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SCSL-03-01-PT
(9349 – 9380)

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THE SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber II

Before: Justice Julia Sebutinde, Presiding
Justice Richard Lussick
Justice Teresa Doherty
Justice El Hadji Malick Sow, Alternate

Registrar: Mr. Herman von Hebel, Acting Registrar

Date: 18 May 2007

Case No.: SCSL-2003-01-PT

THE PROSECUTOR

–v–

DANKPANNAH CHARLES GHANKAY TAYLOR

URGENT AND PUBLIC

DEFENCE MOTION REQUESTING LEAVE FOR CHARLES GHANKAY TAYLOR TO GIVE AN UNSWORN STATEMENT FROM THE DOCK

Office of the Prosecution
Mr. Stephen Rapp
Ms. Brenda Hollis
Ms. Wendy van Tongeren
Ms. Ann Sutherland
Ms. Shyamala Alagendra
Mr. Alain Werner
Ms. Leigh Lawrie

Counsel for Charles Taylor
Mr. Karim A. A. Khan
Mr. Roger Sahota

I. Introduction

1. The Defence for Charles Taylor (the "Defence") respectfully seek the Trial Chamber's (the "Chamber") leave for Mr. Charles Ghankay Taylor to give an unsworn statement from the dock. To allow such a statement, on which the Special Court's Rules of Procedure and Evidence do not pronounce themselves, is within the discretionary powers of the Chamber. Furthermore, the practice is sufficiently prevalent in domestic and international jurisdictions, in particular the International Criminal Tribunal for Yugoslavia (the "ICTY"). Mr. Taylor, in refraining from public pronouncements in regard to the court or the proceedings preferred against him, has acted with discretion and considerable restraint. The Defence submit that it is in the interests of justice, that he should be allowed to make an unsworn statement in these circumstances. The Prosecutor, on his part, suffers no discernable prejudice from an unsworn statement being made by the Accused, particularly if the mandate and objective of the Prosecutor is to achieve justice by dint of a fair and equitable process. Accordingly. it is respectfully submitted that the Chamber, in a reasonable and appropriate exercise of its discretion, should allow Mr. Taylor to give an unsworn statement from the dock after the Prosecution opening speech on 4th June 2007..

II. Jurisdiction

2. The Chamber has both inherent jurisdiction to control court room proceedings, and the presentation of the Prosecution and Defence case, and that granted to it pursuant to Rule 26*bis* and Rule 54 and Rule 89(B). Other Trial Chambers in international tribunals have consistently pronounced themselves, in favour of allowing the accused to give an unsworn statement from the dock, even when not explicitly mandated to do so by the rules, and exercised due control over the statement itself.[1] Thus, the Chamber, consistent with this practice, have jurisdiction to grant the leave requested.

[1] *See Prosecutor v. Delalic,* ICTY Case No. IT-96-21, Trial Transcript, 13 October 1998.

III. Scheduling Order

3. The Defence respectfully request that Mr. Taylor be able to give an unsworn statement from the dock, of no more than one hours duration, immediately after the Prosecutor's opening statement on 4 June 2007.[2] To ensure that the Chamber is able to first consider the parties' submissions on the issue, and to subsequently deliberate and rule in a timely manner, the Defence seek, as a preliminary matter, without prejudicing the substantive application, a scheduling order for expedited filing of the Prosecutor's Response, if the Prosecutor wishes to respond, and the Defence Reply, if necessary.

IV. Allowing an Unsworn Statement is consistent with international jurisprudence and the Special Court's Rules

4. Although, till date, not the practice of the Special Court, an unsworn statement from the dock is not inconsistent with the Special Court's Rules. The Special Court's Rules, like the Rules of Procedure and Evidence for the ICTR, from which they are adopted *mutatis mutandis,* have no explicit provision, either allowing or proscribing an accused from giving an unsworn statement from the dock. However, on the occasion that international tribunals *have* stipulated rules on this narrow issue, unsworn statements from the dock have been allowed.[3] ICTY Rule 84*bis,* followed liberally, states unequivocally that:

> "After the opening statements of the parties or, if the defence elects to defer its opening statement pursuant to Rule 84, after the opening statement of the Prosecutor, if any, the accused may, if he or she so wishes, and the Trial Chamber so decides, make a statement under the control of the Trial Chamber. The accused shall not be compelled to make a solemn declaration and shall not be examined about the content of the statement."[4]

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[2] *Prosecutor v. Taylor,* SCSL-03-01-PT-226, Decision on Defence Motion Requesting Reconsideration of "Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence," dated 23 January 2007, 25 April 2007.
[3] The Special Court's Rule 72*bis* allows for "where appropriate", persuasive jurisprudence, where it is "not inconsistent with the Statute…"
[4] ICTY Rules of Procedure and Evidence, Rule 84 *bis*.

Recent drafters[5] have concurred, and even expanded upon the ICTY Rule 84*bis*. Rule 67(1)(h) of the International Criminal Court (the "ICC") simply entitles the accused "[t]o make an unsworn oral or written statement in his or her defence..." without sequencing or other limitations. The ICC permits unsworn statements from the accused at any point during the trial.

5. Consistent with a Trial Chamber's discretionary power to control its own proceedings, Trial Chambers of other International Tribunals have not found themselves fettered by the lack of formal rules on this issue. In *Delalic,* prior to the amendment to the Rules of Procedure and Evidence that introduced ICTY Rule 84*bis,* the Trial Chamber overruled the Prosecutor's objections, and allowed Mr. Delalic to give an unsworn statement from the dock, albeit limited to mitigation.[6] Further, in *Blagojevic,* the Trial Chamber expanded the scope of the now present ICTY Rule 84*bis,* and allowed unsworn statements *at any time,* subject to the control of the Trial Chamber, but properly ruled that an unsworn statement "generally will carry les weight than the testimony given under oath that is subject to cross-examination and inquiry from the Trial Chamber".[7] As the Trial Chamber articulated:

> "While under the exact language of the rules, an unsworn statement is generally made after the opening statement of the Parties, the Trial Chamber does not find any reason to deny you the opportunity to make an unsworn statement at a later time."[8]

6. National systems are no strangers to unsworn statements from accused persons either. Reference to such comparative law systems may also provide, in the Defence submission, further persuasive guidance to the Special Court on this issue. In the United States of America, for example, both the State of Massachusetts[9] and the U.S. Code of Military Justice[10] still allow for unsworn statements. Although abolished in England, the practice

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[5] According to David Scheffer, in his April 2006 *Memorandum on the Application of International Standards of Due Process by the Extraordinary Chambers in the Courts of Cambodia,* "while there is no international standard of due process for the requiring the admission on unsworn statements, there is sufficient practice at the ICTY and in the legal framework of the ICC to consider the value of such evidence for the Extraordinary Chambers and to make provisions for them in the [Extraordinary Chambers] RPE."
[6] *See Prosecutor v. Delalic,* ICTY Case No. IT-96-21, Trial Transcript, 13 and 14 October 1998.
[7] *Prosecutor v. Blagojevic and Jokic,* ICTY Case No. IT-02-60-T, Decision on Blagojevic's Oral Request, 30 July 2004, para. 21.
[8] *Ibid.*
[9] *Commonwealth v. Stewart,* 255 Mass. 9 (March 1, 1926) [Annex A]
[10] 57 Corpus Juris Secundum, Military Justice, Section 401, updated April 2007. [Annex B],

survives in most commonwealth jurisdictions.[11] The abolition of the practice in the English system, in 1982, was prompted by the lack of evidentiary value attached to unsworn statements, but the continued practice of allowing unsworn statements in support of mitigation indicates that it was not a blanket abolition.[12] In civil law jurisdictions, an accused can make an unsworn statement at any time in the proceedings.

V. Allowing Mr. Taylor to Give an Unsworn Statement from the Dock is in the Interests of Justice

7. Notwithstanding the absence of an explicit rule governing unsworn statements, it is in the interests of justice[13] to allow Mr. Taylor to give an unsworn statement from the dock subsequent to the Prosecutor's opening statement on 4 June 2007. Mr. Taylor, in custody for more than a year, has refrained from making public statements on the merits of the allegations against him. He has, despite repeated and numerous requests, declined press conferences and interviews from the world's media. In the same period, both the Prosecutor, and indeed the former Prosecutor, have left their media imprint across West Africa, Europe and North America, speaking directly and sometimes highly prejudicially to the merits or context of the case. The Defence submit that such a disparity of public statements and comments is unfair and inequitable. The courtroom remains Mr. Taylor's preferred forum to offer his voice to the one-sided narrative so far presented.

8. Mr. Taylor's unsworn statement will, it is submitted, not prejudice a fair minded Prosecutor diligently pursuing his mandate in the least. Given the schedule presented at the Pre-Trial Conference on 7 May 2007, there are five and three quarter hours, excluding breaks, available to the court on 4 June 2007, a Monday.[14] The Prosecutor envisions using four hours

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[11] *See also* Indian Code of Criminal Procedure, Section 313 (allowing accused to explain themselves without being under oath) [Annex C]; Geoffery Bennet, *Wrongful Conviction, Lawyer Incompetence and English Law – Some Recent Themes*, 42 BRANDEIS L.J. 189 (Winter 2003/2004). [Annex E];

[12] Albert Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2663 (1996) [Annex D]. *See also Prosecutor v. Delalic*, ICTY Case No. IT-96-21, Trial Transcript, 13 October 1998, page 15920 (exchange between Howard Morrison QC and Senior Trial Attorney Neimann, in regard to the practice in England).

[13] In determining courtroom proceedings, the interests of justice remains a guiding principle of discretion, as expressed in the conditionality of the Special Court's Rule 84, which states, ". . . in the interests of justice."

[14] *Prosecutor v. Taylor*, SCSL-2003-01-PT, Pre-Trial Conference Transcript, 7 May 2007, pp. 33-36.

of that time.[15] Thus, there is sufficient time available for the Trial Chamber to permit Mr. Taylor to give an unsworn statement from the dock, for no more than one hour. It is submitted that such an order would cause absolutely no disruption to the Court schedule, and would be in the interests of justice.

9. In addition, the Chamber retains the right to give Mr. Taylor's unsworn statement less weight than any testimony that is given under oath, if it considers that appropriate.[16] As such, the inability to cross-examine immediately after the statement from the dock will not hamper the Prosecutor's presentation of their case in the least. In the event that the Accused is required to call a defence, and decides to give evidence under oath at that stage, he may be cross-examined on all statements (including the unsworn statement from the dock) by the Prosecutor at that point. In addition, permitting the requested motion will give the Prosecutor the additional advantage of being able to seek leave to bring additional evidence in its case in chief, in the unlikely event that it feels compelled to rebut any unsworn statement from Mr. Taylor. This would also lead to more organised and more efficient court proceedings in the Defence submission.

10. For these reasons, the Defence submit that there is simply no prejudice to the Prosecutor in the Accused being granted leave to make an unsworn statement from the dock. Further, such unsworn statements are not prohibited in most national jurisdictions or in the majority of international tribunals.

VI. Conclusion

11. It is within the Chamber's discretion, and in the interests of justice, to allow Mr. Taylor to give an unsworn statement from the dock. The Special Court's Rules do not proscribe unsworn statements, and the ICTY and the ICC unequivocally allow for an unsworn statement from the dock at this stage. The practice of national jurisdictions is similarly persuasive.

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[15] *Ibid.* pp. 39.
[16] *See* SCSL Rule 89(B), *see also Prosecutor v. Blagojevic and Jokic,* ICTY Case No. IT-02-60-T, Decision on Blagojevic's Oral Request, 30 July 2004, para. 21.

12. Mr. Taylor would be stifled for far too long, and far too unfairly, if he is not allowed to give an unsworn statement subsequent to the Prosecutor's opening statement. Given the gravity of the allegations, an accused must, in the respectful submission of the Defence, be allowed to state his position, prior to the presentation of evidence, in open court should he request it.

13. Consequently, the Defence hereby request the Chamber to:

i) Order expedited filings of the response, if any, and subsequent replies to this Motion; and
ii) Grant Mr. Taylor leave to give an unsworn statement from the dock, lasting not more than an hour, subsequent to the Prosecutor's opening statement, on 4 June 2007.

Respectfully submitted,

Karim A. A. Khan

Lead Counsel for Mr. Charles Taylor

Dated this 18th Day of May 2007

Table of Authorities

Special Court for Sierra Leone

Prosecutor v. Taylor, SCSL-03-01-PT-226, Decision on Defence Motion Requesting Reconsideration of "Joint Decision on Defence Motions on Adequate Facilities and Adequate Time for the Preparation of Mr. Taylor's Defence," dated 23 January 2007, 25 April 2007.

Prosecutor v. Taylor, SCSL-2003-01-PT, Pre-Trial Conference Transcript, 7 May 2007. Online: http://scsl-server/sc-sl/new/Transcripts/Taylor/TAY07MAY07_MD.pdf.

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Comparative Law

Commonwealth v. Stewart, 255 Mass. 9 (March 1, 1926). [Annex A]

57 Corpus Juris Secundum, Military Justice, Section 401, updated April 2007. [Annex B]

Indian Code of Criminal Procedure (1973), Section 313. [Annex C]

Academic Articles

Albert Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent,* 94 MICH. L. REV. 2625 (1996). [Annex D]

David Scheffer, *Memorandum on the Application of International Standards of Due Process by the Extraordinary Chambers in the Courts of Cambodia,* Open Society Justice Initiative, April 2006. Online: http://www.justiceinitiative.org/db/resource2?res_id=103267.

Geoffery Bennet, Wrongful Conviction, Lawyer Incompetence and English Law – Some Recent Themes, 42 BRANDEIS L.J. 189 (Winter 2003/2004). [Annex E]

Annex A 9357

C
COMMONWEALTH v. STEWART
Mass. 1926

Supreme Judicial Court of Massachusetts, Middlesex.
COMMONWEALTH
v.
STEWART.
March 1, 1926.

Appeal from Superior Criminal Court, Middlesex County.

Richard Stewart, alias Frank Johnson, was found guilty of murder in the first degree, and he appeals. Judgment on the verdict.

1. Criminal law k474-Evidence of expert as to whether one of approximately 13 years had mental ability to plan act and could possess malice held competent.
In murder prosecution, where defendant introduced expert testimony that his mental level was around 12 years of age, evidence of expert for the commonwealth that one of approximately 13 years of age had mental ability to plan act and could possess malice was competent.

2. Criminal law k48-Criminal responsibility depends, not on mental age, but on whether defendant knows difference between right and wrong, understands his relations with others, and is able to perceive consequences of his acts.
Criminal responsibility does not depend on mental age of defendant, nor on question whether his mind is above or below that of the average normal man, but on question whether he knows difference between right and wrong, can understand his relation to others, and that which others bear to him, and has knowledge of the nature of his act, so as to perceive its consequences.

3. Criminal law k483-Question to expert as to whether one of approximately 13 years had mental ability to plan an act and could possess malice held not objectionable in form.
In murder prosecution, where defendant introduced expert testimony that his mental level was around 12 years of age, questions by commonwealth to its expert as to whether one of approximately 13 years had sufficient mentality to have evil motives or malice, or had ability to plan an act, *held* not objectionable in form.

4. Criminal law k554-Statement of prisoner to jury in homicide prosecution is not evidence (Declaration of Rights, art. 12; G. L. c. 233, s 20).
In view of Declaration of Rights, art. 12, and G. L. c. 233, s 20, statement or address of defendant in murder prosecution at close of arguments, and before the charge, is not evidence, but may be considered by jury for its worth in light of all conditions under which it is given.

5. Criminal law k786(5)-Charge that jury must differentiate between sworn testimony and defendant's statement not under oath was proper.
In murder prosecution, where defendant, at close of arguments, and before charge, availed himself of privilege to address jury, charge that his statement was not evidence, and that in considering case jury must differentiate between sworn testimony and his statement not under oath, was proper.

***12** J. H. Gilbride, of Lowell, for appellant.
R. T. Bushnell, Asst. Dist. Atty., of Boston, for the Commonwealth.
RUGG, C. J.
This is an indictment on which the defendant has been found guilty of murder in the first degree. The case comes before us under the practice established by St. 1925, c. 279.

The defendant has been permitted to introduce the testimony of a person, who qualified as an expert, to the effect that from an examination it was his opinion that the mental level of the defendant 'would be somewhere around twelve ***13** years of age * * * that he was not insane nor feeble minded, but low-grade mental capacity, just above the feeble minded level.' This evidence was suffered to remain in the case notwithstanding a motion by the commonwealth that it be stricken out; but the jury were restricted by the court in their use of it in substance to the point whether the defendant was of sufficient mental capacity to have an evil motive for the killing and to hold that motive in his mind for any appreciable length of time. Neither the competency of that evidence nor the

correctness of this ruling need be considered. In this state of the case the commonwealth was permitted, subject to exception by the defendant, to ask of a qualified expert in mental diseases these questions, all of which were answered in the affirmative: Whether or not a person of the age of approximately thirteen years is of sufficient mentality to have evil motives or malice? Whether or not a person of the mental age of thirteen years has the mental ability to plan an act? Whether or not a person of the mental age of thirteen years has the power, the mental power, to premeditate, to plan an act? Whether or not, from your examination of this defendant, in your opinion he has a mentality sufficient to possess malice or evil motives?

It is plain that the posture of the case was such that the evidence thus introduced by the commonwealth was competent. It was in conformity to the true principle of law as to responsibility for homicidal conduct. The evidence had a tendency to show whether the defendant had capacity and reason sufficient to enable him to distinguish between right and wrong as to the act charged against him and to do that act with deliberately premeditated malice aforethought. Criminal responsibility does not depend upon the mental age of the defendant nor upon the question whether the mind of the prisoner is above or below that of the ideal or of the average or of the normal man, but upon the question whether the defendant knows the difference between right and wrong, can understand the relation which he bears to others and which others bear to him, and has knowledge of the nature of his act so as to be able to perceive its true character and consequences to himself and to others. All this is amplified ***14** in Commonwealth v. Rogers, 7 Metc. 500, 41 Am. Dec. 458, which constantly has been followed in this commonwealth. Commonwealth v. Johnson, 74 N. E. 939, 188 Mass. 382; Commonwealth v. Cooper, 106 N. E. 545, 219 Mass. 1; People v. Schmidt, 110 N. E. 945, 216 N. Y. 324, 332, 336, L. R. A. 1916D, 519, Ann. Cas. 1916A, 978.

In view of the evidence introduced by the defendant, the questions were not objectionable in form. It was not necessary to frame them with hypothetical qualifications and circumstances. Without impairing in the slightest degree all that is said in Commonwealth v. Russ, 122 N. E. 176, 232 Mass. 58, 73-76, it is enough to decide that there was no error in the admission of the several questions to which exception was saved. No point has been made of the difference between 'around twelve years' and 'thirteen years' in the testimony of the two expert witnesses and no importance is attached to it.

At the close of the arguments of counsel and before the charge, the defendant, who had not taken the stand as a witness, availed himself of the privilege accorded him by the court and addressed the jury briefly, in substance saying that he did not plan to kill the deceased and that having been drinking he did not know what he did. The jury were charged in effect, subject to exception by the defendant, that this statement by the prisoner was not evidence, and that in considering the case they must differentiate between sworn testimony and the statement not under oath; and that the statement could be regarded only as pointing out those matters which the defendant wished to bring strongly to the attention of the jury; and that, although not evidence, what he said could and ought to be considered as a statement of the defendant of what he claimed to be the facts in the case. The question is thus raised as to the nature of such a statement made by a prisoner upon his trial charged with murder and the consideration to be given it by the jury.

This question, so far as we are aware, has never been presented for decision in the official reports of this commonwealth. References to the subject in our reports are rather meager.

It was said in Commonwealth v. McConnell, 39 N. E. 107, 108, 162 Mass. 499, at 501, decided in 1895: 'In prosecutions for high treason***15** in England, and in capital trials here, it has been the practice to allow the prisoner, at some stage of the trial, to make to the jury such a statement as he might choose. * * * In capital trials in this commonwealth a somewhat similar practice has prevailed, and it is not modified or abandoned in cases where the prisoner avails himself of his right to give testimony in his own behalf. But the practice as to the time of the statement has been uniform, and the proper time is after the arguments of both counsel, and immediately before the charge to

the jury.'

In Commonwealth v. Burrough, 39 N. E. 184, 162 Mass. 513, where the defendant was on trial for a felony less than homicide, it was said:
'The defendant had no right, without being sworn as a witness, to make a narrative statement to the jury, or to tell them his side of the story. * * * The refusal of the court to permit him to make any statement to the jury except by way of argument, unless he was first sworn as a witness in his own behalf, was correct, as was the final exclusion of his proposed statement when he declined either to be sworn or to agrue the case.'

By way of illustration reference was made in Commonwealth v. Dascalakis, 140 N. E. 470, 479, 246 Mass. 12, at 32, to the fact that in 'capital cases at the appropriate time the defendant has a right to make an unsworn statement to the jury.'

It is said in 1 Wigmore on Evidence (2d Ed.) § 579, that it became 'customary in England to allow the accused to made a 'statement' to the jury, i. e., to tell his story, not on oath and not as a witness, but in the guise of an address or argument on the testimony and the whole case.'

The practice in the English courts, as to the weight to be given to the statement of the defendant and the time during the trial for it to be offered, appears not to have been uniform. Reg. v. Beard, 8 C. & P. 142; The Queen v. Manzano, 2 F. & F. 64; Reg. v. Malings, 8 C. & P. 242; Reg. v. Shimmin, 15 Cox. C. C. 122, 123, 124; Rex v. Sherriff, 20 Cox. C. C. 334; Trial of Thistlewood, 33 How. State Trials, 682, 894; Trial of Ings, Id. 958, 1107-1111. See for a review of English cases, Rex v. Krafchenko, 24 Manitoba, 652. It would not be profitable to review these decisions. The weight to be given to English decisions is much lessened by ***16** two circumstances. The first is that it was not until the Prisoners' Counsel Act of 1836, St. 6 and 7, Wm. IV, c. 114, § 1, that a defendant indicted for felony was allowed the benefit of argument by counsel. Before that time, as was said in Reg. v. Doherty, 16 Cox. C. C. 306, 309, 'the effect of that course was that a prisoner was obliged, in the nature of the case, to speak for himself.' The second circumstance is that it was not until the passage of the Criminal Evidence Act in 1898, St. 61 and 62, Vict. c. 36, § 1, that a person charged with crime was permitted to be a witness at his trial for the offense charged. Rex v. Pope, 18 T. L. R. 717. It is possible that these circumstances may have colored the views of various English judges.

This matter is governed by statute in several of the American states and for that reason it is not necessary to make a full examination of the decisions of other states.

Our practice has been established under different conditions. Without tracing the principle further than the adoption of the Constitution, it is plain that since 1780 'every subject' has had the right 'to be fully heard in his defense by himself, or his counsel, at his election.' Article 12 of the Declaration of Rights. Since 1866 defendants in capital as well as all other criminal proceedings have been permitted, at their own request but not otherwise, to be competent witnesses upon the trial of offenses with which they are charged. St. 1866, c. 260, now embodied in G. L. c. 233, § 20, third. Prior to the passage of that statute, the defendant in a capital case had no way of putting his personal views directly before the jury except by statement, even though under the Constitution he was guaranteed the right to be fully heard by himself or his counsel. Com. v. Marsh, 10 Pick. 57. See Trial of Jason Fairbank printed by Russell & Butler, in 1801, p. 11.

A careful examination has been made of the reports of capital trials in this commonwealth so far as available, beginning with that of the British soldiers following the Boston massacre in 1770. The earliest references to this subject which have come to our attention are in the first and second trials of John F. Knapp in 1830, reported by John W. Whitman.***17** At each trial the prisoner was asked if he wished to add anything to what his counsel had said and replied in the negative. No reference appears to have been made to this incident in the charge. The trial of John W. Webster was held in 1850 before the full court. The defendant of course was not, and could not under the law at that time, be called as a witness. At the conclusion of the closing argument by the Attorney General,

Chief Justice Shaw addressed the prisoner by name in these words:
'Before committing this cause to the jury, if you have anything to add to the arguments which have been urged on your behalf by your counsel, anything which you deem material to your defence by way of explaining or qualifying the evidence adduced against you, you are at liberty now to address it to the jury. I feel bound to say to you, however, that this is a privilege of which you may avail yourself or not, at your own discretion.' Report of the Case of John W. Webster by George Bemis, p. 449.

The defendant availed himself of the privilege thus accorded and delivered an address which occupied about fifteen minutes. No instruction appears to have been given to the jury touching the weight to be attached to this statement. Chief Justice Shaw in his charge made a single reference to the statement. Id. 485. The trial of James Dwight was held in 1874 before Chief Justice Gray and Mr. Justice Endicott. It is not reported, but from notes in handwriting it appears that the Chief Justice said to the defendant after a preliminary sentence or two:
'You are entitled by the law of the commonwealth to address the jury in person now after all the other arguments are finished. This is a matter, which is left solely to your choice. If you wish your counsel may confer with you about it; but it rests with you to determine; you are at liberty to address the jury if you see fit. If you should prefer to leave your case where it is now left by the address of your counsel, no inference can be made against you from your not availing yourself of this privilege. Therefore you are absolutely free to make an additional speech in your own behalf or to abstain from it as you think proper.'

The trial of James H. Costley was in 1874. From notes of that trial it appears that Mr. Justice Wells, in advising***18** the prisoner, referred to this matter as 'the privilege, after the evidence has been introduced and the counsel have made their arguments, to make any address or statement to the jury that he may wish to make.' In other cases the statement has been made to the prisoner, by justices of this court eminent for accuracy and learning, that he had the privilege 'to address the jury' in his own behalf. It is significant that in no trial in this commonwealth, so far as we know, has any expression been used indicating that the statement of a defendant has been treated as evidence. It has commonly been referred to as an address or statement. These recurrent forms of statement of the privilege in actual trials from judges of great reputation reaching back almost a century are of great significance in fixing the nature of such statement or address as being simply what those words indicate, and as not being evidence. The proceedings in Com. v. Coy, 32 N. E. 4, 157 Mass. 200, 211, 212, 217, are in accord.

So far as we have personal knowledge of the practice and so far as we are in any way informed as to the customs here prevalent, such a statement by a prisoner has never been regarded as evidence.

On reason it cannot be regarded as evidence. Before 1866, as already pointed out, a defendant in a criminal case was debarred from giving testimony at the trial. It would have been in direct contravention of that settled principle to have treated such address or statement as in the nature of evidence. The time when the statement or address is allowed is strongly indicative of its true nature. It comes after the evidence on both sides is closed. It is subsequent to arguments of counsel. It is not given under oath. It is not given by direct examination and is not subjected to the test of cross-examination. It is not open to the prosecuting officer to reply to it either by calling witnesses or by argument. The defendant now has ample means to protect himself from unjust accusation by offering himself as a witness and giving testimony in full as to the charge against him.

The privilege of making a statement or address is extended by the law out of its humane regard to the defendant charged with a capital offense. It has come down from a time when, ***19** by reason of the nonexistence of the rights of defendants to testify, there was much more reason for the extension of such a privilege than now, when the law affords to a defendant every opportunity to offer his own testimony as a witness.

It results from all these considerations that, under the practice and law as established by long usage in this commonwealth, the statement or address of a defend-

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ant in the circumstances here disclosed is not evidence. It is merely a statement or address to be considered by the jury for what it is worth in the light of all the conditions under which it is given. No finding can be founded by the jury on the strength of such a statement, but every finding essential to the verdict must rest upon evidence and testimony presented in the usual way and under customary safeguards as to competency and credibility.

This conclusion is in accord with Ford v. State, 34 Ark. 649, 659; State v. McCall, 4 Ala. 643, 39 Am. Dec. 314, and the well reasoned decision in Rex v. Perry, [1920] New Zealand, L. R. 21.

Judgment on the verdict.

Mass. 1926
Com. v. Stewart
255 Mass. 9, 151 N.E. 74, 44 A.L.R. 579

END OF DOCUMENT

Annex B 9362

Corpus Juris Secundum
Database updated April 2007

Military Justice
XX. Sentence and Punishment
A. General Considerations

References

§ 401. Unsworn statement by accused

West's Key Number Digest

West's Key Number Digest, Military Justice ⚿1308, 1309

In a court-martial sentencing proceeding, accused may make an unsworn statement, oral or written, in person or through counsel. Accused may not be cross-examined upon the statement, but the prosecution may rebut any statements of fact therein.

In a court-martial sentencing proceeding, accused may make an unsworn statement.[FN36] Thus, accused may attempt to set the record straight where the record does not present the picture that accused believes the sentencing authority should have.[FN37] However, the failure to accord accused an opportunity to make an unsworn statement is not a constitutional or jurisdictional error.[FN38] Accused should have full knowledge of the consequences of making an unsworn statement.[FN39]

Form of presentation.

The statement may be oral or written,[FN40] and may be made by accused personally or through counsel.[FN41] The judge may impose reasonable ground rules for its presentation.[FN42] Accused should not be required to give the statement from the counsel table rather than from the witness stand.[FN43] The statement may take the form of responses to questions posed by accused's counsel.[FN44]

Contents.

The statement must be relevant.[FN45] Accused may not use the statement to challenge the finding of guilt.[FN46]

Effect.

An unsworn statement is not evidence,[FN47] but is simply a means by which accused supplies information to the court in an effort to ameliorate his punishment.[FN48] The fact that the statement is unsworn affects its weight,[FN49] and the weight to be afforded the statement is within the discretion of the court.[FN50]

Cross-examination, rebuttal, and impeachment.

Accused may not be cross-examined upon an unsworn statement.[FN51] The prosecution may rebut any statements of facts therein,[FN52] but may not rebut anything else therein,[FN53] and may not introduce evidence seeking to impeach accused's credibility,[FN54] at least where accused does not incorporate his character for truth and veracity in the unsworn statement.[FN55] Various matters have been held not to be statements of fact.[FN56]

[FN36] AFCMR—U.S. v. Welch, 1 M.J. 1201.

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ACMR—U.S. v. Oxford, 23 M.J. 548, review denied 24 M.J. 346.

[FN37] AFCMR—U.S. v. Merrill, 25 M.J. 501, review denied 26 M.J. 40.

[FN38] NMCMR—U.S. v. Gagnon, 15 M.J. 1037.

[FN39] NMCMR—U.S. v. Gagnon, 15 M.J. 1037.

[FN40] AFCMR—U.S. v. Merrill, 25 M.J. 501, review denied 26 M.J. 40.

[FN41] AFCMR—U.S. v. Welch, 1 M.J. 1201.

[FN42] AFCMR—U.S. v. Welch, 1 M.J. 1201.

[FN43] AFCMR—U.S. v. Welch, 1 M.J. 1201.

[FN44] NCMR—U.S. v. Michael, 4 M.J. 905.

[FN45] ACMR—U.S. v. Oxford, 23 M.J. 548, review denied 24 M.J. 346.

[FN46] ACMR—U.S. v. Oxford, 23 M.J. 548, review denied 24 M.J. 346.

[FN47] AFCMR—U.S. v. Welch, 1 M.J. 1201.

ACMR—U.S. v. Smith, 23 M.J. 744, review denied 25 M.J. 213.

[FN48] AFCMR—U.S. v. Welch, 1 M.J. 1201.

[FN49] ACMR—U.S. v. Oxford, 23 M.J. 548, review denied 24 M.J. 346.

[FN50] ACMR—U.S. v. Cain, 5 M.J. 844.

[FN51] AFCMR—U.S. v. Suttles, 6 M.J. 921.

[FN52] CMA—U.S. v. Partyka, 30 M.J. 242.

NCMR—U.S. v. Shewmake, 6 M.J. 710.

NMCMR—U.S. v. Williams, 23 M.J. 582.

[FN53] CMA—U.S. v. Partyka, 30 M.J. 242.

[FN54] NCMR—U.S. v. Shewmake, 6 M.J. 710.

[FN55] NMCMR—U.S. v. Williams, 23 M.J. 582.

Matter not in issue

By making an unsworn statement which did not include any specific facts as to his truth and veracity, accused did not place that matter in issue, and thus military judge committed error when he permitted government to rebut unsworn statement with evidence of accused's bad reputation for truth and veracity at sentencing portion of trial.

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AFCMR—U.S. v. McCurry, 5 M.J. 502.

[FN56]

Blame and trauma

Even if accused's unsworn statement had placed most of the blame and trauma for victim of carnal knowledge on the victim's stepfather, that would not have been a statement of fact subject to rebuttal.

CMA—U.S. v. Partyka, 30 M.J. 242.

CJS MILITARY § 401

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CODE OF CRIMINAL PROCEDURE, 1973

CHAPTER XXIV : GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS

310. Local Inspection:- (1) Any judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay record a memorandum of any relevant facts observed at such inspection.

(2) Such memorandum shall form part of the record of the case and if the prosecutor, complainant or accused or any other party to the case, so desires, a copy of the memorandum shall be furnished to him free of cost.

311. Power to summon material witness, or examine Person Present:- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned, as a witness, or recall and re-examine any person already examined ; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

312. Expenses of complainants and witnesses:- Subject to any rules made by the State Government, any Criminal Court may, if it thinks fit, order payment, on the part of the Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry trial or other proceeding before such Court under this Code.

313. Power to examine the accused :--(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court -

(a) may, at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under Clause (b).

(2) No oath shall be administered to the accused when he is examined under sub-section (1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for, or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

Annex D
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Michigan Law Review
August, 1996

*2625 A PECULIAR PRIVILEGE IN HISTORICAL PERSPECTIVE: THE RIGHT TO REMAIN SILENT

Albert W. Alschuler [FNa]

I. INTRODUCTION: TWO VIEWS OF THE PRIVILEGE AGAINST SELF- INCRIMINATION

Supreme Court decisions have vacillated between two incompatible readings of the Fifth Amendment guarantee that no person "shall be compelled in any criminal case to be a witness against himself." [FN1] The Court sometimes sees this language as affording defendants and suspects a right to remain silent. This interpretation - a view that countless repetitions of the Miranda warnings have impressed upon the public - asserts that government officials have no legitimate claim to testimonial evidence tending to incriminate the person who possesses it. Although officials need not encourage a suspect to remain silent, they must remain at least neutral toward her decision not to speak. In the Supreme Court's words, " T he privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will.' " [FN2] He must have a " 'free choice to admit, to deny, or to refuse to answer.' " [FN3] The Fifth Amendment ***2626** dictates an "accusatorial system," one requiring "the government in its contest with the individual to shoulder the entire load." [FN4] On this view, the concept of waiving the privilege seems unproblematic; one might waive a right to remain silent for many plausible reasons.

On the Court's second interpretation, the Self- Incrimination Clause does not protect an accused's ability to remain silent but instead protects him only from improper methods of interrogation. [FN5] This second interpretation emphasizes the word "compelled," a word that appears upon first reading to express the Self- Incrimination Clause's core concept. In ordinary usage, compulsion does not encompass all forms of persuasion. A person can influence another's choice without compelling it; to do so she need only keep her persuasion within appropriate bounds of civility, fairness, and honesty. Compulsion is an open- ended concept encompassing only improper persuasive techniques. [FN6] On this ***2627** view of the self- incrimination privilege, the concept of waiver of the privilege becomes paradoxical. Although a defendant or suspect might sensibly waive a right to remain silent, few sane adults would waive a right to be free of compulsion. [FN7]

The two opposing interpretations of privilege advance different interests, [FN8] but the practical difference between them may not be enormous. Like affording a right to silence, forbidding improper means of interrogation protects against torture, other abusive interrogation techniques, and imprisoning someone for refusing to incriminate herself. The clash between the two interpretations centers mostly on whether a fact finder may appropriately treat the refusal of a suspect or defendant to speak as one indication of her guilt. Griffin v. California, [FN9] in which the Supreme Court held that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the ***2628** court that such silence is evidence of guilt," [FN10] focused the choice between the two competing interpretations more sharply than any other Supreme Court decision has.

Justice Douglas's majority opinion in Griffin invoked the language of unconstitutional conditions, declaring that comment "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by

* because this document is over 30 pgs, some pages have been omitted.

witnesses in common law courts were permitted to decline to answer any questions that could lead to criminal punishment or forfeiture. [FN131] Once a witness was sworn, he was subject to compulsion, and his only protection lay in the ability to decline to answer specific questions. The protection of common law defendants, by contrast, lay in not being sworn at all.

Eben Moglen offers persuasive evidence that American courts did not view the answers of unsworn defendants in the same light as those of sworn witnesses. [FN132] Following ratification of the Fifth Amendment, some American lawyers began to object on nonconstitutional grounds to the pretrial interrogation of defendants by justices of the peace. These lawyers noted that, although American law generally incorporated the common law of England, it did not, in the absence of legislative provision to the contrary, incorporate English statutory law. Because the pretrial examination of defendants was authorized by a statute, the Marian Committal Statute of 1555, the lawyers contended that American law did not allow this procedure.

Neither the lawyers nor the commentators who advanced this argument supplemented it with a claim that the pretrial examination of suspects violated either the Fifth Amendment privilege against self- incrimination or the similar provisions of state constitutions. If anyone had thought that the Constitution guaranteed a right to remain silent or ***2660** that "accused speaks" procedures were inconsistent with the privilege, this would have been the occasion to say so. During three decades of debate over whether the Marian Committal Statute was a Parliamentary innovation or merely declarative of the common law, however, no one did. Even the opponents of "accused speaks" procedures did not consider them inconsistent with the constitutional privilege against self- incrimination.

C. You Have a Right to Remain Silent

The transformation of the privilege into a right of criminal defendants to remain silent occurred only during the nineteenth century. Lawyerization of the trial contributed to a changed ideology of criminal procedure - one in which the dignity of defendants lay not in their ability to tell their stories fully, but rather in their ability to remain passive, to proclaim to the prosecutor "Thou sayest," and to force the state to shoulder the entire load. As defendants participated less in the proceedings that determined their fate, they were seen more as objects or as targets of the coercive forces of the state.

In Parliamentary debates of the 1820s and 1830s, reformers complained that "accused speaks" procedures often worked unfairly. Many defendants were not sufficiently educated and articulate to tell their stories coherently. The remedy that the reformers sought, however, was not the declaration of a right to remain silent; instead, they proposed giving defense attorneys the power to argue on the defendants' behalf before juries. The expansion of the role of counsel which they secured in 1836 permitted defendants to take a still more passive role at trial and contributed to the rapidly changing ideology of English procedure. [FN133]

An 1838 opinion declared that " [a] prisoner is not to be entrapped into making any statement" and that a magistrate should advise this suspect before taking his statement "that what he thinks fit to say will be taken down, and may be used against him on his trial." [FN134] A clearer doctrinal recognition of the right to remain silent came ten years later in Sir John Jervis's Act. This Act provided that, before the pretrial examination, the accused should be cautioned that he need not answer and that if he did answer, his answers could be used against him at trial. [FN135] In New York City, magistrates began routinely to caution defendants in ***2661** 1835, the number of defendants who declined to submit to pretrial interrogation increased thereafter. [FN136]

A more significant doctrinal development than the magistrates' cautioning of suspects was the abolition of the testimonial disqualification of defendants. In 1864 Maine became the first American jurisdiction to allow defendants to offer sworn testimony in criminal cases, [FN137] and other states quickly followed. The British Parliament, a latecomer to the movement, enacted its competency statute in 1898. [FN138] By the end of the nineteenth century, Georgia was the only American state to retain the common law disqualification. It did not permit defendants to offer

sworn testimony until 1962. [FN139]

The statutes that ended the testimonial disqualification of defendants were controversial, and the controversy centered on constitutional issues. [FN140] Proponents maintained that defendants should have the same right as other witnesses to testify under oath and that the common law disqualification substituted a presumption of perjury for the presumption of innocence. [FN141] Opponents contended, however, that the statutes threatened the privilege against self- incrimination. [FN142] They argued that jurors would view the failure of a lawyer to call his client to the witness stand as a confession of the client's guilt and that the jurors would draw this inference regardless of whatever cautionary instructions they received. In practice, defendants would be pressed to take the oath; they would be subject to precisely the compulsion that state and federal constitutions condemned. [FN143] Many defendants, moreover, would respond by committing perjury. Sir James Stephen wrote, " I t is not in human nature to speak the truth under such pressure as would be brought to bear ***2662** on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion." [FN144]

In deference to constitutional concerns, most competency statutes, including the federal statute of 1878, [FN145] provided that the prosecutor could not comment on the failure of a defendant to testify and that no presumption against the defendant would arise from his failure to take the stand. [FN146] Some courts later suggested that the statutes would have been invalid without these provisions. [FN147] Placing defendants under oath ***2663** apparently was constitutional only because defendants were thought to have an unfettered option to decline to take the witness stand without suffering any consequence.

Some competency statutes expressly preserved the defendant's power to make an unsworn statement to the jury. Following the English Criminal Evidence Act of 1898, for example, defendants were allowed either to testify from the witness stand or to make an **unsworn statement** from the prisoner's **dock**. The sense that **unsworn statements** were worthless, however, led Parliament to abolish the option of speaking from the dock in 1982. [FN148] Most American jurisdictions had reached the same conclusion long before. Today, Massachusetts may still allow defendants to decide whether to offer sworn or unsworn statements, [FN149] but no other state gives defendants this option.

Following the enactment of competency statutes, the law in some jurisdictions technically might have been that, although jurors could draw no lawful inference from a defendant's failure to testify under oath, they could lawfully consider the defendant's failure to make an unsworn statement. [FN150] This distinction, however, was too thin to be maintained. When defendants, in practice, spoke only from the witness stand and when jurors were forbidden to draw an inference from their failure to take the stand, defendants had a right to remain silent at trial.

In 1965 Griffin v. California held that prosecutorial or judicial comment on a defendant's failure to testify violated the Fifth Amendment privilege. [FN151] The Framers of the Fifth Amendment, who might not have approved of sworn testimony by defendants at all, probably would have agreed that a defendant's refusal to submit to the compulsion of an oath could not be the subject of adverse comment. Griffin, however, forbade comment not simply on the refusal of a defendant to submit to an oath, but "on the accused's silence." [FN152] The Court offered no indication that refusal to submit to an oath might differ from any other form of silence, and one year after Griffin, the Court extended the right to remain silent to unsworn suspects in custody in Miranda v. Arizona. That the presence or absence of an oath might have made a difference seemed inconceivable in 1966. Because an unsworn statement made in ***2664** response to police interrogation would be used against a suspect at trial, it was the "functional equivalent" of testimony. The distinction between sworn and unsworn statements, central to the framers' understanding of what it meant to be compelled to testify, had disappeared.

In 1987 Rock v. Arkansas held that the Constitution guaranteed defendants a right to testify under oath [FN153] - a right the framers might have characterized as the right to be compelled. Turning the original understanding of the

constitutional privilege on its head, the Supreme Court declared, "The opportunity to testify is . . . a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." [FN154]

In the years since Miranda, Americans have seemed increasingly enamored of its accusatorial rhetoric, especially as they have learned that Miranda 's system for protecting the Fifth Amendment privilege has little practical effect. [FN155] During the Reagan administration, the Justice Department proposed abandoning Miranda, [FN156] but its proposal generated considerable criticism even among police administrators. [FN157]

England, by contrast, has reassessed the value of "testing the prosecution" trials. The Criminal Justice and Public Order Act of 1994 provides that, once an accused has been warned of the consequences of a failure to testify, "the court or jury . . . may draw such inferences as appear proper from the failure of the accused to give evidence." [FN158] In ***2665** addition, the Act invites jurors and judges to draw inferences from the pretrial silence of defendants. [FN159] The Act encourages suspects to cooperate with police investigations, to disclose defenses at the earliest opportunity, and to submit to cross-examination at trial, but its supporters contend that it is consistent with the privilege against self- incrimination because it does not treat a suspect's failure to speak as a crime or as contempt of court. [FN160]

The European Court of Human Rights will decide whether the 1994 Criminal Justice and Public Order Act violates England's obligation under the European Convention on Human Rights to give every defendant a fair trial. Past decisions make it doubtful that the Act will survive this scrutiny. [FN161] After centuries of self- congratulation by English judges and lawyers who have denigrated the "inquisitorial" practices of the European continent, continental judges may take ironic pleasure in denouncing England's "inquisitorial" procedure.

Eben Moglen observes, " [T]he history of the privilege reveals how procedure makes substance, and how legal evolution, like natural selection itself, adapts old structures to new functions." [FN162] More than the adaptation of old doctrines to new functions, however, the history of the privilege against self-incrimination seems to reveal the tyranny of slogans. Shorthand phrases have taken on lives of their own. [FN163] These phrases have eclipsed the goals of the doctrines that they purported to describe and even the texts that embodied these doctrines. The phrases and the images they evoked - what the phrases "sounded like" - shaped the law. Latin maxims declaring that "no one shall be compelled to betray himself" have sounded like the declaration that " no ***2666** one shall be compelled in any criminal case to be a witness against himself." The latter declaration has been summarized as "the privilege against self- incrimination" (a description not generally in use before the twentieth century [FN164] and one that omits all reference to the constitutional concept of compulsion). The "privilege against self-incrimination," in turn, has sounded like the "right to remain silent." Much of the history of the privilege has been a story of slippage from one doctrine to another without awareness of the change. Officials appear to have drifted from limiting the burdens of the religious obligation to confess in the interest of obtaining more confessions to condemning incriminating interrogation under oath without adequate evidentiary justification. They have drifted from condemning interrogation under oath without evidentiary justification to condemning torture and all incriminating interrogation of suspects under oath. The officials then have drifted to a judgment that the framers of all of the earlier doctrines unquestionably would have disapproved - that it is unfair to expect defendants on trial and people arrested on probable cause to participate actively in the criminal process by telling what they know. [FN165]

Linguistic confusion also may have affected historians of the privilege, and some of the apparent disagreement among them may have arisen from the ambiguity of phrases like "the privilege against self- incrimination." When scholars like John H. Wigmore have concluded that the privilege was in place in common law courts by the end of the seventeenth century, they have meant, mostly, that sworn witnesses in these courts could decline to answer questions on the ground that their answers would incriminate them. [FN166] When, however, scholars like John Langbein have maintained that the privilege did not come into effective existence until more than a century later, they

have meant, mostly, that until the nineteenth century unsworn criminal defendants were expected to answer questions both before trial and at trial.

It might be said that the historians have described two different privileges that arose centuries apart, each of them treated as "the" privilege ***2667** against self- incrimination. [FN167] Sworn witnesses were privileged not to answer incriminating questions by the end of the seventeenth century, and criminal defendants gained recognition of their right to remain silent approximately 150 years later.

IV. WHERE DO WE GO FROM HERE?

The history of the privilege against self- incrimination seems to pose its own "cruel trilemma" for American courts. One possible option for modern courts is to return to the original understanding of the Fifth Amendment with its strong distinction between sworn and unsworn statements. In our era, however, the fires of hell have smoldered. Oaths have lost their terror and even their meaning. Bruce Ackerman, moreover, has pointed to a number of "constitutional moments" that have effectively altered the Constitution without formal amendment. [FN168] The enactment of statutes ending the testimonial disqualification of defendants was, if not a constitutional moment, at least a constitutional nanosecond. In a very different world from that of the early American republic, restoring the original understanding of the Fifth Amendment privilege is impossible.

If the distinction between sworn and unsworn statements cannot be maintained today, two options remain. One is to treat sworn statements in the same way that eighteenth century English and American courts treated unsworn statements - by strongly encouraging them and by drawing adverse inferences when defendants fail to provide them. England, in effect, chose this option in the Criminal Justice and Public Order Act of 1994, which authorized judges and jurors to draw such adverse inferences in many situations. The second option is to treat unsworn statements in the same way that eighteenth century courts treated sworn statements - with wariness if not complete disapproval. At least on paper, the United States Supreme Court chose this option for defendants in custody in Miranda v. Arizona.

If the United States were now to follow England's lead, which seems extremely unlikely, it would treat sworn statements in the same manner that the framers of the Fifth Amendment treated unsworn statements. ***2668** Just as the framers expected defendants to speak at trial, courts would now expect them to testify. Griffin v. California would be overruled along with Miranda. The privilege would remain a safeguard against torture and other forms of coercive interrogation, although not against the coercion once thought inherent in the oath. As a concession to the past, courts might permit defendants to testify under oath but exempt their testimony from the penalties for perjury, confirming the de facto exemption that prosecutors usually provide in practice. [FN169] With the threat of secular penalties removed, the sworn statements of our era might be no more the product of compulsion than the unsworn statements of the founders' era, and treating today's sworn statements like the unsworn statements of the past might be the most accurate "translation" of the Framers' understanding. [FN170] This position might also be supported by reading the Fifth Amendment at the highest level of generality, by declaring that the word "compelled" invites each generation to determine for itself what interrogation methods are offensive, and by proclaiming that, in the final years of the twentieth century, requiring someone to swear to tell the truth does not seem very much like torture. [FN171] Still, one might be troubled by an interpretation of the Fifth Amendment that, in one very clear sense, would afford less protection to defendants than the Framers intended them to have.

The last alternative - treating unsworn statements by defendants in the same way that the Framers treated sworn statements - might bar sworn and unsworn statements from evidence altogether. At least it would require suspects to make unfettered waivers of the right to remain silent whenever they responded to official inquiry. It also would forbid fact finders from drawing adverse inferences from the failure of defendants to answer. This solution, the one that Miranda adopted for ***2669** suspects in police custody, is the worst alternative of all. It is likely to be honored more on paper than in practice, and if taken seriously, it would all but abandon defendants as an evidentiary resource. No

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Criminal Procedure Discussion Forum

*189 WRONGFUL CONVICTION, LAWYER INCOMPETENCE AND ENGLISH LAW--SOME RECENT THEMES

Geoffrey Bennett [FNa1]

I. The Contemporary Background

Viewed from a distance the outward appearances of the English Legal System might look reassuringly stable. In fact, nothing could be further from the case. During the last ten years almost every facet of the system, even the constitutional order, has been radically overhauled, or at least significantly modified. The whole system of civil procedure has been recast, after over a hundred years of relatively little major modification, in an attempt to simplify and expedite proceedings with a new emphasis on judicial case management. [FN1] Accepting a case on the basis of a contingency fee, once a reason for being professionally disciplined, has in the last four years become lawful and routine in certain types of cases. After some seven hundred years the powers of the House of Lords have been significant curtailed. [FN2] Perhaps most important of all, the Human Rights Act 1998, which has been effective from October 2, 2000, requires courts to take account of the European Convention on Human Rights in reaching their decisions. [FN3] It would be hard to overstate the importance of this all-pervasive measure. Although it had long been the object of criticism, the Act has almost certainly been a factor in the government's decision to abolish the office of Lord Chancellor, after some 1,400 years of existence, which is likely to require a major overhaul of many aspects of the legal system including, for example, the appointment of judges. [FN4] The 1998 Act predictably has had, ***190** and continues to have, a major impact in the area of criminal procedure. One recent example is the decision of the House of Lords to strip the Home Secretary of his power to set the tariff for those sentenced to life imprisonment. [FN5] This, in turn, seems to have increased tension between the legislature and the judiciary on the whole issue of sentencing. [FN6] Most recently, the Proceeds of Crime Act 2002 extends the draconian confiscation provisions which were already in place for drug related offences to offences generally. [FN7] This legislation introduces the entirely new concept of a 'criminal lifestyle' as part of the basis for confiscation and is almost certainly likely to be challenged under the Human Rights Act 1998. The climate is therefore one of pervasive change in many areas of law, [FN8] and this includes criminal procedure to a very significant degree. [FN9]

Against this background of change it is striking that the movement towards codification of the criminal law, substantive and procedural, has made no ground at all, and shows no sign of doing so. A basic reform which ought to reduce the risk of lawyer incompetence, amongst other things, is to ensure that ***191** the rules are at least as transparent and accessible as they can be made. Despite the fact that the Law Commission produced a draft criminal law code as far back as 1985 there seems no immediate likelihood that it will be implemented. [FN10] Perhaps even more surprising, there is not even a draft code of evidence despite the difficulty of applying principles spread out amongst a bewildering array of common law rules and statutes, many of which go back to the nineteenth century. Such reform as has been carried out has been entirely piecemeal and there is nothing to compare with the Uniform or Federal Rules of Evidence. [FN11] It will come as no surprise that there does not appear to be any interest, outside academic circles, for a codification of criminal procedure. As one commentator has observed, not only would there be significant advantages to codification, it would also be eminently feasible. [FN12] Amongst the reasons for reform are the fragmented state of the rules of criminal procedure, the difficulty this poses for anyone trying to discover what the rules are, and the contradictions which flow from the haphazard way different sets of rules are created, usually as a piecemeal response to a particular problem. [FN13] That ***192** something better could be achieved might be indicated by the way criminal procedure was rationalised in Scotland over twenty-five years ago by the Criminal Procedure (Scotland) Act 1975. [FN14] In 1995, a further Act consolidated subsequent legislation and still managed to be shorter than its predecessor. [FN15] If codification has proved to be so uncontroversially feasible in Scotland, is there any compelling reason why England could not achieve as much?

Against this general background issues of incompetent representation and miscarriage of justice have posed a number of different problems recently and elicited at least one major reform of the procedural structure, the institution of a Criminal Cases Review Commission. [FN16]

II. Ineffective Counsel

Some of the most egregious cases in recent times of a defendant being effectively deprived of legal representation have reached English courts on appeal from former colonies. For example, in Dunkley v. Regina, in the midst of a trial involving armed robbery and murder, counsel for the defendant indicated that he wished to withdraw from the case. [FN17] The judge said he could do as he pleased and told the defendant, "you are on your own. You will have to defend yourself," and continued the trial without even an adjournment. [FN18] The defendant was ultimately found guilty of what was a capital offence and his appeal eventually reached the Privy Council in London as, at that date, the final court of appeal from Jamaica. [FN19] It is perhaps not entirely surprising that the defendant's appeal was allowed. Where a defendant on a capital charge was left unrepresented through no fault of his own there should, it was said, normally be an adjournment to enable him to try and secure alternative representation. Even before that stage, a trial judge should seek to persuade counsel to remain or consider adjourning for a cooling-off period.

A less extreme and more difficult problem was posed in Sankar v. The State of Trinidad. [FN20] The defendant was charged with murder, his defence ***193** apparently being self-defence, provocation or accident. [FN21] Obviously establishing such a line of defence makes it almost inevitable that the defendant will have to give evidence. Towards the end of the prosecution's case a conversation took place between the defendant and his counsel in which "something" was said which caused counsel, as a matter of professional duty, to advise the appellant to remain silent. [FN22] As a result, defence counsel told the court that he would not be presenting a defence and that if the jury accepted the prosecution's case they should find him guilty. [FN23] The defendant was convicted and sentenced to death. His main contention on appeal was that counsel's decision not to call him had deprived him of a fair trial. [FN24]

The Privy Council again agreed and allowed the appeal. [FN25] Where defence counsel was told something by his client which embarrassed his further conduct of the trial he should investigate the matter fully, explain the options and if necessary seek an adjournment for that purpose. Counsel here had not fulfilled his duty to explain how important it was in such a case for the defendant to give evidence. In reality the defendant had been deprived of the opportunity to decide whether or not he should give evidence or at least make a statement from the dock. [FN26] Had he decided to do so it was almost certain that the various defences would have been left to the jury with the possibility that the jury would have acquitted him.

***194** In fact, allegations of lawyer incompetence in the course of the trial seem to have been comparatively rare in England. Compared to the United States, with its Sixth Amendment protection, English Law seems to contain relatively few cases where the competence of counsel has received exhaustive consideration at the appellate level. There is nothing to compare with the detailed analysis of the problem by the U.S. Supreme Court in for example, Strickland v. Washington [FN27] and United States v. Cronic. [FN28] Those cases, it might be thought, effectively suggested that there was a strong presumption that the challenged conduct by counsel might have been sound trial strategy and the defendant needed to make a colourable showing of innocence. The English case of Regina v. Ensor certainly pointed in that direction in so far as it suggests that it is a plea where the defendant has a considerable burden to discharge to have any prospects of success. [FN29] The basis for the claim in this case arose from the fact that the defendant faced two charges of rape based upon different incidents with different victims. [FN30] It seems that the defendant made known his wish that the counts be severed and it seems likely that such an application might have been granted. The Court of Appeal was also willing to assume, for the sake of argument, that if the indictment had been severed the defendant's chances of acquittal would have been improved. [FN31] Nevertheless, apparently after considering the matter carefully, defence counsel declined to make such an application. [FN32] He had formed the view that the delay in complaint being made in the first charge of rape might well dispose the jury to acquit on that count. [FN33] Since the evidence on the second count was, if anything, weaker they might well go on to acquit on both charges. Lord Lane, giving the judgment of the court, cited with approval a statement of Justice Taylor that "it should clearly be understood that if defending counsel in the course of his conduct of the case makes a decision, or takes a course which later appears to have been mistaken or unwise, that generally speaking has never been regarded as a proper ground for appeal." [FN34]

That statement was said to be subject to the qualification that the conviction should be quashed if the court had any lurking doubt that the appellant had ***195** suffered some injustice as a result of, "flagrantly incompetent" representation by his advocate. [FN35] The problem with this test was that the standard was both vague and intended to be highly restrictive. [FN36]

In Regina v. Clinton, [FN37] it was again made clear that the circumstances when a verdict will be overturned based wholly or substantially on the conduct of defence counsel are likely to be extremely rare. An example given of such a case might be where a decision not to call the defendant was taken in defiance of, or without, proper instructions. The case did, however, represent a development from Ensor in that, it was stated, the focus of the court's attention should always be, in the last resort, was the verdict safe or unsatisfactory. [FN38]

The latest case to consider the issue, Regina v. Nangle, [FN39] predictably shows the influence of the Human Rights Act 1998 on criminal procedure. [FN40] The Court of Appeal was clearly of the view that the conduct of the case both by solicitors and counsel was in certain respects deficient, but without amounting to flagrant incompetence. The conviction was upheld but the importance of the case is that it appears firmly to shift the

inquiry from asking whether there has been flagrant incompetence to a consideration of the effect of counsel's behaviour on the overall fairness of the trial. [FN41]

***196** This seems an advance on the earlier cases, but the statements by the court are clearly dicta and it is curious how undeveloped English law appears to be in this area compared to American law. It seems probable that the case law currently being generated from Strasbourg will in future be the best place to seek guidance on how English courts are likely to deal with this issue. A recent case, which also seems to suggest that the "flagrant incompetence" test is too demanding, is Daud v. Portugal. [FN42] Here a defence lawyer had only three days to prepare for a complex fraud trial which resulted in the defendant receiving a nine-year prison sentence. [FN43] This was said to violate the applicant's right under Article 6(3) of the European Convention. [FN44]

III. Incompetence Outside the Trial

All of what has been said so far might, however, give a misleading and partial picture of lawyer incompetenceand its effect on the English criminal justice system. In particular, a number of recent and controversial changes have shifted back the point where legal advice becomes crucial. The investigative stage at the police station is now a point where a suspect may have to make crucial decisions which will have a major impact on the trial. The Court of Appeal has recently observed that, "the police interview and the trial are to be seen as part of a continuous process in which the suspect is engaged from the beginning." [FN45] There is scant recent empirical evidence, but it may be at this ***197** point that the indigent defendant is likely to be most prejudiced by incompetence, often perhaps in a way that will not come immediately to light, if at all.

The most important factor in this process is arguably the Conservative government's enactment of section 34 of the Criminal Justice and Public Order Act 1994. [FN46] This was passed as part of a number of measures designed to restrict the common law right to silence and enables adverse inferences to be drawn from an accused's failure to mention when questioned any fact later relied upon in his defence. [FN47] There are also provisions in sections 35-37 which similarly permit the drawing of adverse inferences from a defendant's failure to give evidence at trial, his failure to account for objects, substances or marks, or his failure to account for his presence at a particular place. [FN48]

Section 34 was a controversial measure then and now. Two Royal Commissions had rejected the government's proposals and there was opposition to them by the Bar Council, the Law Society and the Criminal Bar Association. [FN49] The then government nevertheless pressed ahead with the reforms which, as has happened in the past with criminal measures, had been previously enacted in Northern Ireland. [FN50] The obvious dilemma the provision poses for a suspect and their legal adviser is that a tightrope has to be walked ***198** between saying nothing, which might be the subject of adverse inferences, and saying too much, which may be incriminating or turn out to be embarrassing later. A very recent example of the difficulties posed for the courts in trying to resolve the difficulties posed by this provision is Regina v. Howell. [FN51] The suspect gave a "no comment" interview, apparently on the advice of his solicitor who was concerned that there was no written statement from the injured party. [FN52] The trial judge nevertheless gave a direction under section 34 of the 1994 Act that adverse inferences could be drawn. [FN53] The Court of Appeal affirmed the conviction. As they put it, "there must always be soundly based objective reasons for silence, sufficiently cogent and telling to weigh in the balance against the clear public interest in an account being given by the suspect to the police." [FN54] A defence solicitor's predictably cautious advice in waiting until a clearer picture had emerged of the alleged events was, at least on this occasion, not enough to protect his client from the clutches of section 34. An accused may have access to legal advice but can still be harmed if he fails correctly to second-guess the advice of his or her lawyer. At least where the suspect is genuinely relying on that advice, and not merely taking advantage of a self-serving excuse, difficult though it may sometimes be to draw that line, the present law is surely capable of putting an interviewee in an intolerable position.

Not surprisingly, in the brief time that it has been in force the section has generated a large amount of other highly technical case law, the general effect of which is to interpret narrowly, in favour of the defendant, provisions towards ***199** which a significant number of the judiciary seem deeply unsympathetic. [FN55] The sophistication of this case law now means that an evaluation of a lawyer's performance can become the subject of expert testimony, particularly since trial judges may have limited knowledge and experience of interrogation at a police station. [FN56] It has led to a body of cases which, for example, has excluded prosecution evidence on the grounds that it was obtained following incompetent legal advice. Examples of incompetence from the cases include failure to obtain adequate discovery from the police, failure to keep proper records and errors as to the law. Indeed, given that arguments from principle seem to have cut little ice in the debate over this provision, the most cogent reason for repealing section 34 may be that it is simply no longer cost-effective. [FN57] Ironically, a measure passed to increase conviction rates of the supposedly guilty has now become such a legal minefield, capable of generating hyper technical appeals, that it may now be having little or no effect in furthering the policy of the 1994 Act.

The evidence of whether suspects are receiving the often sophisticated legal advice now required is currently very incomplete. In the 1990's the Royal Commission on Criminal Justice found the standard of police station advice "disturbing". [FN58] Since then various initiatives have been taken by the Law Society and by the revision of the Codes of Practice for interrogation under the Police and Criminal Evidence Act 1984. [FN59] It therefore

seems probable that standards have been rising in this area but the flurry of research activity promoted by the last Royal Commission has not been maintained. Certainly a number of troubling cases have reached the courts in recent times [FN60] which gives cause for concern. The lack of cases, moreover, as often, may conceal a larger problem. In many comparatively minor cases the advice will not even be given by a solicitor, but by a legal executive, and it may be that this exemplifies the way in which a high profile figure able to command large legal resources is at a significant advantage in the English system over the indigent defendant. There ***200** is a case for some further empirical research to measure the effect, if any, of developments in the law and procedure over the last five years.

IV. Appeals and Reviews

The standard and scope of appellate review is another area where there is continuing change and development, deeply influenced both by the Human Rights Act 1998 and the establishment of the Criminal Cases Review Commission. In 1995 the criterion for review of a conviction was changed from 'unsafe and unsatisfactory' to merely "unsafe." [FN61] Although not intended to alter existing practice it was probably an ill-advised reform in that the concept of safety, without further definition or elucidation, was almost bound to cause difficulties. Soon afterwards the effect of the Human Rights Act 1998 was felt and again has influenced the policy of the court. What the recent cases do illustrate is a tension, which may not have been finally resolved, between what one might call the crime control and due process models of criminal procedure.

In Regina v. Chalkley [FN62] the defendants had been charged with conspiracy to rob. The defence made an application to exclude the evidence of tape recordings which the police had obtained by placing a listening device in the home of one of the defendants, but the judge rejected this application. [FN63] The defendants thereupon formed the view that any defence had been rendered hopeless and changed their pleas to guilty. [FN64] One of the issues raised was whether a defendant could appeal at all under these circumstances. [FN65] The court held that this was not a plea "founded upon" a ruling of the judge. [FN66] Even an erroneous ruling of law as to the admissibility of evidence did not necessarily mean that the conviction was not "safe." [FN67] The court also noted that the absence from the new test of the words "or unsatisfactory," and "material irregularity" meant that: "The court has no power under the substituted section 2(1) to allow an appeal if it does not think the conviction is unsafe but is dissatisfied in some other way with what went on at the trial." [FN68] The court ***201** clearly appreciated that this was a significant change in the way the court had previously interpreted its powers. [FN69] The result seemed to be that if a defendant pleaded guilty because of an incorrect ruling of law, which meant that an essential element of the offence was not proved, an appeal was possible. It might be otherwise if a plea amounts to an admission of the material facts but the plea has been made as a consequence of a wrong ruling as to admissibility of evidence. An appellate court, on this approach, might still have considered the conviction 'safe.' As was noted at the time, "It is illogical that trial courts should be required to exclude evidence, the admission of which would have no effect on the validity of any conviction which might result." [FN70]

The obvious problem with this approach is that it was, even at the time, difficult to reconcile with Article 6 of the European Convention which guarantees the right to a "fair" trial. [FN71] If evidence is wrongly admitted, how can a resulting conviction really be termed "fair"? The court's view that "procedural unfairness not resulting in unsafety of a conviction may be marked in some manner other than by quashing the conviction" [FN72] was ominous.

The subsequent case law has arguably shown a gradual retreat from this position. The problem of the relationship between the accuracy of a conviction and the fairness of the trial is strikingly illustrated by Regina v. Smith. [FN73] At the end of the prosecution's case the judge wrongly rejected a defence submission of no case to answer. [FN74] Perhaps rather unusually, the defendants nevertheless went on to be convicted. The issue, therefore, arose of whether the court should quash the conviction, or consider the evidence received after the wrongful rejection of a submission of no case. Although it is not completely clear if this is what happened in the case, the court poses the extreme instance of a submission being wrongly rejected but the defendant then being cross-examined into admitting his guilt. [FN75] What should the Court of Appeal then do? The answer given was that the appellate court should judge the position at the ***202** time when the submission was made. [FN76] Accordingly, the conviction is to be regarded as "unsafe" since the defendant was entitled in law to be acquitted at the halfway stage. To allow the trial to continue was said to be an abuse of process and fundamentally unfair.

What is also striking about the decision, apart from its confident brevity, is that it arguably departs from earlier authority [FN77] and betrays an approach much more in sympathy with respect for due process. Other cases confirmed this movement [FN78] but it still seems that not all convictions obtained where there has been some irregularity which would amount to unfairness under Article 6 of the European Convention are necessarily "unsafe" within the meaning of the Criminal Appeal Act 1968. The problem for the courts will be to decide what are the criteria for deciding when "unfairness" fatally compromises "safety." At least in Smith it is quite clear that, had the material irregularity not occurred, the jury could not possibly have returned a guilty verdict. The issue would simply never have been left to them.

The most recent significant contribution to this area, Regina v. Togher, takes a further step away from the approach taken in Chalkley, where the "safety" of the conviction seemed to have been considered irrespective of

the trial process which procured it. [FN79] As Lord Woolf puts it, "Applying the broader approach we consider that if a defendant has been denied a fair trail it will almost be inevitable that the conviction will be regarded as unsafe." [FN80] The problem remains of what sort of "unfairness" will be regarded as fatal to the safety of a conviction? It seems probable that, under the influence of the Human Rights Act 1998, some convictions which would previously have been upheld may now be quashed as "unfair." [FN81] In the somewhat later case of Regina v. Doubtfire, Lord Woolf adds that where a conviction resulted from a trial that was unfair under Article 6 of the European Convention, it would, "almost be inevitable" that it would qualify as "unsafe" under the Criminal Appeal Act 1968 the Court of Appeal appears to have applied Lord Woolf's dictum. [FN82]

***203** Clearly there is certain to be further case law in this area and there is considerable scope for elucidation of what, in concrete terms, constitutes unfairness in the course of a criminal trial. In some ways the law has arguably returned to a position close to that which existed before section 2(1) of the 1968 Act was allegedly simplified. It is doubtful, however, if this adequately accounts for what is happening. In large measure it is arguably the pervasive effect of incorporation of the European Convention which is a vital determinant of how English courts now approach problems in the criminal process.

V. Review After Appeal

One of the most significant developments in the criminal process has been the decision to set up a Criminal Cases Review Commission following the recommendations of the Royal Commission on Criminal Justice of 1993. Prior to this the Home Secretary did have a power to refer cases back to the Court of Appeal, [FN83] and indeed it was under this power that the convictions of the so-called Birmingham Six were reviewed. There was, however, a perception that various Home Secretaries were too reluctant to use this power and also perhaps that the whole procedure was insufficiently independent since the decision was made within the government bureaucracy of the Home Office. Accordingly the new Commission was set up. It has not less than eleven members, independent of government although appointed by the Crown. One third must be lawyers but part of the policy behind the new arrangements is that some are lay members, [FN84] albeit they are likely to have experience of the criminal justice system. Part of the reason for basing it in Birmingham is to mark its separation from and independence of central government.

Under section 9 of the Criminal Appeal Act 1995 The Commission has a broad power to refer any conviction to the Court of Appeal if they consider, "there is a real possibility that the conviction, verdict, finding or sentence would not be upheld." [FN85] It is not the intention in this article to consider and evaluate the detailed operation of this review mechanism, although it is generally regarded as having been a success. [FN86] It is tempting to think that an ***204** independent commission is likely to be much more willing to examine a claim of wrongful conviction than the executive or judiciary, both of whom may have a vested interest in maintaining the status quo. This might particularly be the case if lawyer incompetence is a strand in the case and/or that the conviction is not recent and for a serious offence.

Just one recent aspect of their work has raised new issues which may be worth noting because they involve consideration of controversial areas which loom large in the American literature, namely the death penalty and DNA evidence. A whole generation has grown up in the UK in belief that the execution of James Hanratty in 1962 for murder represented one of the last notorious miscarriages of justice before the abolition of the death penalty in 1965. Indeed, the aftermath of the case may well have accelerated that result. Part of the reason for the subsequent doubt was that it involved a violent murder and sexual assault by someone known previously only as a petty criminal. The crucial identification evidence was provided by the surviving female victim who had been shot. [FN87] The case was referred to the Court of Appeal by the Commission [FN88] some forty years after the event. In a detailed judgment the court demolished all 17 grounds of appeal and finally dismissed the appeal. [FN89] In particular they declared: "The DNA evidence made what was a strong case even stronger." [FN90] This was therefore a case where the new technique of DNA evidence served to confirm the correctness of a conviction. One of the legal issues nevertheless raised is what standard to apply to appellate review in such a case. Undoubtedly the overall trend has been to increase the procedural safeguards for the defendant so that convictions which might not even have been challenged in the past might today be reversed. This is not an entirely novel difficulty as the court had to deal with this issue in Regina v. Bentley where the trial had taken place in 1952. [FN91] In Regina v. Hanratty the court asserts that current standards of fairness should be applied regardless of when the trial took place but that non-compliance with rules which were not current at the time may need to be treated differently from the breach of rules which were in force at the date of the trial. [FN92] It also said that the question of whether a trial is so seriously flawed as to render the conviction unsafe because ***205** it fails today's minimum standards must be approached "in the round," taking account of all relevant circumstances. [FN93]

Quite what this standard means in its practical application to older cases is not entirely easy to divine. However, before totally discounting this supposed standard it is worth looking at how the court viewed this case. By contemporary standards there were procedural imperfections, in particular some material which would now have been made available to the defence was not. It seems probable that, had the conviction followed a trial held today, the appeal would have been allowed. Nevertheless in Hanratty the court was clearly of the view that any procedural shortcomings of that time fell far short of what would be required to render the conviction unsafe.

[FN94]
What is encouraging about this reference is that the independent Commission was willing to have a capital case reconsidered in a way that might well have been politically difficult to secure when, as in the past, the decision lay essentially with a branch of central government. But it also raises issues on how old cases are to be viewed that had not been previously fully addressed. It does at least, however, provide a way in which arguments about a capital case can be finally resolved, or at least as finally as the law can resolve anything. It may also show, as this case surely does, that not all claims relating to notorious miscarriages of justice turn out as people had expected. For obvious reasons, particularly the existence of the death penalty, it is understandable that debate in the United States is often cast in terms of wrongful conviction. In the United Kingdom the lack of such a penalty has perhaps helped encourage the approach in the literature to embrace not just issues of wrongful conviction but also a more general concern for inaccurate verdicts. The conviction of the guilty is also an important element in any rational scheme of criminal procedure.

[FNa1]. Notre Dame University, Director London Law Program.

[FN1]. Civil Procedure Act, 1997, c. 12 (Eng.); Civil Procedure Rules 1998. The legislation followed a report by Lord Woolf, Access to Justice: Final Report. A convenient summary can be found in Law Society's Gazette, Aug. 2 1996. The recommendations for more judicial intervention were influenced by perceptions of American practice.

[FN2]. Hereditary Peers are no longer entitled to vote in the House of Lords, House of Lords Act 1999, c. 34, and there are proposals for an elected chamber. A recent and helpful account of developments can be found in Dawn Oliver, Constitutional Reform in the UK (2003).

[FN3]. Human Rights Act, 1998, c. 12 (Eng.).

[FN4]. The unexpected timing of the announcement, which had involved little prior consultation, attracted criticism. It seems clear that the full implications of this decision remain to be worked out and will be the subject of further discussion. In the meantime, a new Lord Chancellor has been appointed to oversee the dismantling of the office. A large number of statutory provisions, reflecting the wide-ranging powers and responsibilities of the post, will need to be amended or recast to accommodate the new constitutional arrangements, whatever they turn out to be. See Richard Cornes, The UK Supreme Court, New L.J., July 4, 2002, at 1018-1019 (discussing the proposals for a new Supreme Court and reforming the appointment process for judges).

[FN5]. See R. (on the application of Anderson) v. Sec'y of State for the Home Dep't [2002] 3 W.L.R. 1800 (H.L.).

[FN6]. The consequences may be new legislation to restrict the discretion of judges, as is common in American jurisdictions. Lord Woolf, the current Lord Chief Justice, took the unusual step of publicly criticising this proposal in a debate in the House of Lords. He commented that sentencing, particularly in relation to murder, "should be removed from the political arena." "The present proposal will have the effect of increasing political involvement." Francis Gibb & Greg Hurst, Woolf Attacks Political Interference in Courts, The Times of London, June 17 2003, at 2.

[FN7]. Proceeds of Crime Act, 2002, c. 29 Part 2 (Eng.).

[FN8]. The Lord Chancellor is even considering abandoning the wearing of wigs in court. See Francis Gibb, Legal Bigwigs in Line for a Modern Makeover, The Times of London, May 9, 2003. It seems possible that they may be retained for criminal proceedings in the Crown Court. See id.

[FN9]. In two significant areas there is currently consideration of borrowing from the American Legal Sytem. See News, New L.J., June 20, 2003. The Home Secretary has announced proposals to introduce public prosecutors as a way to ensure that the criminal justice system serves its local community. See id. David Blunkett stated that such prosecutors would "command the sort of standing they do in the US." Id. at 935. There is also a limited pilot scheme for public defenders, but this is not expected to lead to a report on the operation of the scheme until 2004.

[FN10]. Law Commission, Codification of the Criminal Law: a report to the Law Commission, Law Com No. 143 (1985). There are numerous articles advocating its implementation. See, e.g., Glazebrook, Still No Code! English Criminal Law 1894-1994, in City University Centenary Lectures In Law 1 (1996); Lord Bingham of Cornhill, A Criminal Code: Must We Wait for Ever?, [1998] Crim. L.R. 694 (1998) (At the time of publishing this article Lord Bingham was the Lord Chief Justice of England, effectively the senior criminal judge. He is currently the senior judge in the House of Lords).

[FN11]. See, e.g., Evidence And Ossification, in City University Centenary Lectures In Law 47 (1996). The problem is perhaps more acute in the criminal field where the law of evidence tends to be more strictly applied. In R v Kearley, [1992] 2 W.L.R. 656 (H.L.), the House of Lords rejected as hearsay the evidence of 17 callers to a

suspected drug dealer seeking to place orders for drugs. Lord Griffiths thought "as a matter of common sense it is difficult to think of much more convincing evidence of his activity as a drug dealer than customers constantly ringing his flat to buy drugs and a stream of customers beating a path to his door for the same purpose." Id. at 659. He went on to say: "I believe that most laymen if told that the criminal law of evidence forbade them even to consider such evidence as we are debating in this appeal would reply, 'then the Law is an ass.'" Id. A different result would presumably have been reached under Federal Law. See Zenni v United States, 492 F. Supp. 464 (1980).

[FN12]. See J.R. Spencer, The Case for a Code of Criminal Procedure, [2000] Crim L.R. 519.

[FN13]. As Professor Spencer comments:

Because we never made the effort to set out all the rules of criminal procedure coherently between one set of covers, we never really see the system in the round. In consequence of this we never fully understand it, or appreciate what is happening to it - and the changes that we make are generally reactive ones, and sometimes ill thought out.

Id. at 526.

[FN14]. Criminal Procedure (Scotland) Act, 1975, c.21 (Sct.).

[FN15]. Criminal Procedure (Scotland) Act, 1995, c.46 (Sct.).

[FN16]. Set up by the Criminal Appeal Act, 1995, c.35 (Eng.)(discussed further below).

[FN17]. [1994] 3 W.L.R. 1124, 1128 (PC (Jam.)).

[FN18]. Id.

[FN19]. Id. at 1126.

[FN20]. [1995] 1 W.L.R. 194 (PC (Trin.)); See also the general discussion of this case in the context of the effect of an accused's failure to testify in All E.R. Rev 1995 pp 237-245.

[FN21]. There are obvious difficulties in such a comprehensive combination of defences. A rare discussion of the problem in English Law is Richard Gooderson, Defences in Double Harness, in Reshaping The Criminal Law 138 (Glazebrook ed. 1978). In addition, Sir Patrick Hastings in his Autobiography notes:

If ever it had been my lot to take a lady for a stray week-end, and at the conclusion of the entertainment I had decided to cut her into small pieces and place her in an unwanted suitcase I should unhesitatingly have placed my future in Norman's hands, [Lord Norman Burkett was a well-known and distinguished advocate] relying confidently upon his ability to satisfy a county jury (a) that I was not here, (b) that I had not cut up the lady, (c) and that if I had she thoroughly deserved it.

Sir Patrick Hastings, The Autobiography of Sir Patrick Hastings 130 (William Heineman LTD 1948).

[FN22]. Sankar, [1995] 1 W.L.R. at 196.

[FN23]. Id. at 197.

[FN24]. Id.

[FN25]. Id. at 194.

[FN26]. A statement from the dock is an unsworn statement made by the defendant from the dock, not subject to cross-examination. It was abolished in England in but survives in some Commonwealth jurisdictions.

[FN27]. 466 U.S. 668, 674 (1984).

[FN28]. 466 U.S. 648, 657 (1984).

[FN29]. [1989] 1 W.L.R. 497 (CA (Crim. Div.)).

[FN30]. Id.

[FN31]. Id. at 500.

[FN32]. Id.

[FN33]. Id.

[FN34]. Id. at 502 (citations omitted).

[FN35]. Id.

[FN36]. It was criticised in the standard criminal practitioner's work, John F. Archbold, Criminal Pleading, Evidence and Practice § 7-82 (P.J. Richardson et. al. eds., Sweet & Maxwell 2000) (1822), on the grounds that "there is no magic in any particular label. The issue for the Court of Appeal is whether or not the conviction is safe, not whether counsel was competent, incompetent or flagrantly incompetent." The current law on incompetent counsel in Archbold 2003 is set out in one page at 7-82, in a volume containing 2,718 pages.

[FN37]. [1993] 1 W.L.R. 1181 (CA (Crim. Div.)).

[FN38]. By virtue of the Criminal Appeal Act 1995 the test is now simply "safety." The "or unsatisfactory" clause was deleted, although it seems there was no intention to alter the law by this change. See J.C. Smith, The Criminal Appeal Act 1995: (1) Appeals Against Conviction [1995] Crim.L.R. 920 (1995).

[FN39]. [2001] Crim.L.R. 506 (2001).

[FN40]. The case was one of many decided after the Human Rights Act, 1998, c. 42 (Eng.), had been passed but before it came into force. In an unusual, if not unique, occurrence in English law the appellate courts in criminal cases often behaved as if the Act was in force. No doubt this was in part designed to prevent the matter being relitigated after the Act came into force on the ground that the court had not previously taken account of the European Convention on Human Rights, as the 1998 Act requires.

[FN41]. Article 6 of the European Convention requires that a defendant be afforded a 'fair trial' with effective legal assistance.

[FN42]. 4 BHRC 522 (1998).

[FN43]. Id at para. 21.

[FN44]. The court stated:

The court notes that the first officially assigned lawyer, before reporting sick, had not taken any steps as counsel for Mr Daud, who tried unsuccessfully to conduct his own defence. As to the second lawyer, whose appointment the applicant learned of only three days before the beginning of the trial at the Criminal Court, the court considers that she did not have the time she needed to study the file, visit he r client in prison if necessary and prepare his defence. The time between notification of the replacement of the lawyer (23 January) and the hearing (26 January) was too short for a serious, complex casein which there had been no judicial investigation and which led to a heavy sentence.

Id. at para 39.

[FN45]. In Regina v. Howell [2003] EWCA Crim 1, para 23 (CA (Crim. Div.)). This was described in the case as a "benign continuum". Id. at para. 24. See the discussion in, The Revised PACE Codes of Practice: A Further Step Towards Inquisitorialism, [2003] Crim. L.R. 355.

[FN46]. Criminal Justice and Public Order Act, 1994, c.33 (Eng.).

[FN47]. Section 34 states:

(1) Where in any proceedings against a person for an office, evidence is given that the accused -

(a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in those proceedings; or

(b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any such fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed,. . . .

(2)(d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.

Id. at § 34.

[FN48]. Id. at § 35-37.

[FN49]. In an entirely different context, it seems reminiscent of the support given to rules 413-415 of the Federal Rules of Evidence at about the same time. See Fed. R. Evid. 413-415.

[FN50]. Where the climate, both political and legal, is somewhat different from the mainland. A significant legal difference is the existence of so-called Diplock Courts where terrorist offences can be tried without a jury. There is no right otherwise in English law to request a bench trial, rather than trial by jury, for serious offences.

[FN51]. [2003] EWCA Crim 1 (CA (Crim Div)). A helpful summary and criticism of the case can also be found in Tom Rees & D.J. Birch, Evidence: Criminal Justice and Public Order Act 1994 S.34 - Silence of Defendant at Interview, [2003] Crim. L.R. 405, 405-408 (2003).

[FN52]. Howell, [2003] EWCA Crim 1 at para. 5. The difficulties of giving effective and appropriate advice when there is no signed statement from the complainant are set out in R. Brown, The Benign Continuum?, Arcbold News, Feb. 3 2003, at 7-8. The author, inter alia, makes the point that, "Experience has shown that a witness's first, formal, signed statement may be quite different in content from the allegation first made orally or in draft to the police. Solicitors are likely to encounter genuine difficulties if they are required to give constructive advice about s. 34 to clients in the absence of any evidence and having to rely on inadequate information of the allegation."

[FN53]. Id. at para. 9.

[FN54]. Id. at para. 24. The effect of the present law is summarized in A. Keogh, The right to silence - revisited again, New Law Journal, Vol. 153, at 1352-1353 (2003). The decision has been criticized as "mischievous," A. Choo & A. Jennings, Silence on legal advice revisited: R v. Howell, International Journal of Evidence & Proof, Vol. 7, No.3, at 185-190, (2003), but its correctness appears to have been recently affirmed by the dicta of Laws L.J. in R v Knight [2003] Crim. L. R. 799.

[FN55]. A strong argument for the current comparative ineffectiveness of Section 34 is to be found in Ian Dennis, Silence in the Police Station: the Marginalisation of Section 34, [2002] Crim.L.R. 25 (2002).

[FN56]. See Ed Cape, Incompetent Police Advice and the Exclusion of Evidence, [2002] Crim. L.R. 471, 483 (2002).

[FN57]. The argument is compellingly presented in Diane J. Birch, Suffering in Silence: A Cost-Benefit Analysis of Section 34 of the Criminal Justice and Public Order Act 1994, [1999] Crim.L.R. 769 (1999).

[FN58]. See, Cape, supra note 56, at 471 n. 2-4.

[FN59]. See Police and Criminal Evidence Act, 1984, c. 60 (Eng.)

[FN60]. See Cape, supra note 56.

[FN61]. See Smith, supra note 38.

[FN62]. [1998] 3 W.L.R. 146 (CA (Crim. Div.)).

[FN63]. Id. at 149.

[FN64]. Id.

[FN65]. Id.

[FN66]. Id. at 157.

[FN67]. Id.

[FN68]. Id. at 163.

[FN69]. It may be noteworthy that, at the date of the trial, the terms of the then Human Rights Bill had been

widely publicised and discussed. The subsequent case of Regina v. Kennedy also reflects this approach. See [1998] Crim.L.R. 739 (CA (Crim. Div.)).

[FN70]. Id. at 741.

[FN71]. Although at the date of the case the Convention was still technically an international treaty, not part of any domestically binding statute.

[FN72]. [1998] 2 All E.R. 155, 173b (CA (Crim. Div.)).

[FN73]. [2000] 1 All E.R. 263 (CA (Crim. Div.)).

[FN74]. Id. at 265.

[FN75]. Id. at 266.

[FN76]. Id.

[FN77]. Which might well have justified upholding the conviction in these circumstances. See Victor Tunkel, When safe convictions are unsafely quashed, 149 New L.J. 1089 (1999).

[FN78]. See Regina v. Davis [2000] Crim.L.R. 1012 (CA (Crim. Div.)).

[FN79]. [2001] 3 All E.R. 463 (CA (Crim. Div.)).

[FN80]. Id. at 473.

[FN81]. This seems to be the view of Professor Smith in his commentary on R. v. Doubtfire, [2001] Crim.L.R. 813, 815.

[FN82]. Id at 813.

[FN83]. Criminal Appeal Act, 1968, s.17 (Eng.).

[FN84]. Criminal Appeal Act 1995 s.8 (Eng.).

[FN85]. Id at s. 9.

[FN86]. A study which helps to provide the background to the need for such a body is, Clive Walker & Keir Starmer eds., Miscarriages of Justice, A Review of Justice in Error (1999). It is now, however, slightly out of date. An analysis of the Commission's performance in its early years can be found in A. James et al., The Criminal Cases Review Commission, [2000] Crim. L.R. 140. The Commission has a website which publishes their annual reports. See www.ccrc.gov.uk (last visited Oct. 7, 2003).

[FN87]. See Regina v. Hanratty, [2002] 3 All E.R. 534 (CA (Crim. Div.)).

[FN88]. Id.

[FN89]. Id. at 534-535.

[FN90]. Id. at 550.

[FN91]. [1999] Crim.L.R.330 (CA (Crim. Div.)).

[FN92]. [2002] 3 All E.R. at 543

[FN93]. Id.

[FN94]. See id.

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