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# European Perspectives on the Accused as a Source of Testimonial Evidence

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## EUROPEAN PERSPECTIVES ON THE ACCUSED AS A SOURCE OF TESTIMONIAL EVIDENCE

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*Gordon Van Kessel\**

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## I. INTRODUCTION

Americans are becoming disillusioned with a system that produces a few lengthy, complex, and highly adversary (yet entertaining) criminal trials, together with a plea bargaining industry that generates numerous rapid fire convictions based on pressurized guilty pleas – a system in which both trials and plea bargains often appear inaccurate or unjust. We occasionally feel that something is amiss when a few defendants, armed with star-quality lawyers and complex rules of evidence, attack the prosecution’s case, but fail to come forward with their own account of the events, leaving victims and the public with incomprehensible acquittals or convictions which fail to answer central questions with respect to the cause of criminal conduct or the possible involvement of others. Both during pretrial investigation and at trial, our rules of procedure and legal culture often result in separating the accused from the criminal process and disregarding the most important witness while focusing on the lawyers rather than on the search for truth. For example, it appears that with increasing frequency, defendants in America are not testifying at trial, and little is said about the change. Apparently, few are concerned that, in such cases as Claus von Bulow, O.J. Simpson, Timothy McVeigh, and Terry Nichols the defendants did not personally present their stories in court.

However, while we generally are receptive to reforming our system of justice, we have an instinctive reaction against foreign, particularly European, systems based on a distrust of anything inquisitory and a confidence in adversary forms of procedure.<sup>1</sup> For many of us, the answer to “Is there a European advantage in criminal procedure?” is a firm “No.” When I told a colleague that the topic of this conference concerned whether there was a European advantage in criminal procedure, he replied, “Sure, You hang them now and try them later.” Despite its many defects, we retain a certain pride in our basic adversary process and a skepticism toward foreign systems of justice, assuming that, “with all its problems,

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<sup>1</sup> The popular American prejudice against inquisitory systems has been recognized by many comparativists. See, e.g., Mirjan R. Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 557 (1973) (“inquisitorial” is surrounded with “the aura of dread and mistrust”); R. DAVID, *ENGLISH LAW AND FRENCH LAW* 64 (1980) (noting the widely entertained prejudice in England that a French prisoner is presumed guilty until he has proved his innocence); Ennio Amodio & Eugenio Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 TEMP. L. REV. 1211, 1213 (1989) (recognizing an “emotional attitude” that makes the accusatory approach “the haven of guaranteed civil liberties” and the inquisitory method “the symbol of an investigatory and judicial technique that sacrifices those same civil liberties on the altar of law enforcement”).

ours is still the best in the world” or “ours is the worst, except for all the others.”

Most Americans – including lawyers and judges – lack a basic understanding of alternative systems of justice and suffer from many misconceptions.<sup>2</sup> Our aversion to anything inquisitory largely arises from the failure to distinguish between the ancient inquisitions of Continental Europe, which relied on inhumane practices including judicially authorized torture to extract confessions, and the modern “less-inquisitory-somewhat adversary” (which I will call “inquiry”) systems now in place in virtually every Continental country. Contrary to common perceptions in this country, modern Continental systems do not rely on torture, presume defendants guilty, or demand that they establish their innocence.<sup>3</sup> The essence of today’s Continental inquiry systems of criminal justice consists of (1) official-judicial control over gathering and presentation of evidence; (2) a professional or mixed bench, as opposed to an all-lay jury, which decides both questions of law and of fact; (3) a unitary trial in which the court determines guilt and sentence in one proceeding; and (4) a flexible, episodic process from pretrial through appeal in which, for example, appellate courts generally hear a case *de novo* and may call witnesses or refer matters back to investigating magistrates to take new evidence.<sup>4</sup>

Even with an understanding of the basic nature of inquiry systems of justice, many pitfalls stand in the way of a comparative approach that looks to European procedures. First, Continental systems of criminal procedure are very diverse (even more so than common law systems) and are constantly changing, due in large part to developments in international law, primarily decisions of the

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<sup>2</sup> See Craig M. Bradley, *The Convergence of the Continental and Common Law Model of Criminal Procedure*, 7 CRIM. L.F. 471, 478 (1996) (observing that Americans really have no sense of alternatives to the classic common law system and that our adversary/jury system, “while often unpopular, is never-the-less generally thought to be the only fair way to proceed.”). For example, in *Anderson v. Maryland*, our Supreme Court described characteristics of the accusatorial system as [t]he requirement of specific charges, their proof beyond a reasonable doubt, the protection of the accused from confessions extorted through whatever form of police pressures, the right to a prompt hearing before a magistrate, the right to assistance of counsel, to be supplied by government when circumstances make it necessary, the duty to advise an accused of his Constitutional rights . . . . *Anderson v. Maryland*, 427 U.S. 463, 476 (1976) (citing *Watts v. Indiana*, 338 U.S. 49, 54 (1949)). However, these aspects also are present in most modern Continental-inquiry systems..

<sup>3</sup> See Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 409-20 (1992).

<sup>4</sup> See generally Mirjan R. Damaska, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1088-90 (1975); Damaska, *supra* note 1, at 510; RUDOLPH B. SCHLESINGER ET AL., *COMPARATIVE LAW* 509-14 (6th ed.1998); JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 9 (1977).

European Court of Human Rights, which has become a Warren Court in the midst of Europe. Inspired by the Court of Human Rights, as well as *Perry Mason* and *LA Law*, Continentals have been moving toward more adversary forms of procedure,<sup>5</sup> and today Continental justice systems contain numerous adversary elements.<sup>6</sup> However, most maintain systems which reflect an inquisitory or non-adversary tradition, such that Continental trials are still a far cry from O.J. Simpson-style fact-finding. Finally, foreign systems are difficult to understand from afar. For example, the *Miranda* court flatly stated that the English interrogation rules “require that any statement made be given by the accused without questioning by police”<sup>7</sup> and that when statements are taken from suspects, “the right of the individual to consult with an attorney during this period is expressly recognized.”<sup>8</sup> The Court was off the mark in both respects. In fact, England’s interrogation rules were much less protective than *Miranda* implied.<sup>9</sup>

Freed from misconceptions concerning the nature of modern Continental systems of justice and aware of the dangers of comparisons and generalizations regarding European systems, we can take a fresh look at recent European developments with respect to the right to silence both on the Continent and in

<sup>5</sup> Most notable examples are Italy’s adoption of the fundamental aspect of adversary procedure, party presentation of evidence, and Spain’s experimentation with a form of jury trial. See ELENA MERINO-BLANCO, *THE SPANISH LEGAL SYSTEM* 180-82 (1996).

On the other hand, England has adopted or flirted with non-adversary-style procedures. At the pretrial stage England has adopted “paper committals” and has considered the concept of an investigating magistrate, while at the trial level England has moved toward greater reliance on written materials by liberalizing admission of “documentary hearsay.” England’s recent revisions of the right to silence also suggest greater acceptance of traditional inquisitory-style procedures.

<sup>6</sup> See Van Kessel, *supra* note 3, at 415 (explaining that no modern civilized country has a pure adversary or non-adversary system and that all are “mixed” to some degree, the Continental system even more so than ours.).

<sup>7</sup> *Miranda v. Arizona*, 384 U.S. 436, 484 (1966). See also *Combe v. Connecticut*, 367 U.S. 568, 593 (1961), in which Justice Frankfurter asserted that English courts have long tended severely to discourage police from questioning those arrested or about to be arrested.

<sup>8</sup> *Miranda*, 384 U.S. at 488 (footnote omitted).

<sup>9</sup> See Gordon Van Kessel, *The Suspect as a Source of Testimonial Evidence, A Comparison of the English and American Approaches*, 38 HASTINGS L.J. 1 (1986). The *Miranda* Court erroneously assumed that English rules severely restricted police from questioning of suspects and gave suspects an effective right to consult with an attorney during interrogation. Not only did the Judges’ Rules allow police to aggressively question an accused in the face of assertions of the desire to remain silent, English limitations on the right of access to legal advice during the police interrogation effectively eliminated any such right. *Id.* at 51-56. The English rules have been revised since *Miranda*. See *infra* notes 55-64 and accompanying text.

England<sup>10</sup> – developments that are revolutionary when compared with incremental changes that have taken place in America since the Warren Court era.

On this European tour we will observe modern Continental and English approaches to questioning suspects both during the pretrial phase and at trial. The scenery will include the basic right to silence, caution and waiver rules, the right counsel and the significance of counsel's presence during police questioning, legal prohibitions on adverse inferences and their significance, and the reasons why defense lawyers may be inclined to advise defendants to waive their right to silence and give their version of the events at an early stage in the investigation and at trial.

As we review European approaches, we might ask the following questions: First, is recognition of a right to silence or a right to counsel compatible with availability of the accused as a principal source of testimonial evidence, that is, learning what happened directly from the accused? As corollary queries, we might ask whether it is possible or appropriate to distinguish inducements or persuasions from compulsion or coercion such that a right to silence would permit some encouragement of defendants to speak and meaningfully participate in the fact-finding process? Finally, we might consider whether the presence of counsel must inevitably lead to loss of the accused as a testimonial resource or whether counsel can play a meaningful role in assuring fair procedures while not blocking access to the defendant's version of the events.<sup>11</sup>

## II. MODERN EUROPEAN APPROACHES TO THE ACCUSED AS A SOURCE OF TESTIMONIAL EVIDENCE

The trend in Europe during the last half of the twentieth century has been toward greater protections for criminal defendants. In the pretrial context, this trend is reflected in widespread adoption of the right to silence and some recognition of the right to counsel during police questioning. However, vast differences appear in the nature of these rights, as well as in the role of lawyers and the expectations of judges.

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<sup>10</sup> I will emphasize Continental systems, but will include England as well, although the English are still debating whether they really want to be part of Europe.

<sup>11</sup> John Langbein suggests that a "challenge the prosecution" form of trial is incompatible with an "accused speaks" procedure: "It was the capture of the criminal trial by lawyers for prosecution and defense that made it possible for the criminal defendant to decline to be a witness against himself." John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1048 (1994).

### A. *The Basic Right to Silence*

There is near-universal agreement throughout Europe on the importance of the right to silence and on certain fundamental aspects of that right. All countries recognize some form of the right to silence and privilege against self-incrimination, which applies to both the pretrial and trial stages of a criminal case. Recognition of these rights by individual states culminated in the early 1990s with decisions of the European Court of Human Rights<sup>12</sup> which repeatedly stated that, although the European Convention on Human Rights contains no explicit guarantee of a right to silence,<sup>13</sup> “there [could] be no doubt that the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6 [which guarantees the right to a fair and public hearing.]”<sup>14</sup> Furthermore, the Court has found the privilege “closely linked to the presumption of innocence contained in Article 6 § 2 of the Convention.”<sup>15</sup>

#### 1. Core Protections

First, prohibitions on torture and other forms of inhumane practices are not open to question. All countries of Europe prohibit the use or threat of force or violence and other forms of coercion and require exclusion of confessions so

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<sup>12</sup> The Court sets human rights standards for the forty countries that are members of the Council of Europe.

<sup>13</sup> See European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (Nov. 4, 1950). There is, however, an explicit privilege against self-incrimination in the United Nations International Covenant on Civil and Political Rights (ICCPR). Section 14(3) states that “in the determination of any criminal charge, everyone shall be entitled to the following minimum guarantees . . . (g) Not to be compelled to testify against himself or to confess guilt.” United Nations, International Covenant on Civil and Political Rights, § 14(j), 999 U.N.T.S. 171 (Dec. 16, 1966) (entered into force, Mar. 23, 1976).

<sup>14</sup> *Murray v. United Kingdom*, 22 Eur. Ct. H.R. 29, 60, ¶ 45 (1996); *Funke v. France*, 16 Eur. Ct. H.R. 297 (1993); *Saunders v. United Kingdom*, 23 Eur. Ct. H.R. 313 (1996). The Court’s language in *Funke*, connecting the right to silence with police interrogation, and its later reliance on the privilege in *Saunders*, when dealing with official compulsion under oath, suggests the Court perceives different roles for the silence right and the privilege.

<sup>15</sup> *Saunders*, 23 Eur. Ct. H.R. 337, ¶ 68. Article 6(2) guarantees that charged persons “shall be presumed innocent until proven guilty according to law.” European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, 213 U.N.T.S. 221, 228 (Nov. 4, 1950).

obtained.<sup>16</sup> However, countries differ as to what constitutes coercion, with Europeans generally focusing more on the need to prevent unreliable confessions, than on deterring improper police practices.<sup>17</sup> Additionally, Europeans generally recognize the rule against official or legal compulsion, that is, forcing one by legal mandate to give incriminating testimony under oath, thereby imposing on the guilty

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<sup>16</sup> See Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L L. 171, 219 (1993). For example, in The Netherlands, police cannot compel suspects to answer questions. A confession not made in "freedom" (obtained under pressure) cannot be used as evidence under the rationale that it might be unreliable. See Johannes Nijboer, *Protection of Victims in Rape and Sexual Abuse Cases in the Netherlands*, presented at the International Conference about Rights of the Accused, Crime Control, and the Protection of Victims (Dec. 1993), at 22 (On file with the author). The statement of a suspect must be made voluntarily (with free will). See Hans Lensing, *Notes on Criminal Procedure in the Netherlands*, 1992 CRIM. L. REV. 623, 627. German law demands automatic exclusion of statements obtained by coercion, force, deceit, undue threats or promises, or after the declarant was administered narcotic or mind-altering drugs. See Code of Criminal Procedure § 136a(3), discussed in Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems; Better Solutions*, 18 B.C. INT'L & COMP. L. REV. 317, 336 (1995). In Spain, evidence is not accepted if obtained by torture, coercion or a violation of basic human rights. See MERINO-BLANCO, *supra* note 5, at 175, 183.

<sup>17</sup> For example, the traditional English rule holding involuntary confessions inadmissible was based primarily on unreliability. See *The King v. Warickshall*, 1068 Eng. Rep. 234 (K.B. 1783) (distinguishing between admissibility of an involuntary confession from its fruit). Thus, while a confession obtained by inducements or threats was inadmissible on the ground it is unreliable, this was not the case with respect to physical evidence discovered from it. See J.A. Andrews, *Involuntary Confessions and Illegally Obtained Evidence in Criminal Cases-I*, [1963] CRIM. L. REV. 15, 18. The current POLICE AND CRIMINAL EVIDENCE ACT, 1984 ("PACE") replaced the common law voluntariness test with a two-prong standard which mandates exclusion of confessions either obtained "by oppression" or likely to have been rendered "unreliable" by anything said or done by anyone. See PACE § 76(2)(a)(b). Oppression includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture). See PACE § 76(8). See David Feldman, *Regulating Treatment of Suspects in Police Stations: Judicial Interpretation of Detention Provisions in the Police and Criminal Evidence Act 1984*, [1990] CRIM. L. REV. 452, 453. Even after PACE, the general reluctance to suppress the "fruit of the poisonous tree" prevails in England. See JOHN F. ARCHBOLD, *CRIMINAL PLEADING, EVIDENCE AND PRACTICE* 15-351 (1998).

However, the disciplinary principle is coming to be more accepted both on the Continent and in England. See Frase & Wiegand, *supra* note 16, at 336 (explaining that deterrence of police misconduct is a concern of German courts that is secondary to maintaining "purity" of the judicial process and protection of individual rights that have been violated.) English courts also are now feeling freer to utilize the disciplinary principle. See Mary Hunter, *Judicial Discretion: Section 78 in Practice*, [1994] CRIM. L. REV. 564; *The Queen v. Samuel*, 2 All E.R. 135 (C.A. 1988) (excluding defendant's confession on the ground that police improperly delayed access to legal advice); see also *The Queen v. Fennelley*, [1989] CRIM. L. REV. 142. See Feldman, *supra*, at 468-71 (contending that English courts are expanding the use of exclusionary rules founded on disciplinary-regulatory principles).



the “cruel trilemma”<sup>18</sup> of self-accusation, perjury, or contempt – the context in which one is threatened by contempt to reveal information that could be used in a criminal prosecution. In this situation, a guilty person would face certain imprisonment whether he speaks the truth or remains silent. In *Saunders v. United Kingdom*<sup>19</sup> the European Court of Human Rights found that the Convention’s privilege against self-incrimination was implicated by an English procedure in which trade and industry inspectors were empowered to examine under oath officers and agents of companies, while providing that “an answer given by a person [in such proceeding] may be used in evidence against him”<sup>20</sup> and threatening such persons with contempt of court upon refusal to produce documents or answer questions.<sup>21</sup> The privilege was violated when statements, which were extracted from a company officer by the inspectors under threat of contempt of court, were used against the officer at his criminal trial.<sup>22</sup> The Court concluded that the public interest cannot “justify the use of answers compulsorily obtained in a non-judicial investigation to incriminate the accused during the trial proceedings.”<sup>23</sup>

## 2. Ancillary Protections

There is less agreement, however, with respect to how far, short of the forgoing coercive devices, authorities may go to persuade or encourage defendants to speak either during pretrial questioning or at trial. Two issues generate the most controversy: (1) During pretrial questioning by authorities, what protections must

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<sup>18</sup> See *Murphy v. Waterfront Comm.*, 378 U.S. 52 (1964) (stating that the Fifth Amendment privilege reflects a number of our fundamental values and noble aspirations, including “our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt”).

<sup>19</sup> (1996) 23 Eur. Ct. H.R. 313.

<sup>20</sup> The Companies Act of 1985, § 434(5).

<sup>21</sup> *Id.* § 436(3).

<sup>22</sup> *Saunders v. United Kingdom*, 23 Eur. Ct. H.R. 313, 320, ¶ 31. The Court emphasized that the statements were used extensively at the officer’s trial, both in the prosecution’s case and to impeach defendant’s testimony and formed “a significant part” of the prosecution’s case. *Id.* at 339, ¶ 72.

<sup>23</sup> *Id.* at 340, ¶ 74. The Court rejected the argument that the public interest in investigating serious fraud cases could justify “such a marked departure as that which occurred in the present case from one of the basic principles of a fair procedure” and found that “the general requirements of fairness contained in Article 6, including the right not to incriminate oneself, apply to criminal proceedings in respect to all types of criminal offenses without distinction from the most simple to the most complex.” *Id.*

be afforded to a suspect, such as warnings of rights and respect for assertion of rights, and (2) To what extent may a defendant be disadvantaged from silence either during police questioning or at trial? While some European countries offer broader protections than we do, in most important respects, European interrogation standards generally offer less rigid protection of defendant's right to silence than do our *Miranda* and associated interrogation rules.<sup>24</sup>

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<sup>24</sup> This view places me somewhat at odds with Professor Bradley. See Bradley, *supra* note 16, at 219. However, it is true that Europeans generally offer greater protections than courts in this country when it comes to the use of deceptive practices in questioning suspects. While the rules of Continental countries vary regarding police trickery, the trend is towards limiting or prohibiting deception by police in the context of police interrogation of suspects. In Germany, for example, evidence obtained through the use of police "brutality or deceit" must be excluded without balancing. Craig M. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032 (1993). See also Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT. L. 171 (1993); Frase & Weigend, *supra* note 16. In America, on the other hand, the law seems to be headed in the other direction. American courts have done little to limit the use of trickery either by judicially condemning deceptive police conduct or by excluding evidence. See Lafave & Israel, CRIMINAL PROCEDURE § 6.2. While *Miranda* stated that "any evidence that the accused was threatened, tricked, cajoled into a waiver will . . . show that defendant did not voluntarily waive his privilege," the Supreme Court has permitted waivers regardless of police deception. See *Moran v. Burbine*, 475 U.S. 412 (1986) (viewing deliberate misleading of defendant's lawyer by the police as "highly inappropriate" and "distasteful," but holding that such deception is irrelevant to the waiver issue when the suspect is unaware of it); *Colorado v. Spring*, 479 U.S. 564 (1987) (holding that police have no obligation to advise a suspect about the crime concerning which they wished to question him, but leaving unresolved the question whether a *Miranda* waiver would be valid had there been "an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation.") For a rare case in which police trickery resulted in exclusion of a confession, see *State v. Cayward*, 552 So. 2d 971 (Fla. Dist. Ct. App. 1989) (excluding a confession obtained after police told the accused that they already had sufficient evidence to convict him). But Europeans are not uniform in their rejection of police deception. In England, for example, despite recent reforms protecting suspects from police misconduct, there seems to be an American-like acceptance of the use of trickery and deceit to obtain confessions from criminal suspects. See Mark Berger, *Legislating Confession Law in Great Britain: A Statutory Approach to Police Interrogations*, 24 U. MICH. J.L. REF. 1 (1990). A barrage of scholarly criticism has been leveled at the lenient attitude of American courts toward police deception. See, e.g., Welsh White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979); Welsh White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105 (1997); Albert Alschuler, *Constraint and Confession*, 74 DENV. L. REV. 957 (1997); Richard J. Ofshe & Richard A. Leo, *The Social Psychology of Police Interrogation...*, 16 STUD. IN L., POL. & SOC'Y 189 (1997); Richard J. Ofshe & Richard A. Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action*, 74 DENV. U. L. REV. 979 (1997); Deborah Young, *Unnecessary Evil: Police Lying in Interrogations*, 28 CONN. L. REV. 425 (1996); Glennon and Shah-Mirani, *Illinois v. Perkins: Approving the Use of Police Trickery in Prison to Circumvent Miranda*, 21 LOY. U. CHI. L. J. 811 (1990); Daniel W. Sasaki, *Guarding the Guardians: Police Trickery and Confessions*, 40 STAN. L. REV. 1593 (1988).

### 3. Rules Governing Police Interrogation

#### a. Caution Requirements

Nearly all European countries now provide that an accused must be told of the right to remain silent both during pretrial questioning and at trial.<sup>25</sup> However, warning standards and other rules relating to questioning suspects differ significantly from country to country. In some countries, caution requirements are broader than the *Miranda* rules in that suspects must be cautioned earlier or more often. For example, in Germany and in England, warnings must be given to suspects who are being investigated, although not in custody,<sup>26</sup> and in Italy even to those who are not under arrest or investigation whenever they begin to make inculpatory statements to magistrates or police officers.<sup>27</sup> British police are required

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<sup>25</sup> See *id.* (concluding that most countries require *Miranda*-type warnings prior to interrogation). See also Damaska, *supra* note 1, at 527. In Germany, the accused has a right to remain silent at all times, and the police are required to instruct the accused of this right. See CHRISTINE VAN DEN WYNGAERT, CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 143 (1993). In Italy, both those under investigation and those formally charged have a right to remain silent at all phases of the criminal proceedings and must be so advised prior to any questioning. See Stephen P. Freccero, *An Introduction to the New Italian Criminal Procedure*, 21 AM. J. CRIM. L. 345, 360 n.101 (1994). Cautions also are required by the RULES OF PROCEDURE AND EVIDENCE FOR THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991. The Rules provide for detailed recording and broad caution requirements. See *id.* at Rules 42, 43. The Rules allow the prosecutor to interrogate the defendant after indictment, but prohibit questioning outside the presence of counsel after the first court appearance. See *id.* at Rule 63. See also Alex C. Lakatos, Note, *Evaluating the Rules of Procedure and Evidence for the International Tribunal in the Former Yugoslavia: Balancing Witnesses' Needs Against Defendants' Rights*, 46 HASTINGS L. J. 909 (1995); Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78 (1994). Belgium is an exception. Belgian authorities are not obligated to inform defendant of the right to remain silent either during pretrial questioning or at trial. See VAN DEN WYNGAERT, *supra*, at 22, 36.

<sup>26</sup> See Frase & Weigend, *supra* note 16, at 334. In England, the warning must be given prior to interrogation as soon as there are "grounds to suspect of an offense" regardless of whether the suspect technically is in "custody." *Codes of Practice for the Detention, Treatment, and Questioning of Persons by the Police*, ¶ 10.1 (rev. 1995). Other common law countries offer similar protections. For example, Canadian law requires warnings with respect to both the right to silence and the right to counsel upon a suspects "arrest or detention." See Bradley, *supra* note 16, at 197.

<sup>27</sup> The new ITALIAN PENAL PROCEDURE CODE greatly heightened caution requirements. Even a person who is not under arrest or investigation who begins to make an inculpatory statement to a magistrate or police officer must be interrupted by the official and informed of his right to silence and to counsel. See Bradley, *supra* note 16, at 217 (citing the Code itself). See also Lawrence J. Fassler, Note, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental*

to caution a person prior to questioning when there are grounds to suspect the person of an offense,<sup>28</sup> again upon arrest,<sup>29</sup> and finally when a detained person is charged with or informed that he may be prosecuted for an offense.<sup>30</sup> Furthermore, some countries require a number of admonitions not found in *Miranda*, such as a statement of reasons for the suspect's arrest and the right to have someone informed of the suspect's whereabouts.<sup>31</sup> Finally, some countries require reliable documentation of official interrogation of suspects. In France the police are required to make a written record of the interrogation process, which includes rest periods, questioning, and release times, and the record must be signed by the accused.<sup>32</sup> English rules require that the caution be in writing as well as oral, that an accurate record be kept of each interview, that the suspect have the opportunity to read and comment upon the written record, and that all police station interrogations be tape recorded where practicable.<sup>33</sup> However, as will be shown, in

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*Europe*, 29 COLUM. J. TRANSNAT'L LAW 245 (1991) (detailed discussion of the new limitations put on unchecked police investigations).

<sup>28</sup> CODES OF PRACTICE § 10.1. Furthermore, if the person cautioned is not under arrest, he must be told "that he is not under arrest and is not obligated to remain with the officer." *Id.* §§ 3.15, 10.2.

<sup>29</sup> *Id.* § 10.3. The only exceptions to this requirement are in cases where it is impracticable to do so or the person arrested has already been cautioned "immediately prior to arrest." *Id.* § 10.3(b), (n).

<sup>30</sup> *Id.* § 16.2. *See generally*, ARCHBOLD, *supra* note 17, §§ 15-294 to 15-314.

<sup>31</sup> These admonitions are required as part of the English caution. *See* Feldman, *supra* note 17, at 463-64. The new French caution rules also require advice of the right to medical examination and the right not to be held incommunicado. *See* Bron McKillop, *Anatomy of a French Murder Case*, 45 AM. J. COMP. L. 527, 569-70 (1997); VAN DEN WYNGAERT, *supra* note 25, at 121-28.

Likewise, the Australian "Judges' Rules" have been supplemented by Federal statute in 1991 which requires that a suspect be informed of his right to communicate with a friend or relative and a lawyer and that police allow the lawyer to be present during questioning. But unlike British and Canadian rules, it is not necessary for police to inform the suspect of availability of a public defender. *See* Bradley, *supra* note 16, at 194 n.141.

<sup>32</sup> *See* Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How do the French do it, How Can We Find Out and Why Should We Care?*, 78 CAL. L. REV. 539, 582 (1990).

<sup>33</sup> *See* CODES OF PRACTICE § 11.5 -13; ARCHBOLD, *supra* note 17, at 15-306. With respect to tape recording of police interviews, see CODE OF PRACTICE ON TAPE RECORDING, ¶ 3.1, in MICHAEL ZANDER, *THE POLICE AND CRIMINAL ACT 1989*, 429 (2d ed. 1990). *See also*, Feldman, *supra* note 17, at 463-64. The most recent CODE OF PRACTICE ON TAPE RECORDING OF POLICE INTERVIEWS requires the tape recording of all persons suspected of indictable offences which are conducted at police stations in specified police areas. *See* ARCHBOLD, *supra* note 17, at §§ 15-227 to 15-228.

many Continental countries the caution need not include the right to counsel, and in virtually all European countries defendant's assertion of the right to silence generally does not operate to end official access to the suspect as a source of testimonial evidence.

## B. *The Right to Counsel During Pretrial Interrogation*

### 1. The Continental Right to Counsel

There is no general understanding on the Continent that a right to counsel during initial questioning of suspects by the police is a necessary aspect of a fair criminal process. Whether the European Convention on Human Rights guarantees a general right to counsel during pretrial interrogation is an open question. The European Court of Human Rights in 1994 found a qualified right to counsel at the investigation stage, but noted that such right "is not explicitly set out in the Convention and might be subject to restrictions for good cause."<sup>34</sup> The case arose from a "Diplock court" prosecution in Northern Ireland where pretrial silence could lead to adverse inferences at trial. The Human Rights Court concluded that where the defendant was thus confronted with "a fundamental dilemma relating to his defense," the right to counsel during pretrial questioning "was of paramount importance" and the concept of fairness in Article 6 required that he have the benefit of assistance of a lawyer already at the initial stages of police questioning.<sup>35</sup> However, the Court has not recognized a right to counsel during initial police questioning of suspects in systems that prohibit adverse inferences from pretrial silence.

Continental approaches to counsel at early stages of pretrial detention differ, but in those countries most representative of Continental practices, such as France and The Netherlands,<sup>36</sup> the right to counsel does not apply to initial stages of police interrogation. For example, in France, interrogation of suspects is regarded as a linchpin of the investigation process,<sup>37</sup> and during the preliminary

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<sup>34</sup> Murray (John) v. U.K., (1994) 18 Eur. Ct. H.R. CD1.

<sup>35</sup> *Id.* at CD11-12. The Court concluded that denial of such right for the first 48 hours of questioning was not compatible with defendant's right to a fair trial under Article 6. *Id.* at CD12.

<sup>36</sup> See Johannes F. Nijboer, *The American Adversarial System in Criminal Cases: Between Ideology and Reality*, 5 CARDOZO J. INT. L. & COMP. L. 79, 82 (1997) (contending that countries such as France, Belgium, and The Netherlands, with a "more historical inquisitorial inheritance," are more representative of Continental practices than Germany and Scandinavian countries).

<sup>37</sup> VAN DEN WYNGAERT, *supra* note 25, at 106, 128; McKillop, *supra* note 31, at 569-70.

*garde a vue*, questioning by police traditionally has been conducted without advice of rights and without the presence of a lawyer.<sup>38</sup> Legislation in 1993 improved the suspect's position under *garde a vue*, but did not provide for a right to have a lawyer present during initial interrogation by police, as opposed to questioning by the *juge d'instruction*.<sup>39</sup> The legislation required that the suspect be informed of a number of rights, but did not include the right to have a lawyer present during interrogation by police.<sup>40</sup> Only after twenty hours (extended to thirty-six hours in some cases) does the suspect have the right to see his attorney.<sup>41</sup> Following consultation with his attorney,<sup>42</sup> questioning may continue outside the attorney's presence.<sup>43</sup>

In The Netherlands, during the first six hours of detention,<sup>44</sup> there is no right to consult with counsel before, or have counsel present during, interrogation by police, as opposed to questioning by the investigating magistrate, which takes place

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<sup>38</sup> JOHN HATCHARD ET AL., *COMPARATIVE CRIMINAL PROCEDURE* B.I.I.C.L. 230 (1996). See also, Frase & Wiegand, *supra* note 16, at 385 (observing that there is no right to a silence warning or right to counsel during investigatory detention); Walter Pakter, *Exclusionary Rules in France, Germany, and Italy*, 9 HASTINGS INT'L & COMP. L. REV. 1, 13-15 (1985) (stating that detainees in France are generally treated far worse than suspects held by United States or German police interrogators).

<sup>39</sup> See VAN DEN WYNGAERT, *supra* note 25, at 121, 129; Helen Trouille, *A Look at French Criminal Procedure*, [1994] CRIM. L. REV. 735. In the few cases in which the *juge d'instruction* investigates, he is obligated to interrogate the defendant at least once in order to give him an opportunity to explain. During this questioning, defendant does not take oath and may be assisted by an attorney. See VAN DEN WYNGAERT, *supra* note 25, at 129.

<sup>40</sup> In fact, the right to silence caution was removed. See HATCHARD, *supra* note 38, at 32.

<sup>41</sup> See *id.* at 32-33. See also, McKillop, *supra* note 31, at 569-70.

<sup>42</sup> Consultations between accused and counsel are limited to 30 minutes at a time. See HATCHARD, *supra* note 38, at 33.

<sup>43</sup> The police retain the ability to continue questioning the accused without counsel even if he expressly refuses to speak. See VAN DEN WYNGAERT, *supra* note 25, at 121.

<sup>44</sup> Police may detain a suspect as the police station for six hours, excluding midnight to nine a.m., making 15 hours, depending on time of arrest, and during this time the suspect has no right or access to counsel while questioned. See Interview with Justice Hans Nijboer (Nov. 1997). Police may hold the suspect for an additional three days (total three days plus 15 hours) with approval of an assistant prosecutor, a high-ranking police officer, and may obtain authorization for additional continuances from a judge. See *id.*

later in serious cases.<sup>45</sup> Even after this initial period of detention when the suspect has counsel, the police may continue to ask questions, and often counsel will advise the suspect to answer. Moreover, an investigation is not considered complete until a statement from the suspect has been obtained, and police legally may detain a person for the purpose of obtaining his statement and may inform him that he will not be released until the investigation is complete.<sup>46</sup> The police report, consisting of a written record of questioning of the suspect and witnesses,<sup>47</sup> usually is the principle evidence in the dossier and has great evidentiary value at trial since it may be accepted by judge as sufficient proof of the charges.<sup>48</sup>

In a few countries the right to counsel during questioning is even more limited than in France and The Netherlands, while in others, the right offers greater protection. In Belgium there is no right to assistance of an attorney even during questioning by the investigating magistrate.<sup>49</sup> On the other hand, in Germany there is a right to counsel during police questioning, but it is limited. While Germany's caution requirements include the right to counsel, they do not include a warning as to right to appointed counsel during police questioning,<sup>50</sup> and the government does

<sup>45</sup> See Lensing, *supra* note 16, at 623; VAN DEN WYNGAERT, *supra* note 25, at 291 (pointing out that the Dutch Supreme Court has found that this limitation does not constitute a violation of European Convention). In 1988 the Minister of Justice declined to adopt a system of legal advice and assistance for suspects in the face of opposition by public prosecutors and police. See Lensing, *supra* note 16, at 627-28 n.18.

<sup>46</sup> Detention is viewed as a legitimate tool to secure evidence from the suspect. Describing an arrest as "only an aid in the process, not an institution that has to be part of the process," Hulsman and Nijboer state that "often no means of coercion like arrest is applied, because of the co-operative behavior of the defendant." L.H.C. Hulsman and J.F. Nijboer, *Criminal Justice System*, in J. CHORUS ET AL., INTRODUCTION TO DUTCH LAW FOR FOREIGN LAWYERS 343 (2nd ed. 1993).

<sup>47</sup> The report is not a transcript of questioning, but a restatement couched in special legal terminology. See *id.* at 343.

<sup>48</sup> See *id.*

<sup>49</sup> While Belgium provides for a right to silence such that technically neither pretrial nor trial silence may be used against a defendant, authorities have no obligation to inform suspects of such right either during pretrial questioning or at trial, nor is there a right to counsel during questioning by police, the prosecutor, or the investigating magistrate. See VAN DEN WYNGAERT, *supra* note 25, at 16, 22, 36.

<sup>50</sup> German law requires that suspects be cautioned prior to police questioning and defendants prior to any questioning in court. The German Code of Criminal Procedure § 136 provides for the right to be informed of the right to silence and of the right to consult with counsel of choice prior to any in court questioning, and the Federal Appeals Court has held that the police are also required to give such warnings prior to interrogation. However, the caution requirement does not include a warning as to the right to appointed counsel if the suspect cannot afford to hire one. See Bradley,

not provide cost-free counsel prior to the filing of formal charges.<sup>51</sup> Furthermore, under the majority view, defense counsel has no right to be present during questioning by the police, as opposed to prosecutorial interrogations.<sup>52</sup> Italy offers considerably greater counsel protections, mandating cautions as to the right to counsel and providing that generally statements made outside the presence of counsel are not admissible at trial.<sup>53</sup> But in practice special benefits are accorded those who waive their right to silence and cooperate, and pressures such as lengthy detention may be applied in order to obtain statements.<sup>54</sup>

As we can see, there is considerable variety among the various Continental states regarding the nature and scope of the right to counsel, but generally the right does not exist or is severely limited during initial periods of police interrogation when suspects are most likely to make statements that set the course for later stages of the criminal process.

## 2. The English Right to Counsel

Prior to the *Police and Criminal Evidence Act 1984* (“PACE”),<sup>55</sup> as a practical matter, English suspects had no legally enforceable right to the presence

*supra* note 16, at 214-15. *See also*, HATCHARD, *supra* note 38, at 233 (explaining that the situation in Germany resembles that in England and Wales prior to PACE: a suspect must be informed of his right to remain silent and right to legal advise, but there are no detailed regulations comparable to the protections under PACE and the Codes of Practice).

<sup>51</sup> *See* Frase & Wiegand, *supra* note 16, at 334.

<sup>52</sup> *See id.* *But see id.* at 333 (discussing a German Federal Court of Appeals case which excluded a statement because police failed to “promptly honor the defendant’s wish to speak with his attorney”).

<sup>53</sup> *See* Freccero, *supra* note 25, at 360 n.101; William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT. L. 1, 11 (1992); Bradley, *supra* note 16, at 218 (observing that Italy “has completely barred confessions from the trial unless the confession is given in the attorney’s presence,” such that statements made without an attorney present may not even be used to impeach). When one not yet officially under investigation starts to make incriminating statements in front of judicial authorities or police, the person must be interrupted and warned of the inculpatory potential of such statements and invited to nominate a defense attorney. *See id.* at 217.

<sup>54</sup> *See* VANDEN WYNGAERT, *supra* note 25, at 231.

<sup>55</sup> PACE came into effect on January 1, 1986.



of a solicitor during police interrogation.<sup>56</sup> The 1981 Royal Commission recommended measures to strengthen the right to counsel, and PACE followed the recommendation, imposing a statutory right of access to a solicitor;<sup>57</sup> as well as a right to have someone informed (right not to be held incommunicado).<sup>58</sup> The Codes of Practice that supplement the statute<sup>59</sup> state that, with certain exceptions,<sup>60</sup> “a person who asks for legal advice may not be interviewed or continue to be interviewed until he has received it”<sup>61</sup> and provide that the person must be allowed to have the solicitor present whenever he is interviewed if a solicitor is available.<sup>62</sup> Prior to any interview at a police station or other authorized place of detention, the suspect must be reminded of his entitlement to free legal advice and that the interview can be delayed for him to obtain it (with certain exceptions).<sup>63</sup> While access to a solicitor may be denied on specified grounds, it is not proper to deny access on the ground based on the fear that the solicitor will advise the suspect to

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<sup>56</sup> See Van Kessel, *supra* note 9, at 53-55. In view of the illusory right to a solicitor during police questioning at this time, the *Miranda* Court was well off the mark when, referring to taking statements from suspects, it stated that “the right of the individual to consult with an attorney during this period is expressly recognized” by the Judges’ Rules. *Miranda v. Arizona*, 384 U.S. 436, 488 (1966) (footnote omitted).

<sup>57</sup> A duty solicitor scheme was established to make this right effective. See ARCHBOLD, *supra* note 17, at 15-210 to 15-217.

<sup>58</sup> See CODE OF PRACTICE §§ 5.1-.8; Police and Criminal Evidence Act 1984, ch. 60 §§ 56, 58 (providing that one held in custody is entitled if he requests to have a person known to him who is likely to take an interest in his welfare (which includes a solicitor) told of his arrest and his place of detention, and is also entitled if he requests, “to consult a solicitor privately at any time”). See authorities in Van Kessel *supra* note 9, at 56. See also, ARCHBOLD, *supra* note 17, at 15-203.

<sup>59</sup> The former CODE OF PRACTICE FOR THE DETENTION, TREATMENT AND QUESTIONING OF PERSONS BY POLICE OFFICERS (1985) was revised following the Criminal Justice and Public Order Act 1994. See *infra* notes 108-18 and accompanying text. The current CODES OF PRACTICE were implemented on April 10, 1995. See ARCHBOLD, *supra* note 17, at 15-227.

<sup>60</sup> A person brought to a police station under arrest or arrested there must be informed of “the right to consult privately with a solicitor and the fact that independent legal advice is available free of charge,” CODES OF PRACTICE § 3.1(ii), and must be asked “whether at this time he would like legal advice.” CODES OF PRACTICE § 3.5.

<sup>61</sup> CODES OF PRACTICE § 6.6.

<sup>62</sup> See *id.* § 6.8.

<sup>63</sup> See CODES OF PRACTICE § 11.2.

remain silent.<sup>64</sup> However, as we will see, the presence of counsel generally does not operate to shut down further questioning, but on the contrary, often furthers it.

### C. *Significance of the Right to Counsel*

In contrast to America where the presence of a suspect's lawyer virtually always terminates police interrogation, European lawyers often participate in the process, seeking to make it fair rather than to end it. Continental defense lawyers usually will advise suspects to speak and to tell the truth, and English solicitors very often will do so as well.

#### 1. Continental Counsel

The Continental view of counsel's presence as consistent with continued police interrogation is due to a number of factors. First is a legal culture in which lawyers are less contentious and combative and are more accepting of accommodation and compromise.<sup>65</sup> Defense attorneys generally perceive of themselves as defenders, but not obstructionists, and as responsible to the system of justice, as well as to the client.<sup>66</sup> These perceptions are supported by a general understanding that finding out what happened and why – truth discovery – is an important part of the process. For example, in Belgium the goal of both the investigation and the trial is “to find material truth,”<sup>67</sup> and all participants share this

<sup>64</sup> See *id.* § 6.9. Exclusion of a solicitor by the police is possible only if the officer is unable properly to put questions to the suspect or in other cases where clearly justified. *Id.* at §§ 6.9-10 (formerly §§ 6.5, 6.6). See authorities in Van Kessel *supra* note 9, at 58.

<sup>65</sup> This cooperative legal culture may rest somewhat on the fact that defendants in Continental countries generally may be less combative than defendants in this country. Professor Hans Nijboer has noted the “cooperative attitude of the vast majority of defendants” in The Netherlands. J.F. Nijboer, PROTECTION OF VICTIMS IN RAPE AND SEXUAL ABUSE CASES IN THE NETHERLANDS at 9 (May 1995) [hereinafter PROTECTION OF VICTIMS] (paper presented at the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders). However, the attitude of both defendants and lawyers may be changing. Recently, Holland has experienced an increase in the number of defendants who contest guilt and demand trial. See J.F. Nijboer, *Fact-Finding in Dutch Criminal Procedure: How General are Concepts Like “Fact-Finding”, “Evidence” and “Proof”?*, at 8-9 presented at International Seminar on Evidence in Litigation (1993) (on file with the author).

<sup>66</sup> See Hein Kotz, *The Reform of the Adversary Process*, 48 U. CHI. L. REV. 478, 481 (1981) (describing continental lawyers as “advocates of somewhat muted adversary zeal”); PROTECTION OF VICTIMS, *supra* note 65, at 9 (stating that normally, “even in matters of very different opinions, the Dutch culture keeps a rather informal and not very aggressive mood”).

<sup>67</sup> VANDEN WYNGAERT, *supra* note 25, at 18-19.

objective, such that even defendant's lawyer is supposed to assist the court in discovering truth.<sup>68</sup> Second, and equally important, usually there are clear advantages in early co-operation and a general expectation that the guilty should confess and the innocent should present their alibis or other defenses at an early point in the process.

a. Confessing Early

In countries such as Holland, with few if any mandatory minimum sentencing rules and numerous non-criminal alternatives, judges possess both the power and the motivation to reward those who admit their guilt when questioned by the police. Furthermore, in contrast to the United States, European countries in general take a more paternalistic approach and generally have more confidence in rehabilitative sentencing goals. Thus, judges in Europe often have a more favorable attitude toward those who "come clean" early, viewing their moral guilt as somewhat diminished and perceiving them as more open to rehabilitation. With punishments less harsh and paternalistic judges with more discretion, it is easier for defendants to accept the consequences of criminal conduct.<sup>69</sup>

b. Presenting a Defense Early

An episodic system that places great reliance on the case file which is compiled throughout the pretrial process advantages a defendant who presents a defense early in the proceedings and punishes one who claims the right to silence and saves his story for trial. In more traditional inquiry systems such as Holland and France, the judge relies heavily on the pretrial investigation conducted by the

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<sup>68</sup> See *id.* at 19.

<sup>69</sup> William Pizzi suggests that harsh punishments affects lawyer practices and asks, "Would lawyers [in a system of mild punishments] see it as important, as do American defense lawyers, to instruct their clients at the station house categorically not to talk to the police and not to waive any right or consent to anything?" William T. Pizzi, *Punishment and Procedure: A Different View of the American Criminal Justice System*, 13 CONST. COMMENTARY 55, 66-67 (1996). However, since the 1980s, Europe has experienced an increase in crime and criminal penalties, although generally not to the same degree as in the United States. For example, in Holland since the 1980s, the number and length of custodial sentences dramatically increased, resulting in a doubling of incarceration rates from 1983 to 1992. See ERHARD BLANKENBURG & FREEK BRUINSMA, *DUTCH LEGAL CULTURE* 52-56 (2d ed. 1994); PETER J.P. TAK, *CRIMINAL JUSTICE IN EUROPE: THE NETHERLANDS* at v (1993).

police, and in serious cases by the investigating magistrate, such that police or magistrate reports often become the most important form of evidence.<sup>70</sup>

As a result of this episodic, case file-centered process, as well as the importance placed on the pursuit of objective truth, the accused in these countries is under great pressure “to be responsive to the needs of the investigation and the system as a whole.”<sup>71</sup> Unless the defendant has made statements contesting guilt and the prosecutor has included them in the files, it is difficult for the judge to be open-minded to versions of events other than those presented by the prosecution. The defendant has a much better chance of acquittal if he has contested guilt from the outset and the judge has been presented with differing stories which will facilitate a more unbiased view of the case.<sup>72</sup> As Professor Rudolf Schlesinger described the situation, since nearly all Continental defendants choose to speak at trial, the defendant usually has little to lose and much to gain by presenting his side of the story not only at trial, but also in the earlier phases of the proceeding.<sup>73</sup>

#### D. *The Role of Solicitors in England*

In England also, the right to counsel is less a barrier to obtaining a suspect’s story than in America. Access to counsel during police questioning had been severely limited before PACE in 1984, but while the act expanded the right, the presence of counsel does not shut down interrogation, as it generally does in this country. First, English rules do not prohibit further police questioning when a suspect has requested a solicitor as long as the solicitor has advised the suspect and is allowed to be present during the interview.<sup>74</sup> Second and most importantly, the

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<sup>70</sup> In France, the investigative phase is of “determinative importance” and the dossier “provides a link between the stages through which a case passes.” McKillop, *supra* note 31, at 582. In Holland, defendant and witness statements are not recorded, but are summarized and “organized from an ‘official’ perspective” – often in a way such that just one story dominates. As Rosett has stated, “The decision maker in effect is the prisoner of the fact-gatherer.” Arthur Rosett, *Trial and Discretion in Dutch Criminal Procedure*, 19 UCLA L. REV. 353, 379 (1972) (explaining that the trial “is not seen as the occasion for an independent judicial investigation, nor the occasion for the finding of truth presented by conflicting witnesses. Rather it is the occasion at which it is demonstrated that the truth has been found elsewhere by the prosecuting officials, or at least that an adequate record of such demonstration has been made in the dossier.”)

<sup>71</sup> McKillop, *supra* note 31, at 583.

<sup>72</sup> PROTECTION OF VICTIMS, *supra* note 63, at 10.

<sup>73</sup> SCHLESINGER ET AL., *supra* note 4, at 520-23.

<sup>74</sup> See CODES OF PRACTICE § 6.1-.15. See also Van Kessel, *supra* note 9, at 58.

role of counsel during police questioning is quite different from that of lawyers in this country. It is not seen as the function of the defense solicitor to bar all interrogation, "but rather to make sure that the questioning is fair and that the suspect is treated properly."<sup>75</sup> This perception, in part, is based on a general understanding that all citizens have an obligation to cooperate with authorities in criminal investigations.<sup>76</sup> While there is considerable disagreement as to the proper role of solicitors representing suspects in station house interviews,<sup>77</sup> it appears that in practice solicitors ordinarily adopt a cooperative, if not deferential, position during interrogation sessions. A study by Professor John Baldwin of the role of solicitors at police stations, conducted after PACE but before the 1994 right to silence revisions,<sup>78</sup> found that solicitors were extremely reluctant to intervene and challenge the propriety of police interrogations. Baldwin studied 182 interviews, finding that in two-thirds of the cases, legal advisers said nothing at all, and, when they did intervene, it was as often to help the police in their interviews as to assist

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<sup>75</sup> THE LAW SOCIETIES' GUIDELINES: ADVISING A SUSPECT IN THE POLICE STATION (3d ed. 1991) cited in Pizzi, *supra* note 69, at 64, make it clear that the solicitor is not present to prevent the interview but to see "that the interview is being and will be conducted fairly." See David Roberts, (1) *Questioning the Suspect; The Solicitor's Role*, [1993] CRIM. L. REV. 368, 368 (discussing the role of the solicitor in the interrogation room in light of the Law Society's guidelines). The guideline states specifically, the officer should be allowed to conduct an interview in his/her own way provided that he/she does so properly and fairly. See also Edward Cape, *Police Interrogation and Interruption*, 144 NEW. L.J. 120 (1994) (discussing the sort of questions that ought to prompt a solicitor to intervene on behalf of the client).

<sup>76</sup> An author critical of the law requiring cooperation with police explained that the duty and liability provisions "have the effect of extending the obstruction offence much beyond its original conception . . . [such that] criminal liability may be imposed on anybody who makes it more difficult to . . . be curious and ask questions." Thomas Gibbons, *The Offence of Obstruction: (1) Obstructing a Constable – The Emergence of a New Duty to Cooperate with the Police [England]*, [1983] CRIM. L. REV. 21, 25.

<sup>77</sup> For example, John Baldwin advocates an adversarial role in which "the interests of the client should be paramount." John Baldwin, (2) *Legal Advice at the Police Station*, [1993] CRIM. L. REV. 371, 373. David Roberts, on the other hand, believes that a more passive role for solicitors better serves client interests. See Roberts, *supra* note 75, at 370 (arguing that while the solicitor should assure that a suspect's account is "given property" and should not act as a third interviewer in order to make the prosecution case stronger, the solicitor should not assume an adversarial approach at the outset and should understand that "interviews run better if the solicitor is able to establish a working relationship with the interviewer based on mutual respect").

<sup>78</sup> See H.M.S.O. 1992 Research Study No. 3 summarized in [1993] CRIM. L. REV. 161.

their clients.<sup>79</sup> Baldwin concluded that legal advisors, far from playing an adversarial role at interviews, were extremely passive, at times merely lending legitimacy to unfair interview practices by putting the lawyer's stamp of approval on what took place.<sup>80</sup>

### E. Waiver and Assertion Rules

#### 1. Continental Rules

The consequences of a Continental suspect's assertion of the right to silence or to counsel during pretrial questioning is vastly different from the situation in the United States. In virtually all countries of Europe, including France,<sup>81</sup> Germany,<sup>82</sup> Belgium,<sup>83</sup> and Holland,<sup>84</sup> police may continue to question a suspect despite the suspect's refusal to make a statement or assertion of a desire to remain silent.

#### 2. English Rules

In England also, continued questioning is accepted. While English suspects may refuse to answer police questions, such refusal does not preclude police from

<sup>79</sup> See Baldwin, *supra* note 77, at 372. Baldwin noted that almost one in ten advisers in effect played the role of a "third interviewer." *Id.*

<sup>80</sup> See *id.*

<sup>81</sup> In France, even in when a suspect has obtained and consulted with his attorney, questioning may continue outside the attorney's presence. See VAN DEN WYNGAERT, *supra* note 25, at 121.

<sup>82</sup> While Germany provides that a suspect must be informed of the right to consult with an attorney before answering any questions, under the majority view, defense counsel has no right to be present during interrogation by the police, as opposed to prosecutorial and judicial interrogations. Frase & Wiegand, *supra* note 16, at 333-34. Thus, once the suspect has consulted with counsel, questioning may continue in counsel's absence.

<sup>83</sup> In Belgium, not only may police avoid cautioning suspects, they may continue to seek to persuade a suspect to talk and confess in the face of his assertion of the right to silence and expression of a desire to see an attorney. See VAN DEN WYNGAERT, *supra* note 25, at 16, 22, 36.

<sup>84</sup> In The Netherlands, there is no requirement that police stop questioning when a suspect expresses a desire to remain silent or requests to see a lawyer. Police may continue questioning over protestations and assertions of the right to silence. See Lensing, *supra* note 16, at 627-28 n.18. Rules require that statements of suspects be taken down as much as possible in the suspect's own words, but this rule is rarely respected, and there is no requirement that police tape-record or make a contemporaneous record of questioning. See *id.*

continuing to question and seeking to persuade the suspect to answer.<sup>85</sup> Neither the Judge's Rules nor any common law principle required that if a suspect indicated he wished to remain silent, no further questions could be asked. As long as a suspect was properly cautioned, interrogation could continue in the face of protestations and objections, subject only to the probation against such pressures as would render the statement involuntary.<sup>86</sup>

PACE made no change in the traditional principle found in the Judge's Rules that allows police to disregard a suspect's assertion of silence rights and to continue questioning.<sup>87</sup> As long as continued questioning does not become "oppressive," assertion of right to silence does not operate to cut off questioning.<sup>88</sup> Also, the Codes of Practice suggests that inducements in the form of telling a suspect of the advantages of making a statement or confessing are permitted as long as they are in response to "a direct question" from the suspect.<sup>89</sup> Even when a suspect has requested a solicitor, further questioning is not prohibited as long as the

<sup>85</sup> As long as an English suspect is properly cautioned, interrogation can continue in the face of protestations and objections, subject only to the probation against such pressures as would amount to oppression or coercion. PACE did not change this principle. See authorities cited in Van Kessel, *supra* note 9, at 49-50. See also Pizzi, *supra* note 67, at 66-67 (explaining that when an English suspect refuses to answer a question, police often will proceed to the next question). Likewise, while Canadian law requires that suspects be warned with respect to both the right to silence and the right to counsel, once consultation with counsel has been allowed, suspects do not have a right to have counsel present during questioning, and the Canadian Supreme Court has specifically authorized police attempts to "persuade" a counseled suspect to confess, "short of denying the suspect the right to choose or depriving him of an operating mind." *The Queen vs. Hebert*, [1990] 77 C.R. (3d) 145, 147, 57 C.C.C. 3d (1), cited in Bradley, *supra* note 16, at 198, n.173.

<sup>86</sup> See authorities cited in Van Kessel, *supra* note 9, at 49-50.

<sup>87</sup> See PACE §§ 76, 78. See also Van Kessel, *supra* note 9, at 50.

<sup>88</sup> See Mark Berger, *Legislating Confession Law in Great Britain: A Statutory Approach to Police Interrogation*, 24 U. MICH. J. L. REF. 1, 39 (1990). See Cape, *supra* note 75, at 204 (discussing proper solicitor response to police questioning "where the suspect is not answering questions, but the officer believes that he may be persuaded to speak."). PACE requires exclusion of confessions either obtained "by oppression" or likely to have been rendered "unreliable" by anything said or done by anyone. PACE § 76(2)(a). Oppression includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture). *Id.* § 76(8).

<sup>89</sup> See CODES OF PRACTICE § 11.3 provides that except in answer to a direct question, the officer must not indicate what action the police will take if the person answers questions or gives a statement. But if the person asks the officer directly what action will be taken in the event, in making a statement or refusing to do so, the officer may inform the person of the action the police propose to take in that event, provided that the action is in itself proper and warranted. *Id.*

solicitor has advised the suspect and is allowed to be present during the interview.<sup>90</sup>

## F. *Legal Prohibitions on Adverse Inferences*

### 1. Continental Approach

Until rather recently, most nations allowed the fact-finder to infer guilt from defendant's silence either during pretrial questioning or at trial.<sup>91</sup> Continental countries generally followed the French practice of allowing adverse inferences to be drawn from a defendant's refusal to respond to police questioning or to give evidence at trial.<sup>92</sup> Germany was the exception.<sup>93</sup> Currently, nearly every Continental country has followed Germany and adopted rules which technically

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<sup>90</sup> The CODES OF PRACTICE states that, with certain exceptions, a person who asks for legal advice may not be interviewed or continue to be interviewed until he has received it and that the person must be allowed to have the solicitor present whenever he is interviewed if a solicitor is available. CODES OF PRACTICE §§ 6.6-8 (formerly §§ 6.3, 6.5). Exclusion of a solicitor by the police is possible only if the officer is unable properly to put questions to the suspect or in other cases where clearly justified. *Id.* §§ 6.9-10 (formerly §§ 6.5, 6.6). *See* authorities in Van Kessel, *supra* note 9, at 58. Further questioning by police is prohibited only when the interrogating officer "believes that a prosecution should be brought against [the person] and that there is sufficient evidence for it to succeed." *Id.* § 11.4. In such a case, the officer must ask the person if he has anything more to say, and if the person responds that he does not, the officer "shall without delay cease to question him about the offence." *Id.*

<sup>91</sup> In 1967, Justice Schaefer remarked, Most nations of the world . . . require that the silence of the accused be noted for consideration in the ultimate determination of guilt or innocence. They neither require that he take an oath nor do they employ contempt as a sanction for his failure to answer. These rules seem to me to follow natural assumptions. The silence of the accused is noted and taken into account because of the strength of the inference of guilt that flows from his failure to respond . . . .  
SCHAEFER, *THE SUSPECT AND SOCIETY* 71 (1967).

<sup>92</sup> *See* authorities cited in Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403, 480, n.334 (1992).

<sup>93</sup> LANGBEIN, *supra* note 4, at 72-73; SCHLESINGER ET AL., *supra* note 4, at 522.



prohibit courts from considering defendant's silence as evidence of guilt.<sup>94</sup> England,<sup>95</sup> Scotland,<sup>96</sup> and Norway<sup>97</sup> are exceptions.

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<sup>94</sup> See, e.g., HATCHARD ET AL., *supra* note 38, at 233 (finding that in neither France nor Germany can one under investigation be subjected to penalty for refusing to reply to questioning). Even in Belgium, where suspects have few rights during pretrial questioning, they are said to have a right to silence such that technically silence either pretrial or at trial may not be used against an accused. See VANDEN WYNGAERT, *supra* note 25, at 16, 22, 36.

<sup>95</sup> See *infra* notes 102-34 and accompanying text. In Australia also, adverse inferences from silence may be drawn in some circumstances. While invocation of silence during pretrial questioning cannot be used as a basis for inferring that the defense was newly fabricated or is otherwise less credible, the judge, although not the prosecutor, may comment on defendant's failure to testify at trial. EVIDENCE ACT 1995, §§ 20, 89. See Ian Dennis, *Codification and Reform of Evidence Law in Australia*, [1995] CRIM. L. REV. 477, 484-85. The High Court in 1991 held that a defendant's silence, either during police interrogation or at trial, may not be used as evidence against him, but these rules were modified by the new act. See Bradley, *supra* note 16, at 194.

<sup>96</sup> In 1980, Scotland reinstated its pretrial examination of defendants under which a judicial officer presides over a deposition-style process in which the prosecutor questions the accused, who is not sworn and is usually represented by counsel. Although some accused declined to answer, typically citing advice of counsel, the prosecutor and judge may comment at trial on the accused's failure to answer whenever the accused or any defense witness has testified about a matter that the accused might have explained at the examination. See CRIMINAL JUSTICE (SCOTLAND) ACT, 1980, ch. 62, Sec. 6(2); See also Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2670 n.175 (1996) (citing *Alexander v. H.M. Advocate*, 1988, Scottish Crim. Cas. Rep. 542, 1989 Scots. L. Times 193). See Neil Gow, *The Revival of Examinations*, 141 NEW L. J. 680 (1991) (stating that Scottish law allows the accused to be quickly brought before the sheriff to make any complaints that a confession was extorted by force and that if the accused does not make such allegations until trial, "his failure to do so at the earlier stage before the sheriff could be commented on to the jury").

<sup>97</sup> Norway's criminal process heavily depends on testimonial evidence from defendants. At trial after the prosecutor has read the charges, the judge asks the defendant if he wishes to respond. Defendant has the right to remain silent, but, if he does, silence may be used against him. See Johannes Andenaes, *Criminal Law, Criminology and Criminal Procedure*, 2 J. INTER. L. AND PRACT. 431, 464 (1993) (stating that the president of the court may inform the accused "that a refusal to answer can be considered as a circumstance speaking against him.") See also, Pizzi, *supra* note 69, at 66-67. Norwegian code provides: "If the person charged refuses to answer, or states he reserves his answer, the president of the court may inform him that this may be considered to tell against him." *Id.* at 61 n.27 (citing the CRIMINAL PROCEDURE ACT OF NORWAY, ch. 9, § 93 (1991) (unofficial English translation)). The unitary Norwegian trial, in which the fact-finder decides sentencing along with guilt, puts additional pressure on defendant to give evidence.

However, as discussed later, Continental prohibitions on adverse inferences from defendant's failure to speak are rather anemic.<sup>98</sup> For example, while French jurisprudence technically guarantees a right to silence and a privilege against self-incrimination which appears to prohibit such silence from being used to prove guilt,<sup>99</sup> actually, the right to silence in France is quite limited in view of its strong inquisitory tradition and the assumption that an accused must be available for questioning under the *garde a vue* and must appear before the investigating judge and submit to the judge's examination.<sup>100</sup> Thus, in actual practice, defendant's silence often will lead to adverse inferences in a French courtroom.<sup>101</sup>

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<sup>98</sup> See *infra* notes 146-60 and accompanying text. Damaska has pointed out that while "as a matter of formal doctrine the trier of fact is usually not permitted to draw unfavorable inferences from his silence, the defendant's quite realistic concern that such inferences will, consciously or unconsciously, in fact be drawn, acts in a typical case as a psychological pressure to speak and respond to questions." Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 527 (1973).

<sup>99</sup> See John Hatchard, Barbara Huber & Richard Vogler, *COMPARATIVE CRIMINAL PROCEDURE*, B.I.I.C.L., 32 (1996) (stating that "French jurisprudence maintains that silence cannot be regarded as evidence of culpability."); McKillop, *supra* note 31 (stating that French law requires that upon a suspect's first appearance before an investigating judge, the judge must warn the person of the right not to answer question, citing the CRIMINAL PROCEDURE CODE Article 114). Stuart Field & Andrew West, *A Tale of Two Reforms: French Defense Rights and Police Powers in Transition*, 6 CRIM. L. F. 473, 495, 497-98 (1995) (stating that the investigating judge must advise the suspect of the right to remain silent). But see, Hatchard, et al., *supra* at 32, stating that the warning requirement was removed from the Code in 1993 such that "defendant is no longer notified of a right to silence at any stage in the proceedings." *Id.*

<sup>100</sup> McKillop, *supra* note 31, at 577 (explaining that it is not uncommon at judicial proceedings to hear the presiding judge inform an accused who remains silent that the court will draw its own conclusions from such behavior).

The French, it appears, have scarcely moved from the traditional inquisitory tradition of permitting adverse inferences from silence. See authorities cited *supra* note 90. See also Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How do the French Do It, How Can We Find Out and Why Should We Care?*, 78 CAL. L. REV. 539, 679 (1990) (stating that French law does not prohibit the drawing of adverse inferences for trial silence); Edward Tomlinson, *Non Adversarial Justice: The French Experience*, 42 MD. L. REV. 131, 174 (1983) (explaining that although a defendant "enjoys . . . the right to silence," an exercise of the right "exposes the defendant to whatever inferences the court chooses to draw"). Tomlinson notes that the defendant is called as the first witness at the trial, emphasizing the expectation that he or she will give evidence. *Id.* at 173. In this regard, French procedure has not changed.

<sup>101</sup> McKillop reported a French murder case in which the effect of a defendant's silence "on the judges and jurors was very likely to be adverse to the accused," and observed that "where the legal culture encourages responses to officials and where responses are thus expected, it is not difficult for court to draw adverse inferences from the silence of accused persons, or more particularly the failure to respond to official questioning." McKillop, *supra* note 31, at 577.

## 2. English Approach

New English revisions to the right to silence take a quite different approach. First, a brief historical perspective. My 1986 survey of studies prior to PACE<sup>102</sup> found that, compared to the United States, English police use interrogation more frequently and are more successful in gaining incriminating statements.<sup>103</sup> Studies found damaging statements in from two-thirds to three-quarters of Crown Court cases, while American studies varied from fourteen percent to sixty-eight percent, with most finding damaging statements in less than half the cases.<sup>104</sup> With the adoption of PACE in 1984 and its implementation in 1986, studies found that British confession rates began to decline towards American levels. Summarizing the available data in 1992, Gisili Gudjonsson noted,

the frequency with which suspects confess to crimes in England has fallen in recent years from over 60% to between 40 and 50%. This appears to have followed the implementation of the Police and Criminal Evidence Act (PACE), which came into force in January 1986. The reasons for this decrease seem to be associated with the increased use of solicitors by detainees, and changes in custodial interrogation and confinement procedures. The presence of solicitors during interrogation is most likely to discourage suspects from confessing where the evidence against them is weak.<sup>105</sup>

Thus, the fear arose that guilty defendants were using the right to silence in conjunction with the new access to solicitors to escape convictions, and concern shifted from protecting injustices in such cases as the Guilford Four and the

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<sup>102</sup> See Van Kessel, *supra* note 9, at 1.

<sup>103</sup> United States' interrogation rates vary widely, while virtually all suspects in serious cases are questioned by English police in some fashion, such that, "[b]y and large, in serious cases, the English authorities tend to rely on interrogation to a greater extent than do police departments in the United States." *Id.* at 126.

<sup>104</sup> See *id.* at 127. American suspects generally are more likely to refuse to make any statement when questioned by police. See *id.* at 127-28. American studies conducted after *Miranda* became common knowledge "detected some increase in refusals and some decline in confession rates." *Id.* at 128.

<sup>105</sup> GISLI H. GUDJONSSON, *THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY* 324 (1992).

Birmingham Six to protection of society.<sup>106</sup> In 1993, Home secretary Michael Howard introduced a Criminal Justice Public Order Bill, arguing that “it is reasonable to expect an accused person to offer an explanation of circumstances that appear to be incriminating and . . . if he does not do so, there is no reason why a court or jury should be prevented from taking account of his silence when considering the strength of the case against him.”<sup>107</sup>

As a result, Parliament enacted *The Criminal Justice and Public Order Act 1994*,<sup>108</sup> which substantially altered the right to silence in England by permitting the trier of fact to draw adverse inferences from both silence during police interrogation and at trial. In addition, the caution was altered from a simple statement of the right to silence and warning that what is said may be used as evidence, to a more complicated caution that included the admonition that the defendant’s case may be harmed by failure to mention something that the defendant later relies on in court. Whereas, the caution before the act stated, “You do not have to say anything unless you wish to do so, but what you say may be given in evidence,”<sup>109</sup> the current warning provides,

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<sup>106</sup> See A.A.S. ZUCKERMAN, *THE PRINCIPLES OF CRIMINAL EVIDENCE* 326-27 (1989) (observing that “[i]f courts become convinced that by their promoting of the suspect’s right to consult a solicitor the police are unduly hindered in the investigation of crime, a reaction is bound to take place.”). See also Carol A. Chase, *Hearing the “Sounds of Silence” in Criminal Trials: A Look at Recent British Law Reforms With an Eye Toward Reforming the American Criminal Justice System*, 44 U. KAN. L. REV. 929, at 936-37. This concern may have been increased by the fact that after PACE, English courts felt freer to utilize the disciplinary principle and were less hesitant to exclude confessions obtained in violation of PACE and the CODES OF PRACTICE. See Hunter, *supra* note 17, at 564; Feldman, *supra* note 17, at 468-71.

<sup>107</sup> See authority cited in Chase, *supra* note 106, at 938 n.58 (citing statement by Michael Howard).

<sup>108</sup> The act, together with revised CODES OF PRACTICE, was implemented April 10, 1995. The adverse inference provisions of the act were based largely on the Eleventh Report of the Criminal Law Revision Committee in 1972, which recommended changes in the right to silence whereby silence (both pretrial and during trial) could be used against a defendant, and on the 1988 enactment of the Criminal Evidence (N.I.) Order which adopted the recommendations of the committee for certain criminal cases arising in Northern Ireland. For a discussion of the Northern Ireland experience, see J.D. Jackson, *Curtailing the Right of Silence: Lessons from Northern Ireland*, [1991] CRIM. L. REV. 404.

<sup>109</sup> See Van Kessel, *supra* note 9, at 39 (quoting CODE OF PRACTICE (1985) § 10.4).

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 in evidence.<sup>110</sup>

The act contains two significant general provisions regarding adverse inferences.<sup>111</sup> Section 34 permits inferences to be drawn from an accused's failure to mention facts when questioned or charged that are later relied on in his defense when he could reasonably have been expected to mention such facts. Section 35 permits adverse inferences to be drawn from failure of accused "without good cause" to testify or to answer any question at trial.<sup>112</sup> The act states that its provisions do not "render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so."<sup>113</sup>

Cases interpreting the new silence provisions have imposed a number of requirements before the judge may instruct on the possibility of adverse inferences:<sup>114</sup> The judge must inform the jury of the standard of proof and that the burden of proof remains on the prosecution, that the defendant retains the right to

<sup>110</sup> CODES OF PRACTICE § 10.4 (1995). The warning initially proposed by the 1994 act provided, You do not have to say anything. But if you do not mention now something which you later use in your defence, the court may decide that your failure to mention it now strengthens the case against you. A record will be made of anything you say and it may be given in evidence if you are brought to trial.

POLICE AND CRIMINAL EVIDENCE ACT, 1984; CODES OF PRACTICE, DRAFT REVISIONS FOR CONSULTATION 45 § 10.4 (1994) (Eng.). This caution was perceived as difficult to comprehend and the current version was proposed several months later. See Richard Ford, *New Measures*, LONDON TIMES, Apr. 11, 1995, at 4M.

<sup>111</sup> The act also contains two specific provisions, one permitting adverse inferences to be drawn from an accused's failure or refusal to account for objects, substances, or marks (Section 36) and another permitting adverse inferences to be drawn from an accused's failure or refusal to account for his presence at a particular place (Section 37).

<sup>112</sup> The judge at the conclusion of the prosecution's case must be satisfied that the accused is aware that such inferences may be drawn if he so fails or refuses. The rule does not apply when the accused's guilt is not an issue or where the court finds that "the physical or mental condition of the accused makes it undesirable for him to give evidence." The Criminal Justice and Public Order Act 1994, § 35.

<sup>113</sup> The Criminal Justice and Public Order Act 1994, § 35(1).

<sup>114</sup> See *R. v. Cowan*, 4 All E.R. 939 (1995); *R. v. Condon*, 1 Crim. App. 185 (1997), reprinted in [1997] CRIM. L. REV. 215; *R. v. Friend*, 2 All E.R. 1011 (1997), reprinted in [1997] CRIM. L. REV. 817.

remain silent,<sup>115</sup> that the jury must be satisfied that the prosecution has established a case to answer before drawing any inferences from silence, and that an inference from failure to give evidence cannot on its own prove guilt.<sup>116</sup> Finally, the jury must be instructed that if, “despite any evidence relied upon to explain his silence or in the absence of any such evidence, the jury conclude that silence can only sensibly be attributed to defendants having no answer or none that would stand up to cross-examination, they may draw an adverse inference.”<sup>117</sup> Despite the forgoing limitations, recent English statutory and case law has evidenced a “trend in criminal procedure towards looking for an explanation from an accused person, where such an explanation could reasonably be expected.”<sup>118</sup>

The *Law Society Guidelines* for solicitors were revised in response to the 1994 act modifying the right to silence,<sup>119</sup> and are rather ambivalent concerning whether solicitors should advise suspects to speak or remain silent.<sup>120</sup> In some circumstances the Guidelines take a conservative approach to advising waiver of silence rights. If the solicitor is “unsure whether the police have sufficient, or sufficiently strong evidence” for the police to charge, or for the prosecution to continue with their prosecution, or for a court to convict, “the safest advise will often be that your client should remain silent.”<sup>121</sup> The guidelines also suggest considering “whether the risk of the suspect being wrongfully convicted might be less if he/she remains silent instead of answering police questions.”<sup>122</sup> However, the guidelines suggest considering a number of options involving providing statements

<sup>115</sup> The jury must be told “that defendant is entitled to remain silent. That is his right and his choice. The right to silence remains.” *Cowan*, 4 All E.R. at 945.

<sup>116</sup> In addition, the judge must also have found a prima facie case. However, since the judge may have believed witnesses the jury did not, the jury must be instructed that “they must find that there is a case to answer on the prosecution evidence before drawing an adverse inference from defendant’s silence.” *Cowan*, 4 All E.R. at 945.

<sup>117</sup> *Id.* A similar instruction should be given with respect to silence during police questioning. *See R. v. Condrón*, 1 Crim. App. 185 (1997), reprinted in [1997] CRIM. L. REV. 215.

<sup>118</sup> *R. v. Callender*, [1998] CRIM. L. REV. 337-38 (excluding defendant’s out-of-court exculpatory statement as substantive evidence when he failed to take the stand at trial).

<sup>119</sup> *See infra* notes 120-24 and accompanying text.

<sup>120</sup> POLICE STATION ADVICE: ADVERSE INFERENCES AND WAIVING PRIVILEGE: GUIDELINES FROM THE CRIMINAL LAW COMMITTEE OF THE LAW SOCIETY (July 1, 1997).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

to police, including use of a “considered statement” – taking of a statement from a the suspect prior to police interview, having him sign it and then handing it to an officer at the time of charge or taking such statement but providing it only at trial in order to rebut an inference of recent fabrication. Furthermore, it is clear that solicitor advice to remain silent usually will not prevent the drawing of adverse inferences, but is merely one factor that courts take into account in deciding whether a defendant acts reasonably in not mentioning facts which he/she later presents at trial.<sup>123</sup> Courts are not concerned with the correctness of the solicitors’ advice, nor whether it complies with the Law Society’s guidelines, but with “the reasonableness of the suspect’s conduct in all the circumstances.”<sup>124</sup>

Solicitor response to the new rules is still being worked out, but a barrister who recently discussed these issues with several solicitors who are engaged in advising suspects at police stations informed me that the current advise they give tends to be as follows:

Usually, the suspect should answer questions. However, if he does not wish to, a solicitor will look to justify his decision on tape if possible. The solicitor may also advise the suspect not to answer questions, and the best ground for doing so is where the police have not made full disclosure of their evidence before interview. That is also the best ground for objecting to the inference being drawn at trial.<sup>125</sup>

Thus, it is likely that solicitors will continue the usual practice of advising suspects to answer questions, perhaps a bit more frequently after the new act. The result will be an even greater difference between English and American confession rates. Prior to the new act, a substantially greater percentage of suspects in England than in the United States made damaging statements to police.<sup>126</sup> Compared to the United States, English police use interrogation more frequently,<sup>127</sup> and are more

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<sup>123</sup> See *id.*

<sup>124</sup> *Id.* (citing *R. v. Argent*, THE TIMES, Dec. 19, 1996).

<sup>125</sup> Letter to the Author from Patrick Thomas, barrister and assistant recorder (Jan. 25, 1998) (on file with the author.).

<sup>126</sup> See Van Kessel, *supra* note 9, at 1.

<sup>127</sup> See *supra* note 95.

successful in gaining incriminating statements.<sup>128</sup> While English confession rates declined somewhat after PACE, with the new act, most likely the proportion of English suspects refusing to answer questions will shrink and the gap between English and American confession rates will widen even further.<sup>129</sup>

A word of caution: The new act has not been tested, and serious questions remain concerning its validity under the European Convention on Human Rights.<sup>130</sup> In *Murray (John) v. U.K.*,<sup>131</sup> a case arising from a Northern Ireland “Diplock Court” conviction, the European Court of Human Rights concluded that drawing adverse inferences from defendant’s silence during police questioning and at trial did not violate defendant’s right to silence. In the Court’s view, the right to silence, which is implicit in the right to a fair trial under Article 6 of the Convention, is not absolute and its immunities do not guarantee that a defendant’s decision to remain silent should necessarily have no implications with respect to the trial court’s evaluation of the evidence,<sup>132</sup> at least in situations that clearly called for an explanation from the defendant<sup>133</sup> and where a conviction is not based “solely or

<sup>128</sup> A substantially greater percent of English than American suspects subjected to questioning make damaging statements. See *supra* note 98 and accompanying text.

<sup>129</sup> A recent study of police interviews conducted between late 1995 and early 1996 at 13 police stations found that, while the number of police station detainees requesting legal advice increased to 40% from 25% in the early post-PACE years (ch. 3), both the rate of statements and the rate of confessions increased slightly from before the 1994 Act allowing adverse inferences. The confession rate increased to 58%, compared to 55% before the Act (p. 34). The percent of those answering all questions increased to 84% from 77 before the Act, and the percent of those declining to answer any questions (no comment response) declined to 6% from 10 before the Act (p. 71). See Tom Burke and David Brown, *In Police Custody: Police Powers and Suspects’ Rights Under the Revised PACE Codes of Practice* (Home Office Research Study, 174, 1997). For a brief summary of this study, see *Police Powers and Suspects’ Rights*, [1998] CRIM. L. REV. 145.

<sup>130</sup> See Roderick Munday, *Inferences from Silence and the European Human Rights Law*, [1996] CRIM. L. REV. 370 (reading the *Murray* decision as only a “qualified approval” of the Northern Ireland law and speculating that the Court’s guarded reactions do not bode particularly well for the 1994 limitations on the right to silence in England).

<sup>131</sup> (1994) 18 Eur. Ct. H.R. CD1.

<sup>132</sup> *Id.* at CD9. The Court regarded established international standards, while providing for the right to silence and the privilege against self-incrimination, as silent on this point. *Id.*

<sup>133</sup> *Id.* at CD9-10. The Court warned that if the prosecution’s case had so little value that it called for no answer, failure to provide one could not justify an inference of guilt. But here, the prosecution’s case was “formidable” and “it was only common sense inferences that the judge considered proper in the light of the evidence against the accused, that could be drawn [by the order].” *Id.* at CD10.



mainly on the accused's silence or on a refusal to answer questions or to give evidence."<sup>134</sup>

However, in one part of the Court's opinion, the Court regarded as significant the fact that in Northern Ireland, where judges sit without a jury, the judge is required to explain the reasons for the decision to draw adverse inferences and the weight attached to them and that this aspect of the decision is subject to review by appellate courts. The Court's emphasis on the requirement of judicial justification for its decision, including the part played by adverse inferences from silence, has negative implications for the validity of the 1994 act which applies generally to English jury trials in which such procedures are not required and would not be practicable. On the other hand, the Court compared the English use of defendant's silence to the procedures of other countries where evidence is freely assessed having regard to all circumstances, including the matter in which defendant behaves, and described the English procedure as merely "a formalized system which aims at allowing common sense implications to play an open role in the assessment of evidence." Thus, at this time the validity of the English rules allowing adverse inferences from silence under Article 6 of the European Convention remains an open question.

### G. *Enforcement of Exclusionary Rules*

Traditionally, European courts have taken a flexible approach in enforcement of rules governing pretrial interrogation of suspects that involved balancing the severity of the violation against other factors. The modern trend, however, is toward strict enforcement of caution rules, with Germany, Britain, France, Denmark, Italy and The Netherlands having adopted a mandatory exclusionary rule for violation of warning requirements.<sup>135</sup> However, not all countries have an automatic or mandatory exclusionary rule for failure to caution,<sup>136</sup>

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<sup>134</sup> *Id.* at CD9.

<sup>135</sup> In The Netherlands, for example, failure to caution will result in automatic exclusion. *See VAN DEN WYNGAERT, supra* note 25, at 308. In Germany, a suspect's statement cannot be used as evidence if the suspect was not informed of the right to remain silent. *See Frase & Wiegand, supra* note 16, at 333. Italy has adopted a strict rule excluding all statements made in the absence of counsel. *See Bradley, supra* note 16, at 217-18. However, note that the French warning requirement applies only to judicial, not police, interrogations. *See generally, Bradley, supra* note 16, at 215.

<sup>136</sup> In Scotland, failure to caution as to the right to silence does not automatically render a defendant's statement inadmissible, but is only one factor in applying the basic test of fairness. Admissibility of confessions in Scotland is governed by a basic test of fairness: Was the statement obtained fairly, considering all circumstances, failure to caution being only one. *See VAN DEN WYNGAERT, supra* note 25, at 362, 369-70.

and some countries limit exclusion by refusing to apply the rule to fruits of illegally obtained evidence.<sup>137</sup>

In England prior to the enactment of PACE in 1984, courts generally declined to exclude confessions obtained in violation of the Judges' Rules or the right of access to a solicitor, but after PACE came into effect on January 1, 1986, the reluctance of courts to exclude improperly obtained evidence vanished, and judges took full advantage of their new statutory powers.<sup>138</sup> The new rights granting liberal access to solicitors and the willingness of courts to enforce them were one factor leading to new restrictions on the right to silence adopted a decade later.<sup>139</sup>

#### H. *Significance of Exclusionary Rules of Evidence and Prohibitions on Adverse Inferences*

In spite of the trend toward mandatory exclusion of statements taken in violation of caution rules, the Continental unitary court leads to weak enforcement of exclusionary rules regarding silence and lawyer rights. Because Continental courts decide both questions of law and of fact, exclusionary rules in Continental courts are more appropriately described as rules of decision than rules of exclusion – what evidence the fact-finder may use to support its decision, rather than what evidence may be presented to the fact-finder. The presiding judge is well acquainted with all evidence in the dossier and often must “put aside” or “forget about” evidence which legally cannot be used to support the judgment, including defendant's reliance on the right to silence and refusal to give his side of the case.<sup>140</sup> As Richard Frase described the situation, in Germany “exclusion” of evidence means merely that is not to be produced or discussed at trial and that the court must

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<sup>137</sup> Germany, for example, does not follow the “poisonous tree” doctrine, such that courts may use evidence obtained as a result of excluded statements. See VAN DEN WYNGAERT, *supra* note 25, at 156; Frase & Wiegand, *supra* note 16, at 337. See generally Bradley, *supra* note 16, at 205. England has not adopted the “fruit of the poisonous tree” principle. See ARCHBOLD, *supra* note 17, at 15-351.

<sup>138</sup> See Hunter, *supra* note 17, at 558. See also, ZUCKERMAN, *supra* note 106, at 326-27 (concluding that after PACE, courts have increasingly exercised discretion under § 78 of the act and excluding confessions obtained in violation of PACE and associated rules governing police behavior).

<sup>139</sup> See *supra* notes 74-80 and accompanying text.

<sup>140</sup> The German judge often is required “to ‘forget about’ information they have seen in the file and to base the judgment on a hypothetical set of facts.” Frase & Wiegand, *supra* note 16, at 334. Other professional judges also may study the case file, whereas lay judges generally may not and are limited to the evidence presented in court.

not rely on it in arriving at its judgment.<sup>141</sup> Also, the principle of free evaluation of the evidence in Germany and the concept of *intime conviction* in France “allows the tribunal at trial to ascribe significance to a total refusal to speak without this being subject to effective review.”<sup>142</sup> Thus, while in Germany the defendant has the right to silence and his silence cannot be used by the court, it has been argued that “there is not a safeguard, procedural or otherwise, to insure that a judge does not take into account a defendant’s silence.”<sup>143</sup>

In the English jury trial involving a bifurcated court, exclusionary rules generally are more effective since, as in the United States, the fact-finder generally is not aware of the excluded evidence. Yet in England the fact of defendant’s pretrial silence usually is known to jury. Even before the 1994 act, the jury was made aware of defendant’s silence when cautioned, while instructed not to draw adverse inferences from it.<sup>144</sup> After the act, the judge has broad powers to authorize such inferences.<sup>145</sup> Thus, in English as well as Continental trials, it is more likely than in this country that the fact-finder will draw adverse inferences from silence despite legal prohibitions on doing so.

<sup>141</sup> See *id.*

<sup>142</sup> HATCHARD, *supra* note 38, at 234.

<sup>143</sup> NIGEL FOSTER, *GERMAN LEGAL SYSTEMS AND LAWS* 223 (2d ed. 1996).

However, Italy and Spain have adopted a “dual file” procedure designed to diminish the importance of the pre-trial phase. Under the Italian procedure, the judge does not receive the entire dossier, but only the charging documents, physical evidence, and evidence gathered during the *incidente probatorio*. The rest must be presented at the trial by the parties. Thus, the judge “will go fresh to trial” relying on the opening statements and presentation of evidence by the lawyers. E. Amodio & E. Selvaggi, *An Accusatorial System in a Civil Law Country: The 1988 Italian Code of Criminal Procedure*, 62 *TEMPLE L. REV.* 1211, 1223 (1989) [hereinafter Amodio & Selvaggi, 1988 ITALIAN CODE] Similarly, in Spanish jury trials, the judge receives only a limited “trial file” and which may restrict the judge’s knowledge of defendant’s response to interrogation. See Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 *HAST. INT’L & COMP. L. REV.* 241, 281-82 (1998) (explaining that under the new Spanish jury trial procedure, “trial file” contains only the pleadings, physical evidence, depositions of witnesses who will not be available at trial as to which the opposing parties have had an opportunity to confront and examine, and the holding order).

<sup>144</sup> See Van Kessel, *supra* note 9, at 13. Thus, prior to the 1994 act, the English rule against drawing adverse inferences from a defendant’s post-warning silence did not affect the admissibility of evidence, but only controlled what the judge and prosecutor said to the jury. See *id.* at 15.

<sup>145</sup> See Criminal Justice and Public Order Act of 1994 § 34 (permitting a negative inference to be drawn at trial from a suspect’s failure to mention any fact to police at the time of questioning that the suspect could have mentioned at that time and on which the suspect now relies).

## I. *The Right to Silence at Trial*

### 1. Silence at Trial – A Rare Event on the Continent

For a number of reasons, very few Continental defendants remain silent at trial.<sup>146</sup> First, Continental rules of procedure and evidence place fewer impediments in the way of defendants actively participating at trial than do American rules. For example, use of prior convictions does not turn on whether the accused decides to testify.<sup>147</sup> Also, the presiding judge already has seen defendant's record in the dossier, though technically the dossier is not considered evidence in some countries.<sup>148</sup> Finally, because the Continental defendant is not sworn as a witness, he is not subject to prosecution for perjury.<sup>149</sup>

Second, the Continental trial process offers more inducements and strongly encourages the defendant to respond to questions by exacting a heavy price for remaining silent.<sup>150</sup> Judges and other participants expect the accused to speak. For example, in France, although the accused technically has the right to remain silent at trial without the risk of negative inferences, he is strongly encouraged to speak,<sup>151</sup> and as a practical matter, defendant's complete silence will lead to adverse inferences by the judges such that the silence right is rarely invoked.<sup>152</sup> The unitary trial (in which guilt and punishment issues are decided in one proceeding) also induces defendants to speak. At trial, the accused may contest guilt and present factors mitigating punishment, but if he refuses to speak at all, he forfeits the

<sup>146</sup> It should be recognized that by the time a case comes to trial on the Continent, the vast bulk of defendants have confessed, such that most Continental trials are concerned primarily with sentencing issues. Yet even in contested cases, the Continental defendant nearly always speaks at trial. See Damaska, *supra* note 1, at 527 (noting that almost all Continental defendants choose to testify); SCHLESINGER, *supra* note 4, at 489 (stating that experience shows "that almost all continental defendants choose to testify at the trial"); LANGBEIN, *supra* note 4, at 72-73 (noting that "German defendants virtually always speak").

<sup>147</sup> For example, in Germany, even when defendant refuses to speak, his prior criminal record routinely is introduced at trial. See Frase & Wiegand, *supra* note 16, at 343.

<sup>148</sup> See Damaska, *supra* note 1, at 519.

<sup>149</sup> Even Spain's new jury trial procedure provides that defendants are not under oath and have no duty to tell the truth. Thaman, *supra* note 143, at 300.

<sup>150</sup> See *id.* at 527.

<sup>151</sup> See VAN DEN WYNGAERT, *supra* note 25, at 129.

<sup>152</sup> See HATCHARD, *supra* note 38, at 33.

opportunity to give mitigating evidence respecting punishment.<sup>153</sup> The unitary trial not only induces defendant to speak, but to confess if he wishes to mitigate his guilt, as when he desires to point out that although he participated in the robbery, he did not have a gun and told his accomplice not to kill the victim.

The environment and choreography of Continental trials also strongly focuses on the accused and encourages him to be an active participant and assist in the presentation of his defense. In Continental courtrooms, defense lawyers usually sit behind the defendant, in contrast to American lawyers who sit protectively at defendant's side. Also, Continental defendants usually are called upon to speak first, before either prosecution or defense witnesses, and are always given the opportunity to speak last.<sup>154</sup> This is the case even under Spain's new jury trial procedure in which the taking of testimony begins with questioning of the defendant by the public and private prosecutors and then by the defense attorney.<sup>155</sup> Although Spanish defendants have a Constitutional right to remain silent, are not under oath, and have no duty to tell the truth, they have always testified at the outset in response to prosecutorial questioning in the first year in which the new Spanish jury trials were conducted.<sup>156</sup>

Throughout the trial, the Presiding Judge continuously focuses the inquiry on the accused, seeking to involve him in the case, for example, asking him if he wishes to respond to the testimony of witnesses.<sup>157</sup> The informality of the proceedings and the discussion format of trial, in contrast to our formal direct and cross-examination procedure, emphasizes participation by all, including questioning of the accused by both professional and lay judges. Even in countries still using the English-style jury, lay jurors are active. For example, in a Belgian jury trial which

<sup>153</sup> See SCHLESINGER ET AL., *supra* note 4, at 521-22.

<sup>154</sup> In Germany, defendant is asked to respond to the charges before the victim has been called as a witness. See Pizzi, *supra* note 67, at 66-67. In Spain's quasi-adversary procedure, either the prosecution or the defense can call upon defendant to give evidence, and although the defendant may remain silent, "this might be seen as indicative of guilt." MERINO-BLANCO, *supra* note 5, at 182-83.

<sup>155</sup> See Thaman, *supra* note 143, at 300.

<sup>156</sup> See *id.* at 297.

<sup>157</sup> See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to The Plea Bargaining System*, 50 U. CHI. L. REV. 931, 1006 (1983). Even in Italy which adopted adversary trial procedures, defendant's role continues to be active. The new rules continue the tradition of allowing defendant to speak at any point challenging witness testimony and of giving defendant personally the opportunity to have the last word. Defendant may remain silent, but if he wishes to present mitigating facts as to sentence, he must do so at the trial. See Amodio & Selvaggi, *supra* note 1, at 1223; Freccero, *supra* note 25, at 360.

I witnessed, following the presiding judge's questioning of the accused, the jurors were asked whether they had any questions. Some posed questions which initially were rephrased by the presiding judge, but eventually defendant answered jurors directly, resulting in an unfiltered discussion between the accused and some of the jurors.<sup>158</sup> Consequently, with the trial focused on the defendant and the defendant expected to participate, the practical effect of defendant's unmasked refusal is so damaging that, despite the general rule against drawing adverse inferences from defendant's silence, it is a rare event in Continental trials for a defendant to remain completely silent.<sup>159</sup>

Contrast trials in the United States where defendants are sidelined and fact-finders are silenced. The American judge generally deals with defense only through defendant's lawyer, and the defendant cannot directly address the fact-finder unless he agrees to take the stand and testify under oath subject to cross-examination. Fact-finders also are discouraged from participating. Members of the jury panel may speak during the selection process, but once chosen as fact-finders, usually jurors are silenced. During jury selection in the Oklahoma City bombing case, prosecutors often would ask prospective jurors if they would be bothered by the fact that they might have some unanswered questions about the case. One prospective juror answered, "Like if something isn't clear, we can ask the judge?" Judge Matsch replied, "The answer to that is: No. You can't ask questions."<sup>160</sup>

## 2. Silence at Trial in England

In England also, defendants are more likely to testify than in America. English rules of evidence and procedure encourage the defendant to take the stand and create an expectation that the accused will participate personally in his trial. First, unlike in America, an English defendant does not subject himself to prior conviction impeachment merely by testifying. Defendant's prior convictions may be brought out by the prosecutor on cross-examination only if defendant (1) places

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<sup>158</sup> A discussion between jurors and the accused would be unthinkable in American criminal trials. But conscientious jurors naturally are inquisitive and often would like to ask questions of the defendant or of witnesses. During jury selection at the Unibomber trial, one of the prospective jurors, seemed to pursue the informal Continental approach. After hearing the charges against Kaczynski, she looked at defendant, gasping, "Did you do that?" or "Is that what you've done?" Defendant did not respond. Reporter's transcript of November 24, 1997, page 1361. SAN FRANCISCO CHRONICLE, November 25, 1997, at A3.

<sup>159</sup> See *supra* note 146.

<sup>160</sup> Jo Thomas, *Oklahoma City Bombing - Questions Persist Even After the Sentence*, NEW YORK TIMES, June 15, 1997, at A1.

his own “character” in question or (2) impugns the “character” of a prosecution witness.<sup>161</sup> Furthermore, courtroom environment and choreography distances the accused from his lawyer. While the English, unlike the Continental, defendant is not subject to judicial inquiry throughout the trial, he is not protected by his lawyer to the same extent as in our system. He must always sit in the dock which usually is elevated in a prominent position in back of the courtroom, usually near to his solicitor but separated from his barrister by several rows of seats.<sup>162</sup> Also, lawyer coaching of defendant if he does testify is reduced by the rule that defendant generally must testify before other defense witnesses, thereby limiting the opportunity to shape his testimony to theirs.<sup>163</sup> Finally, the 1994 legislation imposed even greater costs on silence at trial by specifically allowing the judge to call attention to, and suggest that the jury may draw inferences of guilt from, defendant’s failure to speak from the witness box. Thus, while in general the English trial focuses less on the accused than does the Continental trial, it does so a good deal more than our own such that defendants in England are more likely to testify than in America.

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<sup>161</sup> Impeachment with prior convictions is permitted only if the accused either offers evidence of good character, thereby putting his character “in issue” or attacks the character of a co-defendant or a witness for the prosecution. See CRIMINAL EVIDENCE ACT 1898, § 1(f)(ii), and authorities cited in Van Kessel, *supra* note 9, at 34 n.151. Hughes describes the effect of the English rules: “a deadly threat if the accused does not testify, but a large measure of protection if he does” and states that in England the case in which the defendant fails to testify is “exceptional” whereas defendant’s silence “is becoming the common practice in trials in the United States.” Graham Hughes, *English Criminal Justice: Is It Better than Ours?*, 26 ARIZ. L. REV. 507, 590-91 (1984).

<sup>162</sup> This distance from defendant’s trial lawyer reflects more than courtroom arrangement. Usually not having seen his barrister until on or near the day of trial, and then only in the presence of his solicitor, an English defendant is likely to have a purely professional and rather distant relationship with his counsel.

<sup>163</sup> *Police and Criminal Evidence Act 1984* § 79 generally requires that if the accused testifies, the accused shall be called before other defense witnesses unless the court in its discretion otherwise directs. The section has been interpreted to permit the defense to call a formal or non-controversial witness prior to the defendant, but other than such exception, defendant must testify before any fact witnesses. See ARCHBOLD, *supra* note 17, at § 4-318.

### III. THE MODERN RIGHT TO REMAIN SILENT IN AMERICA

#### A. *Pretrial Interrogation*

While *Miranda* and its progeny do not require the presence of station-house lawyers<sup>164</sup> or even give defendants the right on request to see a lawyer unless interrogated,<sup>165</sup> the strict *Miranda-Edwards* cut-off rules require terminating interrogation whenever a suspect declines to speak or requests a lawyer,<sup>166</sup> and American defense lawyers virtually always advise suspects not to talk to police.<sup>167</sup>

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<sup>164</sup> See *Davis v. United States*, 384 U.S. 436, 474 (1994) (noting that *Miranda* rejected the notion “that each police station must have a ‘station house lawyer’ present at all times to advise prisoners”).

<sup>165</sup> See *Moran v. Burbine*, 475 U.S. 412 (1986) (finding that *Miranda* had been waived despite fact that defendant had not been informed that counsel purporting to represent him had called police and requested that no questioning take place and that police had assured counsel that defendant would not be questioned); *Duckworth v. Eagan*, 492 U.S. 195 (1989) (holding that *Miranda* does not require that lawyers be producible on call, but only that a suspect be informed that he has the right to counsel before and during questioning and that counsel would be appointed for him if he could not afford one). Thus, “[i]f police cannot provide appointed counsel, *Miranda* requires only that police not question a suspect. . . .” *Id.* at 204.

<sup>166</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966). See *Michigan v. Mosley*, 423 U.S. 96 (1975) (describing a person’s “right to cut off questioning” as a “critical safeguard” and stating that *Miranda* requires a “fully effective means. . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored”); *Edwards v. Arizona*, 451 U.S. 477 (1981) (announcing a stricter rule when defendant requests a lawyer – that once a suspect has asserted his right to counsel under *Miranda*, there can be no further interrogation until counsel has been made available to him unless defendant himself initiates further conversations with the police); *Smith v. Illinois*, 469 U.S. 91 (1984) (characterizing *Edwards* as a “ridged prophylactic rule” which embodies two distinct inquiries: (1) Whether defendant actually invoked his right to counsel and (2) if he did, the court may admit responses to further questioning only if defendant both (a) initiated further discussions with the police and (b) knowingly and intelligently waived the right he had invoked); *Arizona v. Roberson*, 486 U.S. 675 (1988) (holding that once a suspect cuts off custodial interrogation by invoking his right to counsel, he may not, as long as he remains in custody, be questioned by the original interrogators or others about an offense wholly unrelated to the crime as to which he has already requested counsel, unless counsel has been provided him or the suspect himself initiates further communications with officials); *Minnick v. Mississippi*, 498 U.S. 146 (1990) (holding that *Edwards*’ protection does not cease once suspect has consulted with his attorney, such that once defendant has requested an attorney, interrogation must cease and police may not reinitiate questioning without an attorney present even though defendant has consulted with his attorney).

<sup>167</sup> Justice Jackson’s well known observation over forty years ago still states the accepted wisdom of criminal defense lawyers in this country: “[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances.” *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting).



For example, when O.J. Simpson appeared with his lawyer Shapiro at a bail hearing and attempted to explain why he had fled in the Bronco, his lawyer advised him to remain silent. However, he kept talking. Finally Shapiro warned Simpson, "I will not allow you to speak and I will resign as your lawyer if you continue to do so."<sup>168</sup> Virtually all criminal defense attorneys would view such advise as sound, indeed vital, under the circumstances.

Not surprisingly, our confession rates generally are lower than those of England and Continental Europe. As noted earlier, nearly all defendants in Continental countries speak at trial, and the vast majority also speak pretrial to police or to investigating magistrates. In England also, most suspects make statements to police, the majority of which are incriminating. In my review of American studies, I found that the incidents of damaging statements varied from 14 percent to 68 percent, with most studies finding damaging statements in less than half the cases, while damaging statements were found in from two-thirds to three-quarters of English Crown Court cases.<sup>169</sup> Differences in the significance of suspects' statements in prosecution cases (when placed alongside other evidence) were consistent with the higher English confession rates, such that confessions generally were more prevalent and more important in English than in American prosecutions.<sup>170</sup> While English confession rates declined following the implementation of PACE in 1986, they are likely to increase as a result of implementation of the right to silence revisions in 1995. Furthermore, our confession rates appear to have declined following *Miranda*.<sup>171</sup> Now that *Miranda*

<sup>168</sup> Initially when he was not represented by Shapiro, Simpson had gone to police headquarters voluntarily, submitted to questioning for 32 minutes, gave a blood sample and returned home. See Peter Arenella, *Forward: O.J. Lessons*, 69 SO. CAL. L. REV. 1233, 1237 (1996). Arenella characterized the police questioning as "polite" and asks why the detectives did not engage in more prolonged and tougher interrogation since he had waived his right to silence and to counsel. While regarding this as "one of the mysteries of the case," Arenella asks whether detectives would have adopted the same polite and deferential style of questioning if they were dealing "with a more typical suspect." *Id.*, at 1237 n.8.

<sup>169</sup> See Van Kessel, *supra* note 9, at 127.

<sup>170</sup> A well-documented English study found suspect statements necessary for conviction in about 20 % and important in another 30 % of Crown Court cases. American studies varied, but generally found statements necessary or important in a somewhat smaller proportion of cases. See Van Kessel, *supra* note 9, at 127-28.

<sup>171</sup> In my 1986 review of English and American confession rates, I noted that American studies conducted after *Miranda* became common knowledge detected an increase in refusals to answer questions and "some decline in confession rates." Van Kessel, *supra* note 9, at 128. Professor Paul Cassell's later, more extensive reviews of American studies and his 1994 Salt Lake County study also found declining confession rates following *Miranda*. See Paul G. Cassell, *All Benefits, No Costs: The*

and the right to silence have become familiar American landscapes, it is not surprising that suspects are less willing to talk to police and less inclined to confess, particularly repeat offenders who were told by their lawyers that if they had not opened their mouths, they would not be facing conviction and imprisonment.

### B. Trial Testimony

Our form of adversary fact-finding separates and often disregards the most important individual at the trial, focusing the trial on the lawyers rather than on the accused and the search for truth. At times, the accused may appear set apart or even isolated from the trial process. Why is this so? Understandably, American criminal defense attorneys do not hesitate to advise their clients not to take the stand if they perceive silence to be in defendant's best interest. Occasionally, they may devise methods to convince their clients that they would be better off remaining silent. For example, O.J. Simpson most likely desired to testify (as do most defendants who think they can persuade the jury of their innocence), but the defense team hired two talented defense lawyers to act as prosecutor and aggressively cross-examine him. Evidently convinced to take the safer course, he did not testify.<sup>172</sup>

Why so often is it in the best interests of defendants to refuse to testify? Our rules of evidence operate to strongly discourage the defendant from taking the stand by saying to him, "If you testify, the jury will become aware of your felonious history and you will be cross-examined by an aggressive prosecutor,"<sup>173</sup> but if you

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*Grand Illusion of Miranda's Defenders*, 90 NW. U.L. REV. 1084, 1091-92 (1996) [hereinafter *Grand Illusion*] (concluding that studies before *Miranda* found that defendants made damaging statements in well over 50 % of the cases, while after *Miranda* the rates dropped considerably such that the rates now vary from 20 to 50 %); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 433-447, 466, 483 (1996) (finding a 16% nationwide drop in confession rates following *Miranda* when confessions were necessary for conviction in 24% of the cases, resulting in a 3.8% loss of convictions in serious cases (.16 x .24)); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 842 (1996) (summarizing their Salt Lake County study and finding a confession rate of 33% which suggests "that *Miranda* has reduced the confession rate"). *But see* Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U.L. REV. 500, 545 (1996) (disputing Cassell's calculations and concluding that with the "necessary adjustments" the confession rate change drops from 16% to 4.1% and the harm to law enforcement due to lost cases declines to "at most 0.78%"). Cassell responded to Schulhofer in *Grand Illusion, supra*.

<sup>172</sup> He did, however, request the opportunity to personally address the jury prior to the defense opening statements. The request was denied.

<sup>173</sup> The threat of felony conviction impeachment can be a powerful deterrent to taking the witness stand. A study of American jury trials found that a defendant was almost three times more likely to refuse to testify if he had a criminal record than if not. *See* HARRY KALVEN AND HANS ZEISEL,

remain silent, neither your past nor your present silence will be mentioned by the judge or prosecutor, and if you wish, the jury will be cautioned against drawing adverse inferences."<sup>174</sup> Furthermore, courtroom choreography and procedure offers American lawyers more opportunities to shield defendants from inquiry by focusing the trial on the lawyers rather than on the accused. In Continental Europe, the courtroom arrangement reflects the greater exposure of the accused and the limited ability of lawyers to shield him from the fact-finder. Rather than sitting beside the accused as in American courtrooms, lawyers generally sit behind their clients and are restricted in prompting their responses to judicial inquiries. In England, the accused is in a dock at the center-rear of the courtroom and is separated from his barrister who sits in the front benches some distance away.

Finally there appears to be a growing acceptance of defendant's non-participation at trial. The traditional view has regarded the right to silence at trial as rather weak and generally of little consequence under the assumption that jurors, and even professional judges, ordinarily will expect the defendant to give evidence and will hold it against defendant if he does not take the stand. However, the *Miranda-Griffin* right to silence slowly is becoming accepted in the marketplace of public opinion. With extensive media coverage of high profile trials, the public is exposed to cases in which the defendant does not make pretrial statements or testify at trial. When neither the judge nor the lawyers ask why the accused fails to talk, people slowly become accustomed to a system in which the accused is a silent and passive observer.<sup>175</sup> It seems that recently, both the legal profession and the public have become more accustomed to criminal trials in which the defendant remains silent with his lawyers attacking the prosecution's case, and are now more

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THE AMERICAN JURY 146 (1966).

<sup>174</sup> See *Griffin v. California*, 380 U.S. 609 (1965); *Carter v. Kentucky*, 450 U.S. 288 (1981) (holding that the defendant can require the court to instruct the jury that silence must be disregarded).

<sup>175</sup> In the Oklahoma City bombing case, the attorney for Timothy McVeigh (who did not take the stand either during the guilt or the penalty phases) even sought to use his client's silence as an argument against the death penalty. In the penalty trial the attorney urged the jury to spare defendant's life on the ground that "dead men do not tell tales" and that "we don't want a Lee Harvey Oswald . . . or a Warren Commission Report." Letting him live, the lawyer argued, might someday provide answers to "the rest of the story." Jo Thomas, *Still Unanswered: Was McVeigh Alone?*, NEW YORK TIMES, June 13, 1997, at A14. Counsel even suggested that McVeigh had revealed to him a conspiracy which he could not, but which McVeigh might, later reveal. He told the jury, "You may well consider that two people share a terrible secret. One of them will not tell you and the other one cannot by his oath of office, but the one that can, may." When after the verdicts, the jurors were asked what they missed, they all said they wanted to know "why." Thomas, *supra* note 160, at A1.

accepting of the notion that the accused is not expected to personally provide his version of the events.<sup>176</sup>

Thus, it is not surprising that with increasing frequency, it appears that defendants are not taking the stand at trial as they once did. Studies of trials in the 1920s and the 1950s show that very few defendants refused to testify at trial and that few were helped by such refusals,<sup>177</sup> but Schulhofer's study of Philadelphia felony trials in the 1980s provides a different picture.<sup>178</sup> Nearly one-half of felony defendants did not testify at trial and twenty-three percent of this group were acquitted,<sup>179</sup> while fifty-seven percent of misdemeanor defendants choose not to testify at trial and thirty-four percent were acquitted.<sup>180</sup> These results are consistent with my own observations and inquiries with trial lawyers and judges which has led me to believe that, while much depends on the particular charge and defense, the nature of the evidence, and the defendant's criminal record, the extent of refusals to testify is considerable – from one-third to well over one-half in some jurisdictions.

#### IV. SUMMARY AND CONCLUSION

Europeans recognize a right to silence and to counsel, while still encouraging suspects to participate as a testimonial resource. In Europe today,

<sup>176</sup> In public comments following the failure to reach a unanimous verdict in the sentencing phase of the Terry Nichols case, jurors disagreed over the strength of the prosecution's case, but did not mention the fact that Nichols did not take the stand in either the guilt or the penalty phase. Apparently, they did a good job of following the court's instructions.

<sup>177</sup> See ARTHUR TRAIN, *THE PRISONER AT THE BAR* 209-12 (1923) (referring to an empirical study revealing that only 23 out of 300 defendants choose to remain silent at trial (21 of these were convicted anyway)). In their study of the American jury, Kalven and Zeisel describe an empirical Chicago Jury Study of trials conducted during the middle and late 1950s showing that 91 % of defendants without prior records, and 74 % of those with prior records, choose to testify at trial. See KALVEN & ZEISEL, *supra* note 161, at 146.

<sup>178</sup> Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 329-30 (1991).

<sup>179</sup> *Id.* at 329-30 (citing Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1080 (1984)). Of the 162 felony defendants tried by a judge without a jury, 79 did not testify and 44% of those that remained silent were acquitted on the principal charge (some convicted on lesser counts). Schulhofer, *supra* note 178, at 330 n.72.

<sup>180</sup> Altogether, 39 % of those who remained silent avoided conviction on the principle charge. See Schulhofer, *supra* note 178, at 330 n.73 (citing Stephen J. Schulhofer, *No Job Too Small: Justice Without Bargaining in the Lower Criminal Courts*, 1985 AM. B. FOUND. RES. J. 519, 571).

there is universal recognition of a right to silence and of a privilege against self-incrimination, although vast differences remain with respect to the nature and scope of these rights.<sup>181</sup> While it is accepted that they prohibit coercion and inhumane practices, including compulsion by legal mandate to give testimony under oath which could be used in a criminal prosecution, there is a general understanding that rules implementing the right to silence should not present substantial barriers to testimonial evidence from defendants. This perspective is reflected in the limited right to counsel during police interrogation and in the permissive approach to waiver rules that allow continued questioning in the face of assertions of silence or expressions of a desire for counsel. With a culture of cooperation and compromise and a criminal defense bar that generally advises suspects to cooperate and give their side of the case at an early stage in the proceedings, it is not surprising that on the Continent the vast bulk of suspects do not remain silent during pretrial questioning by the police or the investigating magistrate.

At trial, European systems encourage suspects to speak by limiting the dangers of testifying and increasing the cost of silence. Continental and English procedures reduce the harm from speaking by rules that do not condition use of prior convictions on whether the accused agrees to speak.<sup>182</sup> Continental systems increase the cost of refusing to speak by procedural devices and expectations, while England accomplishes similar objectives by explicitly authorizing the fact-finder to draw adverse inferences from silence.

In America, on the other hand, as a matter of both practice and principle, *Miranda* and *Griffin* seem to have won the day. Suspects in this country tend to speak to police less frequently and to testify at trial less often than their Continental or English counterparts. Furthermore, we have come to accept the proposition that the more one is suspected of criminal activity, the less we should look to that person for an explanation of his conduct. As a result, we have defendants like O.J. Simpson and Terry Nichols, who make pretrial statements but do not testify, and Timothy McVeigh, who does neither, leaving the fact-finders and the public either

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<sup>181</sup> Occasionally, difficulties have arisen when a statement is obtained in a country with fewer protections than the prosecuting country. See, e.g., *R. v. Konscol*, [1993] CRIM. L. REV. 950 (approving use in an English prosecution of a statement of defendant obtained in Belgium where defendant was questioned by an officer at the direction of a magistrate without being cautioned or offered counsel, a practice which in England would have violated the Police and Criminal Evidence Act 1984). See generally Mark Mackarel & Christopher Gane, *Admitting Irregularly or Illegally Obtained Evidence from Abroad into Criminal Proceedings – A Common Law Approach*, [1997] CRIM. L. REV. 720, 721.

<sup>182</sup> In addition, Continental rules do not threaten the accused with perjury for false testimony.

uncertain as to what the defendant did or at a loss as to why he did it and speculating about the possible involvement of others.<sup>183</sup>

European perspectives suggest that recognition of a right to silence and a right to counsel is not incompatible with learning what happened from the accused. Modern, civilized justice systems can recognize a right to silence and to counsel while still encouraging suspects to speak and actively participate in the fact-finding enterprise. Provided such rights are viewed in proper perspective, they need not require sacrificing the most important witness in order to have fair trials.

With respect to the question of “proper perspective,” I offer some alternatives to conventional views of the nature and status of the right to silence. First, from an historical perspective, the right to silence and the privilege against self-incrimination protections afforded by American and European systems of justice in important respects go far beyond what modern scholars have identified as the scope of such rights following their adoption in England and in America. When the privilege was first advocated and eventually accepted in Seventeenth Century England, it protected only against unjustified compulsory inquires. Compelled testimony was acceptable if based on probable cause.<sup>184</sup> When the privilege was adopted in America as part of the Fifth Amendment, it went beyond England’s original version and prohibited even justified compulsion of incriminating testimony, but it did not require warnings and permitted adverse inferences from silence during pretrial questioning by the justice of the peace as long as the accused remained unsworn.<sup>185</sup>

<sup>183</sup> It is ironic that in our system, if defendant waives counsel and represents himself, he may become a central player at the trial, even more so than in England. For example, in England, the defendant has right to self-representation, but must do so from the dock. Thus, in questioning victims and other witnesses, defendant cannot force them to endure cross-examination at close quarters, as occurs in the United States. See Pizzi, *supra* note 67, at 63 (noting also that in England defendant’s right to personally cross-examine child victims in sexual assault cases has been abolished by statute).

<sup>184</sup> The early English privilege prohibited only “incriminating interrogation under oath until a specific accuser or public fame provided a clear basis for suspicion.” Alschuler, *supra* note 94, at 2646-47. As Wigmore noted, Lilburn had never claimed the right to refuse absolutely to answer incriminating questions. He had merely claimed a proper proceeding of presentment or accusation. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, vol. 8, at 289 (McNaughton rev. ed. 1961). However, while early assertions of the privilege were cast in terms of the wrongfulness of demanding that people not otherwise accused of crime be required to accuse themselves, “these claims had been broadened to cover all formally compelled self-accusation.” R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 55 (1981).

<sup>185</sup> The Fifth Amendment privilege was intended be broader than the English privilege and to prohibit compelled incriminating interrogation under oath even with a strong basis for suspecting defendant’s guilt, but was not intended to prohibit adverse inferences from silence when defendant was questioned without being placed under oath. See Alschuler, *supra* note 96, at 2647-48. See also Eben

Second, the silence right should be viewed in relation to the speaking right. Currently, we seem to regard the right to silence as akin to the basic right to trial counsel recognized as an essential aspect of a fair trial in *Gideon v. Wainwright*.<sup>186</sup> We assume that unless the right is available and frequently exercised, defendants will not have a fair trial, and thus believe that it should be applied broadly and that defendants should be encouraged to claim it. However, the right to silence might better be seen as similar to *Gideon's* counterpart, the right of self-representation,<sup>187</sup> which is controversial and more narrowly drawn because it often leads to disruption and injustice.<sup>188</sup> Better harmonizing the silence right with the speaking right would lead to accepting procedures designed to encourage the exercise of the right to testify – a Constitutional guarantee more essential to a fair trial than the right to silence.<sup>189</sup>

Finally, we might recognize that the American justice system is even more dependent than European systems on forcing admissions of guilt from defendant's mouth. Both Continental and common law systems apply pressures on defendants to speak, but in America the pressures are applied later during the plea bargaining process, which disposes of ninety to ninety-five percent of criminal cases. Furthermore, in the bargaining process coercive pressures are allowed that would

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Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1121, 1124 (1994) (tracing the common law privilege through state constitutions and concluding that the Fifth Amendment privilege was not to embark on a program of law reform but "to preserve existing arrangements").

<sup>186</sup> 372 U.S. 335 (1963).

<sup>187</sup> See *Faretta v. California*, 422 U.S. 806 (1975).

<sup>188</sup> The Court in *Faretta* recognized that the right of an accused to conduct his own defense "seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to assistance of counsel. . . . And that a strong argument can surely be made that the whole thrust of those decisions must inevitably lead to the conclusion that a State may Constitutionally impose a lawyer upon even an unwilling defendant." *Faretta*, 422 U.S. at 832-33. Furthermore, the Court considered it "undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Id.* at 834.

<sup>189</sup> In *Rock v. Arkansas*, 483 U.S. 44 (1987), the Court found the right to testify "essential to due process of law in a fair adversary system," *id.* at 51, as well as mandated by the Fifth and Sixth Amendments. *Id.* Furthermore, the Court described the right to testify as "[e]ven more fundamental . . . than the right of self-representation. . . ." *Id.*

never be accepted in the context of asking a defendant for his story.<sup>190</sup> Most significantly, the goal of the prosecutor in plea bargaining is not merely gaining defendant's story, but his confession, and the focus of the process is not so much on finding the truth, but on settling cases and clearing dockets.<sup>191</sup> Perhaps we should consider shifting our efforts from pressuring defendants to confess and waive their trial rights to encouraging them to give their version of the events so that the fact-finder is better able to determine what happened and why. European perspectives demonstrate that systems of justice can recognize silence and counsel rights while fairly distinguishing between inducements and coercion and permitting procedures that encourage defendants to speak and meaningfully participate in the fact-finding process.

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<sup>190</sup> See, e.g., *Brady v. United States*, 397 U.S. 742, 746 (1970) (holding that “a plea of guilty is not invalid merely because entered to avoid the possibility of the death penalty”).

<sup>191</sup> See Mirjan Damaska, *Book Review: The Death of Legal Torture*, 87 YALE L.J. 860, 884 (1978) (contending that the continental locus of pressure directly relates to “the desire to obtain information about the out-of-court event, [while] the common law plea bargain is less directly related to the desire to establish the truth”).



