ENGLISH CRIMINAL PROCEDURE UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS:

IMPLICATIONS FOR CUSTODIAL INTERROGATION PRACTICES

*Raymond J. Toney**

* B.S., University of Alabama at Birmingham (1983); LL.B, Norwich Law School, University of East Anglia (2001); Master of Studies in Legal Research Candidate, Faculty of Law, University of Oxford (2002). *See* Raymond J. Toney, *Disclosure of Evidence and Legal Assistance at Custodial Interrogation: What Does the European Convention on Human Rights Require?*, 5 INT'L J. EVID. & PROOF 39 (2001) (publishing aspects of this research). I would like to thank Dr. Andrew Ashworth, Vinerian Professor of English Law, Faculty of Law, University of Oxford, and Dr. Rosemary Pattenden, Professor of Law, Norwich Law School, University of East Anglia, for helpful comments on previous drafts. Any remaining errors are my responsibility.

I. INTRODUCTION

In the English legal system, the criminally accused has a general right to a fair trial by a jury of peers. The trial is a rigorous exercise in the regulation of the flow of information from and between the parties, information on which the jury ultimately will be required to make its finding of guilt or innocence. The trial is conducted in accordance with detailed rules governing the admissibility and use of evidence. Few would dispute that these rules are essential to ensure the fair trial to which the criminally accused is entitled.

The elaborate provisions regulating the flow of information

at trial, however, are virtually absent at custodial interrogation, where the criminal suspect is most vulnerable, and which is arguably the single most critical phase of the criminal process.[1] In England, the methods by which the police acquire, develop, and use evidence at custodial interrogation raise very serious issues of procedural fairness and human rights. These methods can have a profound impact on the efficacy of custodial legal advice[2] and the fairness of the criminal process generally.

Unlike in the United States of America, international human rights norms have direct bearing on English rules of evidence and criminal procedure. This influence is achieved principally through England's participation in the European human rights system. Most important for the English criminal process are the decisions of the European Court of Human Rights ("EctHR"), which interpret and apply the European Convention on Human Rights ("Convention") [3] in individual cases. Indeed, English lawyers over the years have been highly enterprising in their use of the ECtHR and in invoking

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1. *See* YALE KAMISAR, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in* POLICE INTERROGATION AND CONFESSIONS – ESSAYS IN LAW AND POLICY 27, 31 (1980) (challenging the logic of the disparate treatment of suspects in the "Gatehouses" (the police stations) and the "Mansions" (the courtrooms) of criminal procedure). Writing in 1965, Kamisar observed that "[i]n the courtroom, the conflict of interest between the accused and the state is mediated by an impartial judge; in the police station, although the same conflict exists in more aggravated form, 'the law' passes it by." *Id*. at 28.

2. It must be noted that, in contrast to U.S. criminal defence lawyers, English legal advisers do not see their role as preventing all police questioning of suspects, and do not in all circumstances advise silence. *See* Gordon Van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 W. VA. L. REV. 799, 815 (1998). In England, legal advisers also are frequently present at custodial interrogation. *See* Editorial, *The Conduct of Police Investigations*, 1993 CRIM. L. REV. 161, 161. In this regard, the English legal adviser has more in common with her Continental European counterparts than with American defence lawyers. *See* Van Kessel*, supra,* at 815–21.

3. G. C. Rodriguez Iglesias, *The Protection of Fundamental Rights in the Case Law of the Court of Justice of the European Communities*, 1 COLUM. J. EUR. L. 169, 175 (1995). Convention for the Protection of Human Rights and Fundamental Freedoms, commonly referred to as the "European Convention on Human Rights," was ratified by the United Kingdom on March 8, 1951. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights].

Convention rights in domestic courts.[4] With the coming-into-force of the Human Rights Act 1998 ("HRA"),[5] which incorporates much of the Convention into the domestic legal order, domestic litigants will have even greater opportunities to shape English criminal procedure using Convention law.[6]

In this article, I critically analyse and discuss two aspects of custodial interrogation in England that may offend the fair trial guarantees provided by Article 6 of the Convention. The first aspect involves the non-disclosure or misrepresentation of evidence by police during custodial interrogation. I will argue that this practice has severe prejudicial effects on the legal position of the suspect and the custodial legal adviser. The non-disclosure or misrepresentation of evidence deprives the suspect and the custodial legal adviser of factual information about the offence in question. This practice creates informational inequality and an imbalance of power between the suspect and the police. This imbalance of power may violate the Convention principle of "equality of arms," which requires that the accused be allowed to present his case "under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent."[7]

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4. MONICA CARSS-FRISK ET AL., HUMAN RIGHTS LAW AND PRACTICE 8-9 (Lord Lester of Herne Hill & David Pannick eds., 1999).

5. Human Rights Act, 1998, c. 42, § 22 (Eng.).

6. Prime Minister Tony Blair stated that the purpose of the HRA was to "give people in the United Kingdom opportunities to enforce their rights under the European Convention in British courts rather than having to incur the cost and delay of taking a case to the European Human Rights . . . Court in Strasbourg." Tony Blair, *Preface* to HOME OFFICE, RIGHTS BROUGHT HOME: THE HUMAN RIGHTS BILL 1 (1997). The HRA requires that the courts, wherever possible, interpret primary and secondary legislation in a way that is compatible with the rights under the Convention. *Id*. at 9. The courts may issue a "declaration of incompatibility" where it is not possible to so construe domestic legislation. *Id*. The declaration serves to encourage the government and Parliament to consider urgent remedial action to remedy the incompatibility. *Id*. at 11. Moreover, the HRA imposes on public authorities a duty not to act in a manner which is incompatible with Convention rights. *Id*. at 8. Ministers in charge of proposed legislation must make a statement to Parliament about the compatibility of their proposed legislation with the Convention rights or, where incompatible, explain that the government intends to proceed with the measure, despite its incompatibility with Convention rights. *Id*. at 13. In this manner, the drafters of the HRA were able to respect the (controversial) British constitutional doctrine of Parliamentary Sovereignty. *Id*. at 10.

7. Dombo Beheer B.V. v. The Netherlands, App. No. 14448/88, 18 Eur. H.R.

Closely linked to the principle of equality of arms is the Article 6(3)(b) right to "adequate facilities,"[8] which requires that the accused be provided "with the results of investigations carried out throughout the proceedings."[9] At present, there are no statutory provisions governing the disclosure and use of evidence at custodial interrogation, and judicial pronouncements on the subject have been limited and contradictory.

The second aspect to be addressed is the right to effective legal assistance provided by Article 6(3)(c) of the Convention.[10] I advance two main arguments here. First, the right to effective legal assistance may be violated by the use of non-lawyers for advising suspects at custodial interrogation, or where qualified lawyers fail to adopt an adversarial posture at custodial interrogation. While the quality of custodial legal assistance in England has improved in recent years, law firms continue to use clerks, former police officers, and other non-lawyers to advise suspects at custodial interrogation.[11] Even fully qualified lawyers may fail to provide suspects with a robust defence at custodial interrogation.[12]

Second, I advance the more complex argument that the informational inequality caused by the non-disclosure or misrepresentation of evidence at custodial interrogation interacts with provisions of the Criminal Justice and Public Order Act 1994 ("CJPOA"), which allow adverse inferences to be drawn from a suspect's failure to answer police questions, to

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Rep. 213, 227 (1994). *See* European Convention on Human Rights, *supra* note 3, art. 6, para. 1, 213 U.N.T.S. at 228.

8. European Convention on Human Rights, *supra* note 3, art. 6, para. 3(b), 213 U.N.T.S. at 228.

9. Jespers v. Belgium, 5 Eur. H.R. Rep. 305 (1978).

10. European Convention on Human Rights, *supra* note 3, art. 6, para. 3(c), 213 U.N.T.S. at 228.

11. *See* Lee Bridges & Jacqueline Hodgson, *Improving Custodial Legal Advice*, 1995 CRIM. L. REV. 101, 101-106 (summarising research on the use and effectiveness of representation at custodial interrogations). The Law Society and Legal Aid Board (now the Legal Services Commission) administers a training and accreditation scheme for police station legal assistance providers. *Id.* at 106.

12. Research indicates that legal advisers are now taking a far more active role at custodial interrogation, though shortcomings remain. *See* LEE BRIDGES & SATNAM CHOONGH, THE LAW SOCIETY AND THE LEGAL AID BOARD, IMPROVING POLICE STATION ADVICE, RESEARCH STUDY NO. 31 142-43, 145-46 (1998).

create a custodial atmosphere in which effective legal assistance is simply not possible.[13] By depriving the custodial legal adviser of complete and accurate factual information about the offence in question, the adviser is unable to properly advise her client on such fundamental matters as whether or not to remain silent. Moreover, in the absence of a requirement that the police disclose the evidence in their possession at custodial interrogation, the legal adviser cannot be certain under any circumstances that the police are not withholding material evidence. I conclude that only by requiring full police disclosure at the earliest moment will the imbalance of power and procedural inequality at custodial interrogation be ameliorated to a degree acceptable under the Convention.

II. THE NATURE AND IMPORTANCE OF CUSTODIAL INTERROGATION IN THE ENGLISH CRIMINAL PROCESS

A. History and Development

Largely by historical accident, in a mere 150 years, the police have come to occupy a decisive place in the English criminal process.[14] The position of the modern police is laden with exceptionally high public, political, and legal expectations.[15] In addition to maintaining public order and preventing crime, the police have also acquired primary responsibility for the investigation of crime and the apprehension of criminal suspects. The Criminal Procedure and Investigations Act of 1996 ("CPIA")[16] imposed additional burdens as to the compilation and disclosure of evidence in individual cases.[17]

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

14. Christopher Williams, *Questioning by the Police: Some Further Points—2*, 1960 CRIM. L. REV. 352, 352-53.

15. *See generally* Charles Pollard, *Public Safety, Accountability and the Courts*, 1996 CRIM. L. REV. 152, 154-61 (discussing the role of police in the criminal justice process and the need for change).

16. Criminal Procedure and Investigations Act, 1996, c. 25 (Eng.).

17. §§ 1-21; ROGER LENG & RICHARD D. TAYLOR, BLACKSTONE'S GUIDE TO THE CRIMINAL PROCEDURE & INVESTIGATIONS ACT 1996 9 (1996); Mark Hardie & Joanna Lyons, *Obtaining Full Disclosure Under the CPIA 1996: Part 1*, OCT. 2000 LEGAL ACTION 15, 15-17 (concerning practical issues relating to disclosures).

One of the most important powers possessed by the police is the authority to interrogate criminal suspects held in police custody.[18] The current rules governing custodial interrogation are rooted in the statutory removal of magistrates' power to interrogate suspects in 1848 and the shifting of investigative functions to the newly formed police forces.[19] Importantly, the transfer of investigative powers from magistrates to the police occurred "singularly free from judicial restraints and controls."[20] As Dixon notes, the police quickly evolved the practice of "taking arrested suspects to stations for questioning and charging before their presentation to the magistrates."[21] The problem, according to Dixon, was that "no provision was made in the law for this enormously significant change in practice (except in regard to police bail) and . . . key concepts such as arrest and charge became ambiguous."[22]

From the very inception of the modern police forces, there was legal and practical confusion as to their proper role in the interrogation of suspects. Many courts maintained that, in the absence of evidence to the contrary, what Parliament prohibited of the magistrates, it also prohibited of the police.[23] As Bentley observed, if judges and magistrates "could not question a prisoner, it was unthinkable that inferior officers of justice, such as policemen, should be allowed to do so."[24] There is additional evidence suggesting that this view was widely held in legal circles. In 1873, the Metropolitan Police published orders prohibiting "any attempt by officers or others to extract a statement in the nature of a confession from a person brought to a police station on a charge of felony. . . ."[25] Similarly, the first Police Code on the duties of constables provided that "'when . . .

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18. Police and Criminal Evidence Act, 1984, c. 60, § 37(2) (Eng.).

19. DAVID BENTLEY, ENGLISH CRIMINAL JUSTICE IN THE NINETEENTH CENTURY 229-30 (1998). *See* C. Williams, *supra* note 14, at 353.

20. C. Williams, *supra* note 14, at 353.

21. DAVID DIXON, LAW IN POLICING: LEGAL REGULATION AND POLICE PRACTICES 130 (1997).

22. *Id*.

23. L.H. LEIGH, POLICE POWERS IN ENGLAND AND WALES 144 (1975).

24. BENTLEY, *supra* note 19, at 230.

25. *Id*. at 231.

a constable . . . is about to arrest a person . . . or has a person in custody for a crime, it is wrong to question such a person touching the crime of which he is accused.'"[26] This view was affirmed in the case of *Regina v. Gavin*, in which the court stated that "the police have no right to ask [a suspect in custody] questions."[27] Equally important to note is the evidentiary rationale accompanying the early prohibition of suspect interrogation: the courts considered statements obtained by police interrogation to be involuntary due to the coercive character of custody and police questioning.[28]

While the law may have been clear that police questioning of suspects in custody was prohibited, the practice of the constable on the beat often did not conform to the law.[29] Further, the courts themselves did not, in all circumstances, sanction police interrogation by excluding suspect admissions or confessions at trial.[30] More direct judicial engagement in the question of police interrogation originated with Lord Chief Justice Alverstone's response to the Chief Constable of Birmingham on October 26, 1906, seeking clarification on police authority to detain and question suspects.[31] In 1912, the judges of the King's Bench Division of the High Court issued general guidelines on the questioning of suspects in the form of the Judges' Rules.[32] The Judges' Rules addressed matters ranging from when a suspect should be cautioned (Rule 1) to the questioning of suspects after being formally charged (Rule 7). The use of the term "rules,"

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26. DIXON, *supra* note 21, at 131 (quoting Lord Brampton, *Preface* to VINCENT'S POLICE CODE (1882)).

27. R. v. Gavin, 15 Cox CC 656, 657 (1885).

28. R. v. Stokes, 17 Jurist 192 (1853); LEIGH, *supra* note 23, at 143-44. In this regard, Bentley notes that the Metropolitan Police "had none too savoury a reputation in this respect in the 1840s." BENTLEY, *supra* note 19, at 231.

29. *See* BENTLEY, *supra* note 19, at 231-33 (discussing some tactics used by the police to "outflank" the prohibition on questioning).

30. Ibrahim v. The King, [1914] A.C. 599, 614 (P.C. 1914) (appeal taken from H.K.).

31. Practice Note (Judges' Rules), [1964] 1 W.L.R. 152, 152 (Eng. Crim. App. 1964).

32. Ian Brownlie, *Police Questioning, Custody and Caution*, 1960 CRIM. L. REV. 298, 298-99. Four rules were published in 1912, with an additional five being set forth in 1918 by the same court. *Id*. at 298-99 n.1.

however, was misleading, as the provisions were not legally binding on either the police or the courts,[33] and were merely "administrative directions . . . which the police . . . should enforce upon their subordinates as tending to the fair administration of justice."[34] Nevertheless, the court expected that the rules would provide adequate guidance to the police as to the investigative conduct judges might consider sufficient to warrant the exclusion of confession evidence at trial.[35]

Most relevant for present purposes, Rule 3 provided that "[p]ersons in custody should not be questioned without the usual caution being first administered."[36] A literal reading of Rule 3 plainly indicated that suspects could indeed be questioned if they were first cautioned. However, many argued that the Judges' Rules carried into effect the prior common law ban on questioning suspects for the offence for which they were detained.[37] For instance, Archbold considered that "Rule 3 [was] not intended to encourage or authorize the questioning or cross-examination of a person in custody, after he has been cautioned, on the subject of the crime for which he is in custody. . . ."[38] This view was strongly reinforced by the Royal Commission on Police Powers and Procedures 1929 ("RCPPP"), which reported that

> [w]e have received much evidence as to these "voluntary statements," which are regarded by the Police witnesses who have appeared before us as of great value and as playing an important part in the successful conduct of prosecutions. On the other hand the view has frequently been tendered in evidence that these statements are not always voluntary in the true sense.[39]

The RCPPP subsequently recommended against allowing any police interrogation of suspects due to its concerns over

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33. The King v. Voisin, 1 K.B. 531, 539 (1918).

34. *Id*. R. v. Powell-Mantle, 1959 CRIM. L. REV. 445, 446-47 (Commentary).

35. *See* Voisin, 1 K.B. at 539-40.

36. *Id*. at 539 n.3. *See also* J.C. Smith, *The New Judges' Rules: A Lawyer's View*, 1964 CRIM. L. REV. 176, 177 (discussing the duty to caution).

37. R. v. Powell-Mantle, 1959 CRIM. L. REV. 445, 447 (Case summary).

38. *Id.* at 446.

39. ROYAL COMMISSION ON POLICE POWERS AND PROCEDURE, REPORT, 1929, Cmd. 3297, at 65.

compelled confessions.[40] In 1930, on the advice of the judges of the King's Bench Division, the Home Office issued a circular clarifying that Rule 3 was not intended to authorize police questioning of suspects in custody regarding the offence for which they were being held.[41]

The Home Office circular and the conclusions of the RCPPP did not end the debate over the prohibition on the interrogation of suspects in police custody. While the record during that time is not entirely clear, the indication of the case law is that, by the 1950s, the courts had virtually abandoned the enforcement of the Judges' Rules and were allowing confessions obtained through custodial interrogation to be admitted at trial.[42] A series of articles in the Criminal Law Review in 1960, led by the distinguished professor Dr. Glanville Williams, highlighting the controversies and inadequacies of the Judges' Rules, undoubtedly contributed to a comprehensive reconsideration of the rules by the judiciary, the police, and the legal profession generally.[43] Dr. Williams began his consideration of the matter by criticising the impotence and ambiguity of the Judges' Rules, and accusing the courts of tending "to wink at breaches of the Rules, at any rate if the [criminal] charge is a serious one."[44] His profound concern over haphazard enforcement of the regime led him to argue that "[w]hen judges both assert that the police should discipline themselves, and yet admit evidence that has been obtained through disregard of the judicially-imposed discipline, the stultification of our professions becomes patent."[45] Indeed, Dr. Williams was led to declare Rule 3 a dead letter, noting that "judges [seem to] have given up enforcing their own rules, for it is no longer the practice to exclude evidence obtained

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40. *Id.* The Royal Commission recommended that "no questioning of a person in custody, about any crime or offence with which he is or may be charged, should be permitted." *Id*.

41. Glanville Williams, *Questioning by the Police: Some Practical Considerations*, 1960 CRIM. L. REV. 325, 329-30.

42. *Id. at* 332. Dixon notes that "[p]olice detained and questioned suspects as a matter of course." DIXON, *supra* note 21, at 134.

43. *See generally* G. Williams, *supra* note 41, at 332 *et seq.*

44. *Id*. at 327-28.

45. *Id*. at 332.

by questioning in custody."[46]

In addition to his forceful criticisms of the Judges' Rules, Dr. Williams also argued for sweeping legal changes to permit police interrogation of suspects. His argumentation constituted a frontal assault on the principles and presumptions ostensibly underpinning Rule 3 and its object of avoiding the questioning of suspects in police custody. For instance, in regard to the risk of false confessions, which the RCPPP had regarded as fully justifying a ban on suspect questioning, Dr. Williams argued that such danger could "hardly be regarded as a general reason for refusing to receive evidence of confessions given to police. A confession given to the police *as a result of ordinary questioning* is likely to be true."[47] His "common sense" approach, as illustrated by the following selection, must have had strong appeal for those fatigued by the inadequate state of the law under the Judges' Rules:

> [t]he duty of the police is to detect criminals, and they are generally allowed to address questions to every quarter where they hope to obtain information. It may seem strange that they should be supposed not to ask questions of the one person who is central to the whole investigation. To tie the hands of the police on a "sporting theory of justice" has a debilitating effect upon morale.[48]

In effect, Dr. Williams had made the argument that what rendered custodial confessions involuntary and unreliable was not custody per se, but the manner of questioning employed by

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46. *Id.* at 331. The accuracy of this claim may be disputed. *See* R. v. Powell-Mantle, *supra* note 37, at 446 (excluding evidence obtained in breach of the Rule 3 prohibition on questioning). Dr. Williams and other scholars also have suggested the rules were abandoned, through what might be termed a "beneficent conspiracy" involving the tacit consent of the police and the courts, as imposing unreasonable restraints on police apprehension of criminals. *See* Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence: A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1, 36 (1986).

47. G. Williams, *supra* note 41, at 336 (emphasis added).

48. *Id.* at 340. Note, however, that his views were not accepted at face value in all quarters. Prof. J. C. Smith, for instance, considered Dr. Williams' arguments to founder on the critical point that they presume the suspect is guilty. *See* J.C. Smith, *Questioning by the Police: Further Points—1*, 1960 CRIM. L. REV. 347, 351.

the police. Following this logic, there must be a distinction between improper and ordinary questioning. Allowing that such a distinction could in practice be drawn, the implication clearly was that adequate safeguards could be developed such that the risk of false confessions could be minimized, if not altogether eliminated. That objective achieved, substantial weight would be lifted from the conscience of the courts, which historically were suspicious of any inculpatory statement allegedly emitted by a suspect held in police custody.[49] The consequence, then, would be the rationalization and regulation of police conduct, albeit indirectly, through the judicial threat of excluding evidence at trial, which, over time, would help build judicial confidence in the police as a professional institution.

Some of the assertions made during the debate will strike the modern reader as quite foreign; for instance, the assertion of J. C. Smith that allowing the presence of a defence lawyer at interrogation would "cramp the style of the police too much to be acceptable."[50] Today, of course, English law not only permits the presence of a legal adviser at interrogation as a matter of legal right, it requires the suspect be informed of this right in writing and that a legal adviser be provided to the suspect during custodial interrogation at no cost.[51] Nor could the utilitarian observation of Christopher Williams that follows be sustained under the weight of modern human rights law, which places a premium on the rights of individuals: "the law exists for the benefit of the community. It is not an elaborate game of chequers, governed by rules of absolute ethical validity, so much as a means, admittedly imperfect, by which society can protect itself. . . ."[52] Yet it must be appreciated that these comments

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49. *See* Ian Brownlie*, Police Questioning, Custody, and Caution*, 1960 CRIM. L. REV. 298, 301. Brownlie stated that "[a]t one time the courts trusted the police so little that they disapproved of any evidence contained in answers to questions put by the police to suspected persons." *Id*.

50. J.C. Smith, *supra* note 48, at 351.

51. European Convention on Human Rights, *supra* note 3, art. 6, para. 3(c), 213 U.N.T.S. at 228; HOME OFFICE, *Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers*, *in* POLICE AND CRIMINAL EVIDENCE ACT 1994 (S.66(1)(A) AND S.66) CODES OF PRACTICE paras. 3.1-3.5, at 31-32 (1995) [hereinafter HOME OFFICE, *Code C*].

52. C. Williams, *supra* note 14, at 354.

were made during what was a formative and even revolutionary period of English criminal procedure, and the commentaries no doubt reflect the best ideas as derived from the knowledge and experience available to their authors at that time. Certainly the writers could not have foreseen the expansionist and self-confident approach of the ECtHR in the field of criminal procedure that has developed in the past two decades, the implications of which English law is only beginning to fully apprehend. The Royal Commission on Criminal Procedure 1981 ("RCCP") shared this view, commenting that the Judges' Rules and the debates surrounding them "represented a first conscious effort within the pre-trial procedure to set out a considered balance between the need to protect the rights of the individual suspect and the need to give the police sufficient powers to carry out their task."[53]

No doubt influenced by the arguments of Dr. Williams and others, the judges of the Queen's Bench Division published a revised set of Judges' Rules in 1964.[54] As with the 1912 Judges' Rules, the rules did not, and were not so intended, to constitute judicial monitoring of investigative activity by police.[55] As Christopher Williams has observed, the concern of the courts in issuing the rules was the admissibility of suspect confessions.[56] While the rules remained administrative in nature, and thus lacked legal effect, they, for the first time, endorsed police interrogation of suspects in custody for the offence for which they were held.[57] Rule 1 provided that

[w]hen a police officer is trying to discover whether, or

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53. THE ROYAL COMMISSION ON CRIMINAL PROCEDURE, REPORT, 1981, Cmnd. 8092, at 7.

54. Practice Note (Judges' Rules), [1964] 1 W.L.R. at 153-56.

55. *Id.* at 152. *See* Police and Criminal Evidence Act, 1984, c. 60, §§1-122 (Eng.) (implementing monitoring of police investigative activity).

56. C. Williams, *supra* note 14, at 353.

57. DIXON, *supra* note 21, at 135. Dixon considers that the new rules were:

> an extraordinary use of administrative rule-making power. Notwithstanding the limited legal significance of the Judges' Rules, this amounted to the announcement of a major change in criminal procedure which was made quietly and unobtrusively without any express discussion or justification of the new policy or even an indication that a new policy had evolved.

Id. at 135-36 (internal quotes omitted).

> by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.[58]

In practice, however, the new rules did not rectify the problems of the past, and gave rise to difficulties of their own, the discussion of which is beyond the scope of this article.[59] Suffice it to say here that the new rules were viewed generally as confusing and lacking a coherent rationale.[60] The RCCP critically reviewed the rules and found them to be an unsatisfactory amalgamation of "jigsaw pieces of two centuries of police and legal history."[61] However, the RCCP did not challenge the position of custodial interrogation under the revised Judges' Rules. Indeed, the RCCP fully endorsed the use of custodial interrogation, stating that "there can be no adequate substitute for police questioning in the investigation, and, ultimately, the prosecution of crime. . . . [T]he police must continue to be allowed to question suspects. . . ."[62]

As this brief review has demonstrated, in a time span of only seventeen years, custodial interrogation took its place at the forefront of English police investigative techniques and the criminal process generally. In the process, a new vocabulary evolved, that of balancing suspects' rights with the needs of the police and society generally.[63] In trying to strike this balance, the RCCP considered it necessary to introduce additional

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58. Practice Note (Judges' Rules), [1964] 1 W.L.R. at 153.

59. *See* DIXON, *supra* note 21, at 136-41.

60. *See* Smith, *supra* note 36, at 181-82; LEIGH, *supra* note 23, at 141; A Police Officer*, The Judges' Rules and the Police*, 1964 CRIM. L. REV. 173, 173-76; Donald Thompson, *Questioning: A Comment*, 1967 CRIM. L. REV. 94, 100; Ian Brownlie*, Police Powers—IV; Questioning: A General View*, 1967 CRIM. L. REV. 75, 78-80.

61. THE ROYAL COMMISSION ON CRIMINAL PROCEDURE, REPORT, 1981, Cmnd. 8092, at 110.

62. *Id.* at 70.

63. *See supra* Part I.A. A concise discussion of the issues of principle arising from this "balancing" approach is provided by Andrew Ashworth, *Crime, Community and Creeping Consequentialism*, 1996 CRIM. L. REV. 220, 228-230.

safeguards for suspects held in custody, made extensive recommendations to that effect, and urged Parliament to place custodial interrogation on statutory footing.[64] The Police and Criminal Evidence Act 1984[65] ("PACE 1984") implemented the RCCP's recommendations in large measure, and, as of January 1, 1986, replaced the Judges' Rules as the principal guidelines for police interrogation of suspects.[66] As Bentley concluded, "[o]f the nineteenth-century prohibition upon the questioning of suspects nothing now remains."[67]

The PACE provisions are extensive and highly detailed. The reader is referred elsewhere for meticulous treatments of their contents, operation, and controversies.[68] For present purposes, only a few points need to be made. First, the interrogation of suspects held in police custody, whether they are voluntarily assisting the police or are held under powers of arrest, is permitted until there is sufficient evidence to charge the suspect with the offence, whether the evidence is obtained through questioning or other forms of investigation.[69] When there is sufficient evidence to charge, the suspect must be so charged or released.[70] Second, the police may not employ conduct which is oppressive in attempting to elicit information from a suspect.[71] Nor may they hold out incentives or inducements in order to elicit information from a suspect.[72] Third, the suspect has a right

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64. THE ROYAL COMMISSION ON CRIMINAL PROCEDURE, REPORT, 1981, Cmnd. 8092, at 6; BARRIE IRVINE, ROYAL COMMISSION ON CRIMINAL PROCEDURE, *Forward* to RESEARCH STUDY NO. 2, POLICE INTERROGATION: A CASE STUDY OF CURRENT PRACTICE iii (1980).

65. Police and Criminal Evidence Act, 1984, c. 60, §§ 121-122 (Eng.).

66. *Id.* at §§ 1-122. *See* Kuk Cho, *Reconstruction of the English Criminal Justice System and Its Reinvigorated Exclusionary Rules*, 21 LOY. L.A. INT'L & COMP. L.J. 259, 261-79 (1999).

67. BENTLEY, *supra* note 19, at 234.

68. *See* MICHAEL ZANDER, THE POLICE AND CRIMINAL EVIDENCE ACT 1984 (3d ed. 1995). Treatments by foreign scholars are also useful. *See* Cho, *supra* note 66, at 278-87; Gordon Van Kessel, *European Perspectives on the Accused as a Source of Testimonial Evidence*, 100 W. VA. L. REV. 799, 813-44 (1998).

69. Police and Criminal Evidence Act § 37; HOME OFFICE, *Code C*, *supra* note 51, para. 11.4, at 52-54.

70. Police and Criminal Evidence Act § 37(2).

71. HOME OFFICE, *Code C*, *supra* note 51, para 11.3, at 53.

72. *Id*.

to consult with and have a legal adviser present during questioning.[73] Finally, PACE makes no reference to the disclosure or use of evidence by police in the questioning of suspects.

B. Modern Custodial Interrogation

The importance of modern custodial interrogation for the police, the suspect, and the criminal justice process generally is now well-recognised. As Baldwin noted, "it has now become something of a truism to observe that, in most criminal cases, the crucial stage is the interview at the police station, for it is at that stage that a suspect's fate is as a rule sealed."[74] Custodial interrogation now constitutes the principal weapon in the investigative arsenal of the police.[75] The foremost objective of custodial interrogation is to obtain admissions from a suspect who, in most instances, the police already consider guilty of the offence in question.[76] Parliamentary limitations on police budgets and political pressures to control crime may further contribute to reliance on interrogation as the central investigative tool and may foster an attitude of "the end justifies the means."

As studies have shown, "to obtain a written confession from an accused is tantamount to securing his conviction . . . ."[77] Significantly, a high percentage of criminal cases is resolved

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73. *See* Police and Criminal Evidence Act § 58.

74. John Baldwin, *Police Interview Techniques: Establishing Truth or Proof?*, 33 BRIT. J. CRIMINOLOGY 325, 326 (1993).

75. DEBORAH CHENEY ET AL., CRIMINAL JUSTICE AND THE HUMAN RIGHTS ACT 1998 59 (1999).

76. *See* Stephen Moston, Geoffrey Stephenson & Thomas Williamson, *The Effects of Case Characteristics on Suspect Behaviour During Police Questioning*, 32 BRIT. J CRIMINOLOGY 23, 33 (1992) (showing in 80% of cases from their study the interviewer's main goal was to obtain a confession from the suspect). This view also appears to be widely accepted amongst academic commentators and practitioners. *See* Andrew Ashworth, *Should the Police be Allowed to Use Deceptive Practices?*, 114 L.Q. REV. 108, 108 (1998); Mike Maguire & Clive Norris, *Police Investigations: Practice and Malpractice*, 21 J.L. & SOC'Y. 72, 74 (1994).

77. JOHN BALDWIN & MICHAEL MCCONVILLE, ROYAL COMMISSION ON CRIMINAL PROCEDURE, CONFESSIONS IN CROWN COURT TRIALS, RESEARCH STUDY NO. 5, 1980, at 19.

through confessions and other evidence generated through custodial interrogation.[78] Indeed, research demonstrates that the great majority of suspects cooperate with the police, answering most or all police questions.[79] Custodial interrogation thus expedites the formal and informal resolution of criminal offences and generates fiscal and other practical benefits for the criminal justice system and society. Viewed in this light, custodial interrogation can be rationalized as an efficient and necessary tool in the fight against crime.[80]

1. The Coercive Nature of the Custodial Environment

It has long been recognised that custodial interrogation is a highly coercive environment susceptible to police abuse and exploitation.[81] The U.S. Supreme Court stated in its landmark decision in *Miranda v. Arizona*[82] that custodial interrogation was "created for no purpose other than to subjugate the individual to the will of [the] examiner."[83] The *Miranda* court commented that, even in the absence of physical violence or threats, "[the custodial] atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it

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78. THOMAS BUCKE & DAVID BROWN, HOME OFFICE RESEARCH AND STATISTICS DIRECTORATE, IN POLICE CUSTODY: POLICE POWERS AND SUSPECT'S RIGHTS UNDER THE REVISED PACE CODES OF PRACTICE, HOME OFFICE RESEARCH STUDY 174 33 (1997) (showing that approximately 58% of suspects confess at custodial interrogation). John Sprack states that "[a] major part of the evidence at most criminal trials concerns the answers the accused made in interview with the police and any written statement he may have signed under caution." JOHN SPRACK, EMMINS ON CRIMINAL PROCEDURE 29 (8th ed. 2000).

79. BUCKE & BROWN, *supra* note 78, at 35.

80. *See* Mohammed-Holgate v. Duke, [1984] Q.B. 209, 216 (1983) (showing that the Court of Appeal has endorsed this view, allowing the police to exercise their discretion to arrest where there is little evidence pointing toward the suspect since a confession is more likely to occur in the coercive atmosphere of police custody).

81. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 357 (1872) (noting that out of court confessions constitute "the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature of being disproved by other negative evidence.").

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

83. *Id.* at 457.

is equally destructive of human dignity."[84] The same holds true for England, where investigators have found a significant percentage of suspects to be in abnormal mental states due to the fear and anxiety that accompany police interrogation.[85] The ECtHR recently noted that the physical conditions of detention and interrogation per se may be such as to be "psychologically coercive and conducive to breaking down any resolve [the suspect may have manifested] at the beginning of his detention to remain silent."[86]

Some of the most egregious miscarriages of justice in England had their roots in police interrogation of suspects in custody.[87] In the context of the sectarian violence of Northern Ireland's recent past, custodial interrogation was the setting for systematic violations, to include physical and sexual assaults, of fundamental human rights of persons suspected of terrorism and other criminal acts.[88] Allegations of psychological ill-treatment included threats by detectives "to arrange that persons detained or members of the families would become targets of a paramilitary group."[89] Important for the discussion to follow on the disclosure and use of evidence by police, detainees in Northern Ireland also were threatened with the inclusion of "compromising material in interview notes" unless the detainee cooperated.[90]

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84. *Id.*

85. *See* GISLI GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 43 (1992).

86. *See* Magee v. United Kingdom, 31 Eur. H.R. Rep. 822, 834-35 (2000).

87. *See* Ian Dennis, *Miscarriages of Justice and the Law of Confessions: Evidentiary Issues and Solutions*, 1993 PUB. L. 291, 291-301.

88. *See generally* EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, REPORT TO THE GOVERNMENT OF THE UNITED KINGDOM ON THE VISIT TO NORTHERN IRELAND CARRIED OUT BY THE EUROPEAN COMMITTEE FOR THE PREVENTION OF TORTURE AND INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (CPT) FROM 29 NOVEMBER TO 8 DECEMBER 1999, 20-29 (2001) [hereinafter CPT REPORT]; Ben Fitzpatrick & Clive Walker, *Holding Centres in Northern Ireland, the Independent Commissioner and the Rights of Detainees*, 1999 EUR. HUM. RTS. L. REV. 27, 27-29.

89. CPT REPORT, *supra* note 88, at 18.

90. *Id*.

2. The Use of Evidence by Police at Interrogation

The use of evidence by police at custodial interrogation has received surprisingly little attention in legal literature, and empirical data is direly lacking. However, information from observational studies of police interviewing does provide some indication of the role of evidence in the interrogation process. Unsurprisingly, several investigators have found that the police use evidence as a tool for manipulating the suspect in pursuit of a confession.[91] Irving describes an interrogation strategy involving the presentation of evidence, whether real or contrived, against the suspect in an attempt to lead the suspect to conclude that he has no real alternative but to confess ("no alternative" approach).[92] He described the "no alternative" approach as involving three types of evidence: (1) forensic evidence/criminal intelligence; (2) specific or general evidence from witnesses; and (3) evidence from accomplices.[93] Irving found that, overall, the "no alternative" approach was used most often when compared with other available ploys such as the manipulation of custodial conditions (*e.g.*, solitary confinement), and was used in a high percentage of cases.[94]

Irving also found that "[c]laims that forensic evidence exists seem to be accepted by a wide range of suspects even when, from

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91. BARRIE IRVING, ROYAL COMMISSION ON CRIMINAL PROCEDURE, RESEARCH STUDY NO. 2, POLICE INTERROGATION: A CASE STUDY OF CURRENT PRACTICE 144-45 (1980); ROGER EVANS, ROYAL COMMISSION ON CRIMINAL JUSTICE RESEARCH STUDY NO. 8, THE CONDUCT OF POLICE INTERVIEWS WITH JUVENILES, 1993, at 12.

92. IRVING, *supra* note 91, at 144-45. This approach is well-documented in the American context. The leading researchers Leo and Ofshe found that:

> [I]nterrogators commonly claim that they have witnesses, fingerprints, hair, blood, semen or other evidence when they have little or nothing. Whether revealing evidence or telling lies, the interrogator labors to convince the suspect that the case against him is so overwhelming that he has no choice but to face the fact that he has been caught, will shortly be arrested, successfully prosecuted and severely punished.

Richard Ofshe & Richard Leo, *The Social Psychology of Police Interrogation: The Theory and Classification of True and False Confessions*, 16 STUD. L. POL. & SOC'Y 189, 198 (1997). *See also* Richard Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 277, 277 tbl.5, 278 (1996); Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 971-73 (1997).

93. IRVING, *supra* note 91, at 144-45.

94. *Id*. at 148.

a scientific viewpoint, the claims are absurd."[95] Moreover, he observed that "[i]nformation received, or said to have been received from accomplices is . . . a frequently used bluff. It is especially useful if more than one suspect is in custody for the same offence."[96] On the other hand, he found that the invention of witnesses was "a dangerous bluff which is very rarely used except in the vaguest terms (for example, 'you were seen')."[97] Irving only briefly considers the potential impact of such tactics on suspects, suggesting that "an innocent man is at a disadvantage when such bluffs are used because he is unaware of the details of the offence."[98] Overall, Irving concluded that "[i]nformational bluffs are understood and used in a more sophisticated manner than any other single kind of interviewing tactic. When properly used their effectiveness in obtaining confessions is beyond doubt, and much of the preparation for an important interview is aimed at providing a basis for their use."[99]

Moston et al. indicate, presumably as a conclusion derived from their investigation, that "the interviewer manipulates the suspect's decision-making by using the available evidence as a persuasive technique."[100] An observational study for the British government ("Home Office") carried out by Softley found that in thirteen percent of the observed cases, the police would adopt the "no alternative" approach of presenting the evidence in a way that "showed the suspect in the most incriminating light, which made denial seem pointless."[101] In fifteen percent of interviews, the police would "bluff or hint that other evidence would be forthcoming . . . . Occasionally the police might have

95. *Id.* at 145.

96. *Id.*

97. *Id.*

98. IRVING, *supra* note 91, at 145. American commentators have observed that "concocted evidence is usually essential to producing false confessions . . . ." Alschuler, *supra* note 92, at 972-73. *See generally* Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R-C.L. L. REV. 105, 108-109 (1997).

99. IRVING, *supra* note 91, at 145.

100. Moston et al., *supra* note 76, at 28.

101. PAUL SOFTLEY, ROYAL COMMISSION ON CRIMINAL PROCEDURE, AN OBSERVATIONAL STUDY IN FOUR POLICE STATIONS, RESEARCH STUDY NO. 4, 1980, at 78.

exaggerated the strength of the evidence which they were likely to assemble."[102]

3. The Right to Silence Provisions (secs. 34-37 CJPOA)

The problems of custodial interrogation have been sharply exacerbated by sections 34-37 CJPOA, which allow adverse inferences to be drawn against the accused under certain circumstances.[103] The complex legal decisions facing the accused under similar Northern Ireland silence provisions led the ECtHR in *Murray v. United Kingdom*[104] to require access to legal assistance without delay at custodial interrogation.[105] The suspect's position is worsened still when the silence provisions are combined with the non-disclosure or misrepresentation of evidence. As one practitioner put it, under CJPOA, a "cat and mouse game" has developed between defence lawyers and the police, making it difficult if not impossible for lawyers to know what legal advice is appropriate in a given case.[106]

The level of skill required for providing effective custodial

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102. *Id*. at 79. *See also* Leo, *supra* note 92, at 277 tbl.5, 278-79 (finding from observations of interrogation in the U.S. that the police engaged in the concoction and/or misrepresentation of evidence in 30% of cases).

103. Criminal Justice and Public Order Act, 1994, c. 33, §§ 34-37 (Eng.) (For inferences to be drawn, the accused must fail to mention any fact during interrogation or when charged that he subsequently relies on at trial, § 34; fail to give evidence or answer questions during trial, § 35; fail to account for objects, marks or substances on him, in his possession or on the premises where he was found, § 36; or fail to account for his presence at a particular place around the time of the offence, § 37. A number of pre-conditions must be met in order for each section to be applicable. §§ 34-37. For a full discussion of CJPOA's operation, *see* Rosemary Pattenden, *Inferences from Silence*, 1995 CRIM. L. REV. 602, 603-11; Rosemary Pattenden, *Silence: Lord Taylor's Legacy*, 2 INT'L J. OF EVIDENCE & PROOF 141, 141-61 (1998); Peter N. Mirfield, *Two Side-Effects of Sections 34 to 37 of the Criminal Justice and Public Order Act 1994*, 1995 CRIM. L. REV. 612, 615-621; Di Birch*, Suffering in Silence: A Cost-Benefit Analysis of Section 34 of the Criminal Justice and Public Order Act 1994*, 1999 CRIM. L. REV. 769, 769-70, 774-88.

104. 22 Eur. H.R. Rep. 29 (1996).

105. *Id.* at 67.

106. *See* Ed Cape, *Advising on Silence: New Cases, New Strategies*, LEGAL ACTION, June 1999, at 14. This expression was also used by Professor Zuckerman to describe the dynamic between the police and criminal suspects throughout the criminal process. A.A.S. Zuckerman, *Bias and Suggestibility: Is There an Alternative to the Right to Silence?*, *in* SUSPICION AND SILENCE: THE RIGHT TO SILENCE IN CRIMINAL INVESTIGATIONS, 117, 135 (David Morgan & Geoffrey M. Stephenson eds., 1994).

legal advice is greater following the implementation of sections 34-37 CJPOA.[107] The legal adviser now must carefully weigh the risk of the suspect making inculpatory statements when responding to police interrogation against the drawing of adverse inferences at trial if the suspect exercises his right to silence at one or more points during interrogation. The adviser also must be continuously alive to the prospect that the police are withholding or misrepresenting the evidence against the suspect. In a great many cases, the legal adviser will be required to give fine-line advice whilst largely ignorant of the police case against the accused.[108]

A result of this situation is that seemingly innocuous suspect responses made in the spirit of cooperation, as a result of prolonged and perhaps hostile police questioning, or on the advice of an inexperienced legal adviser, may later appear as important elements of the police or prosecution case against the accused.[109] If the case proceeds to trial and the accused advances an alternative explanation for an admission made at interrogation, the prior statement may be admitted into evidence with the risk that the suspect will be viewed as a liar. Additionally, adverse inferences may be drawn against him under the CJPOA provisions for failing to mention a fact at interrogation which was subsequently relied on at trial.[110] The troubling result is that custodial legal advisers are required to "operate in a sea of uncertainty," where the balance of power strongly favours the police and prosecution.[111] Berger recently summarised the matter as follows:

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107. *See* BUCKE & BROWN, *supra* note 78, at 27 (recognising that "the new provisions concerning the right of silence mean that expert advice is required if a suspect is to negotiate police questioning without self incrimination.").

108. *See* David Roberts, *Legal Advice, The Unrepresented Suspect and the Courts: Inferences from Silence under the Criminal Justice and Public Order Act 1994*, 1995 CRIM. L. REV. 483, 483-484.

109. *See generally* Rosemary Pattenden, *Using the Overtly Non-incriminating Statement to Incriminate: A Theoretical Framework*, 3 INT'L J. OF EVIDENCE & PROOF 217, 221-30 (1999).

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

111. John Baldwin, *Police Interrogation: What Are the Rules of the Game?*, *in* SUSPICION AND SILENCE: THE RIGHT TO SILENCE IN CRIMINAL INVESTIGATIONS 66, 72 (David Morgan & Geoffrey M. Stephenson eds., 1994).

> [f]irst, if silence is advised and the advice is followed, the defendant may find himself subject to adverse inferences. In deciding what to do, the defendant must make a personal judgement of the reasonableness of the legal advice he has received, a remarkable obligation to impose upon a suspect facing imminent police questioning. Cases in the past have suggested that the presence of [a solicitor] brings the suspect to a position more on even terms with his police questioners, but this is a far cry from asking a suspect to second-guess the advice he receives from his solicitor.[112]

III. DISCLOSURE AND ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

A. Applicability of Article 6 at Custodial Interrogation

The primary objective of Article 6 of the Convention is to guarantee the right to a fair trial. Article 6 reads, in pertinent part, as follows:

> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . . .
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
> 3. Everyone charged with a criminal offence has the following minimum rights:
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> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for

112. Mark Berger, *Reforming Confession Law British Style: A Decade of Experience with Adverse Inferences from Silence*, 31 COLUM. HUM. RTS. L. REV. 243, 288 (2000) (internal footnote omitted).

> the preparation of his defence;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.[113]

In the criminal context, Article 6 applies only to persons subject to a "criminal charge."[114] This would seem to preclude its application to pre-charge procedures such as custodial interrogation. There has been considerable debate over this point, with States Parties generally opposing interpretations which might subject pre-charge investigative procedures to Article 6 guarantees.[115] However, the jurisprudence of the Commission and the ECtHR indicate that the relevant Article 6 guarantees are applicable to pre-trial investigations generally, and certainly, where the CJPOA silence provisions are operative, to custodial interrogation.

The key term "charge" has been interpreted by the ECtHR to mean "when officially notified by a competent authority of an allegation of a criminal offence."[116] The Commission adopted the view that a person becomes "charged" for Article 6 purposes at the point when he is "substantially affected" by the proceedings taken against him.[117] This will usually be the date of charge by the police, but it also could be the date of the suspect's initial arrest or the date upon which "he becomes aware that 'immediate consideration' is being given to the possibility of a prosecution."[118] Cheney et al. conclude, "[i]n England arrest or charge by the police would constitute such notification, as would

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113. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, 213 U.N.T.S. 222, 228.

114. *Id*.

115. *See* STEPHANOS STAVROS, THE GUARANTEES FOR ACCUSED PERSONS UNDER ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AN ANALYSIS OF THE APPLICATION OF THE CONVENTION AND A COMPARISON WITH OTHER INSTRUMENTS 54 (1993).

116. Corigliano v. Italy, 5 Eur. H.R. Rep. 334, para. 34, at 341 (1982).

117. Deweer v. Belgium, 2 Eur. H.R. Rep. 439, para. 46, at 190 (1980).

118. CARSS-FRISK ET AL., *supra* note 4, at 138-39.

the receipt of a summons to attend a magistrates' court."[119]

In a seminal decision, *Can v. Austria*,[120] the Commission recognised that

> [t]he investigation proceedings are of great importance for the preparation of the trial because they determine the framework in which the offence charged will be considered at the trial. . . . It is therefore essential . . . that the basis for [the] defence activity can be laid already at this stage.[121]

In *Imbrioscia v. Switzerland*,[122] the Commission observed that under the relevant Swiss measures "the investigations served the purpose of compiling evidence which would determine *inter alia* the offences the accused [would] be charged with at the trial. The investigations thus bore directly on the preparation and the conduct of the trial."[123] In the same case, the ECtHR held that

> Article 6(3)(c) gives the accused the right to assistance and support by a lawyer throughout the proceedings. To curtail this right during the investigation proceedings may influence the material position of the defence at the trial and therefore also the outcome of the proceedings.[124]

The ECtHR rejected the Swiss government's contention that Article 6 did not apply to preliminary (custodial) investigations.[125] While recognizing that the primary purpose of Article 6 is to ensure a fair trial by a competent tribunal, the ECtHR concluded that "it does not follow that the Article has no application to pre-trial proceedings."[126] The ECtHR in *Imbrioscia* clearly recognised the coterminous nature of the several stages of the criminal process and the cumulative effect of state actions and decisions at those stages on the end result

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119. CHENEY ET AL., *supra* note 75, at 79.

120. Can v. Austria, 8 Eur. H.R. Rep. 14 (1985) (Commission report).

121. *Id*. para. 53.

122. Imbrioscia v. Switzerland, 17 Eur. H.R. Rep. 441 (1994).

123. *Id.* para. 62, at 449.

124. *Id.* para. 60, at 448.

125. *Id*. para. 36, at 455.

126. *Id*.

and overall fairness of the criminal proceeding. It is therefore unsurprising that the ECtHR refused to disjoin the investigative and trial stages for the purposes of Article 6 guarantees.

Additional support for the application of Article 6 at custodial interrogation is found in the ECtHR decision in *Murray v. United Kingdom*.[127] The ECtHR recognised in *Murray* that "[n]ational laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings."[128] Applying this observation to the Northern Ireland silence provisions, the ECtHR concluded that

> at the beginning of police interrogation, an accused is confronted with a fundamental dilemma relating to his defence. If he chooses to remain silent, adverse inferences may be drawn against him . . . . On the other hand, if the accused opts to break his silence during the course of the interrogation, he runs the risk of prejudicing his defence without necessarily removing the possibility of inferences being drawn against him.[129]

In *Murray*, the ECtHR noted that "it has not been disputed by the Government that Article 6 applies even at the stage of the preliminary investigation into an offence by the police."[130] In support of its view that Article 6 can apply at custodial interrogation, the ECtHR cited its decision in *Imbrioscia*, in which it held that Article 6 "may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions."[131] This ruling was recently upheld in *Magee v. United Kingdom*, another case involving the Northern Ireland silence provisions.[132] The ECtHR concluded in *Murray* that "the scheme contained in the Order is such that it is of paramount importance for the rights of the defence that an accused has

127. Murray v. United Kingdom, 22 Eur. H.R. Rep. 29 para. 66, at 67 (1996).

128. *Id.* para. 63, at 66.

129. *Id.* para. 66, at 67.

130. *Id.* para. 62, at 66.

131. *Id.* para. 62, at 66.

132. Magee v. United Kingdom, 31 Eur. H.R. Rep. 822 para. 41, at 834 (2001).

access to a lawyer at the initial stages of police interrogation."[133] Consistent with the Government's failure to contest the applicability of Article 6 to custodial interrogation in *Murray*, English courts now seem prepared to acknowledge that Article 6 encompasses custodial interrogation. In *Regina v. Stratford Justices, Ex parte Imbert*,[134] Lord Justice Buxton stated that "I, of course, accept that Article 6, although it speaks of the right to a fair trial, is concerned also with the fairness of pre-trial proceedings, including not only disclosure but also investigation and the obtaining of evidence . . . ." [135]

Under English criminal procedure there can be no doubt that an individual, once cautioned by the police, is substantially affected by the suspicion against him. The interrogation following caution will be geared toward the acquisition and construction of evidence implicating the suspect in the offence, and toward providing the police with additional leads in the same or related cases. The responses of the suspect at custodial interrogation may determine, and certainly will influence, whether charges are filed against him or not, and what the exact nature of the charges will be. Indeed, custodial interrogation even permits the police and prosecution to construct offences out of what otherwise would be innocent behaviour.[136] This is a

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133. Murray, 22 Eur. H.R. Rep. para. 66, at 70.

134. R. v. Stratford Justices, *ex parte* Imbert, [1999] 2 Crim. App. R. 276, 285 (Q.B. Div'l. Ct.).

135. *Id.* at 285. Buxton, L.J. added in the same paragraph that "The same attitude has been taken by English courts to the ambit of the requirement in section 78 [of PACE] that the 'proceedings' should be fair." Section 78(1) of PACE provides that

> [i]n any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

Police and Criminal Evidence Act, 1984, c. 60, § 78(1) (Eng.).

136. Greer notes that some offences are defined in ways that separate them by a hairsbreadth from innocent behaviour. *See* Steven Greer, *The Right to Silence: A Review of the Current Debate,* 53 MOD. L. REV. 709 (1990). An American commentator similarly observed that "[a] person might be encouraged by skilled police interrogators to admit a mental state more culpable than the one he actually had, or to minimize a partial defence (such as provocation) that he could offer." George C. Thomas III, *The End*

serious risk where the facts or elements of the offence are complex, and innocence and guilt are very narrowly separated. Therefore, given the great importance of custodial interrogation to the suspect, there is every reason to believe the ECtHR will continue to follow its own reasoning in *Imbrioscia*, *Magee*, and *Murray* and hold the relevant Article 6 procedural guarantees to be applicable at custodial interrogation. Certainly no doubt should remain that the ECtHR will hold Article 6 applicable where sections 34-37 CJPOA are operative, given the *Magee* and *Murray* decisions.

B. Equality of Arms and Custodial Interrogation

Under the Convention, the principle of equality of arms[137] provides a lens through which the requisite procedural fairness in any criminal proceeding can be ascertained. It is a central element of the concept of a fair trial guaranteed by Article 6 of the Convention, [138] and has given rise to a significant body of Convention case law. The principle requires that the accused be afforded a reasonable opportunity of presenting his case in conditions that do not place him at a disadvantage vis-à-vis his opponent.[139] This requires procedural equality between the accused and the police and prosecution.[140] Violations of the

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of the Road for Miranda v. Arizona?: On the History and Future of Rules for Police Interrogation, 37 AM. CRIM. L. REV. 1, 24 (2000).

137. A survey of national constitutions and international human rights instruments found the equality of arms principle in twenty-seven national constitutions, as well as the European Convention and the International Covenant on Civil and Political Rights. *See* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 278 (1993).

138. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, 213 U.N.T.S. 222, 228. At least one American commentator has argued for U.S. Supreme Court recognition of a new constitutional right of equality of arms. It is suggested that such recognition would "restore and protect the delicate balance of power between the prosecution and the defence." Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 WIS. L. REV. 1007, 1037.

139. *See* Foucher v. France, 25 Eur. H.R. Rep. 234 para. 34, at 242 (1998).

140. Jasper v. United Kingdom, 30 Eur. H.R. Rep. 441 para. 51, at 471 (2000). The ECtHR recently stated that "it is a fundamental aspect of a right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to

equality of arms principle per se are sufficient grounds for finding an infringement of Article 6.[141]

Importantly, the equality of arms principle must be respected at each stage of a criminal proceeding where Article 6 is found to be applicable. To illustrate its application, in *Borgers v. Belgium*, the ECtHR held the principle to have been breached where the appellant, before the Court of Cassation, was unable to respond in open court to an opinion given by the Procureur General as to whether the appeal should be allowed. [142] The Procureur General also was permitted to retire to the judge's chambers and participate in the court's discussion of the case, though he could not vote.[143] The ECtHR considered that, once the Procureur General expressed an opinion on the merits of the case, he became an adversary to which the appellant should have had a procedural opportunity to respond. In the absence of such an opportunity, the proceeding was found to violate Article 6.[144]

Likewise, in *Bulut v. Austria*, the equality of arms principle was violated where the Attorney General submitted observations to the Supreme Court opposing the appeal in question, without having served the defence with the same observations.[145] The defence therefore had no procedural opportunity to respond to the Attorney General's submissions. The resulting procedural imbalance offended the equality of arms principle.[146] Similarly, in *Belziuk v. Poland*, the petitioner was denied an opportunity to be present at an appeal hearing at which the public prosecutor gave oral arguments opposing the petitioner's appeal.[147] The denial of the right to appear at the hearing deprived the petitioner of a procedural opportunity to

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procedure, should be adversarial and that there should be equality of arms between prosecution and defence." *Id*.

141. De Haes v. Belgium, 25 Eur. H.R. Rep. 1 para. 58, at 58 (1998).

142. Borgers v. Belgium, 15 Eur. H.R. Rep. 92 para. 60, at 105 (1991).

143. *Id*. para. 54, at 104.

144. *Id*. paras. 54-60, at 104-05.

145. Bulut v. Austria, 24 Eur. H.R. Rep. 84, paras. 49-50, at 104 (1994).

146. *Id*. para. 50, at 104.

147. Belziuk v. Poland, 30 Eur. H.R. Rep. 614, paras. 6-13, at 617-18 (1998).

contest his conviction and adduce evidence of his innocence.[148] The ECtHR found a violation of the equality of arms principle and thus Article 6 generally.[149]

In *Foucher v. France*, the prosecution denied the petitioner an opportunity to access his case file and copy relevant documents contained therein.[150] A violation of equality of arms and Article 6 was found by the ECtHR.[151] *Foucher* illustrates the interplay and overlap between the equality of arms and adequate facilities concepts. Without defence access to the case file, this being a form of prosecution disclosure common in civil law systems, the accused was denied adequate facilities for the preparation of an effective defence, and thus was placed in a position of procedural and evidential inequality vis-à-vis the prosecution.[152]

Once satisfied that Article 6 applies to custodial interrogation, and it is submitted on the foregoing evidence that under English criminal procedure it does,[153] the task becomes to determine whether existing procedural safeguards adequately preserve equality of arms, such that the adversarial nature of a criminal proceeding is respected.[154] The sections to follow examine two procedural measures held by the ECtHR to be essential to a fair trial: the disclosure of evidence and effective legal assistance.

148. *Id*. para. 4, at 616.

149. *Id.* paras. 37-39, at 622-23, para. 48, at 624.

150. Foucher, 25 Eur. H.R. Rep. para. 8, at 236 .

151. *Id*. para. 36, at 247.

152. *Id*. para. 34, at 247.

153. This view appears to be shared by Convention experts. *See* DAVID HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 250 (1995).

154. The ECtHR considers the right to adversarial proceedings to be a central element of Article 6 guarantees. *See* Belziuk, 30 Eur. H.R. Rep. para. 37(iii), at 628-29. For a good discussion of this question, *see* Stewart Field & James Young, *Disclosure, Appeals and Procedural Traditions: Edwards v. United Kingdom*, 1994 CRIM. L. REV. 264, 265-66.

C. Disclosure and Custodial Interrogation

1. Requirements Under Article 6

It is trite law that the accused in a criminal proceeding must be made aware of the prosecution's evidence against him in order to prepare a defence. In the context of the Convention, Article 6(3) provides that the accused must be afforded "adequate facilities," which the ECtHR has interpreted as requiring access to the results of investigations undertaken throughout the proceedings.[155] The central issue is whether the Convention requires disclosure of evidence at custodial interrogation, a pre-trial investigative stage.[156]

Convention authority requiring the prosecution's disclosure of evidence can be found as early as *Jespers v. Belgium*.[157] There, the Commission held that investigating and prosecuting authorities are under an obligation to disclose to the accused any material that may assist the accused in exonerating himself or in obtaining a reduction in sentence.[158] The Commission further stated that "the 'facilities' which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings."[159] The Commission also has indicated that a strict approach would be taken where there was willful suppression of evidence or arbitrary conduct on the part of the prosecuting authorities.[160] Importantly, in *Jespers*, the Commission refused to limit the disclosure requirement to any particular stage of the

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155. *See* Can v. Austria, 8 Eur. H.R. Rep. 14, para. 17, at 18 (1998).

156. No distinction will be made here between evidence in the possession of the police or, subsequently, the prosecution, as the two have become procedurally coterminous. As the Royal Commission on Criminal Justice (1993) observed, "few people would nowadays regard the role of the police as being confined to arrest and questioning leading to a charge. The police are plainly involved in preparing the case for prosecution after charge." RCCJ 1981 Report, at 17.

157. Jespers v. Belgium, App. No. 8403/78, 5 Eur. H.R. Rep. 305, paras. 55-58, at 307 (1982) (Commission report).

158. *Id.* para. 58, at 307.

159. *Id.* para. 56, at 307.

160. STAVROS, *supra* note 115, at 179.

criminal proceeding, stating that

> [i]t matters little, moreover, by whom and when the investigations are ordered or under whose authority they are carried out . . . . Any investigation . . . carried out in connection with criminal proceedings and the findings thereof consequently form part of the 'facilities' within the meaning of Article 6(3)(b) . . . .[161]

The ECtHR, in *Lamy v. Belgium,* addressed prosecution refusal to allow the accused to inspect documents in the investigative case file prior to remand hearings.[162] The ECtHR stated that

> [t]he appraisal of the need for a remand in custody and the subsequent assessment of guilt are too closely linked for access to documents to be refused in the former case when the law requires it in the latter case. Whereas Crown Counsel was familiar with the whole file, the procedure did not afford the applicant an opportunity of challenging appropriately the reasons relied upon to justify a remand in custody. Since it failed to ensure equality of arms, the procedure was not truly adversarial.[163]

Lamy thus provides strong support for the proposition that the defence should have access to prosecution facilities that have a bearing on the outcome of a particular stage of the criminal process, whether it is a remand hearing, a trial proceeding, or at sentencing. There is nothing in *Lamy* or other Convention case law to suggest that such facilities should not be extended to defendants at custodial interrogation, clearly recognised by the ECtHR as a decisive stage in the criminal process.

In *Edwards v. United Kingdom*, the ECtHR held it a requirement of Article 6 that the prosecution disclose "material evidence for or against the accused."[164] Consistent with prior Commission rulings discussed above, the ECtHR in *Edwards* did not expressly or impliedly limit the disclosure requirement so as

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161. Jespers, 5 Eur. H.R. Rep. para. 56, at 307.

162. Lamy v. Belgium, 11 Eur. H.R. Rep. 529, para. 14, at 533 (1989).

163. *Id.* para. 29, at 539.

164. Edwards v. United Kingdom, 15 Eur. H.R. Rep. 417, para. 36, at 431-32 (2000).

to exclude its application to custodial interrogation. In *Rowe & Davis v. United Kingdom*,[165] the ECtHR held that the full disclosure right in *Edwards* is not absolute, and could "in the pursuit of a legitimate aim such as the protection of national security or of vulnerable witnesses or sources of information, be subject to limitations."[166] However, the ECtHR emphasised that limitations on disclosure must be proportionate and subject to procedural safeguards that compensate for the handicap imposed on the defence.[167]

The ECtHR's approach to prosecution disclosure is illustrated by its decision in *Jasper v. United Kingdom*.[168] There, counsel for the petitioner sought an in camera review of materials that the prosecution withheld on grounds of public interest.[169] The prosecution, in making an ex parte application to the court to withhold the imputed material, had informed the defence of the application, but not of the contents of the material sought to be withheld.[170] The trial court had permitted the petitioner to make submissions as to the nature of the defence, and to request that the trial judge order disclosure of any evidence material to that defence.[171] The trial judge, in granting the prosecution's application, did not give reasons for his decision.[172]

The ECtHR held that there was no violation of the Article 6 right to disclosure.[173] In so ruling, the ECtHR considered the existence of several procedural safeguards to have assured the overall fairness of the proceeding.[174] First, the trial judge permitted the defence to participate in the proceedings to the

165. Rowe v. United Kingdom, 30 Eur. H.R. Rep. 1, para. 58, at 20 (2000).

166. *Id.* para. 54, at 27.

167. *Id.*

168. Jasper v. U.K., 30 Eur. H.R. Rep. 441 (2000).

169. *Id*. at 468.

170. *Id*. para. 9, at 445.

171. *Id*.

172. *Id*. para. 70, at 445.

173. *Id*. para. 83, at 466. The Court reinforced the proportionality requirement in *Rowe & Davis* by holding that "only such measures restricting the rights of the defence which are *strictly necessary* are permissible under Article 6(1)" (emphasis added). *See id*. para. 52, at 471.

174. *Id*. para. 58, at 473.

extent practicable, short of having to disclose the relevant information.[175] Second, the undisclosed material played no part in the prosecution's case and was never put to the jury.[176] Third, the need for disclosure was under constant consideration and assessment by an independent and impartial trial judge.[177] Finally, the Court of Appeal reviewed the case, and confirmed that the trial judge had exercised adequate care in applying the relevant domestic provisions.[178]

It is clear from the ECtHR's decision in *Jasper* that effective procedural safeguards must be present in order to compensate the accused for the inequality resulting from the prosecution's non-disclosure, certainly where the basis for non-disclosure is the public interest. While the same protections as in *Jasper* are not appropriate for application at custodial interrogation, where the police use of evidence is at issue, the Convention would seem to require identifiable procedural guarantees at custodial interrogation so as to achieve equality of arms and provide the accused with adequate facilities for the preparation of his defence during custodial interrogation and at subsequent stages in the criminal process. Consistent with the wide margin of appreciation afforded to states, the Convention's concern is not with the specific form of the procedural guarantees, but rather with their effect on the overall fairness of the proceedings.[179] As I will now demonstrate, there is serious reason to doubt that existing safeguards under English law provide an acceptable degree of procedural equality at custodial interrogation.

2. Disclosure at Custodial Interrogation Under English Law

> If a defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. Fairness also requires that the rules of natural justice must be observed. In this context . . . the great principle is that of open justice . . . . If fairness demands disclosure, then a way of ensuring that disclosure will

175. *Id*. para. 55, at 472.

176. *Id*.

177. *Id*. para. 56, at 472.

178. *Id*. at para. 56, at 472-73.

179. *See* Murray, 22 Eur. H.R. Rep. at paras. 55-56, at 44.

be made must be found.[180]

As noted earlier, custodial interrogation is governed by PACE and Code of Practice 'C'. These provisions, however, offer no guidance to the police or defence lawyers on the use of evidence at custodial interrogation, and the courts have provided few and inconsistent statements that are of limited guidance to the police, suspects, and defence lawyers.[181] Indeed, English courts historically have been reluctant to recognise any judicial role in supervising the procedures for the acquisition and use of evidence at custodial interrogation.[182]

a) Recent Judicial Decisions on Police Disclosure

The principal legislation on disclosure, the CPIA, governs disclosure by the prosecution where the accused pleads not guilty or the offence is indictable and the accused is committed for trial.[183] The operation of the CPIA disclosure provisions commences from the time of committal.[184] Thus it would appear that there is no statutory duty on either the police or the prosecution to disclose information to the defence prior to committal proceedings. This issue, however, was given detailed attention in *Regina v. DPP, ex parte Lee.*[185] There, the Divisional Court considered an application for judicial review of the refusal of the Crown Prosecution Service to disclose evidence to the

180. R. v. Brown (Winston) [1998] A.C. 367, at 374, 380 (H.L.) (Lord Hope of Craighead).

181. *See supra* notes 68-73 and accompanying text.

182. *See* R. v. Sang [1980] A.C. 402, at 436 (H.L.) (Lord Diplock famously stating that it was "no part of a judge's function to exercise disciplinary powers over the police or prosecution as respects the way in which evidence to be used at the trial is obtained by them.").

183. Criminal Procedure and Investigations Act, 1996, c. 25, § 1 (Eng.); Sybil Sharp, *Article 6 and the Disclosure of Evidence in Criminal Trials*, 1999 CRIM. L. REV. 273, 274.

184. §§ 3(8), 12, 13. Similar to the probable cause determination by magistrates in American criminal procedure, the committal hearing is designed to "identify those cases where the prosecution would obviously fail to secure a conviction, so that in such cases the accused may be spared the strain and expense of a trial on indictment." SPRACK, *supra* note 78, at 175.

185. R. v. Director of Public Prosecutions, *ex parte* Lee, [1999] 2 All E.R. 737, 741-748 (Q.B. Div'l Ct.).

defence prior to committal proceedings.[186] After evaluating the operation of the CPIA provisions and their interaction with the pre-CPIA common law disclosure rules, the court concluded that the common law provisions remain in effect, albeit in a highly restricted form, between arrest and committal proceedings.[187] The court stated that

> [t]he 1996 Act does not specifically address the period between arrest and committal, and whereas in most cases prosecution disclosure can wait until after committal without jeopardising the defendant's right to a fair trial the prosecutor must always be alive to the need to make advance disclosure of material of which he is aware . . . and which he, as a responsible prosecutor, recognises should be disclosed at an earlier stage.[188]

As it is common knowledge that custodial interrogation generally follows arrest, the court should have had in mind disclosure at that stage as well. However, it is by no means evident that this was the case, given the references to prosecution duties of disclosure, and not police duties. Moreover, the court made no reference to earlier Court of Appeal decisions on police disclosure, considered below, and this issue was not explicitly raised by the litigating parties. However, the court did restrict the duty of disclosure between arrest and committal in stating that "what is not required of the prosecutor in any case is to give what might be described as full blown common law discovery at the pre-committal stage."[189] This view is consistent with the Court of Appeal's decision in *Regina v. Imran and Hussain*,[190] discussed below.

Recent Court of Appeal examinations of police non-disclosure suggest the courts are operating under fundamental and grave misapprehensions as to the nature of the case construction process and the distribution of resources between

186. *Id.* at 741.

187. *Id.* at 748-49.

188. *Id.* at 749.

189. *Id*.

190. R. v. Imran & Hussain, 1997 CRIM. L. REV. 754, 754 (Case summary).

the suspect and the police at custodial interrogation.[191] In *Regina v. Argent*,[192] Lord Bingham, C.J., while recognising that the police made a more limited disclosure "than is normal in the circumstances,"[193] dismissed the argument that, in the absence of full disclosure, the defence lawyer was unable to fully advise her client, because the case "was not . . . a very complex case to which to respond."[194] However, Lord Bingham indicated the outcome might be different if the case entailed a "complex web of interlocking facts."[195]

Lord Bingham's judgment can be interpreted as supporting the view that the required level of police disclosure will depend upon the factual complexity of a given case. It is unfortunate that he did not take the opportunity to elaborate on what "normal" disclosure would have been, nor on what circumstances are determinative of the level of disclosure required. Had he done so, he quickly would have realised the futility of his approach: disclosure requirements cannot be tailored to fit factual circumstances, which are infinitely varied. Such an *ad hoc* procedure would be wholly unworkable. Lord Bingham, astutely, may simply have wished to avoid opening a procedural Pandora's Box.

The Court of Appeal's ambiguous, though permissive, view in *Argent* must be contrasted with that of *Imran and Hussain*.[196] There, the Court of Appeal rejected arguments by the defence that sections 34–37 CJPOA require full police disclosure, stating "to hold that the police have to play a form of cricket under one rigorous set of rules whereas the suspect can play under no rules whatever seems to us to lack reality."[197] Instead, the Court of

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191. *See*, *e.g.*, R. v. Maame Barbara Osei-Bonsu, No. 99/6732/Z4, 2000 WL 989551, at *4 (C.A. Crim. Div. June 22, 2000). The position of the courts regarding custodial interrogation should be contrasted with that regarding post-charge (pre-trial) disclosure, where the Court of Appeal has found police and prosecution non-disclosure of evidence material to the credibility of prosecution witnesses to warrant the finding of unsafe conviction. *See id*. at *3–4.

192. R. v. Argent, [1997] 2 Crim. App. R. 27 (C.A.).

193. *Id.* at 35.

194. *Id.*

195. *Id.*

196. *See* R. v. Imran & Hussain, 1997 CRIM. L. REV., at 754.

197. R. v. Imran, Smith Bernal Transcript, No. 96/5613/Y3 and No. 96/5614/Y3,

Appeal endorsed the following view of the trial judge: "It is totally wrong to submit that a defendant should be prevented from lying by being presented with the whole of the evidence against him prior to the interview."[198] While the Court of Appeal's view may have populist appeal, it is profoundly mistaken in ignoring the numerous positive benefits likely to be derived from greater police disclosure, the most important being enhanced suspect cooperation.[199]

The Court of Appeal in *Imran and Hussain* did state that the police are under a duty not to actively mislead a suspect.[200] Yet, in the same judgment, the court sanctioned what in the circumstances must be considered a form of police deception, the withholding of material evidence for the purpose of obtaining suspect admissions.[201] The court's judgment points to alarming judicial confusion over the nature, risks, and limits of custodial interrogation. We find the court decrying a perceived imbalance of power favouring the suspect, endorsing the withholding by police of material evidence from the suspect at custodial interrogation, and stating the general rule that the police are under a duty not to actively mislead a suspect. Further, the Court of Appeal may again be criticised for failing to provide any useful guidance on a central element of its decision, in this instance being what behaviour "actively mislead" might encompass.

Yet, the most disconcerting (and perhaps the most illuminating) aspect of the Court of Appeal's judgment in *Imran*

(C.A. Crim. Div. June 9, 1997), *available at* http://www.psds.co.uk/cases/imran.htm. (last visited Apr. 6, 2002).

198. *Id.* (quoting the trial judge).

199. *See* Christopher Slobogin, *Deceit, Pretext and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775, 799 (1997). Slobogin considers, in the American context, that

> [a] suspect's discovery that a promise or statement is false might lead to subsequent resistance even to legitimate offers, thus possibly resulting in loss of a confession. On a more systemic level, knowledge that police interrogators lie may make all suspects more reluctant to talk, for fear that police importunings are based on fabrication.

Id.

200. Imran, Smith Bernal Transcript, No. 96/5613/Y3 and No. 96/5614/Y3.

201. *Id*.

and Hussain is the court's denigration of the criminal suspect, who is assumed, at least in the instant case, to be a liar.[202] While in regard to that particular suspect, the Court of Appeal's statement may have been accurate, as a judicial statement of broad import, it was reckless. The statement reinforces the police's own restrictive approach to custodial interrogation and case construction. In so doing, the Court of Appeal tacitly endorsed the disparities of power that render custodial interrogation, as has long been recognised, so pernicious to individual liberties and human rights. Finally, in presuming as it did that a defendant will lie if presented with the whole of the evidence against him at custodial interrogation, a view no doubt shared by the police, the court displayed a wholly inappropriate attitude of contempt for the presumption of innocence.

The ambiguity and confusion arising from these judgments is manifest. By indicating that there exists a normative level of police disclosure, *Argent* clearly stands for the proposition that some police disclosure is necessary.[203] The suspect and his legal adviser may therefore expect something from the police, though the court gives no indication as to what that may be. *Imran and Hussain* draws the boundary only by stating that full disclosure is never required at custodial interrogation, while simultaneously holding that the police may not actively deceive a suspect.[204] The suspect and legal adviser are left to ponder in darkness what lies between the two points on the disclosure

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202. *Compare id., with* R. v. Phillipson, 91 Crim. App. R. 226, 235 (C.A. 1990). In Phillipson, the Court of Appeal considered that

> [t]here can be no doubt that by disclosing [the impugned] evidence in a case of this nature the prosecution would afford to the accused the opportunity of trimming her evidence to fit the picture revealed by [such evidence.] That, in our judgment, is not a good reason for permitting the prosecution in every case to keep back such evidence until, and if, the accused gives evidence. The basic principle that the prosecution must include all probative material on which it intends to rely, and must tender it as part of the prosecution case, does not form part of our law because the law wishes to help liars tell more convincing lies, but because an accused needs to know in advance the case which will be made against him if he is to have a proper opportunity of giving his answer to that case to the best of his ability.

Phillipson, 91 Crim. App. R. 226, 235.

203. R. v. Argent, [1997] 2 Crim. App. R. 27, 35 (C.A.).

204. R. v. Imran & Hussain, 1997 CRIM. L. REV. 754, 754 (Case summary).

continuum. The consequences of this situation for custodial legal advice are considered in detail below.

It is highly unlikely that the ECtHR would accept anything like the narrow views expressed in *Argent* and *Imran and Hussain* as justifying limitations on police disclosure during custodial interrogation, and certainly not where sections 34–37 CJPOA are operative. As noted above, during its existence, the Commission indicated that it would take a strict approach where evidence had been withheld wilfully or arbitrarily. Barring any shift in reasoning, it follows that the ECtHR also would deal strictly and unfavourably with deceptive interrogation tactics that involve the misrepresentation or withholding of material evidence in order to induce suspect compliance with police requests.

IV. EFFECTIVE LEGAL ASSISTANCE

A. Article 6(3)(c) Requirements

> [T]he adversarial system of criminal justice cannot work properly if and to the extent that lawyers fail to provide 'full and fearless' defence of their clients, let alone if they share some of the police views about certain types of client.[205]

Article 6(3)(c) affords the accused in a criminal proceeding the right to legal assistance. Such assistance can be private or, where the accused cannot afford legal assistance, legally aided.[206] The right is important to ensure equality of arms at all stages of a criminal proceeding.[207] The right applies to any person subject to a criminal charge.[208] Article 6 also requires

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205. *See* ANDREW ASHWORTH, THE CRIMINAL PROCESS: AN EVALUATIVE STUDY 78 (2d ed. 1998).

206. European Convention on Human Rights, *supra* note 3, art. 6, para. 3(c), 213 U.N.T.S. at 228.

207. In the United States of America, the Sixth Amendment of the U.S. Constitution expressly provides for the right to counsel in criminal proceedings. U.S. CONST. amend. VI. The relationship between this right and the effectiveness of assistance requires counsel who will put the prosecution's case to the "crucible of meaningful adversary testing." U.S. v. Cronic, 46 U.S. 648, 656 (1984).

208. *See supra* notes 114-121 and accompanying text.

that the legal assistance provided be effective; it is insufficient that access merely be available, without regard to competence. In *Artico v. Italy*, the petitioner sought and obtained the appointment of a legal aid lawyer for his appeal to the Court of Cassation.[209] The appointed lawyer for the petitioner had failed to act, citing other commitments and poor health.[210] The petitioner had "doggedly" attempted to remedy his situation before the appointed lawyer and the Court of Cassation.[211] The Italian Government argued that it had fulfilled its Article 6(3)(c) duty by simply making legal assistance available to the petitioner.[212] The conduct of the lawyer thereafter, the Government reasoned, was not the concern of the Government, and the appointed lawyer continued "for all purposes" to be the applicant's lawyer until the end.[213] The ECtHR rejected the Government's arguments on first principles, stating the Convention

> is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the prominent place held in a democratic society by the right to a fair trial, from which they derive.[214]

The ECtHR further considered in *Artico* that the state incurs a positive obligation to respond to complaints or observations of ineffective legal assistance.[215] Once so notified, the ECtHR held, "the authorities must replace him or cause him to fulfil [sic] his obligations."[216] However, the ECtHR properly recognised that the state cannot be held responsible for every shortcoming of a lawyer appointed for legal aid purposes.[217] The ECtHR clarified this point in *Kamasinski v. Austria*,[218] providing

209. Artico v. Italy, 3 Eur. H.R. Rep. 1, para. 13, at 5 (1981).
210. *Id*. para. 14, at 5.
211. *Id*. para. 36, at 15.
212. *Id*. para. 33, at 13.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* para. 36, at 15.
218. Kamasinski v. Austria, 13 Eur. Ct. H.R. 36 (1991).

that "national authorities are required by Article 6(3)(c) to intervene only if a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention."[219] It is very unlikely the Convention protects the legally aided suspect who*, ex post facto*, challenges a legal adviser's reasonable exercise of discretion or a tactical decision in the conduct of the defence.[220]

In *Imbrioscia v. Switzerland*, the petitioner complained that the absence of his lawyer at interrogation violated his Article 6 right to a fair hearing.[221] There, a lawyer of the petitioner's own choosing had been inactive in the case during a two-week period in which the petitioner was interviewed three times by the police and the prosecuting authority.[222] Swiss law did not require the authorities to advise defence counsel of the interrogations, and defence counsel had not asked to be present at the interrogations.[223] Indeed, testimony indicated that defence counsel had failed to attend the interrogations due to "the complexity of the assignment procedure, which . . . had prevented [counsel] from being able to prepare herself" for the interrogations.[224] A divided (6–3) court found that there was no violation of Article 6(3)(c).[225] The majority stated that, although "the applicant did not at the outset have the necessary legal support . . . [the] State cannot be held responsible for every shortcoming on the part of a lawyer appointed for legal aid purposes or chosen by the accused."[226]

However, the ECtHR's decision in *Imbrioscia* should be confined to the unique facts of that case.[227] As Harris et al[228] point out, in *Imbrioscia*, the petitioner sought to hold the state

219. *Id*. para. 65, at 62.

220. *See id*. at para. 63, at 61, para. 65, at 62, para. 68, at 63, paras. 70-71, at 63-64. *See also* Michael Beloff & Murray Hunt, *The Green Paper on Legal Aid and International Human Rights Law*, 1 EUR. HUM. RTS. L. REV. 5, 17 (1996).

221. Imbrioscia v. Switzerland, 17 Eur. H.R. Rep. 441, para. 54, at 447 (1994).

222. *Id.*

223. *Id.* para. 34, at 454.

224. *Id*. para. 40, at 456.

225. *Id*. para. 44, at 457.

226. *Id*. para. 41, at 456 (internal quotations omitted).

227. *See id*. para. 43, at 459 (Pettiti, J., dissenting).

228. HARRIS ET AL., *supra* note 153*,* at 264.

responsible for the failure of private defence counsel to act, where defence counsel did not ask to be present at the interrogations, and where the petitioner himself did not complain to the authorities about his counsel's conduct.[229] Because the problem was neither manifest nor brought to the attention of the authorities by the petitioner, no state responsibility arose.[230]

The ECtHR recently summarised its position regarding effective legal assistance as follows:

> 1) the Convention is designed to guarantee not rights that are theoretical or illusory but rights that are practical and effective . . . ;
>
> 2) assigning Counsel does not in itself ensure the effectiveness of the assistance . . . ;
>
> 3) the conduct of the defence is essentially a matter between the defendant and his Counsel . . . ; [and]
>
> 4) the competent national authorities are required . . . to intervene only if a failure by legal aid Counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.[231]

Unfortunately, the ECtHR, as often is the case where its jurisprudence is emerging, gives no operational definition of effective legal assistance, and provides few details as to what acts or omissions by legal advisers may rise to the level of ineffective assistance.

B. Effective Assistance Requirements Under English Law

Access to legal advice during custodial interrogation has been held to be a fundamental right at common law in England.[232] Legal advice is necessary because, as Belloni and

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229. *Id.*

230. *Id.*

231. Daud v. Portugal, 30 Eur. H.R. Rep. 400, para. 38, at 415 (2000). *See* Beloff & Hunt, *supra* note 220, at 17.

232. *See* R. v. Samuel, [1998] 2 All E.R. 135, 142, 144 (C.A. Crim. Div.).

Hodgson[233] point out, "[t]he mere fact of being detained in police custody makes the suspect isolated and vulnerable and in need of proper legal advice in order that she can make meaningful decisions on how best to respond to the allegations made against her."[234] The RCCP recognised both the threat to justice posed by the imbalances of power and resources favouring the police and prosecution at custodial interrogation and the need for competent legal advice as a counterweight to these imbalances.[235] PACE 1984, while at the same time increasing police powers, placed access to legal advice on statutory footing. Section 58(1) of PACE provides that "[a] person arrested and held in custody in a police station or other premises shall be entitled, if he so requests, to consult with a solicitor privately at any time," regardless of economic standing.[236]

Historically, English courts have been reluctant to engage in the supervision of legal counsel. The courts' attitude underpinning this reluctance is evident in the Court of Appeal's decision in *Regina v. Green*,[237] in which the court stated that attacks on counsel's conduct

> are more often than not the last resort of the disappointed criminal and if frequently made will serve to undermine the confidence and judgment of counsel in the heat of battle and, if unfounded, the criminal justice system itself and, in particular, trial by jury.[238]

Nevertheless, a significant body of case law has developed around the vexing question of the performance of counsel at trial. However, as shall be shown, the courts have infrequently addressed themselves to the conduct of legal advisers at custodial interrogation.

There is some confusion in the case law as regards the

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233. FRANK BELLONI & JACQUELINE HODGSON, CRIMINAL INJUSTICE: AN EVALUATION OF THE CRIMINAL JUSTICE PROCESS IN BRITAIN (2000).

234. *Id.* at 42.

235. ROYAL COMMISSION ON CRIMINAL PROCEDURE, REPORT, 1981, Cmnd. 8092, at 99-100.

236. Police and Criminal Evidence Act, 1984, c. 60, § 58 (Eng.).

237. R. v. Green (C.A. Crim. Div. Sept. 15, 1995) (LEXIS, United Kingdom Caselaw Library, England & Wales Reported & Unreported Cases File).

238. *Id.*

standard by which claims of ineffective assistance will be assessed. Traditionally, the courts have been prepared to intervene only where the conduct of counsel could be characterised as "flagrantly incompetent."[239] This standard was criticised by the Court of Appeal in *Regina v. Clinton* as being a "somewhat semantic exercise of trying to assess the qualitative value of counsel's alleged ineptitude."[240] The court proposed instead an outcome-based assessment that would require the courts to assess the impact of the alleged ineffectiveness on the trial and the verdict, in accordance with section 2(1)(a) of the Criminal Appeal Act 1968.[241] An additional gloss was recently put on the matter in *Regina v. Doherty*,[242] in which the Court of Appeal considered, as did the courts in *Ensor*[243] and *Clinton*, that no ground of appeal would arise unless "it can be demonstrated that in the light of the information available to him at the time no reasonably competent counsel would sensibly have adopted the course taken by him at the time he took it. . . ."[244] The Court of Appeal in *Regina v. Ullah*[245] stated that a proper and convenient approach is that of *Wednesbury*[246] reasonableness. More recently, the Court of Appeal stated that it is likely that a standard less restrictive than "flagrantly incompetent" will need to be applied under the HRA, though on the facts the court was not required to decide what that standard would be.[247]

What is clear from the caselaw is that the court will not intervene merely because hindsight would suggest that a course

239. R. v. Ensor, [1989] 2 All E.R. 586, 586 (C.A. Crim. Div.).

240. R. v. Clinton, 97 Crim. App. R. 320, 326 (C.A. 1993).

241. *Id*. at 325. Section 2(1)(a) allows the court to quash a conviction where it is found to be unsafe. Criminal Appeal Act, 1968, c. 19, § 2 (Eng.).

242. R. v. Doherty, [1997] 2 Crim. App. R. 218 (C.A.).

243. Ensor*,* [1989] 2 All E.R. at 586.

244. Doherty, [1997] 2 Crim. App. R. at 220.

245. R. v. Ullah, [2000] 1 Crim. App. R. 351, 358 (C.A.).

246. Associated Picture Houses Ltd. v. Wednesbury Corp., [1948] 1 K.B. 223, 223 (1948). More commonly associated with judicial review of administrative decisions, the question under *Wednesbury* in this context is whether a decision of counsel was so unreasonable that no reasonable counsel could ever have come to it. *Id*. at 230.

247. Clare Barsby, R. v. Nangle, 2001 CRIM. L. REV. 506, 507 (Case summary).

taken by counsel was possibly erroneous,[248] or where the desired result was not forthcoming.[249] However, where counsel misunderstands the law to the detriment of the accused,[250] fails to consult with the accused on a vital matter such as the calling of alibi witnesses,[251] fails to advise the accused as to his alternative to give evidence,[252] or fails to call important identification evidence,[253] the courts are willing to intervene to quash a jury conviction.

1. Ineffective Assistance at Custodial Interrogation

In a very few instances, the courts have addressed the problem of ineffective legal assistance at custodial interrogation. However, it does not appear from a search of the case law and academic commentary that appellate courts have ever allowed an appeal solely on the grounds of ineffective assistance at custodial interrogation. There is no doubt that the courts possess the authority to do so, as evidenced by the approach advocated in *Clinton*, which considers the impact of ineffective legal assistance on the safety of the trial under section 2(1) of the Criminal Appeal Act 1968.[254] The more likely outcome is that the court will chastise the custodial legal adviser, and may exclude the interviews under sections 76 or 78 of PACE 1984.[255]

In *Regina v. Paris and Others*,[256] the police questioned Miller, one of three persons suspected of a brutal murder, for

248. R. v. Gautam, 1988 CRIM. L. REV. 109, 109 (Case summary).

249. Tom Rees, R. v. Swain, 1988 CRIM. L. REV. 109, 109-10 (Case summary).

250. R. v. Boal, 1992 Q.B. 591, 595 (C.A.).

251. R. v. Irwin, [1987] 2 All E.R. 1085, 1085 (C.A., Crim. Div).

252. 253 Sankar v. Trin. & Tobago, [1995] 1 All E.R. 236, 236 (appeal taken from Trin. & Tobago).

253. R. v. Clinton, 97 Crim. App. R. 320, 321-22 (A.C. 1993).

254. *Id*. at 325.

255. Police and Criminal Evidence Act, 1984, c. 60, §§ 76, 78 (Eng.). Section 76(2) allows the court to exclude evidence on grounds of (a) unreliability, and (b) where obtained through oppression. § 76. Section 78 provides that the courts may exclude evidence where "having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the [trial] that the court ought not to admit it." § 78.

256. R. v. Paris and Others, (1993) 97 Crim. App. R. 99 (C.A. 1993).

thirteen hours over the course of five days.[257] After denying his involvement in the offence more than three hundred times during hostile questioning, Miller ultimately was persuaded to make admissions on which the prosecution subsequently relied.[258] The Court of Appeal, after listening to tapes of the police interviews, concluded that the testimony evidence was inadmissible, since the suspect had been severely bullied and hectored by the police.[259] The court stated that "[s]hort of physical violence, it [was] hard to conceive of a more hostile and intimidating [treatment of a suspect]."[260]

What is remarkable about the conduct of the defence lawyer is that he remained passive throughout virtually the entire oppressive questioning of his client, who was heard to cry and sob at various points during the interview.[261] Not only did the defence lawyer allow his client to be psychologically abused, he failed to intervene to prevent the client from making speculative admissions in response to highly suggestive police questioning.[262] Rose, L.J., delivering the opinion of the court, described the solicitor as "[being] gravely at fault for sitting passively through this travesty of an interview."[263] He continued, stating:

> It is of the first importance that a solicitor fulfilling the exacting duty of assisting a suspect during interviews should . . . discharge his function responsibly and courageously. Otherwise, his presence may actually render disservice. We can only assume that in the present case the officers took the view that unless and until the solicitor intervened, they could not be criticised for going too far.[264]

It is perhaps unfortunate that Miller's appellate counsel did not argue ineffective assistance as a ground of the appeal. Had he done so, the conduct of Miller's defence solicitor surely would

257. *Id.* at 102.
258. *Id.*
259. *Id.* at 103.
260. *Id*.
261. *Id.* at 104-105.
262. *Id*. at 104.
263. *Id.*
264. *Id.* at 110.

have given the court ample ground to find the conviction unsafe under section 2(1) of the Criminal Appeal Act 1968.

In *Regina v. Heron*,[265] a seven year-old girl died after being stabbed thirty-seven times. During police interrogation, the suspect was told repeatedly that the police believed him to be the killer, to which the suspect made some 120 denials.[266] After nine hours of questioning, he confessed to the murder.[267] Also during the interview, the police actively deceived the suspect by informing him that there were confirmed sightings of him with the victim, when in fact this was not so.[268] Four of the twelve interview tapes were excluded on section 76 of PACE grounds of oppression.[269] The suspect was assisted by an unqualified solicitor's representative, who did nothing to intervene during the interrogation.[270] This fact led the trial judge to state that a qualified solicitor should always be present at such interviews.

2. General Quality of Custodial Legal Assistance

A significant body of academic literature on custodial legal advice considered such advice, until very recently, to be generally substandard and frequently detrimental to the interests of the suspect. Indeed, a reader could not be faulted for concluding from a review of the literature that until the mid-1990s (at the earliest), a suspect stood to gain very little by the presence of a legal adviser, who most often was not a qualified lawyer.[271] Writing in 1992, Hodgson described custodial legal assistance as "little more than a hand-holding exercise which is designed to ensure that the client's business is secured, rather than her interests necessarily protected."[272] Earlier research by

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265. (1993) Unreported. *See* David Wolchover & Anthony Heaton-Armstrong, WOLCHOVER AND HEATON-ARMSTRONG ON CONFESSION EVIDENCE, at para. 4-088, at 548-549, (1996) (discussing R. v. Heron).

266. *Id*. at para. 4-088, at 549.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *See generally* Jacqueline Hodgson, *Adding Injury to Injustice: The Suspect at the Police Station*, (1994) LEGAL STUD. 85.

272. Jacqueline Hodgson, *Tipping the Scales of Justice: The Suspect's Right to*

Baldwin showed that "advisers emerged as passive, if not silent, parties in most of the interviews in which they featured."[273] In research for the RCCJ, Baldwin observed numerous instances during police interviews where intervention by legal advisers would have been expected, but was not forthcoming.[274] McConville et al. found that law firms relied heavily on non-lawyers for most custodial legal assistance.[275]

Moreover, the problems of custodial legal assistance are not limited to the passivity or ineptness of unqualified legal advisers. As several investigators have observed, custodial legal advice provided by qualified lawyers under the duty solicitor scheme also may be disadvantageous to the suspect.[276] For instance, some defence lawyers fail to adopt an adversarial posture and even have cooperated with the police in securing suspect admissions.[277] Others have been observed to acquiesce in the face of hostile police questioning, leaving the suspect to his own devices.[278] Belloni and Hodgson consider that at least some of the poor quality legal assistance is due to systemic problems within defence firms, which "are structured towards the production of guilty pleas."[279] Regardless, it is evident that the additional complexities injected into custodial interrogation by sections 34–37 CJPOA mean that only an experienced and robust defence at custodial interrogation will ensure that the suspect's best interests are fully advanced.[280]

There have been significant and positive changes in the culture of criminal defence work in the past few years. Research

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Legal Advice, 1992 CRIM. L. REV. 854, 861.

273. Baldwin, *Police Interrogation*, *supra* note 111, at 73.

274. *Id*. at 73-77.

275. *See* Mike McConville et al., *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (1994), *See* BELLONI & HODGSON, *supra* note 233, at 47 (citing McConville et al.).

276. *Id.* at 50.

277. ASHWORTH, *supra* note 205, at 296.

278. Baldwin, *Police Interrogation, supra* note 111, at 73.

279. *See* BELLONI & HODGSON, *supra* note 233, at 67.

280. Belloni and Hodgson further note that "the role of the custodial legal adviser is becoming yet more important as the period of detention at the police station becomes an increasingly significant part of the process of investigation and construction of the case against the accused." *Id.* at 49.

conducted for the Home Office by Bucke and Brown indicates that most suspects requesting legal advice are now represented by a qualified solicitor.[281] Their study found that qualified solicitors attended suspects in eighty-four percent of cases where legal advice was requested.[282] Legal consultations also were found to have increased in duration and quality.[283] Moreover, recent research indicates legal advisers are more willing to intervene in active defence of their clients, and that the police are more willing to provide details of offences.[284] Nevertheless, the same research demonstrates that some sixteen percent of criminal suspects still do not have access to a fully qualified lawyer at custodial interrogation.[285] Ten percent of consultations were with an individual accredited under the Law Society scheme, and six percent were with an unaccredited representative.[286]

C. Compatibility of English Rules with Article 6(3)(c)

As noted, since PACE came into effect, a great deal of custodial legal advice has been, and continues to be, provided by individuals who are not qualified lawyers.[287] An important first question for the current English legal aid scheme, then, is whether Article 6(3)(c) requires the deployment of qualified lawyers, as opposed to non-lawyers, such as clerks and former police officers. Harris et al.[288] consider the answer to be "no,"

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281. Tom Bucke & David Brown, *In Police Custody: Police Powers and Suspect's Rights Under the Revised PACE Codes of Practice*, Home Office Research Study No. 174 (1997). Also *see* Tom Bucke, Robert Street & David Brown, *The Right to Silence: The Impact of the Criminal Justice and Public Order Act 1994*, Home Office Research Study No. 199 (2000), reporting the same findings.

282. Tom Bucke & David Brown, *In Police Custody: Police Powers and Suspect's Rights Under the Revised PACE Codes of Practice*, Home Office Research Study No. 174, at 26 (1997).

283. *Id.*

284. *See* LEE BRIDGES & SATNAM CHOONGH, IMPROVING POLICE STATION LEGAL ADVICE: THE IMPACT OF THE ACCREDITATION SCHEME FOR POLICE STATION LEGAL ADVISERS, RESEARCH STUDY NO. 31, The Law Society and Legal Aid Board ix, xiii (1998).

285. *Id.* at xi.

286. *Id*. at 26.

287. Hodgson, *supra* note 272, at 860-61.

288. HARRIS ET AL., *supra* note 153, at 265.

given the legislative history of the Convention and its use of the term "legal assistance" rather than "qualified representative."[289] Nor has the ECtHR so stipulated in any of its judgments. Nevertheless, the legal assistance provided must rise to the level of 'effective assistance' regardless of the provider's formal qualification.[290] Undoubtedly the ECtHR would carefully examine the formal qualifications of the legal assistance provider in assessing any claim of ineffective legal assistance, including the reasons why non-lawyers were required to provide the legal assistance, and whether qualified lawyers otherwise were available for the task. To what extent the ECtHR would countenance arguments of cost-effectiveness as justifications for the use of non-lawyers as custodial legal advisers remains to be seen.

1. Failure to Intervene to Stop Oppressive or Degrading Conduct

There is no doubt that the ECtHR would consider the Article 6(3) guarantee of effective legal assistance to be violated where legal advisers fail to intervene to stop police conduct that itself might breach the Convention prohibition on inhuman and degrading treatment, as in *Miller*.[291] Moreover, the argument could be advanced that under circumstances in which the legal adviser fails to act on behalf of her client, the police, as a state authority, are under a Convention duty, as stated in *Kamasinski v. Austria*,[292] to cease interrogation and intervene to replace the legal adviser.

2. Failure of Legal Adviser to Adopt an Adversarial Posture

An additional ground for finding breaches of Article 6(3)(c) is where the legal adviser fails to adopt an adversarial posture or

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289. *Id.* at 265 n.18.

290. In keeping with its role of deciding individual cases rather than rendering judgments on the compatibility of national provisions with Convention rights, the ECtHR has not provided minimum criteria as to what constitutes effective assistance. Under the Human Rights Act 1998, domestic courts will not operate under such restraints.

291. Paris, 97 Crim. App. R., at 226.

292. Kamasinski, 13 Eur. Ct. H.R., at 193.

cooperates with the police, actively or passively, in eliciting admissions from the suspect. While recent evidence suggests that custodial legal advisers are now more likely to engage in a more robust defence of the suspect at interrogation,[293] the likelihood remains high that a significant percentage of legal advisers will, due to inexperience, timidity or lack of training, fail to do so.

It should be recalled here that the ECtHR has found legal advice at custodial interrogation to be necessary to counterbalance the inequalities that exist at interrogation under the CJPOA silence provisions.[294] In *Murray*, the ECtHR considered the Northern Ireland silence provisions to be of such seriousness for the accused that

> [u]nder such conditions the concept of fairness enshrined in Article 6 requires that the accused has the benefit of the assistance of a lawyer already at the initial stages of police interrogation.[295]

The ECtHR here speaks of the "benefit of the assistance of a lawyer," not the mere presence of a legal adviser who is passive and disengaged during police interrogation.[296] Certainly, the ECtHR was not envisioning a legal adviser who collaborates with the police in securing admissions or other detrimental information from the accused, as there would be no benefit derived by the accused from such assistance. Rather, it clearly follows from *Murray* that the ECtHR expects that the legal adviser—presumed in *Murray* to be a qualified lawyer—will actively engage in the defence of the suspect at custodial interrogation. It is self-evident that, without such engagement, the requirement of legal assistance under *Murray* and Article 6(3)(c) would be pointless. Moreover, in such a situation, the ECtHR could find not only that there has been ineffective legal assistance per se, but that such ineffectiveness failed to remedy the inequalities facing the suspect—the rationale for the holding in *Murray*—and therefore breached the principle of equality of

293. *See* BUCKE & BROWN, *supra* note 78.

294. Murray, 22 Eur. H.R. Rep. at para. 62.

295. *Id*. para. 66, at 67.

296. *Id.*

arms.

D. Non-disclosure and the CJPOA Silence Provisions: Is Effective Assistance Possible?

The complex question arises whether the non-disclosure or misrepresentation of evidence at custodial interrogation may render ineffective what otherwise would be competent legal assistance, and thus infringe the Article 6(3)(c) right to effective legal assistance. This question is unusual in that the legal adviser herself may raise the argument that her assistance is rendered ineffective by the legal circumstances in which she must operate. In *Argent*, the reader will recall, the Court of Appeal left open the possibility that police non-disclosure could render custodial legal assistance nugatory in legally or factually complex cases.[297]

There are several points at which disclosure is required if the legal adviser is to give advice that is accurate and reliable. First, the custodial legal adviser will need to ascertain whether the evidence in police possession justifies detention.[298] If the legal adviser concludes that there is insufficient evidence, her proper course of action would be to ask the custody officer to release the suspect immediately without questioning. Police disclosure, albeit limited for this purpose, obviously is necessary to make this determination.

If there is prima facie justification for the police decision to detain and question the suspect, the legal adviser will then have to decide whether to advise that police questions be answered, or that silence be maintained, with the risk of adverse inferences being drawn at committal proceedings in the magistrates' courts[299] and at trial.[300] The legal consequences of this decision

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297. Argent, [1997] 2 Crim. App. R., at 35.

298. That is to say whether the police have evidence providing reasonable grounds to suspect the person of having committed an offence. *See* PACE § 24.

299. § 34(2)(a) of CJPOA 1994, as amended by the Criminal Procedure and Investigations Act 1996, § 44(3).

300. *See* R. v. Pointer, 1997 CRIM. L. REV. 676 (Case summary), (noting inferences from silence at interrogation were disallowed, where the interviewing officer admitted prior to interview that there was sufficient evidence to charge, therefore, the questioning was not directed toward trying to discover whether or by whom an offence

are serious indeed and must be based on information that is as accurate and detailed as possible. Additional disclosure from the police clearly is necessary at this stage.

The law creates a serious dilemma for the legal adviser at this point. The reasonable suspicion upon which the police may detain and question the suspect under section 24 of PACE may be based, for example, on information provided by a single anonymous informant.[301] As shall be shown below, this also may be sufficient to bring the relevant CJPOA silence provisions into operation when police questions are put to the suspect. In order to avoid inferences from silence, then, the suspect is required to lay out, fully or partially, his defence to the charge. He therefore is required to do so on the weakest of evidential grounds. Thus, if the legal adviser advises that the suspect should answer police questions in this situation, she is permitting the police to construct its case around the responses of the suspect, who knows nothing of the details of the case against him.[302] If she advises silence, adverse inferences may be drawn at trial. The inequality of arms is acute. Indeed, it is arguable that a form of police entrapment is being permitted in this situation, which is common under the current disclosure regime.

The ECtHR and domestic courts operating under the HRA may find this situation fundamentally unfair. Under such circumstances, where the CJPOA silence provisions are operative, a court might conclude that effective legal advice is simply not possible.[303] Such a result should come as no surprise. Zuckerman has persuasively argued that the current procedure, which demands that suspects answer police questions "in a process which lacks the most fundamental ingredient of fairness: information about the case to be answered," is

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was committed, as required by the Court of Appeal in *Argent*).

301. *See* Argent [1997] 2 CRIM. APP. R., at 27.

302. This danger has long been recognised. *See*, *e.g.*, G. Williams, *supra* note 41, at 344 ("Not knowing the evidence in the hands of the police, it would be highly dangerous to the defence to allow the accused to be questioned.").

303. There is abundant parallel in the civil law context. For example, no commercial lawyer would consider giving binding legal advice on even a comparatively straightforward matter where she had not had the opportunity to review the relevant documents in private and in detail.

fundamentally flawed.[304] Noting that informing the suspect of the case against him is "a fundamental prerequisite of procedural justice,"[305] Zuckerman argued in 1994 that what are now the CJPOA provisions

> not only undermine procedural fairness, but . . . also create wide scope for police abuse. As the suspect and solicitor will be ignorant of the case that the police have against the suspect, the police will be able to tailor their case to the suspect's answer. We will have, to use a current phrase, interrogation by ambush. Yet, just as it is unfair to expect the prosecution to present their case at trial in ignorance of the nature of the defence, so it is unfair to the suspect that he or she should have to answer the police case without knowledge of what that case really involves.[306]

In addition to the important considerations of procedural fairness, which would be the subject of the ECtHR's "equality of arms" enquiry, Zuckerman also is applying a fundamental principle of English criminal law—that a suspect must be given notice of the case against him before an expectation should arise that he respond in any manner—to the interrogation regime.[307] The principle is a central pillar of the presumption of innocence and the privilege against self-incrimination. It also is reflected in the ability of the defence to seek the dismissal of criminal charges at various points in a criminal proceeding by demonstrating that the prosecution has failed to produce sufficient evidence to show that there is a case to answer.[308]

A question that should be considered, then, is whether custodial interrogation is exempt from the operation of this fundamental legal principle. In other words, should the law expect a suspect to respond, under threat of adverse inferences later being drawn, when presented with a single piece of

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304. Zuckerman, *supra* note 106, at 136-37.

305. *Id.*

306. *Id.*

307. *See* PETER MIRFIELD, SILENCE, CONFESSIONS AND IMPROPERLY OBTAINED EVIDENCE 254 (1997).

308. SPRACK, *supra* note 78, at 152, 182, 284. These include committal proceedings, summary trials, and trials on indictment. *Id*.

identification evidence, or an anonymous tip-off given to the police, where there would be no legal obligation to do so at trial? If there is no case to answer at trial on such evidence, the reasoning goes, there is equally no case to answer at interrogation.[309] And if there is no police disclosure at interrogation, there can be no case for the suspect to answer. And where there is no case for the suspect to answer, the proper legal advice must be to remain silent.

This same question has been addressed indirectly by the Court of Appeal under the CJPOA silence provisions. In *Regina v. Roble*, the court stated, *obiter dicta*, that it may not be reasonable under section 34 CJPOA to allow inferences to be drawn from silence at interrogation where there has been little or no police disclosure; Rose L.J. suggested that legal advice to remain silent may be proper where

> [T]he interviewing officer has disclosed to the solicitor little or nothing of the nature of the case . . . so that the solicitor cannot usefully advise his client, or where the nature of the offence, or the material in the hands of the police is so complex . . . that no sensible immediate response is feasible.[310]

Moreover, the trial judge in *Argent* drew the same conclusion. He considered that the defendant's solicitor had properly advised silence where the only evidence against the defendant at the time of interview was one anonymous telephone call to the police.[311] In disallowing adverse inferences to be drawn from Argent's silence at interrogation, the judge stated, "I do not myself take the view that at that stage . . . there were any circumstances existing at the time which required the accused to mention anything."[312] This position is entirely consistent with the presumption of innocence and the decision in *Roble*: if there is no evidence forthcoming from the police, silence

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309. Pattenden has argued, in the context of adverse inferences from silence at trial under section 35 CJPOA, that the accused has no responsibility to respond to a weak prosecution case. *See* Rosemary Pattenden, *Inferences from Silence*, 1995 CRIM. L. REV. 602, at 605-606.

310. R. v. Roble, 1997 CRIM. L. REV. 449, 449-50 (Commentary).

311. Argent, [1997] 2 CRIM. APP. R., at 29.

312. *Id*.

may be safely advised and exercised free of the threat of inferences at trial. However, the Court of Appeal confused matters further for legal advisers and the lower courts by concluding that the trial judge in *Argent* "may have overstepped the bounds of his judicial function" in making that statement. Unfortunately, the Court of Appeal did not give reasons for this conclusion.[313]

What, then, is the correct statement of English law? The custodial legal adviser, considering these conflicting *dicta*, may legitimately conclude that the risk of adverse inferences remains even where the police have put forth evidence sufficient only to warrant detention. That leads the suspect and the adviser into the legal trap condemned by Zuckerman and the RCCP as fundamentally unfair.[314] Cape succinctly describes the dilemma that the legal adviser faces in these circumstances:

> while a complete failure by the police to disclose information may lead a court to conclude that it would not be reasonable to expect a suspect to have mentioned relevant facts, partial disclosure is unlikely to have the same effect.[315]

The great uncertainty injected into custodial legal advise by the CJPOA silence provisions is now obvious. Absent the CJPOA silence provisions, custodial advice would be far more straightforward: "answer no questions, unless the police disclose the evidence in their possession." This is how, albeit severely impaired by the CJPOA silence provisions, the right to silence should operate in performing its legal function of protecting the suspect from involuntary self-incrimination; the right to silence is most valuable during police interrogation where there frequently is little evidence against the suspect. Preventing the erosion of this function was a principal reason why the RCCP and the RCCJ recommended against fettering the right to silence in any way.

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313. *Id.*

314. *See* Zuckerman, *supra* note 106, at 127-28. *See also* 1981 RCCP REPORT, at paras. 4.51-4.52.

315. *See* Cape, *supra* note 106, at 15. Note also that the § 34 silence provision would seem to create an incentive for the police to only partially disclose their case against the suspect.

1. The RCCP's Triad of Procedural Safeguards

In its 1981 report, the RCCP clearly foresaw that restricting the right to silence at custodial interrogation would "amount to requiring a person during investigation to answer questions based upon possibly unsubstantiated and unspecified allegations or suspicion, even though he is not required to do that at trial."[316] This, according to the RCCP, would be fundamentally unfair and unacceptable in an adversarial system of criminal justice.[317] The RCCP further considered that if the right to silence were to be restricted or abolished, additional procedural guarantees would be necessary to counterbalance the additional burden placed on the accused. The RCCP concluded that restricting the right to silence

> could be regarded as acceptable only if, at a minimum, the suspect were to be provided at all stages of the investigation with full knowledge of his rights, complete information about the evidence available to the police at the time, and an exact understanding of the consequences of silence.[318]

According to the RCCP, then, under the silence provisions the suspect at custodial interrogation must be provided with: (1) full knowledge of his rights; (2) an exact understanding of the consequences of silence; and (3) complete information about the evidence available to the police at the time.[319] Presumably the RCCP would have considered the fairness of any proceeding to be in jeopardy if one or more elements of this triad were absent. At least in theory, PACE has addressed two of the RCCP's concerns; namely, that the suspect be provided with full knowledge of his rights and an understanding of the consequences of silence.[320] While problems remain in practice,

316. 1981 RCCP REPORT, at para. 4.52.

317. *Id.* paras. 4.51-4.52.

318. *Id.*

319. *Id*.

320. *See* BELLONI & HODGSON, *supra* note 233 at 91-92; *see generally* Roderick Munday, *Inferences from Silence and European Human Rights Law*, 1996 CRIM. L. REV. 370 (noting that several commentators have questioned the effectiveness of the current mandatory cautions, while others have observed that the police frequently administer the cautions in a cursory and sometimes unintelligible manner).

the PACE warning requirements go much beyond those in effect under the Judges' Rules, discussed above.

Yet, the current custodial regime fails the crucial third element of the RCCP's procedural triad—that the police provide complete information about the evidence available against the suspect at all times. As I have demonstrated, there have been no attempts to systematically address the issue of police disclosure. It certainly cannot be said conclusively that the suspect is provided with complete information available to the police at the time. On the contrary, as stated in *Imran and Hussain*, the Court of Appeal has expressly rejected the submission that the police must make full disclosure to the suspect at custodial interrogation.[321] It is for these reasons that custodial legal advisers frequently are unable to effectively advise suspects and why "cat and mouse" games between police and legal advisers continue to be played.

2. Additional Difficulties

There are further difficulties facing the custodial legal adviser. If she does advise the suspect to answer questions where police disclosure has been limited, perhaps relying on *Argent*, she must then consider which questions should be answered. If silence is advised for some questions, the suspect may attempt to rely on this advice at trial as grounds for disallowing adverse inferences from the selective custodial silence. Under these circumstances, the legal adviser must consider that she may be required to relinquish the legal professional privilege that exists between her and the suspect as she may well be called to give reasons for her advice under oath at trial.[322]

Along similar lines, legal advisers at custodial interrogation also must decide whether to advise suspects to respond to questions, for example, that seek to ascertain the suspect's whereabouts at a particular time, where the police have

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321. R. v. Imran & Hussain, 1997 CRIM. L. REV. 754, 754 (Commentary).

322. *See* R. v. Cowan, [1995] 4 All E.R. 939, 946. *See generally* Desmond Wright, *The Solicitor in the Witness Box*, 1998 CRIM. L. REV. 44 (discussing the concern surrounding the relinquishment of professional privilege).

disclosed no evidence linking the suspect to the crime.[323] In making her decision, the legal adviser also will be aware that the police may exploit their right to put such questions to the suspect, especially when questioning suspects under the new strategies of "intelligence-led policing."[324] Even where the police do not consider the person in custody to be a strong suspect for the offence in question, they may use the opportunity to conduct a "fishing expedition" for information linking the suspect to other offences.

Finally, it must be kept in mind that even where the police have disclosed some evidence to the suspect, the police may be engaged in deceptive tactics involving "bluffs," fabrications, or other misrepresentations of the disclosed evidence. As we have seen, such deception occurs with a frequency sufficient to warrant serious concern. While the Court of Appeal has said that the police must not actively deceive a suspect,[325] it must be remembered that only a minority of even serious cases ever go to trial where judicial scrutiny may be exercised over the conduct of custodial interrogation. The greater risk is that the police may use deceptive tactics and non-disclosure to obtain suspect admissions that permit the prosecution to "charge high" and thus give the prosecution an unfair advantage during plea negotiations. In effect, the legal adviser, in circumstances in which police deception is being practiced, is required, under pain of adverse inferences from silence, to respond to illusory targets in a room of "smoke and mirrors." Absent honest and full police disclosure, it simply is not possible for the legal adviser to give accurate advice to the suspect. The risk of injustice in this situation, as Birch has stated, is very real since the prosecution case is "constructed using evidence supplied by [the suspect] under pain of inferences, at a time when little evidence was in the bag."[326]

While the issue of police non-disclosure at custodial

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323. This situation is not uncommon, as where a person becomes a suspect due to modus operandi characteristics, where the suspect has previous convictions for similarly committed offences.

324. *See generally* ASHWORTH, *supra* note 205, at 94.

325. Imran & Hussain, 1997 CRIM. L. REV., at 754.

326. Birch, *supra* note 103, at 780.

interrogation has not yet come before the ECtHR, Ashworth queries whether that body "might be expected to scrutinise whether failure to answer questions during interrogation by the police (in cases where section 34 is relied on without section 36 or 37) is a situation which clearly calls for an explanation."[327] He further considers that where "the police failed to give sufficient information about the case against the defendant to the defendant's solicitor, it seem[s] possible that the [ECtHR] might respond more favourably to an argument that Article 6 has been violated."[328]

There are already strong indications that Ashworth's assessment is accurate. In assessing the relationship between the Northern Ireland silence provisions and the privilege against involuntary self-incrimination in *Murray*, the ECtHR noted that it is only if the evidence against the accused "calls" for an explanation which the accused ought to be in a position to give that a failure to respond may lead to the drawing of an adverse inference at trial.[329] While this statement begs the question of what evidence "calls" for an explanation, the ECtHR did further consider that if the case presented by the prosecution had so little evidential value that it called for no answer, a failure to provide one could not justify an inference of guilt.[330] In *Murray*, for instance, the accused had failed to provide an explanation for his presence at a house in Northern Ireland where, at the time of his arrest there, an individual also was being held captive by members of the Irish Republican Army. A single anonymous tip, as in *Argent*, is unlikely to possess the same evidential weight before the ECtHR.

The attentions of the ECtHR certainly would be directed toward ascertaining whether the equality of arms principle and the related right to adequate facilities are respected in circumstances where the police have disclosed little of the case against the accused. The same should also apply to the domestic courts operating under HRA. The defence will need to apply to

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327. Andrew Ashworth, *Article 6 and the Fairness of Trials*, 1999 CRIM. L. REV. 261, 267.

328. *Id.*

329. Murray, 22 Eur. H.R. Rep., at 39.

330. *Id*. at 38.

the courts for relief at the earliest moment possible where police non-disclosure is at issue. Current training manuals and guides for custodial legal advisers emphasise the importance of demanding disclosure from police prior to and during custodial questioning.[331] The great importance given to disclosure at custodial interrogation in these training materials surely indicates that the issue of police non-disclosure will be coming before the courts more frequently. It is, however, unfortunate that the matter should be left to the ECtHR or the piecemeal operation of the common law. Instead, Parliament should reconsider the three-part procedural recommendation of the RCCP, which was considered essential to ensure a minimum standard of procedural fairness, and place police disclosure on statutory footing. This should be done whether or not Parliament decides to repeal the troublesome CJPOA restrictions on the right to silence.

V. CONCLUSION

I have argued here that the Article 6 guarantees of equality of arms, adequate facilities and effective legal assistance fully apply at custodial interrogation in England. The foregoing analysis indicates that English law does not provide procedural guarantees at custodial interrogation sufficient to ensure compliance with Article 6. I have demonstrated that the non-disclosure and misrepresentation of evidence by the police at custodial interrogation may place the accused at a serious disadvantage vis-à-vis the police and prosecution so as to violate the equality of arms principle. The non-disclosure and misrepresentation of evidence at custodial interrogation also may deprive the suspect of adequate facilities for the preparation of a defence and render ineffective what otherwise might be competent legal assistance. Legal advisers must have adequate detail of the case against the accused in order to advise effectively the suspect on such important matters as whether to remain silent and to advocate for the suspect regarding the nature and magnitude of potential charges and at the stages of

331. *See generally* ROGER EDE & ERIC SHEPHARD, ACTIVE DEFENCE (2d ed. 2000).

the remand hearings and plea negotiation.

Moreover, while Article 6 may not require the use of qualified lawyers during all criminal proceedings, the deployment of non-legal personnel to advise suspects at the critical procedural stage of custodial interrogation may further weaken the suspect's relative position and thus undermine the Article 6 guarantees of effective legal assistance and, consequentially, equality of arms. This certainly will be the case where legal advisers, qualified or otherwise, fail to assume an adversarial role and do not engage in a robust defence of the suspect at custodial interrogation.

Furthermore, the realities of the criminal process make it unlikely that the appellate courts can or will play a significant role in the supervision of custodial legal assistance. This is so for at least two reasons. First, a wide range of negotiation options makes the likelihood of a guilty plea high.[332] Thus, comparatively few cases go to trial where judicial scrutiny traditionally has been exercised.[333] Second, the relationship of mutual dependency that exists between solicitors and barristers makes it less likely that trial or appellate counsel will raise claims of ineffective assistance occurring at custodial interrogation.[334] There may be, in other words, a tendency to not "bite the hand that feeds." For these reasons, judicial supervision should be considered an unsuitable procedural safeguard against ineffective legal assistance at custodial interrogation.

Under the Human Rights Act 1998, however, legal advisers themselves may have increased incentives to raise claims involving non-disclosure at the earliest stages of the criminal

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332. Such options include fact, charge, and plea bargains. *See* ASHWORTH, *supra* note 205, at 271-92.

333. Ashworth presents data indicating that in the magistrates' courts the rate of guilty pleas exceeds 90%, including offences triable either way. In the Crown Court, the guilty plea rate was 65% in 1996, though the rate varies considerably from circuit to circuit. *Id*. at 269. Also, Belloni and Hodgson consider that "recent reforms offering sentence discounts for early guilty pleas will only serve to increase the pressure on defendants to capitulate and to accept the prosecution case." *See* BELLONI & HODGSON, *supra* note 233, at 67.

334. Barristers, who act as trial counsel, generally obtain their clients directly through solicitor referrals.

process. This has the great advantages of (1) helping to prevent miscarriages of justice from occurring by rectifying legal error prior to the plea and trial stages and (2) sensitizing the lower courts—those that exercise greatest supervisory functions—to the problems facing the suspect and his legal adviser at custodial interrogation.

Finally, it is important to note what seems to be a growing police practice of voluntarily disclosing evidence and other information to suspects and legal advisers.[335] There has been a suggestion that the police do so not out of concern for procedural fairness, but because it provides the suspect with evidence sufficient to permit police questioning, thereby ensuring the CJPOA silence provisions come into effect.[336] The net result, then, is to limit the options of the suspect and his legal adviser. Such a practice is not to be commended, though it points in the right direction of a statutory requirement of full police disclosure at the earliest possible moment.

335. *See* BELLONI & HODGSON, *supra* note 233 at 45.

336. *Id*. at 45-46.