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# Miranda in Comparative Law

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# *MIRANDA* IN COMPARATIVE LAW

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## I. INTRODUCTION

Historically, confessions of guilt have been the "best evidence in the whole world"[1] in all systems of criminal justice, whether characterized as "adversarial" and rooted in the English Common Law,[2] or "inquisitorial" and based on Continental European traditions founded in Roman and Canon law.[3] The "formal rules of evidence" in Continental European inquisitorial systems expressly provided for torture of suspects caught *in flagrante* or when circumstantial evidence indicated a strong suspicion of guilt.[4] While torture was infrequently used in Common Law England,[5] criminal suspects were routinely interrogated by justices of the peace under a procedure authorized by statute.[6] Incriminating statements were admitted through the testimony of the justice of the peace at a time when criminal defendants were incompetent to

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1. This expression comes from the Pre-1864 Laws of the Russian Empire (1857 ed.), *quoted in* SAMUEL KUCHEROV, THE ORGANS OF SOVIET ADMINISTRATION OF JUSTICE: THEIR HISTORY AND OPERATION 610 (1970).

2. For a discussion of systematic pressures on the accused to speak in early English criminal procedure, see John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries*, *in* R.H. HELMHOLZ ET AL., THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 88 (1997) [hereinafter Langbein, *The Privilege*].

3. Under the French Ordinance of 1670, the confession was proof "par excellence." "[O]f all the proofs which can be had in criminal cases, the accused's confession is the strongest and most certain; consequently that proof is sufficient. . . . Such a confession is the most complete proof that could be wished for." ADHEMAR ESMEIN, A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE WITH SPECIAL REFERENCE TO FRANCE 262 (1913).

4. *See* Constitutio Criminalis Carolina §§ 23, 25-27. For a translation, see JOHN H. LANGBEIN, PROSECUTING CRIME IN THE RENAISSANCE 273-75 app. B (1974) [hereinafter LANGBEIN, PROSECUTING CRIME].

5. JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF: EUROPE AND ENGLAND IN THE ANCIENT RÉGIME 138 (1977) [hereinafter LANGBEIN, TORTURE].

6. Marian Bail Statute, 1554-55, 1 & 2 Phil. & M., c. 13 (Eng.), *reprinted in* LANGBEIN, PROSECUTING CRIME, *supra* note 4, at 256-57.

testify.[7] There was considerable authority at the time that the privilege against self-incrimination in England was meant to protect only against compelled testimony under oath and did not apply to questioning by justices of the peace, which was not under oath.[8] Although the institution of questioning suspects by justices of the peace in Sixteenth and Seventeenth Century England has been characterized as "a system of pretrial inquiry that was devoted to pressuring the accused to incriminate himself,"[9] the use of coercion, torture, threats or promises by interrogators was generally considered to render a statement involuntary and in violation of the privilege against self-incrimination.[10]

Indeed, it was perhaps foolish for suspects to refuse to give a statement to the justices of the peace, because they were incompetent to testify at trial and did not have lawyers to speak for them until well into the Nineteenth Century.[11] Since criminal defendants were often facing the death penalty even in non-homicide cases, the only way to appeal to the jury's mercy was to speak and hope the jury would exercise "pious perjury" even in the event the defendant's guilt could be adequately proven.[12] In some situations, confessing one's guilt to the jury could even lead to mitigation or acquittal.[13] Procedural strictures on the accused, such as threatened Draconian punishments coupled with the hopes of mitigation and mercy exercised first by the jury, and later by the judge in the event of a guilty verdict, are at the root of English and American plea-bargaining. These strictures have been characterized as the Common Law answer to the Continental European institution of torture.[14] The English system of pretrial examination by justices of the peace was transplanted to American soil and prevailed until the late Nineteenth Century,

7. *See* Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective, in* R.H. HELMHOLZ ET AL., THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 194 (1997) [hereinafter Alschuler].

8. Alschuler, *supra* note 7, at 186-87, 193.

9. Langbein, *The Privilege*, *supra* note 2, at 91.

10. On the blurry distinction between the inherent pressures of pre-trial interrogation by justices of the peace and the prohibition of torture in Colonial America, see Eben Moglen, *The Privilege in British North America: The Colonial Period to the Fifth Amendment, in* R.H. HELMHOLZ ET AL., THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 118-21 (1997) [hereinafter Moglen].

11. Langbein, *The Privilege*, *supra* note 2, at 83-87. Langbein calls this the "accused speaks" form of trial. *Id.*

12. *Id*. at 93-94.

13. *Id.* In Tsarist Russia, which had a jury system from 1864 to 1917, studies indicated that juries would be more likely to acquit or mitigate the sentence if the defendant gave a full judicial confession at trial. *See* Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, 62 LAW & CONTEMP. PROBS. 233, 246 n.70 (1999) [hereinafter Thaman, *Europe's New Jury Systems*].

14. *See generally* John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978).

as did the incompetence of defendants to testify in their own defense.[15] However, the Americans brought with them from England a great reverence for the privilege against self-incrimination, which stemmed from the fights of the Puritans and other dissidents against the inquisitorial courts of Star Chamber and the High Commission.[16] The Americans eventually incorporated this protection into the Fifth Amendment to the U.S. Constitution, which provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[17]

Inasmuch as there was no right to appeal either convictions or acquittals in the United States until the end of the Nineteenth Century,[18] there was no mechanism for judicial enforcement of the privilege against self-incrimination. Early cases do indicate, however, that coercive questioning by police[19] was an area controlled by the Fifth Amendment, and statements that were the product of such coercion could be excluded.[20] There appear to be two constants throughout American and European jurisprudence since torture was abolished on the European Continent.[21] First, genuinely involuntary confessions obtained by means of torture or other force, violence, deception, promises or threats were in violation of the law and subject to a rigid exclusionary rule. Second, the police and other investigative authorities continued to use such tactics to induce confessions and admissions on the part of criminal suspects.

In America, the U.S. Supreme Court was prevented by its own jurisprudence from addressing the problem of coerced confessions under the Fifth Amendment privilege against self-incrimination because it had not yet recognized that the amendment was binding on the states.[22] It thus fashioned a "due process" test for the voluntariness of confessions and, between 1936 and 1964, decided thirty-five confession cases arising from questionable police

15. *See* Moglen, *supra* note 10, at 114-17; Alschuler, *supra* note 7, at 198-99.

16. *See* Moglen, *supra* note 10, at 128-38 (noting that the high principles relating to the trials of the dissidents were ignored in trials of common criminals).

17. U.S. CONST. amend. V.

18. *See* United States v. Scott, 437 U.S. 82, 88 (1978).

19. The reputation of law enforcement in the early Twentieth Century was described by Justice Day in *Weeks v. United States*, 232 U.S. 383 (1914).

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

*Id.* at 392.

20. *See* Bram v. United States, 168 U.S. 532, 557-58 (1897).

21. Judicial torture was abolished on the European Continent, by and large, in the mid-to-late Eighteenth Century. *See* LANGBEIN, TORTURE, *supra* note 5, at 10.

22. *See* Twining v. New Jersey, 211 U.S. 78, 93 (1908).

tactics in interrogating suspects in state trials.[23] These cases included out-and-out torture,[24] excessive length of interrogation,[25] oppressive jail conditions used to pressure the suspect,[26] and threats of violence and other undesired repercussions.[27]

When the U.S. Supreme Court finally recognized that the Fifth Amendment privilege against self-incrimination was binding on the states,[28] the question of police interrogation of jailed suspects was again addressed in explicit Fifth Amendment terms. In a 5-to-4 decision in *Miranda v. Arizona*,[29] the U.S. Supreme Court devised procedures "to assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself."[30] The Court, noting that "police violence and the 'third degree' flourished" in the 1930s, stressed the primarily psychological strategies used by police to induce confessions at the time and referred to "various police manuals and texts" describing these tactics.[31] After finding that "without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," the Supreme Court enunciated what are now known throughout the world as the "*Miranda* Warnings." The *Miranda* warnings are a prerequisite to any in-custody questioning by police officials:

> Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights provided the waiver is made voluntarily, knowingly and intelligently. If,

23. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 619 (6th ed. 2000) [hereinafter SALTZBURG & CAPRA].

24. *See* Brown v. Mississippi, 297 U.S. 278, 281-82 (1936) (including among the various methods of torture repeated whippings and hanging from a tree).

25. *See* Ashcraft v. Tennessee, 322 U.S. l43, 150 (l944) (subjecting the defendant to thirty-six hours of interrogation).

26. *See* Watts v. Indiana, 338 U.S. 49, 52-53 (l949) (involving sustained police pressure); Malinski v. New York, 324 U.S. 401, 403 (l945) (stripping defendant naked); Haynes v. Washington, 373 U.S. 503, 507 (l963) (holding defendant incommunicado and denying phone calls).

27. *See* Payne v. Arkansas, 356 U.S. 560, 564-65 (1958) (involving denial of food and threat of mob violence); Lynum v. Illinois, 372 U.S. 528, 533 (l963) (threatening to cut off financial aid to children); Rogers v. Richmond, 365 U.S. 534, 536 (1961) (threatening to bring in arthritic wife for questioning).

28. Malloy v. Hogan, 378 U.S. 1, 6 (1964) (incorporating privilege against self-incrimination through due process clause of Fourteenth Amendment).

29. 384 U.S. 436 (1966).

30. *Miranda*, 384 U.S. at 439.

31. *Id.* at 446, 448.

> however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.[32]

The *Miranda* decision was a compromise between what one commentator called "two incompatible readings" of the Fifth Amendment guarantee: (1) that the "privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will,'" and (2) that the privilege "does not protect an accused's ability to remain silent but instead protects him only from improper methods of interrogation."[33] The *Miranda* Court still allowed custodial interrogations by police officers without the presence of counsel, despite its finding of the inherent oppressive conditions attendant therein, as long as the person interrogated had been properly admonished and had waived the right to remain silent and the right to counsel.[34] The Court also limited the requirement of warnings to custody cases.[35]

*Miranda* was controversial when decided even though the majority pointed out that the most professional police force in the country, the Federal Bureau of Investigation, had been using *Miranda*-like admonitions for many years and had not found it to hamper criminal investigations.[36] Not only was it a narrow 5-to-4 decision, but the U.S. Congress tried to overrule the decision in legislation it passed two years later.[37] This decision would have returned to the "voluntariness" test laid down by the U.S. Supreme Court in its pre-incorporation jurisprudence from 1936 to 1964. The statute was ignored by U.S. Attorneys and federal judges alike until, after prodding by Justice Scalia in a concurring opinion,[38] the issue of the constitutionality of the federal statute

32. *Id*. at 467.

33. Alschuler, *supra* note 7, at 181-82.

34. The Court also indicated that the police need not "have a 'station house lawyer' present at all times to advise prisoners" and implicitly allowed the police not to summon a "court-appointed" lawyer even if one was requested as long as they did not interrogate the suspect. *Miranda*, 384 U.S. at 474.

35. *Id*. at 478.

36. *Id*. at 483. An English law of 1848, Jervis's Act, provided that all prisoners, whether before or during trial, had to be admonished of their right to remain silent and that anything they did say could be used in evidence. *See* Henry E. Smith, *The Modern Privilege: Its Nineteenth-Century Origins*, *in* R.H. HELMHOLZ ET AL., THE PRIVILEGE AGAINST SELF-INCRIMINATION: ITS ORIGINS AND DEVELOPMENT 169-70 (1997).

37. 18 U.S.C. § 3501 (1994).

38. *See* Davis v. United States, 512 U.S. 452, 462 (1994) (Scalia, J., concurring).

reached the Supreme Court. In *Dickerson v. United States*,[39] the Supreme Court affirmed the rooting of the *Miranda* warnings in the Fifth Amendment and distanced itself from earlier caselaw which had called into question the constitutionality thereof and had referred to the warnings as "prophylactic" and "not themselves rights protected by the Constitution."[40]

Between 1966 and 2000, however, the Supreme Court handed down several rulings that called into question the constitutionality of the *Miranda* warnings. These decisions have clarified and limited the applicability of the warnings and the remedy of exclusion of statements acquired in violation of *Miranda*. The Supreme Court has ruled that statements taken in violation of *Miranda* may nevertheless be used by the prosecution to impeach the defendant if he testifies at trial in a manner contrary to his previous statements.[41] The Court has also allowed the police and prosecution to use leads gleaned from statements taken in violation of *Miranda* to gather other evidence, even if the statement itself will not be usable at trial.[42] The Court has even allowed the prosecution to use statements taken after proper *Miranda* warnings, although the police had interviewed the defendant earlier in violation of *Miranda* and had induced incriminating responses.[43]

The result of these rulings is that police departments routinely interrogate suspects without giving them *Miranda* warnings, knowing that the information can be used for leads to impeach a testifying defendant (thus conceivably deterring him or her from testifying), or can be used if a subsequent statement is made confirming the earlier statement following proper warnings.[44] The U.S. Supreme Court has also condoned explicit deception employed by the police to induce suspects to talk to police officers or their agents. Undercover police officers or police informants may, for instance, interrogate an incarcerated suspect without giving him any warnings in his jail cell as long as the suspect is not aware that the interrogator is working for the police.[45] The police or jailers may also refuse to tell an incarcerated suspect that he is represented by a lawyer and even prevent the lawyer from gaining access to the suspect.[46] Although police officers must cease their attempts to interrogate a suspect if he or she invokes the right to remain silent or the right to counsel, the U.S. Supreme Court has held that the police may come back at a later time

39. 120 S. Ct. 2326 (2000).

40. *Dickerson*, 120 S. Ct. at 2333.

41. Harris v. New York, 401 U.S. 222, 226 (1971).

42. Michigan v. Tucker, 417 U.S. 433, 451-52 (1974).

43. Oregon v. Elstad, 470 U.S. 298, 318 (1985).

44. *See* California Attorneys for Criminal Justice v. Butts, 195 F.3d 1039, 1049-50 (9th Cir. 1999); People v. Peevy, 953 P.2d 1212, 1214 (Cal. 1998).

45. Illinois v. Perkins, 496 U.S. 292, 300 (1990).

46. Moran v. Burbine, 475 U.S. 412 (1986).

if the suspect has only invoked the right to remain silent.[47] The police may not return to attempt to gain a waiver if the suspect invokes the right to counsel unless the suspect voluntarily initiates the subsequent conversation.[48]

The U.S. Supreme Court has fashioned much stricter rules for police interrogations after the defendant has been officially charged. Prior to *Miranda*, the Supreme Court had held that neither police nor their undercover operatives could question an indicted suspect, even if the defendant was out of custody and did not realize that his interrogator was a police agent.[49] This seemingly ironclad rule that there be no police interrogation of an indicted defendant without counsel being present has, however, been somewhat loosened in later Supreme Court caselaw. The Court has allowed, for instance, the surreptitious placing of "jailplants," perhaps undercover police informants, into jail cells with indicted defendants, as long as they do not actively question the indicted person.[50] It has also allowed police interrogation of indicted defendants following proper *Miranda* warnings as long as the indicted prisoner has not been arraigned or requested counsel.[51] Finally, the U.S. Supreme Court has allowed questioning of indicted prisoners about crimes other than those for which they have been indicted.[52]

This article will discuss the protections afforded criminal suspects and defendants overseas when faced with interrogation by police, prosecutors, investigating magistrates[53] or judges of the investigation.[54] It will compare the

47. Michigan v. Mosley, 423 U.S. 96, 106-07 (1975).

48. Edwards v. Arizona, 451 U.S. 477, 484 (1981). It is important to note that the Supreme Court has held that "reinitiation" may be found where a suspect asks such things as: "What's going to happen to me now?" *See, e.g.*, Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983). The *Edwards* rule even applies to the interrogation of uncharged suspects as well as to other crimes for which they are not under arrest. Arizona v. Roberson, 486 U.S. 675, 677-78 (1988).

49. Massiah v. United States, 377 U.S. 201, 206 (1964).

50. United States v. Henry, 447 U.S. 264, 272 (1980); Kuhlmann v. Wilson, 477 U.S. 436, 460 (1986).

51. *See* Patterson v. Illinois, 487 U.S. 285, 297 (1988). Compare *Michigan v. Jackson*, 475 U.S. 625, 626 (1986), in which the defendant had been arraigned and requested counsel.

52. *See* McNeill v. Wisconsin, 501 U.S. 171, 176 (1991). Even "jailplants" may be active in their surreptitious interrogations of incarcerated, indicted defendants about such "other crimes." *See* Maine v. Moulton, 474 U.S. 159, 180 (1985).

53. The "investigating magistrate" is a legally trained official who is a member of the judiciary and is entrusted with investigating serious criminal cases in a number of overseas jurisdictions. The main countries emphasized in this study that still have investigating magistrates are France, Spain and the Netherlands. This figure is generally derived from the French *juge d'instruction*, the dominant investigating official in the old European inquisitorial systems. For a discussion of this key figure in the inquisitorial mode of criminal investigation, see JEAN PRADEL, PROCÉDURE PÉNALE 26-31 (9th ed. 1997) [hereinafter PRADEL].

54. I use the term "judges of the investigation" for the judge who has competence during pretrial proceedings to authorize invasions of privacy and personal integrity (searches, seizures, wiretaps, etc.), and to conduct depositions or interrogate defendants in countries which have

admonitions given to such suspects with those provided in the *Miranda* decision and discuss their constitutional, or statutory status. It will further discuss when such admonitions must be given, to what extent the police or other officials may re-admonish after the right to silence or counsel has been invoked, and whether statements taken in violation of such admonitions or the fruits thereof may be used in court, or for the purpose of conducting further investigations or prosecuting third parties. In a brief conclusion, this article assesses what we can learn from this comparison of U.S. law with that of other democratic countries with systems derived from the inquisitorial model. The comparison will focus primarily on England, France, Germany, Italy, Russia and Spain.

## II. THE PRIVILEGE AGAINST SELF-INCRIMINATION IN EUROPE

This study will not concern itself with the constitutional provisions and laws protecting suspects and defendants against being coerced to give statements by law enforcement officials. The use of torture as a means of gathering evidence was abolished long ago in Europe[55] and is, along with other cruel and inhuman treatment, prohibited by national constitutions[56] and international human rights conventions.[57] Any use of such measures would in all civilized countries lead to exclusion of any statement obtained thereby.[58]

abolished the "investigating magistrate," such as Germany and Italy. This term was used by the French Commission on Criminal Justice and Human Rights in its 1991 report. *See* COMMISSION JUSTICE PÉNALE ET DROITS DE L'HOMME, LA MISE EN ÉTAT DES AFFAIRES PÉNALES: RAPPORTS 31 (Fr. 1991) [hereinafter LA MISE EN ÉTAT DES AFFAIRES PÉNALES].

55. *See supra* note 21.

56. *See* CONSTITUCIÓN ESPAÑOLA [C.E.] art. 15 [hereinafter C.E.-Spain], *translated by author* from JULIO MUERZA ESPARZA, LEY DE ENJUICIAMIENTO CRIMINAL Y OTRAS NORMAS PROCESALES 15-25 (1998) [hereinafter MUERZA ESPARZA]; COSTITUZIONE DE LA REPUBLICA ITALIANA [COST.] art. 13 para. 4, art. 27 para. 2 [hereinafter COST.-Italy], *translated by author* from GIUSTINO GATTI ET AL., CODICE PÉNALE E DI PROCÉDURA PÉNALE 9-49 (Giuridiche Simone ed., 1999) [hereinafter GATTI ET AL.]; KONSTITUTSIIA ROSSIYSKOY FEDERATSII [KONST. RF 1993] art. 21(2) [hereinafter KONST. RF-RUSSIA], *translated by author* from B.N. TOPORNIN ET AL., KONSTITUTSIIA ROSSIYSKOY FEDERATSII: KOMMENTARIY (1994) [hereinafter TOPORNIN ET AL.].

57. *See* UNIVERSAL DECLARATION OF HUMAN RIGHTS art. 5; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS; CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT art. 7. For a collection of these texts, see M. CHERIF BASSIOUNI, THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE: A COMPENDIUM OF UNITED NATIONS NORMS AND STANDARDS 21-39 (1994) [hereinafter BASSIOUNI]; EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS art. 3 (1950), *available at* http://conventions.coe.int/treaty/EN/Treaties/html/005.htm [hereinafter ECHR].

58. For example, the German Code of Criminal Procedure, provides:

(1) The suspect's freedom to make decisions or exercise his will may not be impaired through maltreatment, fatigue, physical intervention, the administration of substances,

Furthermore, the study will not deal with procedures for compelling a criminal suspect to testify under oath, a compulsion enforced by the threat of a prosecution for perjury or contempt.[59] Neither police, prosecutors, investigating magistrates nor judges of the investigation may compel a suspect to declare against his own interests in England or on the European Continent unless a kind of immunity is granted.[60] Indeed, in most continental European countries an accused or a criminal defendant[61] is never placed under oath, whether he is declaring to a public prosecutor, a magistrate or judge, or in a trial before judge, jury or mixed court.[62]

Despite the fact that no compulsion is allowed and no oath administered, continental European jurisdictions used to require the investigating authority to

through torture, deception or hypnosis. Force may only be applied to the extent allowed by the law of criminal procedure. The threat of any measure which is not applicable according to the rules, or the promise of a benefit not provided by law are prohibited; (2) Measures which impair the suspect's capacity for memory or the capability of exercising insight are not permitted; (3) The prohibitions of paragraphs 1 and 2 apply regardless of the consent of the suspect. Statements which are made as a result of the violation of this prohibition may not be used, even if the suspect agrees to said use.

STRAFPROZEßORDNUNG [StPO] § 136a [hereinafter StPO-GERMANY], *translated by author* from THEODOR KLEINKNECHT & LUTZ MEYER-GOßNER, STRAFPROZEßORDNUNG (43d ed. 1997) [hereinafter KLEINKNECHT & MEYER-GOßNER]. *See also* CODICE DI PROCEDURA PENALE [C.P.P.] § 64(3) [hereinafter C.P.P.-ITALY], *translated by author* from GATTI ET AL., *supra* note 56.

For the detailed English legislation regulating the conditions of custodial interrogation in England, see Code of Practice C. Police and Criminal Evidence Act, 1984, §§ 12.2-12.5, 12.7 [hereinafter PACE-England], *cited in* STEPHEN SEABROOKE & JOHN SPRACK, CRIMINAL EVIDENCE AND PROCEDURE: THE STATUTORY FRAMEWORK (1996) [hereinafter SEABROOKE & SPRACK].

59. Such compulsion, called the "cruel trilemma" by the U.S. Supreme Court, in *Murphy v. Waterfront Commission of N.Y. Harbors*, 378 U.S. 52, 55 (1964), forces a guilty suspect to risk either self-incrimination and punishment, contempt or perjury prosecution.

60. According to Section 2 of England's Criminal Justice Act of 1987, it is a crime, punishable by up to six-months imprisonment, to refuse to answer questions pursuant to an investigation by the Serious Fraud Office. The answers to such questions may not be used by the prosecution except to impeach the defendant when he testifies differently at trial. Similar powers to compel testimony are enjoyed by the Department of Trade and Industry Inspectors under other legislation. *See* THE ROYAL COMMISSION ON CRIMINAL JUSTICE: REPORT 56-57 (1993) [hereinafter RCCJ REPT.].

61. I shall use the term "suspect" for a person arrested by the police but against whom criminal proceedings have not yet been officially initiated through the filing of a complaint. The term "accused" shall refer to someone against whom criminal proceedings have been initiated, but who has not yet been held to answer in the trial court. The term "defendant" shall refer to a person who has been bound over for trial.

62. *Cf.* StPO-GERMANY § 60(2); LEY DE ENJUICIAMIENTO CRIMINAL [L.E.CRIM.] § 387, [hereinafter L.E.CRIM-SPAIN], *translated by author* from MUERZA ESPARZA, *supra* note 56.

interrogate the suspect-accused.[63] These jurisdictions considered it to be a protection for accused persons to be able to speak and give their sides of the story.[64] Indeed, the old continental European statutes seldom contained explicit references to any right of the accused to remain silent, but rather emphasized, his or her right to make a statement.[65]

Despite the fact that Spain is still using a Code of Criminal Procedure from 1882, Germany from 1877, France from 1955 and Russia from 1966, amendments and new constitutions (Germany in 1949, Spain in 1978 and Russia in 1993) have led to substantial alterations of the old inquisitorial mode of questioning suspects and the accused. The Spanish Constitution provides in Article 24, Section 2 that all persons have the "right . . . not to declare against themselves and not to confess guilt . . . ."[66] It further provides in Article 17, Section 3:

> [E]very detained person shall be informed immediately and in a comprehensible form, of his rights and the reasons for his detention, without being obligated to make a declaration. The assistance of a lawyer is guaranteed to the detained person during police and judicial investigative measures in the terms the law establishes.[67]

The Russian Constitution of 1993 contains similar guarantees.[68]

63. L.E.CRIM-SPAIN § 385; StPO-GERMANY § 163a(1). *See also* KLEINKNECHT & MEYER-GOßNER, *supra* note 58, at 612.

64. PRADEL, *supra* note 53, at 357. The French have traditionally viewed the involvement of an independent judge as being a better safeguard than an abstract right of silence. *See* Richard Vogler, *Criminal Procedure in France*, *in* JOHN HATCHARD ET AL., COMPARATIVE CRIMINAL PROCEDURE 31 (1996) [hereinafter Vogler]. American criminal defendants probably also view the constitutional right to indictment by grand jury, guaranteed by the Fifth Amendment of the U.S. Constitution, as being a mixed blessing.

65. *See* UGOLOVNO-PROTSESSUAL'NYI KODEKS RF [UPK RF] §§ 46, 54 (October 27, 1960) [hereinafter UPK RF-RUSSIA], *translated by author* from 2 SBORNIK KODEKSOV ROSSIYSKOY FEDERATSII (1999). In outlining the rights of accuseds and suspects, the Russian Code of Criminal Procedure mentions the rights "to know what he is being accused of," to "give explanations as to the accusation presented him," and to "present evidence." The Code does not mention a right to silence. *Cf.* L.E.CRIM-SPAIN §§ 396, 400.

66. *See* MUERZA ESPARZA, *supra* note 56, at 18.

67. *Id.* at 16-17. As a result of these constitutional provisions the old inquisitorial provisions of the Spanish Code of Criminal Procedure, such as Section 387, which has the investigating magistrate "exhort" suspects "to tell the truth" in a "precise, clear and truthful manner," have been ruled to be unconstitutional. *See* VICENTE GIMENO SENDRA ET AL., DERECHO PROCESAL PENAL 395-96 (1996) [hereinafter VICENTE GIMENO SENDRA ET AL.].

68. Article 51(1) of the Russian Constitution provides: "No one is obliged to be a witness against himself . . . ." Article 49(2) provides: "The defendant is not obliged to prove his innocence." Article 48(2) provides: "Every person arrested, preventively detained or accused of having committed a crime has the right to make use of the services of a lawyer (defense counsel) from the moment, respectively, of arrest, preventive detention or the filing of a criminal complaint." *See* TOPORNIN ET AL., *supra* note 56, at 260, 265 & 274.

## III. ADVISEMENT OF RIGHTS BEFORE POLICE INTERROGATION IN COMPARATIVE LAW

### *A. Introduction*

Given that modern constitutions and criminal procedure codes guarantee both the right to remain silent and the protection against techniques used to compel self-incrimination, it remains to be seen how these rights are interpreted in the context of police interrogations. The police play different roles in different criminal justice systems. In common law systems such as those in England and the United States, the police are the main criminal investigators and, as such, the main interrogators of criminal suspects. In post-inquisitorial systems the primary duties of the police are to arrest suspects, secure the crime scene and evidence and interview eyewitnesses.[69] The case is then turned over to the public prosecutor who, depending on the country and the type of crime investigated, either investigates the case herself or turns it over to an investigating magistrate,[70] or sends the case immediately to the trial court pursuant to procedures providing for expedited, abbreviated or simplified trials.[71]

If the public prosecutor or the investigating magistrate then agrees to initiate criminal proceedings, he or she has the power or even the duty to again examine witnesses and to interrogate the accused. In nearly all continental European systems the police are permitted to interrogate the suspect before turning the case over to the official investigator. Often the role of the official investigator (whether public prosecutor or investigating magistrate) the judge of the investigation is to give the accused a chance to either confirm or retract the confession or admission given to the police. While the official investigator may delegate the judicial police to conduct further investigative measures through what is called a rogatory commission, this often does not involve interrogation of the accused.[72]

Of special significance on the European continent is French procedure, which allows the police, prior to the initiation of criminal proceedings, to hold a suspect for up to forty-eight hours in what is called "watched custody" or

69. *See* C.P.P.-ITALY §§ 347-55, StPO-GERMANY § 163(1), L.E.CRIM-SPAIN § 282.

70. *See* C.P.P.-ITALY § 347; StPO-GERMANY § 163(2); L.E.CRIM-SPAIN §§ 284, 286; CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] §§ 54-57 [hereinafter C. PR. PÉN.-FRANCE], *translated by author*, unless otherwise noted, from CODE DE PROCÉDURE PÉNALE (Dalloz ed., 42d ed. 2001).

71. For some comments on the Italian and French procedures, see Stephen C. Thaman, *Symposium on Prosecuting Transnational Crimes: Cross-Cultural Insights for the Former Soviet Union*, 27 SYRACUSE J. INT'L L. & COM. 1, 5-9 (2000) (commenting on issues of plea-bargaining and witness immunity).

72. In Italy, the public prosecutor may delegate the judicial police to do interrogations when the suspect is out of custody and a lawyer is present. These interrogations must be proceeded by admonitions of the right to silence and other rights. C.P.P.-ITALY § 370(1).

*garde à vue*.[73] Amendments to the French Penal Code in May 2000, however, have greatly expanded the rights accorded suspects during *garde à vue*.[74]

What follows is an examination of the protective safeguards antecedent to police questioning in key European jurisdictions and a discussion of any additional safeguards provided during the official interrogations by judges or prosecutors that follow.

### *B. Admonitions Required Prior to Police Interrogation*

#### 1. Italy

The Italian Code of Criminal Procedure of 1988 contains the most radical protections for criminal suspects when confronted with interrogation, whether by police, public prosecutors or judicial authorities. In general, a suspect must always be admonished as to the right to remain silent, regardless of who is doing the questioning.[75] The rules governing interrogations by the judicial police, who are only authorized to gather so-called summary information, provide:

> 2. Before gathering the summary information, the judicial police invite the accused to name a defense lawyer or, where this is not done, to proceed according to the provisions of Section 97(3) [relating to official appointment of lawyers].
>
> 3. The summary information must be gathered in the presence of the defense lawyer, whom the judicial police must give timely notice. The defense lawyer is obliged to be present when the procedure is conducted.
>
> 4. If the defense lawyer is not located or does not appear, the judicial police request the public prosecutor to proceed according to Section 97(4) [relating to official appointment of a lawyer].
>
> 5. At the scene of the crime or in emergency situations the officials of the judicial police may, even in the absence of a defense lawyer, gather from the accused, even if he has been arrested *in flagrante* . . . information and tips useful for achieving the immediate goals of the investigation.
>
> 6. No record or use may be made of the information and tips gathered in the absence of defense counsel at the scene of the crime or in emergency situations pursuant to paragraph five.

73. C. PR. PÉN.-FRANCE § 77, para. 1.

74. Law No. 2000-516 of June 5, 2000, J.O. Num. 138, June 16, 2000, p. 9038 (reinforcing the protection of the presumption of innocence and the rights of the victim).

75. C.P.P.-ITALY §§ 64(3), 65(2).

> 7. The judicial police may also receive spontaneous declarations from the accused, but they may not be used in the trial, except pursuant to the provisions of Article 503(3) [relating to impeachment].[76]

In Italy, not only must the suspect be advised of the right to remain silent, but any statement taken in the absence of counsel may not be used in court. Therefore, the suspect-accused is not a source of evidence for the prosecution. According to the Italian Code of Criminal Procedure, during any interrogation: "the person is then invited to explain to the extent he deems it useful for his defense . . . ."[77]

The institutional mistrust of the police as gatherers of evidence evinced by the Italian legislature in the Code of Criminal Procedure was apparent elsewhere. Another provision of the Code prevents police from testifying in court as to prior statements they had taken even when offered as prior inconsistent statements to impeach a testifying witness.[78] The advisement of the right to remain silent also applies, of course, to interrogations by the public prosecutor[79] and to interrogations by the judge of the investigation.[80]

### 2. Spain

The Spanish legislature amended the Code of Criminal Procedure in 1978. These amendments made the code provisions conform to the aforementioned constitutional provisions[81] and transformed Spain's formerly inquisitorial approach to the interrogation of suspects and accuseds. The result was the following section prescribing the admonitions that must be given to suspects-accuseds under arrest or preventive detention:

> Every person detained or imprisoned will be informed in a comprehensible mode and immediately of the acts of which he is accused and the reasons for the deprivation of his liberty, as well as the rights he possesses, especially the following:
>
> (a) The right to remain silent and not to speak if he does not want to, and not to respond to any of the questions which are formulated, or to state that he only wants to declare in front of a judge.

76. C.P.P.-ITALY § 350(2)–(7).

77. C.P.P.-ITALY § 65(1) para.1.

78. C.P.P.-ITALY § 195(4) provides: "The officials and agents of the judicial police may not testify to the content of declarations acquired from witnesses." However, this provision was declared unconstitutional by the Italian Constitutional Court. *See* Corte cost., sez. un., 31 jan. 1992, n.24, Giur. It. 37, 114.

79. C.P.P.-ITALY §§ 294(6), 364, 388.

80. C.P.P.-ITALY §§ 294(4), 302, 391; *see generally* Vittorio Grevi, *Diritto al silenzio ed esigenze cautelari nella disciplina della libertà personale dell'imputato, in* LIBERTÀ PERSONALE E RICERCA DELLA PROVA NELL'ATTUALE ASSETTO DELLE INDAGINI PRELIMINARI 9-10 (1995).

81. *See supra* text accompanying notes 66 and 67.

> (b) The right not to give a statement against oneself and not to confess guilt.
>
> (c) The right to designate a lawyer and to request his presence to help during the police and judicial interrogations and to intervene in any identification procedure no matter what its object. If the detained person or prisoner does not designate a lawyer, one will be officially designated.[82]

Although an accused in Spain has a right to have counsel present during an interrogation by the investigating magistrate, the Spanish Constitutional Court has ruled that the accused may waive this right if he is not in custody and has been properly admonished.[83]

3. Germany

In 1964, two years before the *Miranda* decision, the German Code of Criminal Procedure was amended to provide for the following admonitions, which apply to interrogations by a judge, a prosecutor or the police.[84]

> At the beginning of the first interrogation the accused must be notified as to the act which has been attributed to him and which penal provisions are implicated. He must be advised, that the law permits him, either to respond to the accusation or to say nothing in relation to the case, and at any time, even before his interrogation, to ask questions of a named defense lawyer. He must also be advised, that he can move to introduce particular items of evidence to exonerate himself. In appropriate cases the accused should be advised that he can give a written statement.[85]

Unlike in Italy and Spain, however, a suspect-accused in Germany has no right to have his lawyer present during police interrogation.[86] During interrogations by the public prosecutor or the judge of the investigation, however, the defendant has a right to have his lawyer present.[87]

82. L.E.CRIM.-SPAIN § 520(2)(a-c).

83. S.T.C., Dec. 13, 1999 (10 ACTUALIDAD PENAL, NO. 10, 405).

84. *See* Claus Roxin, *Über die Reform des deutschen Strafprozeßrechts*, *in* FESTSCHRIFT FÜR GERD JAUCH ZUM 65 GEBURTSTAG 184 (l990) [hereinafter Roxin].

85. StPO-GERMANY § 136(1); Section 163(4) of the German Code of Criminal Procedure makes Section 136(1) explicitly applicable to the first interrogation of a suspect by police officers. German courts have held that, though the words of the statute should be used in the admonition, a statement will not be excluded if police officers use another version that clearly explains the privilege against self-incrimination. *See* KLEINKNECHT & MEYER-GOßNER, *supra* note 58, §8, at 466. The *Miranda* decision itself allows for "fully effective equivalents" of the admonitions laid out by the Court. *Miranda*, 384 U.S. at 444.

86. The only way a suspect can ensure the presence of counsel during interrogation is to refuse to speak at all while in police custody. *See* Barbara Huber, *Criminal Procedure in Germany*, *in* JOHN HATCHARD ET AL., COMPARATIVE CRIMINAL PROCEDURE 121 (1996). The *Miranda* court also did not obligate police interrogators to provide lawyers for suspects while in custody. *Miranda*, 384 U.S. at 474.

87. KLEINKNECHT & MEYER-GOßNER, *supra* note 58, at 615 (§ 20).

4. France

Until recently, suspects in French criminal cases had arguably the least protection in the face of police interrogation in Western Europe. Not only were suspects not advised that they had a right to remain silent, but they were only advised after the expiration of twenty-four hours in *garde à vue* that they could speak to a lawyer.[88] Pursuant to a law passed on June 15, 2000, "reinforcing the protection of the presumption of innocence and the rights of the victim," the provisions regulating police interrogation in *garde à vue* now read:

> Every person placed in watched custody (*garde à vue*) shall be immediately informed by an officer of the judicial police or, under his control, by an agent of the judicial police, of the nature of the offense as to which the investigation is being conducted, of the rights mentioned in Articles 63-2, 63-3 and 63-4 as well as the provisions relating to the length of *garde à vue* provided in Art. 63. The person in *garde à vue* shall also be immediately informed that she has the right not to respond to questions which are asked by the interrogators."[89]
>
> From the beginning of watched custody, up until the expiration of twenty hours, the person may request to speak with a lawyer. If she is not able to designate one, or if the lawyer she has chosen cannot be contacted, she can demand that one be appointed by the Bar.
>
> The Bar is notified of this demand by every possible means and without delay.
>
> The designated lawyer may communicate with the person in *garde à vue* under conditions which guarantee the confidentiality of the meeting. He is informed by the officer of the judicial police or, under his control, by an agent of the judicial police, of the nature and the presumed date of the offense as to which the investigation is being conducted.
>
> At the conclusion of the meeting, which may not exceed thirty minutes, the lawyer may in appropriate cases submit written observations which are made a part of the record. The lawyer may not make this meeting known to anyone for the duration of watched custody.[90]

Although the 2000 amendments have improved the position of the suspect who is subject to police interrogation by providing for admonitions of the right to refuse to answer questions and by allowing access to a lawyer before the interrogation begins, the regime is still less protective than those in place in

88. *See* former C. PR. PÉN.-FRANCE §§ 63-1, 63-4.

89. C. PR. PÉN.-FRANCE § 63-1, as amended by Law No. 2000-516 of June 5, 2000, discussed *supra* note 74.

90. C. PR. PÉN.-FRANCE § 63-4, as amended by Law No. 2000-516 of June 5, 2000, discussed *supra* note 74.

Italy, Spain and Germany. The suspect still does not have the right to have her lawyer present during the interrogation.[91] Furthermore, the French Code of Criminal Procedure does not provide for an absolute right to remain silent. Rather, it provides a privilege not to answer specific questions, much like the privilege enjoyed by witnesses testifying at another's trial or before a grand jury in the United States.

Though French accuseds have had a right to counsel during interrogations by the investigating magistrate since 1897,[92] counsel, after having consulted with the accused, remains silent during the interrogation.[93] From 1993 through 2000, however, the investigating magistrate was under no obligation to advise an accused of the right to remain silent before conducting the interrogation.[94]

5. England and Wales

In England and Wales, the law provides for a system of "duty solicitors," lawyers who are present in the jailhouse and are able to confer with arrested prisoners at any time.[95] Arrestees should be immediately informed pursuant to section 58(1) of the Code of Practice C. Police and Criminal Evidence Act (PACE) which provides: "A person who is in police detention shall be entitled, if he so requests, to consult a solicitor privately at any time." Before 1995, an arrested suspect had to be cautioned that he did not have to say anything unless he wished to, but that anything he said could be used as evidence against him. This changed with the passage of the Criminal Justice and Public Order Act of 1994 (CJPOA) which introduced the following modified admonitions or "cautions":

> A person whom there are grounds to suspect of an offence must be cautioned before any questions about it (or further questions if it is his answers to previous questions that provide grounds for suspicion) are put to him for the purpose of obtaining evidence which may be given to a court in a prosecution.[96]
>
> . . .
>
> The caution shall be in the following terms: "You do not have to say anything. But it may harm your defence if you do not mention, when questioned, something which you later rely on in court. Anything you do say may be given

91. *See* PRADEL, *supra* note 53, at 397

92. *Id.* at 537.

93. LA MISE EN ÉTAT DES AFFAIRES PÉNALES, *supra* note 54, at 56.

94. Vogler, *supra* note 64, at 32.

95. *See* Richard Hatchard, *Criminal Procedure in England and Wales*, *in* JOHN HATCHARD ET AL., COMPARATIVE CRIMINAL PROCEDURE 193 (1996) [hereinafter Hatchard, *Criminal Procedure in England and Wales*].

96. PACE-England § 10.1.

> in evidence. Minor deviations do not constitute a breach of this requirement provided that the sense of the caution is preserved.[97]

The CJPOA reauthorized the prosecutor, jury or judge to use an arrested person's silence at trial, overturning an 1898 law which prevented such use.[98] While the regime of duty solicitors does effectively allow jailed suspects to talk to a lawyer before police questioning,[99] unlike in the United States where the police are under no obligations to facilitate such a meeting,[100] the admonitions as to possible use or comment on the exercise of the right to silence certainly provides less protection than the *Miranda* warnings in the United States.[101]

6. Russia

Although neither the Russian Constitution, nor the Russian Code of Criminal Procedure, Ugolovno-Protsessual'nyi Kodeks RF, is explicit about whether the police must admonish suspects as to their constitutional rights to counsel and to remain silent prior to police interrogation,[102] the practice of doing so was developed by trial courts after the re-introduction of trial by jury in nine Russian regions in 1993 and 1994.[103] In a 1996 advisory ruling, the Russian Supreme Court approved the practice.[104]

7. Other Countries

In the Netherlands, the police may hold a suspect for six hours for the purpose of interrogation, and this period may be extended for up to seventy-two hours with the consent of the prosecutor. The Dutch do, however, strictly require that suspects be admonished of the right to remain silent.[105] The Supreme Court of Canada has also held that a defendant must be advised of the right to counsel and the right to remain silent, since "the most important function of legal advice upon detention is to ensure that the accused

97. PACE-England § 10.4.

98. The Criminal Evidence Act 1898, *discussed in* Hatchard, *Criminal Procedure in England and Wales*, *supra* note 95, at 190.

99. *See* RCCJ REPT., *supra* note 60, §§ 57, 59, at 37-38 (discussing criticism of duty solicitors who are perceived as being too closely tied to the police agencies).

100. Police may even deceive lawyers to prevent them from trying to see in-custody suspects. *See* Moran v. Burbine, 475 U.S. 412, 427 (1986).

101. *See* Doyle v. Ohio, 426 U.S. 610, 619 (1976) (commenting on a suspect's invocation of his or her *Miranda* rights constitutes a violation of due process).

102. *See* discussion of the provisions of the Russian Constitution, *supra* note 68.

103. *See* Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 STAN. J. INT'L L. 61, 91-92 (1995) [hereinafter Thaman, *Resurrection*].

104. Thaman, *Europe's New Jury Systems*, *supra* note 13, at 242 n.47.

105. Stewart Field et al., *Prosecutors, Examining Judges, and Control of Police Investigations, in* PHIL FENNELL ET AL., CRIMINAL JUSTICE IN EUROPE: A COMPARATIVE STUDY 232 n.26 (1995) [hereinafter Field].

understands his rights, chief among which is his right to silence."[106] Finally, the German Supreme Court noted, in a survey of comparative law undertaken in 1992, that admonitions as to the privilege against self-incrimination must also be given in Denmark.[107]

### *C. Timing of the Warnings*

Whereas the *Miranda* warnings only apply once a suspect has been "taken into custody or otherwise deprived of his freedom of action in any significant way,"[108] several European countries require warnings relating to the right to remain silent as soon as the criminal investigation focuses on a person as a possible suspect.[109] In a 1992 case, the German Supreme Court explicitly held that admonitions as to the right to remain silent apply to an out-of-custody suspect who is confronted by the police on the streets and suspected of having crashed his automobile while under the influence of alcohol.[110] While acknowledging the "special importance" of the *Miranda* decision, the court noted the U.S. Supreme Court's decision in *Berkemer v. McCarty*,[111] which held that *Miranda* warnings do not apply to out-of-custody automobile stops even when the person is under temporary detention. The German Supreme Court declined to follow *Berkemer*, however, emphasizing the broader applicability of the German admonitions.[112] In Italy as well, the suspect-accused, whether in or out of custody, has the same rights,[113] including the right not to be interrogated by police in the absence of counsel and without having been advised of the right to remain silent.[114]

In England and Wales, the "cautions," though admittedly promising less protection than the *Miranda* warnings, apply to out-of-custody suspects.[115]

106. R. v. Herbert 77 C.R.3d 145, *discussed in* CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 114 (1993) [hereinafter BRADLEY].

107. BGHSt 38, 215 (229-30).

108. *Miranda*, 384 U.S. at 444.

109. A "focus" test was applied in *Escobedo v. Illinois*, 378 U.S. 478, 490-91 (1964), in deciding when the Sixth Amendment right to counsel would apply in the context of police investigation. The test still, however, required that the person under focus be in police custody.

110. BGHSt 38, 215 (218).

111. 468 U.S. 420, 440 (1984).

112. BGHSt 38, 215 (230). For an opinion that the restriction of warnings to custodial situations is not in conformity with notions of procedural fairness as accepted in international law, see Wilfried Bottke, *'Rule of Law' or 'Due Process' as a Common Feature of Criminal Process in Western Democratic Societies*, 51 U. PITT. L. REV. 419, 447-48 (1990).

113. C.P.P.-ITALY § 61.

114. *See* Stephen P. Freccero, *An Introduction to the New Italian Criminal Procedure*, 21 AM. J. CRIM. L. 345, 360 (1994).

115. R. v. Nelson and Rose, Crim.L.R. 814, 815 (C.A. 1998). The Court held that warnings had to be given to the defendant, who was carrying a briefcase customs officials suspected contained false compartments, before he was questioned about the briefcase.

English courts have even held that undercover police officers or informants may not do pointed questioning of suspects in the field without giving the "cautions."

> In our view, although the Code [Code C] extends beyond the treatment of those in detention, what is clear is that it was intended to protect suspects who are vulnerable to abuse or pressure from police officers or who may believe themselves to be so. Frequently, the suspect will be a detainee. But the Code will also apply where a suspect, not in detention, is being questioned about an offence by a police officer acting as a police officer for the purpose of obtaining evidence. In that situation, the officer and the suspect are not on equal terms. The officer is perceived to be in a position of authority; the suspect may be intimidated or undermined.[116]

In *R v. Christou & Wright*,[117] a case involving a police sting operation to nab dealers in stolen property, the Court held that warnings would not have been required. A subsequent case, however, cited the language favorably in holding that it did apply to a police undercover officer who was negotiating to purchase a stolen car from the defendant, and proceeded to interrogate the defendant as to when he had stolen the car.[118]

From the terms of Section 520(2) of the Spanish Code of Criminal Procedure, it appears that the statutory admonitions apply only when someone has been detained or otherwise placed in custody. In the United States, a person must be in custody and subject to interrogation for the *Miranda* rights to be obligatory.[119]

Continental European codes of criminal procedure distinguish meticulously between procedures for police or judicial interviews of witnesses and those that apply to suspects or accuseds. Police and other investigators admonish witnesses routinely that they are obliged to give a statement under penalty of perjury,[120] whereas the privilege against self-incrimination prevents compelling a suspect to speak in such a manner.

If a police officer, who actually has grounds to suspect a person of having committed a crime, obliges him to give a statement "as a witness," all

116. R. v. Christou & Wright, 3 W.L.R. 228 (1992).

117. 3 W.L.R. 228 (1992).

118. R. v. Bryce, 4 All E.R. 567, 571-73 (1992). The Court suppressed the defendant's answers due to the lack of cautions.

119. Conversations between police officers that are not "reasonably likely to induce an incriminating response" do not constitute "interrogation." Rhode Island v. Innis, 446 U.S. 291, 302 (1980); Pennsylvania v. Muniz, 496 U.S. 582, 601 (1990) (booking questions).

120. On the obligation of witnesses to testify in Italy, see C.P.P.-ITALY § 198. With regard to the same obligation in France, see C. PR. PÉN.-FRANCE §§ 105, 109; and PRADEL, *supra* note 53, at 348. On the swearing of witnesses under penalty of perjury in Germany, see StPO-GERMANY § 57. On the obligation to testify under oath in Spain, see L.E.CRIM.-SPAIN §§ 410, 434.

European jurisdictions will suppress such a statement.[121] In Spain, the Constitutional Court has held that an investigating magistrate may not question "as a witness" an out-of-custody person "as to whom can be attributed, more or less well-founded, a punishable act." In such cases, he must be permitted "to exercise the right to defense with the broadest content." Commenting on the "old inquisitory procedure," the Spanish Constitutional Court stated:

> The investigating magistrate questioned without communicating what he was looking for and could interrogate a suspect without letting him know what and why he was suspected, without making self-defense possible and without providing him with the assistance of a lawyer in a way that the interrogation could induce the declarant to make assertions prejudicial to him, including involuntary self-incrimination which could have been avoided in another type of interrogation. The Constitution of 1978 and the reform of the Code of Criminal Procedure of the same year are not compatible with these vestiges of the old inquisitorial procedure.[122]

The Russian Constitutional Court has also recently condemned a practice whereby Russian police arrest suspects as "witnesses" and then question them without warnings or the assistance of counsel.[123] The Court declared Section 47, paragraph 1, of the Code of Criminal Procedure to be unconstitutional because it restricted the right to counsel to those who had been charged, or to detained persons as to whom an order of preventive detention had been issued.[124]

According to the German Supreme Court, the admonitions of Section 136 of the Code of Criminal Procedure[125] must be given "when the suspicion already present at the beginning of the interrogation has so thickened, that the interrogated person can seriously be considered as a perpetrator of the investigated crime."[126] German jurisprudence distinguishes between "interrogations" and "informational questioning." If police are only inquiring to determine if there is sufficient evidence that a crime was committed and are questioning people at the scene to determine whether they were witnesses or perpetrators, no warnings are necessary. Otherwise, the solemnity of the

121. *See* 1989 Bull. Crim. No. 258 (discussing France's practice in this regard); *see also* PRADEL, *supra* note 53, at 536.

122. S.T.C., July 19, 1989 (B.J.C., No.135, 1130, 1135-36).

123. Sobr. Zakonod. RF, 2000, No. 27, Art. No. 2882 (Constitutional Court of the RF June 27, 2000), *available at* http://ks.rfnet.ru/pos/p11_00.html. For a critique of this practice in the first cases tried in the modern Russian jury courts, see Thaman, *Resurrection*, *supra* note 103, at 91.

124. Sobr. Zakonod. RF, 2000, No. 27, Art. No. 2882 (Constitutional Court of the RF June 27, 2000), *available at* http://ks.rfnet.ru/pos/p11_00.html.

125. *See* text accompanying *supra* note 85.

126. BGH StV 8, 337 (338).

warnings would risk treating completely innocent people as suspects and deter them from cooperating with the police in the future.[127]

Police in England and the Netherlands get around giving the *Miranda*-type warnings by engaging in "informal chats" in suspects' homes just after arrest, during searches, in the police car on the way to the station, or in interview rooms just before formal interrogations are to begin.[128] The Dutch Supreme Court has also ruled that such "chats" as well as "unsolicited outbursts" before a suspect is admonished need not be suppressed.[129] German police also used to engage in such pre-admonition "chats" until the Supreme Court articulated a categorical exclusionary rule in such cases.[130]

Only the Italians appear to have erected a barrier against police using the pretext of "informational interviews," "chats," or interviewing the defendant "as a witness" to circumvent the necessity of advising a suspect of the right to counsel and the right to remain silent. Section 350(7) of the Italian Code of Criminal Procedure makes even spontaneous statements to the police in the absence of counsel inadmissible in court.[131]

### *D. Effect of an Invocation of the Right to Counsel or Silence*

The restrictions placed on the police by the U.S. Supreme Court when the defendant invokes either the right to remain silent or the right to counsel appear to be more substantial than in many Continental European jurisdictions. Although police in the United States must desist from questioning a suspect who indicates a desire to remain silent following *Miranda* warnings, the officers may return if a sufficient period of time has passed and, especially, if they wish to interrogate about another crime.[132] On the other hand, in England and Wales, the police may still put questions to the suspect, who need not answer them.[133]

127. *See* RAIMUND BAUMANN & HARALD BRENNER, DIE STRAFPROZESSUALEN BEWEISVERWERTUNGSVERBOTE 79 (1991). Spontaneous admissions following the asking of mere "informational questions" will not be excluded. *See* CLAUS ROXIN, STRAFVERFAHRENSRECHT 179 (24th ed. 1995). The German Supreme Court ruled some years ago that it was not "interrogation" to show the defendant's prior statements made by him to the police and to the public prosecutor and to ask him if they were true. BGHSt 7, 73, *cited in* KLEINKNECHT & MEYER-GOßNER, *supra* note 58, §15, at 467.

128. Field, *supra* note 105, at 232.

129. *Id*.

130. *See* Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1052 (1983). Studies in the 1980s found that German police officers rather routinely ignored the warnings requirement. *Id.* at 1053 n.111.

131. *See* text accompanying *supra* note 76.

132. Michigan v. Mosely, 423 U.S. 96, 106 (1975).

133. *See* RCCJ REPT., *supra* note 60, § 21, at 13.

In the United States, under the rule of *Edwards v. Arizona*,[134] an invocation by a suspect of the right to counsel will generally foreclose any further attempts at interrogation unless the suspect, herself, "initiates" further conversation.[135] As to police attempts to interrogate a suspect after he has invoked the right to counsel in Germany, the German Supreme Court has said:

> If the police officer wants in such a case to continue the interrogation it is only permissible without a preliminary consultation with defense counsel if the accused expressly declares himself in agreement with the continuation of the interrogation after being re-admonished. There must, however, have been a previous earnest effort by the police officer to help the accused in an effective manner to realize the contact with a defense lawyer. All this is required, because the accused is often, especially in the case of an arrest, confused by the events and pressured and anxious by the unfamiliar surroundings.
>
> . . .
>
> There was a lack of the required efforts here. Of course the police will, as a rule, avoid recommending a particular defense lawyer in order to avoid the impression of a close working relationship with particular defense lawyers. It is impermissible to pretend readiness to help in setting up the contact with mere "pretend-activity" and to exploit the expected futility at the outset as well as the related discouragement of the accused in order to continue the attempt at interrogation. The mere handing over of the local Hamburg telephone book in which, under the caption "law offices," a very great number of entries could be found, was no help, and, especially in light of the circumstances was better suited to convince the accused G., who did not understand the German language, of the impossibility of an impending contact with a lawyer. The police officers refrained from advising him of the telephone number of the emergency lawyer service, which could have been of real help.[136]

### *E. Excludability of Statements Made Without Proper Warning*

#### 1. The Theory of "Nullities"

Post-inquisitorial European systems confronted procedural errors, even if they would today impact constitutional rights, as procedural "nullities," that is, void of any legal force. In France "a nullity occurs when there is a failure to recognize a substantial formality required in a provision of the present code or any other provision of criminal procedure has infringed on the interests of the

134. 451 U.S. 477, 484 (1981). *See also supra* note 48.

135. Oregon v. Bradshaw, 462 U.S. 1039, 1045-46 (1983).

136. BGHSt, 42, 15 (19-20). See also BGHSt 38, 372 (373), a case in which police denied the accused the opportunity to contact defense counsel, despite the fact that he already knew who the defense counsel was. The right of police to attempt to re-question the accused is universally accepted once he has had a chance to talk to a lawyer. *See* BGHSt 42, 170 (173-74).

party to which it applies."[137] Such a violation must, however, "affect the interests of the party concerned,"[138] and not be a "mere" formality. The result of the finding of a "nullity" would be removal of the documentation of the tainted evidence from the investigative dossier which was historically the receptacle for all evidence admissible at trial.[139] The French Code of Penal Procedure does not explicitly provide that violations of the protections related to *garde à vue* result in a "nullity" and it is extremely difficult for French defendants to show that violations in the giving of admonitions prior to questioning in *garde à vue* should lead to exclusion of the statements.[140]

For instance, the French Supreme Court, *Cour de cassation*, held that a failure of the police to have the accused sign the document attesting to his having been advised of his rights prior to questioning in *garde à vue* did not affect the accused's rights.[141] Because the accused had indeed been informed of his rights, the statement would not be excluded.[142] On the other hand, the same court recently held that a failure to advise the suspect of his rights before *garde à vue* because of the lack of an interpreter, affected his rights and led to the suppression of the confession he had made.[143]

The Italian Code of Penal Procedure differentiates between "absolute nullities," something akin to what U.S. courts would call "plain error," and "relative nullities." "Absolute nullities" include jurisdictional errors, violations of the prosecutor's monopoly on the charging power, or violations of the mandatory right to counsel. "Relative nullities" deal with other procedural rules during the preliminary investigation or the preliminary hearing.[144] "Absolute nullities" may not be "sanitized" through a proper correction of the erroneous procedures as may some of the other procedural violations.[145]

137. C. PR. PÉN.-FRANCE § 171; *see also* C.P.P.-Italy § 177 (containing similar language).

138. C. PR. PÉN.-FRANCE § 802.

139. C. PR. PÉN.-FRANCE § 174 para. 3. In the Netherlands, even a coerced statement is not removed from the investigative file by the investigating magistrate. The decision as to whether it may be used at trial rests with the trial judge. *See* Field, *supra* note 105, at 242.

140. PRADEL, *supra* note 53, at 398.

141. The decision was made pursuant to Sections 63-1, 64 & 66 of the old version of the French Code of Criminal Procedure, before the 2000 revisions which introduced a form of *Miranda*-warnings. *See* text accompanying *supra* note 90.

142. Crim. Dec. 6, 1995, No. 369, at 1082, 1083.

143. Crim. Dec. 3, 1996, No. 443, at 1297, 1298.

144. C.P.P.-ITALY §§ 178-181.

145. C.P.P.-ITALY §§ 179, 183, 184. *See* Elizabeth M.T. Di Palma, *Riflessioni sulla sfera di operatività della sanzione di cui all'art. 191 c.p.p., in* PERCORSI DI PROCEDURA PENALE, DAL GARANTISMO INQUISITORIO A UN ACCUSATORIO NON GARANTITO 113, 116-17 (Vincenzo Perchinunno ed., 1996).

2. Non-Usability of Evidence

The modern trend in the post-inquisitorial European systems is to depart from the old concept of "nullities," however, in favor of statutory or even constitutionally based exclusionary rules, preventing the use of evidence gathered in violation of the law as a foundation for a judgment or conviction.[146] The Italian Code of Criminal Procedure has introduced what appears to be an ironclad exclusionary rule, phrased in terms of "non-usability," *inutilizzabilità*: "Evidence acquired in violation of prohibitions established by law may not be used."[147] Similarly, in Spain, "evidence obtained, directly or indirectly, in violation of fundamental rights or liberties shall be given no effect."[148]

It will be recalled that Italy applies a more specific rule of non-usability to all statements, whether spontaneous or elicited, which are gathered by the police from a suspect or accused in the absence of defense counsel.[149] Despite the seemingly rigid exclusionary rule relating to statements of suspects and the accused, there seems to be authority in Italy that the failure to advise the person subject to police interrogation of the right to remain silent will not lead to the statement being excluded and a conviction based thereon being overturned.[150] Thus, it appears that the high courts of Italy treat lack of counsel during interrogations as a fundamental violation leading to "non-usability." However, the courts treat failure to advise of the right to remain silent as a mere "nullity," or error in the statutorily prescribed form of gathering evidence, which will not necessarily lead to exclusion.[151]

146. For instance, § 24(2) of the Canadian Charter of Rights and Freedoms provides: "[W]here . . . a court finds that evidence was obtained in a manner that infringed or denied any of the rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute." *See* BRADLEY, *supra* note 106, at 113. Note that this sounds like the U.S. Supreme Court's earlier rooting of the Fourth Amendment exclusionary rule in preserving "judicial integrity." *See* Elkins v. United States, 364 U.S. 206, 222 (1960). The U.S. Supreme Court has rejected this rationale in favor of that based in the deterrent effect on police of a suppression of evidence seized in violation of the Constitution. *See* United States v. Leon, 468 U.S. 897, 919 (1984).

147. C.P.P.-ITALY § 191(1). "Non-usability" is the sanction resulting from a substantive violation which affects the gathering of a piece of evidence, whereas "nullity" is the sanction when there is an error in the statutorily prescribed form of acquiring evidence. *See* SERGIO RAMAJOLI, LA PROVA NEL PROCESSO PENALE 20-24 (1995) [hereinafter RAMAJOLI].

148. LEY ORGANICA DEL PODER JUDICIAL [L.O.P.J.] § 11.1 [hereinafter L.O.P.J.-SPAIN], *translated by author* from MUERZA ESPARZA, *supra* note 56, at 304.

149. C.P.P.-ITALY §§ 63, 350(6)-(7); *see* text accompanying *supra* note 76.

150. *See* Marilena Colamussi, *Interrogatorio dell'imputato ed omesso avvertimento della facoltà di non respondere*, *in* PERCORSI DI PROCEDURA PENALE, DAL GARANTISMO INQUISITORIO A UN ACCUSATORIO NON GARANTITO 15 (Vincenzo Perchinunno ed., 1996) (citing a decision of the Italian Supreme Court rendered November 12, 1991).

151. *Id.* at 16 (criticizing this jurisprudence).

To trigger Spain's statutory exclusionary rule, there must be a violation of a "fundamental right or liberty," and not violations of mere technical statutory formalities in the taking of evidence.[152] The jurisprudence of the Spanish high courts has repeatedly made it clear that a failure to advise a suspect-accused of the right to remain silent or the right to counsel constitute violations of the constitutional rights incorporated in Articles 17(3) and 24(1) of the Spanish Constitution and that this, of necessity, requires suppression of the evidence under Section 11.1 of the Law of the Judicial Power.[153] In the words of the Spanish Supreme Court:

> The caselaw is repeated and settled in the sense that, given the Constitution and the presumption of innocence established in Article 24 as a fundamental right, the declaration of an accused before the police without the guarantees established in Article 17 of the Constitution, among which is fundamentally the presence of a lawyer, cannot be considered to constitute a sufficient basis for rebutting such presumption.[154]

The Spanish Constitutional Court has also ruled that admission of evidence seized in violation of fundamental rights and liberties violates the equality of the parties in the adversarial trial:

> [G]iven the inadmissibility of evidence obtained in violation of fundamental rights, its procedural reception implies an ignorance of the proper 'guarantees' of the trial [Constitución art. 24.2], implying also an unacceptable institutional confirmation of the lack of equality between the parties at the trial [Constitución art. 14], a lack of equality which has been procured illegally benefiting he who has gathered evidentiary instruments in violation of the fundamental rights of the other.[155]

Russia also has an exclusionary rule rooted in its Constitution.[156] The constitutional provision was statutorily implemented in the bill that reestablished trial by jury in 1993.[157] It has been applied to exclude statements

152. The Spanish distinguish, similarly, between "illicit evidence" (*prueba ilícita*) gathered in violation of a simple law and "prohibited evidence" (*prueba prohibida*) gathered in violation of constitutional rights. VICENTE GIMENO SENDRA ET AL., *supra* note 67, at 384. Note the similarity here with U.S. jurisprudence, which normally provides for exclusion only when "constitutional" and not mere statutory rights are violated. *See* SALTZBURG & CAPRA, *supra* note 23, at 456-59.

153. S.T.S., Feb. 7, 1992 (R.J., No. 1108, 1409-10).

154. S.T.S., Feb. 11, 1998 (R.J., No. 175, 1865, 1867).

155. *See* B.J.C., March 26, 1996, (B.J.C., No. 49, 133, 137-38, 180).

156. Article 50(2) of the Russian Constitution provides: "In the administration of justice the use of evidence obtained in violation of federal law shall not be permitted."

157. Section 69, paragraph 3 of the Russian Code of Criminal Procedure provides: "Evidence obtained in violation of the law is recognized as not possessing legal force and may not be made a basis for an accusation nor be used to prove circumstances listed in article 68 of this code" [relating to proving the elements of the crime]. *See also* Stephen C. Thaman, *Das neue russische Geschworenengericht*, 108 ZSTW 191, 196 n.31, 199 (1996).

of suspects and the accused in the absence of the admonitions required pursuant to Article 51 of the Russian Constitution. Evidence has been suppressed by Russian judges in anywhere from one-third to seventy percent of all cases tried before Russian juries since 1993,[158] including cases of violations of Russia's *Miranda*-type warnings.[159] Nevertheless, the Russian Supreme Court has reversed acquittals of defendants in cases where their inculpatory statements had been suppressed on the grounds that the trial judge had purportedly violated the rights of the prosecution by unlawfully excluding the evidence.[160]

The Russian Supreme Court has also reversed acquittals of defendants in cases where confessions were suppressed because they had been taken in violation of the requirement of admonitions, or following police coercion. These reversals were based on the fact that the defendant or defense counsel had told the jury that illegal police tactics had been used. The Supreme Court held that this constituted bringing irrelevant material, unrelated to proving the elements of the crime, before the jury.[161]

3. The Proportionality Test of Exclusion

The Spanish Supreme Court has ruled that when a violation does not affect fundamental rights, then the principle of material truth[162] prevails and the evidence will be admitted.[163] The German Supreme Court has engaged in balancing when considering *Miranda*-type warnings:

> The Chamber shares the interpretation of the submitting appellate court that the violation by a police officer of the duty to admonish pursuant to Sections 136(1)(2) and 163a(4)(2) of the German Code of Criminal Procedure provides the basis for a prohibition in the use of the evidence upon which the appeal filed on behalf of the defendant can fundamentally rely. . . . The Senate deviates thereby from its earlier jurisprudence . . . .
>
> The German Criminal Procedure Statute gives no conclusive rule about prohibitions on the use of evidence . . . . The question as to whether a

158. *See* Thaman, *Europe's New Jury Systems*, *supra* note 13, at 242 n.47.

159. *See* Thaman, *Resurrection*, *supra* note 103, at 91.

160. *Id*.

161. *See* Thaman, *Europe's New Jury Systems*, *supra* note 13, at 284 n.82.

162. The traditional goal of inquisitorial criminal procedure was to ascertain the truth and this principle remains at the heart of Continental European criminal procedure. *See* Albin Eser, *Funktionswandel von Prozeßmaximen*, 104 ZStW 361, 362 (1992). *See also* C. PR. PÉN.-FRANCE § 81(1).

163. With regard to the application of the U.S. constitutional right to be free from unreasonable searches and seizures, however, the U.S. Supreme Court has held: "Unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury." United States v. Leon, 468 U.S. 897, 907 (1984).

> prohibition on the gathering of evidence brings with it a prohibition on the use of the evidence must be specially decided as to each provision and for each case on its facts. . . . The decision as to whether or not there will be a prohibition on use is made on the bases of a comprehensive balancing test . . . . The weight of the procedural violation as well as its importance for the legally protected sphere of the interested party must be considered and placed in the balance as well as the consideration, that the truth may not be sought at any price . . . . On the other hand, one must consider that prohibitions on use impinge on the possibilities of determining the truth . . . and that the State according to the case law of the Constitutional Court must guarantee an administration of justice which is capable of functioning, without which justice cannot be realized . . . . If the procedural provision, which has been violated, does not, or not primarily, serve to protect the accused, then a prohibition on use will be unlikely . . . . On the other hand, a prohibition on use is appropriate when the violated procedural provision is designed to secure the foundations of the procedural position of the accused or defendant in a criminal prosecution.
>
> The principle, that no one must testify against himself in a criminal proceeding, that is, has a right to silence, belongs to the recognized principles of criminal procedure . . . . It has found a positive expression in Article 14(3g) of the International Covenant on Civil and Political Rights of the United Nations. The recognition of this right to silence reflects the care given to human dignity . . . . It protects the personality rights of the accused and is a necessary component of a fair trial . . . .
>
> At the time of the first interrogation by the police the accused is, compared with the circumstances at the trial, not to a lesser extent, but rather to a greater extent in danger of unthinkingly incriminating himself . . . . While the defendant can calmly prepare himself for his testimonial decisions in the trial and seek legal counsel, and moreover often has a defense counsel at his side, the first police interrogation usually finds the accused unprepared, without anyone to counsel him, and also cut off from familiar surroundings, also not seldom confused by the events and pressured or afraid due to the unaccustomed surroundings. The defendant can, also with the help of his defense counsel, smooth out statements given at the trial, while the first statements to the police are often deprived of such a possibility of influence and despite a change in testimonial behavior develop a factual impact which has significant importance for the further course of the trial.
>
> Whoever, at the beginning of the interrogation knew, even without admonitions, that he did not have to give a statement, is, however, not worthy of protection to the same extent as the person who was unaware of his right to silence. To be sure he must be admonished pursuant to Sections 136(1)(2) and 163a(4)(2) of the German Criminal Procedure Statute. However the prohibition on use will exceptionally not apply here. The balancing of the values leads to the result, that the interest on proceeding with the trial in such a case should be accorded priority. If the trial judge, preferably through free

> evaluation of the evidence, comes to the conclusion that the accused knew his right to silence at the beginning of the interrogation, then he may use the content of the statements which the accused made to the police without the admonitions, in formulating the judgment. Otherwise he must heed the prohibition on use.[164]

Determining that a violation is substantial and impacts constitutional rights will always lead to exclusion in Spain, whereas it is only the first step in the German analysis. In Germany, while the failure to admonish is a violation of a substantial right of the suspect, it will not lead to exclusion and is deemed harmless, if there is evidence that the defendant already knew of his constitutional right to remain silent and to speak with counsel.[165] German courts will also balance the seriousness of the offense into the equation and will allow use of evidence seized in violation of basic rights if the seriousness of the offense investigated significantly outweighs the seriousness of the violation.[166]

4. Case-by-Case Fairness Test: The English Approach

There is no blanket statutory exclusionary rule in England and Wales. As in Germany, the decision whether or not to exclude is approached on a case-by-case basis pursuant to Section 78(1) of the PACE, which provides:

> In any proceedings the court may refuse to allow evidence on which the prosecution proposed to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an

164. BGHSt 38, 214 (219-22, 224-25, 227-30).

165. *Miranda* warnings must, on the other hand, be given to all in-custody suspects before being interrogated: "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Miranda*, 384 U.S. at 468.

166. The German Supreme Court has recognized that the seizure and reading of private diaries violates the right to human dignity guaranteed by Article 1 of the German Constitution and the right to a "free development of the personality" guaranteed by Article 22. It has suppressed inculpatory evidence gleaned from such a seizure in a prosecution for perjury. BGHSt 19, 325 (330-33). On the other hand, the Court refused to suppress diary entries in a brutal murder case. BGHSt 34, 397 (401).

The U.S. Supreme Court also makes some distinctions based on the seriousness of the offense. For instance, a warrantless entry of a dwelling on probable cause that evidence will be destroyed is impermissible if the offense is a minor one. *See* Welsh v. Wisconsin, 466 U.S. 740, 750 (1984). Similarly, an arrest in public for a misdemeanor not committed in the presence of the arresting officer will normally not be permitted without an arrest warrant, whereas a felony arrest without a warrant under such circumstances is permissible. *See* United States v. Watson, 423 U.S. 411, 418 (1976).

> adverse effect on the fairness of the proceedings that the court ought not to admit it . . . .[167]

In cases where statements from suspects have been taken in the absence of the required warnings or in violation of the right to counsel, and where no other "oppression" is present,[168] the trial court must decide whether the use of the statements will result in an "unfair" trial. In a case where the accused was interviewed four times without access to counsel in violation of Section 58 of the PACE, the trial court admitted the statements, and the defendant was convicted.[169] The English Court of Appeal ruled that: "In this case this appellant was denied improperly one of the most important and fundamental rights of a citizen" and reversed the conviction. It held that the court had not properly balanced the seriousness of the violation against any possible reasons for the violation.[170] In effecting this case-by-case balancing, English courts, like their German counterparts, take into consideration whether the failure to admonish was in bad faith and whether the suspect already knew of the right to remain silent.[171]

English courts will also suppress statements per Section 78 of the PACE when the suspect is deluded about the precise nature of the charges confronting him at the time he is interrogated. In one case a man was led to believe that he was only being interrogated about a purse-snatch robbery and was not told that the victim, an old woman, had fallen, hurt herself badly, and died in the hospital. The Court of Appeal ruled that this constituted a violation of such seriousness that exclusion was the proper remedy.[172] While the statutes regulating the *Miranda*-like admonitions in Germany, Spain, France and Italy all require that the suspect be advised of the nature of the crime attributed to her, Germany, for instance, allows the police to withhold the exact nature of the offense if its revelation will hinder the police in resolving the case.[173]

167. PACE-ENGLAND § 78 displaces the old case law in England, which did not provide for suppression of illegally gathered evidence other than in cases of involuntary confessions. *See* SEABROOKE & SPRACK, *supra* note 58, at 139.

168. Involuntary statements that are the result of "oppression" are excludable pursuant to PACE-ENGLAND § 76.

169. R. v. Samuel, 2 All E.R. 135, 147 (C.A. 1988).

170. *Id.* at 147.

171. *See* R. v. Alladice, 87 Crim. App. R. 380 (1988), *cited in* SEABROOKE & SPRACK, *supra* note 58, at 130-31.

172. R. v. Kirk, 1 W.L.R. 567 (C.A. 2000).

173. *See* KLEINKNECHT & MEYER-GOßNER, *supra* note 58, at 467 § 13. Presumably this would exclude as a means of resolving the case an inducement of a confession through deception. But the German Supreme Court upheld a conviction in a case where the police told the defendant, who at the time was being interrogated as a witness, that the supposedly "missing person" they were investigating had already been found dead. Once they revealed the death, the defendant was then properly admonished before giving an incriminating statement. BGHSt 8, 337 (338-39).

5. Other Countries

Canada seems to have implemented a fairly rigid exclusionary rule when police do not respect a suspect's request to see counsel before being interrogated. Where a suspect was nevertheless interrogated after having stated, "I ain't saying anything until I see my lawyer," the Canadian Supreme Court suppressed the statement and reversed a conviction based thereon, holding that Section 10(b) of the Canadian Charter of Rights and Freedoms imposed a duty on police "to cease questioning or otherwise attempting to elicit evidence from the detainee until he has had a reasonable opportunity to retain and instruct counsel."[174]

## *F. Fruits of the Poisonous Tree*

The fact that a statement obtained from a suspect in the absence of *Miranda*-like warnings cannot be used against him or her at trial does not necessarily reach the question of whether the information obtained in such statement may be used to follow investigative leads. These leads provide, for instance, a basis upon which to obtain a search warrant or wiretap,[175] or to impeach the defendant if he testifies contrary thereto at trial.[176] If the statement without warnings is followed by proper admonitions, and then a statement affirming the facts that were revealed in the illegal statement is made, the second statement will also be admissible.[177]

The Spanish courts have repeatedly invoked the doctrine of "fruit of the poisonous tree."[178] In a 1992 decision of the Spanish Supreme Court, the defendants appealed convictions for being members of an armed terrorist

174. Queen v. Manninen, 58 C.R.3d 97, 104 (1987), *cited in* BRADLEY, *supra* note 106, at 116.

175. Evidence found by exploiting leads obtained in a *Miranda*-defective statement has been ruled by the U.S. Supreme Court to be beyond the scope of *Miranda's* exclusionary rule. *See* Michigan v. Tucker, 417 U.S. 433, 450 (1974) (witness discovered). *See also* New York v. Quarles, 467 U.S. 649, 660 (1984) (O'Connor J., concurring); United States v. Gonzalez-Sandoval, 894 F.2d 1043, 1048 (9th Cir. 1990); United States v. Elie, 111 F.3d 1135, 1142 (4th Cir. 1997).

176. *See* New York v. Harris, 495 U.S. 14, 21 (1990).

177. *See* Oregon v. Elstad, 470 U.S. 298, 306-07 (1985). Justice O'Connor, in *Elstad*, explained why the "fruits" of a *Miranda*-defective statement would still be admissible: "The *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony." *Id*. at 306-07. Since the Court has distanced itself from this language in *United States v. Dickerson*, 120 S. Ct. 2326 (2000), in holding that *Miranda* warnings are constitutionally compelled, one must wonder if this case law is still fully applicable. This was discussed by Professors Israel, Dripps and Nowak at the Childress Lecture at the Saint Louis University School of Law on September 28, 2000.

178. The term was first coined by Justice Frankfurter in *Nardone v. United States*, 308 U.S. 338, 341 (1939).

group and possessing military weapons and explosives on the basis that the weapons had been found in a garage based on leads gathered in the defendants' statements which were taken in the absence of counsel.

> The illegitimate or illegal acquisition of evidence can function in conformity with Section 11.1 of the Spanish Law of the Judicial Power by directly or indirectly violating or undermining a fundamental right. The condition reflected or indirectly established in the indicated provision cannot but intend to refer to cases in which the illegality of the acquired evidence is based on other activity which in a direct manner has violated a fundamental right.
>
> Thus, a doctrinal example is given of the case in which in an interrogation in which fundamental rights have been violated, one finds, after an act of entry and search effectuated with a judicial warrant, arms and fruits from a robbery or narcotic substances. The theme in such cases is that of determining if the irregularity irradiates its effects to the totality of the evidence by virtue of the so-called 'doctrine of the fruits of the poisonous tree' found in Anglo-Saxon law ['fruit of the poisonous tree doctrine'] or if, on the contrary, there does not exist a relation of interdependency between the irregular and the regular and thus the latter can be deemed to be useful to undermine the presumption of innocence.
>
> The doctrinal solution is reasonable which in such cases distinguishes between the cases in which one simply gains knowledge of a fact and those in which by the verification of such a fact [discovery of the objects] one tries to derive an evidentiary consequence against the accused. [For example, that he/she had placed the objects and had dominion and control over them]. In this second case, the evidence would be illegal, whereas in the first, since the content of the confession had no evidentiary significance, not even in a circumstantial sense, it could not be deemed to be illegally obtained evidence.[179]

In Germany, the literature is not clear as to whether a violation of the admonitions required by Sections 136 and 243(4)(1) of the Code of Criminal Procedure will also lead to a prohibition against following leads gathered from the inadmissible statements.[180] Germans do, however, recognize a variation on the "independent source"[181] and "inevitable discovery"[182] doctrines which

179. *See* STS, Feb. 7, 1992 (R.J., No. 1108, p. 1409, 1410). There appears, however, to be some case law allowing use of "fruits" of a defective confession, as long the "indirect" fruits of the bad confession do not constitute the only basis for the finding of guilt. *See* VICENTE GIMENO SENDRA ET AL., *supra* note 67, at 507.

180. *See* KLEINKNECHT & MEYER-GOßNER, *supra* note 58, § 20, at 469.

181. In U.S. jurisprudence, evidence first discovered unlawfully may nevertheless be admissible, if there is a legal independent source for its ultimate discovery and seizure. *See* Murray v. United States, 487 U.S. 533, 537 (1988). Justice Holmes first used the term "independent source" in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

require that the police have "clean hands."[183] It must thereby be shown that there was a "clean path" to the evidence independent of the illegality or, the counterpart to "inevitable discovery," a "hypothetical clean path."[184]

European Courts have on occasion suppressed statements following proper *Miranda*-like warnings if they followed on the heels of incriminating statements that had been given either without proper warnings or in violation of the right to counsel. In a 1991 case in England, a woman was arrested on homicide charges and was interviewed on two occasions. A solicitor was present for only one of these meetings. The Court of Appeal expostulated:

> On appeal it was held that the first confession was made in consequence of M being denied access to a solicitor and was for that reason likely to be unreliable. Had a solicitor been present the interview would have been halted when M became emotionally upset. The interview was held quickly and without the formalities of the Code because the police were anxious to discover the missing woman, but this heightened the risk of the confession being unreliable.
>
> The second interview took place the following day in compliance with the provisions of the Code and in the presence of a solicitor. However that confession was a direct consequence of the first. Moreover the appellant's solicitor was not informed that the appellant had been wrongly denied access when M was brought to the police station. If the solicitor had known that, she would have realized immediately that the first confession was suspect and in all probability would not have allowed the second interview to take place.
>
> Held, that the earlier breaches of the Act and the Code rendered the contents of the second interview inadmissible also. The court added that one cannot refrain from emphasizing that when an accused person has made a series of admissions as to his or her complicity in a crime at a first interview, the very fact that those admissions have been made are likely to have an effect upon the person during the course of a second interview. Accordingly, if it be held, as it is held here, that the first interview was in breach of the rules and in breach of

182. In U.S. jurisprudence, evidence unlawfully seized may nevertheless be admissible if it would inevitably have been discovered by legal means. *See* Nix v. Williams, 467 U.S. 431, 444 (1984).

183. The German exclusionary rules are not exclusively based on police deterrence as they are in the United States. United States v. Leon, 468 U.S. 897, 919 (1984). Rather, the focus in Germany is on what the U.S. Supreme Court used to call "judicial integrity." *See* discussion of "judicial integrity" *supra* note 146; *see* Thomas Weigend, *Germany*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 197 (Craig M. Bradley ed., 1999) [hereinafter Weigend, *Germany*].

184. Canada also employs the doctrine of "inevitable discovery." In *R. v. Black*, 70 C.R.3d 97, 117 (1989), the defendant requested a particular lawyer and the police attempted unsuccessfully to contact that lawyer. Police questioned the defendant nevertheless, and she confessed. Her confession led police to the murder weapon. The Canadian Supreme Court suppressed the confession but held that the knife would "undoubtedly have been uncovered by the police in the absence of the Charter breach." *See* BRADLEY, *supra* note 106, at 116.

> Section 58, it seems to the court that the subsequent interview must be similarly tainted.
>
> Both confessions should have been excluded under Section 76, PACE the result of that evidence being excluded is that there was no reliable evidence against M and accordingly the appeal was allowed and the conviction quashed.[185]

The sense of urgency that led the police to interview without proper admonitions in the case discussed above might have excused the giving of *Miranda*-like admonitions in the United States under the "public safety exception" articulated by the U.S. Supreme Court.[186] Here, the English Court of Appeal noted that such admissions might be less reliable than those given in non-emergency situations. German courts have also found that subsequent admissions with proper admonitions were not independent from an earlier illegal statement given after police had hampered the suspect's attempts to contact counsel.[187] It must be emphasized, however, that the aforementioned English and German decisions are not necessarily different than would be required by U.S. law, inasmuch as a refusal to respect a request for counsel prior to charging[188] or after charging[189] would also render subsequent statements inadmissible.

Although statements taken in the absence of counsel may not be used against the defendant in his own trial in Italy, they may be used to impeach the defendant and for other non-trial purposes, but only if the defendant had been advised of the right to counsel.[190] There is also authority that such statements may be used against the defendant in hearings related to the imposition of preventive detention or other protective measures, or in making a decision about whether to initiate procedures for an expedited trial.[191] Such statements may also be used against third-party defendants.[192]

### *G. Evidentiary Use of the Exercise of the Right to Remain Silent*

Finally, there is the issue regarding what happens when a suspect-accused in Europe actually decides not to give a statement after being admonished of

185. R. v. McGovern, Crim. L.R. 124, 125 (1991).

186. *See* New York v. Quarles, 467 U.S. 649 (1984).

187. "However this interrogation was directly related to the previous questioning; it had as its goal, among other things, to preserve the confession in an evidentiarily admissible form." *See* BGHSt 38, 372 (375).

188. *See* Edwards v. Arizona, 451 U.S. 477 (1981).

189. *See* Massiah v. United States, 377 U.S. 201 (1964); Brewer v. Williams, 430 U.S. 387 (1977).

190. *See* Rachel VanCleave, *Italy*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 264 (Craig M. Bradley ed., 1999).

191. *Id.*

192. *Id.*; *see also* RAMAJOLI, *supra* note 147, at 42.

the right to remain silent. In the United States, no comment may be made at trial on the defendant's refusal to testify on his own behalf, and the jury is admonished that this fact may not be used by them as evidence of guilt.[193] Regarding the defendant's pre-trial silence, the U.S. Supreme Court has held that the prosecution may comment on a suspect's pre-arrest silence or silence when confronted with incriminating evidence,[194] and on the silence of a suspect post-arrest, but before being given her *Miranda* warnings.[195] The Supreme Court has, however, held that it would violate due process to allow comment or use of a suspect's or accused's silence after she had been admonished pursuant to *Miranda* of the right to remain silent.[196]

> While the fact of a suspect-accused's silence during the investigation may traditionally give rise to an adverse inference in French criminal proceedings,[197] no evidentiary use may be made of such silence following admonitions in Germany. In a 1965 case the German Supreme Court confronted a man who remained silent when the police attempted to interrogate him regarding thefts from telephone booths, but later spoke to the investigating magistrate. The court opined:
>
> Whether the right of the accused, to refuse to make a statement about the case, also completely prohibits drawing disadvantageous conclusions from his silence, may be doubtful. This is especially the case when the accused remains silent only partially, or during only one or a few of multiple judicial interrogations. In the instant case the Chamber need not answer this question.
>
> Such conclusions are legally inadmissible in any case when the accused, as was here the case availed himself of this right to the full extent at arrest and in the following police interrogation, because he, regardless of for what reason, deemed it to be correct to first make statements about the case during a judicial interrogation.
>
> A contrary view would limit the right of the accused, not to make a statement about the case, in a legally impermissible manner. For it signifies that the accused, who is aware thereof, would feel himself compelled to give a statement immediately at his first police interrogation, rather than run the risk that disadvantageous inferences could be drawn in a later judicial proceeding from his conduct during that interrogation. An interpretation which would lead to such results contradicts Section 136a of the German Criminal Procedure

193. Griffin v. California, 380 U.S. 609, 613 (1965); Carter v. Kentucky, 450 U.S. 288, 298 (1981).

194. *See* Jenkins v. Anderson, 447 U.S. 231, 238-39 (1980).

195. *See* Fletcher v. Weir, 455 U.S. 603, 609 (1982).

196. *See* Doyle v. Ohio, 426 U.S. 610, 619-20 (1976).

197. Vogler, *supra* note 64, at 32, notes that "the nature of the trial process ensures that it is almost impossible, in practice, to remain silent," but that when a defendant does so, as in the trials of Marshall Pétain in 1945 and General Salan during the Algerian crisis of 1962, "it may give rise to an adverse inference."

> Statute, which fundamentally prohibits undermining the accused's freedom of exercising his own will through coercion.
>
> Criminal procedure must also be just to accused individuals who are innocent. Even such individuals can, for reasons of the most varied sort, consider it proper to make a statement about the case before a judge rather than before a police officer. The fear that a corresponding attitude could be considered to his disadvantage during the evaluation of the evidence would make such conduct in many cases well-nigh impossible and therefore limit the right to remain silent before the police in a manner which is unacceptable. As to accused individuals who are guilty, the same applies. He should be treated like an innocent person up until a judgment of guilt has become final.[198]

In 1999, the German Supreme Court also held that no inference of guilt may be drawn, not only from the refusal of a defendant to testify, but also from his refusal to release his sister from a statutory privilege not to testify against a close relative.[199]

At common law, an accused's failure to give evidence could not be commented on by the prosecution and could have no independent evidentiary effect.[200] This has changed in the United Kingdom, first with the enactment of the Criminal Evidence (Northern Ireland) Order of 1988,[201] and then, in England and Wales, with the enactment of the Criminal Justice and Public Order Act in 1994 (CJPOA), which provides that:

> (1) Where, in any proceedings against a person for an offence, evidence is given that the accused—
>
> > (a) at any time before he was charged with the offence, on being questioned under caution by a constable trying to discover whether or by whom the offence had been committed, failed to mention any fact relied on in his defence in those proceedings; or
> >
> > (b) on being charged with the offence or officially informed that he might be prosecuted for it, failed to mention any fact, being a fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed, as the case may be, subsection (2) below applies.
>
> (2) Where this subsection applies—
>
> > (c) the court in determining whether there is a case to answer; and

198. BGHSt 20, 281 (282-83).

199. *See* StPO-GERMANY § 52(3); BGH StV 5, 234.

200. *See* SEABROOKE & SPRACK, *supra* note 58, at 73-74, *citing* Criminal Evidence Act 1898 § 1(b) *and* R. v. Martinez-Tobon, 1 W.L.R. 388 (1994).

201. See discussion of the Order in *Murray v. United Kingdom*, 22 E.H.R.R. 29, 36 (1996). This law was enacted to deal with the "troubles" in Northern Ireland. *Id.*

> (d) the court or jury, in determining whether the accused is guilty of the offence charged, may draw such inferences from the failure as appear proper.[202]

Other sections in the CJPOA effectively compel a suspect to respond to police questions when caught *in flagrante*[203] or at the scene of a crime,[204] and allow comment on, and use of, a suspect's refusal to respond to police questions in those situations.

Defendants in Northern Ireland, and in England and Wales have challenged these laws before the European Court of Human Rights. In *Murray v. United Kingdom*,[205] the defendant was arrested at the scene of an alleged hostage-taking. Following the advice of his solicitor, he refused to make any statements at the scene to police officers after having been admonished that his silence could be used against him at trial. The defendant was convicted in a trial before a professional judge who used his silence against him.[206] The defendant claimed that the Northern Ireland statute, which was the model for the CJPOA, violated his right to remain silent and the presumption of innocence as protected by the English common law.[207] The Court discussed the amicus brief of Amnesty International, which made the following arguments:

> Article 14 (3) (g) of the International Covenant on Civil and Political Rights explicitly provides that an accused shall "not be compelled to testify against himself or to confess guilt." Reference was also made to Rule 42(A) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia which expressly provides that a suspect has the right to remain silent and to the Draft Statute for an International Criminal Court, submitted to the United Nations General Assembly by the International Law Commission, which in Draft Article 26 (6)(a)(i) qualifies the right to silence with the words "without such silence being a consideration in the determination of guilt or innocence."[208]

202. *See* Criminal Justice and Public Order Act [CJPOA] § 34 (1)(2) [hereinafter CJPOA-ENGLAND], *cited in* SEABROOKE & SPRACK, *supra* note 58.

203. This is so where, for instance, the suspect is in possession of evidence that the police link to the scene of the crime. *See* CJPOA-ENGLAND § 36.

204. CJPOA-ENGLAND § 37.

205. Murray v. United Kingdom, 22 E.H.R.R. 29, 36 (1996).

206. *Id.* at 34. Jury trial was suspended in Northern Ireland for cases involving alleged terrorism. S*ee* Sean Doran et al., *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1 (1995).

207. The European Convention of Human Rights explicitly guarantees the presumption of innocence under Article 6(2), and the provisions of Article 6(1), which guarantee a right to a fair trial, have been interpreted by the European Court of Human Rights to include a right to remain silent. Funke v. France, 1 C.M.L.R. 897, 909-10 (1993).

208. Murray v. United Kingdom, 22 E.H.R.R. §42, at 58-59.

The Court, while finding that the privilege against self-incrimination "lie at the heart of the notion of a fair procedure under Article 6,"[209] refused to prevent use of silence in all cases:

> On the one hand, it is self-evident that it is incompatible with the immunities under consideration to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself. On the other hand, the Court deems it equally obvious that these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution.[210]

The European Court of Human Rights was later called upon to decide a case arising under Section 34 of the CJPOA, in which the defendants were arrested for narcotics violations and exercised their right to remain silent upon advice of their lawyers partially due to the fact that they were under the influence of drugs at the time.[211] The case was tried by a jury, which was instructed under Section 36 of the CJPOA that it could use the defendants' silence to prove guilt. In this case, the Court held that the evidentiary use of the defendants' silence violated Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, because the jury had not been instructed, per *Murray*, that silence could not be the only evidence showing guilt and that there must be a prima facie showing of guilt for the silence to be admissible. The Court also held that the defendants' testimony that counsel had advised them not to speak made the case distinguishable from *Murray*.[212]

Some English courts, as well, have deemed it error for the judge to instruct the jury that they may draw an inference of guilt from the fact that the defendant did not mention certain things to the police which he later relied upon during his testimony at trial.[213]

209. *Id*. § 45, at 60.

210. *Id*. §47, at 60.

211. Condron v. United Kingdom, Crim. L.R. 679 (2000), *available at* http://www.dhcour.coe.fr/hudoc/ViewRoot.asp?Item=0&Action=Html&X=1111181321&Notice=0&Noticemode=&RelatedMode=0.

212. *Id*. at §§57, 60, 61, 66 & 68.

213. For instance, in *R. v. McGarry*, 1 W.L.R. 1500 (C.A. 1999), the defendant refused to speak to the police and later gave a short written statement claiming he had assaulted the victim in self-defense. At trial he provided more details of the alleged assault by the victim, and the judge instructed the jury that they could use his failure to tell the police of the details as circumstantial evidence of guilt. The court held that in such a situation the court should have instructed the jury pursuant to the common law rule that they may not draw any inferences from the defendant's silence. *Id.* at 1505-06.

## IV. CONCLUSION

This perusal of the laws and jurisprudence in major European democratic jurisdictions as it relates to what we call "*Miranda*-rights" (for instance, the requirement of admonishing a suspect or accused in a criminal case of her right to remain silent and to consult with counsel before being interrogated), has revealed that the U.S. Supreme Court was correct in *United States v. Dickerson*[214] to reject a challenge to the constitutionality of the regime imposed by *Miranda*. Not only have the *Miranda* warnings become a recognized procedure in police interrogations in this country, but, as this article has explained, they have been adopted or strengthened over the years in formerly inquisitorial countries like Germany, Italy, Spain and most recently France, and are now recognized as having constitutional status.[215] The post-inquisitorial regimes of the European Continent seem to be moving in the direction of according criminal suspects more protection in their confrontations with police and other law enforcement officials. Ironically, it is in the United Kingdom, the main common law jurisdiction in Europe, that there has been a regression in this area with the enactment of Section 34 of the CJPOA in 1994. By allowing comment on a suspect's exercise of his right to remain silent, this section puts more pressure on the individual to submit to interrogation than any of the other regimes that have been examined on the European Continent.[216]

In Italy and Spain a suspect has a right to have counsel present when he is questioned by the police, the prosecutor or a judge. This is a right not enjoyed in England, the United States, France or Germany.[217] Finally, Italy has taken a big step in completely eliminating the admissibility of any statements taken by police officers from suspects and has attempted to transform the "interrogation" exclusively into a vehicle of self-defense for the suspect.[218] *Miranda*-like warnings must be administered in Italy, Germany and England whenever suspicion is focused on a suspect, whether or not that person is in custody, thus giving more protection than *Miranda* itself in that regard.[219]

Thus, if America is to entertain ideas about reforming the law of interrogation, it has two directions in which to move. It can either move backwards (historically) to a more inquisitorial form of procedure aimed at making the suspect a prime source for evidence to be used in his own prosecution. Or, the United States can move away from the inquisitorial

214. 120 S. Ct. 2326 (2000).

215. *See* discussion *supra* Section III-B.

216. *See supra* note 98 and accompanying text. An exception is still France, where comment on the defendant's exercise of his right to remain silent may still be used as an inference of guilt. *See supra* note 197.

217. *See* discussion *supra* Section III-B.

218. *See supra notes* 76-80 and accompanying text.

219. *See* discussion *supra* Section III-C.

modes, as is happening on the European Continent, by strengthening the right to counsel during pretrial confrontations with the police and other law enforcement personnel and granting the individual autonomy in the decision of whether to speak in his own defense, or accept guilt and throw himself on the mercy of the court.

What effect do the varying regimes in place have on whether a suspect decides to speak in his or her own defense or to admit guilt? In England and Wales before the enactment of Section 34 of the CJPOA, most suspects spoke with the police.[220] The same is likely true in the United States.[221] It is also no secret that most Continental European defendants speak to their interrogators before trial and go on to testify at trial, regardless of what regime of admonitions is in place.[222] Whether or not a defendant speaks, however, is arguably attributable more to procedural realities in a criminal justice system other than the nature of admonitions, and finally, to a defendant's view on the relative benefits he or she may receive from admitting guilt or giving evidence in his or her own behalf. For instance, Continental European trials are usually not bifurcated into guilt and penalty phases, as are most American trials. Therefore, if the court is to hear mitigating evidence it must be before the guilt question has been decided. This induces most European defendants to speak both before and during trial.[223]

In America, the "accused speaks," as everyone knows, in upwards of ninety percent of all cases in the form of a guilty plea.[224] But we should really examine whether our system of police-dominated, jailhouse interrogations, in the absence of counsel continues to be necessary in the administration of criminal justice in our country. The fact that the police are allowed to question suspects without counsel being present in the United States, England and Wales, France and Germany means that police may, after getting a valid

220. In metropolitan police districts, fourteen to sixteen percent remained silent, whereas in provincial districts the percentage fell to between six and ten percent. In metropolitan districts twenty-nine percent of those who pleaded not guilty remained silent, whereas seventeen percent of those who pleaded guilty did so. *See* RCCJ REPT., *supra* note 60, at 53.

221. In the United States, there are voices in the literature that claim the imposition of *Miranda* warnings has hampered law enforcement ability to get confessions and just as many who claim it has had little effect. *See* SALTZBURG & CAPRA, *supra* note 23, at 652-53.

222. *See* Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*, l2l U. PA. L. REV. 506, 527 (l973).

223. MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 128 n.56 (1986). Some German reformers have proposed bifurcating the guilt and sentencing stages of trials so as to better guarantee a defendant's right to remain silent during the trial. *See* Roxin, *supra* note 84, at 197-98. One could say that the "accused speaks" form of trial still exists to a greater extent on the European Continent than it does today in America. *Cf.* Langbein, *The Privilege*, *supra* note 2, and accompanying text.

224. *See* WAYNE R. LA FAVE, JEROLD H. ISRAEL & NANCY J. KING, CRIMINAL PROCEDURE 957 (3d ed. 2000).

waiver of the rights to counsel and to remain silent, use many of the same psychological tactics (short of coercion, and excessive trickery, promises or threats) that were documented in the *Miranda* opinion itself.[225] All too frequently one reads newspaper accounts in the United States of innocent people who confess to serious crimes, even sometimes capital murder, after succumbing to the pressures or trickery of interrogating police officers,[226] after having waived their *Miranda* rights. Such cases arise in other countries as well.[227] Despite the new regime of *Miranda*-like warnings in Russia, Russian police and investigators are notorious for their use of torture to coerce confessions by pretrial detainees.[228]

The Italian solution of eliminating police interrogation as a source of admissible incriminating evidence is worth considering. The United States could also adopt the Italian legislative solution of permitting interrogation of suspects only on their motion and only when they think it will aid in their defense.[229] This would mean sacrificing the interrogation of the suspect or accused as a means of investigating his or her guilt. In inquisitorial terms, the ascertainment of the truth would have to rely more heavily on witness testimony and circumstantial evidence.

Other options would include substituting interrogation by a judge, which would result in a return to a variant of the justice of the peace system of the common law, or introducing a variant of the "judge of the investigation" or "investigating magistrate" systems that exist on the European continent.[230] A

225. *See Miranda*, 384 U.S. 447 (discussing methods from police manuals, etc.). For good examples of borderline cases involving deception and trickery following waiver of *Miranda* rights in which convictions were upheld, see *Miller v. Fenton*, 796 F.2d 598, 612 (3d Cir. 1986), and *Green v. Scully*, 850 F.2d 894, 904 (2d Cir. 1988). On the methods "aptly described as physically intimidating, teetering on the brink of violence" used by police, including swearing, interrogating late at night, lying about evidence against a suspect and about their ability and willingness to get a suspect a lower sentence, see Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: the Self-Incrimination Clause*, 93 MICH. L. REV. 857, 873 (1995), *citing* DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 199-220 (1991) [hereinafter Amar & Lettow].

226. *See* Stephen C. Thaman, *Is America a Systematic Violator of Human Rights in the Administration of Criminal Justice?* 44 ST. LOUIS U. L.J. 999, 1010 (2000) [hereinafter Thaman, *America*].

227. Andreas Ulrich, *Wer tötete Johanna Schenuit?*, 25 DER SPEIGEL 72 (2000).

228. *See* HUMAN RIGHTS WATCH: CONFESSIONS AT ANY COST: POLICE TORTURE IN RUSSIA 21 (2000). The favorite tools of the Russian police: beatings and asphyxiation, were also used by police in one Chicago precinct to coerce nine confessions in murder cases, some by innocent people, which led to death sentences. *See* Steve Mills & Ken Armstrong, *The Failure of the Death Penalty in Illinois: A Tortured Path to Death Row*, CHI. TRIB. Nov. 17, 1999, at 1.

229. *See* text accompanying *supra* notes 75-80. This could be done by organizing a pre-trial deposition before a judge, as is allowed in some states for the taking of witness testimony. *See* MO. REV. STAT. §§ 25.12, 25.14 (1980).

230. *See supra* notes 60-62 and accompanying text.

number of American commentators have suggested instituting questioning of criminal suspects by a magistrate and allowing comment on their silence in case they refuse.[231] This would presumably mean adopting modified admonitions along the lines of England's CJPOA.[232] Some would restrict such compulsion to speak in cases where the suspect is caught *in flagrante* or when there is an adequate and/or convincing prima facie case of guilt.[233] Some voices have gone even further, advocating a return to a purely inquisitorial system of compelled examination of criminal suspects by magistrates where the suspect's silence would not only be used against him at trial, but would also be punished by contempt.[234] Thus, ironically, the old common law jurisdictions are moving in a more inquisitorial direction and praising the principle of material truth[235] at a time when the post-inquisitorial systems on

231. This would, of course, require overruling *Griffin v. California*, 380 U.S. 609 (1965). *See* discussion in text accompanying *supra* note 193. The classic positions are the following: Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932); WALTER V. SCHAEFER, THE SUSPECT AND SOCIETY: CRIMINAL PROCEDURE AND CONVERGING CONSTITUTIONAL DOCTRINE 78 (1967); Henry J. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 713, n.180, *discussed in* Yale Kamisar, *On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 98 MICH. L. REV. 929, 931-32 (1995). *See also* MARVIN E. FRANKEL, PARTISAN JUSTICE 98-99 (1980). Professor Dripps has also advocated moving in this direction. *See* Donald A. Dripps, *Foreword: Against Police Interrogation—And the Privilege Against Self-Incrimination*, 78 J. CRIM. & CRIMINOLOGY 699, 730-31 (1988).

232. *See* discussion in text accompanying *supra* notes 97-101.

233. *Cf*. Alschuler, *supra* note 7, at 182, 203. The same kind of probable cause was needed in Sixteenth Century Germany before one could use torture. *See supra* note 5 and accompanying text. This would amount to a kind of reversal of the burden of proof before trial in such a case and even, one could argue, in the elimination of the presumption of innocence. *But see Salabiaku v. France*, 13 E.H.R.R. 379 (1991), and *Pham Hoang v. France*, 16 E.H.R.R. 53 (1993), demonstrating that a reversal of the burden of proof has been accepted by the European Court of Human Rights to some extent.

234. Amar & Lettow, *supra* note 225, at 898-99. The authors would also subject a lying suspect to prosecution for perjury and even suggest augmentation of the sanctions for perjury. *Id.* at 899 n.191. The catch is that the statement would not be admissible at the suspect's trial, but any other evidence found as a result of the coerced confession would be admissible. *Id*. at 858. Police interrogation would be discouraged, but Amar and Lettow would still let in "fruits" of their illegal interrogations for they would have been "inevitably discovered" at the "civilized" interrogation by the magistrates. *Id.* at 908 n.227. Lawyers would be excluded from the judicial interrogations. *Id.* at 899 n.192. For criticism of Amar and Lettow's reform proposals and their theoretical foundations, see Kamisar, *supra* note 231. In my opinion, a proposal such as that of Amar and Lettow would be considered to violate human rights in all Western European countries. In addition, such a proposal would likely violate Article 6 of the European Convention of Human Rights. *See* discussions of *Murray v. United Kingdom* and *Condon v. United Kingdom*, in text accompanying *supra* notes 205-212.

235. Examples of articles pushing the principle of material truth include: Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Thomas L. Steffen,

the European Continent are calling into question its centrality among their guiding principles.[236]

While abolishing police interrogation would certainly put more pressure on police departments to do more exhaustive and costly criminal investigations, it would not necessarily result in fewer convictions. There appear to be few cases among *Miranda's* progeny decided by the U.S. Supreme Court in which the prime reason for police interrogation was to determine who committed the homicide. More often than not it appears to have been to gather aggravating evidence which could even trigger a death penalty.[237] Confessions in many cases are not primarily used to ascertain the truth but rather to facilitate the imposition of more severe punishments. America is widely condemned around the world not only for its use of the death penalty, but also for its liberal use of extremely lengthy sentences, including life imprisonment, for non-violent crimes.[238] The threat of these Draconian punishments also serves to enforce our system of plea-bargaining by inducing defendants to enter a plea of guilty to minimize their exposure to such punishments.[239]

Can we reasonably allow suspects and accused individuals to aid in their own convictions by compelling them to a greater degree to submit to interrogations, by allowing comment and use of their silence, in a system

*Truth as Second Fiddle: Reevaluating the Place of Truth in the Adversarial Trial Ensemble*, 1988 UTAH L. REV. 799.

236. While trial judges in France (pursuant to C. PR. PEN-FRANCE § 310) and trial judges in Germany (pursuant to StPO-GERMANY § 244(2)) are obligated to ascertain the truth at trial, the role of Spain's judges (pursuant to L.E.CRIM-SPAIN § 683) and Russia's juries (pursuant to UPK RF-RUSSIA § 429 para. 1) is to facilitate an adversarial taking of the evidence conducive to finding the truth. The Italian legislature's attempt to transform the trial judge into a passive arbiter with no obligation to uncover the truth has been undermined by rulings of the Italian Supreme Court. Supreme Court cases have clearly emphasized that the trial judge still has a duty to uncover the truth. CASS. PENALE, 10 oct. 1991, n.648, 1258. For a discussion, see Hans-Heinrich Jescheck, *Grundgedanken der neuen italienischen Strafprozeßordnung in rechtsvergleichender Sicht*, *in* FESTSCHRIFT FÜR ARTHUR KAUFMANN ZUM 70 GEBURTSTAG, 659, 663 (1993). On the "overburdening" of the principle of material truth, see Bernd Schünemann, *Reflexionen über die Zukunft des deutschen Strafverfahrens*, *in* STRAFRECHT, UNTERNEHMENSRECHT, ANWALTSRECHT, FESTSCHRIFT FÜR GERD PFEIFFER, 461, 475 (1988). On the move in Europe away from the principle of material truth and its lack of continued vitality, see Thomas Weigend, *Die Reform des Strafverfahrens, Europäische und deutsche Tendenzen und Probleme in* 104 ZSTW 486, 488-96 (1992) [hereinafter Weigend, *Reform*].

237. Indeed, in *Miranda* itself, eyewitnesses had already identified Miranda and the defendant in a consolidated case, *Vignera v. New York*. In addition, the defendant in *California v. Stewart* had been identified cashing checks of the robbery-murder victim and evidence from that crime and other similar crimes had been found in his apartment following a search. Stewart had been sentenced to death. 384 U.S. at 456-57.

238. *See* Thaman, *America*, *supra* note 226, at 1000-01, 1021-23. Even in times of prosperity, such as the present, when crime rates are decreasing, America incarcerates more of its children *per capita* perhaps than any other country in the history of the world. *Id*. at 1015.

239. *Id.* at 1015-16.

which subjects them to punishments viewed as cruel and inhumane by many?[240] Police are also given a free hand at interrogation of juveniles and the mentally retarded. These disabled individuals are particularly good candidates for either not comprehending their constitutional rights or for being induced to confess to crimes they did not commit. As a result, they become subject to the death penalty if convicted of capital murder based on such confessions.[241]

It is no coincidence that the principle of material truth, or the duty of the organs of law enforcement to ascertain the truth, developed in a system which used torture to compel confessions and which was characterized by its brutal treatment not only of common criminals, but also of dissidents. Its goal was punishment, not truth. Perhaps the best vehicle for ascertaining the truth is to induce it with lenience, compassion or forgiveness. The approach taken by the Republic of South Africa in granting amnesty to those guilty of horrendous crimes during the reign of apartheid to those who honestly reveal their complicity therein is an example which should be studied by American truth-seekers. One could also study the Netherlands, which has an inquisitorial system with no lay participation and a largely written trial, in which the great bulk of all accused individuals confess. This occurs in the context of a liberal society administered by more or less liberal, compassionate prosecutors and judges.[242]

As long as the United States continues executing those who confess to aggravated murders (most of whom are guilty) and imposing Draconian sentences of deprivation of liberty in other felony cases, the American regime of allowing police interrogations without any warnings in non-custody situations and of custodial interrogations without counsel following waivers is too susceptible to manipulation by police and prosecutors and should be changed along the lines of the regime contemplated in the Italian Code of

240. The growing consensus around the world is that the death penalty itself violates human rights. *See* ECHR, *supra* note 57, at Protocol 7. *See also* Second Optional Protocol to ICCPR. (G.A. Res. No. 44/128, 15 December 1989), *cited in* BASSIOUNI, *supra* note 57, at 20.

241. The U.S. Supreme Court's sanctioning of the execution of minors under eighteen years of age and the mentally disabled have deservedly attracted severe condemnation from overseas. *See* Thompson v. Oklahoma, 487 U.S. 815, 838 (1988); Penry v. Lynaugh, 492 U.S. 302, 340 (1989). *See also* Thaman, *America*, *supra* note 226, at 1023.

242. Most Dutch defendants confess. An unpublished study of this phenomenon by the Max-Planck-Institute for Foreign and International Comparative Law in 1978 found that the reason for the Dutch defendant's readiness to confess is to some extent attributable to the fact that Dutch judges do not always impose the maximum sentence and "handle cases with socially integrative notions and without emotions." The sentences are exceptionally more lenient in type of sanction, and magnitude thereof, than in Germany. Not so much is at stake. He can accept what awaits him. He thus accepts punishment. *See* Ingrid Van de Reyt, *Niederlande*, *in* DIE BEWEISAUFNAHME IM STRAFVERFAHRENSRECHT DES AUSLANDS 284, 314 (Walter Perron, ed., 1995).

Criminal Procedure.[243] Once we join the rest of the civilized world and begin treating our criminals as our children; once we recognize that they have become criminals only after being raised in our families, our neighborhoods and having gone to our schools and churches, only then can we begin treating them compassionately and trying to address the root of the problem with something other than repression. When those who violate the law realize they will be treated fairly and compassionately and receive a humane punishment for their crimes which will allow a possibility of rehabilitation and reintegration into the community, maybe then they will be more likely to speak the truth.[244]

243. *See supra* text accompanying note 76.

244. And in this respect, a system of *compassionate* sentence bargaining, which would reward an honest acceptance of truth with a humane sentence, could be considered not as an end run around due process, but, with due participation of the victim in cases where there is one (most of our sentenced prisoners have committed victimless crimes), as a restoration of the judicial peace and a step towards reconciliation of offender with the victim and society. On this approach, see Weigend, *Reform*, *supra* note 236, at 493-501. *See also* Roxin, *supra* note 84, at 195-96.