THE CRIMINAL SUSPECT'S RIGHT TO SILENCE: A HALLOWED SHIBBOLETH?

By GIM L. TEH*

INTRODUCTION

The right to silence is a specie of the privilege against self-incrimination which developed in the seventeenth century in England as a result of the general revulsion against uncurtailed interrogation of suspects in some prerogative courts.[1] The privilege became established as a fundamental common law rule during the early part of that century when the prerogative courts were abolished.[2] Notwithstanding its early origin in trials the privilege now extends to situations of police interrogation[3] and is better known as the criminal suspect's right to silence.[4] In the modern context of police interrogation, this right to silence in effect means that it is no offence for a criminal suspect to refuse to answer questions put to him by the police. It is nothing more than the lawfulness of silence in the face of questioning.[5] The suspect has no remedy against interrogation nor does he have the right to insist that the police

* LL.B. (Hons.) (Lond.), LL.M. (Monash), of the Inner Temple, Barrister-at-law, Lecturer in Law, Monash University.

1 See generally, Glanville L. Williams, 'Demanding Name and Address', (1950) 66 *L.Q.R.* 465; see also, Wigmore, 'The Privilege Against Self-Crimination: Its History', (1901-1902) 15 *Harv. L. Rev.* 610; Wigmore, *Evidence*, 3rd ed., Vol. 8, 267-295.

2 Wigmore, *Evidence, op. cit.*, 287-289; the learned author listed various policies behind the privilege after having observed that it is 'many things as in many settings' (*Id.*, 295-318).

3 See, *e.g.*, *Rice* v. *Connolly* [1966] 2 All E.R. 649; *Hogben* v. *Chandler* [1940] V.L.R. 285; noted (1940) 14 *A.L.J.* 287. In America, where the privilege has been enshrined in the fifth amendment to the Constitution of the United States, it is a matter of dispute as to whether the fifth amendment covers police interrogations: see, *e.g.*, 'The Privilege Against Self-Incrimination: Does it exist in the Police Station?', (1953) 5 *Stan. L. Rev.* 459. Wigmore, *Evidence, op. cit.*, 328-329, was of the opinion that the privilege did not apply to police interrogations. There are, however, contrary opinions on this point as Wigmore himself recognised in his footnote, *op. cit.* 329, m. 3.

4 The present article is only concerned with the right to silence as applicable to police interrogation of criminal suspects. As to the principle at the trial of an accused, see Glanville L. Williams, *The Proof of Guilt*, 1963, Chapter 3. The learned author calls the principle, 'the right not to be questioned' in so far as it is applicable in the trial of an accused.

5 Criminal Law Revision Committee, 11th Report (Evidence) (general), 1972, *Cmnd.* 4991, p. 16. See also A. R. N. Cross 'The Right to Silence and the Presumption of Innocence — Sacred Cows or Safeguards of Liberty?', (1970) 11 *J.S.P.T.L.* 66; R. H. Field, 'A Rejoinder', *id.*, 76.

desist from interrogating him.[6] As a commentator remarked, 'He is entitled neither to an injunction to prevent such interrogation nor to any subsequent redress against the officers who interrogate him.'[7]

The corollary of this peculiar nature of the so-called right to silence is that the police are not legally entitled to demand answers from the person questioned. In fact, with some exceptions to be discussed below, the police practice of interrogating suspects is nothing but the right or freedom to ask questions.[8] This is because neither the common law nor the legislature gave the police a general power to interrogate, their right to ask questions being no more than that of private persons.[9] Thus, in relation to the suspect's right to silence, it means that whilst the police have the freedom to ask questions there is no legal obligation on the suspect to answer any question asked.

The operation and significance of the right to silence in the everyday situation of police interrogation may be seen in *Rice* v. *Connolly*.[10] The appellant was observed by two policemen to be behaving suspiciously at about 12.45 a.m. in an area where breaking offences had been committed on the same night. The policemen stopped him and asked where he was going, where he had come from and for his name and address. The appellant refused to answer. When asked again for his name and address, he gave his surname and the name of the road where he lived. He was asked to give the information in full but he declined to do so, nor would he go to a policebox to verify his identity as requested. The defendant policeman then arrested him for having obstructed him in the course of his duty in that he had refused to answer questions or go to the policebox as requested.[11] There was no other ground to justify the arrest. The appellant was convicted by justices and the conviction was upheld on his appeal to the Recorder.

In an order for review, the Divisional Court allowed the appeal and quashed the conviction. The Court found that the appellant had done nothing that could have been an obstruction within that meaning in the charge, and that the mere refusal to answer questions could not amount to an obstruction as there was no legal obligation to comply with the police requests. As Lord Parker C.J. said,

> (T)hough every citizen has a moral or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is that right of the individual

6 See *Hogben* v. *Chandler* [1940] V.L.R. 285, 288; *Clough* v. *Leahy* (1905) 2 C.L.R. 139, 156-157.

7 L. Mayers, *Shall We Amend the Fifth Amendment?* (1959), 86-87.

8 *Hogben* v. *Chandler* [1940] V.L.R. 285, 288; *Clough* v. *Leahy* (1905) 2 C.L.R. 139, 156-157; L. Mayers, *Shall We Amend the Fifth Amendment?*, 1959, 86-87.

9 See generally L. Radzinowicz, *A History of English Criminal Law*, 1956, Vol. 1. See also, J. F. Stephen, *A History of the Criminal Law of England*, 1883, Vol. 1, 494; T. F. T. Plucknett, *A Concise History of the Common Law*, 1956, 432.

10 [1966] 2 All. E.R. 649.

11 *I.e.*, pursuant to s. 51 (3) of the *Police Act* 1964 (Eng.).

to refuse to answer questions put to him by persons in authority.[12]

Had the Court decided otherwise it would have meant that a policeman could legally circumvent the right to refuse answers by arresting any person who does not agree to assist him in his inquiries. Such a result would be in violation of the right to silence[13] and its effect would be to make an exercise of the right illegal.[14]

Thus as a general rule, as seen in *Rice*'s case, a suspect's right to silence is a limitation on police interrogation in the sense that the police may not legally demand answers to their questions. Nor may they impose any other legal obligation upon him to persuade him to answer. They may not, for example, threaten to arrest him as a means of inducing him to co-operate with them; nor may they actually arrest him merely because he keeps his silence.[15] In a sense, therefore, the right to silence operates as the suspect's safeguard against self-incrimination in a police interrogation.

Whether the right to silence is a real safeguard against the suspect incriminating himself at a police interrogation must, however, be considered in the light of the common law rule to the effect that any person with knowledge that a felony has been committed has a duty to disclose such information to the police. This common law obligation impinges on the right to silence not in the sense that the suspect interrogated by the police has to disclose whether he himself has committed a felony but in the sense that he has, in given circumstances, to disclose knowledge of someone else's felony. Also to be taken into account are the numerous statutes making it obligatory for persons in defined circumstances to disclose information required by the police. In most of these situations the police are empowered to arrest anyone failing to comply with such obligation, if only on the ground that he elected to keep his silence in circumstances in which the law required him to speak up. Besides, the nature of modern police interrogations has such far-reaching effect on an average criminal suspect that the role of the right to silence as a safeguard against self-incrimination cannot be considered without also taking it into account. The common law obligation to disclose information to the police and similar obligations imposed by statutes will now be discussed. This will be followed by a discussion of the nature of police interrogation and its effect on typical criminal suspects. In the writer's opinion, these considerations render the suspect's right to

12 [1966] 2 All E.R. 649, 652.
13 Note; (1966) 82 *L.Q.R.* 457, 458.
14 [1966] 2 All E.R. 649, 652 (*per* Marshall J.); A. R. Carnegie, 'What is Lawful Obstruction?', (1966) 29 *M.L.R.* 682. See also, *Peach* v. *McCarthy* [1919] V.L.R. 342 (No power to arrest suspect for purposes of demanding name and address); *Hogben* v. *Chandler* [1940] V.L.R. 285 (Held, not an obstruction for a friend to advise suspect of his right to silence); *contra, Steele* v. *Kingsbeer* [1957] N.Z.L.R. 552, criticised in (1970) 4 *N.Z. Univ. L. Rev.* 164; the Hon. Sir F. Adams, *Criminal Law and Practice in New Zealand*, 1964, 698.
15 There is also no power to arrest anyone who advises a suspect that it is within his right not to answer questions put to him by the police: *Hogben* v. *Chandler, supra.*

silence illusory as a safeguard against self incrimination at police interrogation.

THE COMMON LAW OBLIGATION TO DISCLOSE

The circumstances in which the common law obligation arises and the extent to which the obligation must be fulfilled have not been clearly delineated because of the relatively infrequent prosecutions on this charge.[16] It is clear, however, that the duty to disclose arises whenever any person interrogated by the police has knowledge that someone else has committed a felony.[17] The failure to perform this duty is a crime known as misprision of felony,[18] a 'grotesque offence'[19] at one time believed to have fallen into desuetude but revived in recent times.[20]

The crime of misprision is committed when the suspect omits, neglects or refuses to disclose to 'proper authority all material facts known to him relative to the offence'.[21] He need not have done anything active to conceal his knowledge from the police as the crime is a crime of omission.[22] He is required, however, 'when there is a reasonable opportunity for him to do so',[23] either to disclose such knowledge when questioned by the police or, more probably, to contact the police to inform them of such crime.[24] Any failure to take either course of action renders him liable for misprision.

The extent of the obligation to disclose his knowledge of a felony may be seen in the Victorian case of *R.* v. *Crimmins*.[25] The accused was interrogated by a detective on the circumstances in which he had received a gun-shot wound. He told the detective that he had been deliberately shot during a struggle in a house the previous night. He refused, however, to disclose the identity of the person who had shot

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16 See generally, C. K. Allen, 'Misprision', (1962) 78 *L.Q.R.* 40; Stephen *op. cit.*, Vol. 2, 238; P. R. Glazebrook, 'How Long, then, is the Arm of the Law to be?', (1962) 25 *M.L.R.* 301.

17 *Sykes* v. *D.P.P.* [1961] 3 All E.R. 33; [1961] *Camb. L.J.* 142; (1963) 2 *M.U.L.R.* 389; (1962-64) 4 *Syd. L. Rev.* 302. For the present purpose, the discussion will be confined to criminal suspects interrogated by the police although the obligation is imposed on every person with the requisite knowledge.

18 'Misprision', according to Coke, 3 *Institutes*, 36, is derived from 'mespres' an old French word signifying neglect or contempt: cited by Lord Denning in *Sykes* v. *D.P.P.* [1961] 3 All E.R. 33, 36; compare, the *Oxford English Dictionary*, Vol. 6, 1961, 523, which describes the word as meaning to act wrongly and deriving from an old French word '*mesprendre*'. The offence of misprision of felony has been narrowed down by English legislation. It is now termed 'compounding an arrestable offence': s. 5 (1), *Criminal Law Act* 1967 (Eng.).

19 Glazebrook, *op. cit.*, 317.

20 The penalty for the offence is imprisonment and fine. The only limit on the sentence is that it should not be 'inordinately heavy': *Sykes* v. *D.P.P.*, *supra*.

21 *Sykes* v. *D.P.P.* [1961] 3 All E.R. 33, 42 *per* Lord Denning; see also *per* Lord Morris, *id.*, 47.

22 C. K. Allen, 'Misprision', (1962) 78 *L.Q.R.* 40, 54; J. C. Smith & B. Hogan, *Criminal Law*, 1st ed., 593.

23 *Sykes* v. *D.P.P.* [1961] 3 All E.R. 33, *per* Lord Denning.

24 See Glazebrook, *op. cit.*, 315-316; *Sykes'* case, 42 *per* Lord Denning.

25 [1959] V.R. 270; (1959) 2 *M.U.L.R.* 261.

him or the location of the house where the incident occurred. He admitted that he knew both these facts but he told the detective that he would attend to the matter himself. The Full Court of the Supreme Court of Victoria[26] held that what the accused told the detective was an insufficient disclosure of the felony. The Court said that the accused was required to disclose 'facts... that might lead to the apprehension of the felon'.[27] This meant that he was obliged to disclose both the identity of the felon and the place where the crime took place, both facts presumably being necessary to enable the police to apprehend the felon.

It may be difficult to ascertain when a person has such knowledge that he is obliged to disclose all material facts to the police. Clearly he has the requisite knowledge when a felon has confessed his crime to him or when he was at the scene of the felony. What if he heard about it in a casual conversation with some third party? Lord Denning in *Sykes* v. *D.P.P.*[28] took the view that a person has such knowledge if a reasonable man in his place, 'with such facts and information before him' as he has, 'would have known that a felony has been committed'.[29] Aware that even lawyers find difficulty in telling whether a particular crime is a felony or a misdemeanor, his Lordship said,

> If he knows that a serious offence has been committed — and... it is a felony — that will suffice. This requirement that it must be a serious offence disposes of many supposed absurdities, such as boys stealing apples, which many laymen would rank as a misdemeanour and no one would think he was bound to report to the police. It means that misprision comprehends an offence which is of so serious a character that an ordinary law-abiding citizen would realize he ought to report it to the police.[30]

Lord Goddard, on the other hand, said that a person has such knowledge if a jury thinks that 'the knowledge that he has is so definite that it ought to be disclosed'.[31] His Lordship then indicated that the cutting-off line lies between mere gossip and rumour, on the one hand, and, on the other, 'facts... that would materially assist in the detection and the arrest of a felon'.[32]

The House of Lords in that case did not adumbrate the requisite facts of which a person should be cognisant before he can be said to have 'knowledge' of a felony.[33] It is not known, for instance, whether hearsay information and 'facts' heard in a casual conversation with another person would suffice.[34] It has been suggested that 'nothing less

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26 Consisting of Herring C.J., O'Bryan & Dean JJ.
27 [1959] V.R. 270, 274.
28 [1961] 3 All E.R. 33.
29 *Id.*, 42; see also, *id.*, 46 *per* Lord Morton.
30 *Ibid.*
31 *Id.*, 46.
32 *Ibid.*
33 Glazebrook, *op. cit.*, 313-314.
34 Glazebrook, *op. cit.*, 313.

than proved knowledge of the felony will support a charge of misprision'.[35] On this basis, it should follow that the duty to disclose a felony does not arise unless a person is possessed of such knowledge.[36] Mere hearsay information, therefore, unless investigated for its reliability, will not be sufficient knowledge to give rise to a duty to disclose. It need only be observed here that the whole question has yet to be examined authoritatively by a court of law[37] even though academic opinion on the matter is convincing.

What is also not clear from the decision in *Sykes'* case is the question of what crime the suspect must have knowledge before the duty to disclose can arise. The difficulty stems from the 'antiquated and unmeaning'[38] distinction between felonies and misdemeanours in English Law. Few persons know whether a crime that has been committed is a felony or a misdemeanour. If misprision arises only when he fails to disclose his knowledge of a felony then it becomes 'largely a matter of chance'[39] whether misprision is committed or not. Lord Denning's view[40] that misprision would be committed if a person failed to disclose his knowledge that a 'serious' crime had been committed is not a happy solution. Even fewer people could agree on whether a crime was sufficiently 'serious' to require its communication to the police.[41] It remains, therefore, a matter of chance whether misprision has been committed in a given case. Lord Denning has merely turned misprision of felony into a misprision of serious crimes.[42] Lord Goddard's suggestion that a duty to disclose should arise whenever a person knows facts 'that would materially assist in the detection and arrest of a felon'[43] is not as helpful as it may appear; the requisite knowledge must still be of facts sufficient to give rise to a felony, there being no duty to disclose a misdemeanour.[44]

The precise limits to the duty to disclose are, moreover, not known. Three questions may here be instanced.[45] First, is there a duty to disclose when the felon gives some apparent justification for his crime as, for instance, when a thief states that he has some claim of right against the person from whom he took goods? Secondly, is there a duty to dis-

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35 Allen, *op. cit.*, 55; see also, Glazebrook, *loc. cit.*

36 See Glazebrook, *loc. cit.*, where the writer said, 'It will be very curious if evidence insufficient to support a conviction is held sufficient to support a duty to inform the police'.

37 See *R.* v. *Aberg* [1948] 2 K.B. 173; *Sykes'* case, *supra*, *R.* v. *Crimmins*, *supra.*

38 Stephen, *op. cit.*, Vol. 2, 193 *et seq.* The distinction between felonies and misdemeanours has been abolished in England (*Criminal Law Act* 1967, s. 1 (1)), although the distinction is still in existence in Victoria and South Australia.

39 Glazebrook, *op. cit.*, 314; see also, Allen, *op. cit.*, 57.

40 *Sykes'* case, *supra.*, 41-42.

41 Allen, *op. cit.*, 56.

42 Glazebrook, *op. cit.*, 314.

43 *Sykes'* case, *supra.*, 46.

44 See Glazebrook, *op. cit.*, 314.

45 The writer acknowledges indebtedness to Mr. P. R. Glazebrook, *op. cit.*, 314-317, for the three questions raised in the text.

close when the police have already been acquainted with the facts of the felony? Thirdly, is there any situation in which the suspect is privileged from being obliged to inform on a felon? Whether a suspect who keeps silent commits misprision of felony is a matter which becomes purely fortuitous if the answer to the first two questions is in the negative. A felon's justification may, in the first case, turn out to be invalid and, in the second, the police may not in fact have been apprised of the felony. In either instance, the suspect who fails to disclose the crime takes the risk of being indicted for misprision.

As regards the third question, Lord Denning alone in *Sykes'* case[46] adverted to the matter. In his opinion, persons in the following relationships would be exempted from the obligation to disclose:

> Non-disclosure may be due to a claim of right made in good faith. For instance, if a lawyer is told by his client that he has committed a felony, it would be no misprision in the lawyer not to report it to the police, for he might in good faith claim that he was under a duty to keep it confidential. Likewise with doctor and patient, and clergyman and parishioner. There are other relationships which may give rise to a claim in good faith that it is in the public interest not to disclose it. For instance, if an employer discovers that his servant has been stealing from the till, he might well be justified in giving him another chance rather than reporting him to the police. Likewise with the master of a college and a student. But close family or personal ties will not suffice where the offence is of so serious a character that it ought to be reported.[47]

This attempt to narrow down the scope of the obligation to disclose has not gone without criticism. In particular, one commentator said that the defence based on a 'claim of right' was 'inapt' and the choice of exempted relationships 'perverse'.[48]

As formulated by Lord Denning, the defence of a 'claim of right' can only operate once. Thus a doctor who, when interrogated by the police, keeps his silence in the honest belief that he is entitled not to disclose the felonious conduct of a patient cannot again make the same claim on another occasion with reference to other patients.[49] This is because he has no *right* or privilege to keep silent and he cannot again claim in a subsequent case that he honestly believes he has such a right.[50] Moreover, the police may not believe that he has such a 'claim of right' on the first occasion. He remains silent at the risk that a prosecution may be instituted against him. As C. K. Allen observed,

> (T)hat is little satisfaction to the individual who considers that he has acted with moral propriety, but who has to suffer all the anxiety, the publicity and the expense of a prosecution, in addition to the fact that the very crime which he wished to keep dark has

46 [1961] 3 All E.R. 33.
47 *Id.*, 42.
48 Glazebrook, *op. cit.*, 317.
49 Glazebrook, *supra.*
50 Glazebrook, *supra.*; Allen, *op. cit.*, 58.

> now been made public, and may lead to a prosecution which he believed was in the worst possible interest of the accused.[51]

Lord Denning could have avoided the above criticism if he had merely said that persons like lawyers, doctors, clergymen, employers and teachers would be privileged from disclosing any knowledge of a felony committed by those with whom they were in a position of confidence.

His choice of relationships is also unfortunate. It seems incredible that employers, for example, may be exempted from the obligation to inform on their felonious employees whilst members of a family, on the other hand, are required to denounce felons in their midst.[52] This gives the impression, to quote C. K. Allen again,[53] that 'we seem to be getting near the Nazi and Soviet idea of family solidarity'. Until this point has been more carefully considered by a superior court[54] it is clear that other persons in a position of confidence, for example, spouses, family relatives, social workers and probation workers risk being prosecuted for misprision whenever they refuse to inform the police of any information concerning a felony committed by those who have confided in them.[55]

Lord Denning's prediction[56] that judges in cases subsequent to *Sykes'* will aptly impose 'just limitations' on the duty to disclose proved accurate when the Court of Criminal Appeal decided *R.* v. *King*.[57] The facts of that case are simple. The appellant was questioned by police officers who told him that they were making inquiries into a recent robbery. When informed that they were trying to trace the hirer of a car used for the robbery, he denied that he had hired the car. The police officers then showed him some hiring documents, whereupon he admitted being the hirer in question. At the same time, however, he gave them a fictitious account of how he came to hire the car and what he had done at the material time. One week later, when interrogated again by the police, he admitted that his first account was false. He then made another statement to them. He was charged, *inter alia*, with misprision of felony in that he had concealed the commission of a felony which he knew had been committed by certain unknown persons. Judge Block at the Central Court convicted him on this charge and he appealed to the Court of Criminal Appeal.

In the Court of Criminal Appeal, counsel for the appellant conceded that the appellant knew a felony had been committed. He contended, however, that the duty to disclose information relating to the felony did

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51 *Op. cit.*, 58-59.

52 The judge said that 'close family or personal ties will not suffice'; see also, [1961] 3 All E.R. 33, 45, *per* Lord Goddard.

53 *Op. cit.*, 59; see also, Glazebrook, *op. cit.*, 317-318.

54 In fairness to Lord Denning, it may be pointed out that this part of his decision is mere *obiter*.

55 See Allen, *op. cit.*, 59-60.

56 [1961] 3 All E.R. 33, 42.

57 [1965] 1 All. E.R. 1053; see also C. K. Allen's note, (1966) 82 *L.Q.R.* 24.

not arise in the circumstances as any disclosure relating to the hiring of the car would have amounted to a confession that he was involved with the felons. In effect, he urged the Court to recognise a further limitation on the duty to disclose beyond those instanced by Lord Denning in *Sykes'* case, namely, that a person should be privileged from having to make a disclosure where disclosure would tend to incriminate him.[58] The appeal was upheld, Lord Parker C.J., delivering the opinion of the Court, said that 'there clearly (was) such a limitation on the duty to disclose'.[59] The Chief Justice also accepted a contention by the prosecution to the effect that a person who does not keep silent — especially after he had been cautioned to do so — but, instead, makes false statements is guilty of misprision. This is on the ground that he has made an active concealment.[60] The judge pointed out, however, that the trial had proceeded on the basis that there was a passive concealment so that the case could not be reopened on this new argument.

The *King* decision is of great significance to a criminal suspect in that the Court of Criminal Appeal qualified his obligation to disclose knowledge of someone else's crime by making it subject to the cardinal principle that no man is bound to incriminate himself. It is still too early to say whether the Australian courts will follow *King*'s case.[61] If followed, it will mean that a suspect interrogated by the police need not say anything to disclose his knowledge of a felony if his answers may amount to an admission or confession that he is implicated in the crime. Nor, it seems, is he obliged to say anything which tends to indicate that he is himself guilty of misprision of felony.[62] This does not, however, prevent the police from arresting and charging him with misprision whenever he makes any statement indicating that he is actively concealing knowledge of some felony, the police being in no position to tell whether or not he is privileged from the duty to disclose.

OBLIGATION IMPOSED BY STATUTES

Statutory exceptions to the right to silence are found in a variety of statutes dealing with such things as drugs and liquor, immigration, tax, transport, weapons, advertising, conservation and local government. Most of these statutes empower the police to arrest any person failing to comply with the obligation to disclose the required information and anyone refusing or failing to do so may be made guilty of an offence *per se*. The various statutes may be divided into two types. First, those that merely impose a duty upon persons to disclose their name and address in defined circumstances. Secondly, those that require other information to be disclosed in circumstances defined by the relevant statute. Some of the latter type completely abrogate the common law right to silence in that they require the disclosure of *any* information

58 *Id.*, 1055.
59 *Ibid.*
60 *Ibid.*
61 The writer has not been able to find any Australian case on misprision after 1965.
62 [1965] 1 All E.R. 1053, 1055, *semble*.

that the police may wish to have, regardless of whether facts so disclosed may be self-incriminating in character. The two types of statutes will now be examined to give an idea of the extent to which the right to silence has been eroded by legislation. The construction given by judges to some of these statutory exceptions will then be examined to show the general judicial distrust of these exceptions. It may be noted at the outset that these statutory provisions are so numerous that any suspect questioned by the police cannot be at all sure that he can safely rely on his common law right to silence.[63]

Duty to Disclose Name and Address

Statutory provisions of this type are chiefly designed to remedy inadequacies in the law enforcement process.[64] There may be situations where a person has committed a non-arrestable offence and the police can only proceed against him by summons. In such a case, the police have no legal powers to detain him even if he steadfastly refuses to disclose his name and address, prerequisites for the issue of a summons against any offender. *Hatton* v. *Treeby*[65] is an illustration of such a situation. The respondent, a constable, saw the appellent riding a bicycle at night without a light, a summary offence contrary to s.85 of the English *Local Government Act* 1888. The appellant refused to stop when called upon to do so. The respondent then caught hold of the handle-bar of the bicycle, causing him to fall to the ground in consequence. In an action for assault brought by the appellant, it was held that the respondent had no common law or statutory power to stop the bicycle even though he did not know the appellant's name and address and could not have ascertained them in any other way.

Hatton's situation of police helplessness is not necessarily confined to petty and non-arrestable offences. The police are equally powerless in cases where they do not have sufficient evidence to justify arresting a suspected felon even though they have strong feelings about his guilt. In such a situation, the suspect is perfectly entitled to refuse to answer questions and go his own way.[66] Statutes empowering the police to

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63 For the present purpose, the writer proposes to confine himself to an examination of those statutory exceptions that govern police interrogation. Exceptions covering other situations have been dealt with elsewhere by other commentators. See, *e.g.*, J. D. Heydon, 'Statutory Restrictions on the Privilege against Self-Incrimination', (1971) 87 *L.Q.R.* 214; E. J. Cooper, 'Search, Seize and Question under Federal Revenue Laws', (1970) 45 *A.L.J.* 342; T. P. Fry, 'Admissibility of Statements made by Accused Persons', (1938) *A.L.J.* 425, 452-454.

64 *Dumbell* v. *Roberts* (1944) 113 L.J. 185, 191-192, *per* Goddard L.J., with whose judgment Luxmoore L.J. agreed.

65 [1897] 2 Q.B. 452. (D.C.); see also, *Peach* v. *McCarthy* [1919] V.L.R. 342; *Elder* v. *Evans* [1951] N.Z.L.R. 801.

66 See, *e.g.*, *Rice* v. *Connolly* [1966] 3 All E.R. 649. An excellent hypothetical example may be found in E. Campbell & H. Whitmore, *Freedom in Australia* (1966), 69-70. A suspected criminal may not get away so easily if the police are quick enough to find some lawful excuse to arrest him. Thus Professor Glanville Williams, 'Demanding Name and Address', (1950) 66 *L.Q.R.* 465, 467, pointed out that the constable in *Hatton's* case, *supra.*, could have suspected the appellant of having stolen the bicycle when he failed to stop on demand. Had the constable been sharp enough he could have arrested him on this ground.

demand a person's name and address at least enable the police to be better placed to locate the suspect in the near future.

A characteristic feature of these 'name and address' statutory provisions is that they confer upon the police a power to arrest any person whose name and address are demanded but who refuses to comply with such demand.[67] S.6A of the *Road Traffic Act* 1958 (Vic.), for example, provides that a person who has committed a traffic offence within the Act must disclose his name and address when requested to do so by any policeman. The section empowers the policeman to arrest without a warrant any person who, in the relevant circumstances, either refuses to give his name and address or gives a name and address which the policeman reasonably suspects to be false. This section is confined to a traffic offence committed within the 'view' of the policeman.[68] It may be contrasted with s.318 (3) of the *Crimes Act* 1958 (Vic.) which provides that a policeman may without a warrant arrest any driver whom he suspects, on reasonable grounds 'based upon his personal observation', to have driven recklessly or at a dangerous speed.[69] The power to arrest arises when the suspect either refuses to give his name and address or if there is no identifying registration number on the vehicle concerned.

A failure to disclose name and address upon demand by a policeman is not an offence in itself within either of the above statutory provisions.[70] It is common, however, for statutory provisions of this type to render a failure to disclose an offence *per se* punishable by a fine. Thus, s.27 of the *Firearms Act* 1958 (Vic.) provides that a policeman may demand the production of a firearm certificate from a person in possession of or believed to be carrying a firearm. The policeman is authorised, *inter alia*, to demand such person's name and address if he fails to produce the certificate. The refusal to declare his name and address would be an offence in the circumstances and renders an offender liable to a fine of between four and forty dollars.[71] A subsection authorised the policeman to arrest without a warrant upon such refusal but

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67 See, *e.g.*, s.45, *Road Traffic Act* 1934-36 (S.A.); s.157, *Licensing Act* 1911-1959 (W.A.); s.4(6), *Illicit Sale of Liquor Act* 1913-1917 (W.A.) Compare, s.4, the *Children's Protection Acts* 1896-1945 (Qld.), which empowers the police to arrest any person who commits an offence under the act and whose name and address are unknown or cannot be ascertained.

68 The offence may be any violation of a traffic regulation within part 1 of the Act or any other regulation made thereunder.

69 *I.e.*, contrary to s.318 (1) of the Act. See also, s.80 (A) (2), *Motor Car Act* 1958 (Vic.). The section is identically worded with s.318 (3), *Crimes Act* 1958 (Vic.).

70 See also, s.49 (4), *Government Railways Act* 1904-1960 (W.A.); s.158, *Metropolitan Water Supply, Sewerage & Drainage Act* 1909-1960 (W.A.). Compare s.31, *Noxious Weeds Act* 1950-1960 (W.A.); s.157, *Licensing Act* 1911-1959 (W.A.).

71 See also s.43, *Fisheries Act* 1958 (Vic.), where a person who has committed an offence under the Act but who refuses to disclose his name and address upon demand is liable to a penalty of between four to one hundred dollars; see also s.81 (3), *Motor Car Act* 1958 (Vic.) (any person who drives carelessly within view of a policeman and who refuses to give his correct name and address — or if the car has no identification number — commits an offence if he has in fact driven carelessly).

this provision has now been repealed and replaced by a consolidating section of the *Crimes (Powers of Arrest) Act* 1972 (Vic.)[72]

In some cases, statutes of this type may require a person to disclose his name and address to the police on his own initiative. This duty to disclose arises when a driver of a car in Victoria is involved in a road accident in which injury is caused to another person or where property has been damaged. The driver is required by s.80 (1) of the *Motor Car Act* 1958 (Vic.) to give his name and address to, *inter alios*, any policeman present at the scene of the accident.[73] Failure to do so is an offence punishable by fine or imprisonment.[74]

Most of these statutes render a refusal to disclose name and address an offence only when some other offence under the same Act has been committed and where there could be no practical way of prosecuting the offender unless his name and address were taken. In this respect the *Police Act* 1892-1970 (W.A.) extends further. S.50 of that Act provides that a policeman may 'demand and require of any individual with whose person he shall be unacquainted' his name and address. Any refusal or neglect to comply with such demand entitles the policeman to arrest without a warrant. It may be observed that the section is wide enough to empower any policeman to demand the name and address of any driver whenever he feels like it.[75] A similar provision is to be found in s.181 of the *Licensing Act* 1958 (Vic.) which provides that a policeman may demand the name and address of any person found on licensed premises during prohibited hours. Although no power of arrest is given

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72 See *infra.*, footnote 76.

73 See also, s. 139, *Road Traffc Act* 1934-1936 (S.A.); s. 5 (1), *Motor Traffic Acts* 1909-1957 (N.S.W.). Compare s.8 (3), *Motor Traffic Act* 1909-1969 (N.S.W.) under which the duty to disclose name and address arises only 'if required so to do by any person having reasonable grounds for so requiring'. When it is a policeman who so requires the information, the driver is obliged to give other details of the accident such as the time, place and nature of the accident.

74 S. 80 (2) *Motor Car Act* 1958 (Vic.). Other examples of the duty to disclose may be seen in s. 6, *Venereal Diseases Act* 1958 (Vic.); s. 167, *Melbourne Harbour Trust Act* 1958 (Vic.); s. 13, *Railways Act* 1958 (Vic.). Compare s. 66, *Police Act* 1936 (S.A.), where any person who commits an offence under the Act may be arrested if his name and address are unknown to or cannot be ascertained by the arresting policeman. A similar provision may be found in s. 46, *Police Act* 1892-1953 (W.A.).

75 For an indication of judicial response to this type of provision, see *Trobridge* v. *Hardy* (1955) 94 C.L.R. 147, discussed *infra*. A somewhat narrower provision may be found in s. 34 (1) of the *Traffic Act* 1919-1957 (W.A.) which requires any driver, whenever demanded by any policeman, to 'give any information' which may lead to the identification of anyone alleged to have committed an offence under the Act. The power to demand name and address arises only when there is a reasonable suspicion that an offence against the Act has been committed. No power to arrest is given by that section. See also, ss. 99, 140, 27 (17)-(19), *Road Traffic Act* 1934-1936 (S.A.); s. 110, *Racing and Gaming Act* 1952 (Tas.); s. 145, *Police Offences Act* 1958 (Vic.) (power to demand name and address arises when the police enter premises with a warrant and an arrest has been made); s. 11, *Pistol Licence Act* 1929 (S.A.) (power to demand name and address from anyone carrying or using any pistol); s. 11, *Firearms and Guns Act* 1931-1962 (W.A.); s. 12, *Pistol Licence Act* 1927-1946 (N.S.W.); ss. 7 (b) and 8, *Firearms Acts* 1927-1959 (Qld.).

by that section[76] any refusal to comply with the demand is made an offence punishable by a fine.[77]

In his examination of numerous 'name and address' provisions in English statutes, Professor Glanville Williams[78] was of the opinion that the power to arrest and detain contained in such provisions should come to an end whenever the person arrested subsequently agrees to disclose his name and address. He said that, although the statutes were not explicit in this regard, his conclusion stemmed from the underlying purpose of these statutes, namely, to secure the attendance in court of those persons who had committed only trifling offences, their arrest being only a last resort to achieve this purpose.[79] The same observation may also be made of the corresponding Australian provisions. It should also follow that the power of arrest may not be invoked if the police know the name and address of the person whom they are questioning, or if such information was easily ascertainable.[80]

Duty to Disclose Other Information

Statutory provisions of this type are not so numerous. The obligation to disclose information may, however, range from the duty to disclose specific and non-incriminating facts to *any* information sought by the police whether or not they are highly incriminating. For example, s.11(*a*)(4*a*) of the *Road Traffic Act* 1958 (Vic.) empowers a policeman to require a driver, whom he reasonably suspects to have committed a traffic infringement, to state whether or not he is licensed to drive and to state correctly whether or not the licence is probationary. Sub-s. (4*b*) of the section makes it an offence punishable by a fine for any driver to refuse to state any of these facts when required to do so.[81]

A much more onerous obligation to disclose information may be found, for instance, in s.49 of the *State Transport Co-ordination Act*

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76 But see s.2, *Crimes (Powers of Arrest) Act* 1972 (Vic.) which, in effect, provides that any policeman may arrest 'any person he finds committing any offence (whether an indictable offence or an offence punishable on summary conviction)' if he believes that such arrest is necessary, *inter alia*, to ensure the offender's appearance in court or 'to prevent the continuation or repetition of the offence or the commission of a further offence'. This provision is wide enough to cover the situations in which a failure to disclose name and address is made a statutory offence *per se*. See also *Samuels* v. *Hall* [1969] S.A.S.R. 291.

77 S. 181 (2) of the Act. See also s. 157, *Licensing Act* 1911-1959 (W.A.).

78 'Demanding Name and Address', (1950) 66 *L.Q.R.* 465.

79 *Supra.*, 472. In this respect, see s. 37 (2), *Police Offences Act* 1901-1957 (N.S.W.)which gives a policeman the power to detain a person within that section for only so long as he refuses to give his correct name and address; see also, *Report of the Statute Law Revision Committee upon Arrest Without Warrant and Related Matters* 1968 (Vic.), 13.

80 See *Dumbell* v. *Roberts* (1944) 113 L.J. 185; *Hazell* v. *Parramatta City Council* (1968) 1 N.S.W.R. 165.

81 See also s. 4 (6)-(7), *Illicit Sale of Liquor Act* 1913-1917 (W.A.); s. 90 (6)-(8), *Metropolitan and Export Abattoirs Act* 1936 (S.A.); s. 8, *Motor Traffic Act* 1909-1969 (N.S.W.); s. 10A, *Pistol Licence Act* 1927-1946 (N.S.W.) Compare s. 9 (1), *Felons Apprehension Act* 1899 (N.S.W.) which makes it a felony for any person to withhold information from or give false information to any policeman in pursuit of a proclaimed outlaw within the Act.

1933-1937 (W.A.). Sub-s.(1) provides that a policeman may ask the driver of any public vehicle 'to give information with respect to the load' of the vehicle. A refusal to do so or the giving of any false information is made an offence under sub-s.(2). The purpose of conferring such power of questioning is to enable the police to ascertain whether the provisions and regulations of the Act have been contravened.[82] The section in effect requires any driver of a public vehicle who has contravened any other section of the Act to disclose that fact to any policeman questioning him. No power to arrest is, however, conferred by that section.

An extremely severe provision may be found in the *Migration Act* 1958 (C'wealth). S.42 of that Act expressly authorises any policeman — whether he is a member of the Commonwealth, a State or Territory police force[83] — to ask 'such questions as he considers necessary'[84] for the purpose of determining whether a person arrested and held in custody is a prohibited immigrant or a deportee under the Act. The suspected offender who refuses to answer such questions or who makes a 'false or misleading' statement is liable to be fined or imprisoned for six months.[85] The section also expressly provides that he is not exempted from having to answer questions on the ground that his answer might tend to incriminate him.[86]

Judicial Response to Statutory Exceptions

Judges, as a general rule, put a narrow construction on these statutory provisions if only because they represent a departure from the common law principle that every person has a right to remain anonymous. In dealing with the 'name and address' provisions, for instance, judges have insisted that the powers conferred on the police by such provisions must not be abused. Thus in *Trobridge* v. *Hardy*[87] Fullagar J. observed, in disapproving terms that s.50 of the *Police Act* 1892-1970 (W.A.),[88] a wide 'name and address' provision, would literally authorise any policeman in Western Australia 'to approach any person anywhere, though he has done no wrong, and is suspected of no wrong, and demand his name and address: then, if the name and address were not given that

82 S. 49 (1) of the Act. See also s. 11 (e), *Firearms and Guns Act* 1931-1962 (W.A.).

83 S. 5 (1) of the Act.

84 S. 42 (1).

85 S. 42 (2). The penalty is fixed so that anyone contravening the section has, on conviction, either to pay the equivalent of the fine of two hundred pounds or to go to gaol for six months.

86 S. 42 (3). The only saving provision is that answers so disclosed are inadmissible evidence in any other proceedings against the offender. Compare s. 52, *National Service Act* 1951-1966 (C'wealth). See also ss.14B and C, *Liquor Acts* 1912-1965 (Qld.); two equally wide provisions imposing a duty to disclose any information sought by the police but limited to non-incriminating information only; s. 14, *Fisheries Act* 1957-1962 (Qld.).

87 (1955) 94 C.L.R. 147.

88 *Supra.* Compare s. 181, *Licensing Act* 1958 (Vic.); ss. 45 and 89, *Road Traffic Act* 1934-1936 (S.A.).

person may be arrested and held in custody'.[89] The judge then added, in a later passage,[90]

> The drastic power conferred by s. 50 must, I would think, be taken to be conferred only for the purposes of the Act in which it occurs. If the power is used wantonly or otherwise than for the purpose of bringing an offender or suspected offender to book, there is an abuse of power which may give rise to a cause of action.[91]

The judge appeared to be of the opinion that the powers of arrest in a provision such as s.50 could be invoked only when an offence other than that of refusing to disclose one's name and address has been committed.[92] This construction undoubtedly narrows down the otherwise arbitrary powers of arrest in provisions of this type.

Fullagar J.'s opinion was cited with approval by Isaacs J. in *Hazell* v. *Parramatta City Council*.[93] There a dispute arose over a trolley containing two motor-car mudguards left standing on a footpath near the plaintiff's office. Two of the defendants were a deputy health inspector of the local council and a police constable. The plaintiff was a solicitor who had practised in that office for some thirteen years and was well-known to the defendant, the deputy health inspector. The plaintiff was asked whether he had put the trolley on the footpath. He denied responsibility but offered to move it away. The constable told him that it was too late to do that but the plaintiff nevertheless went to the trolley to move it to a nearby yard. The constable followed him to the trolley and again asked who was responsible for leaving it there and the name and address of that person. The plaintiff repeated his answer. Heated words were then exchanged between the plaintiff and the two defendants who were trying to stop the trolley being moved while they were asking their questions. The deputy health inspector then asked for the plaintiff's name and address. The plaintiff told him that he knew them very well and declined to comply with that request. The request was again made and turned down. The constable then warned the plaintiff that

89 (1955) 94 C.L.R. 147, 153. The only condition precedent to the power to demand a person's name and address in that section is that the policeman is 'unacquainted' with him.

90 *Id.*, 154.

91 *Trobridge*'s case itself is an example of a similar provision being abused by a policeman who later found himself the defendant in an action for assault, malicious arrest and false imprisonment. The facts of that case may be summarised as follows: a police constable in plainclothes approached a taxi driver who was about to pick up two intending passengers. He told the driver that he was not supposed to pick up fares at that spot and then demanded his name and address. The driver handed him his business card containing his name and other particulars but he was nevertheless arrested, the constable being evidently dissatisfied with such a response to his demand. The driver was later charged with refusing to give his name and address but he was subsequently acquitted. He then sued the constable. Fullagar J. in the High Court described the constable's conduct as outrageous and one 'actuated by strong personal animosity' *id.*, 160. The constable was held liable in damages.

92 It is an offence under s. 50 of the *Police Act* 1892-1953 (W.A.) for any person to refuse to disclose his name and address when demanded.

93 [1968] 1 N.S.W.R. 165; noted, (1969) 63 *Q.L.J.* 83.

he might be arrested for non-disclosure and repeated the request. The plaintiff again declined to disclose the information and was forcibly arrested and taken to a police station. He was later charged with the offences of obstructing the footpath with the trolley and failing to disclose his name and address when demanded.[94] The charges were duly heard and dismissed. The plaintiff sued, *inter alia*, for assault and wrongful arrest and imprisonment.

In the Supreme Court, counsel for the policeman contended that the plaintiff's arrest was authorised by s.644 of the *Local Government Act* 1919 (N.S.W.).[95] That section in effect provided that a person found committing an offence under the Act was obliged to disclose his name and address when demanded by any member of the local council or by a policeman. The failure to do so was made an offence punishable by a fine.[96] It also entitled the policeman or member of the local council to arrest without a warrant.[97] Isaacs J. held, however, that a 'basic condition precedent'[98] to the power to arrest had not been fulfilled, namely, that the defendants should have actually *found* the plaintiff committing an offence under the Act. The defendants merely found that the plaintiff had undertaken responsibility to shift the trolley away. The plaintiff's obligation to disclose his name and address had, therefore, never arisen.[99]

The interesting part of Isaacs J.'s decision is his observations on the 'name and address' provision under discussion. He pointed out that it merely directed the police or member of the local council to secure the name and address of any one who offended against the Act so that the council might be informed of the offence and could decide whether or not to take action against him.[100] The provision authorised arrest only when an offender refused to disclose his name and address without which it would be impossible for the council to proceed against him.[1] However, the judge pointed out that the power to arrest was only discretionary and should be used sparingly.[2] He then referred to a passage in *Trobridge*'s case[3] to support his view that such a provision should be construed narrowly and gave the following construction of the provision under consideration:

> (The provision) is obviously only directed to the bona fide and genuine obtaining of requisite information. It likewise does not

94 That is, contrary to s. 644 (2) (a), *Local Government Act* 1919 (N.S.W.); compare s. 889, *Local Government Act* 1958 (Vic.); s. 158, *Metropolitan Water Supply, Sewerage and Drainage Act* 1903-1963 (W.A.).
95 He also relied on s. 352 of the *Crimes Act* 1900 (N.S.W.).
96 S. 644 (3); the maximum penalty is ten pounds.
97 S. 644 (2).
98 [1968] N.S.W.R. 165, 176.
99 *Id.*, 177. The judge, however, found for the defendant policeman on a different ground: *id.*, 177-181. For a similar condition precedent to the exercise of the power of arrest, see *e.g.*, s. 46, *Police Act* 1892-1953 (W.A.).
100 *Id.*, 174.
1 *Id.*, 175.
2 *Ibid.*
3 *Supra., per* Fullagar J.

> contemplate that the servant or member of the police force should be required to exercise or perform the duty capriciously, tyranically, or oppressively or arbitrarily. It does not envisage questions being asked which are mere hollow shams or questions not bona fide seeking the requisite information and it does not require the servant or member of the police force to go through the motions or indulge in the farce of demanding information which they well know or which they can supply the council with reasonable certainty without such demand.
>
> In my view this section must be read down to relate exclusively to cases where the offender as described in the section whom the servant or police member finds committing the offence is quite unknown to such servant or police officer or where such person may entertain reasonable doubt as to such offender's name and address, and in such latter case such doubt should be communicated forthwith. It is not for nought that the power or arrest under subsection (2) is discretionary. The legislature would well contemplate that some offenders for good or bad reasons may decline to give their name and address to persons in authority who well knew those matters. Such persons may be prosecuted for their refusal, but it was never intended that their arrest should be a matter of course.[4]

The judge then held that in the case of the defendant, the deputy health inspector, there was no genuine occasion authorising him to demand the plaintiff's name and address. The fact that he actually knew who the plaintiff was made his contribution to the arrest a 'hollow sham'[5] and an abuse of the authority which he never had. Isaacs J. thus clearly showed that such statutory provisions should be read, not literally, but with regard to the policy in the provisions.[6]

Burnside J. in *Ah Hoy* v. *Hough*[7] adopted a similarly restricted approach to statutory provisions of the type requiring a person to disclose much more information than just his name and address. In that case he observed that certain immigration regulations,[8] which authorised the police to interrogate suspected deportees and prohibited immigrants, did not restrict the type of questions that could be asked. He said, however, that such powers could not be extended to permit the interrogation of suspects *in custody*; nor would he interpret the relevant regulation to require that answers, given under legal compulsion, be admitted

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4 [1968] 1 N.S.W.R. 165, 175.

5 *Id.*, 183.

6 Compare *Dumbell* v. *Roberts* (1945) 113 L.J. (K.B.) 185, where a police constable who relied on a 'name and address' provision to arrest a suspect (s. 513, *Liverpool Corporation Act* 1921) was held liable in false imprisonment. Although he had no prior knowledge of the suspect's name and address, he made the arrest before he had asked for them. A condition precedent to the power of arrest coming into existence in the circumstances was therefore not satisfied. The C.C.A. in that case also pointed out that the constable could and should have ascertained the suspect's name and address as the arrest was made at his place of work (*per* Goddard L.J., *id.*, 190).

7 (1912) 14 W.A.R. 214. (Sup. Ct.).

8 Regulations made by the Governor-General of Western Australia pursuant to s. 16 of the *Immigration Restriction Act* 1901-1910 (C'wealth).

in evidence at the trial of such suspects.[9] His observations were made on the basis that the relevant regulation had not clearly altered the common law principle that an arrested person may not be legally called upon to convict himself out of his own mouth. Such a construction of that statutory provision is not unusual. Courts are understandably slow to hold any person liable for having refused to answer incriminating questions unless statutory exceptions to the privilege against self-incrimination are clearly worded.[10]

Although most of the exceptions to the right to silence are intended to safeguard against offenders escaping law enforcement, any one or more of these exceptions provides the police with an effective means of dealing with suspects who refuse to co-operate with them in their investigations. Judicial responses to these exceptions may have been intended to confine their scope and operation. It would, however, be of little assistance to a suspect to be aware of this. There are so many provisions of this kind that it would be practically unsafe for him — be he a mere traffic offender or a person suspected of a serious offence — to maintain absolute silence when questioned by the police.

Moreover, a suspect's reticence may in itself arouse suspicion and invariably lead to an arrest. As a learned commentator explained,[11]

> ... anyone who is not public-spirited enough to answer any questions asked by Police officers in the preliminary stages of their enquiries may find himself in difficulty, not because of his mere failure to answer questions, but because his failure to do so may reasonably lead the Police to suspect him of a particular offence and thus justify his arrest. Any such action would, of course, depend very much on the circumstances. An innocent man, found by the Police on premises which had just been broken into, would be most unwise not to reveal his identity and answer any reasonable questions: the almost inevitable result of his refusal to say anything would be his arrest, because it would in such circumstances be perfectly reasonable for the Police to infer either that he had broken into the premises or was there for some illegitimate purpose.

In making an arrest the police may be taking a chance that they commit

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9 (1912) 14 W.A.R. 214, 219-220.

10 See *Roberts* v. *Brebner* [1962] S.A.S.R. 40 where the appellant was charged with the offence of having refused to answer questions (designed to discover the identity of a driver of a motor utility) contrary to s. 38, *Road Traffic Act* 1961 (S.A.). (Compare s. 90 (6)-(8) *Metropolitan & Export Abattoirs Act* 1936 (S.A.); s. 31, *Noxious Weeds Act* 1950-1960 (W.A.). Although the section clearly authorised *any* type of question, Hogarth J. limited the obligation to those that could be reasonably expected to lead to the identification of a driver on the occasion in question (*Id.*, 43-44). He was of the opinion that other types of questions need not be answered. On the facts, however, he held that the policeman's questions were authorised by that section and that the appellant had wrongly refused to answer. See also, *Warnecke* v. *Pope* [1950] S.A.S.R. 113; *Crafter* v. *Kelly* [1941] S.A.S.R. 237; *Ex parte Thompson; Re Woodrow & Anor* (1930) 47 W.N. 103; *Roser* v. *Fagg* (1929) 29 S.R. (N.S.W.) 429; *Campbell* v. *Goodwin* (1950) 67 W.N. 226; *Commissioner of Customs & Excise* v. *Harz* [1967] 1 All E.R. 117.

11 The Hon. Sir F. Adams, *Criminal Law and Practice in New Zealand* (1964), 698.

a technical assault and false imprisonment if the suspect has in fact no statutory obligation to respond to their interrogation and there is no consequent power to arrest. However, provided that they have acted in good faith and with reasonable cause, their action will not be likely to lead to any disciplinary action or criminal prosecution.[12] More importantly, they know that the coercive nature of an arrest will usually cause a recalcitrant suspect to think twice about keeping his silence.

So far, the preceding discussion does not take into account the nature of modern techniques of police interrogation and its effect on the average criminal suspect. It would not be difficult to believe that most of such suspects will find it practically impossible to maintain silence for long when exposed to modern police interrogation.[13] This is particularly true whenever suspects are interrogated in police custody.[14] It is now proposed to discuss this 'other side' of the criminal suspect's right to silence.

THE NATURE AND EFFECT OF MODERN POLICE INTERROGATIONS

It is commonplace for an accused at his trial to deny that he had confessed or admitted his crime to the police. In most cases, there is no doubt that incriminating statements were in fact disclosed to the police. The mystery is not whether he had made such statements but what actually impelled him to do so when he must have known that no such disclosures would have produced any physical or social consequences that could have been beneficial to him. One need not have to search deeply for some credible explanation for this phenomenon. The central theme of modern police interrogation is the application of tactics that will appeal to the psychology of the average mind and to his normal emotive responses and susceptibilities. The essential characteristics of such interrogations are but variations of the classic police manual techniques for getting guilty suspects to confess.[15] Broadly speaking there are three steps in a classic police interrogation, namely, the creation of stress-inducing conditions, the interrogator's assumption of a role suggesting to the suspect that he represents an invincible authority, and the application of alternating 'hard-soft' interrogation.

Stress-inducing conditions are naturally found in the inherently coercive circumstances of police custody.[16] In particular, it has been demonstrated that a suspect kept in an interrogation room will feel

12 Glanville Williams, 'Demanding Name and Address', (1950) 66 *L.Q.R.* 465, 469. See *Hazell* v. *Parramatta* [1968] 1 N.S.W.R. 165, *Trobridge's* case, *supra.*

13 *Cornelius* v. *R.* (1936) 55 C.L.R. 235, 252; J. Barry 'Police Interrogation', (1965-67) 5 *Syd. L. Rev.* 254, 257.

14 See *R.* v. *Amad* [1962] V.R. 545,548; *Re Groban*, 1 L. ed. 2d. 376,385 (*per* Black J., dissenting); *Blackburn* v. *Alabama*, 361 U.S. 199, 206 (1960); *Miranda* v. *Arizona*, 384 U.S. 436, 447 (1966).

15 For example, *Gross on Criminal Investigation*, 5th ed., R. L. Jackson (ed.); F. E. Inbau & J. E. Reid, *Criminal Interrogation and Confessions* (1962); C. E. O'Hara, *Fundamentals of Criminal Investigation* (1956).

16 See *Miranda's* case, *supra.*; *Culombe* v. *Connecticut*, 367 U.S. 568,580 (1961).

isolated, humiliated, uneasy and apprehensive as to what may happen to him.[17] Such a disfunctional atmosphere tends to be heightened by such factors as a sudden and early-hour arrest of the suspect,[18] the bareness of the interrogation room,[19] the skilful role-playing of the interrogator,[20] and the deliberate delay and silence in the interrogation room before an actual interrogation begins.[21] These are some of the stress-inducing elements that a police interrogator is advised to organise together as a first step to an effective interrogation, particularly in the case of suspects displaying a sense of indignation and recalcitrance.[22]

The second advocated step in a classic interrogation is aimed at making a suspect *feel* that the police know all the facts and that it would be futile for him to maintain silence.[23] The interrogator is advised to express a strong belief in the suspect's guilt as, for instance, by telling him that he *looks* guilty, or by commenting on his behaviour during the interrogation such as a reference to his 'down-cast' eyes, the pulsation from his carotid artery, the nervous movements of his fingers or of his adam's apple, *etc.*[24] The interrogator is also advised that he may further highlight his pretended belief in the suspect's guilt by telling him that they (*i.e.*, the police) *know* he is guilty, that they have more evidence of his guilt than he can imagine, and that it will be a matter of time before they 'book' him.[25] The advocated technique is to point to circumstantial evidence, to suggest that someone has seen him at the scene of the crime or that witnesses are ready to point the accusing finger at him, and to link him to particulars of the crime such as hair from his body being 'found' at the scene of the crime, scratches he probably received from a struggling victim, *etc.*[26]

The effectiveness of the tactics outlined above on the average suspect in police custody is not to be underestimated. Psychologists explain

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17 See, *e.g.*, Milton W. Horowitz, 'The Psychology of Confession', (1956) 47 *Jo. Crim. L.C. & P.S.* 197.

18 See E. D. Driver, 'Confessions and the Social Psychology of Coercion' (1968), 82 *Harv. L. Rev.* 42, 57, where the writer observed that the phenomenal urge to talk, the root causes of which have not been completely unravelled, is 'almost certainly intensified by the host of fears generated by the situations and procedures of arrest and detention'.

19 See Inbau & Reid, *op. cit.*, 7-9, where the authors advised that the room should be kept bare of ornaments and other objects like pencils and paper clips to deprive the suspect of any tension relieving activities, O'Hara, *op. cit.*, 100-101, where the advice is to secure privacy because '(I)nterruptions dispel an atmosphere that may have been carefully created by the interrogator.'

20 See O'Hara, *op.cit.*, 96-97; Inbau & Reid, *op. cit.*, 13-19.

21 See Driver, *op. cit.*, 58.

22 See, *e.g.*, O'Hara, *op. cit.*, 99-100.

23 Inbau & Reid, *op. cit.*, 23-27.

24 Inbau & Reid, *op. cit.*, 29-34; Driver, *op. cit.*, 50.

25 Inbau & Reid, *op. cit.*, 28, where the authors suggested that the interrogator should have on the table a large file folder into which the suspect may look. This tactic is to give the impression that the folder contains incriminating information against the suspect.

26 Inbau & Reid, *op. cit.*, 27, 73-74, 81-88; Driver, *op. cit.*, 53; see *R.* v. *Lee* (1950) 82 C.L.R. 133, where detectives applied the tactic of 'playing one against the other' as a means of inducing three suspects to make statements.

that a combination of the effects of custody and such police activities operates to produce two variable influences on the psychological condition of the suspect.[27] First, he may feel unsure of himself, depending on how far he is led to believe that the interrogator has intimate and overwhelming knowledge of his guilt.[28] Secondly, he may be on the defensive or, as psychologists understand it, in the region of 'psychological negativity'.[29] This may be evidenced by an over-responsiveness to suggestions or by a display of emotion. For instance, the suspect may ask for sympathetic treatment or seek relief in extenuating circumstances and in various ways show that he feels sorry for himself.[30] Some suspects may feel a need to reassert their self-image and they begin to talk even before any serious interrogation has begun.[31]

The third step of the classic interrogation is when the interrogator begins to apply, what may be described as, the 'hard-soft' approach.[32] The police manuals advise him to play the role of a surrogate-friend if, for instance, he perceives that the suspect is showing signs of remorse.[33] The suggested way to do this is to console him, as by telling him that he acted as any normal man would have done under the circumstances, or by playing down the moral significance of the crime by casually imputing blame on the part of the victim or an accomplice, or by attributing the cause of the crime to some extraneous factors such as the effect of drink on an ordinary man in his position.[34] If the crime is not a serious one, the suspect may be told that his first step to breaking his criminal ties would be to make a confession as the start of a law-abiding and socially acceptable career.[35] The interrogator is also advised that the suspect should be told that it was fortunate for him that he had been stopped by the police before it became 'too late', or alternatively, that his continued criminal activity would be a futile one.[36] The idea in such an approach is to make the suspect feel that the interrogator is someone who really understands and can be confided in.

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27 See, *e.g.*, Horowitz, *op. cit.*, 199; K. Lewin, *Principles of Topological Psychology* (1936), 42-47.

28 D. L. Sterling. 'Police Interrogation and the psychology of Confession', (1965) 14 *J. Pub. L.* 25, 28.

29 Horowitz, *op. cit.*, 202.

30 Horowitz, *op. cit.*, 200-202.

31 Driver, *op. cit.*, 58-59, explained this as being attributable to a need to dispel feelings of inferiority in relation to the interrogator and the need to avoid the humiliation of giving in to the pressures of a confrontation which is anticipated to occur later.

32 O'Hara, *op. cit.*, 104 (the author referred to it as the 'Mutt and Jeff' technique); Inbau & Reid, *op. cit.*, 58-60 (the term used is the 'friendly-unfriendly' act).

33 O'Hara, *loc. cit.*; see also Horowitz, *op. cit.*, 201; Sterling, *op. cit.*, 28.

34 For example, a suspect accused of breaking and entering may be told that the owner should never have left all that liquor 'to tempt honest guys like you and me': 'Interrogations in New Haven: The Impact of Miranda', (1967) 76 *Yale LJ.* 1519, 1544.

35 Driver, *op. cit.*, 51.

36 Inbau & Reid, *op. cit.*, 74, where the authors explain that the tactic is based on the hypothesis that 'many offenders do have some awareness of the ultimate consequences of their continued criminal behaviour'.

Such display of sympathetic understanding will be likely to appeal to the young, the first offenders and female ones. It is also likely to find success where the case involves passion or is only trifling.[37] However, in the case of recidivists, those with a seasoned experience of police tactics, and where the crime is motivated by financial gain, the interrogator is advised to appeal to the suspect's own brand of reasoning. The tactic may be, for instance, to stimulate the 'give-up quick and bargain' response.[38] Where the suspect is 'politely apathetic'[39] to the interrogator's questions, the advice in the manuals is to resort to the 'friendly-unfriendly act',[40] namely, to adopt the attitude of an angry, aggressive and impatient interrogator for some time and then switch to that of a friendly, patient, understanding person.[41]

How and to what extent each individual suspect actually responds to such interrogations largely depends on a number of variable factors such as the skill of the interrogator and the importance to the police that the suspect should break his silence. Another important variable is, obviously, the character of the suspect.[42] The psychopath, for example, may be less susceptible to emotive appeals. Other suspects, on the other hand, may begin to talk even though the tactics of the interrogator have not been fully focussed to break their wall of silence. It has been established, for instance, that suspects with a low social status and those with 'strong unconscious self-punitive tendencies (moral masochists, potential and actual depressives)' tend to confess easily.[43] Some may confess through a desire for prestige, status, recognition or notoriety. Others may derive perverse ego satisfaction from discounting their technique in the execution of their crime.[44] As a psychoanalyst observed, men have 'a compulsive, unconscious tendency to confess, or more generally speaking, to communicate or depict endopsychically perceived happenings'.[45] In most cases, the situational circumstances of arrest and detention are usually sufficient to bring about this talkative state.

Given such practical considerations, it is no wonder that, as Sargent observed,[46]

> a prisoner often spends the entire period before his trial, and during it, trying to understand how he came to sign so damaging

37 Inbau & Reid, *op. cit.*, 21.
38 Inbau & Reid, *op. cit.*, 74. The authors call this a 'factual analysis approach', *i.e.* the appeal is to his sense of reasoning rather than to his emotion.
39 Inbau & Reid, *op. cit.*, 60.
40 Inbau & Reid, *op. cit.*, 58-60.
41 *Supra.*
42 See T. Reik, *The Compulsion to Confess* (1966), 267, *et seq.*; W. Sargant, *Battle for the Mind* (1957), 178 *et seq.*
43 G. H. Dession, *et al.*, 'Drug-Induced Revelation and Criminal Investigation', (1953) 62 *Yale L.J.* 315, 319.
44 Horowitz, *op. cit.*, 197.
45 Reik, *op. cit.*, 180.
46 *Op. cit.*, 185.

a 'voluntary' statement as he has given to the police, and trying to explain or extricate himself from its implications.

What he does not know is that he had been subjected to well-tried techniques of interrogation that would leave little doubt as to the notional character of his right to silence.

AN EVALUATION

Although the criminal suspect has the right to refuse to answer questions put to him by the police, his so-called right to silence is, in practice, of little assistance to him when he is confronted by the police. Whilst it may be true that a suspect who keeps his silence cannot be arrested on the ground that his silence constitutes an obstruction of a policeman's execution of duty, he may in fact be arrested for the only reason that he dared to assert his right to silence. The arrest may be made because the police are alert enough to suspect that his silence, in the given situation, gives reasonable cause for the arrest on suspicion. Even if the police cannot really justify the arrest, they may feel that the risk of a subsequent action for false imprisonment by the suspect will be very slight, particularly if the suspect is a known criminal. Moreover although the common law obligation to disclose knowledge of someone else's felony will not commonly arise, there are so many statutory exceptions to the right to silence tucked away in some statute book that it would almost be unusual if the police cannot justify their arrest on the ground that the suspect's silence is in breach of some provision of this kind.

The unrealistic nature of the right to silence is also reflected in the fact that the legal system does not provide any sanction to ensure that the suspect maintains his silence when he does not wish to say anything to the police. Far from encouraging him to be silent, it in fact expects him to make statements to the police. It allows the police to apply psychological tactics to get him to talk to them. Against a skilled interrogator, the average suspect at an interrogation is too psychologically disoriented to be able to maintain silence for too long. He is usually poorly educated and unaware of his right to silence. He may talk because of some misconception about his legal obligation to the police or because he underestimates the legal significance of what he may say to them. He may even talk in feigned public spiritedness in the hope that he can deflect police suspicion away from his direction. The police, naturally, capitalise on his ignorance and misconceptions by asserting their authoritative position and pretending that they have a right to have their questions answered. The net result is that, regardless of his right to silence, a suspect often finds that he in fact discloses damaging or prejudicial information to the police even though he has no wish to do so. Even if he is fully aware of his legal position, he can be easily manoeuvred into a condition where he talks and makes statements despite his wish to remain silent.

It may thus be said that the criminal suspect's so-called right to silence is of no significance to police investigations even though it is true that the police have no general legal power to interrogate and the suspect has, in general, no legal obligation to answer questions asked by the police. The average criminal suspect would have nothing to lose if the right to silence were abolished[47] and effective safeguards introduced to ensure that he is not made to convict himself out of his own mouth.

47 See Criminal Law Revision Committee, 11th Report (Evidence), 1972, *Cmd.* 4991.