

INTERROGATION AND SILENCE: A COMPARATIVE STUDY

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This article examines interrogation practices in detail in three systems: the American, the English (and Welsh), and the Canadian while also discussing rules from various other countries. It considers when the Miranda-type warnings (required in all three systems) must be given and when suspects will be deemed to have waived their rights. This article further discusses how reliability and voluntariness of confession is assured. Finally, a particular emphasis is placed on the issue of when a suspect's silence during interrogation may be used against him in court. The article concludes that American courts have not done enough to ensure reliability and voluntariness. In addition, the article further argues that the English approach whereby a suspect is warned that silence during interrogation may be used against him in court, and then it is so used, is fair. The article explains why this approach is not inconsistent with *Doyle v. Ohio*, 426 U.S. 610 (1976) which bans such use based on the current Miranda warnings. It suggests that a fifth warning as to use in court be added to the Miranda warnings.

INTRODUCTION

In 1966, the United States Supreme Court created a sensation with its decision in *Miranda v. Arizona*.¹ *Miranda* required that the police give suspects the familiar four warnings as to the rights to silence, counsel, etc., prior to any "custodial interrogation."² Initially, the political reaction to *Miranda* in the United States (U.S.) was strong. At a time of rising crime rates, many people complained that the Supreme Court

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¹ 384 U.S. 436 (1966).

² *Id.* at 437, 498-99.

was “handcuffing” the police.³ In 1968, Congress passed a statute attempting to overrule *Miranda*, an effort that the Supreme Court condemned as unconstitutional in 2000.⁴

Internationally, *Miranda* had a strong impact as well. A number of countries, including most of Western Europe,⁵ cited *Miranda* and adopted *Miranda*-type warnings as a requirement for their police to follow. Thus, the United States was in the vanguard of international criminal procedure reform.⁶ In 1972, however, Republican appointees attained a majority in the United States Supreme Court,⁷ a majority that they have not relinquished to this day. While the Supreme Court has been by no means one-sided in its criminal procedure decisions, the issue of further reform of police interrogation has been largely a dead letter. Since 1972, the Supreme Court has never struck down a station-house confession as being involuntary.⁸ In 1981, the Court held that if a suspect asked for counsel, interrogation must cease (though not that counsel must actually be provided).⁹ Moreover, while upholding the constitution-

³ For a brief discussion of the political reaction to *Miranda*, see CRAIG BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* 28-30 (1993). For a more in-depth discussion see, FRED GRAHAM, *THE SELF INFLICTED WOUND* (1970).

⁴ The Omnibus Crime Control Act of 1968 was declared unconstitutional in *Dickerson v. United States*, 530 U.S. 428 (2000).

⁵ France and Belgium, however, do not require a warning of the right to silence, though France tried it for a few years. Richard S. Frase, *France*, in *CRIMINAL PROCEDURE: A WORLDWIDE STUDY* 201, 216 n.107 (Craig Bradley ed., 2d ed. 2007) [hereinafter *WORLDWIDE STUDY*]. Jan Fermon et al., *The Investigative Stage of the Criminal Process in Belgium*, in *SUSPECTS IN EUROPE: PROCEDURAL RIGHTS AT THE INVESTIGATIVE STAGE OF THE CRIMINAL PROCESS IN THE EUROPEAN UNION* 29, 44 (Ed Cape et al. eds., 2007) [hereinafter *SUSPECTS IN EUROPE*].

⁶ Although the “Judges Rules” in England had long required warnings as to right to silence and that anything said might be taken down and used as evidence. See also, Maximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617 (2008) (discussing the various influences on Latin American criminal procedure reform).

⁷ This occurred when Republican Lewis Powell replaced Democrat Hugo Black.

⁸ The only confessions that have been considered involuntary by the Court involve unusual circumstances. In *Mincey v. Arizona*, 437 U.S. 385 (1978), the Court struck down a confession given in the intensive care ward after the suspect had invoked his right to counsel. In *Arizona v. Fulminante*, 499 U.S. 279 (1991), the Court excluded a confession made in prison to an informant who told the suspect that he would protect him from the other inmates only if he told the truth about the crime. However, in *Miller v. Fenton*, 474 U.S. 104 (1985), the Court did recognize that, on a petition for habeas corpus, federal courts should not be bound by a state court finding that a confession was “voluntary.” *Id.* at 112. Moreover, “involuntary” confessions include both those where the “police conduct was inherently coercive” and those where “the confession is unlikely to have been the product of a free and rational will.” *Id.* at 110. However, on remand, Miller’s confession was declared voluntary by the Court of Appeals. See *Miller v. Fenton*, 796 F.2d 598 (3d Cir. 1986).

⁹ *Edwards v. Arizona*, 451 U.S. 477 (1981). They then undercut *Edwards* substantially in 1983 by holding that a suspect’s asking “what is going to happen to me now” was enough to

nality of the *Miranda* requirement,¹⁰ the Court has weakened *Miranda* in a number of ways, most notably in refusing to apply the “fruit of the poisonous tree” rule to *Miranda* violations.¹¹

A particularly striking feature of post-*Miranda* interrogation law is that the Court has focused almost exclusively on the requirements surrounding the warnings themselves. What is custody?¹² What is interrogation?¹³ What happens if the defendant asserts his right to silence?¹⁴ To counsel?¹⁵

The Supreme Court has paid little attention to what happens after the warnings are given. How long may an interrogation last?¹⁶ Must the suspect be given breaks for food and water? What techniques may the police employ to obtain a confession?¹⁷ Should interrogations be audio or videotaped? While these issues have been the subject of extensive academic inquiry¹⁸ and even some state legislation,¹⁹ the constitutional

constitute “initiation” of discussion of the crime by the suspect and to allow interrogation to resume. *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983) (plurality opinion).

¹⁰ See, e.g., *Dickerson v. United States*, 530 U.S. 428 (2000).

¹¹ See *Oregon v. Elstad*, 470 U.S. 298 (1985); *United States v. Patane*, 542 U.S. 630 (2004). For a strong critique of this refusal, see Yale Kamisar, *Dickerson v. United States: The Case That Disappointed Miranda's Critics—and Then Its Supporters*, in *THE REHNQUIST LEGACY* 106 (Craig M. Bradley, ed. 2006).

¹² See, e.g., *Oregon v. Mathiason*, 429 U.S. 492 (1977).

¹³ See, e.g., *Rhode Island v. Innis*, 446 U.S. 291 (1980).

¹⁴ See, e.g., *Michigan v. Mosley*, 423 U.S. 96 (1975).

¹⁵ See, e.g., *Edwards v. Arizona*, 451 U.S. 477 (1981).

¹⁶ The Supreme Court has indirectly limited the total length of time a suspect may be held for interrogation by requiring arraignment within 48 hours of arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 70-71 (1991). At this time, counsel must be appointed. *Rothgerry v. Gillespie County*, 128 S.Ct. 2578, 2584, 2593 (2008). The Court has suggested that further interrogation of an arraigned defendant in the absence of counsel is impermissible. *Patterson v. Illinois*, 487 U.S. 285, 296 n. 9 (1988).

¹⁷ *Miranda* itself condemned a number of interrogation techniques. 384 U.S. 436, 448-454 (1966). These included the so-called “Mutt and Jeff” (good cop-bad cop) and “reverse lineup” techniques. However, none of these methods was actually declared illegal in *Miranda* and they remain standard interrogation tactics today. See, e.g., FRED E. INBAU ET AL., *CRIMINAL INTERROGATION AND CONFESSIONS* 151-53, 312-13 (3d ed. 1986).

¹⁸ For example, beginning as early as 1961, many commentators have urged that police interrogations be tape-recorded, and more recently, videotaped. See, e.g., Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L. & POLICE SCI. 21, 44-45 (1961). Compare Paul Cassell, *Miranda's Social Costs: An Empirical Assessment*, 90 NW. U. L. REV. 387, 486 (1996), with Stephen Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 556-60 (1996). The authors disagreed strongly about the efficacy of *Miranda*, but agreed that interrogations should be videotaped.

¹⁹ Largely as a result of well-publicized reversal of convictions due to DNA analysis, forty states and the federal government now provide statutory access to DNA testing. The Innocent Project, Access to DNA Testing, <http://www.innocenceproject.org/fix/DNA-Testing-Access.php> (last vi-

status of such questions is as unknown today as it was in 1966. For example, the Supreme Court has not established—and lower courts are divided—as to what promises police may give to a suspect to induce him to confess and courts also remain undecided as to what extent the police may lie to a suspect.²⁰

The “states as laboratories” approach (i.e., the notion that the states should be allowed to experiment with various approaches to protecting rights), often cited by conservatives as an excuse for doing nothing at the federal level, is simply unsatisfactory when it comes to safeguarding federally guaranteed rights.²¹ There must be a uniform federal standard. States most in need of federal direction will be the least likely to develop satisfactory standards of their own.

The Supreme Court’s Olympian disregard of what is happening in the interrogation room is unjustified. False confessions continue to plague our criminal justice system. Of over 200 convictions that have been reversed due to DNA analysis by the Innocence Project, 25 percent have been based, at least in part, on false confessions or admissions.²² This percentage most likely represents only a small proportion of all cases based on bad confessions, as most cases are not susceptible to reversal because of DNA analysis.²³ There is no reason to suppose that the rate of false confessions is significantly less in cases where DNA is not availa-

sited Mar. 20, 2009). Moreover, Illinois, Maine, New Mexico, Wisconsin, and the District of Columbia now require the recording of interrogations by statute. State Supreme Courts have taken similar action in Alaska, Maryland, Minnesota, New Hampshire, and New Jersey. Such legislation is pending in twenty other states. The Innocence Project, False Confessions & Recording of Custodial Interrogations, <http://www.innocenceproject.org/Content/314.php> (last visited Mar. 20, 2009).

²⁰ See LAFAYETTE ET AL., CRIMINAL PROCEDURE §6.2(c), at 452-59 (2d ed. 1999).

²¹ E.g., *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (Opinion of Scalia, J. Concurring in the Judgment).

²² The Innocence Project, False Confessions & Recording of Custodial Interrogations, <http://www.innocenceproject.org/Content/314.php> (last visited Feb. 16, 2009). See also Richard Leo & Richard Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429 (1998) (making similar findings after a study of 60 cases of false confessions).

²³ See Steven Drizin & Richard Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004). The authors note that the rate of false confessions found by the Innocence Project as of 2003, was also 25%. *Id.* at 905. Other studies of false confessions have found the rate to be between 14 and 25%. *Id.* at 907. The authors list 125 cases of proven false confessions between 1971 and 2003, but “proven” false confessions must represent a very small percentage of the total.

ble.²⁴ Obviously, the *Miranda* warnings have been ineffective in preventing false confessions.²⁵

However, even though the United States Supreme Court may have remained stagnant in this particular area, other countries have not stopped developing their laws, especially in regards to the provision of counsel upon request. Rather, in some countries, a suspect's right to protection against police overreaching has gone beyond that of the United States. On the other hand, these same countries, particularly England, have shown a greater willingness to allow evidence of the defendant's silence in the face of interrogation to be used at trial than has the United States.²⁶ This article looks to the laws of England and Canada, countries which have among the best developed interrogation laws, as well as the interrogation rules of other countries, for suggestions for possible reforms in the United States.²⁷

In England, counsel is provided on request of the suspect, but with a warning that silence may be used against him/her in court. This article concludes that the English system is a possible alternative approach to interrogation law in the U.S. This article argues that, as in England, the taping of interrogations should be required in the U.S. Additionally, this article concludes that Canada's efforts toward serious inquiry into the voluntariness and reliability of confessions is laudable.

²⁴ Though interrogations may be more aggressive in murder and rape cases where DNA is more likely to be present.

²⁵ See, e.g., William Stuntz, *Miranda's Mistake*, 99 MICH. L. REV. 975 (2001); Richard Leo, *Questioning the Relevance of Miranda in the 21st Century*, 99 MICH. L. REV. 1000 (2001). George Thomas, after studying a large number of confession cases, discussed why this was so: "As long as suspects think they are better off trying to persuade police that they are not guilty, they will continue to talk to police. *Miranda* provides knowledge that it might not be in the suspect's best interest to talk to police. But this knowledge is meaningless as long as suspects are willing to take the chance that it is in their best interest to talk. As that calculation is based on the suspect's entire life telling stories, the *Miranda* Court was naïve if it thought the set of formal warnings could change storytelling behavior. My study suggests that the warnings do not change suspect behavior in any significant way." George Thomas, *Stories about Miranda*, 102 MICH. L. REV. 1959, 2000 (2004).

²⁶ Compare discussion of Canada and England, *infra* note 27, with discussion of *Doyle v. Ohio*, 426 U.S. 610 (1976), *infra* note 78.

²⁷ See Kent Roach, *Canada*, in *WORLDWIDE STUDY*, *supra* note 5, at 75; David J. Feldman, *England and Wales*, in *WORLDWIDE STUDY*, *supra* note 5, at 166.

I. A COMPARATIVE LOOK: CANADA, ENGLAND, AND WALES

A. CANADA

Canada's rules governing searches and seizures seem lax compared to those in America.²⁸ Yet, when it comes to interrogations, in some ways, Canada's rules are more stringent. The 1982 Constitution's Charter of Rights and Freedoms §10, provides that:

Everyone has the right on arrest or detention:

- (a) to be informed promptly of the reasons therefore;
- (b) to retain and instruct counsel without delay and to be informed of that right; and
- (c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.²⁹

Moreover, the Charter declares an exclusionary rule:

[W]here . . . a court concludes that evidence was obtained in a manner that infringed or denied any of the rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.³⁰

Anyone subject to either arrest or detention must be informed of certain rights such as (1) the right to retain and instruct counsel without delay, (2) the availability of legal aid for those who cannot afford a lawyer, and (3) the right to temporary legal advice from duty counsel at the police station, regardless of the suspect's financial status.³¹ Thus, unlike in the United States, a suspect who asks for counsel in Canada actually gets one.

The concept of detention is broad, including for example, a brief five-minute detention in the back of a police car where the police asked

²⁸ See Craig Bradley, *The Emerging International Consensus As to Criminal Procedure Rules*, 14 MICH. J. INT'L L. 171, 195-203 (1993).

²⁹ Part I of the Constitution Act, 1982, § 10, being Schedule B to the *Canada Act 1982*, ch. 11 (U.K.).

³⁰ *Id.* §24(2).

³¹ Kent Roach, *Canada*, in *WORLDWIDE STUDY*, *supra* note 5, at 57, 75-76.

the accused questions.³² However, briefer detentions, that do not involve “significant physical or psychological constraint,” may not require warnings.³³

1. THE SUSPECT’S RIGHTS

In *R v. Orbanski*, the Canadian Supreme Court held that “[t]he s. 10(b) right to counsel, however, is not absolute. It is subject, under s.1 of the *Charter*, ‘to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.’”³⁴ In *Orbanski*, defendants Orbanski and Elias were stopped for suspected drunken driving. The Crown conceded that this was a “detention” for the purposes of the *Charter*. This suggests that defendants should have been informed of their right to counsel; in Orbanski’s case, before being asked to perform sobriety tests and in Elias’s case, before he was asked whether he had been drinking.³⁵

But, the Crown argued that this case created a reasonable exception to the requirement of warnings as to right to counsel “prescribed by law” under § 1 of the *Charter*. The Court agreed that neither common law nor statutory law in Manitoba compelled a driver to perform sobriety tests or to answer police questions about sobriety.³⁶ However, the Court concluded that the police behavior, without warnings, was “implicit” in the traffic laws existing at the time.³⁷ Thus, in Canada, the seemingly broad and explicit warning requirement upon detention is subject, not only to explicit statutory emendation, as the *Charter* provides, but also to a court finding of an “implicit” legal limit. This seems to render the Canadian *Charter* as malleable as its less explicit American cousin. Still, *Orbanski* presents a rather narrow and reasonable exception to the warnings requirement. It might have been resolved less elliptically by a simple finding that this traffic stop did not represent “detention.” This would have been the resolution in the United States where “custody” (i.e., essentially, arrest) is the prerequisite for *Miranda* warnings.³⁸ Still it seems

³² *Id.* at 75, *Id.* at 75, citing *R. v. Elshaw*, [1991] 3 S.C.R. 24 (Can.).

³³ *Id.* at 75, citing *R. v. Mann*, [2004] 3 S.C.R. 59, paras. 19, 22.

³⁴ *R. v. Orbanski*, [2005] S.C.R. 3, 21, 2005 SCC 37 (Can.)

³⁵ *Id.* at 19. They were informed of their right to counsel upon arrest and were given the opportunity to exercise their right before providing breath samples. *Id.*

³⁶ *Id.* at 21.

³⁷ *Id.* at 25.

³⁸ See *Berkemer v. McCarty*, 468 U.S. 420, 429 (1984) (finding that a traffic stop is not “custody” for *Miranda* purposes).

that, during a *Terry*-type stop and frisk, based on “reasonable suspicion” of criminal activity, the warnings requirement would apply in Canada, where it would not in the United States.³⁹

In Canada, after the detainee asks to speak to a lawyer, the police must provide access to a telephone and the relevant telephone numbers. Police “cannot elicit evidence from the detainee until he or she has had a reasonable opportunity to contact a lawyer.”⁴⁰ More importantly, evidence taken in violation of this requirement will generally be excluded on the ground that it affects the fairness of the trial.⁴¹ There are a few exceptions to this principle. These exceptions include: a suspect who did not attempt to contact counsel with reasonable diligence, a suspect who was too drunk to exercise the right, and a suspect who was “rude and obnoxious toward the police.”⁴² Likewise, a lineup must be postponed until counsel is present.⁴³ (Unlike the United States where only lineups “after formal proceedings have begun” require counsel).⁴⁴

In Canada once a suspect has been permitted to consult counsel, he may be interrogated without counsel being present. This remains true even in cases where the accused and/or counsel have indicated a desire not to talk.⁴⁵ However, “the right to counsel may be violated by prolonged questioning without counsel being present, police denigration of counsel, or the offer of a plea bargain without counsel being present.”⁴⁶ Moreover, unlike in the United States,⁴⁷ informers may only serve as “lis-

³⁹ See KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 607 (11th ed. 2005) (quoting Israel, *Criminal Procedure, the Burger Court and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1383-84 (1977) (“Most courts have concluded that absent special circumstances (such as arresting a suspect at gunpoint or forcibly subduing him) police questioning ‘on the street’ in a public place or in a person’s home or office is not ‘custodial.’”). See, e.g. *Yarborough v. Alvarado*, 541 U.S. 652 (2004) (finding that a station-house interrogation of a juvenile suspect who came to the station-house with his parents and probably did not feel free to leave was allowed without *Miranda* warnings).

⁴⁰ Kent Roach, *Canada*, in WORLDWIDE STUDY, *supra* note 5, at 57, 76.

⁴¹ *Id.*

⁴² *Id.* This last exception tells us something about the differences between Canada and the United States generally.

⁴³ *Id.* Contrary to American procedure where only post-indictment lineups require counsel. *Kirby v. Illinois*, 406 U.S. 682 (1972).

⁴⁴ *Kirby*, 406 U.S. at 690-91.

⁴⁵ See, e.g., *R v. Singh*, [2006] 38 C.R. (6th) 217 (Can.) (refusing to recognize such a right, despite repeated assertions of the right to silence by the suspect); See generally Benissa Yau, *Making the Right to Choose to Remain Silent a Meaningful One*, CRIM. REP., Vol. 38, Sixth Series, at 226 (2006).

⁴⁶ *R. v. Burlingham*, [1995] 2 S.C.R. 206, paras. 12-16.

⁴⁷ Questioning of suspects in custody is allowed by *Illinois v. Perkins*, 496 U.S. 292 (1990).

tening posts” for an arrested suspect, but may not actively elicit information from an accused who has asserted his right to silence.⁴⁸

In Canada, the accused may waive his right to counsel if that waiver is “informed and voluntary.”⁴⁹ But, the Supreme Court of Canada has made such a waiver difficult. For example, suspects who answered baiting questions or participated in a lineup before being offered a reasonable opportunity to consult counsel have been held not to have waived their right to counsel.⁵⁰

Unlike in the United States, in Canada an accused must also be informed promptly of the reason for his detention or arrest, unless it is obvious.⁵¹ For example, in Canada, in a case of attempted murder where the victim subsequently died, the court held that the accused should have been so informed and have had another opportunity to consult counsel.⁵² There is no constitutional obligation to inform detainees of their right to silence, but such a warning is customary to ensure voluntariness.⁵³ In any case, it is unnecessary because of the stringent counsel requirement and, as noted, it does not mean that the suspect can cut off interrogation.

Once the suspect has consulted counsel and interrogation has begun, often in the absence of counsel, the police may legitimately lie and engage in deception as long as their conduct is “not so appalling as to shock the community.”⁵⁴ The police can also offer inducements “so long as the inducements do not cast doubt on the voluntariness of the accused’s statement.”⁵⁵ The burden is on the prosecutor to establish voluntariness, but, curiously, the voluntariness requirement does not apply to statements made to undercover officers or private citizens.⁵⁶

⁴⁸ Compare Kent Roach, *Canada*, in *WORLDWIDE STUDY*, *supra* note 4, at 57, 77-78 (actions of undercover officer in jail asking accused “what happened” not violation of accused’s right to silence), and Perkins, 496 U.S. 292, 294 (1990) (*Miranda* warnings not required when suspect in custody is unaware he is speaking to law enforcement officer and gives voluntary statement).

⁴⁹ Kent Roach, *Canada*, in *WORLDWIDE STUDY*, *supra* note 5, at 77.

⁵⁰ *Id.*, at 57, 77.

⁵¹ Compare *Id.* at 77 (in Canada, accused must be informed promptly of reason for detention or arrest, unless obvious), and *Colorado v. Spring*, 479 U.S. 564, 577 (1990) (suspect’s awareness of all possible subjects of questioning before interrogation not relevant to determination of voluntary and knowing waiver of Fifth Amendment privilege).

⁵² *R. v. Black*, [1989] 50 C.C.C. (3d) 1 (Can.).

⁵³ *Id.*

⁵⁴ Kent Roach, *Canada*, in *WORLDWIDE STUDY*, *supra* note 5, at 77.

⁵⁵ *Id.* citing *R. v. Oickle*, [2000] 2 S.C.R. 3. (Can.).

⁵⁶ *Id.* (citing *R. v. Grandinetti*, [2005] 1 S.C.R. 27 (Can.)). Again, this is contrary to the holding of the U.S. Supreme Court in *Arizona v. Fulminante*, 499 U.S. 279 (1991). But recall, as noted above, that undercover agents in Canada are not allowed to actively elicit incriminating informa-

2. CONFESSIONS

The *Oickle* case⁵⁷ is particularly instructive as to the Canadian approach to confessions. In *Oickle*, the accused was one of several people who agreed to take a polygraph test after a series of fires in the community. The testing took place at a motel. The accused was advised of his rights to remain silent, to counsel, and to leave at any time.⁵⁸ Additionally, authorities told the accused that anything said during the test was admissible against him. The accused signed a consent form.⁵⁹

The polygraph test lasted seven minutes and at the conclusion, the accused was informed (apparently accurately) that he had failed the test, but not that the test was inadmissible in court. He was questioned for about an hour by the sergeant who administered the test, until the sergeant was relieved at 6:30 p.m. The accused was reminded of his right to counsel by the detective who resumed the questioning.⁶⁰ He confessed to setting one of the fires thirty to forty minutes later. He was taken to the police station. At around 8:30 and 9:15 p.m. the accused indicated to authorities that he was tired and wanted to go home, but was informed each time that he was under arrest, could call a lawyer if he wished, but could not go home. Questioning did not stop. Finally at 11 p.m. the accused confessed to setting the other fires.⁶¹

Canada, like the United States, has two distinct requirements as to confessions. The first is the warnings requirement provided for by the Charter, discussed above. The second requirement is a common-law voluntariness requirement, known as the “confessions rule.” The Supreme Court of Canada is concerned with the problem of false confessions and discussed the work of Richard Leo and Richard Ofshe, and others in considerable detail in *Oickle*.⁶² The Court noted the need to be “sensitive to the particularities of the individual suspect”⁶³ in determining whether a confession is likely to be false. They further noted:

[T]he danger of using non-existent evidence. Presenting a suspect with entirely fabricated evidence has the potential either to persuade

tion from those who have asserted their right to silence. Kent Roach, *Canada*, in *WORLDWIDE STUDY supra* note 5, at 77.

⁵⁷ See *Oickle*, 36 C.R. (5th) 129 (Can.).

⁵⁸ *Id.* at 130.

⁵⁹ *Id.* at 130.

⁶⁰ *Id.*

⁶¹ *Id.* at 130.

⁶² *Id.* at 146-48.

⁶³ *Id.* at 148.

the susceptible suspect that he did indeed commit the crime, or at least to convince the suspect that any protestations of innocence are futile.⁶⁴

The Court also recognized the danger of threats and promises:

Coerced-compliant confessions are the most common type of false confessions. These are classically the product of threats and promises that convince a suspect that in spite of the long-term ramifications, it is in his or her best interest in the short and intermediate term to confess.⁶⁵

Finally the Court observed that:

[F]alse confessions are rarely the product of proper police techniques . . . false confession cases almost always involve “shoddy police practice and/or police criminality . . . [I]n most cases, “eliciting a false confession takes strong incentives, intense pressure, and prolonged questioning . . . only under the rarest of circumstances do an interrogator’s ploys persuade an innocent suspect that he is in fact guilty and has been caught.”⁶⁶

Additionally, the Court encouraged, but did not require, the recording of interrogations, “preferably by videotape.”⁶⁷

Having set forth the conditions under which false confessions ordinarily occur, the Court then attempted to catalog those police tactics, from earlier cases, that were and were not acceptable. For example, telling a suspect that if he confessed the charge could be reduced from murder to manslaughter was improper. In *Oickle*, the Court said that:

Intuitively implausible as it may seem, both judicial precedent and academic authority confirm that the pressure of intense and prolonged questioning may convince a suspect that no one will believe his or her protestations of innocence, and that a conviction is inevitable. In these circumstances, holding out the possibility of a reduced charge or sentence in exchange for a confession would raise a reasonable doubt as to the voluntariness of any ensuing confession. An explicit offer by the police to procure lenient treatment in return for confession is clearly a very strong inducement, and will warrant exclusion in all but exceptional circumstances.⁶⁸

By contrast, the Court cited two other cases where an inducement offered by the police did not render the confession involuntary. In

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 149.

⁶⁸ *Id.* at 150.

one case, the police offered psychiatric assistance to the suspect in exchange for a confession. In the other case, the police urged suspect "A" to confess, lest his friend "B" would be unjustly convicted. The Court, on the other hand, cited the following as improper inducements: telling a mother that her daughter would not be charged with shoplifting if the mother confessed to a similar offense or a sergeant major keeping his company on parade until he learned who was responsible for a stabbing.⁶⁹

In summary, the Court concluded:

[C]ourts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime. In the vast majority of cases, the police will have to somehow convince the suspect that it is in his or her best interests to confess. This becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt about whether the will of the suspect has been overborne.⁷⁰

In *Oickle*, in addition to threats and promises, the Court characterized "oppression" as an inducement of false confessions. For example, the Court said that, "if the police create conditions distasteful enough, it should be no surprise that the suspect would make a stress-compliant confession to escape those conditions."⁷¹ Specifically, the Court in *Oickle* discussed a 1999 case from the Ontario Court of Appeal. In *Hoi-lett* the accused was arrested at 11:25 p.m. while under the influence of crack cocaine and alcohol. After two hours in the cell, two officers removed his clothes for forensic testing. He was left naked in a cold cell containing only a metal bunk to sit on.⁷² The bunk was so cold that he had to stand up. One and a half hours later he was provided with some light clothes. At 3 a.m., he was awakened for interrogation, during which he nodded off to sleep at least five times. He requested warmer clothes and a tissue to wipe his nose, both of which were refused. His confession was struck down as involuntary.⁷³

Against this background, in *Oickle*, the Court held that the accused's confession was admissible. The single dissenter argued that the six hour length of the interrogation plus "[r]epeated threats and promis-

⁶⁹ *Id.* at 151.

⁷⁰ *Id.* at 153.

⁷¹ *Id.*

⁷² *Id.* at 154.

⁷³ *Id.*

es . . . against the backdrop of the polygraph procedure, they overwhelmed the free will of the [accused].”⁷⁴

Because *Oickle* actually seems to take the voluntariness issue seriously and attempts to provide some guidance to police as to what they may and may not do, it seems enlightened to American eyes, despite the criticism offered by the dissenter and commentators.⁷⁵ The interrogation in *Oickle* did not violate the *Miranda/Edwards* requirements and it is unlikely that the United States Supreme Court would consider the interrogation so lengthy as to render the confession involuntary. This is especially true given the early partial confession. The Supreme Court of Canada’s concern with reliability is admirable, so long as it is recognized that unreliability should be a separate ground for exclusion from involuntariness, though the two often run together. That is, not all unreliable confessions, such as a confession from a mentally retarded suspect, are necessarily involuntary, and not all involuntary confessions, (i.e., confessions by guilty people) are necessarily unreliable. It would behoove the courts of both Canada and the United States to recognize this and to be prepared to strike down confessions on *either* ground.

3. USE OF SUSPECT’S SILENCE

Canadian law is contradictory when considering the use of a suspect’s silence during interrogation. In *R. v. Turcotte*, the Supreme Court of Canada summarized this contradiction.⁷⁶ The Court said: “[A] person in the power of the state in the course of the criminal process has the right to choose whether to speak to the police or remain silent . . . It would be an illusory right if the decision not to speak to the police could be used by the Crown as evidence of guilt.”⁷⁷ Thus, at first blush, the Canadian rule is the same as the American rule on non-use of silence of

⁷⁴ *Id.* at 133 (Arbour, J., dissenting). Accord Don Stuart, *Oickle: The Supreme Court’s Recipe for Coercive Interrogation*, in 36 CRIMINAL REPORTS (5th) 188, 188 (Can.) (Don Stuart et al. eds., 2001) (arguing that *Oickle* was wrong for four reasons: “1. It places the focus largely on reliability rather than police methods; 2. It provides the police with a manual for a wide range of excessively coercive interrogation techniques; 3. It is at odds with the Court’s jurisprudence on the right to silence and the principle against incrimination; and 4. It requires a startling level of deference by Courts of Appeal to a trial judge’s determination of voluntariness.”).

⁷⁵ However, as Christopher Sherrin pointed out, “one may wonder how serious the Court considered the problem [of false confessions], since it did not make any material changes to the law in response.” Christopher Sherrin, *False Confessions and Admissions in Canadian Law*, 30 QUEEN’S L. J. 601, 608 (2005). *Oickle* was false. See 36 C.R. (5th) 129 (Can.).

⁷⁶ *R. v. Turcotte*, [2005] 2 S.C.R. 519, 2005 SCC 50 (Can.).

⁷⁷ *Id.* at 532-33.

Doyle v. Ohio.⁷⁸ Germany also adheres to a non-use approach.⁷⁹ Italy, France, and Israel by contrast, seem to allow such comment.⁸⁰

However, in Canada, “[t]here are circumstances where the right of silence must bend.”⁸¹ For example, if one of the two co-defendants had not given a prior statement, but chose to testify at trial, he may be cross-examined as to his silence by the other co-defendant who had given a full statement to the police at the earliest opportunity.⁸²

Evidence of silence may also be admissible when the defense raises an issue that renders the accused’s silence relevant. Examples include circumstances where the defense seeks to emphasize the accused’s cooperation with the authorities . . . where the accused testified that he had denied the charges against him at the time he was arrested . . . or where silence is relevant to the defense theory of mistaken identity and a flawed police investigation.⁸³

Most significant is the following exception to the non-use principle: “cases where the accused failed to disclose his or her alibi in a timely or adequate manner provide a well established exception to the prohibition on using pre-trial silence against an accused . . . Silence might also be admissible if it is inextricably bound up with the narrative or other evidence and cannot easily be extricated.”⁸⁴

It is unclear why Canada singles out only “alibi” as an exception to its general “non-use” position. Other defenses raised at trial, which might naturally have been advanced by the defendant during interrogation, such as self-defense or, the “I was there but I didn’t shoot anybody” claim, as well as the “frame up” claim in *Doyle v. Ohio*,⁸⁵ would seem equally susceptible to questioning as to why the defendant failed to tell the police about this in the first place. It seems likely that if Canada were

⁷⁸ 426 U.S. 610(1976).

⁷⁹ According to noted German comparativist, Thomas Weigend: “The suspect’s silence at interrogation cannot be used against him in any way. Rules are not very strict on what prosecutors may say in court, but it would not be regarded as good practice for a prosecutor to argue at trial that the defendant relied on his right to silence and therefore might have something to hide.” E-mail from Thomas Weigend to Craig Bradley, Robert A. Lucas Professor, Maurer School of Law, Indiana University (July 6, 2007) (on file with author).

⁸⁰ See CA 139/52 Attorney General v. Keynan [1953] 7 P.D. 619, 637-649 (Israel); Richard S. Frase, *France*, in WORLDWIDE STUDY, *supra* note 5, at 201, 217-18; Rachel A. Van Cleave, *Italy*, in WORLDWIDE STUDY, *supra* note 5, at 303, 326.

⁸¹ *Turcotte*, 2 S.C.R. at 533 (Can.).

⁸² *Id.* at 533-34.

⁸³ *Id.* at 534.

⁸⁴ *Id.*

⁸⁵ See discussion of *Doyle* and *TAN* *infra* Part II.

to confront such cases, they would extend their “alibi” exception to them as well. However, in the United States, *Doyle* forbids any such questioning on the grounds that it is unfair to tell the defendant that he has a right to silence and then to penalize him for using it. As will be discussed later, a solution to this problem lies between the absolutist approach of *Doyle* and Canada’s attempt at compromise in *Turcotte*. The English approach casts further light on this problem and highlights a different approach to the right to counsel during interrogation.

B. ENGLAND AND WALES

In England and Wales,⁸⁶ as summarized by David Feldman:

When [police] have reasonable grounds to suspect that the interviewee has committed an offence [sic], they must caution him, informing him of his right to remain silent, but also the fact that it “may harm your defense [sic] if you do not mention when questioned something which you later rely on in court” and, “[a]nything you do say may be given in evidence.” The caution must be repeated if the person is arrested or charged, and the interviewee must be reminded of it after every break in the interview.⁸⁷

Note that the caution requirement extends to suspects prior to arrest, unlike the *Miranda* requirements, but further that the suspect is warned as to the (adverse) consequences of silence. However, “[p]olice in England . . . get around the *Miranda*-type warnings by engaging in ‘informal chats’ in suspects’ homes just after arrest, during searches, in the police car on the way to the station, or in interview rooms just before formal interrogations are to begin.”⁸⁸ American police often achieve a similar end by the simple expedient of making it clear to the suspect that

⁸⁶ Scotland has a separate system. [On file with author].

⁸⁷ David J. Feldman, *England and Wales*, in *WORLDWIDE STUDY*, *supra* note 5, at 149, 166-67.

⁸⁸ Stephen C. Thaman, *Miranda in Comparative Law*, 45 ST. LOUIS U. L.J. 581, 601 (2001) (quoting Stewart Field, et al., *Prosecutors, Examining Judges, and Control of Police Interrogations*, in *CRIMINAL JUSTICE IN EUROPE* 227, 232 (Phil Fennell, et al. eds., 1995)). Police in the Netherlands do the same. *Id.* Likewise, Thaman’s claim that the German police have discontinued this practice, and his citation to an earlier article of mine to support this claim is incorrect. *Id.* at n.130. The ploys cited by the Field chapter are inconsistent with the rules since they generally involve suspects as to whom police have “reasonable grounds to suspect.” [On file with author.] Feldman does not mention these ploys. [On file with author.]

he is not in custody,⁸⁹ but the practices described by Feldman would not be allowed in America.⁹⁰

1. THE SUSPECT'S RIGHTS

The police must further inform the suspect of his right to free legal advice, though not until they get to the police station.⁹¹

If the suspect is arrested, he must be taken to the "custody officer" in every police station. This official, independent of any investigation, determines whether there is sufficient information to charge the suspect and is responsible for maintaining an interview record, and ensuring that the rules governing detentions are followed.⁹² The custody officer must remind the suspect of his right to free legal advice and a poster must be prominently displayed in every police station informing suspects of this.⁹³

Similarly to Canada, if a suspect asks for counsel, he actually gets one. Every police station must have a "duty solicitor" either present or on-call with whom suspects may consult.⁹⁴ If the suspect does not want a lawyer he must waive it in writing.⁹⁵ The suspect has a right to the presence of a lawyer during interrogation.⁹⁶ But, the lawyer cannot prevent questioning of his client.⁹⁷ Code of Practice C specifically forbids the police from "dissuad(ing) the suspect from obtaining legal advice."⁹⁸

⁸⁹ See *Yarborough v. Alvarado*, 541 U.S. 652 (2004) (Supreme Court approving an unwarned interview with a juvenile at the police station when he had been brought there by his parents and not told he was under arrest).

⁹⁰ See, e.g., *Oregon v. Elstad*, 470 U.S. 298 (1985) (disallowing statements obtained during a post-arrest, unwarned, "chat" but allowing a subsequent, warned, statement).

⁹¹ MICHAEL ZANDER, *THE POLICE AND CRIMINAL EVIDENCE ACT 1984*, at 106 (2d ed. 1990).

⁹² See generally M.R. Franks, *Your Rights If Arrested in England*, 32 S.U. L. REV. 205 (2005) (discussing the requirements of the Police and Criminal Evidence Act (PACE) and the Code of Practice C applicable to police interrogations). David J. Feldman, *England and Wales*, in *WORLDWIDE STUDY*, *supra* note 4, at 149, 169.

⁹³ Zander, *supra* note 91, at 106-07.

⁹⁴ However, Feldman points out that: in practice only about one third of detainees seek to exercise the right to legal advice . . . Suspects without advice face particular dangers now that courts can draw adverse inferences from silence; proper advice about the risks and advantages of speaking is vital, and admitting evidence of silence following a refusal to allow access to an adviser may breach the fair trial guarantee in ECHR (check to see what this abbreviation stands for) Article 6. David J. Feldman, *England and Wales*, in *WORLDWIDE STUDY*, *supra* note 4, at 168.

⁹⁵ Police and Criminal Evidence Act (PACE), 1984, § 3.5 (Eng.).

⁹⁶ *Id.* § 6.8.

⁹⁷ *Id.* § 6.9.

⁹⁸ *Id.* § 6.4.

In England and Wales, the interview must be tape-recorded. The suspect has a right to regular meals and at least eight hours of rest in any twenty-four hour period of detention, as well as breaks every two hours. After the suspect has been charged with an offense, questioning must stop. Breach of these requirements has led to exclusion of evidence.⁹⁹ Evidence has also been excluded when the suspect was bullied and hectorred and when officials misrepresented the available evidence or the suspect's previous answers, leading to disorientation and a confession.¹⁰⁰ Likewise, exclusion has also resulted when officials have threatened to continue the interrogation until the police receive the answers that they want and effectively brainwash the subject over thirteen hours of interrogation.¹⁰¹

Furthermore, similarly to Canada and unlike the United States, "evidence of conversations with undercover officers is likely to be excluded if the court concludes that the main reason for adopting the investigative technique in question was to avoid cautioning the suspect or complying with the provisions about interview records."¹⁰²

2. CONFESSIONS

In terms of the admissibility requirements of confessions, English law requires that the prosecution prove, beyond a reasonable doubt, that a confession was "not obtained by oppression or in consequence of anything said or done which was likely to render the confession unreliable."¹⁰³ This replaced the old voluntariness standard. Moreover, a tainted confession cannot generally be used to elicit a subsequent untainted one.¹⁰⁴ Failures to caution the suspect or to provide counsel are serious breaches that will lead to exclusion under the "fairness" requirement of the code.¹⁰⁵

⁹⁹ David J. Feldman, *England and Wales*, in *WORLDWIDE STUDY*, *supra* note 4, at 149, 169.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 168.

¹⁰³ *Id.* at 170-71, citing PACE § 76(2).

¹⁰⁴ *Id.* at 171. Susan Nash, *Recent Developments in English Criminal Law and Procedure*, 29 CRIM. L.J. 228, 235-36, citing *R. v. Webber*, [2004] UKHL 1.

¹⁰⁵ *Id.* at 171, citing PACE § 78(1). Again, this seems to reject the claim of the Field chapter, Field, et al, *supra* note 78, that police use various ploys to avoid the warning requirements.

3. USE OF SUSPECT'S SILENCE

As noted, through the practice of warning a suspect at the outset that silence may be used against him, England has avoided the issues of fairness that arise as a result of warning the suspect of his right to silence and then subsequently using the assertion of that right against him.¹⁰⁶ This particular provision was included in the Criminal Justice and Public Order Act of 1994.¹⁰⁷ The Act goes on to set forth the circumstances under which silence may be used in court: If the suspect fails to mention a fact that he later relies upon in his defense (e.g., self defense, alibi) the prosecutor may comment on that silence at trial. This is true even if the defendant does not testify, as long as counsel raises the defense at trial.¹⁰⁸ Moreover, if the suspect fails to account for any object in his possession or any mark or other incriminating evidence on his person or clothing, the prosecution may comment whether the defendant testifies or not.¹⁰⁹ Finally, if a suspect fails to account for his presence at the time and place of the crime, the prosecution may again comment whether the defendant testifies or not.¹¹⁰

This places the duty solicitor in a very difficult position during interrogation. Unlike an American lawyer, he cannot give his client blanket advice to "Shut up!" The English courts, with the approval of the European Court of Human Rights,¹¹¹ have made it clear that merely relying on counsel's advice to remain silent is not an adequate reason to preclude adverse comment by the prosecutor at trial. Rather, "a jury could still draw an adverse inference if it was sure that the true reason for his silence was that he had no or no satisfactory innocent explanation to

¹⁰⁶ David J. Feldman, *England and Wales*, in *WORLDWIDE STUDY*, *supra* note 5, at 149, 166-67.

¹⁰⁷ At the time of enactment of this provision some American commentators discussed it. One, Gregory O'Reilly was extremely negative, claiming, wrongly in my view, that this would "extinguish" the right to silence. George W. O'Reilly, *England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice*, 85 J. CRIM. L. & CRIMINOLOGY 402, 406 (1994). The other, Mark Berger, was more balanced, recognizing that this did not fundamentally undercut the right to silence, but suggesting that the English may not have thought through all of the implications of their new rule. Subsequent English law has shown this observation to have been prescient. Mark Berger, *Of Policy, Politics, and Parliament: The Legislative Rewriting of the British Right to Silence*, 22 AM. J. CRIM. L. 391, 428-29 (1995).

¹⁰⁸ See *R. v. Webber*, [2004] UKHL 1, All E.R. 770 (Eng.). See also Susan Nash, *Recent Developments in English Criminal Law and Procedure*, 29 CRIM L.J. 228, 235 (2005).

¹⁰⁹ See Franks, *supra* note 92, at 213 (summarizing the provisions of the Act).

¹¹⁰ See *Id.*

¹¹¹ See *Beckles v. United Kingdom* [2003] 36 E.H.R.R. 13.

give.”¹¹² Moreover, the “adverse comment” may not just be a prosecutorial argument but will likely be in the form of an instruction by the judge to the jury to use the defendant’s silence as evidence of guilt.

C. SUMMARY OF COMPARATIVE DATA

Oddly, just as American scholars are concluding that the *Miranda* warnings are inadequate to prevent or reduce false confessions, the warnings are now widely required. More significantly, some countries require that if the suspect asks for counsel he must actually get one, going beyond the American practice. However, in all but England, Italy,¹¹³ and Russia, this requirement is diluted by the fact that counsel is *not* allowed to be present during interrogation. In Russia, it is weakened because counsel frequently does not do anything though present at the interrogation.¹¹⁴ In England, though counsel must be present at the interrogation, the counsel’s role is complicated by the fact that the suspect’s silence can be used against him in court in various circumstances. Only in the United States and Italy, and nominally in Russia, can the suspect or his attorney cut off questioning by the assertion of the right to silence. The United States makes up for its failure to require the appointment of an attorney on request, by mandating that a request for counsel must have the effect of ending the interrogation. There is, however, a question as to the extent of police compliance with this rule.¹¹⁵ In fact, Supreme Court decisions encourage the police to ignore the assertion of rights by the suspect.¹¹⁶

It would be easy to suggest that the United States should follow the lead of other countries and make counsel available upon request, but in no other country except Italy can assertion of the right to silence, upon counsel’s advice or otherwise, actually cut off questioning. Thus, providing counsel in those countries does not have the same impact that it

¹¹² Case and Comment, *R. v. Hoare and Pierce*, 2005 CRIM L.R. 559, 561. [Hereinafter Case and Comment, *R. v. Hoare and Pierce*]

¹¹³ Rachel A. Van Cleave, *Italy*, in *WORLDWIDE STUDY*, *supra* note 5, at 303, 324-27.

¹¹⁴ Catherine Newcombe, *Russia*, in *WORLDWIDE STUDY*, *supra* note 5, at 397, 433-34.

¹¹⁵ See Thomas, *supra* note 25, at 1978.

¹¹⁶ As I have previously discussed, “[P]olice have everything to gain and nothing to lose by ignoring the rules. If they respect the law, they must stop questioning and get nothing.” CRAIG BRADLEY, *CRIMINAL PROCEDURE: RECENT CASES ANALYZED* 122 (2007). If they ignore the law and continue questioning, they can’t use the first confession (which they wouldn’t have gotten anyway) but they can use the “fruits.” Admissions may also be used for impeachment purposes. *Harris v. New York*, 401 U.S. 222 (1971).

would in the United States. Moreover, the provision of counsel in England, and to a lesser extent in Canada, may actually advance the interrogation because of counsel's fear that his client's lack of cooperation may be used against him at trial. On balance, then, it would appear that only Italy can be said to be clearly more protective of a suspect's rights during interrogation than is the United States. Moreover, it is highly unlikely that either the Supreme Court or Congress would mandate a "duty counsel" system.

There is no serious argument against video recording of interrogations (not just confessions). This measure would be helpful to the police in most cases in order to demonstrate that a confession was fairly obtained. In addition, it would also prevent the use of confessions browbeaten from vulnerable suspects after very lengthy interrogations, fabricated confessions, or confessions obtained after the suspect had asserted his right to silence or counsel. Likewise, time limits on interrogations, with required breaks, seem like obvious ways to reduce unreliable confessions. Threats, promises, and lies present difficult problems that, as the *Oickle* case suggested, must be resolved on a case-by-case basis, but a few clues from the Supreme Court as to which police tactics are flatly unacceptable would be useful.¹¹⁷

II. USE OF SUSPECT'S SILENCE

A particular focus of this article has been the question of what to do about a suspect's silence, whether by positive assertion of his rights or by failure to respond to police questions in the face of interrogation. Canada insists that such silence cannot be used at trial, then concedes that under certain circumstances, such as the assertion of an alibi, this rule must "bend." England by contrast, warns the defendant in advance that his silence may be used against him if it is inconsistent with the defense raised at trial. Italy, Israel, and France also allow use of silence

¹¹⁷ Lower courts are in agreement "that there is an absolute prohibition upon any trickery which misleads the suspect as to the existence or dimensions of any of the applicable rights or as to whether the waiver really is a waiver of those rights." LAFAYE ET AL., *supra* note 19, § 6.9(c), at 589. For article devoted to this topic see Symposium, *Citizen Ignorance, Police Deception, and the Constitution*, 39 TEX. TECH L. REV. 1077 (2007).

against the defendant.¹¹⁸ Germany¹¹⁹ and the United States take the position that such silence may never be used.¹²⁰

The source of the American prohibitory rule is the 1976 Supreme Court case *Doyle v. Ohio*.¹²¹ In *Doyle*, the defendants were charged with selling marijuana to a narcotics informant. At trial, the defendants claimed that they had been framed by the informant who had brought the marijuana to the scene (with police watching) and when the defendants had balked at buying ten pounds, the informant had thrown \$1,320 into Doyle's car and taken back the package of marijuana (contrary to the government's claim that *Doyle* had brought the marijuana and been paid for it). The defendants were then cross-examined about their failure to tell their story to the police at the time they were arrested.

In *Doyle*, the Supreme Court held that:

[S]ilence in the wake of [*Miranda*] warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested . . . [W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.¹²²

In dissent, Justice Stevens, joined by two others, argued:

[T]his is a case in which the defendants' silence at the time of their arrest was graphically inconsistent with their trial testimony that they were the unwitting victims of a "frame up" in which the police did not participate. If defendants had been framed, their failure to mention that fact at the time of their arrest is almost inexplicable; for that reason, under accepted rules of evidence, their silence is tantamount

¹¹⁸ See Richard S. Frase, *France*, in *WORLDWIDE STUDY*, *supra* note 5, at 201, 217-18; Rachel A. Van Cleave, *Italy*, in *WORLDWIDE STUDY*, *supra* note 5, at 303, 326.

¹¹⁹ E-mail from Thomas Weigand, *supra* note 79.

¹²⁰ See also Ed Cape et al., *Procedural Rights at the Investigative Stage: Towards a Real Commitment to Minimum Standards*, in *SUSPECTS IN EUROPE*, *supra* note 5, at 1, 22. "[I]n many jurisdictions it is clear, in practice, that if a suspect refuses to cooperate in the investigative process by answering questions or by providing an explanation concerning the allegation, this may well have adverse consequences not only in respect of whether they are found guilty, but also in relation to decisions such as release pending trial." *Id.* Admissions may also be used for impeachment purposes. *Harris*, 401 U.S. at 226.

¹²¹ 426 U.S. 610 (1976).

¹²² *Id.* at 617-18.

to a prior inconsistent statement and admissible for purposes of impeachment.¹²³

The Court's decision rested entirely on the due process rationale and was not grounded on the Fifth Amendment right to silence. Indeed, it does seem unfair to advise the suspect of a right to silence and then, in effect, pull the rug out from under him at trial for using it. Justice Stevens' protestation in *Doyle* that the defendant failed, at his trial, to explain that his silence was based on reliance on his Fifth Amendment rights misses the point, because by then that silence has already been brought to the jury's attention. But Justice Stevens is certainly right that, as a matter of evidence law, the failure to mention this defense would be tantamount to a prior inconsistent statement.

Doyle is based on the "implicit assurance" that silence will not be used against the suspect. Nothing in *Doyle*, or in the due process notion of fairness on which it is based, suggests that an English-type warning—that "it may harm your defense if you do not mention when questioned something which you later rely on in court"—is impermissible. Nor does *Miranda* suggest that such an additional admonition would somehow violate the Fifth Amendment.

It does seem unduly protective of Fifth Amendment rights to allow criminal defendants to raise claims of alibi, self-defense, or other arguments that they would naturally have been expected to tell the police but did not do so, perhaps because of the *Miranda* warnings, when the warnings could be so easily modified to take this problem into account.

Suppose that A is arrested for an armed robbery which he committed. He receives his *Miranda* warnings and refuses to talk. He is then released on bail. He arranges with two friends to declare that he was with them playing cards, on the other side of town from where the robbery took place, at the time in question. The defendant in these circumstances has a distinct, and unfair advantage if it cannot be brought out that he failed to tell this alibi to the police, as any innocent person would. Under current law, this failure to tell his story could not be mentioned at trial.

It is not, in any meaningful way, compelled self-incrimination to warn the suspect that failure to mention an alibi, for example, may be used against him in court. Indeed, far more compulsion is present in currently allowed practices, such as falsely (or accurately) telling the suspect that a co-suspect has laid all the blame on him, extended interroga-

¹²³ *Id.* at 621-22 (Stevens, J., dissenting).

tions without respite designed to break his will, and a variety of other practices.

There may, of course, be reasons, other than guilt, as to why the suspect chooses to remain silent rather than mention a defense to the police. For example, he may have been in a hotel room with his boss' wife at the time of the crime and does not want to tell this to the police for obvious reasons. But there will be time enough for him to explain this at trial. There is no reason to erect an absolute bar against use of a suspect's silence just because the suspect may later produce a convincing explanation for it.

Cases subsequent to *Doyle* have paved the way for such an additional warning. For example, in *Jenkins v. Anderson*¹²⁴ the U.S. Supreme Court held that pre-arrest, and therefore pre-warning, silence could be used against the defendant at trial: "Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted."¹²⁵ The U.S. Supreme Court, in *Fletcher v. Weir*,¹²⁶ similarly held that post-arrest silence, prior to *Miranda* warnings, could be used against the accused at trial.¹²⁷ If an English warning were given, post-warning silence in the face of questioning would be even less ambiguous than the silences in *Jenkins* and *Weir*, which are at least as likely to be based on a reluctance to volunteer information to the police as on any cover-up.

In *South Dakota v. Neville*,¹²⁸ the U.S. Supreme Court found that the *Doyle* principle was not offended by use of a drunk driving suspect's refusal to take a blood alcohol test:

[T]he officers specifically warned respondent that failure to take the test could lead to loss of driving privileges for one year. It is true the officers did not inform respondent that a further consequence that

¹²⁴ 447 U.S. 231 (1980).

¹²⁵ *Id.* at 239 (citing 3A J. WIGMORE, EVIDENCE § 1042, at 1056 (Chadbourn rev. 1970)); Craig Bradley, *Havens, Jenkins, and Salvucci and the Defendant's Right to Testify*, 18 AM. CRIM. L. REV. 419, 434 (1981). At the time, I argued that Jenkins' silence was just as "insolubly ambiguous" as Doyle's: "anyone who believes that volunteering information to police is 'natural' for a resident of Detroit's inner city has an unusually optimistic view of human nature." [On file with author]. I further argued that, "this evidentiary ambiguity is inherent in any assertion of silence by a criminal suspect." [On file with author]. But *Jenkins* held otherwise and silence in the face of interrogation is much less ambiguous than a failure to volunteer information to the police on the street. The English warning would reduce any ambiguity even further.

¹²⁶ 455 U.S. 603 (1982).

¹²⁷ See also *Anderson v. Charles*, 447 U.S. 404, 408 (1980) (allowing impeachment of a defendant by statements given to police inconsistent with his trial testimony).

¹²⁸ 459 U.S. 533 (1983).

evidence of refusal could be used against him in court, but we think it unrealistic to say that the warnings given here implicitly assure a suspect that no consequences other than those mentioned will occur. Importantly, the warning that he could lose his driver's license made it clear that refusing the test was not a "safe harbor," free of adverse consequences.¹²⁹

Thus, at least in this limited circumstance, the Supreme Court has allowed police to avoid the *Doyle* problem by the simple expedient of warning a suspect that non-cooperation may be used against him, even though he was not explicitly warned that it could be used in court, as I propose. This certainly lays the groundwork for American police to use the English-style warning. I have little doubt that the current Supreme Court would approve it if they did. Thus, I recommend that police departments add this admonition to their *Miranda* warnings and that silence in the face of interrogation could then be used to impeach the defendant at trial if he, or his counsel in the absence of his testimony, advances a defense inconsistent with that silence.¹³⁰

When the suspect asserts his right to counsel, as opposed to silence, however, the matter becomes more complicated. In *Edwards v. Arizona*,¹³¹ the U.S. Supreme Court distinguished between assertions of the right to counsel and the right to silence by the suspect on the ground that, whereas the assertion of the right to silence shows that the suspect recognizes that he is in control of the situation, assertion of the right to counsel is a "cry for help."¹³² Such a cry is not inconsistent with later assertion of a defense of alibi, self-defense, etc.

What happens after counsel arrives and consults with the client is a difficult question that has caused much trouble in the English courts. As noted, the European Court of Human Rights has approved of the English practice of police warning the defendant that his silence during interrogation may be used against him and then the court instruction to the jury that it may hold that silence against him.¹³³ However, in *Beckles v.*

¹²⁹ *Id.* at 566.

¹³⁰ As Justice White, who was later to author *Edwards*, pointed out, concurring in *Mosley*: "(T)he reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice . . ." *Mosley*, 423 U.S. at 110 n. 2 (opinion of White, J., concurring).

¹³¹ 451 U.S. 477 (1981).

¹³² *See Id.* at 485.

¹³³ I emphasize that I am not suggesting that a defendant's decision not to testify at trial should be usable against him for, as I have previously argued, such a decision is also highly ambiguous, depending on such factors as his prior record and his likely skill as a witness, and is not necessar-

*United Kingdom*¹³⁴ the European Court struck down the conviction where the defendant remained silent on counsel's advice on the ground that the trial judge's instruction to the jury did not "allow the jury to consider fully whether the appellant's reason for his silence was a genuine one, or whether, on the contrary, his silence was consistent only with guilt and/or his reliance on legal advice to stay silent [was] merely a convenient self-serving excuse."¹³⁵ What the difference between a "genuine" reason for silence and a "self-serving" "reliance on counsel's advice" might be is unexplained.

On remand, the English Court of Appeal, while allowing the appeal and ordering a retrial, held that "[i]n a case where a solicitor's advice was relied upon by the appellant, the ultimate question for the jury . . . remained whether the facts relied on at the trial were facts which the appellant could *reasonably* have been expected to mention at interview."¹³⁶ The court stressed that defendants must not be allowed to "driv[e] a coach and horses through s.34 and by so doing defeating the statutory objective [of allowing defendants to be impeached by silence at interrogation]."¹³⁷ Thus, even when counsel advises the suspect to remain silent, his silence may sometimes be used against him, though the circumstances under which this may be done remain fuzzy.

In another English case, *R. v. Hoare and Pierce*,¹³⁸ the solicitor advised the defendant to remain silent because it was not clear what evidence the police had to suggest he had committed an offense. The judge left it open to the jury, letting them draw any adverse inferences. The Court of Appeal affirmed, holding that:

[E]ven where a solicitor has in good faith advised silence and a defendant has genuinely relied on it in the sense that he accepted it and believed that he was entitled to follow it, a jury could still draw an adverse inference if it were sure that the *true* reason for his silence was that he had no or no satisfactory innocence to give.¹³⁹

Thus, it seems, even in the best case scenario for the defendant, his silence will be brought to the jury's attention. The only issue seems

ily indicative of guilt. See generally Craig Bradley, *Griffin v. California: Still Viable After All These Years*, 79 MICH. L.REV. 1290 (1981).

¹³⁴ [2003] 36 E.H.R.R. 13.

¹³⁵ Case and Comment, *R. v. Hoare and Pierce*, *supra* note 112, at 561.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ [2004] EWCA (Crim) 784, [2005] 1 W.L.R. 1804 (Eng.).

¹³⁹ *Id.* at para. 51.

to be whether or not the jury was properly instructed to draw an adverse inference from that silence, which they will likely do regardless of the instruction. In 1997, one British commentator suggested that, "there is enough in section 34 . . . to keep the Court of Appeal in business for the foreseeable future."¹⁴⁰ This has proven to be the case. The English courts have not developed an adequate rationale for distinguishing between those cases where an adverse inference may, and where it may not, be drawn from a defendant's reliance on counsel's advice to remain silent.

Based on the English experience, I am led to the conclusion that such silence is "insolubly ambiguous" under *Doyle*. Consequently, I conclude that neither a suspect's silence based on an assertion of the right to counsel, nor his silence after consultation with counsel, should be admissible against him, even under the "English warning" regime that I propose. However, a refusal to answer police questions, not based on an expressed desire to consult counsel, may appropriately be used if the English warning is given. While it is not entirely satisfactory to draw such a fine distinction between the suspect's assertion of his right to silence and his right to counsel, as noted, the Supreme Court has done it before,¹⁴¹ and it is, I believe, consistent with the ambiguity principle that drove *Doyle*.

Finally, I note that, while this proposal would produce a dramatic change in American criminal procedure by adding a fifth "*Miranda* warning" to police interrogations, it is not clear that it would have a significant impact on the trial. Most defendants do not rely on their right to silence during interrogation in the first place. Moreover, it seems likely that many defendants who did rely on their right to silence would not advance an inconsistent defense at trial. Still, in those cases where the defendant, through his testimony or his attorney's argument, does advance a defense that is inconsistent with silence during interrogation, it seems fair for the prosecution to be able to point this out.

If a videotaping requirement was imposed on interrogations, it would not only help to determine the voluntariness of confessions, but also help to clear up ambiguities relating to the use of the defendant's si-

¹⁴⁰ Case and Comment, *R. v. Hoare and Pierce*, *supra* note 112, at 562 (quoting Professor Di Birch).

¹⁴¹ Compare *Michigan v. Mosley*, 423 U.S. 96 (1975) (assertion right to silence allows further questioning in some circumstances), with *Edwards v. Arizona*, 451 U.S. 477 (1981) (assertion of right to counsel does not). See also *Minnick v. Mississippi*, 498 U.S. 146, 164 (1990) (Scalia, J., dissenting) (quoting Kamisar, *The Edwards and Bradshaw Cases: The Court Giveth and the Court Taketh Away*, in 5 *THE SUPREME COURT: TRENDS AND DEVELOPMENTS* 153, 157 (Choper, et al., eds., 1984) ("Either *Mosley* was wrongly decided or *Edwards* was.")).

lence after the “English warning.” For example, suppose police report that a defendant has said nothing after receipt of the *Miranda* and English warnings. The videotape clearly shows that the defendant was stuporous due to drug use and the police stopped trying to talk to him after five minutes. This “silence” is too ambiguous to be useful for impeachment. Videotaping is, of course, also extremely valuable to police to show that a given confession was voluntary, if in fact it was.¹⁴²

CONCLUSION

Consideration of other countries’ interrogation practices suggests that they all recognize that confessions are valuable evidence and do not want to unduly discourage police from obtaining them. Nevertheless, some countries do more to protect against false confessions than does the United States, most notably by enhanced requirements of audio taping or videotaping of confessions and by the provision of counsel upon request. However, England has countered its generous rules regarding provision of counsel and taping by also warning suspects that failure to mention something to the police that is later relied on at trial may be used against him.

There is no serious argument against videotaping. The cost is minimal and the advantages in terms of producing more reliable confessions and convincing the jury that a given confession is reliable are obvious to both sides. Further, the “English warning” as to the use of silence is a sensible rule that would advance the search for truth. It is unfair, as *Doyle v. Ohio* held, to warn a suspect unqualifiedly of his right to silence and then use that silence against him at trial. However, it is equally unfair to allow suspects to make up a defense, and line up witnesses to support it, while prohibiting prosecutors from asking the obvious question, “Why didn’t you mention this defense to the police?” The “English warning” is a solution to this conundrum and one that the Supreme Court would likely accept.

¹⁴² See Kamisar et al., *supra* note 39, at 637–42 for a summary of cases and articles on this subject.