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Judicial Interpretation of Silence: The Criminal Evidence Order of 1988

Thomas P. Quinn, Jr.*

"Finality is a good thing, but justice is better.”
-Lord Atkin

I. INTRODUCTION

The end of the cold war has brought tremendous changes to the political and legal landscape of Europe. Almost overnight, entirely new nation states have been created. Where before a single nation existed, latent hostilities have erupted and now numerous ethnic and religious groups are battling for recognition, rights, and power. In much of Europe, the legitimacy of old institutions has crumbled, and a new European order is emerging. Such changes have been broadcast on an almost daily basis to a news-hungry American public. But due to the prominence of such events in the United States' media, other areas of the globe have been forgotten. One such region is Northern Ireland, a quagmire for hundreds of years. The conflict between Catholic and Protestant, Irish and British, continues with no end in sight. Recently, however, events have taken a wholly new and frightening turn.

As the eyes of the world were turned toward the growth of democracy in the former Soviet bloc, the Thatcher government waged an "inglorious counterrevolution" against what many would consider "basic" civil liberties in Northern Ireland. Perhaps the most infamous of the

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2 The prime example, of course, being the brutal ethnic fighting in Bosnia-Herzegovina between Serbs, Croats, and Muslims. Hardly a day passes without new stories from the region documenting an ever-increasing list of atrocities. For example, Radio Bosnia-Herzegovina related acts of genocide in Kozarac committed by radical groups within the Serbian military ("Chetniks"). The radio report stated that some 13,000-18,000 Muslims and Croats had been interned in "relocation" camps at Tomasica, Omarska, Trnopolje and Keratim. Life at these camps is far less than hospitable, requiring "some 10-15 inmates . . . [to bury] those who were killed the previous night." Bosnian Interior Ministry Releases New Data on "Genocide" in Kozarac (BBC Radio Broadcast, Feb. 10, 1993), available in LEXIS, Nexis library, Omni file.


Thatcher measures was the 1988 media ban prohibiting television or radio statements by members of groups suspected of being linked to terrorist activities. The restriction of civil liberties was not, however, limited to free speech. A number of other enactments, aimed specifically at the Northern Irish, subjected law-abiding citizens and suspected terrorists to curious and outrageous regulations. Perhaps the most significant of them is the Criminal Evidence Order of 1988.

Section I of this Note presents a brief history of the conflict between Great Britain and Ireland, summarizes the relationship between the Irish Republic, Great Britain, and Northern Ireland, and places the Evidence Order into a political and historical context. Section II examines the meaning and scope of the Evidence Order, and considers its language and its expected effect on the people of Northern Ireland. Section III discusses the internal and international legal norms which this enactment calls into question. Finally, section IV provides some suggestions concerning how civil liberties may be safeguarded in Northern Ireland.

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5 The now infamous media ban of 1988 was put into effect by an October 19, 1988 Order from then Home Secretary Douglas Hurd. It directed IBA and BBC

1. . . . to refrain from broadcasting any matter which consists of or includes — any words spoken . . . by a person who appears or is heard on the programme in which the matter is broadcast where —

(a) the person speaking the words represents or purports to represent an organisation specified in paragraph 2 below, or

(b) the words support or solicit support for such an organisation,

2. The organisations referred to in paragraph 1 above are —

(a) any organisation which is for the time being a proscribed organisation for the purpose of the Prevention of Terrorism . . . Act of 1984 . . . and

(b) Sinn Fein, Republican Sinn Fein and the Ulster Defense Association . . . .


6 For instance, the Prevention of Terrorism (Temporary Provisions) Act of 1989 made punishable simply "inviting support" or contributing funds to both the I.R.A. and the Irish National Liberation Army. Prevention of Terrorism (Temporary Provisions) Act, 1989, ch. 12 §§ 1, 9-10, sched. 1 (Eng.). Moreover, the act granted the Home Secretary discretionary power to prohibit those persons suspected of being involved in terrorist activity from entering Great Britain, Northern Ireland, or anywhere else in the United Kingdom. Id. at §§ 4-7. See also Northern Ireland (Emergency Provisions) Act, 1991, ch. 31, §§ 16-18 (Eng.) (granting the police and military personnel the power to conduct warrantless searches of homes of those suspected of terrorist activity).

and elsewhere in the United Kingdom, and includes a discussion of the major arguments both for and against the adoption of a British Bill of Rights.

I. THE CONFLICT IN NORTHERN IRELAND: A BRIEF HISTORY

Throughout the past two centuries, violence between Catholic and Protestant, Republican and Unionist, has become a way of life for the people of Northern Ireland, and unfortunately there is no end in sight. In understanding the present British-Northern Irish equation, two main factors must be kept in mind — history and religion.

There is tremendous mythology connected with the history of the conflict. Battles, figures, and movements of the past have become co-opted by younger generations as badges of identification for their personal beliefs. Names such as the "Apprentice Boys" and the "Orange Order" remain socially charged symbols in a time far removed from the events and persons that were their historical inspiration. Yet even more important than these superficial connections to the past, is the region's history itself, and the devastating effect it has had on the people of Ireland.

The complex relationship between the British and the Irish peoples can be traced back to the year 1170 when the Earl of Pembroke (more commonly referred to as Strongbow) led the Normans to a series of victories over the Gaelic peoples of Ireland. These victories were consolidated by King Henry II of England who, "with the support of would-be Irish landlords . . . came to Ireland in 1171 and declared himself its ruler." Even in these first conflicts with the English, the Irish fell prey to a recurrent problem that plagues the Republican cause

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8 Republicans are those citizens of Northern Ireland and the Irish Republic who seek the unification of the island. Adherents to the Republican cause overwhelmingly tend to be Catholic. Conversely, many Protestants tend to be Unionists, those who feel that the relationship Northern Ireland (which is primarily Protestant) maintains with Great Britain should be sustained. James T. Kelly, The Empire Strikes Back: The Taking of Joe Doherty, 61 FORDHAM L. REV. 317, 320 (1992).

9 The Apprentice boys were a group of Protestants who withstood the siege of Derry by King James (a Catholic) during the Glorious Revolution. This name was later adopted by a Protestant fraternal order which played a key role in the “Battle of the Bogside” in 1969. See KEVIN J. KELLEY, THE LONGEST WAR: NORTHERN IRELAND AND THE I.R.A. ix (2d ed. 1988).

10 The Orange Order is a Protestant organization linked with the Unionist movement. Its name is derived from the Glorious Revolution of 1689 which was led by William of Orange, a Protestant. Id. at xii.

11 Id. at 2.

12 Id.
to this day — dissension and informers within their own ranks.\textsuperscript{13}

For the next two hundred years, the Gaels and the Normans fought a series of battles which saw the Norman invaders pushed back to a small area surrounding Dublin, referred to as "the Pale."\textsuperscript{14} This area became a power base from which the colonization of Ireland was to radiate.\textsuperscript{15} England's expansion into and colonization of the Irish Island was originally based on the invasion of the Normans.\textsuperscript{16}

However, as England grew in status as a world power, this intent gradually began to change.\textsuperscript{17} The shift in focus was owed to Ireland's unenviably strategic position amongst the British isles. It is a perfect jumping-off point for an invasion of the English island, and would have allowed continental powers such as France and Spain to attack the island on two fronts.

This military significance was powerfully illustrated to the English during the 1580s when the Irish took advantage of war between England and Spain to enlist Spanish aid in rebelling against their English masters.\textsuperscript{18} In punishing the Irish for this treasonous activity, the English lashed out, killing thousands of Irish citizens and extending their control well beyond the Pale.\textsuperscript{19}

As this English expansion continued in the beginning of the sixteenth century, the second major factor of the modern Anglo-Irish equation was added. England had been a vanguard state during the European Reformation and, as such, had become a Protestant nation.\textsuperscript{20} Conversely, the Irish Gaels remained "almost exclusively a Catholic people."\textsuperscript{21} With a heavily Catholic nation on a vulnerable flank, England must

\textsuperscript{13} See generally Kelley, supra note 9 at 1-32; Tim Pat Coogan, The I.R.A. (1970).
\textsuperscript{14} Kelley, supra note 9, at 2-3.
\textsuperscript{15} The Pale was comprised mainly of English settlers, as Gaels were technically not allowed to enter the territory. Despite this prohibition, many English settlers began adopting the habits and customs of the Gaelic people, and a good deal of intermarriage occurred. In an attempt to combat this trend, the Westminster Parliament passed the infamous Statutes of Kilkenney in 1366, which forbade intermarriage, required Irish living in the Pale to speak only English, and prohibited "colonizers from following the Brehon laws [the Gaelic legal code], wearing native dress[,] . . . [and from] adopting Gaelic names." Id.
\textsuperscript{16} Id. at 2-4.
\textsuperscript{17} Id.
\textsuperscript{19} Kelley, supra note 9, at 3.
\textsuperscript{21} Kelley, supra note 9, at 1. Ireland was first converted to Catholicism during the fifth century by St. Patrick. Id.
have felt doubly vulnerable in the early seventeenth century, an era of much religiously motivated warfare. To combat this strategic 'achilles heel,' England pursued a second course of action in punishing the Irish for their solicitation of the Spanish. In 1608, it began planting six of the most vehemently pro-Catholic areas in Ireland with English and Scottish Protestant settlers. These six counties today comprise Northern Ireland.

This influx of Protestants into the Irish isle created a new target on which to vent the frustrations of Catholic Irish nationalists. Attacks peaked in 1641 when the Gaels seized on the confusion in England, caused by the split between the Stuart monarchy and Parliament, to slaughter untold numbers of the new colonists. These attacks, however, became more than a simple pogrom. Indeed, they created many of the battle lines which still exist. From that time on, "Protestant settlers would look to Mother England for protection against the savage Catholic hordes. The natives, conversely, were now confirmed in their belief that their land could never again be truly free... unless the newcomers severed their link to a foreign authority and acknowledged that Ireland was their destiny."

These sectarian lines were further emphasized by various English land policies which gradually deprived many Irish of their freehold estates and gave rise to an Anglican (Protestant) ascendancy in Ireland. Aside from outright grants, penal laws also enhanced this deprivation. These laws "were designed to create an apartheid-like system in which Anglicans would be guaranteed special privileges while Catholics would be consigned to hopeless inferiority." A prime example was an enactment which ended the primogeniture system for Catholics. "Under

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22 Id. at 3-5.
23 Id. at 3-4.
24 Id. at 4. The flow of Protestants into Ireland was a virtual flood during the first thirty years of the seventeenth century. By 1640, the eve of the Catholic rising, some 100,000 new Protestant colonists had moved onto the island — comprising nearly one-tenth of the Irish population. Id.
25 Id.
26 Id.
27 Id.
28 Id.
29 The first drastic step in this policy was taken by Oliver Cromwell who reconquered the island following a brief period of semi-independence during the English Civil War (1642-49). Those Catholics whom Cromwell did not kill or enslave were ordered to move to the southern and western reaches of the island under threats of death. Cromwell used the tracts vacated by such exiles as rewards for members of the New Model Army. Id. at 5.
30 Id. at 7.
the new set-up... ownership would accrue to the eldest male offspring only if he converted to Protestantism. Otherwise the land was divided equally among all male heirs, thus reducing the size of Catholic plots." These tactics were so successful that shortly after the end of the Glorious Revolution (1689), Catholics controlled only fourteen percent of the island's territory.

Coupled with this huge disenfranchisement of Irish landowners, was the fact that Britain's empire was growing and required a provider of food. Ireland was to be that source. The imposition of provider status caused further damage to the struggling Irish economy, delaying the start of Irish industrialism, and stunting the growth of an Irish bourgeoisie. Moreover, the reliance on Ireland as a food source for the Empire was also an indirect cause of the devastating Potato Famine of 1845-46 as it forced the Irish to become over-reliant on the potato as a staple of their diet. The famine only added to the hatred between the Irish and English, instilling in the Irish psyche the notion that English misrule was the source of their nation's poverty.

By the turn of the nineteenth century, then, there had developed a large reservoir of beliefs and prejudices concerning the historic role of Britain in Ireland. Yet nationalist groups which had arisen, such as the Fenians and the Irish Republican Brotherhood, were unable to translate this collective sentiment into military victories, as they failed in their attempts to maintain successful campaigns against British rule. This changed, however, in January of 1919 with the formation of the Irish Republican Army (I.R.A.) which arose from the ashes of the Irish Republican Volunteers' failed coup on Easter Monday of 1916.
I.R.A. changed the face of the conflict, bringing ruthless efficiency to the resistance of British rule. Under the direction of Michael Collins, the group's founding father, the I.R.A. developed a plan for the harassment of the British, the heart of which centered on the use of guerilla tactics. Collins also dealt meticulously with matters of intelligence and internal security. This was done to prevent penetration of the I.R.A. by spies or informers.

Thus, with the formation of the I.R.A., the conflict between Irish and English, Catholic and Protestant, took a much more brutal turn. This quickly became apparent among those in Westminster who understood that although the I.R.A. "could not actually defeat Britain militarily . . . [the I.R.A.'].s hit-and-run army would not lose this new type of war either." The British response to this new threat was to gradually divorce herself from Ireland, while still protecting the interests of the Protestant majority residing in the northernmost reaches of the Island. The first step in this progression was the Government of Ireland Act of 1920. The main purpose of this act was to partition the island in two. Six northern counties where Protestants still maintained a numerical majority were carved out from the rest of the island, and both the northern and southern halves of the island received semi-autonomous legislative bodies.

One year later, Britain enacted the Anglo-Irish treaty which established the Irish Free State as a separate, sovereign entity within the Empire. The government of Northern Ireland, however, was given the power to opt out of the Irish Free State. This election was quickly exercised. The basic structure which exists today was essentially cemented by the Ireland Act (1949), which further validated Ireland's status as an
independent nation, but also disallowed any possibility of the reunification of north and south without the formal consent of the Parliament of Northern Ireland.\textsuperscript{52} These rapid series of enactments created the situation in which the people of both Ireland and Great Britain live today. Thus, the Irish conflict is multi-dimensional. History and religion are the two threads, often intertwined, which define the misconceptions and prejudices the Irish and English hold about one another.

When considering the Evidence Order, and how it is viewed by both the Irish and English, these factors must not be forgotten. Despite a long and bloody history, acts such as the Evidence Order, which fundamentally change commonly accepted legal rights in the fight against Irish resistance, have been relatively uncommon.\textsuperscript{53} In fact, throughout much of the nineteenth century, Britain sheltered some of the most violent revolutionaries of the time giving "her a reputation in Victorian times rather like Libya's and Syria's today."\textsuperscript{54} Even when such revolutionary-like activities began to be focused at Britain (such as the Fenian bombing campaign of 1881-85), rather than merely being based there, very few new laws were passed in response.\textsuperscript{55}

The British government presently views the terrorist act to be a criminal affront.\textsuperscript{56} This "policy of criminalization" adopted by the British government is meant "to shape or to construct public perception of terrorism."\textsuperscript{57} From the British perspective, the genius in this approach is that it saps the terrorist act of its heroic nature for those who may be enamoured of the Republican cause. However, the objectives of this policy are hampered by corner-cutting acts such the Evidence Order. Thus, instead of strengthening the rule of law in the face of adversity, enactments such as the Evidence Order actually corrupt the character and integrity of the British legal structure in Northern Ireland — ultimately undermining its intended purpose.

\textsuperscript{52} See Cunningham, supra note 51, at 14-15. See also Ireland Act, 1949, 12, 13 & 14 Geo. 6, ch. 41 (Eng.) (As was the case with the 1920 enactment, much of this act has been replaced and refined by later legislation.).

\textsuperscript{53} The one obvious exception discussed in this historical synopsis would be the Penal Law which ended the primogeniture system among Catholics. See supra notes 29-32 and accompanying text.

\textsuperscript{54} Bernard Porter, Terrorism and the Victorians, HIST. TODAY, Dec. 1986, at 6.

\textsuperscript{55} Id. at 6 (stating that the "only new law the Fenian campaign gave rise to was an Explosives Act (1883) which for the first time put the onus of proof on the possessors of dynamite to show that they had it for a legitimate purpose. Otherwise nothing overt was done").

\textsuperscript{56} See John E. Finn, Constitutions in Crisis 85 (1991).

\textsuperscript{57} Id.
II. THE MEANING, SCOPE, AND EFFECT OF THE CRIMINAL EVIDENCE ORDER OF 1988

A. The Plain Language of the Order

To fully understand how the Evidence Order operates, it is first necessary to analyze its language. The Evidence Order is designed to lessen the burden of persuasion on the prosecution by allowing the finder of fact to infer proof of the accused's guilt from his silence at trial. This inference may be drawn at trial in four situations. The Evidence Order disallows the "ambush" defense tactic, where the suspect remains silent during police questioning, but unveils at trial an explanation or alibi. The exclusion of such "surprise attacks," removes the accused's incentive to remain silent during police interrogation. Guilt may also be inferred from statements made to a prosecutor who has forced a defendant to speak. If the prosecution can "establish that there is a case to answer, the accused must be warned that he will be called to give evidence and that if he should refuse to do so, the court may draw such inferences as would appear proper." By removing the traditional "safe-harbour" of defendant silence, the Evidence Order represents a significant reduction in the protection normally afforded those accused of crimes — despite the possible existence of legitimate, non-incriminating reasons for remaining silent.

The Evidence Order establishes two other situations where the court may draw inferential support from the silence of an accused. They are more practical in scope. Section 5 grants courts the power to "draw such inferences as would appear proper from an accused's failure or refusal to explain to the police certain specified facts such as substances or marks on his clothing." Likewise, section 6 bestows courts with the power to "draw corroborative inferences from the suspect's refusal or inability to account for his presence at a given location." In each of these instances, the Evidence Order states that

the court or jury, in determining whether the accused is guilty of the

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58 See discussion of Diplock Court system, infra note 85.
59 See infra notes 63-68 and accompanying text.
60 140 PARL. DEB., H.C. (6th Ser.) 187 (1988) [hereinafter DEBATE]. See also Evidence Order, supra note 7, at § 3.
61 DEBATE, supra note 60, at 187. See also Evidence Order, supra note 7, at § 4.
62 See infra section IV for examples of how the Evidence Order violates defendant rights and other internal legal traditions.
63 DEBATE supra note 60, at 187. See also Evidence Order, supra note 7, at § 5.
64 DEBATE, supra note 60, at 187. See also Evidence Order, supra note 7, at § 6.
offence charged, may—

(i) draw such inferences from the failure as appear proper; [and]
(ii) on the basis of such inferences treat the failure as, or as
capable of amounting to, corroboration of any evidence given
against the accused in relation to which the failure is material.65

Thus, in the four aforementioned situations, if a defendant chooses not
to say anything in his own defense, this silence may be construed as
demonstrative of the accused’s guilt.66 These negative inferences are
partially offset by section 2(4) of the Evidence Order which affirms that
a “person shall not be committed for trial, have a case to answer or be
convicted of an offence solely on an inference drawn from such a fail-
ure or refusal” to speak.67 However, “even this qualification takes no
account of the legitimate reasons why an accused might choose to re-
main silent.”68

Thus the Evidence Order creates a framework under which a court
may utilize the silence of the defendant as a weapon against him. How-
ever, it is not entirely clear, from the face of the Evidence Order, why
this was done. There is no statement of purpose contained in the act,
and its language is broad enough to cover any range of criminal activi-
ty. Nevertheless, statements of certain members of the British political
and judicial machinery clearly establish that the motivating force behind
the Evidence Order’s enactment lies in concern for the problem of Irish
terrorism. Defending the legislation in the House of Commons, prior to
its passage, Secretary of State for Northern Ireland, Mr. Thomas King,
stated that the Evidence Order resulted from the continued abuse of the
judicial system in Northern Ireland and the difficulties many prosecutors
were experiencing in litigating terrorist trials.69

Indeed, to the frustration of prosecutors, the I.R.A. had used the
legal privileges of silence to its distinct advantage at trial.70 One of the
group’s pamphlets forcefully illustrated this fact, warning would-be
terrorists that “‘interrogation is like walking a dangerous tightrope: the

65 Evidence Order, supra note 7, at §§ 3(2)(c), 4(4), 5(2)(b), 6(2)(b).
66 See Jeanne E. Bishop, The Right to be Arrested: British Government Summary Executions,
67 Evidence Order, supra note 7, at § 2(4).
68 FINN, supra note 56, at 108.
69 See DEBATE, supra note 7, at 185. King stated that “in the light of the grave challenge
from continuing terrorist violence . . . [the drafters] had before them a formidable body of per-
suasive evidence for change, including the acknowledged difficulties faced by the police and the
prosecuting authorities in bringing to justice hardened, professional criminals . . . .” Id.
70 One of the prime motivating factors behind the Evidence Order was the widespread abuse
of the privilege of silence by the I.R.A. See notes 74-75 and accompanying text.
only safety net one has is to maintain absolute silence, from the moment of arrest until the moment of release." Such opportunism was termed a "calculated campaign to frustrate the course of justice" by Secretary King, who felt that the common law privileges were being "deliberately exploited by a number of clearly guilty men."

Such statements expose what is, perhaps, the Evidence Order's greatest flaw — that it is based on the presumption that those charged with terrorist offenses are guilty. Many political and legal supporters of the Evidence Order seem to share in this cynical presumption. For instance, in describing it as a "common-sense proposal," Secretary King stated that he felt it would help "deter the efforts of terrorist groups such as the IRA to avoid justice." Moreover, both King and Lord Denning made statements to the British media to the effect that "in terrorist cases a failure to answer questions or give evidence was tantamount to guilt."

In addition to being founded on this questionable presumption, the bare language of the Evidence Order is vastly over-inclusive. Although intended to be responsive to terrorist silence tactics, it contains no limits on its own application. Labor Party Spokesman on Northern Ireland, Kevin McNamara, drew attention to this infirmity during the course of debates in the House of Commons. He noted that the "Secretary of State [for Northern Ireland] justifies the order by reference to the difficulties involved in dealing with paramilitaries ... yet he proposes this...

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71 Finn, supra note 56, at 107.
73 Id.
75 R. v. McCann; R. v. Cullen; R. v. Shanahan, 92 Crim. App. 239, 250 (1991) (U.K.) (emphasis added). Secretary King noted this presumption at several points during the debate in Commons concerning the Order's passage. At one point King went so far as to state that "In many ... cases it is surely reasonable to expect that an innocent man will wish to proclaim his innocence and to co-operate with the police by answering questions ... most laymen would regard a complete refusal to answer questions as suggestive of guilt." DEBATE, supra note 60, at 186. Aside from the highly speculative nature of this comment, Mr. King's equation also disregards the fact that lay and legal determinations of guilt are two very different things. Yet, even this statement did not go as far as some made by other supporters of the legislation. For instance, one vehement representative went as far as declaring, "It is common sense not to allow ... criminals to mock and manipulate the law and to use it to their own advantage. It is our duty as Members of Parliament to ensure that those evil men are subject to a sensible law and its sanctions." Id. at 206 (emphasis added).
76 The Evidence Order does not contain a schedule of offenses which are to trigger its application, nor does it otherwise expressly limit its application to terrorism trials. See generally Evidence Order, supra note 7.
extension throughout the whole of the criminal justice system and does not confine it merely to emergency legislation. With legislation aimed at an aspect of criminal jurisprudence as fundamental as the "right of silence," and founded on concerns as discrete as politically motivated violence, one should expect the language of the order to be closely tailored to the exigencies of the situation. This, however, is not the case.

B. Policy Problems Limiting the Effectiveness of the Evidence Order

These linguistic and philosophical flaws of the Evidence Order give rise to an even broader problem, which its advocates seem to have forgotten. The law is not an especially effective mechanism for removing the inherent political character from acts of terrorism. As was stated earlier, the Evidence Order is a part of a legislative scheme aimed at "criminalizing" political violence, to eliminate it of its patriotic appeal. However, the formulation of the law as it now exists only reinforces historic prejudices and the belief that there is no "justice" in British courts for Irish men.

Even apart from the logical gaps in its language, the very manner in which the Evidence Order was passed lends credibility to Irish suspicions. The legislation was introduced for ratification by means of an "Order in Council" which is unique in that it is a power exercisable under the "Royal Prerogative," without Parliamentary review or amendment. The Prerogative is "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown . . . ." The Evidence Order was thus a product of executive fiat. Moreover, the Evidence Order went into full effect just one month after its passage, with the crucial section 4 (concerning inferences which can be drawn at trial) going into full effect just one week after passage. Mr. McNamara voiced his concern on this matter, concluding

77 DEBATE, supra note 60, at 193.
78 See infra part IV for a discussion on exactly how fundamental this right is.
79 See notes 56-57 and accompanying text.
80 See FINN, supra note 56, at 116 (referring to a study done by a group of Northern Irish academics which concluded "that public dissatisfaction with the special courts and emergency legislation is considerable").
81 See DEBATE, supra note 60, at 184. More insidious, an Order in Council is passed without debate in Parliament. See also 44 HALSURY'S LAWS OF ENGLAND ¶¶ 981-82 (4th ed. 1983).
82 H.K. BLACK & D.J. LATHAM BROWN, AN OUTLINE OF ENGLISH LAW 66 (1966). While the "Crown" technically refers to the Monarch, in modern practice the Prerogative is exercised by the majority party in power. Id.
83 Evidence Order, supra note 7, at § 1.
that the "order bears the obvious sign of being a rushed measure," and instead of "doing anything to inspire greater confidence in the police and the judiciary . . . [it brings] them into further disrepute."

The Evidence Order, then, is an enactment with a number of fundamental flaws. Not only is it a poorly drafted measure, being far too broad for its intended purpose, but it contradicts basic British anti-terrorism policy aims by raising the spectre of nationalism rather than emphasizing and promoting legalism. It is also important to note that these flaws have a real effect on real people. The case study which follows is an example.

C. A Case Study: R. v. Murray

In R. v. Murray, a recent appellate decision, the defendant's conviction was upheld due in large part to inferences drawn under the Evidence Order. The facts of the case typify many terrorist trials. On March 13, 1989, an attempt was made on the life of William James Anderson, a part-time soldier in the Ulster Defence Regiment. The attack occurred while Anderson was walking his dog along a deserted...
road near his home outside the town of Strabane. Anderson was shot four times by two men wearing balaclava helmets who fled the scene, mistakenly leaving the wounded Anderson for dead. Kevin Murray, the defendant, was convicted of attempted murder and the possession of a firearm with the intent to endanger life in connection with this shooting. However, the evidence linking Murray to the attack was highly circumstantial. For instance, near the scene of the shooting a number of tire tracks were found which matched in pattern, and degree of wear, the tires of a red Vauxhall Cavalier car which was owned by Mr. Patrick Logue, the father of Liam Logue, an acquaintance of the defendant. Inside the car, two further incriminating pieces of evidence were uncovered. A matching thumbprint was found on the rear-view mirror and behind the driver's seat, a sleeve of a black woolen sweater was found with two holes which made it an effective mask to hide the face. Particle analysis of the sleeve revealed residue consistent with that usually found following the discharge of a gun. A sample of the sleeve fibers matched three fibers taken from the head of the defendant during questioning.

Seemingly damning, this evidence was explained by plausible defense testimony. For one, Liam Logue testified at trial that he had seen the defendant driving the car in question in early March with the witness's brother in the passenger seat. This, of course, raises the possibility that the thumbprint discovered on the rear-view mirror could have been placed there prior to the morning in question. There was also some question as to the probity of the particle evidence implicating the defendant. Although there was a match between the fibers taken from the sleeve and from the head of the defendant, the fibers found in the defendant's hair were also similar to samples taken from the waistband and cuffs of an anorak owned by the defendant. Even the expert witness called by the Crown to explain this fiber evidence refused to conclusively link the defendant to the incriminating sleeve, stating that he would "not attach any particular weight" to the fiber evidence in ques-

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88 See R. v. Murray, supra note 87.
89 The opinion makes repeated references to the assailants' having worn "balaclava helmets;" these are ski masks which cover the face.
90 See R. v. Murray, supra note 87.
91 Id.
92 Id.
93 Id.
94 Id.
95 Id.
96 Id.
97 Id.
Significant to the Crown's case, was also a pair of wet, muddy jeans found on the defendant's bedroom floor on the morning of the shooting. These jeans yielded three important pieces of evidence. The first was the fact that the jeans were wet and muddy. This is significant because the area where the shooting occurred (Ballyskeagh Road) was wet and muddy on the morning of the attack. The prosecution claimed that this linked the defendant to the shooting because the mud on his pants and the mud found around the area of the shooting matched after being “compared visually.” The second incriminating link between Murray's jeans and the crime was a set of the defendant's house keys found in the front pocket. This discovery was important because it allowed the prosecution to argue that the defendant had been out the previous night in those jeans, as he would have needed the keys to regain entry to his house.

Finally, the inner surface of the jeans' waistband had residue consistent with the discharge of a gun cartridge. This circumstantial evidence clearly tends to link the defendant with the shooting of Anderson. However, this evidence was also effectively contradicted by the defense. Testimony offered by Kevin Murray's father provided an exculpatory explanation of the condition of the defendant's jeans. Mr. Murray testified that on March 11, two days before the shooting, he and his son had gone hunting at Glenmornan, an area which he described as "mossy ground, very wet and muddy." The defendant's father further testified that he had allowed his son to shoot his shotgun several times during the hunt. Collette Quinn, the forensic expert called by the Crown, testified that it was possible, although not probable, that the gun residue on Murray's jeans could be explained by the shooting of his father's gun while hunting.

Murray also had an alibi. When he was initially questioned by the police at his home on the morning of the shooting, Murray told the
police that he had been out the entire night before with a friend, Guy Breslin. According to Murray, he and Breslin had watched videos at Breslin’s house, where both then spent the night. Murray stated that he returned home at approximately nine in the morning, and that his mother let him into the house.\textsuperscript{107} This alibi was at least partially corroborated by Robert Patton, who testified that he had seen the defendant and Breslin together on the night before the shooting.\textsuperscript{108}

Thus the prosecution’s evidence is, to a large extent, answered by plausible evidence given by the defense, making unlikely a finding of guilt beyond a reasonable doubt on this evidence alone. However, the Evidence Order tipped the scales against Murray. Aside from his brief alibi statement to the police at his home, Kevin Murray did not answer any police questions during his four days of interrogation, nor did he take the witness stand in his own defense at trial.\textsuperscript{109}

From Murray’s silence, the presiding Diplock court judge drew two adverse inferences. The first, under the article 3 “ambush” provision,\textsuperscript{110} and the second, under the provisions relating to the defendant’s refusal to take the stand in his own defense, particularly in light of what the judge felt was a rather incriminating prosecution case.\textsuperscript{111} When the judge viewed the evidence presented in light of these inferences, his conclusion was that, “”[i]t is only common sense, in the circumstances, to infer as proper inference that he is not prepared to assert his innocence on oath because that is not the case.”\textsuperscript{112} Upon reviewing the case, the Appellate court agreed with this deduction, and upheld the defendant’s conviction.\textsuperscript{113}

The Murray case, therefore, is a good illustration of how the inferences allowed under the Criminal Evidence Order can tip the balance toward conviction. In this instance, the conviction may have been correct; however, the power which these inferences granted the Diplock

\textsuperscript{107} Id. The final portion of this alibi is crucial in that, if true, it would rebut the Crown’s presumption that the defendant had worn the muddy jeans the night before because they had his house key in them.

\textsuperscript{108} Id.

\textsuperscript{109} Id.

\textsuperscript{110} Although the defendant did tell the police some of his alibi before going silent, the trial judge found that “his failure to mention the particular matters that he did, many of which were of the greatest importance in his defence, reduce[d] the credibility of his defence and increase[d] the weight of the prosecution case.” Id.

\textsuperscript{111} See notes 63-65 and accompanying text. Indeed, the trial court felt that it was “remarkable” that the defendant did not give any evidence in his defense given the circumstances. See also R. v. Murray, supra note 87.

\textsuperscript{112} See R. v. Murray, supra note 87.

\textsuperscript{113} See R. v. Murray, supra note 86.
judiciary, makes it almost certain that individual liberties will be advised and renders the distinct possibility that innocent men will be convicted.

The Murray opinion is also instructive in other ways. First, the Appellate Court that reviewed the trial court’s disposition of Murray, qualified the point at which inferences under the Evidence Order may be drawn. The Court stated that the right of a court to draw the inferences arises “once the Crown has established a prima facie case” against the defendant. This is an important limitation on the express requirements the Evidence Order. The Court also stated that the strength of the inferences drawn “will . . . depend upon the particular circumstances of the case.” This also seems to be a significant philosophical recantation of the Evidence Order’s broad grant of power. It remains unclear whether future courts will follow these examples and contract the strength of the Evidence Order. However, such steps may intimate that the judiciary is weary of the tremendous grant of power bestowed by the Evidence Order.

Finally, the Murray case illustrates that the Evidence Order does provide the accused with some procedural safeguards which put him on notice as to what the consequences of silence may be. For instance, when Murray was questioned following his arrest he was first warned: “If you fail or refuse to [in this instance account for the mud on the jeans, per section 5 of the Evidence Order] a Court judge or jury may draw such inferences from your failure or refusal as appears proper.” The police warned Murray prior to questioning about the balaclava found in the car. Murray was again warned prior to his being called into the jury box. Murray ignored all these warnings.

Thus, a modicum of protection is granted to defendants under the Evidence Order. However, the cursory reminders such as those provided to Murray, are of relatively little use considering the strength of the inference the Evidence Order creates. Aside from the problems inherent in the Evidence Order, the power it bestows also runs aground of the various legal traditions espoused by Great Britain. Considering traditions, then, is the next issue of importance in examining the philosophical and legal validity of the Evidence Order.

114 Id.
117 See Evidence Order, supra note 7, at §§ 3(2)(b), 5(4), 6(3).
118 R. v. Murray, supra note 7, at §§ 3(2)(b), 5(4), 6(3).
119 Id.
120 Id.
III. CONSIDERATION OF THE CRIMINAL EVIDENCE ORDER UNDER EXISTING LEGAL STANDARDS

A. National Legal Traditions

1. Introduction: Destruction of the "Right to Silence"

Defining the "right of silence" in British jurisprudence is a difficult task. The right "does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance . . . ." Among such immunities must be included rights concerning police questioning, interrogation, and the rights of the accused at trial. It is this last immunity which is of relevance to this Note.

In his article The "Right of Silence" and the Mental Element, Professor Glanville Williams subdivided the "right of silence" at trial into two distinct components. First, Williams terms the privilege against self-incrimination, meaning that the court has no power to force a confession out of a defendant. Second, "no inference can be drawn from the defendant's silence except unavowedly and sub rosa." It is this second aspect of the defendant's right of silence that the Evidence Order decimates. By making the silence of the accused an acceptable piece of evidence, the Evidence Order legitimates a cynical viewpoint of the meaning of that silence, and oversimplifies the role that silence can play in a criminal trial.

Although the Evidence Order destroys an entire strand of the multifaceted right of silence, invalidating this change is a difficult task for several reasons. Great Britain has no written constitution, no single repository of individual rights, and no rigid limits on the powers of government. Under this regime, liberty is not "residual;" rights exist only after Parliament's creation of them. "Parliament is the supreme law-making body in the United Kingdom, [and] Acts of Parliament are absolutely binding on all courts taking precedence over all other sources of law . . . ." Therefore, Parliament may restrict or remove any

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121 Smith v. Director of Serious Fraud, 3 All E.R. 456, 463 (1992).
122 Id. at 463-64.
124 Id.
125 Id.
126 See infra notes 210-11 and accompanying text.
127 Id.
128 HER MAJESTY'S STATIONARY OFFICE, THE LEGAL SYSTEMS OF BRITAIN 7 (H.M.S.O.
right. The "principles of natural justice (broadly speaking, roles which an ordinary, reasonable person would consider fair) . . . which are commonly considered . . . inviolate, are not protected against change by Parliament . . . ."129 Indeed, theory has become reality in the Evidence Order.

Despite these obstacles, there remain two fronts on which the Evidence Order may be attacked: "fundamental fairness" and "discriminatory focus." These concepts clearly demonstrate the absurdity of the present British system of justice in Northern Ireland. More importantly, however, they help to show that the Evidence Order, in particular, perpetrates an injustice on the people of Northern Ireland.

2. Problems of Fundamental Fairness

The Evidence Order constitutes a deprivation of a fair "means" of justice in Northern Ireland. Prior to the Evidence Order, the "right of silence" in English jurisprudence had a complex role. Juries tend to conclude that a defendant's silence at trial is evidence of guilt.130 The purpose of the Evidence Order is to legitimate such conclusions in terrorism cases.131

Prior to the Evidence Order, in cases where the silence of an accused was at issue, there was a confusing relationship between accused, judge, and jury. While the prosecution was not allowed to comment on the accused's silence, the judge could.132 The judge's comment on the silence of the accused came during the "summing up," a process similar

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129 Id. (emphasis added).
130 CELIA HAMPTON, CRIMINAL PROCEDURE 190 (2nd ed. 1977).
131 In a television interview in 1988 concerning proposed changes in Northern Ireland's criminal justice system, Thomas King, the Secretary of State for Northern Ireland stated:
what I have to deal with is a sustained and deliberate attack on the whole system of justice and the fact that people who, if they were innocent could easily make their case, simply look at the wall and refuse to answer any questions whatsoever. It is a very old saying by a very distinguished jurist who said that innocence pleads for a chance to make its case and it is silence that is offering an opportunity for the guilty.
Moreover, Lord Denning, whose "reputation and influence on the law are unique and cannot be overestimated . . . [stated that]: 'Too many people have been acquitted when they were guilty and that's because our rules favor the guilty person far too much. Our rules of evidence should be brought about that proper convictions can be had of the guilty.'" R. v. McCann; R. v. Cullen; R. v. Shanahan, supra note 75. Now, however, it seems that there is in place a system where there is the great potential to have improper convictions due to an accused's silence coupled with incorrect notions of prejudice and cynicism. Id.
132 HAMPTON, supra note 130, at 190.
to judge giving jury instructions in the United States. During the sum-
moving up, the judge was allowed to “comment on the accused’s failure to
give evidence or to call witnesses, as long as the comment . . . [did] not amount to a misdirection as it would plainly be if suggested that the
accused’s silence amounted to corroboration. It would also be a misdi-
rection to equate guilt with silence.”133 Any such misdirection would
require redirection of the jury.134 Although the accused’s silence may
incriminate him in the eyes of the jury, the judge may not directly
equate this silence with the accused’s guilt. Nor may the judge instruct
jurors that the accused’s silence corroborates evidence submitted against
him. Any such direction would be a misdirection, “and it should be
clearly understood that it [would be] wrong in law.”135

This rule which prevents the inference of guilt from silence still re-
mains intact in Great Britain. In Re Arrows Limited, for instance, a Brit-
ish case heard in December 1992, stated rather forcefully: “It has always
been a cardinal principle of the English criminal jurisprudence that a
person tried for a criminal offense cannot be compelled to give evi-
dence . . . [nor may] his failure so to do . . . be the subject of adverse
comment at the trial or of any adverse inference . . . .”136 While this
statement expresses the current law of Great Britain, there has been
serious dissatisfaction with this rule among many British jurists.137 The
Criminal Law Revision Committee expressed such dissatisfaction in its
Eleventh Report:

the present law and practice are much too favourable to the defence.
We are convinced that, when a prima facie case has been made against
the accused, it should be regarded as incumbent on him to give evi-
dence in all ordinary cases. We have no doubt that the prosecution
should be entitled, like the judge, to comment on his failure to do so.
The present prohibition of comment seems to us wrong in principle

133 Id. at 197. See also DAVID FELLMAN, THE DEFENDANT’S RIGHTS UNDER ENGLISH LAW
114-15 (1966) (stating that the judge should remind “the jury that failure of the accused to give
evidence should not be held against him, and . . . the judge must not suggest that the
defendant’s failure to testify was inconsistent with innocence or that the only reasonable inference
is one of guilt”).
134 HAMPTON, supra note 130, at 198.
(1968) (Lord Parker stated that when the accused fails to give evidence, “the jury have been
deprived of the opportunity of hearing his story tested in cross-examination, the one thing they
must not do is to assume that he is guilty because he has not gone into the witness box.”).
Ukcase File.
137 See R. v. Murray, supra note 87 (discussing the fact that the prohibition against adverse
comment on defendant silence is drawing heavy criticism in British juridical literature).
and entirely illogical.\textsuperscript{138}

The Committee went on to state, "[w]e have no doubt that . . . adverse inferences, such as common sense dictates, should be allowed to be drawn from the accused’s failure to give evidence . . ."\textsuperscript{139} Based on this conclusion, the Revision Committee suggested relaxing evidentiary standards when confronted by silence, to allow such inferences to be drawn.\textsuperscript{140} The suggestions made in the Report were never adopted, however, as they met with a hail of criticism in the House of Lords. Lord Ritchie-Calder, for instance, argued that enabling silence to be used as a presumption of culpability would be an "absurdity."\textsuperscript{141} Likewise, Lord Salmon contended that the "principles upon which our system of justice rests are . . . threatened . . . by . . . the recommendations contained in this report."\textsuperscript{142}

Yet despite these misgivings, and the ultimate rejection of the changes suggested by the Revision Committee, the drafters of the Evidence Order resurrected the Report as the basis for the 1988 Order.\textsuperscript{143} One reason for this may have been that the proposal provided a ready-

\textsuperscript{138} CRIMINAL LAW REVISION COMMITTEE, ELEVENTH REPORT, 1970, CMND. 4991, at 68-69.
\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} 338 PARL. DEB., H.L. (5th ser.) 1604-17 (1973).
\textsuperscript{143} Id. at 1604.

This can be deduced from the striking similarities in the language of the two documents. For example, note the similarities in the language of the documents on the crucial issue of what types of conclusions the court may draw from the silence of the accused. The Criminal Law Revision Committee's proposed changes suggested that:

the court or jury, in determining whether the accused is guilty of the offense charged, may draw such inferences from the refusal as appear proper; and the refusal may, on the basis of such inferences be treated as, or capable of amounting to, corroboration of any evidence given against the accused.

CRIMINAL LAW REVISION COMMITTEE, supra note 138, at 176-77. The Criminal Evidence Order similarly states that:

(c) the court or jury, in determining whether the accused is guilty of the offense charged, may —

(i) draw such inferences from the failure as appear proper;
(ii) on the basis of such inferences treat the failure as, or as capable of amounting to, corroboration of any evidence given against the accused in relation to which the failure [of the accused to testify] is material.

Evidence Order, supra note 7, at §§ 3(2)(c). See also id. §§ 4(4), 5(2)(b), 6(2)(b). Although this is but one, albeit crucial, example, the similarities between the two documents have been previously noted. In this regard, see R. v. Murray, supra note 87 (concluding that because of the similarities between the Order and the Revision Committee Report, the former was probably based on the latter).
made blueprint for the new law. However, there remains the possibility that the reliance on the 1972 formulation was more calculated. As has been noted, there was some feeling in Great Britain that the rights afforded the accused were too great. In a legal climate such as Northern Ireland, where defendant’s rights were often twisted and abused, such a sentiment is obviously magnified. The statements of Thomas King and Lord Denning, concerning the disintegration of the British justice system in Northern Ireland, were testimony to such feelings of frustration. The 1988 Evidence Order could also have represented a de-sensitizing of British citizens to a fundamental change in the law which had been contemplated in Britain, but never executed. Due to the flouting of rights in terrorism trials, Northern Ireland offered the perfect setting for the introduction of such a change.

The Criminal Evidence Order, therefore, is fundamentally unfair to the Northern Irish. It removed from these citizens what had been a basic principle of British jurisprudence, it did so on prejudicial policy concerns, and based the legal change on an outdated and once-rejected design. The result has been the creation of a situation which breeds distrust and creates opportunities for abuse of the accused (especially in light of the Diplock system in place in Northern Ireland). Moreover, through these changes in procedure, there now exists a system in Northern Ireland which shifts the burden of proof: once the prosecution has established a prima facie case against the defendant, the latter is forced to choose between remaining silent, and thereby risking an adverse inference, or testifying in the hopes of exculpating himself. This inverts the usual requirement of the Crown having to prove guilt.

Indeed, the judicial system in Northern Ireland under the Evidence Order

144 See supra sections III, A-B.
145 See supra notes 69-75 and accompanying text.
146 Labor Party Secretary for Northern Ireland Kevin McNamara expressed this same fear, stating that the Thatcher government was “using Ulster as a ‘laboratory for draconian measures, which are to be introduced in the United Kingdom.’” Moloney, supra note 74. Moreover, there is historical support for such concern of Britain using Northern Ireland as a social laboratory. See C.K. Boyle & D.S. Greer, The Legal Systems, North and South: A Study Prepared for the New Ireland Forum 9-10 (1984) (concluding that based on historical data Northern Ireland may form a sort of “social laboratory” where “Englishmen were willing to experiment . . . on lines which they were not prepared to contemplate or tolerate at home”).
147 See discussion of Diplock System, supra note 85.
148 This conclusion was reached in R. v. Murray, supra note 86. It seems to be the correct reading of the Evidence Order. See supra note 59-62 and accompanying text.
149 In terms of basic criminal procedure, such as the prosecution having to prove guilt beyond a reasonable doubt, American and British approaches are very similar. See generally Hampton, supra note 130; Yale Kamisar, Et Al., Modern Criminal Procedure (7th ed. 1990).
redefines commonly held conceptions of trial and "due process of law." Regardless of parliamentary supremacy, such changes are an affront to the rule of law in Northern Ireland and Great Britain. Even more frightening is the prospect that the Evidence Order is a test case for future changes in Britain. If such suspicions are correct, then the magnitude of this affront to the rule of law will only increase. The citizenry of Northern Ireland, law-abiding and terrorist alike, deserve more than grand social experimentation.

3. The Criminal Evidence Order: Legal Discrimination by Parliament

The second major front upon which the Evidence Order can be attacked is that it is discriminatory in application — it applies to Northern Ireland alone. Though the Evidence Order's language contains no overt statement detailing its scope, the discussions surrounding the passage of the Evidence Order indicates its exclusive application to Northern Ireland. The singling out of a discrete group of citizens, within the United Kingdom, is a patently discriminatory act by the British government. Yet under existing British constitutional and parliamentary principles, there is little doubt that the Evidence Order is a valid law. This is due in part to the fact that in "its modern form the legislative supremacy of Parliament asserts [ultimate] authority over the governed; [and] there is . . . no entrenched protection of human rights . . . [nor] judicial or other review of primary legislation."

Past experience bolsters the presumption that the Evidence Order is, in fact, a "valid" law, despite its discriminatory focus. The British Race Relations Act of 1976 provides an example. This enactment defines "discrimination" as: (1) treating a person less favorably due to his race; or (2) applying extra conditions or requirements to a person

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150 In this context, "due process" connotes concepts of "fairness" with respect to certain trial procedures and practices, rather than American notions of "due process" connected with the Fourteenth Amendment.

151 The Evidence Order, by its very title, indicates its exclusive application to Northern Ireland. See Evidence Order, supra note 7.

152 See supra notes 58-62 and accompanying text.

153 Indeed discrimination is defined as "[u]nfair treatment or denial of normal privileges to persons because of their race, age, sex, nationality or religion." BLACK'S LAW DICTIONARY 467 (6th ed. 1990).


155 See Race Relations Act, 1976, ch. 6 (Eng.).

156 Id. at § 1(1)(a).
because of his race.\textsuperscript{157} Despite such seemingly potent protections, the Act contains several loopholes which make it inapplicable to the situation in Northern Ireland.\textsuperscript{158} Furthermore, several British cases also clearly enunciate that this Act does not apply to Northern Ireland.\textsuperscript{159}

4. Conclusion

The discriminatory character of the Evidence Order is therefore clearly established in British jurisprudence. The lack of judicial review in Britain, and the established willingness to exempt Northern Ireland from common civil rights protections, make legal arguments against the validity of Evidence Order rare. However, strong policy arguments against the Evidence Order abound. First, the reduction of legal rights for the Northern Irish sector of British society is irreconcilable with the notion that “[e]very person within the [British] jurisdiction enjoys the equal protection of [its] laws.”\textsuperscript{160}

Second, “two wrongs do not make a right.” In its creation and ongoing use of the Evidence Order, the British government is fighting the sabotage of the political and legal order in Northern Ireland with its own form of sabotage — discrimination against the Northern Irish, through removal of their “right of silence” at trial. The Evidence Order only plunges Northern Ireland’s judicial system into further dispute.\textsuperscript{161}

In Great Britain, such legislation is often justified on the grounds of exigent circumstances.\textsuperscript{162} Existence of a true emergency merits executive implementation of broad regulatory powers to insure the preservation of peace and the adequate distribution of life’s essentials (food, water, fuel, etc).\textsuperscript{163} Traditionally, such regulations may be as broad as the Crown deems necessary to ensure continuance of peaceful, civilized

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\item Id. at § 1(1)(b). For both of these limitations a “racial group” includes groups of persons defined “by reference to nationality or ethnic or national origins . . . .” Id. at § 3(1).
\item Two such limitations are of importance here: (1) Section 41(1)(a) of the Act states that nothing in the Act “shall render unlawful any act of discrimination done—in pursuance of any enactment or Order in Council . . . .” Id. at § 41(1)(a); (2) Section 42 states that nothing in the Act “shall render unlawful an act done for the purpose of safeguarding national security.” Id. at § 42.
\item Khera v. Secretary of State for the Home Dep’t, 1 All E.R. 765, 782 (1983) (holding that British laws apply equally to British nationals as to resident aliens).
\item See discussion infra section IV.A.2 relating to popular dissatisfaction among the Northern Irish with their justice system.
\item See FINN, supra note 56, at 107-08.
\item See 8 HALSBURY’S LAWS OF ENGLAND ¶ 983 (4th ed. 1983).
\end{enumerate}
\end{footnotesize}
life. However, even given this broad grant of discretion, the "existing procedure in criminal cases is not to be altered . . . ." Therefore the Evidence Order oversteps even the mandate of the legitimate concerns which gave rise to its existence.

The Evidence Order, due to the notion of parliamentary supremacy, is technically a "valid" enactment under British law. Despite meeting formal and legal requirements, the Evidence Order remains unfair, discriminatory, and unjust. As such, the Evidence Order is a testament to the dangers of a Parliament left unchecked. In a single stroke, the Evidence Order deprived a whole category of citizens a basic right guaranteed to the rest of British citizens.

B. International Sources of Higher Law

Aside from the various legal traditions and policy concerns discussed above, the Criminal Evidence Order of 1988 also violates a number of commonly accepted international legal norms. However, the relationship between Britain's national law and the international documents which codify these norms is not entirely clear.

Two levels of "supra-national law" may impact the Evidence Order. The first is the European Convention of Human Rights (Convention). This document is particularly relevant because it has inspired a heated debate in the United Kingdom concerning whether its enumeration of rights should be adopted as, or used as a blueprint for, a British Bill of Rights. Multilateral agreements to which the United Kingdom is a signatory are also relevant to this analysis. Several multilateral human rights accords protect liberties which the Evidence Order contravenes, however Britain has signed surprisingly few. Such agreements

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164 Id. (emphasis added).
165 "Valid" is defined as "[h]aving legal strength or force, executed with proper formalities . . . ." BLACK'S LAW DICTIONARY, supra note 153, at 1550.
166 "Unjust" is defined as "[c]ontrary to right and justice, or to the enjoyment of his rights by another . . . ." Id. at 1535.
167 Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter the Convention]. The Convention came into force Sept. 3, 1953, after ten states had ratified the document. The ten original ratifying states included the United Kingdom of Great Britain and Northern Ireland, Norway, Sweden, the Federal Republic of Germany, Saar, Ireland, Greece, Denmark, Iceland, and Luxemburg. Id. at note 1. The Convention was subsequently adopted by Turkey, Belgium, and the Netherlands. Id.
169 Two such "secondary" documents will be discussed which relate to the Evidence Order: (1) the Charter of the United Nations; and (2) the Universal Declaration of Human Rights. See
(and to a lesser extent the Convention) are generally written in broad, lofty language, and their schedules of protected liberties seldom deal specifically with criminal procedure. Nevertheless, the rights articulated in these arguments are important to the analysis of the Evidence Order's legal character — especially as Great Britain moves swiftly toward fuller integration within the European Community (EC).

1. Regional Agreements: The European Convention on Human Rights

The European Convention on Human Rights, officially known as the Convention for the Protection of Human Rights and Fundamental Freedoms, details basic rules for signatory states to follow. Some signatory states directly incorporated the Convention into domestic law — the United Kingdom did not. Despite this fact, the Convention does have some regulatory effect on Britain, as it "extrinsically establish[es] rules to which ... [the British] domestic system must conform." Two such "extrinsic rules," are violated by the Evidence Order. First, Article 6 of the Convention, provides in section 1, that "everyone is entitled to a fair and public hearing within a reasonable time by an impartial tribunal established by law." Presently, however, Northern Ireland operates under the "Diplock System" which dispenses decisional justice without juries. This system was established in response to fears that either terrorists would intimidate jurors in cases

supra notes 197-205 and accompanying text.

170 One explanation as to why such broad policy statements are used may be that "[w]hile international human rights law focuses on international rules, procedures, and institutions, it ... also requires ... knowledge of and sensitivity to the relevant domestic law of countries ... ." Richard B. Bilder, An Overview of International Human Rights Law, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 1 (Hurst Hannum ed., 1986). The criminal procedure of a particular nation would obviously be an example of such "relevant domestic law." However, although an amount of sensitivity will be shown to sovereign nation-states to allow them independence in the running of internal matters, international law still has a regulatory effect on such sovereigns as it establishes broad parameters for them to follow. In enacting the Criminal Evidence Order, the United Kingdom has gone beyond the allowable scope of even these broad guidelines.

171 See the Convention, supra note 167. See also MAURO CAPPELLETTI & WILLIAM COHEN, COMPARATIVE CONSTITUTIONAL LAW 145 (1979).

172 Id.

173 Id.

174 Id. This conclusion is bolstered by the fact that the European Court of Justice has embraced the fundamental tenets of the Convention. See Case 4/73, Nold v. Commission, 1974 E.C.R. 491 (1974).

175 The Convention, art. 6, supra note 167, at 228.

176 See supra note 85 for further discussion of this system.
where their comrades were on trial, or jurors would grant perverse acquittals based on sectarian bias.  

The Diplock system has perverted the criminal justice system against the interests of the accused. Contributing to this perversion is that Diplock judges are “case-hardened,” and thus less likely to acquit than juries, or other judicial finders of fact. The case-hardening phenomenon is evidenced by a Diplock Court conviction rate of 90-95% according to some estimates. Further perversions of justice have resulted from the Diplock Court’s willingness to admit “supergrass” and coerced evidence. These factors, coupled with laws which increase judicial discretion such as the Criminal Evidence Order, leave many Irish citizens “thoroughly convinced that there is no British justice for Irish men and women accused of terrorist crimes.”

For a violation of article 6(1) of the Human Rights Convention, however, the “unfairness” involved likely must rise to a level greater than simple community disapproval. However, there has been a recent trend in the European Court of Human Rights to view the protection of article 6(1) broadly, to encompass more rights than those specifically enumerated in article 6(3). Under a broad interpretation, it is much
more likely that the Court of Human Rights would consider the Evidence Order’s prejudicial and discriminatory background and effect to be destructive of the article 6(1) protections of the right to a fair trial.

Proof that the Evidence Order violates the Convention’s fair trial extrinsic rule is supported by the language of Article 6(2) of the Convention. Article 6(2) states that “[e]veryone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” As discussed, the Evidence Order is based on the presumption that those who avail themselves of their privileges of silence do so to conceal guilt. Thus, in cases where the Evidence Order is implicated, the defendant is “presumed guilty” if he chooses to remain silent.

Moreover, presumptions are integral parts of all legal systems. Article 6(2) recognizes this and “requires States to confine themselves within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.” The Evidence Order’s presumption of guilt exceeds the “reasonable limits” of Britain’s power; it destroys one of the most basic rights protected by the Convention, and by British Common law, that a defendant must be proven guilty beyond a reasonable doubt. The retraction of defendants’ rights allowed under the Evidence Order belies the importance of the situation. By cutting legal corners, to respond to socio-political concerns, the Brit-

prominent a place in a democratic society that there can be no justification for interpreting Article 6 § 1 of the Convention restrictively”). Article 6(3) states that “Everyone charged with a criminal offence has the following minimum rights:
(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
(b) to have adequate time and facilities for the preparation of his defence;
(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

The Convention, supra note 167, at 228.

184 Id.

185 See supra notes 70-75 and accompanying text.

186 Although the Evidence Order itself contains no such statements, both Lord Denning and Secretary King made statements alluding to the law as a way of rectifying a situation where, as Lord Denning put it: “our rules favoured the guilty person far too much. Our rules of evidence should be brought about [so] that proper convictions can be [had] of the guilty.” McCann, supra note 75, at 244.

ish government, has itself, disregarded the rule of law.

The Evidence Order also violates a second Convention "extrinsic rule." Article 14 states that "[t]he enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." As discussed, supra, the Evidence Order is discriminatory in its drafting and application. Specifically, it removes the "right of silence" only from Northern Irish defendants. Thus, the Evidence Order is likely in violation of Article 14's prohibition against discrimination on the basis race, religion, opinion, origin, associate, birth, or status.

The Convention, however, does allow for the limitation of "fundamental rights" when the body politic is threatened. Article 15(1) states that: "[i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligation under this Convention to the extent strictly required by the exigencies of the situation . . . ." While this article grants significant discretion to signatory states, there are several limitations on this power. The first is that such derogations may only take place where there exists a "war or other public emergency threatening the life of the nation . . . ." The conflict in Northern Ireland since the early 1970s has constituted a "public emergency." It has been recognized as such by the European Court of Human Rights.

The power of States to limit rights secured by the Convention is restricted by the requirement that such measures be only "to the extent strictly required by the exigencies of the situation . . . ." The Evidence Order is not strictly tailored, and on this requirement fails the test established by article 15. While the I.R.A. crisis may threaten the life of the nation, the "defect" in the law which the Evidence Order was designed to repair did not. In this sense, the Evidence Order is not narrowly tailored.
Article 17 provides a third limitation on the ability of states to restrict "rights" found within the Convention. Article 17 states that "[n]othing in this Convention may be interpreted as implying for any State . . . to engage in any activity or perform an act aimed at the destruction of any of the rights and freedoms set forth . . . in the Convention." Therefore, even article 15 does not permit the destruction of a right. Yet the Evidence Order destroys the defendant's presumption of innocence at trial, a right guaranteed by article 6(2) of the Convention.

Finally, article 15(1) of the Convention also disallows "measures . . . inconsistent with . . . [the Nation's] other obligations under international law." It is toward those other international obligations of Great Britain which this analysis must turn.

2. International Agreements

The Evidence Order's validity is also questionable under international law. Article 55(c) of the Charter of the United Nations sets out the organization's predicate policies. "With a view to . . . [creating] conditions of stability and well-being which are necessary for peaceful and friendly relations among nations . . . the United Nations shall promote . . . universal respect for, and observance of, human rights and fundamental freedoms for all . . . ." While at first glance, this broad statement of policy would appear to have no relevance with respect to the discrete problems raised by the Evidence Order. However the U.N. Charter has been cited to demonstrate an act's dubious legal character, and it is generally considered to be legally binding on U.N. member states. By enacting the Evidence Order, Britain violated the

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195 Id. at 234.
196 Id.
197 U.N. CHARTER art. 55(c).
198 A prime example was the United States' invocation of the Charter as representative of a body of fundamental rights which were violated when Iran took 52 American hostages at the United States Embassy in Teheran. The United States argued that "the existence of a corresponding duty on the part of every state to respect and observe . . . [these rights] are . . . reflected, inter alia, in the Charter of the United Nations . . . ." RICHARD B. LILLICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 47 (2d ed. 1991) (quoting Memorial of the Government of the United States of America at 71, Case Concerning United States Diplomatic and Consular Staff in Teheran [U.S. v. Iran], 1980 I.C.J. 3).
199 Indeed, "[t]hroughout the Charter it is evident that obligations are imposed upon Members, even though in most cases these obligations do not have sanctions." Id. at 42. See also Oscar Schachter, The Charter and the Constitution: The Human Rights Provisions in American Law, 4 VAND. L. REV. 643, 658 (1951) (stating that in United States courts the "obligations of the Charter regarding human rights should properly be carried out in certain respects by the courts in
Charter by diminishing (if not destroying) the Northern Irish's "fundamental freedom" relating to fair trial proceedings and the presumption of innocence.\textsuperscript{200}

The Universal Declaration of Human Rights\textsuperscript{201} also protects both the right "to a fair and public hearing by an independent and impartial tribunal,"\textsuperscript{202} and "the right to be presumed innocent until proved guilty,"\textsuperscript{203} but in more explicit fashion than the United Nations Charter. However the Declaration's status as international law is uncertain. Soon after its drafting, the United States denied its legal significance, stating that the Declaration "does not purport to be a statement of law or legal obligation . . ."\textsuperscript{204} In recent years, however, this view of the Declaration has been modified somewhat.\textsuperscript{205}

These documents are the only major agreements to which Great Britain is a signatory, and which are relevant to the Evidence Order.\textsuperscript{206} Although the wording of these documents is broad and theoretical, and clearly oriented towards developing international policy rather than establishing specific individual rights,\textsuperscript{207} these agreements do bolster the notion that the Evidence Order is fundamentally unjust and violative of international legal norms.

\textsuperscript{200} It can be persuasively argued that these two liberties are "fundamental," as they both were freedoms listed in the Convention.


\textsuperscript{202} Id. at art. 10.

\textsuperscript{203} Id. at art. 11.

\textsuperscript{204} 19 DEP'T ST. BULL. 751 (1948).

\textsuperscript{205} For instance, consider the statement made by the General Assembly in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. Here the Assembly stated that there was a "duty to 'observe faithfully and strictly' not only the provisions of the Charter, but also of the Universal Declaration . . . ." LOUIS B. SOHN & THOMAS BUERGENTHAL, BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 116-17 (1973).

\textsuperscript{206} Examples of treaties aimed at righting the evils of a specific problem would include documents such as the International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (1966); and the Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. A/RES/34/180 (1980). Documents which are aimed at specific acts would include the various Geneva Conventions dealing with the treatment of civilians during wartime. Individualized problems, such as the AIDS epidemic and refugees also merit individual treaties.

\textsuperscript{207} This is especially evident in the U.N. Charter which states as its goal the creation of "conditions of stability and well-being" among nations, rather than the creating or changing of specific individual rights. U.N. CHARTER, art. 55.
3. Sources of Higher Law: Conclusion

On both regional and international levels, the Evidence Order violates basic tenets of jurisprudence. It clearly relies on the presumption that those availing themselves of the right of silence are doing so to conceal guilt. It thus violates not only the presumption of innocence, but also the right that all individuals be entitled to a fair trial. The Evidence Order also vividly illustrates the potential for abuse within a civilized nation where there is unbridled discretion in how it confronts a state emergency.208

Yet repealing the Evidence Order would be only a partial solution, the underlying weaknesses of the English legal system would remain. A plan of action to prevent future abuses like the Evidence Order must therefore be comprehensive.

IV. A Preventive Mechanism for the Future Protection of Fundamental Rights in the United Kingdom

A. Background Information

The Evidence Order is contrary to both national and international protections of civil liberties. However, neither legal system offers objective or concrete support of such liberties — particularly when the national security is threatened. In response, this Note proposes a meta-law for Great Britain which incorporates traditional international legal norms.

This approach is adopted for three reasons. First, Great Britain's integration with the EC will require greater harmonization of its laws with those of the EC209 Second, under the British legal system, ade-

208 Aside from the fact that the Evidence Order constitutes an abuse of discretion under Article 15 of the Convention, it also violates several rights mentioned in the PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY. Specifically, the order violates the right to a fair trial as protected by Article 7 of this accord. See THE PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY (1984), reprinted in 79 AM. J. INT'L L. 1072, 1079 (1985). This document, while not technically binding on states, is meant to ensure that "the state concerned will refrain from suspending those basic human rights which are regarded as non-derogable under Article 4 of the International Covenant on Civil and Political Rights, Article 1 of the European Convention on Human Rights and Article 27 of the American Convention on Human Rights," SUBRATA ROY CHOWDHURY, RULE OF LAW IN A STATE OF EMERGENCY 1 (1989) (quoting Richard B. Lillich in THE PARIS MINIMUM STANDARDS OF HUMAN RIGHTS NORMS IN A STATE OF EMERGENCY, reprinted in 79 AM. J. INT'L L. 1072, 1079 (1985)).

209 The Maastricht Treaty has been ratified by Great Britain, establishing Great Britain's commitment to EC membership. See infra note 214 and accompanying text. The Treaty essentially sets forth the first steps on the road to a truly integrated European Community. See gener-
quate human rights protection requires both national and international analysis. Britain is without either a written constitution or a bill of rights; as a result, "the rights of Englishmen . . . [and of subjects of the United Kingdom, such as those in Northern Ireland] turn out to be merely residual liberty to act within the limits of what the law does not prohibit." Furthermore, under existing British law, strong protection of individual rights is not available through international legal norms. The "basic rule of English law regarding treaties is that, whilst the Crown has power to enter into treaty obligations internationally, these can only take effect in English law if Parliament legislates appropriately."211

Third, the metalaw is proposed in the hope that by tying the protection of human rights in Great Britain into sources of international higher law, consciousness will be raised concerning the nature of Britain's actions in Northern Ireland. By putting the issue of British human rights more fully before the eyes of the world, it may be easier to ensure compliance with minimum standards through "international peer pressure" (i.e. unfavorable reporting of the situation in other countries, public statements made by world leaders, and other forms of publicly "shunning" the United Kingdom).

B. A Proposal For Increasing the Protection of Human Rights in the United Kingdom

The first requirement of the metalaw is that the British Parliament should promulgate a "general enabling act" which states that Great Britain adheres to "commonly accepted" sources of international law regarding human rights. Not only would this incorporate a wide number of international agreements in one stroke of the pen, but it would also provide an internal foundation for the enforcement of individual rights under such agreements.212 This may seem overly simplistic, however such clauses already exist within the constitutions of France,213 Italy,214 and Germany,215 and have served to raise the level of human

ally Treaty on European Union, infra note 214.


212 This would include the enforcement of decisions by international arbiters, such as the European Court of Human Rights.

213 See FR. CONST., art. 55 (stating that "Treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws . . . ").

214 ITAL. CONST., art. 10 (stating that "Italy's legal system conforms with the generally recog-
rights protection.\textsuperscript{216}

The metalaw must clearly state its supremacy over other parliamentary enactments. This would be a significant departure from the British legal tradition of Parliamentary supremacy. The metalaw requires that Parliament voluntarily relinquish sovereignty to international accords and related international courts of law.

Such a methodology also seems to be in concert with current thinking on how to approach the European Union. Article F of the Treaty of European Union (more commonly referred to as the Maastricht Treaty) requires the Community to respect the provisions of the Convention.\textsuperscript{217} This "would formally make [its] human rights principles part of the Community's own 'constitutional' law."\textsuperscript{218}

Coupled with this integrative approach, British sovereignty may be preserved through an internal mechanism for the protection of individual liberties. A fully written constitution or perhaps a bill of rights, would provide a degree of rigidity necessary to prevent the risk of individual liberties changing with each passing Parliament, while also protecting against the E.C. having undue direct influence on British law.\textsuperscript{219} As with international integration, this would require the British Parliament to compromise an element of sovereignty, and make itself answerable to another body — in this case, the national court system.\textsuperscript{220}

\textsuperscript{215} GER. CONST., art. 25 (stating that "[t]he general rules of public international law form part of the federal law. They take precedence over the laws and directly create rights and duties for the inhabitants of the Federal territory"). For the purposes of securing the rights of individual British subjects, this model seems to be the most instructive.

\textsuperscript{216} Such a scheme would become a part of Britain's "unwritten constitution." See Kenney, supra note 5, at 256 (stating that "[t]he British Constitution is a conglomeration of statutory law . . . formal practices, and works of authority which set out the structure and relative powers of state organs among each other and common citizens").

\textsuperscript{217} Treaty on European Union, Feb. 7, 1992, at 9. Article F § 2 states that "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law." Id.

\textsuperscript{218} GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 146 (1993).

\textsuperscript{219} Such a document, to be successful, would therefore have to be difficult for Parliament to change once it was ratified. If Parliament were free to change the Constitution by simple majority, the document would be worthless as a protection of individual liberties. Exactly how this divestment of ultimate parliamentary power could be accomplished is beyond the scope of this discussion and is left for future commentators.

\textsuperscript{220} British courts would, necessarily, have to be given the unenviable task of judging when Parliament overstepped its now restricted mandate. In other words, a system of judicial review needs to be established.
These proposals call for checks to be placed on the power of Parliament. There is a saying in British juridical literature that "[a]n Act of Parliament can do no wrong, though it may do several things that look pretty odd." Yet while this saying may remain more or less true from a formalistic viewpoint, the Evidence Order demonstrates the fact that Parliament can "do wrong" in both a moral and a legal sense. Inroads must be made on the power of Parliament to prevent future dangerous precedents such as the Evidence Order.

CONCLUSION

Great Britain is at a crossroad. Long-heralded as the birthplace of individual rights and liberties, the home of the Magna Carta, and the Bill of Rights of the Glorious Revolution, Great Britain has reverted to tyrannical measures to deal with the crisis in Ireland. The sides to the crisis in Northern Ireland are currently seeking a peaceful settlement. Respect for the rule of law is crucial to the success of this process, and depriving suspected terrorists of fundamental legal rights has no constructive role. For "without the higher moral ground of legality and fairness, any democratic society is left weaker against its enemies."

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21 Bonham's Case, 8 Coke's Rep. 114, 376 (1610).
22 As precedential authority, the Evidence Order is extremely dangerous. In light of this conclusion consider the following: "[e]ach time inroads are made into the principle, a further contraction of a fundamental right becomes easier, as models and arguments become available for application to new areas, and resistance to abolition is weakened." Adam Tomkins & Brian Bix, The Sounds of Silence: A Duty to Incriminate Oneself?, 1992 PUB. L. 363. 371-72.
23 How Blind is Justice?, supra note 182, at 60.