EVIDENCE AND CIVIL LIBERTIES *

J. D. Morton ‡

What distinguishes our type of society from others is what are called the Civil Liberties we enjoy, the righs which a citizen may call his own: individual rights which do not depend upon the bounty of the State and indeed, in certain cases, may well exist to what, at the particular moment, is believed to be the general detriment of the State. This, at least, is the theory. Most of us will have read of the disappearance, after secret trial and secret evidence, of Boris Pasternak's co-worker and friend. That sort of thing, we say, could not happen here. Foremost of our distinguishing liberties is the freedom to think what we please. Further, we may say what we think within certain fairly clearly defined limits. Again, we may do what we please, again within clearly defined limits.

These are the basic civil liberties: the freedoms which we enjoy and which the whole democratic process is designed to secure. This freedom cannot be absolute. Absolute freedom, as advocated by the Anarchists, rests upon the notion of man as a noble savage, a notion surely forever destroyed by the history of the twentieth century, if not even before then. In so far as the interests of all may be ascertained we call them the interests of Society. These interests of Society must be balanced against the interests of any individual in order to allow the maximum practical freedom for each. We are justly proud of the balance which we have achieved within our democratic communities.

A proper balance is a relative matter, however, and yesterday's balance may not suit today's society. If democratic society is to survive as the best in all probable worlds we must constantly be on guard that the balance remains properly adjusted.

What has the law of evidence to do with freedom? I have defined civil liberty in terms of the citizen's right to think, talk and act. We lawyers, by a perfectly natural transposition, are accustomed to use the word to designate those legal devices by which these great freedoms are secured. The law of evidence is not the least significant of these devices.

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‡J. D. Morton, M.A., LL.B., (T.C. DUBLIN), of the Faculty of Law, the Osgood Hall Law School.

Before passing to the law of evidence, however, it is necessary, however briefly, to set our topic in relation to the new Canadian Bill of Rights.[1] I have defined civil liberty in very general terms as the citizen's right to think, talk and act. The Bill of Rights does exactly the same thing defining the rights in general, or political terms, in Section I, where certain human rights and fundamental freedoms, the right of the individual to life, liberty, security of the person and enjoyment of property, the right to equality before the law, freedom of religion, freedom of speech, freedom of assembly and freedom of the press are guaranteed.

I have referred to the legal devices by which these general freedoms are secured, usually called by lawyers, civil liberties. Section 2 of the Bill of Rights refers to certain legal devices by which the rights which are set out in section I may actually be secured. Matters of evidence are dealt with directly in some only of the clauses of Section 2. Section 2 (f) refers to the presumption of innocence. Section 2 (d) refers to the compellability of a person to give evidence if he is denied counsel, protection against self-crimination or other constitutional safeguards. Section 2 (e) refers to the right to a fair hearing.

My thesis is that the law of Evidence may be involved in civil liberties in one of two ways.

Firstly, there are certain evidentiary notions which can be related only to the protection of civil liberties. Secondly, there is a possibility that the law of evidence may be used as an indirect protection for civil liberties. I shall deal firstly with the first sub-division, devices related only to the protection of civil liberties.

The first of these devices is the presumption of innocence. This presumption, so called, has two aspects: firstly, as a general policy in the light of which all the rules relating to trials must be viewed: secondly, as the device by which the primary and secondary burdens of proof are generally to be allocated to the prosecution where a person is charged with having transgressed the limits of his freedom. It is up to the prosecution to introduce evidence upon which a jury could convict, i.e., to make out a **prima facie** case. In the event that the particular Judge or jury is left with a reasonable doubt as to guilt, the accused may be acquitted. It is an interesting subject for speculation whether the Courts will give any effect to the Bill of Rights in this regard. If any meaning is given to Section 2 (f), it would seem that a number of existing evidence rules have been altered. Those that come immediately to mind are the presumptions that arise

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1. (1960) 8-9 Eliz. II c. 44 Can.

from mere possession of narcotics and smuggled goods. It is my own guess that Canadian judges will not be prepared to treat the Bill as affecting any existing trial procedures, i.e., they will treat it as merely declaratory of the existing law.

The other device with which I propose to deal is the right set out in the Bill of Rights, Section 2 (d) not to be compelled to give evidence if a person is denied counsel, protection against self-crimination or other constitutional safeguards.

(a) **"if he is denied counsel".** The right of an accused person to retain counsel is, of course, well established in the orthodox courts. The provision was, no doubt, aimed at preventing administrative tribunals and other quasi-courts from importing a new practice which would preclude the appearance of counsel on behalf of interested parties. Two things are to be noted about this liberty to have counsel. First, there may be economic denial of counsel even though there is political freedom. Secondly, the provision as it stands gives the right of counsel to any person who is compelled to give evidence, i.e., any witness. If this plain meaning is accepted by the courts, it means a substantial change in court procedure and a considerable financial benefit to the legal profession. It would, however, be regarded as a backward step by many of us to turn our courts into the sort of circus well exemplified by the American Congressional Committees. On the other hand, it might well be a forward step in other tribunals which have tended to retreat every witness as a quasi or potential accused.

(b) **"if he is denied protection against self-crimination"**

The common law privilege against self incrimination arose in England in the mid-seventeenth century in consequence of the religious persecution then rampant. Th Star Chamber, with its ex-officio oath, approximated the Spanish inquisition and aroused a revulsion from the process whereby a man could be interrogated ruthlessly as to his acts and beliefs and then condemned on what had been extracted from him.

As Dr. Glanville Williams has pointed out, the privilege in England really consists of two separate privileges:

(1) the right of an accused person to remain silent and not to be questioned

(2) the right of any witness, other than the person on trial, to refuse to answer questions, the answers to which might incriminate him.

These two elements will be considered separately.

The right of an accused person to be free from questioning at trial is, of course, expressly recognized by the Canada Evi-

dence Act, s. 4 [2] which provides that an accused person may, but cannot be compelled to, go into the witness box.

Such is the case under our own Evidence Act, s. 5 [3] which provides that on a trial for violation of a provincial statute, the accused shall not be compelled to testify.

As Professor Maguire of Harvard has pointed out in his recent book "Evidence of Guilt" [4] this privilege harmonizes with the firm precept of our legal system that innocence rather than guilt of an accused person shall be assumed when his criminal trial begins. He advances the proposition that the privilege is supportable only because it brings substantial benefit to the community by aiding the innocent, by tending to convict the guilty or at least on the whole not unduly impeding conviction, and by advancing good public policy in other ways. As he points out, supporters of the privilege assert that to allow interrogation, even in court alone, might lead to an undue reliance by the prosecution upon the fruits of such interrogation – a skilful and unscrupulous prosecutor might trick an innocent person into conviction: a lazy police investigation might let a man guilty but quick-witted, steer his way to acquittal.

In terms of public policy. Professor Maguire points out that it is highly important to have wide respect for the administration of justice – this privilege has contributed to such respect and as Maguire emphasizes:

> "Accustomed personal safeguards, fixed in men's minds by usage of decades and centuries, are not lightly to be destroyed"

What is the other side of the coin? Are there any arguments against the continuation of this freedom not to incriminate yourself? Why do we deprive ourselves in many cases of the evidence of the main suspect, the prson most likly to know the truth? Under our present law, a man charged with the murder of his wife and proved to have been the only other person in the house with her when she died may not be forced to go into the witness-box, nor may the judge or prosecutor comment on his failure to do so.

Are we too defence-minded? In a recent report, [5] the lone dissenting member of the British section of the International Commission of Jurists is of opinion that the British are. He pro-

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2. R.S.C. 1952, c. 307, s. 4.
3. R.S.N.B. 1952, c. 74, s. 5.
4. Evidence of Guilt by John MacArthur Maguire; Little, Brown & Co. (1959) Chapter 2.
5. Not yet available.

poses that, subject to certain conditions, an accused person should be liable to be forced into the witness-box. He would not be forced to answer the questions put to him but his failure to answer would certainly count against him. It should be noted that under existing English law a judge may comment on the failure of the second to give evidence.

Defence lawyers will reply that under existing Canadian law an accused person who was forced into the witness-box would be treated as any other witness and if he had a criminal record would have it immediately exposed to the jury.

Can these objections be met?

The first objection that interrogation might be so unfair as to lead to the conviction of the innocent clearly suggests that our courts are so badly conducted that a witness may be so bullied and badgered that he is incapable of conveying a true impression. If this is so, the whole machinery of criminal justice is sadly in need of over-haul. It is one of the duties of a judge to protect all witnesses from unfair treatment. There are few complaints about the superior Court judges in this regard; it may be that some of our magistrates need to be reminded of this duty.

The second objection that the accused who is forced into the witness-box will automatically be forced to disclose his criminal record could easily be met by repealing this harsh and unfair rule. To use the words of a seventeenth century English judge, a man should not be tried on his whole life but on the facts of the crime of which he stands accused. In England, an accused person who chooses to go into the witness-box is given special protection against having a criminal record disclosed.

It is clearly unjust to convict the innocent and every effort must be made to avoid such a judicial error. It is, however, also unjust to acquit the guilty. **It would seem reasonable that criminal courts should attempt to convict all the guilty and acquit the innocent.**

That the present rule of privilege is questionable in its effect is well illustrated by a recent Ontario case. [6]

Two young men were charged with the rape of a young girl. The evidence for the prosecution was that the girl was walking with another girl when the pair were accosted by some youths in an automobile. The youths dragged one of the girls into the car and drove off. Her companion noted the licence number and ran home and told her parents, who informed the police. The girl who had been abducted later returned to her

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6. [1959] O.W.N. 286 (C.A.).

home claiming that she had been raped by the youths in the car. The police by this time had traced the car and taken two youths into custody. There was blood and semen on their clothes and on the car seat. At an identification parade arranged by the police, the girl identified one youth by his appearance, but had difficulty identifying the second. At the trial, both were convicted but, on appeal, the second was acquitted. At no time was this second youth put in the witness-box and asked to account for himself on the night in question! At no stage of his trial was he asked how the blood and semen got on his clothes! Yet these are the first questions a reasonable person would ask when determining his guilt or innocence.

This is not to suggest that the youth was guilty. However, it is suggested that his guilt or innocence would only sensibly be determined by asking him these questions. As Maguire points out "Liberty never comes free of charge."

Is the charge too steep here? Is the balance adjusted? Mr. John Foster, the dissenting member of the British Section of the International Commission of Jurists expressly, and Professor Maguire impliedly propose that the privilege of an accused against self-crimination be abolished and that he be made a compellable witness subject to the requirement that the prosecutor make out a **prima facie** case before being given liberty to call him.

An alternative suggestion was made in 1940 by Dr. C. A. Wright. [7] The English rule was preferable to the Canadian in his opinion, in that under the present interpretation of the Canada Evidence Act s. 12, an accused in Canada is in fact discouraged from giving evidence in that his record, if any, would automatically be thrown at him if he did. The present rule is that an accused need not go into the witness-box: if he does he is open to cross-examination on his record: if he decides to remain silent, no comment may be made on his decision by Judge or prosecutor. Dean Wright suggests that it might be more in the interests of justice to protect an accused from automatic cross-examination on his record and to permit the Judge to comment on the failure of an accused to take advantage of this right. In other words to encourage an accused to tell his story from the witness-box under proper safeguards.

There is, of course, another possibility which must be considered by those contemplating change. It is possible to abolish the privilege completely. This is what we have done in Ontario in matters falling within the Ontario Evidence Act. [8] The

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7. (1940), 18 Can. Bar Rev. 808.

8. R.S.O. 1960 C. 125.

Ontario Evidence Act s. 7 makes a person charged with violation of a provincial statute, competent and compellable and our courts have held that compellable means what it says, i.e., compellable to give evidence which will incriminate him of the offence with which he is now charged. As Chancellor Boyd pointed out in **R. v Fee** [9] this privilege to remain silent has been ablished by a number of other statutes both British and Canadian. I think that it may fairly be said that up until the enactment of the Canadian Bill of Rights there was little, if any, dissatisfaction expressed by our strongly defence-minded Bar at the position of an accused person under the Ontario legislation. It may be that this was because the section was rarely availed of. At the moment, concern is being shown in respect of a similar compellability provision in the Ontario Securities Act.

British and American traditions are that the privilege against self-crimination is one of the great bulwarks of civil liberty.

Bentham wrote:

> "If all the criminals of every class had assembled and framed a system after their own wishes, is not this rule the very first they would have established for their own security? Innocence never takes advantage of it — innocence claims the right of speaking, as guilt invokes the privilege of silence."

Sir Fitzjames Stephen wrote of the privilege:

> "Its policy may well be discussed without laying open those who question it to the charge of disrespect for the law of England."

What of the other aspect of this privilege against self-crimination? What Glanville Williams described as the right of any witness, other than the person on trial, to refuse to answer questions the answers to which might incriminate him? This privilege persists in the English common law and under the Fifth Amendment to the Constitution of the United States. It has been abolished in Canada by both Dominion and Provincial Evidence Acts. For the old common law privilege has been substituted a statutory privilege – the witness must answer but his answer is not receivable against him in subsequent criminal proceedings. I am in favour of this most sensible modification of the common law rule. There is only one observation I would make. In Ontario, it is common for a witness to ask the Judge presiding at the trial at which the question is asked, for "the protection of the Canada Evidence Act." Frequently the judge will accede to this request by saying that he "extends the protection." It should be noted that a dialogue of this sort indi-

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9. (1887), 13 O.R. 590.

cates a misunderstanding of the statutory enactments. Suppose the question is put to a witness in a civil trial governed by the New Brunswick Evidence Act. Despite the fact that he objects to answer on the ground that the answer will tend to incriminate him, the judge will properly compel him to answer under section 7 of the New Brunswick Act. Should that answer be offered against him in a subsequent trial for an offence against the Criminal Code, it is the judge at that second rial who will extend the protection of the Canada Evidence Act s. 5 (2) and exclude the answer. The witness deserves the protection by operation of law after he has been compelled to answer.

This discussion has been confined to the privilege not to incriminate yourself in court. Does the privilege exist outside the court-room? To quote from Professor Maguire again, it is clear that at common law this privilege accompanies a suspected person at all times and goes with him even into the police station. With this aspect of the common law rule I am in complete agreement. A citizen is not bound to make incriminating statements to the police nor is he, in general, required to furnish any other proof of his own guilt. I write "in general" not to hedge or equivocate, but to make allowance for such exceptions as the recent Saskatchewan legislation providing for the suspension of the driving licence of any licence holder who "when suspected of driving . . . a motor vehicle while under the influence of intoxicating liquor . . . refused to comply with the request of a police officer . . . that he submit to the taking of a specimen of his breath." [10] The validity of this legislation came to be considered by the Supreme Court of Canada [11] and in his judgment Rand J. (as he then was) demonstrated the type of testing which is necessary if the balance of individual liberty and social interest is to be kept in proper balance. Although, with respect, his remarks were not strictly relevant to the question before the Court [the existence of conflict between the Criminal Code s. 224 (4) and s. 92 (4) of the Motor Vehicle Act (Sask.)), he weighs the dangers to the innocent who are required to give a sample against the dangers to society from the intoxicated driver and concludes "the public interest rises to a paramount importance."

I pass now to the second topic: the possibility that the law of evidence may be used as an indirect protection for civil liberties. What I mean by this is the possibility of the courts policing the police by rejecting evidence obtained by the police in violation of the civil liberties of a suspected or accused person.

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10. Sask. Legis. Vehicles Act, 1957 (Sask.) c. 93 s. 92 (4).

11. [1958] S.C.R. 608.

There are two sharply divergent views on the desirability of the courts engaging in this supervisory function.

Sir Patrick Devlin, in his book "The Criminal Prosecution in England" [12] is strongly in favour of such supervisory jurisdiction and includes as one of the sanctions available to the judge "the general power of excluding from the trial, whether it be legally admissible or not, evidence that is prejudical to the accused," and he goes on to point out that the judge "will include in this category evidence that has been obtained by means he thinks unfair to accused persons generally."

Professor F. E. Inbau of Northwestern University of Chicago in the course of a paper delivered at the Criminal Law Conference held at the Osgoode Hall Law School in September, 1960, took the opposite view. He maintained that:

> "The courts have no right to police the police. That is an executive and not a judicial function."

In his view, the courts have imposed a straight-jacket of antiquated, impractical rules and regulations while, at the same time, the public demand that the police satisfy the social requirement of public protection. [13]

A good starting point for any discussion of these two divergent points of view is the law relating to the admissibility of confessions. Sir Patrick takes the view that the rule that confessions are to be excluded unless they are voluntary has nothing to do with policing the police but is confined to excluding untrustworthy evidence. Professor Inbau would not quarrel with Sir Patrick on the desirability of excluding untrustworthy evidence. Battle is joined on the question of excluding evidence which although trustworthy has been obtained through some violation, at the most, of the civil liberties of the accused as by torture or illegal detention; at the least through some violation of the sense of fair play in the community.
Inbau says:

> "Of necessity criminal interrogators must deal with criminal offenders on a somewhat lower moral plane than that upon which ethical, law-abiding citizens are expected to conduct their everyday affairs".

He makes it clear that he is opposed to any third degree tactics for he is "unalterably opposed to the use of any tactic . . . that is apt to make an innocent person confess."

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12. The Criminal Prosecution in England.

13. The proceedings are reported in the Criminal Law Quarterly, Vol. 3, No. 3 (1960).

He does approve, however, "such psychological tactics and techniques as trickery and deceit that are not only helpful but frequently necessary in order to secure incriminating information from the guilty, or investigative leads from otherwise uncooperative witnesses or informants."

Devlin, on the other hand, maintains that the Judges' Rules exist, not to exclude worthless evidence "but to regulate legitimate methods of enquiry." They are in his view "an expression of the judge's discretionary power to exclude evidence unfairly or oppressively obtained." If a judge is satisfied that some unfair or oppressive use has been made of police power . . . he will reject the evidence. It should be noted that Sir Patrick draws his authorities for this discretion to reject evidence improperly obtained from somewhat tenuously related fields, that of the admissibility of similar fact evidence and the effect of improper communication with a juror.

An examination of the cases actually on the point does not altogether support Sir Patrick's conclusion.

It is true that, in **Kuruma** v. **R.** [14] the Privy Council did say, obiter, that

> ". . . in a criminal case the judge always has a discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused . . . If for instance, some admission of some piece of evidence, e.g. a document, had been obtained from a defendant by a trick, no doubt the judge might properly rule it out . . . "

However, in a later passage, their Lordships appear to have held that the question is

> "whether what has been obtained is relevant to the issue being tried."

Their Lordships were not talking about confessions but about real evidence which had been improperly obtained.

The attitude of Canadian courts to the admissibility of such real evidence is well exemplified by R. v. St. Lawrence [15] where McRuer C. J. H. C. held that

> "it is permissible to prove . . . the facts discovered as a result of the inadmissible confession . . . "

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14. [1955] 1 All. E.R. 236 (P.C.) An example of the exercise of such discretion is to be found in **R.** v. **McLean and McKinley** (1960), 31 W.W.R. 89 (B.C.)

15. [1949] O.R. 215 followed in **A.-G. for Quebec.** v. **Begin** [1955] S.C.R. 593.

As Meredith J. A. once said [16]

> "The criminal . . . has no right to insist upon being met by the law only when in kid gloves or satin slippers . . . "

The opposite point of view has been well put on many occasions by the Supreme Court of the United States. In **Rochin** v. **California** [17], Mr. Justice Frankfurter had occasion to consider the admissibility of two capsules of morphine obtained by forcibly pumping the stomach of a person suspected of possession of morphine. In rejecting the evidence on constitutional grounds, the learned judge said

> " . . . to sanction the brutal conduct . . . would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society . . . "

How is the balance to be adjusted? The police officer will answer that to reject evidence which is demonstrably true merely because it has been illegally obtained is to cut off your nose to spite your face. Those who take this view feel that society can use the ordinary methods of control under civil and criminal law to curb excessive zeal on the part of the police.

The other view is that public respect for the administration of justice requires that every step in the criminal process be beyond reproach and that the courts must keep their hands clean by rejecting any evidence, true or not, which has been improperly obtained.

In so far as the Supreme Court of Canada has ruled upon the matter it would appear that such evidence is admissible with the possible exception of the case where force was employed [18].

In Canadian law today, we buy our liberty at a very fair price.

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16. **R.** v. **Honan** (1912), 26 O.L.R. 484 (Ont. C.A.).

17. (1951), 342 U.S. 165.

18. **A.G. for Quebec.** v. **Begin** [1955] S.C.R. 593.