JOSEPH A. GREENAWAY JR. LECTURE SERIES ON LAW
AND JUSTICE*
SPEAK AT YOUR OWN PERIL

Hon. Joseph A. Greenaway, Jr.**

ABSTRACT

This lecture given at Birmingham City University School of Law, March 21, 2019 considers the origins of the right to silence in the jurisprudence of the Supreme Court of the United States and compares the constitutional protections against self-incrimination with those of the United Kingdom. It notes that the effect of the changes introduced by the Police and Criminal Evidence Act 1984 and the Criminal Justice and Public Order Act of 1994 is that there is now a fundamental divergence in approach between the two jurisdictions and concludes that as the twenty first century progresses, defendants on both sides of the Atlantic will be less likely to exercise their rights without consequence and then when they do choose to speak it will be at their peril.

KEYWORDS

Right to Silence, The Warren Court, Miranda v. Arizona, Police and Criminal Evidence Act 1984, Criminal Justice and Public Order Act 1994

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I. INTRODUCTION

I would be remiss if I did not begin my remarks with both acknowledging and thanking the many distinguished persons kind enough to attend this inaugural lecture.

From BCU/School of Law:

Professor Philip Plowden (Vice Chancellor of Birmingham City University)

Professor Keith Horton (Pro Vice Chancellor and Executive Dean of Birmingham City University's Faculty of Business, Law, and Social Sciences)

Dr. Anne Richardson Oakes (Director, Centre for American Legal Studies)

Dr. Sarah L. Cooper (Reader in Law)

Panel members:

Mr. Mark George, QC (Head of Chambers, Garden Court North Chambers)

Ms. Ada Bosque (Senior Litigation Counsel, United States Department of Justice, United States Embassy London)

Mr. Justice Julian B. Knowles, QC (High Court Judge)

From Birmingham Law Society:

Mr. James Turner (President, Birmingham Law Society)

Mr. Regan Peggs (Birmingham Law Society)

Ms. Becky Lynch (Birmingham Law Society)

Last but not least, my law clerk, Jeanine Alvarez.

Members of the Birmingham Law Society, administration and faculty of Birmingham City University School of Law, distinguished guests, and students: thank you all for the warm welcome you have extended to me and my wife, Dr. Valerie Purdie Greenaway. We have thoroughly enjoyed our stay and hope to meet more of you to thank you personally for your graciousness.

Having a lecture established in one's name is an honor that frankly is unfathomable. Who could have foretold that, after leaving London before developing my proper British accent, I could go to the States, achieve some modicum of success, and have such an honor bestowed upon me here in my home country? Amazing. I am blessed. Thank you.

There are a great number of topics that could be worthy of this august group of lawyers, intellectuals, and students. Intellectual property, procedure, and diplomacy, to name a few. I chose the right to silence because of the ubiquity of the topic. For over fifty years, the *Miranda* Warnings have been commonplace in film, literature, television, and the news.

You have the right to remain silent.

Anything you say can and will be used against you in a court of law.

You have a right to an attorney and have him (or her) present while you are being questioned.

If you cannot afford an attorney, one will be appointed to you at government expense.
You can decide at any time to exercise these rights and not answer any questions or make any statements.
Do you understand these rights?

These warnings are as well known in America as any legal principle. The opportunity of giving this lecture piqued my interest greatly. What did this right look like in the United Kingdom?

I have an admission to make to you today. I am somewhat sheepish about mentioning it. My interest in the right to silence was not piqued initially in a Supreme Court history class or a constitutional law seminar. No, it was the movies. It was in college that I saw the movie “Dial M for Murder,”¹ starring the well-known character actor John Williams. In the movie, Mr. Williams, playing Chief Inspector Hubbard, said to Grace Kelly: “I shall warn you first that anything you say will be taken down and may be used in evidence.”² This recitation was different from contemporary police shows in the United States. It seemed shorter and somehow cleaner. Through the research that I conducted for this lecture, I learned that the simplicity of Chief Inspector Hubbard’s Caution did not reflect reality. The Caution, as it is known in the United Kingdom, could not have had a more different genesis than the *Miranda* Warnings, but the question of the day is why? My objective today is to speak to how the different approaches came about and how our respective systems of justice affect the right to silence.

II. ORIGINS OF THE RIGHT TO SILENCE

The Latin phrase—*nemo tenetur se ipsum accusare* (no one is bound to incriminate or accuse oneself)—speaks to a concept that in one form or another has origins centuries old. Some historians claim that it originated in biblical times, others claim medieval times. Undoubtedly, we could trace the historical parallels into antiquity. A common starting point for the right to silence analysis is the inquisitorial Court of Star Chamber. Many commentators, jurists, and legislators have at times harkened back to the Star Chamber as the starkest example of the consequences of compelled testimony. Indeed, Justice Stewart of the Supreme Court of the United States described the circumstance quite succinctly in his dissent in *Griffin v. State of California*:

When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment.³

¹ DIAL M FOR MURDER (Warner Bros. Entertainment Inc. 1954).

² *Id.*

³ *Griffin v. California*, 380 U.S. 609, 620 (1965) (Stewart, J., dissenting).

Unfortunately, I cannot explore the nuanced development of the accusatorial system and the inquisitorial system. Suffice it to say that the accusatorial system reflected the inclusion of the community in the truth-seeking process, but did not compel the defendant to testify; the inquisitorial system, emanating from the Star Chamber, which had developed in the ecclesiastical courts, required an oath to tell the truth as to all matters on which the defendant was questioned. Given the historical breadth of the right to silence in both the United States and the United Kingdom, I will limit myself to roughly the last century.

The Fifth Amendment is part of the ten amendments to the Constitution of the United States making up the Bill of Rights. The Bill of Rights includes the right to free speech, the right to bear arms, the right to be free from unreasonable searches and seizures, the right to counsel, the right to a trial by jury, and the right to not be subject to cruel and unusual punishment. Although not a comprehensive list of those amendments, these are most of the key ones. For our purposes, the Fifth Amendment is most critical. Its text, as it relates to self-incrimination, states: “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”⁴ Although not part of the initial drafting and framing of the Constitution, the Bill of Rights has proven over time to have had the most profound effect on the operation of our democracy.

These ten amendments have shaped the societal conversation over our country’s modest life span of nearly 243 years. In the United States, our discussion of constitutional rights is ubiquitous. The conversation occurs in the halls of Congress, the media, the White House, our courts, schools, churches, and shops. Although the Fifth Amendment is multifaceted, historically, it did not draw the same attention as other constitutional amendments until the middle of the twentieth century. The major impetus behind our discussion of the Fifth Amendment came about through what I argue was a confluence of events having a profound impact on the Supreme Court. As a result, the Supreme Court took the laboring oar in addressing the constitutional protections regarding self-incrimination that, for decades, had laid relatively dormant in both Fifth Amendment jurisprudence and in our legislative considerations.

III. THE IMPETUS BEHIND *MIRANDA V. ARIZONA*, 384 U.S. 436 (1966)

Some commentators assert that the crux of *Miranda*—the marrying of the Fifth and Sixth Amendments resulting in the *Miranda* Warnings— came onto the legal scene like a nova, out of nowhere. I would assert that *Miranda* resulted from a confluence of two factors: leadership and incrementalism, including the case of *Brown v. Board of Education*⁵. The leader of whom I speak is Supreme Court Chief Justice Earl Warren. During his time as Chief Justice, we refer to the Supreme Court colloquially as the “Warren Court.”

In the history of the Supreme Court, there have not been many great Chief Justices. What makes a great Chief Justice? It is beyond peradventure that Chief

⁴ U.S. CONST. amend. V.

⁵ *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

Justice John Marshall was a great Chief Justice, perhaps the best. He, literally, put the Supreme Court on the map. He became Chief Justice in 1801. At a time when the Court held no prestige and was frankly an unknown entity with no past, he, through force of will and erudition, commanded respect and penned opinions that framed what the Court was and was not. He commanded the Court with camaraderie and respect. Many of his early opinions were unanimous and left an indelible impression on American law.

Earl Warren followed in that tradition. Although many Chief Justices between John Marshall and Earl Warren were incredibly accomplished, few drew both the accolades and ire of Warren because the Courts they led did not achieve and distinguish themselves as Warren's did.

Earl Warren, as many of you know, became the Chief Justice of the Supreme Court in 1953. Warren was not known as a legal scholar, but rather as an accomplished politician. You see, Warren had spent a lifetime in politics and public service. He had enough political heft to run for President of the United States in both 1948 and 1952, after having served as both Attorney General and Governor of California. Indeed, in 1952, he garnered a significant number of delegates on the first ballot at the Republican National Convention. Through savvy negotiations, he agreed to encourage and deliver his delegates to join General Eisenhower's delegates, all but assuring the presidency to Eisenhower. In return, Eisenhower agreed that Warren would receive the first available nomination to the Supreme Court. The rest, as they say, is history.

At the time Warren joined the Court, the docket famously included *Brown v. Board of Education*,⁶ the school desegregation case forcing America to look itself in the mirror regarding the issue of race. Many have said, including Justice David Souter and Justice Thurgood Marshall, that *Brown* was the most important case of the twentieth century. The case specifically addressed the separate schooling by law of black and white students. The desegregation of schools was certainly not popular. In fact, the Court was torn. Warren inherited a Court deeply divided. Warren's leadership, it can be argued, almost singlehandedly brought his colleagues to a unanimous decision outlawing segregation based on race. *Brown* was pivotal in setting the tone of the Warren Court as a court focusing on civil rights, administration of criminal justice, protection of individual liberty, and extension of political democracy. Essentially, *Brown* provided the impetus for the highest court in the land to review the law through the lens, some would say the aggressive lens, of equity, fairness, and equality.

Archibald Cox, the noted legal scholar and Harvard Law School professor, encapsulated the conundrum the Warren Court faced: "Should the Court play an active, creative role in shaping our destiny, equally with the executive and legislative branches? Or should it be characterized by self-restraint, deferring to the legislative branch whenever there is room for policy judgment and leaving new departures to the initiative of others?"⁷

Needless to say, the Warren Court followed the former theory as its focus. As a result of this choice, the Warren Court had many critics. Primarily, critics argued that the Warren Court engaged in result-oriented jurisprudence in which

⁶ *Id.*

⁷ ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 2 (1968).

the text of the Constitution was not the primary source of interpretation. Indeed, many argued that Warren was no scholar and, rather than provide well-reasoned analysis, the Court provided reasoning not befitting of legal giants such as Justices Marshall, Holmes, Brandeis, and others. Warren wrote plainly and with vision. The jurisprudence he propounded attempted to shape laws to be adherent to the Constitution. Warren's response to this critique is apparent in his non-judicial writings concerning his theory of judging and the Constitution. One of Warren's biographers, G. Edward White, noted:

The pursuit of justice, as Warren defined it, was thus a "continuing direction for our daily conduct." The Bill of Rights needed revision with time. "We will pass on," Warren said, a "document [that] will not have exactly the same meaning it had when we received it from our fathers." For the Bill of Rights protections to be real, Warren argued, they needed constant application by the judiciary. A "better" Bill of Rights was "burnished by growing use"; a "worse" one was "tarnished by neglect."⁸

Mr. White, in paraphrasing Warren's theory of judging and his ideas on the Bill of Rights as reflected in an essay Warren wrote for *Fortune Magazine* in 1955, stated:

He assumed that the meaning of the Bill of Rights necessarily changed with time; the interpretations of the framers would necessarily differ from those of him and his contemporaries. He assumed that continued and active application of the Bill of Rights was necessary to make its protections "real" and that active application would necessarily alter the meaning of the words in the Bill of Rights.⁹

The focus on Chief Justice Warren's view concerning the Bill of Rights is both prescient and a portent of things to come. At the time the Warren Court's tenure began, there was a particular conundrum that the law faced. How do federal pronouncements about the scope and breadth of federal constitutional law affect state law? Federalism is a concept at the heart of our form of government. Federal and state law operate in parallel universes, except for those specific instances where intersection occurs. In other words, if the Supreme Court makes a pronouncement through a case that a particular constitutional provision has application in a certain circumstance, how can that ruling apply to a similar factual circumstance occurring in the states?

The answer was the Fourteenth Amendment, which essentially stated that no state shall make or enforce any law which shall abridge the privileges or immunities of a citizen of the United States. In other words, states could not pass or enforce laws inconsistent with the Constitution.

The problem was that no case or federal statute had made clear that all of the basic rights set forth in the Bill of Rights were protected under state law. This was the genius of the Warren Court.

Accolades and critiques aside, in the criminal area, many cases foretold the Warren Court's focus on expanding constitutional rights in the name of justice.

⁸ G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* 223 (1982).

⁹ *Id.* at 224.

There were significant and substantial changes made in criminal law and procedure. Two such notable cases are *Mapp v. Ohio*.¹⁰ and *Gideon v. Wainwright*.¹¹ In *Mapp v. Ohio*,¹² the Supreme Court established the exclusionary rule, as applicable to the states through the incorporation doctrine of the Fourteenth Amendment, in which evidence obtained in violation of the Fourth Amendment prohibition against unconstitutional searches and seizures meant any evidence illegally seized was inadmissible at trial. *Gideon v. Wainwright*,¹³ established that, in a criminal case charging a felony under state law, a defendant had a right to counsel, regardless of financial station, as required by the Sixth Amendment.

IV. COMING OF MIRANDA

One area of jurisprudence that remained less than clear until the Warren Court was the Fifth Amendment right against self-incrimination. The lead up to *Miranda* included four cases: *Bram v. United States*,¹⁴ *Brown v. Mississippi*,¹⁵ (not to be confused with *Brown v. Board of Education*,¹⁶) *Escobedo v. Illinois*,¹⁷ and *Griffin v. California*.¹⁸ Each of these cases led to the incremental incorporation of the right to silence so that it applies to the states.

In *Bram v. United States*,¹⁹ the notion of voluntariness arose for the first time in the context of the Fifth Amendment. That is, if there is evidence that a confession was not voluntary, its admission could be challenged and suppressed. Forty years later in *Brown v. Mississippi*,²⁰ the Supreme Court spoke more plainly when it stated that coercion and brutality vitiate any notion of voluntariness and a confession in that circumstance cannot stand. In that case, police took several Black men out of their homes and horse-whipped them until they confessed to crimes they did not commit.²¹ Although the constitutional underpinning there was the Due Process Clause of the Fourteenth Amendment, it signaled the Court's willingness to enliven the debate regarding self-incrimination.²² The question is in keeping with Warren's view of the Constitution. What actions may the state take that are not violative of the Constitution?

*Escobedo*²³ was next in the line of Supreme Court cases that set the framework for *Miranda*. Danny Escobedo was a suspect in a murder investigation.²⁴ Upon the

¹⁰ *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹² *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹³ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁴ *Bram v. United States*, 168 U.S. 532 (1897).

¹⁵ *Brown v. Mississippi*, 297 U.S. 278 (1936).

¹⁶ *Brown v. Bd of Educ. of Topeka*, 347 U.S. 483 (1954).

¹⁷ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

¹⁸ *Griffin v. California*, 380 U.S. 609 (1965).

¹⁹ *Bram v. United States*, 168 U.S. 532 (1897).

²⁰ *Brown v. Mississippi*, 297 U.S. 278 (1936).

²¹ *Id.* at 281-82.

²² *Id.* at 285-87.

²³ *Escobedo v. Illinois*, 378 U.S. 478 (1964).

²⁴ *Escobedo*, 378 U.S. at 479-81.

inception of interrogation, he requested that he be permitted to see his attorney.²⁵ His request was denied.²⁶ Interestingly, his attorney was literally on the other side of the door requesting an opportunity to see Escobedo, but he too was denied entry by the police.²⁷ Eventually, after hours of grilling, Escobedo confessed, based on an entreaty from an officer promising that he would be able to go home that night, if he promptly confessed.²⁸

The Supreme Court reversed the conviction. Justice Goldberg, in writing the majority opinion, focused on both the Fifth Amendment constitutional right against self-incrimination and on the Sixth Amendment right to counsel.²⁹ Specifically, the Supreme Court stated that “[w]e hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer.”³⁰

Escobedo also held that these constitutional rights applied to the states through the incorporation doctrine.

Justice Stewart’s dissent in *Escobedo* is noteworthy because it stands as a portent of things to come. He noted “[t]his Court has never held that the Constitution requires the police to give any ‘advice’ under circumstances such as these.”³¹

A fourth case which came down pre-*Miranda* but shone the path to *Miranda* was *Griffin v. California*.³² In *Griffin*, the Supreme Court held that the Fifth Amendment prohibited a prosecutor or judge from commenting on a defendant’s failure to testify.³³

In *Griffin*, the jury instruction the opinion overturned, which was lawful under California state law, stated:

As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.³⁴

The trial court added as part of its instruction that the adverse inference did not affect the presumption of innocence nor shift the burden of proof to the defendant. I know that this instruction sounds quite familiar to many of you as it is similar to the instructions given in a criminal case in the U.K.

In *Griffin*, the prosecutor stated in his closing that there were many open questions about the victim’s murder and the only thing keeping the jury from learning that

²⁵ *Id.* at 481-82.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Escobedo v. Illinois*, 378 U.S. 478, 482 (1964).

²⁹ *Id.* at 488-92.

³⁰ *Id.* at 492.

³¹ *Escobedo*, 378 U.S. at 494.

³² *Griffin v. California*, 380 U.S. 609 (1965).

³³ *Griffin*, 380 U.S. at 614.

³⁴ *Id.* at 610.

information was the defendant's silence.³⁵ The Supreme Court reasoned that such comments, and any adverse inferences drawn from them, are a "penalty" imposed on the defendant's exercise of his Fifth Amendment privilege, and thus, unconstitutional.³⁶ This was another case where, although addressing state law, the Fifth Amendment, through the incorporation doctrine, was applicable to the states nonetheless.

And now we reach *Miranda*. It is not an overstatement to say that *Miranda* is one of, if not the, most important criminal case in the history of the Supreme Court. *Bram*, *Brown*, *Escobedo*, and *Griffin* reflect the normal progress of cases through the federal and state courts—principles are established and discussed at length over time. Each is tested, critiqued and judged. Expanded in some instances; contracted in others. *Miranda* is an example of expansion.

What is striking about *Miranda* is that the facts are not extraordinary. Like so many cases that gain notoriety, its facts are straightforward.

Warren sets the stage for the opinion at the very start. He noted:

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.³⁷

Ernesto Miranda was arrested at his home.³⁸ He was taken into custody and brought to a Phoenix police station.³⁹ He was identified by a witness, then brought to an interrogation room.⁴⁰ He was not advised of his right to have an attorney present.⁴¹ Two hours later, police emerged with a signed confession, labelled voluntary.⁴² However, no mention was made of the right to remain silent or the right to counsel.⁴³

The Court concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.⁴⁴

The purpose of *Miranda* was clear—remove the aura and reality of compelled testimony in custodial settings. The rules of *Miranda* are plain. The consequences of

³⁵ *Id.* at 610-11.

³⁶ *Id.* at 614-15.

³⁷ *Miranda v. Arizona*, 384 U.S. 436, 439 (1966).

³⁸ *Id.* at 491.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Miranda*, 384 U.S. at 491-92.

⁴² *Miranda*, 384 U.S. at 492.

⁴³ *Id.*

⁴⁴ *Miranda*, 384 U.S. at 467.

violation are stern—suppression of evidence. Here, the confession was suppressed and the conviction vacated. However, *Miranda*, in most senses, is the beginning and not the end of the story. The Supreme Court's role in a constitutional democracy means that it and the lower courts constantly re-examine the rules it sets down.

Miranda is an example of a fundamental difference in the perspective of scholars, jurists, and practitioners regarding the work of the Supreme Court. It is also a precursor to how many Americans view the dichotomy in constitutional interpretation in American jurisprudence today. At the time of the Warren Court, the theoretical landscape was less cluttered. On the one hand, those adhering strictly to the text of the Constitution—textualists—believed that such examination was the beginning and end of the analysis. On the other hand, many, Chief Justice Warren among them, believed in a living Constitution, which required interpretation consonant with changes and advances in society. The *Miranda* decision is an example of the latter view.

Two key legal components of *Miranda* were the announcement of a new constitutional rule and, through the incorporation doctrine, the application of the Fifth Amendment rule of *Miranda* to the states.

In writing *Miranda*, Chief Justice Warren took into account many factors, data and information that were anathema to certain members of the Court because he ventured outside of the realm of the text. Indeed, much of the criticism of the majority opinion is of the view that the Constitution did not require or call for the safeguards or protections that the majority had deemed to be essential to the practical functioning of the right against self-incrimination. Of course, this view of the Constitution supports Warren's democratic view of our Constitution; i.e., to avoid the concentration of power in the hands of the few.

Miranda was undeniably a response to the inconvenient truth that police forces did not operate in a perfect world in which questioning occurred in a non-coercive, controlled, and safe environment. Actually, the cases are legion that police forces around the country resorted at times to brutality, torture, and other, more drastic means, to induce, force, and coerce confessions with nary a care about constitutional rights. Thus, the *Miranda* Warnings were instituted with one principle objective: to ensure that no accused would be compelled to incriminate himself. Was it a panacea then? No, particularly given the turbulence of the times. The Constitution was being argued and interpreted in new and expansive ways to bring more of our nation's constituents into the constitutional dialogue.

V. U.K. RIGHT TO SILENCE

Miranda crystallizes the stark contrast between the legal systems our respective countries adhere to today. A constitutional form of government in which the judiciary is empowered to decide the ambit and parameters of the Constitution is fundamentally different than parliamentary sovereignty. In our system, the Supreme Court, with the Constitution in mind, determines whether certain laws and actions operate within the world of the permissible. In the United Kingdom, Parliament and its laws reign supreme.

In contrast to our Supreme Court's role in the right to remain silent, there are three Parliamentary Acts that have principally controlled the vantage regarding the

right to silence in the United Kingdom. The Criminal Evidence Act of 1898,⁴⁵ the Police and Criminal Evidence Act of 1984,⁴⁶ and the Criminal Justice and Public Order Act of 1994,⁴⁷ are the most important laws on the right to silence over the last century or so.

The Criminal Evidence Act of 1898 provided a resounding rejection to any notion of compulsion. The Act reversed the practice of prohibiting a defendant from offering sworn testimony. More important, it established that a defendant could not be compelled to give evidence and a defendant's failure to do so could not be commented upon by the prosecution; however, if a defendant offered any evidence, the privilege would be waived. This Act is similar in many ways to the current law in the United States. Interestingly, in the United States, even if a defendant chooses to put on a defense, no comment may be made about his or her failure to testify, but a prosecutor is free to comment upon and criticize the quantum and quality of the evidence presented.

All assembled here today will no doubt be proud to know that Birmingham played a role in the public discussion of the right to silence. Apparently, the "Caution," as it is referred to now in legislation, came about in 1912. The Caution was instituted because the Chief Constable in Birmingham had asked for clarification as to when to use it. Of course, this earlier version of the Caution informed an accused of his right to silence. In what was known then as the Judges' Rules, the requirement that police formally give a caution to suspects upon arrest was introduced.

The key difficulty in the application of the Caution was that the Judges' Rules were administrative in nature and there was no uniformity. Hence, violating the Judges' Rules did not come with the sanction of suppression of statements from evidence or an altering of the criminal case at all. The conceptualization of the Judges' Rules is best described in the 1918 case *Rex v. Voisin*:

In 1912, the judges, at the request of the Home Secretary, drew up some rules as guidance for police officers. These rules have not the force of law, they are administrative directions the observance of which the police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the judge presiding at the trial.⁴⁸

In the intervening years, the courts addressed the Caution in various ways, but it was not until the 1984 Police and Criminal Evidence Act that the Caution became law.

The Police and Criminal Evidence Act of 1984 sets forth what under English law is the Caution: "You do not have to say anything. But it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence."⁴⁹

⁴⁵ Criminal Evidence Act 1898, 61 & 62 Vict. c. 36 (Eng.).

⁴⁶ Police and Criminal Evidence Act 1984, c. 60 (Eng.).

⁴⁷ Criminal Justice and Public Order Act 1994, c. 33 (Eng.).

⁴⁸ *R. v. Voisin* [1918] 1 K.B. 531 at 539-40 (Eng.).

⁴⁹ Police and Criminal Evidence Act 1984, App. A, § 10.4, Code of Practice C (Eng.).

The Caution presents several challenges seemingly without providing a resolution. First, how may exercising your right to silence harm your defense? Remember, this is before the advent of the adverse inference. The court may comment, but it is certainly not clear how the court may comment. Presumably, it is evident in the jury instructions, but it appears uncertain. Second, is there any notion of materiality or relevance in the consideration of evidence? Specifically, does the Caution apply to anything and everything you could possibly say to the authorities? Suppose an innocent omission occurs. Is that now an instance that could be harmful to the defense? Third, the Act alludes to a detriment by omission. Is there a negative inference to be drawn or is there a shift in burden?

The Criminal Justice and Public Order Act of 1994 addresses some of the open questions presented by the Police and Criminal Evidence Act of 1984. The 1994 Statute, in relevant part, states:

- (1) Where, in any proceedings against a person for an offence, 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 his defence 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, . . .[The Jury] may draw such inferences from the failure as appear proper.⁵⁰

The most important change in the statutory language is the fact that a judge or jury “may draw such inferences from the failure as appear proper.”⁵¹

The negative inference, in whatever form, creates a legal dynamic diametrically opposed to the system in the United States. In the United Kingdom, the accused is required to shoulder a substantial additional burden with multiple potential effects. Indeed, one could plausibly argue that the Caution turns the burden of proof on its head, affecting any consideration of guilt in several ways. First, the presumption of innocence is affected. Even when a judge instructs a jury that, despite the effect of the Caution and the adverse inference to be drawn from silence, the presumption persists, that admonition does not leave an accused untarnished. What is the purpose of the presumption if the adverse inference negates the dynamic of the presumption? Second, the Caution upsets the burden of proof. Notwithstanding the fact that the Crown carries the burden of proof throughout the trial, the adverse inference creates two issues: 1) an expectation by the jury that the accused will explain himself or herself and answer any open questions and 2) whatever quantum of proof the Crown gathers, the accused, through his or her testimony, will be expected to likewise come forth with an explanation professing innocence of the charges. The burden is no longer non-existent, as the defendant never takes on a burden of proof, and instead requires the accused to actually show innocence.

⁵⁰ Criminal Justice and Public Order Act 1994, c. 33, § 34 (Eng.).

⁵¹ *Id.*

VI. COMPARISON OF U.S. AND U.K.

My fascination in comparing and contrasting our respective systems' views on the right to silence continues well past *Miranda*. Indeed, it is ironic that both systems sought a legislative solution to the right to silence, but the results were quite different.

Within two years after the *Miranda* decision—1968, to be exact—the United States Congress, spearheaded by the Southern contingent, still upset by the meddling of the Supreme Court in their way of life, as evidenced in *Brown v. Board of Education*,⁵² the school desegregation case I alluded to earlier, passed what became known as the Crime Bill of 1968.⁵³ The key provision for our purposes was Section 3501.⁵⁴ This statute was a rebuke of *Miranda*. It was specifically passed to undermine the effectiveness of the *Miranda* Warnings and take, so to speak, the handcuffs off of law enforcement in federal prosecutions. It was thought by legislators, with no proof or empirical data to support them, that if the *Miranda* Warnings were given to those accused in custody, no confessions would come about.

Congress, in taking on the Supreme Court, attacked the notion that *Miranda* was a new constitutional rule. Passage of the Act meant Congress thought that the Court acted pursuant to its supervisory authority which Congress can challenge with legislation, essentially undoing a decision. Such was not the case. Because of its constitutional breadth, *Miranda* was a rule affecting both state and federal prosecutions. You will recall I mentioned the incorporation doctrine earlier. This concept required the application of federal law—the rule against self-incrimination and the right to counsel—to the states. Specifically, the statute listed all of the factors taken into account in *Miranda*: (1) time between arrest and arraignment; (2) knowledge of charges; (3) admonition of silence and statement's use against the defendant; (4) the right to an attorney; and (5) provision of an attorney if one could not afford an attorney. The statute tried to effect change allowing for a looser application of *Miranda*.

Here is the key. The statute said the presence or absence of any one factor is not conclusive (or dispositive) on voluntariness. In other words, it is okay if you forget one or two or three of the warnings; it would be permissible for a judge to find any confession voluntary. Great statute for law enforcement but one slight problem—Section 3501 only applied to federal prosecutions.

No Supreme Court case at the time of the statute squarely took on *Miranda* in this way. To be sure, the incrementalist approach eventually resulted in a chipping away of the absolutism of *Miranda*. Little by little, more ways were introduced for evidence to be garnered despite silence. As a consequence, *Miranda* remained the law of the land, but not in the same form as it began.

Fast forward thirty-two years later. Opponents of *Miranda* thought that when the Supreme Court agreed to hear *Dickerson v. United States*,⁵⁵ vindication and evisceration of *Miranda* was imminent.

⁵² *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

⁵³ Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968).

⁵⁴ 18 U.S.C. § 3501 (1968).

⁵⁵ *Dickerson v. United States*, 530 U.S. 428 (2000).

Dickerson came down in 2000. Chief Justice Rehnquist took the opinion. More reason for *Miranda* opponents to feel enthused, at first blush, because his view of constitutional interpretation was the exact opposite of Warren's. *Dickerson* was an interesting case. The Court had to address when should a precedent be re-examined and, if necessary, overturned. Stare decisis, the examination of and adherence to precedent, carried the day. Indeed, Chief Justice Rehnquist noted that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."⁵⁶

The notion that law enforcement would be irrevocably impeded from doing its investigative work as a basis for overturning *Miranda* had long been laid to rest. Indeed, very few cases present viable claims of compelled confessions when *Miranda* Warnings are given.

In *Dickerson*, the defendant was arrested and indicted for bank robbery.⁵⁷ He made a statement to the FBI (Federal Bureau of Investigation) without the benefit of the *Miranda* Warnings.⁵⁸ The lower court noted that, using the test under Section 3501, the statement was voluntary and, despite the absence of *Miranda* Warnings, was admissible. Chief Justice Rehnquist reversed the lower court.⁵⁹ The sole holding was that *Miranda*'s warnings and its approach to admissibility of statements by an accused during custodial interrogation was constitutionally based and could not be, in effect, overruled by legislative act.⁶⁰ Congress could not replace a voluntariness test for the *Miranda* Warnings.

Lastly, the case presented, and the Chief Justice dispatched, any notion that Congress could encroach upon the Court's province. As the great Chief Justice John Marshall said in the seminal case of *Marbury v. Madison*,⁶¹ in 1803, the Supreme Court states what the law is. Congress may not supersede the Supreme Court's authority in interpreting and applying the Constitution. *Miranda* is a constitutional rule. Section 3501 cannot seek to overturn or supersede that precedent. *Miranda* survived *Dickerson*.

VII. THE RIGHT TO SILENCE TODAY

What can we say about the right to remain silent today? First, the right is not absolute. An accused cannot merely stay silent during in-custody interrogation, at trial or at sentencing without any consequences. How has that state of affairs been achieved in the American system? Constant re-examination. The right to be read the *Miranda* Warnings remains. But seemingly endless permutations, aimed at achieving a journey towards the truth, persist.

The ultimate goal of *Miranda* was to extract coercion from the custodial interrogation process, which was then and continues to be today, infected by issues of class, race, and ethnicity. That concern has only intensified when we consider the number of confessions obtained through questionable means, which later are

⁵⁶ *Id.* at 443.

⁵⁷ *Id.* at 432.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 444.

⁶¹ *Marbury v. Madison*, 5 U.S. 137 (1803).

proved by DNA evidence or otherwise to be false or coerced. Second, the concern regarding the shifting burden of proof does not fall solely within consideration of the adverse inference. In the States, citizens are bombarded with television, film, and literature where the defense in a criminal case presents a theory of the case. Jurors, now more than ever, come to court with an expectation that they will hear from both sides. The right to remain silent be damned.

In reviewing the effect of the 1994 Act, I seriously grappled with whether there is a way to apply the adverse inference without a detriment to the defense. For instance, an instruction, as occurs now in U.K. courts, which states 1) that the presumption of innocence of the accused persists despite the adverse inference and 2) that the burden of proof remains with the Crown to prove the guilt of the accused is beneficial but hardly enough. After all, how can a lay person, after grasping the import of the adverse inference, say never mind? Every piece of evidence reviewed, every bit of testimony heard, would be filtered through the fulcrum of why is he just sitting there? Why isn't he talking up? The answer to the next question settles the matter—would he be silent if he were innocent? When, as we know, innocence is not the issue.

What is keenly apparent is that as you examine the different ways of addressing both the right to remain silent and the right to silence, neither carries the day. Each is the result of a fundamental divergence in approach with vastly different aims. Is either better suited to obtain the truth or protect the right of the accused? Arguments abound on either side. What is clear is that as we move further into the twenty-first century, defendants will be less likely to cloak themselves in silence without consequence, and when they do speak, it will indeed be at their peril.