This study paper, prepared by the Evidence Project of the Law Reform Commission of Canada, is circulated for comment and criticism. The proposals do not represent the views of the Commission.

EVIDENCE

5. COMPELLABILITY OF THE ACCUSED AND THE ADMISSIBILITY OF HIS STATEMENTS

The Law Reform Commission of Canada will be grateful for comments before May 30, 1973.
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LAW REFORM COMMISSION

COMMISSION DE RÉFORME DU DROIT

EVIDENCE

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A study paper
prepared by the
Law of Evidence Project

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NOTA BENE

This paper is the fifth of a series of eleven study papers prepared by the Law of Evidence Project of the Law Reform Commission of Canada. The first four papers dealt with: (1) Competence and Compellability, (2) Manner of Questioning Witnesses, (3) Credibility, and (4) Character. The next papers, to be published during the course of this year, will be on: (6) Judicial Notice, (7) Burden of Proof and Presumption, (8) Expert and Opinion Evidence, (9) Hearsay, (10) Documentary Evidence, and (11) Privileges.

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INTRODUCTION

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A number of rules of evidence apply uniquely to the accused person in a criminal trial. Special rules relate to the right of the accused to remain silent in the face of pre-trial questioning, the admission of out-of-court statements made by the accused, and the compellability of the accused as a witness at trial. Since these rules all relate to the questioning of the accused, and because they are designed to support the same interests, the Evidence Project decided that they should be considered together.

Basic Dilemma in Criminal Evidence

These rules of evidence form an important part of the rules of law that are designed to achieve a fair balance between the need to prosecute criminals effectively and the need to protect the innocent and ensure the moral acceptability of our criminal justice system. The elementary democratic values defining this balance are embodied in our Canadian Bill of Rights - which is largely a document of criminal procedure. Rights declared by that document include: due process of law, equality before the law, the right to retain and instruct counsel without delay, protection against self-incrimination, a fair hearing in accordance with the principles of fundamental justice, and the right to be presumed innocent until proven guilty.

Are these ideals achieved by our present rules of evidence concerning the admissibility of accused's statements and his right to silence? Those persons whose main concern appears to be the security of the state argue that the rules weight the balance too much in the accused's favour and consequently impair the effectiveness of the criminal justice machinery. Those whose main concern appears to be the protection of the innocent and the fairness of the system argue that the safeguards provided by the present rules are largely illusory and that they take advantage of the poor, the ignorant and confused.

In studying these rules the Project began with the assumption that the rights of the individual should not be viewed as being opposed to the welfare of the state, but rather as being embraced within it.[1] We therefore recognized that while the aims of the criminal process are the prompt conviction of the guilty and the prompt acquittal of the innocent, it must accomplish these aims with a minimal disruption of basic human values.[2] The criminal process has always sought these ends, with varying degrees of success, and has adopted various procedures over the years toward their

accomplishment. In this paper we ask whether our current law provides the best means of achieving our ideals.

Purpose of the Paper

While the purpose of this study paper is primarily to begin a discussion about the adequacy of the existing law, to focus that discussion the Project is here making a proposal for a new procedure as a substitute for the current system. The project hopes that the form of this paper does not mislead; the extent of the argument in favour of the proposal is to ensure a fair reaction to its merits and should not lead the reader to the conclusion that the Project is wedded to the proposal.

The format of the paper is somewhat different from other Project Study Papers. In particular, we have not included any proposed legislation: the Project has not agreed on all the details of the proposal and our final recommendations to the Commission will naturally be affected by your responses and by the work of the Criminal Procedure Project on Pre-Trial Procedures. We decided to distribute this Study Paper in its present form because we think it is essential that all interested persons be involved in the development or rejection of the proposal from the very outset. Not only is this in conformity with the Law Reform Commission's stated policy of proceeding as openly as possible, but also this will enable the Evidence Project to benefit from a discussion of the philosophy of the proposal. Moreover, if we eventually recommend to the Commission a proposal similar to the one outlined in this Study Paper, we anticipate that the ideas we receive will be useful to us in working out the details.

HISTORICAL SKETCH

Judicial Questioning

By statutes enacted in the middle of the sixteenth century, before committing to gaol or admitting to bail a person charged with a felony, justices of the peace were required to question him and to record their examination in writing.[3] The statutes contemplated an inquisitorial examination of the accused rather than a judicial inquiry into the strength of the prosecution's case against the accused.[4] This examination was conducted without putting the accused upon oath.[5] By these statutes the justices performed the functions of police, detective, prosecutor, and chief complaining witness at trial, as well as examining

magistrate. There was apparently no time limit on the interrogation; the accused might be detained in gaol and re-examined after new evidence was obtained; the accused had no right to know the evidence of other witnesses against him; and the accused was not entitled to have counsel with him during the questioning. Following the interrogation, the justice transmitted his record of the evidence to the trial judge and the compulsory examination of the accused was read to the jury.[6] While some commentators have argued that the procedure created by these statutes was opposed to earlier common law tradition,[7] the better opinion seems to be that the practice of interrogating the accused had existed in England for some time prior to their enactment.[8]

This practice of questioning the accused prior to trial fell into gradual disuse during the eighteenth century, and by the beginning of the nineteenth the practice had become limited to the recording of any voluntary statements that the accused wished to make.[9] By statute enacted in 1848,[10] the change from inquisitorial examination to preliminary inquiry was completed: the accused could be asked no questions; he was invited to make a statement if he wished and cautioned that it would be taken down and might be given in evidence against him; the witnesses were examined in the accused's presence and could be cross-examined by him or his counsel. This, of course, is the procedure now in force in Canada.[11]

Why did the procedures for questioning the accused change between the sixteenth and nineteenth centuries? One reason lies in the development of professional police which relieved the justices from having to supplement the deficiencies of the earlier constables untrained in the investigation of crimes.[12] Another reason was the growth of the privilege against self-incrimination.[13] In the sixteenth and seventeenth centuries the accused was both competent and compellable as a witness in the Ecclesiastical Courts and the Court of Star Chamber. These courts were, of course, the chief agencies used for rooting out heresy and treason. When no private or public accuser was available for these offences, the courts invoked an alternative procedure wherein the judge acted on his own initiative, i.e., ex officio. The privilege against self-incrimination grew out of the people's resistance to this requirement that a person, not yet formally charged with any wrongdoing, was himself compelled to provide the evidence for his own accusation. At that time neither persons formally charged nor judges of common law courts voiced any objection to the practice of compelling the accused to answer questions after he had been properly charged. When Parliament abolished the Star Chamber and took away the criminal jurisdiction of

the Ecclesiastical Courts in 1640, the initial reason for the privilege ceased. However, by the middle of the seventeenth century accused persons began to claim, and judges were occasionally granting, a privilege to refuse to answer incriminating questions at trial, even though the accused had been formally charged.[14] Evidently, the memory of the Ecclesiastical Courts and the Court of Star Chamber was so abhorrent to Englishmen that anything reminiscent of their procedure was anathema, and conversely, anything opposed to their procedure was regarded as a bastion of liberty. By 1700, the common law courts had applied to themselves an even stricter prohibition respecting questioning an accused than they had earlier addressed to the church courts. Thus an accused could not be required to give testimony incriminating himself before a tribunal seeking information leading to a criminal prosecution or after a prosecution on a formal indictment had commenced. This attitude at trial gradually influenced the examination by justices.[15] All judicial questioning of the accused had ceased to exist by the beginning of the nineteenth century.

Admissibility of Statements[16]

The attitude of the courts to admissibility of confessions has varied greatly throughout history. In the sixteenth and seventeenth centuries there was no rule excluding confessions. The first judicial expression that confessions might be rejected if found to be involuntary occurs in 1775.[17] Eight years later the modern rule is expressed: "A confession forced from the mind by the flattery of hope, or by the torture of fear comes in so questionable a shape . . . that no credit ought to be given to it . . ."[18] The reason for the sudden emergence of a concern for the reliability of confessions is not clear.[19] Certainly at this time there was no general sentiment against confessions and, if voluntary, they were regarded as the highest evidence of guilt.

During the nineteenth century a judicial antipathy toward police questioning developed. Some judicial decisions went so far as to hold that all statements made in response to any questions put to the accused after he was placed in custody were deemed to be involuntary and therefore inadmissible.[20] Various reasons have been advanced to explain this change of attitude by the courts towards police questioning.[21] First, a large number of capital crimes then existed; with such severe automatic punishments awaiting upon conviction, the exclusion of confessions was one method by which judges could exercise leniency toward some accused persons. Second, most of these crimes involved petty thefts of property committed by the poor and subservient; it would be natural to expect humane judges

to distrust statements of such persons made in awe of their social superiors. Third, no right of appeal existed in criminal cases; a judicially merciful view called for settling arguable questions in favour of the accused and for eliminating questionable evidence altogether. Fourth, an accused faced considerable handicaps in defending himself at trial: his right to counsel was extremely limited and he was not permitted to testify. The accused was not to be trusted to testify in his own behalf, and yet the state was permitted to use any of his statements against him. To balance the advantage the judges tended to exclude confessions on any available pretext. Finally, to some extent this benevolent judicial attitude was influenced by the judges' concern over the establishment in England of that continental creature, the organized police force.[22]

The leading modern case on confessions, Ibrahim's Case,[23] still relied on by Canadian courts, repeated the rule of exclusion for involuntary statements, but also expressed the view that judges, in their discretion, may exclude statements to prevent improper questioning of prisoners.[24] Numerous Canadian decisions during the first half of the twentieth century recognized this discretion in the trial judge to reject a confession even though it was voluntary in the accepted sense.[25] It appears from these English and Canadian decisions that the privilege against self-incrimination, which had gradually been extended to protect the accused from questioning at trial and then from questioning by the examining justice, was continuing to grow and to be seen as a protection against improper questioning and the use of unfair tactics by the police.[26] Although the necessity and morality of police questioning appeared to be assumed by the courts at this time, they attempted to ensure that the police used fair methods in obtaining statements.

THE PRESENT LAW

Compellability of the Accused

At his trial the accused cannot be called as a witness by the prosecution,[27] and his failure to testify cannot be made the subject of comment by the trial judge or by the prosecutor.[28] At the preliminary hearing, after the prosecution has concluded its evidence, the accused is asked whether he wishes to make a statement concerning the charge against him but is advised that he need not say anything.

While he is cautioned that he has nothing to hope from any promise made to him and nothing to fear from any threats, he is told that what he does say may be given in evidence notwithstanding such threats or promises.[29] The accused may choose to testify at trial in his own defence but he thereby becomes a witness and is not entitled to refuse to answer questions which might tend to criminate him.[30] The accused who becomes a witness is also subject to questions respecting his past convictions and if he does not admit them or refuses to answer, they may be independently proved.[31]

Admissibility of Statements[32]

The police are free to ask questions of anyone whether the person be a bystander, a suspect or a person accused of a crime. The police have no power to detain anyone for the purpose of questioning unless they arrest him, and a person being questioned does not have to answer any questions.[33] The citizen's so-called "right to silence" is said to be grounded not on the privilege against self-incrimination but, rather, simply on the absence of any right in the police to legally compel an answer to their questions.[34]

By the present law, if the accused does make a statement[35] to persons in authority it is admissible if it is proved[36] to be voluntary in the sense that it was not obtained either by fear of prejudice or hope of advantage.[37] The Supreme Court of Canada has recently [38] denied any discretion in the trial judge to reject an involuntary confession the truth of which was confirmed by the finding of subsequent facts; the decision thereby preserved as a single rationale for the confession rule the promotion of trustworthiness. Statements obtained by deception are receivable though the practices are "reprehensible"[39] and "contemptible"[40] unless the deception affects the voluntariness.[41] Even if the statement is involuntary, other evidence obtained as the result of it is receivable, and the statement itself in so far as it is confirmed by the finding of subsequent facts can also be received.[42]

A person under arrest is entitled to be advised by his counsel of his right to refuse to answer any questions.[43] The Canadian Bill of Rights guarantees to the accused "The right to retain and instruct counsel without delay".[44]

CRITICISMS OF THE PRESENT LAW

Compellability of the Accused

By the present law the accused is competent to testify but not compellable.[45] The trier of fact is thereby deprived, at the accused's option, of the most knowledgeable witness respecting his own guilt or innocence. The resulting inefficiency in fact-finding is balanced, it is said, by the values inherent in the privilege against self-incrimination including the cruelty of placing the accused in a position of having to choose among perjury, contempt proceedings or incriminating himself.[46] However, in at least three respects the protection afforded the accused is minimized by the present law. First, if the accused wishes to dispute the voluntariness of his confession he most often will be required to take the witness stand during the voir dire. While on the stand he can be asked whether his confession was true.[47] Thus, in effect he is forced to testify respecting his guilt or innocence before the trier of fact when he is tried by a judge sitting alone. Second, at least in some provinces the prosecution can simply delay charging a suspect and compel him to testify before an administrative tribunal or a coroner's inquest.[48] Finally, a person charged with an offence may be forced to testify at the separate trial of his accomplice or co-conspirator.[49] In these latter two instances, while the accused's testimony at these hearings may not be admissible at his subsequent trial, evidence obtained as a direct result of his testimony is admissible.[50]

While the accused has this legislative privilege of remaining off the witness stand, and there is an express prohibition against comment thereon,[51] the jurisprudence on the privilege has reduced it to a deceptive and illusory right. The prohibition against comment has been held to be applicable only to cases being tried before a jury. When the case is being tried before a judge alone, not only can the trial judge take into account, when weighing the evidence, the accused's failure to testify, but also he may comment on such failure in his judgment.[52] Also, the prosecution is entitled, when the case is being tried by judge alone, to comment on the accused's failure to testify.[53] While the accused's failure to testify cannot be an ingredient making up a prima facie case against him, it may have the effect of converting the prima facie case into a conclusive case in the mind of the trier of fact.[54]

When the case is being tried before a jury, comment on failure to testify is prohibited; however, no legislation is capable of denying the exercise of common sense and our courts have therefore recognized that a jury may draw an

adverse inference from the accused's silence at trial.[55] Moreover, while the legislation prohibiting comment appears absolute, our courts have made considerable inroads into it; only direct comments are prohibited and even then a breach of the legislation does not automatically result in a mistrial.[56] Finally, our appellate courts regularly take into account the accused's failure to testify when determining whether they should dismiss his appeal under their broad curative powers to do so when there has been no substantial miscarriage of justice.[57]

Besides the deceptive nature of the privilege, its exercise can be genuinely unfair. Although an accused is legally competent to testify, his decision not to do so may be dictated by factors other than fear of exposing his guilt of the offence charged. At trial the accused who chooses to become a witness may find himself confronted on cross-examination with damaging questions about his past misconduct,[58] and with proof of his previous convictions.[59] These matters are said to be receivable as relevant to his credibility. However, the manner in which an accused is questioned concerning them[60] is highly prejudicial, despite limiting instructions, since the jury may be inclined to conclude that the accused having sinned before is guilty once again.[61] When an accused chooses to testify he thereby also forfeits his right to address the jury last.[62] These considerations, particularly the former, no doubt contribute to the frequency with which accused persons in Canada remain off the stand, and yet they are difficult, if not impossible, to communicate to the trier of fact. The trier of fact in drawing the adverse inference permitted by the present law may then be doing the accused a grave injustice since the accused may not be as free to testify as would appear.

Admissibility of Statements

Under the present law involuntary statements made by the accused as the result of police questioning are inadmissible. Our courts have said that the only reason for this rule is that such statements might be unreliable. A confession which is involuntary is therefore received in so far as it is confirmed by the finding of subsequent facts since the tangible evidence discovered ensures its trustworthiness.[63] The courts, however, have not been consistent in their consideration of this single rationale and on the basis of their decisions not only could a reliable confession be excluded but also an unreliable confession could be received.

If the rule is to be consistent with its given rationale, all reliable confessions should be admitted, as they are when confirmed by a subsequent fact. But the courts have proceeded on the basis that even if the accused himself, under oath, admits the truthfulness of his confession, it still might be rejected.[64] They have also held the rule to be applicable even when the accused's statement is not tendered for the purpose of establishing its truth.[65]

If the rule is to be consistent with its given rationale, all unreliable confessions should be excluded. But this has never been the law. Although statements can be untrustworthy for a variety of reasons other than a lack of voluntariness, for example because the accused was intoxicated when he made the confession, they are not thereby rendered inadmissible.[66] Also, the confession rule is only applicable when the threat or promise was made by a "person in authority", [67] even though threats or promises by anyone capable of carrying them out could make a statement involuntary and hence untrustworthy. The threat or promise must, in order to exclude a confession, relate to the charge or contemplated charge;[68] nevertheless, it is easy to imagine strong inducements unrelated to the charge which could seriously affect trustworthiness. [69] Statements made under compulsion of statute are not thereby rendered involuntary although the person is threatened with a penalty for failure to speak;[70] statements given for one purpose under threat of penalty are nevertheless receivable for other purposes.[71]

An accused charged with a criminal offence is entitled to refuse to submit to any questioning before judicial officers at an inquest,[72] a preliminary hearing,[73] or at trial,[74] although these are open, public forums. The same accused is subject after arrest to questioning by police in the stationhouse behind closed doors. Although the accused has the right to remain silent during police questioning, the failure of the police to advise him of this right will not necessarily result in an accused's subsequent statement being ruled inadmissible.[75] Often a suspect assumes that there is a legal duty to answer questions asked by the police or answers because he is frightened that an illegal sanction would follow his refusal. Although contempt proceedings will not follow a refusal, can we truly say that no suspects are in fact compelled to answer?[76]

An accused is guaranteed the right to counsel at trial[77] and for certain offences counsel will be furnished when the accused is unable to afford the expense. The accused also has the right to retain and instruct counsel without delay after he has been arrested or detained.[78] The police, however, are not obliged to inform people of this latter right, [79] and denying a defendant access to his lawyer before trial is not a ground for rejecting any evidence obtained as a result.[80] The trial of the guilt or innocence of an accused in Canada can become, therefore, nothing more than an appeal from his interrogation by the police. An accused's right to counsel at trial is of small value if his conviction is assured by statements improperly obtained from him at the earlier stage.[81] Our lawyers are fond of characterizing our

criminal process as accusatorial; at the pre-trial stage our system is in fact inquisitorial. Moreover, it contains none of the protections afforded in those countries which profess such a system.[82] It is inconsistent to provide an accused with a number of rights which are regarded as important at trial but to allow these rights to be subverted in the pre-trial stage of the criminal process. An unsympathetic observer might be tempted to characterize it as a charade.

Our courts have pursued a single-minded search for truth in the law of confessions, often excluding from consideration any other values involved in the administration of justice. At the same time, however, we have exclusionary rules in other areas of the law of evidence, for example solicitor-client privilege and spousal testimony, the sole justification of which is the protection of interests other than the search for truth.[83] The Project seriously questions whether these interests are more important than the interests enumerated in our Canadian Bill of Rights.[84]

The Supreme Court of Canada has expressly disavowed any right in a trial judge to reject a confession on the sole ground that the tactics employed by the police in obtaining it were unfair[85] unless the tactics affected its voluntariness in the limited sense noted above.[86] Unlike England,[87] and the United States,[88] Canada has no guidelines describing the manner in which police should conduct their questioning and permitting the exclusion of confessions obtained if they are breached. The remedies available to an individual for redressing a violation of his rights are said to exist through complaints to police disciplinary tribunals or through civil actions for damages.[89] The adequacy of such remedies is open to question.[90]

Perhaps the most serious criticism of the existing law is that it is inherently discriminatory. Individuals have the legal right to refuse to answer the questions of police, but only a minority are aware of such right or capable of exercising it. The majority of our citizens feel compelled to respond to authority. This tendency is intensified when the individual is isolated from those on whom he normally relies for support[91] and it is not stultified by a formal warning from the police that he is not obliged to speak.[92] The psychological talents and techniques possessed by our police, honed by experience, are considerable.[93] Recognizing that their methods "are in a certain sense of the word 'unfair' to the prisoner", they are sometimes justified on the basis that they are not "apt to induce an innocent person to confess a crime he did not commit".[94] The assumption that false confessions are unlikely is questionable.[95] Moreover, one must ask whether the price paid in terms of "destruction of human dignity"[96] is worth the results obtained. The inherently

coercive atmosphere of police interrogation, even when ethically conducted, exerts such subtle pressures to speak as to be immeasurable by our current "voluntariness" rule.[97] These pressures can be resisted, but it requires a self-confidence and self-assertion possessed by few. The best preparation for resisting police questioning is familiarity with it through previous exposure.[98] Therefore the law in practice discriminates in favour of the sophisticated criminal who is less likely to be intimidated and more able to weigh rationally the advantages of silence or co-operation in the particular situation. The strong, knowledgeable individual who, aware of his rights, resists police questioning, is not faced with having to explain his silence at trial, no inference of guilt is permitted and he may as a result be acquitted; the weak, naive or co-operative suspect who speaks may find that in effect he has sealed his conviction before the trial begins.

The Project questions the efficiency of the present system. Numerous reported appellate decisions describe allegedly improper police questioning; when we consider that these decisions comprise a minute sample of criminal cases it is obvious that our present law has done little to discourage such activity. Whatever the actual frequency of brutality and illegal activities, the secrecy of police questioning permits the allegation of their occurrence to an extent that public respect for the police is lessened, morale of the honest policeman is disrupted and the "us versus them" philosophy is enhanced. Whereas the citizen and his appointed official should be working together toward a common goal, our law of confession tends to embitter the relationship by not ensuring that the process is seen to be fair.

Our present law permits the introduction into evidence of statements made in response to police questioning. If, however, the accused remains silent in the face of police questioning, although this fact can be considered in assessing the weight to be given to any explanation advanced by the defence at trial[99] it cannot be used as circumstantial evidence of guilt.[100] Not only is this distinction irrational, but by permitting the accused to reserve his explanation or defence until the last moment it may have the effect of depriving the court of important evidence that could otherwise be gathered and introduced by the prosecution to verify or rebut the accused's defence.

The voluntariness of a confession is determined on a voir dire, a trial within the trial. The circumstances surrounding the taking of the statement can be determined by the trial judge only on the basis of testimony of witnesses to the interrogation, who are often just the accused

and the police. If ruled voluntary, the truth or falsity and the effect of the statement are to be determined by the jury; the jury must therefore listen to the conflicting stories of how the statement was obtained.[101] The procedure for taking statements made by the accused is thus inefficient in at least two important respects. First, the lack of an independent record[102] of what in fact transpired when the statement was taken requires that the decision respecting its voluntariness be based upon credibility of the witnesses.[103] Efficiency in fact-finding suffers from the opportunity for perjured testimony by the policeman or by the accused, or at least the allegation of perjury, and the real issue of guilt or innocence is displaced by the issue of credit. Second, determining the voluntariness of pre-trial statements in each individual case is extremely time-consuming both at trial and on appeal. Indeed, on occasion more time is spent determining the issue of voluntariness than is spent determining guilt or innocence.

PROPOSAL FOR A SYSTEM OF SUPERVISED QUESTIONING

Our proposal for reform, which is by no means novel,[104] is essentially a system of supervised questioning designed to mitigate the inconsistencies, lack of fairness and inefficiencies that exist in the present system. We believe the proposal to be preferable to the reform recently suggested in England[105] and the reform recently accomplished in the United States.[106] The proposal, briefly, is as follows:

> *The police will retain the right to question any person about a crime, but such persons will, as under the present law, be under no obligation to answer. However, no statements given by a person to the police or their agents will be receivable at his trial except those given before an independent official. A person's silence in the face of police questioning will no longer be receivable as evidence to impeach the credibility of his defence advanced at trial.*[107]

> *A person who has been arrested, summoned or issued with an appearance notice may be required to attend before an independent official. If the police decide that they will not require his attendance they must nevertheless advise the accused that he has a right to be taken before the official at the earliest possible opportunity. The police must satisfy the official that there existed reasonable and probable grounds for the arrest, summons or appearance notice.*

The official will ensure that the accused is aware of his right to legal counsel and his right to remain silent. After telling the accused the exact crime with which he is charged and the details calling for an explanation, the accused will be asked by the official if he wishes to make a statement. The accused will be instructed by the official that both his answers and his silence will be receivable in evidence at his trial. The police may then, in the presence of the official, ask the accused any questions relating to the charge. An accused's refusal to answer proper and relevant questions will be noted and may also be used as evidence at trial. The silence of the accused in the face of questions before this official may be used at trial, not only for the purpose of weakening any explanation or defence then advanced, but also for the purpose of supplying an inference of guilt. The accused will not be subject to contempt proceedings for failing to answer, but will be subject to prosecution for perjury should he testify falsely. A verbatim record will be kept of the proceedings and will be receivable at trial without the necessity of a voir dire.

The accused will remain an incompetent witness for the prosecution at trial but will retain his right to choose to testify. Should the accused testify at trial, he will be entitled to lead evidence of the fact that on the earlier occasion he testified to the same effect for the purpose of illustrating his consistency. Should the accused fail to testify at trial, the trier of fact may, as now, make adverse inferences against the accused. Also, the trial judge may comment, in his instruction to the jury, on the accused's failure to testify.

A few additional comments may be helpful for the purposes of clarifying the proposal.

Under the proposal no statements made by the accused to the police, except those made before the independent official, are admissible at trial. To avoid an indirect frustration of this rule, no reference to any prior statements of the accused will be permitted at his examination. Since the greatest danger of the accused being coerced into making a statement arises after the police have so focussed their investigation on a suspected person that he, in effect, becomes an accused, an argument could be made that only statements made after that time should be made inadmissible. For four reasons the Project decided against making such a distinction. First, as experienced in those jurisdictions that have made such a distinction, the difficulties of determining the dividing line are enormous. Second, the

police might attempt to avoid the rule by delaying formal charges or refraining from taking the accused into custody until their questioning was complete. Third, such a distinction would preserve the opportunity for the police to misrepresent, intentionally or innocently, what the accused actually said. Finally, the lack of publicity would continue the allegations that police misrepresent what was said. A compromise between the two positions might be a provision that statements of the accused given in the presence of his counsel would also be admissible.

The Project thinks that the questioning before the independent official should be in public; this should raise public confidence in the criminal justice system by manifesting the fairness of the procedure. However, if the examination is open to the public two dangers are presented. First, publicity might impair the accused's right to an unbiased jury at his trial. Second, the accused's answers, while exculpating him from the charge and causing its withdrawal, may be particularly embarrassing to him and cause irreparable damage to his reputation. Perhaps these dangers could be overcome by providing that on the application of the accused an order would issue prohibiting any publication of the proceedings or prohibiting public attendance at the examinations.

The Project does not envisage the examination of the accused as being a rigorous cross-examination by the police, but rather simply an opportunity for the accused to answer straightforward questions in explaining the evidence incriminating him. The independent official would have the power to determine the duration of the questioning and the proper bounds of the interrogation and would ensure that the questions asked were limited to the charge. The official himself would ask no questions, except to clarify answers given. We believe it crucial that this officer be viewed as a protective arbiter whose prime function is to assure that the accused is advised of his rights and to be "society's witness" to the fairness of the questioning. The class of people from whom these officers could be appointed will depend in part upon how the scheme is meshed with other pre-trial proceedings. We are undecided, and anxious to receive comment on whom this officer might be: magistrate, justice of the peace, member of the local bar, layman?

The accused's counsel will be entitled to object to any questions which are not relevant to the charge and also to the form of the questions. The accused will, of course, be entitled to consult with counsel prior to the examination.

If counsel of his choice is not available within a reasonable period of time, counsel will be appointed so that the process of investigation will not be unduly delayed.

As indicated at the outset, the proposal is not designed to control all facets of police questioning and does not pretend to be effective in eliminating all improper police conduct. The Project recognizes that simply excluding statements of the accused will not discourage improper activity designed to produce statements from which other leads and perhaps tangible evidence will be found. The proposal makes no recommendations respecting the exclusion or reception of real evidence improperly obtained but defers such consideration to future study.

ARGUMENTS IN FAVOUR OF THE PROPOSAL

No adequate data exist to evaluate the necessity of police questioning to an effective and fair system of law enforcement.[108] Police say it is essential to crime detection; civil libertarians say it is unnecessary. We believe that questioning can, at times, be an important requirement to effective law enforcement[109] and, until a convincing case is otherwise made, would propose that opportunity for it be continued. We believe that the secrecy which surrounds the present mode of questioning is at the root of most of the criticisms discussed above and therefore decided that the best solution would be to substitute a form of public, supervised questioning.

This proposal will inject a new integrity into the criminal justice system. It affords a rational adjustment between the concern of society for effective law enforcement and for a fair system of criminal justice. Not only would it increase the effectiveness of law enforcement, but it would also provide more safeguards for the prompt acquittal of the innocent and the fair treatment of the guilty.

The proposal, of course, has its costs. Most notably, although the interrogation between arrest and the hearing before the judicial officer could continue to perform its fact-finding function, it could not serve its admittedly more questionable function of securing statements to be used against the suspect at trial. Thus, the court may be deprived of some evidence. However, this cost, high though it may sometimes appear,[110] is outweighed by the following advantages.

(1) From the police point of view, not only will the proposal be easy to administer, but it will provide them with a more effective device for investigation than they have at present. In most cases the proposal will secure the suspect's

version of the facts at an early stage in the proceedings. If there are any weaknesses in the accused's explanations, they can be demonstrated at trial; moreover, the police could make use of any leads provided by the testimony to collect external evidence of the crime. Also, the police will be assured that any statements obtained before the judicial officer will be admissible at any ensuing trial. They will be protected from allegations that statements had been obtained from the suspect by improper methods or had been tampered with or suppressed. If the accused refuses to answer questions at the hearing, and thus in effect refuses to commit himself to a defence, at trial the prosecutor will be able to use his silence as circumstantial evidence of his guilt.

(2) Although the proposal will not guarantee the elimination of all improper police conduct, it will go a long way toward assuring that while in police custody accused persons are treated in a manner which corresponds with our conceptions of human dignity. This goal will be achieved by excluding any statements obtained by the police in an unauthorized inquiry and by encouraging the police to take the accused promptly before a judicial officer in order to get a statement from him. Under the present law the police may hold a person in custody if they think they can get a statement from him. Not only will the accused be secure against statements extracted by tricks, threats or promises, but also he will be protected against the possibility that incriminating statements might be attributed to him by over-zealous police officers, who perhaps sometimes innocently distort what the accused has told them.

(3) At present the accused's testimony at trial is often given little weight because he has had an opportunity to prepare the most plausible defence. The proposal will permit the accused at an early opportunity to make a complete statement of his innocence and to have this self-serving statement admitted to confirm his testimony given at trial. Thus, his later testimony would be given more weight.

(4) The time-wasting, undignified, and often inconclusive arguments, which now take place at a voir dire in attempting to determine if a statement was given voluntarily by an accused to the police, will be eliminated. Under the present law there must be an independent appraisal of the facts of every case to determine the voluntariness of a statement given by the accused. Most of these hearings turn upon a straight question of believing the accused or the police and often result in unfounded claims of police abuse and intimidation. Because of the difficulties and subjective judgments necessary in determining voluntariness, if the statement is held admissible, the accused may feel he has

been treated unfairly, and if the statement is held inadmissible, the police may feel frustrated and resentful. Any statement given before the judicial officer under the suggested proposal is invulnerable, morally as well as legally.

(5) The public should be aware that accused people are being interrogated, how they are being interrogated, and for how long. The secret proceedings in the police station are irreconcilable with the rest of our system which assumes that the proceedings themselves will be accessible to the public in general, or at least that a report of the proceedings will be made public. The proposal raises the visibility of one of the most important stages of our criminal justice system. The principle of publicity is one intimately connected with considerations of civil liberty.

(6) The proposal, by requiring people to appear before the judicial officer as soon as arrested, should remove many people at the outset from the criminal justice system. If the accused gives an explanation which is plausible and which the police cannot impeach, he may not have to face the ordeal of trial. Under the present law the accused's protestations of innocence may never be brought to light.

(7) Perhaps as important as any other advantage the proposal will tend to eliminate the discrimination between the knowledgeable and the naive. The shrewd and hardened criminal from whom the police know they cannot get a statement and who exercises all his rights to prove his innocence, is often treated very differently from the timid or ignorant accused from whom the police think they can get a statement and whom they know will not protest his mistreatment. The accused will have the benefit of legal counsel during the interrogation and will be protected against the use of statements extracted by threats, promises or tricks. Every suspect will be properly instructed of his rights in a way that is understandable to him and in every case the opportunity to exercise them will be given.

ARGUMENTS AGAINST THE PROPOSAL[111]

We believe this proposal is based upon common sense; that in circumstances which reasonably call for an explanation and in the face of an orderly inquiry an accused's failure to explain leads to an inference of guilt. The inference is, of course, not conclusive and may be mitigated, if not entirely explained away, by evidence led by the defence.

But the trier of fact should be allowed to consider it in the same way that he considers other circumstantial evidence and subject to the same right of comment.

We anticipate various arguments disputing the common sense of the inference, pointing to "valid" reasons not founded in guilt for the accused's failure to speak and asserting the absolute necessity of giving the fullest scope to the privilege against self-incrimination to "protect the innocent".[112] First, the objection might be made that an accused person often refuses to take the witness stand because of fear of being confronted with his previous convictions. But the potential prejudice to the accused from cross-examination with respect to his previous convictions, under the guise of attacking his credibility, will in all likelihood be removed.[113] Second, it might be argued that an innocent accused's failure to testify might be explained by an accused's excessive timidity, nervousness when facing others and fear that cross-examination might induce him to give inconsistent statements or otherwise give an appearance of guilt. We feel that this fear is greatly exaggerated.[114] Even if we admit the possibility of that danger, it is highly questionable whether it outweighs the risk of a miscarriage of justice by convicting an innocent, as a result of the inference that is now drawn from the accused's failure to testify. Moreover, our proposal offers greater protection for the nervous and timid accused since there is a greater danger that such a person would give inconsistent and incriminating statements in the face of police interrogation than he would at an orderly inquiry. Finally, it might be argued that individuals often remain silent out of fear of exposure respecting matters only remotely related to the charge: the proverbial married man who risks revealing indiscretions should he speak the truth.[115] We sympathize with their dilemma but deny that we should shape our laws to accommodate them.[116]

Not only do we believe the proposal to be founded upon common sense, but we also believe it to be fair. While the proposal does not go as far as some would prefer[117] in that it does not make the accused a compellable witness, it is a sufficient departure from our present practice to warrant a discussion of the human values involved in such a change. These values, the disruption of which some might feel outweigh the advantages to be achieved in the adoption of our proposal, are values thought to be embodied in the privilege against self-incrimination.

We do not feel it sufficient simply to point out that historically the privilege had no application to a person properly arrested and charged: most people who feel strongly about it undoubtedly feel that the privilege has transcended

its origin. Nor is it sufficient to point out that the proposal does not violate the privilege as set out in the Canadian Bill of Rights; to meet the question fairly we must examine the underlying policies of the privilege. That the proposal does not infringe the privilege described in the Canadian Bill of Rights seems plain: the accused will not be "compelled" to give evidence. We believe there is a valid distinction between subjecting the accused to an inference of guilt for refusing to testify and forcing him to testify by use, for example, of the contempt power. The contempt power punishes the accused for silence; the proposal, however, uses silence as evidence of guilt and punishes the defendant, if at all, only for the substantive offence charged.[118]

Does our proposal seriously conflict with any human values believed to underly the privilege against self-incrimination and the right to remain silent? There is no agreement as to what "the" policy behind the privilege is and it may truly be said that it is a "doctrine in search of a reason".[119] It may, however, be of benefit to canvass some of the reasons that have been suggested to see if our proposal demands too high a price.

(1) It may be argued that the right to remain silent is necessary to prevent improper conduct by the police in attempting to coerce people into giving confessions; if there is a right to an answer the belief develops that there is a right to the expected answer and physical force is seen to be justified in extracting it.[120] We believe that our proposal would prevent such abuses more effectively than the present law. Denying the use of statements obtained otherwise than subject to supervision, and by providing an opportunity for supervised questioning, the incentive for improper questioning should be lessened.[121]

(2) Some may argue that giving full scope to the privilege is necessary to encourage greater efficiency in police investigation techniques by insisting on evidence secured independently of the accused.[122] However, although modern science has contributed much to our ability to detect crime in many cases physical clues are unavailable and questioning therefore remains indispensable to solving crimes.

(3) The privilege is necessary to prevent the state from embarking on "fishing expeditions" hoping to discover sufficient evidence out of the mouths of suspects to justify criminal prosecutions. Our proposal requires that prior to the supervised questioning a person must be arrested or summoned. There must then exist and be demonstrated to the

supervising official reasonable and probable grounds for believing the accused guilty. All questions by the police must be related to the specific charge.

(4) The privilege secures an area of privacy for the accused which is essential to any notion of human dignity. There is a sense of personal degradation, incompatible with that dignity, in being compelled to incriminate oneself. While this policy basis might justify an absolute privilege against self-incrimination, it cannot justify the privilege as it exists in Canada today. We presently do make use of the accused to facilitate the prosecution of crime. For example, we permit compulsory fingerprinting of the accused and we force him to provide a sample of his breath. The existing privilege only protects against evidence produced under testimonial compulsion.[123] Even with respect to oral communications the government has at times felt the need to balance other interests against the privilege. For example, the Criminal Code provides[124] that a person involved in a motor vehicle accident must give his name and address or risk a penalty to a maximum of two years. Evidently Parliament, in balancing the safety of road users against the privilege, has decided to limit the latter. Also, the Canada Evidence Act requires that a witness testify to information though it tends to incriminate him and we provide him with immunity from prosecution in a very limited sense, i.e., that the statement he was forced to give will not be used against him directly in any subsequent prosecution. Parliament has decided that the need for evidence not otherwise available in its search for truth outweighs the privacy secured by the privilege. We have in Canada various statutes which require the maintenance of records and their opening for inspection, statutes requiring the communication of data directly to the government departments or agencies, and various administrative tribunals have been given the power to summon and examine witnesses against whom no charge has been laid.[125] Our prohibition against unlawful search and seizure does not guarantee immunity from all invasions of privacy but only from those which are unreasonable; if probable grounds exist the police may forcibly enter any dwelling and seize the most personal and incriminating evidence. This account of a few instances of lawful intrusion illustrates how privacy in the sense in which it must be used in this argument has never been considered an absolute value.[126]

(5) Any interference with the accused's right to remain silent would lessen respect for the legal process by producing "situations which are likely to degenerate into undignified,

uncivilized and regrettable scenes".[127] It is, of course, the central thesis of our proposal that the integrity of the judicial process and the public's respect for it will be enhanced rather than diminished; we believe it preferable that the "scenes" of police questioning be exposed to public view and by their exposure the system will become more dignified and civilized. To enhance the integrity of the system, all aspects of it must be considered and not just that part of it which takes place in the courtroom.

It will perhaps be argued that our proposal would convert an accusatorial system into an inquisitorial system. However, we ought not to be persuaded by mere labels. To derive conclusions from any characterization involves the danger of losing sight of the real objectives of our system and converting instrumentalist goals into values which are ends in themselves. Most of those who consider the accusatorial system to be inviolate define it as one in which society carries the burden of proving the charge against the accused independently of any assistance from him. The state must establish its case, not by interrogation of the accused, but by evidence independently secured through skilful investigation. This is necessary, it is argued, to preserve the integrity of the judicial system. It is difficult to see how fairness to the accused and judicial integrity require the Crown to prove its case independent of the accused's testimony. More importantly perhaps, if this is the meaning we give accusatorial, then our system has never been such, nor could it be. It has never been the law nor the practice that the court cannot convict an accused person except by evidence independent of that supplied by him. Indeed, any system in which pre-trial statements made by the accused are admitted in evidence is to that extent inquisitorial. Thus, under present practices an inquisitorial system has been engrafted onto our accusatorial one, which latter system does not, in reality, come into operation until the trial stage, or, at the earliest, on arraignment. At present, there is no provision for police pre-arraignment procedures and no control over them. They have been open to the worst vices with which the inquisitorial system could be charged. Our proposal should go some distance to minimizing these dangers by contributing to the control of the inquisitorial aspects of our present system.

END NOTES

1. See Hofstadter and Levittan, Lest the Constable Blunder: A Remedial Proposal (1965), 20 Record of N.Y.C.B.A. 629.

2. Schaefer, The Suspect and Society 5 (1966).

3. 1 & 2 Phil. & M., c. 13, sec. 4 (1554); 2 & 3 Phil. & M., c. 10, sec. 2 (1555). The Act passed in 1554 required the justice of the peace to conduct the examination only if the accused was applying for bail. Its purpose seems to have been to prevent collusion between criminals and justices who were allegedly granting bail too easily and sometimes as the result of bribes. Plucknett, A Concise History of the Common Law 432 (5th ed. 1956); 1 Stephen, History of Criminal Law 237-38 (1883). The Act passed in the next year extended the requirement for a judicial examination to those persons who were committed to gaol. It was apparently passed because the examination of the accused proved to be a useful proceeding for all cases. 4 Holdsworth, History of the English Law 529 (3d ed. 1945).

4. 4 Holdsworth, supra note 3, at 529; 1 Stephen, supra note 3, at 228.

5. 3 Wigmore, Evidence, sec. 848 (Chadbourn rev. 1970); 1 Stephen, supra note 3, at 441.

6. For descriptions of the justices' functions see Kauper, Judicial Examination of the Accused - A Remedy for the Third Degree (1932), 30 Mich. L. Rev. 1224, 1232-33, and 1 Stephen, supra note 3, at 221-28. At p. 225 Stephen noted: "I do not think any part of the old procedure operated more harshly upon prisoners than the summary and secret way in which justices of the peace, acting frequently the part of detective officers, took their examinations and committed them for trial." (Emphasis added.)

7. For example, 4 Blackstone, Commentaries 349 (Beacon Press ed. 1962); 1 Greenleaf, Evidence, sec. 224 (15th ed. 1892).

8. Stephen, supra note 3, at 219; Stephen, The Practice of Interrogating Persons Accused of Crime (1858), 1 Juridical Society Papers 456, 461; Select Cases Before the King's Council, 1243-1482, Selden Society, Vol. 35, p.xiii. See generally Kauper, supra note 6, at 1232; Morgan, The Privilege Against Self-Incrimination (1949), 34 Minn. L. Rev.

1-14; 8 Wigmore, Evidence, sec. 2250 (McNaughton rev. 1961).

9. Kauper, supra note 6, at 1233. The accused was being advised that such statements would be used against him at trial; for a description of the appropriate caution, see R. v. Green (1832), 172 E.R. 990. See also Bentham, 5 Rationale of Judicial Evidence 256, 257 (1827).

10. Jervis's Act, 11 & 12 Vic., c. 42 (1848).

11. Criminal Code, R.S.C. 1970, c. C-34, sec. 468, 469.

12. 1 Stephen, supra note 3, at 194-200; Plucknett, supra note 3, at 432.

13. For the history of the privilege against self-incrimination generally see Levy, Origins of the Fifth Amendment: The Right Against Self-Incrimination, esp. Chapters 8-10 (1968); 9 Holdsworth, History of English Law 197 (3d ed. 1944); Morgan, The Privilege Against Self-Incrimination (1949), 34 Minn. L. Rev. 1; 8 Wigmore, Evidence, sec. 2250 (McNaughton rev. 1961).

14. Levy, supra note 13, at 263; but see 8 Wigmore, Evidence, sec. 2250, n. 108 (McNaughton rev. 1961), noting that Lord Holt questioned accused persons at trial until his death in 1710.

15. Maury, Validity of Statutes Authorizing the Accused to Testify (1880), 14 Am. L. Rev. 753, 761.

16. For the history of the admissibility of confessions see generally 3 Wigmore, Evidence, secs. 817-820 (Chadbourn rev. 1970); Macdonald and Hart, The Admissibility of Confessions in Criminal Cases (1947), 25 Can. Bar Rev. 823.

17. Rudd's Case (1775), 1 Leach Cr. C. 115, 168 E.R. 160.

18. Warickshall's Case (1783), 1 Leach Cr. C. 263, 264, 168 E.R. 234, 235. Note that the express rationale of the rule of exclusion was concern for reliability; 3 Wigmore, Evidence, sec. 822 (Chadbourn rev. 1970).

19. Comment, Developments in the Law - Confessions (1966), 79 Harv. L. Rev. 935, 958.

20. R. v. Gavin (1885), 15 Cox C.C. 656 (per A.L. Smith, J: "A prisoner's mouth is closed after he is once given in charge, and he ought not to be asked anything."); see also R. v. Mick (1863), 3 F. & F. 822, 823, 176 E.R. 376

("I entirely disapprove of the system of police officers examining prisoners."); R. v. Kerr (1837), 8 C & P. 176, 173 E.R. 449 (holding a confession admissible though secured by police questioning, but expressing disapproval of the practice). And see, R. v. Thornton (1824), 1 Moody C.C. 27, 168 E.R. 1171; R. v. Wild (1835), 1 Moody C.C. 425, 168 E.R. 1341. In two cases confessions were excluded because the police had advised the accused to tell the truth: R. v. Enoch (1833), 3 Car. & P. 539, 172 E.R. 1089; R. v. Hearn (1841), Car. & M. 109, 174 E.R. 431. In other cases a confession was rejected because a warning was given to the accused that what he said could be used against him: R. v. Furley (1884), 1 Cox C.C. 76; R. v. Harris (1884), 1 Cox C.C. 106.

21. 3 Wigmore, Evidence, sec. 820a (Chadbourn rev. 1970). While Professor Wigmore has described these decisions as "distortions and irrational excrescences", he did so because he felt there was only one valid rationale for the exclusion of confessions, i.e., concern for trustworthiness of the statement. This view that the rule excluding confessions has only one rationale has been repudiated in the United States by both judges and commentators. Comment, Developments in the Law - Confessions (1966), 79 Harv. L. Rev. 935, 954-982; 3 Wigmore, Evidence, secs. 822, 823 (Chadbourn rev. 1970). See also McCormick, Some Problems and Developments in the Admissibility of Confessions (1946), 24 Texas L. Rev. 239, 245; Maguire, Evidence of Guilt 109 (1959).

22. See generally, 1 Radzinowicz, A History of English Criminal Law, ch. 1 (1948).

23. [1914] A.C. 599 (P.C.)

24. Ibid, at 614. See also R. v. Voisin (1918), 13 Cr. App. Rep. 89: "...the mere fact that a statement is made in answer to a question put by a police-constable is not in itself sufficient to make the statement inadmissible in law. It may be, and often is, a ground for the judge in his discretion excluding the evidence; but he should do so only if he thinks the statement was not a voluntary one in the sense above mentioned, or was an unguarded answer made under circumstances that rendered it unreliable, or unfair, for some reason, to be allowed in evidence against the prisoner." (Emphasis added.)

25. For example, see R. v. Fitton, [1956] S.C.R. 958, per Nolan, J., who in denying that questioning a prisoner automatically renders his statements inadmissible, quoted with approval the above remarks in Voisin; and see R. v. Kooten (1926), 46 C.C.C. 159 at 163 per Curran, J., adopting that statement as his own. See also R. v. Price, [1931] 3 D.L.R. 155 (N.B.C.A.); R. v. Anderson, [1942]

3 D.L.R. 179 (B.C.C.A.); R. v. Gillis, [1966] 2 C.C.C. 219 (B.C.C.A.); and R. v. Starr (1960), 33 C.R. 277 (Man. Co. Ct.). Note also the apparent approval of this attitude in the leading Canadian decision of Boudreau v. The King, [1949] S.C.R. 262, esp. at 271 and 275.

26. Although the histories of the two rules were distinct, a dual function of the confession rule, to promote trustworthiness and to protect the person's privilege against self-incrimination, was recognized recently in England in R. v. Harz, [1967] A.C. 760 at 820 (H.L.) and in the United States in Miranda v. Arizona (1966), 384 U.S. 436. See express Canadian recognition in DeClercq v. The Queen, [1966] 1 O.R. 674 (C.A.) per Laskin, J.A., dissenting, and R. v. Wray (1970), 11 D.L.R. (3d) 673 (S.C.C.) per Cartwright, C.J., dissenting.

27. Canada Evidence Act, R.S.C. 1970, c. E-10, sec. 4(1).

28. Ibid, sec. 4(5).

29. Criminal Code, R.S.C. 1970, c. C-34, sec. 469.

30. Canada Evidence Act, supra note 27, sec. 5; that accused is subject thereto, see R. v. Connors et al (1893), 5 C.C.C. 70 (Que. Q.B.).

31. Canada Evidence Act, supra, sec. 12, see R. v. D'Aoust (1902), 5 C.C.C. 407 (Ont. C.A.), holding that provision to be applicable to the accused.

32. Borins, Confessions (1958-9), 1 Crim.L.Q. 140; Fox, Confessions by Juveniles (1962-3), 5 Crim.L.Q. 459; Graburn, Truth as the Criteria of the Admissibility of Confessions (1962-3), 5 Crim.L.Q. 415; Grimaud, DeClercq v. The Queen; a confession's reliability on voir dire (1970), 8 Osgoode Hall L.J. 559; Martin, The Admissibility of Confessions and Statements (1962-3), 5 Crim. L.Q. 35; Powell, A Question of Fairness (1970), 8 Osgoode Hall L.J. 567; Ratushny, Unravelling Confessions (1971), 13 Crim. L.Q. 453-501; Ratushny, Statements of an Accused: Some Loose Strands (1972), 14 Crim. L.Q. 306, 405; Roberts, The Legacy of Regina v. Wray (1972), 50 Can.Bar.Rev. 19; Ryan, Involuntary Confessions (1959-60), 2 Crim. L.Q. 389; Savage, Admissions in Criminal Cases (1962), 5 Crim. L.Q. 49; Sheppard, Restricting the Discretion to Exclude Admissible Evidence (1972), 14 Crim. L.Q. 334.

33. Statutory exceptions to this general rule do exist: e.g., see The Highway Traffic Act, R.S.O. 1970, c. 202, s. 14; The Criminal Code, R.S.C. 1970, c. C-34, sec. 232(2).

34. The inapplicability of the privilege against self-incrimination to police questioning has recently been re-emphasized in Canada; Curr v. The Queen (1972), 7 C.C.C. (2d) 181. Compare R. v. Eden, [1970] 2 O.R. 161 (C.A.). See also 8 Wigmore, Evidence, sec. 2266, (McNaughton rev. 1961).

35. In Piche v. The Queen (1970), 11 D.L.R. (3d) 700 (S.C.C.) the Court abandoned the previous distinction between inculpatory and exculpatory statements.

36. The prosecution must satisfy the trial judge of the voluntariness of the statement on a voir dire, although this requirement may be waived by the defence: R. v. Dietrich, [1970] 3 O.R. 725, 734 (C.A.). The quantum of proof on the issue of voluntariness appears to be proof beyond a reasonable doubt: see R. v. Towler, [1969] 2 C.C.C. 335 at 338 (B.C.C.A.), Mentenko v. The King (1951), 12 C.R. 228, 223 (Que. K.B.), R. v. Murakami (1951), 99 C.C.C. 347 at 351 (B.C.C.A.), and R. v. Sartori et al, [1961] Crim. L. Rev. 397. Respecting the appropriate standard of proof, see O'Regan, Admissibility of Confessions - The Standard of Proof, [1964] Crim. L. Rev. 287.

37. Boudreau v. The King, [1949] S.C.R. 262.

38. R. v. Wray (1970), 11 D.L.R. (3d) 673.

39. R. v. Gardner & Hancox (1915), 11 Cr. App. Rep. 265; but see R. v. McLean & McKinley (1957), 32 C.R. 205.

40. R. v. Todd (1901), 13 Man. R. 364.

41. R. v. McLeod (1968), 5 C.R.N.S. 101 (Ont.C.A.); R. v. Pettipiece (1972), 7 C.C.C. (2d) 133 (B.C.C.A.).

42. R. v. St. Lawrence (1949), 93 C.C.C. 376 (O.H.C.), confirmed in R. v. Wray, supra note 38. Although the United States Supreme Court has not yet directly ruled on the question, (however, see Harrison v. U.S. (1967), 392 U.S. 219), some U.S. courts are applying the "fruits of the poisonous tree" doctrine, fashioned in arrest, search and seizure cases, to the "fruits" of involuntary confessions: see e.g., People v. Ditson (1962), 57 Cal. 2d 415, 369 P. 2d. 714; but see People v. Varnum (1967), 66 Cal. 2d 808.

43. See, for example, Roach, Arrest and Interrogation, L.S.U.C. Special Lectures 57 (1963).

44. R.S.C. 1970, App.III, sec. 2(c)(ii). The right of a person under arrest to consult with a lawyer was of course recognized in Canada before the enactment of the Bill of Rights: e.g., see Koechlin v. Waugh and Hamilton (1957), 118 C.C.C. 24.

45. Canada Evidence Act, R.S.C. 1970, c. E-10, sec. 4(1).

46. See text infra at pp. 17-21.

47. DeClercq v. The Queen, [1969] 1 C.C.C. 197 (S.C.C.).

48. For citation to cases and description of the practice, see McWilliams, The Position of a Person Suspected of Homicide at a Coroner's Inquest (1972), 20 Chitty's L.J. 293; Henkel, Competence, Compellability and Coroner's Courts (1970), 8 Alta. L. Rev. 124; Hooper, Discovery in Criminal Cases (1972), 50 Can. Bar Rev. 445, 473.

49. Hooper, supra note 48, citing Re Regan (1939), 71 C.C.C. 221.

50. Canada Evidence Act, R.S.C. 1970, c. E-10, sec. 5 has no prohibition against such derivative use.

51. Canada Evidence Act, R.S.C. 1970, c. E-10, sec. 4(5). Though in England the judge is permitted to comment and only the prosecutor is forbidden: Criminal Evidence Act, 1898, sec. 1(b).

52. Pratte v. Maher and the Queen, [1965] 1 C.C.C. 77 (Que.C.A.).

53. R. v. Binder, [1948] O.R. 607 (C.A.).

54. See generally Cross, Evidence 40-42 (3d ed. 1967) and O'Regan, Adverse Inferences from Failure of an Accused to Testify, [1965] Crim. L.R. 711. In R. v. Burdett (1820), 4 B. and Ald. 95, 120, 106 E.R. 873, 898, a decision before the accused was entitled to give evidence in his own behalf, Abbott, J. noted: "In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has

been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction, but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends? (Emphasis added.) Abbott, J., then noted the failure of the accused to call other witnesses to contradict the evidence led by the Crown; his reasoning of course is clearly now applicable to the probability of an adverse inference in the mind of the trier of fact when the accused, competent to testify, fails to do so.

55. In McConnell and Beer v. The Queen, [1968] 4 C.C.C. 257, 263 (S.C.C.), Ritchie, J., noted: "... it would be most naive to ignore the fact that when an accused fails to testify after some evidence of guilt has been tendered against him by the Crown, there must be at least some jurors who say to themselves, 'If he didn't do it, why didn't he say so.' " In R. v. Steinberg, [1931] O.R. 222, 236 (C.A.), aff'd., [1931] S.C.R. 421, Middleton, J.A., noted: "No comment may be made upon this to the jury, but the law does not forbid jurors to use their intelligence and to consider the absence of denial or explanation." Other cases to the same effect are R. v. Clark (1901), 3 O.L.R. 176, per Osler, J.A.; R. v. Duffy (1931), 4 M.P.R. 81, per Chisholm, C.J.; and R. v. McDonald, [1948] 3 D.L.R. 129, per Harvey, C.J.A.

56. McConnell and Beer v. The Queen, supra note 51, at 265; R. v. Lee, [1970] 3 O.R. 285 (C.A.); Avon v. The Queen, [1971] S.C.R. 650.

57. R. v. Steinberg, supra note 51, at 236; R. v. Pavlukoff (1953), 106 C.C.C. 249, 262 (B.C.C.A.); R. v. Tremblay et al. (1956), 115 C.C.C. 281 (B.C.C.A.); R. v. Caldwell (1972), 7 C.C.C. (2d) 285 (Alta. C.A.); and Avon v. The Queen, supra note 56. See also R. v. Duffy (1931), 4 M.P.R. 81 (N.S.C.A.); R. v. McDonald, [1948] 3 D.L.R. 129 (Alta. C.A.); R. v. Schwartzenhauer, [1935] 2 D.L.R. 739 (B.C.C.A.); R. v. Northey, [1947] 4 D.L.R. 744 (B.C.C.A.). The opposite opinion was expressed by Coyne, J.A. in R. v. Nykolyn (1947), 55 Man. R. 323.

58. See for example Colpitts v. The Queen, [1965] S.C.R. 739.

59. See R. v. D'Aoust (1902), 5 C.C.C. 407.

60. See for example R. v. LeForte (1961), 35 C.R. 227 (B.C.C.A.), rev'd 36 C.R. 181 (S.C.C.).

61. See Study Paper on Credibility by Evidence Project of Law Reform Commission of Canada, 1972.

62. Criminal Code, R.S.C. 1970, c. C-34, sec. 578(2).

63. R. v. Wray (1970), 11 D.L.R. (3d) 673 (S.C.C.).

64. In DeClercq v. The Queen, [1969] 1 C.C.C. 197 (S.C.C.) it was held permissible to ask the accused on the voir dire whether his confession was true since truth or falsity was relevant to the issue of voluntariness. If we admit that truth may be relevant to voluntariness, no one could say that it was conclusive. The Court was therefore saying that a confession, even though admitted by the defendant on oath to be true, could be rejected as involuntary. (See Laskin, J.A., in R. v. DeClercq, [1966] 1 O.R. 674, 678 (C.A.).) The anomaly created by these two Supreme Court decisions was pointed out by Cartwright, C.J., in his dissent in R. v. Wray, supra note 64, at 679.

65. In Piche v. The Queen (1970), 11 D.L.R. (3d) 700 (S.C.C.), a decision handed down on the same day as the Wray decision, the Court abandoned the previous distinction between inculpatory and exculpatory statements.

66. See R. v. Oldham (1971), 1 C.C.C. (2d) 141 (B.C.C.A.), respecting the effect of intoxication; see also McKenna v. The Queen, [1961] S.C.R. 660.

67. This expression has been variously defined in the cases to include those involved in the apprehension or prosecution of the accused, but does not include all persons who are capable of carrying out their threats or promises: see Deokinanan v. R., [1968] 2 All E.R. 346, 350 (P.C.). See also R. v. Pettipiece (1972), 7 C.C.C. (2d) 133 (B.C.C.A.).

68. R. v. Rasmussen, [1935] 1 D.L.R. 97 (N.B.C.A.).

69. In Commrs. of Customs and Excise v. Harz, [1967] 1 All E.R. 177, 184 (H.L.), Lord Reid, in denying the validity of such a limitation, noted: "The law of England cannot be so ridiculous as that."

70. Walker v. The King, [1939] S.C.R. 214 applying R. v. Scott (1856), 169 E.R. 909. See Barker, Statutorily Compelled Self-Incriminating Statements (1972), 20 Chitty,s L.J. 224; Scollin, Admissibility in Criminal Proceedings of Statements Made by the Accused Under Compulsion of Provincial Law (1962), Can. B. Papers 175; Savage, Statements Made by Compulsion of Statute and R. v. Wilks (1968), 10 Crim. L.Q. 262.

71. See Marshall v. The Queen, [1961] S.C.R. 123, and note the recognition by Cartwright, J., at 131: "That such a conclusion has anomalous results cannot be denied." And see R. v. Lunan, [1947] 3 D.L.R. 710 (Ont. C.A.) and R. v. Tass (1947), 87 C.C.C. 97 (S.C.C.) respecting subsequent use of statements on failure to object.

72. Batary v. A.G. Sask., [1966] 3 C.C.C. 152 (S.C.C.), but compare R. v. McDonald Ex Parte Whitelaw, [1969] 3 C.C.C. (B.C.C.A.).

73. See Criminal Code, R.S.C. 1970, c. C-34, sec. 469.

74. Canada Evidence Act, R.S.C. 1970, c. E-10, sec. 4(1).

75. The absence of any such caution is regarded as but one factor to be considered in determining the voluntariness of his statement: see Boudreau v. The King, [1949] S.C.R. 262, interpreting Gach v. The King, [1943] S.C.R. 250, which had apparently viewed the existence of a caution as an absolute necessity to the receipt of a confession.

76. Admittedly the confession rule and the privilege against self-incrimination have distinct origins. However during the early development of the privilege there were no police interrogators to whom the privilege could apply and examining justices, whose functions were largely assumed by the new police forces, were subject to the privilege. See Morgan, Basic Problems of Evidence 147-48 (1962) and Note, An Historical Argument for the Right to Counsel During Police Interrogation (1964), 73 Yale L.J. 1000, 1034.

77. Canadian Bill of Rights, R.S.C. 1970, App. III, sec. 2(d).

78. Ibid, sec. 2(c)(ii).

79. In R. v. DeClercq, [1966] O.R. 674, MacKay, J.A., noted: "As to his not being told that he was entitled to counsel, he did not ask for counsel. Also, I am not aware that there is any legal duty imposed on police officers, unless they are asked, to tell people they question when investigating complaints or before they take statements, that they are entitled to counsel."

80. See O'Connor v. The Queen, [1966] S.C.R. 619 and R. v. Steeves, [1964] 1 C.C.C. 266 (N.S.S.C.); compare R. v. Ballegeer, [1969] 3 C.C.C. 353 (Man. C.A.). That denying accused's request to see his solicitor does not render a confession inadmissible, but is only a factor in determining voluntariness, see R. v. Emele, [1940] D.L.R. 758 (Sask. C.A.). Note particularly the effect of the Wray decision in the recent case of R. v. Deleo and Commisso (1972), 8 C.C.C. (2d) 264 (Ont. Co. Ct.).

81. See Escobedo v. Illinois (1963), 378 U.S. 478, 487.

82. See Kamisar, Equal Justice in the Gatehouses and Mansions, in Kamisar, Inbau and Arnold, Criminal Justice in Our Time (1965).

83. See 8 Wigmore, Evidence, sec. 2291, 2285 (McNaughton rev. 1961).

84. See for example Lawrie v. Muir, [1950] Scots L.T. 37, noting that authorities proceeding by irregular methods can be more dangerous than permitting a criminal to escape from justice.

85. R. v. Wray (1970), 11 D.L.R. (3d) 673 (S.C.C.).

86. In R. v. Pettipiece (1972), 7 C.C.C. (2d) 133, 148 (B.C.C.A.), the court described the means adopted by the police in obtaining the confession: "It was the action of irresponsible policemen totally bankrupt of all ideas of fair play, prepared to stoop to any tactics to discharge their duty as policemen and totally ignorant of all those civil rights or freedoms which one living in our society is entitled to, including one's right to the protection of the law." Despite such characterization it is interesting to note that the courts forced, tortuous analysis in terms of how the tactics could have affected voluntariness within the "classic rule". See also R. v. McLeod, supra note 41.

87. See Gooderson, The Interrogation of Suspects (1970), 48 Can. B. Rev. 270, describing the operation of the Judges' Rules in England.

88. See Miranda v. Arizona (1966), 384 U.S. 436.

89. The possibility of a criminal prosecution for disobeying the Canadian Bill of Rights pursuant to Criminal Code, R.S.C. 1970, c. C-34, sec. 115, suggested by Tarnopolsky, Canadian Bill of Rights (1966), appears slim: see judicial refusal in Quebec of authorization of criminal charges against police officers for such violations reported in the Toronto Globe and Mail, August 1, 1972, p. 4, and August 10, 1972, p. 5.

90. Canadian Civil Liberties Report, Due Process Safeguards and Canadian Criminal Justice, 32, 33 (1971).

91. See Driver, Confessions and the Social Psychology of Coercion (1968), 82 Harv. L. Rev. 42.

92. See Letter from English Policeman on Use of Judges' Rules, in Selected Writings on Law of Evidence and Trial 846 (Fryer ed. 1957): "When I said to you that prisoners always opened their mouths too much, I meant it, but what they usually do is to make a statement which they think, in their ignorance of the law, excuses them, e.g., they will frequently say something to this effect: 'I didn't break into the house. It was Smith that did it. I only went with him.' Or: 'I didn't steal the money. Smith took it and gave me some of it.' Frequently they will apologize thinking that then we will let them go, e.g., 'I'm sorry I did it. I don't know what made me, and I won't do it again.' This may all sound fantastic to you, but it is literally true. The ignorance of the Great British Public neutralises the Judges' Rules. When we deal with an educated man who knows his rights, we have had it, unless we have outside evidence enough." (Emphasis added.)

93. See Inbau and Reid, Criminal Interrogation and Confessions 25-93 (2d ed. 1967), where the authors detail sixteen proven techniques for "persuading" a suspect to confess. Kaufman, Admissibility of Confessions 111 (1960), the most thorough examination of confession law in Canada, notes that all of these methods have in the past been accepted by our Canadian courts. See also Clendenning, Police Power and Civil Liberties (1966), 4 Osgoode Hall L.J. 174, describing tactics employed, on the basis of his experience as a Canadian police officer.

94. See Kaufman, supra note 93, at 111.

95. See Sterling, Police Interrogation and the Psychology of Confession (1965), 14 J. Pub. L. 25, 46; Driver, supra note 91, at 48, 51, 58; Reik, The Compulsion to Confess (1959).

96. Miranda v. Arizona (1966), 384 U.S. 436 at 457.

97. Some have queried whether a "voluntary" confession can ever be the offspring of a reasoned choice: see Schaefer, The Suspect and Society 12 (1966) and Silving, Essays on Criminal Procedure 256-69 (1964).

98. See Interrogations in New Haven: The Impacts of Miranda (1967), 76 Yale L.J. 1519 at 1648: "With a record, a suspect is more likely to be in sufficient control to evaluate the evidence and decide whether co-operation is the rational course of action. Without a prior record, a suspect is more likely to be at a detective's mercy."

99. R. v. Cripps (1968), 3 C.R.N.S. 367 (B.C.C.A.). In R. v. Itwaru (1970), 10 C.R.N.S. 184, 217 (N.S.C.A.), it was noted: "The test then appears to be not so much whether or not the silence took place after a warning. The test is whether the comments of the trial judge were directed to reminding the jury that when the accused has not advanced at an earlier stage the explanation offered at the trial, the jury could take that fact into account when assessing the weight to be given such explanation, or whether the jury was being invited to find that because the accused had remained silent, it could draw an inference of guilty." The latter instruction is forbidden by the current law. In England the position is the same: see R. v. Littleboy, [1934] 2 K.B. 408 (C.C.A.); R. v. Ryan (1964), 50 Cr. App. R. 144, 148. And also in some courts in the United States: see 3 Wigmore, Evidence, sec. 821, n.9 (Chadbourn rev. 1970).

100. R. v. Eden, [1970] 2 O.R. 161 (C.A.); R. v. Sigmund et al, [1968] 1 C.C.C. 92 (B.C.C.A.); Hall v. R., [1971] 1 W.L.R. 298.

101. While voluntariness is a question of admissibility and for the judge to decide, the jury takes into account all the circumstances surrounding the taking of the statement in assessing the weight to be given to the statement: see R. v. McAloon, [1959] O.R. 441 (C.A.); approved in Chan Wei-Keung v. The Queen, [1967] 2 A.C. 160 (P.C.); accord R. v. Burgess, [1968] 2 Q.B. 113 (C.C.A.).

102. Respecting the need for a record of such questioning see Enker & Elsen, Counsel for the Suspect (1964), 49 Minn. L. Rev. 47, 85, Elsen & Rosett, Protections for the Suspect (1967), 67 Col. L. Rev. 645, 666. See also Gooderson, The Interrogation of Suspects (1970), 48 C.B.R. 270, 298.

103. Respecting the difficulties that arise when there is no verbatim account of the manner in which a statement was given, see Thiffault v. The King, [1933] S.C.R. 509.

104. Although in many respects the proposal is unique, similar proposals have been made. A similar proposal was made in the United States as early as 1883. Baldwin, 6 A.B.A. Report 225, 238, 242. See also Lowell, The Judicial Use of Torture (1897), 11 Harv. L. Rev. 290, 299. In the United States in the 1920's and 1930's national concern over the third-degree practices stimulated a number of such proposals. See Knox (1925), 4 U. of Pa. L. Rev. 139, 142. In 1928 the American Law Institute reported that such a suggestion was included in the first draft of its Code of Criminal Procedure, but was rejected after discussion with advisers. See A.L.I. Code of Criminal Procedure, 26-27 183 (Tentative Draft No. 1, 1928). See also A.L.I. Code of Criminal Procedure Commentary, 264-65 (1931). The National Commission on Law Observance and Enforcement (Wickersham Commission), (1931), No. 11, p. 5, No. 4, p. 26 suggested that a suspect be examined by a magistrate after he had been advised of his rights. This same recommendation was made by others, including: Waite, Report on Lawlessness in Law Enforcement (1931), 30 Mich. L. Rev. 54, 58; Warner, How Can the Third Degree be Eliminated (1940), 1 Bill of Rights Review 24; Kauper, Judicial Examination of the Accused - A Remedy for the Third Degree (1932), 30 Mich. L. Rev. 1224; Pound, Legal Interrogation of Persons Accused or Suspected of a Crime (1934), 24 J. Crim. L.C. & P.S. 1014; 3 Wigmore, Evidence, sec. 851 at p. 320 (1940 ed.); Chafee, Remedies for the Third Degree (1931), 48 Atlantic Monthly 621. It was criticized by Miller, Lawyers and the Administration of Criminal Justice (1934), 20 A.B.A.J. 77; Douglas, The Means and the End, [1959] Wash. U.L.Q. 103, 115.

Justice W.V. Schaefer of the Illinois Supreme Court has recently suggested a proposal having many of the features as the one suggested here. His proposal is put forward in his 1966 Rosenthal Lectures, The Suspect and Society (1966), published also in (1966) 61 N.W.U.L. Rev. 506, 519. For recent discussion of similar proprosals see Note (1964), 78 Harv. L. Rev. 426; Breitel, Criminal Law and Criminal Justice, [1966] Utah L. Rev. 1; Hofstadter & Levittan, Lest the Constable Blunder: A Remedial Proposal (1965), 20 Record of N.Y.C.B.A. 629; Moreland, Some Trends in the Law of Arrest (1955), 39 Minn. L. Rev. 479, 489; Dession, The New Federal Rules of Criminal Procedure (1946), 55 Yale L.J. 694, 714;

La Fave, Detention for Investigation by the Police, An Analysis of Current Practices, [1962] Wash. U.L.Q. 331, 389; Elsen and Rosett, Protection for the Suspect Under Miranda v. Arizona (1967), 67 Col. L. Rev. 645, 667; Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change (1968), 37 U. Cinn. L. Rev. 671, 713-716, 721-722; 3 Wigmore, Evidence, sec. 851 (Chadbourn rev. 1970).

Recently a similar proposal has also been considered by the American Law Institute in drafting their Model Code of Pre-Arraignment Procedure, but was rejected as being inconsistent with the current interpretation by the U.S. Supreme Court of the accused's constitutional rights. See Study Draft No. 1, p. 43, (1968).

In England, the Report by Justice, British Branch of the International Commission of Jurists, The Interrogation of Suspects (1967), suggested a similar proposal. See comments in 117 New L.J. 607 (1967); Gooderson, The Interrogation of Suspects (1970), 48 C.B.R. 270, 304. For similar proposals made in Great Britain, see Kilbrandon, Other People's Law 102 (1966); Smith, British Justice 130 (1961); Lord MacDermott, 21 Current Legal Problems 1, 20 (1968); Criminal Procedure, Journal of the Law Society of Scotland, Jan. 1972, p. 7 at pp. 18-19.

In Canada, the authors of the Report of the Canadian Committee on Corrections (The Ouimet Report) (1969) at p. 54 advised against the adoption of the Justice proposal. They were concerned that under that proposal, "A professional criminal might very well use such a procedure to get a fabricated defence on the record and avoid the rigorous cross-examination of experienced Crown counsel at his trial." The proposal being presented in this paper avoids that possibility since the defence will be entitled to use a previous exculpatory statement only if the accused takes the stand at trial. However the Ouimet Committee's primary reason for rejecting the proposal was their concern for the privilege against self-incrimination. In his article, The Investigation of Offences and Police Powers (1970), 12 Can. J. Corr. 209, Professor Beck comments: "I wonder whether the privilege is so deeply ingrained in our sense of fairness of the criminal process as the Committee suggests. I agree that 'such a long respected privilege should not be disturbed except for the clearest reasons', but usage alone should not require us to maintain procedures that no longer have validity. I do not say that this is necessarily the case with respect to the privilege, but I do suggest that the entire adversary system of criminal justice is in need of a searching inquiry."

105. The English Criminal Law Revision Committee's Eleventh Report, Evidence (General), 1972 greatly restricts the accused's right to silence and abolishes the Judges' Rules requirements of cautioning an accused before questioning. (See Clause 1 of the Draft Bill). An accused's silence in the face of police questioning, even before the accused is charged with an offence, may be used by the court in determining whether the accused should be committed for trial or whether there is a case to answer, may be used by the court or jury as an inference of guilt, and may be treated as corroboration of other evidence given against the accused. The Criminal Bar Association in England has attacked this proposal by noting the frailty of the accused when he is alone in the hands of the police, the accused's need for legal counsel when being questioned, the "grim dangers to a suspect of having his words falsified and twisted when in a police station", the open-endedness of the permitted questioning, the fact that "the suspect would be under pressure to reply to every question asked without knowing on what charge he would eventually be tried", the fact that "there would be no limit in time or scope" to the questioning: The Guardian, Sept. 30, 1972, p. 9. The Evidence Project recognizes the strength of these criticisms, proposes a system which cannot be so criticized, and which places the accused in a strengthened position with respect to police questioning.

106. A code of procedure for the admissibility of statements of an accused was judicially enacted in the United States in the decision of Miranda v. Arizona (1966), 384 U.S. 436, 444. The Supreme Court advised that as conditions for the reception of statements in response to police questioning: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him." The Project disagreed with this solution to the problem of the admissibility of accused's statements since it regards the secrecy surrounding police interrogation which is preserved by these rules as the very core of the problem. The secrecy is the principal impediment to ascertaining the truth. Empirical studies (see infra note 109) have indicated no decline in the

confession rate as the result of the new rules and it is extremely difficult to decide whether the police are giving full effect to the spirit as well as the letter of the Court,s instructions. Previous to the new code the trial judge had to determine the voluntariness of the accused's statements; by the new code he must decide the voluntariness of the accused's waiver of his rights.

107. Respecting its current restricted use as evidence affecting only the credibility of a defence advanced at trial, see R. v. Cripps (1968), 3 C.R.N.S. 367, 371 (B.C.C.A.); R. v. Itwaru (1970), 10 C.R.N.S. 184, 217 (N.S.C.A.); Russell v. The King (1936), 67 C.C.C. 28 (S.C.C.). See also Molot, Non-Disclosure of Evidence, Adverse Inferences and the Court's Search for Truth (1972), 10 Alta. L. Rev. 45, 65. Also of interest in this area of adverse inferences see R. v. Higgins (1902), 7 C.C.C. 68, 75-78 (N.B.C.A.); R. v. Mah Hong Hing et al. (1920), 33 C.C.C. 195, 197 (B.C.C.A.); R. v. Rotelink (1936), 65 C.C.C. 205 (Sask. C.A.); Bathurst (1968), 52 Cr. App. R. 251; R. v. Pratt, [1971] Crim. L. Rev. 234; Hall v. Reginam, [1971] 1 All E.R. 322.

108. The A.L.I. Model Code of Pre-Arraignment Procedure, Study Draft No. 1, pp. 102-69, (1968) reviewed the empirical materials then available and concluded: "No one can now provide a complete and reliable picture of the usefulness for different law enforcement tasks of the information secured from questioning suspects compared to other sources of information." See also, Comment, Interrogations in New Haven: The Impact of Miranda (1967), 76 Yale L.J. 1519; Seeburger and Wettich, Miranda in Pittsburgh: A Statistical Study (1968), 29 Univ. of Pitt. L. Rev. 1347; Younger, Results of a Survey (1966), 5 Am. Crim. L.Q. 32. That conclusion is unchanged.

109. See Kamisar, On the Tactics of Police Prosecution Orientation Critics of the Court, 49 Cornell L.Q. 436; Inbau, Police Interrogation - A Practical Necessity, 52 J. Crim. L., C. & P.S. 16, Forum on the Interrogation of the Accused, 49 Cornell L.Q. 377. And see Frankfurter, J., in Culombe v. Connecticut (1960), 367 U.S. 568, 571: "Despite modern advances in the technology of crime detection, offences frequently occur about which things cannot be made to speak. And where there cannot be found innocent human witnesses to such offences, nothing remains - if police investigation is not to be balked before it has fairly begun - but to seek out possibly guilty witnesses and ask them questions, witnesses, that is, who are suspected of knowing something about the offence precisely because they are suspected of

implication in it." But compare his opinion in Watts v. Indiana (1949), 338 U.S. 49. See also Nolan, J., in the Queen v. Fitton, [1956] S.C.R. 958, 972.

110. As mentioned in note 108 the studies on the necessity of permitting the use of the accused's statements as evidence against him at trial are inconclusive. However, at least two jurisdictions, India and Scotland, have strict rules excluding from evidence information, including confessions, obtained as the result of police questioning. For a description of the law and practice in Scotland see Hardin, Other Answers: Search and Seizure, Coerced Confessions, and Criminal Trial in Scotland (1964), 113 U. Pa. L. Rev. 165. Hardin concludes that the Scottish criminal justice system seems to function smoothly without post-arrest interrogation. See also A Scots Advocate, Scots Law Regarding Confessions, [1961] Crim. L.R. 592; Walker and Walker, The Law of Evidence in Scotland 37-41 (1964). Section 25 of the India Evidence Act provides that all confessions made by a person in the custody of police are inadmissible. See generally 2 Chitaley & Rao, The Indian Evidence Act, secs. 25-26 (1956).

Responses to this study paper will assist us in determining the need for the admissibility of confessions in Canada or for the need of some form of empirical study in this area.

111. Many of the arguments that can be made against the proposal raise issues surrounding the privilege against self-incrimination. See generally 8 Wigmore, Evidence, sec. 2251, (McNaughton rev. 1961) for a thorough description of the dozen policies advanced as justification for the privilege. See also MacKay, Self-Incrimination and the New Privacy, [1967] Supreme Court Rev. 194, 214, dismissing some of the reasons traditionally given as "pretentious nonsense" and "empty pomposities".

112. But see Griswold, The Right to be Let Alone (1960), 55 Nw. L. Rev. 216, 223, recanting from his earlier position: "It was a mistake, I now think, to undertake to defend the privilege on the ground that it is basically designed to protect those innocent of crime, at least in any numerical sense." See also, Schaefer, The Suspect and Society 63-68 (1966). And see McKay, Self-Incrimination and the New Privacy, [1967] Supreme Court Rev. 193, 203: "It does not add to clarity of thought to pretend that any substantial portion of those who assert the privilege are innocent of all wrong doing." See also 1 Stephen,

A History of the Criminal Law of England 445 (1883): "No greater test of innocence can be given than the fact that as soon as he is charged, and whilst there is still time to inquire into and test his statements, a man gives an account of the transaction which will stand the test of further inquiry."

113. See Study Paper on Credibility by Evidence Project of Law Reform Commission of Canada, 1972. See also Teed, The Effect of Section 12 of the Canada Evidence Act Upon an Accused (1971), 21 U.N.B.L.J. 65, (1970), 13 Crim. L.Q. 70; Friedland, Cross-Examination on Previous Convictions in Canada (1969), 47 Can. B. Rev. 656; Whitehead, An Accused with a Previous Conviction (1968), 16 Chitty's L.J. 152; Cadsby, Cross-Examination of Accused Persons (1962), 4 Crim. L.Q. 265; Turca, A Study of the Use of Previous Convictions (1967), 3 U.B.C.L. Rev. 300.

114. See 8 Wigmore, Evidence, sec. 2251, at n. 3 (McNaughton rev. 1961), referring to this argument as an "obvious make weight", and noting: "... the privilege in the mass of cases of frightened innocent defendants (if it influences them at all) probably has a net tendency to seduce them into convicting, not saving, themselves by their silence."

115. See Maloney and Tomlinson, The Right to Remain Silent, in Studies in Canadian Criminal Evidence 334, 339. (Salhany and Carter eds., 1972).

116. See Schaefer, The Suspect and Society 67 (1966).

117. See Haines, The Right to Remain Silent, in Studies in Canadian Criminal Evidence 321, 325 (Salhany and Carter eds., 1972).

118. As noted by Laskin, J., in Reference Re Criminal Amendment Act, 1968-69, s. 16, [1970] 3 C.C.C. 320, 340 (S.C.C.): "There is no compellability of an accused to self-crimination by reason only of statutory prescriptions for presumptive proof of facts in issue." See also The Queen v. Appleby, [1972] S.C.R. 303. Compare Griffin v. California (1965), 380 U.S. 609. But see Tehan v. Shott (1966), 382 U.S. 406, in which the U.S. Supreme Court decided that the prohibition against comment, announced in Griffin, should not be applied retroactively; the Court there noted that the privilege against self-incrimination was not for the purpose of protecting the innocent although that was the main policy reason given in Griffin. Note also Curr v. The Queen (1972), 7 C.C.C. (2d) 181 (S.C.C.) holding that the privilege against self-incrimination has no application to police questioning.

119. See Schaefer, supra note 116, at 61. And note also the remarks of Louisell, Criminal Discovery and Self-Incrimination: Roger Traynor Confronts the Dilemma (1965), 53 Cal. L. Rev. 89, 94: "There is, on the one hand, the supportive rationale for the rule against self-incrimination, the true justification - whatever it may be. I speak now not of its historic value; it has indeed been a good friend. I speak of present circumstances. We no longer have the rack and screw, at least not as officially acknowledgedlegitimate instruments. We have instead due process, elaborated notions against coerced confessions, careful articulation of and devotion to the requirement of proof beyond a reasonable doubt. Is not the real old friend - protection against brutality whether physical or psychological - now in the garb of fundamental fairness? Is it not an artifice to drape it also in the mantle of compelled abstention from the most rational inquiry available, questions to the suspect himself?" (Emphasis added).

120. 8 Wigmore, Evidence, sec. 2251, n. 1 (McNaughton rev. 1961).

121. See Maguire, Evidence of Guilt 13 (1959): "Deprived of assurance that the prosecutor can probe for a suspect's information by decent, orderly questioning, police are tempted to bully their prisoner into admissions suggesting lines of investigation usable to turn up other evidence of guilt. The privilege may encourage torture rather than the reverse."

122. No doubt proponents of this argument would quote 1 Stephen, A History of the Criminal Law of England 442 (1883): "It is far pleasanter to sit comfortably in the shade rubbing red pepper in a poor devil's eyes than to go about in the sun hunting up evidence." See also 8 Wigmore, Evidence, sec. 2251, n. 1 (McNaughton rev. 1961).

123. Which includes chattels or documents within his control since there is a testimonial communication inherent in such production, as the defendant is compelled to give an assurance, as an incident of process that the articles produced are the ones demanded.

124. R.S.C. 1970, c. C-34, sec. 233(2).

125. See Martin, The Privilege Against Self-Incrimination Endangered (1962), 5 Can. Bar. J. 6; see also Ontario Royal Commission Inquiry into Civil Rights, 1968, Report No. 1 (The McRuer Report), Vol. 1, pp. 385-481, and Report of the Canadian Committee on Corrections (The Ouimet Report) 67-70 (1969). And see Heydon, Statutory

Restrictions on the Privilege Against Self-Incrimination (1971), 87 L.Q.R. 214, and Houlden, Discovery in Criminal Prosecutions in Bankruptcy Matters (1972), 50 Can. Bar Rev. 486; Baillie, Discovery-Type Procedures in Security Fraud Prosecutions (1972), 50 Can Bar Rev. 496; and Chalmers, Disclosure in Income Tax Matters (1972), 50 Can. Bar Rev. 512.

126. One must also recognize the plethora of instances reversing the onus of proof as instances demanding convictions should the accused remain silent. See Levy, Reverse Onus Clauses in Canadian Criminal Law (1970), 35 Sask. L. Rev. 40.

127. 8 Wigmore, Evidence, sec. 2251, p. 312 (McNaughton rev. 1961). See also Maloney and Tomlinson, The Right to Remain Silent 335, 341, in Studies in Canadian Evidence (Salhany and Carter eds. 1972). And see 1 Stephen, A History of the Criminal Law of England 441, 445 (1883).
