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**Editor's Note**

With great pride and pleasure, the Editors and I present Issue 2 of the Interdisciplinary Undergraduate Law Journal. I would like to thank everyone involved in the production of this issue, including the Editors, the Amherst College Department of Law, Jurisprudence, and Social Thought, the college, and particularly the authors. Without all of your contributions and support, this issue would not have been possible. We received a very favorable response to our first issue and we hope this issue is equally thought provoking. The Editors and I hope you will continue to support us on the road ahead, and we expect the journal will continue to prosper and set a standard of excellence in the field. We look forward to receiving your feedback, suggestions, requests for subscriptions, support, and of course your submission of new articles.

Sincerely,

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Editor-in-Chief/Founder



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# **Legislating Against Silence: An Examination of Violence and Criminal Law Reform in the United Kingdom from 1973 to 1994**

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## **Abstract:**

On one hand, the right to silence and the right against self-incrimination are inherent within the Canadian and American justice systems. But, on the other hand, in many other countries, with very different legal regimes, these rights are far from the legal norms. However, take for instance the United Kingdom: a legal system woven from the same cloth as our own, rooted in common law, and developed by precedent. In the British legal regime, the right to silence is no longer absolute; adverse inferences are drawn from a failure to comply with police questioning. The objective of this paper is to explore why? I examine the discourse of violence in Northern Ireland and the climate of legal reform in England, and I explore the social, political, and legal contexts on reform and its implications on criminal law.

More specifically, this paper approaches these topics by asking "To what extent did violence play a role in the legislative change curtailing the right to silence?", looking in particular at the reality of violence and the judicial process in Northern Ireland throughout the 1970s and 80s. Furthermore, in regards to international law, it asks "How does British case law develop within the more rights-based and protective European Conventions?"

## **An Introduction: Restricting the Right to Silence in the United Kingdom**

### **The Right to Silence in Context:**

The concepts of the right to silence and the privilege against self-incrimination are as complex as Irish politics. A primary indicator of this complexity is the international discrepancy in the protection of the right to silence within criminal law practice. For example, in a 2007 Supreme Court of Canada decision in the case of *R. v. Singh*, the Court upheld that Mr. Singh's right to silence was violated, and that "he was conscripted to provide evidence against himself . . . [and] the use of this evidence rendered the trial unfair."<sup>1</sup> In contrast, in early 1994, then British

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<sup>1</sup> *R. v. Singh* [2007] S.C.J. No. 48. 28

Secretary of State Tom King commented on the United Kingdom's Criminal Justice and Public Order Act, an act aimed at the curtailment of the right to silence; he stated: "we would be mad not to draw inference of guilt [from an accused's silence]"<sup>2</sup>. It becomes apparent that the underpinning values of the justice system and of political motivation differ to a great extent from nation to nation, even among those that have similar roots in law.

It is important to explain where the right to silence fits into the criminal justice process. The right to silence in Canada, in Northern Ireland (prior to 1988), and in Great Britain (1994), can be exercised at three stages in the criminal justice process. First, a person may exercise this right before any arrest. This means that people are not obliged to talk to police officers if they are stopped or questioned in public. Second, once arrested a person may exercise the right to silence, typically while in custody under police questioning. Third, this right applies at trial, as an accused may decline to answer any questions or give evidence.<sup>3</sup> Legislative restrictions affect silence only at the arrest and trial stages, and not at the pre-arrest stage.

The origins of the right to silence are controversial. Some historians claim the roots of the right to silence concept date back centuries. Critics argue about the importance of the retention of the right to silence. However, legal historian Leonard Levy acknowledges that the further back the origins of this right and the privilege are traced, the stronger is the case for their retention<sup>4</sup>. Furthermore, if this right were to be suspended in general in the United States, for example, the justice system would be held in disrepute.

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<sup>2</sup> Greers, Steven. "Right to Silence: A Review of the Current Debate." *Modern Law Review* 53 (1990): 709-730. 209

<sup>3</sup> Brown, et. al. *The Right to Silence: the Impact of the Criminal Justice and Public Order Act 1994*. London: A Research, Development and Statistics Directorate Report, London Home Office, 2000. 4

<sup>4</sup> Brown 2

It is central to differentiate between the right to silence and the privilege against self-incrimination. Essentially, the right to silence in the context of the justice system of the United Kingdom still exists, but it now has different implications. Instead of being a protective mechanism, it allows courts and other judicial actors to draw adverse inferences from silence.<sup>5</sup> The privilege against self-incrimination, however, is understood as a person's freedom not to provide incriminating information against himself/herself. Flowing from this concept is that no 'adverse,' typically condemning, consequences should be drawn from exercising this privilege.<sup>6</sup> It is this privilege that has been altered by the criminal law reform in the United Kingdom. Now, under the new legislation, adverse inferences may be drawn from exercising this choice.

### **An Examination of the Right to Silence:**

This paper examines the effect of the volatility of the politico-legal climate in Northern Ireland in the 1970s and 1980s on the initiation of major criminal law reform in the United Kingdom in Northern Ireland in 1988, and Great Britain in 1994. While the primary focus of this examination is Northern Ireland, Great Britain provides an interesting connection that allows a further exploration of the implications of criminal law reform. This paper takes a two-fold approach in examining this topic: a discussion of discourse and an analysis of the criminal law reform.

First, the abolition of the right to silence will be examined through the discourse of violence, specifically focusing on how violence and the threat of violence were used as tools to incite fear in politicians, judicial actors, and society at large in Northern Ireland. Through a condensed analysis of the history of violence in Northern Ireland, two major themes become

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<sup>5</sup> Levy, Leonard. Origins of the Fifth Amendment: The Right Against Self-Incrimination. New York: Oxford University Press, 1968. 3-4

<sup>6</sup> Levy 4

apparent and may be regarded as providing the impetus for an important change in legal discourse and justice models in the United Kingdom.

Second, this paper raises the question ‘to what extent did violence play a role in the legislative change curtailing the right to silence’ and seeks to answer it through an analysis of the legal climate of Northern Ireland and Great Britain and a review of legislative measures. Specifically, this section examines the formal criminal law reform commissions in the United Kingdom and highlights the legal discussions and implications of legislating against the right to silence. The controversial nature of the Irish legislation, the Police and Criminal Evidence Order of 1988, and similarly contentious British legislation, the Criminal Justice and Public Order Act of 1994, offer important evidence that the right to silence was not only discussed differently in legal circles but was also treated differently in law.

### **A History of Violence - Examining the Discourse of Inciting Fear in Northern Ireland:**

At the core of the Irish and British criminal law reforms are two pieces of legislation that initiate a new form of legal language. The Irish Police and Criminal Evidence (Northern Ireland) Order 1988 (PACE), and the British Criminal Justice and Public Order Act 1994 (CJPOA), resonate with calls to foster a climate of social protection. Embedded within and behind that language, however, is a deeply-rooted history of violence between the two countries. This section examines the discourse of violence, and how a threat of violence was used to incite fear. In particular, this section examines two overarching themes which contributed to the politico-legal volatility in the United Kingdom, including jury intimidation and political coercion. The goal of this section is to develop an understanding of the socio-legal and political effects, implications, and power of violence.

**Juror Intimidation:**

In the Irish context, fear of violence, it seems, is a useful tool if it is used to disrupt the judicial process. Generally, action, language, or the mere presence of a threatening individual are often enough to instill a substantial amount of fear of violence in a person. Then, place that person in the role of juror, a role that places the fate of another human being in his/her hands: the role of juror makes one highly susceptible to influence, bias, and fear. In nineteenth century Ireland, for example, the *Irish World* newspaper published an article with a challenging headline, “I dare them to convict”.<sup>7</sup> The words are shocking, but they illustrate the tenor of the time. In an attempt to eliminate the intimidation, judges, in some cases, suspended juries, or solicited only jurors of wealthy background and strong character as they were less likely to be intimidated.<sup>8</sup>

The violence, however, continued into the twentieth century in Ireland. The Irish Republican Army (IRA) fought with the Irish unionists and other armed militants over many political issues.<sup>9</sup> These ongoing campaigns of violence resulted in government intervention and initiated legislative reform. British politician Lord Diplock held that in an attempt to curtail perverse verdicts and jury intimidation, it was imperative to build public confidence in the legal system. This he concluded as the committee chair charged with establishing the 1973 Emergency Provisions (Northern Ireland) Act, which permanently suspended juries from terrorism-related cases.<sup>10</sup> Lord Diplock, while leading this advisory committee noted, “a frightened juror is a bad

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<sup>7</sup> Donohue, Laura K. *Counter-Terrorist Law and Emergency Powers in the United Kingdom 1922 – 2000*. Dublin: Irish Academic Press, 2001. 1324

<sup>8</sup> Donohue 1326

<sup>9</sup> Hogan and Walker. *Political Violence and the Law in Ireland*. Manchester: University Press, 1988. 24

<sup>10</sup> Donohue 1326

juror.”<sup>11</sup> Interestingly, these juryless trials in terrorism-related cases, better known as the “Diplock Courts”, lasted until the reinstatement of juries in July of 2007.<sup>12</sup>

While juryless courts prevailed from 1973 until 2007, it seems that the fear of intimidation and jury tampering had become structural and embedded within the politico-legal institutions themselves. For example, a series of inquests between 1999 and 2000 examined the possibility of reinstating jury trials for those charged with terrorism-related offences, however, the then Minister of State of the Northern Ireland Office, Adam Ingram, submitted that, “while the Government’s overall objective remains a return to jury trials for all offences . . . the time is not yet right for such a move.”<sup>13</sup> This political hesitance demonstrates the extent to which a fear of violent repercussions and jury tampering was still present, as this inquest was conducted nearly thirty years after the Diplock Courts began.<sup>14</sup> The fear or threat of violence seems timeless in the context of Northern Ireland and it seems that at many points, this fear permeated the foundation of the legal system and judicial processes.

### **Political Coercion:**

To understand the implications of this structural fear of violence we have to ask why fear was such a powerful tool in Northern Ireland. Lord Diplock addressed this question in 1973, explaining that in regard to the Emergency Provisions Act, “people in Northern Ireland . . . live in close-knit communities . . . [some] are dominated by members of paramilitary organisations. This increases the risk of intimidation. It also creates a fear of intimidation that can be just as damaging.”<sup>15</sup> Therefore, because of the proximity of potentially intimidating neighbours, the

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<sup>11</sup> Donohue 1327

<sup>12</sup> Donohue 1328

<sup>13</sup> Donohue 1327

<sup>14</sup> Donohue 1327-8

<sup>15</sup> Donohue 1328

people of Northern Ireland were especially susceptible to the threat of violence because they lived it as part of their daily existence.

Further, another theme at the core of the structural implications of the fear of violence is apparent in the political coercion of the government to act in a way that protects its citizens. Essentially, in the wake of increasingly violent IRA and other militant campaigns against the stability of the state<sup>16</sup>, the government was compelled to act, often aggressively, in an effort to protect society and secure the prosecution of offenders. First, government and political efforts produced in the Detention of Terrorist (Northern Ireland) Order of 1972, which gave officials special executive powers to arrest and detain, for an extended period of time, any person suspected of terror-related offences<sup>17</sup>. As well, and as mentioned before in the Emergency Provisions Act of 1973, there was a legislative response to the issue of jury tampering. This Act initiated the suspension of juries in terror-related cases. Some may argue that the government's recourse to use legislation as a tool to fight the terrorists was a victory for the terrorists.

Moreover, nearly 15 years and many amendments later, as the transcripts of the 1988 Northern Ireland House of Commons final debates on the PACE Order attest, many members of parliament acknowledged their anxiety about the implementation of the legislation, out of grave concern about the resulting threat and risk for innocent people.<sup>18</sup> A British Member of Parliament, Mr. Kevin McNamara, contested the claim of the then Secretary of State, Tom King, that, "innocent people have nothing to fear."<sup>19</sup> McNamara held that, "the innocent have much to fear . . . [as] they are the only people likely to be intimidated by their surroundings into making

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<sup>16</sup> Donohue 44

<sup>17</sup> Hogand and Walker 86

<sup>18</sup> Northern Ireland Commons Sitting Transcript of November 8, 1988. Parliamentary Transcript. <<http://hansard.millbanksystems.com/commons/1988/nov/08/criminal-evidence-northern-ireland>>, 1988. 225

<sup>19</sup> Commons Transcript 310

misleading concessions.”<sup>20</sup> The ongoing discussion of fear, in the form of a threat of violence, was an extremely real factor during this contentious time in Northern Ireland.

### **Adverse Inference Legislation - Exploring Criminal Law Reform and its Legal Implications:**

The previous sections developed an understanding of the effects of violence on politics, society, and the legal system. This section of the paper will explore that understanding and discuss what it means for criminal law reform. Is it sufficiently compelling to say that fear of violence motivates legislative change? Are there further reasons and rationales for such a transition in the criminal law system? The following sections examine the legal history of criminal law reform of the right to silence in Northern Ireland and Great Britain, and the legal implications of that reform as considered by the law-makers. First, the focus is on the evolution of British criminal law reform and on its resistance to change. Secondly, the focus is on the expedient reform in Northern Ireland and on the reasons for such pragmatic changes. Finally, this section will examine the implications of the criminal law reform legislation on the legal rights of an accused.

### **Criminal Law Reform in Northern Ireland:**

To engage in the practice of criminal law is to consider the weight of the rights of all the parties involved. To engage in legislation is to understand the greater need of society, and the implications of any decisions that may have bearing on individual or group rights. Lawmakers must balance the rights of the accused with the welfare of society, while maintaining the search for the truth as paramount within the criminal law system. In Northern Ireland, however, the criminal law system in the 1970s was spiralling downwards into a state of disrepute. The threat

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<sup>20</sup> Commons Transcript 310

of violence was largely intimidating to jurors, not to mention to witnesses; suspects in terrorism cases made prosecution difficult by regularly exercising their right to silence.<sup>21</sup> Lord Diplock referred to these cases as perverse verdicts.<sup>22</sup> In a British context, the Criminal Law Revision Committee held that criminals often take advantage of their right to silence and refuse to answer any questions. This can lead to the grinding halt of police investigation, and prevent a trial from even beginning.<sup>23</sup> Therefore, when faced with this reality, British lawmakers seemed to lack any other choices but to reform the criminal law.

Criminal law reform in Northern Ireland was ripe with legislative activism in the late 1980s. Politicians and law-makers, who often responded to the adverse effects of the recurring violence, used the legislation as a mechanism of deterrence. From the Diplock Courts beginning in the early 1970s, which banned juries from terrorism-related trials, to the 1984 Irish Criminal Justice Act that allowed for an adverse inference from silence to be drawn in select specified circumstances in the pre-trial stage, criminal law reform has long been a response to academic discussion in Great Britain, while in Northern Ireland it is a response to the real likelihood of violence and social unrest.

In 1988, Tom King, in a House of Commons debate, outlined Northern Ireland's reformative history and rationales, and the new reform legislation. He noted the 1984 legislative reforms, and explained how the Northern Ireland (Emergency Provisions) Act of 1987 provided for the rights of an accused in police custody.<sup>24</sup> Finally, King drew upon the British-born report

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<sup>21</sup> Berger, Mark. "Of Policy, Politics, and Parliament: The Legislative Rewriting of the British Right to Silence." *American Journal of Criminal Law* 22 (1995): 391-430. 407

<sup>22</sup> Donohue 1326

<sup>23</sup> Berger 401-2

<sup>24</sup> Commons Transcript 187

of the CLRC, and conceded that, even though its recommendations were not implemented by British legislators, the situation in Northern Ireland was very different.<sup>25</sup>

King further discusses the major reformatory measures within the Police and Criminal Evidence Order of 1988, highlighting, in the House of Commons debate, articles two through six. The new legislation, as outlined by King, did not officially abolish the ability to maintain a right to silence, but now allowed courts, police officers, and juries to draw inferences from the choice of an accused to remain silent.<sup>26</sup> It therefore changed the interpretation of the accused's right to silence. The Irish legislation, PACE, states that inferences may be drawn from the failure of an accused

. . . to mention any such fact . . . [that they] could reasonably have been expected to mention when so questioned . . . [and] on the basis of such inferences treat the failure as . . . corroboration of any evidence given against the accused in relation to which the failure is material (Criminal Evidence (Northern Ireland) Order 1988 Article 3).

For Northern Ireland this was a proactive, yet controversial step. In order to secure public confidence and judicial integrity, the government had to maintain control and regulation over these provisions, especially when dealing with younger offenders and people with disabilities.<sup>27</sup> The legislative area of most concern was the portion that addressed inferences being drawn during police questioning, and thus special care was taken in designing the interrogation process, and in crafting later legislation.

### **Criminal Law Reform in Great Britain:**

In Britain, the debate on the right to silence began as a shift in jurisprudence and a change in political and legal philosophies. The shift was not immediately connected to a looming threat

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<sup>25</sup> Commons Transcript 187

<sup>26</sup> Commons Transcript 187

<sup>27</sup> Her Majesty's Criminal Justice Review Group. Review of the Criminal Justice System in Northern Ireland. 2000. Accessible via <[www.nio.gov.uk](http://www.nio.gov.uk)> or <[www.hmso.gov.uk](http://www.hmso.gov.uk)>. 45-6

of violence, as was the case in Northern Ireland, but as observers of the Irish conflict and its legal consequences, the British became increasingly aware of the implication and benefits of reform. In Britain in the 1960s a report was commissioned by the International Commission of Jurists to assess typical thoughts on transition.<sup>28</sup> The report, known as JUSTICE, presented a variety of reform ideas for the criminal justice system in Britain. The reforms held that the police should remain at the investigative helm with the aid of magistrates, similar to, but not quite like, the inquisitorial system, and the police should have the pre-trial ability to conduct questioning, in which case a failure to respond to questioning could be used to draw adverse inference.<sup>29</sup> However, JUSTICE did not make any recommendations for an at-trial abolishment of the right to silence.<sup>30</sup>

The then Home Secretary, Henry Brooks, commissioned the Criminal Law Revision Committee (CLRC). The underlying objective of this committee was the fundamental search for the truth, and “to forbid it [the abolition of the right to silence] seems to us to be contrary to common sense.”<sup>31</sup> The CLRC recommended an at-trial restriction of the right to silence and that the judicial actors be permitted to make any sort of inference from an accused’s silence or failure to disclose.<sup>32</sup> The logic behind this recommendation holds that an accused should disclose all necessary information during an investigation to prevent the risk of having adverse conclusions drawn from “surprise” evidence, or efforts to remain silent. Finally, it seemed that the CLRC did not want to concede any ground to the accused, and their recommendations almost seemed to

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<sup>28</sup> Berger 389

<sup>29</sup> Berger 399

<sup>30</sup> Berger 399

<sup>31</sup> Berger 401

<sup>32</sup> Berger 402

serve as an indicator of bias, as they contended that present British law and practice were already much too sympathetic to the defence.<sup>33</sup>

The CLRC was seen as extreme by critics at the time and its recommendations were not implemented, yet they did lead to further review. In the latter half of the 1980s, criminal law reform committees in Britain recommended many changes to rules dealing with confessions and interrogations with the goal of making the pre-trial process a more efficient lead into a trial. It was not until the Irish reform of 1988 that Britain began initiating legislation against the right to silence, even though Britain held fast to its retention of this right until 1994, with the legislation of the British Criminal Justice and Public Order Act. Did the Irish legislation finally convince Great Britain that abolishing the right to silence was the route to follow, or did Great Britain finally appreciate the recommendations of the Criminal Law Revision Committee?

Finally, in 1994, the British Criminal Justice and Public Order Act passed through parliament accompanied by its own controversy. At the core of the Act were the reform provisions, sections 34 through 37, which included, “failure to mention facts when questioned or charged, failure to account for objects, substances or marks, failure to account for presence at a particular place, and [the rules surrounding] silence at trial.”<sup>34</sup> What is interesting to note is that the government finally acknowledged many of the recommendations that had been previously outlined by the Criminal Law Reform Commission.

### **A Discussion of Legal Rights - Criticisms and Considerations:**

Within the consideration of legal rights, we must remember to take into account both the rights of the offender and the rights of citizens. In order to frame this idea of balancing the rights, consider the argument of the nineteenth century British philosopher Jeremy Bentham. On the one

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<sup>33</sup> Berger 399

<sup>34</sup> Brown 6-8

hand, Bentham, in his *Treatise on Judicial Evidence*, argues that the right to silence is a protection only for the guilty.<sup>35</sup> He then went on famously to write “innocence claims to the right of speaking, as guilt invokes the privilege of silence.”<sup>36</sup> In a search for the truth Bentham therefore, suggests, that the right to silence often holds the truth hostage; however, if there is no right to silence, and people are compelled to speak, they may be more inclined to give false stories or confess to the charges before them to simply end the process. Bentham, nevertheless, held that invoking silence excluded the most reliable evidence of the truth; he argued that these steps inevitably hindered courts from discovering the truth, and therefore formed no part of a rational legal system.<sup>37</sup>

On the other hand, some questioned the laws asking how far the state can encroach upon the legal rights of criminal suspects and offenders charged with an offence. Lord Runciman, a twentieth century legal scholar and member of the British House of Lords, was unconvinced of Bentham’s reasoning, and argued that the curtailment of the right to silence within the new legislation would contribute further to wrongful convictions.<sup>38</sup> Furthermore, in the 1988 Northern Ireland House of Commons debate on the PACE, Mr. McNamara argued that the innocent were the most vulnerable, and there was great fear that innocent people would make false or damaging statements.<sup>39</sup> British scholar and advocate Ian Dennis furthers the argument about increasing the possibility of wrongful conviction, also discusses the weakening of the right

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<sup>35</sup> Bentham, Jeremy. *A Treatise on Judicial Evidence*. London: B. Bensley, 1825. 241

<sup>36</sup> Gordon, Francis and Eileen Skinnider. “The Right to Silence: International Norms and Domestic Realities.” *SINO: Canadian Int’l Conference of the Ratification and Implementation of Human Rights Covenant* (2001). 8

<sup>37</sup> Gordon 8

<sup>38</sup> Greers 719

<sup>39</sup> Commons Transcript 225

to silence, claiming that this action “lacks any convincing justification and may well be dangerous.”<sup>40</sup>

Overarching this domestic debate is a growing body of international law. The legal rights as outlined in international law are clear. The Universal Declaration of Human Rights (UDHR), the European Convention on Human Rights (ECHR), and the International Covenant on Civil and Political Rights (ICCPR) all contain what is interpreted as an implicit right to silence within the principle of a fair trial.<sup>41</sup> Further, the Rome Statute, a document that governs international criminal court proceedings, similarly emphasizes that an accused is “not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence.”<sup>42</sup> International law still protects this allegedly inherent legal right, but nevertheless provides room for the interpretation of the right.

Moreover, as British case law developed under the criminal law reforms many cases were appealed within the United Kingdom, and, to a further extent, at the European Court of Human Rights. For instance, *UK v Murray*<sup>43</sup>, is a case that began in the early 1990s in Northern Ireland; it was then appealed to no avail in the United Kingdom, and was finally appealed to the European Court of Human Rights in 1996. In *Murray*, at the trial level, the judge complied completely with the restrictive legislation and did so despite the fact that the accused was held and questioned for forty-eight hours without a lawyer. The case was in compliance with the

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<sup>40</sup> Dennis, Ian. “The Criminal Justice and Public Order Act 1994 – The Evidence Provisions.” *Criminal Law Review* 4 (1995). 10

<sup>41</sup> Cavanaugh, K. A. “Emergency Rule, Normalcy Exception: The Erosion of the Right to Silence in the United Kingdom.” *Cornell International Law Journal* 35 (2002): 491- 514. 505-6

<sup>42</sup> Rome Statute of the International Criminal Court. <<http://www.icc-cpi.int>>. Article 67g

<sup>43</sup> *Murray* was interrogated and questioned 12 separate times and remained silent. Upon trial the judge drew adverse inferences from this silence, and coupled with the denial of a lawyer to the accused the case was challenged on constitutional and conventional grounds. The importance of this case is that, as a consequence, it was recognised that the right to remain silent was a priority to be considered in correspondence to Article 6 of the European Convention of Human Rights, the right to a fair trial. *UK v Murray* (1996) 22 European Human Rights Review 29 (ECHR).

British Emergency Provisions Act of 1987, and the inferences from his silence were admissible.<sup>44</sup> On appeal to the European Court of Human Rights, *Murray* claimed a violation of Article 6, the right to a fair trial (European Convention for the Protection of Human Rights and Fundamental Freedoms). The Court held that there was no violation of Article 6; however, it did consider the legal implications of drawing inferences from silence. These considerations acknowledged that in cases which lower the burden of proof for establishing guilt and place a greater weight on adverse inferences, the Court would likely hold this increased power of adverse inferences incompatible with Article 6.<sup>45</sup>

Arguably then, criminal law reforms have had dire legal implications for the burden of proof from the viewpoint of the offender. The reforms, as we see through the development of case law, have shifted the burden of proof needed by the state to convict.<sup>46</sup> Further, some critics contend that the legislation is “a clear down of the prosecution’s burden of proof.”<sup>47</sup> The concern about the infringement of legal rights is widespread, and is important because it provokes further scrutiny of the legal system. However, rulings by the European Court of Human Rights hold that proper discretion must be exercised to prevent violations of Article 6 of the *Convention*.<sup>48</sup>

The initial criticisms by the European Courts were most fascinating, and spoke to the strength and stability of the existing body of international law. Notably, prominent English barrister, Anthony Scrivener, with reference to the British criminal law reform, remarked that, “the [then] Home Secretary [Michael Howard] seems to have forgotten that Britain is in Europe.

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<sup>44</sup> Cavanaugh 506

<sup>45</sup> Cavanaugh 507

<sup>46</sup> Gordon and Skinnider 20

<sup>47</sup> Gordon and Skinnider 20

<sup>48</sup> Cavanaugh 508

The right to silence will be upheld in Strasbourg, and once that happens, Mr. Howard will not have done much good for crime.”<sup>49</sup>

### **Conclusion - Reflections on Reform:**

Overall, within this rights-based discussion, for example, we see that legislative change and its underlying reasoning show the direction of both socio-legal and political philosophies at the time. Further, from within this contextual timeframe, the themes that emerge demonstrate that the politico-legal volatility in Northern Ireland was indeed the catalyst for legislative change in Northern Ireland in the late 1980s. Violence was effective as a political tool. The case in Britain, however, although less influenced by ongoing violence, still exemplified a reactive approach to criminal justice reform. On balance, the international community holds fast to its proactive right-asserting model, which provides a strong emphasis on due process and procedural rights.

At the end, what is most interesting is society’s tolerance of legislation that encroaches upon an arguably inherent human right. It would seem that, at least in Northern Ireland, and because of geographic proximity and shared concerns Great Britain, giving up individual legal rights to gain a stronger sense of collective social protection is seen as a fair trade. By contrast, if the 5<sup>th</sup> Amendment were to be suspended in the United States, social outrage, coupled with the media frenzy, would create chaos in the justice system.<sup>50</sup> These international differences are remarkable considering the bedrock of both legal systems is British common law, however it is the internal and circumstantial differences, such as fear of violence and the resulting social

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<sup>49</sup> Wall, Gordon. The Pre-Trial Right to Silence in Canada and the United Kingdom. Ottawa: National Library of Canada (L.L.M. Thesis), 1996. 189

<sup>50</sup> Levy 186

unrest, which ultimately lead a government into transitional phases and when this happens law and its legislative actors are at the core of reform.