

WOLCHOVER AND HEATON-ARMSTRONG ON CONFESSION EVIDENCE. By David Wolchover and Anthony Heaton-Armstrong. London, England: Sweet and Maxwell, 1996. Pp. li, 734. £99.

Reviewed by Irene Merker Rosenberg*

The authors of *Wolchover and Heaton-Armstrong on Confession Evidence*¹ (hereinafter *On Confession Evidence*) are barristers (counsel who are admitted to the bar and allowed to litigate in superior courts), affiliated with Grays Inn in London. That they are practicing barristers who, as is customary in England, both prosecute and defend in criminal cases, informs much of this excellent treatise. For example, the book contains a detailed analysis of the substantive arguments regarding abolition of the right to silence. One of the assumptions of those favoring abolition is that innocent people will deny accusations against them. As the authors point out, however, this “axiom assumes that the generality of mankind is by nature vocal.”² They go on to note that “it tends to be forgotten that many people nevertheless remain timorous and tongue-tied, particularly in the presence of authority figures,”³ and they conclude that “experience shows that most people are sufficiently intimidated by the ‘inherently coercive’ nature of custodial interrogation that they will give answers despite the traditional caution and against their preferred inclination.”⁴ This is not to suggest that the authors are biased. Rather, they are scrupulous in presenting all sides of an issue, although it seems clear that they do not favor the recent changes in English law curtailing the right to silence.

The book is not a spare practitioner’s guide or nutshell. As the authors acknowledge in their introduction, they were torn between producing “a quick reference handbook” or “an exhaustive treatise.”⁵ While leaning in the direction of the

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1. DAVID WOLCHOVER & ANTHONY HEATON-ARMSTRONG, *WOLCHOVER AND HEATON-ARMSTRONG ON CONFESSION EVIDENCE* (1996) [hereinafter *ON CONFESSION EVIDENCE*].

2. *Id.* at 621.

3. *Id.* at 622.

4. *Id.*

5. *Id.* at v.

exhaustive treatise approach, their end-product is a nice compromise that incorporates the best aspects of both extremes. As a result, there is something for everyone in this lengthy, informative, elegantly written and analytical tractate on the law of confessions in English criminal law. This is also a book that will not soon be out of date. The authors plan to supplement it as needed. Indeed, I have seen a draft of the first supplement, which was issued in March 1997, and it is a continuation of the fine scholarship found in the basic text.⁶

The book is not entirely new. The authors relied on an earlier work by Peter Mirfield,⁷ which had become outdated, and a 1985 treatise by co-author David Wolchover entitled *The Exclusion of Improperly Obtained Evidence*.⁸ Although there is a fair amount of historical material in *On Confession Evidence*, this background information will be most helpful to those with at least a basic knowledge of English history and law. There are casual references to the reigns of various monarchs and English judges that will have special meaning only for English lawyers. The language is of course English, but it is English English, not its American counterpart, and the British version does take some practice. For example, in describing the predecessor Mirfield book, the authors note that it is "getting rather long in the tooth,"⁹ rather than using my more pedestrian description of it as outdated. There is also a generous sprinkling of "whilsts" which gives one only slight pause. The writing is also quite dense and demands the reader's full attention. Whatever impediments these factors may present, it is well worth the effort.

The book has of course a detailed table of contents, a table of cases and statutes, mostly English, and a very good index. It only has five chapters, but they are long and subdivided by sections, and extensively footnoted with articles, both legal and nonlegal, cases, empirical studies, and statutes. At the start of each chapter, there is a list of the issues dealt with and the section numbers in which they appear. References are only to the section numbers, not

6. See DAVID WOLCHOVER & ANTHONY HEATON-ARMSTRONG, WOLCHOVER AND HEATON-ARMSTRONG ON CONFESSION EVIDENCE (Draft Supp. 1997) [hereinafter SUPPLEMENT].

7. See ON CONFESSION EVIDENCE, *supra* note 1, at v (citing PETER MIRFIELD, CONFESSIONS (1985)).

8. See *id.* at vi (citing DAVID WOLCHOVER, THE EXCLUSION OF IMPROPERLY OBTAINED EVIDENCE (1985)).

9. *Id.* at v.

pages, which makes it a bit more difficult to flip to the desired material.

Chapter 1 is entitled "The Nature and Character of Confessions," and it examines the need for confessions, their sufficiency, denials, the different types of confessions, and the empirical and psychological aspects of interrogation and confession, including the problem of false confessions. The succeeding chapters are arranged in chronological order paralleling the steps in the criminal justice process. Chapter 2, "The Obtaining of Confessions: Interrogation and the Regulation of Questioning," contains an informative historical synopsis of the English law of interrogation and goes on to set forth the modern rules and statutes governing the interrogation process. The chapter analyzes such issues as detention and treatment conditions, vulnerable suspects, incommunicado interrogation and cut-off questioning, the right of access to free legal advice, and special statutory grants of power to conduct inquisitorial investigations in select areas such as bankruptcy and serious or complex frauds. The title of Chapter 3 is "Proving Confessions," which deals with the old and modern methods of establishing a defendant's statement such as audio and video recordings, and the more difficult question of how to disprove the giving of a confession. American readers will be very comfortable with Chapter 4, "The Exclusion of Coerced and Improperly Obtained Confessions," even though there is not any systematic consideration or comparison with the American law of confessions. As the authors explain, space limitations precluded a thorough exposition,¹⁰ although some cases from common law countries are cited and explained.

Chapter 5, the final chapter and also the most interesting, is entitled "The Evidential Significance of the Suspect's Silence." The chapter treats silence before and at trial, and is an analysis both of common law principles and modern rules and statutes.¹¹ There have been recent changes in this area in England, which will not go unnoticed on this side of the Atlantic,¹² and which will indeed provide support

10. See *id.* at vi-vii.

11. For analyses of the origins of the common law privilege against self-incrimination, see John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047 (1994); Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625 (1996).

12. See Gregory W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402, 406 (1994) (noting that British advocates denigrating the right to silence "could find a

for the view of some American commentators that the right to silence embedded in the privilege against self-incrimination¹³ should be abandoned or at least modified.¹⁴

In the United States such a change would presumably require a constitutional amendment, or at least a radically different interpretation of the Fifth Amendment by the United States Supreme Court.¹⁵ England, however, has a parliamentary system of government that permits such changes by statute and without any recourse to the courts.¹⁶ In 1994 England passed the Criminal Justice and Public Order Act.¹⁷ Part III of the Act allows courts and jurors to draw adverse inferences when defendants fail to protest their innocence to the police or do not mention exculpatory facts to them that the defendants subsequently rely on at trial, if under all the circumstances a person would be expected to mention those facts.¹⁸ Similarly, adverse inferences are permissible in the case of suspects who fail to respond to police questions about suspicious objects, substances, or marks on their person or clothing or place where they are arrested;¹⁹ or if they do not explain to the police why they were present at a place around the time of the crime;²⁰ or if they fail to testify on their own behalfs at trial.²¹ Even though the law does not make refusal to testify a criminal offense, which would be a total abolition of the privilege, the

responsive audience in the United States, as the press, the public, and politicians focus on crime and an extraordinary array of proposals aimed at its control”).

13. *But see* Alschuler, *supra* note 11, at 2631 (arguing that the privilege “was not intended to afford defendants a right to remain silent . . . Its purpose was to outlaw torture and other improper methods of interrogation.”).

14. *See, e.g.*, Donald A. Dripps, *Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. L. & CRIMINOLOGY 699, 731 (1988) (urging pre-trial judicial examination of arrestees enforceable by contempt power, and the right to subpoena defendants to testify at trial); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 713 & n.180 (1968) (building on Paul Kauper’s proposal to permit judicial questioning of suspects); Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1225 (1932) (concluding that history and policy supported the use of pre-trial judicial examination of suspects).

15. *See* OFFICE OF LEGAL POLICY, U.S. DEPT OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON ADVERSE INFERENCES FROM SILENCE (1989), *reprinted in* 22 U. MICH. J.L. REFORM 1005, 1119–21 (1989) (arguing that the privilege only protected the guilty, and urging that the Supreme Court be persuaded to abandon its position that adverse inferences could not be drawn from an accused’s silence).

16. *See, e.g.*, RONALD DWORKIN, A BILL OF RIGHTS FOR BRITAIN 9 (1990).

17. Criminal Justice and Public Order Act, 1994 (Eng.).

18. *See id.* ch. 33, § 34(1)–(2).

19. *See id.* § 36(1)–(2).

20. *See id.* § 37(1)–(2).

21. *See id.* § 35(2)–(3).

1994 legislation nonetheless represents a sea change in English law.²² As the authors note, “Any suggestion that the suspect’s obligation to *notify* the police of the bones of his defence on peril otherwise of invoking or increasing suspicion against himself falls short of being equivalent to the imposition of a duty to *prove* his innocence is nothing more than a semantic exercise.”²³ At the very least, restricting the privilege against self-incrimination facilitates an inquisitorial system of justice.²⁴ Proponents of the change argue that it is human nature to protest one’s innocence and the jury is only being told what they already instinctively know—that silence in the face of accusation is evidence of guilt.²⁵

In some sense of course, that is true. Although on this side of the Atlantic we do not allow prosecutors or judges to comment adversely on a defendant’s failure to testify,²⁶ as any criminal defense attorney will tell you, if defendants do not take the stand and deny guilt, they are more likely to be convicted,²⁷ O.J. Simpson notwithstanding. At the same time,

22. Even before the new legislation, in certain cases such as bankruptcy, suspects were required to respond to questions, and failure to do so was punishable by contempt. See ON CONFESSION EVIDENCE, *supra* note 1, at 319–46.

23. *Id.* at 614.

24. See O’Reilly, *supra* note 12, at 405 (“[C]urtailing the right to remain silent will shift the criminal justice system from its *accusatorial* focus on proof by witnesses and extrinsic evidence, to an *inquisitorial* focus on the interrogation of suspects to gain evidence of their guilt.”).

25. See, e.g., *Lakeside v. Oregon*, 435 U.S. 333, 342 (1978) (Stevens, J., dissenting) (“Experience also justifies the inference that most people who remain silent in the face of serious accusation have something to hide and are therefore probably guilty”); 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2272, at 426 (John T. McNaughton ed., rev. ed. 1961) (“What inference does a plea of privilege support? The layman’s natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime.”). *But see supra* note 4 and accompanying text.

26. See *Griffin v. California*, 380 U.S. 609, 615 (1965). Courts may, however, even over a defendant’s objection, charge the jury that it is not to draw adverse inferences from defendant’s failure to testify. See *Lakeside*, 435 U.S. at 340–41.

27. See F. LEE BAILEY & HENRY B. ROTHBLATT, SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS 416 (2d ed. 1985). There are, however, perfectly innocent reasons why defendants would elect not to testify on their own behalves. See, e.g., *Wilson v. United States*, 149 U.S. 60 (1893). In that case, the Court stated:

Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offences charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand.

Id. at 66. Defendants with previous convictions face special perils if they testify. See MCCORMICK ON EVIDENCE § 42, at 58 (John William Strong ed., 4th ed. 1992).

we heavily penalize many of those defendants who do elect to testify on their own behalves. Once defendants take the stand, we generally permit their credibility to be impeached by evidence of prior criminal convictions, which also makes guilty verdicts more likely.²⁸ Furthermore, defendants who testify may be impeached by confessions elicited during custodial interrogation without the proper *Miranda*²⁹ warnings,³⁰ as well as by confessions secured after invocation of the right to counsel.³¹ Although the United States Supreme Court has prohibited the use of postwarning silence for impeachment purposes,³² an unwarned arrestee's silence can be used for impeachment,³³ as can a defendant's prearrest silence.³⁴

Still, all that is different from allowing judges to instruct juries that they may draw adverse inferences from the defendant's failure to protest his or her innocence to the police or to deny guilt in court. The judge's instructions institutionalize and legitimate that which was an unarticulated suspicion,³⁵ one that conflicted with the judge's charge that defendant's failure to take the stand could not be used as evidence of guilt.³⁶ Indeed, as noted, it can be argued that the effect of the law is to shift the burden of proof. As one American commentator has observed:

Under the new [English] law, if the prosecution establishes a *prima facie* case—even if it falls short of proof beyond a reasonable doubt—the accused will have to testify. If the accused refuses to testify, the

28. See MCCORMICK ON EVIDENCE, *supra* note 27, § 42, at 58.

29. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

30. See *Harris v. New York*, 401 U.S. 222, 224–26 (1971).

31. See *Oregon v. Hass*, 420 U.S. 714, 722–24 (1975). *Harris* does not apply if the confession was coerced or involuntary under the Fourteenth Amendment. See *New Jersey v. Portash*, 440 U.S. 450, 459–60 (1979) (prohibiting use of testimony given under a grant of immunity for impeachment); *Mincey v. Arizona*, 437 U.S. 385, 401–02 (1978) (prohibiting use of coerced confession for impeachment).

32. See *Doyle v. Ohio*, 426 U.S. 610, 618–19 (1976).

33. See *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (*per curiam*).

34. See *Jenkins v. Anderson*, 447 U.S. 231, 238 (1980).

35. See *Griffin v. California*, 380 U.S. 609, 614 (1965) (“What the jury may infer [from the failure of the defendant to testify], given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.”).

36. See *Carter v. Kentucky*, 450 U.S. 288, 305 (1981) (holding that a trial judge must instruct the jury not to draw adverse inferences from defendant's failure to testify, even if the prosecutor does not make an adverse comment); *Bruno v. United States*, 308 U.S. 287, 292–93 (1939) (holding that judges in federal courts, upon defendant's request, are required to charge that defendant's failure to take the stand cannot be used against the defendant).

prosecutor's case will be bolstered by an inference of the accused's guilt. This effectively lowers the prosecution's burden of proof to showing a *prima facie* case.³⁷

As Wolchover and Heaton-Armstrong explain, the new law puts "pressure on suspects to give answers or run the risk that they will increase the evidence against themselves . . . [Thus, this] removes the pre-existing right to say nothing without cost."³⁸ The authors also provide an artful response to this argument. Supporters of the new regime contend that the law is "irrelevant in *ordering* the responses of suspects."³⁹ Rather, "An evidential rule allowing silence to be indicative of guilt would merely be descriptive of, and flowing from, the law of human nature."⁴⁰

Of particular interest is section C in Chapter 5, which is entitled "Abolitionism and Retentionism: The Four Stances."⁴¹ In this section, the authors have categorized the supporters and opponents of the right to silence. Those opposing the right to silence fall into two groups—the "utilitarian and [the] exchange abolitionists;"⁴² similarly, there are two groups in favor of the privilege—the "symbolic and [the] instrumental retentionists."⁴³

The utilitarian abolitionists, as exemplified by Bentham, are purists, who believe that the exclusive purpose of a criminal trial is accuracy in fact-finding.⁴⁴ Since the right to silence merely represents an external value, that of protecting defendants, it is unrelated to that end.⁴⁵ The pure abolitionists argue that the privilege should be abolished without providing other safeguards for defendants.⁴⁶ The utilitarian abolitionists, however, were unable to prove empirically that affording the accused a right to silence did not preclude wrongful convictions.⁴⁷ That gave rise to the exchange abolitionists, who condition abolition on providing other safeguards to defendants that will prevent erroneous

37. O'Reilly, *supra* note 12, at 446. The author also argues that the new law undermines the presumption of innocence. *See id.*

38. ON CONFESSION EVIDENCE, *supra* note 1, at 614.

39. *Id.* at 615.

40. *Id.*

41. *Id.* at 619.

42. *Id.*

43. *Id.*

44. *See id.* at 620.

45. *See id.*

46. *See id.*

47. *See id.*

convictions, mainly the right to counsel at police interrogations.⁴⁸

On the other side are the symbolic retentionists, who see the right to silence not as of any value to the defendant, but mainly as a bulwark against excessive police powers.⁴⁹ The instrumental retentionists, however, view the privilege as essential in assuring that innocent people are not convicted.⁵⁰ They demand that any safeguards designed to protect the innocent not be abolished unless it is proven that the procedure does not perform that function, and that any alternative procedures must be as effective in preventing erroneous convictions.⁵¹

In section D of Chapter 5, the authors present “The Substantive Arguments on Abolishing the Right to Silence.”⁵² It is extremely well done—clear, accurate, and terse. The first argument is “[t]he supposed inclination of the innocent to speak.”⁵³ As previously noted, the primary argument in favor of penalizing silence during police questioning is that innocent persons will protest when confronted with an accusation of wrongdoing, and that if suspects do not speak, it may indicate guilt.⁵⁴ The opposing arguments are that (1) most people are afraid to assert themselves to authority figures; (2) there may be valid reasons for remaining silent, such as shock or a desire to protect other people; (3) those invoking the right to silence may do so because of hostility to police, thus effectively making that factor a basis for increasing the likelihood of conviction; and (4) persons may also make a reasoned decision to consult first with legal counsel.⁵⁵

Since silence may be explainable on innocent grounds, retentionists argue that it is arbitrary to permit it to be used to prove guilt.⁵⁶ The abolitionists, on the other hand, contend that if the defendant’s reason for silence is innocent, that point can simply be explained to the jury.⁵⁷

The second argument is a constitutional one. “[I]n reality the right of silence form[s] a vital issue in the whole

48. *See id.*

49. *See id.* at 621.

50. *See id.*

51. *See id.*

52. *Id.*

53. *Id.*

54. *See id.*

55. *See id.* at 622–23.

56. *See id.* at 623.

57. *See id.*

constitutional relationship in a free society between the individual and the state.”⁵⁸ This same notion was expressed very eloquently by Justice Fortas:

The roots of the privilege are . . . far deeper [than a concern with the reliability of confessions]. They tap the basic stream of religious and political principle because the privilege reflects the limits of the individual’s attornment to the state and—in a philosophical sense—insists upon the equality of the individual and the state.⁵⁹

The third argument is that the right to silence deprives the police of investigative opportunities and would allow experienced criminals to keep their defense secret until trial when it would be too late for the police to investigate, the so-called “ambush defence.”⁶⁰ The retentionists argue that there is no hard evidence that such abuses have occurred and that, in any event, the problem can be addressed without abolishing the right to silence during interrogations, such as by requiring the defendant to make a pre-trial disclosure of his or her defense.⁶¹

The fourth argument of the abolitionists is that the right to silence protects professional criminals and terrorists.⁶² Although there is some evidence that these two classes of suspects invoke the privilege disproportionately,⁶³ the authors argue that there are two problems with this reasoning. One is that career criminals would understand that in most situations silence would still be better than making incriminating statements.⁶⁴ Thus, even after abridging the right to silence, there might be only a “marginal decrease” in the invocation of the privilege by career criminals, while at the same time there would be an increase in erroneous convictions of vulnerable suspects.⁶⁵ Second, abolishing the privilege means that the police caution to suspects (the English equivalent of our *Miranda* warnings)

58. *Id.* at 624 (quoting Royal Commission on Criminal Procedure, Report, para. 1.27).

59. *In re Gault*, 387 U.S. 1, 47 (1967) (applying the privilege against self-incrimination to delinquency adjudicatory hearings).

60. ON CONFESSION EVIDENCE, *supra* note 1, at 624–25.

61. *See id.* at 625.

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

would have to be modified to reflect the price of silence.⁶⁶ This would put increased pressure on weak suspects to make incriminating statements that were unreliable.⁶⁷ Furthermore, just as the police used to deliver the caution in such a way that suggested that silence was not really an option, now they would overlay the cost of silence.⁶⁸

The fifth argument of the abolitionists, that is, the exchange abolitionists, is that the privilege is a relic of an era when there were not many protections for criminal defendants, whereas there are now new statutory safeguards such as access to free legal advice, tape recording of interrogations, and a limit on the pre-charge detention periods.⁶⁹ That being the case, it is contended that only the guilty would refuse to speak.⁷⁰ The authors counter that the weakness of the abolitionists is their assumption that these safeguards do away with any legitimate bases for innocent suspects to invoke the right to silence.⁷¹ Furthermore, these safeguards in their view are irrelevant to abolition “because they were part of the balance of police powers and suspects’ rights carefully worked out by the Royal Commission on Criminal Procedure which included the maintenance of the right to silence in its existing form.”⁷²

Retentionists also do not put much stock in the right to free legal advice because police actively dissuade suspects from asserting the right by, for example, reading the warnings too quickly, and because the available solicitors do not provide effective representation.⁷³ Even more to the point, if suspects do receive the legal advice and if they follow the solicitor’s advice to remain silent, is it fair to permit an adverse inference to be made?⁷⁴ Tape recordings are also not viewed as an adequate protection because there is some evidence that police may be “steering suspects away from

66. *See id.* at 625–26.

67. *See id.* at 626.

68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.* at 627.

72. *Id.*

73. *See* Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 104 (1989) (arguing that “the question of ineffective assistance of counsel, even in the interrogation context, cannot be easily dismissed”).

74. In the first draft supplement to the book, the authors provide an extensive exposition of an English case discussing the problem. *See* SUPPLEMENT, *supra* note 6, at 31–33.

attempts to articulate an exculpatory account.”⁷⁵ Moreover, it is argued that recording police interrogations was changing their nature, “enabling [interrogations] to be much more sophisticated and to put more pressure on suspects.”⁷⁶

The sixth abolitionist argument is that the new law will reduce police incentives to elicit admissions.⁷⁷ Under the old law, the police often had to press suspects to get evidence of the crime, whereas now that silence can be used as evidence the police will not need to be as assertive.⁷⁸ Thus, suspects will not have to endure unpleasant interrogations, but the price is that their silence is in effect a confession. In addition, many suspects who fear having their silence used as incriminating evidence may give confused responses that make it seem as if they are lying.⁷⁹

The seventh argument relates to fabricated silence.⁸⁰ Some contend that the new law provides an incentive for police officers, consciously or unconsciously, to suppress suspects’ attempts to explain their defense.⁸¹

The eighth argument deals with controlling the jury’s instinct to draw adverse inferences from the silence of the defendant.⁸² Under the old law the jury would be charged not to make such inferences.⁸³ Abolitionists argue that such warnings did not prevent the jury from making “wholly unmerited inferences of guilt from silence.”⁸⁴ A better mechanism, they assert, would be to permit adverse inferences, but accompanied by very detailed instructions on how to make them.⁸⁵ The retentionists counter that the best way to prevent the defendant from being prejudiced by silence is not to let the jury know that he or she chose not to speak. That is, “If silence is no evidence it need not be

75. ON CONFESSION EVIDENCE, *supra* note 1, at 628.

76. *Id.*; see also OFFICE OF LEGAL POLICY, U.S. DEP’T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION 105 (1986), reprinted in 22 U. MICH. J.L. REFORM 437, 551–52 (1989) (arguing that *Miranda* be overruled and suggesting as an alternative safeguard the recording or videotaping of interrogation sessions). *But see* Rosenberg & Rosenberg, *supra* note 73, at 102 n.205 (contending that a “videotaping or recording requirement is too easily subject to circumvention, permitting officials to coerce the suspect before capturing an ostensibly voluntary account on film or tape”).

77. See ON CONFESSION EVIDENCE, *supra* note 1, at 628.

78. See *id.*

79. See *id.*

80. See *id.*

81. See *id.* at 628–29.

82. See *id.* at 629.

83. See *id.*

84. *Id.*

85. See *id.*

mentioned.”⁸⁶ Yet research shows that in most cases such evidence is brought to the jury’s attention, presumably to bolster the government’s case.⁸⁷

The empirical research findings indicate that only a small percentage of suspects remain silent, between six and sixteen percent, depending on geography;⁸⁸ that suspects with access to counsel are more likely to remain silent, perhaps because the solicitors are inexperienced with police interrogations;⁸⁹ that there is a correlation between silence and three variables—seriousness of the offense, prior criminal record, and the presence of counsel;⁹⁰ that the police do not generally benefit when suspects provide a defense because the information they give is often too vague to be disproved or helpful to the police;⁹¹ that the concern about “ambush defences” is misplaced because they occur in a small number of cases, do not always succeed, and are often caused by the police’s failure to let suspects explain their defenses adequately;⁹² and, finally, that there is no evidence that suspects who remain silent are less likely to be either charged or convicted although in borderline cases silence makes a charge more likely.⁹³ Thus, much has been given up for not very much in return. The ironic part is that this has occurred in the country of origin of the privilege against self-incrimination.

The *Miranda* decision was also met with arguments that it would result in fewer confessions and convictions.⁹⁴ Initial research findings belied those assumptions,⁹⁵ although recently it has been suggested that there is an adverse impact.⁹⁶ Whether true or not, the issue is whether rights

86. *Id.*

87. *See id.*

88. *See id.* at 630.

89. *See id.*

90. *See id.* at 631.

91. *See id.*

92. *See id.* at 632.

93. *See id.* at 632–33.

94. *See, e.g.,* Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1464–67 (1985) (noting several studies which indicated that *Miranda* impacted police efficiency).

95. *See, e.g.,* Welsh S. White, *Defending Miranda: A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 19 n.99 (1986) (“The great weight of empirical evidence supports the conclusion that *Miranda*’s impact on the police’s ability to obtain confessions has not been significant.”).

96. *See* Paul G. Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 395–418 (1996) (noting several studies and setting forth his own theory for assessing the costs of *Miranda* and its alternatives). *But see* Stephen J. Schulhofer, *Miranda’s Practical Effect: Substantial Benefits and*

should be extended or withdrawn depending on the extent of their invocation. If there is a principled basis for the right to silence, such as protecting the innocent or limiting police power, then evidence that it is frequently invoked or adversely impacts conviction rates should be irrelevant.

I must, however, put all my cards on the table. I do not think much of confession evidence, particularly confessions obtained from defendants in custody. I simply do not believe that such statements are voluntary. I also distrust confessions obtained during interrogation, custodial or otherwise, and, for that matter, all confessions. In my view, it is the state's job to prove its case without assistance from the accused. My position is no doubt influenced by the Talmudic rule *ein adom mayseem atzmo rasha*—that is, no one can incriminate himself.⁹⁷ Thus, normative Jewish law, which is perhaps the source of the English privilege against self-incrimination, as David Wolchover has argued elsewhere,⁹⁸ prohibits the use of all confessions whether voluntary or not, whether reliable or not, whether out of court or in court, whether by the defendant or a witness.⁹⁹ In other words, under Jewish law, confessions have no evidentiary value in criminal cases.

The 1994 law, while not subject to invalidation by English courts, may be construed in a restrictive way by English jurists, who are past masters of statutory evisceration by interpretation.¹⁰⁰ Moreover, the law may face

Vanishingly Small Social Costs, 90 NW. U. L. REV. 500, 503 (1996) (arguing that “once we make essential adjustments to the data [reported by Professor Cassell], *Miranda*'s detectable net impact on conviction rates shrinks virtually to zero”). For Professor Cassell's reply to Professor Schulhofer's critique of his argument that *Miranda* imposes social costs, see Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084 (1996).

97. See BABYLONIAN TALMUD, SANHEDRIN 9b (Jacob Shachter & H. Freedman trans., Dr. I. Epstein, ed., The Soncino Press 1987).

98. See DAVID WOLCHOVER, THE DESCENT OF THE MAXIM NEMO TENETUR SEIPSUM PRODERE FROM SANHEDRIN 9B: A DEVELOPMENTAL ASPECT OF THE PRIVILEGE AGAINST SELF-INCRIMINATION 13 (1973) (privately published essay on file with the *Houston Journal of International Law*). For a contrary view, see LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 439–41 (1968).

99. See AARON KIRSCHENBAUM, SELF-INCRIMINATION IN JEWISH LAW 17 (1970) (“Not only may a man not be compelled to be a witness against himself, but even were he voluntarily to testify against himself and confess wholly or partially to a crime, his testimony is rejected completely and has no status in court.”).

100. See, e.g., *Sweet v. Parsley*, [1970] App. Cas. 132 (H.L. 1968) (appeal taken from Q.B.) (construing a statute making it a crime for any person concerned in the management of any premises used to smoke cannabis as inapplicable to the owner of premises who rented it to persons who, unknown to her, smoked cannabis there).

additional resistance in the European Court of Human Rights, which recently held that “the right not to incriminate oneself, like the right to silence, was a generally recognised international standard which lay at the heart of the notion of a fair procedure under article 6 [of the European Convention on Human Rights].”¹⁰¹ There is also the possibility that the recent election victory of the Labour Party in England may yet result in political tampering with the law. Regardless, however, of the immediate outcome with respect to this issue, the Wolchover and Heaton-Armstrong book is a fine contribution to the scholarly literature in the area, and it will be an important reference source for many years to come.

101. SUPPLEMENT, *supra* note 6, at 18; *see also* ON CONFESSION EVIDENCE, *supra* note 1, at 335 (discussing the European Convention on Human Rights).