

GUILT AND THE CONSCIOUSNESS OF GUILT: THE USE OF LIES, FLIGHT AND OTHER 'GUILTY BEHAVIOUR' IN THE INVESTIGATION AND PROSECUTION OF CRIME

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[This article explores the idea that the accused's guilt can be determined by examining his or her behaviour in the aftermath of a crime and during its investigation. The behaviour discussed includes lying, disposing of evidence, exercising the right of silence, refusing to co-operate with the investigation, failing to deny an accusation of guilt, and fleeing the scene of the crime or the jurisdiction. The article shows how each of these different kinds of 'guilty behaviour' can support an inference of guilt, and identifies the circumstances which might make such an inference unsafe. This analysis reveals that all 'guilty behaviour' depends for its relevance on similar psychological generalisations, and requires for its use the same distinctive inferential process. It therefore forms — the article argues — a single broad class of circumstantial evidence, a fact obscured by the traditionally fragmented treatment of evidence of guilty behaviour.]

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I INTRODUCTION

If asked to decide which of two people committed a crime, one of the first things we would want to know is how each of them had behaved after the crime was committed, how each had reacted to any suggestions that they may have been responsible for it, how each had responded to any questioning about their possible involvement. What makes this information seem relevant to our hypothetical inquiry is the widely-held belief that the guilty and the innocent behave differently. For this reason, police investigating a crime are likely to closely scrutinise the behaviour, reactions and emotional states of the possible suspects in order to form conclusions about the likelihood of each of them being guilty or innocent of the crime. But in the criminal trial, 'guilty behaviour' appears to play a much smaller role; indeed, apart from well-recognised examples of guilty behaviour such as lies, flight or silence in the face of accusations of guilt, the explicit admission of such evidence is either rare or unreported. Moreover, the inferential processes involved in the use of such evidence tend to be blurred by the fact that these recognised examples of guilty behaviour are generally discussed in the textbooks under headings such as 'Corroboration' or 'Implied Admissions' or 'Admissions by Conduct'.¹ Not only does this treatment direct attention towards technical issues which have little or no bearing on the probative value of the evidence or on the way in which it should be used, it also obscures the fact that the well-recognised examples of guilty behaviour are just that: examples of a much broader class of potential circumstantial evidence.

¹ See, eg, J D Heydon, *Cross on Evidence* (5th Australian ed, 1996) [15200]–[15225], [33435], [33470]–[33505]; Andrew Ligertwood, *Australian Evidence* (2nd ed, 1993) [4.39]–[4.40].

One of the aims of this article, therefore, is to establish the existence of guilty behaviour as a single broad class of circumstantial evidence.² This can only be done by closely examining the various kinds of guilty behaviour and the ways in which they can be used by the jury in a criminal trial as the basis for an inference that the accused is guilty as charged. The analysis suggests that there are two features which unite and define the class of evidence as a whole. The first is that the requirement of relevance is the only barrier to the admissibility of evidence of guilty behaviour. Guilty behaviour does not, in other words, fall within the scope of any of the exclusionary rules of the law of evidence. The second unifying feature is that the different kinds of guilty behaviour all depend for their relevance on the same or similar psychological generalisations and require the same distinctive process of reasoning. These common features aside, it has to be conceded that the different kinds of guilty behaviour are highly diverse, do raise distinct issues, and do vary enormously in their probative value.

In structural terms, the article is divided into three main parts. The first — ‘The Prosecutorial and Investigative Uses of Guilty Behaviour’ — describes the two contexts in which guilty behaviour is used to form conclusions about a person’s guilt, namely the criminal investigation and the criminal trial. This part of the article attempts to establish, among other things, that the requirement of relevance is indeed the only test for the admissibility of this class of evidence. The second part of the article — ‘Inferring Guilt From Guilty Behaviour’ — lays bare the inferences involved in the use of guilty behaviour as evidence of guilt, arguing that a double inference of guilt from guilty state of mind, and of guilty state of mind from guilty behaviour is almost always necessary. It also attempts to describe, in a general way, some of the uses which can be made of guilty behaviour, and some of the circumstances which might make those uses unsafe. The third part of the article — ‘Five Categories of Guilty Behaviour’ — contains a detailed examination of several different kinds of guilty behaviour. It shows how each category of behaviour might be capable of supporting an inference of guilt, and identifies any possible innocent explanations for the behaviour, explanations which would need to be considered by the jury before any such inference could be drawn.

II THE PROSECUTORIAL AND INVESTIGATIVE USES OF GUILTY BEHAVIOUR

A Guilty Behaviour as Evidence of Guilt

Guilty behaviour is, if anything, circumstantial evidence of guilt, of a kind which Wigmore would classify as ‘retrospectant’; that is, where the evidence

² Although the focus of the article is restricted to criminal trials and the question of guilt, similar questions can arise in civil cases as well: see, eg, *Jones v Dunkel* (1959) 101 CLR 298 (a party’s failure to lead evidence may lead to an inference that the evidence would not have assisted that party’s case); *G v H* (1994) 181 CLR 387 (likely father’s refusal to take a paternity test justifying an inference that he was in fact the father).

points backwards to the commission of the crime.³ In this section of the article I will examine the legal rules which determine the admissibility of such evidence, and will argue that the only barrier to the admissibility of evidence of guilty behaviour is the requirement of relevance. The use of the phrase 'guilty behaviour' should not, however, be taken to suggest that 'guilty behaviour' is always associated with actual guilt; on the contrary, one of my purposes in the subsequent sections of the article will be to show why an inference of guilt from guilty behaviour is not always safe.

1 *The Test for Admissibility*

The fundamental test for the admissibility of evidence is the test of relevance: would the information, if accepted, render more or less probable the existence of the facts in issue?⁴ On this test, guilty behaviour should be admissible to prove guilt if we can say that the fact that the accused behaved in a particular way renders more probable the fact of their guilt. The fact that the guilty behaviour might also be classified as an 'implied admission' of guilt or as 'corroboration' should not in itself raise any additional barriers to admissibility. The question of whether a particular piece of behaviour amounts to an 'implied admission' of guilt can, for example, be seen as just another way of asking whether the person has behaved in the manner that one would expect a guilty person to behave.⁵ Similarly, the restrictions on the use of lies as corroborative evidence are really just designed to ensure that the correct inference from the lie is that the accused has shown a consciousness of guilt.⁶ In other words, most of the legal learning about the well-recognised examples of guilty behaviour is best viewed as a series of context-specific manifestations of the requirement of relevance.

2 *Guilty Behaviour and the Hearsay Rule*

Unfortunately, the fact that recognised examples of guilty behaviour are often referred to as 'implied admissions' or 'admissions by conduct', does tend to raise the spectre of the hearsay rule. It would indeed be possible to argue in respect of much of the evidence discussed in this article that it is being used to prove the truth of a belief which can be inferred from it.⁷ That being so, the evidence might be held to fall within the scope of the hearsay rule, albeit that it would then be admissible under the exception to the hearsay rule which applies to admissions made by accused persons in criminal proceedings. In my view, the pointless complexity of this exercise demonstrates the extent to which the

³ John Wigmore, *Wigmore on Evidence* (3rd ed, 1940) [43].

⁴ This common law requirement of admissibility is restated in ss 55–6 of the Evidence Act 1995 (Cth) and the Evidence Act 1995 (NSW) (hereinafter referred to as 'the uniform evidence legislation').

⁵ See below Part III(C).

⁶ See below Part III(A)(2).

⁷ Cf Andrew Palmer, 'Hearsay: A Definition that Works' (1995) 14 *University of Tasmania Law Review* 29, 30 where the hearsay rule at common law is defined in the following terms: 'An out-of-court act is inadmissible as evidence of the truth of any belief which is asserted by or which can be inferred from that act'.

definition of hearsay at common law has become divorced from the rule's rationale.⁸ The better view is surely that guilty behaviour is used circumstantially, rather than testimonially, and therefore falls outside the scope of the hearsay rule.⁹ Fortunately, 'implied admissions' and 'admissions by conduct' clearly fall outside the definition of the hearsay rule contained in s 59 of the uniform evidence legislation.

What is less clear, however, is whether the evidence discussed in this article would fall within the scope of the rules — contained in Part 3.4 of the uniform evidence legislation — which determine the admissibility of admissions. An admission is defined in the legislation's 'Dictionary' provisions as a 'previous representation' which is 'adverse to the person's interest in the outcome of the proceedings'. Representation is defined broadly to include 'an express or implied representation' and 'a representation to be inferred from conduct'. On the basis of this definition, Odgers suggests as examples of implied representations 'flight from the jurisdiction, attempts to suborn witnesses, lies on a material issue ... [and] silence in response to questioning'.¹⁰ That lies or flight or silence can even arguably be described as 'representations' confirms, for myself anyway, the fact that the extension of the hearsay rule to 'implied assertions' is likely to leave an enduring legacy of distorted thinking. In the case of a lie, for example, we are being asked to accept that by making a false exculpatory statement the accused is actually making an 'implied representation' to the effect that 'I am guilty'. This is absurd. The better view is surely that lying, fleeing the jurisdiction, and failing to deny an accusation of guilt are simply circumstantial evidence from which guilt can be inferred. This being so, consideration of the hearsay rule at common law and of the admission rules under the uniform evidence legislation should be entirely unnecessary. The only test to be applied should be that of relevance.

3 *Satisfying the Requirement of Relevance*

With much guilty behaviour, however, the requirement of relevance will often be difficult to satisfy because of the fact that guilt can not usually be inferred directly from guilty behaviour. For example, it might be argued that the fact that a person has lied about their involvement in a crime renders it more probable that they are guilty of the crime. But as soon as one asks why lying suggests guilt, or considers the possibility that there might be other explanations for the lying, it can immediately be seen that the process of reasoning must be broken

⁸ The specific application of the hearsay rule to silence in the face of accusations of guilt is discussed in Part III(C).

⁹ Wigmore, *Evidence*, above n 3, [1025]; Ligertwood, above n 1, [8.82]; Palmer, 'Hearsay', above n 7, 47–61. Cf *Walton v The Queen* (1989) 166 CLR 283, 304, where the distinction between hearsay and original evidence was defined as being 'between evidence of conduct which, even though it may contain an assertion, is tendered as a relevant fact or a fact relevant to a fact in issue and is therefore admissible and evidence of conduct which has no probative value other than as an assertion and is therefore not admissible.' For a specific ruling that lies are not hearsay, see *Mawaz Khan v The Queen* [1967] 1 AC 454, 462.

¹⁰ Stephen Odgers, *Uniform Evidence Law* (2nd ed, 1997) 137, n 158.

down into two steps.¹¹ First, the guilty behaviour must be used to establish that the accused had a particular 'guilty' state of mind.¹² Only if the existence of this state of mind is accepted as the correct explanation for the behaviour can the behaviour be used as the basis for the second step: an inference of guilt, drawn from the existence of the guilty state of mind, rather than from the behaviour itself.¹³ If the use of the evidence cannot be broken down in this way, then it is doubtful that it provides the basis for a proper inference, as opposed to mere speculation;¹⁴ and if we can only speculate about the significance of a particular item of information then it must clearly fail the test of relevance.

Even when the use of the evidence can be broken down into the two inferences above, the strength of each of the inferences will vary from case to case, depending on the ambiguity of the conduct, and the cogency of the state of mind whose existence it suggests. It may be difficult to safely infer a relevant state of mind from the behaviour in question; and even if a particular state of mind can be inferred, the inference from that state of mind to guilt itself may still be doubtful. Both inferences will depend, to a large degree, on psychological generalisations. The difficulty of explaining precisely why a particular piece of behaviour makes guilt more probable means that a person's guilty behaviour will often be regarded by lawyers as having only very slight, if indeed any, relevance to the question of guilt. This no doubt explains why an examination of reported cases reveals a general absence of several of the kinds of guilty behaviour discussed in the third part of the article.

As with any item of circumstantial evidence, there will often be an innocent explanation for guilty behaviour. If the evidence is admitted, then it is of course for the jury, rather than the judge, to decide which of two possible explanations — the guilty or the innocent — is to be believed. But before the evidence can be admitted, it must be held to be relevant. Wigmore suggests that where circumstantial evidence is open to both innocent and guilty explanations, then the test for determining the relevance of the evidence can be stated in one of two ways.¹⁵ On the first, and stricter view, the question the court must ask is this: 'Does the evidentiary fact point to the desired conclusion (not as the only rational hypothesis, but) as the hypothesis (or explanation) more plausible or more natural out of the various ones that are conceivable?' In other words, the evidence will only be admissible if the guilty explanation is the *most* plausible explanation. On the second, and less strict view, the question for the court to ask is this: 'is the desired conclusion (not the most natural, but) a natural or plausible one among the various conceivable ones?'

Some support for the stricter test can be found in *Edwards*, a case about lies. There, a majority of the High Court held that the jury 'should not have been

¹¹ Wigmore, *Evidence*, above n 3, [173]; *R v Godlewski* [1994] 3 WWR 153, 160.

¹² This inference is discussed in detail below Part II.

¹³ This inference is also discussed in detail below Part II(A).

¹⁴ Cf *Holloway v McFeeters* (1956) 94 CLR 470, 476–7.

¹⁵ Wigmore, *Evidence*, above n 3, [32] (emphasis removed).

invited to use the [appellant's lie] either as independent evidence of guilt or as evidence corroborating the account given by [the complainant]' because 'the innocent explanation for that lie was so plausible that the lie could not have been probative of guilt'.¹⁶ In other words, the plausibility of the innocent explanation deprived the guilty behaviour of any probative value it might otherwise have had. Their Honours made no comment about the *relative* plausibility of the guilty and innocent explanations; nevertheless, the ruling does perhaps suggest that evidence of guilty behaviour should be excluded as irrelevant unless the guilty explanation for the evidence is significantly more plausible than any innocent ones. At the very least, it suggests that the existence of a plausible innocent explanation can prevent evidence of guilty behaviour from satisfying the requirement of relevance. I would submit that evidence of guilty behaviour should also be held irrelevant if there is no rational basis for the jury to choose between the guilty and innocent explanations. Alternatively, a court unwilling to go so far as to make a finding of irrelevance could instead exclude the evidence on discretionary grounds, as more prejudicial than probative.¹⁷

4 *Directing the Jury About the Use of Guilty Behaviour*

If the guilty behaviour is left for the consideration of the jury, then there remains the question of how they are to be instructed about its use. In *Edwards* the High Court stated that 'the jury should be instructed that there may be reasons for the telling of a lie apart from the realization of guilt', and should be told what those reasons are.¹⁸ The same must be true for every other form of guilty behaviour. No matter what kind of guilty behaviour is being offered in evidence, therefore, the trial judge should inform the jury of all of the possible innocent explanations for an accused person's apparently guilty behaviour. It is for this reason that the third part of the article spends a considerable amount of time identifying what those explanations are.

The degree to which the jury must be satisfied that the guilty explanation is the correct explanation does, however, depend on the role that the evidence is performing in the prosecution case. If the guilty behaviour is either the only evidence of guilt or the only evidence capable of proving one of the elements of the offence then it will be an indispensable link in a 'chain' of proof. In such, no doubt rare, cases, the jury will only be able to find the accused guilty beyond reasonable doubt if they are able to eliminate as unreasonable all innocent explanations for the behaviour.¹⁹ In other words, a guilty verdict will only be open if the jury is satisfied beyond reasonable doubt that the guilty explanation

¹⁶ *Edwards v The Queen* (1993) 178 CLR 193, 212–3 ('*Edwards*').

¹⁷ See, eg, *The Queen v Bridgman* (1980) 24 SASR 278, where evidence of flight was excluded in the exercise of discretion, in large part because the judge found convincing an explanation of the flight consistent with innocence of the crime charged. The common law discretion to exclude evidence on these grounds is retained in ss 135 and 137 of the uniform evidence legislation.

¹⁸ *Edwards* (1993) 178 CLR 193, 211.

¹⁹ See, eg, *Michael Jeffrey Rice* (1996) 85 A Crim R 187, 204 ('*Rice*').

for the behaviour is the correct explanation. If, on the other hand, the guilty behaviour is a strand in a 'cable' of proof (as it usually will be), then the behaviour 'may be considered together with the other evidence and for that purpose does not have to be proved to any particular standard of proof'.²⁰ This means that in most cases the jury will be able to use guilty behaviour as evidence supporting an inference of guilt even though they are unable to positively eliminate as unreasonable all of the possible innocent explanations for the behaviour in question.

B *Guilty Behaviour in the Investigative Process*

The fact that a suspect's guilty behaviour might fail to qualify as evidence of guilt does not mean, however, that it has no legitimate role to play during the investigative stage of criminal proceedings. This is because the purposes of a criminal investigation and a criminal trial are fundamentally different. A criminal investigation is essentially a search for evidence, and there are no limitations on the nature of the information which an investigator may take heed of when deciding where to search (although there are, of course, restrictions on *how* the search may be carried out). One of the first questions asked during a criminal investigation, for example, will not be 'is this person guilty?', but 'is this person worth investigating as a suspect?' In answering such a question, hunches, intuition, gossip, hearsay, and the person's criminal record may all legitimately guide the criminal investigator. Criminal investigators, unlike courts, are perfectly entitled to act upon material which is merely capable of raising suspicion.

1 *Using Guilty Behaviour to Determine Guilt or Innocence*

It should not therefore be surprising that criminal interrogation manuals indicate that a suspect's guilty behaviour can play a very significant role in helping an investigator to decide whether to consider someone a suspect, and can form the basis for the investigator's own decision about the guilt or innocence of a suspect. For example, Inbau, Reid and Buckley, authors of the leading criminal interrogation manual,²¹ suggest that interrogators should begin their interrogation of a suspect of 'doubtful guilt' with a 'behavioural analysis interview', the core of which is 'the asking of non-investigative questions that are specifically

²⁰ *Edwards* (1993) 178 CLR 193, 210. See also David Hamer, 'The Continuing Saga of the Chamberlain Direction: Untangling the Cables and Chains of Criminal Proof' (1997) 23 *Monash Law Review* (forthcoming). For an illustration, in the context of judicial directions about the use of lies, of the confusion which courts are still experiencing despite the High Court's attempted clarification in *Shepherd v The Queen* (1990) 170 CLR 573 of its earlier decision in *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 ('Chamberlain'): cf *Jeffrey v The Queen* (1991) 60 A Crim R 384 with *Ucler Akbulat* (1993) 69 A Crim R 75.

²¹ See, eg, Barrie Irving and Linden Hilgendorf, *Police Interrogation: The Psychological Approach*, Royal Commission on Criminal Procedure, Research Study No 1, London (1980) 19, 52; Gisli Gudjonsson, *The Psychology of Interrogations, Confessions and Testimony* (1992) 31.

designed to evoke behavioural responses'.²² Some of the details of the behavioural responses analysed under this approach are discussed under the various categories of guilty behaviour identified in the third part of the article; for the moment it is sufficient to note that the behavioural analysis is founded on a belief that a person's guilt or innocence can be determined by an analysis of their behaviour during interrogation.

The investigators' determination of guilt or innocence is clearly of the utmost importance in determining the course of an investigation. If the investigators become convinced that a particular suspect is innocent, then they are likely to pursue other avenues of inquiry, even if there is some evidence tending to implicate that suspect.²³ If, on the other hand, the investigators form the view that a particular suspect is guilty then they are likely to focus their attentions on that suspect. If the determination of guilt is incorrect, then at best this will merely cause inconvenience to an innocent person, in the sense that they will remain the subject of the investigation or interrogation, until the suspicions are resolved or the police accept that any prosecution will fail for a lack of evidence.²⁴ At worst, the police may take measures to overcome what they perceive to be the deficiencies in the evidence and thereby create a risk of wrongful conviction.²⁵ Given that a common thread in many miscarriages of justice is an erroneous belief by the police in the guilt of a particular person, the importance of the police attitude towards the guilt or innocence of a suspect can scarcely be overstated.

2 *Using Guilty Behaviour as a Means of Procuring a Confession*

Another possible investigative use of a suspect's guilty behaviour is as a means to confession. The overall strategy of Inbau, Reid and Buckley's approach to interrogation, for example, is to lead the suspect to a perception that the negative consequences of confession are less undesirable than the negative consequences of non-confession. This requires the interrogator to psychologically manipulate the suspect so as 'to decrease the suspect's perceptions of the consequences of confessing, while at the same time increasing the suspect's

²² Fred Inbau, John Reid and Joseph Buckley (eds), *Criminal Interrogation and Confessions* (1986) 63. One such question is detailed in below n 53.

²³ A tendency warned against: *ibid* 5. A few pages later, however, they give a warning of directly opposite effect: *ibid* 21.

²⁴ See, eg, Barrie Irving, *Police Interrogation: A Case Study of Current Practice*, Royal Commission on Criminal Procedure, Research Study No 2, London (1980) 126: 'In the absence of other sufficient evidence and depending on the seriousness of the crime (and sometimes on the reputation of the suspect), serious interrogation will go on until either the suspect resolves police suspicion (by explanations or admissions) or the officer in charge exhausts his patience, or his repertoire of techniques, or both'.

²⁵ See, eg, the evidence of Detective Senior Constable Duncan Demol to the NSW Police Royal Commission: Rachel Gibson, 'Evidence was Fixed, Hearing Told', *The Age* (Melbourne), 5 July 1995, 5. Detective Senior Constable Demol told the Commission that police regularly met in sessions called 'scrum-downs' to cover up holes in the evidence. He added that 'he had not shored up prosecution evidence unless he believed a person was guilty, but he agreed that this required that he make his own judgment of guilt or innocence'.

internal anxiety associated with his deception'.²⁶ There are a variety of methods of increasing the suspect's anxiety levels;²⁷ but one of the most effective is to deprive the suspect of any confidence that his or her deception is being believed. A suspect's guilty behaviour provides one of the means of depriving them of this confidence. For example, Inbau, Reid and Buckley claim that a 'suspect who has been caught in a lie about some incidental aspect of the occurrence under investigation loses a great deal of ground; thereafter, as the suspect tries to convince the interrogator that he is telling the truth, he can always be reminded that he was not telling the truth just a short while ago.'²⁸ This will bring the suspect much nearer the confession stage. Similarly, in an earlier edition of their work, Inbau and Reid suggested that if the suspect displays any of the 'physiological and psychological indicators of deception'²⁹ then this should be brought to their attention:

An offender who is led to believe that his appearance and demeanour are betraying him is thereby placed in a much more vulnerable position. His belief that he is exhibiting symptoms of guilt has the effect of destroying or diminishing his confidence in his ability to deceive and tends to convince him of the futility of further resistance.³⁰

The anxiety which can be caused by this, and the pressure it places on a deceitful suspect, is vividly conveyed in Dostoyevsky's *Crime and Punishment*, by Raskolnikov's attempts to engage the examining magistrate Porfiry in conversation without sounding guilty:

'I believe that you said yesterday that you would like to question me — formally — about my relations with the — the murdered woman,' Raskolnikov began again. 'Why did I put in *I believe*,' it flashed through his mind. 'But why am I so worried about having put in that *I believe*,' another thought immediately flashed through his mind. And he suddenly felt that his suspiciousness had assumed quite monstrous proportions from the mere contact with Porfiry,

²⁶ Brian Jayne, 'The Psychological Principles of Criminal Interrogation' in Inbau, Reid and Buckley, above n 22, 327, 332. The use by British police of the interrogation techniques suggested by this approach has been confirmed by Paul Softley, *Police Interrogation: An Observational Study in Four Police Stations*, Royal Commission on Criminal Procedure, Research Study No 4, London, (1980) 76–84, and by Irving, above n 24, 138–50. The major finding of the latter report was to 'confirm that that the kinds of techniques which were predicted from a review of the psychological literature', reported in Irving and Hilgendorf, above n 21, 'are in fact used, and that there are many similarities between what is taught to American detectives and what happens in the interview rooms at Brighton Police Station.' A subsequent study reported that the procedural requirements introduced by the Police and Criminal Evidence Act had initially led to a drastic fall in the use of such tactics, but that by 1987 their use was again on the rise as police officers became more comfortable with the requirements of the Act: Barrie Irving and Ian McKenzie, *Police Interrogation: The Effects of the Police and Criminal Evidence Act 1984* (1989) 172–8.

²⁷ Jayne, above n 26, 342–5.

²⁸ Inbau, Reid and Buckley, above n 22, 128 (gendered language in original).

²⁹ These are discussed below Part III(A)(1).

³⁰ Fred Inbau and John Reid, *Criminal Interrogation and Confessions* (1962) 29. See also Robert Royal and Steven Schutt, *The Gentle Art of Interviewing and Interrogation: A Professional Manual and Guide* (1976) 119–21, dealing with various techniques under the heading 'Undermine Suspect's Confidence of Success'.

from only two words, from a few glances, and that that was terribly dangerous: his nerves were becoming frayed and his agitation was increasing.³¹

Anxiety and the sense of uncertainty it creates — rather than feelings of guilt — are ultimately the primary emotional route to confession.³² A suspect's guilty behaviour can be used to increase their levels of anxiety and so make confession more likely.

III INFERRING GUILT FROM GUILTY BEHAVIOUR

In the previous part of the article I argued that applying the test of relevance to evidence of guilty behaviour will usually require the inference of guilt from guilty behaviour to be broken down into two distinct inferences. This part of the article examines in detail each of the two inferences required: first, an inference of guilty state of mind from the guilty behaviour; and secondly an inference of guilt itself from the guilty state of mind. The two inferences are, however, approached in the opposite order.

A *Inferring Guilt from Guilty State of Mind*

The reason why a person's post-crime behaviour might be thought relevant to the question of their guilt is because that behaviour provides clues to their state of mind; and the reason why a person's post-crime state of mind might be thought relevant to the question of their guilt is because, as Wigmore suggests, the commission of a crime can be expected to leave some 'mental traces' on the criminal:

The struggle of a victim for his life, and the act of taking his life, may leave upon the perpetrator indelible traces of blood, wounds, or rent clothing, which point back to the deed as done by him; these traces come from a mechanical contact with the body, weapons, and other things involved in the deed, and they remain upon him or are divested from him by a mechanical process. But a deed may also leave traces upon the doer through other than a mechanical process, *ie* through a *mental* or *moral*, *ie* *psychological* process. These traces may be as

³¹ Fyodor Dostoyevsky, *Crime and Punishment* (1951 translation by Stuart Gilbert) 348. Cf Arthur Aubrey and Rudolph Caputo, *Criminal Interrogation* (1980) 45: 'the fear of the various punishments which await them naturally contributes to their remaining silent. But, they pay for their silence with bodies and minds, their souls, their entire existence shrunken and warped in fear, anxiety and other emotions that tear and rip at them all the time.' For another vivid 19th century description of the psychological pressures leading to confession, see the prosecutor's jury address in *Commonwealth of Massachusetts v John Francis Knapp*, VII American State Trials 395 (1830), reproduced in Wigmore, *Evidence*, above n 3, [276].

³² Irving, above n 24, 133. A non-emotional route is the use of techniques which appeal to common sense and reason rather than emotion, and which are 'designed to convince [the suspect] that his [*sic*] guilt already is established or that it soon will be established and, consequently, there is nothing else to do but admit it': Inbau, Reid and Buckley, above n 22, 78. This kind of evidence-based approach was found to be the most common catalyst for confession in a study of Icelandic prisoners who had confessed; 55% of the prisoners said they had confessed because they believed that the evidence against them meant that the police would be able to prove their guilt anyway: Gudjonsson, above n 21, 77–8. See also Geoffrey Stephenson and Stephen Moston, 'Attitudes and Assumptions of Police Officers when Questioning Suspects' (1993) 18 *Issues in Criminological and Legal Psychology* 30, 33.

significant in their way as the others, — perhaps more so; and they may be equally relevant evidentially to show their bearer to be the doer of the act.³³

I will consider three different mental traces which the commission of a criminal act might leave on its perpetrator: consciousness of guilt; feelings of guilt; and feelings of shame.

1 *Consciousness of Guilt*

The first kind of mental trace is simply knowledge of the fact of guilt: if I did it, then I should know that I did it. This is what is meant by the phrase ‘consciousness of guilt’. Consciousness of guilt says nothing about how the perpetrator might feel about the fact of his or her guilt: that is, the perpetrator of a crime can be *conscious* of his or her guilt without suffering any *feelings* of guilt, although the two may often in fact be found together.³⁴ When using a person’s consciousness of guilt to identify him or her as the perpetrator of a crime we rely on an assumption that people are generally not mistaken when it comes to their own actions. If, in other words, a person thinks that they committed a crime, then they are probably right.

Nevertheless, Wigmore’s claim that ‘the only other hypothesis conceivable is the rare one that the person’s consciousness of guilt is caused by a delusion, and not by the actual doing of the act’³⁵ slightly overstates the matter. Ignorance of the law or uncertainty about how it would be applied could conceivably lead an innocent person to erroneously believe themselves to be guilty of a crime. A person might, for example, believe themselves to be guilty of murder or manslaughter when in fact a defence such as self-defence was available to them. I will return to this point shortly.

Another explanation to which consideration must be given is the possibility that a person might be conscious of their guilt of a crime other than that under investigation. A suspect might, for example, lie not to conceal his or her involvement in the crime under investigation, but to conceal his or her involvement in some other crime. The accused in *Woon*, for example, denied knowing his alleged accomplice Radcliffe, when in fact he knew him well, and had sent several secretly-coded telegrams to him. Windeyer J was happy to concede that this evidence might provide the foundation for an inference that the accused was engaged with Radcliffe in some criminal enterprise, but denied that it was capable of proving beyond reasonable doubt that the accused was a participant in the specific crime charged.³⁶ This was largely because there was no evidence connecting the accused to the crime charged, and in the absence of that evidence, no rational basis by which the jury could eliminate the possibility that the

³³ Wigmore, *Evidence*, above n 3, [172] (emphasis in original).

³⁴ This distinction is sometimes overlooked: see, eg. *Woon v The Queen* (1964) 109 CLR 529, 535 (*Woon*) where Kitto J uses the phrases ‘consciousness of guilt’ and ‘guilty conscience’ as if they were interchangeable. Presumably one would only be suffering from a ‘guilty conscience’ if one actually felt guilty about the matter in question.

³⁵ Wigmore, *Evidence*, above n 3, [173].

³⁶ *Woon* (1964) 109 CLR 529, 542–3.

accused's consciousness of guilt related to some other crime. Windeyer J commented that:

[T]he inference which can be drawn from conduct and demeanour that displays a consciousness of guilt may depend upon whether there is other evidence pointing to the accused as guilty of the offence charged. When there is, false accounts of movements, false denials of knowledge of relevant facts, any conduct, utterance or demeanour demonstrative of guilt may go far to support a conclusion that the accused committed the very crime charged. But when there is no other evidence implicating the accused, an attitude of guilt, without more, may mean only that the accused was a participant in some wrongdoing, not that he committed the crime alleged, in the manner and form alleged.³⁷

Of course, the actual decision in *Woon* — from which Windeyer J dissented — can arguably be cited for the proposition that the accused can be convicted solely on the basis that they have through their behaviour manifested a consciousness of guilt.³⁸ Of course, the correctness of this proposition is seldom likely to be tested, because in most cases consciousness of guilt evidence will merely be one part of the prosecution case. If a consciousness of guilt is all that connects the accused to the crime charged, however, then I would tend to agree with Windeyer J that any conviction is unlikely to be safe.

The fact that the accused's consciousness of guilt must relate to the crime charged does not, however, mean that the accused must be conscious of his or her guilt of a specific, legally-defined, charge. As the Victorian Supreme Court commented in *Woolley*:

There is no authority for the proposition that the accused must be found to have acted out of a consciousness of guilt of a particular offence where the wrongdoing may cover a number of possible charges. Thus, where a serious assault has taken place, it would be fanciful to make possible resort to the conduct in question by the jury depend on whether the accused had a consciousness of guilt of particular offences such as causing grievous bodily harm, or actual bodily harm or common assault. ... Rather the question is whether he is betraying a consciousness of guilt of being implicated in the *actus reus*, whether it be [a] killing or [a] robbery.³⁹

An accused person's likely ignorance of the finer details of the law, of the possibility of there being defences available to them, and of the exact nature of the charges which might arise on the facts, means that the 'guilt' of which an accused person might be conscious is not the same as the 'guilty' which a lawyer might, after carefully considering the facts of a case, declare the accused to be. Consciousness of guilt really just means consciousness of some wrongdoing. In the next section I will examine some of the ways in which consciousness of guilt evidence might be used to establish the facts in issue in a criminal trial.

³⁷ Ibid 541–2.

³⁸ See generally *Woon* (1964) 109 CLR 529.

³⁹ *Clive Samuel Woolley* (1989) 42 A Crim R 418, 423–4 ('*Woolley*').

2 Inferences from Consciousness of Guilt

Although the passage from *Woolley* above states that the question is whether the accused has betrayed a ‘consciousness of guilt of being implicated in the actus reus’, this should not be taken to suggest that consciousness of guilt evidence can only be used to establish the accused’s involvement in the *actus reus* of a crime, and cannot be used to prove *mens rea*. There are two reasons for this. First, in the actual context of a criminal trial, the points of contention between prosecution and defence may be defined in such a way that *actus reus* and *mens rea* are effectively inseparable. This is typically true of cases where the defence is one of identity. In an armed robbery trial, for example, there might be ample evidence of the commission of the crime, including video surveillance evidence, and the testimony of those present when the robbery occurred. The only issue would then be whether or not the accused was one of the perpetrators. If the accused lied in such a way as to manifest a consciousness of guilt in relation to the robbery then this could be used to prove the accused’s involvement in it. If the jury were satisfied that the accused was involved in the crime, then this would clearly carry with it proof of both *actus reus* and *mens rea*.

In other cases, the issue is whether the alleged crime occurred at all. In such cases, proof that the accused committed the *actus reus* will also provide the basis for an inference that the accused did so with the requisite *mens rea*. In the *Chamberlain* case, for example, the choice was effectively between a dingo and murder.⁴⁰ In practical terms, there was no room for the jury to find that the accused had caused the death of her child with a state of mind falling short of that required for murder. Similarly, in *Makin* the two accused were charged with the murder of an infant. The primary issue which the jury had to decide was whether the child had been killed, or had died of an accident or from natural causes. The court commented that ‘the secret disposition of [the child’s] body, and the falsehoods told by the prisoners, all pointed to the conclusion that they were concealing a crime’.⁴¹ In other words, the consciousness of guilt to be inferred from this behaviour provided the basis for an inference that the death of the child was the result of a crime — in the sense of both *actus reus* and *mens rea* — rather than being due to an accident or to natural causes.

The second reason why the use of consciousness of guilt evidence is not restricted to proof of the *actus reus* is that the criminal law’s general requirement of *mens rea* reflects our ordinary concepts of moral fault. This means that a person whose physical actions caused harm will not usually feel that they have done wrong unless they intended the consequences of their actions, or were reckless as to those consequences, or were simply careless. In short, the fact that a person is conscious of some wrongdoing will usually indicate the presence of what the law would describe as *mens rea*. Take, for example, a rape case where the accused had originally denied having had intercourse with the complainant.

⁴⁰ *Chamberlain* (1984) 153 CLR 521.

⁴¹ *R v Makin and Wife* (1893) 14 LR (NSW) 1, 13 (*‘Makin’*).

DNA comparison of a semen sample taken from the complainant with a blood sample taken from the accused might establish that intercourse had indeed taken place. In light of this evidence, the defence would be likely to shift to one of consent. The complainant would obviously testify that she had not consented to the intercourse. The issues for the jury would therefore be whether the intercourse had taken place without the complainant's consent, and whether the accused had been aware that it was taking place without the complainant's consent. In such a case, the accused's lie would not really be explicable by the mere fact of him having had intercourse with a woman who did not consent. If he did not know that the complainant had not consented then he would be unlikely to have been conscious of any wrongdoing in relation to the intercourse. Of course he might have lied out of a sense of panic, when he discovered after an act of intercourse which he had believed to be consensual, that the complainant was claiming that she had not consented. In other words, there might still be an innocent explanation for the lie. But another, and at least as plausible, explanation for the lie is that the accused lied because he knew that the complainant had not been consenting. If the jury preferred this latter explanation then they could clearly use the lie as the basis for an inference about the accused's *mens rea*.

Nevertheless, there are cases where an inference that the accused committed the *actus reus* with a specific state of mind would be dangerous. This is particularly true of cases where the same, or a similar, *actus reus* is shared by several offences, the difference between the offences instead being largely determined by the perpetrator's state of mind. In *Rice*, for example, the accused was charged with the murder, and in the alternative, the manslaughter of his then girlfriend.⁴² The deceased had disappeared after spending a weekend with the accused. The accused had told numerous lies in relation to his and the deceased's movements and whereabouts on the weekend in question, and had hidden her body. The body was eventually found by the police some four years later in a 44-gallon drum which had been left by the accused on a property belonging to an acquaintance. An obvious explanation for the accused's behaviour was that he was conscious of wrongdoing in relation to the death of the deceased. Why else would he have told the lies he told and have hidden the deceased's body? The evidence could clearly, therefore, have been used as the basis for an inference that the accused had caused the death of the deceased through some wrongful act. But how it could be used to prove that the wrongful act was performed with the *mens rea* for murder as opposed to manslaughter? The lies and the concealing of the deceased's body were equally consistent with the accused having caused the death of the deceased in circumstances which would amount only to the lesser charge.

Similar problems might also arise in cases where the accused claims to have acted in self-defence or under provocation. One could, of course, argue that

⁴² *Rice* (1996) 85 A Crim R 187.

notwithstanding any ignorance about the details of the criminal law, a person who had in fact acted in self-defence, or under provocation, would be less likely to be conscious of wrongdoing than a person who had not. On this reasoning, a consciousness of guilt could be used to rebut the claimed defence. The argument seems overly simplistic, however. The complexity of the defences available to persons accused of a crime means that the availability of a defence will only become apparent after the facts have been exhaustively reviewed at trial. On the other hand, in the immediate aftermath of a traumatic event such as a homicide or assault, it is highly unlikely that the persons involved will have much idea about how the law would judge their behaviour. At the very least, such a person might — out of panic — lie, dispose of evidence, or flee the scene. But such a person might also be conscious of wrongdoing, notwithstanding that the law would partially excuse or justify their behaviour. The use of consciousness of guilt evidence in such cases is therefore likely to call for considerable care.

In summary, the safest use of an accused person's consciousness of guilt is to establish his or her involvement in the crime charged. In the circumstances of a specific trial, however, proof of involvement may also effectively carry it with it proof of *mens rea*; and in other cases, such as the rape example above, the only possible use of the consciousness of guilt evidence will be to establish the accused's *mens rea*. Particular care will be called for, however, in cases where a defence might be available to the accused or where the physical acts committed by the accused may be classified in more than one way depending on the state of mind with which the acts were performed. In the latter kind of case it is unlikely that consciousness of guilt evidence will be able to assist to the jury to determine what the accused's state of mind was.

3 *Feelings of Shame and Guilt*

Feelings of guilt or shame are other possible 'mental traces' of the commission of a crime. Of course, not everyone who commits a crime feels guilty or ashamed. Psychopaths are notorious for not doing so; but even delinquents and career criminals who might be thought immune to such feelings frequently exhibit them, albeit that the feelings are often avoided through various rationalisations designed to justify the criminal behaviour.⁴³ Nevertheless, a large proportion of people who commit a serious crime probably do experience some feelings of guilt or shame. Although shame and guilt can both be reactions to the commission of acts perceived by the actor as wrongful, they differ in both their focus and their effect.⁴⁴ When a person feels guilty their focus is on 'specific behaviours or transgressions': 'guilt involves the perception that one has done

⁴³ See, eg, Gresham Sykes and David Matza, 'Techniques of Neutralization: A Theory of Delinquency' (1952) 22 *American Sociological Review* 664.

⁴⁴ For research demonstrating the distinctiveness of the two emotions in terms of actions, tendencies and motivational goals, see Ira Roseman, Cynthia Wiest and Tamara Swartz, 'Phenomenology, Behaviours, and Goals Differentiate Discrete Emotions' (1994) 67 *Journal of Personality and Social Psychology* 206.

something “bad”.⁴⁵ This ‘bad’ act is, however, seen by the person as ‘alien’ to who they really are; at worst, the act has ‘disfigured a self which otherwise remains the same’.⁴⁶ With shame, on the other hand, the focus is on the entire self: ‘[t]he entire self is painfully scrutinized and negatively evaluated’.⁴⁷ Unlike guilt, the person’s ‘bad’ act ‘is not alien to himself but on the contrary expresses what he really is’.⁴⁸ In short, with guilt the feeling is that I have done a bad act; with shame it is that I am a bad person.

But the fact that feelings of shame are a common psychological response to the commission of crime does not mean they provide a safe foundation for an inference of guilt. This is because feelings of shame, as just noted, relate to the entire perception of the self rather than to specific behaviours. This means that it will generally be impossible to trace the emotion’s origin back to a single shaming event, such as the crime charged. The existence of shame does not, therefore, provide a reliable foundation for an inference of guilt. The most that one can do with shame is speculate about its causes. Fortunately, there does not appear to be any kind of guilty behaviour the use of which depends on an inference that the accused was suffering from feelings of shame. The significance of shame, therefore, lies in the fact that it may provide an alternative — and arguably innocent — explanation for behaviour which might otherwise be thought suggestive of guilt.

Feelings of guilt can provide a safer foundation for an inference of guilt because they do relate to specific transgressions. Nevertheless, an inference of guilt from feelings of guilt is not nearly as safe as an inference of guilt from consciousness of guilt. This is because a person may experience feelings of guilt for a variety of reasons other than that they are guilty of the crime charged. They may, for example, be feeling guilty about something other than the crime in question; or they may feel themselves to be in some way responsible for the crime without actually having committed it. People do feel guilty about things for which they are in fact blameless.⁴⁹ Of course, if we know that a person has committed a specific transgression we may be prepared to predict that they are likely to feel guilty. But to attempt to work backwards from known feelings of guilt to unknown possible causes, to conclude that because a person is feeling guilty a particular event must have occurred as alleged, is far more dubious.

Consider, for example, the common case where an infant has died from injuries which must have been inflicted by one of the adults with whom it was

⁴⁵ June Tangney, ‘Assessing Individual Differences in Proneness to Shame and Guilt: Development of the Self-Conscious Affect and Attribution Inventory’ (1990) 59 *Journal of Personality and Social Psychology* 102, 102–3.

⁴⁶ Gabriele Taylor, *Pride, Shame and Guilt: Emotions of Self-Assessment* (1985) 92.

⁴⁷ Tangney, above n 45, 103.

⁴⁸ Taylor, above n 46, 90.

⁴⁹ Unfounded feelings of guilt are, for example, one — albeit only one — of the explanations for the phenomenon of false but uncoerced confessions. For a ‘catalogue’ of such confessions through history see John Rogge, *Why Men Confess* (1959). See also Gudjonsson, above n 21, 226–7; Rosemary Pattenden, ‘Should Confessions be Corroborated?’ (1991) 107 *Law Quarterly Review* 317, 318.

living: let us say, the infant's mother and the mother's boyfriend. The parental tendency to feel responsible for everything bad that happens to one's child might lead the mother in such a case to feel guilty about the infant's death, regardless of whether she had actually inflicted the injuries, and even if the injuries had been inflicted in her absence. It would therefore be unsafe to infer from the mother's feelings of guilt that it was her rather than her boyfriend who was guilty. In other cases, however, no such alternative explanation will be available. Consider, instead, that the infant's body had been found outside the home, with the mother claiming that the infant had been abducted and murdered. Feelings of guilt on the part of the mother would still not provide a safe foundation for an inference of guilt because she would probably still feel that she had been in some way responsible for the death of the infant. But if a total stranger manifested symptoms of guilt in relation to the infant's death, then the only plausible explanation for those feelings of guilt might be that they had murdered the infant.

But even if it is accepted that feelings of guilt might, in the context of a particular case, provide a reasonably safe basis for an inference of guilt, the problem remains of ensuring that the accused's feelings have been correctly diagnosed as feelings of guilt rather than feelings of shame. For an untrained observer this diagnosis may be difficult to make. The difficulty of making this diagnosis is clearly significant, because if the correct diagnosis is that the accused is actually suffering from feelings of shame then clearly the evidence should not be used as the basis for an inference of guilt. The same is true for cases where the two diagnoses are equally plausible. Fortunately, the use of almost all of the examples of guilty behaviour discussed in the third part of the article depends on an inference that the accused had manifested a *consciousness* of guilt, rather than *feelings* of guilt. Feelings of guilt are, in other words, relatively unimportant in evidential terms. The main exception to this is — it will be argued — evidence of an accused person's failure to deny their guilt.⁵⁰ As failure to deny guilt could equally be caused by a guilty person's feelings of guilt and an innocent person's sense of shame, the jury would need to be instructed to consider both explanations before using the evidence as the basis for an adverse inference.

B *Inferring Guilty State of Mind From Guilty Behaviour*

Before a person's guilt can be inferred from their state of mind, however, that state of mind must first be proven to exist. It is at this point that we turn to the person's behaviour, on the assumption that we can infer a person's state of mind from the way in which they behave. Indeed, in the absence of direct (and truthful) testimony from the person themselves, their behaviour provides the only

⁵⁰ See below Part III(C).

means of knowing what they are thinking or feeling.⁵¹ Broadly speaking, there are two types of connection between state of mind and behaviour: motivation and self-betrayal.

1 *Behaviour Motivated by a Guilty State of Mind*

The first type of connection is where a person's state of mind or emotion provides a *motivation* towards a particular action. For example, one of the characteristic responses of a person suffering from feelings of guilt is a desire to undo the wrong through reparative action such as confession, apology or repayment.⁵² If a person performs such an act we may therefore infer that they do so because of their feelings of guilt.⁵³ Similarly a person conscious of their guilt but desirous of avoiding punishment has a motive to lie about their involvement in the activities under investigation; the fact that a person lied may therefore be used as a basis for an inference that they did so because they were conscious of their guilt. In short, in order to establish the existence of a particular state of mind, we may look for the kind of behaviour which is commonly motivated by that state of mind. If we find such behaviour then we may infer the presence of the state of mind in question. Of course, it is quite possible that the behaviour may have been motivated by something other than the state of mind in which we are interested. Consciousness of guilt is not, for example, the only reason why persons suspected of crime tell lies. Thus, before an inference of guilty state of mind can be drawn, the jury will need to explore the possibility that there may be an innocent explanation for the behaviour. Only if the innocent explanations for the behaviour can be excluded will the inference be safe.

⁵¹ Constant use is made of this connection in the law as the basis for inferences about a person's state of mind at the time of performing relevant acts: 'Now it is well established in English jurisprudence, in accordance, with the dictates of common sense, that the words and acts of a person are admissible as evidence of his state of mind. Indeed they are the only possible evidence on such an issue': *Lloyd v Powell Duffryn Steam Coal Co Ltd* [1914] AC 733, 751. See also *Sugden v Lord St Leonards* (1876) 1 PD 154, 251.

⁵² Tangney, above n 45, 103.

⁵³ One criminal interrogation manual therefore suggests that in a case of theft, an interrogator who is uncertain of a suspect's guilt or innocence should ask the suspect whether or not he or she is willing to make restitution to the victim of the theft. If the suspect agrees to do so this is a strong indicator of guilt: Inbau, Reid and Buckley, above n 22, 148–9. One might also have expected that investigators would use feelings of guilt as a means of procuring a confession. In fact, criminal interrogation manuals tend to suggest that an interrogator should attempt to reduce, rather than exacerbate, the suspect's feelings of guilt. Techniques for doing so include suggesting that anyone else might have done the same thing; reducing the suspect's feelings of guilt by minimising the moral seriousness of the offence; suggesting a less revolting and more morally acceptable motivation or reason for the offence than that which is known or presumed; and condemning others, including the victim, an accomplice, or anyone else upon whom some degree of moral responsibility might conceivably be placed: Inbau, Reid and Buckley, above n 22, 97, 99, 102, 106. The rationalisations suggested are largely the same as those identified by Sykes and Matza, above n 43. Inbau, Reid and Buckley even suggest that interrogators should 'view with considerable scepticism any "conscience-stricken" confession'. The 'instinct for self-preservation', they argue, dictates that offenders do not simply surrender themselves and confess their guilt: above n 22, 197. This last point highlights the reason why feelings of guilt are viewed as more of an obstacle, than a catalyst, to confession: the guiltier a person feels, the greater they are likely to imagine their punishment will be. By reducing, rather than playing on a suspect's feelings of guilt, the interrogator may reduce the perceived adverse consequences of confession and so make confession more likely.

2 Behaviour Betraying a Guilty State of Mind

The second type of connection between state of mind and behaviour might best be described as one of self-betrayal. Such behaviour is a form of 'leakage', providing clues to a state of mind or emotion which the actor may be attempting to conceal.⁵⁴ It is behaviour which exemplifies Freud's comment that:

When I set myself the task of bringing to light what human beings keep hidden within them, not by the compelling power of hypnosis, but by observing what they say and what they show, I thought the task was a harder one than it really is. He that has eyes to see and ears to hear may convince himself that no mortal can keep a secret. If his lips are silent, he chatters with his finger-tips; betrayal oozes out of him at every pore.⁵⁵

But Freud is here just expressing an idea which reflects ordinary, pre-Freudian, common sense understandings of human psychology. The idea that guilt betrays itself in guilty actions can, for example, be found in Shakespeare, is one of the main themes of Dostoyevsky's *Crime and Punishment*, and is reflected in the following judicial comment from a 19th century American court case:

From our knowledge of the human mind and its workings, we expect, with almost positive certainty, that when it is the sole repository of so dreadful a secret it will affect the conduct and sayings of the person; hence the mind naturally looks to these with the most anxious scrutiny, and would require for its satisfaction, if such a thing were possible, a complete transcript of the person's conduct and sayings.⁵⁶

But as undeniable as it may be that human behaviour does sometimes betray something about a person's state of mind which they may not have intended to reveal, an inference which assumes that this is what is happening will seldom be completely safe. This is because of the equivocal nature of much of the behaviour that might be considered to be self-betraying.⁵⁷ This means that the inference from guilty behaviour to guilty state of mind will usually be safer when the argued connection between behaviour and state of mind is one of motivation, rather than self-betrayal.

⁵⁴ Of course it is also possible to argue that the true distinction is between consciously and unconsciously motivated behaviour. For example, the Freudian analyst Reik argues that feelings of guilt produce an unconscious desire for punishment. The criminal *wants* to be caught, and it is this desire which causes the criminal to betray him or herself through 'guilty' actions. The criminal actually 'aims at self-betrayal ... dictated by dark intentions unknown to himself': Theodor Reik, *The Compulsion to Confess: On the Psychoanalysis of Crime and Punishment* (1959) 49. Self-betraying behaviour is, on this view, just another kind of motivated behaviour, albeit one where the motivation springs from the unconscious.

⁵⁵ Sigmund Freud, 'Fragment of an Analysis of a Case of Hysteria' in James Strachey (ed), *The Standard Edition of the Complete Psychological Works of Sigmund Freud* (1953 translation by Alix Strachey and James Strachey) vol 7, 78.

⁵⁶ *Moore v State*, 2 Ohio St 502 (1853), reproduced in Wigmore, *Evidence*, above n 3, [273].

⁵⁷ See below Part III(A)(1) and Part III(E).

IV FIVE CATEGORIES OF GUILTY BEHAVIOUR

I will now examine the most important kinds of guilty behaviour which might arguably be used as evidence of guilt. For convenience, I have divided the guilty behaviour discussed into the following broad categories: 'Concealing the Truth', 'Refusal to Assist the Investigation', 'Failure to Deny Guilt', 'Attempting to Avoid Apprehension', and 'Guilty Demeanour'. Each of the categories is intended to group together behaviour where the inference of guilt depends on similar psychological assumptions. In dealing with each of the categories, my aim is twofold. The first aim is to show why the behaviour might be thought to support an inference of guilt. This involves breaking the use of the behaviour down into a double inference of the kind described in the previous part of the article. If no persuasive double inference can be formulated, then the evidence is probably not capable of satisfying a test of relevance. If a persuasive double inference can be formulated, however, then an inference of guilt will usually be open on the evidence and — assuming that the requirement of relevance can be satisfied — the evidence should be left for the consideration of the jury. Whether the jury chooses to draw that inference is, of course, another matter.

The second aim is to outline any possible innocent explanations for the behaviour. It is absolutely crucial to note, however, that the fact that such explanations can be identified does not necessarily mean that the guilty behaviour in question will be incapable of satisfying the test of relevance.⁵⁸ Only if, in the circumstances of the particular case, an innocent explanation appears to be as plausible as the guilty one, or if there is no rational basis for the jury to exclude the possible innocent explanations, can it be said that the guilty behaviour lacks relevance. In most cases, though, the existence of possible innocent explanations for the guilty behaviour will not mean that the evidence ought to be withheld from the jury.

The significance of the possible innocent explanations instead lies in the fact that it is these explanations which the jury must consider before using the evidence as the basis for an inference of guilt. Only if the jury is satisfied that the innocent explanations for the evidence can be excluded, can the inference of guilt be drawn. The weight and attention to be given to particular explanations will no doubt vary from case to case. In some cases, for example, the defence might advance a particular explanation for the guilty behaviour; in such a case it would be appropriate for the trial judge to focus the jury's attention on the plausibility of that one explanation. If, on the other hand, the defence attempts to explain the behaviour away by pointing to the many possible innocent explanations without focusing on any one in particular, then the appropriate direction would be one which reminded the jury of all of those possible innocent explanations for the behaviour.

⁵⁸ See above Part I(A)(3).

A Concealing the Truth

The first set of behaviours I have given the label of concealing the truth. Included in this category is behaviour such as lying, suborning witnesses to give false evidence or persuading them to withhold evidence,⁵⁹ and concealing or tampering with evidence. In the investigative context, deciding whether or not the suspect is telling or concealing the truth is probably the most important method used by investigators to determine the suspect's guilt or innocence. Inbau and Reid, for example, assume that there is a very simple and direct correlation between the fact that a person 'is lying (and guilty) or telling the truth (and innocent)'.⁶⁰ Because of the importance of this particular category of guilty behaviour, and the complexities associated with its use, this section of the article has been broken into three parts: 'Lie-Catching', 'Lies as Evidence of Guilt' and 'Concealing, Destroying or Tampering with Evidence'.

1 Lie-Catching

There are several methods of catching a suspect in a lie. One can simply question the suspect about their involvement in the crime and then check to see whether their answers match the facts in so far as they can be ascertained. This task is obviously much easier if the facts are already known. A common investigative technique, therefore, is to provide the suspect with opportunities to lie about matters in relation to which the truth is already known. The interrogator can do this by pretending not to know the truth already;⁶¹ or by asking the suspect about non-existent facts or events which, if their story were true, they would have perceived.⁶² A suspect who claims to have perceived the non-existent fact or event is clearly lying.

Another method is to have the suspect go over and over his or her story; the different tellings of the story can then be compared and searched for inconsistencies. Where two or more inconsistent stories have been told, or details given, then at best only one can be true. Although a major inconsistency clearly indicates deliberate deceit,⁶³ a minor inconsistency might easily be due to mistake or confusion. Investigators, who tend to assume that most suspects are guilty,⁶⁴ will often be less charitable, however, choosing to see such mistakes as a result of the fact that 'few liars are able to remember all of the details of a previous lie'.⁶⁵ The interrogator might also seek a detailed account of the suspect's activities before and after the event in question. This technique is

⁵⁹ Or to simply refuse to talk to the police: see, eg, *R v R(G)* (1993) 80 CCC (3d) 130, 136.

⁶⁰ Inbau and Reid, above n 30, 90.

⁶¹ Inbau, Reid and Buckley, above n 22, 72-3.

⁶² *Ibid* 74.

⁶³ See, eg, *Johann Manfred Weissensteiner* (1992) 62 A Crim R 96, 106-7.

⁶⁴ Stephenson and Moston, above n 32, 35.

⁶⁵ Inbau, Reid and Buckley, above n 22, 75. In fact, 'an honest man usually makes little mistakes, particularly in relating a long complex story', while 'too smooth a line may be the mark of a well-rehearsed con man': Paul Ekman, *Telling Lies: Clues to Deceit in the Marketplace, Politics, and Marriage* (1992) 45.

particularly useful for testing alibis: a person whose memory of events at the time of the crime is either unreasonably good or unreasonably bad in comparison to their memories of other events at around about the same time is likely to be lying.⁶⁶

A final method of detecting deception is to observe the suspect and see whether or not he or she exhibits any of a variety of psychological and physiological indicators of lying. This method relies on the fact that, for most people, the act of lying produces some sort of emotional response. According to Ekman there are two main negative emotions associated with deceit: 'detection apprehension', or the fear of being caught in the lie, and 'deception guilt', the feelings of guilt which relate to the act of lying as opposed to the guilt which might be felt about the content of the lie.⁶⁷ Detection apprehension is essentially a form of anxiety and, in the context of criminal investigation, is the most important of the emotions associated with deceit. If it can be shown that a person's anxiety is really detection apprehension then this obviously suggests that they are lying, which may in turn suggest a consciousness of guilt for the reasons discussed below. States of emotional arousal, such as anxiety, are also associated with physiological changes. If a person exhibits any of these physiological symptoms of emotional arousal during interrogation or while testifying, the reason may be that they are lying. The more emotion a liar feels, the easier it should be to detect their lies,⁶⁸ while a liar who experiences none of the relevant emotions should give away no clues to the fact that they are lying.⁶⁹ Royal and Schutt provide a convenient summary of the kind of things which may be clues to deception:

- a. Dryness of mouth — frequent requests for water.
- b. Restlessness — frequent change in position, tapping of foot, fidgeting, gripping arms of chair, elbows held tight to body, running hands through hair; chewing fingernails, pencils or other objects.
- c. Excessive sweating — particularly of hands or in armpits.
- d. Unusually pallid or ruddy complexion — changes in complexion.
- e. Pulsation of the carotid artery.

⁶⁶ Inbau, Reid and Buckley, above n 22, 75. In the Sheree Beasley case, for example, police suspicions about Robert Lowe, the man eventually convicted of the murder, were aroused by the fact that he was instantly able to produce an alibi when asked about an event which had occurred a month before. Andrew Rule, 'Mind Games with a Child Killer Leave New Victim', *The Sunday Age* (Melbourne), 4 December 1994, 1, 4.

⁶⁷ Ekman, above n 65, 49, 64.

⁶⁸ *Ibid* 335–40, sets out a checklist of factors which will determine the amount of each emotion a liar is likely to experience.

⁶⁹ For example, a police officer who believed that he could prevent a polygraph lie-detector from working by placing bullets under the pneumograph tube and the blood pressure-pulse cuff gave no discernible indications of deception. In fact, the bullet had no such effect; but the fact that the police officer believed that it did meant that he suffered no deception apprehension when he lied: John Reid and Fred Inbau, *Truth and Deception: The Polygraph ("Lie-Detector") Technique* (1966) 167.

f. Excessive swallowing — indicated by the unusual activity of the ‘Adam’s Apple.’

g. Avoiding direct gaze of the interrogator’s eyes.

h. Excessive assertions of truthfulness; such as, ‘I hope to die if I am lying’; or, ‘I’ll swear that is the truth standing on my dead mother’s grave’; or, ‘My right arm to God.’

i. Evasive or vague answers; such as, ‘I am not sure what happened’; ‘I can’t remember’; ‘I have forgotten’; ‘I don’t think it could have been that much’; etc.

j. A disturbing feeling of tenseness and turbulence in the pit of the stomach.⁷⁰

These ‘symptoms’ of deceit can be divided into two categories: behavioural and physiological. This means that a person exhibiting the symptoms may be said to be either behaving in a guilty fashion, or simply ‘looking guilty’.⁷¹ The behavioural symptoms, such as avoiding an interrogator’s gaze, can be seen as indications of conscious or unconscious attempts to reduce the anxiety associated with lying; in other words, the connection between the behaviour and the state of mind is one of motivation rather than self-betrayal. An evasive answer should, for example, produce less anxiety than an outright lie;⁷² while avoiding the interrogator’s gaze might reduce the guilt associated with deception. Here the problem lies in the cultural specificity of many of our beliefs about truthful and deceptive behaviour: in some cultures, for example, ‘looking someone in the eye’ is considered a sign of honesty, in others a sign of disrespect.⁷³ The physiological changes, on the other hand, tend to ‘occur involuntarily when emotion is aroused, are very hard to inhibit, and for that reason can be very reliable clues to deceit’.⁷⁴ The connection here is one of self-betrayal. It is these physiological changes which are measured by the polygraph or lie-detector. The problem with the physiological symptoms is that they really only indicate a state of emotional arousal; they do not indicate what the emotion is, nor do they

⁷⁰ Royal and Schutt, above n 30, 83; see also Charles Swanson, Neil Chamelin and Leonard Territo, *Criminal Investigation* (1992) 220–2. Far more detailed descriptions of the indicators of deception can be found in Ekman, above n 65, chh 4–5; Inbau, Reid and Buckley, above n 22, ch 5.

⁷¹ It is a look we all recognise. The success of the Victorian Liberal Party’s ‘Guilty Party’ campaigns in the 1992 and 1996 state elections, for example, depended in no small part on the footage of former Labor Treasurer, Mr Tony Sheehan, during a television phone-in after the 1991 Budget. The way Sheehan glances ‘evasively’ from side to side, the ‘shifty’ look in his eyes, the tension in his mouth, combine to suggest that Sheehan was experiencing some uneasiness as a result of the questions he was being asked or the answers he was giving: Shane Green, ‘Sheehan Upset by “Guilty” Ads’, *The Age* (Melbourne), 14 March 1996, A5.

⁷² Jayne, above n 26, 329–32.

⁷³ This is acknowledged by Inbau, Reid and Buckley, above n 22, 148.

⁷⁴ Ekman, above n 65, 114. Cf Hamlet’s comment to Rosencrantz and Guildenstern that ‘There is a kind of confession in your looks which your modesties have not craft enough to colour’: William Shakespeare, *Hamlet* II.2.279–80.

indicate what has aroused it.⁷⁵ Furthermore, in the context of criminal interrogation, there are many reasons other than deceit why a suspect's emotions might be aroused.

First, the experience of police custody itself may be sufficient to produce a state of emotional arousal, even in an innocent suspect. Irving and Hilgendorf, for example, identify three general classes of stress to which a suspect might be prone: 'stresses arising from the physical characteristics of the suspect's environment in the police station', 'stresses arising from confinement and the isolation of the suspect from his peers' and 'stresses arising from the suspect's submission to authority'.⁷⁶ One of the specific stresses to which a suspect might be subject is the threat of harm and failure:

Most if not all of those questioned by the police will perceive the situation as being one in which they may personally be at risk. The situation may pose a threat of loss of liberty, a threat of punishment, social stigma, or economic threat to the family. This complex of threats brings into sharp relief the immediate threat of fear of detection for the guilty and fear of failure to convince on the part of the innocent. Even where a person is being questioned and there is no real chance of him suffering unpleasant consequences, the symbolic association of the police with unpleasant outcomes in the minds of some people, can be sufficient for the situation to be seen as threatening.⁷⁷

Because an innocent person may find the experience of interrogation stressful they may display the same indicators of emotional arousal as the guilty person. Other emotions which may lead to the conclusion that a truthful suspect is lying include 'extreme emotional tension or "nervousness"'; 'overanxiety'; anger or resentment at being the subject of an investigation; 'concern over neglect of duty or responsibility that made possible the commission of the offence by someone else'; and 'involvement in other similar acts or offenses'.⁷⁸ The ambiguity of emotional arousal, and the possibility of concealing it through behaviour, means that any confidence that deception can be detected through a person's demeanour is probably misplaced. Ekman, for example, tested a range of professional groups whose jobs involved the detection of lies in order to assess their accuracy at this task. Of all the professional groups — which included judges, trial attorneys, police, polygraph operators, and agents of the CIA and FBI — only

⁷⁵ Note however, Ekman, above n 65, 115, who argues that there are distinctive physiological — or more specifically autonomic nervous system ('ANS') — changes for each emotion, so that it ought in theory to be possible to identify the emotion aroused by closely monitoring ANS changes. He makes similar arguments in relation to changes in speech patterns, pitch of voice and use of gestures: Ekman, above n 65, 332–4. He admits, however, that his is a controversial view, and that the differences, if there are any, have not yet been established.

⁷⁶ Irving and Hilgendorf, above n 21, 28–41. For a discussion of the effect of these factors on actual suspects, see Irving, above n 24, 131–7.

⁷⁷ Irving and Hilgendorf, above n 21, 32. The fear of failure means that '[a] truthful person who is worried she won't be believed may out of that fear show the same raised pitch a liar may manifest because she is afraid of being caught': Ekman, above n 65, 94; see also 170–1 where he discusses what he calls the 'Othello error'.

⁷⁸ Reid and Inbau, above n 69, 169–76. A similar set of emotions is discussed in Inbau, Reid and Buckley, above n 22, 54–9 under the heading 'Precautions When Differentiating Between Behavior Symptoms of Truthful and Untruthful Suspects'.

US Secret Service agents did better than they would have if they had simply tossed a coin.⁷⁹ Given the extent to which criminal interrogators tend to assume the guilt of suspects,⁸⁰ their errors are likely to be all in the same direction, with the interrogator invariably, and sometimes falsely, interpreting any symptoms of emotional arousal as indicating that the suspect is lying and hence guilty.

These clues to deception also play a role in the courtroom in terms of the decision the tribunal of fact must make about whether or not a witness is telling the truth. The importance of being able to observe a witness' demeanour is constantly put forward as a reason for an appellate court to refuse to overturn a jury verdict;⁸¹ it is also one of the commonly-advanced justifications for the hearsay rule.⁸² In fact, as Ekman argues, this belief in the ability of the judge or jury to successfully detect deceit from demeanour is largely unfounded:

The criminal justice system must have been designed by someone who wanted to make it impossible to detect deceit from demeanour. The guilty suspect is given many chances to prepare and rehearse her replies before her truthfulness is evaluated by jury or judge, thus increasing her confidence and decreasing her fear of being detected. Score one against the judge and jury. The direct examination and cross-examination take place months, if not years, after the incident, thereby blunting emotions associated with the criminal event. Score two against the judge and jury. Because of the long time delay before the beginning of the trial, the suspect will have repeated her false account so often that she may start to *believe* her own story; when that happens she is, in a sense, not lying when she testifies. Score three against the judge and jury. When challenged in cross-examination, the defendant typically has been prepared if not rehearsed by her own attorney, and the questions asked often allow a simple yes or no reply. Score four against the judge and jury. And then there is the *innocent* defendant who comes to trial terrified of being disbelieved. Why should the jury and judge believe her, if the police, prosecutor, and the judge, in pretrial moves for dismissal, did not? The signs of fear of being disbelieved can be misinterpreted as a guilty person's fear of being caught. Score five against the judge and jury.⁸³

This suggests that a jury might be better placed to assess the truthfulness of the accused if they were able to observe him or her answering questions before the emotions associated with the crime were blunted and before he or she had had the opportunity to rehearse his or her answers. In short, the jury would be better placed to assess truthfulness if they were able to observe the police interrogation of the accused. The use of videotape to record police interviews now makes this possible; but the difficulties of determining truthfulness from demeanour mean that screening videotaped records of interview in court might create more

⁷⁹ Ekman, above n 65, 285.

⁸⁰ Stephenson and Moston, above n 32, 31–2.

⁸¹ See, eg, *M v R* (1994) 181 CLR 487, 531; *Edwards* (1993) 178 CLR 193, 213.

⁸² See, eg, *Teper v R* [1952] AC 480, 486: 'The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost.'

⁸³ Ekman, above n 65, 291–2.

problems than it would solve. The jury might well interpret an innocent suspect's anxiety or nervousness as symptoms of deceit; indeed, one could hardly expect a jury to do better than professional lie-catchers such as the police, who according to Ekman's study did no better at distinguishing liars from those telling the truth than chance.⁸⁴ Furthermore, the mere fact of police interrogation, especially if the suspect is tired, dishevelled or incoherent, may tend to convey an aura of guilt which is highly prejudicial.⁸⁵

2 *Lies as Evidence of Guilt*

Once a lie has been 'caught', it may then be offered at trial as evidence of guilt. As McPherson J noted in a recent case:

[T]he prosecution turns, as it nowadays so often does, to the theory that the accused manifested consciousness of her guilt by telling lies about what happened. In practical terms, what this seems to mean in a case like this is that, having examined the accused's statements once in search of damaging admissions, it is necessary to examine them a second time with the idea in mind that any exculpatory matter they contain may really be evidence not of her innocence but of carefully concealed guilt.⁸⁶

However the fact that so few people are able to accurately determine whether or not a person is lying on the basis of the behavioural and physiological indicators of deception described in the preceding section, has one obvious implication for the use of lies as evidence of guilt: it suggests that it is only when the truth can be independently proved that it is safe to assume that a person is in fact lying. But even if the fact of a lie can be established in this way, the inference of consciousness of guilt from that lying is still only one possible inference.

What lying and the other behaviour included in this category do tend to suggest, though, is a fear of the truth and a corresponding desire to ensure that the truth does not emerge. But even this inference is not inescapable: lying or attempts to produce false evidence may simply indicate a person's fear that the truth will not be believed. Coke, for example, tells the story of an uncle, suspected of having murdered his niece, being ordered by the court to produce the child by the next assizes. Unable to do so, he took along another child who resembled her; but his deception being discovered, he was found guilty of murder and hanged. Several years later the niece reappeared, having spent the intervening years in a neighbouring county.⁸⁷ Similarly, the manufacturing of a false but well-corroborated alibi might be based on a fear that a true alibi, incapable of corroboration, might not be believed. Lying to bolster a weak but

⁸⁴ Ibid 285.

⁸⁵ Perceptions of voluntariness and guilt can even be influenced by the point of view from which an interview is videotaped: Daniel Lassiter *et al*, 'The Potential for Bias in Videotaped Confessions' (1992) 22 *Journal of Applied Social Psychology* 1838.

⁸⁶ *R v Michelle Alice Mary Finn* (Queensland Court of Criminal Appeal, Pincus, McPherson and Davies JJA, 4 February 1994) 20.

⁸⁷ Sir Edward Coke, 'The Uncle's Case' in John Wigmore, *The Science of Judicial Proof* (1937) 157.

true cause is not an uncommon form of behaviour, a fact recognised by King CJ in the South Australian case of *Harris*:

The circumstances in which lies told after an accused becomes aware that he is or might be under suspicion in connection with the crime can amount to positive evidence of the commission of crime must be rare. The tendency of persons under suspicion to wish to distance themselves from the persons or events connected with the alleged crimes and to endeavour to improve their position by falsehood is far too common to enable an inference to be drawn with confidence, in any but the rarest of cases, that lies proceed from a consciousness of guilt.⁸⁸

Even if we are satisfied that the correct inference to be drawn from the behaviour is a fear of the truth, this does not in itself establish a consciousness of guilt. There are many reasons, other than that the truth is incriminating, for why a person might prefer that it not emerge: the emergence of the truth might incriminate them in an offence other than that charged, or might incriminate someone else whom the person wishes to protect. Then there is the possibility that someone may lie simply to avoid the inconvenience of being involved in a criminal investigation. Finally, if the truth is sufficiently embarrassing, people may go to extraordinary lengths to conceal it. Robert Wood, charged with the Camden Town Murder of 1907, for example, lied to his acquaintances and to the police, and attempted to suborn several of his acquaintances to lie on his behalf. Apart from a dubious eyewitness identification, his highly suspicious behaviour was really the only evidence against him. His explanation for the behaviour, an explanation accepted by the jury and a public convinced of his innocence, was that he had merely wished to keep from his elderly father the fact that he had been on familiar terms with the deceased, who was a prostitute.⁸⁹ Nevertheless, through his 'guilty' behaviour he very nearly got himself hanged.

The law recognises the fact that lying can be consistent with innocence by only allowing some lies to be used as evidence of guilt. The English Court of Appeal, for example, has declared that:

To be capable of amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly the statement must be clearly shown to be a lie by evidence other than that ... to be corroborated.⁹⁰

Although this test is stated in terms of corroboration, very little turns on the question of whether the lie is offered as corroborative evidence or as independ-

⁸⁸ *Harris v R* (1990) 55 SASR 321, 323 ('*Harris*').

⁸⁹ Basil Hogarth (ed), 'Robert Wood — 1907' in Harry Hodge and James Hodge (eds), *Famous Trials* (1984), and published in unabridged form as part of the *Notable British Trials* series (1936).

⁹⁰ *R v Lucas (Ruth)* [1981] 1 QB 720, 724 ('*Lucas*').

ent evidence of guilt.⁹¹ The concept of evidence which requires corroboration before it can be acted on is, of course, a rapidly disappearing one. Section 164 of the uniform evidence legislation, for example, completely abolishes all corroboration requirements; s 165 of the legislation instead imposes a duty on the judge to warn the jury about the specific dangers associated with the use of certain specified classes of potentially unreliable evidence. If a lie is being offered as corroborative evidence, though, then the only additional requirement is that the fact of the lie must be established by evidence other than that which is being corroborated. This is simply a matter of logic: were it otherwise, the evidence would be providing its own corroboration.⁹² Furthermore, nothing turns on whether the lie is one told out of court, or as part of the accused's testimony.⁹³

A requirement common to both possible uses of a lie, however, is that the lie must 'amount to conduct which is inconsistent with innocence':

It is only if the accused is telling a lie because he perceives that the truth is inconsistent with his innocence that the telling of the lie may constitute evidence against him. In other words, in telling the lie the accused must be *acting as if he were guilty*. It must be a lie which an innocent person would not tell. That is why the lie must be deliberate. Telling an untruth inadvertently cannot be indicative of guilt. And the lie must relate to a material issue because the telling of it must be explicable only on the basis that the truth would implicate the accused in the offence with which he is charged. It must be for that reason that he tells the lie. To say that the lie must spring from a realisation of guilt or consciousness of guilt is really another way of saying the same thing. It is to say that the accused must be lying because he is conscious that "if he tells the truth, the truth will convict him".⁹⁴

As the words in italics indicate, lying is really just another form of guilty behaviour; and although the decisions in cases such as *Edwards* and *Lucas* are often regarded as some sort of specialised legal learning,⁹⁵ in truth they do no more than insist that the jury should be informed of the conditions which must be met and the alternative explanations which must be considered before an inference of guilt can safely be drawn from the fact that an accused person has told a lie.

3 *Concealing, Destroying or Tampering with Evidence*

An attempt to conceal the truth which takes the form of suborning witnesses to give false evidence or persuading them to withhold evidence, raises the same issues as the use of lies. But where the conduct concerned is concealing, destroying or tampering with evidence, there may be additional obstacles to the drawing of an inference of consciousness of guilt. For us to know that a person is lying, for example, we must presumably know what the truth is; but if a person

⁹¹ See, eg, *R v Perera* [1982] VR 901, 905 ('*Perera*').

⁹² *Edwards* (1993) 178 CLR 193, 198 (Brennan J), 208 (Deane, Dawson and Gaudron JJ).

⁹³ See, eg, *Perera* [1982] VR 90; *Edwards* (1993) 178 CLR 193, 198 (Brennan J), 208-9 (Deane, Dawson and Gaudron JJ).

⁹⁴ *Edwards* (1993) 178 CLR 193, 209 (emphasis added).

⁹⁵ See, eg, J D Heydon, 'Can Lies Corroborate?' (1973) 89 *Law Quarterly Review* 552.

is successful in their attempt to conceal, destroy or tamper with evidence then it may be impossible to prove that what was concealed, destroyed or tampered with was in fact evidence of guilt. Of course, if the attempt was unsuccessful, or if a witness is able to testify to having perceived the evidence before it was destroyed, then this problem will not arise. But if the putative evidence of guilt is gone, and no-one is able to testify to what it was, then the most we can possibly say is that it *might* have been evidence of guilt. And if we can not prove that it was evidence of guilt which has been concealed, destroyed or tampered with, then it would appear to be impossible to infer that the motive for concealing, destroying or tampering with it was a consciousness of guilt. Yet in the absence of any other explanation for the behaviour, a consciousness of guilt may well be the most reasonable inference.

At Lizzie Borden's trial for the bloody axe murder of her parents,⁹⁶ for example, the prosecution led evidence that she was seen burning one of her dresses the day after she was informed that she was a suspect in the murder. The burning of the dress obviously made it impossible to know whether or not it had been blood-spattered; indeed, the prosecution could not even prove that the dress was the one she was wearing on the day of the murder. Nevertheless, the strangeness of such behaviour — particularly given that it occurred *after* she knew she was a suspect — would surely justify an inference of consciousness of guilt in the absence of any innocent explanation for it. As it happens, the defence did attempt to offer an innocent explanation for the behaviour, in the form of an alleged family custom of burning old dresses.⁹⁷

At the very least, evidence such as the destruction of the dress ought to be admissible for the purpose of providing a possible explanation of the absence of evidence which would otherwise have been expected. Given that the murder was particularly bloody, for example, one would have expected the clothing of the person who committed it to be covered in blood. The fact that no such clothing was found would therefore suggest that Lizzie Borden was innocent. Given that such an argument was apparently put by the defence, the prosecution should surely have been permitted to provide an explanation of the fact that no such clothing was found.⁹⁸ I would also argue, however, that the prosecution should have been permitted to use the burning of the dress as the basis for an inference of consciousness of guilt. The actual drawing of that inference would obviously

⁹⁶ As in the nursery rhyme:

*Lizzie Borden took an axe,
Gave her mother forty whacks,
When she saw what she had done,
She gave her father forty one.*

⁹⁷ John Wigmore, 'The Borden Case' (1893) 27 *American Law Review* 819, 842. In fact, in a ruling criticised by Wigmore, this explanation was withheld from the jury. Cf *Donellan's case* in William Wills, *An Essay on the Principles of Circumstantial Evidence* (1912) 132: the accused was charged with murdering someone by poison; immediately after administering a medicine which was the apparent cause of death, the accused was seen to rinse out the phial in which it had been contained. The phial having been rinsed it was impossible to prove that it had contained the poison.

⁹⁸ See Wigmore, 'Borden', above n 97, 834.

have depended on the lack of any reasonable explanation for the behaviour which was consistent with innocence. Specifically, in the Borden case the jury would only have been able to draw an inference of consciousness of guilt if it rejected the explanation that the dress was burnt in accordance with the alleged family tradition of burning old dresses. If this explanation of her behaviour was regarded as implausible then there would appear to be no reason why the jury should not have been allowed to infer the accused's consciousness of guilt.

Two common examples of evidence to which this approach is applied are evidence that the accused concealed or disposed of the weapon allegedly used in the commission of a crime and evidence that the accused in a homicide case concealed or disposed of the body of the deceased. In *Perera*,⁹⁹ for example, the accused was charged with murdering a woman with whom he had been involved. The deceased had died of multiple gunshot wounds. The accused admitted that four days before her death he had purchased a shotgun and 25 Winchester buckshot cartridges. There was evidence that was consistent with the deceased having been killed by such shot. The police were never able, however, to locate the accused's shotgun. At the trial, the explanation advanced by the defence for the disappearance of the shotgun was that it had been taken by one of the investigating police officers. The appeal revolved around the question of whether this explanation could be used as the basis for a consciousness of guilt inference on the assumption that the jury were satisfied that the explanation was a lie. At the trial, however, the jury was also directed about the incriminating significance of the fact that the accused:

did not dare produce the shotgun because you know that there is evidence, no cross-examination about it, by the firearms expert, that if he is given the shotgun and the fired cartridges he can tell whether or not those cartridges were fired from that shotgun.¹⁰⁰

Similarly, in *Rice*, where the accused was charged with murdering his girlfriend during the course of a weekend spent at a motel, Brooking JA made the following comment about the fact that the accused had attempted to conceal the deceased's body:

If the woman died from natural causes, or in any circumstances other than those of an unlawful and dangerous act on the part of the applicant, what did he have to fear if her death came to light? Any reasonable person must have realised that, by concealing her body and her death as he did, and telling the lies which he told, he ran a great risk that, if the body was found, he would be charged with murder. Why should a man take such a risk if the explanation of the death was an innocent one?¹⁰¹

Of course, in the context of a particular case there might be innocent explanations for an attempt to conceal or tamper with the body of the deceased. Brook-

⁹⁹ *Perera* [1982] VR 901.

¹⁰⁰ *Ibid* 903.

¹⁰¹ *Rice* (1996) 85 A Crim R 187, 203. See also *R v Greenacre* (1837) 173 ER 388, discussed in *Wills*, above n 97, 135; *People v Galbo*, 218 NY 283 (1916); *People v Kirwan* [1943] IR 279.

ing JA was, thus, at pains to point out that the case was ‘not one of a man committing adultery, or having intercourse with a prostitute, in what might be circumstances highly embarrassing to him’.¹⁰² The existence of such circumstances might have provided an innocent explanation for the accused’s behaviour; in their absence, the court was satisfied that consciousness of guilt was the correct inference to be drawn.

In summary, then, lies and other behaviour designed to conceal the truth may provide the basis for an inference that the motive for the behaviour lay in the fact that the accused was conscious of his or her guilt. Possible innocent explanations for the behaviour which should be considered by the jury include the following:

- panic, or a fear that the truth will not be believed;
- a desire to avoid the inconvenience of involvement in a criminal investigation;
- a desire to conceal the truth because it is embarrassing, or would incriminate the accused in some crime other than that charged; and
- a desire to conceal the truth in order to protect someone else.

B *Refusal to Assist the Investigation*

This category of behaviour includes any refusal to assist an investigation, such as a refusal to answer police questions, a refusal to allow one’s home or person to be searched, a refusal to provide a bodily sample,¹⁰³ or a refusal to undergo some test or procedure believed to be capable of confirming guilt or innocence. Just as an open and co-operative attitude tends to suggest that the person has nothing to hide and is therefore presumed to be consistent with innocence,¹⁰⁴ so an unco-operative attitude tends to suggest that the person does have something to hide, and that something may very well be that they are guilty of the crime under investigation. In other words, the refusal to co-operate might be a rational, motivated response to the person’s consciousness of their guilt. It should not be surprising, therefore, that criminal investigators may take a suspect’s attitude into account when forming their views about the suspect’s guilt or innocence. There can be little doubt, for example, that one of the main reasons why so few suspects actually exercise their right to remain silent is that they fear that doing so would be likely to raise or confirm the suspicions of the investigating officers. The fear is well-founded: as one English study noted, a suspect’s exercise of the

¹⁰² *Rice* (1996) 85 A Crim R 187, 202. Cf *R v Sharmal Singh* [1962] AC 188, 190–1, where the accused was (again) charged with the murder of his wife, who had died from asphyxiation caused by the simultaneous application of pressure to the chest, neck and throat. The accused claimed that the death was accidentally caused by the pressure of a ‘sexual embrace’. The accused had, however, gone to considerable lengths to disguise the cause of death by making it appear that the deceased had been attacked and robbed on her way to an outside toilet. The prosecution obviously relied on this as evidence from which a consciousness of guilt could be inferred; the defence instead submitted that it was equally consistent with panic on the part of the accused when discovering that his wife had died accidentally. The latter explanation would obviously have to have been excluded by the tribunal of fact before this conduct could have been used as the basis for an inference of guilt.

¹⁰³ Or a sample of handwriting, as in *Woon v R* (1964) 109 CLR 529, 531.

¹⁰⁴ See, eg, *M v R* (1994) 181 CLR 487, 499.

right to remain silent ‘appears so extraordinary to police officers that it automatically leads to deepening suspicion’.¹⁰⁵ Inbau and Reid even suggest that a suspect’s decision to exercise their right to remain silent can usually be reversed by pointing out how guilty their refusal to answer questions makes them appear.¹⁰⁶

1 *Innocent Explanations for a Suspect’s Refusal to Assist an Investigation*

A similar significance can be given to a suspect’s refusal to undergo a test believed to be capable of confirming guilt or innocence. Inbau, Reid and Buckley, for example, suggest that one means of resolving doubt about the guilt or innocence of a suspect is to offer him or her the opportunity of taking a polygraph lie-detector test:

The suspect’s reaction to this may be very helpful. If he agrees and seems willing to take the test as soon as possible, this usually is an indication of possible innocence. ... A guilty person to whom a proposal has been made for a polygraph test will usually seek to avoid or at least delay submission to the test by offering such comments as: “I’m not taking a lie detector test; they say the lie detector makes mistakes” or “Hold on — I’ve got to talk to my lawyer first.” Responses of this nature are usually strong indications that the suspect is guilty.¹⁰⁷

On this reasoning, the actual efficacy of the polygraph at detecting deceit is besides the point: what matters is the suspect’s beliefs about it. Provided that the suspect believes that the test in question will assist in the discovery of the truth, then a refusal to undergo the test can be seen as evidencing a fear of being found out which is inconsistent with innocence. The same inferences could, therefore, be drawn from a person’s attitude towards entirely superstitious tests of guilt. It used to be believed, for example, that a corpse would bleed afresh if touched by the murderer. A superstitious suspect’s refusal to touch the corpse might thus suggest a consciousness of guilt on their part.¹⁰⁸ On the same basis, in medieval times a person’s attitude towards the trial by ordeal could be almost as conclusive as the results of the ordeal itself.¹⁰⁹

¹⁰⁵ Irving, above n 24, 153.

¹⁰⁶ Inbau and Reid, above n 30, 111; cf the police interrogation in *Van der Meer v R* (1988) 82 ALR 10, 34–6. This advice was removed from the third edition of the book, presumably because *Miranda v Arizona*, 384 US 436 (1966) ‘prohibits talking a suspect out of a claim of silence or the assistance of counsel’: Inbau, Reid and Buckley, above n 22, 230.

¹⁰⁷ Inbau, Reid and Buckley, above n 22, 150–1.

¹⁰⁸ *Gassenheimer v State*, 52 Ala 316 (1875), extracted in Wigmore, *Evidence*, above n 3, [27]. Wigmore recounts an even more bizarre example: the seven suspects of a theft were asked to step into a darkened room and touch a live hen fastened to the table. They were told that the hen would crow when touched by the guilty party. Unbeknownst to the suspects, the hen had been saturated with blueing. An inspection of the suspects’ hands revealed that all but one had touched the hen. The failure of this suspect to do so was admitted as evidence of his guilt on the basis that ‘the guilty one, in the uneasy state of his conscience, would be overcome with dreadful superstition and avoid carrying out the test’: *Boston* (unreported), reproduced in Wigmore, *Evidence*, above n 3, [275].

¹⁰⁹ The refusal of the Danish noble Magnus, for example, to accept an offer to clear himself of a charge of treason by taking the ordeal of the hot iron was thought ‘very suspicious’, while the Count of Flanders was able to completely clear himself of suspicion of involvement in the

Of course, a person's reluctance to take a proposed test of innocence or truthfulness might be explained not by their belief in the efficacy of the test, but by their fear that it could *falsely* implicate them. For example, the Danish noble Magnus justified his 'suspicious' refusal to take the ordeal by hot iron with the claim that 'this kind of proof was very doubtful and did not always produce a miracle; it often condemned the innocent and cleared the wicked; the outcome of the test was largely a matter of chance'.¹¹⁰ Similarly, Inbau, Reid and Buckley concede that too much significance ought not to be given to a person's refusal to take a polygraph examination, because the 'unfavourable publicity that has been given in recent years to polygraph testing may be believed by innocent persons'.¹¹¹ The correct inference from a refusal to take such a test may not then be a consciousness of guilt, but a consciousness of innocence combined with a fear of false conviction. It is only safe to infer a consciousness of guilt if it is likely that the suspect actually believed in the efficacy of the test in question. The more scientifically well-established the test is, the more likely this is to be the case. In the case of *Robert William Smith*,¹¹² for example, the English Court of Appeal approved the following judicial comment about an accused person's refusal to provide a sample of his hair for comparison with a hair found at the scene of a robbery:

So what the prosecution says is this, if a man is declining to assist in that way, then he has got something to be afraid of, what he has to be afraid of is the fact that it might turn out to be his hair that was found at the scene of the crime.¹¹³

But even if it can be established that the suspect did believe in the efficacy of the test, a refusal to take the test could still be consistent with innocence. In a recent Victorian case, for example, a man suspected of the rape and murder of his estranged wife consistently refused to provide a sample of his blood for the purposes of DNA comparison with semen found in the deceased woman's vaginal cavity.¹¹⁴ When a sample was eventually obtained by order of the Magistrates' Court, the samples were found to match. At trial, however, the accused claimed that his semen had been deposited during consensual intercourse prior to the murder of the deceased at the hands of some unidentified person. If the accused knew the semen was his but feared that his story might not be believed, then it would have been perfectly rational for him to refuse to provide the sample or to admit that he saw the deceased on the night of her death. The jury, which had been informed by the *defence* of the accused's refusal

murder of the Duke of Normandy by merely *offering* to undergo the ordeal by fire: Robert Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (1986) 15, 76–7. See also Richard Underwood, 'Truth Verifiers: From the Hot Iron to the Lie Detector' (1986) 84 *Kentucky Law Journal* 597.

¹¹⁰ Bartlett, above n 109, 76.

¹¹¹ Inbau, Reid and Buckley, above n 22, 67.

¹¹² *Robert William Smith* (1985) 81 Cr App Rep 286.

¹¹³ *Ibid* 289.

¹¹⁴ *Walsh v Loughnan* [1991] 2 VR 351; *Loughnan v Magistrates' Court of Victoria* [1993] 1 VR 685.

to provide the sample, apparently accepted this explanation, bringing in a verdict of not guilty. The case thus suggests another possible innocent explanation for a refusal to undergo such a test: a fear of wrongful conviction on the basis of apparently incriminating circumstantial evidence.

2 *The Significance of a Right to Refuse Co-operation*

Perhaps more important than any of the above objections, however, is the significance of the distinction between actively misleading an investigation, and simply refusing to assist it. This difference is crucial, because generally speaking a person being officially investigated is under absolutely no obligation to assist in that investigation. The Victorian Crimes Act, for example, explicitly recognises a suspect's right 'to refuse to answer questions or to participate in investigations except where required to do so by or under an Act or a Commonwealth Act'.¹¹⁵ The singling out of the right of silence from a more general right to refuse co-operation is consistent with the fact that the High Court has specifically held it to be impermissible to use a person's exercise of their right of silence as evidence of a consciousness of guilt, or in any other way adverse to the accused.¹¹⁶ The fact that the High Court has never made such a ruling in respect of any other form of non-co-operation arguably means that if a person's refusal to co-operate does take any other form, then the only barrier to using that refusal as evidence of guilt is the requirement of relevance.¹¹⁷

Of course, the fact that a suspect does have a right to refuse their co-operation means that the requirement of relevance may be more difficult to satisfy, and that it may be more difficult for the jury to be sure that consciousness of guilt is the correct explanation for the refusal. This is because there is an additional possible innocent explanation for the refusal which the jury must be able to eliminate before they can draw an inference of consciousness of guilt. This additional explanation is the possibility that the suspect may have refused their co-operation simply because the law gave them the option of doing so. However much the police might wish it to be the case, the right to refuse co-operation is not invariably waived by the innocent. A person might have a negative attitude towards the police, perhaps based on previous experience of the police, which makes them adopt a generally unco-operative stance, despite the fact that they are innocent of the particular crime under investigation. They may have reasons,

¹¹⁵ Crimes Act 1958 (Vic) s 464J(a).

¹¹⁶ Provided that is, that in refusing to answer the questions the person will be taken to have been exercising their right to remain silent: *Woon v R* (1964) 109 CLR 529. In *Petty and Maiden v R* (1991) 173 CLR 95, 99 a majority of the High Court (Mason CJ, Deane, Toohey and McHugh JJ) defined the right in the following terms: 'A person who believes on reasonable grounds that he or she is suspected of having been a party to an offence is entitled to remain silent when questioned or asked to supply information by any person in authority about the occurrence of an offence, the identity of the participants, and the roles which they played.' This means that the right only applies to official questioning, and only applies at the point at which there are reasonable grounds for the person to believe that they are suspected of having committed an offence. Clearly the giving of the formal caution will provide reasonable grounds for such a belief, but the police cannot prevent the right from coming into operation by simply delaying the caution. The position is essentially the same under s 89 of the uniform evidence legislation.

¹¹⁷ *Cf G v H* (1994) 181 CLR 387, 402.

other than guilt, for not wishing the truth to emerge, such as an extra-marital affair, guilt of some other crime, or knowledge of someone else's guilt of the crime under investigation. They might be so affronted by an imputation of criminality that they prefer not to dignify the proceedings with their participation. They may be aware of incriminating circumstances which they would prefer not to have to admit to or to lie about, even though they are innocent. They may know that if they are unable to convince the police of their innocence then anything they say will be scrutinised for inconsistencies which may then be used as evidence of lying. They may fear that any answers they give will be twisted and given a meaning they did not intend. They may simply prefer to wait until they have received legal advice; or they may have been advised by their lawyer to say nothing.¹¹⁸ One should never lose sight of the fact that:

[m]any people accused of crime tend to be ignorant, inarticulate, suspicious, frightened and suggestible, arguably not able to face up to and deal with official questioning even if that questioning is scrupulously fair. They may misunderstand the true significance of questions. People are commonly unable to sort out and state the factual aspects of their problems clearly, even after time for studied reflection and discussions with friendly legal advisers.¹¹⁹

For such suspects, refusing to co-operate may actually be the safest course. The numerous possible explanations — other than consciousness of guilt — for why a person might refuse to co-operate with an investigation means that it may be difficult for a jury to ever be properly satisfied that guilt is the correct inference to be drawn from the behaviour, and given this, such evidence might well be thought to either lack the relevance required for admission, or to be more prejudicial than probative.

The fact that suspects have a right to refuse their co-operation is likely, however, to be treated by our courts as more than just another possible explanation for the behaviour. In *Petty and Maiden*, for example, the High Court pointed out that to allow adverse inferences to be drawn from an accused person's exercise of their pre-trial right of silence 'would be to erode the right to silence or to render it valueless'.¹²⁰ Similar arguments can be made in relation to any legally-permitted refusal of co-operation. One could argue, for example, that there would be no point in allowing suspects to refuse to allow their homes to be searched without a warrant, if such a refusal could be used as evidence of their guilt.¹²¹ The police would then be able to force a suspect to choose between waiving their rights, or creating evidence from which their guilt might be inferred. One might as well abolish the requirement of a warrant. And if legislation stipulates that a bodily sample can only be taken from a suspect if either the

¹¹⁸ As to the giving of such advice, see Rowan Skinner, 'The Police Suspect: Where to Draw the Line' (1997) 71 *Law Institute Journal* 31.

¹¹⁹ Australian Law Reform Commission, *Evidence*, Interim Report No 26 (1985) vol 1, 427.

¹²⁰ *Petty and Maiden v R* (1991) 173 CLR 95, 99 ('*Petty and Maiden*').

¹²¹ Cf *Perera* [1982] VR 901, 902 (Young CJ), 914 (Marks J), where such a refusal was referred to by the court, albeit without its relevance being explained.

suspect consents, or a Magistrates' Court orders that the sample be taken,¹²² would it not completely undermine the whole statutory regime to allow a suspect's refusal of consent to be used against them?

It is quite likely, therefore, that Australian courts would be unwilling to allow an accused person to suffer a disadvantage from doing that which the law gave them a perfect right to do. For this reason, evidence of an accused person's refusal to co-operate might be kept from the jury, not for relevance-based reasons, but because it would undermine the general right of a suspect to refuse to assist an investigation. In *McCarthy and Ryan*, for example, the accused refused to participate in an identification parade, a refusal which might clearly be thought to suggest a guilty fear of being identified as the perpetrator. In ruling the evidence inadmissible the court might have referred to the possible explanations for why an innocent person might also refuse to participate in an identification parade, such as fear of *false* identification. Instead the court simply asserted that because 'the accused had a fundamental right to decline to participate in an identification parade ... his exercise of the right must not lead to any conclusion ... that he is guilty.'¹²³

3 *What About Weissensteiner?*

The High Court's decision in *Weissensteiner*, however, does appear to allow adverse inferences to be drawn from an accused person's exercise of their rights.¹²⁴ In that case, a majority of the High Court held that an accused person's failure to testify at trial might be used by the jury to eliminate as unreasonable any hypotheses consistent with innocence and thus make safer an inference of guilt already open on the evidence. As far as the evidence in the category currently under consideration is concerned, however, there are at least two reasons why the rights-reinforcing approach of *Petty and Maiden* is likely to prevail over the rights-undermining approach of *Weissensteiner*. The first is that the majority of the High Court in *Weissensteiner* emphasised that at-trial silence could not be used as evidence of guilt, but could only be used to resolve doubt about an inference of guilt already open on the evidence led by the prosecution. It is difficult to see how failure to participate in an identification parade, for example, could possibly perform this role.

The second reason is that the court went to considerable lengths to justify the differential treatment of pre-trial and at-trial silence, and so explain why the decision in *Weissensteiner* was not inconsistent with the approach it had taken in

¹²² See, eg, Crimes Act 1958 (Vic) s 464R(2).

¹²³ *Rodney Raymond McCarthy and Diane Tania Ryan* (1993) 71 A Crim R 395, 404. Cf Patrick Donovan, 'Police Tell of Frustration at Grollo Group Tactics', *The Age* (Melbourne), 10 July 1996, 5, reporting the trial of Bruno Grollo and others on charges of conspiring to pervert the course of justice and conspiring to bribe a federal police officer. A police officer who headed an investigation into an alleged tax fraud by the Grollo Group testified that in 27 years of policing 'he had never come up against such stern opposition in an investigation.' Unfortunately, the report does not discuss the relevance of this testimony to the charges being tried.

¹²⁴ *Weissensteiner v R* (1993) 178 CLR 217 ('*Weissensteiner*').

Petty and Maiden.¹²⁵ One of the justifications the court advanced for allowing the jury to use the accused's at-trial silence was that the jury could hardly be expected not to notice, and if it noticed, to ignore, the fact that the accused had failed to testify.¹²⁶ But as with the exercise of the pre-trial right of silence, the jury need never know that the accused had refused to co-operate with an investigation. Another justification advanced by the court was the fact that an accused person's decision to not testify occurs in the context of 'proceedings directly under judicial control'; whereas the pre-trial right of silence falls to be exercised at a time when the accused is beyond judicial protection.¹²⁷ This justification too, suggests that whatever form an accused person's refusal to co-operate with an investigation takes, it should be given the same rights-based treatment as that endorsed by the High Court in *Petty and Maiden* in respect of the pre-trial right of silence.

A related justification for *Weissensteiner* is that there is a fundamental distinction between an accused person refusing to assist in the gathering of evidence against him or herself; and an accused person failing to answer at trial a prosecution case capable of raising an inference of guilt. On this argument, using an accused person's failure to testify as a means of eliminating doubt about a prosecution case capable of establishing guilt is justified as a method of ensuring that a prosecution does not fail because the only person who knows what happened has refused to say anything about it.¹²⁸ As the Privy Council put the argument in *Singh*:

When the prisoner, who is given the right to...[testify]...chooses not to do so, the court must not be deterred by the incompleteness of the tale from drawing the inferences that properly flow from the evidence it has got nor dissuaded from reaching a firm conclusion by speculation upon what the accused might have said if he had testified.¹²⁹

Placing the accused at peril of conviction if he or she fails to answer a prosecution case capable of establishing guilt is quite different from drawing an inference of guilt from the accused's failure to assist in the *preparation* of that case. Failure to testify at trial can thus be distinguished from refusal to assist an investigation. This means that even if the relevance of an accused person's refusal to co-operate can be established — and given the many possible innocent explanations for such a refusal that in itself will be no easy task — a court is likely to withhold the evidence from the jury on the grounds that to do otherwise would be to undermine the accused's right to refuse their co-operation.

¹²⁵ For a detailed discussion of the court's reasoning, see Andrew Palmer, 'Silence in Court: The Evidential Significance of an Accused Person's Failure to Testify' (1995) 18 *University of New South Wales Law Journal* 130.

¹²⁶ *Weissensteiner* (1993) 178 CLR 217, 229 (Mason CJ, Deane and Dawson JJ), 233 (Brennan and Toohey JJ).

¹²⁷ *Ibid* 231–2.

¹²⁸ Palmer, 'Silence', above n 125, 142–3.

¹²⁹ *R v Sharnpal Singh* [1962] AC 188, 198 ('*Singh*').

In summary, the accused's refusal to assist the investigation could be used as the foundation for a consciousness of guilt inference on the basis that it suggests a fear of the truth which is inconsistent with innocence. A significant obstacle to the use of such a refusal, however, is the fact that by doing so the accused would simply be exercising a right granted by law. If the refusal takes the form of an exercise of the right of silence, then this objection is — at present — fatal. If it takes any other form a court might still be reluctant to allow the accused to suffer a disadvantage from doing that which the law permits them to do. This possibility distinguishes the evidence in this category from each of the other categories, because it suggests that the relevance of the evidence may not be the only consideration taken into account in determining its admissibility. Even if the evidence is admitted, however, then as with the other categories of guilty behaviour, there are still several possible innocent explanations for a refusal to assist an investigation which the jury will need to consider before drawing an inference of guilt.

C Failure to Deny Guilt

Although refusal to answer official questions is an example of an unwillingness to assist an investigation, it is also part of another category of behaviour, namely failure to deny guilt. It is widely believed that an innocent person's response to accusations of guilt should be one of firm and repeated denial. A suspect's failure to make appropriate denials may therefore suggest that they are in fact guilty.¹³⁰ Of course, the accusation must be one in response to which one would expect a denial to be forthcoming, but this really only excludes accusations forming part of official police questioning. The primary reason for this exclusion is not to be found in the different psychology of that situation, but in the policy reasons underlying the right of silence. Situations where a failure to protest one's innocence might be admitted as evidence of one's guilt include an accusation by someone other than the police;¹³¹ conversations with one's friends or acquaintances about the fact that one is suspected of having committed a crime;¹³² and communications about trial strategies with others involved in a prosecution.¹³³ A failure to deny guilt in such circumstances is often referred to as an 'implied admission'.¹³⁴ Before turning to the reasons why failure to deny guilt might be capable of supporting an inference of guilt, I want to consider the usefulness of that label.

¹³⁰ This is the chief argument used against that aspect of the right to silence which prevents a suspect's exercise of it from being used as evidence of their guilt: see, *inter alia*, Jeremy Bentham, *A Treatise on Judicial Evidence* (1825) 241: 'innocence claims the right of speaking, as guilt invokes the privilege of silence'; Glanville Williams, 'The Tactic of Silence' (1987) 137 *New Law Journal* 1107; C Williams, 'Silence in Australia: Probative Force and Rights in the Law of Evidence' (1994) 110 *Law Quarterly Review* 629, 648.

¹³¹ Or, to be more precise, someone with whom the accused is 'speaking on even terms': *Parkes v R* [1976] 1 WLR 1251, 1254 ('Parkes').

¹³² *R v Alexander* [1994] 2 VR 249, 258–63; *Weissensteiner* (1993) 178 CLR 217, 223.

¹³³ See, eg, the letters in *Harriman v R* (1989) 167 CLR 590, 611.

¹³⁴ See, eg, Heydon, above n 1, [33470]–[33505].

1 'Implied Admission' or Circumstantial Evidence of Guilt?

The reason why the accused's response to an accusation of guilt is often referred to as an 'implied admission' is presumably due to the fact that the reception into evidence of an accused person's response to an accusation of guilt logically requires the admission of the accusation itself. The reception into evidence of an out-of-court statement naturally makes us think of the hearsay rule, and to perhaps assume that the accusation itself is being admitted for its truth, in exception to the hearsay rule. In *R v Christie*, for example, Lord Atkinson said that:

the rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement, so as to make it, in effect his own. ... He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct, or demeanour at the time when a statement was made amounts to an acceptance of it in whole or in part.¹³⁵

The result of such an approach, however, is to obscure the real reason why a failure to deny guilt might have probative value. In the interaction between accuser and accused, what is significant is not what the accuser said, but how the accused responded. To ask whether the accused 'adopted' or 'accepted' the accusation through his or her lack of denial is really beside the point; the question we should be asking is whether the accused's response to the accusation was the response of a guilty person. In other words, the focus should always be on the accused's behaviour and the question of whether that behaviour is 'guilty' behaviour. The confrontation of the accused with an accusation of guilt merely provides us with a context in which to evaluate the accused's behaviour. As Windeyer J said in *Woon*, 'It is not that what is said to the accused can of itself be evidence against him. But his response or reaction may be; and that is why what is said to him may be admitted.'¹³⁶

This can be demonstrated by comparing a case like *Parkes*,¹³⁷ where an accusation was made to the accused's face, with a case like *Alexander*,¹³⁸ where the accused was merely discussing with his acquaintances the chances of him being convicted of his wife's murder. The reason why failure to deny guilt was significant must surely be the same for both cases: because one would have

¹³⁵ *R v Christie* [1914] AC 545, 554. See also *Woon* (1964) 109 CLR 529, 539.

¹³⁶ *Woon* (1964) 109 CLR 529, 541. Cf *R v Christie* [1914] AC 545, 560: 'The evidential value of the occurrence depends entirely on the behaviour of the prisoner, for the fact that some one makes a statement to him subsequently to the commission of the crime cannot in itself have any value as evidence for or against him. The only evidence for or against him is his behaviour in response to the charge'.

¹³⁷ *Parkes* [1976] 1 WLR 1251. In fact, the accused's failure to deny the accusation of guilt in that case was accompanied by an attempt to stab his accuser, who had seized the waistband of his trousers in order to detain him until the police arrived. Nevertheless, the case has often been cited for the proposition that silence in the face of an accusation of guilt can amount to an implied admission of guilt.

¹³⁸ *R v Alexander* [1994] 2 VR 249, 258-63 ('*Alexander*').

expected an innocent person to proclaim their innocence. Given that the evidence is incriminating for the same reason in both cases, it seems absurd to classify one as an 'implied admission', merely because it happened to be preceded by an accusation of guilt, while regarding the other as evidence from which a consciousness of guilt could be inferred. Classifying failure to deny guilt in cases such as *Parkes* as circumstantial evidence from which guilt can be inferred does not mean, however, that the accusation made to the accused in a case like that could not be admitted into evidence. But it should be admitted as original evidence, rather than for its truth, its significance lying in the fact that it was made and in the manner in which the accused responded to it.¹³⁹

2 The Inference from Failure to Deny Guilt

As failure to deny guilt has usually been discussed in the context of the hearsay rule, the reasons why it might be thought relevant have seldom been properly analysed. The behavioural generalisation which supposedly justifies the use of failure to deny guilt as evidence of guilt is that an innocent person will always protest their innocence, while a guilty person might not. The basis for this generalisation is that an innocent person is likely to feel a sense of outrage at an unjustified accusation of criminality which would not be shared by the guilty, in respect of whom the accusation would of course be true. On this basis, failure to deny guilt is significant because it suggests the absence of the emotional response to an unjustified accusation of criminality which would be expected of the innocent. Of course, the generalisation overlooks the possibility that an innocent person suffering from shame might also lack a sense of outrage. For such a person the accusation of criminality might accord with their own negative self-evaluation, even if it was untrue. The jury should clearly be instructed to consider this possibility before using the accused's failure to proclaim their innocence as evidence of their guilt.

The generalisation overlooks another important fact: that a person conscious of their guilt but wanting to appear innocent has a motive to deny their guilt. The existence of this motive means that the absence of an innocent person's outrage is insufficient explanation for a guilty person's failure to deny their guilt. Another explanation is needed. One possible explanation is that for most people the act of lying exacts a psychological toll, and may lead the person to display some of the physiological and behavioural indicators of deception.¹⁴⁰ In order to avoid the anxiety associated with the act of lying, and to avoid displaying any of the indicators of deception, a guilty person might refrain from making false denials, or desist from making such denials sooner than an innocent person would. In such a case the failure to deny guilt would be a form of behaviour motivated by the person's desire to avoid the anxiety of lying or the risk of being

¹³⁹ Cf *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, 970: 'It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.'

¹⁴⁰ See above Part III(A)(1).

caught out in a lie, and the correct inference from the behaviour would be that the person was conscious of their guilt. For many people, however, the desire to avoid appearing guilty by failing to deny guilt would outweigh the desire to avoid the anxiety associated with a false denial. In other words, a consciousness of guilt, as evidenced by a desire to avoid the anxiety associated with lying, might explain why some guilty people refrain from denying their guilt; but it can not explain all such failures.

Feelings of guilt provide the final explanation. This is because feelings of guilt might prevent a guilty person from falsely denying their guilt, notwithstanding that they have a motive to do so. The denial might ‘stick in the accused’s throat’, just as Macbeth found himself unable, while on his way to murder Duncan, to say ‘Amen’ in response to the ‘God bless us’ of one of the two sleepers in the chamber adjoining Duncan’s: ‘I had most need of blessing’ he says, ‘and “Amen” stuck in my throat’.¹⁴¹ In *Hamlet*, Claudius also finds himself unable to pray, observing that ‘My stronger guilt defeats my strong intent’.¹⁴² Similarly, a guilty person’s desire to deny an accusation of crime in order to appear innocent might be defeated by their sense of guilt. By the time of the trial, when the emotions associated with the crime have lost much of their force, false denial might be possible; but in the immediate aftermath of the crime, the denial might simply stick in their throat.

The use of an accused person’s failure to deny guilt can, therefore, be broken down into a persuasive double inference of the kind described in the second part of the article. From the failure to deny guilt it can either be inferred that the accused was conscious of his or her guilt, or that the accused was suffering from feelings of guilt. Although in a given case it may be impossible to determine which of these is the correct inference, this is probably unimportant because both states of mind provide an acceptable foundation for an inference that the accused is guilty of the crime charged.

D Attempting to Avoid Apprehension

Attempts to avoid apprehension — such as running away from the scene of a crime, hiding from the police, resisting arrest, escaping from custody¹⁴³ or fleeing the jurisdiction — do not so much suggest fear of the truth — as did the first two categories of guilty behaviour — as fear of punishment. Because those who know themselves to be guilty of a particular crime are likely to fear being punished for that crime, however, a suspect’s attempts to avoid apprehension can also found an inference of consciousness of guilt.¹⁴⁴ Nevertheless, there are also

¹⁴¹ William Shakespeare, *Macbeth* II.2.31–2.

¹⁴² Shakespeare, *Hamlet*, above n 74, III.3.40.

¹⁴³ See, eg, Johann Manfred Weissensteiner (1992) 62 A Crim R 96, 106–7.

¹⁴⁴ Indeed in medieval times flight was sufficient to lead to an adverse judgment in the form of forfeiture of goods, though this was perhaps more a method of ensuring attendance at trial, than a rule of evidence: Wigmore, *Evidence*, above n 3, [276], and Sir Frederick Pollock and Frederick Maitland, *The History of English Law Before the Time of Edward I* (2nd ed, 1898) vol 2, 481.

several possible innocent explanations for flight, and it is only after these explanations have been eliminated that an inference of consciousness of guilt can safely be made.

First, fear of punishment may be the wrong inference to draw from the flight, which might instead have been motivated by a simple desire to avoid being taken into custody or placed under arrest, at that particular time or at all. This was the explanation offered for the most widely witnessed 'flight' in history: the low speed pursuit of OJ Simpson down fifty miles of Los Angeles freeway. The police theory seems to have been that Simpson was headed for Mexico,¹⁴⁵ but Simpson himself has since claimed that although he knew he was supposed to surrender himself into custody that day, he first wished to visit his wife's grave; and that after finding himself unable to do so, he had too many other things to think about — including the possibility of suicide — to worry about the fact that the police were looking for him.¹⁴⁶ Although Simpson's flight apparently did much to persuade the American public that Simpson really might be guilty,¹⁴⁷ it was never offered as evidence at his trial, presumably because the prosecution lawyers considered it to be too equivocal.

Secondly, a person may wish to avoid apprehension because they fear that they will be wrongly convicted of a crime of which they are in fact innocent.¹⁴⁸ In a perfect world, of course, the innocent would have complete faith in their acquittal. But we do not live in a perfect world: the innocent are sometimes convicted, and often inconvenienced. Given this, it is hardly surprising that many people would choose to avoid the expense and inconvenience of defending a charge of criminality and the risk of a wrongful conviction by, for example, fleeing the scene of a crime even though they know themselves to be innocent. The following claim about the guilt to be inferred from flight therefore has more to do with some idealised vision of universal faith in the perfect administration of justice together with uniform levels of personal fortitude and resolution among those accused of crime, than with reality:

The truth is — and it is an old scriptural adage — 'that the wicked flee when no man pursueth, but the righteous are as bold as a lion.' Men who are conscious

¹⁴⁵ 'Apprehending Officers — On Direct Examination', <http://www.dnai.com/~caz/appofd.html> (Copy on file with author).

¹⁴⁶ *Rufo, Goldman and Brown v Simpson*, No SC031947, 1996 (Superior Court of the State of California for the County of Los Angeles, 22 January 1996), Deposition of Orenthal James Simpson, 80, 86, 188, 209 and 211, <http://www.latimes.com/simpson/trans/> at 16 April 1997 (Copy on file with author).

¹⁴⁷ 'O.J. On The Run', <http://www.dnai.com/~caz/run.html> at 16 April 1997 (Copy on file with author); Lawrence Schiller, 'Foreword' in OJ Simpson, *I Want to Tell You: My Responses to Your Letters, Your Messages, Your Questions* (1995) vii.

¹⁴⁸ In discussing whether or not suspected witches should be imprisoned, for example, a medieval witch hunters' manual suggested that one approach was to dismiss the suspected witch 'with the safeguard of sureties; so that if she makes her escape, she can then be considered as convicted'; one need not believe in the existence of witches, however, to see that fleeing the jurisdiction might be a sensible course of action for someone suspected of witchcraft: Heinrich Kramer and James Sprenger, *Malleus Maleficarum* (1486), translated and edited by Montague Summers (1971) 214.

of right have nothing to fear. They do not hesitate to confront a jury of their country, because the jury will protect them.¹⁴⁹

The possibility that flight might be motivated by a fear of wrongful conviction rather than a fear of justified punishment was recognised in the case of *Wallace v SA Police*. In that case the accused was seen outside a house from which, ten or so minutes earlier, someone had attempted to steal a car. When the householder called out to his neighbour 'I reckon that's him there', the accused ran away and hid in some bushes. The Special Magistrate who tried the case thought that this behaviour clearly evidenced a consciousness of guilt sufficient to found a conviction; but on appeal Mullighan J accepted the possibility that the accused — who was 'known to police' — might have seen 'the police activity near the scene of an apparent crime, the damaged motor vehicle, and feared that suspicion would fall upon him because of his past record ... and tried to get away for that reason and not because of a consciousness of guilt of interfering with the motor vehicles'.¹⁵⁰

Thirdly, apprehension may have consequences for the accused other than conviction of the crime charged, and it may be those consequences which the accused is attempting to avoid. The accused might, for example, have committed other crimes;¹⁵¹ or the accused might fear that apprehension for this offence might lead to revocation of parole or bail for other offences.¹⁵² Having to explain the reason for the flight in cases such as this also poses a substantial risk to the accused, because it will generally be impossible for the accused to do so without disclosing the fact that he or she was suspected of, or had been convicted of, other offences, and such a disclosure might seriously prejudice him or her.¹⁵³ If this is the explanation offered by the accused, then it may be that the evidence should be excluded in the exercise of the judge's discretion, on the grounds that it is more prejudicial than probative.¹⁵⁴

In summary, attempts to avoid apprehension can support an inference of guilt on the basis that they manifest a fear of punishment which suggests a consciousness of guilt. As with any other form of guilty behaviour, however, the jury should be informed of the possible innocent explanations for the accused's

¹⁴⁹ From the charge to the jury in *Starr v US*, 164 US 627 (1896), reproduced in Wigmore, *Evidence*, above n 3, [276].

¹⁵⁰ *Wallace v SA Police* (Supreme Court of SA, Mullighan J, 22 July 1993) 8.

¹⁵¹ Cf *R v Melrose* [1989] 1 Qd R 572, where the evidence of flight was held to be admissible despite this problem.

¹⁵² See, eg, *R v Bridgman* (1980) 24 SASR 278 where the accused's flight from relatively minor charges was excluded after being attributed to his fear that conviction, whether justified or not, would lead to revocation of his parole on far more serious charges; and *Harradine v Henderson* (Supreme Court of South Australia, Olsson J, 29 October 1991) where the Court found that a Magistrate was not justified in attributing the accused's flight from police in a stolen red Holden Commodore to a fear of being apprehended for a series of burglaries which had been carried out in the vicinity by two men driving such a car, when it could instead be explained by the accused's fear that his bail for other offences would be revoked because of the fact that he was in a stolen car.

¹⁵³ *R v Bridgman* (1980) 24 SASR 278, 280.

¹⁵⁴ The common law discretion to exclude evidence on these grounds is retained in ss 135 and 137 of the Evidence Act 1995 (Cth).

behaviour, and should be instructed that unless those explanations can be excluded, it will not be open to them to use the evidence as the basis for an inference of guilt.¹⁵⁵ With attempts to avoid apprehension, the possible innocent explanations include:

- a fear of punishment for a crime of which one is innocent; and
- a desire to avoid some consequence other than conviction and punishment for the crime charged, such as the revocation of parole, punishment for some other crime, or the negative experience of involvement in a criminal investigation.

E Guilty Demeanour

This final category explores the idea — implicit in Windeyer J's reference in *Woon* to a 'demeanour demonstrative of guilt'¹⁵⁶ — that the accused's guilt can be inferred from his or her 'demeanour' in the immediate aftermath of a crime and during its investigation.¹⁵⁷ By demeanour it is meant the accused's bearing and manner of comporting him or herself. Of course, every form of guilty behaviour so far considered is arguably covered by such a description; in this article, however, 'guilty demeanour' is being used to refer to conduct or behaviour which is far less tangible than that contained in the earlier categories. It will usually be fairly easy to determine, for example, whether the accused lied, refused to participate in an identification parade, or fled the scene of the crime. The main issue for the jury will instead revolve around the significance of the behaviour: should it be used as the basis for an inference of guilt, or is it consistent with innocence?

Guilty demeanour, on the other hand, is both more difficult to define, and identify. Perceptions of guilt based on demeanour are likely to depend on highly subjective impressions which may be difficult for the witness to articulate, let alone convey to a jury. The greatest obstacle to the use of guilty demeanour, therefore, will usually be the difficulty of establishing that the accused did indeed behave in a way which might be thought consistent with guilt. Even if this can be established, however, the significance of the behaviour will often be fairly equivocal. It may, therefore, be difficult for the jury to eliminate possible innocent explanations for the behaviour. Because of this, guilty demeanour will usually provide a far less secure basis for an inference of guilt than the evidence in the other four categories of guilty behaviour. In the discussion which follows, guilty demeanour has been divided into four sub-categories: 'Responses to the Crime', 'Fascination with the Crime', 'Responses to the Investigation' and 'Unconvincing Denials of Guilt'.

¹⁵⁵ *Harradine v Henderson* (Supreme Court of South Australia, Olsson J, 29 October 1991) 6–7; *R v Adamson* (Supreme Court of Victoria, Southwell, Ormiston and Coldrey JJ, 19 April 1994) 8.

¹⁵⁶ *Woon* (1964) 109 CLR 529, 542.

¹⁵⁷ As opposed to demeanour at trial.

1 Responses to the Crime

As a general rule, one would expect someone who has committed a crime — or at least a bloody one — to experience some sort of immediate psychological or emotional reaction to that fact. Birch, for example, has argued that '[f]ailing to show any emotion after committing murder is so unusual' that 'if the question is which of two mentally normal men committed a murder, evidence that one was upset afterwards ought to be relevant.'¹⁵⁸ It was presumably on this basis that evidence was admitted in *Rice* — where the accused was charged with murdering his girlfriend during the course of a weekend spent at a motel — to the effect that the accused had appeared 'agitated and depressed' shortly after the time at which the deceased is alleged to have died.¹⁵⁹ Evidence of this kind need not be broken down into a double inference: its probative value, if any, rests on the plausibility of generalisations of the type put forward by Birch. My own view is that while Birch's generalisation is plausible, the question of whether an inference can actually be drawn from the accused's post-crime emotional state will depend very much on the circumstances of the individual case.

In *Blastland*, for example — the case which Birch was discussing — the person whose emotional responses were under consideration had — in all probability — either committed the murder in question, or had witnessed it, or had discovered the body of the deceased shortly after he had been murdered by someone else.¹⁶⁰ Any one of these scenarios might have been sufficient to explain his emotional state; and given this, it is not self-evident that his emotional state was relevant to the inquiry. In *Rice*, on the other hand, at the time at which the accused appeared 'agitated and depressed' the deceased was either already dead at his hands, or still alive and at the motel. As the accused's emotional state was more consistent with the former hypothesis than with the latter, the evidence would appear to have had some probative value. This is really no different from the way in which the deceased's state of fear shortly before she was shot in *Ratten* was used to rebut the defence of accidental shooting.¹⁶¹

In the longer term, albeit infrequently, feelings of guilt might so destabilise a person's psyche as to lead to madness or suicide. The psychological basis for this lies in the fact that a person experiencing feelings of guilt perceives their wrongful act as alien to their true self.¹⁶² The act and self can be reconciled either by making reparation for the wrong and thus maintaining the integrity of

¹⁵⁸ D Birch, 'Hearsay-logic and Hearsay-fiddles: *Blastland* Revisited' in P Smith (ed), *Criminal Law: Essays in Honour of J C Smith* (1987) 24, 33. This generalisation is, however, qualified by reference to a quote from *R v Rivett* (1950) 34 Cr App R 87, 90 which exemplifies the extent to which people differ in their emotional expressiveness: 'That he appeared detached and unconcerned did not strike the doctor at the time as remarkable, owing to his acquaintance with the phlegmatic disposition of the labouring class in East Anglia, but he agreed that it was remarkable for even an East Anglian to sleep soundly after committing murder.'

¹⁵⁹ *Rice* (1996) 85 A Crim R 187, 189.

¹⁶⁰ *R v Blastland* [1986] 1 AC 41, 54 ('*Blastland*').

¹⁶¹ *Ratten v R* [1972] AC 378, 387–8 ('*Ratten*'), discussed in Palmer, 'Hearsay', above n 7, 37–8.

¹⁶² See above Part II(A)(3).

the self, or by modifying the self to conform to the act.¹⁶³ If no such reconciliation is attempted or achieved, however, then the ongoing contradiction between the perception of the act and the perception of the self may lead to mental instability. In *Macbeth*, this is manifested by Macbeth's hallucinations of Banquo's ghost. Resolving to continue on his bloody course, however, Macbeth explains the apparitions to his wife as the 'initiate fear that wants hard use'.¹⁶⁴ From then on his conscience troubles him no more; he deals with his sense of guilt by modifying his perception of self, to that of a person who ruthlessly removes all obstacles to his ambition.¹⁶⁵ Lady Macbeth, on the other hand, is unable to achieve any such reconciliation. Initially believing that '[a] little water clears us of this deed',¹⁶⁶ she is eventually driven to madness by the realisation that her hands will 'ne'er be clean'.¹⁶⁷ Unable to reconcile self with deed as her husband does, Lady Macbeth eventually finds it impossible to live with herself and commits suicide. This sort of behaviour is virtually useless as evidence of guilt, because it will always be difficult if not impossible to identify and isolate its causes.¹⁶⁸

Another arguably relevant emotional response to an alleged crime occurs when the accused's behaviour and emotional responses depart from the behaviour and responses which would have been expected if the hypothesis consistent with innocence were true. For example, the idea that Lindy Chamberlain's failure to publicly cry over the death of her daughter Azaria meant she had probably murdered her, was based on beliefs about the ways in which bereaved mothers supposedly behave.¹⁶⁹ Similarly, in a case where the accused was charged with murdering his wife in a manner designed to make it appear that she was the victim of a bungled burglary, the only reason why the fact that the accused 'showed no emotion' on being told of his wife's death could possibly have been noteworthy was on the basis that this lack of emotion was a departure from the behaviour one would expect of a bereaved husband.¹⁷⁰ In both cases, the guilty

¹⁶³ Taylor, above n 46, 93.

¹⁶⁴ Shakespeare, *Macbeth*, above n 141, III.4.143.

¹⁶⁵ See also Taylor, above n 46, 94–5.

¹⁶⁶ Shakespeare, *Macbeth*, above n 141, II.2.67.

¹⁶⁷ *Ibid* V.1.42.

¹⁶⁸ *Commonwealth of Massachusetts v John Francis Knapp*, VII American State Trials 395 (1830), reproduced in Wigmore, *Evidence*, above n 3, [276], where the prosecutor offered suicide as the basis for an inference of guilt.

¹⁶⁹ See, eg, Norman Young, *Innocence Regained: The Fight to Free Lindy Chamberlain* (1989) 10. Given the comment by the expert witness Joy Kuhl that, '[s]he is, you know, a witch' (John Bryson, *Evil Angels* (1988) 432) it is interesting to note that a woman's capacity to weep was a medieval test for determining whether or not she was a witch. Kramer and Sprenger, above n 148, 227, thus advise a judge to 'take note whether she is able to shed tears when standing in [the Judge's] presence or when being tortured. For we are taught both by the words of worthy men of old and by our own experience that this is a most certain sign, and it has been found that even if she be urged and exhorted by solemn conjurations to shed tears, if she be a witch she will not be able to weep'.

¹⁷⁰ *Alexander* [1994] 2 VR 249, 252.

behaviour is a departure from what would have been expected if the person was innocent.¹⁷¹

I would argue, however, that while departure from the stereotype might legitimately arouse the suspicions of investigators, an inference of guilt can not be safely drawn from it. This is because the evidence can not be broken down into a persuasive double inference of the type outlined in the second part of this article. The most that can be said is that the accused's emotional responses to the event appeared to be unusual. Guilt would, of course, be one explanation for the apparently unusual nature of the accused's responses; but another equally plausible one would be that the accused's *general* emotional responses or levels of expressiveness differed from the norm. Without recourse to a battery of psychological testing, or the admission of a host of evidence about how the accused had responded in other, comparable, situations (if indeed any could be found), it is difficult to see how the jury could ever eliminate this possible explanation.

In any case, a guilty person is likely to try and prevent any such inference from being drawn by faking the reactions and behaviour that they imagine would be expected of an innocent person. In the notorious Bamber case in England, for example, Jeremy Bamber murdered his adoptive parents, his sister and her twin sons in a manner designed to make it appear that they were the victims of a murder-suicide carried out by his sister. When told that they were dead, Bamber broke down and wept; he kept asking to see his father and had to be repeatedly told that he and the rest of the family were dead; and at their funeral he was prostrate with grief. His 'faking' was so successful that the police swiftly decided that it had indeed been a murder-suicide, and so certain of this were they that a couple of days after the shooting they burnt the bloodstained bedding, wallpaper and carpets. It was only later that crucial evidence emerged to show that the family had in fact been murdered by Bamber.¹⁷²

Of course there may seem something unnatural about the faked behaviour of a guilty person for the simple reason that — unless the person is an accomplished actor — simulated emotions will seldom seem as natural as the real thing. In *Crime and Punishment*, for example, Raskolnikov becomes acutely self-conscious of his behaviour and struggles to act as an innocent person would while aware that he no longer knows what that is:

¹⁷¹ See also Albert Camus, *The Outsider* (1961 translation by David Magarshack) 91 where the protagonist's failure to conform to the stereotype of the grieving son at his mother's funeral is used against him on charges arising out of his *subsequent* shooting of an Arab: 'After asking the jury and my lawyer if they had any questions, the judge heard the door-keeper's evidence. On stepping into the box the man threw a glance at me, then looked away. Replying to questions, he said that I'd declined to see Mother's body, I'd smoked cigarettes and slept, and drunk *café au lait*. It was then I felt a sort of wave of indignation spreading through the courtroom, and for the first time I understood that I was guilty.'

¹⁷² Sandra Parsons, 'Bamber Took the Rifle From the Wall and Slipped Silently into the Farmhouse. His First Victims Were the Sleeping Twins ...', *Daily Mail* (London), 30 July 1994, 30; Julia Lewellyn Smith, 'After the Mourning', *The Times* (London), 1 August 1994, 12.

'I shall have to gush over him, too,' he thought, turning pale and with a beating heart, 'and do it naturally, too. It would be more natural not to do anything at all. Make a point of doing nothing at all! No, *to make a point of it* would not be natural again.¹⁷³

But while an investigator's suspicions might well be aroused by their sense that a possible suspect was 'faking it', it is again hard to see how behaviour believed to be fake could possibly qualify as evidence of guilt. Apart from anything else, it is only *after* we have decided that the person is guilty that we can confidently say that their behaviour was faked. Until then, the most that can be said is that the behaviour does not ring true. Attempting to break down such a conclusion into a persuasive double inference presents exactly the same problems as those which arise when the accused's behaviour departs from that which one would expect of an innocent person.

2 *Fascination with the Crime*

Another stereotypical indicator of guilt is an unusual degree of fascination or pre-occupation with the crime. In *Crime and Punishment*, for example, Raskolnikov accidentally meets the chief clerk of the police station at a restaurant and deliberately toys with his suspicions, first leading him to believe he is guilty and then implying that the whole thing had merely been some sort of game.¹⁷⁴ In the guise of telling people how he would have committed such a crime, had he been its perpetrator, he actually tells them how he did commit it and dispose of its traces.¹⁷⁵ He returns to the scene of the crime.¹⁷⁶ He asks the examining magistrate, Porfiry, whether one of his interrogation methods is to 'put [the suspect] off his guard, and then stun him in the most unexpected manner by a most fatal and dangerous question, hit him, as it were, on the head with it'.¹⁷⁷ The metaphor describes, as Porfiry draws to Raskolnikov's attention, the exact method by which the two women were murdered. If this sort of behaviour suggests guilt it is not because one would expect that every person who commits a crime would have that crime, or the fear of apprehension for it, constantly on their mind.

Rather, the relevance of the evidence would depend on the plausibility of a generalisation to the effect that a person who committed a crime is more likely to be preoccupied by it or fascinated with it, than a person who did not commit it. No doubt as a generalisation this is true, although it might be more accurate to talk of an *unusual* degree of fascination and preoccupation, given the fact that some crimes are so widely-reported that large sections of the public might be

¹⁷³ Dostoyevsky, above n 31, 263 (emphasis in original).

¹⁷⁴ Ibid 183ff.

¹⁷⁵ Ibid 183–4. If through doing so he had betrayed an esoteric knowledge of the crime which he could only have had if he had committed it, then the fact of this knowledge obviously could have been used to prove his guilt. Cf *R v Matthews* (1990) 58 SASR 19, 21 where the accused was charged with murdering his estranged wife. A diary entry which he admitted might have been written on the night of the murder read 'Liz dead, 27 years five months and nine days'. Absent some innocent explanation for how he had known the deceased was dead, the fact of him having had this knowledge was clearly incriminating.

¹⁷⁶ Dostoyevsky, above n 31, 190–2.

¹⁷⁷ Ibid 349.

said to be fascinated by them. An equally plausible generalisation, however is that persons guilty of committing a crime *or suspected of committing it* are more likely to be fascinated by it or preoccupied with it than persons who are neither guilty nor under suspicion. The plausibility of this second generalisation means that fascination or preoccupation with crime should probably only be considered relevant if it was manifested before the accused became a suspect; if it was manifested after the accused became a suspect then the innocent explanation for the behaviour is arguably as plausible as the guilty one. Even if this restriction is accepted, the difficulties of establishing an unusual degree of fascination or preoccupation on the part of the accused should not be underestimated.

3 Responses to the Investigation

A guilty person might also be expected to display signs of agitation and anxiety during the course of the investigation. In *Crime and Punishment*, for example, Raskolnikov faints when he is at a police station on an unrelated matter and conversation turns to the murder.¹⁷⁸ Similarly, he starts, goes pale or becomes agitated whenever the murder, or an aspect of its investigation, is unexpectedly mentioned.¹⁷⁹ On the same psychological basis, Hamlet uses the play he calls *The Mousetrap* as a method of determining Claudius' guilt:

For murder, though it have no tongue, will speak
With most miraculous organ. I'll have these players
Play something like the murder of my father
Before mine uncle. I'll observe his looks,
I'll tent him to the quick. If a do blench,
I know my course.¹⁸⁰

Claudius' agitated exit after the acting out of the murder is taken by Hamlet as confirmation of the ghost's allegations of murder, though one wonders whether an innocent Claudius might not also have been 'marvellous distempered'¹⁸¹ by the play's insinuations. Nevertheless, there is no doubt that anyone wanting to know whether a particular person was guilty would be interested to know how he or she had reacted, for example, upon arrest. Were they anxious or calm,

¹⁷⁸ Ibid 123. Cf *R v Haggerty* (1807) 6 Celebrated Trials 19, discussed in Wills, above n 97, 122–3: 'A remarkable fact of the same kind occurred in the case of one of three men convicted in February, 1807, of a murder on Hounslow Heath. In consequence of disclosures made by an accomplice, a police-officer apprehended the prisoner four years after the murder on board the 'Shannon' frigate, in which he was serving as a marine. The officer asked him in the presence of his captain where he had been three years before; to which he answered that he was employed in London as a day-labourer. He then asked him where he had been employed that time four years: the man immediately turned pale, and would have fainted away had not water been administered to him. These marks of emotion derived their weight from the latency of the allusion — no express reference having been made to the offence with which the prisoner was charged — and from the probability that there must have been some secret reason for his emotion connected with the event so obscurely referred to, particularly as he had evinced no such feeling upon the first question, which referred to a later period'.

¹⁷⁹ Dostoyevsky, above n 31, 157, 250, 358.

¹⁸⁰ Shakespeare, *Hamlet*, above n 74, II.2.546–551.

¹⁸¹ As he was so described by Guildenstern: *ibid* III.2.273.

agitated or composed? A person conscious of their guilt might well respond to such circumstances with anxiety or agitation; unfortunately, an innocent person might be just as likely to do so.¹⁸² As interesting as the information is, therefore, it will always be difficult to eliminate innocent explanations for such responses. In the case of response to arrest, for example, the innocent will often be as nervous as the guilty, for the simple reason that being the subject of an investigation is capable of inducing anxiety even in the innocent.¹⁸³ And before the jury even gets to the point of considering innocent explanations for such emotional states, they would need to be satisfied that the witness' diagnosis of the accused's emotional state was accurate. No doubt it is for these reasons that it is difficult, but not impossible, to find cases where such information is offered as evidence. In a recent Canadian drugs case, for example, the accused's 'nervous reaction' was listed as one of the items of evidence against him:

Officer Coderre, who knew the appellant, reached him first, took away his weapon and informed him that they wanted to question him in the context of their ongoing investigation with respect to marijuana plants in the area. In response to this, the appellant reacted nervously and told the officers that he was in the process of hunting, that he had done nothing wrong and he asked them to let him leave.¹⁸⁴

It is difficult to see how the jury could possibly have eliminated the many conceivable innocent explanations for the accused's alleged nervousness; and if the jury could not eliminate those explanations, then knowing that the accused reacted nervously could not have assisted them to make a rational decision about the accused's guilt or innocence.

An earlier, and arguably more reliable, indicator of guilt might be the fact that the accused had exhibited anxiety before he or she had actually become a suspect. Once a person is actually suspected of committing a crime their anxiety might be explained by that fact, rather than by their consciousness of guilt. But if someone exhibits anxiety, or starts to behave like a suspect, *before* suspicion has been formed then that explanation is obviously not open. In such cases, the most plausible explanation for the behaviour might be the fact that a person conscious of their guilt is likely to believe themselves a suspect even when they are not. In *Crime and Punishment*, for example, much of the behaviour referred to above actually occurs before Raskolnikov becomes a suspect; and it is that behaviour, more than anything else, which eventually makes him the target of the investigation. Similarly, one can imagine the suspicions of the police being aroused by

¹⁸² Cf *Webster's Trial*, Bemis' Rep 486 (Mass, 1850), reproduced in Wigmore, *Evidence*, above n 3, [273]: 'Such are the various temperaments of men, and so rare the occurrence of the sudden arrest of a person upon so heinous a charge, that who of us can say how an innocent or a guilty man ought or would be wholly likely to act in such a case, or that he was too much or too little moved for an innocent man? Have you any experience that an innocent man, stunned under the mere imputation of such a charge, though conscious of innocence, will always appear calm and collected? Or that a guilty man who, by knowledge of his danger, might be somewhat braced up for the consequences, would always appear agitated?'

¹⁸³ See above Part III(A)(1) and Part III(D).

¹⁸⁴ *R v Couture* (1995) 93 CCC (3d) 540, 542-3.

the fact that a person — not yet considered a suspect — was claiming the right of silence.¹⁸⁵ And the fact that a person had taken an unusual interest in the progress of a criminal investigation might also suggest an anxiety about apprehension which is consistent with a consciousness of guilt.¹⁸⁶

There are, however, two obstacles to the drawing of a consciousness of guilt inference from such behaviour. The first is that consciousness of guilt is not the only conceivable explanation for a person mistakenly believing themselves to be a suspect. A person with little experience of criminal investigation might misinterpret police behaviour — such as asking the person to attend at a police station for the taking of a formal witness statement — as indicative of suspicion. And a person with adverse experience of the criminal justice system — who had, for example, been wrongly suspected on other occasions, or who simply distrusted the police — might also too readily assume that they were a suspect. The second obstacle to the drawing of an inference of consciousness of guilt relates to the difficulties of proving that the person was not in fact a suspect at the time. Determining the exact point of time at which a person moved from being a witness to being a suspect, revolving as it does around the state of mind of the investigating officers, would clearly be no easy matter.

4 *Unconvincing Denials of Guilt*

I have already discussed the reasons why an accused person's failure to deny their guilt might be capable of supporting an inference of guilt. It has also often been suggested that an unconvincing denial of guilt may be used in the same way. In *Woon*, for example, Windeyer J commented that:

Whether an accusation be in terms denied or conceded may sometimes be less important than the manner and tone of the words used by the accused and the circumstance of their utterance. A man's looks may belie him. Demeanour and conduct may discount denial and manifest guilt as surely as would a confession made by words.¹⁸⁷

This argument clearly depends on a belief that the accused's guilt can be determined by an assessment of his or her demeanour. An example of such an

¹⁸⁵ Given that the right of silence only arises when there are reasonable grounds for a person to believe themselves a suspect should not, in theory at least, prevent the drawing of an inference of guilt from the fact that a person had claimed the right of silence at a time when there were no reasonable grounds for them to believe themselves a suspect: *Petty and Maiden* (1991) 173 CLR 95.

¹⁸⁶ See, eg, *Blastland* [1986] 1 AC 41, 45 where the defence was that another man — one Mark — had committed the murder with which the accused was charged, and defence counsel pointed to the fact that Mark had shown an 'unusual interest in police inquiries' as evidence supporting the claim that Mark was the murderer. Cf *Moore v State*, 2 Ohio St 502 (1853), reproduced in Wigmore, *Evidence*, above n 3, [273]: 'Sometimes a person is detected as the author of a crime by showing an unusual anxiety to discover the perpetrator; at other times the discovery is led to by the person showing too much indifference ... These are generally acts that in themselves show no disposition to do mischief; but it is because they are unnatural, because they tend to the conclusion that they are produced by a mind conscious of its guilt, that they are provable against the accused. They are in themselves nothing, except as showing the state of mind of the party'.

¹⁸⁷ *Woon* (1964) 109 CLR 529, 541 (Windeyer J). See also *Woon* (1964) 109 CLR 529, 537 (Kitto J), 539 (Taylor J); *R v Christie* [1914] AC 545, 554.

assessment is provided by the following comment made by the judge in a recent Canadian child sexual abuse case:

Most importantly, I want to mention that in my opinion ... [the accused] ... lacked the sense of outrage while testifying concerning the allegations, which one would expect if he were the subject of fabricated allegations or innocently distorted memories. If the evidence in the question against him had been totally made up, one would have expected to see a young man much more upset and much stronger in his denials of the accusations.¹⁸⁸

Lack of outrage aside, how can we define the demeanour which 'discounts denial'? Inbau, Reid and Buckley list a variety of differences between the guilty person's and the innocent person's denial of guilt.¹⁸⁹ An innocent suspect's denial would, they claim, be 'direct, crisp and almost angry'; it would be 'given in seemingly sincere disbelief of the suspicion or accusation', or in a way that 'seems to imply "Are you crazy?"' A guilty person's denial, on the other hand, might be 'apologetic or pleading', or might be preceded by a long delay, or by the suspect 'staring about the surroundings, somewhat hypnotically'. As useful as Inbau, Reid and Buckley's list of differences might be to investigators, however, it is subject to one fundamental defect: it assumes that all innocent people falsely accused of a crime would experience the same degree of outrage and express it in the same manner. In other words, it depends on a stereotype from which some innocent people will depart.¹⁹⁰

It is surely unrealistic, for example, to expect a person with numerous prior convictions and long experience of the criminal justice system to feel the same outrage at a false accusation as might be felt by a person who had never even been suspected of criminality before. The former suspect might simply choose the path of silence and non-co-operation as representing their best chance of avoiding a wrongful conviction; and even an outraged person might express their outrage by refusing to dignify with their denial an unfounded accusation of criminality. Nor is it realistic to expect that a person prone to feelings of shame, or in a state of depression, would react in the same way to a false accusation as a person with high self-esteem and a strong sense of self; for the person prone to feelings of shame the false accusation might simply exacerbate those feelings.¹⁹¹

¹⁸⁸ *R v B (SP)* (1994) 90 CCC (3d) 478, 483.

¹⁸⁹ Inbau, Reid and Buckley, above n 22, 49–50; see also 141–8. Cf American Law Institute, *Model Code of Evidence*, ch 6, Rule 507, 247–8, as approvingly quoted in *Woon* (1964) 109 CLR 529, 537: 'a halting or otherwise suspiciously spoken denial, in the face of a damaging accusation, may furnish ample grounds for an inference of consciousness of its truth'.

¹⁹⁰ The New Brunswick Court of Appeal rejected the comment reproduced above n 189, declaring that it 'would refuse to determine the credibility of an accused person by relying on a stereotyped degree of reaction, outrage or denial that one subjectively might expect from someone who is falsely accused': *R v B (SP)* (1994) 90 CCC (3d) 478, 483.

¹⁹¹ Cf *Smith v State*, 9 Ala 990 (1846), 995, reproduced in Wigmore, *Evidence*, above n 3, [273]: 'The conduct of one accused of crime is the most fallible of all competent testimony. Those emotions or acts which might be produced in one person by a sense of guilt, or by the stings of conscience, might be exhibited by another, differently constituted, by an overwhelming sense of shame, and the degradation consequent upon a criminal accusation; the same cause producing opposite effects in different persons, owing to weakness or strength of nerve, and other inexplicable moral phenomena.'

Furthermore the person suffering from shame is most likely to want to 'hide from others and, more specifically, to remove himself or herself from the interpersonal situation(s) that gave rise to this experience';¹⁹² outraged denial is therefore the least likely response.

This is not the only problem, however. In the Canadian case referred to above, the supposedly unconvincing denial of guilt occurred in court, so that the jury would have been able to decide whether or not the denial was that of a guilty man on the basis of their own perceptions. In most cases, however, the unconvincing denial will have occurred out of court, and the jury would have to decide whether the denial was that of a guilty person purely on the basis of a witness' account of that denial. Yet the supposed difference between the denial of the guilty and the denial of the innocent clearly turns on subtle nuances of tone and timing, matters which are particularly difficult to convey accurately to a court.¹⁹³ I would therefore argue that an accused person's out of court denial of guilt, no matter how unconvincing it might have seemed to those who heard it, should never be offered as evidence from which the accused's guilt can be inferred. As Lowe J said — with the addition by myself of the word in parentheses — 'by no torturing of the statement "I did not do the act" can you (safely) extract the evidence "I did do the act"'.¹⁹⁴

In summary, as diverse as the behaviour contained in this category is, it does tend to share the two following characteristics: difficulty in satisfactorily establishing the fact of the behaviour, and difficulty in eliminating any innocent explanations for it. These two characteristics mean that evidence of guilty demeanour should seldom, if ever, be admitted.

V CONCLUSION

However they may currently be classified in the textbooks, lies, flight, failure to deny guilt and all of the other kinds of guilty behaviour discussed in this article do indeed form one broad class of circumstantial evidence. The defining feature of this class of evidence is that any inference of guilt must be broken down into a double inference, of guilty state of mind from guilty behaviour, and of guilt from guilty state of mind. By far the most important state of mind, in evidential terms, is consciousness of guilt. If a persuasive double inference of

¹⁹² Tangney, above n 45, 103. Cf *R v Owens* (1986) 33 CCC (3d) 275, 282, where the accused, a teacher charged with sexually assaulting some of his pupils, testified that his failure to ask the principal about the details of the allegations against him or to vigorously protest his innocence was due to him being raised by an alcoholic father. The result of such a childhood was, he claimed, that his natural response to crisis situations was to withdraw rather than to react.

¹⁹³ 'How easy is it ... for the hearer to take one word for another, or to take a word in a sense not intended by the speaker, and for want of an exact representation of the tone of voice, emphasis, countenance, eye, manner and action of the one who made the confession, how almost impossible it is to make third persons understand the exact state of his mind and meaning!': *Resp. v Fields* Peck's Rep 140, quoted in Wills, above n 97, 120. See also *Woon* [1964] 109 CLR 529, 542: 'Something might turn on the tone of voice in which these things were said. But of that we know nothing'.

¹⁹⁴ *Edmunds v Edmunds and Ayscough* [1935] VLR 177, 186.

this type cannot be formulated, then this will almost invariably mean that the evidence lacks the probative value required for admission. If, on the other hand, a persuasive double inference can be formulated then the evidence probably satisfies the requirement of relevance.

With almost all of the behaviour discussed, this should be sufficient for admission, because guilty behaviour is not, in general, subject to any of the exclusionary rules of the law of evidence. The only undoubted exception to this is the exercise by the accused of his or her right of silence. Where silence is concerned, considerations of policy have consistently been held to override considerations of relevance, and the courts have forbidden the accused's exercise of the right of silence from being used as the basis for an inference of guilt. The same policy considerations might also prevent the adverse use of any refusal by the accused to assist an investigation which takes a form other than silence. Apart from these two exceptions, however, the requirement of relevance is the only non-discretionary barrier to the admissibility of evidence of the accused's guilty behaviour.

Most guilty behaviour is, however, susceptible of innocent explanation. The plausibility of those explanations — which were detailed in the body of the article — will obviously vary from case to case. The fact that there may be innocent explanations for an accused person's apparently guilty behaviour does not necessarily mean, however, that the guilty behaviour will be incapable of satisfying the requirement of relevance. Provided that the guilty explanation is a plausible explanation for the behaviour then, in general, the evidence should be left for the consideration of the jury. The jury will, however, need to be informed of all of the possible innocent explanations for the behaviour, and instructed that unless those explanations can be excluded, the behaviour cannot be used as the basis for an inference of guilt.