra* note 174, at 68-69.

[184] *Id.* at 92-97.

[185] *Id.* at 127.

[186] Bucke, Street & Brown, *supra* note 6, at 31.

[187] *Id.* at 34-36. On the legal significance of lies, see R v. Lucas [1981] Q.B. 720.

[188] JACKSON, WOLFE & QUINN, *supra* note 174, at ch. 8.

[189] Bucke, Street & Brown, *supra* note 6, at 52-56.

INCRIMINATION

The question of whether inferences from silence infringe the privilege against self-incrimination is a difficult one to answer, in part because the privilege is such a mysterious concept. There is no agreed theory of the privilege against self-incrimination; indeed, it may be that there is no coherent theory to be had.[190] Even at the jurisprudential level, courts disagree as to whether inferences from silence undermine fundamental rights.[191] The European Court of Human Rights has found inferences from silence at interview and at trial to be permissible, so long as certain safeguards are in place.[192] The United States Supreme Court has held that inferences from failure to testify are incompatible with the Fifth Amendment.[193] Inferences from silence at police interview, however, may not breach the Fifth Amendment. In *Doyle v. Ohio* they were merely held to be incompatible with due process because, given the *Miranda* warnings, "post arrest silence is insolubly ambiguous."[194] The Canadian Supreme Court has held that inferences from silence at trial breach the right to silence and the privilege against self-incrimination at trial,[195] both guaranteed by the Canadian Charter of Rights and Freedoms.[196] When it comes to inferences from silence at interview, in *R. v. Chambers*[197] the Canadian Court echoed the reasoning in *Doyle*: "it would be a snare and a delusion to caution the accused that he need not say anything in response to a police officer's question but nonetheless put in evidence that the accused clearly exercised his right and remained silent in the face of a question which suggested his guilt."[198] Both *Doyle* and *Chambers* imply that, were the words of the police caution changed, an inference from silence at interview might be permissible. But it is not easy to reconcile this with the position, taken by

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[190] *See* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986); Ronald J. Allen, *Theorizing About Self-Incrimination*, 30 CARDOZO L. REV. 729 (2008); Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243 (2004); *cf.* Mike Redmayne, *Rethinking the Privilege Against Self-Incrimination*, 27 OXFORD J. LEGAL STUD. 209 (2007).

[191] For the Australian position, see David Hamer, *The Privilege of Silence and the Persistent Risk of Self-Incrimination: Part II*, 28 CRIM. L.J. 200 (2004).

[192] *See* Ashworth, *supra* note 52.

[193] Griffin v. California, 380 U.S. 609 (1965).

[194] Doyle v. Ohio, 426 U.S. 610, 617 (1976).

[195] R v. Noble, [1997] 1 S.C.R. 874 (Can.). The decision does allow very limited use of silence, but it appears that it is only permissible to use silence to confirm a case already proved beyond reasonable doubt.

[196] Canadian Charter of Rights and Freedoms, §§ 11, 13, *as reprinted in* R.S.C., No. 44 (Appendix II 1985).

[197] R. v. Chambers, [1990] 2 SCR 1293 (Can.).

[198] *Id.* at 1316.

both courts, that the drawing of inferences from silence at trial directly breaches the privilege against self-incrimination.

The view taken here is that the privilege against self-incrimination should be viewed as an immunity from being placed under a duty to provide information. This, it is suggested, is a morally coherent view of the privilege and one which fits much of the ECtHR jurisprudence.[199] On this view, inferences from silence are usually compatible with the privilege because they merely treat silence as suspicious—they do not create a duty to speak. It is true that the U.S. Supreme Court in *Griffin* argued that judicial comment on failure to testify is "a penalty imposed by courts for exercising a constitutional privilege,"[200] but that view has little to be said for it. Would one want to argue that the admissibility of a confession is a penalty imposed for the exercise of the right to free speech? There is, however, a complication in the duty-based view of the privilege. Outside clear cases, such as the imposition of a penalty for failing to speak, when exactly is a duty created? There is a reasonable argument that, when an inference from silence cannot be justified on rational grounds, the law has gone beyond the basic inference that silence is suspicious, and then the drawing of an inference should be seen as a penalty which creates a duty and so breaches the privilege.[201]

On this view, there are aspects of the U.K. case law that are problematic. The most obvious examples are inferences from legally advised silence at the police station and inferences from a failure to testify when the accused does not want to testify for fear that his previous convictions will be exposed. But the section 35 regime may be open to broader criticism, insofar as it goes beyond the position in *Murray*[202] that inferences should only be drawn where the defendant fails to testify about an issue within his knowledge. The inference in "I did not do it" cases is so tenuous that drawing it comes close to penalizing silence.

CONCLUSION: EXPORTING THE CJPOA

In the introduction it was suggested that section 34 of the CJPOA might be a reform worth considering in the United States, as it could

[199] Redmayne, *supra* note 190. *But cf.* Jalloh v. Germany, 44 Eur. Ct. H.R. 32 (2007).

[200] Griffin v. California, 380 U.S. 609, 614 (1965).

[201] For a similar view, see Hamer, *supra* note 46. In terms of the ECtHR jurisprudence, this is one way to make sense of the ECtHR's position that a balance must be struck between inferences and the right to silence. *See, e.g.*, Condron v. United Kingdom, 31 Eur. Ct. H.R. 1, [61] (2001).

[202] Murray v. Dir. of Pub. Prosecutions [1994] 1 W.L.R. 1 (N. Ir.).

offer a means of cutting through some of the tensions caused by *Miranda*. Even ignoring the *Miranda* debates, section 34 has something to be said for it in that it allows relevant evidence to be placed before the fact-finder. A similar case can be made for section 35. In the light of the preceding analysis of the sections, then, is there an argument for exporting the CJPOA provisions to jurisdictions which do not have them?

Academic opinion is generally negative about section 34. Di Birch considers that the limited benefits it offers do not outweigh the costs,[203] the costs mainly being a complex case law, described in one judgment as a "notorious minefield."[204] Ian Dennis was critical of section 34 when it was introduced,[205] and now takes the view that it "ought to be repealed as a matter of principle."[206] John Jackson is also critical.[207] Roberts and Zuckerman are more ambivalent; they run through the various arguments against adverse inferences from silence at interview and find none of them terribly convincing, but they do not exactly endorse the section.[208]

Exporting section 34 would not necessarily mean exporting the case law that has accreted to it. The current Lord Chief Justice has recently remarked on the lengthy JSB directions on silence, and raised the question whether it would be possible to simplify them.[209] An alternative model would be the *Turnbull* direction on eyewitness evidence,[210] which to a large extent simply warns the jury about the dangers of mistaken identification and lets them get on with it, without imposing on them the sort of step by step analysis that the section 34 case law does. Mistaken eyewitness identification is presumably a greater threat to justice than over-strong inferences from silence, so there is a good argument for a more relaxed approach. Complexity, however, is not the only problem with section 34. It was questioned above whether the courts are right to allow inferences in cases where the police case appears to the suspect to be based on slender suspicion, and in cases where the suspect was legally advised to remain silent. Craig

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[203] Diane J. Birch, *Suffering in Silence: A Cost-Benefit Analysis of Section 34 of the Criminal Justice and Public Order Act 1994*, 1999 CRIM. L. REV. 769.

[204] R v. B [2003] EWCA (Crim) 3080, [20].

[205] *See* Dennis, *supra* note 72.

[206] *See* I. H. DENNIS, THE LAW OF EVIDENCE 206 (3d ed. 2007). For the background to this conclusion, see *id.* at 165-92, 205-06. See also Dennis, *supra* note 41 for a slightly more ambivalent conclusion, arguing that section 34 has been marginalized by the case law, and that its repeal would simplify things.

[207] John D. Jackson, *Silence and Proof: Extending the Boundaries of Criminal Proceedings in the United Kingdom*, 5 INT'L J. EVIDENCE & PROOF 145 (2001).

[208] ROBERTS & ZUCKERMAN, *supra* note 24, at 392-464.

[209] Phillips, *supra* note 42.

[210] R v. Turnbull [1977] Q.B. 224.

Bradley's case for the English warning stops short of permitting adverse inferences in the latter situation.[211] The concern here—and this is obviously what has driven the U.K. courts to take a tough line in legal advice cases—is that this will negate the reform, for advice to remain silent will become automatic.[212] It therefore seems unlikely that Bradley's proposal is realistic. Drawing a line around slender suspicion cases would also create some difficulties because defining the appropriate standards would not be easy.

During the reform debates, a prominent concern about section 34 was that it would place more pressure on suspects, and that this might lead to an increase in false confessions.[213] The introduction of the section does appear to have changed the dynamics of police questioning. We know that more suspects talk. Those who refuse to answer questions can be repeatedly reminded of the terms of the caution, i.e., that they may be harming their defense in court.[214] The police can also use this strategy to undermine legal advice to remain silent. But whether any of this is problematic is hard to say because it is hard to say what degree of pressure it is appropriate to place on a suspect. Indeed, the psychologist who has done most to alert us to the danger of false confessions has criticized the police for not putting sufficient pressure on suspects during questioning in non-serious cases.[215] There are of course particular concerns about vulnerable suspects,[216] but, as has often been pointed out, it is these suspects who are least likely to stay silent whether or not adverse inferences are drawn.[217] There is also some evidence that police questioning, and in particular the treatment of silent suspects, may be more relaxed once silence as well as speech has evidential value.[218]

We have seen that it is not easy to point to concrete benefits that

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[211] Bradley, *supra* note 2.

[212] Whether this is likely is arguable. Prior to the CJPOA, legal advisers by no means routinely advised silence. It is also relevant that the majority of suspects do not receive legal advice. *See* BROWN, *supra* note 36.

[213] *See* ROYAL COMMISSION ON CRIMINAL JUSTICE, *supra* note 30; Nick Blake, *The Case for Retention*, *in* THE RIGHT TO SILENCE DEBATE (Steven Greer & Rod Morgan eds., 1990).

[214] *See* JACKSON, WOLFE & QUINN, *supra* note 174, 108-11.

[215] J. Pearse & G. H. Gudjonsson, *Police Interviewing Techniques at Two South London Police Stations*, 3 PSYCHOL., CRIME & L. 63 (1996). Gudjonsson does, however, raise concerns about questioning in more serious cases. *See* GUDJONSSON, *supra* note 69, at ch. 4.

[216] *See* Gisli H. Gudjonsson, *Psychological Vulnerability: Suspects at Risk*, *in* SUSPICION AND SILENCE: THE RIGHT TO SILENCE IN CRIMINAL INVESTIGATIONS 91 (David Morgan & Geoffrey M. Stephenson eds., 1994). Gudjonsson does not come out strongly against inferences from silence as a means of protecting the vulnerable, but does call for research on the effects of the changes.

[217] *See, e.g.*, A. A. S. Zuckerman, *The Inevitable Demise of the Right to Silence*, 144 N.L.J. 1104 (1994).

[218] JACKSON, WOLFE & QUINN, *supra* note 174, at 112.

flow from section 34, or indeed from section 35. But we really know little about the current state of play. One further cost should be borne in mind, however. In numerous cases U.K. judges have overstepped the mark by giving a direction on adverse inferences under section 34 where a defendant has not relied on a fact at trial.[219] In one case a section 35 inference was drawn where the defendant's only argument was that admitted behavior did not satisfy the legal definition of "disorderly"![220] A jurisdiction contemplating introducing the CJPOA provisions would have to have remarkable faith in its judiciary to be able to discount the cost of misuse of the provisions.

Section 35 has, in general, received more positive reviews than section 34. The feeling is that the section did not go far beyond the common law or beyond what juries did in any event, and that by requiring judges to instruct juries carefully about inferences from failure to testify, it may actually have improved things.[221] Mark Berger has rightly questioned whether we should be so complacent about this provision.[222] Unless they rely on a purely legal argument, all but those defendants who are borderline unfit to plead are expected to testify so that their credibility can be judged, even if they can say no more than "I did not do it." Again, a jurisdiction contemplating reform would not have to go this far. But there remains the other serious problem: that of defendants who justifiably believe that taking the stand will lead to their previous convictions being put to the jury. In England and Wales, the problem has been mitigated by provisions in the Criminal Justice Act 2003, which expand the admissibility of previous convictions. But in a jurisdiction like the United States, where testifying can lead to automatic character impeachment,[223] the problem is more serious than it ever was in England and Wales. To that extent, *Griffin* is right.[224] But the character impeachment rules are not set in stone and, given the difficulty of justifying them,[225] a package whereby character impeachment is dropped but reasonable inferences permitted has its attractions.

[219] *See supra* note 9 and accompanying text.

[220] R v. McManus [2001] EWCA (Crim) 2455. Significantly, the committee considering the right to silence in Ireland did not recommend eroding the right to silence at trial, but only at interview. *See* BALANCE IN THE CRIMINAL LAW REVIEW GROUP, *supra* note 1.

[221] *See, e.g.*, DENNIS, *supra* note 206, at 206, 529-37; ROBERTS & ZUCKERMAN, supra note 24, at 440, 462-63.

[222] Berger, *supra* note 21, at 260.

[223] *See, e.g.*, RICHARD O. LEMPERT, SAMUEL R GROSS & JAMES S LIEBMAN, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES 390-401 (3d ed. 2000).

[224] Griffin v. California, 380 U.S. 609, 615 (1965).

[225] *See* Friedman, *supra* note 48. Note also Blume's finding that "many demonstrably innocent defendants did not testify at trial because, had they done so, they would have been impeached with their prior convictions." Blume, *supra* note 141, at 19.

It seems unlikely that the analysis of inferences from silence offered here will convince many readers that the CJPOA provisions are a worthwhile reform. But it is worth noting that, by and large, the problems of the provisions do not lie in the fact that silence is not suspicious. The most significant problems arise from aspects of the legal system that supervene on the basic fact that silence in certain situations is evidence of guilt. So long as we allow suspects access to legal advice in the police station, and allow testifying defendants to be impeached by previous convictions in situations where non-testifying defendants would not be, the use of silence as evidence is deeply problematic.