The right to silence ill-considered

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This article responds to a defence of the right to silence attempted at a jurisprudential level by Professor Dennis Galligan. The author argues that there is no justification for a "substantive right to silence" and sets out to refute Galligan's detailed arguments. The discussion is illustrated by reference to the (English and Welsh) Police and Criminal Evidence Act 1984 but the issues and arguments are of general application.

In Puccini's *La Bohème* the inevitable death of the consumptive Mimi is a long, drawn-out and noisy affair. The equally inevitable death of the "right to silence" promises to be equally long, drawn-out and noisy.

We have long been used to the requirement for defendants to give notice of alibi defences though even that is fiercely resisted in some jurisdictions. Major inroads are now being made into the right to silence in the United Kingdom only 16 years since the Eleventh Report of the Criminal Law Revision Committee sank without trace because it recommended such steps. In New Zealand the powers of the Serious Fraud Office will include the power to examine. The place of the right to silence will inevitably fall to be considered in the course of the Law Commission's review of criminal procedure and investigation - a review which should result in some form of codified Police and Criminal Evidence Bill. The provisions of the (England and Wales) Police and Criminal Evidence Act 1984 (PACE) and decisions applying it have already been referred to by the Court of Appeal when they appear to reflect common law principles.[1] The Hon. Paul East MP has said in the context of the Serious Fraud Office Bill that the question of silence and self-incrimination should be reviewed generally and not just in respect of fraud;[2] while conversely the New Zealand Bill of Rights Act 1990 enshrines the right to silence in section 22(4).

In this context the arguments put forward by Professor Dennis Galligan in his essay "The Right to Silence Reconsidered"[3] assume topical and local interest. Galligan argues that the "right to silence" is a substantive right which is in need of protection and he focusses on the provisions of PACE. His argument is important and requires refutation.

Galligan begins by alleging that PACE may not recognise a right to silence per se but it does set up a group of rights for prisoners which appear to be clustered around an inarticulate right to silence. In order to test this thesis one would examine the Act

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1 Eg, *Webster* (1989) 4 CRNZ 123, 129.

2 *The Dominion* Wednesday 23 May 1990, p 2.

3 [1988] Current Legal Problems 69, bare page references below are to this article.

carefully in order to see if there is anything in the Act which in fact occupies the central space around which these "rights" are clustered. It is not long before one finds section 37 (2) which provides:

> If the custody officer determines that he does not have [sufficient evidence to charge immediately] before him, the person arrested shall be released either on bail or without bail, unless the custody officer has reasonable grounds for believing that his detention without being charged is necessary to secure or preserve evidence relating to an offence for which he is under arrest *or to obtain such evidence by questioning him.* (emphasis supplied).

It appears incoherent to suggest that giving police the power to detain a person in order to obtain evidence by questioning him is tantamount to recognising an inarticulate substantive right to silence. A far more satisfactory explanation is that the Act creates a power for the police to question prisoners which is hedged around with safeguards, as are the other powers in the Act. The question of whether the police should have power to arrest for this purpose remains to be decided as a matter of policy in New Zealand. The present law is ambiguous and the ambiguity is not resolved by the Bill of Rights Act's provision in s 22(2) that: "Everyone who is arrested for an offence has the right to be charged promptly or to be released."

Mr Justice Vincent of the Supreme Court of Victoria recognised that restrictions on the right to silence might give the police *de facto* power to arrest for the purposes of investigation. He stated (extra-judicially) that this power had been "deliberately and sensibly withheld".[4] This is not the place to enter into this argument; it suffices to point out that this position is more eccentric than Mr Justice Vincent and other Antipodeans seem to recognise.

By concentrating only upon the right of a prisoner to remain silent in the police station and ignoring court proceedings Galligan glosses over the problem of the "ambush defence". It must be remembered that we are not genuinely discussing a right to silence; no one is considering compelling speech in this context. What we are discussing is the privilege of not having one's silence commented upon in court. This may remain (to varying degrees depending upon the jurisdiction) even when the defendant in court elects to offer an explanation for his conduct which would, if true, have been available when he was questioned by the police. This is not a matter of the exercise of a "right" but simply of a tactic and is rationally indefensible.

Ronald Dworkin posited a fundamental right not to be convicted wrongfully of a criminal offence and Galligan tells us that the value of this right cannot be weighed against the problem of wrong acquittals.[5] This assertion, if it is to be relevant, must assume that ending the right to silence will somehow increase the number of wrongful convictions. The grounds for assuming this are not stated and in fact the claim by

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4 Vincent *The Right to Silence Revisited Again* 9th Commonwealth Law Conference (1990), Conference Papers, p 263.

5 P 72.

those who wish to end the right to silence is precisely that it will lead to greater accuracy in truth-finding and therefore reduce the number of wrong decisions of all sorts. Galligan claims that many features of the criminal trial make sense in the light of the assumption of a right not to be wrongfully convicted, "the presumption of innocence, the burden of proof on the prosecution, and the onus of proof of beyond reasonable doubt."[6] What the slogan "the presumption of innocence" actually *means* is elusive. Persons believed innocent ought not to be charged. It is sometimes said that the presumption simply means that the prosecution go first, but the presumption appears (contrary to English mythology) in article 6 of the European Convention on Human Rights and in the majority of States Parties the prosecution does not go first, in fact the interrogation of the accused by the judge is the central feature of a criminal trial. The best explanation is that the presumption of innocence is simply a restatement of the allocation of the burden of proof,[7] in which case Galligan is arguing by repetition.

In any case if there is a fundamental right not to be convicted of a criminal offence one has not committed it is a rather peculiar sort of right. This is because not only is it tacitly admitted that it is constantly violated, since no decision making system is perfect but there is no way of telling when it has been violated, since subsequent investigations are dogged by the same imperfections as the first. Nor does it even state an ideal to be pursued by the spending of resources as Dworkin suggests. The Warren Commission must have been the largest and most expensive criminal investigation in history and yet we still do not feel that we know the truth of the events surrounding the assassination of President Kennedy.

Besides it is not clear what conclusion is to be drawn from the assertion that there is a profound right not to be wrongfully convicted of a criminal offence. Two options present themselves. One is that the danger of wrongful conviction is so great that we should abandon the criminal process altogether. In his opaque references to "fundamental reform" of the investigation process Galligan certainly seems willing to countenance rendering it ineffective.[8] The other is that we should strive for greater rectitude of decision making. The protection of the accused is provided for by the standard of proof. The way to avoid wrongful convictions is to come to the most accurate possible assessment of probability of guilt and then consider whether this assessment reaches the standard of beyond reasonable doubt. The greatest barriers to accuracy of decision making however are those based on concepts of "due-process" stemming from "rights".

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6 Above n 5.

7 Cross *Evidence* (5 ed, Butterworths, London 1979) 122. Endorsed by Mathieson, 4th New Zealand edition, Butterworths Wellington, 1989, 97.

8 The most frightening of Galligan's proposals relates to the power of waiver of the right to silence. Waiver he says should be "reasonably informed and reasonably voluntary" (p 79). As he states, most suspects do talk. They frequently do so in vehicles on the way to the police station and/or while to varying extents under the influence of drink or drugs. All these statements would apparently become meat for argument over admissibility. If this concept were to be applied and then, because we are taking rights seriously, the "fruit of the poisoned tree" doctrine applied then it is submitted that the criminal process would become regarded by the public as a joke.

Into a discussion of rights Galligan inserts some empirical material. The great majority of prisoners, we are told, do answer questions and the great majority of those who refuse are convicted nonetheless. This fundamental right is therefore defended on the ground that it does not actually matter very much. The fact that the great majority of prisoners do answer questions is the converse of the often heard argument that ending the right to silence will force the weak and impressionable to talk. (This is not an argument for the right to silence it is an argument for *not allowing* the accused to speak.) Of course it is the weak and impressionable who talk already. Both these arguments are often advanced, sometimes in the same breath.[9] They are related to the questionable claim that Galligan goes on to make that in the vast majority of cases where the prisoner remains silent the lack of a confession is not "crucial" to the prosecution.

The first question raised by this claim is who decided in which cases a confession was not crucial? Not the Crown Prosecutor who had to convince a jury. The criticality of a confession may look very different depending upon whether the matter is viewed from the luxury of an academic surveyor's chair or from the prosecutor's seat after a crucial witness has failed to appear.

In any case this is all to miss the point. Galligan's claim that even in serious cases there is no problem of convicting without a confession equally misses the point. The point is not the seriousness of offences but the *nature* of certain offences created by Parliament which are practically impossible to convict absent a confession or the ability to draw inference's from the accused's silence. The question has also been raised in the context of the Serious Fraud Office of the very considerable expense which may be incurred to investigate quite simple matters which the accused could easily settle. This expense may be so great that it is sufficient in prospect to force abandonment of the investigation.

Another frequently heard argument for the right to silence is that alternative explanations may be drawn from someone's silence at the time of arrest. As far as it goes this is perfectly true. But all circumstantial evidence is capable of alternative explanations so juries are in the business of dealing with this problem every day. Furthermore the accused will get an opportunity to explain the reason for silence at the trial. Still, it may be true that it is difficult to know what inference to draw from the shocked silence of a newly arrested prisoner. This problem can be solved and Galligan offers the solution. He says that if we are to take this right seriously (which is not admitted) then we should apply resources and fundamentally reform procedures to protect

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9 It is of considerable assistance when defending the right to silence to be able to advance mutually contradictory arguments. For a different example see Heydon *Cases and Materials on Evidence* (2 ed, Butterworths London 1984) 171 where at the top of the page the author argues that the right to silence is an essential counterbalance for the individual to the enormous resources of the state ranged against him and at the bottom of the page that most wrong acquittals are due not to the right to silence but to lack of police resources.

it. This somewhat opaque comment presumably means that we should ensure that prisoners have access to legal advice and are questioned in proper conditions, perhaps with video recording and so forth. No one could argue with this. Of course it is precisely once a prisoner has had time to reflect and had access to legal advice that the strongest and most reliable inferences can be drawn, not only from a confession as Galligan himself admits, but also from his remaining silent.

So Galligan attacks the reliability approach by saying that it leads to the admission of confessions extracted by torture if they can be shown by external evidence to be true. It is not quite clear what this has to do with the reliability of inferences to be drawn from silence. Perhaps the claim is that reliability should be dropped as a test of all forms of evidence in which case Galligan is deserting the rational tradition which he himself identifies as the mainstream of Western thought.[10]

In any case as a representation of section 76 PACE this is just plain wrong. Section 76(1) prevents the introduction of evidence obtained by torture or inhuman and degrading treatment regardless of any question of reliability and section 76(2) prevents the admission of evidence obtained "by oppression...or in consequence of anything said or done which was likely ... to render unreliable any confession which might be made ... in consequence thereof." The question is not the assessable reliability of a confession but whether it was obtained in a manner likely to render it unreliable.

Galligan then claims that section 76(1) constitutes a defence of an underlying right to silence. Occam's razor applied to this argument brings one to the conclusion that the section merely defends a right to be free of the behaviour mentioned. In fact enactment of section 76(1) so far as torture is concerned is a requirement of article 15 of the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to which the United Kingdom and New Zealand are signatories. The prohibition on inhuman and degrading treatment reflects article 3 of the European Convention on Human Rights. Most other signatories to these Conventions would be amazed to be told that they were defending an underlying right to silence since it quite definitely does not exist in their legal systems.

It would likewise amaze them to be told that the right to silence is a concomitant of the right to privacy. The right to privacy is contained in article 8 of the European Convention, signed by numerous perfectly civilised countries who have never heard of the right to silence. The right to privacy is also contained in article 17 of the International Covenant on Civil and Political Rights to which New Zealand is a signatory. The Human Rights Committee set up by that Covenant has issued considered "General Comments" on the right to privacy in which the question of the right to silence receives no mention.[11]

Nor is it sensibly the case that the right to silence defends a right to a fair trial by guarding against forced confessions. Article 6 of the European Convention creates a

10 Galligan "More Scepticism about Scepticism" (1988) 8 O J L S 249, 264.
11 United Nations CCPR/C/21/Add.6 31 March 1988.

right to a fair trial but the framers did not think it necessary to include the right to silence. Section 76(1) PACE protects prisoners from forced confessions quite adequately without resort to any right to a fair trial. In fact it is equally arguable that it is precisely the inadmissibility of inferences drawn from silence which creates the perceived need to force confessions. In this connection Galligan also says that it is unfortunate that section 78 leaves open the question as to whether the expression "fairness of the proceedings" is limited to the trial proceedings or extends to pre-trial matters. It is submitted that the section does not leave the question open at all. There is a discretion to exclude evidence the *admission* of which would adversely affect the fairness of the proceedings. Since cause must precede effect the adverse effect on the fairness of the proceedings can only take place after the admission of the evidence, ie in court. Unfortunately the courts have, it is respectfully submitted, got it wrong in a line of cases starting with *Mason*,[12] a case in which police obtained a confession after falsely telling the accused's solicitor that there was fingerprint evidence. The Court of Appeal was obviously minded to exclude the evidence but unfortunately section 82(3) PACE, which preserves common law exclusions, was not argued to the court.[13]

The argument is even offered that the right to silence helps "to ensure that it is only confessions, freely and voluntarily made, which are admitted in evidence. On the assumption that such confessions are likely to be reliable...the right to silence serves as a filter of evidence."[14] Galligan also commends the High Court of Australia for "expressing voluntariness in terms of free will."[15] In fact the concept of voluntariness has been completely abandoned by PACE as meaningless. Psychologists indicated to the (UK) Royal Commission on Criminal Procedure that they could attend an interview with a suspect and not be able to state whether the confession was "voluntary". Pressure begins as soon as one is questioned by a police officer and increases throughout the process. One of the researchers for the Royal Commission opined that: "to remain silent requires abnormal exercise of will which the observer might think is connected with some powerful cause, eg guilt as opposed to innocence."[16] The only "freely and voluntarily made" confession would be one made by a person who spontaneously came to the police station and confessed to a crime. This sort of confession may be the most unreliable of all.

Galligan argues that the right to silence is part of our culture and a symbol of our relationship with the State. "[W]e should accept the unwritten constitution of the United Kingdom".[17] Does this mean that Professor Galligan is opposed to any change in the UK Constitution? This is surely off the point. Our relationship with the State

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12 [1987] 3 All ER 481.

13 This point is fully argued in Robertson "The Looking-Glass World of Section 78" (1989) 139 NLJ 1223 and Gelowitz "Section 78 of the Police and Criminal Evidence Act 1984: Middle Ground or No Man's Land?" (1990) 106 LQR 327.

14 P 86.

15 P 82.

16 *Royal Commission on Criminal Procedure Research Study No 2* (1980) HMSO London 153 (Irving).

17 P 85.

is determined by the powers the State and its agents have to question us and our rights are protected by the requirement that police officers and others have reasonable grounds to suspect an offence before they interfere in our lives. Once they have they have good reason to ask questions it is nonsense to suggest that it is an essential part of our relationship with the State that we may remain silent and not have inferences drawn from the fact. It did not help the unfortunates summoned before the House UnAmerican Activities Committee that they were able to fall back on the Fifth Amendment. The power to call them should never have existed in the first place and its existence was of far more consequence than the privilege against self-incrimination. Galligan believes that the ending of the right to silence would change the relationship between state and suspect "with the suspect being a source of valuable evidence."[18] But the suspect *is* in most cases a source of valuable evidence, whether this be in the form of confession, fingerprints, samples or attendance on an identity parade. Once more this is not an argument for a right to silence but an argument for not permitting the interrogation of suspects at all.

Galligan is unable to distinguish "in principle" between plugging someone into a mind reading machine and removing the privilege not to have inferences drawn from silence.[19] There is of course a world of difference in principle. In the one case one's freedom of choice is destroyed, in the other it is not. Freedom of choice usually carries with it the burden of responsibility for the consequences of one's decisions. The suspect should be free to choose to remain silent but should also bear the cost of that silence in the form of an appropriate adverse inference.

Galligan makes one laudable point. That is that the burden of proof is not under discussion here.[20] All we are discussing is the kind of evidence the prosecution is permitted to use in discharging the burden. This is welcome since most defenders of the right to silence take the opposite line. The Home Office Working Party apparently believe that a shift in the burden of proof would be effected[21] and Zuckerman criticises their report on this basis.[22] The burden of proof determines which party will lose if a case is not made out. In general the burden is clearly on the prosecution. This would remain the case. The only burden which may be transferred in a particular case is the "tactical" burden, ie. the defendant may lose if further evidence is not adduced. But this is frequently the case in a criminal trial and does not raise any issues of principle.

The line of argument taken by Galligan illustrates two points. First his frequent assertions that the right to silence is a fundamental part of our criminal law backed up by some quotations from others saying the same thing echoes Bentham's observation that: "[a]t the head of everything, which ...has been advanced...in the view of securing the attachment of the people to the exclusionary rule, let us place the old sophism, the

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18 P 87.

19 P 89.

20 P 87.

21 *The Report of the Working Group on the Right to Silence* (C Division, Home Office, London, 13 July 1989).

22 "Trial by Unfair Means" [1989] Crim L R 855.

well-worn artifice...which consists in the assumption of the propriety of the rule, as a proposition too plainly true to admit of dispute."[23] Secondly the fundamental problem with a rights based approach is clearly demonstrated, namely that rights are capable of infinite expansion. The right to almost anything can be argued to underlie almost any process one wishes to defend.

The issue of a "right to silence" is far more complex than a rights based analysis allows. For one thing jurors have all watched television and it will not escape their notice that the accused does not seem to have been interviewed. They will draw their own conclusions. If the jurors are to be assisted to draw reliable conclusions then the accused must be asked to explain the reason for silence and the judge must be free to explain to the jury what inferences may in that particular case safely be drawn. The present position is that we wilfully shut our eyes to the prospect that the jury may be drawing all sorts of inferences from the obvious fact that the accused has not spoken. If we were serious about the right to silence, as Galligan claims to be, then we would require a direction by the judge in every case to the effect that the accused had a right to remain silent when questioned. This might however have the counter-productive effect of reinforcing the jury's perception that the accused has not spoken - it would be equivalent to telling them "not to think about white elephants".

The trial process is required to balance the interests of rectitude of decision making with other values society holds dear. It is necessary however to examine interferences with the rationality of the trial process to ensure first that the value to be protected is of sufficient importance to over-ride rectitude of decision making and secondly to ensure that the interference actually achieves protection of the value concerned. We are offered a right not to be wrongly convicted, a right to privacy and a right to a fair trial as the values to be protected. Most countries in the world which recognise the rights to privacy and to fair trial manage to protect them without a right to silence. It is far from clear how a right to silence protects a right to be free from *wrongful* conviction. These are questions deserving of rigourous analysis and if in the process a sacred cow is found only to be obstructing the road then so be it.

23 *Rationale of Judicial Evidence*, Book V, Ch III, Sect III - "Pretences for the exclusion".