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Acquittal of the Guilty

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Notes and Comments

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Acquittal of the Guilty

Every acquittal is an injustice. Either a guilty man has escaped conviction, or an innocent man has been subjected to false accusation, with all the accompanying worry, anxiety, publicity, humiliation, perhaps detention, probably expense.

Some of the difficulties undoubtedly spring from the adversary system, a system evolved in the eighteenth and nineteenth centuries to meet the then contemporary problems. It is a system with certain inherent inefficiencies and ineffectivenesses, a system designed to ascertain whether the prosecution has proved an allegation against D the defendant beyond all reasonable doubt and not designed to ascertain the truth of the incident in issue. The question is not: What happened? Who did it? The question is: Has it been proved that D did it? Guilty or not guilty?

Protagonists of the present system point to the fact that notorious professional criminals such as the Krays and the Richardsons have been convicted and sentenced, while critics point out that the Krays were previously acquitted on a protection racket charge and were able to terrorise large areas of London for a considerable period before being finally brought to justice.

The police labour under considerable handicaps. They have no right to insist upon an answer to a question. The administration of the caution may induce a criminal to rely upon his strict legal rights, e.g., the right to remain silent. Confessions are not infrequently retracted or denied at the trial and unpleasant allegations are made against the police at the trial within a trial. The law of evidence, especially admissibility, is complicated and difficult, e.g., in regard to previous convictions. The law of corroboration is unclear. The substantive criminal law leaves a good deal to be desired.

Those who advocate changes in the system, principally with the object of making the conviction of the guilty less difficult, have suggested the abolition of the right of silence on arrest and at the trial, perhaps subject to safeguards; pre-trial disclosure of defence; admissibility of previous convictions; as well as more liberal or

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relaxed rules of evidence, especially the abolition of the hearsay rule.

In England the current rate of acquittal in contested cases in the crown courts, i.e. serious cases heard on indictment before the jury, is running at between one third and one half[1], though an acquittal rate must be seen in the context of a situation in which the vast majority of defendants plead guilty.

The meaning of acquittal is open to argument and it is important to define terms. Where there are two or more charges (quite common in the crown courts) the defendant may successfully plead not guilty to all the charges or may enter a mixed plea (guilty to some of the charges, not guilty to others). Then the success in the not guilty plea may be attributable to the action of the prosecution, withdrawing the charge or offering no evidence; or of the judge, directing an acquittal because of insufficient evidence as a matter of law to justify conviction, or judicial approval of acceptance by the prosecution of plea of guilty to lesser charge or as a result of the verdict of the jury on another charge; or of the jury, giving a not guilty verdict following a full trial. Incidentally, conviction on the so-called lesser charge can be a very serious matter; in mixed plea the prosecution could, for example, accept a not guilty plea to attempted murder and a guilty plea to causing grievous bodily harm with intent (maximum penalty life imprisonment). So, acquittal can mean "going down" (being convicted) on a lesser charge. It can also mean that the case does not get to the jury at all, and finally, it may mean a verdict by the jury of not guilty leaving the defendant a free man without a stain on his character.[2]

However, the fact that a high proportion of charges of serious crime do not result in conviction has given rise to considerable disquiet, criticism, inquiry and discussion into the system of trial. Conversely, a very low rate of acquittal, if such were the case, would also give rise to concern. In a famous lecture, the Dimbleby Lecture 1973, Sir Robert Mark, Commissioner of the Metropolitan

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1. Some acquittal figures are given in Sir Robert Mark and Peter Scott, *The Disease of Crime: Punishment or Treatment?* (Edwin Stevens Lectures for the Laity, 1972) (London: Royal Society of Medicine, 1972), Appendix at 19-22. See also Nigel Walker, *Crimes, Courts and Figures* (Harmondsworth: Penguin, 1971) at 46; Trial by Jury (1966), 116 N.L.J. 928; S. Elgrod and J. Lew, *Acquittals - A Statistical Exercise* (1973), 123 N.L.J. 1104. The published studies are all conveniently summarized and discussed in Michael Zander, *Acquittal Rates and Not Guilty Pleas: What Do the Statistics Mean?*, [1974] Crim. L.R. 401.
2. These distinctions were brought out clearly by Zander, *id.*

Police in London, stated that in his opinion the situation is unacceptable.[3]

A prosecution is not brought unless there is a considerable body of evidence. What then is the explanation for the apparently high rate of acquittal? Sir Robert Mark suggested that the exclusionary rules of evidence, the plausible false story put forward by the defendant, the persuasive advocate, the direction of the judge, the thin case committed for trial "on the papers" without sufficient investigation, and the "perverse" jury[4] may all be contributing factors.

Michael Zander[5] summarised his findings on the reasons for acquittals as follows:

> Up to about one third of all acquittals are the result of directions from the judge.
>
> Preverse jury decisions account for between 6 per cent and 9 per cent of the total acquittals.
>
> The remainder of acquittals are accounted for by a whole variety of factors — such as failure of prosecution witnesses to turn up or to come up to proof; the bad impression created by prosecution witnesses; general weakness of the prosecution case; sympathy for the defendant; lack of sympathy for the law under which he is charged; reaction against the judge's handling of the case; belief in the defendant's innocence; acceptance of the defendant's defence; or simply the feeling that the prosecution case has not been proved beyond a reasonable doubt.

Acquittals often occurred in the comparatively minor cases, although even in the crown court there are still today a predominance of comparatively minor cases in the court list.

The Zander thesis takes the professional criminal as the defendant charged with the major, serious or heavy offences or with the most criminal convictions,[6] a somewhat arbitrary approach, because the legal description of a criminal situation may be very misleading, e.g. robbery or conspiracy. The seriousness of a crime is subject to

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3. (1973), 90 The Listener 613 (8th November) at 615. (Also printed separately by the B.B.C.).
4. *Id.*
5. Michael Zander, *Are Too Many Professional Criminals Avoiding Conviction? A Study in Britain's Two Busiest Courts* (1974), 37 Mod. L. Rev. 28 at 58.
6. *Id.* at 33-5.

subjective evaluation. It should also be remembered that the inadequate recidivist criminal has a long list of convictions compared with the highly skilled professional criminal who cleverly avoids detention and arrest. Furthermore, the professional criminal is not necessarily a full time or regular "worker"; his criminal activities are often irregular (perhaps because the rewards are good) and a lawful, normal and innocent "front" activity is clearly wise. The reasons for the acquittal are often based upon the judgment of the lawyers involved, a judgment not to be despised, but one not necessarily cognizant of the whole story. Lawyers tend to detach themselves from too readily forming guilt or innocence type of appraisals.

Mark Carlisle Q.C.[7] puts the point clearly:

> Indeed it might be argued that the more sophisticated the criminal the less likely he is to have a previous criminal record, and it is, I think, fallacious though tempting to suggest that, of those who come before the courts, the sophisticated or professional criminals can be picked out on the basis of their previous criminal record or lack of it. After all, was not Al Capone convicted only of one offence and that what one might term a technical offence?

A comparison between the Mark thesis and the Zander thesis is interesting. Neither thesis is based on any first hand research into the jury itself. Both agree that about a third of acquittals are attributable to the direction of the judge, frequently because the case has been carelessly committed on the papers and should never have been brought. Both seem to recognize the existence of the perverse verdict, but as a comparatively infrequent phenomenon. The fresh, new, or inexperienced jury seems readier to grant an acquittal. Zander offers many other reasons for acquittals.

(1) The witness does not turn up. This may be the result of insufficient vigilance by the prosecution — a situation which could and should be remedied — or it may be attributable to corruption by the defence.

(2) The witness does not come up to proof. Although minor discrepancies in succeeding narratives are inevitable, a substantial change on an important issue usually occurs only if the witness has been corrupted.

(3) The prosecution witnesses create a bad impression. This may be expected if these witnesses are criminals or their

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7. Mark Carlisle, *The Criminal Law Revision Committee's Report on Evidence* (1973), 12 J.S.P.T.L. 224 at 232.

confederates; however, honest witnesses — police officers or ordinary reputable people — may create such an impression through arrogance, inaccuracy or uncertainty. There is also the situation in which an element of perversity seems to exist on the part of the jury.

(4) The case is generally weak. This indicates poor preparation and/or presentation — faults which can and should be corrected.

(5) Sympathy exists for the defendant. This should hardly be a relevant factor in determining liability.

(6) There is a lack of sympathy for the law. The jury ought to act as a barrier against arbitrary and oppressive laws and prosecutions; however, the modern juror's lack of sympathy for, say, the motoring laws, is neither commendable nor responsible.

(7) There is a reaction against the judge. Though not infallible, judges are likely to be experienced and impartial; reaction against them, unless for some exceptional reason, seems irrational and perverse.

(8) The jury believes the defendant to be innocent. This is fair enough.

(9) The jury accepts the defendant's defence. Zander apparently distinguishes this from #8. Nonetheless, it could be a false and surprise defence.

(10) The prosecution fails to prove the case beyond reasonable doubt. This is also fair — but it should be remembered that a false and surprise defence could create doubts.

Having committed himself to the reasons for acquittal, Zander is inevitably unable to say what if any effect would result from any change in the existing rules; for example, abolition of the right of silence, before and at the trial, abolition or modification of the hearsay rule, admissibility of previous convictions, because his thesis is that existing rules on these matters are immaterial in promoting or securing the acquittal.[8] He ventures the opinion that the admission of the previous convictions might cause a drastic increase in convictions.[9]

The suggested reasons given by Alec Muir[10] for acquittal in the higher courts are:

(1) the defendant is pleading guilty to a lesser charge.

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8. *Supra*, note 5 at 58-9.
9. *Id.* at 59.
10. Alec Muir, *The Rules of the Game*, [1973] Crim. L.R. 341 at 342.

(2) the judge has decided that there is insufficient evidence to sustain a particular charge.

(3) The defendant is not the principal offender but (possibly?) associated with the principal offender.

(4) the line between a domestic dispute and a criminal offence is blurred and indistinct and

(5) in the eyes of the jury the defendant is less to blame than his "victim".

The Oxford study[11] found that of the acquittals about 38 per cent were policy cases, where the weight of the evidence was inadequate, about 25 per cent were a real failure on the part of the prosecution to prove the case (the witnesses did not come up to proof), about 25 per cent the explanation by the defendant was accepted (i.e. not rejected), and about 12 per cent the acquittal was perverse in that a conviction was generally expected. The defence very frequently admitted that the defendant was present, and did the act, so the issue turned upon his intent. Experience and research confirm this statement.

How far did the existing rules protect the guilty defendant, if there was one? Would an adverse inference from silence on arrest or silence in court by refusing to give evidence have changed the result? Would the duty to disclose his defence in advance have changed things? Would the admissibility of his previous convictions, if any, have changed things? These are the imponderables which research cannot answer very effectively.

Intimidation, which is effective, is by its very nature difficult to establish. In England in 1967 the principle of majority verdict, 10 : 2 after at least two hours, was introduced because of widespread police anxiety about intimidation of jurors. The prosecution witness who changes his story or fails to appear at the trial might well have been intimidated. Experience shows that ordinary people do not so readily change their story or fail to turn up to a criminal court. Recent English trials involving alleged I.R.A. killings and bombings had to be held out of London and in conditions of extremely tight security.

Sir Robert Mark, Micheal Zander and the Oxford study all seem to agree upon the incidence of the directed verdict, and upon the

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11. Sarah McCabe and Robert Purves, *The Jury at Work* (Oxford University Penal Research Unit Occasional Paper No. 4) (Oxford: Basil Blackwell, 1971) at 38. Table 3 on that page has been modified to exclude directed verdicts.

principal reason, namely, the thin evidence because of committal for trial on the papers.[12] The Oxford study draws particular attention to the policy prosecution,[13] i.e. cases where the evidence was not very strong but where the police felt justified in prosecuting for a policy reason; for example, a prosecution of participants at a fight outside a pub because this sort of thing was getting out of hand and publicity for a police "crack down" might discourage such occurrences. Another instance might be the prosecution of a defendant alleged to have committed an offence against a coloured victim, because failure to prosecute might be misinterpreted as racial discrimination. An alleged thief or burglar might be prosecuted at the instigation of a shopkeeper victim anxious to safeguard his insurance position.

Such is the pressure of work upon the prosecution that where two defendants are charged arising out of the same matter (for instance, a mother and son, or wife and husband are charged with shoplifting, and son or husband pleads guilty and mother or wife pleads not guilty) the prosecution are often willing to accept the not guilty plea. A jury might be expected to sympathise with an older person, or a woman, or someone likely to have played a subordinate role, or to have been led into it. They may well accept the likely defence that the son or husband was the only one criminally involved; this is a line most likely to be taken by the son or husband pleading guilty and hoping to find favour with the sentencing judge by accepting responsibility and exonerating the other. It may also be difficult on the evidence to prove satisfactorily that it was one rather than the other, or both; this also leads to a likely acquittal.

The Unethical ["Bent"] Lawyer

The defence is conducted by a fearless independent advocate, accustomed to appearing for both prosecution and defence, an officer of the court, a professional person required to subscribe to rigorous and exacting ethical standards, imposed and enforced by professional disciplinary bodies. He must not put forward or suggest any matter which he knows to be false; he must not mislead the court; he must not put forward a witness as a witness of truth if he knows him not to be; he must not run a defence he knows to be

12. *Supra,* note 3 at 615, note 5 at 44-8 and Sarah McCabe and Robert Purves, *By-passing the Jury: A Study of Changes of Plea and Directed Acquittals in Higher Courts* (Oxford University Penal Research Unit Occasional Paper No. 3) (Oxford: Basil Blackwell, 1972) at 43-44.
13. *Supra,* note 11 at 12-26.

false. Sir Robert Mark suggests that not all defence lawyers in fact follow these standards. A minority of lawyers, unnamed and unidentified, are "more harmful to society than the clients they represent"[14] because, by improper means, they secure unjust acquittals. They repeatedly run the same defence in which prosecution witnesses suddenly and inexplicably change their stories, concocted defences beyond the defendant's capacity are offered, false alibis are given, and in cross examination damaging and extraneous material is put to the police, e.g. perjury, planting (drugs, explosives), intimidation, violence, suspension of a police colleague. But the defendant with a criminal record must by very careful in attacking the witnesses for the prosecution, even justifiably, because then the prosecution can retaliate by revealing his record. In "The Curious Case of the Bingo Register"[15], a lawyer was alleged to have taken a bingo register into the prison so that the defendant in custody could sign his name as if he had signed it on the day in question and thus provide himself with a false alibi. However, professional disciplinary bodies cannot act without proof. Unsupported allegations, however sincerely held, cannot constitute proof; a just society cannot act without proof.

The Tolerant Jury

Why does the jury acquit when it does?[16] Speaking from his experience as a lawyer and trial judge Lord Salmon[17] suggests that the jury does not accept as reliable the evidence called by the prosecution, or the prosecution so overcomplicate the case that the jury is "left in a fog", or the jury feels that the accused has been treated unjustly in that the case against him has been unfairly pressed by the prosecution or possibly by the judge.

> It is the prerogative of a jury in very special circumstances to come to the conclusion that although a man is technically guilty it would not be fit and proper to convict him.[18]

There has been no satisfactory investigation or research into jury behaviour and acquittal; indeed, Sir Robert Mark has called the jury

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14. *Supra,* note 3 at 616.
15. *Id.*
16. For the perverse jury, see Ely Devons, *Serving as a Juryman in Britain* (1965), 28 Mod. L. Rev. 561.
17. Lord Salmon, *Are Too Many Guilty Acquitted?* (1974), 124 N.L.J. 624 at 635.
18. *Id.*

a "social institution which is protected from rational inquiry"[19]. Even the occupation of jurors is not now made known. A small body of reasearch and general experience seem to suggest that the jurors today are better educated, less ready to accept police evidence, inclined to toleration (especially the younger jurors), and likely to be against laws relating to motoring, tax, pornography, and trade unions. As from 1 April 1974, The English jury has been wholly "democratised", i.e. all registered electors 18 — 65, irrespective of sex or property, are eligible. This has meant that the average jury now consists of six women and one or two or even three young people. The jury is probably capable of satisfactorily determining a straight-forward issue of dishonesty in theft or aggravated theft, and deliberate intention in assault or aggravated assault, but probably incapable of determining a complicated fraud case. Some sort of special jury might be more appropriate in a fraud case, i.e. one containing accountants, professional and business men. Even the "perverse" jury may be acting sensibly, e.g. the ringleader was not prosecuted and the defendant played only a very minor role, or there was impropriety of some kind somewhere along the line, or the prosecution is in all the circumstances oppressive. The ultimate safeguard of the twelve men and women and true, who will not convict, is a precious safeguard not to be abandoned lightly. The instinctive, unfavourable reaction of the jury to the prosecution witness or to the judge strongly summing up for a conviction may be the only protection against wrongful conviction.

Independent Prosecution Service

The duty of the police is to prevent, investigate, and detect crime. The exercise of the discretion to prosecute and the preparation and presentation of the case in court ought to be exercised by an independent legal presecution service, a national DPP service, such as is found in Scotland and now in Northern Ireland. Police are busy enough with police duties. Police understandably feel a sense of commitment to the case, to their belief in the guilt of the defendant, and to the temptation to bend the rules because of the difficulty of securing a conviction; whereas the lawyer can bring an independent fresh appraisal of the strength or weakness of the prosecution evidence and a more professional appraisal of the forensic possibilities of the case. The public would feel a greater sense of

19. *Supra*, note 3 at 615.

confidence in the system if the police were seen to be separated from the prosecution process. The DPP should be better able to present a strong case against the guilty; and to withdraw the case against the innocent. He should be better able to identify the guilty and the innocent.[20]

Appeal by Prosecution

No one seriously suggests that the prosecution should have the right of appeal or retrial following an acquittal. The prosecution cannot have the chance to repair a deficient case. This would be oppressive for the defendant. In England the prosecution can appeal on a point of law, but not so as to upset the sovereign verdict of acquittal[21]

Northern Ireland

The terrible and tragic situation in Northern Ireland has resulted in certain repercussions against the judicial system. An independent legal prosecution service on Scottish lines has been introduced, following the recommendations of Lord Hunt. Detention without trial has taken place, a situation which has led the Republic of Ireland to take the United Kingdom before the European Commission on Human Rights. Certain minimum safeguards ought to be provided even in terrorist emergency situations: the right to a judicial hearing, to be presumed innocent, to be informed of the charge, to receive legal aid, and to be cross examined.[22] The political terrorist or urban guerilla presents a wholly new problem to the criminal court system accustomed to dealing with the ordinary non-political criminal, traditionally operating singly or in small groups against property. By the Northern Ireland (Emergency Provisions) Act 1973[23] a Commissioner may order detention of a terrorist or suspected terrorist following a hearing. The hearing is in private; the rules of evidence do not apply; the respondent may be

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20. See *The Prosecution Process in England and Wales* (London: Justice Educational and Research Trust, 1970).
21. See Alec Samuels, *Miscellaneous Matters,* [1973] Crim. L.R. 27 at 28-9 and *Criminal Justice Act* (1972), 116 S.J. 931 and 953.
22. See Edmund McGovern, "Internment and Detention Without Trial in the Light of the European Convention on Human Rights", in J.W. Bridge ed., *Fundamental Rights* (London: Sweet & Maxwell, 1973) at 219-31.
23. 1973, c. 53 (U.K.), s. 10(5) and Schedule 1. See also. *Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland* (The Diplock Commission Report) (1972), Cmnd. 5185).

excluded on the grounds of public security or danger to the safety of any person (e.g. a witness) though subsequently he must be informed of the substance of the matters dealt with, and the Commissioner may question the respondents (Schedule 1). Serious offences, e.g. murder, manslaughter, arson, riot, criminal damage, serious assualt, explosives, firearms, aggravated robbery and aggravated burglary, are triable by judge alone (s.2(1) and Schedule 4).

Canada

L. P. de Grandpré, former President of the Canadian Bar Association and now a justice of the Supreme Court of Canada, has called publicly for reform along the lines of the proposals of the Criminal Law Revision Committee. He argues that the present rules of evidence are too complicated, too tender to the criminal, and not adequate protection for the innocent man.[24] The rules emerged in the eighteenth and nineteenth centuries when circumstances were very different; even the defendant was unrepresented, jurors ignorant and prejudiced and penalties harsh. Today, virtually every defendant in a serious criminal case is legally represented. The jurors are educated, sophisticated people without knowledge of the defendant. There is a proper appeal procedure available.

Grandpré urges the adoption of the principle that any evidence relevant to truth should be admissible, so that weight, and not admissibility should be the principal concern for the jury; it is also suggested that the judge should retire with the jury to help them evaluate the evidence.[25] He urges the abolition of the right of silence, the admissibility of confessions, the admissibility of previous convictions — to be given at the beginning of the trial — and, upon the establishment of a *prima facie* case by the prosecution, the obligation upon the defendant to give evidence, on oath, subject to cross-examination, refusal to do so entitling the jury to draw an adverse inference if they so wish[26]. The Canadian rule that a defendant may still be cross-examined on his record has to a considerable extent forced the defendant to remain out of the witness box.

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24. L. de Grandpré, *Criminals Coddled in Court,* Canadian Bar Bulletin, May 1973 at 3.
25. *Id.* at 4.
26. *Id.* at 5.

Reform

The law must endeavour to secure the right verdict. The defendant must be convicted if the evidence proves guilt beyond reasonable doubt, not otherwise. The balance between truth and justice must be maintained, though the balance may properly be adjusted from time to time. We must not oppress the suspect or accused. We must protect the victims in society. What is needed is a review of criminal procedure, preserving the traditional and tried virtues, affording proper safeguards for the accused who may be innocent but at the same time enabling the prosecution to discover and to present relevant evidence to the court. It is not a matter of strengthening or weakening the prosecution or defence, but giving both sides a fair "crack of the whip". The position of both sides should be improved. An independent prosecution service should be established; greater judicial control should exist; there should be mutual disclosure; rules for the admissibility of evidence ought to be more liberal, and an adverse inference should be able to be drawn from a failure to speak, provided proper safeguards are observed.

The establishment of an independent forensic laboratory whose facilities and services would be available without discrimination to all parties to a criminal case would assist in ascertaining the truth through the latest scientific means.

The Right of Silence

The traditional right of silence should be retained. Not only is it an integral part of the principle that the prosecution must prove its case beyond a reasonable doubt, it is also widely understood that alteration or elimination would be difficult.

There are a multitude of reasons for a suspect or arrested person remaining silent. He might not appreciate what is relevant at the trial. He may be overawed by the police. He may be trying to protect someone else. He may wish to conceal other offences, or behaviour which is disreputable though not illegal. He may be (and may know it) a bad witness. He may be stupid and inarticulate. He may be faced with clever or difficult questions he is unable to answer. He may not say anything on a point because he is not asked. He may be unaware of what is relevant if questions are too wide-ranging.

The issues in a criminal case may be very complex. The police may be tempted to suppress or not record what the accused actually

did say. When a person is being closely questioned by the police, he probably is a suspected person — a fact of which he is probably aware. To decide whether on apprehension "he could reasonably have been expected to mention" any matter would involve a trial within a trial. And is this a subjective or objective test?

Is it suggested seriously that a person could be committed for trial solely on the basis of his refusal to answer questions? "Anything you do not say will be taken down and may be used in evidence against you"! It is not enough to say that only "proper" inferences may be drawn from silence, and that the judge will empathize with, protect the accused, and direct the jury on the matter in a fair and helpful way. Silence should never be sufficient as corroborative evidence, a purely negative factor.

Presently, in practice, in England the accused usually gives evidence at the trial for tactical reasons. But he may be a poor witness, or have been involved in other offences, or be able by other means to demolish the prosecution case (Dr. Bodkin Adams), and it seems hard to draw an adverse inference in such circumstances. The innocent may not wish to speak.

Certainly the accused should be required (as in Scotland and some parts of the U.S.A.) to disclose his hand before the trial but only after he has received a written formulation of the charge, warning of the risk of adverse inference, and legal advice as well as the statutory right to have a solicitor present when any defence witness is interviewed by the police. What is called for is the extension of the alibi procedure. The legal adviser would be most unwise to advise his client to say nothing, except for very good reason indeed, and an adverse inference should properly be drawn if the jury so desire when no answer is given after proper safeguards have been provided. At present, comment on the late appearance of any defence is not uncommon and not improper. If a satisfactory notice followed by disclosure procedure were introduced the present unsatisfactory caution should be abolished. Sir Brian MacKenna favours pretrial disclosure subject to safeguards.[27] The burden of proof should naturally remain on the prosecution throughout. The right (so-called) of silence is not a necessary corollary of the rule that the prosecution carry the burden of proof. There is presently nothing to stop the jury from drawing an adverse inference from silence by the defendant at any stage.

27. Sir Brian MacKenna, *Criminal Law Revision Committee's Eleventh Report: Some Comments*, [1972] Crim. L.R. 605 at 616.

The arguments for and against the right of silence have been conducted at a very high qualitative level in Canada.[28] Those favouring the right to silence say that the apparent crime explosion is attributable principally to the population explosion, especially among the under 30's, the increase in crime reporting, and the economic ills of society. This group also claims that the strengthening of the police and the improvement of the detection rate is the way to convict criminals. As it is the prosecution already enjoys very considerable advantages over the accused, in terms of resources and scientific aid, and the balance should not be further shifted, lest the protection of the innocent be jeopardised.

Those favouring the abolition of the right to silence point to the crime wave and high level of acquittal and consequent police frustration. Toughness is essential in such a situation. As Bentham long ago pointed out, the right of silence is the first rule that the criminal likes to see, and the sophisticated criminal avails himself to it, and without an admission or confession the prosecution often have no admissible evidence and cannot secure a conviction. The honour of the legal profession may be damaged because of the ethical dilemma presented to the lawyer advising a client whom he knows or suspects to be guilty to exercise the right of silence and thus hamper conviction. Civil law countries, which have crime problems as well as a proper sense of justice, do not find a right of silence necessary.

Interrogation

Some form of controlled interrogation is imperative. At present the police are often accused of fabricating confessions, a generally unfounded though annoying allegation; however, on the few occasions when this is true, the accused has little protection. A system of controlled interrogation, in the presence of a magistrate or other independent third party, would protect the police from false accusations and the accused from oppressive interrogation and abuse. In such circumstances a confession might well be more readily forthcoming; it would also be virtually incontrovertible. The defence lawyer should be entitled to be present. Adverse inference could be drawn from silence. An atmosphere of mistrust

28. See Edson Haines, Arthur Maloney and Paul Tomlinson, "Future of the Law of Evidence — The Right to Remain Silent — Two Views" in R. Salhany and R. Carter eds., *Studies in Canadian Criminal Evidence* (Toronto: Butterworths, 1972) at 321-47.

unfortunately now prevails in respect of police evidence and in consequence perfectly true confessions are rejected by juries. In any interrogation the suspect should be entitled by statute to have his solicitor present. If the accused is prepared to make a statement it would be desirable that he should write it in his own hand.

In the absence of a proper interrogation system the present rule about the admissibility of confessions seems reasonably sound. The CLRC proposals for two different sorts of confessions seem unconvincing.[29] There cannot be permissible and impermissible threats.

Tape recording should be required and should be practicable in most circumstances. Every police station and every police car could easily be provided with an adequate supply of tape recorders. However, there is a risk that the sophisticated criminal will say, without justification, as soon as the tape recorder is turned on: "Stop twisting my arm and hitting my face, you rotten copper." Video-tape cannot be far off as a practicable possibility. Only the limits of technology should limit the protection of the suspect.

There is no legal right in the police to detain on suspicion for interrogation. The detainee often experiences considerable difficulty in seeing a solicitor, because it is the middle of the night, or he has no solicitor, or the police say that access to a solicitor would unreasonably impede their enquiries, or the police simply refuse access. Detention of the alleged IRA terrorists following the Old Bailey bombs in 1973 for four days without access to an available solicitor rightly caused very considerable adverse public comment.

The police should have the legal right to detain a person for a reasonable period for interrogation, provided that proper protection were afforded, in particular that much more effective access to a solicitor was given. Every detainee should be entitled to a private interview with a solicitor as soon as possible after detention. Interrogation should be timed, and the detainee should be required to endorse the written record of the length of the detention and interrogation. A duty solicitor (an institution in which Canada has led the way) should be available wherever possible, but the difficulty of finding sufficient solicitors to man such a service, especially at night and weekends, and the public expense involved must be recognised.

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29. See Eleventh Report of the Criminal Law Revision Committee: *Evidence (General)* (1972, Cmnd. 4991) at 43-4 (para. 65). See Clause 2(2) of the Committee's draft Bill (at 173, explained at 212-213).

The present situation is unsatisfactory for the detainee because he is alone with the police and may be induced to make a confession which in fact is not true. It is unsatisfactory for the police because increasingly juries are suspicious of police evidence of a confession, and may acquit the guilty. It is unsatisfactory for the court because of the trial within a trial problem. It is unsatisfactory for the public because of the difficulty of ensuring that a confession is or is not true.

One possibility to be considered is that a confession should not be admissible unless given in the presence of a police officer of a prescribed senior rank, e.g.a superintendent. The Committee did not favour this course.[30]

The most satisfactory possibility is a system of controlled interrogation, under which no statement made by a detainee to the police would be admissible in evidence unless made in the presence of a magistrate. A rota of magistrates would ensure 24 hour 7 day availability. The detainee would be entitled to have a solicitor present, to advise generally, but the solicitor would be legally and ethically prohibited from advising silence. The police would be entitled to ask any questions they wished, subject to a ruling by the magistrate; the proceedings would be recorded and admissible in evidence at the trial, and the jury could be invited to draw an adverse inference from refusal to answer if they wished. The right of silence would be thus diminished, but subject to safeguards. At the same time the alibi procedure would be extended; in other words, there would be mutual disclosure subject to safeguards.

Previous Convictions

The admission of previous convictions increases the chance of conviction, if those convictions are for similar offences. If they are dissimilar, it is possible for them to have an effect that is positively favourable to the accused. It would be better to eliminate previous convictions altogether in view of their potentially highly prejudicial effect. The CLRC proposed test that a witness for the prosecution may be attacked on credibility without risk of retaliation[31] would be too difficult to operate in practice. The proposal to admit previous convictions, if the act is admitted and the issue intention, but not if the act is denied, is quite illogical. Accused charged with rape,

30. *Id.* at 39 (para. 58).
31. *Id.* at 71-85 (paras.114-132).

denies presence, convictions excluded; admits connection, but pleads consent, convictions admitted. In both cases an essential ingredient of the offence is denied and previous convictions are irrelevant in establishing that ingredient. Previous convictions if admitted would not be limited to those of a similar character. Accused charged with indecent assualt on a woman — admits accidental touching. Prosecution can give evidence of rape conviction 12 years ago. Admissibility of previous convictions should not depend upon the line taken by the defence. The accused was usually present at the scene of the crime and the issue turns on knowledge, intention and self-defence and such matters. However, it must be recognised that the admissibility of previous convictions is common practice in the inquisitorial procedure in civil law jurisdictions and not contrary to the European Convention of Human Rights.

The Law Reform Commission of Canada Evidence Project Study Paper No. 4 did not propose the admissibility of previous convictions as a general rule, though the possible formulation speaks curiously of general admissibility though not in order to prove disposition *per se*. Basically the proposal codifies the existing common law position with no substantial changes. The proposal for general judicial discretion is most welcome:[32]

> Evidence relevant to the character of any person may be excluded if, in the opinion of the judge . . . its probative value is substantially less than the likelihood of:
> (a) creating unfair prejudice to any party in the proceeding, or
> (b) confusing the issues to be decided, or
> (c) misleading the jury . . . , or
> (d) unduly delaying the proceeding.

The retaliation of the prosecution rule is proposed to be retained but to be limited to character evidence of a trait relevant to the crime charged.

Arguments for Prosecutorial Discovery of Defence Case

The surprise element in the common law criminal trial may be dramatic but it is hardly compatible with a desire to ascertain the truth. Pre-trial discovery, which the principle of equality of arms would seem to require, would enable the prosecution to adduce rebutting evidence if discoverable and available and thus reduce the

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32. *Character* (Ottawa: Law Reform Commission, 1972) at 1.

risk of false evidence being given or passing unchallenged; indeed the absence of challenge by the prosecution to evidence of the defence disclosed before trial would strengthen the credibility of that defence evidence because speculative challenge by the prosecution could not be plausibly made at the trial. The defence witness interviewed by the police, under conditions of proper safeguard, would be unlikely to give false evidence.

Relevant Evidence

The law of evidence is "a group of disparate, ill-connected and often unrationalised rules owing their origin to history, to common law and to the intuition of the judges."[33] The guiding principle in the law of evidence should be, as Professor Meyer rightly says,[34] relevance and weight rather than admissibility based on traditional exclusionary rules. The judge should play a more active role and should have and exercise a wide discretion to admit or reject. The whole system must be gradually improved. Scientific evidence of credibility, such as polygraphs, testimony given under hypnosis, the testimony of an expert witness on credibility should be admitted subject to appropriate safeguards. Naturally, the defence would have to have access to appropriate scientific experts in order to challenge such evidence, and the ordinary right of cross-examination would naturally continue to apply.

Hearsay evidence should be admissible for both prosecution and defence, perhaps subject to certain safeguards. Written notice and a copy of the proposed evidence would have to be submitted to the other side x days before the trial; no direct evidence reasonably obtainable, derived from an apparently reputable source, contemporaneous or reasonably contemporaneous with the incident in question could be permitted; there would be a warning given to the jury, the judge would have an overriding discretion to refuse to admit such evidence if prejudice to the accused would far outweigh its probative value in the light of the nature of the accusation and all relevant circumstances. Professor Sir Rupert Cross draws attention to three cogent illustrations of inadmissible hearsay under the present rules:[35]

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33. *Second Annual Report of the Law Reform Commission of Canada,* 1972-73 (Ottawa: Information Canada, 1973) at 21.
34. P. Meyer *Evidence in the Future* (1973), 51 Can. B. Rev. 107 at 110.
35. Rupert Cross, *A Very Wicked Animal Defends the 11th Report of the Criminal Law Revision Committee,* [1973]Crim. L.R. 329 at 340.

> . . . the statement made by the deceased victim of a rape two hours after the incident, that it was a coloured boy who did it; the assertions by the deceased on a charge of abortion-manslaughter that she intended to operate upon herself and had in fact done so; and a document signed by the deceased on a murder charge identifying the accused as her assailant, produced in circumstances in which she expected to die shortly although the expectation was not a "settled hopeless" expectation.

Weakening the legal requirement of corroboration and substituting a mandatory warning would be a retrograde step, especially since the corroboration issue so often arises in what is really a case of disputed identification. Where the victim of a sexual offence or a child under 14 (preferably 16) gives evidence, that evidence should be corroborated as a matter of law by other sworn evidence in view of the seriousness of the matter for the accused. The corroboration rules have developed through years of experience and cannot lightly be jettisoned. In sex cases and in cases involving child victims, the accused should be liable to conviction only on the basis of sworn evidence corroborated in a material particular by other sworn evidence, in view of the grave and well-known risk of unreliable evidence in such cases.

Every acquittal is an injustice. Either a guilty man has escaped conviction or an innocent man has been wrongly accused.