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# Notes and Comments

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Reform of the Law of Evidence in  
Criminal Cases

J. A. Coutts\*

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## 1. *History*

Events surrounding the recent proposals for the reform of the English law of evidence in criminal cases may be thought to afford a cautionary tale, indicating the wrong way to engage in public debate upon such matters. In 1964, the Home Secretary asked the Criminal Law Revision Committee to review the law of evidence in criminal cases. Before its Report<sup>1</sup> was published (some eight years later), and, indeed, before the Home Secretary had himself received it, there occurred a flood of critical comment in the Press and on radio and television, and questions in Parliament, on what were thought (not altogether accurately) to be the main recommendations about to be made. Those very critics who had thus jumped the gun then proceeded to blame the Committee itself for what had happened, on the ground that its work had not been sufficiently 'open' to the public. This seems to be less than fair to the Committee, since its task was publicised in the Press and in Parliament and the public were invited to comment; the Committee consulted those bodies likely to be interested and obtained the assistance of experts from overseas (among whom Professors Edwards, Friedland and Tollefson of Canada are mentioned in the Report).

When the Report was at last published, on June 27, 1972, the Home Secretary undertook to study it and any views conveyed to him, as "a framework for early and necessary reform", and asked for such views by October. This caused a storm of protest from most interested bodies, who complained that insufficient time had been allowed for consideration and, more particularly, research. The Minister of State at the Home

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1. Criminal Law Revision Committee. Eleventh Report. Evidence (General). Cmd 4991.

Office then conceded that, although he would be content to receive "preliminary views" by that date, other views could be expressed later. With this postponement of the Government's decision to introduce a Bill to Parliament, the first round seems to have gone to the pressure groups, as some of them were quick to remark.

The Committee's proposals, which most observers think will tilt the balance of a criminal trial to make it less favourable to the accused, have caused the reaction that might be expected from the self-appointed professional guardians of our civil liberties. And the language of these critics has at times been less than restrained. The Committee's purpose has been described as that of simply increasing the number of convictions. It is said to be part of a massive assault on our liberties, part of a deliberate campaign against the individual. Its proposals are stated to be a threat to the things which give British justice a good name and are even seen as a prelude to an attack on the jury system and the right of appeal. The Committee has been accused of double-talk and double-think and of hysteria (no less) — and that by a critic who thinks the proposals will "encourage the use of torture".<sup>2</sup> The proposals have been thought (inaccurately) to reverse the presumption of innocence and to compel the accused to enter the witness-box, and have been stigmatised as one of the longest steps backwards the criminal law has taken for many years. We have had a clarion call to eternal vigilance,<sup>3</sup> although, as the Lord Chancellor has drily remarked, it is hardly enough simply to cry 'Wilkes and Liberty!', these days.

It would, however, be idle for the Government to pretend that all criticism is of this kind. The Chairman of the Bar Council has said that "many of those most experienced in criminal procedure have grave misgivings"; and the President of the Law Society has reported a "strong reaction" to the Report in his branch of the profession. How, then, does it come about that a long, technical, closely-argued Report on a subject of such complexity and difficulty should so soon rouse the suspicious of so many? There are, it is suggested, both a general and a particular reason.

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2. 116 Solicitors Journal 623.

3. 116 Solicitors Journal 493.

English pride in their peculiar form of democratic government and in the common law is traditional. If support for the former is now less than enthusiastic in some of the countries to which it was exported, belief in the latter is, perhaps for that very reason, the more cherished. But the world's approbation of the common law seems, on examination, to be founded upon, and perhaps limited to, the result of our criminal procedure, the 'fair trial'. This is very largely achieved by the illogical and otherwise irrational development of the law of evidence so as to exclude relevant material, in order to protect the accused from the assumed prejudices of lay jurymen and lay magistrates – the prejudices of the professional being for some reason discounted. It is perhaps the vague perception by members of the public of the link between a political system which protects minorities and a criminal procedure, developed by an independent judiciary, which protects those accused of crime that has led to the otherwise inexplicable furore which has greeted the publication of the Report. For the Committee's avowed intention is to diminish the protection afforded by the present rules of evidence to a person accused of crime, and it is for that reason that the Committee has been accused of diminishing the chances of a 'fair trial'.

The more particular reason for opposition to the Report is that it came at the end of a series of events which assumed an importance to which they are barely entitled. First, the Lord Chief Justice, in a widely criticised statement to the American Bar Association, expressed the opinion that the presence of a suspect's solicitor at police interrogation was "unacceptable". Then the Lord Chancellor, in an address to the London Criminal Courts Solicitors' Association, emphasised the need to deal with the growth of crime. These remarks of high authority appear to support the claim made by the Metropolitan Police Commissioner in a much publicised lecture that clever and silent professional criminals escape the consequences of their crime because of the inadequacy of the criminal law. And the Conservative Political Centre issued a pamphlet, *The Conviction of the Guilty*, which accepted the Commissioner's view that too many of the guilty escape. The Report of the Criminal Law Revision Committee thus came to be thought of as part of a conspiracy to improve the conviction rate by the same hard-line approach as had already been advocated. A most unfortunate

result has been the polarisation of views almost on party-political lines and certainly on primarily an emotive plane. The Liberals and the Labour lawyers and the bodies professedly concerned with individual liberty, on the one hand, are campaigning<sup>4</sup> against the Conservative Political Centre, the Monday Club, the Police Federation and others who are urging the Government to get on with a consideration of the Report. Rationality of decision, it might be thought, is more likely to be impeded than fostered thereby: we are in danger of having slogans substituted for argument. This is not to say that a start has not been made upon a rational critical appraisal of the Committee's recommendations and of the assumptions on which they are based, but these can more conveniently be considered after the Committee's principal proposals have been outlined.

## 2. *Principal Recommendations*

The Committee assumes that serious crime will continue to be tried by a judge and jury and that the orality of such trials will be preserved. It further assumes that, although in theory all relevant evidence should be admissible and all witnesses compellable, exceptions must be made where that would be too prejudicial to the accused. The Committee, however, saw as its "main object" the reduction of the exceptions to admissibility, although it would none the less retain the present unfettered discretion of the judge to exclude any evidence which is too prejudicial to the accused.

*Interrogation of the accused.* It is not proposed to abolish the 'right to silence', for a suspect may remain silent if he chooses; but, as the Committee frankly remarks (p. 35), its recommendations will "put a measure of compulsion upon suspects to answer questions, even when they are in custody" and "will therefore give some kind of statutory sanction to police questioning". It is proposed that this should be done in three ways. First, natural inferences may be drawn from

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4. The National Council for Civil Liberties opened a "campaign" to "stop" the Bill with a Press conference, to launch their pamphlet *Judgment on Justice* and the issue of "action kits" to their branches, which will "spearhead the attack".

silence<sup>5</sup> in the face of interrogation or when charged<sup>6</sup> or from a failure to give evidence at the trial.<sup>7</sup> Secondly, the prosecution may comment on a failure to answer or to give evidence. Thirdly, such failure may constitute corroboration of other evidence in respect of which it is material. The Committee consequentially recommends the abolition of the caution now given to suspects under the Judges' Rules and in its place would substitute a written statement warning the suspect of the consequences of — silence. It further recommends the abolition of the Judges' Rules and in their place administrative directions from the Home Office. The idea of interrogation before magistrates is rejected, as is the proposal for the tape-recording of police interrogation; but a majority recommended experimenting with tape-recording, while a minority would suspend the Committee's recommendations until such a safeguard had been put into effect.

*Confessions.* At present, a confession is not voluntary if it is obtained by oppression or by threat or inducement made by a person in authority. It is recommended that a threat or inducement made by anyone<sup>8</sup> shall have this effect. A more important proposal, however, is that a threat or inducement shall not render a confession involuntary unless that threat or inducement were "likely to produce an unreliable confession".

*Evidence of disposition.* We are told that this point was most divisive of the Committee and of those whom it consulted. It seems equally to have divided those who wrote the report, since the recommendations are described as "minor changes" (para. 70) and "substantial amendments" (p. 214). In effect, the present law, based on the similar fact principle, is retained, but an important exception is proposed. Where the accused admits the *actus reus*, evidence of disposition shall be admissible

5. When the accused has failed to mention a fact which he could reasonably have been expected to mention, the court or jury may draw such inference as appears proper.

6. But no inference shall be drawn in the exceptional case of interrogation after charge. Why not?

7. The prosecution may also comment on the failure of the accused's spouse to give evidence.

8. Presumably this would include a co-suspect. If so, is it enough that one suspect says to another, 'Make a statement so that we can leave the police station'?

to show the necessary state of mind or to rebut a defence of accident or lawful justification or excuse. This is an important proposal, if there is anything in the conclusion reached by the Oxford University's Penal Research Unit that seven out of every ten accused admit the basic facts and their involvement in them.<sup>9</sup>

*Evidence by the accused.* Pressure is to be put on the accused to induce him to give evidence (*v. sup.*); and, if he does, his testimony must be on oath. The Committee suggests the re-writing of the circumstances (at present set out in s. 1 (*e*) and (*f*) of the Criminal Evidence Act, 1898) in which he may be cross-examined about his past; but the Committee accepts a compromise, like that of 1898, between the extremes of fully protecting the accused and treating him as an ordinary witness. In future, he will be open to cross-examination and subject to the introduction of counter-evidence of disposition or reputation even if he suggests only indirectly<sup>10</sup> that he is of good character. But (in favour of the accused) it is recommended that, where he makes an imputation on the prosecution (or a prosecution witness), he shall be liable to cross-examination as to his past only if the "main purpose" of the imputation was "to raise an issue as to the [prosecution] witness's credibility". Thus, an imputation necessary to his defence will no longer let in evidence of his past.

*Burden of proof on the accused.* Here again, a recommendation in favour of the accused is made. At present, any burden placed on the accused at common law (except for insanity) is evidential only; but statutory burdens are usually persuasive. It is now recommended that (with two minor exceptions) the accused's burden shall never be more than evidential (even in cases of insanity or diminished responsibility).

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9. It is suggested in 122 NLJ 646 that this "puts the kibosh" on the Committee's proposal. But the Oxford Report shows, not that the accused were innocent, but that, under the present rules of evidence, they were acquitted. This conclusion would seem to point equally to the need to change the law of evidence.

10. This proposal has been called "at best petty and at worst vindictive": [1972] Crim. L.R. 468. The change will perhaps not be so important as might appear, for an attack on an accused's character often leads to sympathy from the jury, rather than the reverse.

*The accused's spouse as witness.* It is proposed that the accused's spouse be compellable for the defence in all cases, but for the prosecution only in cases of violence to herself or a sexual offence against a child under 16 or the same household. If the spouses are no longer married, they will be compellable as if they had never been married.

*Corroboration.* The Committee recommends that corroboration shall not be required as a matter of law in the case of accomplices, but the judge shall decide whether to 'warn' the jury or not. In the case of sexual offences, corroboration shall be required by law where the victim is below the age of fourteen, but in other cases it shall be sufficient for the judge to warn the jury of a "special need for caution".<sup>11</sup> Corroboration shall be required in cases of perjury only where that perjury was in court, but corroboration of evidence of speeding will still be required. In cases of identification, the judge will have to warn the jury of the "special need for caution". This last is termed "the important innovation" (para. 475); but perhaps the most important innovation is the proposal that the accused's silence on interrogation, on charge or on trial may account to corroboration: his negative act is to afford positive proof.

*Hearsay.* The draft Bill contains more on this subject than on any other, yet the critics have been silent. The Committee's claim to have made "large inroads" into the rule is no understatement. Generally speaking, first-hand hearsay will be admissible, but second-hand hearsay (except for statements in other legal proceedings) will not. This means, for instance, that the prosecution will be able to give evidence of a statement made by one co-accused implicating the other, even if the co-accused are husband and wife being tried jointly (para. 252).

### 3. Criticisms

*The Committee's composition and method of work:* Critics complain that the Committee contained no criminologist, sociologist or lay magistrate. This is the more significant by reason of the fact that it relied on its own and on colleagues' impressions and the opinions of foreign experts. This in turn is

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11. This coincides with the recommendation that a child's evidence shall be unsworn before the age of 14 but sworn if of that age or above.

the more significant by reason of the fact that it proceeded on the basis of assumptions founded on these impressions and opinions without any attempt at empirical investigation. This lack of research is the major objection taken to the Committee's *modus operandi*, though it may be remarked that its assumptions are now assailed by critics who have themselves done as little research. Moreover, on many matters for which critics call for 'facts', it is difficult to see how they could be obtained. For instance, the Committee says that opinions differ as to how far the Canadian treatment of the accused as an ordinary witness operates to deter the accused from giving evidence. On this, the comment has been made<sup>12</sup> that we require "rather less estimation of opinion and very much more ascertainment of fact". But what sort of 'fact' is obtainable? Why assume that those accused of crime could or would give accurate information on such a matter? Similarly, the Committee has been taken to task for assuming, without research, that professional criminals are acquitted because of defects in criminal procedure and evidence. But, again, what 'facts' would research elicit? In these matters, which cannot be expected to go beyond impressions, the Committee's reliance on opinion is justified as inevitable. The inconclusiveness of the conclusions of 'research' is, indeed, demonstrated by the excessive weight sought to be given to the inferences to be drawn from the Oxford University Research Unit's paper on acquittals.

*The 'right to silence'*. It is proposed to deal with this separately, because it is the vital question and most criticism has been directed to it; for if injustice occurs before the trial, it is immaterial how just is the trial procedure itself.<sup>13</sup> At present, the 'right to silence' is the law's method of protecting the accused from police oppression. It may not be logical. It may not be very effective, since most juries will be suspicious of an accused who remains silent on interrogation, on charge or on trial.<sup>14</sup> If, therefore, protection against police oppression could be afforded *aliter*, it would be preferable. Hence the critics'

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12. 35 M.L.R. 621.

13. See 122 N.L.Jo. 573.

14. For this and the further reason that most accused give evidence, the suggestion that the prosecution may comment on the accused's silence will, one suspects, have little practical effect.

emphasis on the fact that the Committee nowhere remarks on the accused's right, under the Judges' Rules, to see a solicitor. The objection to the presence of a solicitor during interrogation is that he is not an independent person and would be likely to advise silence.<sup>15</sup> This is not an easy question, as can be seen by the fact that the Lord Chief Justice has objected to the presence of a solicitor, yet expresses his uneasiness at prosecutions based on police 'verbals' (i.e. oral statements attributed to the accused by the police). Sir Brian McKenna<sup>16</sup> has argued that, since most suspects are in some way connected with the offence, they may well have something to explain away and should have legal advice to do so.<sup>17</sup> Sir Brian urges the retention of the Judges' Rules<sup>18</sup> and of the caution, on the ground that the caution serves two purposes: to make it more likely that a confession is voluntary and to inform the suspect of his rights. The latter purpose is equally served by the written warning proposed by the Committee, but that warning may increase the possibility of an involuntary confession, for (*pace* the Committee) it may well be regarded as a threat.

If a solicitor is not to be present during interrogation, the arguments in favour of tape-recording are strong, although the presence of the machine may not only inhibit the accused but also lead to formalising the process of interrogation, which is better left informal. Moreover, the status of untaped statements (for instance, on the way to the police station) would remain a difficult question. But if the danger of police oppression were removed in some way such as this, there would seem to remain no argument in favour of a 'right to silence'.<sup>19</sup> There would

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15. It has been suggested that disciplinary action by the Law Society would be a sufficient remedy for this. Paradoxically, those who believe this do not believe that disciplinary action by the police authorities would equally be a remedy for police impropriety.

16. [1972] Crim. L.R. 605.

17. The proposed abolition of the right to see a solicitor, as expressed in the preamble to the Judges' Rules, would make little or no difference, if there is any truth in the suggestion (122 N.L.Jo. 805) that in practice the police prevent the accused from seeing a solicitor until it is too late.

18. Which some critics would prefer to see in statutory form.

19. It has been suggested that it is unfair to treat a failure to mention a fact as significant, if the police have not asked a question about it. This can apply only in cases where they know of the fact; their failure in these

then arise, however, the question whether, if the accused were thus forced to show his hand, the prosecution ought not equally be forced to show its hand by pre-trial discovery to the accused of what information it has.<sup>20</sup>

*The Committee's assumptions.* In the first place, it assumed that the law is ripe for reform on the ground that major changes have been made, improving the position of the accused, since the rules of evidence protecting the accused were founded. It has been pointed out<sup>21</sup> that the prosecution has also improved its position and is immensely more powerful. This is undoubtedly so, but the prosecution's power has increased outside the trial; even though in the trial itself, the Committee's assumption appears to be valid. This would seem to cast doubt on some of, but not all, the Committee's conclusions.

Secondly, Professor Dworkin has challenged the assumption that the law's object should be to secure that the result of the trial is the right one. He asserts that this means that its object should be the highest number of right results in the long run. But, he argues, its aim should be to produce the smallest number of convictions of the innocent.<sup>22</sup> If, however, one considers, not trials 'in the long run', but each individual trial as a separate entity, there would appear to be no objection to saying that a 'fair' trial is one aimed at producing the 'right' result. In the concept of a 'fair rent',<sup>23</sup> one is not concerned with averaging over all the rents and asking whether they are 'fair' 'in the long run': one is concerned with each rent in turn. Professor Dworkin seems to fall into the same error as that of the Member of Parliament who said, 'When I say a fair rent, I mean one fair to the tenant'.

The Committee's assumption that law is not a game and that an accused should not be allowed to escape by reliance on technical rules has been subjected to an all-out attack by Sir

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circumstances will be evidence of the 'reasonableness' of the accused's equal failure and will sterilize any 'inference', as not a 'proper' one to draw in the circumstances.

20. See 122 N.L. Jo. 996: *cf.* [1972] Crim. L.R. 465.

21. 35 M.L.R. 621; *cf.* [1972] Crim. L.R. 465, where the Editor speaks of the prosecution's *practical* advantages over the defendant.

22. The Times, July 3, 1972.

23. Under the Rent Act, 1968 and the Housing Finance Act, 1972.

Brian McKenna.<sup>24</sup> The adversary system, he contends, is like a game at least in so far as it is governed by rules. His thesis is that each side is bound equally by the rules, since the prosecution always puts forward its full case and the judge never bends the rules in the accused's favour. This opinion, coming from a High Court Judge concerned with criminal trials, is obviously worthy of the greatest attention, though it is not (it would seem) the opinion of the judicial members of the Committee. Certainly, it is generally said (and *semble*, believed) that the prosecution does not press its case as hard as the defence will do. If it does, neither the judge nor the jury will like it and it is likely to have its own condemnation.

Finally, there are the Committee's assumptions that the crime rate is in some way connected with the efficacy of the criminal process and acquittals are in some measure dependent on defects in criminal procedures. These assumptions, which are common to the Metropolitan Police Commissioner's call for a reform of the law of evidence (*supra*) and many of the Committee's proposals, are denied by most of those who claim that the increase in crime has nothing to do with the way a suspect is interrogated, charged or tried. But this denial seems to argue too much. Common sense dictates that successful convictions must deter at least some criminals and that convictions of the guilty are more likely if the rules relating to interrogation and trial are 'relaxed'. More dubious seems the Committee's assumption that it is the professional criminal who escapes under the present rules.<sup>25</sup>

Some criticism has proceeded on the basis that the Committee assumed that its task was to assist in the fight against crime. But the Chairman of the Committee has been at some pains to emphasise that this was not the object of the Committee.<sup>26</sup> Its recommendations were intended to secure "the fair and efficient administration of justice". This presumably means the conviction of those proved guilty and the

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24. [1972] Crim. L.R. 605.

25. The argument that only the low-grade criminal will fall within the mesh of the proposed changes is hardly conclusive. The petty thief, known to the police, who cannot be convicted until he is in the position of asking for numerous other petty offences to be taken into account might be stopped in his tracks a little earlier, under the changes proposed.

26. See *The Times*, September 29, 1972.

acquittal, not simply of the innocent, but of those not proved guilty. It might be argued that it is logically indefensible to use the laws of evidence (as the Common law does) to afford special protection for the accused, since everything capable of proof is in some measure relevant to the proof of facts. Indeed, the French so argue;<sup>27</sup> they afford the accused such protection as policy dictates by certain institutional devices. While we continue to protect the accused by the rules of evidence, the question to which the Committee's Report gives rise is whether it recommends a sufficient number of exceptions to the general principle that all relevant evidence should be admitted.

*Conclusion.* The Committee's proposals constitute, in a sense, no more than an interim measure, since they are based on the assumption that the law of evidence will be codified by the Law Commission. Looked at in this light, it may be thought that many of the proposals, taken separately, are worthy of immediate enactment, even if the sum total, looked at as a package deal, appears unattractive to many. If the proposals came to be considered piecemeal, the test for each might well be: — is there any chance that it will increase the possibility of convicting the innocent? Few, it may be thought, would reject such a test; but even complete agreement on the test would be unlikely to bring us nearer to agreement on its application. Many (but not all) libertarians argue that the inevitable result of most of the proposals is to increase the risk of convicting the innocent; others have claimed even that the chances of wrongful conviction will be marginally less.<sup>28</sup> This must remain a matter of impression: on such impressions the progress of the Committee's proposals will depend.

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27. See M. Manfred Simon's letter to The Times, October 5, 1972.

28. See 136 J.P. 426; 711; 781.