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I. INTRODUCTION

Most legal systems, common or civil, religious or customary, are haunted by the archetypal specter of the innocent man suffering punishment for a crime he did not commit, particularly if the man had somehow condemned himself by his own mouth. We give forth a collective shudder at the prospect, regardless of the unlikelihood of such an eventuality.[1] It is for this reason that nearly all legal systems have erected some sort of procedural bulwark against the nightmarish results of coerced self-incrimination, spanning the spectrum from *per se* exclusion to corroborative independent evidence requirements.

II. HISTORICAL DEVELOPMENT

Each of the major western European jurisdictions and their progeny recognize some form of protection against compelled self-incrimination.[2] The earliest European rules concerning self-incrimination evolved from the Roman Law and were continued in its Canon Law successor. Under Canon Law, if an accused "contumaciously refused" to answer, such refusal was viewed as a confession to the truth of the matter in question.[3] From this common root, the civil and common law diverged.

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1. *But see When Justice Isn't Done*, ECONOMIST, Oct. 28, 1989, at 16 (detailing the repeated and systematic coercion of false confessions by the now-defunct West Midlands Serious Crimes Squad in northern England).

2. *See* Manfred Pieck, *The Accused's Privilege Against Self-Incrimination in the Civil Law*, 11 AM. J. COMP. L. 585 (1962).

3. ROBERT B. CLUNE, THE JUDICIAL INTERROGATION OF THE PARTIES 14 (Catholic University Canon Law Series No. 269, 1948).

A. Civil Law

In codified civil law jurisdictions, generally based on the 1808 *Code d'Instruction Criminelle* of France, some form of privilege against self-incrimination emerged. The purpose of this privilege was not, as we shall see in the common law, to prevent untrustworthy statements by an accused, but rather to secure the physical and psychological integrity of the accused's person from intimidation, coercion, or torture.[4] Indeed, even today the accused is not generally informed of his right against self-incrimination until he is formally charged. In Germany and the Netherlands, a suspect is often "tricked" into confessing because there is no requirement to inform him of this right.[5] In France, where the police and prosecutors are given great latitude in determining when a suspect will be charged, formal accusation is often delayed to deliberately keep the suspect ignorant of his rights.[6] Some civilian jurisdictions statutorily address the admissibility of coerced self-incriminating statements, for example, Germany, France, and the former-Yugoslavia; but many do not.[7]

B. Common Law

On the matter of self-incrimination, the common law languished in a kind of schizophrenia until the English Civil War. During the 15th century, English courts did not compel testimony by oath or torture, but the accused was subject to compulsory pre-trial interrogation by a magistrate.[8] This interrogation was conducted without counsel and any resulting statements were admissible at trial.[9] Before that time, the English "common law" courts would conduct a judicial examination of the accused without oath at the commencement of each trial.[10]

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4. Pieck, *supra* note 2, at 589-91.

5. *Id.* at 601.

6. *Id.*

7. Mirjan Damaška, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 522 (1973).

8. OFFICE OF LEGAL POLICY, TRUTH IN CRIMINAL JUSTICE REPORT NO.1, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION, at 90 (1986) [hereinafter REPORT TO THE ATTORNEY GENERAL].

9. *Id.*

10. *Id.*; *see also* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 580-81 (3d ed. 1990). The accused was required, however, to *request* a jury trial. When

Contemporaneously, the English "ecclesiastical" courts compelled testimony through the *oath ex officio*, with attendant punishment for refusal to either answer truthfully or to take the oath.[11] After the Restoration, the practice of examining the accused was eliminated.[12] In fact, an accused was regarded as incompetent to testify as a witness at his own trial, presumably to prevent him from perjuring himself, although a confession could still be admitted in evidence.[13]

What has developed between the modern common and civil law is a substantive consensus but a procedural schism. The consensus that emerged is a general agreement concerning the *use* of self-incriminating statements, yet two vastly different procedural schemata for dealing with such statements.

> The core of this protection in almost all systems is the desire to prevent investigation or adjudication procedures from coercing unreliable confessions from the mouths of the accused persons. It is *not* the desire to prevent investigators from asking accused or suspected persons questions relating to the crime, nor the desire to keep the person from answering them . . . nor the desire to keep people from drawing adverse inferences from an accused person's refusal to answer questions.[14]

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pleading "not guilty," the accused was asked how he wished to be tried—the only viable answer being "by God and the country." If the accused refused to request a jury trial, he was to be kept confined, in accordance with the 1275 Statute of Westminster, in *prison forte et dure* (confined under harsh conditions and on a "meagre diet"). *Id.* at 580. By some "grisly misunderstanding," the word *prison* was misread (or misapplied) as *peine* (pain) with the result that a prisoner who refused to request a jury would be pressed under heavy weights until he either made the request or died. *Id.* This practice continued apace for several centuries, with the last known incident of *peine forte et dure* occuring in Cambridgeshire in 1741. *Id.* After which, the abolition of this procedure, a *refusal* to plead resulted in an immediate conviction. *Id.* Subsequent to 1827, a refusal to plead was treated as equivalent to a plea of not guilty. *Id.* at 581 n.43.

11. REPORT TO THE ATTORNEY GENERAL, *supra* note 8, at 3.

12. *Id.* (the period between the return of Charles II (1660) and the Revolution of 1688). For a detailed history of the evolution of the right against self-incrimination in England and the United States, see E.M. Morgan, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 1-23 (1949).

13. T.B. SMITH, STUDIES CRITICAL AND COMPARATIVE 280 (1962). This "dangerous privilege" of giving sworn evidence in one's own behalf was established by statute in 1898. Criminal Evidence Act of 1898, Stat. 61 & 62 Vict. c. 36, *noted in* BAKER, *supra* note 10, at 583.

14. BARTON L. INGRAHAM, THE STRUCTURE OF CRIMINAL PROCEDURE: LAWS AND

Although both systems persist in considering confessions as the first and best form of evidence in a criminal proceeding, they differ greatly on the treatment of such. Lord Chief Justice Mansfield offered a warning to common law judges concerning confessions: "Magistrates cannot be too cautious in receiving confessions, as they very rarely flow from a conscientious desire to offer reparation."[15] Additionally, a contemporary of Mansfield, Sir Michael Foster, noted that "this kind of evidence, I have found . . . to be the most suspicious of all testimony."[16] Yet, the common law insists that an accused, if he wishes to testify at all, must do so under oath, thereby exposing himself to perjury on the one hand, guilt on the other, should he be in any way less than truthful. The civil law, however, recognizes that an accused person will generally make self-serving, often untruthful statements in a natural attempt to save himself. Thus, civilian jurists view the common law rule requiring that an accused testify under oath, or not at all, as somewhat barbaric. As Professor Damaška points out, "[t]he requirement of oath is said to be an unfair pressure on the guilty defendant either to convict himself out of his own mouth by telling the truth, or else to suffer punishment for perjury by lying . . . . Placing him in this predicament is even termed inhumane."[17] Nevertheless, civil law jurisdictions see the accused as the first and foremost evidentiary source, to be examined before any other form of evidence at the trial.[18]

In modern times, the common law's adversarial love-hate relationship with testimony from the accused has grown, in the eyes of many, ever more anachronistic. The common law's love of confessions, evidenced by the existence of the plea bargain and the guilty plea in modern adversarial systems, and the seemingly contradictory presumption against testimony by the defendant, appears inconsistent to many law enforcement professionals. Sir Robert Mark, a Commissioner of Scotland Yard, speaks for many:

> Most of these [adversarial] rules are very old. They date from a time when . . . an accused person was not allowed to give

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PRACTICE OF FRANCE, THE SOVIET UNION, CHINA, AND THE UNITED STATES 78 (1987).

15. HENRY H. JOY, ON THE ADMISSIBILITY OF CONFESSIONS AND CHALLENGE OF JURORS 100 (1842).

16. *Id.*

17. Damaška, *supra* note 7, at 516.

18. *Id.* at 529.

> evidence in his own defence, when most accused were ignorant and illiterate. There was no legal aid and, perhaps most important, if someone was convicted he would likely be hanged or transported. Under these conditions, it is not surprising that the judges who made the rules were concerned to give the accused every possible protection.[19]

Although defendants are now deemed competent to testify as witnesses on their own behalf and penalties are more graduated, the procedural skeleton remains virtually intact. The "gulf between Is and Ought"[20] apparently grows ever larger and "we learn that coercion is often used to extract confessions from suspected criminals; we are then told that convictions based on coerced confessions may not be permitted to stand."[21] Yet the Anglo-American common law resists attempts to significantly change this ossified status quo, based largely upon the perceived necessity of this tension to the functioning of the adversarial system.[22] The need for a system which excludes of coerced incriminating statements has been blindly asserted to the point of tautology. Judge Marvin Frankel has framed the issue more broadly: "We should begin, as a concerted professional task, to question the premise that adversariness is ultimately and invariably good."[23]

Proposals for reform in the American procedure addressing self-incrimination are often summarily dismissed for resembling European inquisitorial method; such an analogy conjures up "visions of torture,

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19. ROBERT MARK, DIMBLEBY LECTURE FOR 1973 (pamphlet version published by the British Broadcasting Corporation), *reprinted in* JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 148-49 (1977).

20. Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV 1, 3 (1964).

21. *Id.*

22. Indeed, the privilege against self-incrimination is, in conjunction with the right to cross-examination, a defining characteristic of the Anglo-American adversarial system.

23. Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1052-53 (1975). Judge Frankel suggests that the American legal community should embrace the Continental preference for "an open and orderly procedure of having a judicial officer question suspects" rather than the apparent emphasis for station house confessions with all their attendant room for abuse. *Id.* at 1053. Although interesting from a critical standpoint, administrative fact-finding of this type is not realistic within the constraints of the Constitution.

secrecy, and dictatorial government"[24] and other machinations anathema to liberal democracy. Yet such assertions rest on a smug, if not arrogant, confidence that the adversarial system is somehow innately superior to other forms of criminal justice, and a parallel ignorance of the fact that the purely inquisitorial system is extinct on this planet.[25] Oddly enough, civilian jurists generally view the adversarial "party contest" as a clash of technicalities showing scant concern for the professed primary goal of criminal courts: to search for the truth.[26]

C. United States

The Puritans in the early 17th century brought the early form of the privilege against self-incrimination to the American colonies. By the 1780's nine states adopted the privilege as an integral part of their respective bills of rights, modeled after Virginia's Declaration of Rights.[27] The first Congress, on a motion made by James Madison, incorporated the privilege in the Fifth Amendment of the Bill of Rights.[28] The federal version differed from those adopted by most states, because it applied only to criminal prosecutions.[29] It is not entirely clear from the legislative history of the Fifth Amendment whether the framers intended it to be identical to the common law privilege as it existed at the time.[30]

Regardless of its rather enigmatic beginnings, the American privilege against self-incrimination was swiftly inculcated within the American political culture as an undisputed right of the free-born American. In 1821, Chief Justice Marshall asserted that the rights endowed by the Fifth Amendment were intended "for ages to come . . . designed to approach immortality as nearly as human institutions can approach it."[31] The reach of the Fifth Amendment was not meaningfully tested, however, until the Supreme Court interpreted it liberally in 1886.[32] Six years later, this

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24. *Id.* at 1053.

25. *Id.*

26. Damaška, *supra* note 7, at 581-82.

27. STEPHEN A. SALTZBURG, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARIES 406 (3d ed. 1988).

28. *Id.*

29. *See* U.S. CONST. amend. V.

30. SALTZBURG, *supra* note 27, at 407.

31. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387 (1821).

32. Boyd v. United States, 116 U.S. 616 (1886) (applying the Fifth Amendment to

expansive interpretation was extended to all criminal proceedings.[33] By 1936,[34] the Supreme Court incorporated, through the due process clauses of the Fifth and Fourteenth Amendments, the common law exclusion of involuntary confessions based on their inherent unreliability.[35] Thus began the era of fact-specific review for voluntariness, based on the totality of the circumstances.

1. The Due Process Approach

The Supreme Court considered many factors in assessing the voluntariness of incriminating statements or confessions, including: age and education,[36] deprivation of food[37] and sleep,[38] and infliction of psychological coercion.[39] Over the period of more than twenty-five years through thirty-odd cases, the Supreme Court engendered "an elaborate, sophisticated, and sensitive approach to admissibility"[40] that gave some recognition to "society's interest in suspect questioning as an instrument of law enforcement."[41] As the Supreme Court extended the rights of the accused, the power of federal law enforcement officers to hold suspects *incommunicado* for extended periods was concurrently curtailed;[42] such practices were seen as an open invitation to abuse of the Fifth

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the compelled production of business records).

33. Counselman v. Hitchcock, 142 U.S. 547 (1892) (applying the Fifth Amendment to grand jury proceedings).

34. Brown v. Mississippi, 297 U.S. 278 (1936).

35. SALTZBURG, *supra* note 27, at 448-49.

36. Compare *Payne v. Arkansas*, 356 U.S. 560 (1958), holding that the defendant, who had only a fifth-grade education, did not knowingly waive his Fifth Amendment rights, with *Crooker v. California*, 357 U.S. 433 (1958), holding that the defendant, who had attended law school for one year, was able to knowingly waive his Fifth Amendment rights.

37. *Payne*, 356 U.S. at 560.

38. Ashcraft v. Tennessee, 322 U.S. 143 (1944) (confession found to have been obtained through coercion, and therefore, inadmissible where law officers forced defendant to stay awake for 36 hours).

39. *See, e.g.*, Watts v. Indiana, 338 U.S. 49 (1949) (court found confession forced, and therefore, inadmissible where defendant was kept in solitary confinement with no sleep).

40. Miranda v. Arizona, 384 U.S. 436, 508 (1966) (Harlan, J., dissenting).

41. *Id.* at 509.

42. *Id.* at 463.

Amendment.[43] This codification of the so-called *McNabb-Mallory* Rule in rule 5 of the Federal Code of Criminal Procedure was extended to the states in 1964.[44]

The Supreme Court's incremental refinement of the due process-based voluntariness standard proceeded apace until a 1964 Warren Court decision shed doubt on the standard's future efficacy. In *Escobedo v. Illinois*, the Court found the conviction of an accused, who was clearly coerced into making incriminating statements under the voluntariness standard, violative of the Sixth Amendment right to counsel.[45] The ensuing confusion for law enforcement officials was short-lived. The decision in *Escobedo* paved the way for one of the most noteworthy and notorious Supreme Court decisions of the century.

2. The *Miranda* Approach

In *Miranda v. Arizona*, the Warren Court attempted, in one fell swoop, to draw a glaringly bright line for both law enforcement and the courts. In its simplest form, the *Miranda* majority opinion adopted a *per se* exclusionary rule for all statements made by a suspect during a "custodial confession" absent a knowing and intelligent waiver of his Fifth and Sixth Amendment rights.[46] The Court defined a custodial interrogation as any form of questioning initiated by police after a person is either in custody or "otherwise deprived of his freedom of action in any significant way."[47]

On a more fundamental level, the *Miranda* majority adopted the philosophical position that a person has a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy."[48] The Supreme Court aimed at "placing [the] suspect on equal footing with the police and placing the inexperienced on a par with the experienced" through the application of two basic principles.[49] First,

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43. *Id.*

44. Malloy v. Hogan, 378 U.S. 1 (1964).

45. Escobedo v. Illinois, 378 U.S. 478 (1964).

46. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

47. *Id.* at 445.

48. *Id.* at 460 (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (Frank, J., dissenting)).

49. Special Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1614-15 (1967) [hereinafter *New Haven Project*].

the Fifth Amendment forbids *all* forms of pressure or coercion aimed at inducing an accused to incriminate himself, and second, the indispensable prerequisite to an intelligent waiver is *precise* knowledge of ones' Fifth and Sixth Amendment rights.[50] The majority broke new ground in the application of these principles. Three of the four cases argued concurrently with *Miranda* involved written confessions signed by the accused.[51] Chief Justice Warren went as far as to state, "in these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest."[52]

The *Miranda* court grounded its sweeping *per se* exclusionary rule on an inherent distrust of the police interrogation room.[53] This is evident in the Court's adherence to the importance of an accused's access to counsel: "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one *merely made aware of his privilege* by interrogators. Therefore, the right to have counsel present at the interrogation is indispensable."[54] The Court did not go so far as to encompass the mandatory presence of counsel within the sweep of its new exclusionary rule. However, if an "interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right . . . to counsel."[55] The *Miranda* court, while stating quite unequivocally that all questioning must cease immediately when a suspect expresses a desire to remain silent or requests the assistance of counsel, did not exclude "volunteered statements" made to law enforcement authorities without any sort of prompting.[56]

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50. Richard H. Seeburger & R. Stanton Wettick, Jr., Miranda *in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1, 3 (1967).

51. *Miranda*, 384 U.S. at 445.

52. *Id.* at 457.

53. *Id.* at 469.

54. *Id.* (emphasis added). In an interesting if not altogether befuddling bit of legal legerdemain, the Chief Justice adds, in the next paragraph, that the presence of counsel would also aid *police* in validating the "trustworthiness" of statements should his client choose to confess. *Id.* at 470.

55. *Id.* at 475 (quoting Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964)).

56. *Id.* at 478.

Facially, *Miranda* purported to draw bright lines between the police and the suspect in custody, but a light scratch of the surface revealed some glaring problems and inconsistencies with this *per se* approach. The *Miranda* dissent argued that the majority's strict exclusionary rule was both under and overinclusive. Justice White pointed out that if the majority's goal was to eliminate the inherent coerciveness of custodial interrogation, then the exclusionary rule should be applied to *all* statements made by the accused, while in custody, regardless of knowing waiver.[57] Justice Harlan, also writing in dissent, posited the underinclusiveness of the majority's tack: the new *per se* rule does not stop coercion or even brutality because unscrupulous police officers will simply dissemble concerning knowing waiver, as they would have done previously concerning the circumstances of voluntariness.[58] "The aim in short is toward 'voluntariness' in a utopian sense, or to view it from a different angle, voluntariness with a vengeance."[59]

At least three other related problems arise from the majority's *per se* rule. First, the majority placed great emphasis on their desire to end "police manual" interrogation procedures, but the *per se* exclusionary rule was not "sensibly tailored" to that end. What emerged is a situation where an assertion of rights leads to immediate cut-off of all questioning, including even brief or reasonable questioning. Conversely, coercive questioning may continue indefinitely after a waiver of rights.[60] Second, if custodial statements are innately coerced, an accompanying warning will not preclude a finding of coercion, nor does the omission of warnings necessarily constitute any additional coercion.[61] Finally, the presumption that custody equals coercion may not be universally valid.[62]

III. THE PLACE OF SELF-INCRIMINATION IN AMERICAN LAW

The question then remains—what protections do Americans (or perhaps more appropriately, the American legal profession) really desire

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57. *Id.* at 533 (White, J., dissenting).

58. *Id.* at 505 (Harlan, J., dissenting).

59. *Id.*

60. *See generally* REPORT TO THE ATTORNEY GENERAL, *supra* note 8.

61. *Id.*

62. *Id.* at 50 (referring to the questioning by local police of Senator Edward Kennedy after the Chappaquidick incident; the report points out that Senator Kennedy himself was a lawyer and was accompanied by a former assistant attorney general—hardly the circumstances making for an innately coercive environment).

against self-incrimination and, in particular, coerced confessions? Professor Herbert L. Packer, in a seminal law review article first published in 1964, proposed that what Americans really desire in their system of criminal procedure is, borrowing from our economic brethren, a kind of production possibilities frontier, a "guns-or-butter" model susceptible to manipulation by the political branches. Packer labels his two possibilities Due Process and Crime Control.[63]

Packer views the machinations of the American criminal procedure system as oscillating between two "models." Indeed, a gain in Due Process for the criminal is seen as a diminution in Crime Control for society as a whole. Packer analogizes these models quite effectively: the Crime Control model is seen as an efficient assembly line with various specialty stations performing specific functions along the way, whereas the Due Process model is an obstacle course, designed to place barriers in the path of the government in carrying the accused along in the judicial process.[64]

The *Miranda* decision was and is viewed as a rather large swing of the procedural pendulum in the direction of Due Process. According to Packer's analysis, the majority's *per se* exclusion rule is inimical to the Crime Control model.[65] Since the exclusionary rule would ultimately encourage litigation concerning asserted violations, the *Miranda* rule stands in the way of an efficient Crime Control process "[o]ne that throws off at an early stage those cases in which it appears unlikely that the person apprehended is an offender and then secures, as expeditiously as possible, the conviction of the rest with a minimum of occasions for challenge, let alone postaudit."[66] Ultimately, reduced to its barest bones, the Crime Control model would involve just two steps: administrative fact-finding, at which point the innocent would be ejected from the system, followed by a guilty plea, eliminating or minimizing the need for judicial fact-finding.[67]

Packer's view is generally, although not universally, accepted as a useful and insightful paradigm for procedural analysis.[68]

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63. Packer, *supra* note 20, at 1-18.

64. *Id.* at 11-13.

65. *Id.* at 17-18.

66. *Id.* at 11.

67. *Id.* at 13.

68. *See, e.g.*, John Griffiths, *Ideology and Criminal Procedure*, 79 YALE L.J. 359

IV. SELF-INCRIMINATION IN OTHER COMMON LAW JURISDICTIONS

A. England

In England, the criminal courts apply, as their American cousins did prior to *Miranda*, a "voluntariness" standard to custodial confessions and other self-incriminating statements by an accused.[69] In the interest of providing a degree of predictability, the English judiciary and Home Office developed a set of guidelines for exclusion known as the Judges' Rules.[70] These Rules can be adequately canvassed in five steps. First, citizens have a duty to cooperate with the police.[71] Second, police are not permitted to take an individual into custody, without a formal arrest.[72] Third, when arrested, a suspect has only a limited right to counsel.[73] Fourth, as soon as there is sufficient evidence to charge a suspect, the police should do so immediately.[74] Finally, all confessions must be voluntary in light of all the circumstances.[75]

After passage of the Police and Criminal Evidence Act in 1984, the Judges' Rules have been largely codified and partially superseded. Police are now permitted to detain a suspect for twenty-four hours without formally charging him,[76] with a possible extension to thirty-six hours if a

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(1970). Griffiths proposes that Packer's models are simply two manifestations of the same ideological view of the adversarial system of criminal justice. Instead, Griffiths consolidates the Crime Control and Due Process models within a single "Battle" model, contrasting this with his alternative "Family" model. This Family model would be based upon a highly-individualized approach to criminal punishment, based equally on the needs of the convicted criminal and society at large. *Id.* Although interesting as a think piece, Griffiths' Family model bears, twenty years later, no resemblance to any extant system of criminal justice anywhere in the United States, although it may be a fair representation in part of some foreign criminal justice systems.

69. Glanville L. Williams, *England, in* POLICE POWER AND INDIVIDUAL FREEDOM 185-86 (Claude R. Sowle ed., 1962).

70. Judith Kaci, *Confessions: A Comparison of Exclusion Under* Miranda *in the United States and the Judges' Rules in England*, 6 AM. J. COMP. L. 87, 88 (1982).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 90.

75. *Id.* at 91.

76. Police and Criminal Evidence Act, 1984, Vol.12, § 41 (Eng.) [hereinafter PACE].

senior police official thinks it necessary to preserve evidence or to conduct investigation expeditiously.[77] Any further detention must be justified on reasonable cause to a magistrate,[78] who can then extend detention to a total of ninety-six hours.[79] In addition, suspect may be held *incommunicado* for up to thirty-six hours[80] if he is detained for a serious offense.[81] Although a suspect enjoys an absolute right to counsel, access to a solicitor can be delayed for up to thirty-six hours.[82] While a suspect is in custody, police may take fingerprints and other "intimate samples,"[83] but these must be destroyed if a suspect is subsequently cleared.[84] The Police and Criminal Evidence Act does not specifically require that the suspect be informed of certain rights or privileges.

English judges liberally exclude statements upon any showing of inducement by the authorities; however, a *subjective* causal connection between the inducement and the subsequent incriminating statements must be demonstrated.[85] Judges are particularly inclined to exclude self-incriminating statements elicited in violation of the Judges' Rules when accompanied by a statutory or common law breach.[86] Yet even in these circumstances, exclusion is within the discretion of the judge, and any incriminating statement may be admitted if the judge is satisfied as to its overall voluntariness.[87]

Absent from the Judges' Rules is a requirement that the accused be notified of his right to counsel. It is possible that the right to counsel is specifically excluded based upon a kind of "efficiency" view of the criminal process, but even this justification is apparently lost after probable cause attaches and the decision is made to charge, thereby theoretically precluding any further questioning by the police.[88]

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77. *Id.* § 42(1).
78. *Id.* § 43(1).
79. *Id.* § 44(3)(b).
80. *Id.* § 56(3).
81. *Id.* § 56(2)(a).
82. *Id.* § 58(5).
83. *Id.* §§ 61-63.
84. *Id.* § 64(1).
85. Kaci, *supra* note 70, at 91, 92.
86. FRED KAUFMAN, THE ADMISSIBILITY OF CONFESSIONS 137 (1979).
87. *Id.*
88. Kaci, *supra* note 70, at 104-06.

The English seem particularly concerned about the formalization of custodial confessions. A confession or other self-incriminating statement must be reduced to writing, signed by the accused, and accompanied by a signed certification of voluntariness.[89] Additionally, the police are not permitted to prompt statements nor use a question-and-answer format.[90] Although the procedures appear cumbersome, the police are well rewarded for this additional effort; such confessions enjoy almost *per se* admissibility.[91]

B. Canada

The Canadian right to silence was based upon the English right. In Canada, as in England, the privilege against self-incrimination is based on the absence of any right by the police to coerce statements from an accused rather than any absolute protection against self-incrimination.[92]

The Canadian courts adopted the English Judges' Rules in 1918,[93] modifying them somewhat, but still generally toeing the English line.[94] The cautions which must be given, however, differ rather substantially. An individual taken into custody must be immediately notified of the charges against him and informed that he has an absolute right to retain counsel.[95] The accused must be brought before a magistrate within twenty-four hours of his initial detention for formal arraignment[96] and a judicial advisory of his rights. The police, however, are not required to advise a suspect or an accused of his right to silence, the implications of self-incriminating statements, the availability of appointed counsel, or his

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89. *Id.* at 102.

90. *Id.*

91. *Id.* For an extreme example of how even this formalized system for assuring the voluntariness of custodial confessions may go awry, see Quentin Cowdy, *Appeal Court Frees Man Who 'Confessed' to Disbanded Squad*, THE TIMES (London), Feb. 24, 1990, at 3 (detailing one of several written confessions fabricated by the now-defunct West Midlands Serious Crimes Squad).

92. RICHARD V. ERICSON & PATRICIA M. BARANEK, THE ORDERING OF JUSTICE: A STUDY OF ACCUSED PERSONS AS DEPENDENTS IN THE CRIMINAL PROCESS 49 (1982).

93. R. v. Voisin, (1918), 13 Cr. App. R. 89 (C.C.A.), *cited in* KAUFMAN, *supra* note 86, at 149.

94. KAUFMAN, *supra* note 86, at 149.

95. REPORT TO THE ATTORNEY GENERAL, *supra* note 8, at 90.

96. *Id.*

privilege to refuse questioning.[97] Confessions and other self-incriminating statements are admitted on a voluntariness standard, with the Canadian courts applying a less restrictive standard for admissibility than the English.[98]

Some Canadian commentators have observed that the entire criminal process, from intake to verdict, tends to favor coercive tactics by the police and prosecutors.[99] Whereas an accused in custody who is told to make an incriminating statement many times will, the "complex and procedure-ridden process of the criminal courts" *de facto* preclude the accused from offering an explanation or questioning any step of the process.[100] The system of plea bargaining is, even more so than in the United States, a coercive instrument in the hands of the police. One study revealed that, in cases involving plea bargains, seventy-nine percent involved direct police participation, with the police officer as the *only* public official involved in fifty-two percent.[101]

With the declaration of the Canadian Charter of Rights and Freedoms[102] in 1982, the privilege against self-incrimination and to access to counsel may rise to the level of constitutionally-entrenched rights. As of May 1991, however, Canadian courts have declined granting an absolute right to counsel[103] or against self-incrimination.[104]

C. Scotland

As a hybrid system of uncodified civil law with a 300-year-old common law overlay,[105] Scotland represents a suitable model for the

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97. *Id.*

98. *Id.*

99. ERICSON & BARANEK, *supra* note 92, at 193-202.

100. *Id.*

101. *Id.* at 59.

102. CAN. CONST. (Constitution Act, 1982) pt. 1 (Canadian Charter of Rights and Freedoms), which was adopted incident to the Canada Act (1982), which officially returned sovereignty to the Canadian Parliament from Westminster.

103. *See, e.g.*, Howard v. Presiding Officer of the Inmate Disciplinary Court, 57 F.C. 280 (1987) (holding that there is no right to counsel at parole hearings); Regina v. Rowbotham, 63 O.A.C.3d 113 (1980) (Ont.) (holding that there is no "constitutionalized right" to funded counsel for the indigent).

104. *See* Regina v. Woolley 63 O.A.C.3d 333 (1988) (Ont.) (holding that courts may exclude evidence obtained from a violation by police of the right to silence if admitting such evidence would "bring the administration of justice into disrepute").

105. Act of Union, 1707, 5&6 Anne c.8. (Eng.). The Act of Union unified the

interaction of the two predominant legal systems. Like all common and civil law jurisdictions, Scottish criminal law recognizes that an accused should not be compelled to convict himself from his own mouth. This assumption underlies the rather strict exclusionary rule for unfairly coerced confessions in Scotland.[106]

The Scots' view of confessions or other incriminating statements given at the station house is quite disapproving:

> In the eyes of every ordinary citizen, the venue is a sinister one. When he stands alone in such a place confronted by several police officers . . . the dice are loaded against him, especially as he knows that there is no one to corroborate him as to what exactly occurred during interrogation, how it was conducted, and how long it lasted.[107]

The Scots take a rather pragmatic view of law enforcement, recognizing that the people have some interest in expeditious police investigation. As in England, no privilege against self-incrimination attaches when an individual is merely questioned by police.[108] Upon

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parliaments of Scotland and England, the crowns having been joined with the accession of James VI (of Scotland) and James I (of England) upon the death of Elizabeth I in 1603. The Act made the Courts of Session, hearing civil matters, subject to the ultimate appellate authority of the House of Lords, but through a quirky piece of draftsmanship, intentional or otherwise, the Act only subjects the Scottish criminal courts to the authority of those parts of Parliament sitting at Westminster. *Id.* Since the Lords were not sitting at Westminster in 1707, criminal appeals in Scotland are heard only by a special panel of the High Court of Justiciary in Edinburgh. This fact has, in many respects, allowed the Scottish criminal law, more so than most other areas of Scottish law, to retain a large portion of its original Dutch-Roman flavor. *See generally* SIR WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 3-21 (1938).

106. Paul Hardin, *Other Answers: Search and Seizure, Coerced Confessions, and Criminal Trial in Scotland*, 113 U. PA. L. REV. 165, 177 (1964). For a good example of the strictness of this exclusionary rule, at least prior to 1980, see Manuel v. H.M. Advocate, [1958] J.C. 41 (Scot.) (involving the written confession of convicted mass murderer, Peter Manuel).

107. Chalmers v. H.M. Advocate, [1954] J.C. 66 (Scot. H.C.J.). It is not clear why the Scottish legal system takes a markedly more distrustful view of police activity than do the English or the continental systems. The Scots' distrust may have to do with the country's rather unpleasant experiences at the hands of the English following the suppression of Prince Charlie's Rebellion and the subsequent Highland Clearances, seen even today by many Scots as institutionally sanctioned ethnocide.

108. Hardin, *supra* note 106, at 172-74. There have been in the past some problems

arrest, Scottish courts are quite strict: after a suspect is "arrested, cautioned, and charged,"[109] police may undertake no further interrogations and any custodial confessions will be subject to a rigorous "voluntariness" review.[110] Generally, courts prefer that if an accused wishes to make a *voluntary* statement or confession, the statements should be made only after specific consultation with a solicitor, given to a senior police official not directly involved in the case, reduced to a writing that includes cautions, and signed by the accused.[111] In 1980, the near *per se* bar on police custodial questioning was relaxed somewhat with the adoption of the Criminal Justice Act.[112] The Act sought to strike a more realistic balance between the rights of the individual and the interests of society in the detection of crime. Police were authorized to detain an individual in custody for questioning, but this authority was limited to detention for no more than six hours.[113] During that time, the police could fingerprint, search, and interrogate a suspect. However, the police were required to advise a suspect of the absolute right to remain silent, the right to a solicitor at government expense, and the right to request that one other person, other than a solicitor, be informed of his whereabouts.[114] Additionally, the Act featured a revival of a limited form of judicial examination. Although similar to an initial appearance or arraignment in the United States, the new judicial examination would allow the prosecutor[115] to "put to an accused questions designed to elicit any explanation he may have to offer."[116] This revived form of judicial examination was justified by the government as offering the accused an

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with police "inviting" people to accompany them to the police station for questioning, making this seemingly innocent mere questioning appear a bit more earnest.

109. A.V. SHEEHAN, CRIMINAL PROCEDURE IN SCOTLAND AND FRANCE 133 (1975).

110. *Id.*

111. *Id.* at 133. For these reasons, custodial confessions play a pivotal part in very few Scottish criminal prosecutions.

112. Act of Adjournal (Procedures under Criminal Justice (Scotland) Act 1980, No.1), *reprinted in* GERALD H. GORDON, THE CRIMINAL JUSTICE (SCOTLAND) ACT 1980 145 (1981).

113. REPORT TO THE ATTORNEY GENERAL, *supra* note 8, at 89.

114. *Id.* at 90.

115. The prosecutor is officially known as the *procurator fiscal* in Scotland.

116. 982 PARL. DEB., H.C. (5th ser.) 821 (1980) (statement of George Younger, Secretary of State for Scotland).

early opportunity to lay the foundation for challenging a confession or presenting an alibi. The Crown, in turn, could comment at trial upon an accused's refusal to answer questions at the judicial examination.[117]

Although the ability of the Crown to comment on an accused's silence at trial was seen by some as a retrograde step in protecting the rights of the accused, it should be noted that judges were already permitted to make comment to the jury concerning silence by the accused.[118] Some commentators see this counterbalanced by other, peculiarly pro-accused, elements in Scottish criminal procedure.[119]

Two other unique, at least in a common law sense, features of Scottish criminal procedure deserve comment. As in most civil law jurisdictions, if police are led to physical evidence by coerced statements from the accused, the evidence itself is admissible.[120] The prosecution must, however, find some way of linking the evidence to the accused other than by the coerced statements.[121] Second, the Scots have adopted, since the institution of criminal legal aid in 1964, a "Duty Solicitor Scheme."[122] Each local Committee of the Bar drafts an annual Duty Plan, insuring that one or more local solicitors is readily available at all times to advise any detainees in police custody.[123]

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117. *Id.* at 853, 854. The Labour MPs, who represented a vast majority of Scottish constituencies, saw this resuscitated judicial examination as a serious threat to the right of an accused to remain silent, since his silence at the judicial examination could be commented upon by the Crown at trial, and therefore represented a *de facto* form of self-incrimination. *Id.* at 923.

One practitioner's handbook advises solicitors to question their clients about any extrajudicial statements, stating "[i]f there is anything untoward . . . the solicitor should advise the accused to mention this at a judicial examination." ALASTAIR STEWART, THE SCOTTISH CRIMINAL COURTS IN ACTION 99-100 (1990).

118. Scott v. H.M. Advocate, [1946] J.C. 3 (Scot. H.C.J).

119. Hardin, *supra* note 106, at 182-84 (referring, for example, to the requirement that two witnesses speak to the accused's guilt, including two-witness corroboration of any inculpatory physical evidence).

120. Perhaps physical evidence is deemed different because "however obtained, it cannot lie." K.D. EWING & W. FINNIE, CIVIL LIBERTIES IN SCOTLAND: CASES AND MATERIALS 102 (1982).

121. Chalmers v. H.M. Advocate, [1954] J.C. 66 (Scot. H.C.J.).

122. J. ROSS HARPER, A PRACTITIONER'S GUIDE TO THE CRIMINAL COURTS 57-59 (1985).

123. *Id.*

D. Other Common Law Influenced Jurisdictions

Some other jurisdictions have much of their antecedents in the common law. India, for instance, excludes all custodial statements made by an accused, requiring that confessions be made before a judicial forum. Evidence derived from a coerced statement, along with the relevant part of the statement itself, is admissible. At trial, a judge is required to question the accused, albeit unsworn, after conclusion of the prosecution's evidence, and unfavorable inferences can be drawn from an accused's subsequent silence.[124]

Israel, although providing no statutory or constitutional guarantee, traces its privilege against self-incrimination through the Judaic Law to the fourth century B.C.[125] Israeli law does not allow a suspect to be held more than forty-eight hours without being charged, with the Israeli courts applying the Judges' Rules for required cautions and prohibited interrogations. Confessions and incriminating statements are admitted on a basically English voluntariness standard.[126]

V. SELF-INCRIMINATION IN CIVIL LAW JURISDICTIONS

A. France

Under the French *Code de Procédure Pénale*, article 114 grants all accused persons the right of silence, but only explicitly before the *juge d'instruction*.[127] Traditionally, this right has been extended to include all judicial proceedings.[128] However, this right does not extend to police interrogations.[129] Additionally, article 114 requires that an accused be informed of his right to remain silent at his first appearance before the

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124. REPORT TO THE ATTORNEY GENERAL, *supra* note 8, at 88-89.

125. Haim H. Cohn, *Israel*, *in* POLICE POWER AND INDIVIDUAL FREEDOM 265-268 (Claude R. Sowle ed., 1962).

126. *Id.* at 201-04. One should not be too hasty, however, in accepting as given these procedural safeguards. The ongoing problems in the West Bank, most notably the *intifada*, have cast doubts on the equal applicability of Israeli procedural safeguards.

127. Pieck, *supra* note 2, at 585. The *juge d'instruction* is the investigating judicial officer who prepares the *dossier* (case file), which is heavily relied upon by the trial court. *Id.*

128. *Id.*

129. *Id.* at 586.

juge d'instruction. However, before the accused's first appearance he may be interrogated by both the police and the *procureur* without cautions or counsel.[130]

What emerges from the application of article 114 is that, much like the English system, the level of protection an accused receives depends on his status. In the French criminal justice system, a person is not an accused, and therefore is not given the protections of article 114, until officially arraigned before a *juge d'instruction*.[131] By law, however, the police and prosecutor may hold a suspect[132] and interrogate him for up to forty-eight hours (the *garde à vue*) without charging before a *juge d'instruction*.[133] Any statements made during this time are entered in the *dossier* and admitted at trial.[134] Once a suspect is charged, however, the *juge d'instruction* must advise the accused of his right to know the charges against him, to remain silent, and to secure free counsel prior to any judicial examination.[135]

When examined before the *juge d'instruction*, that an accused's right to silence may be *inviolate* in theory, but the practical ramifications of refusal to answer questions can be significant. Although pre-trial detention is generally frowned upon in most civil law jurisdictions,[136] refusal to cooperate in the fact-finding process may lead to detention.[137] The accused's demeanor and attitude at the judicial examination will be commented upon in the *dossier* by the *juge d'instruction*, obliging the

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130. *Id.* at 596. The *procureur* is the public prosecutor in France.

131. *Id.* at 592.

132. INGRAHAM, *supra* note 14, at 62. The French Code of Criminal Procedure does, however, require that detailed notes be kept for the *dossier*. These notes must include the dates and times of any interrogations, rest periods, and release of the accused. C. PR. PÉN. arts. 64, 65. The accused must be shown these notes and he must sign them. *Id. See also* Richard Frase, *Comparative Criminal Justice as a Guide to Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 581-82 (1990).

133. INGRAHAM, *supra* note 14, at 62.

134. *Id.* at 48. The *juge d'instruction* may, of course, disregard a coerced statement if, in his opinion, the coercion has rendered the statements so unreliable as to be irrelevant.

135. *Id.* at 74.

136. RUDOLF SCHLESINGER ET AL., COMPARATIVE LAW: CASES, TEXT, & MATERIALS 480-81 (1988).

137. Pieck, *supra* note 2, at 598.

accused to offer some explanation.[138] French law does not allow the trial court to draw an inference of guilt from the accused's silence, yet his reticence will generally reinforce the state's case and may be commented upon unfavorably by the judge and prosecutor.[139] Finally, the accused is never put on oath at any stage of the judicial process. Therefore, the threat of perjury does not reinforce any desire to remain silent.[140]

When the accused is finally brought to trial, he is not systematically excluded from participation as in the adversarial process. In France, trials generally commence with an examination of the accused by the presiding judge. This examination includes the accused's name and personal history, summation of prior offenses, details of the charges and accused's reactions to them, the accused's rebuttals to the statements of witnesses, and a kind of cross-examination by the judge, prosecutor, and the accused's counsel.[141] Even if the accused decides to make a judicial confession at trial, this does not, as in the common law, signal acquiescence to immediate judgment. Rather, such a confession is treated as an important piece of evidence, evaluated by the court with all the other relevant evidence.[142]

The French take a markedly different view of remedies for a violation of an accused's rights. Since there is no real exclusionary rule, remedial measures take the form of administrative actions. The most salient of these is the remedy for detention without charge for a period longer than forty-eight hours. The responsible police officer is disciplined by his superiors within the police bureaucracy. Additionally, the officer may be held liable in both criminal and civil proceedings for illegal detention.[143]

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138. *Id.*

139. *Id.*

140. INGRAHAM, *supra* note 14, at 79. The French extend the privilege of testifying unsworn not only to the defendant, but also to his spouse, parents, collaborators, accomplices, and all relatives to the fourth degree. WILLIAMS, *supra* note 69, at 259. Relatives in the fourth degree include grandnephews and nieces, great aunts and uncles, and first cousins. JOHN RITCHIE ET AL., CASES AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 91 (7th ed. 1988).

141. SHEEHAN, *supra* note 109, at 72-73. Article 238 of the Code of Criminal Procedure requires only that the presiding judge "shall interrogate the accused and receive his statement." C. PR. PÉN. art. 238 (Kock trans., 2d ed. 1988 as *The French Code of Criminal Procedure*).

142. INGRAHAM, *supra* note 14, at 50.

143. SHEEHAN, *supra* note 109, at 38.

B. Germany

Under section 136(1) of the *Strafprozeßordnung*,[144] the German police, prosecutors, and courts are required to respect an individual's right against self-incrimination.[145] Applied more expansively than the French privilege, this right extends to those suspected of committing a crime, those against whom criminal proceedings have been initiated, and those formerly charged and bound over for trial.[146]

German police are permitted to hold a suspect in custody until the day following the arrest, but are supposed to advise the suspect of the presumed charges, the right to silence, and his right to counsel.[147] The suspect may consult with counsel, but counsel may not be present during interrogation.[148] Although required by statute, the omission of cautions does not result in the exclusion of confessions or self-incriminating statements.[149] Additionally, physical evidence gained from an improperly procured statement is admissible in court.[150]

At trial, the contribution expected of the accused is similar to that in France. The trial generally opens with examination of the accused concerning personal details and then, after recautioning as to his right to silence, questioning concerning the specific offenses at bar.[151] The accused may refuse to answer each specific inquiry, and the court is prohibited from drawing a legal inference from such a refusal.[152] Surprisingly, nearly half of all defendants tender judicial confessions anyway.[153] This apparent penchant to confess may be attributable to

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144. StPO § 136(1) (F.R.G.) (Schmidt trans., 1965 as *The German Code of Criminal Procedure*). The code specifically prohibits coercion by "ill-treatment, fatigue, physical interference, dispensing medicines, torture, deception, or hypnosis." *Id.* at 78. Section III states that these prohibitions apply "irrespective of the accused person's consent. Statements which were obtained in violation . . . may not be used even if the accused agrees to said use." *Id.*

145. Pieck, *supra* note 2, at 586.

146. *Id.* at 594-95.

147. REPORT TO THE ATTORNEY GENERAL, *supra* note 8, at 94.

148. Pieck, *supra* note 2, at 596, 597.

149. REPORT TO THE ATTORNEY GENERAL, *supra* note 8, at 94.

150. *Id.*

151. *Id.*

152. LANGBEIN, *supra* note 19, at 72-73.

153. *Id.* at 74.

several factors. First, a guilty plea is not dispositive, nor does it relieve the court of its duty to conduct a trial. The court has an absolute duty to examine the accused, and this obligation cannot be fulfilled by reviewing a transcript or written copy of a confession.[154] Second, although the court is prohibited in most cases from drawing a legal inference of guilt from the accused's silence, the German system of free evaluation of all relevant evidence tends to put a negative gloss on other evidence when the accused refuses to answer judicial inquiries.[155] Third, the judge and prosecutor may make unfavorable comments regarding an accused's silence.[156] Finally, an accused's silence may be considered an aggravating factor in sentencing after a determination of guilt.[157]

Unlike the French, the Germans have one exclusionary rule. If self-incriminating statements are coerced by specifically prohibited police behavior, they are excluded from evidence. This exclusionary rule, unlike its common law brethren, is based on the perceived irrelevancy of obviously coerced, and therefore unreliable, self-incriminating statements.[158]

C. The Netherlands

Under article 29(1) of the Dutch *Wetboek van Strafvordering*,[159] an accused has no obligation to answer inquiries by the police, prosecutor, or judge.[160] An "accused" is defined as a person about whom there is "on the basis of facts and circumstances . . . a reasonable suspicion of guilt of having committed any punishable act"[161] or against whom a prosecution has been initiated.[162]

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154. *Id.* at 66-67.

155. Pieck, *supra* note 2, at 598.

156. *Id.* at 599.

157. *Id.*

158. LANGBEIN, *supra* note 19, at 69. It is not entirely clear why the German courts, with their preference for free evaluation of all evidence, do not admit purportedly coerced statements along with evidence of coercion mitigating the credibility of the statements. The rule is detailed in StPO § 136(a)(3).

159. Sv. art. 29(1) (Neth.) (Code of Criminal Procedure), *cited in* Pieck, *supra* note 2, at 585.

160. Pieck, *supra* note 2, at 586.

161. Sv. art. 27.

162. Pieck, *supra* note 2, at 586.

Compared to other civil law jurisdictions, the Dutch system takes a much less rigorous stance in protecting this codified right of an accused. The accused is purposefully not cautioned concerning his rights so as not to discourage his cooperation in the truth-finding process.[163] The accused also has a right to consult with counsel, but the police and prosecutor may suspend any such consultation for up to six days.[164]

As in France and Germany, an accused faces several influential factors which may compel him to answer inquiries. First, he may be subject to pre-trial detention. Second, his silence may be subjected to unfavorable comment at trial.[165] Third, although his silence cannot be legally dispositive, it will weigh heavily and can become dispositive when joined by other minimal evidence.[166] An accused's silence cannot, however, be considered an aggravating factor at sentencing.[167]

D. Norway

The Norwegian criminal justice system, although resembling other major civil law jurisdictions in most respects, has a few interesting idiosyncrasies. As in Germany, a suspect can be held overnight without being charged, but the police are not required to caution him concerning his rights.[168] In practice, Norwegian police may generally caution a suspect that his *silence*, not his statements, can be used against him at trial.[169] Under the Criminal Code, an accused is under no duty to make a statement, but if he chooses to make one, he must tell the truth, if he can do so without exposing himself or his family to danger of punishment

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163. *Id.* at 597 (asserting that the theory underlying this deliberate omission of cautions is that an innocent person will remain silent because he simply does not know the details of a crime he did not commit, whereas with a guilty person, the very act of advising will suggest to him that he not cooperate in the ascertainment of his own guilt).

164. *Id.* at 597.

165. *Id.* at 600.

166. *Id.* at 599-600. Police may detain suspects for 48 hours. Prosecutors may then detain suspects for an additional 48 hours. With a court order, suspects may be detained for up to 110 days. DAVID DOWNES, CONTRACTS IN TOLERANCE 14 (1988).

167. Pieck, *supra* note 2, at 600.

168. Anders Bratholm, *Norway*, *in* POLICE POWER AND INDIVIDUAL FREEDOM 211, 212 (Claude R. Sowle ed., 1962).

169. *Id.* at 211.

or the loss of the respect of his fellow citizens.[170] There is, however, no legal penalty for perjury.[171]

The Norwegian Criminal Procedure Act prohibits police from extracting incriminating statements by the exertion of undue pressure,[172] but offers no guidelines concerning what methods constitute undue pressure.[173] Although written confessions are not admitted into evidence, a police officer may review the confession and testify as to those statements written in his presence.[174] The accused has the right to consult counsel at the earliest stages of the criminal process, but in practice, this right is seldom respected until after the initial judicial appearance.[175]

E. Japan

The Japanese criminal law joined the circle of codified civil law jurisdictions during the late 19th century after the Meiji Restoration.[176] Initially, the traditional elements of torture and the *requirement* of a confession for conviction were retained.[177] Under European influence, the

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170. Criminal Code of 1902 §§ 167, 333 (1902) (Nor.), *cited in* Williams, *supra* note 69, at 211.

171. Bratholm, *supra* note 168, at 211.

172. Criminal Procedure Act §§ 256-258 (1887) (Nor.).

173. Bratholm, *supra* note 168, at 211.

174. *Id.*

175. *Id.* at 211, 212.

176. Williams, *supra* note 69, at 269. As a part of the rapid modernization program undertaken after the collapse of the Tokagawa shogunate, the Japanese adopted new criminal procedure and penal codes based on the French model. B.J. George, Jr., *Rights of the Criminally Accused*, 53 LAW & CONTEMP. PROB. 71, 73 (1990). For a detailed history of the Meiji criminal law reforms, see PAUL CH'EN, THE FORMATION OF THE EARLY MEIJI LEGAL ORDER 31-79 (1981). *See also* GEORGE BECKMAN, THE MAKING OF THE MEIJI CONSTITUTION (1957).

177. Haruo Abe, *Japan*, *in* POLICE POWER AND INDIVIDUAL FREEDOM 268, 269 (Claude R. Sowle ed., 1962). The Meiji government originally continued the use of torture, with certain restrictions; for example, no one under fifteen nor over seventy could be tortured. PAUL HENG-CHAO CHEN, THE FORMATION OF THE EARLY MEIJI LEGAL ORDER 65 (London Oriental Series Vol. 35, 1981). By happenstance, the European jurist Boissonade de Fontarabie, acting as a government advisor on legal reform, witnessed the torture of a suspect and immediately pressed the Ministry of Justice to abolish all torture. Official torture had all but ceased by 1879 and was officially abolished in 1882. *Id.* at 67.

Japanese abandoned these practices in 1879 and adopted a system whereby convictions are based solely upon the evaluation of evidence.[178]

Although guaranteed by the post-war Japanese constitution,[179] Japanese have no historical precedents (other than the wholly artificial imposition of the European concept in 1879) for a privilege against self-incrimination. Indeed, before the 1879 reforms, self-incrimination was encouraged in the harshest form: by torture. It is not surprising then that Japanese law enforcement has traditionally been quite hostile to the privilege.[180] Although required to advise suspects of their right to silence prior to interrogation, this is usually no more extensive than a "reluctantly murmur[ed] . . . prototype phrase: 'You don't have to answer, if you don't want to.'"[181]

Japanese police may detain and interrogate a suspect for forty-eight hours without approval from a prosecutor or review by a magistrate.[182] Upon a showing of probable cause to a magistrate, a suspect can be detained for ten days; those accused of serious crimes may be held for an additional ten days.[183] Extended detention is the rule, resulting primarily from the police and prosecutors' great preference for confessions over any other form of evidence.[184] Additionally, detained suspects have no access to bail, since they have not yet been charged.[185]

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178. Abe, *supra* note 177, at 269.

179. Article 38 reads: "No person shall be compelled to testify against himself. No confession shall be admitted in evidence if made under compulsion, torture or threat, or after prolonged arrest or detention. No person shall be convicted or punished in cases where the only proof against him is his own confession." KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION 308 (1991).

180. Abe, *supra* note 177, at 270.

181. *Id.* Although constitutionally mandated, the right to silence is implemented through the Code of Criminal Procedure, art. 311(1). George, *supra* note 176, at 103 n.288. Professor Dando points out that the voluntariness of a custodial confession generally turns on the interpretation of "prolonged detention." SHIGEMITSU DANDO, JAPANESE LAW OF CRIMINAL PROCEDURE 197 (B.J. George, Jr. trans., 1965).

182. DANDO, *supra* note 181, at 205.

183. George, *supra* note 176, at 88-89.

184. *See generally* Abe, *supra* note 177, at 206.

185. *Id.* Apparently, it is not at all uncommon for people who are either innocent or not prosecutable to be detained for long periods. In 1958, for example, of 113,065 persons held for 5 to 10 days before being released or formally charged, and 40,203 were never prosecuted. *Id.* This represents a "miss" rate of over 35%. *Id.*

During detention, suspects generally have access to counsel, but this right is subject to the "designation authority" of prosecutors and police.[186] This authority, amounting to time and place restrictions for suspect-counsel consultation, is systematically used to severely limit a suspect's access to his counsel to two or three 15-minute interviews during a ten-day detention.[187]

In theory, any statements made after the expiration of the permissible detention period are barred from admission at trial.[188] In practice, prosecutors have seldom, if ever, attempted to admit such statements, so the question is essentially moot.[189] Even total denial of access to counsel extended beyond the prescribed period does not necessarily lead to exclusion, since confessions made after complete denial of counsel have been admitted.[190]

F. Other Civil Law Jurisdictions

Although sometimes viewed as a distinct form, socialist jurisdictions are generally codified civil law jurisdictions with peculiarly socialist substantive law. Many of these jurisdictions recognize an accused's right to silence. In Russia, as in Germany, "[a]n acknowledgement of guilt by the accused may become the basis for an accusation only if acknowledgement is confirmed by the totality of the evidence in the case."[191]

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186. *Id.* at 208. "The legal dichotomy between suspects and accused persons . . . is critical: the constitutional right to counsel in Japan governs only after the institution of public prosecution. Before that time, the claim to counsel is purely statutory under the Code of Criminal Procedure." George, *supra* note 176, at 96-97.

187. Abe, *supra* note 177, at 208-09. Since a suspect may be held for his entire detention (up to 20 days or more) in a *police* detention cell, many allegations of abuse of detainees' rights have arisen as a result. George, *supra* note 176, at 89-90 n.150.

188. Abe, *supra* note 177, at 210. If a confession is made *after* an unduly long detention, it may still be admitted since a long enough lapse between the detention and the confession can eliminate the "significant effects" of the detention. DANDO, *supra* note 181, at 196.

189. Abe, *supra* note 177, at 210.

190. DANDO, *supra* note 181, at 196. Professor Dando states, regarding exclusion, "We probably should not make use of the Anglo-American evidence law doctrines on the point in their present form." DANDO, *supra* note 181, at 197.

191. UPK RSFSR art. 77, *cited in* INGRAHAM, *supra* note 14, at 80 (limited to the Russian Republic, but representative of similar provisions in the codes of criminal procedure in other former-Soviet republics). An admittedly biased contrary view of the

In the People's Republic of China, the accused enjoys no explicit right to silence; the Criminal Procedure Law states that "[t]he defendant *shall* answer the questions put by the investigation personnel according to the facts."[192] Somewhat paradoxically, the police are specifically prohibited from using coercive methods: "[t]he gathering of evidence by threat, enticement, deceit, or other unlawful methods are strictly prohibited."[193]

VI. SELF-INCRIMINATION IN RELIGIOUS AND TRADITIONAL JURISDICTIONS

A. Islamic Law

The *Shari'a*, Islamic sacred law derived from divine inspiration,[194] offers protection of an accused's privilege against self-incrimination apparently more expansive than even the *per se* exclusions of *Miranda*. Under the *Shari'a*, an accused has an absolute right to remain silent and is never placed under oath.[195] Generally, confessions or incriminating statements obtained through coercion, trickery, or torture are not admitted in evidence,[196] although some Islamic jurists would disagree.[197]

Russian privilege against self-incrimination can be found in Natan Sharansky's political biography. NATAN SHARANSKY, FEAR NO EVIL 3-228 (1988).

192. Law on Criminal Procedure art. 64, *cited in* INGRAHAM, *supra* note 14, at 81 (emphasis in original).

193. Law on Criminal Procedure art. 32. The import of this article is apparently honored more in the breach, as the events of 1989 in Tiananmen Square sadly demonstrated.

194. The *Shari'a*, literally "the way" or the "straight path," is composed of the Koran, the words and acts of the Prophet Mohammed (the *hadith*), traditional pre-Islamic law, and, to a greater or lesser degree depending on the country, a kind of common law composed of analogy and scholarly consensus.

The only major jurisdiction still adhering to a relatively pure form of *Shari'a* is Saudi Arabia. Islamic criminal law, as embodied within the *Shari'a*, is applied in Iran, the Sudan, Afghanistan, Oman, and Yemen. SAYED H. AMIN, ISLAMIC LAW IN THE CONTEMPORARY WORLD 21 (1985).

195. M. CHERIF BASSIOUNI, ED., THE ISLAMIC CRIMINAL JUSTICE SYSTEM 106 (1981).

196. *Id.* at 106. *See also* Richter H. Moore, Jr., *Courts, Law, Justice, and Criminal Trials in Saudi Arabia*, 11 INT'L J. COMP. & APPLIED CRIM. JUST. 61, 66 (1984).

197. There is some reference in the Koran to incidents where the Prophet utilized trickery to extract criminal confessions from a few hapless followers. BASSIOUNI, *supra* note 195, at 107.

The *Shari'a* is quite specific concerning the requirements for admissibility at trial of a confession by the accused. First, the confession must be a product of the accused's "free and conscious will;" judges are not permitted to encourage confessions. Second, the confession must be unequivocal, with explicit details of the crime included.[198] Third, the confession must be made in a judicial forum, not in police custody.[199] Fourth, the confession must be corroborated by other evidence or circumstances.[200] Finally, the confession must be repeated before a judicial tribunal a number of times equal to the number of witnesses who would be required to convict the accused in the absence of his confession.[201]

Confessions are admitted at trial, if made in accordance with the above criteria, but the confession can only implicate the confessor, not any co-defendants or accomplices.[202] The confession is only admissible, however, if the accused confesses to all elements of a crime. If this requirement is not met, the confession will not be considered in any way.[203] The accused is also afforded an unlimited right to retract a confession, literally right up to the time the axe falls.[204]

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198. *Id.*

199. *Id.*

200. *Id.* at 119-20.

201. *Id.* (e.g., four witnesses are needed to convict for adultery, one for defamation). This requirement for multiple confessions applies only to *hudud* crimes (those crimes specifically detailed in the Koran) and is related to the quest for nearly absolute assurance of guilt before a *hudud* punishment is meted out. Moore, *supra* note 196, at 65. The most notorious *hudud* crimes and punishments are amputation for theft and stoning for adultery. There are only seven *hudud* crimes.

The *Shari'a* does provide incentives for self-incrimination by offering an offender complete forbearance of punishment if he comes forward, confesses, and repents his crime before he is apprehended or formally accused. Sam H. Souryal, *The Role of the Shari'a Law in Determining Criminality in Saudi Arabia*, 12 INT'L J. COMP. & APPLIED CRIM. JUST. 1, 5 (1985). For a detailed description of the accused's procedural rights under Saudi criminal law, see Jeffrey K. Walker, *The Rights of the Accused in Saudi Criminal Procedure*, 15 LOY. L.A. INT'L & COMP. L.J. 863 (1993).

202. BASSIOUNI, *supra* note 195, at 120 (noting that a man's confession to adultery would not impugn guilt to his nonmarital female partner).

203. *Id.*

204. *Id.* at 120. If the accused retracts his confession after sentencing, punishment is immediately suspended and the matter is either retried or dismissed. Moore, *supra* note 196, at 65.

B. Ethiopia

Prior to the overthrow of Haile Selassie in 1974, Ethiopian law was largely based on the customary law of the Coptic Christian majority. Concerning self-incrimination, the Ethiopian criminal law generally compelled an accused to forego silence.[205] This was largely due to a blurring of the boundaries between what European law views as criminal and civil litigation. The prosecution of a crime was carried out by an accuser, who may or may not have been the victim. The accuser was permitted to call witnesses, whereas the accused was only able to refute their testimony through his own testimony.[206] Absent proof of guilt, the accuser was allowed to request a decisory oath, heavily steeped in Coptic Christian tradition.[207]

Another traditional truth-finding procedure resulted in compulsion of a guilty accused to convict himself from his own mouth. In the *affersata*, the entire community where the crime occurred would be sequestered, with no one allowed to leave or, in some instances eat, until the guilty party was offered up for trial.[208]

VII. INSURING THE PRIVILEGE AGAINST SELF-INCRIMINATION: A COMPARATIVE VIEW

A case may be made questioning whether *any* right to silence, qualified or unlimited, is really in the best interest of either a Due Process or Crime Control view of criminal justice.[209] Since nearly every major legal system recognizes some form of the privilege, one may assume that it is here to stay for the foreseeable future. But how we justify the privilege may not at all dovetail with what we expect the privilege to do for us as a society, and the experiences of some foreign jurisdictions may lend insight into our own treatment of the privilege.

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205. Stanley Z. Fisher, *Traditional Criminal Procedure in Ethiopia*, 19 AM. J. CRIM. L. 709, 716-725 (1971).

206. *Id.* at 724-28.

207. *Id.* at 730.

208. An accused may have preferred the *affersata* over some of the other forms of truth-determination: divination, ordeal, and a form of curse authorized by the Coptic Church. *Id.* at 734-39.

209. *See, e.g.*, David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1963 (1986).

The fundamental analytical conundrum we face in borrowing from other jurisdictions, aside from questions of cultural specificity, is that the American criminal justice system apparently does not really know what it wants from the privilege against of self-incrimination. Returning to Packer's Crime Control and Due Process models, it is perhaps apparent that *Miranda* was designed as another hurdle in the Due Process obstacle course. Indeed, the majority opinion in *Miranda* is replete with references to the individual's "right to a private enclave,"[210] to buffering "the circumstances surrounding in-custody interrogation,"[211] or to shifting to the government the burden "to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination."[212]

Since the earliest days of *Miranda*, there has been a steady erosion to the procedural protections of the *per se* exclusionary rule.[213] Regardless of the original intent of the Warren Court, *Miranda* has not lived up to its initial promise.

What may very well have happened to *Miranda* is a kind of untoward transformation into a device for getting just as many coerced incriminating statements into court as were admitted under the antecedent voluntariness standard. Thus, the *per se* rule may have, like the serpent eating its own tail, turned upon itself. This has occurred in two ways. First, if the environment of the custodial interrogation is, as the *Miranda* majority would assert, inherently coercive, all that has effectively been done is to ratchet up the level of coercion one notch. Instead of *statements* being coerced (and then justified in evidence under a voluntariness standard), a *waiver* of rights becomes the coerced element, with all subsequent (coerced or otherwise) incriminating statements admitted under the *per se* rule. The likelihood of such a paradoxical result is only increased by the almost mantra-like quality taken on by the recitation of *Miranda* rights;

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210. Miranda v. Arizona, 384 U.S. 436, 460 (1966) (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (1956) (Frank, J., dissenting)).

211. *Miranda*, 384 U.S. at 470.

212. *Id.* at 475 (quoting Escobedo v. Illiniois, 378 U.S. 478, 490 n.14 (1964)).

213. *See, e.g.*, Harris v. New York, 401 U.S. 222 (1971) (holding that *Miranda*-defective statements could be admitted to impeach defendant's testimony); Jenkins v. Anderson, 447 U.S. 231 (1980) (holding that prearrest silence may be used for impeachment purposes); Michigan v. Tucker, 417 U.S. 433 (1974) (adopting a "good faith" exception to per se exclusion after incomplete *Miranda* warnings). *But see* Edwards v. Arizona, 451 U.S. 477 (1981) (holding that statements resulting from subsequent questioning without presence of counsel after defendant had asserted right to counsel were per se inadmissible).

surely there are few American teenagers, steeped in the cops-and-robbers culture of American television, who could not rattle off a *Miranda* warning on demand. For police, the warnings have become a formality of interrogation, mere form rather than substance.[214] Second, as Justice Harlan pointed out in his *Miranda* dissent,[215] the *per se* exclusionary rule does absolutely nothing to curtail the actions of unscrupulous police officers who would have dissembled concerning voluntariness under the old test. If anything, *Miranda* makes the dishonest cop's job easier: now he would only have to fabricate a waiver of rights, rather than concoct some convincing indicia of voluntariness.

What comes of this divergence between the theory and practice of *Miranda*? It may have, since 1967, become an unwitting yet effective weapon in the Crime Control model arsenal. If, as Packer states, the purely distilled essence of the Crime Control model is a two-step procedure of early culling of innocent persons followed by a guilty plea, then *Miranda* may go a long way in assisting with the second step. The cost of this assistance may, however, be borne largely by the first step.

What then can be learned, borrowed, and applied from foreign jurisdictions concerning the privilege against self-incrimination? Again, we must first define the vantage point at which we view the privilege.

A. Miranda *as a Tool of the Due Process Model?*

If our goal is to strengthen the Due Process model through staunch protections of the right to silence, then the United States would stand something like this in relation to the rest of the world, assuming that the

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214. The very police interrogation manual that so outraged the *Miranda* majority has not been rendered obsolete. Instead, the authors have simply added a new section on dealing with a suspect's *Miranda* rights as a stumbling block to effective interrogation. FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSION (2d ed. 1967). Studies in the United States have shown that confessions were seen by police and prosecutors as necessary for convictions in anywhere from 12-21% of cases. *New Haven Project*, *supra* note 49, at 1519-1648; Richard H. Seeburger & R. Stanton Wettick, Jr., 29 U. PITT. L. REV. 1, 1-26 (1967). Compare this to England, where admissible confessions are presumably easier to come by under the voluntariness standard and the nonbinding Judges' Rules: a recent study by the British section of the International Commission of Jurists reports that if all custodial confessions were excluded from evidence, only about 6% of convictions would be affected. Horsnell, *Police Malpractices 'Made Impossible Under Today's Laws,'* THE TIMES (London), Oct. 21, 1989, §1, at 2.

215. *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting).

Miranda exclusionary rule could in fact be made to work as originally intended:

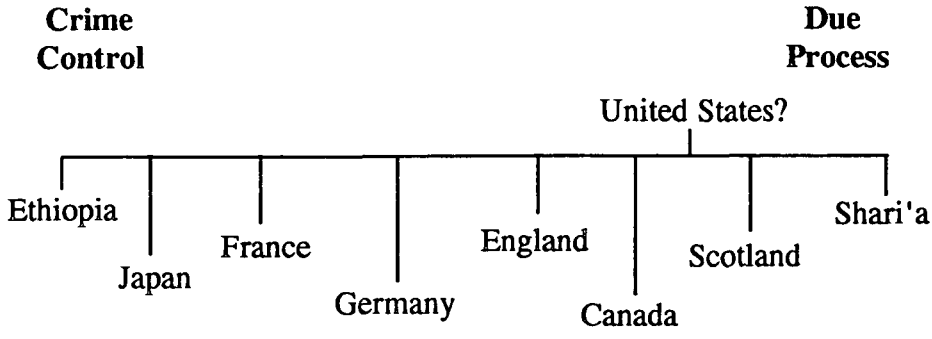

Figure 1

The extremes, Ethiopia and Japan (Crime Control) and India and the *Shari'a* (Due Process), only rest at the poles when viewed through Western eyes.[216] Ethiopia (that is, pre-revolutionary Ethiopia, as discussed *supra*) represents the most Crime Control-oriented view of self-incrimination for two reasons. First, a defendant *must* speak at trial, since he is not permitted to call any witnesses on his own behalf; any refutation of the case against him must be from his own mouth.

Second, the system of *affersata* places extremely coercive, community-wide pressure upon an individual, guilty or otherwise, to admit responsibility for a crime. Japan is listed close to Ethiopia because, although maintaining Western-imposed constitutional guarantees against self-incrimination, both practice and historical precedents show a quite marked disdain among law enforcement officials for the privilege.

The Islamic *Shari'a* rests at the opposite extreme. The *Shari'a* maintains a complete exclusion of extra-judicial statements, adding more Due Process obstacles through elaborate procedures for both making and

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216. It may be an almost cavalier overgeneralization to place these various systems along a Western, adversarial continuum with no regard to the specific cultural milieu of each. This said, the intent is to see what Americans may borrow from other systems; so perhaps the imposition of an admittedly American ethnocentric interpretive model is not entirely without merit.

refuting confessions as well as bars to incrimination of co-defendants resulting from a confession.

In the center lies the familiar groupings of the civil and common law countries. The civilian jurisdictions lie toward the Crime Control end of the continuum for the simple reason that they share the general characteristic of guaranteeing an absolute right to silence, but exerting a kind of *de facto* compulsion for the defendant to testify through the civil law's preference for a free evaluation of evidence coupled with expansive relevancy criteria. What separates the civil law jurisdictions tends to be specific procedural idiosyncrasies, such as the amount of time a suspect may be held *incommunicado*[217] or when and of what rights a suspect must be advised during the investigative process.[218] Likewise, the common law jurisdictions lie closer to the Due Process end than the civilians simply because the adversarial system, by its general nature, places many more obstacles between the suspect, the state, and the successful resolution of the criminal process (i.e., elaborate rules of admissibility, relevancy, and hearsay). The common law jurisdictions, too, are separated by specific procedural quirks much like those separating the civilians.[219]

And what of the United States under an effective *Miranda* regime? Although apparently pure Due Process, that would be a too-hasty generalization. The problem with *Miranda*, even if applied in exactly the manner foreseen by the majority, is that it does not define just what it is about. The majority opinion blurs the distinction between prevention of police coercion and preclusion of self-incriminating statements as evidence, thereby wallowing in a kind of jurisprudential schizophrenia. It is quite

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217. For example, the Germans only allow a suspect to be held overnight, a maximum of something less than 24 hours. The French can detain a suspect for up to 48 hours, depending on the circumstances.

218. For example, the Germans require that a suspect be informed almost immediately of the charges under investigation, his right to silence, and his right to counsel. The Dutch, on the other hand, purposefully refrain from advising a suspect of his rights, lest the knowledge somehow interfere with the fact-finding process. The Norwegians inform suspects that their *silence*, not their statements, may be used against them at trial.

219. The placement of England and Canada is really a bit of a coin toss, but Canada belongs more toward the Due Process pole because of the Charter of Rights and the Canadian Supreme Court's power of judicial review. Although not yet clear what long-term effects these two factors will have, they represent the structural makings of some possibly significant future movement. Scotland is placed to the right of Canada and England because of the peculiar burden placed on the Crown in criminal prosecutions, as well as the Scots' traditional distrust of all law enforcement institutions.

possible that the *Miranda* majority sought both, and if so the method chosen was less than satisfactory. If the aim is to prevent coercion by law enforcement officials, then something may be learned from the jurisdictions left of the tentative United States position. The express intent of England and Canada is to prevent coercive methods by the police. Both countries apply a voluntariness standard for incriminating statements, scrutinizing the specific circumstances surrounding the statements. In the United States, applying this standard would return us to the pre-*Miranda* due process voluntariness approach; no doubt much to the satisfaction of the *Miranda* dissenters. On the other hand, if the aim is to prevent suspects from convicting themselves from their own mouths, an eventuality philosophically anathema to adversarial criminal justice, then the methods of those to the right of the United States, such as the *Shari'a*, may instruct us. If we are truly dedicated to adversarial criminal justice, then the logical extension of this dedication would lead us to something like the Islamic system of complete exclusion of all non-judicial statements coupled with an absolute right to withdraw a confession at any time during the judicial process.

B. Miranda *as a Tool of the Crime Control Model?*

Miranda in theory and *Miranda* in practice have turned out to be quite the opposite. The actual position of the United States along the self-incrimination continuum is probably more like the following:

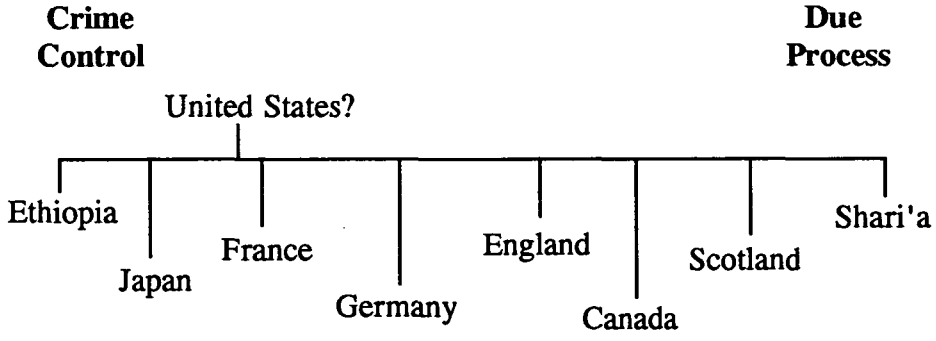

Figure 2

What has happened in practice is that the U.S. treatment of the privilege against self-incrimination has slid to the left. This is the result of two factors. First, by discarding the due process voluntariness standard, courts no longer consider the circumstances surrounding an incriminating statement, only whether the defendant was advised of his rights and made a knowing waiver. Second, by imbuing the recitation and waiver of rights with a kind of magical quality, the American courts have eviscerated the *Miranda per se* exclusionary rule. Whereas only *clever* dishonest police could get by the voluntariness standard, *stupid* dishonest police can circumvent by *Miranda* by asserting a believable waiver. A further factor pushing the U.S. farther left along the continuum is the increasing reliance of the American criminal justice system on the bargained guilty plea. Such a plea is, by its very nature, the ultimate self-incriminating statement. American courts, unlike their civilian sister jurisdictions, accept guilty pleas without any investigation into its veracity; truth, in essence, is not the issue.

Viewed in this light, the United States would rest somewhere near France on the continuum. Although maintaining, like the civilian jurisdictions, an absolute right to silence, the United States does not have direct remedial mechanisms to correct police abuses, as do the French. The acceptance of bargained-for guilty pleas without any inquiry reinforces the position of the United States to the left of both France and Germany. This seemingly inexorable leftward drift along the Crime Control-Due Process continuum halts well right of Japan, since the United States requires a thorough rights advisory, does not allow a suspect to be warned *against* remaining silent, and harbors a traditional Lockean emphasis on the autonomy of the individual *vis à vis* the state. It almost appears that the American judicial system, regardless of the supposed constraints of *Miranda*, would be hard pressed to proceed any further toward a more Crime Control-oriented view of self-incrimination and still remain within even a very broad reading of the Constitution.

What the United States might learn, absorb, and borrow from other jurisdictions is always circumscribed to a greater or lesser extent, by the constraints of the Bill of Rights. The most salient feature of these constraints, at least in the context of self-incrimination, is the Fifth Amendment. Oddly, all Western criminal justice systems have a similar guarantee against being "compelled in any criminal case to be a witness against himself." In Germany, France, and their progeny, a trial begins with an examination of the accused, but at no time is the accused's *right* to silence questioned; he may refuse to answer any and all inquiries.

Some systems allow the prosecution to comment on this silence, others do not.

A second oddity of the presumed constitutional constraints on tinkering with self-incrimination is that some of the procedural devices that most discourage a defendant's participation in his own trial are found nowhere in the text of the Constitution. The requirement that a defendant testify under oath or not at all is not a constitutional requirement. Nor is the attendant crime of criminal perjury. Although coming to us on faded parchment through the common law, both the effectiveness and necessity of oath-taking is seriously in question today. Judge Frankel would likely agree; this is just another procedural hulk in the course of truth-finding.

Finally, there is no mention of the phrase *adversarial system of criminal justice* anywhere within the text of the Constitution. Many would argue that adversarial criminal justice is implicitly written between the lines of the Bill of Rights. Others could argue that, aligning themselves with Thomas Jefferson's view that constitutions should perhaps be rewritten each generation, the great strength of the United States Constitution lies in its flexibility in the face of changing circumstances, its uncanny ability to expand without snapping. Although an accused must, under the Sixth Amendment, be confronted by all witnesses against him, this does not necessitate set piece examination and cross-examination by wholly partisan counsel. Although juries are made the supreme trier of fact by the Seventh Amendment, there is no reason that juries must be given free reign to nullify substantive law rather than be asked to respond to interrogatories of fact.

The perceived superiority of the adversarial system may be the most widely held and, at the same time, least logically persuasive justification for the preservation of the traditional devices surrounding the privilege against self-incrimination. This argument, however, is really mere tautology. Like Edmund Burke's defense of the 18th century English constitution,[220] saying something is best because it is what history, through design or happenstance, has saddled us with, is wholly unpersuasive. This assertion is belied by the fact that the vast majority of the industrialized world's population gets by (and apparently quite well) under some amended version of an inquisitorial system of criminal justice.

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220. *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1790).