ADVERSARY SYSTEM

the Fifth Amendment Be Updated?

NO

BY IRA D. LONDON

IGMUND FREUD'S most often repeat-rvations is, "Sometimes a cigar is just Similarly, sometimes a declination to just silence.

ion of our Bill of Rights, silence in ccusation has historically and tradi-ected from interpretation by prosecu- and governmental investigators. The e right to remain silent in the face of s a reaction by the authors of the e abuses of Star Chamber proceed-iselves were an outgrowth of the medieval forum for criminal charges. silence was considered an acknowl-The Fifth Amendment protects silence n of any kind, as it should.

E a notorious criminal case is thought one awry, we experience thoughtless the Bill of Rights as the remedy for ved miscarriage. Rarely do the critics the blunders of the police or the cy were the reason for the unpopular eard the appeal for abolition of the nt ever since the Warren Court put rohibiting prosecutors from using evi-police obtain illegally. It is ill-advised forfeiting our constitutional protec-otable remedy for the inability of a hieve a conviction, or the police to tions professionally.

gued, is at the very least suspicious, happenings. Criminal trials deserve an our everyday dealings because the ences of an error are much more se-w asked to consider allowing a fact-

ILLUSTRATION BY JOHN MacDONALD

nipulate suspects. For example, "We prints at the scene of the crime" (a urse). "Do you have anything to say? in silent" (in the face of this fabrica-rable inference will be drawn."

stitution," a refusal to respond is tanta-al. Under the proposed change, that construed as an admission of guilt, Constitution on its head. The many situation are frightening. If an inno-person is uncomfortable with speaking ly with freedom on the line and under police, he should not be penalized for If the police rely on witnesses whose ccuracy is highly suspect, why should d to respond?

he of the adversary system of justice is been that the citizen is not required to erely because an accusation has been

no court has rendered a decision of re that would permit a fact-finder to inference from the failure to respond. I stitutional scholar who has proposed e British system into the Constitution. , I attended a meeting of the American al Lawyers in London. We met with Counsels at the Middle Temple and ithout exception they derided the new fact-finders to draw an inference from e of an accusation. The concerns of the s ranged from the ability of the police uspects to the inability of clients to ses to accusations, both of course in a setting.

HER PEOPLE believe that silence is a ce to say nothing or a shield is correct-n a courtroom by the traditional in-ction that silence does not allow any ence. Juries are also shielded from the witness has invoked the Fifth Amend-o inference should be drawn from that ell.

pal in a trial is the search for truth. The e accused had something to hide when olice in a hostile setting is only one of which might be drawn from silence. path on the road to truth is to contin-s recognize this, and be instructed to ce at all.

YES

BY JAMES D. ZIRIN

WHEN AN ARTICLE I wrote appeared in *Forbes* recently, suggesting that interpretations of the Fifth Amendment be "updated" to permit an inference to be drawn from a witness's election to remain silent and not cooperate with an inquiry, the wrath of a certain element of the criminal defense bar fell on my head.

In fact, the criticism is unwarranted. I categorically support the value of the Fifth Amendment that no one should by testimonial compulsion be required "to be a witness against himself." And my suggestions for improvement, if adopted, would apply equally to all without regard to race, color or creed — to Mark Fuhrman as well as O.J. Simpson; to the FBI shooter at Ruby Ridge as well as the mobster kingpin.

The proposal is simply this. We should reexamine the judge-made rule that the fact-finder in a criminal case may draw no inference from silence in situations where the accused is given a fair opportunity to explain. Silence, as we all know, is suspicious. In certain circumstances, it may be damning. Provided the circumstances of the interrogation afford adequate safeguards against browbeating, coercion, a perjury prosecution or misquotation, we should allow the fact-finder to draw an adverse inference from silence just the way we all do. This may involve the right to have a lawyer present during the inquiry.

The proposal does not impact civil cases since the fact-finder in a civil case may now draw an unfavorable inference from the invocation of the Fifth Amendment. After all, the Constitution says that "no person . . . shall be compelled *in any criminal case* to be a witness against himself . . . ." (emphasis mine). And it is the fashion nowadays to construe controlling language strictly.

This suggestion is not off the wall. The British overhauled their version of the protection in 1994 to provide by Act of Parliament that an adverse inference may be drawn at trial from a suspect's refusal to speak when questioned by authorities. In Britain, an arrest is accompanied by a warning that the suspect need not say anything but "it may harm your defense if you do not mention something which you may later rely on in court." While the European Court of Human Rights is considering two cases that will test the procedure, an eminent barrister I know, close to the litigation, says that British lawyers are well satisfied with the results — at least in non-jury cases.

The proposal has also gained acceptance in this country. An outstanding jurist, the late Vincent L. Broderick of the Southern District of New York, whom I personally knew as a staunch defender of human rights, believed that silence could be used against an accused provided the questioning was not under oath, the silence was not punishable by contempt, the questioning was not coercive, a lawyer was present (or presence waived) and a transcript was made (*Theriot v. Senkowski*, 802 F.Supp. 1081, 1083 n.1 (SDNY 1992)).

The Broderick suggestion requires no revolution and no constitutional amendment. Indeed, it is consistent with current interpretations of the Constitution. As noted, what the Constitution forbids is compelled testimonial self-incrimination. This means self-incrimination in words. Current law permits the government to force the accused to try on a hat or a glove, give a blood, fingerprint or handwriting sample, or even speak so that a witness may hear the voice. If such evidence can be validly commented upon by the prosecution, why not silence?

The suggestion may be of great benefit to suspects. Under the present system, a public official or investment banker who is under suspicion may prefer to "take the Fifth" rather than to run the risk of a perjury prosecution, a contempt citation or a misinterpretation of the answers by inquisitors. Silence, however, if made known, may lead to public disgrace prejudicing the right to a fair trial or to continue with a worthwhile livelihood. Under the Broderick proposal, a possibly embarrassing explanation may stave off an unjust indictment and save a deservedly good reputation, as well as eliminate the burden of staggering defense costs.

At present, prosecutors often rely unduly upon sting operations, informants and undercover agents all too ready to entrap the unwary innocent, in order to make a dubious case. This is surely a greater enemy of civil liberties than a modest reinterpretation of our rigid approach to the implications of silence. The Broderick proposal offers a reduced need for such questionable practices since prosecutors will know that the accused's explanation might be secured at the outset.

Finally, the proposal will permit the jury to infer what the public assumes anyway — that silence is not golden; it is often incriminating. This is because the very

LETTERS

To the Editor

Additional Comment On Lanham Act Suit

As the attorney who represented Robert J. Groden in his litigation against Random House Inc., *The New York Times* and Gerald Posner, I was interested to read the article, "Federal Fight Against Fraud," in the special insert on Intellectual Property (*NYLJ*, Dec. 4). There is neither reasonable basis nor excuse for the article's emotionally charged statement concerning the Second Circuit's opinion in Mr. Groden's case that, "the court refused to allow the Lanham Act to be *subverted* to 'resolve all public controversies' when the plaintiff clearly was not interested in remedying commercial harm, the sine qua non of an actionable Lanham Act claim. (emphasis supplied)" This is not what the Second Circuit said, and is nonetheless completely inaccurate in light of the facts in the Record on Appeal and appellate briefs. Among other harms, in his complaint and in his affidavits, Mr. Groden claimed serious and substantial commercial damages. These included lost sales of a book that he published through Viking/Penguin in the fall of 1993, which competed directly in the marketplace with Mr. Posner's book. He also claimed for loss of lecture bookings, which formed a significant portion of his income; also, loss of sales of a companion video for his new book.

For the first time in history, substantial relevant, competent and admissible evidence was presented to a court of law through the affidavits of medical experts, official government documents (including eye- and ear-witness accounts), and nearly two dozen film exhibits on videocassette to support Mr. Groden's contention that President John F. Kennedy was shot by at least two gunmen, and that the defendants' advertising campaign was literally and explicitly false, disparaging and anticompetitive. Initially, notwithstanding our written offer of proof, the district judge refused to allow us to submit this material in opposition to the defendants' motion to dismiss under Rule 12(b)(6) or, in the alternative, for summary judgment. I had to bait that judge and trick him into giving me an opportunity to submit it to the record, where legal scholars and historians may now examine it. The sole basis of the dismissal of Mr. Groden's action was the unwillingness of the courts, under the rubric of the fact/opinion dichotomy, to allow him to litigate the falsity of the advertisement. When comparing the Groden case to Judge Charles S. Haight's evaluation of virtually identical advertising language in *Cuisinarts Inc. v. Robot-Coupe, Int'l Corp.*, No. 81 Civ 731 (CSH), slip op. (SDNY, Dec. 7, 1981 (LEXIS, Genfed Library, Dist file), what is "clear" is that this man was penalized for the particular frame of reference of his commerce. It is wholly unwarranted, however, to charge him with attempting to "subvert" the Lanham Act. First, it is still an open question whether this Circuit does or does not agree with the Third Circuit's Opinion in *U.S. Healthcare Inc. v. Blue Cross of Greater Philadelphia*, 898 F2d 914 (3d Cir.), cert. denied, 498 U.S. 816 (1990), holding that advertisers should not be permitted to immunize false or misleading information from Lanham Act regulation simply by including references to controversial public issues. Second, from a cold, objective and logical standpoint, I defy any reader of this newspaper to come up with a cogent and persuasive explanation based on statutory interpretation why this litigant's claim did not properly lie under the Lanham Act. In this connection, I also direct the bar's attention to *United States v. Ninety-Five Barrels, etc. of Vinegar*, 265 U.S. 438, 442, 68 L.Ed. 1094, 44 S.Ct. 529 (1924), and *Murray Space Shoe Corp. v. Federal Trade Commission*, 304 F2d 270, 272 (2d Cir. 1962), both holding that, where an advertisement is susceptible of two meanings, one of which is true and the other false, then it shall be construed in plaintiff's favor as false.

Roger Bruce Feinman
Briarwood, N.Y.